No. 13-975

IN THE

Supreme Court of the United States

T-MOBILE SOUTH, LLC,
Petitioner,
v.
CITY OF ROSWELL, GEORGIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE UNITED STATES CONFERENCE OF MAYORS, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national organizations representing local governments and their personnel—both elected and appointed. They represent governments and government officials in every state and of all sizes. *Amici* respectfully submit this brief to protect the sovereign interests of state and local governments that make wireless siting and other local land use decisions and that are responsible for balancing federal obligations with their own laws and procedures. They urge the Court to reject arguments by T-Mobile and its wireless industry *amici*, which would impose stringent procedural requirements that are not supported by the plain text of 47 U.S.C. § 332(c)(7)(B)(iii) and which would contribute neither to sound substantive decisionmaking at the local level nor to the granting of meritorious wireless siting applications.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief through the filing of letters granting blanket consent to the filing of *amicus* briefs.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes nearly 1,400 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating for and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Representing more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The American Planning Association is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes in order to advance the art and science of land use planning—including physical, economic, and community planning—at the local, regional, state, and national levels. The American Planning Association's mission is to encourage planning that will contribute to the public's

well-being today, as well as to the well-being of future generations, by developing sustainable and healthy communities and environments. The American Planning Association has 47 regional chapters and represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues nationwide.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns 47 U.S.C. § 332(c)(7), a provision of the Telecommunications Act of 1996 ("the 1996 Act") that preserves to local governments, subject to certain exceptions, most of their traditional land use authority over the siting and zoning of wireless facilities. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended throughout Sections of 47 U.S.C.). As groups that represent local governments and their employees across the nation, *amici* represent those that are tasked with carrying out Section 332(c)(7) on a day-to-day basis and within the resource constraints of their respective jurisdictions—be it a large city with a dedicated legal and planning staff or a small town in a rural area lacking even a single full-time employee devoted to those tasks.

T-Mobile and its wireless industry *amici* urge this Court to adopt an interpretation of Section 332(c)(7)(B)(iii)'s "in writing" requirement that would put local governments of all sizes under far more stringent procedural requirements than Congress has imposed on federal courts and federal agencies that are subject to other statutory "writing" requirements. Such an interpretation is not supported by the plain text of the statute, by its legislative history, by the weight of precedent, or by considerations of public

policy. *Amici* believe that T-Mobile's interpretation of the "in writing" requirement would impose significant additional costs on, and unreasonably burden the ability of, local governments to carry out land use regulation—a core local function—within their jurisdictions.

On its facts, this is a peculiar case. Unlike virtually all other courts in similar circumstances, the district court here reached and decided the case solely on what it concluded was the City's failure to satisfy Section 332(c)(7)(B)(iii)'s "in writing" requirement and then issued an injunction granting T-Mobile's application. This was an error. As *amicus* United States demonstrates, the reasons for the City's decision could readily be gleaned from the written minutes and transcript of the city council meeting which were before the district court, and the court's professed inability to discern those reasons stemmed not from the inadequacy of the minutes or transcript, but from the district court's clear misreading of them. As a result, the court of appeals was put in the position of likewise reaching and deciding only the "in writing" issue. It held, consistent with its prior decision in *T-Mobile South, LLC v. City of Milton,* 728 F.3d 1274 (11th Cir. 2013), that the "in writing" requirement is satisfied where, as here, the locality issues a written denial letter and the reasons for the locality's decision can be gleaned from the written minutes or transcript. Pet. App. at 16a. The court of appeals accordingly reversed and remanded the district court's decision.

The Eleventh Circuit was correct. Common tools of statutory interpretation and construction reveal that the imposition of T-Mobile's stringent interpretation of the statute's "in writing" requirement would be contrary to Congressional intent. Further,

the practical effects of T-Mobile's reading of the statute would be to impose substantial new costs and burdens on local governments without providing any benefit in terms of facilitating the grant of meritorious wireless siting applications.

A review of lower court Section 332(c)(7) case law reveals that T-Mobile's construction of the statute's "in writing" component is not aligned with how courts typically review local government siting decisions. And a heightened "in writing" requirement would also be misaligned with the practical realities of how elected local government bodies operate and the resource limitations they face.

Requiring local governments to make written minutes and transcripts available "contemporaneously" with their decision in writing—as *amicus* United States advocates—is similarly misguided. Such a requirement is unnecessary for the successful operation of Section 332(c)(7) and unsupported by the purposes of the statute. Further, a "contemporaneously available" requirement targets an issue—the 30-day deadline to file suit under Section 332(c)(7)(B)(v)—that was not an issue below and is not before this Court. Compliance with a "contemporaneously available" requirement would have made no difference in this case because the district court mistakenly failed to consider the council minutes in its decision.

The judgment of the Eleventh Circuit should therefore be affirmed.

ARGUMENT

I. SECTION 332(c)(7) PRESERVES LOCAL AUTHORITY SUBJECT ONLY TO LIMITED EXCEPTIONS.

1. This case concerns a single provision of the 1996 Act. That provision, Section 332(c)(7), is entitled "Preservation of local zoning authority." It provides, in its opening lines, that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). To be sure, Section 332(c)(7)(B) sets forth specific limitations on local governments' exercise of land use authority over wireless facilities. But Section 332(c)(7)(A)'s "nothing in this chapter" phraseology provides reviewing courts with a "rule of statutory construction" that must guide, and confine, the reading of the balance of Section 332(c)(7). *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373 (1986).

T-Mobile and its industry *amici* ignore this rule, focusing instead only on the 1996 Act's more general objective "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers." Pet. Br. at 2-3 (quoting Pub. L. No. 104-104, 110 Stat. 56 (1996)); *accord* PCIA Br. at 16; Competitive Carriers Association ("CCA") Br. at 7; CTIA Br. at 13. But, in the context of a dispute about the language of Section 332(c)(7), the 1996 Act's generalized policy and purpose cannot be read to overcome either the plain language or Congress's specific purposes in enacting Section 332(c)(7). "Every statute purposes, not only to achieve certain ends, but

also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." *Dir., Office of Workers' Comp. v. Newport News Shipbuilding,* 514 U.S. 122, 136 (1995). As this Court has observed, "no legislation pursues its purposes at all costs . . . and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original).

2. In Section 332(c)(7), Congress made a very deliberate choice that was different from the sweeping, general objectives of the 1996 Act. The Conference Report provides that this section was created to:

> prevent[] Commission preemption of local and State land use decisions and preserve[] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.

H.R. Conf. Rep. No. 104-458, at 207-08 (1996), *reprinted in* 1996 U.S.C.C.A.N. 142, 222. At the same time, Congress made clear to the Federal Communications Commission ("FCC") that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service] facilities should be terminated." *Id.* at 208.

Further, Congress showed an awareness of local land use procedures, recognizing that wireless siting requests may involve "a zoning variance or a public hearing" and noting that "[i]t is not the intent of this provision to give preferential treatment to the

personal wireless service industry in the processing of requests." *Id.*

Both the plain text of Section 332(c)(7) and its legislative history demonstrate that Congress made preservation of local authority over land use a priority. And there are deeply rooted reasons why Congress chose to do so. Courts have repeatedly found that "[l]and use decisions are basically the business of state and local governments." *Am. Tower LP v. City of Huntsille*, 295 F.3d 1203, 1206 (11th Cir. 2002) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (noting that "regulation of land use [is] a function traditionally performed by local governments") and *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (stating that "regulation of land use is perhaps the quintessential state activity")). Indeed, "land-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community." *Gardener v. City of Balt.*, 969 F.2d 63, 67 (4th Cir. 1992); *see also Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 828 (4th Cir. 1995).

Section 332(c)(7) "is a deliberate compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." *Town of Amherst v. Omnipoint Commc'ns Enters. Inc.,* 173 F.3d 9, 13 (1st Cir. 1999). As four concurring justices of this Court stated in *Ranchos Palos Verdes v. Abrams*, Congress rejected a top-down federal government approach to wireless siting, instead "substitut[ing] a system based on cooperative federalism. State and local authorities would remain free to make siting decisions," though they would do so

subject to certain federal standards. 544 U.S. 113, 128 (2005) (internal citation omitted).

Here, T-Mobile and its industry *amici* urge the Court to rewrite Section 332(c)(7)'s simple "in writing" requirement to place on local governments the burden of crafting separate written decisions that must satisfy the formal "findings and conclusions" requirements imposed on specialized federal agencies by the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(c)(3)(A). They ignore the reality, recognized by most courts, that unlike federal agencies subject to the APA, local bodies making wireless siting decisions, particularly in small communities, are typically composed of layperson generalists, not lawyers or telecommunications specialists. T-Mobile's reading of the "in writing" requirement would upset the deliberate balance struck by Congress, and the court of appeals was correct to reject it.

II. BOTH GENERAL PRINCIPLES OF STATUTORY CONSTRUCTION AND THEIR APPLICATION TO ANALAGOUS STATUTES SUPPORT THE COURT OF APPEALS' INTERPRETATION OF THE "IN WRITING" REQUIREMENT.

Basic tools of statutory construction lay bare the flaws in T-Mobile's and its industry *amici*'s reading of Section 332(c)(7)(B)(iii)'s "in writing" requirement.

1. As this Court has often repeated, the first place to start in interpreting a statute is with its plain meaning. *See Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984) (the first step in statutory analysis "always, is the question [of] whether Congress has directly spoken to the precise question at issue"). The court of appeals properly

concluded that the plain meaning of the "in writing" requirement is just that: "in writing." The statute says nothing about a formal written decision containing findings and conclusions.

Here, T-Mobile received a "written denial," and, as the Eleventh Circuit found, the reasons for "the denial could be gleaned from the written transcript and the written minutes of the [city council] hearing." Pet. App. at 17a. Taken collectively, these written documents surely satisfy the brief phrase "in writing." Indeed, *amicus* United States agrees. U.S. Br. at 25-26.

Where Congress has intended to require a formal, separate written decision setting forth findings and reasons, it has said so. It did not do so in Section 332(c)(7). Other sections of the 1996 Act specifically require a more detailed writing—a requirement of "written findings as to any deficiencies" in 47 U.S.C. § 252(e)(1) and a requirement that the FCC "state the basis for its approval or denial" in 47 U.S.C. § 271(d)(3). Congress's deliberate and contemporaneous choice of different, and far more sparse language in Section 332(c)(7)(B)(iii) should be respected rather than deemed an oversight. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

2. Further, T-Mobile's and its industry *amici*'s argument that the "in writing" requirement mandates that the reasons for a locality's decision be set forth in a written decision rather than in the minutes or transcript of a local council meeting is flatly at odds with how other federal statutes that impose written decision requirements far more expansive than Section 332(c)(7)(B)(iii) have been construed. For instance, 18 U.S.C. § 3142(i)(1) requires a district court to "include written findings of fact and a written statement of the reasons" to justify the detention of

a defendant pending trial. Yet even there, where a defendant's liberty interests are at stake, a district court may satisfy this written findings and reasons requirement with a transcript of a hearing that contains the court's findings and reasons. *United States v. Peralta*, 849 F.2d 625, 626 (D.C. Cir. 1988) ("We find no cause to remand when the transcript clearly embodies the district court's findings and reasons for detention."); *see also United States v. English*, 629 F.3d 311, 320-21 (2d Cir. 2011) ("[W]here the court's findings and reasons for issuing a detention order are clearly set out in the written transcript of the hearing, the requirement of a writing is satisfied.").

If setting forth findings and reasons in a court transcript is sufficient to satisfy 18 U.S.C. § 3142(i)(1)'s written findings and reasons requirement, then surely council meeting minutes or a transcript are sufficient to satisfy Section 332(c)(7)(B)(iii)'s far simpler "in writing" requirement. Nothing in Section 332(c)(7) or its legislative history remotely suggests that Congress intended to place greater burdens on local governments than it has placed on federal courts and federal agencies, and as discussed above, much suggests Congress intended in Section 332(c)(7) to place a lesser burden on local governments.

3. T-Mobile's and some of its industry *amici*'s argument that Section 332(c)(7)(B) "differentiates a local government's written 'decision' from the 'written record'" suffers from a similar flaw. Pet. Br. at 27; CTIA Br. at 8; Chamber of Commerce Br. at 8. Read in context, the "written record" referred to in Section 332(c)(7)(B)(iii) is the *evidentiary* record. However, Section 332(c)(7)(B)(iii) does not dictate the form that record must take. The minutes or a transcript of a local council meeting, can and often do include both

the evidentiary record *and* the council's decision. That decision is no less of a decision "in writing" merely because it was delivered in a single document with the evidentiary record, rather than broken into two documents. *See Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606-07 (6th Cir. 2004).

4. T-Mobile and some of its *amici* argue that requiring local governments to provide reasons for denials separate from the written minutes or transcript is needed to prevent localities from engaging in *post hoc* rationalization of their decisions. Pet. Br. at 29. T-Mobile ignores, however, that the separate, formal written decision that it asserts the statute requires would necessarily have to be drafted sometime after the hearing and the council vote. How a later-drafted formal written decision would be less susceptible to *post hoc* rationalization, T-Mobile does not, and cannot, say.

As was the case here, a local government's record typically consists of the minutes and a transcript from the public meeting at which a hearing is held and a decision is made on a wireless siting application. The locality does not attempt to supplement the record or alter its rationale by later finalizing the minutes, but rather ensures the minutes accurately reflect the events at the public meeting before they are finalized. As was also the case here, those minutes and transcript are prepared before litigation and are presented to the reviewing court. T-Mobile's concerns about *post hoc* rationalization are therefore unfounded.

III. COURTS HAVE CONSIDERED THE PRACTICAL RESOURCE LIMITATIONS OF LOCAL GOVERNMENTS WHEN INTERPRETING THE OBLIGATIONS SECTION 332(c)(7) PLACES ON LOCAL GOVERNMENTS, AND IT IS PROPER TO DO SO HERE.

This Court and others have recognized that Section 332(c)(7) requires a balancing to be made between, on the one hand, the obligations it imposes on local governments and, on the other, the practical realities and resource limitations of local governments. This balancing counsels against T-Mobile's rigid, APA-style reading of the "in writing" requirement.

1. This Court considered that balancing in *Ranchos Palos Verdes*, 544 U.S. at 123, where it held that Section 332(c)(7) precludes an action for damages under 42 U.S.C. § 1983. The Court noted the inherent resource asymmetry between local governments and telecommunications providers, stating that "in the § 332(c)(7) context, making local governments liable for the (often substantial) legal expenses of large commercial interests for the misapplication of a complex and novel statutory scheme" would "have a particularly severe impact" on local governments. *Id.*

Courts of appeals that previously considered the same question—and which were cited by the Court in *Ranchos Palos Verdes*—likewise recognized that resource asymmetry and, relatedly, the practical limitations of local governments. Then-Judge Alito, writing for the Third Circuit, emphasized that "[Section 332(c)(7)] plaintiffs are often large corporations or affiliated entities, whereas [Section 332(c)(7)] defendants are often small, rural municipalities." *Nextel Partners, Inc. v. Kingston Twp.*, 286 F.3d 687,

695 (3rd Cir. 2002). Indeed, "[s]uch municipalities may have little familiarity with [Section 332(c)(7)] until they are confronted with a [Section 332(c)(7)] claim, and in land-use matters they may generally rely on attorneys who may likewise know little about [Section 332(c)(7)]." *Id.* The Third Circuit then concluded that this imbalance counsels against "increas[ing] the federal burden on local land-use regulation beyond what Congress intended." *Id*; *accord PrimeCo Pers. Commc'n, Ltd. P'ship v. City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003) (in Section 332(c)(7) cases, "[large wireless carriers] find themselves opposed not by other large corporations but by small towns, such as Mequon, [Wisconsin], population 21,000, with a planning commission some of whose members double as aldermen").

Most of the courts that have considered the "in writing" requirement have likewise found that it, too, must be read in light of the practical resource limitations faced by local governments. For instance, the First Circuit, while ruling that a decision "in writing" requires more than the court of appeals did here, noted that the "[p]assage of the [1996 Act] did not alter the reality that the local boards that administer the zoning laws are primarily staffed by lay-people." *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 59 (1st Cir. 2001); *accord MetroPCS, Inc. v. City and Cnty. of S.F.*, 400 F.3d 715, 722 (9th Cir. 2005).

These courts' observations are supported by available empirical evidence. Data from the U.S. Census Bureau's 2012 Census of Governments demonstrate the widely varying amounts of resources and expertise available to local governments of different sizes and in different locations. U.S. Census Bureau, *2012 Census of Governments: Employment*,

2012 Local Government: Individual Government Data and ID File, Census.gov.[2] Those data do not isolate zoning and land use personnel specifically, but include them in the category, "Other Government Administration" personnel. Even looking at that broader group—which includes members of city and town councils, boards of supervisors, commissioners, executive officers such as city managers and mayors, and clerks and recorders—a full 61% of municipalities and townships do not have a single full-time paid employee in the "Other Government Administration" category. Percentages derived from U.S. Census Bureau, *2012 Census of Governments*. Seventy-one percent have no more than one full-time paid employee, and 33% of that group have no more than one part-time paid employee as well. *Id.*

Those limitations notwithstanding, the wireless siting decisions made by local governments are, of course, subject to review under Section 332(c)(7) and must be supported by substantial evidence. That does not mean, however, that it is "realistic to expect highly detailed findings of fact and conclusions of law" from non-lawyer laypeople. *Sw. Bell Mobile Sys.*, 244 F.3d at 59; *see also MetroPCS, Inc.*, 400 F.3d at 722.

2. To be sure, courts appear to be in uniform agreement that the amount of evidence that constitutes "substantial evidence" within the meaning of Section 332(c)(7)(B)(iii) does not differ from the more conventional "substantial evidence" standard for review of agency decisions: it is "more than a scintilla" but "less than a preponderance." *Cellular Tel. Co. v. Town of Oyster Bay,* 166 F.3d 490, 494 (2d Cir. 1999); *see also Am. Tower Corp. v. City of San Diego*, No. 11-

[2] *Available at* https://www.census.gov/govs/apes/.

56766, at 31 (9th Cir. Aug. 14, 2014). Contrary to T-Mobile's and its supporting *amici*'s claims, however, it does not follow that Congress intended the short phrase "in writing" to import the same demands on local governments as the more elaborate written findings and reasons language found in the APA and other federal statutes does of federal agencies. As the Fourth Circuit observed, "the 'reasonable mind' of a legislator is not necessarily the same as the 'reasonable mind' of a bureaucrat, and one should keep the distinction in mind when attempting to impose the 'substantial evidence' standard onto the world of legislative decisions." *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d 423, 430 (4th Cir. 1998). To the contrary, "[i]t is not only proper but even expected that a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters." *Id.* Constituent views, "if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators." *Id.*

3. Local councils acting on wireless siting applications are subject to additional constraints that agencies subject to the APA are not and that, in many cases, aim to prioritize collection of constituent viewpoints. This same set of constraints should be considered when discussing how the sparse phrase "in writing" should be construed. Unlike federal agencies, local councils are often required by state or local laws to hold public hearings before acting on land use applications, including those related to wireless siting. That means, first, that the public must be given the opportunity to participate orally at that hearing, and second, that the record is therefore not complete until the close of the hearing, after which the

local council typically votes immediately. Local councils do not have the luxury of sifting through the evidence for as much time as they wish—especially in light of the many other competing and time-consuming items on their agenda—to craft a written decision complete with formal findings and reasons. Rather, councils typically rely on the minutes of the meeting to perform that function.

These elements are key components of the local government land use process that Congress recognized and did not intend to overturn in Section 332(c)(7). The local government's responsibility under Section 332(c)(7) is to balance the community's land use interests with the wireless provider's facility deployment interests, subject to the limitations of Section 332(c)(7)(B). The statute is not intended to transform a local government into an expert wireless siting agency dragooned into complying with the formal procedural requirements that other federal statutes impose on specialized expert federal agencies.

4. Industry *amici* point to the costs of litigation for carriers that might result from anything less than formal written findings and reasons. *See* Chamber of Commerce Br. at 22; CCA Br. at 25-26. But they overlook that local governments also bear the costs of litigation, when it occurs, as well as the cost of reviewing applications within the timeframe required by the FCC's shot clock rules and, of course, the costs of issuing a decision that complies with the other requirements of Section 332(c)(7)(B). Although the Competitive Carriers Association's brief focuses on the need for broadband expansion in rural communities, CCA Br. at 25-26, the localities in those areas are often among those with the fewest and least expert staff and with the fewest resources for

litigation. *See Rancho Palos Verdes*, 544 U.S. at 123-24 (observing the resource disadvantages of municipal defendants vis-à-vis wireless providers).

5. Together, these concerns—the limited resources of local governments and the constituent-focused public hearing requirements of state and local law—counsel against grafting the APA's full written findings and reasons requirement onto Section 322(c)(7)(B)(iii)'s "in writing" requirement. On an issue such as local land use in particular, where there is such a long and recognized history of local control, that reality cannot be lightly discarded; nor is there any evidence that Congress intended to do so when it enacted Section 332(c)(7).

As the First Circuit has observed, "ultimately, we are in the realm of trade-offs . . . . But subject to an outer limit," the trade-offs were left by Congress for local governments to resolve. *Town of Amherst*, 173 F.3d at 15. T-Mobile's interpretation of the "in writing" requirement, in contrast, would needlessly, and improperly, expand the burden and expense placed on local governments.

IV. T-MOBILE'S RIGID AND DEMANDING INTERPRETATION OF THE "IN WRITING" REQUIREMENT IS NOT NECESSARY TO PROMOTE WIRELESS DEPLOYMENT.

T-Mobile and its industry *amici* claim that the court of appeals' simple, plain-meaning construction of "in writing" would frustrate the 1996 Act's goal of promoting deployment of wireless facilities and services. Pet. Br. at 31; PCIA Br. at 23; Towercom Br. at 4; CCA Br. at 25-26; Chamber of Commerce Br. at 21-22; CTIA Br. at 13, 15. But that claim is belied by industry's own data.

1. Since the passage of the 1996 Act, wireless facilities deployment has flourished. Between 1996 and 2013, for instance, CTIA-The Wireless Association, an *amicus* supporting T-Mobile here, reports that the number of CTIA members' cell sites grew tenfold, from 30,045 to 304,360. CTIA-The Wireless Association, Annual Year-End 2013 Top-Line Survey Results, CTIA.org (2014)[3]; CTIA Br. at 2 n.7. Much of that growth has been in recent years: the number of cell towers has more than doubled in the last decade. *Id.* There also has been significant wireless deployment in Roswell, Georgia. As the City notes in its brief, there are currently 32 cell tower sites in the 42 square miles of the City of Roswell. Resp. Br. at 5; J.A. at 133. Seventeen of those towers were used by T-Mobile at the time of its application in 2010. *Id.*

In short, Section 332(c)(7), as it has been implemented by local governments, has allowed wireless facilities siting to mushroom. There certainly is no evidence that the Fourth and Eleventh Circuits' interpretation of the "in writing" requirement, about which T-Mobile and its industry *amici* complain, has been an obstacle to wireless deployment in the regions encompassed by those circuits.

Nor is there evidence that T-Mobile has been placed at any competitive disadvantage or that local land use authorities have prevented it from expanding its wireless coverage. In July 2014, T-Mobile informed investors that it is the fastest growing wireless company in America and that its network covers 233 million Americans in 325 metro areas. T-Mobile US Inc., *T-Mobile US Reports Second Quarter 2014*

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[3] *Available at* http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2.

Results, Fastest Growth, Fastest Network and Best Customer Service in the Industry (July 31, 2014).[4] At that time, T-Mobile stated that its "network expansion is continuing at an accelerated pace" and that "[t]he improvements to increase speed, capacity, and coverage across the T-Mobile network footprint are rapid and ongoing." *Id.*

Accordingly, T-Mobile's and industry *amici*'s rigid and stringent interpretation of the "in writing" requirement is not about promoting wireless facility deployment. It is about imposing more burdens and costs on local governments, particularly small local governments, in the course of carrying out their traditional governmental functions.

V. A WRITTEN DECISION SEPARATE FROM THE MINUTES OR TRANSCRIPT IS NOT REQUIRED FOR SUBSTANTIAL EVIDENCE REVIEW.

T-Mobile and its industry *amici* claim that a separate written decision setting forth reasons is necessary for a court to apply the "substantial evidence" standard. But an examination of "in writing" decisions, even those with which the court of appeals disagreed, belies that claim.

T-Mobile and its industry *amici* argue that a denial letter that does not specify reasons for the denial unduly burdens the judiciary with the task of reviewing the record to ascertain the reasons for the decision. Pet. Br. at 34-35; Chamber of Commerce Br. at 21. Courts, however, routinely review the record in Section 332(c)(7) challenges, and doing so is not an

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[4] *Available at* http://investor.t-mobile.com/file.aspx?IID=4091145&FID=24663128.

undue or extra burden. In fact, such review is necessary to determine whether the decision is supported by substantial evidence, as well as whether it complies with Section 332(c)(7)(B)'s other requirements. And courts have had little difficulty discerning the reasons for a locality's decision from the minutes or transcript.

1. *Courts of Appeals.* Of all the "in writing" Section 332(c)(7) cases reaching the courts of appeals, only in the *Roswell* and *Milton* decisions did first the district court, and then the court of appeals, address and resolve the case *solely* on "in writing" grounds. Pet. App. at 14a-18a; *Milton,* 728 F.3d at 1285-86. In the other cases, the district courts, and then the courts of appeals, addressed other Section 332(c)(7) issues beyond the "in writing" requirement. *See Helcher v. Dearborn Cnty.,* 595 F.3d 710, 722-23 (7th Cir. 2010) (addressing "in writing" requirement and substantial evidence challenge); *MetroPCS,* 400 F.3d at 723-24 (same); *City of Southfield*, 355 F.3d at 606-07 (addressing "in writing" requirement and 30-day statute of limitations); *New Par v. City of Saginaw,* 301 F.3d 390, 396-97 (6th Cir. 2002) (finding order not "in writing" but also not supported by substantial evidence); *Sw. Bell Mobile Sys.,* 244 F.3d at 60 (addressing "in writing" requirement and substantial evidence issues); *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312 (4th Cir. 1999) (same); *City Council of Va. Beach*, 155 F.3d at 427-29 (considering "in writing" requirement, substantial evidence challenge, and unreasonable discrimination challenge).

In no case has a court of appeals found that, regardless of whether the "in writing" requirement was satisfied, the record was insufficient for a court to

engage in "substantial evidence" review. In fact, the Eighth Circuit recently sided with the Eleventh and Fourth Circuits on the "in writing" issue and had no difficulty conducting substantial evidence review. *NE Colo. Cellular, Inc. v. City of North Platte,* No. 13-3190 (8th Cir. Aug. 22, 2014).

2. *District Courts.* *Amicus* CTIA cites several district court decisions as examples where it claims courts have had "difficulties" conducting judicial review due to the local government's failure to satisfy the "in writing" requirement. CTIA Br. at 18-21. CTIA mischaracterizes the Section 332(c)(7) case law. As noted above, although there are cases in which local governments have been found to have failed to comply with the statute, in the overwhelming majority of those cases, district courts have not decided the case solely on "in writing" grounds but have instead gone on to the "substantial evidence" issue, even if compliance with the "in writing" requirement was also at issue.

In *Omnipoint Communications, Inc. v. Town of LaGrange*, for instance, the court found the town's compliance with both the "in writing" and "substantial evidence" requirements to be at issue. 658 F. Supp. 2d 539, 553-58 (S.D.N.Y. 2009). The court did not stop at the "in writing" requirement, however, noting that it would be "rely[ing] solely on a technicality" if it were to do so. *Id.* at 554.

The same is true of all but one of the district court decisions CTIA cites: the supposed "in writing" shortcoming of the locality's decision notwithstanding, the court nevertheless reached and decided the "substantial evidence" issue. *See Am. Towers, Inc. v. Wilson Cnty.*, No. 3:10-cv-1196, 2014 WL 28953 at *11 (M.D. Tenn. Jan. 2, 2014) (finding no substantial

evidence for any of the reasons given for denial); *Sprint Spectrum L.P. v. Cnty. of San Mateo*, No. C 08-0342 CW, 2013 WL 6326489 at *3-4 (N.D. Cal. Dec. 4, 2013) (evaluating written decision against evidence in the record); *Ill. RSA No. 3, Inc. v. Cnty. of Peoria*, 963 F. Supp. 732, 743 (C.D. Ill. 1997) (noting that the lack of substantial evidence was a "more substantial basis" for ruling against the local government than the "in writing" requirement); *W. PCS II Corp. v. Extraterritorial Zoning Auth. of City & Cnty. of Santa Fe*, 957 F. Supp. 1230, 1236 (D.N.M. 1997) (holding that "the record does not provide any indicia of 'substantial evidence' which would support a denial of the special exemption request on any legitimate ground").

The lone exception is *Smart SMR of New York, Inc. v. Zoning Commission of the Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998). Even there, however, the *Smart SMR* court addressed and resolved the wireless provider's argument that the town had violated another substantive requirement of Section 332(c)(7)(B)—namely, that the local decision had the effect of prohibiting the provision of personal wireless services. Thus, the *Smart SMR* decision was also not based solely on the "in writing" requirement. *Id.* at 58.

3. The district court here, in contrast, decided the case solely on the "in writing" requirement, declining to reach any of the other Section 332(c)(7) issues raised. As a result, the court of appeals did likewise. Pet. App. at 16a-18a. And based solely on the City's supposed failure to comply with the "in writing" requirement, the district court imposed the draconian remedy of ordering the City to grant T-Mobile's application rather than reaching the substantial evidence question or remanding to the City to correct

the supposed "in writing" deficiency. Pet. App. at 34a-35a. That is plainly at odds with what other courts have done in similar circumstances. *See, e.g., AT&T Wireless Servs. of Fla., Inc. v. Orange Cnty.*, 982 F. Supp. 856, 859, 862 (M.D. Fla. 1997) (remanding on the basis of the county's failure to meet the in writing requirement and stating that the court "is loathe to trespass on that [local land use] authority" by ordering injunctive relief).

4. When coupled with T-Mobile's argument that the "in writing" requirement demands that a locality immediately draft and issue a separate written decision that will allow the reviewing court to be "sure to know" the reasons for a denial, Pet. Br. at 22, the district court's action would straitjacket a local government in a way that even federal agencies subject to more demanding written findings and reasons requirements are not. T-Mobile's position would mean that a locality, unlike a federal agency or a court,[5] would have but one opportunity to draft a decision that would satisfy T-Mobile's "sure to know" standard, on penalty of having the reviewing court order the wireless provider's application granted, without even addressing substantial evidence or other issues.

T-Mobile is therefore arguing that under Section 332(c)(7)(B)(iii)'s "in writing" requirement, localities must clear an even higher bar than federal agencies under the APA, as well as a higher bar than the courts of appeals that have adopted a more stringent "in

[5] Under *SEC v. Chenery Corporation,* 318 U.S. 80 (1943), and its progeny, and on which T-Mobile and industry *amici* heavily rely, the typical remedy is to remand to the agency to give it the opportunity to better explain its reasons, not to foreclose the agency entirely.

writing" requirement have set, and that the price for not clearing that bar should be grant of the wireless provider's application. When a court, like the district court here, deems that injunctive relief is appropriate without reaching the substantial evidence or other substantive Section 332(c)(7)(B) issues, it frustrates Section 332(c)(7)'s purpose, discussed in Section I above, of balancing the land use interests of a local government and its residents with wireless deployment. T-Mobile's position elevates a wireless provider's interest in having its application granted, regardless of that application's merits, above the local government's land use process and interests in reviewing and acting on that application. *See PrimeCo Pers. Commc'ns, L.P. v. Vill. of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999) ("We continue to believe that granting PrimeCo's request for an injunction under these specific circumstances would have been unfair to the Village, and upsetting to the balance intended by Congress when it reserved zoning authority to municipalities.").

5. The failure by the district court here, unlike almost all other courts, to reach any issue other than the "in writing" issue also leads to judicial inefficiency. An inquiry into whether the denial was supported by substantial evidence (or whether the decision was inconsistent with any of the other substantive requirements of Section 332(c)(7)(B)) is necessary for the court to determine whether the proper remedy is a remand to the locality or an injunction ordering the locality to issue the permit. *See T-Mobile Ne. LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 463 (S.D.N.Y. 2009) ("But at least for violations of the substantial evidence provision, 47 U.S.C. § 332(c)(7)(B)(iii), almost all courts to address the question have held that 'the appropriate remedy is injunctive relief in the form of

an order to issue the relevant permits.'" (quoting *Town of Oyster Bay,* 166 F.3d at 497, and citing *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2012))).

If a court were to remand solely on the basis of a locality's failure to satisfy the "in writing" requirement without reaching Section 332(c)(7)'s other requirements, the wireless provider would likely bring another court challenge in the event that the locality again issues a written decision denying the application, and at that point the court would need to reach the substantial evidence question. It would be a far more efficient use of judicial resources, as well as more consistent with the expedited court review process that Section 332(c)(7)(B)(v) requires, for courts not to consider the "in writing" requirement in isolation, but to instead, in the first instance, also consider whether there is substantial evidence to support the denial.

VI. *AMICUS* UNITED STATES' PROPOSED "CONTEMPORANEOUSLY AVAILABLE" REQUIREMENT RELATES TO AN ISSUE NOT BEFORE THE COURT AND IS INCONSISTENT WITH THE STATUTE.

As noted above, we wholeheartedly agree with *amicus* United States that Section 332(c)(7)(B)(iii) does not require that a locality's reasons be set forth in a separate written decision, U.S. Br. at 24-26, and that instead, as the court of appeals held, the "in writing" requirement is satisfied as long as the applicant receives a written decision and the reasons for a locality's decision can be gleaned from the written minutes or written transcript. Pet. App. at 17a. The United States goes on to argue, however, that where a locality relies on the written minutes or transcript to lay out the reasons for its decision, the minutes or

transcript "must be made available at substantially the same time as the written decision denying the request," U.S. Br. at 26-27, and here, according to the United States, it was not, *id*. at 28-31. The United States believes that "contemporaneously available" minutes or a transcript are necessary because of the short 30-day limitations period for the wireless provider to seek judicial review under Section 332(c)(7)(B)(v). *Id.* at 28. The United States' "contemporaneously available" requirement is misguided in several respects, and the Court should reject it.

1. The United States' proposed "contemporaneously available" requirement relates not to the "in writing" requirement—the only issue before the Court—but to the 30-day review period in Section 332(c)(7)(B)(v), which is not before the Court. There is no dispute here that T-Mobile satisfied Section 332(c)(7)(B)(v)'s 30-day limitation requirement. Nor can there be any claim of prejudice suffered by T-Mobile as a result of the delay in finalizing the written minutes of the hearing: both the written minutes and the written transcript were available before the lawsuit was filed and were before the district court when it made its decision. The City's decision should not be overturned, and T-Mobile's application ordered granted, based on a "contemporaneously available" requirement that did not appear until an *amicus* raised it in this Court.

2. The United States' "contemporaneously available" requirement is contrary to Congress' intent. The Conference Report makes clear that the Section 332(c)(7)(B)(ii) requirement that a locality must act on a wireless siting application "within a reasonable period of time" was "not intend[ed] . . . to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject

their requests to any but the generally applicable time frames for zoning decisions." H.R. Conf. Rep. No. 104-458, at 208. Yet, by requiring wireless siting applications, and only wireless siting applications, to be subject to a "contemporaneously available" requirement, that is precisely what the United States' proposed new requirement would do. Nor should any delay in a locality's finalizing of the minutes be of any concern. The locality's final decision, as reflected in the written minutes, would still be subject to the FCC's presumptive "shot clock" deadlines that this Court upheld in *City of Arlington v. FCC*, 133 S.Ct. 1863, 1874 (2013).

3. There is no requirement in Section 332(c)(7)(B) that local governments defer transmission of the written decision until the final minutes are available. Indeed, localities usually transmit a short letter notifying the wireless provider of the denial in response to the provider's request for such a letter. The 30-day period in which to initiate judicial review should be deemed to run from the point at which the locality's action is final—namely, when the local government has made available the official written minutes.

4. Reading Section 332(c)(7)(B) to require localities to provide contemporaneous minutes—or to pay for contemporaneous transcripts—for wireless siting applications would substantially burden local governments and upset the balance Congress sought to strike in that provision. *See USCOC of Greater Mo. v. City of Ferguson*, 583 F.3d 1035, 1042 (8th Cir. 2009) ("The statute requires only 'a written record,' and establishes no specific requirements as to its nature."). Local governments already must comply with a variety of state and local legal requirements

in reviewing and acting on applications, including requirements for public notice, hearing, and other procedures, and the preparation of contemporaneous minutes, rather than the preparation of minutes in the normal course, is neither necessary for nor aligned with the goals of Section 332(c)(7).

5. In practice, the "contemporaneously available" requirement would place an even greater burden on localities under Section 332(c)(7)(B)(iii) than the APA places on federal agency decisions. Agencies often vote on a decision on one date but issue a formal written decision much later; in other words, the APA does not require agencies to issue a "contemporaneous" writing explaining the reasons for their decision. Yet, as noted above, no court, and not even T-Mobile or its industry *amici*, have suggested that Section 332(c)(7)(B)(iii) places a higher burden on local governments than the APA places on federal agencies.

6. The United States' proposed "contemporaneously available" requirement would not have affected the outcome of this case. The district court's decision in this case would not have been different had the City produced contemporaneous minutes or a transcript. To the contrary, the district court had both the City's minutes and T-Mobile's transcript before it, yet as the United States notes, U.S. Br. at 29-30, the court considered only the transcript. Neither the City's brief written decision nor the delay in producing the written minutes had any impact on the district court's decision. The United States' new "contemporaneously available" requirement therefore provides no basis for reversing the court of appeals' decision to reverse and remand to the district court.

VII. BECAUSE OF THE CLEAR ERRORS MADE BY THE DISTRICT COURT, THE COURT OF APPEALS' REVERSAL AND REMAND WAS CORRECT, AND THIS COURT SHOULD THEREFORE AFFIRM.

As the United States points out (and we agree), the reasons for the City's denial of T-Mobile's application were apparent from the minutes and the transcript, U.S. Br. at 17, 30-31 & n.6, and the district court thus erred in concluding otherwise. Moreover, as the United States also points out (and we agree), the district court apparently overlooked the minutes—even though they were before it—and instead relied exclusively on the transcript, which contained an error that, in turn, led the district court to "mistakenly count[ ]" the City Administrator as a Councilmember. *Id.* at 29-30.

The district court thus committed clear error in reviewing the record before it, and one that even "contemporaneous" minutes would not have avoided. The court of appeals' disposition of the district court's judgment—reversing and remanding—was therefore correct, and on this ground alone, the court of appeals should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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