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 FOR PETITIONER

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QUESTION PRESENTED

In order to promote the prompt deployment of telecommunications facilities and to enable expedited judicial review, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any "decision" by a state or local government denying a request to place, construct, or modify a personal wireless service facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

The question presented is whether a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory requirement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner T-Mobile South LLC references the Rule 29.6 Statement included in its Petition for Certiorari.

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BRIEF FOR PETITIONER

Petitioner T-Mobile South LLC respectfully requests that the judgment of the United States Court of Appeals for the Eleventh Circuit be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 731 F.3d 1213 and is reproduced at Pet. App. 1a-18a. The relevant opinion of the district court is unpublished and is reproduced at Pet. App. 19a-35a.

JURISDICTION

The Eleventh Circuit issued its opinion on October 1, 2013. Pet. App. 1a. On December 20, 2013, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including February 13, 2014. *See* No. 13A614. This Court granted a writ of certiorari on May 7, 2014. *See* 134 S. Ct. 2136 (2014). The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the Telecommunications Act of 1996 are reproduced in the Statutory Appendix at the end of this Brief.

STATEMENT OF THE CASE

This case presents an important issue concerning one of the "limitations" that, in order to facilitate the growth of the wireless communications industry, the Telecommunications Act of 1996 imposes upon the authority of local governments.

A. Statutory and Factual Background

1. For most of the twentieth century, the Nation's communications marketplace was dominated by government-sanctioned and regulated monopolies. Consumers had no choice among providers of telephone service. Nor did they have any choice in the technology that provided the service.

During the 1980s and early 1990s, the Federal Communications Commission ("FCC") began to allow the deployment of some competitive wireline long-distance service. The FCC also began to facilitate the introduction of some wireless telecommunications services. *See generally Amendment of the Commission's Rule to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd. 7700 (1993); Peter W. Huber, Michael K. Kellogg, & John Thorne, *Federal Telecommunications Law*, §§ 10.1 & 10.2 (2d ed. 1999). Yet, the overwhelming majority of telecommunications services still continued to be provided only by government-regulated monopolists.

Congress enacted the Telecommunications Act of 1996 ("1996 Act"), which amended the Communications Act of 1934 (the "Act"), to significantly alter this landscape. The 1996 Act is designed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications

consumers." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). It also is intended to "encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996); *see also City of Rancho Palos Verdes*, 544 U.S. at 115; H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (1996) (purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition").

Consumer wireless telecommunications service – or cell phone service – is one of the key technologies that Congress intended to open to competition in the 1996 Act. Although only a nascent technology in 1996, Congress foresaw that the rapid deployment of wireless telecommunications services could reap great benefits for individuals and businesses alike. At the same time, Congress recognized that this deployment could occur effectively only by opening up markets to enable competition. Yet, "current State and local requirements, siting and zoning decisions by non-federal units of government," Congress observed, "have created an inconsistent and, at times, conflicting patchwork of requirements which [would] inhibit the deployment of" wireless facilities such as towers and antennas. H.R. Rep. No. 104-204, pt. 1, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 60, 61 (1996); *see also City of Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring); *Amendment of the Commission's Rules to Establish Part 27, the*

Wireless Communications Service, Report and Order, 12 FCC Rcd. 10785, ¶ 90 (1997) (noting that "zoning approval for new [wireless] facilities" has historically been "both a major cost component and a major delay factor in deploying wireless systems").

To break down local regulatory barriers to the effective deployment of wireless infrastructure and services, Section 332(c)(7)(B) of the 1996 Act "imposes specific limitations on the traditional authority of [S]tate and local governments to regulate the location, construction, and modification of [personal wireless] facilities." *City of Rancho Palos Verdes*, 544 U.S. at 115. Some of these limitations are substantive, while others are procedural.

On a substantive level, Section 332(c)(7)(B) prohibits local zoning authorities from unreasonably discriminating among providers; issuing decisions that effectively prohibit the provision of personal wireless services; denying applications without support of substantial evidence; or from regulating the deployment of wireless services on the basis of environmental effects of radio waves that comply with FCC specifications. 47 U.S.C. §§ 332(c)(7)(B)(i), (iii), & (iv).[1]

On a procedural level, the statute requires that local governments act on any request for

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[1] The 1996 Act also imposes other substantive limitations on local authority – for example, prohibiting state and local authorities from regulating the market entry of, or rates charged by, personal wireless services providers, 47 U.S.C. § 332(c)(3), and prohibiting state and local actions that may have the effect of prohibiting the provision of telecommunications services, 47 U.S.C. § 253.

authorization to place, construct, or modify personal wireless service facilities "within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii); *see also City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (upholding FCC Declaratory Ruling specifying time periods). Section 332(c)(7)(B) also creates a system for subjecting denials of such requests to judicial review. It allows "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph" to file a lawsuit "within 30 days after such action or failure to act." 47 U.S.C. § 332(c)(7)(B)(v). It then mandates that "[t]he court shall hear and decide such action on an expedited basis." *Id.* And to facilitate this system of expedited review, Section 332(c)(7)(B) requires – in the provision directly at issue in this case – that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

The competition-enhancing reforms of the 1996 Act have helped the United States become an increasingly technologically mobile society. Consumer use of smartphones, tablets, and other mobile devices has skyrocketed in recent years – a trend that will likely continue for the foreseeable future. *See, e.g., Riley v. California*, Nos. 13-132, 13-212, 2014 WL 2864483, at *9 (U.S. June 25, 2014) (noting that modern cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy");

Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, ¶ 2 (2013) ("*2013 Wireless Broadband NPRM*"); Centers for Disease Control, Wireless Substitution: Early Release of Estimates From The National Health Interview Survey, January-June 2013 at 1 (Rel. Dec. 2013) (reporting that 39.4% of all households have eliminated wireline telephone service and now rely solely on wireless service). But to meet burgeoning consumer demand, wireless service providers – particularly upstart companies seeking to fulfill the 1996 Act's goals of increasing competition and lowering prices – must have the necessary infrastructure in place. *See, e.g., 2013 Wireless Broadband NPRM*, 28 FCC Rcd. 14238, ¶ 2. This means deploying increasingly tightly stitched networks of wireless facilities (including cell towers) to reach the places where consumers live and work. *See, e.g., id.*; *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 41 (1st Cir. 2009).

2. Petitioner T-Mobile South, a subsidiary of T-Mobile USA, Inc., is a provider of wireless voice and data services. Founded in 1994 (then known as VoiceStream Wireless), T-Mobile has sought since the passage of the 1996 Act to compete with "incumbent carriers," such as AT&T and Verizon, that have developed from the traditional monopoly "Bell" companies and that now overwhelmingly dominate the market. To that end, T-Mobile strives to offer a competitive alternative to consumers (with superior service at lower rates, but without tying consumers to restrictive multi-year service contracts).

T-Mobile is now the fourth largest wireless carrier in the country, and is the Nation's fastest

growing wireless provider – serving some 49 million subscribers. *See T-Mobile, Facts at a Glance*, http://newsroom.t-mobile.com/content/1020/files/TMUS%20Fact%20Sheet_6_4_14_Branded.pdf. In the first quarter of 2014, T-Mobile added more customers than its three larger competitors combined. Competing at this level requires T-Mobile to continually invest in new and better infrastructure. While customers want to save money on cell phone bills, they generally do not want to sacrifice coverage or speed of service.

As part of its nationwide efforts to deploy infrastructure to meet consumer demand, T-Mobile determined in 2010 that it needed an additional personal wireless service facility in a residential area in Respondent the City of Roswell, Georgia ("the City"), a suburb of Atlanta. It, therefore, applied to the City for a permit to construct a 108-foot cell tower, disguised as a pine tree, on a 2.8-acre, vacant parcel of property.

The Planning and Zoning Division of the City's Community Development Department reviewed T-Mobile's application and found that it met all the requirements of the City code's standards for wireless facilities. Pet. App. 4a. The Planning Department further recommended that the City approve the application with certain modifications. *Id.*

On April 12, 2010, the City Council considered the application at a public hearing. The hearing lasted over two hours (reflected in 108 pages of transcript), and produced a range of divergent views on the application. During the first part of the hearing, some T-Mobile representatives and local residents spoke for and against the proposal. T-Mobile also submitted evidence in the form of

photographs "showing that the tower would be virtually invisible from surrounding properties" and several studies showing that such towers "ha[ve] no detrimental effect" on property values. Pet. App. 31a. Later, certain councilpersons expressed concern or outright opposition to the application. They suggested, among other things, that "other carriers apparently have sufficient coverage in this area"; that the cell tower would be "aesthetically incompatible with the natural setting and surrounding structures"; and that the cell tower might not be able "to provide continuous emergency power for 911 services." Pet. App. 7a-8a, 28a-29a. Another councilperson simply asked follow-up questions of T-Mobile, Pet. App. 28a, and a final councilperson recused herself and never spoke at all. J.A. 111.

Near the end of the discussion, one councilperson, Dr. Betty Price, spoke out against the application. Referencing a local ordinance designed to "minimize the number of towers," she argued that "the proposed cell phone tower would be aesthetically incompatible with natural setting and surrounding structures, particularly due to the tower's height being greater than the surrounding trees." Pet. App. 7a-8a. Dr. Price further mused that "the adverse effects to the enjoyment of th[e] neighbors and the potential loss of resale value among other potential parameters are difficult really to definitively assess." *Id.* 8a.

After expressing her views, Dr. Price moved to deny the application. The members who were present and eligible to vote unanimously passed the motion. J.A. 177, 340. No one ever identified which of the various concerns expressed at the meeting

constituted the City's official reasons for denying the permit.

Two days later, the City mailed T-Mobile a letter. The letter stated in full:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number]. If you have any additional questions please, contact me at [phone number].

Pet. App. 9a; J.A. 278.

The minutes of the hearing were not available at the time T-Mobile received this letter. Twenty-six days later, they were finally approved and published. *See* J.A. 321-41 (minutes); Minutes of Hearing, http://roswell.legistar.com/MeetingDetail.aspx?ID=101786&GUID=63828B21-EB83-4485-B4EA-10EE65CF48CD&Search (noting approval and publication of minutes on May 10, 2010). The minutes "summarize the testimony of experts and concerned citizens, along with comments and questions from councilmembers." Pet. App. 15a. They also recount the concerns that Dr. Price expressed before moving to deny T-Mobile's application. *Id.* But nothing in the minutes ascribes those concerns or any other concern to the Council as a whole.

B. Procedural History

1. Invoking the 1996 Act's judicial review provisions, T-Mobile timely filed an action in the U.S.

District Court for the Northern District of Georgia, challenging the City's denial of its application and seeking an injunction that would require the City to issue the requested permit. J.A. 34-62. Among other provisions of the Act, T-Mobile contended that the City's unexplained denial letter violated Section 332(c)(7)(B)(iii)'s requirement that decisions denying applications such as this be "in writing and supported by substantial evidence."

The district court granted summary judgment to T-Mobile and ordered the City to allow T-Mobile to install its wireless communications facility. Pet. App. 35a. Reading the statutory phrase "decision . . . in writing and supported by substantial evidence" in light of Section 332(c)(7)(B)(iii)'s purpose of facilitating expedited judicial review, the district court adopted the interpretation of that provision followed by a majority of federal courts of appeals that have addressed the issue. Pet. App. 27a. Under the majority interpretation, a decision denying an application concerning a personal wireless facility must be separate from the written record and "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Id.* 26a (quoting *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001), and citing *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 722-23 (9th Cir. 2005)). Thus, "even where the written record may offer some guidance as to the board's rationale," a denial letter violates Section 332(c)(7)(B)(iii) where that separate writing itself does not identify the reasons for the denial. *Todd*, 244 F.3d at 60.

In the district court's view, this case exemplified the good sense behind that rule. The City argued that "its letter of denial satisfies the 'in writing' requirement because it refers to the minutes of the hearing and there is also a transcript of the hearing." Pet. App. 28a. But, as the district court pointed out, the written record "reflects a number of different reasons that may have motivated individual Council members to vote to deny T-Mobile's application." *Id.* 30a. As a result, the district court found it "impossible . . . to discern which of these reasons motivated the Council as a whole or commanded the support of a majority of the Council members." *Id.*

Moreover, the denial letter's bare reference to the minutes "left [the court] to review this voluminous record without any guidance as to what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id.* 32a. For example, "insofar as the Council relied on evidence regarding the proposed tower's adverse effect on aesthetics and property values," it was "impossible" for the court "to determine whether [the Council] found that this particular tower would have an adverse effect in this particular neighborhood, or instead, that any cell tower would have such an effect" – a finding that "would be insufficient to justify denial of a permit." *Id.* "Absent some explanation of the rationale for the City Council's denial of T-Mobile's application," the district court was simply unable to conduct "meaningful judicial review." *Id.* 28a (quoting *Todd*, 244 F.3d at 60), 32a.

2. The Eleventh Circuit reversed. The court of appeals did not dispute that under the majority interpretation of Section 332(c)(7)(B)(iii) T-Mobile

would prevail. But, reaffirming its intervening decision in *T-Mobile South LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the Eleventh Circuit expressly rejected the majority construction of Section 332(c)(7)(B)(iii). Pet. App. 14a. Joining the Fourth Circuit, the Eleventh Circuit held that a written document announcing the bare conclusion that an application was "denied" can satisfy Section 332(c)(7)(B)(iii). Pet. App. 12a-13a; *see also AT&T Wireless PCS, Inc. v. City Council of City of Va. Beach*, 155 F.3d 423, 429 (4th Cir. 1998); *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312 (4th Cir. 1999). The Eleventh Circuit added that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." Pet. App. 13a (quoting *City of Milton*, 728 F.3d at 1285).

The Eleventh Circuit ruled that the City satisfied the court's standard because (1) the City sent T-Mobile "a letter explicitly denying T-Mobile's request; (2) [the] minutes summariz[e] the April 12, 2010 hearing and recount[] the reasons for the denial; and (3) a verbatim transcript of the April 12, 2010 hearing during which the City Council denied the request" also exists. Pet. App. 16a.[2] The Eleventh Circuit did not attempt to pinpoint which reasons, among the various concerns expressed in the latter

[2] The Eleventh Circuit stated it was "unclear whether T-Mobile hired the court reporter to transcribe the hearing," Pet. App. 16a, but T-Mobile in fact did so. Had T-Mobile not taken this initiative, no written transcript of the hearing would exist.

two documents, constituted the City's actual reasons for denying the application. Instead, the Eleventh Circuit simply remanded to the district court – the same district court that has already combed through those documents and found it impossible to discern why the City denied the application – for further proceedings. Pet. App. 18a.

3. This Court granted certiorari. 134 S. Ct. 2136 (2014).

SUMMARY OF THE ARGUMENT

The City violated Section 332(c)(7)(B)(iii) when it issued a letter denying T-Mobile's application for a permit to construct a cell tower but failed to specify any reasons for doing so.

I. Section 332(c)(7)(B)(iii) requires "[a]ny decision" denying a permit request concerning a personal wireless facility to "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). The phrase "supported by substantial evidence" is a term of art in administrative law – the customary standard for reviewing agency action – and invokes the cluster of principles traditionally attached to that standard. Foremost among those principles is the requirement that the agency specify its reasons for the action at issue. Only then can the judiciary perform its statutory mandate of assessing whether those reasons have adequate grounding in the administrative record.

The Eleventh Circuit focused on a different phrase in the statute – "in writing" – and reasoned that so long as a local government transmits the word "denied" in written form, it has satisfied the statute. But such reasoning ignores this Court's

repeated admonition that statutory terms must be read in context, not in isolation. The statute's "in writing" directive is designed to facilitate judicial review, and simply requiring decisions to be issued in written – as opposed to oral – form would fail to achieve that objective. Furthermore, allowing local agencies simply to transmit the word "denied" without any reasoning would contravene the statute's use of the word "decision" as the object of the "in writing" modifier. A "decision," as opposed to a mere "notification," implies a transmission of reasons, not merely an announcement of an outcome.

This analysis holds even where, as here, a local agency's transmittal of its denial includes an invitation to obtain the minutes of a hearing or any other part of an administrative record – and even where various concerns or objections regarding the application can be found in that record. "A written record can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board." *Todd*, 244 F.3d at 60. Only by requiring the document transmitting the denial to the applicant to include "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," *id.*, can a reviewing court be sure to know the rationale of the local government *as a whole* for denying the application.

Two other structural elements of Section 332(c)(7)(B) reinforce this reading of subsection (iii). First, subsection (v) requires courts to review permit denials "on an expedited basis." If courts first had to

comb though lengthy administrative records in search of reasons for such denials, they would be unable to hear and decide these cases in an efficient manner. Second, as numerous federal courts of appeals have recognized, substantial-evidence review under Section 332(c)(7)(B)(iii) forbids local governments from defending permit denials based on post hoc rationales. But only if local authorities are required to specify the reasons in the first place can courts know which reasons were actual reasons for denials – and evaluate those reasons for substantial evidence.

The purpose and legislative history of Section 332(c)(7)(B) are in accord. Congress sought in the Telecommunications Act of 1996 "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition." H.R. Rep. No. 104-458, at 113 (Conf. Rep.), 1996 U.S.C.C.A.N. at 124. Section 332(c)(7)(B) is designed to achieve that objective by preventing local governments from imposing "impediments [to] the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes*, 544 U.S. at 115. Allowing local governments to issue unreasoned denials, thereby generating obfuscation and delay, would thwart these goals – particularly with respect to carriers such as T-Mobile, which are attempting rapidly to deploy wireless infrastructure for exactly the reasons Congress envisioned when it passed the 1996 Act, while engaged in competition with larger carriers. The Eleventh Circuit's holding also contradicts Congress's expectation that courts would judge permit denials against "the traditional

standard used for judicial review of agency actions." H.R. Rep. No. 104-458, at 208 (Conf. Rep.), 1996 U.S.C.C.A.N. at 222-23.

II. Allowing local zoning authorities to issue unreasoned denials would also pose serious administrative difficulties. Records compiled in connection with permit applications can include statements from local residents, paid experts, agency personnel, and others. Such persons often express wildly divergent reasons for opposing applications. The judiciary should not be saddled with the task of determining which of these statements count as the official reasons for denying permits. Indeed, requiring the district court to first identify the local government's reasons for denial risks attributing to the local government reasons that the local government did not intend.

This case perfectly illustrates the administrative difficulties. After surveying the "voluminous" administrative record, the district court found it "impossible . . . to discern which of the[] reasons [expressed in the hearing and the minutes] motivated the Council as a whole or commanded the support of a majority of the Council members." Pet. App. 30a, 32a. This inability posed a significant problem, because at least some of the concerns expressed in the record would have violated the 1996 Act and others lacked any substantial evidentiary support. In the face of such uncertainty, the district court had no choice but to correctly find a violation of Section 332(c)(7)(B)(iii). The Eleventh Circuit's ruling should be reversed.

ARGUMENT

I. Customary Tools Of Statutory Construction Dictate That A Document Stating That An Application Has Been Denied, But Providing No Reasons For The Denial, Violates Section 332(c)(7)(B)(iii).

The text, structure, purpose, and legislative history of Section 332(c)(7)(B)(iii) dictate that decisions denying applications to place, construct, or modify a personal wireless service facility must be separate from the administrative record and must identify reasons for the denial.

A. Text

1. We begin with the text, and with this Court's familiar admonition that "[s]tatutory interpretation is a holistic endeavor." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks and citation omitted). Thus, "[i]n expounding a statute, [this Court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013) (quoting *U.S. Nat'l Bank of Or. v. Independent Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting in turn *United States v. Heirs of Boisdore*, 8 How. (49 U.S.) 113, 122 (1849))). Furthermore, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning . . . , it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952); *accord FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012);

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991).

When a local authority denies a permit concerning a personal wireless facility, Section 332(c)(7)(B)(iii) requires it to issue a "decision . . . in writing" that is "supported by substantial evidence." The phrase "supported by substantial evidence" is a term of art in administrative law – the "traditional" standard used for reviewing agency actions. *Friends of the River v. FERC*, 720 F.2d 93, 98 (D.C. Cir. 1983) (Ginsburg, J.).

This Court initiated this tradition nearly a century ago, before the Administrative Procedure Act of 1946 reduced the rules governing judicial review of most agency action into a detailed statutory regime. In 1938, this Court explained that the phrase "substantial evidence" "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). And in subsequent cases, this Court established the equally important corollary that the requirement that agency action be supported by substantial evidence presupposes that the agency must identify reasons for its actions.

For example, in *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), this Court set aside an order of the Interstate Commerce Commission because the agency failed to set forth reasons for its decision. This Court explained that when Congress provides for judicial review of agency action, the duty of the courts is to ensure that Congress's "policies be executed" – that is, to ensure that the agency has abided by statutory limitations on its authority and not taken action on any impermissible ground. *Id.* at 489. "If that inquiry is

halted at the threshold by reason of the fact that it is impossible to say whether or not those [statutory] standards have been applied, then that review has indeed become a perfunctory process." *Id.* Hence, this Court stressed that the requirement to provide reasons "is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." *Id.*

This Court elaborated on these principles in the seminal *Chenery* decisions. Refusing to accept an agency order lacking any specification, this Court reaffirmed that "the orderly functioning of the process of [substantial-evidence] review requires that the grounds upon which the administrative agency acted be clearly disclosed." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery I*"). "[C]ourts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *Id.* Put another way: "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) ("*Chenery II*").

Numerous other cases confirm that an indispensible element of substantial-evidence review is that the agency provide reasons for its decision. *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) ("A reviewing court reviews an agency's reasoning to determine whether it is . . . supported by 'substantial evidence.'") (citing *Chenery I*, 318 U.S. at 89-93); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Life. Ins. Co.*, 463 U.S. 29, 43, 44 (1983) (the

agency must "articulate a satisfactory explanation for its action" to enable judicial review of whether agency's decision is "supported by 'substantial evidence on the record as a whole") (citation omitted); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) ("[F]or the courts to determine" whether an agency has acted within its statutory authority, "[t]he agency must make findings that support its decision, and those findings must be supported by substantial evidence."); *see also* Harry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1292 (1975) (describing, and agreeing with, traditional rule that "[a] written statement of reasons" for agency action is "almost essential if there is to be judicial review").[3]

When read against the backdrop of the traditional requirement that agencies subject to substantial-evidence review must identify reasons for their actions, it is fully apparent – as some Members

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[3] Even when Congress has not seen fit to subject agency action to judicial review, persons may sometimes bring suit to challenge the adequacy of state administrative procedures when liberty or property interests are at stake. In such circumstances, this Court likewise has held that "the minimum requirements of procedural due process" require "a written statement by the factfinders as to the evidence relied on and reasons" for the agency's actions. *Wolff v. McDonnell*, 418 U.S. 539, 563, 564 (1974) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). The Model State Administrative Procedure Act also provides as one of its "minimum procedure requirements" that "[t]he decision in a contested case must be based on the hearing record and contain a statement of the factual and legal bases of the decision." Uniform Law Commission, Revised Model State Administrative Procedure Act § 403(j) (2010).

of this Court have already observed – that Section 332(c)(7)(B)(iii) "requires local zoning boards . . . [to] *give reasons* for [their] denials in writing." *City of Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., joined by Ginsburg, Souter, and O'Connor, JJ., concurring) (emphasis added). Just as with other statutes subjecting agency action to substantial-evidence review, Section 332(c)(7)(B)(iii) exists against the backdrop of a judicial review regime and prohibits denying permits based on beliefs lacking substantial evidence support in the administrative record. Section 332(c)(7)(B) also imposes other substantive restrictions against denying permits for certain impermissible reasons. *See* 47 U.S.C. §§ 332(c)(7)(B)(i) & (iv). Courts cannot enforce these restrictions if local agencies do not specify why they did what they did. Accordingly, when a local zoning authority issues a letter denying a permit but fails to identify any reasons for its action, the issuance is not a "decision" that is "supported by substantial evidence." 47 U.S.C. § 332(c)(7)(B)(iii).

This remains so even where, as here, a local agency's transmittal of its denial includes an invitation to obtain the minutes of a hearing or any other part of an administrative record – and even where various concerns or objections regarding the application can be found in that record. As the First Circuit has explained, "[a] written record can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board." *Todd*, 244 F.3d at 60. Only by requiring the document transmitting the denial to the applicant to

include "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," *id.*, can a reviewing court be sure to know – as the district court here needed to know – "the rationale of the Council *as a whole* for denying the application." Pet. App. 28a (emphasis added). And only by knowing that rationale can a court actually assess whether the decision to deny the permit is supported by substantial evidence.

2. The Eleventh Circuit – in this case and in its previous holding in *T-Mobile South LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013) – resisted this reading of Section 332(c)(7)(B)(iii) on textual grounds. Focusing exclusively on the words "in writing," the Eleventh Circuit held that the alleged "plain meaning" of the statute requires nothing more than that local zoning authorities transmit denials in written – as opposed to oral – form. Pet. App. 12a-14a. The Eleventh Circuit implicitly acknowledged that this bare-bones interpretation of Section 332(c)(7)(B)(iii) would thwart the provision's purpose of enabling expedited judicial review. *See City of Milton*, 728 F.3d at 1284-85. But the court of appeals declared that it was powerless to give effect to that intent. "We must . . . take the model that Congress has constructed," the Eleventh Circuit asserted, "perceived defects and all." *Id.* at 1284.

Though cast as judicial modesty, this reasoning actually subverts Congress' work for no legitimate reason. As this Court has said time and again, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Accordingly, "a court should not interpret each word in a statute with blinders on,

refusing to look at the word's function within the broader statutory context." *Abramski v. United States*, 134 S. Ct. 2259, 2267 n.6 (2014); *see also Porter v. Nussle*, 534 U.S. 516, 527 (2002) (each statutory term should be construed "not in isolation, but 'in its proper context'") (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). Indeed, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

That is precisely the case here. Whatever the words "in writing" might indicate in a vacuum, the import of those words – when read in tandem with Section 332(c)(7)(B)(iii)'s "substantial evidence" requirement and the statutory scheme of Section 332(c)(7)(B) – is clear: Denials of permit applications must identify the reasons for the zoning authorities' actions so as to facilitate the judicial review that Section 332(c)(7)(B) contemplates. As one court of appeals has put it, "[i]f [judicial review for substantial evidence] is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record." *MetroPCS,* 400 F.3d at 722.

That is particularly so in light of the fact that any permit denials must be based on criteria set forth in "applicable state and local law." *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 798-99 (6th Cir. 2012) (quoting *MetroPCS*, 400 F.3d at 723-24)); *accord ATC Realty, LLC v. Town of*

Kingston, 303 F.3d 91, 94 (1st Cir. 2002). In this case, for example, the Roswell City Code set forth nine criteria for determining whether to grant T-Mobile's application. J.A. 71-72. The City's Planning and Zoning Director found that T-Mobile's application satisfied all of those criteria. Pet. App. 4a. At the same time, the administrative record contains a good deal of material that is unrelated to any of these criteria. If a local government in this situation were not required to specify its reasons for denying a permit in a document separate from the administrative record, then a district court would have no way of knowing whether the locality denied the application based on an improper ground arising from this irrelevant record material.

Section 332(c)(7)(B)(iii)'s use of the word "decision" as the object of the "in writing" modifier reinforces Congress's expectation that permit denials must set forth the reasons for the local zoning authority's action. In legal parlance at the time the 1996 Act was drafted, the word "decision" commonly meant the same thing as "opinion" – namely, a written document providing "the reasons given for [a] judgment." Black's Law Dictionary 407 (6th ed. 1990).

To be sure, the word "decision" has "no fixed, legal meaning" and can mean something short of a statement of reasons explaining a determination. Black's Law Dictionary 407. But there can be no doubt in the context of the 1996 Act that the word "decision" implies something more than the statement of a bald conclusion with no reasoning whatsoever. Several other provisions of the Communications Act require agencies merely to "notify" parties of certain actions in writing. *See,*

e.g., 47 U.S.C. § 11 (requiring the FCC to "notify the parties concerned" after making determinations in certain common carrier cases); 47 U.S.C. § 398(b)(5) ("[T]he Secretary shall, within 10 days after such determination, notify the recipient in writing of such determination. . . ."). The fact that Section 332(c)(7)(B)(iii) uses the word "decision" implies more than a mere notice of conclusion. Rather, local zoning authorities must identify reasons for their actions.

3. Notwithstanding its "plain language" rhetoric, even the Eleventh Circuit was unwilling to hold unequivocally that a local authority that denies a permit application need not provide anything in writing explaining the reasons for the denial. Instead, the Eleventh Circuit tried to elide the issue, stating that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to," such as the minutes or a transcript of the hearing at which the application was considered. Pet. App. 13a (quoting *City of Milton*, 728 F.3d at 1285).

This will not do. The Eleventh Circuit's holding that the local government's "decision" need not contain any reasoning leaves only two possible interpretations of Section 332(c)(7)(B)(iii), neither of which withstands scrutiny.

First, the Eleventh Circuit could follow through on its reading of the words "in writing" in isolation and conclude – as the Fourth Circuit seemingly has – that a local zoning authority that denies a permit application need not provide anything at all in writing explaining the reasons for the denial. *See*

Winston-Salem, 172 F.3d at 312; *City of Va. Beach*, 155 F.3d at 429. Under this interpretation of Section 332(c)(7)(B)(iii), it would suffice for the local government simply to stamp the word "denied" on the permit application. *See Winston-Salem*, 172 F.3d at 312. No reasons for that action would need to exist in written form – whether in the administrative record or anywhere else.

The problems with such an interpretation are manifest. Most obviously, courts would be disabled from performing the judicial review that Section 332(c)(7)(B) mandates. As this Court has explained, "We must know what [an agency's] decision means before the duty becomes ours to say whether it is right or wrong." *Chenery II*, 332 U.S. at 197 (quoting *United States v. Chicago, Milwaukee, St. Paul & P. R.R. Co.*, 294 U.S. 499, 511 (1935)). Without any statement of reasons for an agency's action, a court cannot evaluate whether the action is valid.

The lack of any requirement to provide reasons for permit denials would also remove a critical check against arbitrary and capricious decision-making. "The necessity for justification is a powerful preventive of wrong decisions," Friendly, 123 U. Pa. L. Rev. at 1292, and "helps to insure that administrators . . . will act fairly." *Wolff v. McDonnell*, 418 U.S. at 565. This is because "reasoning forces the administrative decisionmakers to confront arguments against their position," 3 Charles H. Koch, Jr., Administrative Law and Practice § 10:40 (3d ed. 2010), and to crystallize and sharpen their analyses. Dispensing with these incentives would run exactly counter to Section 332(c)(7)(B)'s design.

Second, the Eleventh Circuit could construe Section 332(c)(7)(B)(iii) as requiring a statement of reasons but as being indifferent as to whether the reasons appear in the decision or merely in the administrative record. But such an interpretation cannot be squared with the language of the statute. Section 332(c)(7)(B)(iii) expressly differentiates a local government's written "decision" from the "written record." And the statute contemplates that the "written record" is where "evidence" should be housed. It follows that the "decision" must be where the local government must provide the reasons for its action.

B. Structure

Two other components of Section 332(c)(7)(B)'s system of judicial review buttress the conclusion that local governments must provide reasons for permit denials in writings separate from the administrative record.

1. Section 332(c)(7)(B) requires applications for permits to place, construct, or modify wireless service facilities to be resolved rapidly. For starters, the statute requires local governments to act on such applications "within a reasonable period of time after filing," 47 U.S.C. § 332(c)(7)(B)(ii) – presumptively 90 days to collocate a new antenna on an existing structure or 150 days to install a new structure. *See City of Arlington*, 133 S. Ct. 1863 (upholding FCC determinations in *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd. 13994, ¶ 4 (2009)). Moreover, Section 332(c)(7)(B) requires any lawsuits

challenging denials to be filed within 30 days of the local government's decision. 47 U.S.C. § 332(c)(7)(B)(v). And courts must resolve these lawsuits "on an expedited basis." *Id.*; *see also City of Rancho Palos Verdes*, 544 U.S. at 127-28 (Breyer, J., concurring) (noting centrality of these timing requirements to the congressional scheme).

The Eleventh Circuit's holding would thwart this requirement of expeditious judicial resolution. If local governments are not required to identify reasons for their actions in written documents separate from the administrative record, wireless carriers and other aggrieved parties would often have no reliable means to assess within 30 days whether they should file suit. There is no deadline for issuing a written administrative record. In this case, for instance, the City did not issue the minutes from the hearing at which T-Mobile's application was considered until 26 days *after* it sent the letter notifying T-Mobile that the application had been denied.[4] That left T-Mobile only four days to decide whether it should try to correct identified deficiencies in its application, enter into further negotiations with the City, or file suit. The next applicant may not even have that much time. Thus, the only sensible reading of Section 332(c)(7)(B)(iii), consistent with the overall statutory scheme, is one that affords wireless carriers the full 30-day allotment in the

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[4] *See http://roswell.legistar.com/MeetingDetail.aspx?ID=101786&GUID=63828B21-EB83-4485-B4EA-10EE65CF48CD&Search* (showing that minutes of April 12, 2010 hearing were adopted on May 10, 2010).

statute to carefully evaluate their options and whether to challenge a permit denial.

Even apart from this 30-day problem, Congress has directed courts themselves to resolve challenges to permit denials expeditiously. As a result, courts must be provided with clear statements of the reasons for the local governments' actions. If Section 332(c)(7)(B) lawsuits had to begin with an opening phase of litigation simply to determine the reasons for the local governments' actions, courts would be stymied in any attempts to expeditiously resolve the disputes.

2. Requiring local governments to provide reasons for their permit denials in documents apart from the administrative record is also critical to allow another part of Section 332(c)(7)(B)'s system of judicial review to function properly. As numerous federal courts of appeals – including the Eleventh Circuit – have recognized, substantial-evidence review under Section 332(c)(7)(B)(iii) is limited to the specific reasons identified by the local government. "A board may not provide the applicant with one reason for a denial and then, in court, seek to uphold its decision on different grounds." *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21 (1st Cir. 2002); *see also Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1220 n.9 (11th Cir. 2002) (a local government "may not rely on rationalizations constructed after the fact to support the denial of Appellee's application"); *Laurence Wolf Capital Mgmt. Trust v. City of Ferndale*, 61 F. App'x 204, 212 (6th Cir. 2003) ("[A]llowing retroactive cure of a deficiency thwarts Congress's intent.").

This rule

> follows not only from the requirement that the decision provide an adequate explanation to support judicial review, but also from the background understanding of the model of judicial review of administrative actions against which the Act was enacted. That model customarily prohibits a court from affirming an agency on grounds other than those the agency gave in its decision.

National Tower, 297 F.3d at 21 (internal citation omitted); *see also FEC v. Akins,* 524 U.S. 11, 25 (1998) (background rule); *Motor Vehicle Mfrs. Ass'n ,* 463 U.S. at 50 (same).

The only way to implement this rule against post hoc rationalizations is to require local zoning authorities to clearly articulate the reasons for their denials in the first place. Courts can then conduct their customary "substantial evidence" inquiry against those reasons – and only those reasons.

C. Purpose

"In determining the meaning of the statute, [courts should] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). That analysis further confirms the inadequacy of the City's bare-bones denial letter in this case.

1. The object and policy of the 1996 Act is "to promote competition" and to "encourage the rapid deployment of new telecommunications technologies" "in order to secure lower prices and higher quality services for American telecommunications

consumers." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996); *accord City of Rancho Palos Verdes*, 544 U.S. at 115 (2005); *see also* H.R. Rep. No. 104-458, at 113 (Conf. Rep.), 1996 U.S.C.C.A.N. at 124 (purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition"). Section 332(c)(7)(B) is designed to achieve that objective by preventing local governments from imposing undue "impediments [to] the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes*, 544 U.S. at 115.

Issuing a denial of a permit application with no reasoning whatsoever – and thereby making judicial review more arduous, if not downright impossible – is one such impediment. The longer it takes and the more procedurally burdensome it is for wireless carriers to process their applications for permits, the more costly and difficult it will be for such companies to meet consumer demand and compete effectively in the marketplace.

T-Mobile's predicament in this case vividly illustrates the point. T-Mobile is a competitive carrier, challenging larger, more established carriers in an effort to expand consumer choice and to lower prices. To take but one example of that strategy in practice, T-Mobile has recently invested in so-called "low band spectrum" – something that should enable T-Mobile to substantially improve its network and reach many currently underserved areas. The Federal Government has confirmed the desirability of

T-Mobile's low-band spectrum effort, explaining that, if successful, it could indeed "improve the competitive dynamic in the wireless market and benefit consumers." *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Letter from William J. Baer, Antitrust Division of the Department of Justice to Marlene H. Dortch, FCC, May 14, 2014, at 1.

But without necessary physical infrastructure, such as antennas and towers like the one at issue in this case, this effort will all be for naught. The only way for T-Mobile to deploy this infrastructure is to seek and obtain thousands of permits – one by one – from local zoning authorities. It thus is critical that if and when local authorities deny such applications, they specify their reasons for doing so. Otherwise, courts would be unable to expeditiously conduct substantial-evidence review, so as to allow competitive carriers to promptly smoke out unjustified denials and to allow legitimate deployment projects to go forward.[5]

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[5] In the fall of 2013, the FCC adopted a Notice of Proposed Rulemaking in which it seeks to "explore opportunities to promote the deployment of infrastructure that is necessary to provide the public with advanced wireless broadband services, consistent with governing law and the public interest." *2013 Wireless Broadband NPRM* , 28 FCC Rcd. 14238, ¶ 1. In the *2013 Wireless Broadband NPRM*, the Commission recognized that "[t]he ability of wireless providers to meet" the rapidly growing demand for wireless broadband services "will depend not only on access to spectrum, but also on the extent to which they can deploy new or improved wireless facilities or cell sites." *Id.* ¶ 2.

2. The Eleventh Circuit turned a blind eye to these concerns, choosing instead to favor what it perceived as the 1996 Act's "intent to preserve local authority over the location and construction of cell towers and other wireless facilities." *City of Milton*, 728 F.3d at 1283. Crediting this alleged goal of the 1996 Act, however, turns Section 332(c)(7)(B) on its head.

Section 332(c)(7)(B) is entitled "Limitations." As that title suggests, the entire purpose of the provision – including the provision at issue here – is to "*impose[] specific limitations* on the traditional authority of [S]tate and local governments to regulate the location, construction, and modification of [personal] wireless communications facilities." *Rancho Palos Verdes*, 544 U.S. at 115 (emphasis added). It would flout congressional intent to construe Section 332(c)(7)(B) in a crabbed manner so as to preserve local zoning authority.

Indeed, this Court itself has already rejected an argument extremely similar to the one the Eleventh Circuit credited here. In *City of Arlington*, the local government disputed the reasonableness of the FCC's order establishing presumptive timetables for processing applications for wireless facilities on the ground that the order supposedly impacted "matters of traditional state and local concern." 133 S. Ct. at 1873 (internal quotation marks and citation omitted). This Court retorted that "th[e] case ha[d] nothing to do with federalism" because "Section 332(c)(7)(B)(ii) explicitly supplants state authority." *City of Arlington*, 133 S. Ct. at 1873. This Court should similarly dismiss the Eleventh Circuit's "faux-federalism argument," *id.*, here.

D. Legislative History

Lest any doubts remain concerning the proper construction of Section 332(c)(7)(B)(iii), the Eleventh Circuit's holding also contravenes the 1996 Act's legislative history. The House's Conference Report on the legislation explains that "[t]he phrase 'substantial evidence contained in a written record'" in Section 332(c)(7)(B)(iii) "is the traditional standard used for judicial review of agency actions." H.R. Rep. No. 104-458 (Conf. Rep.) at 208, *reprinted in* 1996 U.S.C.C.A.N. at 222-23. Hence, far from envisioning a departure from ordinary administrative review principles, the drafters of Section 332(c)(7)(B)(iii) intended courts – at least to the extent not directed otherwise – to review local zoning authorities' decisions under the 1996 Act according to "traditional" rules. One such rule is the requirement that agencies specify the reasons for their decisions in writings separate from the administrative record. *See supra* at § I.A.

II. Allowing Denial Letters To Omit Any Specification Of Reasons Would Unduly Burden The Judiciary.

The Eleventh Circuit's holding that local governments are free to deny a permit for a personal wireless facility without issuing a separate written decision articulating the reasons for the denial would impose serious, unwarranted burdens on the judiciary. This case, in fact, perfectly illustrates the point.

1. This Court long ago observed that an agency's failure to identify reasons for its action "leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order."

Beaumont, Sour Lake & W. Ry. Co. v. United States, 282 U.S. 74, 86 (1930). "[S]tatements by the [agency] showing the grounds upon which its determinations rest are quite as necessary" to judicial review "as are opinions of lower courts setting forth the reasons on which they base their decisions." *Id.*

So too here. The Eleventh Circuit instructed that "[a]ll of the written documents should be considered collectively in deciding if the decision, whatever it must include, is in writing." Pet. App. 13a. But an administrative record in a case such as this may contain numerous sorts of documents: a transcript of the hearing at which the carrier's application was considered; minutes of the meeting; exhibits and studies introduced for and against the application; written recommendations prepared beforehand from subcommittees; letters and other submissions from community residents; and sometimes even news articles related to the application. What is more, several of these sorts of documents contain statements from numerous kinds of sources – statements from everyone from councilpersons themselves to paid experts to concerned local residents.

If courts truly had to wade through all of this material simply to make the threshold determination of what were the local authority's reasons – against which to conduct substantial-evidence review – it would become extremely difficult for courts to do their jobs. The judiciary would be forced into the role of a super-zoning board – required "to spell out, to argue, to choose between conflicting inferences" in administrative records, *Chicago, Milwaukee, St. Paul & P. R.R. Co.*, 294 U.S. at 510-11, trying to deduce why local governments denied permits. This is not

something courts are accustomed to doing or are well suited to perform. *See id.*[6]

For example, what if, as is sometimes the case, the minutes of a hearing that a local government adopts say one thing and the transcript turns out to say another? What if only local residents speak at a hearing and then the councilpersons just vote; should the residents' views be imputed to the councilpersons? What if an expert report appears in the record but no-one ever comments on it; does the expert's views count as the local government's? None of these quandaries admits to easy answers, and yet, under the Eleventh Circuit's approach, they would be sure to arise with regularity. Far better to require local governments themselves to identify their reasons for denying the permit in a simple document that short-circuits all of these problems.

2. This case exemplifies many of the difficulties that the Eleventh Circuit's rule would create. Witnesses spoke at the hearing and expressed a variety of divergent concerns. *See* J.A. 110-77. Later, five City Council members voted against T-Mobile's application. Yet to the extent they offered any reasons at all for opposing T-Mobile's application, they also expressed wildly disparate concerns:

- The first member asked some technical questions about T-Mobile's proposal but

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[6] Nor is it something that even local governments would likely embrace. When federal courts search through the record in order to surmise why local governments denied permit applications, they risk attributing to governments reasons that may not reflect the local government's intentions, desires, or policies.

"gave no reasons for opposing T-Mobile's application." Pet. App. 28a; *see* J.A. 121-22.

- The second member asked questions "about the height of the proposed tower" and about the possibility of using an alternative technology to achieve T-Mobile's objective. Pet. App. 28a-29a; J.A. 122. In later comments, he expressed concern about "the tower's '[in]compatability with the natural setting.'" Pet. App. 29a; J.A. 175-76.
- The third member asked T-Mobile representatives how it would provide continuous 911 service without a backup generator on site. Pet. App. 29a; J.A. 171-72. But when speaking later, she suggested that the tower was not "compatible with this area." Pet. App. 29a; J.A. 176.
- The fourth member did not ask any questions. In his comments before the vote, he asserted that "other carriers apparently have sufficient coverage in this area" and added that "[i]t's not our mandate to level the field" for T-Mobile. Pet. App. 29a; J.A. 173-74. This Council member also expressed his belief that "cell towers should *never* be allowed in residential areas." Pet. App. 29a (emphasis added); *see also* J.A. 174.
- The fifth member stated that she was opposed to T-Mobile's application because of "its aesthetic incompatibility with the neighborhood." Pet. App. 29a; *see also*

> J.A. 177. She also mused that "the adverse effects to the enjoyment of those neighbors and potential loss of resale value among other potential parameters are difficult really to definitively assess." Pet. App. 30a n.10; J.A. 177.

Following the fifth council member's prefatory remarks, she moved to deny the permit. Pet. App. 8a. Without any further discussion, her motion passed. J.A. 340.

About one month later, the City approved minutes of this hearing. These minutes "summarize the testimony of experts and concerned citizens, along with comments and questions from councilmembers." Pet. App. 15a; *see also* J.A. 321-41 (complete minutes). They also recount the concerns the final councilmember expressed before moving to deny T-Mobile's application. J.A. 339-40. Yet nothing in local law imputes concerns expressed before a motion to other voting members of the City Council. Nor does anything in the minutes specify any particular reasons for why the Council as a whole denied T-Mobile's application.

Finally, the letter the City sent T-Mobile to advise that it had denied T-Mobile's application does not point to anything in the administrative record where the reasons for the City's action might be found. Instead, the letter merely advised that the application had been denied at the hearing and that "[t]he minutes from the aforementioned hearing may be obtained from the city clerk." Pet. App. 15a.

After thoroughly analyzing this record, the district court found it "impossible . . . to discern" which of the various concerns expressed at the hearing or recounted in the minutes "motivated the

Council as a whole or commanded the support of a majority of the Council members." Pet. App. 30a. This impossibility posed a serious problem, because some of the reasons some council members gave at the hearing would have violated the 1996 Act. For instance, a denial based on a "blanket aesthetics objection – independent of any specific evidence relating to the cell tower's impact on the specific neighborhood and property values" would not be able to stand. Pet. App. 32a (citing *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 761 (11th Cir. 2005)). The same would be true with respect to a denial based on other carriers' coverage. *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd. 13994, ¶ 56 (2009) (citing cases).

Worse yet, some of the other potential reasons advanced by certain council members may have lacked substantial supporting evidence. *See* Pet. App. 31a. Yet "[a]bsent some explanation of the rationale for the City Council's denial of T-Mobile's application," the district court had no idea "what evidence [the City Council] found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id.* 32a.

It is equally telling that the Eleventh Circuit itself seemingly could not identify the City's reasons for the denial of T-Mobile's permit. The Eleventh Circuit spent four paragraphs describing the various components of the administrative record. Pet. App. 15a-16a. But it never told the district court which of the numerous concerns expressed in these documents

should count for purposes of substantial-evidence review. It is, therefore, anyone's guess how the Eleventh Circuit expected this case to proceed on remand. But whatever the Eleventh Circuit might have had in mind, there can be little doubt it would contravene Section 332(c)(7)(B)'s mandate of streamlined and expeditious judicial review – not to mention set the stage for frustration of that mandate in a more widespread way with respect to other permit applications for the placement, construction, and modification of personal wireless service facilities.

This Court should bring the Eleventh Circuit in line with the majority of other courts of appeals and require decisions denying permits to provide reasons for the denials. Only then will Section 332(c)(7)(B) serve its purpose of enabling efficient and expedited judicial review. And only then can the overall goal of the Act – facilitating the effective deployment of wireless infrastructure and services – be fulfilled.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

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STATUTORY APPENDIX

STATUTORY APPENDIX

Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c), provides in relevant part:

(7) Preservation of local zoning authority

(A) General authority – Except 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 facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service

facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.