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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State and Local Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

Starting from the dubious premise that Congress enacted the 1996 Act in order to maintain the status quo ante – preserving full local authority over decisions related to siting wireless communications facilities – the City suggests that local governments have no obligation to provide written reasons when denying applications to construct such facilities, and that even if they do have such an obligation, it is sufficient if those reasons can be gleaned from the record.

This argument fails to come to grips with the meaning or purpose of the Telecommunications Act of 1996. As petitioner has explained, this Court has held, and the Solicitor General confirms, Section 332(c)(7)(B)(iii) of the Act is expressly designed to require local governments to adhere to certain non-negotiable requirements when considering applications to construct or modify wireless communications facilities. Chief among those actions is the requirement that local governments provide contemporaneous reasons for denying any such application. And there is nothing particularly onerous about this requirement. Local governments already must provide reasons for denying various sorts of applications, and – as the Solicitor General stresses – they can "easily" do so in this context too. U.S. Br. 34.

The Solicitor General, of course, does not completely agree with petitioner. He also contends that, while the City's failure to provide timely reasons for its denial mandates reversal here, such reasons need not invariably "be provided in the written denial itself." U.S. Br. 24, 34. This contention, however, cannot be squared with the

statutory directive that local governments issue written "decision[s]" – a directive in the context of Section 332(c)(7)(B)(iii) that connotes a document not only with the word "denied" but also with an explanation of *why* the application was denied. The Solicitor General's proposal also would generate an operational nightmare. Federal courts would regularly have to scour administrative records to surmise for themselves why local governments might have denied applications for wireless facilities, thwarting the efficiency and predictability that Section 332(c)(7)(B)(iii) is designed to ensure. Accordingly, this Court should not only reverse the Eleventh Circuit's holding, but it should make clear that local governments' written decisions denying wireless facility applications must explicitly state the reasons for denial.

I. Local Governments Must Provide Written Reasons For Denying Applications At The Same Time They Issue Such Denials.

The Solicitor General agrees with petitioner that the Eleventh Circuit's decision should be reversed because (1) local governments must provide written reasons for denying applications to place, construct, or modify personal wireless service facilities and (2) such reasons must be provided at least "at substantially the same time as the decision denying the request," U.S. Br. 26-27. The City, however, is noncommittal on the first of these propositions – allowing only that "[r]easons *may* be necessary," Resp. Br. 39 (emphasis added); *accord id.* at 23, 44 – and disputes the second. Both propositions are correct.

1. To the extent the City argues that a decision denying the type of application at issue here satisfies Section 332(c)(7)(B)(iii) *regardless of whether reasons for the denial can be gleaned from the administrative record*, the City is plainly incorrect. As petitioner and the Solicitor General have explained, Section 332(c)(7)(B)(iii)'s requirement that denials be supported by "substantial evidence" necessarily imposes an obligation on local governments to provide reasons for such denials. Petr. Br. 17-34; U.S. Br. 18-23.

The City never expressly disagrees with this contention, instead merely noting that the term "substantial evidence" denotes "a defined quantum of evidence." Resp. Br. 36. Certainly that is one thing the term does. But the term – in conjunction with the statute's "in writing" directive – also imposes the corollary requirement that a local government provide written reasons for its action. "[C]ourts cannot exercise their duty of review" for substantial evidence "unless they are advised of the considerations underlying the action under review." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see also* Petr. Br. 18-21; U.S. Br. 19-22.

2. Seemingly recognizing as much, the City retreats to arguing that the meeting minutes in this case – issued twenty-six days after it denied petitioner's application – satisfied the statutory requirement to provide written reasons. This is so, the City contends, because documents released after issuing a written denial and anytime "within the 150 days set by the FCC for determination of new siting

requests" can provide the statutorily required reasons. Resp. Br. 51-52.[1]

The City's argument ignores the text of Section 332(c)(7)(B) and would create serious administrative difficulties. As to text, the requirement that local governments provide reasons for denying applications to construct wireless facilities arises from subsection (iii)'s "in writing" requirement, not from FCC regulations implementing the "reasonable time" requirement for issuance of denials. *See* U.S. Br. 27. Accordingly, the reasons must be issued at the same time as "decisions" denying such applications, 47 U.S.C. § 332(c)(7)(B)(iii), not weeks or months later.

To be sure, wireless companies need to know reasons for denials in part "to give [them] information to determine whether judicial review is warranted." U.S. Br. 27. And companies have thirty days from "*final action* . . . by a State or local

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[1] The City also asserts (Resp. Br. 12) that T-Mobile did not seek to obtain the minutes before their adoption and that the minutes were available before they were approved. Neither of these assertions is true. On the same day the City sent the denial letter, Lannie Greene, T-Mobile's Site Acquisition Specialist, requested a copy of the minutes from the City's Clerk. The Clerk supplied him with a copy of the draft "brief minutes," which were essentially a copy of the April 12, 2010 agenda with a notation of the outcome and the vote. As the Solicitor General recognizes, the "brief minutes" were not replaced with the complete, detailed minutes until May 10, 2010. U.S. Br. 11-12; *see also* http://roswell.legistar.com/MeetingDetail.aspx?ID=98007&GUID=67841775-E4E0-4B78-BB60-CF4EE6701AD0&Options=info|&Search (brief minutes adopted Apr. 19, 2010).

government" to file such lawsuits. 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added). But the "final action" of an administrative agency occurs when the agency issues a document "mark[ing] the 'consummation' of the agency's decisionmaking process" and defining legal "'rights or obligations.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). Accordingly, a local government's "final action" in this context is obviously its written decision denying the application, J.A. 278, not the later publication of meeting minutes or any other part of the administrative record.[2]

Any other rule would decouple "decisions" from the statutory limitations period for challenging them, creating intolerable uncertainties for applicants. Upon receiving written denials, wireless companies would never know whether the thirty-day window for seeking judicial review would begin then, or perhaps at some later, unspecified date. Worse yet, Section 332(c)(7)(B)(iii) would no longer track state law. The Georgia Supreme Court has held that when a zoning board issues a written decision, that decision is its "final act" for purposes of triggering the limitations period for bringing state-law challenges to such

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[2] The City suggests that the Sixth Circuit held to the contrary in *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601 (6th Cir. 2004), asserting that the 30-day limitations period there "did not begin to run until the minutes were approved." Resp. Br. 51. But the City misrepresents the holding in that case. The 30-day limitations period commenced there "when the [local government's] *resolution* became final," and the resolution was the local government's *decision* – "a writing separate from [the minutes and the rest of] the hearing record." *Omnipoint*, 355 F.3d at 606 (emphasis added).

agency action. *Chambers v. City of Atlanta Bd. Zoning Adjustment*, 340 S.E.2d 922, 923 (Ga. 1986). Other state-court decisions are in accord. *See, e.g.*, *City of Bethany v. Hill*, 509 P.2d 1364, 1365 (Okla. 1973) ("The minutes of the Board patently are not the written ruling of the Board."). Diverging from such state-law rules with respect to seeking review under the Telecommunications Act would needlessly complicate procedures for seeking judicial review of administrative action.

II. Reasons Local Governments Provide For Denying Applications Must Appear In The "Decisions" Disposing Of The Applications.

While the Solicitor General suggests that local governments "would be well advised" to provide reasons for denials in their decisions, the Solicitor General contends that such reasons need not necessarily be provided in the decisions themselves. U.S. Br. 34. It is sufficient, the Solicitor General argues, if "the minutes or another document in the record" issued contemporaneously with the decision "clearly sets forth the reasons for the denial." *Id.* at 25. The City advocates an even more lenient approach, maintaining that local governments comply with Section 332(c)(7)(B)(iii)'s "in writing" requirement "as long as [reasons for the denial] can be gleaned from the record." Resp. Br. 39.

Neither of these proposals withstands scrutiny. The text, purpose, and functionality of Section 332(c)(7)(B)(iii) all dictate that the reasons for a denial must appear in the written denial itself.

A. The Text Of Section 332(c)(7)(B)(iii) Requires Reasons To Be Provided In Decisions Themselves.

When a local government denies an application to build or modify a wireless facility, Section 332(c)(7)(B)(iii) requires it to provide not only a written "record" but also a written "decision." As the City itself acknowledges, these are two "separate and distinct requirements." Resp. Br. 29. And as petitioner has explained – and the Chamber of Commerce has elaborated – the word "decision" indicates that the reasons for the denial must be included in the written denial itself. Petr. Br. 27; *see also* Chamber of Commerce Br. 7-18. Other provisions of the Communications Act reinforce the point: The Act typically uses words such as "notify" when it envisions nothing more than advising someone of an outcome, while other sections use the term "decision" when contemplating statements of reasons. Petr. Br. 24-25; Chamber of Commerce Br. 9-13.

The Solicitor General offers no answer to this textual argument. That silence is telling.

The City offers a response. But its response is equally telling. According to the City, the statute should be "amended by Congress." Resp. Br. 19. Suffice it to say this Court decides cases based on the language Congress actually enacted, not amendments that parties might like to have proposed or adopted in the future.

B. The Purpose Of Section 332(c)(7)(B)(iii) Demands That Reasons Be Stated In Decisions Themselves.

The City next expends considerable energy arguing that requiring it to provide reasons for denials in the denials themselves would run afoul of Section 332(c)(7)(B)'s purpose. "The stated intent" of the statute, the City contends, is "to preserve local zoning authority" and "protect this long standing domain of local authorities." Resp. Br. 32-33. Thus, the City continues, local governments must remain free to decide for themselves what type of process is manageable and appropriate for dealing with applications to construct or modify personal wireless facilities. And given that city councils and other types of land-use boards are often comprised of laypersons working part-time, the City maintains that it would be simply too burdensome for them to provide reasons in denial letters.

Each of these assertions is demonstrably incorrect.

1. The title of Section 332(c)(7)(B) is "Limitations." 47 U.S.C. § 332(c)(7)(B). In other words, the stated intent of the statute is precisely the opposite of what the City contends. The statute does not preserve local authority but rather "*impose[s] specific limitations* on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (emphasis added). Put another way, giving local governments, such as the City, carte blanche to engage in business-as-usual with respect to

applications to construct wireless facilities would flout the very purpose of Section 332(c)(7).

To be sure, the overall structure of the Telecommunications Act of 1996 incorporates certain elements of "cooperative federalism." *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring). The Act, for example, makes local governments the initial venue for evaluating wireless facilities applications and allows them – subject to the statute's constraints, *see* Petr. Br. 4 & n.1; *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 799 (6th Cir. 2012) – to craft their own substantive criteria for considering those applications. But at least when it comes to core process requirements, Section 332(c)(7)(B) "explicitly supplants state authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013). Accordingly, the specific statutory directive at issue here, just like other procedural directives in Section 332(c)(7)(B)(iii), "has nothing to do with federalism." *Id.*; *see also* PCIA Br. 24-25.

What is more, this statutory directive – which one commentator has characterized as effectuating "process preemption," Ashira P. Ostrow, *Process Preemption in Federal Siting Regimes*, 48 Harv. J. on Legis. 289 (2011) – is the backbone of the Act. Congress adopted Section 332(c)(7)(B) to "reduce 'the impediments imposed by local governments upon the installation of facilities for wireless communications.'" U.S. Br. 4-5 (quoting legislative history). By requiring local governments to provide written reasons when denying applications to construct wireless facilities and subjecting those reasons to expedited judicial review, Congress expected that courts would be able quickly to smoke out unlawful denials. Yet, as the Solicitor General

acknowledges, "it may sometimes be difficult to discern the rationale of a [local government] from a written record" alone. U.S. Br. 26. Hence the need for reasons to be spelled out in denials themselves.

Moreover, requiring local governments to provide reasons for their actions in decisions denying wireless facility applications "create[]s an incentive for zoning boards to exercise principled discretion" in the first place. Ostrow, Harv. J. on Legis. at 330. This incentive "promotes more deliberate and rational decisionmaking, leading to better substantive results." *Id.*; *see also* Petr. Br. 26 (collecting other authorities). The requirement is, therefore, essential to fulfill the purpose of the Act – namely, facilitating the effective and expeditious deployment of wireless facilities.

2. That leaves the City's complaint that providing reasons in denial letters is just too hard or would interfere with the supposedly "normal processes" of local government. Resp. Br. 47-49; *see also* Nat'l League of Cities Br. 13-18 (same). There is no exception in Section 332(c)(7)(B)(iii) that excuses compliance with the provision's directives on any such basis. At any rate, the City's plea misconstrues petitioner's legal argument and imagines a burden where none exists.

Petitioner does not advocate that local governments must – like federal agencies – issue "the equivalent of findings of fact and conclusions of law." Resp. Br. 47-48. Rather, all the statute requires – consistent with the First Circuit's leading opinion on the issue – is that denial documents "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."

Southwestern Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 60 (1st Cir. 2001).[3]

The City cannot plausibly claim that this requirement is burdensome. Once it is clear that a local government must provide reasons for a denial somewhere in writing, "those rationales [can] easily [be] incorporated into the denial letter itself." U.S. Br. 34.

Nor can the City seriously maintain that having to provide reasons in a denial itself interferes with the way local governments operate. Georgia law already routinely requires the City and other local government entities to issue decisions containing reasons when denying other kinds of land-use applications. For instance, when denying a permit for use of an abandoned cemetery, a municipality

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[3] The City's brief (at 33) contains a cryptic citation to *Todd*, perhaps meant to suggest that the City's position is somehow consistent with that case. Not so. To the extent the City intends to suggest that the First Circuit does not actually require reasons to be provided in the written decision itself, *Todd* and a subsequent First Circuit case hold squarely to the contrary. *See Todd*, 244 F.3d at 60 (decision must provide reasons "[e]ven where the record reflects unmistakably the Board's reasons for denying a permit"); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21 (1st Cir. 2002) (decision itself must provide "an adequate explanation to support judicial review"). To the extent the City intends to suggest that requiring a statement of reasons in the decision would serve little purpose because review is not limited to the reasons stated in the written decision, the First Circuit has rejected that argument too. *See, e.g., National Tower,* 297 F.3d at 21 ("A board may not provide the applicant with one reason for denial and then, in court, seek to uphold its decision on different grounds."); *see also* Petr. Br. 29-30 (other courts holding same).

"shall notify the applicant in writing of its decision . . . with written reasons therefor." Ga. Code § 36-72-7. Similar examples abound. *See, e.g., id.* § 36-36-11 (when objecting to request to zone or rezone property, county governing authority "shall . . . . document in writing the nature of the objection specifically identifying the basis for the objection"); *id.* § 36-36-34 (when denying an application to annex territory, local governments must "notify in writing the persons presenting the application, stating wherein the application is deficient"); *id.* § 44-10-28 ("In the event [a local government] rejects an application" regarding historical preservation, "it shall state its reasons for doing so and shall transmit a record of such action and the reasons therefor, in writing."). Even the City's own municipal code explicitly requires various City boards and committees to issue written decisions setting forth the reasons for the decision.[4]

Other states impose equivalent obligations on local governments, some of which apply directly to applications to construct cell towers and other wireless facilities. *See, e.g.*, Idaho Code § 67-6535(2) (denials "shall be in writing and accompanied by a

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[4] *See, e.g.*, Roswell Municipal Code § 5.5.8 (requiring the Construction Board of Adjustment and Appeals to issue a written decision and "[e]ach decision of the board shall also include the reasons for the decision"); § 4.5.15 (upon denial of an escort services license "the applicant shall be notified by mail of the denial and reasons thereof"); § 21.2.13 (if an application to the City to lease City-owned property for installation of a wireless tower is denied, the decision shall be in writing and "the determination shall include the reason for denial following review of [specified] factors"); § 21.2.23 (if renewal of a lease of City-owned property for a wireless tower is denied "the written determination shall include the reason for denial").

reasoned statement that . . . explains the rationale for the decision"); Nev. Rev. Stat. § 707.585(1) (denials "must set forth with specificity each ground on which the authority denied the approval of the application"); N.H. Rev. Stat. § 676:3 ("The local land use board shall issue a final written decision . . . provid[ing] the applicant with written reasons for the disapproval."); 53 Pa. Stat. Ann. § 10508 (denials "shall specify the defects found in the application and shall describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon.").

Local governments are easily able to discharge these duties in part because they consist of much more than the "lay" people the City references. Even if board or council members are not lawyers or full-time legislators, city and county governments typically employ professional staffs. Such personnel evaluate and make recommendations regarding all manner of applications and proposals, and then draft and issue decisions after full consideration by relevant councils or committees. The City, for example, has a city attorney and a Director of Planning and Zoning, the latter of whom issued the decision at issue here. *See* J.A. 278. No other staffing regime would make sense, given that local governments administer programs involving millions of dollars of investment annually.

The City's "woe is me" refrain, in short, has no basis in reality. The City already must provide reasons when denying various kinds of land-use applications. Local governments in other states must do so when denying precisely the kinds of applications at issue here. The City is fully capable of doing so as well.

C. Allowing Reasons For Denials To Be Stated Only In The Record Would Create Havoc In The Federal Courts.

Any doubts concerning the proper outcome here should be easily resolved on administrability grounds. Neither the City's contention that a local government's reasons for denying an application need only be capable of being "gleaned from the record" nor the Solicitor General's proposal that reasons may be "clearly set[] forth" in a document issued "at substantially the same time as the written decision" could be efficiently or evenhandedly applied in Section 332 litigation.

1. Section 332(c)(7)(B)(iii) is designed to facilitate streamlined and expeditious judicial review. Yet if a local government did not need to provide reasons for denials in denial documents themselves, courts presiding over Section 332 lawsuits would struggle to perform the threshold task of determining exactly why local governments denied applications to construct or modify wireless facilities. Courts would need to "read the record, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision" – and all this before "try[ing] to determine whether a decision thus arrived at should be sustained." *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles*, 522 P.2d 12, 19 n.15 (Cal. 1974).

Not to worry, the City says; courts would be "guided" in this task "by the legal briefs before them." Resp. Br. 25. But allowing local governments to advance reasons for denials in legal briefing would create a strong temptation for their lawyers to generate reasons after the fact, rather than merely

identifying the local governments' own reasons for denying applications. And even if lawyers did stick strictly to identifying local governments' own reasons, relying on such briefing would still unduly complicate matters. As much as those of us in the legal profession might like to think our filings invariably illuminate and clarify issues such as why a legislative entity took certain action, the City's brief vividly demonstrates that such is not always (perhaps even not usually) the case.

In particular, the City's brief never exactly says what it contends the reasons for the denial here were. The City argues at certain points that, "[t]hough not as articulate" as it might have been, "the motion of Councilmember Price" gave the City's reasons for the permit denial. Resp. Br. 22; *accord* Resp. Br. 46-47. Yet, Dr. Price's motion was only a single declarative sentence, with no reasoning or explanation. J.A. 177.

To be sure, Dr. Price preceded her motion with some personal comments criticizing petitioner's proposal. But as the Solicitor General notes, "there is no clear indication in the record that the other council members agreed with Dr. Price's reasoning." U.S. Br. 33. Consequently, "the views of Dr. Price cannot reliably be imputed to the entire group." *Id.* at 34.

The City's brief also points to a variety of other sources of potential reasons for the denial, but these references only create further confusion and uncertainty. First, the City suggests that "the reasons were contained in the minutes." Resp. Br. 21. Second, the City indicates that it denied petitioner's application because T-Mobile already "had towers and good coverage in the City, including the specific area at issue." Resp. Br. 9; *see also id.*

10-11. Third, the City asserts that T-Mobile's application conflicted with its supposed policy of promoting "newer technologies not requiring the larger traditional towers." *Id.* at 5-6. Finally, the City suggests that "even [its] city ordinance that sets forth the factors (reasons) to be considered by the Council" sets forth the basis for its denial. *Id.* at 46.

How the City would expect a district court to sort through this hodgepodge of contentions is anyone's guess. Most of the City's assertions lack any accompanying citations – and thus, not surprisingly, turn out to lack any foundation in reality.[5] Others, such as the reference to the minutes and its city code, lack any specificity, leaving one to wonder precisely which parts of the minutes or city code the City believes support its action. Contrary to the City's contention, in short, briefing on the issue of reasons does not simplify a court's task; it complicates it.

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[5] For example, the City's speculation about the alleged demise of wireless towers – for which it cites no factual support – is contradicted by specific factual data submitted by *amicus* PCIA—The Wireless Infrastructure Association. PCIA Br. at 12-14. Likewise, the City's speculation that new technologies, such as Distributed Antenna Systems, will eliminate wireless siting disputes ignores the numerous cases where local governments have unlawfully denied even applications for Distributed Antenna Systems. *See, e.g., Crown Castle NG East, Inc. v. Town of Greenburgh*, No. 12-CV-6157, 2013 WL 3357169 (S.D.N.Y. July 3, 2013), *aff'd*, 552 F. App'x 47 (2d Cir. 2014); *NextG Networks of Cal., Inc. v. City of Newport Beach*, No. SACV-10-1286, 2011 WL 717388 (C.D. Cal. Feb. 18, 2011).

Similarly, the City's assertion that T-Mobile has no gap in coverage in the area of the proposed facility conflicts with the City's own expert, who conceded T-Mobile's gap in service. Dkt. No. 106-12 at 1-2; 106-16 at 13-14.

And contrary to the City's suggestion (Br. 41-42), nothing about this case is atypical in terms of the opacity of the record. The City asserts that this is "the first time in a *circuit court* telecommunications case that the underlying district court said that it could not decipher the reasons for the local government's denial." Resp. Br. 42 (emphasis added). But this carefully crafted assertion ignores several *district court* decisions in which courts struggled – even after briefing on the issue – to determine the reasons for permit denials. *See, e.g.*, CTIA Br. 18-21 (discussing seven such cases). The City offers no formula capable of avoiding a steady run of such cases into the future.

2. The Solicitor General's attempt to devise a system for identifying reasons for denials in administrative records fares no better. Departing not only from the City's proposal but also the Eleventh Circuit's holding that "[a]ll of the written documents" in the administrative record (including "testimony of experts and concerned citizens, along with comments and questions from councilmembers") can provide reasons for denials, Pet. App. 13a, 15a, the Solicitor General offers a third approach. According to the Solicitor General, only statements in transcripts or minutes that "can fairly be imputed to the entire council" (or at least to individual council members) can count as reasons. U.S. Br. 31-33 & n.6. While perhaps intended to be stringent enough to allow for straightforward application, this proposal also crumbles in practice.

For starters, the Solicitor General's proposal depends on questionable forms of head-counting. Surveying the transcript, the Solicitor General deduces that "three of five voting members . . .

identified aesthetic incompatibility with the surrounding area as a reason to disapprove petitioner's application." *Id.* at 31. But the Solicitor General ignores that each councilperson expressed this concern *before* voting to deny the application. It is thus unclear why a court should be able to say with confidence that those expressions actually motivated the councilpersons' votes. Certainly someone could not read a transcript of one of this Court's oral arguments and deduce that this Court based a decision on a certain reason simply because five or more Justices mentioned it during the argument.

Worse yet, the Solicitor General suggests that even "[i]f each member of a council majority gives a different reason [during a hearing] for voting to deny an application," each of those reasons must be evaluated for substantial evidence. U.S. Br. 31-32 n.6. Such a requirement would hardly seem to serve the Solicitor General's prerequisite that "[t]he statement of reasons must . . . be clear." U.S. Br. 21; *accord id.* at 16, 18, 32. It would mean that a court would need to evaluate virtually every expression of concern over the course of sometimes-lengthy hearings – often with no real way to know whether the concern actually motivated anyone's vote. How would a court decide, for example, whether an argument advanced by a council member actually motivated the member's vote if countervailing evidence and argument was presented later in the hearing? Far better to require local governments, *after* voting to deny applications, to specify the reasons for doing so in the written denials themselves. Courts can then immediately ascertain those reasons and go straight to substantial-evidence review.

The Solicitor General's proposal also depends on impracticable forms of hair-splitting. The Solicitor General asserts that "testimony given by experts and concerned citizens" in the record "does not constitute a statement of reasons for the denial *unless the council members indicate that they are voting against the application based on those reasons*." U.S. Br. 32-33 (emphasis added). But what constitutes such an indication? Typical responses from councilpersons to expert or citizen testimony might be "that's a good point" or "thanks, we'll take that into consideration." The need for courts to categorize such statements according to whether they express a sufficient level of adoption to constitute a reason for the denial would generate uncertainty and much litigation.

The same is true with respect to the Solicitor General's assertion that one councilperson's statements cannot be attributed to others unless there is a "clear indication in the record that the other council members agreed with [the speaker's] reasoning." U.S. Br. 33. What types of indications of agreement are clear enough? The Solicitor General does not say, and courts would be sure to struggle with the issue.

3. There is still another area in which the City's and Solicitor General's approach would create problems: If a local government did not need to provide reasons in denials themselves, it would become necessary to decide when other written documents are sufficiently "contemporaneous" to satisfy Section 332(c)(7)(B)(iii). The Solicitor General proposes that the test should be whether such documents are issued "at substantially the same time" as the denials themselves. U.S. Br. 27. Once

again, questions abound. While the delay here went far beyond any acceptable limit, what exactly constitutes "substantially the same time"? The same day? The same week? Somewhere in between?

These concerns about administrability are far from theoretical. Petitioner and other wireless providers submit thousands of applications a year to construct or modify wireless facilities. They need to know what the rules are. And, as Congress recognized, they need to be able to expeditiously challenge permit denials when they believe such denials are unfounded. *See* CTIA Br. 12-16, 22-23; Chamber of Commerce Br. 19-24. The inability of the City's and Solicitor General's proposals to promise anything approaching such predictability and efficiency is not only a significant weakness, but it demonstrates the stark incompatibility of their proposals with the Act itself.[6]

CONCLUSION

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

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[6] On the last page of its brief, the City asserts that "[g]ranting an injunction requiring a local government to issue a permit" for a violation of Section 332(c)(7)(B)(iii) would "run afoul of the Tenth Amendment." Resp. Br. 56. The City has never previously raised any such Tenth Amendment argument, and the Eleventh Circuit did not address the issue of remedy. There is no basis, therefore, for this Court, to address this argument.

Respectfully submitted,

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