No. 13-975

In The
Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* TOWERCOM V, LLC IN SUPPORT OF PETITIONER

Mohammad O. Jazil
Counsel of Record
Gary K. Hunter, Jr.
D. Kent Safriet
HOPPING GREEN & SAMS, P.A.
119 S. Monroe St., Ste. 300
Tallahassee, Florida 32301
(850) 222-7500
MohammadJ@hgslaw.com
GaryH@hgslaw.com
KentS@hgslaw.com
Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF AMICUS CURIAE[1]

TowerCom V, LLC ("TowerCom") sites, constructs, and operates cell towers for telecommunications carriers in Florida, Georgia, and North Carolina. Like the Petitioner, TowerCom must obtain permits from local governments for its cell towers. And like the Petitioner, TowerCom has an interest in seeing the Eleventh Circuit's decision in *T-Mobile South, LLC v. City of Roswell, Ga.,* 731 F.3d 1213 (11th Cir. 2013) overturned. Allowing local governments to simply stamp "denied" on permit applications, provide boilerplate language, or cross-reference to often confusing meeting minutes would subvert the very purpose of the Telecommunications Act of 1996's "in writing" requirement. 47 U.S.C. § 332(c)(7)(B)(iii). This would ultimately frustrate Congress's intent to "accelerate rapidly private sector deployment of advance telecommunications and information technologies and service to all Americans" for the reasons noted in the Petitioner's initial brief. H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.) *reprinted* in 1996 U.S.C.C.A.N. 124; *see also Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 857 (1997) ("The Telecommunications Act of 1996 was an unusually important legislative enactment. As

---

[1] In accordance with Rule 37.2 of the Rules of the Supreme Court, counsel for the Petitioner and the Respondent received timely, written notice of TowerCom's intent to file this brief. On July 1, 2014, counsel for both parties provided a joint letter to the Court consenting to this and other amicus curiae briefs. No counsel for a party authored TowerCom's brief in whole or in part, and no person, other than TowerCom or its counsel, made any monetary contribution to the preparation or submission of this brief.

stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage the rapid deployment of new telecommunications technologies.") (internal citations omitted).

TowerCom writes separately to highlight its recent experience with the Telecommunications Act's "in writing" requirement. This experience is detailed in *TowerCom V, LLC v. City of College Park, Ga., No. 1:13-cv-530-SCJ,* 2013 U.S. Dist. Lexis 126534, 2013 WL 4714203 (N.D. Ga. Aug. 21, 2013) [hereinafter *City of College Park*], which was decided shortly before the Eleventh Circuit's decision now before this Court. *City of College Park* provides a specific example of the types of absurd results that the Eleventh Circuit's decision would allow to the detriment of TowerCom and similar companies, and to the detriment of Congress's goal of ensuring that *all* Americans have access to quality, wireless telecommunications services.

SUMMARY OF THE ARGUMENT

Cell towers are essential infrastructure – they make it possible for Americans to have critical wireless telecommunications services. Yet, as here, "an outpouring of public opposition" through "letters, e-mails, and petition signatures" often makes it difficult to site, construct, and operate cell towers. *T-Mobile South,* 731 F.3d at 1215. In such instances, local governments, typically acting through elected officials, have every incentive to pacify their constituents by denying applications for cell tower permits. The Telecommunications Act, however, places substantive and procedural

limitations on the ability of local governments to do just this. *See* 47 U.S.C. § 332(c)(7)(B).

The Telecommunications Act's limitations rely on the ability of reviewing courts to understand the basis for the local government's decision. Absent a separate, written explanation for local government decisions, courts would be hard-pressed to provide meaningful review – to determine whether local governments complied with the Act's limitations. Without that explanation, local governments would have every opportunity to mask the true rationale for their denials of cell tower permit applications. Many telecommunications providers might simply shy away from the cost and uncertainty of litigation to discover this true rationale, abandoning plans to fill gaps in services. Others, like TowerCom, might slog through the litigation – delaying access to even the most basic emergency 911 services – only to be confronted with after-the-fact rationales that rely on snippets from public comments or the minutes of collegial bodies acting on behalf of the local governments. Either way, access to wireless telecommunications services would suffer.

Congress surely did not intend the Telecommunications Act's "in writing" requirement to be read in a way that would thwart its goal of rapidly deploying telecommunications services. Yet that is what the Eleventh Circuit's decision now condones. Accordingly, this Court should reverse the Eleventh Circuit's decision.

ARGUMENT

I. THE TELECOMMUNICATIONS ACT OF 1996 REQUIRES LOCAL GOVERNMENTS TO PROVIDE A SEPARATE, WRITTEN EXPLANATION OF THEIR DECISIONS.

Government should not do that which it cannot explain. The Court recognized this common sense principle for administrative agencies long ago in *SEC v. Chenery Corp.,* 318 U.S. 80, 94 (1943), and reiterated it more recently for federal, state, and local governments in *Koontz v. St. Johns River Water Mgmt. Dist.,* 133 S. Ct. 2586 (2013). The Petitioner's initial brief makes clear that the Telecommunications Act's plain text and legislative history require much the same here. Indeed, TowerCom's experience shows that holding otherwise would lead to absurd results – it would force courts to engage in a game of pin the tail on the rationale. The Telecommunications Act cannot be read in a way that leads to absurd results, in a way that subverts Congress's clear and unequivocal intent by obfuscating judicial review and delaying the development of telecommunications technologies. *See, e.g., K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("it is a venerable principle that a law will not be interpreted to produce absurd results"); William Blackstone, *Commentaries on the Laws of England* § 2 at 60 (4th ed. 1770) ("where words bear . . . a very absurd significance, if literally understood, we must a little deviate from the received sense of them").

A. Meaningful judicial review requires a separate, written explanation.

The Telecommunications Act provides in relevant part that a local government's decision "to deny a request to place, construct, or modify [cell towers] shall be *in writing* and supported by *substantial evidence* contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii) (emphasis added). The Act's "in writing" and "substantial evidence" standards are inextricably intertwined. The Ninth Circuit has recognized that under the Telecommunications Act's "substantial evidence" standard "[i]f such an evidentiary review is to be undertaken at all," then "courts must at least be able to ascertain the basis of the zoning decision at issue." *MetroPCS, Inc. v. City & Cnty. of San Francisco,* 400 F.3d 715, 722 (9th Cir. 2005). Put another way, a "zoning decision must be sufficiently elaborated to permit this assessment" because "only then can [courts] accurately assess the basis of the zoning decision at issue." *Id.*; *see also Helcher v. Dearborn Cnty.,* 595 F.3d 710, 719 (7th Cir. 2010).[2] To find otherwise would allow a local government to thwart meaningful review under the "substantial evidence" standard by "provid[ing] the applicant with one reason for a denial and then, in court, seek[ing] to uphold its decision on different grounds." *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals,* 297 F.3d 14, 21 (1st Cir. 2002).

---

[2] There, the Seventh Circuit specifically stated that "the primary purpose of the 'in writing' requirement for the Telecommunications Act is to allow for meaningful judicial review of the decisions of local governments." *Helcher,* 595 F.3d at 719.

This Court has recognized much the same for administrative agencies – both before and since Congress's enactment in 1946 of the Administrative Procedure Act, 5 U.S.C. §§ 500, *et seq.* In *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 294 U.S. 499, 511 (1935), for example, the Court said, "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." In *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941), the Court required the National Labor Relations Board to provide a sufficient explanation for its order, explaining that the "administrative process will best be vindicated by clarity in its exercise." The Court similarly stated in *Chenery* that "the orderly functioning of the process of [substantial evidence] review requires that the grounds upon which the administrative agency acted be clearly disclosed." *Chenery,* 318 U.S. at 94. And since Congress's enactment of the Administrative Procedure Act, this Court has required federal agencies to "articulate a satisfactory explanation for its action" so that a court may review whether the action is "supported by substantial evidence on the record considered as a whole." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Life. Ins. Co.,* 463 U.S. 29, 43-44 (1983) (internal citations omitted). "*Post hoc* rationalizations for agency action" simply will not do. *Id.* at 50.

To be sure, this Court's administrative law precedents have great relevance under the Telecommunications Act because Congress intended the Telecommunications Act's "substantial evidence" standard to be "the traditional standard used for judicial review of agency action." H.R. Rep. No. 104-

458, at 208. Even the Eleventh Circuit recognized as much in *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1218 (11th Cir. 2002). Thus, if "[t]he requirement of written findings and conclusions, coupled with a statement of reasons, is *indispensably necessary* so far as administrative agencies" are concerned, then it follows that local governments should not be held to a lesser standard. Att'y Gen. Comm. on Admin. P., Final Rep., at 30 (Jan. 21, 1941) (emphasis added). As the Petitioner notes, holding otherwise would sanction gamesmanship from local governments, force telecommunications providers to file lawsuits in search of a rationale, and delay the rapid deployment of telecommunications services.

B. TowerCom's recent experience with the Act's "in writing" requirement.

TowerCom's experience in *City of College Park* proves that the Petitioner's concerns are very real. In *City of College Park*, TowerCom sued the city after it denied TowerCom's application for a cell tower. *City of College Park,* 2013 U.S. Dist. Lexis 126534 at *1. Specifically, the case "stem[med] from TowerCom's proposal to construct a 147-foot cellular monopole tower" near the Atlanta Airport. *Id.* at *2. Among other things, TowerCom chose the specific site to fill a gap in wireless service that prevented some "residential and commercial customers from reaching emergency 911 services." *Id.*

Months after TowerCom filed its application for the cell tower, the city planner issued a staff report recommending that the city deny TowerCom's

application. *Id.* at *4. According to the staff report, the proposed cell tower fell within a "special corridor" under the city's nonbinding comprehensive plan for future development. *Id.* at *4-5. The staff report concluded that the tower would be inconsistent with the "vision" for this special corridor even though it "would not detract from the aesthetic appeal and design character of *existing* uses in the area." *Id.* at *6 n.3 (emphasis in original).

Again, several months later, the mayor and city council held a public meeting on TowerCom's application. *Id.* at *8. At that meeting, TowerCom pled its case, provided additional supplements to counter the staff recommendation, and otherwise made its representatives available for questioning. *Id.* There were few questions from the mayor or council members and only a single public commenter who opposed the proposal because he thought the tower "would only serve commuters using the nearby interstate." *Id.* Acting as a collegial body, the mayor and council members then denied TowerCom's application without offering any reason for their decision. *Id.*

Ten days later, TowerCom asked the city for a written decision. *Id.* The city did not provide one. *Id.* A week later, TowerCom again asked for a written decision. *Id.* This time, the city offered two boilerplate sentences, noting only that a hearing was held on TowerCom's application and that the application was denied. *Id.* at *9. TowerCom then filed suit in federal district court, arguing among other things that the city failed to abide by the Telecommunications Act's requirement that its

decision "to deny a request to place, construct, or modify [cell towers] shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

Believing the city's staff report provided justification for the city's decision, TowerCom focused its attack on the staff report and established two things. First, TowerCom established that the comprehensive plan referenced in the staff report showed that the proposed cell tower site did not actually fall within the special corridor whose future aesthetic character served as the basis for recommending denial of TowerCom's application. *City of College Park,* 2013 U.S. Dist. Lexis 126534 at *1. So, concerns about the corridor's future plans were misplaced. *Id.* Second, even if the site did fall within the special corridor, the comprehensive plan specifically contemplated the area would benefit from improved telecommunications services to help with the area's excessive 911-call volume and urban blight. *Id.* at *7. Stated differently, TowerCom showed that the cell tower would be consistent with the comprehensive plan's vision for the nearby corridor. *Id.*

In its responsive filings, the city completely abandoned the rationale provided in its staff report. *Id.* at *19 n.9. Instead, for the very first time, the city seized on snippets of TowerCom's presentation to the mayor and city council and argued a new and separate ground for denying TowerCom's application: the proposed cell tower's height. *Id.* at *22-24. Fortunately for TowerCom, the record provided little, if any, support for the city's new

rationale for denying TowerCom's application. *Id.* After considering the case on an expedited basis as required by the Telecommunications Act, the district court thus reversed the city's decision almost a year after the city issued its initial staff report. *Id.* at *37-38. The court did so on three separate grounds, one of which was the city's failure to satisfy the "in writing" requirement, and another was the city's failure to support its decision through "substantial evidence" in the record. *Id.*

Despite TowerCom's success on the merits in *City of College Park*, the case stands as a cautionary tale. For nearly a year, TowerCom had to delay the permitting (which is separate and apart from the construction) of a cell tower necessary to fill a gap in emergency 911-coverage. TowerCom had to incur the expense and uncertainty of litigation to understand the rationale for the city's decision; it had to sue the city to pin down *possible* rationales that ranged from a desire to prohibit all cell towers near residential areas to waiting for a new city ordinance that charged annual fees "pegged to the amount of data that passes through a particular cellular tower." *Id.* at *7. And based on the standard subsequently announced by the Eleventh Circuit, the case might yet have turned out differently had the city (or public commentators) thrown enough dots into the record for the city to connect as the *post hoc* rationale for its decision. Regardless, Congress's intent to "accelerate rapidly private sector deployment of advance telecommunications and information technologies and service to all Americans" was subverted, H.R. Rep. No. 104-458, at 113, through what the First

Circuit has called "purposeful obscurity." *Nat'l Tower,* 297 F.3d at 23.

CONCLUSION

Obtaining cell tower permits from local governments is difficult. Submittals ranging from engineering drawings to landscape plans, meetings with staff and counsel, responses to requests for additional information, and a seemingly endless stream of written explanations from the applicant to the local government are the norm. It seems only appropriate for local governments to provide a separate, written explanation of their decisions. Indeed, to ensure consistency with Justice Holmes's admonition that "men must turn square corners when they deal with the government," it is only fair that the government should be held "to a like standard of rectangular rectitude when dealing with its citizens." John M. Maguire & Philip Ziment, *Hobson's Choice and Similar Practices in Federal Taxation,* 48 Harv. L. Rev. 1281, 1301 (1935). The Eleventh Circuit's decision should thus be reversed and the Telecommunications Act's "in writing" requirement given the effect that Congress intended.

Respectfully submitted.

Mohammad O. Jazil
Counsel of Record
Gary K. Hunter, Jr.
D. Kent Safriet
HOPPING GREEN & SAMS, P.A.
119 S. Monroe St., Ste 300
Tallahassee, FL 32301
(850) 222-7500
MohammadJ@hgslaw.com
GaryH@hgslaw.com
KentS@hgslaw.com
Counsel for Amicus Curiae

Date: July 10, 2014