No. 13-975

IN THE

Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business. It is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

The Chamber and NFIB have a direct interest in this case. Economic growth both in the wireless industry and the national economy depend on rapid deployment of wireless infrastructure throughout the country. One study estimates that the industry's investment in expanding wireless infrastructure produces up to a ten-fold return for the domestic economy. The proper interpretation of the Telecommunications Act of 1996, which removed state and local barriers to deployment, is therefore central to the nation's continued economic growth. Accordingly, the Chamber and NFIB respectfully submit this brief and respectfully urge the Court to reverse the Eleventh Circuit's judgment.

SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 ("1996 Act") amended the Communications Act of 1934 ("Act") to accelerate deployment of wireless infrastructure facilities. To that end, the 1996 Act "impose[s] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 115 (2005). "State and local practices that unreasonably delay the siting of personal wireless service facilities … impede the promotion of advanced services and competition that Congress deemed critical[.]"[2] Under the statute, therefore, "[s]tate and local authorities …

2. *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,* 24 F.C.C.R. 13994, 14008 (2009) ("*Shot Clock Order*"), *aff'd*, *City of Arlington v. FCC,* 133 S. Ct. 1863 (2013).

remain free to make siting decisions. They … do so, however, subject to minimum federal standards—both substantive and procedural—as well as federal judicial review." *Id.* at 128 (Breyer, J., concurring).

One of the 1996 Act's key procedural protections for wireless carriers is the requirement that "[a]ny decision by a State or local government … 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). Requiring a zoning authority to produce a "'written record' *and give reasons* for denials 'in writing,'" *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring) (emphasis added), enables the court to fulfill its duty to "hear and decide" a carrier's challenge "on an expedited basis," 47 U.S.C. § 332(c)(7)(B)(v).

Requiring zoning boards to "give reasons for denials" adheres to the ordinary meaning of "decision." Although "decision" has a range of meanings, it is fairly interpreted in this context to require more than a bare disposition. Elsewhere in the Act, Congress used the term "decision" to signal that the decisionmaker must set forth the rationale for the disposition—not just provide notification. When Congress requires only a disposition, in contrast, the Act employs the term "order" or "notify." There is no reason to interpret "decision" differently in Section 332(c)(7)(B)(iii). Congress's decision to borrow the "substantial evidence" standard from federal administrative law confirms this understanding. That standard has always been understood as requiring the agency to provide reasons for its action to facilitate judicial review.

The Fourth Circuit and Eleventh Circuit, however, have rendered this important requirement meaningless by misinterpreting the statute. The Fourth Circuit has ruled that a zoning authority need not set forth reasons for its denial and can meet the "decision … in writing" obligation merely by stamping the application "denied." *See AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998). But the Fourth Circuit confused "fair meaning" textualism with the long discredited practice of "strict constructionism." *Reading Law: The Interpretation of Legal Texts*, Antonin Scalia & Bryan A. Garner 356 (1st ed. 2012). The interpretative objective is to identify the fairest reading of the text—not the narrowest one. The fairest reading of this provision is one that requires the zoning board to concisely explain its rationale for denying the carrier's application, not just spill ink on paper and declare itself in compliance with federal law.

The Eleventh Circuit's approach is also misguided. That court assumed (but did not concede) that the zoning board must provide reasons for the denial, yet incorrectly concluded that the obligation is satisfied so long as those reasons can be found somewhere in the written record. *See T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274, 1277 (11th Cir. 2013). The Eleventh Circuit ignored a cardinal principle of statutory construction: by requiring a "decision … in writing *and* … a written record" Congress imposed independent duties on zoning authorities. The written record is not a substitute for the written decision. *See Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001). Contra the Eleventh Circuit, the law requires both.

Requiring judges to scour the written record in search of a rationale also is incompatible with Congress's goal of accelerating deployment and streamlining judicial review. Litigation over rejected siting applications already takes years notwithstanding the 1996 Act's mandate for expedited review. An "opening phase of litigation," Brief for Petitioner 29 ("Pet. Br.")—over why the zoning board denied the application—so the court *then* can decide if that rationale is supported by substantial evidence, will make the process intractable or, worse still, lead carriers to abandon infrastructure initiatives in those regions where local resistance is most egregious.

Importantly, this needless legal wrangling would cause economic harm far beyond its detrimental impact on the parties to the litigation. "Wireless services are central to the economic, civic, and social lives of over 270 million Americans." *Shot Clock Order*, 24 F.C.C.R. at 13995. The wireless industry has invested $223 billion in the economy over the last decade and is responsible for creating nearly 4 million jobs. The industry therefore occupies a critical role in the nation's overall economic health. In fact, one recent study found that every $1 invested in wireless infrastructure creates an additional $7-$10 of Gross Domestic Product ("GDP"). In light of Congress's goal of encouraging infrastructure investment, there is no reason to delay and complicate the litigation by forcing the court to investigate the record in search of reasons the zoning board could provide with minimal effort.

In any event, such investigation is usually fruitless. Attempting to discern such reasons from the statements of individual lawmakers and other participants in the review process is perilous under perfect conditions. It would be

especially problematic here. As this case shows, there is almost never a way to confirm the reason for the denial based on the transcript and minutes. Individual board members, the applicant's representatives, city employees, and members of the public often make statements leading in conflicting directions. Some statements reflect reasons for denial impermissible under the 1996 Act. Others might reflect potentially legitimate rationales if supported by substantial evidence. There is simply no way of knowing why a majority of the zoning board voted to deny the application by examining the written record. At the end of the day, then, the judge will have no choice but to guess. Without a statement of reasons from the board to guide it, the reviewing court will form its own view of why the carrier's application was denied and whether those reasons pass muster by its own lights.

The Court should find that prospect unacceptable as it would, at best, approximate the *de novo* review that the "substantial evidence" standard was designed to preclude. Section 332(c)(7)(B)(iii)'s "judicial review scheme resembles that governing many federal agency decisions." *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring). The point of deferentially reviewing federal administrative decisions is to keep courts from engaging in policymaking under the guise of judicial review. But Congress also understood that any form of deferential review depends on the agency providing reasons for its action. A "decision … in writing" is the price for being shielded from intrusive judicial oversight. Yet the Eleventh Circuit would scrap that model and replace it with one that requires courts to exercise independent judgment and, in turn, paradoxically deprives zoning authorities of the autonomy Congress carved out for them. The Court should reverse the Eleventh Circuit's judgment.

ARGUMENT

I. The "Decision ... In Writing" Requirement Obligates The Zoning Authority To Set Forth The Reasons For Its Denial In A Document Separate From The Written Record.

The "decision … in writing" that Section 332(c)(7)(B)(iii) requires is a document setting forth the zoning authority's rationale for denying the carrier's application. *See* Pet. Br. 18. Although "decision" has a range of ordinary meanings, it is fairly understood in this context as something more than the bare disposition that the 1996 Act refers to elsewhere as an "order" or "notification." Congress's use of the "substantial evidence" standard to govern judicial review reinforces this interpretation. A court cannot apply that deferential standard unless it knows the precise rationale for which the record evidence is intended to provide substantial support.

The Fourth Circuit's holding that merely stamping "denied" on the application constitutes a "decision … in writing" is emblematic of the type of hyperliteralism this Court has soundly rejected. The interpretative enterprise is designed to locate the fairest reading of the specific text—not the strictest. The Eleventh Circuit's holding that the "written record" can also be the "decision … in writing" is likewise unfaithful to the statute's text. Congress required that the zoning board produce a written "decision" *and* a "written record"—not a written "decision" *or* a "written record." The only way for the judiciary to respect that choice is by requiring the zoning authority to set forth its reasons for denial in a document separate and apart from the written record.

A. The statutory term "decision" is fairly interpreted in this context to require the state or local government to set forth the rationale for its denial of the wireless facility application.

"We begin, as always, with the text of the statute." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (citation omitted). Section 332(c)(7)(B)(iii) requires the zoning authority to produce both a "decision … in writing … *and* … a … written record" when it denies the wireless carrier's application. *Id.* (emphasis added). Congress's interjection of the conjunctive "and" between "decision" and "record" means that the former "stands independent" of the latter. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989); *see also Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1078 (2011) ("[T]he job of a coordinating junction like 'and'" is to "link[] independent ideas."); Scalia & Garner, *supra*, at 116 ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."). The statute also plainly requires that both the "decision" and "record" take written form, and that the written record contain "substantial evidence" justifying the zoning board's "decision" to deny the application.

The only disputable issue, then, is the meaning of "decision." Because the 1996 Act does not define that term, its ordinary meaning controls. *See Clark v. Rameker*, 134 S. Ct. 2242, 2245 (2014); *Taniguchi v. Kan Pac. Saipan, Ltd.* 132 S. Ct. 1997, 2002 (2012). The task of identifying the term's ordinary meaning is complicated, however, by the fact that "decision" is a "popular rather than technical or legal word" with "no fixed, legal meaning." Black's Law

Dictionary (6th ed. 1990). Sometimes a "decision" is merely the "judgment" a court issues; in other circumstances a "decision" is the "opinion of the court" or "the reasons given for the judgment." *Id.*; *see also* Black's Law Dictionary (7th ed. 1999) (cross-referencing the definition of "opinion"). When, as here, a term can carry a range of meanings, the interpretative process is guided by the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000); *see also Graham Cnty Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005) ("Statutory language has meaning only in context.").

In this context, the term "decision" requires the zoning authority to set forth the reasons for denying the wireless carrier's application. *See* Pet. Br. 24-25. "[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi*, 132 S. Ct. at 2004-05 (citation and quotations omitted); *see also Powerex Corp. v. Reliant Energy Servs., Inc.,* 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning") (citation omitted); *see, e.g.*, *Dep't of Revenue of Oregon v. ACF Indus., Inc.* 510 U.S. 332, 342 (1994). The way Congress used the term elsewhere in the Act indicates that Section 332(c)(7)(B)(iii) uses "decision" to mean something more than a notification or mere disposition.

Section 409, for example, establishes the procedures for Federal Communications Commission ("FCC" or

"Commission") adjudications. 47 U.S.C. § 409. After a hearing, "the person or persons conducting" the adjudication "shall prepare and file an initial, tentative, or recommended decision." *Id.* § 409(a). The parties then "file exceptions [to the decision] and memoranda in support thereof" that "shall be passed upon by the Commission." *Id.* § 409(b). In that context, "decision" must mean something more than just an unexplained disposition. Without knowing the reasons for the hearing officer's adjudication, it would be impossible for parties to contest its legal or factual basis or for the Commission to discharge its statutory duty to "pass[] upon" the decision's merit. That is why Section 409 "decisions" do not resemble bare dispositions. *See, e.g.*, *In the Matter of Florida Cable Telecommunications Assoc., Inc.*, 26 F.C.C.R. 6452 (2011).

Section 1442 also employs the term, establishing the standard of review for an FCC "decision" disapproving a State's plan for a public safety broadband network. 47 U.S.C. § 1442(h)(2). Among other reasons, the reviewing court must overturn the "decision of the Commission" if it failed "to hear evidence pertinent and material to the decision." *Id.* § 1442(h)(2)(C). There too, "decision" must mean more than a disposition that "disapproves a plan under this subparagraph" without any explanation as to why. *Id.* § 1442(e)(3)(c)(iv). Because courts necessarily assess the materiality of "evidence in the context of the legal issues involved," *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.3d 1017, 1021 (8th Cir. 1997), a court reviewing a "decision" under Section 1442 cannot know what evidence was "pertinent and material" unless it also knows the Commission's reasons for disapproving the State's plan.

In contrast, when Congress wants to indicate that it is referring only to the bare disposition, it knows how to do so. Section 402, for example, provides that "[a]ppeals may be taken from decisions *and* orders" of the FCC. 47 U.S.C. § 402(b) (emphasis added); *id.* § 402(h) ("In the event that the court shall render a *decision* and enter an *order* reversing the order of the Commission, it shall remand the case.") (emphasis added). In other places, the Act uses the term "notify" to signal that only a bare disposition is required. *See* Pet. Br. 24-25. This dichotomy—between "orders" and "notices" on the one hand, and "decisions" on the other—pervades the Act. *See e.g.* 47 U.S.C. § 405(a) ("After an order, decision, report, or action has been made …."); *id.* § 413 ("[A]ll notices and process and all orders, decisions, and requirements of the Commission.").

The distinction the Act draws in those other sections must inform the interpretation of Section 332(c)(7)(B)(iii). The Court "generally seek[s] to respect Congress' decision to use different terms to describe different categories of people or things." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). If a document, for instance, says "*land* in one place and *real estate* later, the second provision presumably includes improvements as well as raw land" even if you *could* interpret the terms interchangeably. Scalia & Garner, *supra*, at 170. The presumption must be that "the different term denotes a different idea." *Id.*

Here, the terms can have independent meaning by interpreting "decision" in Section 332(c)(7)(B)(iii) to mean a document setting forth the rationale. Doing so respects

Congress's decision, reflected in various other provisions of the Act, to use "order" or "notify" to presumptively signal that only a bare disposition is required. Though the Act does not define "order," the Administrative Procedure Act defines it as "the whole or a part of a final disposition." 5 U.S.C. § 551(6); *see also* Black's Law Dictionary (6th ed. 1990) (defining "order' as "[d]irection of a court or judge made or entered in writing … which determines some point or directs some step in the proceedings."). Respondent is thus quite wrong to contend that the Act always specifies through additional language when a "decision" means a document setting forth an "explanation of the bases or reasons for a denial." Brief in Opposition 26. In fact, Section 155 provides that in "passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications *without specifying any reasons thereof*." *Id.* (emphasis added). Section 155 alone defeats Respondent's argument that the Act *never* requires a decision to include a rationale absent specific language to that effect.

To be sure, at least one of the Act's provisions goes out of its way to make clear that the decision must provide the reasons for the disposition. *See* 47 U.S.C. § 546(c)(3) ("[T]he franchising authority shall issue a written decision …. Such decision shall state the reasons therefor."). But Section 546 just reflects that Congress sometimes employs the "lamentably common belt-and-suspenders approach," Scalia & Garner, *supra*, at 177, when "decision" already transmitted that intention. The fact that Congress did so, however, is not a basis for distorting the term's ordinary meaning throughout the rest of the Act, especially as the statute tends to use the term "order" or "notify" when referring to the bare disposition.

At bottom, "only the most compelling evidence could persuade" the Court "that Congress intended … nearly identical language of … two provisions to have different meanings." *CWA v. Beck*, 487 U.S. 735, 754 (1988); *see also Finnegan v. Leu*, 456 U.S. 431, 438 (1982) ("Certainly one would expect that if Congress had intended identical language to have substantially different meanings in different sections of the same enactment it would have manifested its intention in some concrete fashion."). There is no such compelling or concrete evidence here. Thus, the Court should interpret "decision" as used in Section 332(c) consistent with its use elsewhere in the Act, *viz.*, to mean a document setting forth the reasons for the disposition—not just the disposition itself.

Any doubt as to the ordinary meaning of "decision" is put to rest by its affiliation in Section 332(c)(7)(B)(iii) with that provision's "substantial evidence" standard. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (2013) ("Words that can have more than one meaning are given content … by their surroundings."). Congress's use of the "substantial evidence" standard as the yardstick for evaluating the legality of the zoning board's decision signaled incorporation of "the traditional standard used for judicial review of agency actions." H.R. Rep. No. 104-458, at 209 (1996) (Conf. Rep.); *see also Rancho Palos*, 544 U.S. at 129 (Breyer, J., concurring); Pet. Br. 17-18. That standard requires the court to ensure that the decision is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

But before the court could decide whether there is relevant evidence supporting that conclusion, it of course would need to know *why* the board denied the application. Pet. Br. 18-20. That is precisely why the statute "requires local zoning boards … [to] give reasons for denials 'in writing.'" *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring). In other words, "[t]he requirement that agency action be supported by substantial evidence presupposes that the agency must identify reasons for its actions," Pet. Br. 18, because the system of judicial review Congress established could not function without it.

B. The unduly narrow interpretation of the "decision … in writing" requirement the Fourth and Eleventh Circuits adopted is unsustainable.

In the name of textualism, the Fourth Circuit and Eleventh Circuit have adopted a blinkered version of Section 332(c)(7)(B)(iii) that does not square with the law's ordinary meaning. In the Fourth Circuit's view, merely stamping "'Denied' on the first page of [an] application … fulfills the 'in writing' requirement of § 332(c)(7)(B)(iii)." *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312 (4th Cir. 1999); *see also City Council of City of Virginia Beach*, 155 F.3d at 429 (same). But in its haste to "quickly dispose" of this question, *id.*, the court mistook "'strict constructionism'—a hyperliteral brand of textualism"—for proper statutory interpretation. Scalia & Garner, *supra*, at 355.

"Strict constructionism understood as a judicial straightjacket is a long-outmoded approach deriving from a mistrust of all enacted law." *Id.* That is because

"a sterile literalism … loses sight of the forest for the trees." *N.Y. Trust Co. v. Commissioner*, 68 F.2d 19, 20 (2d Cir. 1933) (L. Hand, J.); *see also Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946) ("Literalness may strangle meaning."). "Adhering to the *fair meaning* of the text," in contrast, "does not limit one to the hyperliteral meaning of each word in the text" because "[t]he full body of a text contains implications that can alter the literal meaning of individual words." Scalia & Garner, *supra*, at 356; *see also Ranchos Palos Verdes*, 544 U.S. at 127 (Breyer, J., concurring) ("[C]ontext, not just literal text, will often lead a court to Congress' intent in respect to a particular statute"). "The words" of any legal text, in sum, "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816).

The Fourth Circuit's strict construction of "decision … in writing" illustrates the hazard of an interpretation that ignores the full statutory context and structure. Under such an approach, the board could consummate its "decision" with an "X" on the wireless carrier's application, or even respond to the application in a different language. Either would literally convey the disposition "in writing." As the Eleventh Circuit rhetorically asked in defense of the Fourth Circuit's approach: "After all, everyone knows what 'in' means and everyone knows what 'writing' means. How much simpler and clearer could the statutory language be?" *City of Milton*, 728 F.3d at 1277. Both courts forgot, however, that statutory interpretation is not a contest in which the first one to dream up the narrowest formulation of the text is crowned champion textualist. The goal is to identify the *fairest* reading of the specific statutory text in light of its context and structure—not the *narrowest*.

The Fourth Circuit's crabbed interpretation of the "decision … in writing" requirement does not capture the fair meaning of the provision in light of the statute's context and structure. Had Congress envisioned a regime in which the zoning authority could simply issue an unexplained order rejecting the application, it could have just required "a written denial." Its deliberate use of the more elaborate phrase "a decision … to deny … in writing" naturally implies that the "decision" be something more than a bare disposition. Fairly read, the written decision that Section 332(c)(7)(B)(iii) requires must set forth the reasons for the denial to facilitate the expedited judicial review the statute promises.

The Eleventh Circuit's approach fares no better. After expressing sympathy for the Fourth Circuit's unduly narrow interpretation, it held that "*to the extent* that the decision must contain grounds or reasons or explanations," they need not be provided in a separate document; rather, it was enough that the reasons could be found in the hearing transcripts and minutes. *City of Milton*, 728 F.3d at 1285 (emphasis added); *see also* Pet. App. 13a ("All of the written documents should be considered collectively in deciding if the decision, *whatever it must include*, is in writing.") (emphasis added). Accordingly, the Eleventh Circuit has, at least for now, accepted that "there must be [written] reasons for the denial" because, "otherwise, there would be nothing for substantial evidence to support." *Milton*, 728 F.2d at 1283.

But the Eleventh Circuit's conclusion that those reasons nonetheless "can be gleaned from the denial itself *or* from the written record" does violence to the statutory text. *Id.* (emphasis added). As explained above, Section

332(c)(7)(B)(iii) uses the conjunctive "and" instead of the disjunctive "or." *See supra* at 8; *see also* Pet. Br. 27. Section 332(c)(7)(B)(iii) thus speaks of both a "decision in writing" *and* a "written record." The two are not the same, and, as a result, the "decision … in writing" cannot also be the "written record." *See Todd*, 244 F.3d at 59-60 ("The [1996 Act] distinguishes between a written denial and a written record, thus indicating that the record cannot be a substitute for a separate denial.").

The Eleventh Circuit's reminder "that we are a country of laws, not one ruled by the musings, whether pragmatic or otherwise, of the black-robed class" is well taken. *Milton*, 728 F.3d at 1285. But "to subtract" words from the law is no more appropriate than to "add" them; the judicial task is "neither to delete nor to distort." *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951). In admonishing that "the words of Congress" must be taken "defects and all," *Milton*, 728 F.3d at 1284, the court thus committed the very error it warned against. Congress's call for a "decision … in writing" *and* a "written record" must be respected. Yet the Eleventh Circuit would refashion the law to permit the written record to act as substitute for a separate written decision. Whether state and local boards should be required to offer the reasons for their decisions *and* produce a written record was a battle "fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 462 (2002).

It is certainly true, then, that the "actions of [zoning authorities] should be judged based on the rules of the

game that were written into the Act when it acted." *Milton*, 728 F.3d at 1285. But the Eleventh Circuit missed that the 1996 Act's "rules" are a deliberate tradeoff between state and local autonomy and acceleration of wireless infrastructure deployment. The zoning authority's denial of the carrier's application is due deference under the "substantial evidence" standard. But it must set forth the reasons for denying the application in a document separate from the written record to facilitate expedited judicial review. The Eleventh Circuit's myopic focus on "in writing," at the expense of the rest the provision, reduces the "decision … in writing" requirement to a hollow formality. It should be rejected.

II. A Meaningless "Decision … In Writing" Requirement Will Frustrate Judicial Review, Undermine Congress's Purposes, and Hamper Economic Growth.

Respondent's assertion that a court must search the written record to identify those reasons is not only legally unfounded, it is impracticable, unwise, and at odds with Congress's purposes. Forcing judges to dig through the written record to uncover the zoning authority's reasons for denying the application will turn an already long review process into an interminable one. The additional delay will be costly. Congress passed Section 332(c)(7) to accelerate infrastructure deployment that was being inhibited by abuses at the state and local level. Undermining that mission will cause substantial harm to the national economy.

The exercise also is pointless. It usually will be impossible to determine from the record the basis for the

zoning authority's decision. At the end of the day, courts will be left to guess at what motivated the board to deny the carrier's application. Judicial oversight designed to ensure the zoning authority's denial under state law was "supported by substantial evidence," as a result, will devolve into *de novo* review. But that type of independent review is not what Congress wanted when the siting denial is grounded in otherwise permissible state-law bases. It thrusts courts into precisely the kind of policymaking role that is beyond the judicial ken. The Court can avoid this problem by requiring the zoning board—not the court—to identify the reasons for the denial in a document separate from the record.

A. Forcing courts to scour the written record to discern the zoning authority's rationale will deter wireless deployment and harm the economy.

Congress has long understood that wireless carriers face significant hurdles in securing approval for tower locations. They must enter into private arrangements with landowners, comply with the rules for environmental review under the National Environmental Policy Act of 1969 and the National Historic Preservation Act of 1966, and, of course, obtain local zoning approval. *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 28 F.C.C.R. 14238, 14239 (2013) ("*Wireless Facilities Siting NPRM*"). Before the 1996 Act, zoning authorities had "created an inconsistent and, at times, conflicting patchwork of requirements which [] inhibit[ed] the deployment" of wireless networks. H.R. Rep. No. 104-204(I), at 94 (1995); *see also* Pet. Br. 2-3.

The 1996 Act was designed to curb these abuses. *See id.* 3, 30-31; *supra* at 2-3. But while Section 332(c) "requires state and local zoning authorities to take prompt action on siting applications for wireless facilities[,] … in practice, wireless providers often faced long delays." *City of Arlington,* 133 S. Ct. at 1867. In the face of continued local obstacles since the 1996 Act's passage, both Congress and the FCC have taken additional steps to accelerate this process. The Middle Class Tax Relief and Job Creation Act of 2012 requires that localities approve all modifications to existing wireless towers that do not change the physical dimensions of those towers. *See* 47 U.S.C. § 1455(a). The FCC established presumptive timeframes for state and local zoning boards to process tower siting requests in the 2009 *Shot Clock Order* upheld in *City of Arlington*. *See supra* at 2 n.2.

Ensuring timely disposition from zoning authorities has only partially solved the problem. A rejected siting applicant's path to judicial resolution has proven no less arduous. As this dispute shows, cases can take years to resolve once litigation ensues. T-Mobile filed the complaint in this case on May 13, 2010; the district court entered judgment on March 27, 2012. Pet. App. 35a. Nearly two years of litigation in the district court is not resolution "on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). Yet many disputes take even longer to adjudicate. *See, e.g., Sprint Spectrum L.P. v. Paramus, N.J.*, 2:09-cv-4940-KM-MAH (D.N.J.) (56 months); *BellSouth Mobility, Inc. v. Miami-Dade Cnty.*, 1:98-cv-2724-AJ (S.D. Fla.) (28 months). And these lengthy timeframes do not take into account the inevitable appeal.

The Eleventh Circuit's approach would make this already long process even longer. Before a district court could evaluate whether the zoning authority's denial was supported by substantial evidence—the task assigned to it by Congress—it would first need to figure out why the board denied the carrier's application. *See* Pet. Br. 29. To do that, the court would need to root through the written record to divine the basis for the denial since the board would be under no legal obligation to separately provide its reasons. *See supra* at 14-18. Even if this were feasible, *but see infra* at 24-28, it is an onerous task that would expand the scope of the siting dispute, burden the district court, and substantially delay the proceeding.

For example, the written record here included over 750 pages of documents and a 108-page transcript of witnesses from T-Mobile, Council members, city officials, and city residents. JA 92a-277a; *T-Mobile South, LLC v. City of Roswell, Ga.*, 1:10-cv-01464-AT (N.D. Ga.) (Doc. Nos. 32-102, 106-17). A sizable record is not uncommon. *See, e.g.*, *Indus. Commc'ns & Elecs., Inc. v. Town of Alton,* 07-CV-082-JL, 2012 WL 4343759, at *2 (D.N.H. Sept. 21, 2012) (2300 pages); *Sprint Spectrum L.P. v. Parish of Plaquemines*, CIV.A. 01-0520, 2003 WL 193456, at *1 (E.D. La. Jan. 28, 2003) (775 pages). District courts and carriers should not have to carry the heavy burden of pouring through these documents in search of a rationale because the zoning authority has been excused of fulfilling its duty to separately set forth its reasons for denying the application. Congress wisely charged the party with first-hand access to this information with the legal obligation to provide it.

Notably, this is not just typical wrangling between opponents seeking to gain a litigation advantage. Congress and the FCC have intervened in order to "expand wireless services and increase competition among those providers." *Todd*, 244 F.3d at 57. There is every reason for concern that protracted litigation will force wireless carriers to devote resources to fighting zoning authorities that should be allocated to infrastructure deployment. Carriers facing the prospect of prolonged litigation may even decide the cost is too great and restart the zoning process instead. Worse still, carriers may be forced to altogether abandon efforts to fill gaps in their network in those regions of the country where local resistance is greatest. Regardless of which unappealing path the wireless carrier chooses, the inevitable result of the Eleventh Circuit's "anywhere in the record" rule is to encourage zoning authorities to obscure the rationale for the denial in the hope that carriers will find the prospect of fighting them too daunting. The potential for gamesmanship is especially acute given that the statute does not impose a deadline on when the record must be made available to the wireless carrier; indeed, nothing prevents a zoning board from waiting until after Section 332(c)(7)(B)(v)'s 30-day limitations period has run to release the record. *See* Pet. Br. 9, 28-29

The economic consequences of all this bureaucratic gamesmanship are quite troubling. The wireless industry has been a significant driver of economic growth and job creation. *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act,* Sixteenth Report, 28 F.C.C.R. 3700, 3929-30 (2013) ("*Sixteenth Report*"). The numbers are staggering. The industry invested over $25 billion in wireless infrastructure in 2011 alone, with a total of $223 billion invested over the

previous decade. *See* CTIA, *The U.S. Wireless Industry Overview*, Apr. 25, 2012, at 7, *available at* http://files.ctia.org/pdf/042412_-_Wireless_Industry_Overview.pdf ("*CTIA Study*"). That same year, the industry generated over $195.5 billion in global economic activity, with $146.2 billion being retained domestically. Roger Entner, *The Wireless Industry: The Essential Engine of US Economic Growth, Recon Analytics*, May 2012, at 1, *available at* http://reconanalytics.com/wp-content/uploads/2012/04/Wireless-The-Ubiquitous-Engine-by-Recon-Analytics-1.pdf ("*Recon Report*"). This was all while the wireless industry directly or indirectly employed more than 3.8 million Americans, accounting for 2.6% of *all* U.S. employment. *Id.*

Moreover, every sector of the economy has a vested interest in accelerating wireless deployment. Access to cutting-edge technology "improve[s] productivity for firms in other industries." *Sixteenth Report*, 28 F.C.C.R. at 3929-30. Improving wireless networks lowers transaction costs for businesses; and with an advanced digital infrastructure, "employees and firms in all sectors are able to communicate more quickly … thereby enabling them to anticipate and respond to changes and variations in consumer demand faster and at a lower cost." *Id.* at 3930. Consumers realize substantial benefits too as they are able to "more efficiently gather information on goods, services, and employment opportunities." *Id.* at 3931.

Overall, the industry "accounted for $33 billion in productivity gains for U.S. businesses in 2011." *Recon Report* at 4. Another $1.4 trillion in productivity gains is expected over the next decade. *Id.* It is little wonder, then, that President Obama called for the rapid deployment of

"the next generation of high-speed wireless coverage to 98 percent of all Americans" in his 2011 State of the Union address. *See* White House, *State of the Union Address* (Jan. 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address. Such progress will "make America a better place to do business and create jobs." *Id.*

In sum, business and consumer demand for wireless services is only increasing, *see* Pet. Br. 5-6, and the "ability of wireless providers to meet this demand will depend … on the extent to which they can deploy new and improved wireless facilities." *Wireless Facilities Siting NPRM*, 28 F.C.C.R at 14239. The Eleventh Circuit's approach, which undercuts the industry's ability to meet this growing demand, thus will have real economic consequences. In simple terms, every $1 invested in wireless infrastructure creates an additional $7-$10 of GDP. *See CTIA Study* 6. With each cell tower costing on average $250,000-$300,000 to construct, *see Sixteenth Report*, 28 F.C.C.R. at 3909, the economy suffers up to $3 million in lost GDP every time a carrier abandons a tower siting because of local resistance. The Court should reject any interpretation of Section 332(c)(7)(B)(iii) so evidently at odds with the 1996 Act's purpose and design.

B. Scouring the written record in order to divine the zoning authority's rationale is a fruitless exercise that will force judges to guess at a disposition's basis.

Interpreting the statute to require courts to scour the written record in search of a rationale is not only at odds with Congress's desire for streamlined review, it

is unrealistic. Because the zoning authority is usually a multiple-member body, individual statements regarding one member's reasons for his or her vote provides limited insight into the reasons for the board's denial. "Individuals in general and lawmakers in particular frequently act for a variety of reasons." *Pers. Adm'r of Mass. v. Feeney* 442 U.S. 256, 282 (1979). "Every legislat*or* has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislat*ure* is a collective body that does not have a mind; it 'intends' only that the text be adopted, and statutory texts usually are compromises that match no one's first preference." Frank H. Easterbrook, foreword to Reading Law, *supra*.

In other words, "[w]hat motivates one legislator to make a speech … is not necessarily what motivates scores of others" to cast their vote. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). A court reviewing the written record to discern the basis for the zoning authority's denial thus confronts a nearly insuperable task "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; *cf. Rust v. Sullivan*, 500 U.S. 173, 185 (1991) ("The parties' attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing.").

This case exemplifies the problem. *See* Pet. Br. 7-8, 37-38. The district court explained that the six council members' comments at the hearing "reflect[] a number of different reasons that may have motivated individual Council members to vote to deny T-Mobile's application." Pet. App. 30a. As a result, it was "impossible for the Court

to discern which of these reasons motivated the Council as a whole or commanded the support of a majority of the Council members." *Id.* Indeed, neither in *Milton* nor in this case could the Eleventh Circuit identify the reasons for the denial that were supposedly contained within the written record. *See* Pet. Br. 39-40.

But this is not the worst-case scenario. Other cases involve records that may not include even individual board members' justifications. *See id.* 12 n.2. Such cases would leave the court with almost nothing to work with because zoning records generally contain "a substantial volume of conflicting evidence on a number of different issues, including," in this case, "the aesthetics of the proposed tower, its impact on property values, and whether it is needed for [T-Mobile] to provide reliable service." Pet. App. 31a. Contradictory evidence forces a court to guess as to what "the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id.* 32a. Absent overwhelming evidence pointing to a single justification for the siting denial, a record that will inevitably contain contradictory information (if it contains probative information at all) will not reveal the reasoning for the board's action.

This makes it nearly impossible to enforce Section 332(c)(7)'s substantive prohibitions. Zoning authorities cannot discriminate against certain carriers and they cannot effectively prohibit wireless coverage over certain areas. 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II). Yet at least one Council member in this case appeared to rely on precisely these reasons for denying T-Mobile's proposal, stating that "other carriers apparently have sufficient coverage in this area," Pet. App. 7a-8a, which plainly discriminates against

T-Mobile in favor of other providers, *Shot Clock Order*, 24 F.C.C.R. at 14016 (prohibiting zoning authorities from denying a tower siting application "solely because one or more carriers serve a given geographic market."). That same Council member also stated his view that towers should never be allowed in residential areas, JA 174a ("Bottom line here, I just don't think it's appropriate for residentially zoned properties to have the cell towers in their location."), which at the very least would "have the effect of prohibiting the provision of personal wireless services," 47 U.S.C. § 332(c)(7)(B)(i)(II).

Further, although the 1996 Act prohibits zoning boards from basing action on potential health effects from FCC compliant facilities, *see id.* § 332(c)(7)(B)(iv), the issue is often raised at siting hearings. Here, for example, four participants spoke against the tower location because of health risks they perceived would arise if the tower were placed in a residential area. JA 125a, 148a, 153a, 156a-158a, 331a. In fact, one participant received applause after stating: "I'm deeply concerned because I do not want my children or the children of anyone else to grow up less than 300 feet from a cell-phone tower. I've been told that there are no negative health effects from cell towers .... I ask you tonight, is it right that a family should have to raise its children less than 300 feet from a cell-phone tower? Does that feel right to you?" *Id*. 153a-154a.

This kind of opaque record puts the reviewing court in an untenable position. The zoning authority has not provided the rationale for its disposition in a separate document. The transcript refers to considerations that the 1996 Act prohibits. Yet it also refers to considerations that might provide a lawful state-law basis for denying

T-Mobile's application, but only if supported by substantial evidence. Pet. Br. 39 (citing Pet. App. 31a). The court is therefore forced to guess at what in fact served as the determining factor based on individual statements of board members and various comments from the public. The Eleventh Circuit may have no problem with this kind of approach. But "the stakes are sufficiently high" here that the Court should "eschew guesswork" altogether. *O'Brien*, 391 U.S. at 384.

Put simply, the regime approved by the Fourth and Eleventh Circuits does not even remotely resemble the substantial-evidence review Congress envisioned in Section 332(c)(7)(B)(iii).[3] Without guidance, however, courts must "read the record, speculate upon portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision

3. As discussed above, a zoning board's denial of an application that is based on otherwise permissible state-law grounds will be upheld against a wireless carrier's challenge so long as it is supported by substantial evidence in the written record. That is distinguishable, however, from a circumstance in which the wireless carrier claims that the denial violates the substantive restrictions of Section 332, such as by considering "the environmental effects of radio frequency emissions." 47 U.S.C. § 332(c)(7)(B)(iv), by "unreasonably discriminat[ing] among providers of functionally equivalent services," *id.* § 332(c)(7)(B)(i)(I), or by "prohibit[ing] … the provision of personal wireless services," *id.* § 332(c)(7)(B)(i)(II). That type of challenge, which turns on the zoning board's compliance with federal law and not the quality of the evidence in the written record, is reviewed *de novo*. *See T-Mobile Northeast LLC v. Loudoun County Bd. of Sup'rs*, 748 F.3d 185, 192 (4th Cir. 2014); *Second Generation Props., L.P. v. Town of Pelham,* 313 F.3d 620, 629 (1st Cir. 2002).

thus arrived at should be sustained." *Topanga Assn. for a Scenic Cmty. v. Cnty. of Los Angeles*, 11 Cal. 3d 506, 517 n.15 (1974); *Fields v. Kodiak City Council*, 628 P.2d 927, 934 (Alaska 1981) (same); *Ocean Hideaway Condo. Ass'n v. Boardwalk Plaza Venture*, 515 A.2d 485, 490-91 (Md. Ct. Spec. App. 1986) (same). In other words, instead of evaluating whether "substantial evidence" supports the zoning authority's permissible state-law basis for denying the carrier's application, the district court would be forced to conduct what is essentially *de novo* review.

The Court should find that unacceptable. *De novo* review in no way approximates the federal administrative regime upon which the "substantial evidence" standard in Section 332 is modeled. *See supra* at 13-14. "Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.'" *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 444 (1965) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Zoning denials cannot be defended based on judicial guesswork as to what might have motivated the board under any sensible system of review. Indeed, forcing the district court to construct its own reasons as to why the zoning authority denied the carrier's application would circumvent the ban on post-hoc rationalizations. *See* Pet. Br. 29.

Adopting the Eleventh Circuit's rule would in fact have the paradoxical consequence of undermining the local autonomy Congress sought to preserve. *See Milton*, 728 F.3d at 1283; Pet. Br. 36 n.6. When an agency's reasoning cannot "reasonably be discerned," a court determined to forge ahead will "substitute its judgment for that of the

agency." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). *Chevron* deference itself arose from the recognition that courts relying on their own judgment, instead of deferring to agencies, will inevitably legislate. Before *Chevron*, federal courts could "impose [their] own construction of the statute," which in turn "conferred vast policymaking power on judges who are not part of either political branch of government." Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2233, 2234 (1997). The Court thus recognized that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984). Deference ensures the responsibility "for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones" and resides where it should: with the politically accountable bodies. *Id.*

But deferential review for "substantial evidence" is predicated on the agency upholding its end of the bargain. Deference neither can be required nor properly exercised if the agency does not itself explain the reasons for its determination. *See Fox Tel. Station, Inc.*, 556 U.S. at 513 (explaining that "we insist that an agency examine the relevant data and *articulate a satisfactory explanation for its action*") (emphasis added). Thus, a "reviewing court should not attempt itself to make up for the [agency's deficiencies]: '[Courts] may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Motor Vehicle Mfrs. Assoc. of United States, Inc. v. State Farm Mut. Ins., Co.*, 463 U.S. 29, 43 (1983) (quoting *Chenery*, 332 U.S. at 196); *see also Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. United*

States, 735 F.2d 1525, 1531 (D.C. Cir. 1984) ("[We] have neither the expertise nor the authority to substitute our judgment for that of the agency and provide an explanation where the agency's path is entirely uncharted.").

To ensure that state and local governments receive the deference that Section 332(c)(7)(B)(iii) affords them, the Court must require Respondent to provide the reasons for its denial in a manner that allows the court to perform "substantial evidence" review. That is not to suggest that the 1996 Act requires a decision with the level of detail often needed to survive judicial review under the APA or *Chevron*. Nor does the statute require formal findings of fact and conclusions of law. *See City Council of City of Virginia Beach*, 155 F.3d at 429-30. But there must be a separate written decision that "describe[s] the reasons for the denial … to allow a reviewing court to evaluate the evidence in the record that supports those reasons." *New Par v. City of Saginaw*, 301 F.3d 390, 396 (6th Cir. 2002). Where there is a single basis for denial, that description may be brief. Where there is conflicting evidence, more may be required. But such a description is essential in every case if the courts are to conduct the review that Section 332(c)(7)(B)(iii) requires.

CONCLUSION

For the forgoing reasons, and for those in the Petitioner's opening brief, the Court should reverse the Eleventh Circuit's judgment.

Respectfully submitted,

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