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 RESPONDENT

RICHARD A. CAROTHERS*
REGINA BENTON REID
CAROTHERS & MITCHELL, LLC
1809 Buford Highway
Buford, Georgia 30518
(770) 932-3552
richard.carothers@carmitch.com
regina.reid@carmitch.com
**Counsel of Record*
Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

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

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

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BRIEF FOR RESPONDENT

It is clear that a document (letter) from a state or local government stating than an application has been denied that provides no reasons for the denial therein can satisfy the statutory "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii). Respondent City of Roswell therefore respectfully requests that the judgment of the United States Court of Appeals for the Eleventh Circuit be upheld and that the case be remanded back to the District Court for the Northern District of Georgia for determination of the substantive merits of the case.

STATEMENT OF CASE

A. Statutory and Factual Background

1. a. The Telecommunications Act of 1996 was enacted by Congress as a tool to help advance the breakup of long existing monopolies and promote competition and entry into the market for new providers of telecommunication and cable services. The legislation was not intended or envisioned as a means to transform or thwart the day to day operations of local government. This can be seen by looking at the Act as a whole. In the only section that addresses local government, Congress specified its intent to "preserve local zoning" autonomy. "Nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service

facilities." 47 U.S.C. § 332(c)(7)(B). The restrictions on local decision-making are therefore extremely limited in number and scope and are clearly set forth in the Act.

In *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113 (2005), this Court recognized § 332(c)(7) as a "scheme of expedited judicial review and limited remedies." With respect to Congressional intent, members of the Court noted:

> "[c]ontext here, for example, makes clear that Congress saw a national problem, namely, an "inconsistent and, at times, conflicting patchwork" of state and local siting requirements, which threatened "the deployment" of a national wireless communication system. H.R. Rep. No. 104-106, pt. 1, p. 94 (1995). Congress initially considered a single national solution, namely a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority. *Ibid*. see also H.R. Conf. Rep. No. 104-458, p. 207 (1996), U.S. Code Cong. & Admin. News 1996, pp. 124, 221. But Congress ultimately rejected the national approach and substituted a system based on *cooperative federalism*. *Id*. at 207-208. State and local authorities would remain free to make siting decisions. They would do so, however, subject to *minimum* federal standards – both substantive and procedural – as well as federal judicial review.

Id. at 127-128 (Breyer, J., concurring) (emphasis added).

The need for local governments to be able to protect their divergent local environs and aesthetics was expressly advocated. H.R. Conf. Rep. No. 104-458, pp. 207-08 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 222-23. "Conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50 foot tower in a residential district," H.R. Conf. Rep. No. 104-458, p. 208 (1996), likewise leaving flexibility for local governments to address aesthetic values without running afoul of the non-discrimination limitation.

To the extent that this case casts telecommunications providers against local government, this Court like the Solicitor General should not take one side over another as both are extremely important to the welfare of the people of the United States, as well as the overall economy. Like Congress, the Court should seek to minimize the impact on local government and its operations while advancing the needs of the telecommunications industry thereby advocating a compromise between the equally essential competing interests.

b. The City of Roswell, Georgia was founded in 1854. The daughter of one of Roswell's first families, Mittie Bulloch Roosevelt, was the mother of 26th President Theodore Roosevelt. Her granddaughter, Eleanor Roosevelt, would later marry President Franklin D. Roosevelt. http://www.roswellgov.com/index.aspx?NID+125. The City is one steeped in history, culture and beautiful natural surroundings. Situated

on the banks of the Chattahoochee River, Roswell strives to be the "premier riverside community connecting strong neighborhoods and the entrepreneurial spirit." The City's values promote "respect, flexibility, inclusion, communication, trust, courage, innovation, and excellence." http://www.roswellgov.com/index.aspx?nid=129. With a population of 88,346, an average household income now approaching $135,186 and average home values of $212,363, it is a progressive and active community in which telecommunications and current technologies are obviously an important aspect of the everyday lives of the residents. http://www.roswellgov.com/index.aspx?NID=933. The City thus "encourages" the development of wireless communications while concurrently attempting to "maintain the aesthetic integrity of the community," as envisioned by Congress. City of Roswell, Ga., Code of Ordinances § 21.2.1 (2008); J.A. 67.

In 2003, Roswell adopted "Standards for Wireless Communications Facilities," to establish guidelines for the siting of all wireless communications towers and antennae. Section 21.2.4(a) therein provides the specific factors to be considered by the City and Council in determining whether to issue a permit for a wireless facility. These reasons include: "(1) Proximity to residential structures and residential district boundaries; (2) The proposed height of the tower; (3) Nature of uses on adjacent properties; (4) Surrounding topography, tree coverage and foliage; (5) Design of the facility, with particular reference to design characteristics which have the effect of reducing or

eliminating visual obtrusiveness; (6) Proposed ingress and egress; (7) Availability of suitable existing towers, other structures, or alternative technologies (micro cells) not requiring the use of towers or structures; (8) Demonstrated need for the telecommunications facility at the specified site; and (9) Utilization of the City of Roswell Master Siting Plan, as amended." Roswell actually has a plan with approved sites for towers, some of which are not yet utilized. J.A. 67.

2. Of the estimated 283,385 cell sites quoted by T-Mobile and Amici, there are 32 cell tower sites in the 42 square miles of the City of Roswell. J.A. 133. Seventeen of those sites were already being used by T-Mobile at the time of its Application in 2010. Based on these numbers alone, it is nonsensical to aver that the City desires to or has slowed the advancement and placement of wireless communication sites in its jurisdiction. The City balances the needs of its constituents for service against the aesthetics of its community. It is a difficult task to accomplish. The City takes into account that there are newer technologies that can and do strike a true balance between these competing needs by preserving the local aesthetics, some of which are becoming the norm in the industry, like microcells or Distributed Antenna Systems.

"[G]rowth in new site deployment is likely to accelerate as providers increasingly deploy small cells and Distributed Antenna Systems ("DAS") that expand capacity or coverage in a local area through small, low-mounted antennas [like telephone poles]." It is these newer technologies not requiring the larger

traditional towers, particularly in residential areas, that Roswell promotes. Roswell Ordinance § 21.2.4(a). J.A. 67. "These new technologies supplement the capacity of the 'macrocell' network [honeycomb cell tower grid], filling in gaps or providing additional capacity in localized outdoor or indoor areas where adding a traditional macrocell would be impractical or inefficient." *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Notice of Proposed Rulemaking*, 28 FCC Rcd. 14238, ¶ 2 (2013).

It has been recognized that the top 5 wireless providers have all standardized on 4G LTE as their wireless communication standard, which has now been deployed in most major population centers. While still using it, this new standard is less dependent on the "macrocell" honeycomb cell tower system that was vital to 2G phones and their predecessors. In a 2014 update on its own technological advances that will provide "Network Innovation at Internet Speed," T-Mobile stated:

> [W]e began rolling out our LTE in early 2013. Today, just over a year later, we deliver America's fastest nationwide 4G LTE network, covering 233 million Americans in 325 metro areas. Then, just over two months ago, our network guru, Neville Ray, announced T-Mobile Voice over LTE (VoLTE) in the Seattle area – making T-Mobile the first in the nation to launch VoLTE. In the same breath, Neville promised VoLTE nationwide by the end of 2014 – while continuing to build out

> our T-Mobile Wideband LTE. . . . As of today, T-Mobile offers nationwide VoLTE. That's nationwide. . . . The team has also been aggressively rolling out Wideband LTE, **upgrading our remaining 2G footprint to 4G LTE** and starting to roll out our new low-band 700 MHz A-Block spectrum. In fact, in the three months since we got hold of this spectrum, we've already begun equipping sites with 700 MHz gear. Just. Three. Months. And we've begun field-testing our first 700 MHz-compatible devices, so we can get those devices in stores and online – and in customers' hands – before the end of this year. **As we roll out this low-band spectrum, expect to see big improvements in in-building 4G LTE coverage – as well as coverage out beyond major metro areas.** And we've got at least 10+10MHz 4G LTE in an amazing 43 of the top 50 markets. Plus, our T-Mobile Wideband LTE, which we define as at least 15+15MHz, is already in 17 metro areas – with 26 total metro areas planned for the end of this year. . . . No one else is capable of lighting up new network technologies like this team. **We can do this, because we're not playing the phone company utility game. We're playing the mobile *Internet company game*.**

http://newsroom.t-mobile.com/news/firing-on-all-cylinders.htm (emphasis added).

T-Mobile no longer even provides the 2G coverage on which the Application in Roswell was based. In the

immediate future, its phones will rely primarily on internet connectivity and the ability to switch seamlessly between internet and lower band wireless that requires less from its traditional honeycomb network, thereby stretching the reach and capacity of the existing equipment. Bottom line, it is newer and better technology allowing Voice over Internet, and many other upgrades in both its network and its phones that could ultimately make cell towers a thing of the past. As for T-Mobile's current 4G LTE coverage for the Lake Charles Drive neighborhood in Roswell, Georgia, the coverage map indicates T-Mobile has "good" coverage and that residents can "[g]et clear calls plus surf the web, tweet, post to Facebook . . . you've got all the 4G LTE coverage you need to stay connected." http://www.t-mobile.com/coverage.html.

This is exactly why in introducing the 1996 Telecommunications Act, Congressman Pressler stated that "it was anticipated that it would be succeeded with the ushering in of the wireless age by another act, maybe in 10 or 15 years." 142 Cong. Rec. S686-03. That time has come. It is a different era with diverse and rapidly expanding options using a new and different set of rules to govern the contest between carriers. It is and will become telecommunications on a global level, not unlike the first steps of the internet revolution. It is not a stretch to imagine that the need for large cellular towers could become obsolete within the next few decades as international standards and internet technologies are applied. Now more than ever, it is paramount that local governments

exercise their planning and zoning judgment in the siting of additional mega-structure towers that will remain as permanent fixtures in their communities.

3. On February 2, 2010, T-Mobile filed an Application with the City of Roswell desiring to place an 11 story (108 foot) cellular tower in the middle of the City's oldest lakeside residential neighborhood to "improve existing [2G] service."[1] Pet. App. 3a-4a. The Application was for a new tower located at 1060 Lake Charles Drive. *Id*. The proposed site is surrounded on all sides by residential homes, including lakeside properties. *Id*.; *see also*, J.A. 64-65. The tower would stand 25 feet taller than any existing tree on the proposed residential site. *Id*.

At the time of this Application, T-Mobile subscribers primarily had 2G phones and it was estimated that there were only 700 customers in the entire City of Roswell. J.A. 97, 138. Nonetheless, T-Mobile had towers and good coverage in the City, including the specific area at issue. The company desired to make the coverage better in accordance with its own definitions of what "better" meant and

[1] The Application was reviewed by the Roswell Zoning Department and it recommended approval of the application *with the condition* that the cell tower site be moved 120 feet east of the west property line, placing the onus of any visual impact on the leasing property owner receiving the financial gain. Pet. App. 4a. While the proposed T-Mobile site was in a clearing on the proposed property, the Zoning Department required moving the tower to a wooded area completely surrounded by trees. *Id*. T-Mobile refused to accept this condition. *Id*.

without any standards for what could be deemed acceptable coverage in the industry as a whole. The crux of its stated need was to improve indoor coverage for its subscribers and provide for anticipated growth. It demanded the improvement in this exclusive residential area without revealing if there was a problem with existing coverage or complaints regarding its service. When confronted with these crucial inquiries regarding its need, T-Mobile told the constituents of Roswell that:

> The information requested [the number of customers and actual complaints regarding service in the area] . . . is proprietary. T-Mobile has a responsibility as a business to provide the best service possible to our customers; any other business providing any kind of service or product has the same responsibility. If ONE customer demanded improved service, if ONE customer will receive the benefit of improved service, T-Mobile has a right to request this permit . . . in order to provide improved service. . . .
>
> One dropped call or one complaint is too much. We have determined that there is a need to improve service in this area to a level deemed acceptable by our engineers charged with monitoring the network. As a company, we are certainly entitled to determine the service levels we deem acceptable.

J.A. 96, 104-105.

It is no wonder that Roswell's residents came forward at the April 12, 2010 hearing on the Application prepared with local experts who were attorneys [explaining what the community must show to meet the current "substantial evidence" test employed by recent Georgia district court decisions], real estate agents [to speak to the impact of towers on real estate value], telecommunication industry workers and IT specialists [to speak to all of the available less-invasive technologies, questioning T-Mobile's need for a tower], and current T-Mobile customers [to address the excellent coverage existing in the area]. After the presentation by both sides and comments by almost all council members voting, a specific motion was made by Council Member Price to deny the Application.

> As liaison to the department, it is my, I won't say distinct honor, but my responsibility to make some sort of motion . . .
>
> I think based on our ordinance, Article 21.2.1, . . . the purpose and intent of our cell phone ordinance to protect the residential areas from the adverse impact of telecommunications towers and to minimize the number of towers and the other adverse impacts being minimized. I think the conclusion from that first section would be that this is aesthetically incompatible and certainly in this area. It's other than I-1, C-3, offices or highway commercial area [zoning districts].
>
> Number two, the alternative tower that was proposed, in my opinion, it would not be

> compatible with the natural setting and surrounding structures also due to the height being greater than the other trees.
>
> And, number three, in our Ordinance Article 21.2.4, the proximity to residential structures, the nearness to other homes, and being within the residential zoning area and adjacent properties, therefore, the adverse effects to the enjoyment of those neighbors and potential loss of resale value, among other potential parameters are difficult really to definitively assess.
>
> Therefore, overall, I move to deny the application for the wireless facility mono-pine tower on Lake Charles Drive.

Pet. App. 8a; J.A. 176-177. This motion was seconded by two Council members and then unanimously approved. Pet. App. 15a. The City Council unanimously voted to deny the Application.

As part of the usual course of business, two days after the vote the City Zoning Administrator sent a letter to T-Mobile stating that the City had denied the Application and that "minutes from the aforementioned hearing may be obtained from the city clerk." J.A. 278. T-Mobile did not seek to obtain the minutes. Nonetheless, per the letter *the minutes were available*. However, just like with every other local government in Georgia, those minutes were not formally adopted and approved by Council until the next full meeting on May 10, 2010. Petitioner's Brief, p. 9.

T-Mobile filed suit on May 13, 2010. J.A. 34. One can surmise that T-Mobile did not need the minutes to determine whether to file suit because: 1) providers as a rule of thumb file suit when they are denied a site; 2) it was represented at the hearing, heard the presentation of the community and the comments, motion and vote of Council firsthand; 3) it had its own verbatim transcript of the proceedings on which to make its decision regarding appeal; and 4) it never approached the City with questions concerning the denial.

B. Procedural History

1. The Complaint.

On May 10, 2010, T-Mobile filed an action in the United States District Court for the Northern District of Georgia alleging that the City's denial was not supported by substantial evidence in the record, would have the effect of prohibiting the provision of wireless service in violation of the Act and that the denial had the effect of unreasonably discriminating among providers of functionally equivalent services.[2]

[2] There was no contention in T-Mobile's Complaint that the City failed to meet the "in writing" requirement of the Act. Although it noted in its Statement of Facts that the City issued a letter denying the Application and "[t]he letter gave no reasons for the denial," there is no allegation that this violated the Act in any way. Likewise there is no mention of the "in writing" requirement in any of the alleged theories of recovery, including the theory that there was not substantial evidence in the record to support the denial. J.A. 56-58.

In connection with these claims, T-Mobile also sought an injunction to compel the City to grant the requested permit for the tower. There was no allegation that the City did not timely process and hear the Application.

Following a lengthy discovery period that was expanded by T-Mobile, both parties moved for summary judgment. At that time, T-Mobile dropped its unreasonable discrimination claim. The City had desired to bifurcate the case into two parts, first dealing with the "substantial evidence in the record" test and then the other expert based allegations, allowing for immediate motions that would have included the issue at bar and would have resulted in no delay in obtaining a decision on the merits of the substantial evidence claim.

2. The Erroneous Decision of the District Court.

On March 27, 2012, the district court granted T-Mobile's motion for summary judgment finding that the City did not meet the "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii). In so finding, the court had before it a letter in writing stating that T-Mobile's Application had been denied and that minutes of the meeting *were* available. The written record contained the City's Ordinance that set forth the factors considered by the Council, comprehensive minutes of the Council meeting which included a specific motion setting forth detailed reasons pursuant to the

City Ordinance to deny the Application with a unanimous vote thereon, and a verbatim transcript of the hearing. The court held that because the City did not provide a separate written denial that set forth the specific reasons the Application was denied it had violated § 332(c)(7)(B)(iii). The court stated that to meet the "in writing" requirement, a written decision "must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." Pet. App. 27a-28a.

The court went further, finding that while "[t]he minutes and transcript of the hearing reflect questions and comments by individual Council members . . . nowhere is there a clear articulation of the rationale of the Council as a whole for denying the application." *Id*. at 28a. No reason "was cited by a majority of the council members as a basis for their vote to deny the application." *Id*. The court specified that it was "left to review the voluminous record without any guidance as to what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id*. at 32a. As a result, the court concluded that it was unable to assess whether the City's decision was supported by substantial evidence in the record. *Id*. at 33a. Elevating form over substance and based solely on this defect in the writing, the district court issued

an injunction directing the City to grant T-Mobile's Application for the cellular tower. *Id*. at 34a.

3. The Decision of the Eleventh Circuit.

Relying on its rationale in *T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274 (11th Cir. 2013), the Eleventh Circuit reversed the district court and held that the City of Roswell met the "in writing" requirement. Pet. App. 16a. In *City of Milton*, the circuit court adhered to its long standing precedent in statutory interpretation of refusing to add to or alter the plain language of the Act, and ruled that the straightforward language of § 332(c)(7)(B)(iii) that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record," plainly requires that the decision to deny be "in" a "written document." 728 F.3d at 1283. In that case, as in Roswell's case, the writing was a simple letter to T-Mobile stating that the Application had been denied, providing no reasons for the denial. *Id*. at 1279.

The *City of Milton* decision went further in its analysis of the entirety of the statutory language, stating there "must be reasons for the denial that can be gleaned from the denial itself or from the written record; otherwise, there would be nothing for substantial evidence to support. What is neither expressed nor implied, however, is any requirement

that the reasons for a denial must be stated in the letter or some other document that announces the decision, if there is a separate document doing that, or any prohibition against having the reasons stated only in the hearing transcript or minutes." *Id*. at 1283. As *dicta*, the court stated that "to the extent that a decision must contain grounds or reasons or explanations as required by other district courts, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." *Id*. at 1285.

In reviewing the record, the circuit court in *T-Mobile South, LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1219 (11th Cir. 2013), determined not only that the City met the "in writing" requirement, but that there were adequate reasons for the denial in the minutes of the meeting and the transcript that allowed the trial court to conduct a meaningful "substantial evidence" review under § 332(c)(7)(B)(iii). Pet. App. 17a-18a. The Eleventh Circuit properly reversed and remanded the case to the district court. *Id*. at 18a.

SUMMARY OF THE ARGUMENT

In 1996, Congress amended the Communications Act of 1934. The Telecommunications Act of 1996 was the first comprehensive overhaul of national telecommunications policy in over sixty years. The intent of the 1996 Act was to promote competition and, most important to Petitioners and Amici, provide rapid

deployment of new telecommunications. Despite the asserted local government interference to this deployment, Congress saw fit and specifically determined that there were legitimate state and local concerns involved in regulating the siting of wireless service facilities such that it could not be mandated on a federal level.

47 U.S.C. § 332(c)(7) is an attempt to harmonize local autonomy in land use regulation with the needs of the telecommunications industry. In doing so, the Act clearly respects and preserves state and local authority over land use. This attempt at *cooperative federalism* comes at the expense of *limited* intrusion on how local governments operate. *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 127-128 (Breyer, J., concurring). "The statute's balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations, and it imposes an unusual burden on the courts. But Congress conceived that this course would produce individual solutions best adapted to the needs and desires of particular communities. If this experiment in 'cooperative federalism' does not work, Congress can always alter the law."[3] Indeed, with the newer technologies that were not even foreseeable in 1996 and a new global outlook and standard, the time is ripe for such a revision.

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[3] Eagle, Steven J., *Wireless Telecommunications, Infrastructure Security, and the Nimby Problem*, 54 Cath. U. L. Rev. 445 (2005).

Given today's technology, unfettered access to more and more cell towers is not the answer to meeting the needs of tomorrow's generations. It would be a critical error to advance the swelling need for cellular communication and turn a blind eye to the simultaneous explosion in technologies available for meeting the ever increasing demand. This is particularly true when newer technologies will not necessitate the enormous towers that generate the negative response of constituents that local governments must typically address. That is why, until amended by Congress, the current statute must be read strictly when it comes to intrusion on State and local government and its processes.

A. Petitioner and Amici would have this Court take a small provision of the Act designated to preserve and protect local zoning authority and expand it to require local governments to jump through more and more technical and procedural hoops to meet the specified limitations of the statute. Taking the exact words of the statutory text in their natural and obvious sense and not unreasonably restricting or enlarging them reveals that: ([A]ny decision) by a state or local government [modifies 'any decision' – a decision by whom] denying a request to place, construct, or modify a personal wireless service facility [modifies 'any decision' by defining what the decision is – it is a denial] shall be in writing and supported by substantial evidence contained in a written record. Thus, a denial must be in writing and supported

by substantial evidence in the record; nothing more, nothing less.

The text, structure, history and purpose of § 332(c)(7)(B)(iii) demonstrate that a letter from a state or local government stating than an application has been denied that provides no reason for the denial whatsoever satisfies what has come to be known as the statutory "in writing" requirement. The Solicitor General, on behalf of the FCC who administers the Act, has filed a brief agreeing that the statute "neither explicitly nor implicitly" requires that reasons be provided in a written denial. SG Brief at 24.

B. "Substantial evidence" is a standard of review telling the Court and local government what must be in the written record as evidence to support the denial. It defines a quantum of evidence. It does not define a writing. Even if Congress knowingly or unknowingly engrafted a need for "reasons" by electing a substantial evidence review, this must still be read within the set boundaries of preserving the local government zoning process. The fairest interpretation, taking nothing away and adding only reasons to facilitate review, would mean as the Solicitor General found:

> Although Congress's provision for substantial evidence review imposes a corollary requirement that the local government give reasons for denying an application to construct a cell tower, the statute neither explicitly nor implicitly requires that those reasons be provided in the written denial

> itself. Consistent with the savings clause, 47 U.S.C. § 332(c)(7)(A), permitting the statement of reasons to be incorporated from the written record minimizes the intrusion on the normal processes of local government. . . . The 1996 Act should not be read to disturb that process, so long as the minutes or another document in the record clearly sets forth the reasons for the denial.

SG Brief at 24-25.

Regardless of their adoption or rejection of the three-part standard for "in writing" found in *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002), expanded upon by the district court and Petitioner, the majority of circuit courts now agree that the "reasons" can be in minutes of the meeting or a resolution in those minutes, or in minutes and other documents in the written record. In other words, just as the Solicitor General has pronounced, there does not have to be a separate denial letter containing reasons. The reasons can be in writing in the minutes or another document in the record. This does not strain the interpretation of the statute and add requirements restricting the way local governments operate.

In the instant case, the circuit court found that the reasons were contained in the minutes. *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606 (6th Cir. 2004), supports that decision. In *Omnipoint*, the reasons were contained in a resolution (the same as the motion in this case) made by a Council member with a unanimous vote to deny. According to

the dissenting opinion, this resolution was in the minutes. Though not as articulate, the motion of Councilmember Price is akin to that in *Omnipoint*, addressing the Ordinance governing the decision and reasons for denial from that Ordinance with a following unanimous vote. *Omnipoint* also involved the necessity of the adoption and approval of the minutes of the meeting (and thus the resolution or vote) in the following council meeting. Likewise, the Solicitor General confirmed that the reasons were evident from the minutes, contained in the statements of the voting council members. SG Brief at 31.

The very foundation of Petitioner's rationale for its tortured and expanded definition of "in writing" is predicated on the inability of courts to perform a substantial evidence review without all of this detailed information (posited as "reasons") in a separate written denial. Yet, in every other circuit court case, whether or not the "in writing" requirement was met, there was a determination on the merits as to whether there was substantial evidence in the record to support the denial. Excepting *City of Milton*, 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 and did not perform or attempt to perform a substantial evidence review based on the written record. It is no wonder that Petitioner chose this as its model to test its "in writing" definition.

No other court needed the reasons set forth with the specificity requested by the district court to

perform a merits review. Moreover, it has been shown that the district court erred in finding that reasons could not be determined from the record. The Solicitor General was able to readily discern that a majority of the Council stated that aesthetic incompatibility with the surrounding area was the basis for the denial. SG Brief, p. 31. This highlights not only the glaring error of the district court, but the fallacy of any need for detailed reasons for substantive judicial review.

In simplest terms, Petitioner advocates that because Congress provided that a denial must "be supported by substantial evidence in a written record," this provision must be read with "denial in writing" to mean that: (1) a denial must be in a writing that is separate from the written record; (2) the denial must set forth the majority consensus of the local council members' specific "reasons" for that denial; and (3) the denial must contain sufficient explanation of the reasons to allow a reviewing court to evaluate the evidence in the record that supports those reasons, including what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why. Obviously such language is not in the statutory language itself nor was it grafted into the statutory language by implication.

Examining each component of Petitioner's definition of "in writing," it has already been addressed that there is no statutory basis or need for a separate written denial with reasons. Reasons, to the extent necessary, may be in the minutes or in the written record. Likewise, there is no need for a majority

consensus on the reasons. The APA does not require federal agencies to be unanimous in the reasons for their decisions. Indeed, *Omnipoint* would suggest that consensus could be implied by concurrence (voting yes) to a specific motion with subsequent adoption and approval of the minutes containing same.

C. Finally, and most importantly, making reasons part of the "in writing" requirement necessitates a slippery slope concerning exactly what will constitute reasons sufficient to allow judicial review. To avoid litigation on this slope, local governments will be forced to issue the equivalent of "findings of fact and conclusions of law," thereby putting the burden of the APA on a local lay governing body. Requiring reasons to contain "what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether and why" is an outright demand for "findings of fact and conclusions of law."

Placing Administrative Procedure Act burdens and constraints on State and local governments in the rendering of their decisions would necessitate a Tenth Amendment challenge and review. Further, as there is no basis for issuing an injunction and mandating a permit without violation of a substantive or time limitation in the Act, such an injunction likewise incites the need for Tenth Amendment evaluation. No circuit court case has allowed an injunction without a substantial evidence merits review.

The simplest way to avoid imposing these onerous federal standards on State and local governments and facing constitutional challenge to the statutory system that governs an important component of our national commerce, is to follow the plain wording of the statute and answer the question presented with a simple "yes." Or, in the alternative, to answer the question as posed by the Solicitor General with a simple "yes." Either way, the imposition of reasons sufficient to allow Petitioner's definition of "meaningful" judicial review is avoided and courts can continue to do what they have always done – look to the written record guided by the legal briefs before them.

Not making a local government issue a denial in writing with sufficient reasons to allow meaningful judicial review (ultimately requiring findings of fact and conclusions of law) does not affect the substantive rights and protection provided by the Act to telecommunication carriers. Regardless of "the writing," carriers whose petitions are denied at the local level are still entitled to substantive review of the merits of any decision and enforcement of the protections provided to them by Congress. Indeed, the telecommunications industry has nothing to lose in this alleged conflict, but it undoubtedly has everything to gain. If this Court adopts Petitioner's position and decides that the Eleventh Circuit was wrong, it is the local governments who would be harmed, as they would be forced to allow cellular towers in the heart of their residential communities based upon a mere technicality, without regard for the

merits of their decisions. Seeking to obtain this advantage for itself and the industry, Petitioner brings these issues to this Court and asks for an interpretation that is clearly not mandated by the language.

ARGUMENT

A. Statutory Construction

The text, structure, history and purpose of 47 U.S.C. § 332(c)(7)(B)(iii) demonstrate that a decision denying an application need only be in writing. This writing does not need to identify the reasons for the denial. Thus, a letter from a state or local government stating than an application has been denied that provides no reason for the denial therein satisfies the statutory "in writing" requirement.

1. The text of § 332(c)(7)(B)(iii) provides that the decision to deny a request be in writing.

The text in dispute specifies that "any decision by a state or local government denying a request to place, construct, or modify a personal wireless service facility shall be in writing and supported by substantial evidence contained in a written record." This language is clear and unambiguous. A simple diagram of the sentence as one would do in a high school English class reveals the plain meaning. ([A]ny decision) by a state or local government [modifies 'any decision' – a decision by whom] denying a request to

place, construct, or modify a personal wireless service facility [modifies 'any decision' by *defining* what the decision is – it is a denial] shall be in writing ***and*** supported by substantial evidence contained in a written record. Thus, a "decision to deny" must be "in writing" and "supported by substantial evidence contained in a written record."

Petitioner espouses tortuous interpretations of this language in an attempt to overcome the very basic wording of the statute. First it seeks to redefine "decision" beyond its simplistic meaning, going so far as to compare "decision" with "notify." Secondly, it argues that "decision" must mean more than a "bald" denial despite the fact that the statute contains no such language.

Seizing on the fact that the definitions of "decision," like most words in the English language, are numerous and multi-faceted, Petitioner latches upon the more elaborate interpretations that best suit its needs. In *Merriam-Webster's Collegiate Dictionary,* 11th Ed. (2003), the very first definition of decision is: "a determination arrived at after consideration: conclusion." *Black's Law Dictionary*, 6th Ed. (1990), clarifies that a decision is a "determination . . . A popular rather than technical or legal word; a comprehensive term having no fixed legal meaning. . . . 'Decision' is not necessarily synonymous with 'opinion.' A decision of the court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the judge." Synonyms include: "choice, result, conclusion, verdict, pronouncement, judgment,

resolution, outcome, decree," all of which lead naturally to the meaning provided in the text itself. A "decision" in this context is a "denial." For a local government, the decision is clearly the result of the vote – a "yes" or "no" (denial) on the matter before it. Had Congress intended "decision" to mean anything more, such as to include reasons for the decision, it would have so specified or it could have used a term such as "opinion."[4] No definition equates "decision" to "notify."

Petitioner also seeks to read "decision . . . in writing" and "supported by substantial evidence contained in a written record" as one, but then ironically must separate the two to reach the ultimate interpretation it desires. Petitioner and Amici paradoxically argue that because "supported by substantial evidence" means that there must necessarily be reasons for judicial review under that judicial standard, those reasons must be in the written denial. They argue that the language must be read together and joined

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[4] Congress plainly and specifically required certain content for other kinds of writings issued under the Act. *See, e.g.,* 47 U.S.C. § 252(e)(1) ("written findings as to any deficiencies" are required in connection with certain types of agreements); § 271(d)(3) (FCC is required to "state the basis for its approval or denial" of specific kinds of applications). *See also,* 47 U.S.C. § 204(a)(1) (Congress required the FCC to provide a carrier a "statement in writing of its reasons" for suspending charges); § 213(f) (Congress required that "reasons" be provided for denying access to certain records). Had Congress wanted more in the writing mandated by § 332(c)(7)(B)(iii) it would have specified the specific content it envisioned.

so that "in writing" and "reasons" are made into one requirement. Then, they separate the two again by contending that "in writing" must be separate from the "written record" because of the conjunctive. This distortion makes no sense given the plain language of the statute.

Indeed, both the structure of the language and the use of the conjunction "and" provide for separate and distinct requirements. This rightfully puts "reasons" with the "written record" as both relate to the "substantial evidence review." The text itself and a rational reading of it make clear that the City's letter stating the application had been denied met the "in writing" portion of the Congressional limitation.

To reach this conclusion, this Court need not take a strict constructionist approach that is scorned by Petitioner and Amici. From the beginning, this Court has instructed that "[t]he words of any legal text . . . are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged." *Martin v. Hunters*, 14 U.S. 304, 326 (1816). The Court has also relied on grammatical structure and has held that the use of "and" means the phrase that precedes "stands independent of the language that follows." *United States v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 241 (1989). In this case, it means that a local government must meet both – two different directives.

In *Ron Pair*, the Court stated that "the task of resolving the dispute over the meaning [of the

statute] begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms. The language before us expresses Congress' intent . . . with such sufficient precision so that reference to the legislative history and to pre-Code practice is hardly necessary." *Id*. (citations omitted). *See also, Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 475 (1992) (In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished); *Carter v. United States*, 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by examining the text, not by psychoanalyzing those who enacted it."). The same rules apply here. The grammar, the intent of Congress expressed in the text itself, along with the use of the conjunction, clearly provide the logical interpretation of the natural language and require neither adding nor taking anything away from the wording of the statute. As in *Ron Pair*, this is where the inquiry should end.

Further substantiating this obvious conclusion, the Solicitor General on behalf of the FCC who administers the Act, has filed a brief agreeing that a letter from a state or local government stating that an application has been denied but providing no reason for the denial therein can satisfy the statutory

"in writing" requirement. "Although Congress's provision for substantial evidence review imposes a corollary requirement that the local government give reasons for denying an application to construct a cell tower, the statute neither explicitly nor implicitly requires that those reasons be provided in the written denial itself." SG Brief at 24.

2. The broad structure of the Telecommunications Act confirms that § 332(c)(7)(B)(iii) was not intended to impose additional burdens on local governments.

While there is no question that the intent of the Telecommunications Act as a whole is to promote competition and rapid deployment of new telecommunications, Congress saw fit and specifically determined that there were legitimate state and local concerns involved in regulating the siting of wireless service facilities such that it could not be mandated on a federal level. 47 U.S.C. § 332(c) reads:

> *(7) Preservation of local zoning authority*
>
> (A) General authority
>
> Except as provided in this paragraph, *nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction*

> *and modification of personal wireless service facilities.*

(Emphasis supplied).

This Court has already recognized that the context for this particular provision was "a system based on *cooperative federalism*. State and local authorities would remain free to make siting decisions . . . subject to *minimum* federal standards." *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 127-128 (2005) (Breyer, J., concurring) (emphasis added).

The stated intent to preserve local zoning authority reveals that the overall aim of the Act was not one of rigid interpretation that would impact the local government zoning process. The Solicitor General and FCC recognize in their brief that the intent of Congress was to "*minimize* the intrusion on the normal processes of local governments, which are often composed of laypeople who are not accustomed to writing opinions setting forth the reasons for their actions. As reflected in decisions addressing this issue, local zoning boards or city councils often operate by discussing an issue during a hearing, and then providing "minutes" or a written summary of what transpired at the meeting, which are reviewed and may be amended by the board. The Act should not be read to disturb that process. . . ." SG Brief, pp. 24-25. The Act does not impose an "inflexible requirement" that a denial letter include reasons, indeed "[a] strict requirement that the state or local government include a statement of reasons in a 'decision to deny' that is separate

from the written record would . . . serve little purpose." *Id. See, Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001) (Although requiring reasons in the denial, the court acknowledged that a meaningful review of the decision is not limited to the written decision. "[S]uch a requirement would place an unjustified premium on the ability of a lay board to write a decision.").

3. The underlying purpose and the legislative history of § 332(c)(7)(B)(iii) both underscore that its provisions were meant to be narrow and not an imposition by Congress of inflexible requirements on local governments.

Land use decisions have historically been the province of local government. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). In fact, land use regulation is "the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 (1982). In the Act, Congress in its wisdom sought to protect this long standing domain of local authorities in the statute.

The Act initially proposed lodging all tower siting decisions with the FCC and eliminating local zoning control. *Omnipoint Corp. v. Zoning Hearing Board*, 181 F.3d 403, 407 (3d Cir. 1999). Upon reflection, "Congress . . . acknowledged that there are legitimate State and local concerns involved in regulating the siting of such facilities. . . . Localities should have the flexibility to address such things as **aesthetic values** and the costs associated with the use and

maintenance of public right of ways." *Id*. So Congress stripped the Act of its provisions placing tower siting decisions with the FCC and restored local zoning control. Section 332(c)(7) was added to "preserve the authority of State and local governments over zoning and land use matters except in *limited* circumstances." H.R. Conf. Rep. No. 104-458, pp. 207-08 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 222-23 (emphasis added). Congress was clear and the Act honors the local government decision-making processes, subject only to the limited circumstances stated. Local decisions must be timely, in writing, supported by substantial evidence in a written record, and not have the effect of prohibiting the provision of wireless service or of unreasonably discriminating among providers of functionally equivalent services. That's it. No more restraints can be imposed on the local government zoning process or read into the Act.

4. The circuit court correctly found that the statutory language requires that a denial of a permit simply be "in writing."

Given the plain wording of § 332(c)(7)(B)(iii), along with the structure, history and purpose of this section of the Act, answering the Question Presented of "whether a document (letter) from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory 'in writing' requirement," is a simple and straightforward yes. The

circuit court thus properly adhered to its long standing precedent of statutory interpretation, refusing to add to or alter the plain language of the Act, and ruled that the language of § 332(c)(7)(B)(iii) requires only that the decision to deny be in writing. "The words of the statute we are interpreting require that the decision on a cell tower construction permit application be 'in writing,' not that the decision be 'in a separate writing' or in a 'writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held' or 'in a single writing that itself contains all of the grounds or reasons or explanations'" for the decision. *T-Mobile, LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1219 (11th Cir. 2013), quoting *T-Mobile South, LLC v. City of Milton, Ga.,* 728 F.3d 1274, 1285 (11th Cir. 2013). There is no reason to overturn this decision and many more reasons that the circuit court's decision, in particular remanding the matter back to the district court, should be upheld.

B. The Position Advanced By Petitioner Needlessly Re-writes the Statute and Necessarily Strains the Question Before This Court.

If as Petitioner argues, by adopting the substantial evidence standard, Congress did either wittingly or unwittingly incorporate a need for "reasons" for a local government's denial, new questions arise that were not before the circuit court. Indeed, this whole train of thought and the arguments advanced

regarding same by Petitioner and Amici stray further and further afield from the Question Presented.

Petitioner asserts that "[w]here Congress borrows terms of art in which are accumulated the legal tradition and meaning . . . , it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1953) (where it was held that "intent" or a "culpable mind" was necessarily a part of a crime). Because Congress used the words "supported by substantial evidence," it is argued that courts cannot perform a substantial evidence review without the reasons for the decisions. Petitioners and Amici cite to *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), as support for this rationale. Obviously, *Chenery* deals with administrative agency decisions and not local government zoning.

"Substantial evidence" is a defined quantum of evidence. It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). Whether Congress intended to import federal standards of review into local government practice and what impact that would necessarily have was not the question before the circuit court nor is it the precise question presented by certiorari herein. Of necessity, this prompted the Solicitor General to rephrase the question presented to be:

> Whether, when denying an application for a permit to construct a new cell tower, the relevant state or local government must provide a clear statement of reasons for the denial, and, if so, whether those reasons must be set forth in the written "decision . . . to deny [the] request," 47 U.S.C. § 332(c)(7)(B)(iii), or whether they may instead appear elsewhere in the written record that supports that decision.

Although the circuit court does not directly address this question, it appears to concur that the substantial evidence requirement "necessarily means that there must be reasons for the denial that can be gleaned from . . . the written record." *T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274, 1283 (11th Cir. 2013). It can readily be inferred from both the *City of Milton* and *City of Roswell* opinions that these reasons need not be in a separate writing that is distinct from the written record. In answering the rephrased question to address both issues raised by Petitioner, the Solicitor General concurs that the "reasons" need only appear in the written record that supports the decision.

> Although Congress's provision for substantial evidence review imposes a corollary requirement that the local government give reasons for denying an application to construct a cell tower, the statute neither explicitly nor implicitly requires that those reasons be provided in the written denial itself. Consistent with the savings clause, 47 U.S.C.

> § 332(c)(7)(A), permitting the statement of reasons to be incorporated from the written record minimizes the intrusion on the normal processes of local government. . . . The 1996 Act should not be read to disturb that process, so long as the minutes or another document in the record clearly sets forth the reasons for the denial.

SG Brief, pp. 24-25.

1. The correct interpretation of "in writing" and "substantial evidence" as separate and distinct requirements is actually supported by the statutory construction demanded by Petitioner and its Amici.

Answering the question posed by the Solicitor General, which is only part and parcel of the entire extrapolation demanded by Petitioner, does not require a strict or strangled interpretation of the language of the statute before the Court. Instead, the "holistic" and "fairest" interpretation is allowed for and accomplished. "The interpretive objective is to identify the *fairest* reading of the text – not the narrowest one." Chamber of Commerce Brief, p. 15. The fairest interpretation would not require the Court to find that decision means a separate statement of reasons when Congress a) defined decision in the statute; b) purposely used a conjunctive between the requirements; and c) specifically intended to limit the intrusion on local government regarding these

decisions. It also fulfills the objective that "[t]he 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*, 14 U.S. 304, 326 (1816). "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. U.S.*, 340 U.S. 593, 596 (1951).

These interpretative arguments as espoused by Petitioner and Amici lead naturally to the conclusion advocated by Respondent, the Solicitor General and the FCC. This Court need neither add nor subtract from the language to find that "in writing" does not necessitate a separate writing with reasons. Reasons may be necessary for judicial review, but as long as they can be gleaned from the record to allow for that examination by the courts the words and supposed Congressional intent are both satisfied.

2. The majority of the circuit courts now accept that the writing and the reasons can actually be a part of the written record.

Even while reading the "in writing" and "substantial evidence" requirements together, the majority of the circuit courts now allow the writing with the reasons to be a part of the written record and do not require a separate denial with reasons. In *Omnipoint Holdings, Inc. v. City of Southfield*, 355

F.3d 601, 606 (6th Cir. 2004), the circuit court stated "*we reject the concept that a resolution in meeting minutes will never meet the separate writing requirement, if it otherwise allows meaningful judicial review.*"[5] (Emphasis added). *See also, U.S. Cellular v. Board of Adjustment*, 180 Fed. Appx. 791, 798-801 (10th Cir. 2006) (Board meeting minutes and letters not condensed into a formal denial document were deemed sufficient to meet the "in writing" requirement); *Helcher v. Dearborn County*, 595 F.3d 710, 721 (7th Cir. 2010) (minutes of the meeting satisfied the "in writing" requirement where the minutes delineated the issues that arose with the application); *AT&T Wireless, PCS, Inc. v. City Council of City of Va. Beach*, 155 F.3d 423 (4th Cir. 1998) ("The City Council's decision was reflected 'in writing' both in the condensed minutes of the March 25 meeting and in the letter from the Planning Commission describing the application, with the word 'DENIED' and the date of decision affixed."); *T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274, 1283 (11th Cir. 2013) ("to the extent that a decision must contain grounds or reasons or explanations as required by other district courts, it is sufficient if those are contained in a

[5] Reading *Omnipoint* carefully, the resolution was actually a motion made at the hearing which recited reasons from the City Ordinance to deny the request. There was a unanimous vote. This resolution or motion was the "majority consensus" and satisfied the "in writing" requirement. While the opinion differentiates the resolution from the record, the dissent makes clear that this resolution was actually in the "meeting minutes."

different written document or documents that the applicant is given or has access to").

This majority rationale comports with the determination of the Solicitor General and the FCC that the reasons can be in the written record and need not be in a separate written denial. In the instant case, they found that the minutes of the meeting contained the reasons and were sufficient for a substantial evidence review. SG Brief, p. 31.

3. District and circuit courts have routinely sifted through the record and conducted "substantial evidence" review without the need for a separate written statement of reasons for a denial.

Aside from the T-Mobile cases in the Eleventh Circuit, in every single circuit decision cited by Petitioners and Amici, including those where the court specifically found that the "in writing" requirement was not met because there was not a statement of the reasons for the decision in a separate denial letter that was not a part of the written record, the courts *all* moved forward to conduct a substantial evidence review of the record. *See, e.g.*, *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001) ("we conclude that the record contains substantial evidentiary support for the Board's denial of the permit application"); *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002) ("we conclude that the Board's denial of New Par's variance request was not

supported by substantial evidence contained in a written record"); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 726 (9th Cir. 2005) ("we affirm the district court's ruling that the Board's decision was supported by 'substantial evidence' as required by the TCA").

The fact that this did not occur in this case and its companion *City of Milton* makes these decisions completely novel. That must be the reason Petitioner and Amici chose this case to challenge the "in writing" requirement. It 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 and did not perform or attempt to perform a substantial evidence review based on the written record before it. The finding that reasons could not be determined from the record in *City of Roswell* (Pet. App. 30a) is shown to be incorrect by the Solicitor General's ability to readily discern that a majority of the Council stated that aesthetic incompatibility with the surrounding area was the basis for the denial. SG Brief, pp. 30-31. This highlights not only the glaring error by the district court, but also the frailty of Petitioner's position which is predicated on the alleged inability of courts to decipher the "reasons" without a separate written denial stating them for the court. Based on these errors, the case should be remanded back to the court for a review on the merits, as directed in the Eleventh Circuit opinion.

4. The stated need for a majority rationale or consensus on the reasons is not part of the question presented and would conflict with the need to limit intrusion on the operation of local government.

Petitioner and Amici further decree that the reasons needed must be the consensus of the majority of the council. They argue that because it is much too difficult to determine the "majority rationale" from the written record alone, a separate written denial with reasons is necessary. As a corollary, they contend that without this consensus it is impossible for the court to conduct a "substantial evidence" review. Already flawed in logic given the ability of all other courts to perform the review based on the written record, the additional problems generated by this inflexible stance taken by the district court, Respondent and Amici presupposes two erroneous theories. One, that there must be a majority "consensus" for such a review; and two, that a motion on which the majority votes and agrees cannot be equated to a majority "consensus" by virtue of a unanimous vote.

As pointed out by the Solicitor General and the circuit court, incorporating the standard of "substantial evidence review" mandates reasons. Unlike Petitioner and Amici, the Solicitor General and FCC, along with the majority of the other circuit courts, agree that these reasons can be in the written record. However, a need for "reasons" does not equal a "majority rationale" specifically stating those reasons or

that such a consensus is necessary to meet the substantial evidence review standard. "If each member of a council majority gives a different reason for voting to deny an application, but each reason is permissible and supported by substantial evidence in the record, that combination of rationales would likely be a proper basis for upholding the local government's decision." SG Brief, n. 6, pp. 31-32.

To support this reasoning, the Solicitor General cites to cases wherein panels in administrative agencies did not have a "majority rationale," for the decision. *See, e.g., United States Steel Grp. v. United States*, 96 F.3d 1352, 1361 (Fed. Cir. 1996) (concluding that commissioners of the International Trade Commission were permitted to engage in different reasoning to reach the same conclusion); *NLRB v. American Can Co.*, 658 F.2d 746, 753 (10th Cir. 1981) (stating that "there is no decision which holds that the lack of a majority rationale renders the Board's orders unenforceable"). It necessarily follows that if administrative agencies are not required to have a "majority rationale" it would be illogical and problematic to impose such a requirement on a local governing board of lay people who are not judges or experts in their fields. Congress could never have intended and this Court should not impose standards for local governments that specialized agencies are not even required to meet.

Taking that a step further and incorporating the way local governments work, it could also mean that when a motion is made with reasons and a majority

affirms same, it is adopting the reasons in said motion – when there is no evidence to the contrary. Indeed, lacking a need for a majority consensus, it is a reasonable interpretation of such a vote and the simplest, most efficient and logical way for a local government to provide reasons. Otherwise, each council member would be forced to offer the equivalent of concurring opinions found in appellate courts. The facts of *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606 (6th Cir. 2004), certainly support this reasoning.

Thus, even if incorporating a necessity of reasons with substantial evidence review, Congress was still expressly preserving the authority and zoning processes of local governments. Congress could not have intended the imposition of a "majority rationale," or even worse exacted reasons from each and every legislator to confirm same or support a review. In Petitioner's leading case, *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001), the court "**stress[ed]** that a meaningful review of the decision is not limited . . . only to the facts specifically offered in the written decision. [As] such a requirement would place an unjustified premium on the ability of a lay board to write a decision." *Todd* recognized that at the end of the day, the district court must sift carefully through the record to determine if there are additional facts supporting the denial by the local government, taking away from the espoused critical importance of the majority consensus and rationale for the decisions.

In addition, in *SEC v. Chenery Corp.,* 318 U.S. 80, 94 (1943), quoted repeatedly by Petitioner and Amici, this Court found that "had the Commission . . . promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different. [The] SEC had not promulgated general standards of conduct in this situation. . . . [C]ourts cannot exercise their duty of review unless they are advised of the **considerations** underlying the action under review. The process of review requires that the **grounds upon which the administrative agency acted** be clearly disclosed and adequately sustained. . . . We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." Nowhere does this language mandate a "majority consensus" and it further supports the idea that a simple Ordinance specifying what the council must consider in determining its action on a cell tower application could meet the *Chenery* requirement and allow for substantial evidence review.

The bottom line is that if the district court can glean reasons for the denial from the statements of the council members or a motion with reasons such as the one made by Councilmember Price in this case, or even a city ordinance that sets forth the factors (reasons) to be considered by the Council, the district

court should be able and routinely does perform a review of the record (regardless of its size)[6] to determine whether there is substantial evidence to support a denial. Given that the reasons could be found in the record, the circuit court was correct in reversing the district court and remanding the case for a review on the merits.

C. Requiring Reasons for a Denial Outside of the Written Record Will Place Local Governments in the Untenable Position of Having to Issue Findings of Fact and Conclusions of Law.

If this Court holds that the "in writing" requirement can only be satisfied by a separate written denial that sets forth the reasons for denial with sufficient clarity to enable meaningful judicial review as demanded by Petitioner, it will force local governments to the same playing field as administrative agencies

[6] Petitioner's arguments regarding the size of the record are merely a red herring. The size of the record herein (750 pages) is substantially less than many records courts must deal with on a daily basis. Furthermore, the district court herein shows that the fastest and easiest route (and indeed probably the only one performed by the lower court) is to look to the transcript of the hearing which will no doubt include the evidence presented, statements of council members if any, and any specific motion setting forth reasons and the actual vote. In this case the transcript was 108 pages. A quick perusal of the pages preceding the actual vote to find reasons would not unnecessarily burden the judiciary or delay decisions on the merits. A review of the minutes (10 pages) would be even shorter.

and necessitate that they issue the equivalent of findings of fact and conclusions of law to support a denial of a permit. No other circuit court has been willing to even entertain such a finding.

> The requirement of formal findings of fact and conclusions of law has no basis in the language of the Act. Section 332(c)(7)(B)(iii) merely requires a written decision, in contrast to the Administrative Procedures Act and other sections of the TCA that explicitly require formal findings of fact and conclusions of law. *See City Council of Virginia Beach*, 155 F.3d at 429-30 (citing statutes). Furthermore, strong policy reasons counsel against reading congressional silence on this matter as permission to impose such a requirement. Passage of the TCA did not alter the reality that the local boards that administer the zoning laws are primarily staffed by laypeople. Though their decisions are now subject to review under the TCA, it is not realistic to expect highly detailed findings of fact and conclusions of law. In the absence of an express congressional directive, therefore, we find no basis for inflating "[t]he simple requirement of a 'decision . . . in writing' . . . into a requirement of a 'statement of . . . findings and *60 conclusions, and the reasons or basis thereof.'" *Id*. at 430.

Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 60 (1st Cir. 2001). *See also, Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (The Fifth Circuit, in a different zoning context, cautioned

that requiring a local zoning authority to provide judicial type findings from the record evidence shifts the function of a member of a zoning board from that of a legislator deciding the best course for the community to that of a judge adjudicating the rights of contending petitioners); *Helcher v. Dearborn County*, 595 F.3d 710 (7th Cir. 2010) (Local zoning boards typically are not populated with lawyers, much less judges, so that courts cannot expect something akin to a judicial opinion); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005) (Requiring findings of fact and conclusions of law would place an unduly heavy burden on lay zoning boards).

By adopting a requirement that the writing be "sufficient to permit meaningful judicial review," the question then becomes "How much is enough?" How is a group of 5 or 6 lay people on a council supposed to know how much and what magic language should be used? This again strains the question presented and adds new questions that have not been posed. It opens the door to a myriad of different interpretations that place the focus on the writing and not the evidence in the written record.

1. A "fair construction" would necessitate a compromise between the need for expedited review and the way local government operates.

Requiring reasons in writing in a separate denial letter sufficient to allow meaningful judicial review

again re-writes and adds to the statutory language. Worse, it changes how local lay governments do business day in and day out and seeks to make them into federal administrative bodies akin to the SEC or NLRB. As T-Mobile argues herein, and as all carriers will henceforth argue, the reasons stated will never be enough to provide for meaningful judicial review. In the instant case, the district court stated that to provide for meaningful judicial review it needed to know "what evidence the City Council [meaning each and every individual member] found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id*. at 32a. Petitioner advances this position as reasonable and necessary. If local governments are required to provide reasons at this level, findings of fact and conclusions of law are mandated. No local government comprised of elected lay people can possibly meet that level of procedural and substantive scrutiny. Even the courts imposing these standards eschew making local government go that far beyond the pale of its everyday workings.

As already shown, if the Court takes the "fair construction" of the statute and re-words the question presented as that of the Solicitor General, a written denial need not contain reasons, if reasons are contained in the written record. Thus, in accordance with the Solicitor General's argument the letter stating the application was denied and giving no reasons but directing T-Mobile to the minutes in the record that contained reasons would meet all of the requirements under 47 U.S.C. § 332(c)(7)(B)(iii).

2. The position advocated by Petitioner raises more questions than can be answered by the question presented, including consideration of the constraints of the Tenth Amendment.

Once the Solicitor General answers its own version of the question presented, it continues on to espouse that a letter of denial must be issued contemporaneously with the minutes that contain the reasons. He then takes an erroneous leap to find that because that did not occur the circuit court's order must be overturned, all the while conceding that all elements of the statute had been met with respect to a denial in writing and sufficient reasons in the record. To reach this conclusion, the Court must make a new inquiry and engraft more language and reasoning arising from the interplay between § 332(c)(7)(B) and § 332(c)(7)(B)(iii) as to the timing of appeals. The new question must incorporate: When does the timing for the thirty-day appeal of a denial begin?

If the denial letter referred to the minutes and the minutes are not final and approved until the next meeting of Council, the thirty days could and should start to run with the "final" act of the local government with respect to its denial of the application – the adoption of the minutes. *See Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606 (6th Cir. 2004) (Thirty-day time period did not begin to run until the minutes were approved at the next board

meeting.). *See also*, *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 127 (2005) (Breyer, J., concurring) ("Those adversely affected by 'final action' of a state or local government may obtain judicial review provided they file their review action within 30 days."). In this case the minutes contained the reasons and the final action was thus the adoption and approval of those minutes.

This necessitates no delay if that time, as here, was still within the 150 days set by the FCC for determination of new siting requests. That predetermined "shot clock" protects against unreasonable delay in finalizing the record. In this case, the City's minutes were approved on day 99 of that 150-day window. There was no delay. The City had a denial in writing and reasons for the denial in the written record, per the findings of the circuit court, the Solicitor General and FCC, well within the allotted time. Given same, the timing of appeal cannot and should not be the dispositive issue.

This reading once again gives deference based on the way local government operates and is a reasonable and fair construction of the statute and its constraints on local government. A denial of a new tower within 99 days cannot be touted as arbitrary or even an attempt at delay to stop deployment or timely judicial review. Clearly the City should not be penalized for trying to meet the letter of the statute with a denial in writing and the separate provision of timely reasons in minutes in the written record. This in no way hampers judicial review and the carrier is

accommodated as its appeal clock does not begin until the minutes are approved and final.

In sum, requiring written reasons will lead to the imposition of findings of fact and conclusions of law for each and every telecommunications decision that requires substantive evidence. Local government is not designed to function this way. The administrative nightmare it would create is neither authorized nor necessary to determine the merits of this case and the question presented. As is shown, the position of Petitioner and Amici create more questions than they answer. The slippery slope of those questions directed at additional requirements from the APA that could and would be imposed at the local level as litigation on this issue continues and leads inevitably to the erosion of boundaries between federal and local government. This scenario becomes too dangerous to even countenance. The simple solution, given that the City has met the stated mandates of § 332(c)(7)(B)(iii), is affirming the circuit court decision and remanding same. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), would merely require remand to provide the reasons. In *Chenery*, this Court held that "the cause should therefore be remanded to the Court of Appeals with directions to remand to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate." *Id*. To do otherwise would impose federal standards that would openly invite Tenth Amendment scrutiny.

> Imposition of any federal standard on a state or local body's legislative process, even if

"relatively modest" as the district court characterized it, has at least two substantial, detrimental effects on federalism. First, the very act of imposition, without a meaningful opportunity for a state to opt out, compromises state and local sovereignty. And second, regardless of the relative effects of the federal and local standard, the imposition of a federal standard on a local board confuses the electorate as to which governmental unit, federal or local, is to be accountable for a legislative decision made by the local board. These two effects alone threaten fundamental constitutional values. They undermine the structure which assures the division of power and thereby preserves our fundamental liberties, and they compromise the effective exercise of democratic power, that power which is reserved to the people. . . . When a congressional enactment compromises "the structural framework of dual sovereignty," the compromise, regardless of its degree, results in a fundamental defect, and "no comparative assessment of the various interests can overcome [it]." Consequently, the command that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" is categorical. . . . When a local legislative body acts under a standard imposed by the federal government, even if the federal standard is comparable in effect to state standards, a significant risk arises that the citizens of the community will not know whether the legislative act is the product of Congress or of

> their local legislature. This confusion inevitably frustrates a normal democratic response.

Petersburg Cellular Partnership v. Board of Supervisors, 205 F.3d 688, 700 (4th Cir. 2000).

This Court has already recognized that 47 U.S.C. § 332(c)(7)(B) is an attempt by Congress at "cooperative federalism" and that the statute requires that state and local governments operate under limited federal substantive and procedural standards. *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 127-128 (2005) (Breyer, J., concurring). Mandating more and more federal procedural requirements as requested by Petitioner, will make this constitutional decision inevitable. There is no need to open the Act to this query when based on the question presented the answer is a clear "yes."

3. No circuit court has allowed the issuance of an injunction based solely on a failure to comply with the "in writing" requirement because doing so would be a clear violation of the Tenth Amendment.

Irrespective of all other arguments herein, Petitioners are not entitled to the right to an immediate injunction without consideration of the substantive limitations imposed by 47 U.S.C. § 332(c)(7)(B)(iii). There is no authority upon which an injunction can

be issued for failing to meet the procedural "in writing" requirement. In every circuit court case in which an injunction has issued under this Section it has been as the result of the failure to have substantial evidence in the record to support the denial. Granting an injunction requiring a local government to issue a permit without reaching the merits would assuredly run afoul of the Tenth Amendment.

Granting an injunction when the district court erred and espoused the necessity of "findings of fact and conclusions of law" in accord with the APA would cross the line and demand Tenth Amendment scrutiny. A fair and constitutional interpretation would not require an injunction issue solely on the basis of failure to meet the "in writing" requirement or even to correctly time a denial letter with the minutes that contain the reasons. As long as decisions are not delayed, telecommunications are not hampered. Balancing these interests weighs in favor of local government as they are the only ones that have anything to lose in this dispute.

CONCLUSION

For the reasons set forth herein, Respondent City of Roswell respectfully requests that this Court affirm the holding of the circuit court remanding the case to the district court for findings on the merits.

Respectfully submitted,

RICHARD A. CAROTHERS*
REGINA BENTON REID
CAROTHERS & MITCHELL, LLC
1809 Buford Highway
Buford, Georgia 30518
(770) 932-3552
richard.carothers@carmitch.com
regina.reid@carmitch.com
**Counsel of Record*
Counsel for Respondent