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 CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* SUPPORTING PETITIONER

MICHAEL F. ALTSCHUL
BRIAN JOSEF
CTIA—THE WIRELESS ASSOCIATION®
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

MICHAEL K. KELLOGG
Counsel of Record
GREGORY G. RAPAWY
EMILY T.P. ROSEN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@khhte.com)

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INTEREST OF *AMICUS CURIAE*[1]

Amicus CTIA—The Wireless Association® ("CTIA") is an international nonprofit organization that represents the wireless communications industry.[2] CTIA's members include wireless carriers, suppliers, manufacturers, providers of data services and products, and countless other contributors to the wireless communications industry. CTIA regularly appears before the Court in cases presenting issues of importance to the wireless industry. *See*, *e.g.*, *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014); *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013); *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

CTIA has an interest in this case because the question presented will affect how well the Telecommunications Act of 1996 ("1996 Act") serves the important federal policy of encouraging rapid deployment of wireless services and networks. Expanding existing networks to meet the ever-growing demand for faster and more robust wireless services is vital to the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* represent that all parties have consented to the filing of this brief through the filing of letters granting blanket consent to the filing of *amicus* briefs.

[2] CTIA was founded in 1984 as the Cellular Telecommunications Industry Association. In 2000, CTIA merged with the Wireless Data Forum and became the Cellular Telecommunications & Internet Association. In 2004, the name was changed to CTIA—The Wireless Association®.

industry that CTIA represents and to the national economy. This case presents important issues relevant to the prompt deployment of those networks, and thus strongly implicates the interests of CTIA and its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The wireless industry is facilities-based and depends on quick and effective judicial review of local zoning decisions to meet the ever-growing consumer demand for more and better wireless services. That demand has grown tremendously in recent years. By the end of 2013, there were more than 335 million wireless subscriber connections.[3] Wireless connections outpace not only the number of wired end-users, but also the entire population of the United States.[4] In 2013, wireless subscribers transferred more than 3.2 trillion megabytes of data, used more than 2.6 trillion minutes of talk time, and transmit-

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[3] *See* CTIA, *Annual Wireless Industry Survey* ("*CTIA Survey*"), *available at* http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey (last visited July 3, 2014).

[4] *See* CTIA, *US Wireless Connections Surpass Population*, *available at* http://www.ctia.org/resource-library/facts-and-infographics/archive/more-wireless-subscriber-connections-than-us-population (last visited July 3, 2014). According to the Federal Communications Commission ("FCC"), "[i]n June 2013, there were 90 million end-user switched access lines [i.e., landlines] in service, 45 million interconnected VoIP [Voice over Internet Protocol] subscriptions, and 306 million mobile subscriptions in the United States, or 441 million retail local telephone service connections in total." FCC, Indus. Analysis & Tech. Div., Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2013*, at 1 (June 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327830A1.pdf.

ted more than 1.9 trillion text messages.[5] During the first half of 2013, 39.4% of all households in the United States relied exclusively on wireless telephones (and 65.6% of all adults ages 25-29 lived in wireless-only households).[6]

To keep pace with such explosive growth, the wireless industry in the United States invests billions of dollars every year to build or upgrade tens of thousands of wireless facilities in communities throughout the country.[7] These investments include investments in building facilities for wireless broadband. That investment is projected to increase GDP in the U.S. by as much as $100 billion in 2017 and to create up to 1.2 million net new jobs.[8]

In order to construct these tens of thousands of needed wireless facilities, a provider must obtain

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[5] *See CTIA Survey*.

[6] *See* Centers for Disease Control, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2013*, at 1, 2 (Dec. 2013), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf.

[7] *See* CTIA, *Annualized Wireless Industry Survey Results*, at 2, 12 (2014) (cumulative capital investment of nearly $400 billion in 2013), *available at* http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2; *see also id.* at 2, 11 (more than 300,000 reported commercially operational cell sites in 2013).

[8] *See* Alan Pearce, et al., *Wireless Broadband Infrastructure: A Catalyst for GDP and Job Growth 2013-2017*, at 1 (PCIA – The Wireless Infrastructure Association, Sept. 2013), *available at* http://www.pcia.com/images/IAE_Infrastructure_and_Economy_Fall_2013.PDF. Of those 1.2 million projected net new jobs, 28,000 come directly from investment in wireless broadband facilities, and the remainder come from effects on other industries. *See id.* at 25, tbl. D.

permission from a state or local government entity – usually, a zoning board or its equivalent. Often, this process is swift and routine, because local governments across the country are familiar with the need to build and modify wireless facilities and providers are experienced with the requirements in the relevant localities.

Yet, there are still too many cases of obstruction and delay. The problem in such cases is often one of incentives. While the whole community benefits from having a new facility and thus better service, usually only nearby landowners who object to the facility have enough of an incentive to communicate with their representatives or attend meetings to protest. *See Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 51 n.9 (1st Cir. 2009) (describing this "'not in my backyard'" problem).

As part of the 1996 Act, Congress gave wireless service providers a remedy for that problem. While preserving many aspects of local zoning authority, *see* 47 U.S.C. § 332(c)(7)(A), the 1996 Act imposes both procedural and substantive limits on that authority and provides for federal judicial review of local zoning decisions to ensure that the statutory requirements are honored. At issue in this case is one aspect of that federal scheme: the requirement that local zoning decisions with respect to wireless facilities "shall be in writing and supported by substantial evidence contained in a written record." *Id.* § 332(c)(7)(B)(iii).

The best reading of that statutory requirement is that it creates a duty for a local authority to incorporate in its written decisions the reasons for which it has denied the request in dispute.

First and foremost, the text and structure of § 332(c)(7)(B)(iii) support a requirement that a locality write down the reason or reasons it reached its conclusion. In particular, the requirement that the denial of a request be "in writing" must be read in the context of the requirement that it be "supported by substantial evidence contained in a written record." That language indicates Congress's intent that judicial review of local decisions take place under well-settled principles of administrative law. Those principles, in turn, require that the agency set forth the reasons that support its decision, so that a reviewing court can determine whether the reasons that the agency gave are in fact supported by substantial evidence in the record. Simply put, the reference to the "substantial evidence" standard strongly indicates that Congress understood that a local zoning authority would provide in writing the reasons necessary to permit judicial review. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., joined by Ginsburg, Souter & O'Connor, JJ., concurring) (observing that § 332(c)(7)(B)(iii) "requires local zoning boards . . . to . . . *give reasons* for denials 'in writing'") (emphasis added).

Further, this construction is also necessary in order to ensure that § 332(c)(7)(B) as a whole serves the purposes for which it was intended. In particular, § 332(c)(7) mandates expedited court review. Such quick and efficient judicial review would be undermined by the conclusion that a local authority may require reviewing courts to search through the full record in an attempt to divine the reason or reasons that motivated that entity's conclusion. Beyond that, moreover, the federal statute includes

important substantive prohibitions on local action that would be much more difficult for courts to apply if no statement of reasons were required.

Experience with the practical application of § 332(c)(7)(B) confirms that reviewing local zoning decisions without the benefit of a reasoned written decision is burdensome at best and verges on the impossible at worst. As the cases discussed below demonstrate, *see infra* pp. 18-21, courts cannot reliably review locality decisions that consist of conclusory denials supported by unhelpful meeting minutes and transcripts.

Finally, requiring written statements of reasons is likely to conserve judicial resources in another way as well: by promoting the resolution of wireless facility siting disputes without litigation.

ARGUMENT

SECTION 332(c)(7)(B)(iii) SHOULD BE READ TO REQUIRE A REASONED DECISION IN WRITING

Section 332(c)(7)(B)(iii) requires that the "decision" of a local zoning authority "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."

The best reading of this mandate is that the local authority's decision must set forth in writing the reasons for the challenged denial. That statutory requirement cannot be satisfied by a mere statement that a denial has occurred.[9] Although elaborate

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[9] The entirety of the letter denying the application in this case is as follows:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108′ mono-

findings are not necessary, the denial must provide sufficient reasons to allow judicial review as to whether those reasons are supported by substantial evidence. As T-Mobile has persuasively shown in its brief, that construction is supported by the statute's text, history, and purpose. CTIA will not repeat T-Mobile's arguments, but instead highlight a few points about the statute that deserve emphasis. CTIA will also provide the Court with some concrete examples of why this understanding of the statutory scheme is important to achieving Congress's procedural and substantive purposes.

A. The Text of § 332(c)(7)(B)(iii) Requires a Written Decision That Includes Reasons

The phrase "decision . . . in writing," in the context of a judicial or quasi-judicial body, is most naturally read to include written reasons for the decision as well as the conclusory indication of the result. If a district court rules on an issue before it from the bench, one would not ordinarily say that the court had rendered a "decision . . . in writing" merely because the court's clerk made a (written) indication of the ruling on that court's docket – like the clerk's letter here. Nor would one say that the decision was in writing because the court's (spoken) words were recorded in the (written) transcript. Instead, one would refer to the decision itself as having been made orally. A local zoning authority is acting in a

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pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number].

If you have any additional questions, please contact me at [phone number].

Pet. App. 9a (brackets in original).

quasi-judicial capacity,[10] and the same basic understanding should apply. If Congress intended to allow a one-word denial conveying only the result to satisfy the statute, it would have used a word such as "notification" or "conclusion" or "result" instead of "decision."

The Court need not rest on that understanding alone, however. In this context, that ordinary-language interpretation of the written-decision requirement is strongly buttressed 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." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) (internal quotation marks omitted). Here, § 332(c)(7)(B)(iii) requires *both* that a state or local government's denial of a request be "in writing" *and* that it be "supported by substantial evidence contained in a written record." To give both requirements meaning, the written decision must exist apart from the written record; and the natural inference is that Congress meant the decision and the record to serve distinct (though related) purposes in the process of federal judicial review. *See Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.") (internal quotation marks omitted). If, by contrast, the written-decision requirement could be met by a mere statement that the reasons for decision could be found in the record, the written-decision requirement would add nothing to the

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[10] *See, e.g.*, *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 409 (3d Cir. 1999) (describing the quasi-judicial status of a zoning board under Pennsylvania law).

statutory requirement of a "written record," and the requirement of a "decision . . . in writing" would be superfluous.

This understanding is further reinforced by the presumption that, "when Congress employs a term of art, 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." *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (internal quotation marks omitted). The phrase "substantial evidence" is such a term of art, and it has a well-understood meaning: it refers to a well-understood standard employed for many decades in judicial review of administrative action. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951) (interpreting the Administrative Procedure Act ("APA") in light of its "[r]etention of the familiar 'substantial evidence' terminology" from older cases).[11] Because "'substantial evidence' is a legal term of art, . . . presumably Congress intended the term [in § 332(c)(7)(B)(iii)] to carry the same meaning it carries in administrative law." *United States Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 255 (5th Cir. 2004). Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support

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[11] Further, because (as *Universal Camera* recognized) the phrase "substantial evidence" derives from nonstatutory pre-APA case law, it forms part of the "background of common-law adjudicatory principles" against which Congress is presumptively "understood to legislate." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (stating that this presumption applies "except when a statutory purpose to the contrary is evident" (internal quotation marks omitted)).

a conclusion." *Consolidated Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938).[12]

Applying that settled standard, incorporated in the text of § 332(c)(7), requires an agency to state the basis (or bases) for its decisions. The court must then determine whether *those stated conclusions* are supported by substantial evidence in the record. *See*, *e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The agency must make findings that support its decision, and those findings must be supported by substantial evidence.") (citing *ICC v. J-T Transp. Co.*, 368 U.S. 81, 93 (1961), *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 488-89 (1942), and *United States v. Chicago, M., St. P. & P.R.R. Co.*, 294 U.S. 499, 511 (1935), for this proposition); *see also*, *e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) (describing substantial-evidence review as testing the validity of "a record-based factual conclusion").

A court undertaking traditional review of administrative action does not scour the record so that it can attempt to surmise what the agency's reasons may have been – or what reasons might hypothetically have supported the agency's action, which in the end is the same thing. To the contrary, foundational precedent expressly forbids a reviewing court from taking that approach. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (explaining that agency "action cannot be upheld merely because findings might have been made and considerations disclosed which would justify" that action); *International Union, United Auto., Aerospace & Agric. Implement Workers*

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[12] *See also MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 725 (9th Cir. 2005) (collecting cases applying the substantial-evidence standard to § 332(c)(7)(B)(iii)).

of Am. (UAW) v. NLRB, 459 F.2d 1329, 1346 (D.C. Cir. 1972) (describing the expectation that administrative agencies "are required to give rational reasons for their decisions" as the "underlying supposition upon which the vast structure of administrative law is built").

By contrast, judicial review in which courts look at hypothetical reasons that *might have been* given (rather than actual reasons that *have been* given) is associated with the most deferential form of rational-basis review of legislative action. *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) (asking whether "there is an evil at hand for correction, and [whether] it might be thought that the particular legislative measure was a rational way to correct it"). It would be unlikely under any circumstances that Congress meant to incorporate that approach into review of quasi-judicial action under § 332(c)(7)(B)(iii), and impossible that Congress would have done so in a provision that calls explicitly for substantial-evidence review.

B. The History and Purpose of § 332(c)(7)(B)(iii) Support an Interpretation That Requires Written Reasons

The legislative history of the 1996 Act confirms – briefly, but in clear terms – that Congress meant to refer to the "traditional standard used for judicial review of agency actions" in § 332(c)(7)(B)(iii). H.R. Conf. Rep. No. 104-458, at 208 (1996) (explaining that the reference to "'substantial evidence contained in a written record'" was meant to incorporate that "traditional standard").[13] That standard, as we have

[13] Courts have relied on that statement in interpreting and applying § 332(c)(7)(B)(iii). *See*, *e.g.*, *Cellular Tel. Co. v. Town*

already explained, necessarily incorporates the requirement that agencies give reasons for their decisions – and indeed cannot be applied coherently without such a requirement.

In addition, as discussed further below, the statutory written-decision requirement can only serve the purposes that Congress meant to achieve with § 332(c)(7) if it is interpreted to include written reasons. That is so for two reasons. *First*, the text of the statute demonstrates that Congress intended to create a judicial-review process that was quick and efficient. That statutory evidence weighs heavily against a process in which wireless service providers and courts must sift through the record in an effort to infer all potential bases for a decision and the evidentiary support (if any) for each basis. *Second*, Congress also included several substantive prohibitions in § 332(c)(7) that can be effectively enforced only if courts can reliably determine the reasons behind local action.

1. Congress Intended Judicial Review Under § 332(c)(7) To Be Speedy and Efficient

Congress intended judicial review of local zoning actions to proceed with dispatch. It manifested this intent most directly by mandating that any such action be "hear[d] and decide[d] . . . on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). That provision was intended to work together with the requirement that a locality respond to a wireless siting or modification request "within a reasonable period of time

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of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999) ("In determining whether the denial was supported by substantial evidence, we must employ 'the traditional standard used for judicial review of agency actions.'").

. . . , taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii). Read together, those provisions indicate a policy of ensuring not only that wireless providers are able to build and upgrade their facilities without unreasonable local obstruction, but also that they are able to do so quickly. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (recognizing that § 332(c)(7) sought to "encourage the rapid deployment of new telecommunications technologies" by "reduc[ing] . . . the impediments imposed by local governments upon the installation of [wireless] facilities") (internal quotation marks omitted); *see also* Pub. L. No. 104-104, 110 Stat. 56, 56 (1996 Act is an "Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); H.R. Conf. Rep. No. 104-458, at 113 (purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services").

The FCC has also recognized the importance of speed to the statutory scheme. Implementing the requirement in § 332(c)(7)(B)(ii) that a state or local government respond to a wireless siting or modification request "within a reasonable period of time," the Commission issued a declaratory ruling,[14] ultimately affirmed by this Court, that a "reasonable period of time" is presumptively 90 days to process an applica-

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[14] Declaratory Ruling, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd 13994 (2009) ("*Wireless Siting Ruling*").

tion to place a new antenna on an existing tower and 150 days to process all other applications. *Wireless Siting Ruling* ¶ 32. The Commission determined that these presumptive "shot clock" time periods were necessary because "unreasonable delays in the personal wireless service facility siting application process have obstructed the provision of wireless services." *Id.* ¶ 34. It reasoned that such delays "impede the promotion of advanced services and competition that Congress deemed critical in" the 1996 Act. *Id.* ¶ 35.[15]

Courts of appeals and district courts have likewise recognized the importance of quick judicial action in implementing this statutory and regulatory scheme. For example, there has been widespread adoption among the courts of appeals and district courts of the principle that an immediate injunction ordering the issuance of the requested permits is normally the appropriate remedy for an adjudication of a violation of § 332(c)(7).[16] As the First Circuit has explained,

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[15] The presumptive deadlines in the Commission's order were upheld by the Fifth Circuit as a "permissible construction of § 332(c)(7)(B)(ii) and (v) . . . entitled to *Chevron* deference," *City of Arlington v. FCC*, 668 F.3d 229, 256 (5th Cir. 2012); this Court affirmed the application of *Chevron* deference and the judgment, 133 S. Ct. 1863, 1874-75 (2013).

[16] *See*, *e.g.*, *New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1222 (11th Cir. 2002); *Omnipoint*, 181 F.3d at 410; *Cellular Tel.*, 166 F.3d at 497; *Cincinnati Bell Wireless, LLC v. Brown Cnty.*, No. 1:04-CV-733, 2005 WL 1629824, at *5 (S.D. Ohio July 6, 2005); *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108, 120-21 (D. Mass. 2000).

> [t]he statutory requirements that the board act within "a reasonable period of time," and that the reviewing court hear and decide the action "on an expedited basis," indicate that Congress did not intend multiple rounds of decisions and litigation, in which a court rejects one reason and then gives the board the opportunity, if it chooses, to proffer another.

National Tower, 297 F.3d at 21.

The requirement that localities' written decisions identify the reasons for the denial of a request contributes to courts' ability to address these cases quickly and efficiently. A written statement of reasons enables wireless service providers to provide reviewing courts with arguments targeted to the actual reasoning of local decisions, rather than trying to rebut every possible basis for a decision that might be found in a potentially voluminous record. That is particularly important because providers will be appearing as plaintiffs and so will generally need to prepare their arguments without seeing the local authority's response.

Similarly, the burden of expedited review on the district courts will be much decreased if that review can focus on the actual reasoning of local decisions. If localities are not required to provide a written statement, much judicial time and effort will be needlessly wasted as courts comb through the record of the locality's decision-making process in an attempt to surmise what reason or reasons may have motivated the body's ultimate conclusion. That concern has been a significant motivating factor for the numerous circuits that have interpreted the written-decision requirement to include written reasons. *See*, *e.g.*, *Omnipoint Holdings, Inc. v. City of*

Southfield, 355 F.3d 601, 606 (6th Cir. 2004) ("The primary purpose of the separate writing requirement is to allow a reviewing court to focus with precision on the action that was taken and the reasons supporting such action.");[17] *see generally In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (reasoning that judicial review of agency action can be "accurate[] and efficacious[]" only where the agency "indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act"). Where, as here, expedited judicial review is an explicit goal, it is especially important for the reviewing court to be able to focus quickly on the actual reasons for the decision under expedited review.

2. Requiring Localities To Give Reasons Is Necessary To Enforce the Substantive Provisions of § 332(c)(7)(B)

In § 332(c)(7)(B), a subsection entitled "Limitations," Congress also placed several substantive restrictions on local zoning authority. Under those restrictions, regulations by local authorities "shall not unreasonably discriminate among providers of functionally equivalent services," 47 U.S.C. § 332(c)(7)(B)(i)(I);

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[17] *See also Helcher v. Dearborn Cnty.*, 595 F.3d 710, 718 (7th Cir. 2010) ("The purpose of the 'in writing' requirement is to allow for meaningful judicial review of local government actions relating to telecommunications towers."); *MetroPCS*, 400 F.3d at 722 ("If [judicial review for substantial evidence] is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record."); *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001) ("[P]ermitting local boards to issue written denials that give no reasons for a decision would frustrate meaningful judicial review, even where the written record may offer some guidance as to the board's rationale.").

"shall not prohibit or have the effect of prohibiting the provision of personal wireless services," *id.* § 332(c)(7)(B)(i)(II); and may not be "bas[ed on] the environmental effects of radio frequency emissions," so long as provider "facilities comply with [FCC] regulations concerning such emissions," *id.* § 332(c)(7)(B)(iv). A clear indication of the actual basis for local decisions is necessary to ensure that there can be an effective federal judicial remedy for violations of these substantive provisions.

The problem is that the written record supporting a locality's decision – especially if presented in a disorganized form such as the minutes of a public meeting – will frequently suggest both potentially lawful reasons for denying permission to build a facility (such as aesthetic concerns raised by a particular proposal) and unlawful reasons (such as health concerns about radio frequency emissions that are permitted by FCC standards). If there is no authoritative statement of the reasons for which permission has been denied, a reviewing court will have great difficulty determining whether the local authority properly rejected the unlawful reasons or improperly accepted them. *See Southwestern Bell*, 244 F.3d at 60 (noting the difficulties of "determining the rationale behind a [zoning] board's decision" in the face of a record that "reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board").

The district court's opinion in this case illustrates the point: the minutes and transcript of the hearing reflected that of the six Council members who voted to deny T-Mobile's application; one did not speak at all; one asked questions but gave no reasons for

his vote; one gave reasons that suggested an impermissible reason for denying the application;[18] two referred briefly to the "compatibility" of the tower with its surroundings; and one gave a relatively longer explanation of her reasons. Pet. App. 28a-29a. Faced with this record, the district court reasonably expressed frustration at the lack of any "clear articulation of the rationale of the Council as a whole for denying the application." *Id.* at 28a.[19]

C. Experience Under § 332(c)(7) Confirms the Importance of Requiring Localities To Give Written Reasons

The difficulties faced by the district court in this case in attempting to conduct judicial review under § 332(c)(7)(B) without the benefit of written reasons are echoed in the experience of other district courts who have experienced similar problems.

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[18] *See* Pet. App. 29a (discussing the comments of Commissioner Kent Ingleheart, who "expressed concern that 'other carriers apparently have sufficient coverage in this area,' . . . stated that '[i]t's not our mandate to level the field for inferior technology[,]' . . . [and] stated his view that cell towers should never be allowed in residential areas"). Had respondent based its denial of the application on the availability of coverage from other carriers, it would have violated § 332(c)(7)(B)(i)(II). *See Wireless Siting Ruling* ¶ 56.

[19] The court of appeals apparently would have permitted judicial review on the basis of the longer statement, treating it as the rationale of the entire Council. Pet. App. 15a. But there is no indication that the two reasons cited by that particular Council member (aesthetic incompatibility and adverse impact on property values) were the Council's rationale. To the contrary, only a plurality of the Council ("[t]hree of the six council members") mentioned concerns about "the tower's incompatibility with the neighborhood" and "[o]nly one . . . cited the tower's adverse impact on property values." *Id.* at 30a.

1. In *Omnipoint Communications, Inc. v. Town of LaGrange*, 658 F. Supp. 2d 539 (S.D.N.Y. 2009), the court reviewed a denial letter that "merely advised T-Mobile that its application had been denied, leaving it up to the imagination of T-Mobile (and this Court) to speculate as to why the [zoning board] chose to act as it did." *Id.* at 554. In reviewing the record, the court struggled to determine the reasons for the zoning board's actions. *See*, *e.g.*, *id.* at 556 ("[Mr. Zeidan] was against it. He did not specify why he was against it."). The court noted that most of the record consisted of comments from the public, many of which involved desires to deny the application which were explicitly unlawful under the 1996 Act. *Id.* at 554. It therefore declined to "parse [the] record and guess which of the things mentioned therein was ultimately found persuasive." *Id.*

2. In *American Towers, Inc. v. Wilson County,* No. 3:10-cv-1196, 2014 WL 28953 (M.D. Tenn. Jan. 2, 2014), the district court confronted a record that included four zoning board hearings and seven planning commission hearings on a total of four applications (two before the board, and two before the commission), over the course of nearly two years, for permission to construct a single facility. *See id.* at *1-5. The denials came in the form of "note[s] on the paper applications" that the applicant had filed, supplemented by "meeting minutes and hearing transcripts" for the entire 11-hearing process. *Id.* at *6-7. After reviewing these materials, the district court found itself unable to "discern after studying them the arguments the Zoning Board and Planning Commission relied on as opposed to the arguments those bodies found unavailing." *Id.* at *7.

3. In *Smart SMR of New York, Inc. v. Zoning Commission of Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998), the district court found a record that "reflect[ed] . . . only . . . [i]ndividual [zoning] [c]omission members' opinions," with no indication of the "[c]omission's collective reasoning." *Id.* at 57. The court noted the "burden" of "wad[ing] through the record below in an attempt to discern the [c]ommission's rationale," *id.*; it then went on to shoulder that burden in a lengthy analysis, reviewing the record in some detail and explaining that a number of the concerns raised by the individual members were in any event unlawful or unsupported by record evidence, *see id.* at 57-60.

4. In *T-Mobile South LLC v. City of Milton*, Civil Action No. 1:10-CV-1638-RWS, 2011 WL 2532920 (N.D. Ga. June 24, 2011), *on recon.*, Civil Action No. 1:10-CV-1638-RWS, 2011 WL 6817820 (N.D. Ga. Dec. 28, 2011) *rev'd and remanded*, 728 F.3d 1274 (11th Cir. 2013), the district court was faced with a situation where a city sought to defend the denial of a permit on two bases, one of which (the lack of a wind-load certification as required by ordinance) the plaintiff contended was a pretext adopted only after the fact. *See id.* at *3 & n.3. The court found itself unable to evaluate the denial for substantial evidence because the absence of written reasoning left it "unable to readily discern which motivation the City Council actually relied upon." *Id.* at *3.[20]

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[20] After remand from the Eleventh Circuit, the district court in the *City of Milton* case recently upheld the city's decisions. *See T-Mobile S. LLC v. City of Milton*, Civil Action No. 1:10-CV-1638-RWS, 2014 WL 2766092 (N.D. Ga. June 18, 2014). In doing so, the court concluded that the "comments" of two city planning commissioners and one city Council member suffi-

Cases such as these and others[21] illustrate the fundamental difficulty that will confront district courts across the country if this Court accepts respondent's view of the statute: a statutory imperative to conduct substantial-evidence review combined with a purported "decision" that does not permit such review to go forward in any recognizable or meaningful form. Congress did not intend the protections it provided for in § 332(c)(7) to be frustrated in this manner.

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ciently "suggested" a "balanc[ing] [of] the specific aesthetic concerns of the community with the purported need for additional coverage." *Id.* at *13 & n.5. Taken as a whole, its analysis gives the distinct impression of a conscientious and thorough district judge being compelled by the governing circuit-court standard to put words in the city's mouth.

[21] *See also*, *e.g.*, *Sprint Spectrum L.P. v. County of San Mateo*, No. C 08-0342 CW, 2013 WL 6326489, at *5 (N.D. Cal. Dec. 4, 2013) (denial letter "contained only one sentence explaining the Board's decision" and was internally contradictory because it "cited 'information provided by staff' as one of the evidentiary bases for the Board's decision" but "failed to acknowledge that the staff itself had recommended granting Sprint's permit request"); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 745 (C.D. Ill. 1997) (district court confronted record with conflicting evidence (including objections based on impermissible concerns) and was unable to determine county's rationale: "If the County weighed all of this conflicting evidence and found the general complaints of citizens more compelling than the findings of the County's zoning experts, then the County should have said so in a written order"); *Western PCS II Corp. v. Extraterritorial Zoning Auth. of City & Cnty. of Santa Fe*, 957 F. Supp. 1230, 1236 (D.N.M. 1997) (record before district court that "clearly indicate[d] only the rationale of one member" of the zoning authority "frustrate[s]" the ability of the "court to ascertain the rationale behind a denial so that it can determine if that denial comports with the requirements of the statute").

D. Requiring Localities To Give Written Reasons Also Promotes Efficient Dispute Resolution

Requiring localities to give written reasons for a decision to deny permission to build or modify a wireless facility will also encourage the resolution of local zoning disputes through means other than litigation. That will promote not only the specific policies of § 332(c)(7), but also general interests in judicial economy.

In particular, a local authority's articulation of reasons for rejecting a particular application submitted by a wireless provider will frequently suggest ways in which the locality's concerns can be resolved other than litigation. If so, it may well be in all parties' interests to pursue such a resolution rather than to file suit. Such a resolution may well be surer and more prompt than even expedited litigation. Moreover, whether they win or lose in court, wireless providers still have to live with the governments of the local communities in which they provide service. Providers thus have no incentive to file suit if there is a feasible alternative; and, by requiring localities to identify specific problems with applications, the statutory scheme increases the likelihood that such an alternative can be found.

In addition, the availability of a reasoned decision before a complaint must be filed will reduce uncertainty – and therefore litigation – by assisting both providers and the localities to assess the likely outcome of a challenge that is filed in court. Providers will be less likely to challenge denials for which a locality has produced a reasonable basis that has record support, and localities will be less likely to engage in protracted defenses of reasoning that

appears indefensible on its face. The rule endorsed by the Eleventh Circuit, by contrast – in which a locality can issue a conclusory denial and then wait as late as summary judgment to select reasons from a record to defend it – will breed uncertainty and litigation. This Court should reject that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL F. ALTSCHUL
BRIAN JOSEF
CTIA—THE WIRELESS ASSOCIATION®
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

MICHAEL K. KELLOGG
Counsel of Record
GREGORY G. RAPAWY
EMILY T.P. ROSEN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@khhte.com)

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