No. 13-975

In The
Supreme Court of the United States

T-MOBILE SOUTH LLC

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner T-Mobile South LLC references the Rule 29.6 Statement included in its Petition For Certiorari.

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Try as the City might, it is unable to undercut the plainly compelling need for review here. The conflict over how to construe the "in writing" requirement in 47 U.S.C. § 332(c)(7)(B)(iii) is widely acknowledged and irrefutable. The most the City can do is try is to rearrange the division of authority. Yet even that attempt fails. The City's attempts to downplay the significance of the question presented and the appropriateness of this case as a vehicle for resolving the conflict also lack merit. Finally, the City's defense of the decision below falls flat. Certiorari should be granted.

1. The City acknowledges that the Eleventh Circuit's holding conflicts with decisions from the First and Ninth Circuits. BIO 2-3, 17. At the same time, the City tries to minimize this conflict and to deny that the conflict extends beyond those circuits. Neither attempt is persuasive.

a. The City suggests that if given the chance, the First and Ninth Circuits would move towards a "middle ground" of allowing zoning authorities to satisfy the "in writing" requirement with statements in the administrative record. BIO 17. But the City offers zero evidence to support that assertion. And none exists. The First and Ninth Circuits' strict separate-writing requirements are now entrenched law in those jurisdictions. *See* Pet. 11 n.2 (citing several recent district court decisions within First Circuit finding violations of Section 332(c)(7)(B)(iii) for failure to provide reasons for denials in separate documents); *Sprint Spectrum L.P. v. County of San Mateo*, 2013 WL 6326489 *3-7 (N.D. Cal. Dec. 4, 2013) (finding violations of Act under Ninth Circuit's rule).

b. The Eleventh Circuit's holding conflicts not only with First and Ninth Circuit precedent, but also with law in the Sixth and Seventh Circuits.

The City claims that in *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 604-07 (6th Cir. 2004), the Sixth Circuit "backed down from its earlier concurrence with the First and Ninth Circuits in *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002), that a separate writing stating the denial and the reasons for the denial was required." BIO 16. But *Omnipoint* actually reaffirmed the holding in *New Par*. *See Omnipoint*, 355 F.3d at 605. The Sixth Circuit simply held in *Omnipoint* that a city council's resolution satisfied *New Par*'s separate writing requirement because it was "a writing separate from the hearing record" and it "contain[ed] the reasons for the denial as is required by *New Par*." *Omnipoint*, 355 F.3d at 606. The City's separate writing here, by contrast, provided no such reasoning.

The City also argues that the Eleventh Circuit's holding does not conflict with *Helcher v. Dearborn County*, 595 F.3d 710, 721 (7th Cir. 2010), because the Seventh Circuit there held that minutes from a zoning board's hearing satisfied Section 332(c)(7)(B)(iii)'s "in writing" requirement. BIO 15-16. Not so. The Seventh Circuit in *Helcher* explicitly stated that it was joining the First, Sixth, and Ninth Circuits. 595 F.3d at 719. The Eleventh Circuit, in contrast, said it "rejected" the law in those circuits. Pet. App. 14a. To the extent that *Helcher* diverges from the strict requirements in the First, Sixth, and Ninth Circuits that reasons for denials be provided in documents separate from the hearing record, *see* Pet. 10-11 & n.1; 595 F.3d at 719, the Seventh Circuit's holding still

conflicts with Eleventh Circuit's here. In *Helcher*, the Seventh Circuit insisted that a written decision "contain[] a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," 595 F.3d at 719, and held that the minutes there satisfied that requirement because they "cite[d] the specific provisions of the Ordinance that *the majority* of the voting members found were not met by the application," *id.* at 722 (emphasis added). Here, by contrast, the minutes merely list various concerns that councilmember Price and others expressed before Price made her motion to deny the application, Pet. App. 15a, leaving it unclear which of those reasons were the basis for the motion – and which, if any, garnered the support of a majority of the councilmembers who voted for it. *See* Pet. 19-21.

2. None of the City's attempts to downplay the significance of the question presented withstands scrutiny.

a. The City suggests the question presented will soon wane in importance because "local jurisdictions will see fewer requests for these larger cellular towers as technology continues its progression." BIO 18. But the City provides no support for this assertion. That is because none exists. There is every expectation that cellular towers will remain a vital component of our Nation's telecommunications infrastructure for the foreseeable future. *See, e.g., Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, ¶ 2 (2013) ("The ability of wireless providers to meet" the rapidly growing demand for wireless broadband services "will

depend not only on access to spectrum, but also on the extent to which they can deploy new or improved wireless facilities or cell sites.").

At any rate, Section 332 is not limited to traditional cell towers. Any personal wireless service facility is protected by Section 332(c)(7)(B), including those on buildings and Distributed Antenna Systems. *See, e.g., Crown Castle NG East v. Town of Greenburgh*, 2014 WL 185012 (2d Cir. Jan. 17, 2014) (Summary Order) (town denial of Distributed Antenna System application violated Section 332(c)(7)(B)(iii)); *T-Mobile Northeast LLC v. Borough of Leonia Zoning Bd. Of Adjustment*, 942 F. Supp. 2d 474 (D.N.J. 2013) (denial of application to install antennas on existing building violated Section 332(c)(7)(B)). Consequently, the question presented will remain important regardless of the precise types of wireless infrastructure deployed in the future.

b. The City contends that the majority's separate writing rule serves no real purpose because when municipalities fail to satisfy it, such failures can be remedied with remands to local authorities to specify the reasons for their denials of the permit applications. BIO 19-20. This is incorrect. As the district court here recognized, the proper remedy for a violation of the "in writing" requirement is "an injunction ordering issuance of a permit." Pet. App. 34a-35a (quotation marks and citation omitted). That is because one of the key purposes of Section 332(c)(7)(B) is to preclude local authorities from imposing unnecessary delays or costs upon the permitting process. *See* Pet. 5 (citing legislative history, administrative guidance, and case law to this effect). In keeping with that objective, the "in writing" requirement – in combination with the

directive that all cases challenging denials of permits be resolved "on an expedited basis," 47 U.S.C. § 332(c)(7)(B)(v) – demand that local authorities enable prompt and streamlined judicial review of their action. Allowing local authorities to obtain no-cost do-overs whenever they fail to specify reasons for denials of permits in writings separate from the administrative record would flout these statutory imperatives.

c. Finally, the City maintains that the minority rule is adequate to meet the telecommunication industry's concerns because "[t]o the extent the lower courts need the reasons or specific rationale to conduct a 'substantial evidence' review . . . the courts can simply look to the Minutes and transcripts of the hearing." BIO 19-20. But petitioner has already explained at length why such a system is inadequate and, indeed, unworkable. Pet. 18-21, 28. The City offers no response to those explanations.

3. The City asserts that this case is an unsuitable vehicle for resolving the circuit split because "the reasons for [the City Council's] denial are easily found in the Minutes and transcript of the hearing." BIO 20. Of course, the district court did not think so, noting after it pored through the administrative record that it found it "impossible . . . to discern" which of the concerns expressed in the minutes and at the hearing "commanded the support of a majority of the Council members." Pet. App. 30a. The Eleventh Circuit's view of the administrative record was less clear, but it does not matter. In at least three circuits, allowing the administrative record to provide the reasons for a permit denial violates Section 332(c)(7)(B)(iii) "[e]ven where the record reflects unmistakably the Board's

reasons for denying a permit." *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *see also* Pet. 11 (citing Sixth and Ninth Circuit law to this effect). Accordingly, this case squarely presents the issue over which the circuits are divided. And the issue is outcome-determinative. Pet. 21.

4. Apart from repeating the Eleventh Circuit's reasoning, the City advances two new arguments in defense of the holding below. Neither is convincing.

First, the City asserts that it would be improper to construe Section 332(c)(7)(B)(iii) as requiring local governments to specify reasons for denials in separate writings because the "clear intent" of the statute is "to maintain local zoning control" and the "ability [of localities] to protect their unique environs." BIO 5, 23. In fact, just the opposite is true. Congress enacted the statute in order to remove "impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005); Pet. 5-6 (citing cases and legislative history). Section 332(c)(7)(B)(iii) thus "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.* Interpreting Section 332(c)(7)(B)(iii) to allow local governments to conduct business as usual would thwart that congressional initiative.

Second, the City offers a structural argument. Pointing to other provisions of the Communications Act requiring the FCC and state regulatory agencies to provide reasons for various actions in writing, the City argues that Section 332(c)(7)(B)(iii) cannot be

construed to do the same because it lacks any such express language. BIO 25. But again, just the opposite is true. The four provisions to which the City points simply reinforce – each using slightly different verbiage – that decision makers generally need to specify their reasons for making decisions that affect the telecommunications industry. Section 332(c)(7)(B)(iii) is no different. It requires any denial of a permit to place, construct, or modify a personal wireless facility to be "in writing and supported by substantial evidence contained in a written record." The only way to construe this directive in the context of the provision's goal of facilitating expedited judicial review and limiting municipal authority is to require the denials to contain actual reasoning.

At the very most, Section 332(c)(7)(B)(iii) from the City's perspective clearly requires denials to be "in writing" but fails explicitly to state what information such writings need to transmit. But even if accurate, this characterization would simply make the "in writing" provision like others in the Communications Act, requiring a detailed statement of reasons for denial even absent explicit statutory language. For example, Section 224(f)(2) of the Act provides that an electric utility may deny access to its utility poles or conduits based on "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). Although the statute does not include any language addressing how the utility must reply or what information it must convey, the FCC's rules implementing that provision require an electric utility to produce a written explanation of its denial that "shall be specific, shall include all supporting evidence

and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards." 47 C.F.R. § 1.1403(b).

In short, requiring a party that is denying an application to explain the grounds for the denial to allow for meaningful judicial or administrative review is hardly uncommon or considered to be onerous. To the contrary, it is standard practice under the Act, regardless of exactly how the requirement is set forth in any given statutory subsection.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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