No. 03-1601

IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

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

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS AND THE AMERICAN PLANNING ASSOCIATION, AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the limits on state and local zoning and land-use authority established by 47 U.S.C. § 332(c)(7)(B) can be enforced through an action for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.

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INTEREST OF THE *AMICI CURIAE*

Amici National League of Cities, National Association of Counties, International City/County Management Association, National Conference of State Legislatures, Council of State Governments, International Municipal Lawyers Association, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1]

Amicus National Association of Telecommunications Officers and Advisors (NATOA) has represented the telecommunications needs and interests of local governments for over 20 years. NATOA advises individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

Amicus American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. With more than 34,000 members nationwide, APA has a longstanding policy interest and involvement in the federal legislative debate concerning the Telecommunications Act to ensure that communities remain empowered to make appropriate, necessary, and citizen-driven decisions about telecommunications infrastructure.

All of the *amici* have a compelling interest in the issue presented in this case: whether Congress intended that the remedy provided in 47 U.S.C. § 332(c)(7)(B)(v) for challenging wireless facility zoning or permitting decisions that allegedly violate § 332 be exclusive or whether such challenges can be brought under 42 U.S.C. § 1983. While Con-

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[1] The parties have consented to the filing of *amicus curiae* briefs in this case and have filed blanket consent letters with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

gress imposed certain federal standards on wireless facility zoning and permitting decisions, it did so in a manner that is highly deferential to state and local government review processes. For example, while Congress created a right of judicial review, it imposed the same 30-day limitations period that exists in most States. Moreover, Congress adopted the same standard of judicial review that is used by state courts reviewing local land use decisions. Section 1983 suits are fundamentally incompatible with the remedial scheme Congress created in § 332(c)(7)(B).

The court of appeals' holding that § 1983 suits nonetheless are available to challenge local wireless facility zoning and permitting decisions undermines the scheme Congress created in § 332(c)(7)(B) and will disrupt the state and local zoning review process. *Amici* accordingly submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

1. Section 332(c)(7), entitled "Preservation of local zoning authority," is designed to facilitate the rollout of wireless service in a way that is respectful of existing state and local zoning processes. Congress achieved this balance by adopting traditional state-law principles and limitations governing judicial review of zoning determinations. For example, Congress provided that a person seeking judicial review of any final action or failure to act by a state or local government must commence an action "within 30 days." 47 U.S.C. § 332(c)(7)(B)(v). This 30-day limitation is derived from the Standard State Zoning Enabling Act of 1926, which was adopted by all 50 States and remains in effect in modified form in 47 States. Most States impose a relatively short time limit on persons seeking judicial review of zoning decisions, and 30 days is the most common state-imposed limit. Congress determined that the same 30-day require-

ment should apply when a challenge to a local zoning or permitting decision is based on the federal standards of § 332(C)(7)(B).

The provision of § 332(c)(7)(B)(v) that judicial review is available for "final" actions of state or local governments parallels similar "final agency action" requirements for judicial review of zoning decisions under state law. Likewise, the requirement that zoning decisions be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. § 332(c)(7)(B)(iii), also follows typical state-law requirements governing judicial review of zoning decisions.

The Court has recognized that when a federal statute does not expressly authorize particular remedies, it is presumed that court are authorized to award any *appropriate* relief. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 73 (1992). Congress' decision to adopt the existing framework for state judicial review of zoning decisions strongly indicates that the appropriate remedies for violations of the standards of § 332(c)(7)(B) are those generally available when a court reviews a zoning decision under state law. Consistent with traditional appellate review of agency action, those remedies may include injunctive or declaratory relief setting aside or modifying the administrative decision, but not damages or attorney's fees. Indeed, most States grant local governments and municipalities immunity from damages liability for zoning decisions. Those grants of immunity should be respected under the 1996 Act's saving clause, which provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . . ." 47 U.S.C. § 152 (note).

2. Allowing suits under 42 U.S.C. § 1983 would upset the careful balance struck by Congress in the 1996 Act. If § 1983 actions are available to redress violations of the federal standards of § 332(c)(7)(B), then the 30-day limi-

tations period is ineffective, because plaintiffs would have up to four years to commence an action under § 1983. *See* 28 U.S.C. § 1658. In addition, if § 1983 actions are available private parties may obtain damages and attorney's fees awards under 42 U.S.C. § 1988, neither of which are available under § 332(c)(7)(B)(v). There is persuasive evidence that Congress did not intend to saddle local and state governments with this liability.

The practical consequences of allowing § 1983 actions could be significant. There are thousands of counties, municipalities, and townships in the United States, including many with few inhabitants, limited financial resources, and no full-time counsel. Faced with the threat of large claims for attorney's fees and damages by well-financed corporations represented by high-priced counsel, local governments may be deterred from vigorously protecting visual, aesthetic, and safety concerns. Such a result would defeat Congress' intention to allow local governments to retain "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996).

This Court's decisions point towards reversal of the court of appeals' decision in this case. Where this Court has held that § 1983 actions are available, the federal statute that creates the federal rights at issue has not expressly provided individuals with a private right of action to vindicate those rights. In contrast, where Congress has expressly provided for a private right of action in the statute that creates the federal rights at issue, this Court has held that actions under § 1983 are foreclosed. In enacting § 332(c)(7), Congress created an express private right of action that parallels the judicial review of zoning and permitting decisions that is traditionally available under state law. In these circumstances, allowing resort to § 1983 would contravene the intent of Congress.

ARGUMENT

In the Telecommunications Act of 1996, Congress imposed federal standards on local zoning authorities' "decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Substantively, Congress prohibited local zoning authorities (1) from "unreasonably discriminat[ing] among providers of functionally equivalents services" (*id.* § 332(c)(7)(B)(i)(I)); (2) from "prohibit[ing] . . . the provision of personal wireless services" (*id.* § 332(c)(7)(B)(i)(II)); and (3) from regulating the placement, construction, and modification of personal wireless service facilities based on "the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations" (*id*. § 332(c)(7)(B)(iv)). Procedurally, Congress required zoning authorities (1) to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time, . . . taking into account the nature and scope of the request" (*id*. § 332(c)(7)(B)(ii)) and (2) to ensure that decisions "deny[ing] a request . . . be in writing and supported by substantial evidence contained in a written record" (*id*. § 332(c)(7)(B)(iii)).

The 1996 Act expressly provides private parties with "a mechanism for judicial relief from zoning decisions that fail to comply with" these requirements. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996). Specifically, 47 U.S.C. § 332(c)(7)(B)(v) allows "[a]ny person adversely affected by any final action or failure to act by a State or local government . . . that is inconsistent with [the federal standards listed above], within 30 days after such action or failure to act, [to] commence an action in any court of competent jurisdiction." Congress viewed such actions as "appeal[s]" of "final" zoning and permitting decisions (H.R. Conf. Rep. No.

458, *supra*, at 209), and required courts to "hear and decide [them] on an expedited basis" (47 U.S.C. § 332(c)(7)(B)(v)).[2]

Despite Congress' decision to provide a specific avenue for private parties to seek judicial enforcement of these federal standards via § 332(c)(7)(B)(v), the court of appeals held that private parties can enforce the same federal standards under 42 U.S.C. § 1983 as well. The court ruled that § 1983 actions are cognizable (and § 1983 remedies are available) because § 332(c)(7)(B)(v)—the very "mechanism for judicial relief" (H.R. Conf. Rep. No. 458, *supra*, at 208) that Congress chose to include in the 1996 Act—"does not explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs[,]" and "grants no remedies beyond procedural rights." Pet. App. at 5a, 6a. The court further reasoned that § 332(c)(7)(B)(v)'s 30-day limitations period "imposes a burden on an aggrieved plaintiff, not a benefit" and that "[t]he only benefit to an aggrieved plaintiff is expedited judicial review," which "does nothing to remedy a TCA violation in itself." *Id.* at 8a-9a.

In so holding, the court of appeals misconstrued the scope and effect of § 332(c)(7)(B)(v), as well as Congress' intent in the 1996 Act to minimize disruption to state and local zoning decisions. As *amici* will show, the judgment below should be reversed for two reasons. *First*, examination of the text, structure, and legislative history of the Act confirms that Congress designed § 332(c)(7)(B)(v) to provide for judicial review of wireless facility zoning and permitting decisions that parallels, in terms of timing, scope, and remedies, the review that is available in nearly every State for zoning and permitting decisions. Contrary to the views of the court of

[2] The Act further allows persons who claim a local zoning authority's decision was impermissibly based on radio frequency emissions the option of petitioning the Federal Communications Commission or a court for relief. 47 U.S.C. § 332(c)(7)(B)(v).

appeals, § 332(c)(7)(B)(v) authorizes courts to order appropriate remedies, such as declaratory and injunctive relief, upon a determination that a local zoning authority's decision fell afoul of the 1996 Act's requirements. *Second*, allowing private parties to sue under § 1983, and thereby circumvent the prescribed limits on § 332(c)(7)(B)(v) actions, upsets Congress' carefully designed scheme; could have significant, negative consequences for local governments that Congress sought to avoid; and is contrary to this Court's precedents on the availability of § 1983 remedies.

I. SECTION 332(C)(7)(B)(V) PROVIDES FOR JUDICIAL REVIEW OF WIRELESS FACILITY ZONING DECISIONS THAT IS ANALOGOUS TO THE REVIEW TRADITIONALLY AVAILABLE FOR STATE AND LOCAL ZONING DECISIONS.

With § 332(c)(7)(B), Congress sought to facilitate the rollout of wireless service in a manner that is respectful of existing state and local zoning processes. Section 332(c)(7) is entitled "Preservation of local zoning authority." *See also* H.R. Conf. Rep. No. 458, *supra*, at 208 (Congress did not intend "to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decisions."). Other than the non-discrimination and procedural requirements that are set forth in § 332(c)(7)(B) and described above, Congress disavowed any intent to "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)(A); H.R. Conf. Rep. No. 458, *supra*, at 207-08 (1996 Act "preserves the authority of State and local governments over zoning and

land use matters except in the limited circumstances set forth" in § 332).[3]

A. Congress Patterned § 332(7)(B)(v) After State Review Mechanisms.

The judicial review provision of § 332(c)(7)(B)(v) reflects Congress' deferential stance toward state and local zoning processes. Strikingly, both it and § 332(c)(7)(B)(iii)'s requirement that zoning decisions be "in writing and supported by substantial evidence contained in a written record" parallel requirements contained in state enabling acts that create, and define the scope of, private parties' rights to obtain judicial review of zoning determinations in state court.

1. *Section 332(c)(7)(B)(v) follows the lead of most States and the Standard State Zoning Enabling Act in restricting the time for seeking judicial review to 30 days.*

The court of appeals characterized § 332(c)(7)(B)(v) as establishing a "short" statute of limitations for review of local zoning authority decisions. Pet. App. 5a. But Congress did not select the 30-day limitations period from thin air. Thirty-day limits have a venerable provenance in early zoning law and continue to be widely used in state zoning law review schemes.

"Statutes and ordinances prescribing the time limitations to initiate judicial review are often patterned after the Standard State Zoning Enabling Act," which was adopted in final form

[3] A House amendment to the bill would have required the FCC to issue specified siting regulations and to create a "negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries . . . to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites." H.R. Conf. Rep. No. 458, *supra*, at 207. This amendment was rejected by the conferees in favor § 332's more deferential approach to existing land use processes. *Id.*

in 1926 and published by the U.S. Department of Commerce. 8 Patrick J. Rohan, *Zoning and Land Use Controls* § 52.04[2] (2004) (footnote omitted).[4] Section 7 of the Zoning Enabling Act authorized the appointment of boards of adjustment to decide such matters as appeals from administrative orders and requests for special exceptions and variances. *See* U.S. Dep't of Commerce, A Standard State Zoning Enabling Act, *supra*, at 9-11. Section 7 provided that "[a]ny person . . . aggrieved by any decision of the board of adjustment . . . may present to a court of record a petition . . . setting forth that such decision is illegal . . . . Such petition *shall be presented to the court within 30 days after the filing of the decision in the office of the board.*" *Id*. at 11 (emphasis added).

The Zoning Enabling Act was subsequently "adopted by all 50 states and is still in effect, in modified form, in 47 states." Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History* 3, in 1 American Planning Association, *Modernizing State Planning Statutes* 3 (1996). When the American Law Institute published its Model Land Development Code, it

> "suggest[ed] 4 weeks as a reasonable time in which to commence legal proceedings to challenge the validity of orders issued by a Land Development Agency. Most states that currently provide for statutory judicial review

[4] The Act was the product of a committee of leading lawyers, engineers, and housing and planning experts, which was appointed by then Secretary of Commerce Herbert Hoover. *See* U.S. Dep't of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations (1926). The Act's principal drafter was Edward M. Bassett, an attorney who was instrumental in the creation of New York City's "pioneering zoning code in 1916." Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History* 1, in 1 American Planning Association, *Modernizing State Planning Statutes* 1 (1996).

> of local administrative zoning decisions prescribe a 30 day time period for such actions to be initiated."

Model Land Dev. Code § 9-107, at 423 (Reporters Note) (1975). *See also id.* § 9-107(1), at 422 ("The validity of an order of a Land Development Agency granting or denying development permission or an enforcement order shall not be questioned in any legal proceeding commenced more than [4 weeks] after notice of the order was given. . . ."). Even today, while "[t]he time restrictions range from 10 to 60 days, most require[e] that proceedings be commenced within 30 days of the decision in issue." 4 Kenneth H. Young, *Anderson's American Law of Zoning* § 27.24, at 572 (4th ed. 1997 & 2004 Supp.). *See, e.g.*, Del. Code Ann. Tit. 22, § 328(a) (30 days); Fla. Stat. Ann. § 120.68(2)(a) (same); N.Y. Town Law § 267-c (same); N.C. Gen. Stat. § 160A-381 (same); Pa. Stat. Ann. Tit. 53, § 11002-A (same).

2. *Section 332(c)(7)(B)(v)'s requirement that State or local government action be "final" as a condition of review accords with typical state requirements for zoning decision review.*

Similarly, Congress' decision to restrict judicial review to "final" state or local government decisions emulates state judicial review provisions. Nearly every state review scheme is identical, in that virtually all allow parties "aggrieved" or "affected" by a "final" state administrative zoning or permitting decision to challenge the decision in court. *See, e.g.*, Haw. Rev. Stat. § 91-14(a); 55 Ill. Comp. Stat. Ann. § 5/5-12012; Ky. Rev. Stat. § 100.347(1); N.H. Rev. Stat. Ann. § 677:4; N.M. Stat. Ann. § 3-21-9; Tenn. Code Ann. § 27-9-101. That Congress chose to follow the state-law model for challenges to wireless facilities zoning decisions demonstrates its intent to preserve the integrity of local zoning and permitting processes, while ensuring that private parties have an effective method of securing compliance with federal

standards through judicial actions under § 332(c)(7)(B)(v). The particular balance Congress struck in this regard was carefully considered. *See* H.R. Conf. Rep. No. 458, *supra*, at 208 (rejecting alternative that aggrieved parties must exhaust any "independent State *court* remed[ies]," in addition to obtaining "final administrative action at the State or local government level" before commencing an action under § 332(c)(7)(B)(v)) (emphasis added).

3. *Section 332(c)(7)(B)(iii)'s requirement that decisions denying requests be "in writing and supported by substantial evidence contained in a written record" replicate zoning review standards used throughout the States.*

Congress' decision to require that zoning decisions be "in writing and supported by substantial evidence contained in a written record" (47 U.S.C. § 332(c)(7)(B)(iii)) also follows typical state review mechanisms. Most States apply the same standard. *See, e.g.,* Alaska Stat. § 29.40.060(b); N.M. Stat. Ann. § 39-3-1.1(D)(2); Utah Code Ann. § 10-9-708(6); *see also Nevada Contractors v. Washoe Cty.*, 792 P.2d 31, 33 (Nev. 1990) (substantial evidence test).

The Conference Report for the 1996 Act confirms that Congress intended the "phrase 'substantial evidence contained in a written record'" to be construed as "the traditional standard used for judicial review of agency actions." H.R. Conf. Rep. No. 458, *supra*, at 208. *See also id.* at 209 (describing § 332(c)(7)(B)(v) action as an "appeal" of state or local administrative decision). As contemplated by Congress, the scope of judicial review under § 332(c)(7)(B)(v) parallels certiorari review of administrative zoning boards in state courts. *See Anderson's American Law Of Zoning*, *supra*, § 27.07, at 507 (The "writ is traditionally confined to the review by a judicial tribunal of a decision of an inferior tribunal, on the record made by the latter."). As another authority explains, "[a] challenge to a quasi-judicial deter-

mination brought by way of certiorari or appeal is similar to the appeal of a judicial decision to a higher court. The appellate court will, of course, correct any errors of law by the lower tribunal." Rohan, *Zoning & Land Use Controls*, *supra*, § 52.05[3].

Moreover, the appellate court will overturn a board's decision where it "has failed to follow procedures required by state statutes or its own prescribed procedures." *Id*. (footnote omitted). A reviewing court, however, "will not weigh the evidence but will examine the record to determine whether there is any legal or competent evidence in the record to support the decision." *Anderson's American Law Of Zoning*, *supra*, § 27.30, at 614 (footnotes omitted). As a leading authority explains:

> In the instance that the board's decision is supported by 'substantial evidence' the board will be generally upheld. . . . .[A]s a rule the courts limit their inquiry of the administrative record to ascertain that the zoning board decision was neither irrational nor clearly erroneous. It is in fact error for the trial court to amplify its review beyond such findings.

Rohan, *Zoning & Land Use Controls*, *supra*, § 52.05[2] (footnotes omitted). *See also Anderson's American Law Of Zoning*, *supra*, § 27.30, at 610-11 & n.45 ("While a court reviewing a decision of a board of adjustment may not substitute its judgment for that of the board, it will examine the record upon which the board's decision is based to determine whether the findings of the board are supported by substantial evidence.") (footnotes omitted); Model Land Development Code, § 9-110(1) & (f), at 422 (A "court may declare the order . . . invalid . . . if it determines that . . . the order is not based on findings of fact which are supported by substantial evidence.").

Likewise, the commentary to the Model Land Development Code explains, "[i]f findings of fact were made by a

prior administrative agency, the courts are not free to disregard the weight given the evidence by the agency." *Id*. at 433. *Accord Pacifica Corp v. City of Camarillo*, 149 Cal. App.3d 168, 178 (Ct. App. 1983); *Education Dev. Center, Inc. v. West Palm Beach Zoning Bd. of Apps.*, 541 So.2d 106, 108 (Fla. 1989); *Turner v. Hammond*, 310 A.2d 543, 553 (Md. 1973); *Younger v. City of Portland*, 752 P.2d 262, 263 (Or. 1988).

B. Section 332(c)(7)(B)(v) Allows Private Parties To Obtain Federal Remedies That Are Consistent With Congressional Intent.

As the foregoing discussion demonstrates, Congress provided for judicial review in § 332(c)(7)(B)(v) that mirrors the review process for zoning decisions that is widely used throughout the States. The court of appeals acknowledged that § 332(c)(7)(B)(v) "provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction." Pet. App. 6a. But the court nonetheless concluded that § 332(c)(7)(B)(v) "does not provide for any type of relief." *Id*. at 7a. In its view, "[t]he only benefit to an aggrieved plaintiff [in § 332(c)(7)(B)(v)] is expedited judicial review," which "does nothing to remedy a TCA violation in itself." *Id*. at 8a-9a. The lower court's interpretation of § 332(c)(7)(B)(v) is contrary to all indicia of congressional intent and common sense.

1. *Declaratory and injunctive relief are available in actions brought under § 332(c)(7)(B)(v).*

Contrary to the view of the court of appeals, it is of no consequence that § 332(c)(7)(B)(v) does not itemize the remedies available to private parties for a violation of federal standards. As this Court has long recognized, "[t]hat a statute does not authorize the remedy at issue 'in so many words is no more significant than the fact that it does not in terms

authorize execution to issue on a judgment.'" *Franklin v. Gwinett County Pub. Schs.*, 503 U.S. 60, 68 (1992) (quoting *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940)). Rather, there is a "traditional presumption in favor of any *appropriate relief* for violation of a federal right." *Franklin*, 503 U.S. at 73 (emphasis added). *See also* 3 W. Blackstone, *Commentaries* 23 (1783) (quoted in *Franklin*, 503 U.S. at 66) (It is "'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'")).

"[A]ppropriate relief," within the meaning of *Franklin*, includes "forms of relief traditionally available in [analogous] suits." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). Congressional intent remains the touchstone for determining what relief is "appropriate." *See Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 285 (1998) (general rule that all "appropriate relief" is available "must be reconciled with congressional purpose" of the statute); *id.* at 284 (consideration of "the statutory structure and purpose" is "pertinent . . . to [determination of] the scope of the available remedies").

Errors in state zoning decisions are typically remedied by relief setting aside or modifying the order of the lower tribunal. The Model Land Development Code states:

> "[T]he Court may, in a proceeding involving an order, affirm the decisions of the agency, set aside the order, remand the matter for further proceedings before the agency in accordance with directions contained in the opinion or order of the Court, or enter an order that might have been entered by the agency issuing the order and that the court could order the agency to issue."

Model Land Dev. Code, *supra*, § 9-111(2), at 434. *See* Standard State Zoning Enabling Act, *supra*, § 7, at 12 ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."); Rohan, *Zoning & Land Use Controls*, *supra*, § 52.05[3] ("A court will overturn a

zoning determination which is beyond the ambit of the board's legislatively prescribed powers . . ., or where the lower tribunal has failed to follow procedures required by state statutes or its own prescribed procedures.") (footnotes omitted).

Nearly every state zoning review scheme provides for the same specific remedies.[5] Given Congress' decision to pattern § 332(c)(7)(B)(v) after these state models, § 332(c)(7)(B)(v) clearly embraces these traditional remedies.

Indeed, the district court had little problem fashioning a comprehensive remedy for the violation of federal right which it found to have occurred in this case. Respondent obtained complete relief when the district court enjoined the city council "to set aside its earlier resolution denying [respondent's] application" and ordered it "to adopt a new

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[5] *See, e.g.,* Cal. Gov. Code § 65009(c)(1)(E) (authorizing suit "[t]o attack, review, set aside, void, or annul any decision" on applications for conditional use permits and variances made by a zoning board of adjustment or zoning board of appeals, "or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit"); Mich. Comp. Laws § 125.293a(3) ("the court may affirm, reverse, or modify the decision of the board of appeals"); N.Y. Town Law § 267-c(4) ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review determining all questions which may be presented for determination."); Or. Rev. Stat. § 197.850(9) ("The court may affirm, reverse or remand the order."); Pa. Stat. Ann. Tit. 53, § 11006-A(a) ("In a land use appeal, the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal."); R.I. Gen. Laws § 45-24-69(d) ("The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision. . . ."); Tex. Local Gov't Code § 211.011(f) ("The court may reverse or affirm, in whole or in part, or modify the decision that is appealed."); Wash. Rev. Code § 36.70C.140 ("The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings.").

resolution granting . . . a Conditional Use Permit" subject to "reasonable conditions." Pet. App. 14a. A federal court order that sets aside a local government's zoning determination on the ground that it violates federal law and further commands local officials to grant a conditional use permit subject to certain conditions is not merely "procedural." *Id.* at 9a (Ct. App. Op). Quite the opposite, the district court's order "remed[ies] a TCA violation in itself." *Id.* at 8a-9a.

2. *Damages and attorney's fees are not "appropriate relief" under § 332(c)(7)(B)(v) and would contravene Congress' unambiguous intent not to modify, impair, or supersede state and local immunity laws.*

Violations of § 332(c)(7)(B) occur as a result of the exercise of a quasi-judicial function. *See* Rohan, *Zoning & Land Use Controls*, *supra*, at § 52.01 (noting "the adjudicatory power to enforce [zoning] ordinances and to grant or deny, on an individual basis, permits, exceptions, nonconforming uses and variances under the ordinances"). As explained above, *see supra* pp. 11-12, "[a]ppeal and certiorari are the usual avenues of review open to a party aggrieved by the quasi-judicial decision of zoning boards." Rohan, *Zoning & Land Use Contols*, *supra*, § 52.05[1]. *See also Anderson's American Law Of Zoning*, *supra*, § 27.07, at 507 ("the writ of certiorari is probably the most common device for reviewing the decisions of administrative boards"); *id.* at 27.06, at 504 ("The courts are in apparent agreement that a decision of a legislative body is subject to review by certiorari or appeal where such decision is an administrative or quasi-judicial one."). Moreover, "[a] challenge to a quasi-judicial board determination brought by way of certiorari or appeal is similar to the appeal of a judicial decision to a higher court." Rohan, *Zoning & Land Use Controls*, *supra*, at § 52.05[3].

Just as a trial court's ruling that violates a party's rights does not give rise to damages when it is overturned on appeal,

damages are traditionally unavailable where a board of adjustment or city council has incorrectly denied a permit, special use exception or request for a variance. *See, e.g.*, *Torromeo v. Town of Fremont*, 813 A.2d 389, 392 (N.H. 2002). ("[Q]uasi-judicial . . . acts of a town ordinarily do not subject it to claims for damages. . . . [P]laintiffs are not entitled to damages, and . . . their only remedy is issuance of the erroneously-denied building permits.") (internal quotation and citation omitted). Consistent with the "American Rule," *see Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), attorney's fees generally are not recoverable either. Consequently, neither damages nor attorney's fees would constitute "appropriate relief" in actions brought under § 332(c)(7)(B)(v). *See Barnes*, 536 U.S. at 187; *Gebser*, 524 U.S. at 285.

Interpreting § 332(c)(7)(B)(v) not to allow damages and attorney's fee recoveries is also required by Section 601(c)(1) of the 1996 Act. *See* 47 U.S.C. § 152 (reprinting Section 601(c)(1) in historical and statutory notes). In that provision, Congress admonished that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided. . . ." Most States by statute grant local governments immunity from damages liability for zoning decisions.[6] If damages and fee-shifting were deemed available under § 332(c)(7)(B)(v), those "State [and] local law[s]" would, contrary to Section 601(c)(1), be "impair[ed] or supersed[ed]" by the 1996 Act in the absence of an "express[]" provision.[7]

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[6] *See, e.g.*, Ala. Code § 11-47-190; Cal. Gov. Code § 818.4; Del. Code Ann. Tit. 10, § 4011(a)(2); Idaho Code § 6-904B(3); Or. Rev. Stat. § 30.265(3)(c); S.C. Code Ann. § 15-78-60(1) & (2); Tenn. Code Ann. § 29-20-201.

[7] Any conclusion that damages and attorney's fees are appropriate relief under § 332(c)(7)(B)(V) would rest on the implausible premise that

II. INTERPRETING THE 1996 ACT TO ALLOW SUITS UNDER § 1983 WOULD UPSET CONGRESS' CAREFULLY CHOSEN ENFORCEMENT SCHEME AND RUN COUNTER TO *SEA CLAMMERS* AND ITS PROGENY.

The Ninth Circuit reasoned that actions to enforce § 332(c)(7)(B)'s requirements with respect to zoning decisions are cognizable under § 1983 because § 332(c)(7)(B)(v)'s enforcement provisions do not contain a sufficiently "comprehensive" remedial scheme to overcome the "presumption" that respondent is entitled to § 1983 remedies. Pet. App. 4a-5a. In reaching this conclusion, the Ninth Circuit lost sight of the "crucial consideration" this Court has identified for determining whether § 1983 actions are available—"what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Allowing private parties to assert claims under § 1983 to enforce federal standards for wireless zoning and permitting decisions is fundamentally incompatible with Congress' desire to preserve existing state and local zoning processes and place limits on enforcement actions brought under § 332(c)(7)(B)(v). Cases such as *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), further support the conclusion that § 1983 actions are unavailable under § 332(c)(7).

Congress—while deferring to the traditional authority of state and local governments over zoning matters—nonetheless intended to subject their decisionmaking process to the extraordinary and unprecedented prospect of damages suits and fee shifting for merely misapplying federal law. Being subject to damages suits and fee shifting would create a strong incentive for local governments to abdicate their authority over the zoning and permitting of wireless facilities. Given the continued need of wireless service providers to expand their networks and build additional towers, the liability could be substantial in comparison to typical municipal budgets. *See, infra*, pp. 21-23 (discussing budgetary consequences for local governments of damages and fee awards).

A. Section 1983 Actions Are Fundamentally Inconsistent with the Mechanism for Judicial Relief That Congress Chose To Include in 1996 Act.

As discussed *supra*, pp. 8-13, Congress patterned § 332(c)(7)(B)(v)'s review provisions after those typically available under state law as part of its effort to facilitate provision of wireless services while minimizing disruption to existing zoning processes. If the door to § 1983 actions is opened to private parties that challenge wireless zoning and permitting decisions, important limits on § 332(c)(7)(B)(v) review would be circumvented, thereby frustrating congressional intent.

1. *Plaintiffs proceeding under § 1983 could circumvent the 30-day limitations period governing actions under § 332(c)(7)(B)(v) and prevent expedited judicial review.*

A key feature of § 332(c)(7)(B)(v) review is its 30-day limitations period. *See supra* pp. 8-10 (discussing the zoning law origins of the 30-day limit). This short limitations period reduces the amount of time local governments need worry about whether a particular zoning decision will be challenged and helps bring about swifter resolution of disputes. It is particularly beneficial to local governments as they deal with the proliferation of litigation concerning the scope of § 332(c)(7)'s substantive requirements. Lower courts have recognized that the statute "fairly bristles with potential issues." *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999). As wireless networks continue to expand in terms of geographic reach and competitors, the number of disputes continue to rise. *See* Pet. 26-28 (describing explosion of § 332(c)(7) litigation).

If § 1983 actions are available, however, plaintiffs "would be freed of the short 30-day limitations period and would

instead presumably have four years to commence the action." *Nextel Partners, Inc. v. Kingston Township*, 286 F.3d 687, 695 (3d Cir. 2002) (citing 28 U.S.C. § 1658).[8] In this same vein, it should be noted that parties to a § 1983 suit, unlike those in a § 332(c)(7)(B)(v) appeal, would not be entitled to have courts "hear and decide [the] action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). The consequences would be significant. Permitting challenges to zoning decisions to be filed up to four years after the fact and dispensing with expedited review would deprive local governments of the certainty afforded by § 332(c)(7)(B)(v)'s speedier processes. Furthermore, it would delay local zoning authorities' receipt of timely, much-needed guidance from courts about how to comply with § 332(c)(7). If private parties can invoke § 1983's generous time-frame, local government decision-makers may not learn that they have a good-faith but erroneous view of § 332(c)(7) until many years, and many other similarly mistaken decisions, later.

Resulting delays in obtaining final judgments—whether from a longer limitations period or slower judicial decision-making—can harm local governments and the public. Such delays will slow the roll-out of personal wireless facilities and increase the adverse fiscal consequences that § 1983 damages and § 1988 attorney's fee liability poses to local governments.

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[8] Section 1658 provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." Last Term, this Court held that "a cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990—and therefore is governed by § 1658's 4-year statute of limitations period—if the plaintiff's claim was made possible by a post-1990 enactment." *Jones v. R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836, 1845 (2004). A § 1983 action brought to enforce rights secured by § 332(c)(7)(B) is "made possible by" § 332(c)(7)(B), a post-1990 enactment.

2. *Plaintiffs proceeding under § 1983 could subject local governments to monetary judgments and attorney's fee awards.*

Allowing private parties to bring § 1983 suits to enforce § 332(c)(7) would also allow litigants to seek monetary damages and attorney's fee awards, neither of which are available under § 332(c)(7)(B)(v). As discussed above, all available indicia of legislative intent strongly suggest that Congress affirmatively did *not* wish to saddle local governments with potential liability for damages and attorney's fees for zoning and permitting decisions. In addition to these indicia of congressional intent, it is worth considering the real-world consequences that are likely to follow from a judicial decision to expose local governments to liability for damages and attorney's fees under §§ 1983 and 1988.

There are thousands of local governments that potentially would be affected by a decision holding them liable under § 1983 for violations of zoning and permitting requirements under the 1996 Act. *See The Municipal Year Book* xi (2004) (reprinting 2002 U.S. census data regarding number of county and municipal governments). The vast majority of these jurisdictions have less than 50,000 inhabitants. *Id.* at xii-xiii. Many do not have full-time counsel or significant financial resources.

Damages and attorney's fees awarded under § 1983 would reduce the amount these local governments otherwise would spend on services for their communities, such as police and fire protection, infrastructure, and general services. Governments would pay either directly, from their general revenue, or indirectly, through increased insurance premiums or contributions to insurance alternatives, such as municipal liability pools.

A recent survey of attorney's fee awards in California civil rights cases found that federal courts awarded attorney's fees

at an average billable rate of $253.44 per hour. Michael Kao, *Calculating Lawyers Fees: Theory and Reality*, 51 U.C.L.A. L. Rev. 825, 841 (2004). Moreover, in four of the sixteen federal cases reviewed in the survey, the fee award exceeded $290,000. *Id*. at 840-41. Attorney's fees in civil rights cases can substantially exceed the monetary damages awarded to plaintiffs. *See City of Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986) (upholding fee award of $245,456 where plaintiff recovered total damages of $33,350). Substantial attorney's fees are also awarded in cases involving declaratory and injunctive relief.[9]

If anything, these figures likely understate the potential amounts involved in § 332(c)(7) disputes. Typical plaintiffs in these suits are large telecommunications companies who hire sophisticated counsel and have the resources to litigate aggressively. Even though Respondent does not fit this mold, the potential damage and fee amounts in this case are staggering. *See* Josh Cohen, *Supreme Court to Hear City's Antenna Case*, Palos Verdes Peninsula News, Oct. 1, 2004, (Respondent "told the *News* that 'based upon attorney's fees, court costs and the loss of my revenue,' the court could grant him upward of $15 million"), *available at* http://pvnews.nminews.com/articles/2004/10/01/local_news/news1.txt. *See also* Nick Green, *High Court to Rule on RVP Tower Issue*, The Daily Breeze, Sept. 29, 2004, at 1 (reporting that Respondent "said he is seeking more than $3 million").

Given their often razor-thin budgets, many local governments may conclude that visual, aesthetic, and safety

[9] To place such awards in context, police officers and sheriff's deputies had median annual base earnings of $42,270 in 2002, and firefighters approximately $36,000 during the same time period. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, (2004), *available at* http://stats.bls.gov/oco/ocos160.htm & http://stats.bls.gov/oco/ocos158.htm.

concerns are not worth fighting for in view of the threat of a damages or fee award being entered against them. Such a result would undermine Congress' intent to leave authority for local zoning decisions in the hands of state and local governments and compromise local governments' ability to protect their citizens. *Cf.* H.R. Conf. Rep. No. 458, *supra*, at 208 (expressing intent that municipalities retain "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements").

B. This Court's Precedents Further Demonstrate That § 1983 Remedies Should Not Be Engrafted Onto The 1996 Act.

The court of appeals interpreted this Court's decisions in cases such as *Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418 (1987), *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), to support its conclusion that § 1983 remedies were available. See Pet. App. 3a-12a. In fact, this Court's decisions support the opposite result. In no case where Congress expressly created a private right of action against state officials has the Court held that a § 1983 remedy is available.

Most of this Court's cases addressing whether private parties have a cause of action under § 1983 did not involve statutory schemes closely analogous to the scheme at issue here. In several cases, the Court examined statutes that created enforceable federal rights, but did not, in contrast to § 332(c)(7)(B)(v), expressly provide individuals with the means to vindicate those rights in court. In each of these cases, the Court concluded that "'the availability of administrative mechanisms to protect the plaintiff's interests' " did not defeat the plaintiff's ability to seek judicial review via § 1983. *Blessing*, 520 U.S. at 347 (quoting *Golden*

State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)).

For example, *Wright* examined an amendment to the United States Housing Act that gave petitioners, tenants living in low income housing, an enforceable right to pay rent commensurate with their income, but did not expressly provide petitioners with a cause of action to enforce the statutory limit. The court of appeals had inferred that Congress' failure to include a specific provision giving petitioners access to court while investing the Department of Housing and Urban Development with audit and budgeting authority indicated that petitioners had to rely on the Secretary to ensure compliance. *See* 479 U.S. at 428. This Court reversed, holding that provisions granting an administrator "generalized [auditing and oversight] powers [were] insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Id.* at 428.

Likewise, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990), examined the Medicaid Act, which "contain[ed] no . . . provision for private judicial or administrative enforcement" of a hospital's statutory right to reasonable and adequate reimbursement rates. Again, the Court concluded that statutory provisions granting the Secretary of Health and Human Services general budget and oversight authority and requiring States to adopt certain administrative review schemes were not "sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." *Id.* at 522. *Blessing* similarly held that provisions of Title IV-D of the Social Security Act that granted the Secretary limited powers to audit and cut federal funding, but did not provide private parties with a private cause of action, did not create a remedial scheme "comprehensive enough to close the door on § 1983 liability" for violations of rights that were secured by the statute. 520 U.S. at 348. *Accord Golden State*, 493 U.S. at 108-09 (§ 1983 action available where

National Labor Relations Board "ha[d] no authority to address conduct protected by the NLRA against governmental interference" and no provision of the NLRA authorized private suits for that purpose); *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (same).

In stark contrast to *Wright*, *Wilder*, and *Blessing* are cases such as *Sea Clammers* and *Smith v. Robinson*, 468 U.S. 992 (1984). Both examined whether § 1983 remedies remained available to plaintiffs where the statutory scheme at issue, like § 332(c)(7) of the 1996 Act, expressly provided for a right of action to enforce federally-secured rights. In both cases, this Court found § 1983 actions foreclosed. *See also Wright*, 479 U.S. at 427 ("congressional intent to supplant the § 1983 remedy" is evidenced where "the statute[] at issue . . . provide[s] for private judicial remedies").

In *Sea Clammers*, plaintiff-respondent, an association of commercial fishermen, claimed that the Environmental Protection Agency and the Army Corps of Engineers allowed defendant-petitioners to dump pollutants in violation of Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act of 1972 and caused its members to suffer $250 million in damages. *See* 453 U.S. at 5. Both "Acts contain[ed] unusually elaborate enforcement provisions" that allowed "private citizens" to "seek judicial review . . . of various particular actions by the Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants," and "citizen-suit provisions authoriz[ing] private persons to sue for injunctions," but not damages. *Id*. at 13-14 & n.24.

Looking at the statutory remedies as a whole, the Court "found it 'hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions.'" *Blessing*, 520 U.S. at 347 (quoting 453 U.S. at 200).

It "therefore concluded that the existence of these express remedies demonstrate[ed] . . . that [Congress] intended to supplant any remedy that otherwise would be available under § 1983" to enforce federal statutory claims. *Sea Clammers*, 453 U.S. at 21. As in this case, the absence of a provision expressly authorizing private parties to recover damages did not warrant a different result.

In *Smith* the Court confronted a similar issue: whether the existence of a statutory enforcement provision under the Education of the Handicapped Act (EHA) (20 U.S.C. §§ 1400 *et seq*.) precluded petitioners from seeking relief under § 1983 for a "constitutional deprivation[]" that was "virtually identical" to statutory claims redressable under the EHA. *Id.* at 1008-09. Although the EHA's judicial review provision did not state that it foreclosed § 1983 actions, the *Smith* Court nonetheless had "little difficulty concluding that Congress intended the EHA to be the exclusive avenue" for enforcement of claims "to a publicly financed special education." *Id.* at 1009. The Court's holding was based on the recognition that allowing § 1983 suits to proceed would bypass the carefully tailored statutory scheme Congress intended to ensure that children receive a free appropriate public education. *See id*. at 1011.

This case falls squarely within the *Sea Clammers*-*Smith* line of decisions. In enacting § 332(c)(7), Congress did not simply leave it to federal administrative officials to enforce its provisions. Rather, Congress expressly created a private right of action to challenge zoning decisions that violate the federal standards set forth in § 332(c)(7)(B). Congress' decision to provide in § 332(c)(7)(B) a "mechanism for judicial relief," H.R. Conf. Rep. No. 458, *supra*, at 208, that parallels, in terms of timing, scope, and remedies, the review that is available in nearly every State for zoning and

permitting decisions is conclusive evidence of its intent to foreclose resort to § 1983.[10]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[10] For the numerous reasons explained above, Congress intended that § 332(c)(7)(B)(v) provide the exclusive remedy for violations of §§ 332(c)(7)(B) (i)-(iv). There is thus no merit to the court of appeals' contention that the savings clause of the 1996 Act (Pub. L. No. 104-104, § 601, 110 Stat. 143, *reprinted in* 47 U.S.C. § 152 (note)) evidences congressional intent to preserve § 1983 remedies for violations of § 332(c)(7)(B). *See* Pet. App. 10a-12a. Recognizing the exclusivity of the § 332 remedy does not impair § 1983, as the latter remains available to redress violations of federal rights whenever Congress did not intend to foreclose its use. And as explained above at p. 17, authorizing damages actions for violations of § 332 would impair state laws denying damages liability and attorney's fees for erroneous zoning and permitting decisions.