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 FOR PETITIONERS

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QUESTION PRESENTED

The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.*, expressly preserves "the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," such as antenna towers used to provide cellular telephone service. 47 U.S.C. § 332(c)(7)(A). The Act also establishes limits on that state and local authority, requiring (among other things) that state and local decisions regulating the placement and construction of wireless service facilities not unreasonably discriminate among providers of functionally equivalent services, and not have the effect of preventing the provision of wireless telephone service. 47 U.S.C. § 332(c)(7)(B)(i). The Act requires that state and local decisions denying requests be in writing and be supported by substantial evidence. 47 U.S.C. § 332(c)(7)(B)(iii). Finally, the Act provides an express cause of action through which "[a]ny person adversely affected" by a decision alleged to violate those limits may seek judicial review, subject to a 30-day limitations period. 47 U.S.C. § 332(c)(7)(B)(v). The question presented is:

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

PARTIES TO THE PROCEEDINGS BELOW

Petitioners the City of Rancho Palos Verdes (a municipality) and the City of Rancho Palos Verdes City Council were defendants-appellees in the court of appeals. Respondent Mark J. Abrams was the plaintiff-appellant in the court of appeals. Frank Lyon, John Cartwright, Thomas Long, Craig Mueller, Theodore Paulson, Donald Vannorsdall, John McTaggart, Douglas W. Stern, Lee Byrd, Barbara Ferraro, Marilyn Lyon, and Larry Clark (individual members of the City Council and the City Planning Commission) were defendants in district court.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 354 F.3d 1094. The order and opinions of the district court (Pet. App. 13a-15a, 16a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2004. A petition for rehearing was denied on March 16, 2004 (Pet. App. 65a). A petition for a writ of certiorari was filed on May 25, 2004. The petition was granted on September 28, 2004. 125 S. Ct. 26. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act, 47 U.S.C. § 151 *et seq.*, and of 42 U.S.C. §§ 1983 and 1988, are

set forth in the Appendix to the Petition for a Writ of Certiorari, Pet. App. 66a-79a, and are reproduced as an Appendix to this Brief, App., *infra*, 1a-14a.

STATEMENT

This case concerns the effect of 47 U.S.C. § 332(c)(7), a Communications Act provision entitled "Preservation of local zoning authority." The question is whether Section 332(c)(7) subjects local governments to liability for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988 for ordinary land-use decisions found to violate the Communications Act. The Third and Seventh Circuits have answered that question in the negative, holding that the expedited judicial review provided by the Communications Act itself, in 47 U.S.C. § 332(c)(7)(B)(v), furnishes the appropriate remedy. In the decision below, the Ninth Circuit reached the opposite result, following a vacated decision of the Eleventh Circuit.

1. The Communications Act of 1934 ("Communications Act" or "Act"), 47 U.S.C. § 151 *et seq.*, "established a comprehensive system for the regulation of communication by wire and radio." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 6 (1942). In 1996, Congress amended the Act "to secure lower prices and higher quality services for * * * consumers" by "promot[ing] competition," "reduc[ing] regulation," and "encourag[ing] the rapid deployment of telecommunications technologies." Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. Of particular relevance here, the 1996 Act added 47 U.S.C. § 332(c)(7) to address the relationship between local land-use policies and the siting, construction, and modification of antenna towers used to provide cellular and other wireless telephone services. 1996 Act, § 704, 110 Stat. at 151-152.

As initially drafted, Section 332(c)(7) "would have allowed the FCC total federal preemption of state authority to regulate tower siting." *Sprint Spectrum L.P.* v. *City of*

Carmel, 361 F.3d 998, 1003 (7th Cir. 2004). Congress, however, "rejected this approach," enacting Section 332(c)(7) to establish a balance that "leaves zoning authority in the hands of state and local governments," subject to specified limits. *Ibid.*; see H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207-208 (1996) (Section 332(c)(7) "prevents [FCC] preemption * * * and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth.").

Entitled "Preservation of local zoning authority," Section 332(c)(7) states in part:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

47 U.S.C. § 332(c)(7)(A).

The next paragraph, 47 U.S.C. § 332(c)(7)(B), establishes certain limits on that authority. First, it provides that state and local "regulation of the placement, construction, and modification of personal wireless service facilities" may not "unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). Second, it declares that such regulation may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). Finally, the Act bars regulation based on the "environmental effects of radio frequency emissions" if the facilities otherwise comply with FCC rules. 47 U.S.C. § 332(c)(7)(B)(iv). Within those limits, however, States and municipalities retain "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently." H.R. Conf. Rep. No. 458, *supra*, at 208. Thus, even "if a State or local government grants a permit in a commercial district," there

is no requirement that it "also grant a permit for a competitor's 50-foot tower in a residential district." *Ibid.*

Section 332(c)(7) incorporates traditional local administrative review followed by a right to federal judicial review. It requires state and local authorities to act on requests to "place, construct, or modify" wireless service facilities "within a reasonable period of time * * * taking into account the nature and scope of such request." 47 U.S.C. § 332(c)(7)(B)(ii). Any decision denying a request must "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). The Conference Report explains that the "substantial evidence" test is "the traditional standard used for judicial review of agency actions," and that a "reasonable period of time" means "the usual period" for zoning decisions under similar circumstances. H.R. Conf. Rep. No. 458, *supra*, at 208. "It is not the intent of this provision 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 decision." *Ibid.*

Finally, to enforce those requirements, the Act provides an express federal cause of action:

> Any person adversely affected by any final action or failure to act by a State or local government * * * that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

47 U.S.C. § 332(c)(7)(B)(v). Section 332(c)(7)(B)(v) provides a "mechanism for judicial relief from zoning decisions that fail to comply with" the limits of Section 332(c)(7)(B). H.R. Conf. Rep. No. 458, *supra*, at 208. The "court to which a party appeals a decision may be the Federal district court in which the facilities are located or a State court of compe-

tent jurisdiction, at the option of the party making the appeal." *Id.* at 209.

Persons adversely affected by improper consideration of the "environmental effects of radio frequency emissions" in violation of Section 332(c)(7)(B)(iv) have an additional option: They may bring the cause of action for judicial review described above, or they may "petition the [FCC] for relief." 47 U.S.C. § 332(c)(7)(B)(v). The FCC handles such requests as petitions for declaratory judgments. *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 15 F.C.C.R. 22,821, 22,822-22,823, 22,826, ¶¶ 1, 4, 10 (2000).

2. This is the second lawsuit between respondent Mark J. Abrams and the City of Rancho Palos Verdes, California ("the City"), in connection with respondent's construction and commercial use of antenna towers in the yard of his single-family residence.[1] Respondent holds numerous FCC licenses and provides radio communication services for profit, individually and as a principal in a company called Mobile Relay Associates; he is also a licensed amateur (or "ham") radio operator. Pet. App. 2a; Certified Administrative Record ("Admin. Rec.") 434, 863. Respondent resided in the City's Del Cerro neighborhood. His property and the surrounding neighborhood are zoned for detached, single-family residences in a low-density environment.

a. Between 1989 and 1990, respondent applied for and received permission from the City's Planning Department to erect a radio antenna in the yard of his residence, solely

[1] The City of Rancho Palos Verdes, population 41,000, is located on the scenic Palos Verdes peninsula, about 23 miles from downtown Los Angeles. The Del Cerro neighborhood is near the top of a ridge about two miles from the coast, providing panoramic views of canyons, the ocean, and offshore islands from one side, and of the L.A. basin, city lights, and the San Gabriel Mountains from the other.

for amateur use. The application proposed a 30-foot antenna structure with a 10-foot retractable mast that would "extend to 40 [feet] and nest at 30 feet." Admin. Rec. 2; see *id.* at 14; Pet. App. 23a. The City's Municipal Code barred the construction of any antenna taller than 40 feet absent a minor exception permit, which respondent did not seek. See Rancho Palos Verdes Mun. Code § 17.04.050(B)(4), (8); Admin. Rec. 335. The permit approving the structure specified that the "maximum height of the structure shall not exceed 40.0 feet from grade to top of mast when in use" and that, "when not in use, [the] structure shall be lowered to 30[-foot] nesting height." Admin. Rec. 862, 921. The permit expressly prohibited commercial use. *Ibid.*

After receiving that permit, respondent submitted construction plans that described the "project" as a "30 foot * * * tower," but depicted an antenna structure with a fixed height of 52.5 feet. Admin. Rec. 50-51. Apparently unaware that the Planning Department had specified a maximum height of 40 feet and a nesting height of 30 feet, the building inspector stamped the plans as approved, *id.* at 50, and respondent erected a 52.5-foot tower. See Pet. App. 54a.[2] Notwithstanding the permit's prohibition on commercial use of the antenna structure, respondent used it to provide commercial services. *Id.* at 2a, 34a-35a. In addition, respondent, his company, and others, acquired more than 70 FCC licenses to operate on commercial frequencies from respondent's residence. Admin. Rec. 909-916.

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[2] The inspector's stamp stated that the "stamping of these plans and specifications SHALL NOT be held to permit or be an approval of the violation of any provisions of any City Ordinance or State Law." Admin. Rec. 50, 620. Consequently, there was a dispute as to whether the inspector's final approval rendered the tower lawful despite the Municipal Code's prohibition on towers taller than 40 feet absent a special use permit. See, *e.g.*, *id.* at 169-170, 307-308, 312-313, 332.

While the City was investigating suspected commercial uses of that antenna tower, respondent erected another, this time on a trailer in his yard, and extended it to a height of more than 100 feet. Admin. Rec. 867-868, 1301-1302. Respondent did not seek a permit for the new tower. Instead, he advised the City that the tower was a "mobile" antenna not covered by the Municipal Code. Although respondent later lowered the tower to 75 feet, he declined to remove or fully retract it. *Id.* at 868, 966-967. The City filed an action for declaratory and injunctive relief against respondent in Los Angeles County Superior Court on April 12, 1999, alleging that the antennae and their commercial use violated the City's zoning laws. On September 13, 1999, the Superior Court preliminarily enjoined respondent's unauthorized commercial use of the towers and required him to remove the trailer-mounted tower. C.A. E.R. 21-23.

b. After the Superior Court issued the injunction, respondent applied for a conditional use permit (or "CUP") to allow him to offer commercial radio services using the 52.5-foot antenna tower in his yard. The Staff of the City's Planning Department prepared an 18-page report assessing the impact of converting the tower to commercial use. Admin. Rec. 553-570; *id.* at 878-885. The Report recommended that the application be denied. *Id.* at 556-562. After conducting two hearings and taking written evidence, the Planning Commission adopted a resolution denying the application. Pet. App. 54a-64a. The resolution stressed the tower's "visual[] prominen[ce] within the neighborhood" and its "negative visual impacts." *Id.* at 57a, 60a-61a. The Commission found that the commercial use of such a visually prominent structure would be inconsistent with the residential purpose and character of the neighborhood, as well as the City's Antenna Development Guidelines, which encourage the placement of commercial antennae "in non-single family residential areas." *Id.* at 59a, 60a. The Commission

addressed, and found its decision consistent with, each of the Communications Act's requirements. *Id.* at 61a-63a.

Respondent appealed to the City Council. After further public hearings, the Council adopted a resolution upholding the Planning Commission. Pet. App. 34a-53a. Like the Planning Commission, the City Council concluded that the proposed commercial use was inconsistent with the neighborhood's zoning, which designated it for detached, single-family residences. That designation permits "accessory" structures, *i.e.*, structures closely linked, incidental, and subordinate to the property's use as a single-family residence. The Council found that a commercial antenna is neither incidental nor subordinate to the property's primary use as a residence. *Id.* at 43a.

The Council noted that, when the City authorized respondent to build the antenna structure, he "expressly agreed" that it "was not to exceed forty feet in height" and was "not to be used for commercial purposes." Pet. App. 39a-40a. "Notwithstanding those conditions, the antenna structure was constructed at a height of fifty-two and one-half feet," *id.* at 40a, and respondent used it for commercial purposes, *id.* at 34a-35a. "[I]t appears that one of the purposes of the existing antenna structure at its current height of fifty-two and a half feet," the Council found, "was to accommodate the commercial use[s]." *Id.* at 40a-41a.

The Council found that the tower and antenna array were "highly visible" and had adverse "visual and aesthetic impacts" on the surrounding neighborhood. Pet. App. 46a, 48a. Because of the tower's height, configuration and proximity to surrounding lots and rights-of-way, as well as the small size of respondent's lot, the Council found that the adverse visual impacts could not be addressed except by modifying the tower's height, location, or configuration. *Id.* at 38a-39a, 41a. Respondent, however, advised the Council "that he would not consider any alteration or reduction of

the height, size, configuration or location of the existing tower." *Id.* at 39a; see *id.* at 41a, 46a-47a.

The City Council noted that permitting commercial use of the tower would not, by itself, alter the tower's visual impact. But the Council found that commercial use of the 52.5-foot tower would "perpetuate [its] existing adverse visual impacts." Pet. App. 41a.[3] Echoing the Planning Commission's concerns, see *id.* at 51a, 60a, the Council also found that "the establishment of a commercial antenna of this size and scale in the *Del Cerro* neighborhood would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects," harming both "aesthetics and residential property values," *id.* at 41a. "Such proposals are likely," the Council observed, "given the neighborhood's elevation * * * and unique geographic setting." *Ibid.*

Finally, the City Council found that its decision was consistent with 47 U.S.C. § 332(c)(7). There was no discrimination among service providers because the denial rested on the tower's "adverse visual and aesthetic impacts" and respondent's refusal to mitigate those effects. Pet. App. 48a. Nor did the denial prohibit the provision of wireless services. *Ibid.* Many companies, the City noted, were providing wireless service throughout the City "from facili-

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[3] Although the Council did not elaborate on the finding of "perpetuation," it appears to reflect two concerns. First, so long as the tower was used solely to support an amateur hobby, it could be seen as a transitory structure that would be removed when the resident moved or gave up the hobby (and would be lowered when not in use). Converting it to commercial use, in contrast, would create business reliance and afford the tower greater permanence. Second, the Council appeared to be concerned that granting the permit would accord the 52.5-foot tower, which was then of questionable legality, permanent status as a lawful structure. See p. 6, n.2, *supra*; Pet. App. 24a n.5 (addressing claim that, after denying the permit, the City might require that the tower be reduced in height or removed).

ties that are not causing" such "adverse visual and aesthetic impacts." *Id.* at 49a. The City's expert "demonstrated that" respondent's "ability to transmit would be increased" by using another site that would not present the same zoning issues. *Id.* at 45a; see *id.* at 47a, 49a-50a.

3. Respondent then filed suit in United States District Court for the Central District of California, alleging that the City violated 47 U.S.C. § 332(c)(7) by denying him a conditional use permit. Invoking 47 U.S.C. § 332(c)(7)(B)(v), respondent sought an injunction requiring the City to issue a permit allowing commercial use of the tower. Respondent also sought damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988, asserting that the City had violated his rights under the Communications Act. C.A. E.R. 13-14, 18; Supp. C.A. E.R. 74-82. The district court initially stayed that action in light of the City's suit in Los Angeles Superior Court, see p. 7, *supra*, but lifted the stay after the Superior Court entered judgment for the City in May 2001.

Following trial on a stipulated administrative record, the district court ruled for respondent, holding that the City's decision was not supported by "substantial evidence" as required by 47 U.S.C. § 332(c)(7)(B)(iii). Pet. App. 16a-33a. The City's concern about the tower's visual impact, the district court held, was insufficient to justify denying the permit because the "antenna is already in existence, and thus there is no further aesthetic impact created by [respondent's] proposed use." *Id.* at 23a. The district court rejected the City's argument that permitting commercial use would contradict the "original intention of the 1990 permit" and "lead to the proliferation of more antennas," labeling the former rationale "immaterial," *id.* at 24a, and the latter "unfounded," *id.* at 25a. Other antenna applica-

tions might follow, but the City could deny permits that threaten "an increase in visual blight." *Ibid.*[4]

The district court declined to resolve respondent's claim that the City had unreasonably discriminated among providers of functionally equivalent services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I). Pet. App. 29a-30a & n.8. The court, however, rejected respondent's claim that the City had precluded the provision of wireless services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). Pet. App. 30a-32a. Other providers had successfully operated in the City consistent with municipal requirements, and there was at least one alternative site for respondent's antenna. *Id.* at 31a-32a.

The court concluded that 47 U.S.C. § 332(c)(7)(B)(v) afforded it "broad authority" to fashion "an appropriate remedy that would bring expedited relief." Pet. App. 32a. After additional briefing and argument, the court entered

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[4] The district court recognized that conversion of amateur antennae to commercial use creates the potential for abuse. Pet. App. 29a-30a. Amateur antennae are permitted under more lenient standards pursuant to an FCC decision known as "PRB-1," which requires their reasonable accommodation. See 101 FCC 2d 952, 953 (1985). Because there ordinarily is no economic incentive to build amateur antennae, they seldom present a risk of undue concentration. If amateur antennae could be readily converted to commercial use, however, those seeking to build commercial antennae in residential areas could first establish "amateur" antennae under more permissive criteria and then demand permission to convert the antennae to commercial use. (After decision in this case, another Rancho Palos Verdes property owner constructed twenty antennae across a rooftop and sought permission to put them to commercial use; that case is in litigation. *Kay* v. *City of Rancho Palos Verdes*, No. CV-02-03922 (C.D. Cal. May 15, 2003)). Here, the district court saw no evidence that respondent had obtained an amateur *radio license* with dubious intentions, Pet. App. 29a, but "acknowledge[d] th[e] potential problem" and "regulatory quandary" that conversions present. *Id.* at 29a-30a. The court declined to address the City's concern about subversion of the regulatory process, however, because it "was not stated in the record." *Id.* at 30a & n.8.

an order vacating the City's denial of respondent's application, remanding the matter to the City, and enjoining the City to grant the application subject to reasonable conditions. *Id.* at 13a-15a. The district court denied respondent's "request for damages under 42 U.S.C. § 1983" and his corresponding request for "attorney's fees under 42 U.S.C. § 1988." Pet. App. 15a. The remedies for the Communications Act violations, the court stated, "are subsumed" within the Act's review provisions, and "damages pursuant to 42 U.S.C. § 1983 are not available." Pet. App. 14a.[5]

4. Respondent appealed the district court's denial of damages and fees under 42 U.S.C. §§ 1983 and 1988, and the Ninth Circuit reversed. Pet. App. 1a-12a. The Ninth Circuit acknowledged that, under *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and its progeny, a party cannot use Section 1983 to assert the violation of a federal statute if that statute establishes a "comprehensive" remedial scheme that is incompatible with Section 1983 remedies. Pet. App. 4a. The Ninth Circuit concluded that the Communications Act, through 47 U.S.C. § 332(c)(7)(B)(v), creates a "right of action" for "expedited judicial review" of any final state or local government decision, subject to "a short statute of limitations (30 days)." Pet. App. 5a-6a. But the Ninth Circuit held that the Communications Act's remedial scheme is not sufficient to "close the door on § 1983 liability" because it "does not provide for any type of relief" and "contain[s] no remedies at all." *Id.* at 6a, 7a-8a.

The Ninth Circuit rejected the Third Circuit's decision in *Nextel Partners Inc.* v. *Kingston Township*, 286 F.3d 687 (2002), which had reached the opposite conclusion. Pet.

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[5] Following the district court's decision, the California Court of Appeal reversed the Superior Court injunction against respondent's commercial use of his antenna. *Rancho Palos Verdes* v. *Abrams*, 101 Cal. App. 4th 367, 370 (2002).

App. 8a.[6] The Ninth Circuit first faulted *Nextel*'s conclusion that the expedited cause of action for judicial review created by 47 U.S.C. § 332(c)(7)(B)(v) is "remedial." Pet. App. 8a. That provision's short limitations period, the Ninth Circuit stated, "can hardly" be considered remedial, since it "imposes a burden on an aggrieved plaintiff, not a benefit." *Ibid.* Similarly, the Ninth Circuit declared that expedited judicial review "is hollow" because it "does nothing to remedy" a Communications Act "violation in itself." *Id.* at 8a-9a. On the issue of damages, the Ninth Circuit conceded that the "lack of any damages" under Section 332(c)(7)(B)(v) could be construed as "evidence that Congress impliedly intended to foreclose damages." Pet. App. 7a. But the Ninth Circuit held that the "better justification for" that omission was "that Congress intended" for plaintiffs to obtain that relief (plus attorney's fees) by "invok[ing] § 1983." *Ibid.*

The Ninth Circuit dismissed the Third Circuit's concern that allowing Section 1983 suits under the four-year limitations period provided by 28 U.S.C. § 1658 would undermine the 30-day period imposed by 47 U.S.C. § 332(c)(7)(B)(v). Pet. App. 8a (citing *Nextel*, 286 F.3d at 695). "Congress can limit the time in which a plaintiff can file," the Ninth Circuit stated, "without inadvertently limiting the plaintiff's remedies at the same time." *Id.* at 9a.

Finally, the Ninth Circuit relied on the savings clause in Section 601(c)(1) of the 1996 Act, codified as 47 U.S.C. § 152 (note). Pet. App. 10a-11a. That provision states that the 1996 Act "shall not be construed to modify, impair, or

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[6] After argument but before the Ninth Circuit issued its decision, the Seventh Circuit held that Section 1983 and 1988 remedies are unavailable. *PrimeCo Personal Communications, L.P. (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (2003). The parties brought the Seventh Circuit's decision to the Ninth Circuit's attention, but the Ninth Circuit's opinion did not discuss it.

supersede Federal, State, or local law unless expressly so provided." *Id.* at 10a. The Ninth Circuit stated that construing rights created by the 1996 Act to be enforceable solely through that Act's review provisions would "impair" Section 1983. *Ibid.* The Ninth Circuit conceded that this Court had rejected a similar argument in *Sea Clammers*, 453 U.S. at 15-16. But the Ninth Circuit distinguished the savings clauses in *Sea Clammers* on the ground that those clauses preserved federal "rights," whereas the savings clause here preserves federal "laws." Pet. App. 11a-12a.

Accordingly, the Ninth Circuit held that "Section 1983 remedies are available" and that "the district court should award § 1983 damages" in this case. Pet. App. 12a. On March 16, 2004, the Ninth Circuit denied rehearing and rehearing en banc. *Id.* at 65a.

SUMMARY OF ARGUMENT

I. A. The Communications Act provides a comprehensive remedial scheme that, under *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and its progeny, precludes suits for damages and fees under more general remedial provisions such as 42 U.S.C. §§ 1983 and 1988.

B. Throughout the Communications Act, Congress both established legal duties and specified the means for their enforcement. When Congress amended the Communications Act in 1996 and added 47 U.S.C. 332(c)(7)—a provision entitled "Preservation of local zoning authority"—Congress adhered to that pattern. Thus, while Section 332(c)(7) imposes certain limits on state and local authority, it also provides calibrated enforcement mechanisms that carefully balance traditional state and local control over zoning and land-use with federal interests. Recognizing the importance of state and local administrative proceedings, Section 332(c)(7)(B) first provides for resolution of zoning disputes through those processes. Importantly, Section 332(c)(7)

(B)(v) then provides a carefully tailored and expedited private judicial remedy for any person "adversely affected by" a state or local government's "final action or failure to act," subject to a 30-day limitations period.

C. Enforcement under Section 1983 would be inconsistent with the specific and calibrated statutory remedy that Section 332(c)(7) provides. Permitting suit under Section 1983 would permit bypass of Section 332(c)(7)(B)(v)'s 30-day limitation period and mandatory expedition, undermining that mechanism for speedy resolution; contravening traditional state rules; and undercutting the Act's goal of "rapid deployment of new telecommunications technologies" for public benefit. Moreover, Section 1983 carries with it attorney's fees under Section 1988—relief that is notably absent from Section 332(c)(7)(B)(v) and is wholly inconsistent with Congress's goal of preserving (rather than eroding) state and local authority in this area of traditional state concern.

D. This Court has observed that the statutes in *Sea Clammers* and *Smith* v. *Robinson* "provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright* v. *Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 427 (1987). No less than the statutes in those cases, Section 332(c)(7) "provide[s] for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." While this Court will not lightly infer an intent to withhold judicial review, it should not lightly infer duplicate (and inconsistent) mechanisms for obtaining review.

E. The Ninth Circuit's holding that Section 332(c)(7)(B)(v) is not remedial—because it provides "no remedies"—cannot be squared with that provision's text and purpose, or with common sense. Congress intended Section 332(c)(7)(B)(v) to provide a mechanism for judicial relief. Further, a cause of action that does not permit the imposition of remedies would be non-justiciable; federal courts cannot

issue advisory opinions absent relief that alters the legal relationship of the parties. While Section 332(c)(7)(B)(v) does not enumerate the appropriate remedies, this Court has long presumed that such statutes empower federal courts to provide any appropriate relief.

In this context, the traditional and thus appropriate remedy for an erroneous municipal decision has long been specific relief (*e.g.*, an injunction). Federal courts hearing cases under Section 332(c)(7)(B)(v) thus have authority to award aggrieved persons precisely what they sought in the first instance—authority to construct or modify the disputed facility—by enjoining the municipality to issue the permit. Every court to have considered the matter (other than the Ninth Circuit) has agreed.

The Ninth Circuit's conclusion that Congress's *refusal* to provide for damages under Section 332(c)(7)(B)(v) evinces its intent to *permit* actions for damages and fees under Sections 1983 and 1988 defies *Sea Clammers* and its progeny. Those cases recognize that Congress's decision to limit or condition statutory remedies ordinarily precludes efforts to bypass such restrictions through Section 1983.

II. The Ninth Circuit's decision is also impossible to reconcile with traditional tools of statutory construction.

A. Courts properly presume that Congress is unlikely to intend any drastic departures from settled practice, absent an express statement to the contrary. That is particularly true with respect to legislation touching on matters of traditional state and local concern. Imposing damages and attorney's fees for otherwise ordinary errors in the administration of zoning and land-use laws is wholly contrary to longstanding traditions—traditions that Congress sought to emulate rather than overturn.

B. The text of the Communications Act forecloses the Ninth Circuit's contrary ruling. The 1996 Act's savings clause—Section 601(c)(1), 47 U.S.C. § 152 (note)—directs

that the Act "shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in" the Act itself. Reading the 1996 Act to expand Section 1983 liability into this new context would impair ubiquitous state immunity laws that otherwise shield municipalities from liability for land-use decisions.

C. As originally proposed, the 1996 Act would have vested the FCC with authority to preempt state and local zoning laws. The legislative history belies any suggestion that FCC preemption would have led to the imposition of monetary liability. It is implausible to suppose that Congress, by adopting amendments to preserve local zoning authority, intended to impose that liability.

III. Finally, the Ninth Circuit erred in interpreting the Act's savings clause, Section 601(c)(1), as "preserving" a right to bring Section 1983 suits for violations of 47 U.S.C. § 332(c)(7). In *Sea Clammers*, this Court rejected the same construction of similar savings clauses. The Ninth Circuit's reasoning—that the 1996 Act "impairs" Section 1983 unless the interests created by the 1996 Act are enforceable under Section 1983—also defies logic. There was no right to enforce 47 U.S.C. § 332(c)(7) through damages actions under Section 1983 before the 1996 Act was adopted, and there is no such right now. Congress thus did not "impair" Section 1983 in the 1996 Act; Congress merely declined to expand the claims that may be asserted under Section 1983. Indeed, the expansion of Section 1983 liability the Ninth Circuit envisioned would itself be contrary to Section 601(c)(1), as it would impair state immunity laws that otherwise shield municipalities from damages liability for ordinary (even if mistaken) land-use decisions.

ARGUMENT

The Communications Act "is a comprehensive scheme for the regulation of interstate communication." *Benati* v. *United States*, 355 U.S. 96, 104 (1957). Consistent with that

scope, the Act—in provision after provision—both establishes federal regulatory requirements and specifies the means of private and governmental enforcement. When Congress amended the Communications Act through the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, it adhered to that pattern, again establishing federal limits and specifying the means of enforcement.

Of central importance here, the 1996 Act added 47 U.S.C. § 332(c)(7)—a provision entitled "Preservation of local zoning authority." Section 332(c)(7) protects traditional state and local zoning and land-use authority in connection with the siting and construction of antenna towers and other facilities used to provide wireless telephone service. 47 U.S.C. § 332(c)(7)(A). At the same time, it imposes certain limits on that authority, proscribing, for example, unreasonable discrimination among providers of functionally equivalent services, 47 U.S.C. § 332(c)(7)(B)(i)(I), and regulations that foreclose the provision of wireless service altogether, 47 U.S.C. § 332(c)(7)(B)(i)(II); p. 3, *supra*.

Consistent with the object of preserving local zoning authority—and consistent with the pattern throughout the Act—Congress paired those federal limits with carefully calibrated mechanisms to ensure their vindication. Those mechanisms reflect and emulate traditional zoning and land-use principles that have long governed in this context. Congress required (among other things) that any decision to "deny" a request to build or modify a wireless facility "be in writing," and be "supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii); p. 4, *supra*. Importantly, Congress also provided for expedited judicial review of "final" decisions alleged to violate Section 332(c)(7)(B)'s requirements. In particular, 47 U.S.C. § 332(c)(7)(B)(v) permits any person "adversely affected" by final action or a failure to act to file an action "in any court of competent jurisdiction"; requires that "such

an action be filed within a very short period—30 days"; and "correspondingly requires the court to 'hear and decide such action on an expedited basis.'" *Nextel Partners, Inc.* v. *Kingston Township*, 286 F.3d 687, 694 (3d Cir. 2002) (quoting 47 U.S.C. § 332(c)(7)(B)(v)).

Applying *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and its progeny, the Third and Seventh Circuits have concluded that Section 332(c)(7) provides its own comprehensive remedial scheme and that, as a result, violations may not be asserted as actions for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988. *Nextel*, 286 F.3d at 694; *PrimeCo Personal Communications, L.P. (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (7th Cir. 2003). As the Third Circuit explained, the remedial mechanisms in Section 332(c)(7) are "not complicated" but are "comprehensive in the relevant sense," providing "private judicial remedies that incorporate both notable benefits and corresponding limitations." 286 F.3d at 694. Expedited review benefits plaintiffs by "provid[ing] speedy redress for violations of the Act," while the short 30-day filing deadline both echoes traditional state procedure and limits the potential harm that might result from inappropriate delay. *Id.* at 695.

"Allowing plaintiffs to assert" Communications Act claims under Section 1983, those courts held, "would upset th[e] balance" that Congress established in Section 332(c)(7). A "plaintiff would be freed of the short 30-day limitations period and would instead presumably have four years to commence the action. See 28 U.S.C. § 1658." 286 F.3d at 695. Courts "would also presumably be freed of the obligation to hear the claim on an expedited basis." *Ibid.* And, "[p]erhaps most importantly, attorney's fees would be available." *Ibid.*

In the decision below, the Ninth Circuit reached the opposite result, superimposing the heavy sanctions of 42 U.S.C. § 1983 and § 1988 over the tailored review provisions

of Section 332(c)(7)(B)(v). That result cannot be reconciled with this Court's cases or Congress's evident intent. It rests on an unfounded reading of the Communications Act—that Section 332(c)(7)(B)(v) provides "no remedies at all" and that expedited judicial review is a "hollow" promise that "does nothing to remedy" a "violation in itself." Pet. App. 8a-9a. It departs from *Sea Clammers* and its progeny. Those cases recognize that, when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." 453 U.S. at 20 (internal quotation marks omitted). Here, the Ninth Circuit treated deliberate and important limits on the remedies contemplated by Section 332(c)(7) as a reason to *permit* circumvention through Section 1983. It deemed the 30-day limitations period for seeking judicial review irrelevant because it "imposes a burden on an aggrieved plaintiff, not a benefit." Pet. App. 8a. And it treated Congress's decision to omit a damages remedy under Section 332(c)(7)(B)(v) as evidence that Congress intended to make damages and fees available under 42 U.S.C. §§ 1983, 1988. Pet. App. 7a-8a.

Ultimately, the Ninth Circuit's decision cannot be reconciled with "[t]he crucial consideration," which "is what Congress intended." *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984); *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997) ("inquiry focuses on congressional intent"). It is an ordinary principle of statutory construction that Congress is unlikely to intend radical departures from past practice absent an express indication of that intent—particularly where, as here, Congress is addressing a matter of core state and local concern. In this context, the traditional rule is that mistaken zoning decisions are remedied through judicial review and orders for equitable—*e.g.*, injunctive rather than damages—relief. Imposing the heavy sanctions of damages and attorney's fees on local governments for

every mistaken exercise of traditional zoning and land-use power would represent a radical departure from that practice and would be wholly at odds with Congress's express intent to "preserve" state and local authority in this area. Far from evincing an intent to upset and depart from traditional modes, Section 332(c)(7) demonstrates Congress's intent to emulate them. Reading the Communications Act to impose damages and fees under Section 1983, moreover, would "impair" the numerous state laws that otherwise limit municipal liability for zoning and land-use decisions. That would be contrary to Section 601(c)(1) of the 1996 Act, 47 U.S.C. § 152 (note), which precludes such impairments of state and local law except where the 1996 Act expressly provides for them.

I. The Communications Act Establishes A Comprehensive Remedial Scheme For The Enforcement Of Federal Requirements.

A. Section 1983 and 1988 Remedies Are Not Available Where Congress Has Provided A Comprehensive Remedial Scheme.

Section 1983 creates a cause of action for the violation of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States, while Section 1988 entitles successful Section 1983 plaintiffs to attorney's fees. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 & n.2 (1983). In 1980, this Court concluded that the cause of action created by Section 1983, and associated remedies under Section 1988, are available not only for violations of constitutional rights, but also for violations of certain statutory rights. *Maine* v. *Thiboutot*, 448 U.S. 1, 12-13.

Since then, this Court has clarified that, "to seek redress through § 1983 * * * a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340-341. The statute thus must textually focus on and create "rights" in the plaintiff; it is not suffi-

cient that the statute simply limit the actions or authority of the defendant. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 287 (2002); see *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'") (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)).

Moreover, the cause of action under Section 1983 is not available where Congress has provided a comprehensive remedial scheme in the federal statute allegedly violated. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20. Likewise, if "allowing § 1983 actions * * * 'would be inconsistent with Congress' carefully tailored scheme,'" relief is limited to that provided in the underlying statute. *Blessing*, 520 U.S. at 346. "[T]he crucial consideration is what Congress intended." *Smith* v. *Robinson*, 468 U.S. at 1012.

This Court has repeatedly concluded that—where Congress enacts a statute that simultaneously establishes a federal interest and provides tailored means for its vindication (such as private judicial remedies)—Congress intends enforcement through that specific and tailored procedure rather than damages actions under more general remedial statutes such as Section 1983. In *Sea Clammers*, for example, the Court found that the "elaborate" enforcement provisions of the statutes at issue there, "including the two citizen-suit provisions," 453 U.S. at 20, demonstrated that Congress "intended to supplant any remedy that otherwise would be available under § 1983," *id.* at 21.

Three years later, in *Smith* v. *Robinson*, *supra*, the Court again concluded that Congress had established an enforcement mechanism that precluded resort to Section 1983. The statute at issue there—the Education of the Handicapped Act (EHA), 84 Stat. 175, as amended, 20

U.S.C. § 1400 *et seq.*—provided "a 'carefully tailored administrative and judicial mechanism,' 468 U.S., at 1009, that included local administrative review and culminated in a right to judicial review. [468 U.S.] at 1011 (citing 20 U.S.C. §§ 1412(4), 1414(a)(5), 1415)." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990). Relying on those features, the federal courts had generally agreed that the EHA "may not be claimed as the basis for a § 1983 action." *Smith* v. *Robinson*, 468 U.S. at 1008 n.11. Invoking the same considerations, this Court concluded that constitutional equal protection claims could not be asserted through Section 1983 if the same claims could be asserted under the EHA. "Allowing a plaintiff to circumvent the EHA administrative remedies" by bringing suit under Section 1983 "would be inconsistent with Congress' carefully tailored scheme." *Id.* at 1012; see *id.* at 1011 n.14 ("[N]othing in Section 1983 requires a plaintiff to exhaust his administrative remedies before bringing a § 1983 suit.").

Likewise, in *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1978), this Court concluded that violations of Title VII's prohibition on employment discrimination cannot be asserted through 42 U.S.C. § 1985(3).[7] The Court observed that, under Title VII, "[t]he time limitations for administrative and judicial filing are controlled by express provisions of the statute," and "the Act expressly authorizes only equitable remedies." 442 U.S. at 374-375. Suit under Section 1985(3) would upset the resulting balance: "If a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law"; among

[7] Like Section 1983, 42 U.S.C. § 1985(3) originates from the Civil Rights Act of 1871, 17 Stat. 13. Like Section 1983, Section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Novotny*, 442 U.S. at 372.

other things, "[t]he short and precise time limitations of Title VII would be grossly altered." 442 U.S. at 375-376.

Those same considerations demonstrate that Congress intended Section 332(c)(7) to be enforced through the remedial scheme created by the Communications Act itself—not through actions for damages and fees under Sections 1983 and 1988. The Communications Act establishes a remedial regime that is comprehensive in every relevant respect. It repeatedly identifies both regulatory limitations and the available means of private or governmental enforcement. As in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny*, enforcement through Section 1983 is inconsistent with the tailored requirements and careful balance that Congress established—through a combination of local administrative review followed by expedited judicial review under a strict limitations period—in the Communications Act itself. As in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny*, Congress expressly "provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright* v. *Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 427 (1987). Finally, here, even more than in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny*, enforcement through the heavy sanctions of Sections 1983 and 1988 for mistaken zoning and land-use decisions cannot be reconciled with Congress's express intent to "[p]reserv[e]" "local * * * authority" in this area of traditional state and local concern.

B. The Communications Act Provides A Comprehensive Remedial Regime

No less than the statutes at issue in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny*, the Communications Act provides an extensive and comprehensive remedial regime. In provision after provision of that Act, Congress specified both the legal duty and the appropriate governmental and private remedies. See, *e.g.*, 47 U.S.C. § 202(c) (penalty for

common carriers' unjust or unreasonable discrimination in charges and practices); 47 U.S.C. § 203(e) (penalty for tariff violations); 47 U.S.C. § 205 (penalty for violation of rate orders); 47 U.S.C. §§ 206-207 (private action for damages and attorney's fees for persons injured by common carrier violations); 47 U.S.C. § 227(b)(1)(C), (3) (prohibition on certain uses of telephone, with private action for injunctive relief, actual damages, statutory damages, and treble damages in specified circumstances); 47 U.S.C. § 231 (fines and civil penalties, but no private action, for violations of internet minor-access restrictions); 47 U.S.C. § 605(e)(3) (private action for unlawful interception of communications, including injunctions, damages computed under statutory criteria, and "reasonable attorneys' fees").

When Congress amended the Communications Act in 1996, it followed the same deliberate pattern, establishing both specific requirements and the corresponding mechanisms for redress. See, *e.g.*, 47 U.S.C. § 258 (prohibiting changes to telephone service provider absent verification procedures and providing damages to the disconnected carrier "in an amount equal to all charges paid by such subscriber after such violation"); 47 U.S.C. § 274 (authorizing damages action or complaint to the Commission for violations of electronic publishing restrictions). Section 332(c)(7) is an integral part of that comprehensive remedial regime. Directed to a specific issue of federal, state, and local concern—the relationship between zoning and the development of wireless infrastructure—Section 332(c)(7) both identifies the substantive requirements of federal law (preventing state and local governments from prohibiting service altogether, for example) and specifies the means for their vindication.

Recognizing the traditional importance of state and local administrative processes, Section 332(c)(7) first provides for resolution in those proceedings. It requires state and local governments to act "on requests for authorization to place,

construct, or modify personal wireless facilities within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii); requires that any decision to "deny" such requests "be in writing," 47 U.S.C. § 332(c)(7)(B)(iii); and requires that such decisions be "supported by substantial evidence contained in a written record," *ibid.* Critically, Section 332(c)(7) then provides an express and carefully tailored expedited judicial remedy "through which a plaintiff can redress" violations of Section 332(c)(7). Pet. App. 5a-6a (citing 47 U.S.C. § 332(c)(7)(B)(v)); H.R. Conf. Rep. No. 458, *supra*, at 208 (provision is a "mechanism for judicial relief from zoning decisions that fail to comply" with federal requirements).

In particular, any person adversely affected by a state or local government's "final action or failure to act"—which "means final administrative action at the State or local government level," H.R. Conf. Rep. No. 458, *supra*, at 209—may "file an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v). Section 332(c)(7)(B)(v) also establishes careful conditions on such suits, requiring that "such an action be filed within a very short period—30 days"; and "correspondingly requir[ing] the court to 'hear and decide such action on an expedited basis.'" *Nextel*, 286 F.3d at 694-695 (quoting 47 U.S.C. § 332(c)(7)(B)(v)).

Even within Section 332(c)(7)(B)(v), Congress's careful elaboration of options is evident. While Congress provided *all* adversely affected persons with the ability to enforce Section 332(c)(7)(B)'s requirements in federal court, it provided those aggrieved by certain violations with the alternative of federal administrative enforcement followed by judicial review. In particular, Section 332(c)(7)(B)(v) authorizes "any person adversely affected by" a violation of Section 332(c)(7)(B)(iv)—which prohibits state and local regulation based on the environmental effects of radio frequency emissions—to bring an action in court *or* "petition the [FCC] for relief." The FCC handles such requests as petitions for declaratory rulings, see p. 5, *supra*,

which in turn are subject to judicial review under 47 U.S.C. § 402(b) and 28 U.S.C. § 2342. See also 47 U.S.C. § 401.

As the Court recognized in *Sea Clammers*, the presence of such an "elaborate" and detailed enforcement regime indicates that Congress "provided precisely the remedies it considered appropriate" and "supplant[ed] any remedy that otherwise would be available under § 1983." 453 U.S. at 14-15, 20-21. Cf. *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988). Here, as in *Sea Clammers*, the elaborate regime makes it clear that Congress carefully identified and elected the enforcement mechanisms it thought most suitable. Where Congress intended a particular method of enforcement—or sought to provide unusual relief such as attorney's fees—it expressly so provided in the Communications Act itself.[8]

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[8] Respondent has urged (Br. in Opp. 19-20) the Court to ignore many of these detailed provisions on the ground that they "provide for private redress in situations where *non-governmental* persons violate the statute." That plea is misplaced for two reasons. First, the cited provisions apply with equal force to government actors, including the many municipalities that operate their own local telephone companies. Second, and more important, the fact that Congress enacted provisions such as Section 332(c)(7) expressly for the purpose of limiting and providing judicial redress for certain state and local government activities is evidence of the Act's comprehensiveness. The Act contrasts sharply with the statutes at issue in *Livadas* v. *Bradshaw*, 512 U.S. 107 (1994), and *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103 (1990), where there was an "intricate scheme * * * to remedy violations by private actors" but a "complete absence of provision for relief from governmental interference." 512 U.S. at 133. Here, Congress directly addressed state and local conduct, providing limits and a calibrated mechanism for judicial redress.

C. Enforcement Through Section 1983 Would Be Inconsistent With Section 332(c)(7)(B)(v)

This Court has recognized that the general remedial mechanism of Section 1983 may not be invoked where "[a]llowing a plaintiff" to bring such an action "would be inconsistent with Congress' carefully tailored regime." *Smith* v. *Robinson*, 468 U.S. at 1011; *Blessing*, 520 U.S. at 341 (Section 1983 not available if statutory remedies are "incompatible with individual enforcement under § 1983"). Such is precisely the case here.

As the Third Circuit observed in *Nextel*, Section 332(c)(7)(B)(v) establishes a careful balance. 286 F.3d at 694. The cause of action it creates requires expedition, "provid[ing] speedy redress for violations of the Act." *Id.* at 695. In addition, it imposes a 30-day filing period. *Ibid.* That deadline ensures that affected persons seek relief quickly, consistent both with traditional zoning requirements (see p. 42, *infra*) and with Congress's intent to avoid delays that might interfere with the goal of "rapid deployment of new telecommunications technologies" for public benefit. 1996 Act, 110 Stat. at 56. Finally, the Act "makes no provision for attorney's fees." 286 F.3d at 695.

1. "Allowing plaintiffs to assert" Communications Act claims "under § 1983 would upset this balance." *Nextel*, 286 F.3d at 695. For one thing, a "plaintiff would be freed of the short 30-day limitations period" for filing suit under Section 332(c)(7)(B)(v). 286 F.3d at 695. Instead, a plaintiff would "have four years to commence" a Section 1983 action under "28 U.S.C. § 1658." 286 F.3d at 695; see *Jones* v. *R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836, 1845 (2004). A more dramatic inconsistency is difficult to imagine.

2. Allowing suit under Section 1983 would also "free[]" courts "of the obligation to hear the claim on an expedited basis." 286 F.3d at 695. The absence of mandatory expedition does not merely harm litigants who must bear losses

that accrue during delay. It harms the public interest in the "*rapid* deployment of new telecommunications technologies" that Congress sought to promote. By imposing a 30-day filing period and mandating expedited review under the Communications Act, Congress provided a mechanism for rapid and streamlined resolution of antenna siting decisions in the public interest. Replacing that mechanism with a 4-year limitations period and ordinary time frames for judicial resolution under Section 1983 would grossly undermine Congress's intent.

3. Finally, unlike Section 332(c)(7)(B)(v), which follows the presumptive "American" rule that each party must bear its own fees, Sections 1983 and 1988 make attorney's fees available to prevailing plaintiffs. That heavy sanction is in considerable tension with Section 332(c)(7)'s title and primary purpose, which is "*preservation* of local zoning authority." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section" are "tools available for the resolution of a doubt about the meaning of a statute.").

That tension is exacerbated by the nature of disputes under Section 332(c)(7). Like other Communications Act provisions, Section 332(c)(7) is highly technical and "fairly bristles with potential issues," *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999), creating ample opportunity for dispute and good-faith error.[9] The FCC,

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[9] That complexity and the resulting legal uncertainty have not been lost on the federal courts. *Sprint Spectrum L.P.* v. *Willoth*, 176 F.3d 630, 641 (2d Cir. 1999) (determining whether the service qualifies as "personal wireless service" requires "a detailed parsing of the statutory language, including layers of highly technical definitions"); *Aegerter* v. *City of Delafield*, 174 F.3d 886, 891 (7th Cir. 1999) (adopting antitrust market definitions to determine whether services are "functionally equivalent"); *Omnipoint Holdings* v. *Town of Westford*, 206 F. Supp. 2d 166, 169 (D. Mass. 2002) (noting the "difficulty of effectuating the Congressional compromise" embodied

the expert federal agency tasked with administering the Communications Act, itself is often overturned by the courts in its implementation of the Act (yet never pays damages). It is thus inevitable that local governments—particularly small, rural municipalities—will sometimes "stumble, albeit in an earnest attempt to comply with the Telecommunications Act." *City of Atlanta*, 50 F. Supp. 2d at 1361; *Nextel*, 286 F.3d at 695; *National Telecomm. Advisors* v. *City of Chicopee*, 16 F. Supp. 2d 117, 122 (D. Mass. 1998) (similar).

Because "municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983," *Leatherman* v. *TCNICU,* 507 U.S. 163, 166 (1993), permitting Section 1983 actions in this context threatens significant liability for virtually every mistake in implementing the Act's often complex requirements. The potential exposure is enormous. Each year, municipalities must address tens of thousands of applications to construct wireless facilities. Over the last decade, the number of cell towers increased

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in Section 332(c)(7)). There are disputes over the extent to which "[a]esthetic concerns may be a valid basis for denial of a permit," *Preferred Sites, LLC* v. *Troup County*, 296 F.3d 1210, 1219 (11th Cir. 2002); see *Oyster Bay*, 166 F.3d at 495; and what constitutes "regulation" of wireless facilities, *Sprint Spectrum, L.P.* v. *Mills*, 283 F.3d 404 (2d Cir. 2002). The federal courts are also grappling with whether the requirement of a "decision * * * in writing" mandates not merely a written resolution but also a written explanation for the result. See *AT&T Wireless PCS, Inc.* v. *City Council of Virginia Beach*, 155 F.3d 423, 429-430 (4th Cir. 1998); *PrimeCo PCS* v. *Village of Fox Lake*, 26 F. Supp. 2d 1052 (N.D. Ill. 1998). See also Br. Local Gov't Amici 18, 28 (noting additional uncertainties). Many similar issues arose in this litigation. Admin. Rec. 793 (whether respondent's service is "personal wireless service" covered by Section 332(c)(7)); Pet. App. 24a (whether aesthetic concerns can constitute "substantial evidence"); *id.* at 30a (whether "substantial evidence" requires rationale to appear in the written decision or merely in the record).

from 25,000 to 165,000; according to the Cellular Telephone Industry Association, more than 23,000 new cell sites were added in 2003 alone; and there is no sign the expansion will abate. T. Baldas, *Cell Towers Lead to Litigation Static*, Nat'l L.J., Aug. 2, 2004, at 1, 26; see <http://www.ctia.org/public_policy/statistics/index.cfm/AID/10030>. Under the Ninth Circuit's view, each proposal for a new or modified cell site represents a potential damages and fee award.

Section 332(c)(7) plaintiffs, moreover, "are often large corporations or affiliate[s]," while the "defendants are often small, rural municipalities" that cannot risk significant liability. *Nextel*, 286 F.3d at 695; see *Verizon Wireless*, 352 F.3d at 1152 (suits involving Section 332(c)(7) typically pit "substantial corporations, such as Verizon" against "small towns, such as Mequon, population 21,000, with a planning commission some of whose members double as aldermen."). As Judge Carnes has observed, plaintiffs like AT&T Wireless—"a seven billion dollar subsidiary of a sixty-two billion dollar multi-national corporation"—are "more than happy to serve as 'private attorneys general' to enforce the legislative measures they have lobbied through Congress, without the need for taxpayers to pay their litigation costs." *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 210 F.3d 1322, 1330 (11th Cir.) (concurring opinion), vacated on reh'g en banc, 260 F.3d 1320, dismissed on settlement, 264 F.3d 1314 (2001). Compared to the budgets of the defendant local governments, the fees incurred by such well-funded and determined plaintiffs can be staggering; a single erroneous zoning decision could cost the smallest of towns hundreds of thousands of dollars—potentially at the expense of basic governmental services. See Br. Nat'l League of Cities, *et al.*, 21-23.

The threat of such awards seriously distorts the decision-making process. Permitting suit under Section 1983 for claimed violations of 47 U.S.C. § 332(c)(7) would not threaten local governments with liability for authorizing a

facility; they would confront that risk only if they deny authorization. Smaller communities that lack sufficient resources to risk damages and attorney's fees thus by necessity may shrink from meaningfully overseeing the placement of the "often unsightly transmission towers that" otherwise "seem to sprout like weeds after a summer rain." *National Tower, LLC* v. *Frey*, 164 F. Supp. 2d 185, 187 (D. Mass. 2001), *aff'd*, 297 F.3d 14 (1st Cir. 2002). The resulting patchwork of towers, sited with little regard for legitimate zoning and planning requirements, would be wholly inconsistent with Congress's goal of preserving state and local authority. The routine imposition of damages and fees thus "stretches the Telecommunications Act too far." *Omnipoint Communications, Inc.* v. *Penn Forest Township*, 42 F. Supp. 2d 493, 507 n.16 (M.D. Pa. 1999).[10]

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[10] Permitting suit under Section 1983 is potentially inconsistent with the framework established by the Communications Act in another respect. In providing for judicial review, Section 332(c)(7) generally affords that review after state and local administrative proceedings. The Act contemplates that requests will be filed with state and local governments in the first instance and acted on "within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii); establishes requirements for such action, *e.g.*, 47 U.S.C. § 332(c)(7)(B)(iii) (requiring "substantial evidence"); and provides for judicial review of "any *final* action or failure to act," 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added); see H.R. Conf. Rep. 458, *supra*, at 208 ("final" action "means final administrative action at the State or local government level"). Requiring requests to be presented through those channels reflects traditional zoning principles and ensures that the "flexibility" provided by administrative procedures can be brought to bear. 3 Kenneth H. Young, *Anderson's American Law of Zoning* § 19.08, at 375-376 (4th ed. 1996); see 4 Young, *supra*, § 27.28, at 593-599; 3 Edward H. Zeigler, Jr., *Rathkopf's The Law of Planning and Zoning* §§ 57.1, 57.2, at 57-4 to 57-13 (1997). As respondent has observed, a "survey by the American Planning Association" shows that "92 percent of applications for cellular towers were approved by local governments, most within 60 days." Br. in Opp. 20. In *Smith v. Robinson*, this Court concluded that permitting suit under Section

4. Perhaps recognizing the inconsistency between Section 1983 and the express review mechanisms provided by the Communications Act, respondent urges that the Ninth Circuit's decision avoids such conflicts by "clearly" holding that the 30-day limitations period in Section 332(c)(7)(B)(v) applies to suits under Section 1983. Br. in Opp. 8, 11-12 & n.11, 21. But the Ninth Circuit's opinion neither says that nor justifies such a result. In any event, the theory is legally incoherent. As the Ninth Circuit and other courts have recognized, Section 332(c)(7)(B)(v) creates a cause of action, subject to a 30-day limitations period. Pet. App. 6a; *AT&T Wireless PCS* v. *City Council of Virginia Beach*, 155 F.3d 423, 426 (4th Cir. 1998) ("Section (B)(v) creates a cause of action"). But Section 332(c)(7)(B)(v) does not by its terms apply its 30-day limitations period to any cause of action other than the one that Section 332(c)(7)(B)(v) itself creates. Respondent has nowhere explained why that limit—or the expedition requirement—can be judicially engrafted from Section

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1983 would be inconsistent with a statutory regime that similarly provided for "local administrative" processes "culminat[ing] in a right to judicial review." *Wilder*, 496 U.S. at 521 (citing 468 U.S. at 1011). The Court explained that permitting suit under Section 1983 could permit bypass of otherwise required administrative processes, because "nothing in Section 1983 requires a plaintiff to exhaust his administrative remedies before bringing a § 1983 suit." 468 U.S. at 1011-1012 & n.14; see also *Patsy* v. *Florida Bd. of Regents*, 457 U.S. 496 (1982). Likewise here, permitting suit under Section 1983, subject only to often complex ripeness requirements, may create an unacceptable risk that parties will circumvent otherwise mandatory state and local administrative proceedings by invoking Section 1983 to beat an immediate path to federal court—and be rewarded for their haste with the promise of damages and attorney's fees. Just as Congress did not intend Section 332(c)(7) "to give preferential treatment to the personal wireless service industry in the processing of requests," H.R. Conf. Rep. 104, *supra*, at 208, it did not intend to allow that industry to bypass state and local processes altogether.

332(c)(7)(B)(v) onto the separate cause of action created by Section 1983.[11]

That approach is also at odds with *Sea Clammers* and its progeny. None of those cases transplants statutory limits from a more specific statutory remedial regime into Section 1983 in an effort to reconcile otherwise glaring inconsistencies. *Sea Clammers* did not transplant the requirement of 60-days' notice to defendants from the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act to Section 1983, see 453 U.S. at 14; *Novotny* did not engraft Title VII's procedures and tight limitations periods onto Section 1985(3), 442 U.S. at 375-376; nor did *Smith* v. *Robinson* attach the EHA's procedural requirements to Section 1983, 468 U.S. at 1010-1011. Rather, those cases recognize that, where Congress provides specific remedial procedures inconsistent with suit under Section 1983, Section 1983 remedies are unavailable.

D. Judicial Review Itself Is A Sufficiently Complete Remedy Here

Congress's provision of an express federal cause of action for judicial review in Section 332(c)(7) "through which a plaintiff can redress * * * violations," Pet. App. 5a-6a, by itself suggests an intent to preclude enforcement through Section 1983. This Court has observed that the statutes in *Sea Clammers* and *Smith* v. *Robinson* "provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright*,

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[11] Just last Term, this Court emphasized the importance of Section 1658's 4-year limitations period in the context of Section 1983 and other causes of action that do not provide their own limitations periods. *R.R. Donnelly & Sons Co.*, 124 S. Ct. at 1845. Section 1658, the Court explained, eliminates confusing and wasteful litigation created by the former practice of borrowing limitations periods from state law. *Ibid.* It seems premature to overrule *R.R. Donnelly & Sons* and to resume "borrowing" limitations periods for Section 1983.

479 U.S. at 427. See *Kendall* v. *City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999) ("[T]he Supreme Court has repeatedly emphasized that the availability of [private judicial remedies] strongly suggests a Congressional intent to preclude resort to § 1983."); *Nextel*, 286 F.3d at 694 ("A key distinction between schemes that are sufficiently comprehensive and those that are not is the availability of private judicial remedies."). No less than the statutes at issue in those cases, Section 332(c)(7) "provide[s] for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy."

This Court, in fact, has *never* applied *Sea Clammers* to hold that resort to Section 1983's more general remedial scheme is appropriate where, as here, Congress has provided an express private judicial remedy in the underlying statute. The statutes at issue in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny* each provided a mechanism for private parties to seek federal judicial relief and this Court each time found resort to Section 1983 foreclosed. Conversely, the absence of judicial review combined with other evidence of intent may demonstrate that Congress intended to allow private enforcement through Section 1983. See, *e.g.*, *Blessing*, 520 U.S. at 348 (no "private remedy—either judicial or administrative—through which aggrieved persons can seek redress"); *Livadas*, 512 U.S. at 133 ("complete absence of provision for relief from governmental intereference"); *Golden State Transit Corp.*, 493 U.S. at 107 (similar); *Wilder*, 496 U.S. at 523 (incomplete state administrative remedy insufficient to "evidence[] an intent to foreclose a private remedy in the federal courts"); *Wright*, 479 U.S. at 427-428 ("a state administrative remedy" does not by itself "ordinarily foreclose resort to § 1983"). Private judicial remedies are thus sufficient (although perhaps not necessary) to support a finding of comprehensiveness.

That makes sense. The "rebuttable presumption that" statutory "rights are enforceable under § 1983," *Blessing*, 520 U.S. at 343, reflects the general presumption in favor of judicial review, and the judiciary's extreme reluctance to presume that "Congress has closed the avenue of effective judicial review * * * ." *Rosado* v. *Wyman*, 397 U.S. 397, 420 (1970); see *Wright*, 479 U.S. at 428 (relying on *Rosado* v. *Wyman*). Where Congress has *already* provided a specifically tailored statutory remedy that includes judicial review, an "avenue of effective judicial relief" exists under that more specific statutory provision. Such a cause of action also meets Section 1983's purpose "to provide a federal remedy for the enforcement of federal rights." *Wright*, 479 U.S. at 429. This Court, of course, does not "lightly" infer that Congress intended to foreclose review altogether. But it should no more lightly conclude that Congress intended to multiply the avenues of judicial review, particularly where resort to Section 1983 threatens the balance Congress struck in the underlying statute. That is particularly true here, where the plain text of the statute says that, "except as" specifically provided, "nothing in this Act shall limit or affect" local zoning authority.

E. The Ninth Circuit's Reasoning Is Incorrect

1. *Section 332(c)(7) Provides A "Remedial" Scheme*

In the decision below, the Ninth Circuit did not dispute that Section 332(c)(7) provides for the invocation of local administrative procedures followed by federal judicial review. To the contrary, it acknowledged that 47 U.S.C. § 332(c)(7)(B)(v) expressly provides private judicial remedies "through which a plaintiff can redress [Communications Act] violations" in federal court. Pet. App. 5a-6a. But the Ninth Circuit held that Section 332(c)(7)(B)(v) is not "remedial" within the meaning of *Sea Clammers* because, according to that court, it "does not provide for any type of relief." Pet. App. 7a, 8a; see *id.* at 7a (Act "contains no

remedies at all."); *id.* at 8a (The "provisions are not remedial."); *id.* at 9a ("no remedial provisions"); *ibid.* ("[T]he statute grants no remedies beyond procedural rights."). Deeming the cause of action for "expedited judicial review" to be "hollow," the Ninth Circuit declared that "an expedited decision does nothing to remedy a [Communications Act] violation in itself." *Id.* at 8a-9a; Br. in Opp. 17.

The assertion that Section 332(c)(7)(B)(v) creates a federal private cause of action, but affords successful plaintiffs "no remedies at all," borders on the absurd. A statutory cause of action that does not permit courts to impose remedies would be non-justiciable; federal courts have no authority to issue advisory opinions without relief that alters the legal relationship of the parties. Congress, moreover, designed the cause of action in Section 332(c)(7)(B)(v) to "provide[] a mechanism for *judicial relief*." H.R. Conf. Rep. No. 458, *supra*, at 208 (emphasis added).

To be sure, Section 332(c)(7)(B)(v) does not enumerate the available remedies. As this Court explained in *Franklin* v. *Gwinnett County Public Schools*, however, federal courts adjudicating claims under statutes that create a cause of action, but are silent about remedies, are presumed to "have the power to award any *appropriate* relief." 503 U.S. 60, 70-71 (1992) (emphasis added); see *Nextel*, 286 F.3d at 695 n.6. In *Barnes* v. *Gorman*, 536 U.S. 181 (2002), this Court explained that "appropriate" relief under *Franklin* includes the "forms of relief traditionally available" in the particular type of suit at issue. *Id.* at 187; see *ibid.* (looking to breach-of-contract remedies to determine the scope of relief under Spending Clause provisions of Title VI).

In the context of judicial review of zoning disputes, the traditionally available and thus "appropriate" relief has long been equitable or specific relief, such as an injunction requiring the defendant to issue improperly withheld permits, or a remand for a new decision that complies with legal standards. As explained by the National League of

Cities, *et al.*, as Amici Curiae (Br. 13-15), and set forth below (see pp. 41-42, *infra*), virtually every State provides that relief (but not damages) on review of zoning decisions. Consistent with that tradition, every other court to have considered the matter has concluded that 47 U.S.C. § 332(c)(7)(B)(v) authorizes injunctive relief. *Oyster Bay*, 166 F.3d at 497 (one "appropriate remedy is injunctive relief in the form of an order to issue the relevant permits"); *National Tower, LLC* v. *Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 22 (1st Cir. 2002) ("appropriate remedy" is generally "an injunction" or "a remand, depending on the nature of the board's decision and the circumstances of the case"); *Preferred Sites, LLC* v. *Troup County*, 296 F.3d 1210, 1221-1222 (11th Cir. 2002) ("[A]n injunction (or other equitable relief) in the form of an order to issue the relevant permits is a proper form of relief."); *Nextel*, 286 F.3d at 695 & n.6 (citing cases). Indeed, the district court ordered precisely that relief here. Pet. App. 13a-15a.[12]

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[12] For similar reasons, Section 332(c)(7) is not properly read as providing damages (although the Court need not resolve the issue here). Damages are not a "traditionally available" and thus an "appropriate" form of relief on review of zoning decisions. See pp. 41-45, *infra*; Br. Nat'l League of Cities, *et al.*, 15-16; Br. Local Gov't Amici, *et al.*, 21-23. The FCC—to which this Court traditionally defers—has reached that conclusion with respect to the portion of Section 332(c)(7) it administers. Section 332(c)(7)(B)(iv) gives persons aggrieved by the improper consideration of the environmental effects of radio frequency emissions the option of seeking relief directly from the FCC, and the FCC has interpreted that provision as providing for *declaratory* relief. See p. 5, *supra*. Given that Congress gave certain plaintiffs the choice between federal administrative and judicial relief, it would be anomalous to conclude that Congress provided the sweetener of damages only for the latter. Congress, in any event, envisioned Section 332(c)(7) as providing an "appeal" to federal court, see H.R. Conf. Rep. 458, *supra*, at 209, and appellate courts typically affirm, reverse, or vacate improper decisions but do not award damages. Interpreting Section 332(c)(7) to provide damages would also run afoul of Section 601(c)(1) of the

There is nothing "hollow" about those traditional remedies. They have long provided prompt and effective review and revision of zoning and land-use decisions. They likewise have proved effective in the context of the Administrative Procedure Act, which provides similar (and potentially more limited) specific relief from unlawful or erroneous agency decisions. See 5 U.S.C. § 704. Indeed, as *National Tower*, 297 F.3d at 22, *Oyster Bay*, 166 F.3d at 497, *Preferred Sites*, 296 F.3d at 1221-1222, and *Nextel*, 286 F.3d at 695 & n.6, make clear, the federal courts that "hear and decide" cases under Section 332(c)(7)(B)(v) have authority to order the issuance of *the very thing the claimant sought* in the first instance—a permit to build the disputed antenna structure. That relief is "quick and complete." *City of Chicopee*, 16 F. Supp. 2d at 123.

2. *The Ninth Circuit's Effort To Fill Perceived Gaps Is Inconsistent With* Sea Clammers

At the same time the Ninth Circuit declared that Section 332(c)(7)(B)(v) provides no remedies at all, it also held that limits on the *express* private cause of action provided by the Communications Act evinced Congress's intent to permit resort to the more expansive remedial provisions of Section 1983. "[T]he lack of any damages" under the Communications Act, the Ninth Circuit stated, is evidence "that Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983." Pet. App. 7a. That strained reasoning

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1996 Act, 47 U.S.C. § 152 (note), which directs that "this Act * * * shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Damages awards under federal law would have to pre-empt (and thus impair and supersede) the laws of many jurisdictions, including California, which immunize local governments from monetary liability for their zoning decisions. See pp. 44-45, *infra*. Finally, a damages remedy for ordinary zoning errors would represent a departure from prevailing practice, a departure that should not be presumed in this traditional area of state and local concern. See pp. 41-44, *infra*.

cannot be reconciled with *Sea Clammers*. The statutes in *Sea Clammers* did not provide for damages. 453 U.S. at 14, 17; Pet. App. 7a-8a. Yet this Court held that Section 1983 remedies were unavailable nonetheless.

The Ninth Circuit's dismissal of the 30-day limitations period required by Section 332(c)(7)(B)(v)—because it "imposes a burden on an aggrieved plaintiff, not a benefit"—is similarly wanting. *Id.* at 8a. Like the Ninth Circuit's treatment of damages, it turns *Sea Clammers* and its progeny on their heads. Those cases recognize that Congress's decision to impose limits on express statutory remedies, far from evidencing an intent to provide the withheld relief under Section 1983, ordinarily precludes efforts to circumvent such limits through resort to Section 1983:

> [W]hen "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983."

453 U.S. at 20 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)); see *Novotny*, 442 U.S. at 376 (Title VII violations cannot be asserted under 42 U.S.C. § 1985 because, among other things, the otherwise "short and precise time limitations of Title VII would be grossly altered").

Sea Clammers and its progeny support the "proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the remedial apparatus of Section 1983." *Smith* v. *Robinson*, 468 U.S. at 1003. Under the Ninth Circuit's inverted logic, Congress's decision *not* to provide a damages remedy in an underlying statute evidences Congress's intent to provide *both* damages and attorney's fees under Section 1983.

II. Congress Did Not Intend To Displace Traditional State Authority With Section 1983 Damages and Section 1988 Fees

The Ninth Circuit's decision is also difficult to reconcile with traditional tools of statutory construction. Zoning and land-use decisions are matters "particularly within the province of state and local" government. *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975). The attachment of Section 1983's remedial apparatus to Section 332(c)(7)'s carefully crafted review mechanism would be inconsistent with and upset the longstanding rules that govern zoning and land-use decisions. It would be contrary to Congress's express desire not to impair the functioning of state laws. And it would be at odds with the legislative history of Section 332(c)(7), which evinces no intent to impose new liabilities on state and local governments for their exercise of traditional zoning authority.

A. Imposing The Remedial Apparatus of Section 1983 Is Inconsistent With The Traditional Zoning Regimes Congress Preserved And Emulated

The interpretation of any statute begins with "the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999); see *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[W]e do not lightly assume that Congress has intended to depart from established principles."); *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 212 (1978) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."). That presumption is particularly weighty where, as here, the Court is "determining the breadth of a federal statute that impinges upon or pre-empts the State's traditional powers" in an area such as land-use and zoning. *Oregon Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 345 (1994);

Gonzaga, 536 U.S. at 286 n.5 (rejecting the "judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials" by authorizing Section 1983 damages).

In the context of judicial review of zoning and land-use decisions, the nearly universal "past practice" is to provide specific relief but not damages and attorney's fee awards. Virtually every State provides judicial review of such decisions, subject to a short limitations period (42 jurisdictions require that a challenge be brought in 30 days or fewer, and none allows more than 90 days); virtually every State has broad standing rules that allow suit by individuals "adversely affected" or "aggrieved" by a "final" agency action or decision; and virtually every State applies a deferential "substantial evidence" test. See Br. Nat'l League of Cities, *et al.*, 8-17; App., *infra*, 26a-41a (collecting state zoning and permit review laws). Critically, virtually every State limits judicial remedies to specific relief, such as an order affirming, reversing, vacating, remanding, or modifying the decision under review. See Br. Nat'l League of Cities, *et al.*, 14-17; App., *infra*, 25a-41a; App., *infra*, 15a-25a (immunity laws). They do not award damages—much less attorney's fees—against a locality for ordinary errors in the application of zoning laws, and barely a handful afford such relief even in extraordinary cases.

Nothing in Section 332(c)(7) evinces an intent to depart from that practice by introducing unprecedented liability for attorney's fees and damages for virtually every mistaken zoning decision. To the contrary, Section 332(c)(7) reflects a concerted effort to preserve and emulate traditional procedures. It does not merely rely on state and local administrative proceedings in the first instance. The mechanism for judicial review it furnishes expressly echoes the typical characteristics of state review mechanisms: It provides for review of "final" administrative action or

failure to act. 47 U.S.C. § 332(c)(7)(B)(v). It imposes a short limitations period, opting for the 30-day period used by most States. *Ibid.* It affords standing to any person who is adversely affected. *Ibid.* It employs the substantial evidence test. 47 U.S.C. § 332(c)(7) (B)(iii); H.R. Conf. Rep. No. 458, *supra*, at 208. And it envisions that judicial review will function as an "appeal"—a process that, like traditional state review, ordinarily results in the affirmance, vacatur, or revision of (but not the imposition of damages because of) the judgment below. See H.R. Conf. Rep. 458, *supra*, at 209 ("The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a state court of competent jurisdiction, at the option of the party making the appeal * * * .").

Indeed, in providing for judicial review, Section 332(c)(7)(B)(v) directs courts to "hear and decide" cases. That phrase is used in virtually every state zoning act to describe the function of zoning boards of adjustment, which serve an appellate function and provide specific (but not monetary) relief from the operation of otherwise potentially rigid zoning laws.[13] Congress's obvious solicitude for existing

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[13] See, *e.g.*, Ala. Code § 11-19-19 (1989) (board of adjustment may "hear and decide appeals" and "hear and decide on requests for special exceptions"); Ariz. Rev. Stat. Ann. § 9-462.06 (West 1996) ("hear and decide appeals"); Colo. Rev. Stat. Ann. § 30-28-118 (West 2002) ("hear and decide appeals" and "hear and decide * * * requests for special exceptions"); Conn. Gen. Stat. Ann. § 8-6 (West 2001) ("hear and decide appeals" and "requests for special exceptions"); 55 Ill. Comp. Stat. Ann. 5/5-12011 (West 1993) ("hear and decide appeals" and "hear and decide all matters referred to it"); Mass. Gen. Laws Ann. ch. 40A, § 14 (West 2004) (board of appeals shall "hear and decide appeals"; "hear and decide applications for special permits"; "hear and decide petitions for variances"); N.Y. Town Law § 267-a (McKinney 2004) (jurisdiction of the board is "appellate only" and is "limited to hearing and deciding appeals"); Pa. Stat. Ann. tit.

state procedures cannot be reconciled with the "radical departure" of imposing damages and attorney's fees for ordinary (if mistaken) zoning and land-use decisions.

B. Damages And Fees Liability Is Inconsistent With Section 601(c)(1) Of The 1996 Act

The text of the Communications Act erases any doubt regarding the availability of damages and fees under Section 1983. As noted above, Section 332(c)(7)'s title alone, "Preservation of local zoning authority," is virtually dispositive. It would defy Section 332(c)(7)'s clear instruction—and basic common sense—to conclude that state and local zoning authority is somehow "preserved" by subjecting those decisionmakers to liability that is completely foreign to traditional zoning schemes.

That result, moreover, would be inconsistent with the savings provision in Section 601(c)(1) of the 1996 Act, 110 Stat. 143, 47 U.S.C. § 152 (note). Under the title "No implied effect," that provision directs that "this Act and the amendments made by this Act shall not be construed to modify, *impair*, or supersede Federal, *State, or local law* unless expressly so provided in such Act or amendments." *Ibid.* (emphasis added). A majority of States have by statute or decision immunized themselves and their municipalities from damages arising from the exercise of zoning and land-use authority. See App., *infra*, 15a-25a (listing state laws). For example, Section 818.4 of the California Government Code declares that a "public entity is not liable for an injury caused by the * * * denial * * * or by the failure or refusal to issue * * * any permit, license, certificate, approval, order, or similar authorization," and the California Supreme Court has held that the statutory immunity prevails over laws that would otherwise impose monetary liability, *State of California* v. *Superior Court*,

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53, § 14759 (West 1998) ("[t]o hear and decide appeals" and "[t]o hear and decide special exceptions").

524 P.2d 1281, 1286-1287 (Cal. 1974). Reading the Communications Act to expand Section 1983's reach to impose that sort of monetary liability—and preempt otherwise applicable state immunity laws—in this area of traditional state regulation would unmistakably "impair" such state immunity laws.

Congress, of course, has the "undisputed power * * * to override" state-law immunities "when subjecting a municipality to suit under a federal cause of action." *Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003). And Congress has exercised that preemptive authority through Section 1983. See *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) ("[A] state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted."). But Congress directed that the Communications Act should not be read as exercising the power to "impair * * * State or local law" *unless* the Act itself "expressly so provides." Reading Section 332(c)(7) to *expand* Section 1983's preemption of otherwise applicable state immunity laws—preventing those state laws from achieving their purpose of protecting localities from liability for the exercise of traditional zoning and land-use authority—certainly "impair[s]" them. See *Humana, Inc.* v. *Forsyth*, 525 U.S. 299, 309-310 (1999) (defining "impair" as "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner" (quoting Black's Law Dictionary 752 (6th ed. 1990)). Nothing in the Communications Act provides for that result expressly, and Section 601 precludes the Act from being read to yield that result by implication.

C. Section 332(c)(7)'s Origins Belie Any Intent To Impose Liability For Damages And Fees Under Sections 1983 and 1988

The evolution of the text that ultimately became Section 332(c)(7) likewise belies the contention that Congress intended to impose damages and fee awards under Sections

1983 and 1988. As originally drafted, the 1996 Act would have vested the FCC with responsibility and authority to preempt state and local zoning law regarding wireless communications tower siting. See pp. 2-3, *supra*. Nothing in the legislative record suggests that such agency preemption would have resulted in the imposition of Section 1983 liability. To the contrary, the Congressional Budget Office "pay-as-you-go cost estimates" associated with the legislation suggest the opposite.[14] It would be a perversion of Congress's intent to argue that Congress, by amending proposed legislation to "preserve" the authority of state and local governments (subject to judicial review under Section 332(c)(7)(B)(v)), intended to impose such costs. Indeed, Congress appears to have shifted from FCC enforcement to judicial review—at least in the context of 47 U.S.C. § 253—to avoid imposing financial burdens, such as the cost of traveling to Washington, D.C., to defend actions before the FCC, on small and rural municipalities.[15] To read the resulting statute to require those local governments to pay damages under Section 1983 and fees under Section 1988 would impose the very sort of financial burdens that Congress sought to avoid.

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[14] While those estimates address other potential costs to state and local governments, they nowhere suggest any financial impact from potential damages and fee awards under Section 1983. H.R. Conf. Rep. No. 204, 104th Cong., 2d Sess. 70-71 (1996); Cong. Budget Office, *Cost Estimate for S. 652, Telecommunications Competition and Deregulation Act of 1995*, at 8-9 (May 5, 1995).

[15] See Br. Local Gov't Amici 29-30; 141 Cong. Rec. 15,591 (1995) (Sen. Feinstein) (observing that the "preemption provision will force small cities to defend themselves in Washington, and many will be just unable to afford the cost"); 141 Cong. Rec. 15,984 (1995) (Sen. Feinstein) (noting that most cities lack the financial wherewithal to litigate before a federal agency located in Washington, D.C.).

III. The 1996 Act's Savings Clause Does Not Establish Congress's Intent To Permit Enforcement Through Section 1983

Alternatively, the Ninth Circuit held that Section 601(c)(1) of the 1996 Act, 47 U.S.C. § 152 (note), supports Section 1983 liability. That provision declares that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." As explained above, precisely the opposite is true: That provision forecloses the imposition of monetary liability—and the concomitant preemption of state municipal immunity laws—for Communications Act violations. See pp. 44-45, *supra*. The Ninth Circuit's reading of Section 601(c)(1), in any event, cannot be reconciled with this Court's construction of virtually indistinguishable savings clauses in *Sea Clammers*. Nor can it be reconciled with the most sensible reading of Section 601(c)(1)'s text.

A. The Ninth Circuit's Reading Of Section 601(c)(1) Is Foreclosed By *Sea Clammers*

In *Sea Clammers*, this Court addressed whether the savings clauses found in the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), had the effect of permitting those statutes to be enforced through Section 1983. The savings clauses declared that the FWPCA and MPRSA should not be interpreted to "restrict any right which any person * * * may have under any statute or common law *to seek enforcement of any * * * standard or limitation or to seek any other relief* (including relief against the Administrator * * * or a State agency)." 453 U.S. at 7 n.10 & n.11 (quoting 33 U.S.C. §§ 1365(e), 1415(g)(5)) (emphasis added). Rejecting the claim that the clauses authorized Section 1983 suits for violations of the FWPCA or MPRSA, the Court explained that the clauses were designed to preserve the right to enforce the substantive requirements created by *other* statutes, not to

create alternative means of enforcing the FWPCA and MPRSA themselves through statutes like Section 1983. 453 U.S. at 20 n.31 ("[T]he savings clauses do not refer at all to a suit for redress of a violation of these statutes—regardless of the source of the right of action asserted.").

Although recognizing the similarity between the savings clauses at issue in *Sea Clammers* and Section 601(c)(1), the Ninth Circuit urged that Section 601(c)(1) of the Communications Act "sweeps more broadly" than the savings clauses in *Sea Clammers*. The Ninth Circuit observed that, whereas Section 601(c)(1) states that the 1996 Act shall not be construed so as to "modify, impair, or supersede Federal, State, or local law," the savings clauses at issue in *Sea Clammers* provided that the statutes there should not be read to "restrict any right which any person * * * may have under any statute or common law to seek enforcement * * * or to seek any other relief." Pet. App. 11a. "The [1996 Act's] general savings clause forbids the impairment of any federal 'law'—not the impairment of any 'right,'" the Ninth Circuit declared. *Ibid.*

It is hard to see how, given the language of the savings clauses in *Sea Clammers*, that purported distinction can make a meaningful difference. It is true that Section 1983 does not itself create rights; it provides a mechanism for *enforcing* rights created by other laws. But the savings clauses in *Sea Clammers* did not preserve "rights"; they preserved the right to "*seek enforcement*" or "*any other relief,*" precisely what Section 1983 would provide. If the specific preservation of the right to "seek enforcement" or "any other relief" in *Sea Clammers* did not evince Congress's intent to allow enforcement of the FWPCA and MPRSA or relief for violations of those statutes under Section 1983, then the general bar against "impair[ment]" of federal "laws" found in Section 601(c)(1) does not either.

B. The Ninth Circuit's Reasoning Is Unsound

Even apart from its inconsistency with *Sea Clammers*, the Ninth Circuit's reading of Section 601(c)(1) is fundamentally flawed. The Ninth Circuit assumed the very conclusion—the availability of Section 1983 relief—that it set out to prove. The Ninth Circuit essentially reasoned that, unless Section 332(c)(7)'s limits upon enactment became enforceable through Section 1983, then the Communications Act and Section 332(c)(7) would somehow "impair" Section 1983. But violations of Section 332(c)(7) were not enforceable under Section 1983 before the 1996 Act became law (Section 332(c)(7) did not exist). Likewise, violations of Section 332(c)(7) still cannot be enforced through Section 1983 now that the 1996 Act is law. That does not mean that Congress, in passing the 1996 Act, "impair[ed]" Section 1983. It means that the 1996 Act left the violations that can be asserted under Section 1983 *unchanged*. As the Third Circuit observed in *Nextel*:

> [The] holding * * * that the relevant provision of the [1996 Act] does not create a right enforceable under § 1983 * * * does not mean that the [1996 Act] in any way modified, impaired, or superceded § 1983. [The court need not] hold that enactment of the [1996 Act] had any effect on § 1983; [the court need only] hold that the [1996 Act] itself did not create a right that can be asserted under § 1983 in lieu of the [1996 Act's] own remedial scheme.

286 F.3d at 696. "A 'savings clause' can only save what already exists." *Verizon Maryland, Inc.* v. *RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 557 (D. Md. 2002). As this Court observed when rejecting efforts to assert Title VII claims through Section 1985(3) in *Novotny*: There is no "question of implied repeal. The right Novotny claims under § 704(a) did not even arguably exist before passage of Title VII. The only question here, therefore, is whether the rights created by Title VII may be asserted within the

remedial framework of § 1985(3)." 442 U.S. at 376-377. The Ninth Circuit simply confused Congress's refusal *to expand* the category of claims that can be asserted under Section 1983 with an "impairment" of that statute.

In *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004), this Court all but rejected the Ninth Circuit's reasoning when construing the antitrust-specific savings clause in Section 601(b)(1) of the 1996 Act. That provision declared that "nothing in this Act or the amendments made by this Act shall be construed *to modify, impair, or supersede* the applicability of any of the antitrust laws." The Court concluded that Section 601(b)(1) evinces an intent to leave antitrust law essentially unchanged, holding that Section 601(b)(1) both "preserves those claims that satisfy established" or "preexisting" "antitrust standards," *id.* at 878, and forecloses a construction of the statute that would create "new claims that go beyond existing antitrust standards," *ibid.* In this case, Section 601(c)(1) evinces a similar intent—to leave the scope of pre-existing federal, state, and local laws undisturbed absent an express contrary directive in the Communications Act itself. The Ninth Circuit's invocation of Section 601(c)(1) as mandating a radical departure from previously settled principles is thus wholly at odds with Section 601(c)(1)'s basic purpose.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

FEDERAL STATUTORY PROVISIONS

1. The Communications Act of 1934, as amended by Pub. L. No. 97-259, § 120(a), 96 Stat. 1096, by Pub. L. No. 103-66, § 6002(b)(2)(A), 107 Stat. 1093, and by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 704, 110 Stat. 151, codified as 47 U.S.C. § 332, provides in relevant part:

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required

to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications

services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

> **(i)** market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> **(ii)** such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission

completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such sub-paragraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local gov-

ernment or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Com-

mission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

2. Section 601 of the Telecommunications Act of 1996, 110 Stat. 143, codified as 47 U.S.C. 152 note, provides in relevant part:

Applicability of Consent Decrees and Other Law

* * * * *

(b) Antitrust laws.—

(1) Savings clause.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

* * * * *

(c) Federal, State, and local law.—

(1) No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) State tax savings provision.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

3. Section 1983 of Title 42 of the United States Code provides, in relevant part:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. Section 1988 of Title 42 of the United States Code provides, in relevant part:

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs,

including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX B

STATE DAMAGES IMMUNITY LAWS FOR PERMIT DENIALS

Alaska Stat. § 09.65.070(d) (LexisNexis 2002) ("An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim * * * is based upon the grant, issuance, refusal, suspension, delay, or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning.").

Ark. Code Ann. § 21-9-301 (LexisNexis 2004) ("[A]ll counties, municipal corporations, * * * and all other political subdivisions of the state and any of their boards, commissions, [or] agencies, * * * shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.").

Cal. Gov. Code § 818.4 (West 1995 & Supp. 2004) ("A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit * * * where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."); *State of California* v. *Superior Court*, 524 P.2d 1281, 1286-1287 (Cal. 1974) ("general provisions" providing damages "were not intended to prevail over the specific immunities granted by sections 818.4 and 821.2 of the Government Code.").

Colo. Rev. Stat. Ann. § 24-10-106 (West 2001 & Supp. 2003), *as amended*, Colo. Legis. Serv. Ch. 280 (West 2004) ("A public entity shall be immune from liability in all claims for injury which lie in tort * * * except as provided otherwise in this section."); *Sundheim* v. *Bd. of County Comm'rs of Douglas County*, 904 P.2d 1337, 1345 (Colo. App. 1995) ("An action for judicial review under C.R.C.P. 106(a)(4) is the exclusive remedy for contesting a zoning decision when

the entire zoning ordinance is not challenged and when record review of the county procedure provides an adequate remedy. * * * C.R.C.P. 106 does not provide for a remedy in damages."), *aff'd*, 926 P.2d 545 (Colo. 1996).

Conn. Gen. Stat. Ann. § 52-557n(b) (West 1991) ("[A] political subdivision of the state or any employee, officer or agent * * * shall not be liable for damages to person or property resulting from * * * the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization, when such authority is a discretionary function by law, unless such issuance, denial, suspension or revocation or such failure or refusal constitutes a reckless disregard for health or safety.").

Del. Code Ann. tit. 10 § 4011(b) (1999) ("[A] governmental entity shall not be liable for any damage claim which results from * * * [t]he undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.").

Fla. Stat. Ann. § 768.28 (West 1997 & Supp. 2004) ("[T]he state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability in torts, but only to the extent specified in this act."); see *Paedae* v. *Escambia County*, 709 So. 2d 575, 577-78 (Fla. Dist. Ct. App. 1998) ("[T]here has never been and there is no present state tort liability imposed for peculiarly governmental functions such as permitting," including "the conduct or the functions of county commissioners or boards in the issuance of or refusal to issue licenses and permits," even "where the city acted in an arbitrary and capricious manner."); *Trianon Park Condominium Assoc., Inc.* v. *City of Hialeah*, 468 So.2d 912 (Fla. 1985) (sovereign immunity bars suit because "commissions, boards, city councils, and executive officers, * * * by their issuance of, or refusal to issue, licenses,

permits, [and] variances, * * * are acting pursuant to basic governmental functions").

Ga. Code Ann. § 36-33-1 (2000) ("Except as provided in this Code section * * * there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages.")

Haw. Rev. Stat. § 662-15 (2002 & Supp. 2003) (State Tort Liability Act does not apply to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused."); see *Allen* v. *City and County of Honolulu*, 571 P.2d 328, 331 (Haw. 1977) ("to permit damages" in "zoning disputes" is "not only unprecedented but would also be unsound policy" as it would "have a detrimental effect on the community's control of the allocation of its resources.").

Idaho Code § 6-904B (Michie 1998 & Supp. 2003) ("A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct * * * shall not be liable for any claim which * * * [a]rises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.").

745 Ill. Comp. Stat. Ann. 10/2-104 (West 2002) ("A local public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit * * * where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.").

Ind. Code Ann. 34-13-3-3 (LexisNexis 1998 & Supp. 2003) ("A governmental entity * * * is not liable if a loss

results from the * * * issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit * * * where the authority is discretionary under the law.").

Kan. Stat. Ann. § 75-6104 (1997) ("A governmental entity * * * shall not be liable for damages resulting from * * * any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved."); see *Weeks* v. *City of Bonner Springs*, 518 P.2d 427, 436 (Kan. 1974) ("granting or denial of [an occupancy] permit falls within the discretionary powers of the administrative tribunal").

Ky. Rev. Stat. § 65.2003 (Michie 1993 & Supp. 2003) ("[A] local government shall not be liable for injuries or losses resulting from * * * [a]ny claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include * * * [t]he issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.").

La. Rev. Stat. Ann. 9:2798.1(B) (West 1997 & Supp. 2004) ("Liability shall not be imposed on public entities * * * based upon the exercise or performance or the failure to exercise or perform their * * * discretionary acts when such acts are within the course and scope of their lawful powers and duties."); see *Inv. Mgmt. Servs., Inc.* v. *Village of Folsom*, 808 So.2d 597, 607 (La. App. 2001) ("[T]he issuance of a building permit is * * * a discretionary act").

Me. Rev. Stat. Ann. tit. § 8104-B (West 2003) ("[A] governmental entity is not liable for any claim which results from * * * [u]ndertaking or failing to undertake any judicial

or quasi-judicial act, including, but not limited to, the granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.").

Md. Code Ann., Cts. & Jud. Proc. § 5-503(e) (2003) ("A local government may assert on its own behalf any common law or statutory defense or immunity in existence as of June 30, 1987, and possessed by its employee for whose tortious act or omission the claim against the local government is premised."); *Baltimore Police Dep't.* v. *Cherkes*, 780 A.2d 410, 431 (Md. App. 2001) (Local Government Tort Claims Act "neither authorizes a direct action against a local government nor waives the common law governmental immunity of an entity designated as a local government.").

Mass. Gen. Laws Ann. ch. 258 § 10 (West 2004) (provisions waiving immunity from liability "shall not apply to * * * any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.").

Mich. Comp. Laws Ann. § 691.1407 (West 2000 & Supp. 2004) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if * * * engaged in the exercise or discharge of a governmental function."); see *Louis J. Eyde Ltd. Family P'ship* v. *Charter Township of Meridian*, No. 248312, 2004 WL 1366936, at *3 (Mich. App. June 17, 2004) ("Clearly, [the zoning board's] action of deciding whether to grant a [special use permit] is a governmental function").

Minn. Stat. Ann. § 466.03 (West 2001 & Supp. 2004) (absent statutory waiver, "every municipality shall be immune from liability * * * [for] [a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is

abused."); see *Barton Contracting Co.* v. *City of Afton*, 268 N.W.2d 712, 717 (Minn. 1978).

Miss. Code Ann. § 11-46-3 (LexisNexis 2002) ("[T]he 'state' and its 'political subdivisions,' * * * are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or equity on account of any wrongful or tortious act or omission * * * notwithstanding that any such act [or] omission * * * constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discretionary or ministerial nature.").

Neb. Rev. Stat. § 13-910 (2004), *as amended*, Neb. Legis. 560 (March 19, 2004) (political subdivisions retain immunity for "[a]ny claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order.").

Nev. Rev. Stat. Ann. § 278.0233 (LexisNexis 2002) (permitting property owners to "bring an action against the agency to recover actual damages caused by * * * [a]ny final action, decision or order of the agency which imposes requirements, limitations or conditions upon the use of the property in excess of those authorized by ordinances" if such was "arbitrary or capricious" or "unlawful or exceeds lawful authority," but barring such actions "[w]here the agency did not know, or reasonably could not have known, that its action, decision or order was unlawful or in excess of its authority."); see Nev. Rev. Stat. Ann. § 278.0237 (LexisNexis 2002) ("The court may award reasonable attorney's fees, court costs and interest to the prevailing party in an action brought under NRS 278.0233.").

N.J. Stat. Ann. § 59:2-5 (West 1992) ("A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to

issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked.").

N.M. Stat. Ann. § 41-4-4 (West 2003) ("A governmental entity * * * [is] granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act and by Sections 41-4-5 through 41-4-12 NMSA 1978.").

Allan and Allan Arts Ltd. v. *Rosenblum*, 615 N.Y.S.2d 410, 413 (App. Div. 1994) (the "Board's determination" to deny "an application for a variance" was "'discretionary and quasi-judicial in nature,' thus immunizing the members of the Board from suit.") (quoting *Moundroukas v. Foley,* 472 N.Y.S.2d 32 (App. Div. 1984)).

Northfield Dev. Co. v. *City of Burlington,* 523 S.E.2d 743, 749-750 (N.C. Ct. App. 2000) ("Individuals, including county commissioners and city council members, are entitled to absolute quasi-judicial immunity for actions taken in the exercise of their judicial function," including decisions "to grant or deny variances or special use permits."); *Law Bldg. of Asheboro* v. *City of Asheboro*, 423 S.E.2d 93, 95 (N.C. Ct. App. 1992) ("We know of no authority or precedent for recognizing or allowing a civil action in damages for alleged unlawful denial of a building permit by a municipality."); *Stephenson v. Town of Garner*, 524 S.E.2d 608 (N.C. Ct. App. 2000) (suit properly dismissed because "the aldermen may claim legislative immunity to suits arising out of their denial of Sprint's CUP petition").

N.D. Cent. Code § 32-12.1-03(3) (1996 & Supp. 2003) ("[A] political subdivision or a political subdivision employee is not liable for any claim that results from * * * [t]he decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including the decision to grant, to grant

with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.").

Okla. Stat. Ann. tit. 51 § 155 (West 2000 & Supp. 2005), *as amended*, Okla. Legis. 381 (2004) ("The state or a political subdivision shall not be liable if a loss or claim results from * * * the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.").

Or. Rev. Stat. Ann. § 30.265(3) (2003) ("Every public body and its officers, employees and agents acting within the scope of their employment or duties * * * are immune from liability for * * * [a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."); see *Culver* v. *Sheets*, 509 P.2d 1221, 1225 (Or. Ct. App. 1973).

42 Pa. Cons. Stat. Ann. § 8541 (West 1998 & Supp. 2004) ("Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person."); see 42 Pa. Cons. Stat. Ann. § 8542 (West 1998 & Supp. 2004).

R.I. Gen. Laws § 9-31-1 (1997) (waiving immunity for the State of "Rhode Island and any political subdivision thereof" to liability "in all actions of tort in the same manner as a private individual or corporation" but limiting recovery to "the monetary limitations * * * set forth in this chapter.").

S.C. Code Ann. § 15-78-60 (West 1997 & Supp. 2003) (governmental entities "not liable for a loss resulting from * * * the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, regis-

tration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.").

S.D. Codified Laws § 21-32A-3 (Michie 1987 & Supp. 2003) ("Except insofar as a public entity participates in a risk sharing pool or insurance is purchased pursuant to § 21-32A-1, any public entity is immune from liability for damages whether the function in which it is involved is governmental or proprietary.").

Tenn. Code Ann. § 29-20-201 (LexisNexis 2000 & Supp. 2003) ("Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from * * * the exercise and discharge of any of their functions," because "[c]omplete and absolute immunity is required for the free exercise and discharge of the duties of such boards, commissions, authorities and other governing agencies."); Tenn. Code Ann. § 29-20-205 (LexisNexis 2000 & Supp. 2003) (waiving immunity "for injury proximately caused by a negligent act or omission of any employee * * * except if the injury arises out of * * * the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization.").

State v. *City of Galveston*, No. 01-03-00557-CV, 2004 WL 2066448, at *11-12 (Tex. Ct. App. Sept. 10, 2004) ("Under Texas law, 'a city is immune from liability for its governmental actions,' unless the Legislature has expressly waived governmental immunity;" only enacted waiver is for damages arising from an employee's "operation or use of a motor-driven vehicle or motor-driven equipment.").

Utah Code Ann. §§ 63-30d-301(4), (5) (1997 & Supp. 2004) (immunity is waived "as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment," but waiver does not apply "if the injury arises out of, in connection

with, or results from * * * the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization.").

Graham v. *Town of Duxbury,* 787 A.2d 1229, 1232 (Vt. 2001) ("Municipal sovereign immunity is a common-law doctrine which dates back to the mid-1800s in Vermont. It protects municipalities from tort liability in cases where the municipality fulfills a governmental rather than a proprietary function.") (citations omitted); see *Maurice Callahan & Sons, Inc.* v. *Cooley,* 220 A.2d 467, 469 (Vt. 1966) ("[I]n issuing a permit under a zoning ordinance, municipal officials are discharging a governmental function.").

Wash. Rev. Code Ann. § 64.40.020(1), (2) (West 1994) ("Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: Provided, that the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority. The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.").

W. Va. Code Ann. § 29-12A-5 (LexisNexis 2001 & Supp. 2004) ("A political subdivision is immune from liability if a loss or claim results from * * * the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.").

Wis. Stat. Ann. § 893.80(4) (1997 & Supp. 2003) ("No suit may be brought against any * * * political corporation,

governmental subdivision or any agency thereof * * * for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."); see *Weinstein* v. *Yahara Builders*, 463 N.W.2d 882, 1990 WL 198172, at *1 (Wis. Ct. App. Oct. 23, 1990) (immunity for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions" encompasses "[t]he power to issue permits," a "quasi-judicial function.").

Wyo. Stat. Ann. § 1-39-104 (LexisNexis 2003) ("A governmental entity * * * [is] granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112 and limited by W.S. 1-39- 121."); see Wyo. Stat. Ann. §§ 1-29-105 to 1-39-112 (LexisNexis 2003) (no exception for issuance or denial of permits).

APPENDIX C

STATE ZONING DECISION REVIEW LAWS

Ala. Code § 11-52-81 (1994) ("Any party aggrieved by any final judgment or decision of such board of zoning adjustment may within 15 days thereafter appeal therefrom to the circuit court by filing with such board a written notice of appeal * * * ."); *id.* § 11-52-80(d) (Board of adjustment may "reverse or affirm, wholly or partly, or * * * modify the order, requirement, decision or determination * * * ."); *Asam* v. *Tuscaloosa*, 599 So.2d 1192, 1194 (Ala. Civ. App. 1992) ("On an appeal * * * the trial court is limited to the powers given to the board of adjustment under Ala. Code 1975, § 11-52-80(d).").

Alaska Stat. § 29.40.060 (LexisNexis 2002) ("The assembly shall provide by ordinance for an appeal by a municipal officer or person aggrieved from a decision of a hearing officer, board of adjustment, or other body to the superior court. An appeal to the superior court under this section is an administrative appeal heard solely on the record established by the hearing officer, board of adjustment, or other body."); *South Anchorage Concerned Coalition, Inc.* v. *Coffey*, 862 P.2d 168, 173 (Alaska 1993) ("[Appeals] shall be heard solely on the record established before the municipal bodies and the zoning body's decision shall not be reversed if, in the light of the whole record, [it is] supported by substantial evidence.").

Ariz. Rev. Stat. Ann. § 11-808 (West 2001) ("[J]udicial review of the final decisions of the board of supervisors shall be pursuant to [§ 12-901 et seq.]"); *id.* § 12-904(A) ("An action to review a final administrative decision shall be commenced by filing a complaint within thirty-five days * * * ."); Ariz. Rev. Stat. Ann. § 12-910(A) (West 2003) ("An action to review a final administrative decision shall be heard and determined with convenient speed."); *id.* § 12-

911(A)(5) ("The court may affirm, reverse, modify, or vacate and remand the agency action.").

Ark. Code Ann. § 14-56-425 (Michie 1998) ("[A]ppeals from final action taken by the administrative and quasi-judicial agencies in the administration of this subchapter may be taken to the circuit court of the appropriate county where they shall be tried de novo according to the same procedure which applies to appeals in civil actions from the decisions of inferior courts * * * ."); Ark. R. App. P. 4(a) ("[A] notice of appeal shall be filed within thirty (30) days from the entry of the judgment * * * .").

Cal. Gov't Code § 65009(b)(1) (West 1997 & Supp. 2004) ("[A]n action or proceeding [may be brought] to attack, review, set aside, void, or annul a finding, determination or decision of a public agency made pursuant to [Title 7, Div. 1, Ch. 1, California's Planning and Zoning General Provisions]."); *id.* § 65009(c)(1)(E) ("[N]o action or proceeding shall be maintained * * * by any person unless the action or proceeding is commenced * * * within 90 days after the legislative body's decision * * * [t]o attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit."); see also Cal. Civ. Proc. § 1095 ("If judgment be given for the applicant, the applicant may recover damages which the applicant has sustained * * * or as may be determined by the court * * * , together with costs * * * ."); *State of California* v. *Superior Court*, 524 P.2d 1281, 1286-1287 (Cal. 1974) ("It seems clear that sections 818.4 and 821.2 of the Government Code [conferring immunity from damages upon municipalities] were intended by the Legislature to qualify section 1095 of the Code of Civil Procedure * * * . The general provisions of section 1095 were not intended to prevail over the specific immunities granted by sections 818.4 and 821.2 * * * .").

Colo. R. Civ. P. 106(a)(4)(I) (West 1986) ("Review shall be limited to whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer."); Colo. R. Civ. P. 106(b) ("[A] complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer."); *Sundheim* v. *Bd. of County Comm'rs of Douglas County*, 904 P.2d 1337, 1345 (Colo. App. 1995) ("An action for judicial review under C.R.C.P. 106(a)(4) is the exclusive remedy for contesting a zoning decision when the entire zoning ordinance is not challenged and when record review of the county procedure provides an adequate remedy * * * . C.R.C.P. 106 does not provide for a remedy in damages."); see also 5A Colo. Prac., Handbook on Civil Litigation § 1520 (2003-2004 ed.) ("[D]amages are not available under Rule 106(a)(4), the section of this rule providing relief in the nature of certiorari and used to review administrative actions.").

Conn. Gen. Stat. Ann. § 8-8(b) (West 2001) ("[A]ny person aggrieved by any decision of a board, * * * may take an appeal to the superior court * * * . The appeal shall be commenced * * * within fifteen days."); *id.* § 8-8(l) (West 2001) ("The court * * * may reverse or affirm, wholly or partly, or may modify or revise the decision appealed from.")

Del. Code Ann. tit. 22 § 328(a) (1997) ("Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment * * * may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the board within 30 days after the filing of the decision in the office of the board."); *id.* § 328(c) ("The Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

D.C. Code Ann. § 2-510(a) (2001) ("Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to judicial review thereof in accordance with this subchapter upon filing in the District Court of Appeals a written petition for review * * * . Upon the filing of a petition for review, the Court * * * shall have power to affirm, modify, or set aside the order or decision complained of, in whole or in part, and, if need be, remand the case for further proceedings, as justice may require."); D.C. R. App. Ct. 15(a)(2) ("[T]he petition for review must be filed within 30 days after notice is given.").

Fla. Stat. Ann. § 120.68 (West 2002 & Supp. 2004) ("Any party who is adversely affected by final agency action is entitled to judicial review * * * . All proceedings shall be instituted by filing a notice of appeal or petition for review within 30 days after the rendition of the order being appealed * * * . Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a special provision of this section, it shall affirm the agency's action.").

Beugnot v. *Coweta County*, 500 S.E.2d 28, 30 (Ga. App. 1998) ("A disappointed landowner travels to superior court by direct appeal, if the zoning ordinance so provides, or otherwise by mandamus.") (internal quotation marks omitted); *RCG Props., LLC* v. *City of Atlanta Bd. of Zoning Adjustment*, 579 S.E.2d 782, 788 (Ga. App. 2003) ("[T]he superior court must * * * decide whether the record contains evidence supporting the [board of zoning adjustment's] * * * decision * * * [and] must decide whether the [board] (1) acted beyond the scope of its discretionary powers; (2) abused its discretion; (3) or acted in an arbitrary or capricious manner.") (citations omitted).

Haw. Rev. Stat. § 91-14 (2003) ("Any person aggrieved by a final decision and order * * * is entitled to judicial review thereof under this chapter * * * ." "Upon review of

the record the court may affirm the decision of the agency or remand the case with instructions * * * or it may reverse or modify the decision."); Haw. Legis. 202 (2004) ("[P]roceedings for review shall be instituted in the circuit court within thirty days after the * * * final decision and order of the agency * * * .").

Idaho Code § 67-6519 (Michie 2001 & Supp. 2003) ("An applicant denied a permit or aggrieved by a decision [of a governing board or zoning commission] may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review."); *id.* § 67-5279(2) ("If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.").

55 Ill. Comp. Stat. Ann. 5/5-12012 (West 1993) ("All final administrative decisions of the board of appeals hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Law [735 Ill. Comp. Stat. 5/3-101 et seq.] * * * ."); 735 Ill. Comp. Stat. Ann. 5/3-103 (West 2003) ("Every action * * * shall be commenced by the filing of a complaint and the issuance of a summons within 35 days * * * ."); 73 Ill. Comp. Stat. Ann. 5-3/111 (West 1993) ("The Circuit Court has power * * * to affirm or reverse the decision in whole or in part, * * * to reverse and remand the decision in whole or in part, * * * or to remand for the purpose of taking additional evidence.").

Ind. Code Ann. § 36-7-4-1003 (LexisNexis 1999 & Supp. 2003) ("Each person aggrieved by a decision of the board of zoning appeals * * * may file with the circuit or superior court * * * a verified petition setting forth that the decision is illegal in whole or in part * * * . The person shall file the petition with the court within thirty (30) days."); Ind. Code Ann. § 36-7-4-1009 (LexisNexis 1999) ("[T]he court may reverse, affirm, or modify the decision of the board brought up for review.").

Iowa Code Ann. § 335.18 (2001) ("Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment * * * may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part * * * . Such petition shall be presented to the court within thirty days."); Iowa Code Ann. § 414.18 (1999) ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

Kan. Stat. Ann. §§ 19-2962 (1995) ("Any person * * * dissatisfied with any order or determination of the board of zoning appeals or the board of county commissioners may bring an action in the district court * * * to determine the reasonableness of any such order or determination."); *id.* § 19-223 ("Any person who shall be aggrieved by any decision of the board of county commissioners may appeal from the decision of such board to the district court within thirty days."); *M.S.W., Inc.* v. *Bd. of Zoning Appeals of Marion County*, 24 P.3d 175, 180 (Kan. App. 2001) ("The district court's power [on appeal] is limited to determining (a) the lawfulness of the action taken, and (b) the reasonableness of such action.").

Ky. Rev. Stat. § 100.347 (Michie 1993 & Supp. 2003) ("Any person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court * * * . Such appeal shall be taken within thirty (30) days after the final action of the board."); *Fritz* v. *Lexington-Fayette Urban County Gov't*, 986 S.W.2d 456, 458-459 (Ky. App. 1998). ("[J]udicial review is limited to the question of whether the administrative decision was arbitrary.").

La. Rev. Stat. Ann. § 33:4727(E)(1) (West 2002) ("Any person or persons jointly or severally aggrieved by any decision by the board of adjustment * * * may present to the district court * * * a petition, duly verified, setting forth that the decision is illegal, in whole or in part * * * . The

petition shall be presented to the court within thirty days * * *."); *id.* § 33:4727(E)(5) ("The court may reverse or confirm, wholly or in part, or may modify the decision brought up for review.").

Me. Rev. Stat. Ann. tit. 5, § 11001 (West 2002 & Supp. 2003-2004) ("[A]ny person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court."); Me. Rev. Stat. Ann. tit. 5 § 11002(3) (West 2002 & Supp. 2003) ("The petition for review shall be filed within 30 days."); *Lippoth* v. *Zoning Bd. of Appeals, City of S. Portland*, 311 A.2d 552, 557 (Me. 1973) ("[T]he power of the court is limited to determining (a) the lawfulness of the action taken, * * * and (b) the reasonableness of such action.").

Md. Ann. Code art. 66B, § 4.08 (2003) ("[An aggrieved party] may, jointly or severally, appeal a decision of a board of appeals or a zoning action of a local legislative body to the circuit court * * * . The circuit court may not allow costs against the board unless it appears to the court that the board, in making the decision * * * acted: (1) [w]ith gross negligence; (2) [i]n bad faith; or (3) [w]ith malice."); Md. Cir. Ct. Rule 7-203(a) ("[A] petition for judicial review shall be filed within 30 days * * * ."); *Stansbury* v. *Jones*, 812 A.2d 312, 318 (Md. 2002) ("In judicial review of zoning matters, * * * the correct test to be applied is whether the issue before the administrative body is fairly debatable * * * .") (internal quotation marks omitted).

Mass. Gen. Laws. Ann. ch. 40A, § 17 (West 2004) ("Any person aggrieved by a decision of the board of appeals may appeal * * * by bringing an action within twenty days after the decision has been filed in the office of the city or the town clerk * * * . The court shall hear all evidence * * * and * * * annul such decision if found to exceed the authority of such board or permit granting authority or make such other decree as justice and equity require").

Mich. Comp. Laws Ann. § 125.293a (West 1997 & Supp. 2004) ("[A] person having an interest affected by the zoning ordinance may appeal to the circuit court * * * . As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals."); Mich. Ct. R. 7.101(B) ("[A]n appeal of right must be taken within 21 days.").

Minn. Stat. Ann. § 462.361 (West 2001) ("Any person aggrieved by an ordinance, rule, regulation, decision or order of a board of adjustments and appeals * * * may have such * * * reviewed by an appropriate remedy in the district court."); Minn. Stat. Ann. § 394.27(9) (West 1997) ("[A]ny aggrieved persons * * * shall have the right to appeal within 30 days."); *Kehr* v. *City of Roseville*, 426 N.W.2d 233, 235 (Minn. App. 1988) ("[T]he scope of review * * * to be used for zoning matters is * * * whether the zoning authority's action was reasonable.").

Miss. Code Ann. § 11-51-75 (LexisNexis 2002) ("Any person aggrieved by a judgment or decision of a board of supervisors * * * may appeal [to the circuit court] within ten (10) days."); *Barnes* v. *Bd. of Supervisors, DeSoto County*, 553 So.2d 508, 511 (Miss. 1989) ("If the Board's decision is founded upon substantial evidence, then it is binding upon an appellate court * * * . This is the same standard of review which applies in appeals from decisions of other administrative agencies and boards.").

Mo. Ann. Stat. § 89.110 (West 1998) ("Any person * * * aggrieved by any decision of the board of adjustment * * * may present to the circuit court * * * a petition, duly verified, setting forth that such decision is illegal * * * . Such petition shall be presented to the court within thirty days * * * . The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

Mont. Code Ann. § 76-2-327 (2003) ("Any person * * * aggrieved by any decision of the board of adjustment * * *

may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part * * *. Such petition shall be presented to the court within thirty days * * * . The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."); see also *id.* § 76-2-227.

Neb. Rev. Stat. § 14-413 (2004) ("Any person * * * aggrieved by any decision of the board of appeals * * * may present to the district court a petition, duly verified, setting forth that such decision is illegal, in whole or in part * * * . Such petition must be presented to the court within thirty days."); *id.* § 14-414 ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

Nev. Rev. Stat. Ann. § 278.3195 (LexisNexis 2002) ("Any person who: (a) has appealed a decision to the governing body * * * and, (b) is aggrieved by the decision of the governing body, may appeal that decision to the district court of the proper county by filing a petition for judicial review within 25 days."); *Nevada Contractors* v. *Washoe County*, 792 P.2d 31, 33 (Nev. 1990) ("If the [zoning decision] is supported by substantial evidence, there is no abuse of * * * discretion.").

N.H. Rev. Stat. Ann. § 677:4 (1996) ("Any person aggrieved by any order or decision of the zoning board of adjustment * * * may apply, by petition, to the superior court within 30 days."); *id.* § 677:11 ("The final judgment upon every appeal shall be a decree dismissing the appeal, or vacating the order or decision complained of in whole or in part, as the case may be; but, in case such order or decision is wholly or partly vacated, the court may also, in its discretion, remand the matter to the zoning board of adjustment.").

N.J. R. Civ. P. 4/69-6 § 4:6906 (providing for superior court review of a board of adjustment's decision by filing an

"action in lieu of prerogative writs" and mandating that, "No action in lieu of prerogative writs shall be commenced * * * to review a determination of a * * * board of adjustment * * * after 45 days from the publication of a notice."); *New Brunswick Cellular Tel. Co.* v. *Township of Edison Zoning Bd. of Adjustment*, 693 A.2d 180, 184 (N.J. Super. 1997) ("In reviewing any decision of a zoning board, the court's power is tightly circumscribed * * * . [Z]oning determinations may be set aside only when the court has determined the decision to be arbitrary, capricious or unreasonable.").

N.M. Stat. Ann. § 3-21-9 (West 2003) ("A person aggrieved by a decision of the zoning authority * * * may appeal the decision pursuant to the provisions of Section 30-3-1.1 * * * ."); *id.* § 39-3-1.1 ("[A] person aggrieved by a final decision may appeal the decision to district court by filing in district court a notice of appeal within thirty days * * * . [T]he district court may set aside, reverse or remand the final decision if it determines that: (1) the agency acted fraudulently, arbitrarily or capriciously; (2) the final agency decision was not supported by substantial evidence; or (3) the agency did not act in accordance with law.").

N.Y. Town Law § 267-c (McKinney 2004) ("Any person * * * aggrieved by any decision of the board of appeals * * * may apply to the supreme court for review * * * . Such proceeding shall be instituted within thirty days * * * . The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

N.C. Gen. Stat. Ann. § 160A-381 (2003) ("[D]ecision[s] of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days."); *Butler* v. *City Council of the City of Clinton*, 584 S.E.2d 103, 105 (N.C. App. 2003) ("The trial court's review is limited to determining whether the conduct of the city council was in

accordance with the law and whether the decision was supported by competent, material, and substantial evidence.").

N.D. Cent. Code § 40-47-11 (1983 & Supp. 2003) ("A decision of the governing body of the city on an appeal from a decision of the board of adjustment may be appealed to the district court in the manner provided in section 28-34-01."); *id.* § 28-34-01 "The notice of appeal must be filed * * * within thirty days."); *City of Fargo* v. *Ness*, 529 N.W.2d 572 (N.D. 1995) ("In reviewing a decision of the city's governing body * * * , the trial court must be guided by separation of powers principles; judicial review of a nonjudicial governing body is limited to whether that body's decision is arbitrary, capricious, or unreasonable.").

Ohio Rev. Code Ann. § 2506.01 (Anderson 2001) ("Every final order, adjudication, or decision of any officer, tribunal, authority, [or] board, * * * may be reviewed by the court of common pleas."); *id.* § 2505.07 (Anderson 2001) ("[T]he period of time within which the appeal shall be perfected * * * is thirty days."); Ohio Rev. Code Ann. § 2506.04 (Anderson 2001 & Supp. 2003) ("The court may find the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from.").

Okla. Stat. Ann. tit. 11 § 44-110(A) (West 1994) ("An appeal from any action, decision, ruling, judgment, or order of the board of adjustment may be taken by any person * * * aggrieved * * * to the district court * * * . The appeal shall be taken * * * within the time limits which may be fixed by ordinance * * * . The district court may reverse or affirm, wholly or partly, or modify the decision brought up for review. Costs shall not be allowed against the board of adjustment unless it shall appear to the district court that

the board acted with gross negligence or in bad faith or with malice in making the decision appealed from.").

Or. Rev. Stat. Ann. § 197.850 (2003 & Supp. 2004) ("Any party to a proceeding before the Land Use Board of Appeals * * * may seek judicial review of a final order issued in those proceedings * * * . Proceedings for judicial review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 21 days * * * . [Attorney's fees may be awarded if] (a) [t]he party appealed a decision of the board to the Court of Appeals; and (b) [i]n making the decision being appealed * * * the board awarded attorney fees and expenses against that party under ORS 197.830 (15)(b) * * * [or if a party prevails on a claim] that an approval condition imposed by a local government on an application for a permit pursuant to ORS 215.416 or 227.175 is unconstitutional under section 18, Article I, Oregon Constitution, or the Fifth Amendment to the United States Constitution."); see also Or. Rev. Stat. Ann. § 197.830(15)(b) (2003) ("[The Land Use Board of Appeals] shall award reasonable attorneys fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was a well-founded in law or on factually supported information.").

53 Pa. Cons. Stat. Ann. § 11002-A (West 1997) ("All appeals from land use decisions * * * shall be taken to the court of common pleas * * * and shall be filed within 30 days."); 53 Pa. Cons. Stat. Ann. § 11006-A (West 1997 & Supp. 2004) ("In a land use appeal, the court shall have the power to * * * 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 (1999) ("An aggrieved party may appeal a decision of the zoning board of review to the superior court * * * by filing a complaint stating the reasons for the appeal within twenty (20) days * * * . 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 if substantial rights of the appellant have been prejudiced.").

S.C. Code Ann. § 6-29-820 (West 2004 & Supp. 2004) ("A person who may have a substantial interest in any decision of the board of appeals * * * may appeal from a decision of the board to the circuit court * * * by filing with the clerk of the court a petition in writing setting forth * * * why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed."); S.C. Code Ann. § 6-29-840 (West 2004) ("In determining the questions presented by the appeal, the court shall determine only whether the decision of the board is correct as a matter of law.").

S.D. Codified Laws § 11-2-61 (Michie 1995) ("Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, * * * may present to the court of record a petition, duly verified, setting forth that the decision is illegal * * * . The petition shall be presented to the court within thirty days after the filing of the decision."); *id.* § 11-2-65 ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review. Costs are not allowed against the board of adjustment unless the court determines that the board * * * acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.").

Tenn. Code Ann. §§ 27-9-101, 27-9-102 (LexisNexis 2000) ("Anyone who may be aggrieved by any final order or judgment of any board or commission * * * may have the order or judgment reviewed by the courts * * * . Such party shall, within sixty (60) days from the entry of the order or judgment, file a petition of certiorari in the chancery court."); *Brooks* v. *Fisher*, 705 S.W.2d 135, 136 (Tenn. App. 1985) ("Under common law writ of certiorari the scope of review by the trial court is limited to a

determination of whether the inferior tribunal has exceeded its jurisdiction, has followed unlawful procedure, has been guilty of arbitrary or capricious action or has acted without material evidence to support its decision.").

Tex. Loc. Gov't Code Ann. § 211.011 (West 1999 & Supp. 2004-2005) ("[An aggrieved person] may present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part * * * . The petition must be presented within 10 days. The court may reverse or affirm, in whole or in part, or modify the decision that is appealed.").

Utah Code Ann. § 10-9-708 (2003) ("Any person adversely affected by any decision of a board of adjustment may petition the district court for a review of the decision * * * . The petition is barred unless it is filed within 30 days after the board of adjustment's decision is final * * * . The court shall affirm the decision of the board of adjustment if the decision is supported by substantial evidence in the record.").

Vt. Stat. Ann. tit. 24 § 4471 (1992 & Supp. 2002) ("An interested person may appeal a decision of a board of adjustment * * * to the environmental court."); Vt. R. Civ. P. 76 ("An appeal taken under this rule shall be taken* * * within [30 days]." Vt. R. Civ. P. 76 ("The order of the court may affirm, reverse, or modify the decision of the board or commission and shall expressly set forth all conditions and restrictions with which the parties must comply.").

Va. Code Ann. § 15.2-2314 (LexisNexis 2003) ("Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, * * * may file with the clerk of the circuit court * * * a petition specifying the grounds on which aggrieved within 30 days after the final decision of the board * * * . The court may reverse or

affirm, wholly or partly, or may modify the decision brought up for review.").

Wash. Rev. Code Ann. § 36.70C.060 (West 2003) ("[A] person aggrieved or adversely affected by the land use decision [may bring a challenge]."); *id.* § 37.70C.040 ("Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court * * *. The petition is timely if it is filed and served on all parties * * * within twenty-one days * * * ."); *id.* §36.70C.140 ("The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings."); Wash. Rev. Code Ann. § 36.70C.130 (West 2003 & Supp. 2004) ("A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.").

W. Va. Code Ann. § 8A-9-1 (LexisNexis 2003) ("Within thirty days after a decision or order by the * * * board of zoning appeals, any aggrieved person may present to the circuit court * * * a duly verified petition for a writ of certiorari."); *id.* § 8A-9-6 ("[T]he court or judge may reverse, affirm or modify, in whole or in part, the decision or order.").

Wis. Stat. Ann. § 59.694(10) (West 2000) ("A person aggrieved by any decision of the board of adjustment, * * * may, within 30 days * * * , commence an action seeking the remedy available by certiorari. * * * The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.").

Wyo. R. App. P. 12.01 ("[A]ny person aggrieved or adversely affected in fact by a final decision of an agency * * * may obtain such review as provided in this rule."); Wyo. R. App. P. 12.03 ("The proceedings for judicial review under Rule 12 shall be instituted by filing a petition for review in the district court."); Wyo. R. App. P. 12.04 ("[T]he petition for review shall be filed within 30 days."); Wyo. R.

App. P. 12.09(d) ("The district court shall enter judgment reversing, vacating, remanding or modifying the order for errors appearing on the record.").