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

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Respondent insists that 47 U.S.C. § 332(c)(7), a provision of the Communications Act entitled "Preservation of local zoning authority," should be read to impose the heavy burdens of damages and attorney's fees under Sections 1983 and 1988 for mistaken exercises of that authority. That contention is contrary to "[t]he crucial consideration" in this context: "what Congress intended." *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984); *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997); *Wright* v. *Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 427 (1987). The Communications Act's remedial scheme specifically addresses disputes like this one. It provides for administrative decisions at the state and local level, followed by an express cause of action for expedited judicial review. Respondent does not dispute many of the inconsistencies between that regime and enforcement under Section 1983—that Section 332(c)(7)(B)(v) imposes *mandatory* expedition, while Section 1983 does not; that Section 1983 (through 42 U.S.C. § 1988) imposes attorney's fees, and authorizes punitive damages against individual officers, while Section 332(c)(7)(B)(v) does not; and that Section 332(c)(7)(B)(v) requires "final action" by state or local authorities on a permit application as a precondition to judicial review, while Section 1983 does not.

Respondent does not deny that there is a dramatic inconsistency between the one- to six-year limitations periods generally applicable under Section 1983 and the 30-day limitations period applicable to Section 332(c)(7)(B)(v). His attempt to avoid that conflict by transplanting Section 332(c)(7)(B)(v)'s 30-day period to Section 1983 is textually unsupported; inconsistent with *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979); foreclosed by *Wilson* v. *Garcia*, 471 U.S. 261 (1985); and precluded by 28 U.S.C. § 1658, as recently construed in *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004). Even respondent's construction of the 1996 Act's savings clause, Section 601(c)(1), 110 Stat. 143, 47 U.S.C. § 152 (note), turns that provision on its head, converting it from an effort to preserve pre-existing state and federal laws into a mandate for expanded Section 1983 liability and the concomitant impairment of state zoning immunity laws.

* * * * *

First, it is necessary to correct a potential misapprehension about Section 332(c)(7). Respondent does not dispute the incongruity of construing a provision titled "Preservation of local zoning authority" to impose the heavy burden of Section 1983 liability (including fees under Section 1988) for every mistaken exercise of that authority.[1] Nor does he dispute this Court's reluctance to infer departures from past practice when construing statutes that, like Section 332(c)(7), bear on traditional state functions like zoning. Pet. Br. 41-42; *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 286 n.5 (2002). Instead, respondent (Br. 2-4, 7-8, 24-29) and his amici (CTIA Br. 1-2, 5-6) recharacterize Section 332(c)(7) as expressing hostility to zoning rules, which they dismiss as "NIMBYism" or "obstructionist."

That characterization is belied by the careful balance that Congress struck when it enacted Section 332(c)(7). Respondent's contrary view rests almost exclusively not on what Congress enacted, but on an FCC proposal that Section 332(c)(7) expressly *terminated* and a legislative amendment that Congress *rejected*. Wireless providers were dissatisfied with zoning law before 1996. Those generally applicable rules often imposed height restrictions or prevented the placement of commercial or industrial structures like antenna towers in certain locations (*e.g.*, residential neighborhoods). The wireless industry lobbied the FCC broadly to preempt local zoning authority, and an early draft of the 1996 Telecommunications Act, H.R. 1555, 104th Cong., 1st Sess. § 107(a) (1995), included such a proposal, accompanied by a Committee Report (quoted by the CTIA, Br. 6, 26), urging that "State and local regulation" be limited to the "minimum necessary." H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1, at 94.

But Congress was *not* convinced; the proposal for expansive FCC preemption was *not* enacted; and, following consul-

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[1] Respondent relies (Br. 31 n.33) on the title of Section 704(a) of the 1996 Act, "National Telecommunications Wireless Policy." But that title does not identify the contents of that "National * * * Policy." The title of Section 332(c)(7)—which the Act inserts into the United States Code—does: "Preservation of local zoning authority."

tation with local governments, Congress enacted 47 U.S.C. § 332(c)(7) to *preserve* "local zoning authority." That provision "prevents [the FCC] preemption" for which the CTIA had lobbied, ordering that the FCC proceeding be "terminated." Instead, it expressly "preserves the authority of State and local governments * * * except in the limited circumstances set forth." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207-208 (1996). It is difficult to reconcile *that* provision with the CTIA's suggestion (Br. 6-7) that Congress distrusted and "bold[ly]" moved to "federalize" zoning.

Section 332(c)(7) *does* impose certain federal standards to accommodate zoning to the necessities of wireless service. Pet. Br. 3-4, 18. But zoning law is otherwise *preserved*. State and local governments may "treat facilities that create different visual, aesthetic, or safety concerns differently," and may preserve the integrity of "residential district[s]." Pet. Br. 3-4; H.R. Conf. Rep. No. 458, *supra*, at 208. The hostility to zoning values and processes that respondent and his amici imply is impossible to reconcile with the requirement that wireless providers first submit permit applications through state and local administrative processes and obtain final action thereon before seeking judicial review. *Ibid.*; pp. 14-15, *infra*. "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests." *Ibid.* Far from being a pro-industry edict hostile to state interests, Section 332(c)(7) reflects a balance—a balance that would be upset by superimposing Section 1983 relief over the specific, tailored mechanism for judicial review that Congress provided in Section 332(c)(7) itself.

I. Section 1983 Enforcement Is Inconsistent With The Communications Act's Comprehensive Regime

The holdings of *Sea Clammers* and its progeny are not in serious dispute. "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." *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). Respondent

urges (Br. 25) that the *Sea Clammers* standard be replaced with the novel rule that Section 1983 enforcement is always permissible unless Congress "(a) precludes compensatory damages or (b) imposes elaborate exhaustion requirements." But Congress need not preclude damages or use the word "exhaustion" to evince its intent to require resort to a more specific statutory review mechanism like Section 332(c)(7)(B)(v) instead of Section 1983. *Sea Clammers* and its progeny do not create a special rule about damages or exhaustion. They apply the principle that, where Congress imposes particular limits in a more specific statute, it does not intend for those restrictions to be circumvented or nullified by more general enactments. *Sea Clammers*, 453 U.S. at 20 ("The requirements of [a comprehensive] enforcement procedure may not be bypassed by bringing suit directly under § 1983."); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974) ("specific statute will not be * * * nullified by a general one"); *Busic* v. *United States*, 446 U.S. 398, 406 (1980); *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973).

Likewise, comprehensiveness is important *not* because the judiciary ought to decide how much relief is enough or that "more is better." State Amici Br. 15-17. Nor is the provision of "multiple enforcement options" for private parties and the government, Pub. Cit. Br. 10, significant for its own sake (although Congress delineated certain options here, see p. 6, *infra*). Rather, the "balance, completeness, and structural integrity" of a statutory scheme may be "inconsistent with the * * * contention that" it is "designed merely to supplement other * * * judicial relief." *Brown* v. *GSA*, 425 U.S. 820, 832 (1976).

Here, as in *Sea Clammers*, *Smith* v. *Robinson*, *Novotny*, and *Preiser*, the Communications Act's remedial scheme is "comprehensive in the relevant sense." *Nextel Partners, Inc.* v. *Kingston Township*, 286 F.3d 687, 694 (3d Cir. 2002). With respect to every potential violation, the Act provides "private judicial remedies that incorporate both notable benefits and corresponding limitations"—a balance that would be upset by permitting plaintiffs to bypass its remedial mechanism in favor of Section 1983. *Ibid.*

A. The Communications Act Establishes A Comprehensive Remedial Scheme

There is no dispute that the Communications Act establishes a "comprehensive system for the regulation of communication by wire and radio." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 6 (1942); Pet. Br. 17. Nor is there any serious dispute that the Act establishes a similarly extensive remedial scheme that repeatedly matches each statutory duty with a corresponding mechanism for relief. Pet. Br. 24-25. Following that pattern, Section 332(c)(7) establishes both substantive requirements and the corresponding enforcement mechanism (administrative consideration followed by judicial review). Pet. Br. 25-26. The Act's comprehensive structure, which carefully pairs duties with remedial devices, shows that Congress in each instance "provided precisely" the remedial mechanism "it considered appropriate." *Sea Clammers*, 453 U.S. at 15.

Respondent urges that the Act's structure can be ignored because most of its provisions address "other" violations, while "only § 332(c)(7) addresses the harms at issue here." Resp. Br. 26 n.29. But the fact that Congress enacted a specific remedial mechanism to address *precisely* the conduct challenged here (and *different mechanisms* for *other* harms) reinforces the conclusion that Congress provided the enforcement mechanisms it deemed appropriate. Pet. Br. 27 n.8; *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 133 (2000) (court should not "confine itself to examining a particular statutory provision in isolation").[2] Even statutes that were

[2] Respondent's claim (Br. 26 n.29) that most Communications Act provisions address "private" conduct obscures the dramatic consequences of his position. State public utility commissions implement the federal interconnection and pricing mandates of 47 U.S.C. §§ 251, 252. *Iowa Util. Bd.*, 525 U.S. at 384-385. While Congress provided a mechanism for review of such state decisions, 47 U.S.C. § 252(e)(6), respondent would convert them into an occasion for Section 1983 actions against state commissioners, imposing *fee awards* against them whenever their decisions in this complex area are invalidated by declaratory or injunctive relief (without a qualified immunity defense). See *Hutto* v. *Finney*, 437 U.S. 678 (1978) (fee award permissible in official capacity suit); *Hewitt* v. *Helms*, 482 U.S. 755, 766 (1987) (qualified immunity no defense to declaratory or injunctive relief).

amended over time must be read as a whole. *Id.* at 143. Congress "expressly directed that the 1996 Act," including Section 332(c)(7), "be inserted into the Communications Act of 1934" and made "part of" that statute, making respondent's effort to read Section 332(c)(7) in isolation particularly inappropriate. *AT&T* v. *Iowa Util. Bd.*, 525 U.S. 366, 377, 378 n.5 (1999).

Respondent also overlooks the procedural detail in Section 332(c)(7)(B)(v). That provision establishes a system under which applications to build wireless facilities are first considered in state and local administrative processes. 47 U.S.C. § 332(c)(7)(B)(v) (review only of "final action or failure to act" at state or local level). It establishes standards for those processes. *E.g.*, 47 U.S.C. § 332(c)(7)(B)(iii) (written decisions "supported by substantial evidence" in "a written record"). It provides for judicial review of resulting decisions, subject to express limits (a 30-day limitations period) and requirements (mandatory expedition). 47 U.S.C. § 332(c)(7)(B)(v). Finally, it provides those aggrieved by certain violations (improper consideration of radio frequency (RF) emission health effects) the alternative of "petition[ing] the [FCC] for relief." 47 U.S.C. § 332(c)(7)(B)(v); Pet. Br. 5, 38 n.12. The claim that Congress intended yet another alternative—suit under Section 1983—is at odds with the "balance, completeness, and structural integrity" of that remedial scheme. *Brown*, 425 U.S. at 832.[3]

B. The Mechanism For Private Judicial Remedies In Section 332(c)(7) Evidences Congress's Intent

The Communications Act, like the statutes in *Sea Clammers* and *Smith* v. *Robinson*, "provide[s] for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright*, 479 U.S. at 427. Indeed, as in

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[3] The objection that Section 332(c)(7) does not provide details for FCC enforcement, or provides less detail for administrative processes than *Smith* v. *Robinson*, see Resp. Br. 21-25; Pub. Cit. Br. 5-6, 9-10, 12, is misplaced. The FCC does not generally enforce Section 332(c)(7) at the agency level (although the government may sue under 47 U.S.C. § 401), so no such details are necessary. Likewise, Congress in this case piggy-backed on pre-existing state administrative procedures for zoning disputes, making the detail of *Smith*—where Congress *created* the administrative process—unnecessary.

Smith v. *Robinson*, the Act provides private judicial remedies as part of a structure that begins with "local administrative review" and "culminate[s] in a right to judicial review." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990).

Respondent's claim that *Wright* does not mean what it says (Br. 23) ignores why *Wright*'s observation makes sense. The "rebuttable presumption" that statutes may be enforced under Section 1983 reflects the rule against presuming that "Congress has closed the avenue of effective judicial review." *Rosado* v. *Wyman*, 397 U.S. 397, 420 (1970). Where the underlying statute provides an express "avenue of effective judicial review," however, that presumption ceases to be relevant. The express statutory cause of action also meets Section 1983's purpose of providing "a federal remedy for the enforcement of federal rights." Pet. Br. 36. It is thus unsurprising that this Court has *never* held Section 1983 relief available for statutory violations where the underlying statute provides its own express mechanism for private judicial relief. Pet. Br. 34-36.

The United States (Br. 14-20) and the State Amici (Br. 7-12) make a persuasive case that the availability of an express mechanism for private judicial relief ordinarily forecloses resort to Section 1983.[4] There is nothing "paradoxical" about "determin[ing] that a § 1983 remedy is not available" where "Congress has made clear that it intended for there to be a private [judicial] remedy" through an express cause of action. Pub. Cit. Br. 11; see CTIA Br. 17-19. While the cause of action shows that Congress intended judicial enforcement, it also shows the conditions and limits that Congress intended to im-

[4] The claim that such a rule would eliminate Section 1983 claims for all statutory violations, CTIA Br. 16-17, 19; Pub. Cit. Br. 11, misreads *Gonzaga*. That decision compares the test for whether a statute creates the "rights" necessary to support Section 1983 enforcement with the *first* of *four* requirements for judicial implication of a cause of action. 536 U.S. at 283-285. It is thus not true that, whenever Congress creates "rights" under a federal statute, the statute will also have its own express or implied cause of action. Conversely, the provision of an express cause of action (*e.g.*, a citizen suit provision) does not show that the statute creates private rights necessary to support a Section 1983 action. State Amici Br. 28-30.

pose on such relief. Indeed, where a statute already expressly provides for judicial review, permitting suit under Section 1983 adds nothing *except* relief that Congress chose not to provide, or a means of bypassing the restrictions on review that Congress imposed. Even if the provision of a specific judicial remedy is not *conclusive* by itself, *Wright* makes clear that it *supports* the conclusion that Congress intended enforcement through that mechanism rather than Section 1983.

II. Enforcement Under Section 1983 Is Incompatible With Section 332(c)(7)(B)(v)

A. Inconsistent Limitations Periods

Respondent does not dispute that Section 332(c)(7)(B)(v)'s 30-day limitations period and mandatory expedition are critical to Congress's effort to provide rapid dispute resolution for public benefit. Nor does he deny that allowing Section 1983 actions under longer limitations periods—whether the four-year period under 28 U.S.C. § 1658, or the one- to six-year periods for personal injury otherwise borrowed from state law under *Wilson* v. *Garcia*—would be dramatically inconsistent with the balance struck in Section 332(c)(7)(B)(v). Instead, respondent attempts to eliminate that conflict by urging the Court to transplant the 30-day limitations period in Section 332(c)(7)(B)(v) to Section 1983 for claims that (like his) assert Communications Act violations, while borrowing limitations periods from state law for other Section 1983 suits. That argument is foreclosed by text, precedent, and a federal statute.

1. Respondent and his amici do not seriously suggest that the 30-day limitations period Congress attached to the independent cause of action in Section 332(c)(7)(B)(v) applies, by its own terms, to Section 1983 claims. "Federal statutes of limitations * * * are almost invariably tied to specific causes of action," not the underlying "rights" or "interests." *Agency Holding Corp.* v. *Malley-Duff & Assoc.*, 483 U.S. 143, 168 (1987) (Scalia, J., concurring); cf. *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687, 726 (1999) (Scalia, J., concurring) (jury-trial right "determined by the federal cause of action [Section 1983] and not by the innumerable constitutional and

statutory violations upon which that cause of action is dependent"). Section 332(c)(7)(B)(v) follows that pattern: It provides that "[a]ny person adversely affected by any final action or failure to act * * * may * * * commence an action," a classic formula for "the conferral of a private [cause] of action." *Verizon Maryland, Inc.* v. *Maryland Pub. Serv. Comm'n*, 535 U.S. 635, 644 (2002); Pet. Br. 26, 33. Section 332(c)(7)(B)(v) then conditions the cause of action thus created, stating that it must be filed "within 30 days after" the challenged state or local government's "final action or failure to act."

Although respondent suggests that Section 332(c)(7)(B)(v)'s limitations period applies to any "claim *to enforce the rights* set forth in § 332(c)(7)(B)," or is "attached to the federal *right* at issue," Resp. Br. 43, 45, that is not what Section 332(c)(7)(B)(v) says. That provision attaches the limitations period to the cause of action it creates. Congress could have departed from tradition and attached Section 332(c)(7)(B)(v)'s 30-day limitations period to putative statutory "rights." It did not.

Novotny and *Sea Clammers* all but foreclose the contrary view. In *Novotny*, 442 U.S. at 374 n.13, Title VII used virtually indistinguishable language to create a cause of action and accompanying limitations period, declaring that, "within ninety days," a "civil action may be brought * * * by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). This Court did not read that provision to establish a limitations period for Section 1985(1) claims where Title VII provides the underlying rights. Instead, the Court borrowed state law. Indeed, the Court held that, *because* the borrowed state-law limitations period could be as long as six years, allowing Title VII violations to be asserted under Section 1985(1) "would grossly alter[]" Title VII's "short and precise time limitations." 442 U.S. at 376 & n.10. The statutes in *Sea Clammers* used similar language to create a cause of action, 453 U.S. at 6, 7 & nn.9, 11, and broader language to provide that "[n]o action may be commenced" without 60 days' prior notice, *id.* at 6, 8, 14 & nn.9, 11. As in *Novotny*, this Court read those limits to apply only to the *causes of action* those statutes created, holding that suit under Section 1983 would

allow plaintiffs to avoid them. Because *Novotny* addressed limitations periods, those cases cannot be distinguished (Resp. Br. 45) as addressing other "procedural restrictions."

2. Respondent primarily asserts that the limitations period for Section 1983 claims in this case should be "borrowed" from Section 332(c)(7)(B)(v). Resp. Br. 45. But the effort to "borrow" a limitations period for Section 1983 claims from Section 332(c)(7)(B)(v) is also inconsistent with *Novotny*, which did not "borrow" Title VII's 90-day period and apply it to Section 1985(1). Rather, it concluded that much longer state periods would apply to Section 1985(1) suits enforcing Title VII rights, upsetting the careful time limits in Title VII.

More fundamentally, respondent's proposal to borrow federal limitations periods selectively for certain Section 1983 claims is foreclosed by *Wilson* v. *Garcia*, 471 U.S. 261 (1985). In that case, this Court chose between holding that "*all* § 1983 claims should be characterized in the same way for limitations purposes," *id.* at 271 (emphasis added), and a rule requiring courts to select a limitations period in light of the "factual circumstances and legal theories" underlying the claims, *id.* at 261. Recognizing the diverse claims maintainable under Section 1983, *id.* at 273-274, the Court held that Section 1983 claims "are best characterized as personal injury actions," and that federal courts should borrow the state personal injury limitations period. *Id.* at 280. The Court explained that "a simple, broad characterization of *all* § 1983 claims best fits the statute's remedial purpose" and avoids "uncertainty." *Id.* at 262 (emphasis added). The Court *expressly* addressed the fact that some § 1983 claims "are based on statutory rights, *Maine* v. *Thiboutot*, 448 U.S. 1, 4-8 (1980)," but found an across-the-board rule appropriate nonetheless. *Wilson*, 471 U.S. at 278. Respondent's suggestion that *Wilson* applies only to constitutional claims (Br. 46) is thus without foundation.

Respondent's proposal to judicially subdivide the Section 1983 cause of action so that it sometimes borrows a limitations period from state law and other times from federal law, based on the nature of the underlying rights, is unprecedented. This Court has "declined in other contexts to classify § 1983 actions

based on the nature of the underlying right asserted." *Del Monte Dunes*, 526 U.S. at 711 (plurality); *id.* at 725 (Scalia, J., concurring) (*Wilson* "concluded * * * that all § 1983 claims should be characterized in the same way."). Respondent cites no case in any context that adopts multiple limitations periods for a single cause of action based on the underlying violations.[5] The proposal would eviscerate *Wilson*, introducing the uncertainties and anomalies it sought to avoid.[6]

To the extent respondent asserts (Br. 45-46) that 42 U.S.C. § 1988 requires the Court to borrow a limitations period from federal law, that argument too defies precedent. *Wilson* expressly held that the governing *federal principle* that must be applied under Section 1988 is the longstanding and "settled practice" that limitations periods for federal statutes lacking their own will be drawn from an analogous *state law*—an approach "Congress implicitly endorsed * * * with respect to

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[5] While respondent relies (Br. 44 n.45) on *Malley-Duff*, 483 U.S. at 150, that case rejects his approach. *Malley-Duff* borrowed the limitations period for RICO from the Clayton Act—the statute upon which RICO was modeled—but *rejected* the argument that RICO's limitations period should depend on the underlying violations or predicate acts (*e.g.*, mail fraud). The court explained that, "for reasons similar to those expressed in *Wilson* v. *Garcia*," for RICO "as with § 1983, a *uniform* statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' *Wilson* v. *Garcia*, 471 U.S. at 272." 483 U.S. at 149-150 (emphasis added).

[6] Under respondent's theory, "[m]ultiple periods of limitations" would apply to Section 1983 claims in "the same case," 471 U.S. at 274 & n.33. Here, respondent's statutory claims under Section 1983 would be governed by the 30-day limit of Section 332(c)(7)(B)(v), while his Section 1983 due process claim would be governed by California's (now) two-year limitations period for personal injury. Moreover, Section 332(c)(7)(B)(v)'s 30-day limit is not appropriate for Section 1983. Section 332(c)(7)(B)(v) creates a cause of action for review of agency action, which is distinct from (and typically governed by shorter limitations periods than) the tort actions to which this Court has analogized Section 1983. This Court repeatedly has rejected efforts to impose similar limitation periods on Section 1983 in light of the statute's remedial purposes. *Felder* v. *Casey*, 487 U.S. 131, 141-149 (1988) (120-day notice-of-claim statute); *Burnett* v. *Grattan*, 468 U.S. 42, 49-55 (1984) (six-month period for administrative complaints). By endorsing a 30-day period for Section 1983, respondent's amici (*e.g.*, Pub. Cit. Br. 15) undermine the civil rights interests they purport to serve.

claims enforceable under the Reconstruction Civil Rights Acts." 471 U.S. at 266-267; *R.R. Donnelley & Sons*, 124 S. Ct. at 1839, 1842-1843. "Recognizing the problems inherent in the case-by-case approach, [*Wilson*] determined that *42 U.S.C. § 1988 requires* courts to borrow and apply to *all* § 1983 claims the one most analogous state statute of limitations." *Owens* v. *Okure*, 488 U.S. 235, 240 (1989) (emphases added).

Respondent's reliance on *Lampf, Pleva, et al.* v. *Gilbertson*, 501 U.S. 350 (1991), see Resp. Br. 44; CTIA Br. 21, is misplaced. *Lampf* concerned the limitations period for a judicially implied right of action for violations of the Securities Exchange Act. The *Lampf* plurality expressly acknowledged that, for *Section 1983* actions, *Wilson* v. *Garcia* had selected "a single variety of state actions" for "borrowing purposes," "characterizing *all* actions under 42 U.S.C. § 1983 as analogous to a state-law personal injury action." 501 U.S. at 357 (plurality opinion) (emphasis added). Justice Scalia's concurring opinion—providing the critical fifth vote—specified that, for express causes of action lacking "a congressionally created limitations period," such as Section 1983, "state periods govern." *Id.* at 364-365; accord *id.* at 368 (Stevens, J., dissenting). There is no basis for overruling *Wilson* here.

3. The proposal to borrow a limitations period at all, moreover, is foreclosed by 28 U.S.C. § 1658. Congress enacted that provision to address the "vast amount of litigation" that had been spawned by the absence of express limitations periods for many federal statutes. *R.R. Donnelley & Sons*, 124 S. Ct. at 1843. Section 1658 creates a prospective limitations period applicable to certain federal causes of action lacking their own: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues." In *R.R. Donnelley & Sons*, this Court gave that "arising under" formulation a broad construction, holding that "a cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990—and therefore is governed by § 1658's 4-year statute of limitations period—if the plaintiff's claim against the defendant *was*

made possible by a post-1990 enactment." 124 S. Ct. at 1845. Respondent does not dispute that his Section 1983 "claim was made possible by a post-1990 enactment"—the Telecommunications Act of 1996.

Respondent urges that Section 1658 is inapplicable because the limitations period for his Section 1983 claim is "otherwise provided by law." Resp. Br. 43-44. But the phrase "otherwise provided by law" establishes that Section 1658's limitations period is a catch-all and does not apply where a federal cause of action provides its *own* limitations period. Respondent concedes that Section 1983 does not contain its own limitations period, Resp. Br. 42, and Section 332(c)(7)(B)(v) does not by its terms purport to provide a limitations period directly applicable to Section 1983, see pp. 8-10, *supra*. Respondent thus appears to read "[e]xcept as otherwise provided by law" to mean "except as might be achieved by borrowing from other sources." Resp. Br. 45. But that defeats Section 1658's purpose: It was precisely that sort of *ad hoc* borrowing that Section 1658 sought to avoid. 124 S. Ct. at 1844.[7]

B. Mandatory Expedition

Respondent agrees that Section 1983, unlike Section 322(c)(7)(B)(v), does not mandate expedition, but he urges that Section 1983 does not foreclose expedition. Resp. Br. 33 n.36. There is, however, a critical difference between the *mandatory* expedition required by Section 332(c)(7)(B)(v) and discretionary expedition under Section 1983. Mandatory expedition *ensures* that localities receive prompt resolution of land-use disputes, which can affect related development projects. And it promotes the public interest in rapid deployment of wireless technology. Pet. Br. 28-29; NLC Br. 20. Allowing suits under Section 1983 rather than Section 332(c)(7)(B)(v) would free

[7] Respondent's tacit suggestion (Br. 43) that Section 332(c)(7)(B)(v)'s limitations period must apply if his claim "arises under" the 1996 Act within the meaning of 28 U.S.C. § 1658 is unpersuasive. The limitations period in Section 332(c)(7)(B)(v) does not attach to claims "arising under" the 1996 Act as expansively construed in *R.R. Donnelley & Sons*. Rather, as is "almost invariably" the case, *Malley-Duff*, 483 U.S. at 168, Section 332(c)(7)(B)(v) attaches the limitations period to the *cause of action* it creates.

parties and courts of that mandate. *Nextel*, 286 F.3d at 695. Respondent's effort to cast doubt on the efficacy of mandatory expedition merely second-guesses Congress's judgment.

C. Final Administrative Action

Enforcement under Section 1983 would permit plaintiffs to bypass another important feature of Section 332(c)(7)(B)(v). Section 332(c)(7)(B)(v) defers judicial review pending a "final action or failure to act," 47 U.S.C. § 332(c)(7)(B)(v)—which "means final administrative action at the State or local government level" on an application to construct or modify a wireless facility. H.R. Conf. Rep. 458, *supra*, at 208; *Nextel*, 286 F.3d 692. That is important: State administrative processes introduce "flexibility," allow consideration of individualized circumstances and compromise, and thus minimize the likelihood of lawsuits. Pet. Br. 32 n.10 (citing treatises); U.S. Br. 25 n.5; cf. *Weinberger* v. *Salfi*, 442 U.S. 749, 765 (1975) (benefits of awaiting administrative decision). Because Section 1983 does not require that plaintiffs "first seek relief in a state forum," 411 U.S. at 489—it is subject only to unpredictable ripeness rules—allowing suit under Section 1983 here would, as in *Preiser* and *Smith* v. *Robinson*, 468 U.S. at 1011 n.14, threaten bypass of an important precondition to suit. Pet. Br. 32 n.10.

Respondent concedes (Br. 47 n.49) that Section 332(c)(7)(B)(v) provides judicial review only after "final action on a permit application." But he argues that *exhaustion* of administrative remedies (*e.g.*, internal appeals) is not required. That is no answer. At a minimum, Section 332(c)(7)(B)(v) requires the plaintiff to submit an application to and await the decision of some state or local body; Section 1983 does not. Cf. *Heckler* v. *Ringer*, 466 U.S. 602, 617 (1984) ("presentment" requirement). Nor is it clear that exhaustion is optional. Respondent relies (Br. 47 n.49) on the holding in *Darby* v. *Cisneros*, 509 U.S. 137 (1993), that the APA's "final" decision requirement does not *itself* require exhaustion. But administrative exhaustion is a universal requirement of state zoning laws. 4 Kenneth H. Young, *Anderson's American Law of Zoning* § 27.28, at 593-599 (4th ed. 1996). *Darby* makes it

clear that exhaustion *is* required if the *underlying* law or agency rules make exhaustion a precondition to finality and review. 509 U.S. at 147.[8]

D. Relief Under Section 1983

Respondent concedes two inconsistencies between the relief available under Section 332(c)(7)(B)(v) and Section 1983. First, although Congress authorized attorney's fee awards in other provisions of the Communications Act, it did not provide fees in Section 332(c)(7)(B)(v). In contrast, Section 1983, through Section 1988, authorizes fee awards. While respondent downplays that conflict, his argument would override Congress's choice not to provide fees in Section 332(c)(7) itself. The claim that awards should be reasonable, moreover, ignores the tremendous burden that even putatively "reasonable fees" impose, an effect that is aggravated by the enormous number of new and proposed wireless towers and resulting permit applications (23,000 in 2003). See NLC Br. 21-23; Pet. Br. 30-32. The threat of fees for each good-faith denial of those applications fuels litigation and undermines the ability of state and local officials to enforce the zoning requirements Congress expressly sought to preserve—particularly where smaller municipalities confront well-funded wireless companies (including respondent's). *Ibid.*[9] Second,

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[8] Respondent errs in relying (Br. 47 n.49) on a failed legislative proposal to mandate exhaustion expressly. Its non-adoption is equally consistent with the conclusion that no change was necessary because "the existing legislation already incorporated the offered change." *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 188 (1994).

[9] *Nextel*, 286 F.3d at 695; *PrimeCo PCS (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003); Pet. 26-27 n.7 (collecting cases). Respondent's effort to portray himself as the little guy is belied by his own public statement: "[W]hat [city officials] fail to realize is I have more money to fight them than they have to fight me." Green, *Antennas Make Waves in RPV*, Daily Breeze, Mar. 17, 2002. The related claim that many antenna owners are small businesses, Resp. Br. 35 n.8; AMTA Br. 3, appears to rest in part on an oral statement; may not distinguish between the CMRS antennae covered by the Act and private antennae for other purposes; and ignores the backing *wireless providers*—ordinarily multi-billion dollar businesses—may supply where they wish to use a particular antenna.

respondent concedes that punitive damages are not available under Section 332(c)(7)(B)(v) but are available against individual officers under Section 1983. The threat of such extraordinary liability, even if unlikely, distorts the balance Congress established in Section 332(c)(7)(B)(v).

Respondent's insistence that both Section 1983 and Section 332(c)(7)(B)(v) provide for compensatory damages is unpersuasive. Respondent never sought damages under Section 332(c)(7)(B)(v). App., *infra*, 1a-11a. While respondent characterizes the damages issue as the City's "principal argument," Resp. Br. 26, the City prefaced its brief footnote on that issue with the disclaimer that "the Court need not resolve the issue here," Pet. Br. 38 n.12. And respondent's claim that damages are "necessary" to effectuate Section 332(c)(7) is belied by history. Zoning requirements have long been judicially enforced without the threat of damages. Likewise, courts have long provided effective judicial review of administrative action through specific relief alone. Pet. Br. 42; U.S. Br. 16 n.2.

Respondent insists that "any appropriate relief" under *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), includes damages for every statutory violation. *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002), holds otherwise, specifying that "appropriate" means "traditionally available," with specific reference to the nature of the underlying dispute. Respondent does not deny that, for land-use and zoning disputes, the traditional remedy is specific relief—such as an order requiring that the disputed permit be granted. Pet. Br. 42; NLC Br. 14-17. While respondent urges (Br. 29) that *Barnes* is irrelevant to "legislation not enacted under the Spending Clause," *Barnes*'s defies that distinction.[10]

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[10] Respondent's reliance (Br. 27, 30) on Section 1983 cases—such as *Carey* v. *Piphus*, 435 U.S. 247 (1978)—to allege the importance of damages under Section 332(c)(7)(B)(v) is wholly circular. The fact that damages are traditionally available under Section 1983 does not prove that they are appropriate under a separate cause of action for review of administrative action under the Communications Act. In this context, the traditional remedy of specific relief is quick and complete. Pet. Br. 38-39.

Respondent, moreover, fails to address the other overwhelming evidence that Congress did *not* intend to permit damages awards under Section 332(c)(7)(B)(v). *First*, the FCC has interpreted Section 332(c)(7)(B)(v), which authorizes the FCC to grant relief from zoning decisions that consider RF emissions, as not providing for damages. Pet. Br. 5, 26, 38 n.12. Respondent does not explain why the adjacent option of seeking relief in court should be construed differently. *Second*, respondent ignores the legislative history of Section 332(c)(7)(B)(v), which describes that provision as an "appeal," and "judicial review of agency action," which traditionally do not offer damages. See Pet. Br. 38 n.12, 43. *Third*, respondent says nothing about Section 332(c)(7)(B)(v)'s use of the phrase "hear and decide," a phrase that in the zoning context typically describes an appellate function. Pet. Br. 43 & n.13.

Fourth, respondent's position conflicts with the Act's savings clause, 1996 Act § 601(c)(1), 47 U.S.C. § 152 (note). That provision declares that, absent an *express* direction to the contrary, the Act should not be construed to "modify, impair, or supersede" "state" or "local" law. Section 332(c)(7)(B)(v) does not expressly provide for damages. Providing damages for zoning and land-use decisions under Section 332(c)(7)(B)(v) would preempt—and thus "impair" and "supersede"—myriad state laws that afford localities and their officers immunity for such decisions. Pet. Br. 38-39 n.12, 41-43, 45; p. 20, *infra*.

E. Respondent Ignores Congress's Evident Intent

Respondent cannot dispute that imposing fees (and damages) for otherwise good-faith zoning decisions would radically depart from prior practice in this area of traditional state authority. Pet. Br. 41-43, 45. Instead, respondent urges that Congress "clearly departed from state law in enacting § 332(c)(7)(B)(v)" because Section 332(c)(7) imposes substantive requirements, *e.g.*, it proscribes zoning laws that effectively prohibit wireless service.

That misconstrues the City's argument. No one suggests that Section 332(c)(7) left substantive zoning law unchanged. Rather, it is the *procedures* that Section 332(c)(7) provides for

obtaining review that emulate critical features of virtually every state zoning law: initial administrative decisions by state and local authorities; review of "final" administrative action or failure to act; a short limitations period; standing for any person "adversely affected"; and the substantial evidence test. Pet. Br. 42-43; NLC Br. 8-12. Those extensive procedural similarities make it unlikely that Congress intended to displace the nearly universal form of relief—specific relief according the plaintiff the thing to which the statute entitled him—with damages and fee awards under Section 1983.[11]

That result also would be at odds with Congress's stated intent to "not limit or affect the authority of a State or local government" except as expressly provided. It would defy Section 332(c)(7)'s clear instruction—and common sense—to conclude that state and local zoning authority is somehow "preserved" by subjecting those decisionmakers to liability that is foreign to traditional zoning schemes. While respondent (Br. 35-36) dismisses that as a "policy" argument, the issue is not "policy" but *congressional intent*. The imposition of potentially massive fees liability under Section 1983 would contravene Section 332(c)(7)'s purpose and distort the balance it establishes. See pp. 15-16, *supra*; Pet. Br. 29-32.

Respondent's claim (Br. 36-37) that state and local governments may behave lawlessly absent the threat of fee awards is baseless. Congress did not accept that supposition, for it channeled permit requests through those very governments and declined to provide fee awards in Section 332(c)(7)(B)(v), even as it provided for that relief in other sections of the Communications Act. The assertion is in serious tension with respon-

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[11] Respondent errs in relying (Br. 34) on a 1992 Amendment to the Cable Act, Pub. L. 102-385. That amendment was prompted by the assertion of *constitutional* claims against municipalities for franchising decisions "even when fully consistent" with the Cable Act. S. Rep. No. 102, 92d Cong., 2d Sess. 49 (1992). Congress therefore protected franchising authorities from damages liability under Section 1983 "for acts that *are authorized under title VI of the 1934 Act*." *Ibid.* (emphasis added). That provision has no bearing on whether Congress intended to make Section 1983 relief available for the alleged *statutory* violations at issue here.

dent's own representations that local governments approve "92 percent of applications, * * * most within 60 days," and that they "have learned to compromise to accommodate both the needs of providers and the preferences of local communities." Br. in Opp. 20. In any event, judicial review of zoning decisions, and judicial review of agency action generally, have long functioned effectively without fee awards. There is no statutory basis for concluding that Congress believed that traditional relief to be insufficient here.[12]

III. The Savings Clause Defeats Respondent's Arguments

Respondent's construction of Section 601(c)(1), 47 U.S.C. § 152 (note), assumes the very conclusion—the availability of Section 1983 relief—that it sets out to prove. Respondent contends that, unless the Communications Act's requirements are enforceable under Section 1983, then the Act somehow "impairs" Section 1983. But respondent offers no answer to the Third Circuit's explanation that Congress's refusal to create Communications Act rights that are enforceable under Section 1983 does not "impair" Section 1983; it merely declines to *expand* the categories of claims that can be raised under that provision. Pet. Br. 49-50.

Respondent likewise nowhere distinguishes *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004), in which this Court construed strikingly similar language in an antitrust-specific savings provision to leave pre-existing law unchanged. Pet. Br. 50; see *Cellco P'Ship* v. *FCC*, 357 F.3d 88, 91 (D.C. Cir. 2004) (Section 601(c) designed to protect pre-existing law). Nor does he

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[12] While the CTIA (Br. 26-29) purports to identify five cases involving municipal misconduct, those cases do not hold up on close inspection. Five alleged cases in the *eight years* following the Acts' effective date hardly justifies fee awards for *every* mistaken application of the Act's complex requirements. Moreover, wireless companies themselves have overreached. *E.g.*, *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (finding "untenable" Sprint's claim that it "has the right * * * to construct any and all towers that, in its business judgment, it deems necessary"); *Town of Amherst* v. *Omnipoint*, 173 F.3d 9, 15 (1st Cir. 1999) (noting provider's intransigent "one-proposal strategy").

answer *Novotny*, 442 U.S. at 376-377, which rejected an argument (under the rubric of implied repeal) indistinguishable from respondent's. Pet. Br. 50. Finally, respondent's effort to distinguish *Sea Clammers* (Br. 48-49) is no more persuasive than the Ninth Circuit's. Pet. Br. 47-48.

Section 601(c), moreover, provides that the Communications Act shall not be read to "impair" or "supersede" *state and local* law except as "*expressly so provided.*" It thus prevents federal preemption or impairment of state law unless Congress makes its intent express. Expanding Section 1983 liability to this new context clearly would preempt (and thus supersede)—for a whole new category of cases—the many state immunity laws that otherwise protect municipalities and their officers from liability for zoning decisions. Pet. Br. 44-45 & App. 25a-35a. It likewise would impair their purpose by preventing them from protecting the government fisc for public benefit and ensuring that individuals are willing to serve on zoning commissions (and rule evenhandedly) without fear of monetary liability. *Humana* v. *Forsyth*, 525 U.S. 299, 310 (1999) ("impair" encompasses "frustrat[ion]" of "state policy"). Respondent's veiled suggestion that all of those immunity laws apply only to *state law* claims (Br. 49), is unsupported by citation, has no basis in text, and is belied by numerous cases addressing whether the application of such limits to federal claims is preempted by federal law. *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) ("state law that immunizes government conduct" is "preempted" by Section 1983); *Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003); *Howlett* v. *Rose*, 496 U.S. 356, 377-379 (1990); Pet. Br. 44. Nor is there any basis for asserting that such preemption is not an "impairment" of state law, but rather "an attribute of federal law." Br. 49. It is both: Under the Supremacy Clause, one attribute of federal law is that it preempts inconsistent state laws—except where, as here, Congress expressly directs otherwise.

* * * * *

For the foregoing reasons and those set forth in the City's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2005

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-09071-SVW (RNBx)

MARK J. ABRAMS,

Plaintiff and Petitioner,

v.

CITY OF RANCHO PALOS VERDES, A MUNICIPALITY; CITY OF RANCHO PALOS VERDES PLANNING COMMISION; CITY OF RANCHO PALOS VERDES CITY COUNCIL; FRANK LYON; LARRY CLARK; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND SUPERIOR COURT OF LOS ANGELES COUNTY;

Defendants and Respondents.

[February 25, 2002]

PLAINTIFF/PETITIONER'S BRIEF RE: REMEDIES AND DAMAGES

Pursuant to the Court's order of January 9, 2002, Plaintiff/Petitioner MARK J. ABRAMS hereby submits his Brief with respect to the issue of appropriate remedy and damages.

1. INTRODUCTION

On January 9, 2002, this court issued its *Order Granting Petition to Vacate Defendants' Decision to Deny Plaintiff a Conditional Use Permit ("Order Granting Petition")*, wherein it was determined that the defendant/respondent CITY OF

RANCHO PALOS VERDES ("RPV" or the "CITY") had violated the Telecommunications Act of 1996 ("TCA") by denying plaintiff/petitioner MARK J. ABRAMS' application for a conditional use permit ("CUP") to use the antenna facilities already legally existing on his property for transmission on certain commercial, as well amateur, radio frequencies. The court directed the parties to submit further briefing with respect to the appropriate remedy in this case, as well as the issue of damages under 42 U.S.C. § 1983.

It should be noted here that plaintiff's complaint alleges several separate and distinct claims for relief. Insofar as is relevant here, the first claim for relief alleges defendants' violation of the TCA, and seeks equitable relief in the form of mandamus or injunction to compel defendants to issue the CUP to plaintiff forthwith. The third claim for relief is to recover damages under 42 U.S.C. § 1983, including all lost profits and income due to plaintiff's inability to utilize and provide the wireless telecommunications facility proposed by the CUP. Related to plaintiff's Section 1983 claim is his claim for attorney's fees under 42 U.S.C. § 1988(b).

2. PLAINTIFF IS ENTITLED TO IMMEDIATE INJUNCTIVE RELIEF

Plaintiff's complaint herein prays, in part, that defendant CITY be ordered to forthwith issue to plaintiff the CUP in question, and for a writ of mandate to issue, commanding the CITY to forthwith and unconditionally issue the CUP as applied for by plaintiff. As the court has noted in its *Order Granting Petition*, the court has the authority, either via mandamus or injunction, to fashion an appropriate remedy under the TCA.

Indeed, most cases decided under Section 332(c)(7) of the TCA that favor the party attempting to construct an antenna have compelled the municipality to issue the necessary permits to allow construction of the antenna. The Court cites two such cases on page 20 of its *Order Granting Petition: Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1463 (N.D. Ala. 1997) (permitting mandamus to be issued) and

Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (finding appropriate relief under the Act was an injunction). Several other courts have also used an injunction as the proper relief for violation of Section 332(c)(7). See *New Par d/b/a Verizon Wireless v. City of Saginaw*, 161 F.Supp.2d 759, 771 (E.D. Mi. 2001) (issued mandatory injunction as the appropriate remedy); *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403, 410 (3rd Cir. 1999) (injunction is proper form of relief under §332(c)(7)(B)(v)); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2nd Cir. 1999) ("appropriate remedy is injunctive relief in the form of an order to issue the relevant permits"); *Sprint Spectrum, L.P. v. Town of Easton*, 982 F.Supp. 47, 52 (D. Mass. 1997) (ordering injunction directing defendant to issue Special Permits). Courts have also found writs of mandamus to be a proper remedy. See *Western PCS II Corporation v. Extraterritorial Zoning Authority*, 957 F. Supp. 1230, 1237 (D.N.M. 1997) (mandamus relief was appropriate where there had been considerable municipal delay); *Bellsouth Mobility Inc. v. Gwinnett County, GA*, 944 F. Supp. 923, 929 (N.D. Ga. 1996) (TCA gives courts sufficient authority to issue mandamus relief "if such relief would be warranted under the circumstances").

The overriding theme in all of these cases, whether issuing an injunction or mandamus relief, is that the TCA calls for prompt decisions regarding cases decided under Section 332(c)(7) and the only way to ensure expedited action is to issue an injunction or writ of mandamus compelling the municipality to issue the necessary permits to the prevailing party. ABRAMS, as noted *infra*, has had this case pending for over 18 months, during which time competitive wireless service has been unavailable to the public. Moreover, the present case offers an even more compelling reason for immediate injunctive or mandamus relief. Unlike all the cases cited above, no construction is necessary to implement ABRAMS' proposal. The court has already recognized this fact in its decision. *Order Granting Petition*, at pgs. 10, 12. Thus, there is nothing for the CITY to approve and no remand

is necessary. Indeed, the courts that have considered the matter under similar circumstances (but where cellular facilities were to be constructed atop an existing support structure) have generally found that remand would be inappropriate. As stated in *Cellular Telephone Co. v. Town of Oyster Bay, supra:*

> "Given the weight of authority that injunctive relief best serves the TCA's stated goal of expediting resolution of this type of action [Citation], and our agreement with the District Court that remand would serve no useful purpose in this case [Citation], we hold that an injunction ordering the Town to issue the permits was an appropriate remedy." (166 F.3d at 497).

Also see *New Par d/b/a Verizon Wireless v. City of Saginaw, supra,* 161 F.Supp.2d at 771 ("a remand would serve no useful purpose and would only be the occasion for further delay"); *Bellsouth Mobility Inc. v. Gwinnett County, GA, supra*, 944 F. Supp. at 929 ("simply remanding the matter to the Board for their [further] determination would frustrate the TCA's intent to provide aggrieved parties full relief on an expedited basis"); *Illinois RSA No. 3, Inc. v. County of Peoria, supra,* 963 F. Supp. at 746 (remand of case to the local zoning board would be a "waste of time and frustrate the TCA's direction to expedite these proceedings"); *Western PCS II Corporation v. Extraterritorial Zoning Authority, supra,* 957 F. Supp. at 1237 (remand inappropriate where the record indicates that the zoning authority "is willing to ignore the requirements of federal law and reach far beyond its authority to create a reason to deny the Petitioner's request."); and *Sprint Spectrum, L.P. v. Town of Easton, supra*, 982 F.Supp. at 52 (appropriate remedy is injunction compelling defendant to issue Special Permits, rather than remand).

As the court herein acknowledges that the TCA requires that remedies thereunder be effected on an expedited basis, plaintiff submits that the court should, first of all, forthwith make and enter a judgment ordering defendant CITY to immediately and unconditionally grant plaintiff's application for CUP 207, and to issue the CUP accordingly.

3. PLAINTIFF IS ENTITLED TO RECOVER DAMAGES UNDER 42 U.S.C. § 1983.

The court has directed the parties to further brief "the issue of damages pursuant to 42 U.S.C. § 1983". Plaintiff is not sure if this further briefing is to discuss the nature and extent of plaintiff's damages, or whether plaintiff is entitled to recover damages in the first instance. Plaintiff has already briefed the issue concerning his entitlement to damages, concluding that "this matter should be set for further briefing and/or an evidentiary hearing to determine the nature and amount of damages which plaintiff is entitled to recover"; see Part IV of Plaintiff/Petitioner's Opening Brief. However, defendants declined to address the issue of damages at all in their brief; see Part VII to Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Opening Brief. Moreover, the court has not ruled, in its *Order Granting Petition*, whether or not plaintiff is in fact entitled to recover Section 1983 damages.

As noted in Plaintiff's Opening Brief, case law supports the proposition that a denial of rights under the TCA, and specifically Section 332 thereof, is protected by 42 U.S.C. § 1983. A few cases in particular merit further discussion. In *Sprint Spectrum, L.P. v. Town of Easton, supra.*, the court found that the Town of Easton had violated Section 332 of the TCA. The court also decided that the Town violated 42 U.S.C. § 1983 by denying Sprint its rights under the TCA. The court followed the Supreme Court's interpretation of Section 1983, in which enforcement of a federal right through Section 1983 will be denied only if the statute at issue precludes a Section 1983 action, or if the statute does not create a substantive right. The court stated that the TCA does not explicitly or implicitly preclude Section 1983 suits. Also, the TCA creates substantive rights by "providing that 'any person adversely affected by any final action . . . by a . . . local government or any instrumentality thereof . . . may . . . commence action in any court of competent jurisdiction." *Sprint Spectrum* at 53 (citing 47 U.S.C. §332(c)(7)(B)(v)). Moreover, the court stated

that enforcing a plaintiff's rights under the TCA would not strain judicial competence.

The U.S. District Court of Connecticut has also found that a violation of 332(c)(7) is enforceable under Section 1983. In *Smart SMR of New York, Inc. v. Zoning Commission of the Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998), the court concluded that the Town had violated Section 332(c)(7)(B)(iii) by not supporting its decision with substantial evidence. The court concluded that a Section 1983 claim was available to Smart SMR. The court analyzed the case in the same manner as the *Sprint Spectrum* court and agreed with the *Sprint Spectrum* court's analysis that violations of the TCA could form the basis for a Section 1983 action.

In *AT&T Wireless PCS, Inc. v. City of Atlanta*, No. 99-12261; 20 Pike & Fischer Communications Regulation 442, vacated on unrelated procedural grounds at 223 F.3d 1324 (11th Cir. 2000), the 11th Circuit determined that the TCA did not foreclose Section 1983 remedies. In that case, AT&T Wireless was denied a special use permit by the City of Atlanta that was not supported by substantial evidence under the TCA (Section 332(c)(7)(B)(iii)). The court decided that this section of the TCA creates a federal right. This creates a rebuttable presumption that the federal right can be enforced through Section 1983. The court relied on the explicit direction of Congress that the TCA shall have no implied effect on other laws to conclude that the Act did not intend to preclude Section 1983 remedies from a TCA plaintiff. Although this decision was subsequently vacated and dismissed due to a purely procedural matter, there is no indication that the 11th Circuit would change its substantive analysis of the Section 1983 action in that case.

Thus, courts have found that violation of the TCA, generally, and specifically Section 332(c)(7)(B)(iii), can form the basis for a Section 1983 action.

4. PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

42 U.S.C. § 1988(b) provides that in any action to enforce a provision of 42 U.S.C. § 1983, the court, in its discretion, may award the prevailing party therein a reasonable attorney's fee as part of the recoverable costs. A plaintiff is deemed to be the prevailing party when he obtains relief on the merits of the claim which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112, 113 S.Ct. 566, 573, 121 L.Ed.2d 494, 503 (1992); *Foreman v. Dallas County, Texas*, 193 F.3d 314, 323 (5th Cir. 1999). Specifically, a plaintiff is deemed the prevailing party where "the goal of the lawsuit, a permanent injunction . . . was achieved", and where the defendants' behavior was altered thereby; *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554, 557 (5th Cir. 1998); *Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993).

While the statue provides that an award for attorney's fees is discretionary, a prevailing plaintiff should be awarded fees under § 1988(b) absent special circumstances that would make the award unjust; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402, 88 S.Ct. 965, 966, 19 L.Ed.2d 1263, 1266 (1968); cf *Scham v. District Courts Trying Criminal Cases, supra* (although plaintiff was the prevailing party, fees were properly denied because the requested fees were outrageously high). Plaintiff ABRAMS must be deemed the prevailing party in this action, as he has demonstrated in this action that his rights under the federal TCA has been violated, and has obtained relief (i.e., an injunction directing the issuance of the CUP) which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."

Accordingly, upon entry of the judgment in plaintiff's favor awarding money damages under 42 U.S.C. § 1983, plaintiff will apply for an award for attorney's fees under 42 U.S.C. § 1988(b) in accordance with F.R.C.P. Rule 54(d)(2) and Local Rule 54-12.

5. PLAINTIFF IS ENTITLED TO AN IMMEDIATE JUDGMENT WITH RESPECT TO THE INJUNCTIVE RELIEF, AND THEN TO PROCEED WITH HIS ACTION FOR DAMAGES UNDER 42 U.S.C. § 1983.

To support his claim for damages under 42 U.S.C. § 1983, plaintiff will offer proof that, as a result of the defendants' refusal to issue him his CUP and his resultant inability to use his existing antenna facilities to provide Commercial Mobile Radio Service to several potential clients, he has suffered damages in the form of lost profits in excess of $250,000. In addition, plaintiff believes that discovery will uncover facts demonstrating that the defendants acted maliciously, or with a reckless or conscious disregard of plaintiff's rights under federal law, so as to justify the imposition of punitive damages. Plaintiff assumes that the court will require some sort of trial or hearing, whether by way of live testimony or by declarations, to determine the amount of damages which plaintiff is entitled to recover. Plaintiff further assumes that defendants will also require sufficient time in which to investigate plaintiff's damage claims, and to conduct their own discovery; perhaps the court may also require the parties to explore settlement per Local Rule 16-14. It may therefore be several months before the issue of damages can be tried and finally resolved. Accordingly, plaintiff submits that, pursuant to the clear intent of the TCA to expeditiously initiate competitive Personal Wireless Communications services, he is entitled to have judgment for injunctive or mandamus relief entered immediately so that he can commence service and limit further damages, and then be allowed to proceed thereafter to prove his damages under his Section 1983 claim.

The court clearly has authority to do so. F.R.C.P. Rule 54(b) provides, in part:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express

> determination and direction that there is no just reason for delay and upon an express direction for entry of judgment."

"Judgment" includes any decree or order from which an appeal lies (Rule 54(a)). An order or judgment granting (or denying) injunctive relief is final and appealable; 28 U.S.C. § 1292(a)(1). The primary purpose of this Rule is to restrict piecemeal appeals (see, e.g., *Business Communications, Inc. v. Cahners Pub. Co.*, 420 F.2d 535 (6th Cir. 1969)). However, its use is not confined solely to permitting occasional piecemeal appeals, as the court can also consider factors such as delay, economic effect, expenses, and the like; *Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944, 949 (7th Cir. 1980). Furthermore, the decision to direct the entry of final judgment on one of several pending claims is committed to the sound discretion of the trial court, which decision will not be disturbed on appeal absent an abuse of discretion; *Harriscom Svenska AB v. Harris Corp.* 947 F.2d 627, 629 (2nd Cir. 1991); *Atterberry V. Carpenter*, 310 F.2d 126 (9th Cir. 1962).

Significantly, since an order granting or denying injunctive relief is itself an appealable order, the court is empowered to finally and fully adjudicate the injunctive claims on an interlocutory basis and then proceed with the remaining claims, without regard to Rule 54(b). In the case of *Ackerman-Chillingsworth v. Pacific Electrical Contractors Ass'n*, 579 F.2d 484, 489 (9th Cir. 1978) the court noted:

> "Whenever a court fully adjudicates a claim for an injunction and does not execute a Rule 54(b) certificate, the adjudication is interlocutory if other claims remain pending. [Citations.]"

Accord, *Simmons v. Block*, 782 F.2d 1545, 1549 (11th Cir. 1986) (citing the *Ackerman-Chillingsworth* case, *supra.*); *Rains v. Cascade Industries, Inc.*, 402 F.2d 241, 243 (3rd Cir. 1968) ("Although the district court did not dispose of defendant's counterclaim for damages and injunctive relief and made no certification of appealability under Rule 54(b) of the Federal Rules of Civil Procedure, its judgment [] denied

plaintiff the injunctive relief which he sought and is therefore appealable under 28 U.S.C. § 1292(a)(1) as an order refusing an injunction.") Accordingly, even if the court were to be unable to make "an express determination that there is no just reason for delay" the court may nevertheless grant plaintiff his injunctive relief on an interlocutory basis, pending resolution of his remaining claims.

The court is asked to take judicial notice of its own file of this matter, which will disclose the following chronology: Plaintiff filed its complaint for relief herein on August 24, 2000. At the Case Management Conference for this matter which took place on November 6, 2000, defendants raised their contention that this court should abstain from hearing this matter, or that this matter should be stayed, due to a prior related action which was pending in the Los Angeles County Superior Court. The result was that the court ordered this matter stayed until the Superior Court action was resolved. The Superior Court finally issued its judgment in that case on April 19, 2001. Plaintiff thereafter promptly brought a motion to vacate the stay and restore this matter to active status, which motion was opposed by defendants. Defendants have therefore done everything possible to stall and delay final resolution of this matter. Accordingly, despite the fact that plaintiff was entitled to have this matter decided in an expedited manner, this case has been pending now for over 18 months. Given the fact that plaintiff was entitled as a matter of law to have his TCA claim decided on an expedited basis but has already endured an extraordinary delay, he (and the public which deserves competitive personal wireless service) should not have to wait the additional time until plaintiff's separate claim for money damages is also finally resolved, which could take many more months, before he obtains his expedited relief.

6. CONCLUSION.

In light of the court's *Order Granting Petition*, plaintiff submits the following:

A. Judgment should be entered forthwith in favor of plaintiff, and against defendants, in the form of mandamus and/or injunction compelling defendants to forthwith grant plaintiff's application for CUP 207 and to issue said CUP 207, together with an express determination by the court that there is no just reason for delay and an express direction for immediate entry of said judgment pursuant to Rule 54(b).

B. This matter should thereupon be allowed to proceed with respect to plaintiff's claim for actual and punitive damages, as well as attorney's fees, under 42 U.S.C. §§ 1983 and 1988, respectively. The court should set this matter on a schedule to include reasonable deadlines for discovery completion, final status conference, and trial.

DATED: January 23, 2002

CHEONG, DENOVE, ROWELL,
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CHRISTOPHER D. IMLAY,
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