

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 T-MOBILE SOUTH, LLC, :

4                      Petitioner                      :

5 v. : No. 13-975.

6 CITY OF ROSWELL, GEORGIA. :

7 - - - - - x

8 Washington, D.C.

9 Monday, November 10, 2014

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11           The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States  
13   at 10:05 a.m.

14      APPEARANCES:

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16 Petitioner.

17 ANN O'CONNELL, ESQ., Assistant to the Solicitor General,  
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19 United States, as amicus curiae, in support  
20 of neither party.

21 RICHARD A. CAROTHERS, ESQ., Buford, Ga.; on behalf of  
22 Respondent.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 13-975, T-Mobile  
5 South v. the City of Roswell, Georgia.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF PETITIONER

9 MR. FISHER: Mr. Chief Justice, and may it  
10 please the Court:

11 Local governments violate the in-writing  
12 requirement of Section 332 when they fail to issue a  
13 document separate from the administrative record that  
14 specifies the reasons for denying an application to  
15 construct a personal wireless facility. Any other  
16 construction would flout the very purpose of this  
17 provision, which is to enable meaningful judicial  
18 review. Indeed, allowing local governments to deny  
19 applications without specifying their reasons would  
20 require district courts across the country to embark --

21 JUSTICE SOTOMAYOR: That's not actually what  
22 the court below said. It said that it could discern the  
23 reasons from the record. That's a very different  
24 statement than saying there are no reasons set forth.

25 MR. FISHER: Justice Sotomayor, I'm not sure

1 the Eleventh Circuit did actually specify what the  
2 reasons were. It did pronounce that it believed that  
3 the administrative record contained reasons. We don't  
4 deny that there are a bevy of potential reasons in the  
5 district courts -- I'm sorry, in the administrative  
6 record. I counted nine or ten as I read the transcript  
7 and the minutes. The problem is we don't know which one  
8 of those were the City's real reasons for denying the  
9 permit, and therefore, we can't have the expedited  
10 proceeding that Section 332 contemplates.

11 JUSTICE ALITO: Well, how far does your  
12 argument go? Suppose the -- suppose the instrument of  
13 denial, the letter, does not list any reasons, but it  
14 incorporates by reference or makes reference to some  
15 other document that sets out the reasons. Is that  
16 sufficient?

17 MR. FISHER: We think that if the denial  
18 letter was clearly -- clearly directed us to some other  
19 document and said -- and said where the reasons were,  
20 and that document was contemporaneously available, we  
21 think that would be enough.

22 Now, neither of those things are present  
23 here. There's no explicit reference to any particular  
24 reasons in the minutes. It just simply says the reasons  
25 are available, and of course, as the Solicitor General

1 has pointed out, the minutes were not available.

2 JUSTICE ALITO: All right. Well, suppose  
3 that --

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE ALITO: Just to follow up, I'm sorry  
6 to interrupt. Suppose the letter doesn't make a  
7 specific reference to some other document, but there is  
8 some other document known to the parties that has been  
9 approved by the town council and sets out the reasons,  
10 that would not be sufficient. There has to be an  
11 express reference in the instrument of denial.

12 MR. FISHER: Right. I think the question  
13 is, what does the decision say? That's the statutory  
14 term. And so, the decision needs to provide the  
15 reasons. Now, you could have a situation like the  
16 Omnipoint case in the Sixth Circuit where instead of  
17 getting a separate letter like we got in this case, you  
18 get a resolution from the city council specifying the  
19 reasons, and we think that would be enough as well. All  
20 we want to know is why -- why the application was denied  
21 so that we can decide, first of all, whether to bring a  
22 suit or try to negotiate with the local government. And  
23 second of all --

24 CHIEF JUSTICE ROBERTS: No, that's not --  
25 I'm sorry, go ahead.

1           MR. FISHER:           And second of all, so the  
2   district court can do the streamlined work that Section  
3   332 contemplates.

4           CHIEF JUSTICE ROBERTS:           But that's not all  
5   you want. Let's say on Monday you get a letter that  
6   says your application is denied. And on Friday the city  
7   council says the reasons we denied the application were  
8   because of this, this, and this. Is that enough for  
9   you?

10          MR. FISHER:           No, it would not be enough --

11          CHIEF JUSTICE ROBERTS:           No.

12          MR. FISHER:           -- because the letter needs to  
13   tell us why.

14          CHIEF JUSTICE ROBERTS:           It doesn't matter  
15   that four days or three days, whatever is later, there  
16   is a resolution that doesn't say it's denied, it says  
17   the reason we denied it is this. That's not good  
18   enough?

19          MR. FISHER:           Well, I think you'd have it in  
20   a timing question, the Solicitor General frames, whether  
21   that was substantially contemporaneous. We think that  
22   it --

23          CHIEF JUSTICE ROBERTS:           I know.

24          MR. FISHER:           -- needs to be in a single  
25   document.

1 CHIEF JUSTICE ROBERTS: It has to be in a  
2 single document. What if it's stapled together? You  
3 know, here's one, it says denied. And here's one  
4 saying, the next day, the reasons we denied it is -- are  
5 these.

6 MR. FISHER: I think stapled together would  
7 be just fine.

8 CHIEF JUSTICE ROBERTS: No, no. What if  
9 they're not stapled together?

10 MR. FISHER: Oh, I'm sorry. I  
11 misunderstood.

12 (Laughter.)

13 MR. FISHER: Make it easier for myself. No,  
14 we think that the statutory term is definition -- sorry,  
15 is decision, is a singular. So it needs to be put  
16 together.

17 JUSTICE GINSBURG: But decision -- decision,  
18 Mr. Fisher, often means just denied. There -- there is  
19 one statute was mentioned in the brief at -- this is 47  
20 U.S.C. 546 (c) (3), "The franchising authority shall  
21 issue a written decision." That's one sentence. Next  
22 sentence, "Such decision shall state the reasons  
23 therefore." So the requirement of a decision alone  
24 doesn't necessitate that reasons be given.

25 MR. FISHER: Justice Ginsburg, we think it's

1 fine to look at other provisions of the Communications  
2 Act. That one particular provision stands apart from  
3 the several other provisions that the Chamber of  
4 Commerce cited around page 10 of its brief and that we  
5 cite in our brief where the word "decision" is used by  
6 itself and in context clearly to mean a specification of  
7 reasons. Where the Communications Act contemplates no  
8 statement of reasons, it uses words like "notify" or  
9 "order." And so we think it's perfectly fine to look at  
10 the whole Act. That one provision is the only  
11 countervailing piece of evidence.

12 JUSTICE GINSBURG: Your bottom line is  
13 because of this supposed default, you get your -- your  
14 application is granted, and that seems odd when the  
15 thrust of this arrangement is that the decision should  
16 be in the hands of the local governing board or the  
17 local council or something. And then to say because of  
18 the procedural lapse, then you emerge the winner and it  
19 doesn't matter what good reasons the town might have  
20 had.

21 MR. FISHER: Well, there's two important  
22 things about that, Justice Ginsburg. First is the  
23 ordinary remedy is an injunction. We think that's the  
24 ordinary remedy. That's an equitable remedy that, of  
25 course, isn't absolute. And the second reason is, is



1     why that's the remedy. Remember, the whole purpose of  
2     this Act is to defeat local intransigents. In other  
3     words, process is the problem, not the solution. So  
4     simply requiring additional process, additional time,  
5     additional reasons, that's exactly what the Act is  
6     designed to solve, that problem that existed before  
7     1996.

8             JUSTICE KENNEDY:             Well, I suppose that could  
9     be left up to the district court on remand.

10            MR. FISHER:             Of course, Justice Kennedy.  
11     The Eleventh Circuit didn't reach the remedy question.

12            JUSTICE KENNEDY:            Let me ask you, I think we  
13     would have a much different case if at the time of the  
14     written notice, they appended the official copy of the  
15     transcript. Is the problem here that the transcript was  
16     too late?

17            MR. FISHER:             That's one problem, but it's  
18     not the only problem.

19            JUSTICE KENNEDY:            Because it seems to me you  
20     don't make the lateness part -- you don't make the  
21     lateness argument that the government makes in your --  
22     in your question presented. You do say that there has  
23     to be a -- whether documents stating the application  
24     been denied but providing no reasons. So I suppose we  
25     can imply from that that you think that the later copy

1 of the transcript is -- is just not applicable.

2 MR. FISHER: That's right, Justice Kennedy.  
3 We think that's one problem, but it's not the only  
4 problem. Even if the --

5 CHIEF JUSTICE ROBERTS: But do you -- I'm  
6 sorry.

7 MR. FISHER: Even if the transcript had been  
8 attached, there still wouldn't have been, based on this  
9 letter, a specification of reasons. And I'd be happy to  
10 walk the Court through exactly why that's so if you  
11 have a question.

12 CHIEF JUSTICE ROBERTS: Well, before you do  
13 so, why is the transcript required? They had minutes  
14 that summarized the testimony. Your position is not  
15 that the transcript had to be attached.

16 MR. FISHER: No, it's not. I think Justice  
17 Kennedy asked me if the transcript had been attached,  
18 and so I was saying that -- taking -- taking that  
19 question as -- as I got it.

20 CHIEF JUSTICE ROBERTS: But if the -- I'm  
21 sorry.

22 MR. FISHER: The minutes would be enough --

23 CHIEF JUSTICE ROBERTS: I may not have  
24 followed this. If the transcript were attached, what?

25 MR. FISHER: Then that would not be enough

1 on its own --

2 CHIEF JUSTICE ROBERTS: Oh, okay.

3 MR. FISHER: -- because the letter would  
4 still need to tell us where in the transcript the  
5 reasons were. And I'd like to walk the Court through --

6 JUSTICE KAGAN: Mr. Fisher, you're deriving  
7 all this from the word "decision" and "decision" as even  
8 the dictionary you principally cite, Blacks Law  
9 Dictionary states, "decision," you know, can mean one of  
10 two things. It can mean an opinion or it can mean a  
11 judgment, and people refer to it -- use that word to  
12 refer to either. So why should we interpret it your  
13 way?

14 MR. FISHER: For two reasons, Justice Kagan.  
15 One is because the overall context of the Act and the  
16 substantial evidence review requirement and the overall  
17 purpose tell us that "decision" needs to specify  
18 reasons. You can't conduct substantial evidence review  
19 until you know what the reasons are.

20 JUSTICE KAGAN: Well, that only suggests  
21 that you need reasons. It doesn't suggest that the  
22 reasons have to appear in a decision as opposed to some  
23 other document.

24 MR. FISHER: Fair enough. So one other part  
25 of the Act, which is the expedited review provision, I

1 think, also is instructive. The idea that Congress had  
2 in mind was that parties could show up in a district  
3 court and go straight to the question whether evidence  
4 in the record supported the city's decision. Congress  
5 did not contemplate what we would have under the City's  
6 approach or even the Solicitor General's approach, which  
7 is an entire first phase of litigation devoted to  
8 figuring out what those reasons are.

9 JUSTICE KENNEDY: But the larger problem  
10 here, of course, is that under your view, the Federal  
11 statute says that a local legislative body has to act  
12 like an administrative agency, and that raises very  
13 serious concern under Federalism. In the -- in the law  
14 of zoning, generally -- forget this Act -- in the law of  
15 zoning generally, if you go to the board of supervisors  
16 and want to rezone the property from agriculture to  
17 multi-family residential, do we say that due process  
18 requires them to give some reason? Is there anything in  
19 the law of zoning generally that says you have to give  
20 reasons?

21 MR. FISHER: I don't think generally. If  
22 there were a liberty interest or a property interest at  
23 stake --

24 JUSTICE KENNEDY: It would be like *Goldberg*  
25 *v. Kelley* for - zoning.

1           MR. FISHER:           Right. And we cite in our  
2   brief the Wolff v. McDonnell case, which says that when  
3   liberty or property interests are at stake, minimal due  
4   process requires a specification of reasons. And it's  
5   not the only time that cities provide specifications of  
6   reasons. They do it on their own. If you look at J  
7   (a) (84) and if you look at Footnote 4 of our reply  
8   brief, we cite numerous instances where the city takes  
9   it upon itself already to provide reasons for denials of  
10   permits. They do it --

11           JUSTICE GINSBURG:           Mr. Fisher, could you  
12   explain how you are disadvantaged? Now, first of all,  
13   what happens on remand to the district court in your  
14   view? The Eleventh Circuit rendered its decision, the  
15   case is remanded, what happens on remand?

16           MR. FISHER:           Well, as the case stands now,  
17   we prevailed in the district court and the district  
18   court gave us an injunction allowing the site to be  
19   constructed. The city took an appeal to the Eleventh  
20   Circuit which reversed on the question of whether the  
21   Act was violated. So I think what would happen, after  
22   this Court rules, it would go back to the Eleventh  
23   Circuit with the case in that -- in that posture.

24           If I could say a couple more things about --

25           JUSTICE GINSBURG:           Then what would -- then

1 if this Court should uphold the Eleventh Circuit, then  
2 what happens?

3 MR. FISHER: If you uphold the Eleventh  
4 Circuit, then we go back down to the district court and  
5 are going to --

6 JUSTICE GINSBURG: And what happens there?

7 MR. FISHER: And I think there we're going  
8 to have to have one of these prolonged proceedings to  
9 decide what -- first of all, what the reasons are. The  
10 city has already filed one brief in the district court,  
11 before this case started to go up on appeal, where it  
12 took the position that there were three reasons for its  
13 denial: Property values, the fact that T-Mobile  
14 allegedly already had sufficient service in the area,  
15 and compatibility with the neighborhood.

16 The city, in this Court, has offered some  
17 different reasons. The Solicitor General offers a still  
18 different take on the transcript and the minutes. And  
19 so, first we have to have in the district court one of  
20 these first mini hearings that I've been describing.  
21 And then we would, perhaps, then be able to litigate the  
22 question Congress contemplated, which is substantial  
23 evidence followed by some other arguments we might make.

24 JUSTICE SOTOMAYOR: Mr. Fisher, assume, and  
25 just for the sake of argument, that we do say that a

1 separate writing that clearly sets forth or sets forth  
2 the reasons for denial is adequate. I understand you to  
3 say that this is not adequate because it's not clear  
4 presumably; am I correct?

5 MR. FISHER: Yes.

6 JUSTICE SOTOMAYOR: Under this board's  
7 rules, do -- I'm assuming the board has to be unanimous,  
8 majoritarian voting rules, but why does every council  
9 member have to have the same reason? Can't different  
10 people say no for different reasons?

11 MR. FISHER: I think, Justice Sotomayor,  
12 they might be able to. The ordinary course would be a  
13 letter that provides reasons that speak for the entire  
14 council. But I wouldn't deem it impossible for a letter  
15 to come to us that says two city council members voted  
16 to deny the application for this reason and two others  
17 voted to deny the application for another reason. We  
18 can still use that to go into district court and the  
19 district court could still do its job.

20 JUSTICE SOTOMAYOR: Oh. So your --

21 JUSTICE SCALIA: But you say you can't use  
22 it in this case. You say that that factor renders  
23 the -- the giving of reasons inadequate.

24 MR. FISHER: No, Justice Scalia, it's not  
25 just the multiplicity of people on the board stating

1 different things. It's the fact that we don't know  
2 whether those statements constitute reasons. And this  
3 is one thing I really would love to give you a couple of  
4 examples.

5       There are many problems, first of all,  
6 arising out of the first question whether or not what  
7 citizens and experts say can constitute reasons. The  
8 Solicitor General says: Well, there has to be a clear  
9 indication that the voting members agree with that.  
10 Well, what if somebody just says, that's a good point,  
11 we'll take it into consideration? Or, thanks, you know,  
12 I'll -- I'll think about that? What about the fact that  
13 a member, him or herself, might say something with an  
14 equivocal tone. For example, Dr. Price said: I'm not  
15 sure how to assess property values here.

16       JUSTICE KAGAN:           Well, doesn't that --

17       MR. FISHER:           Does that count as a reason?

18       JUSTICE KAGAN:           All of these kinds of  
19 examples, don't they only suggest that a State or a  
20 locality would be well advised to write up a little  
21 paragraph that clearly states its reasons? But, you  
22 know, if they want to take the risk that a district  
23 court is going to say, gosh, I just can't find the  
24 reasons in this record, it's all too muddled. If they  
25 want to take that risk, what in the statute prevents it?



1           MR. FISHER:           The nature of substantial  
2 evidence review, which has a limiting principle --

3           JUSTICE KAGAN:       No. But I mean, substantial  
4 evidence review requires reasons. If they want to take  
5 the risk that their -- that their minutes or their  
6 transcript will not allow the district court to do  
7 substantial evidence review, then, you know, they'll  
8 lose.

9           MR. FISHER:       But, Justice Kagan, substantial  
10 evidence review requires them to defend only on their  
11 actual reasons. And what the city wants to do is have a  
12 record of over a hundred pages where anything it can  
13 find a foothold in, the lawyers can come in and make an  
14 argument that that's why they denied something. That  
15 not only frustrates process, but even, Justice Kennedy,  
16 to your question about Federalism, it starts to  
17 frustrate Federalism, because now Federal courts are  
18 deciding why local government -- local governments --

19          JUSTICE SCALIA:      Well, I'm surprised that --  
20 that you're willing to accept that there does not have  
21 to be a reason or a number of reasons that -- that the  
22 city council agrees on, that, you know, seven members of  
23 the city council, each -- each one of them has a  
24 different reason, and that's okay. Do you think that  
25 that's what the statute means?

1           MR. FISHER:           Well, I'm not sure, Justice  
2 Kennedy -- Justice Scalia. It -- you don't have to  
3 decide that in this case. The Solicitor General  
4 reserves it in a footnote. I'm not sure that just like  
5 this voting body can reach a decision without a single  
6 reason -- you know, these local government boards I  
7 think are really acting in an adjudicatory posture here,  
8 so I wouldn't want to preclude that.

9           JUSTICE SCALIA:       Yes. But one can interpret  
10 the statute as demanding that they have a reason. Now,  
11 to be sure, that's contrary to normal legislative  
12 action. Congress doesn't have to have a particular  
13 reason for a statute. Every -- every congressman can  
14 have a different reason, and it's still valid. But I --  
15 I would read this as saying the city needs to -- when it  
16 denies, it has to have a reason for denying. I don't --  
17 I don't know how else you read it.

18          MR. FISHER:           I certainly won't argue with  
19 that.

20          JUSTICE BREYER:       Well, then what's the  
21 disagreement? I mean, what's the disagreement between  
22 you and the Solicitor General? Justice Brandeis said  
23 years ago, which I thought was a great statement of law  
24 which doesn't ordinarily appear: Before we can say  
25 whether an agency decision is right or wrong, we have to

1 understand what it means.

2 MR. FISHER: Uh-huh.

3 JUSTICE BREYER: You get some piece of  
4 paper, you can't figure out what it means, well, then  
5 they'll send it back or they say no. That's what judges  
6 do with administrative agencies all the time. Your  
7 question says, do they have to have reasons? Yeah.  
8 Their question says can it appear in a separate  
9 document? Why not, as long as the document is given  
10 about the same time? So what's the problem?

11 MR. FISHER: The problem -- we do agree with  
12 the Solicitor General, you need reasons. We also agree  
13 with the Solicitor General that they need to be clear.  
14 Where we part ways with the Solicitor General is on the  
15 proposition that the ordinary administrative record can  
16 meet that clarity standard.

17 JUSTICE BREYER: Sometimes it could,  
18 sometimes it couldn't. It depends on what it says.

19 MR. FISHER: Well, let me -- let me just  
20 talk about the record in this case, Justice Breyer.

21 JUSTICE BREYER: But that's the -- I know.  
22 You want -- that's what you really want to say. You  
23 want to say the record here isn't good enough. But it  
24 seems to me that the one thing we're not deciding is  
25 whether the record here is good enough. Rather, the

1 questions have been put to us in general terms; we can  
2 answer them in general terms. We probably even might be  
3 able to write an opinion in three paragraphs, clear.

4 MR. FISHER: What I want to use is the  
5 record here to be illustrative, Justice Breyer. There's  
6 nothing unusual about this record in the sense that --

7 JUSTICE BREYER: Ah, yes. But to do that, I  
8 would have to know quite a lot, wouldn't I, about --  
9 about the situation of your client, about the situation  
10 of the city council, about what was actually meant by  
11 what they said about the context. You understand the  
12 problem.

13 MR. FISHER: Well, let me -- let me just  
14 give you a few examples. At JA 336, 338, and 340 are  
15 the parts of the minutes that the city and the Solicitor  
16 General rely on. And they say things, for example, in  
17 equivocal ways, as I was describing. We don't know  
18 whether that was a reason. We also have a temporal  
19 problem that arises sometimes.

20 JUSTICE KAGAN: As I understand the SG's  
21 position, the SG says there were five members of the  
22 council, three of them talked about the incompatibility  
23 of this tower with the neighborhood. So what in that  
24 statement do you contest?

25 MR. FISHER: That statement is --

1 JUSTICE KAGAN: Do you think that three of  
2 them did not base this on the incompatibility of the  
3 fake tree with the neighborhood?

4 MR. FISHER: I'm not a hundred percent  
5 certain they did, because the motion, as is set forth in  
6 JA 340, comes after all of those statements. There are  
7 many other statements, Justice Kagan. One -- one -- one  
8 council member said: I don't think cell towers should  
9 ever be able to be built in a residential neighborhood.  
10 Another asked whether T-Mobile could use different  
11 technology to establish the cell site.

12 So we don't know whether these statements,  
13 which also were right around the same time, also are  
14 things the city could defend on. And I'm not sure the  
15 Solicitor General even has taken a position as to  
16 whether or not there are any other reasons in the  
17 record. The Solicitor General has told us there's one  
18 thing we can consider.

19 JUSTICE KAGAN: The Solicitor General only  
20 needs one.

21 MR. FISHER: Well, no. They don't  
22 necessarily need one, Justice Kagan, because in the  
23 district court we're going to challenge for substantial  
24 evidence those reasons. So it's going to be very  
25 important if in the district court we can show, as we

1 think we can, that substantial evidence does not support  
2 the city's incompatibility argument. Then the question  
3 is going to be is there another reason in the record,  
4 and we haven't -- we have, perhaps, conflicting answers  
5 from the -- from the other two lawyers in the room  
6 today.

7 JUSTICE KAGAN: Well, then you're going to  
8 reach the question that Justice Scalia had a view of,  
9 which was, you know, if two people think X and two  
10 people think Y and one person thinks Z, is that  
11 sufficient? But as long as you have something that  
12 three people think, why isn't that sufficient?

13 MR. FISHER: It's not sufficient because we  
14 can't guarantee that that is why they voted. These are  
15 statements that come before a vote. And just like in  
16 this oral argument today, there's going to be many  
17 concerns and questions that precede the vote. The vote  
18 may be for a different reason. You don't know -- I'd  
19 like to think that every answer I give today is going to  
20 assuage any question that I get, but that's not  
21 necessarily the case. And it's not necessarily the case  
22 that something a local council person says for a round  
23 of applause in the room is exactly why they're going to  
24 vote 10 minutes later on the application.

25 If I could reserve the remainder of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Ms. O'Connell.

3 ORAL ARGUMENT OF ANN O'CONNELL  
4 FOR UNITED STATES, AS AMICUS CURIAE

5 MS. O'CONNELL: Mr. Chief Justice, and may  
6 it please the Court:

7 It's our position that a local government  
8 must provide reasons when it denies permission to  
9 construct a cell tower so that a court can conduct  
10 substantial evidence review as contemplated by the  
11 statute, but those reasons don't necessarily need to be  
12 included in the same document as the city's written  
13 denial of the application. It's fine for the city to  
14 give its reasons in some other document like meeting  
15 minutes. If the local government relies on a separate  
16 document, that document must be available at the time  
17 the written decision is issued.

18 JUSTICE GINSBURG: Where does that come  
19 from? There's nothing -- Ms. O'Connell, there's nothing  
20 in the statute that says that the decision doesn't have  
21 to have the reasons, something has to have the reasons.  
22 It has to be, you say, fairly contemporaneous. I don't  
23 see anything -- you -- you are inserting something into  
24 the statute that is not there.

25 MS. O'CONNELL: The -- the primary reason

1    why we're saying it has to come out at the same time is  
2    because otherwise it would frustrate the judicial review  
3    provision, where the applicant has 30 days under the  
4    statute to decide what action to take based on the  
5    denial.

6           JUSTICE GINSBURG:           But wouldn't it more  
7    sensible, then, to take a suggestion that has been made  
8    that we run the 30 days from when reasons are given, run  
9    30 days from when the minutes are available? I don't  
10   know why you have chosen a route that would say this  
11   applicant wins automatically, no hearing, no nothing.  
12   It doesn't matter that town's council had good reasons  
13   for it, they weren't contemporaneous, that's the end of  
14   it.

15           MS. O'CONNELL:           I think one reason why,  
16   Justice Ginsburg, is because it's difficult to read the  
17   statute that way. The 30 days runs from the final  
18   action of the local government, and the local government  
19   has to issue a decision in writing. It would be  
20   difficult to say once you have a letter in hand that  
21   says, dear applicant, your application has been denied,  
22   that you don't have a written decision. The applicant  
23   would be left to wonder whether reasons are coming at  
24   all, and if so, what those reasons are going to be. And  
25   I think if you follow that to its logical conclusion,



1 if -- if you didn't have reasons and didn't know if they  
2 were coming, I guess what you would do, then, is wait  
3 150 days from the day you filed your application and  
4 then file a lawsuit saying, they didn't act on my  
5 application in a reasonable time, which seems not  
6 correct, given that they sent --

7 JUSTICE BREYER: How does it work in -- in  
8 the ordinary agency, which I should know but I don't?  
9 The Federal Power Commission, a blessed memory, is faced  
10 with an application by El Paso Natural Gas to add an  
11 extension in a little area of New Mexico. The power  
12 commission denies. There are five votes. One person  
13 says I'm denying because we don't need the gas; a second  
14 person says I'm denying because it's ugly; a third  
15 person says I'm denying because it blocks certain  
16 animals from getting to their feeding place; and the  
17 other two vote to grant, all right? That's arisen in  
18 the course of the last 100 years, something like that.  
19 How do the courts handle that?

20 MS. O'CONNELL: In footnote 6 of our brief  
21 we describe some cases along those lines, where -- I  
22 mean, in this case we think that you have a majority,  
23 three of five given the same reason --

24 JUSTICE BREYER: But if -- I just want to  
25 know how it works in the case I put.

1           MS. O'CONNELL:           Right. In -- in the cases  
2 we describe in footnote 6, some courts have said and the  
3 D.C. Circuit did assume in one case that we cited that  
4 you need a majority, but other courts have said that  
5 it's okay as long as -- if everybody gives a different  
6 rationale, as long as you can get to a majority; you can  
7 conduct substantial evidence review of each of those  
8 rationales. And we think that makes sense here because  
9 the statute gives reasons why you can't deny an  
10 application. It doesn't say there are only certain  
11 permissible reasons why you can't.

12          JUSTICE SCALIA:          But doesn't the  
13 Administrative Procedure Act require providing reasons  
14 when -- when there's a grant or a denial?

15          MS. O'CONNELL:          Yes. And we agree that  
16 reasons are required. The question Justice Breyer was  
17 asking was what if you don't have a majority in -- in  
18 support of any particular rationale, and the response is  
19 we've cited some cases in footnote 6.

20          JUSTICE SCALIA:          Don't -- don't you have to  
21 give the reasons with the decision under the APA?

22          MS. O'CONNELL:          Yes, but --

23          JUSTICE SCALIA:          So how can you give it  
24 if -- if there is no majority for any single reason?

25          MS. O'CONNELL:          You would just -- you would

1 give the rationales of each individual council member.

2 This is not -- it's not a problem that's unique.

3 JUSTICE SCALIA: Has this Court ever held  
4 that? Because I would never hold that.

5 MS. O'CONNELL: No, no. It's not a --

6 JUSTICE SCALIA: It's absurd.

7 MS. O'CONNELL: Justice Scalia, we cited  
8 some cases in footnote 6 of our brief that indicate that  
9 other courts have allowed that to occur.

10 JUSTICE SOTOMAYOR: I'm -- I'm a little bit  
11 confused by that because -- and this is what troubles me  
12 the most. You get five council members, five different  
13 reasons. At what point does he win, meaning if he  
14 proves that three of them were wrong in their reasons,  
15 so there wasn't a majority vote for anything? That's  
16 what he has to do?

17 MS. O'CONNELL: There weren't a majority of  
18 council members that gave a reason that wasn't  
19 prohibited by the statute or was not supported by  
20 substantial evidence.

21 JUSTICE SOTOMAYOR: That's a --

22 MS. O'CONNELL: And it's not a problem  
23 that's unique to this particular context. That comes up  
24 sometimes in agency decisions where there's a  
25 multi-member body that's heading the agency. The cases

1 in footnote 6 --

2 JUSTICE KENNEDY: Do you want us to write an  
3 opinion that says under this Act agencies have to comply  
4 with SEC v. Chenery? Or pardon me, city councils have  
5 to comply with SEC v. Chenery?

6 MS. O'CONNELL: We think that by requiring  
7 that decisions be in writing and supported by  
8 substantial evidence and then also by providing for  
9 judicial review of those decisions, implicit in the  
10 statute and explicit in the legislative history is that  
11 the local government has to give reasons.

12 JUSTICE KENNEDY: Either under general laws  
13 of zoning or under any similar Federal statute, have we  
14 ever imposed -- has the Federal Government ever imposed  
15 requirements like this on a legislative body?

16 MS. O'CONNELL: I don't think so, but it's  
17 not -- I mean, we realize that this is a little bit of  
18 an anomaly in this statute, that normally a city council  
19 can do whatever it wants and it's not required to give  
20 reasons for its decisions unless it's --

21 JUSTICE SCALIA: Is it just a legislative  
22 body?

23 MS. O'CONNELL: No. In this case, we think  
24 it's acting sort of as a --

25 JUSTICE SCALIA: Yes. I would -- I would

1 consider this as an adjudicative body.

2 MS. O'CONNELL: Right. It's -- it's not  
3 making laws that would apply prospectively, but taking  
4 a -- a specific ordinance that already exists and  
5 applying it to the facts of this case. But in any  
6 event, that is the one thing that we think the statute  
7 does require local governments to do that could be  
8 different from its normal procedure, is to give reasons.

9 JUSTICE SCALIA: Do you think that --

10 JUSTICE SOTOMAYOR: What does the -- what  
11 does the Petitioner do with the one council member who  
12 didn't give reasons? What does that person count as?

13 MS. O'CONNELL: So -- so if he didn't give a  
14 reason, then I think you just don't count his -- his  
15 vote toward the -- the people that gave a rationale.

16 JUSTICE ALITO: What happens if --

17 JUSTICE SOTOMAYOR: It was four people who  
18 were there.

19 MS. O'CONNELL: There were five.

20 JUSTICE SOTOMAYOR: There were five. One  
21 didn't speak, so you don't count his or her vote. So  
22 it's a split vote.

23 MS. O'CONNELL: Yes, but there were still  
24 three people that gave incompatibility with the  
25 neighborhood as their -- as their reason.

1 JUSTICE ALITO: What if -- what if three  
2 people say, this is -- this is incompatible with the  
3 neighborhood, and then later other -- another member or  
4 other members provide other reasons, and those other  
5 reasons are either invalid under the statute or not  
6 supported by substantial evidence? Under that  
7 circumstance, is it -- can it be inferred that the final  
8 vote of those who previously expressed the view that  
9 this was bad for aesthetic reasons was the reason for  
10 their vote? That seems to be Mr. Fisher's argument, and  
11 what's your answer to that?

12 MS. O'CONNELL: I think -- I want to make  
13 clear that we're not saying that when you look through  
14 the written administrative record to determine what the  
15 reasons are, that you read through the whole transcript  
16 and that anything that came up during the hearing, like  
17 what happens when the power goes out or can't you make  
18 these things smaller or something like that is the  
19 reason why a particular council member voted, just as we  
20 wouldn't think questions at oral argument are your  
21 reasons for voting to affirm or reverse.

22 But in this case, you can pretty easily see  
23 that at the end of the hearing, the mayor said, okay,  
24 now, if everybody is finished giving their testimony,  
25 let's hear from the council, and they went down the line

1 and everybody said what they thought about it. It's  
2 those that we think are the reasons that each person has  
3 given.

4 JUSTICE KAGAN: Ms. O'Connell, I think part  
5 of Mr. Fisher's arguments is that if everyone agrees  
6 that reasons have to be given, what sense does it make  
7 to require judges to scour the minutes and to scour the  
8 transcript and to try to make these judgment calls  
9 about, you know, when an individual council member has  
10 given a reason? Why not at that point, once we're in  
11 the mode of requiring things, why not just require that  
12 the reasons be stated in the two or three sentences that  
13 the council or other body promulgates?

14 MS. O'CONNELL: It's not our position that  
15 such a requirement would be difficult to comply with.  
16 The reason we oppose it is because we don't think  
17 Congress went that far. By requiring that decisions be  
18 supported by substantial evidence and providing for  
19 judicial review, we think Congress imposed a requirement  
20 that reasons be given. But other than that, they have a  
21 savings clause that says that, other than what they  
22 specifically said, nothing else should interfere with  
23 the decision-making process of local governments. And  
24 so if it's part of that decision-making process to  
25 normally talk about it at a meeting and give the

1 decisions orally and then write up a summary that's  
2 written, then we don't think that the statute should  
3 be --

4 JUSTICE SCALIA: I think Justice Kagan is  
5 not disagreeing with you. She is saying, yes, reasons  
6 must be given. And reasons aren't given if there's just  
7 this exchange in which a congressman -- a councilman  
8 expresses a certain fondness for a particular view.  
9 What -- what is the big deal of requiring either that  
10 the full council give its reasons or if you think it's  
11 enough that different councilmen have different reasons,  
12 each councilman say, I am voting against this for this  
13 reason? What is the big deal about that?

14 MS. O'CONNELL: There is certainly not a big  
15 deal about it.

16 JUSTICE SCALIA: Especially since you're  
17 making the council do the same thing. You're making  
18 them give reasons, right?

19 MS. O'CONNELL: Right.

20 JUSTICE SCALIA: So why not say you have to  
21 spell the reasons out?

22 MS. O'CONNELL: I think the -- that is part  
23 of substantial evidence review and part of Chenery, that  
24 the reasons have to be clear. That's not part of our  
25 test. It's inherent in substantial evidence review, and



1 we do think the statement has to be sufficiently clear  
2 to conduct substantial evidence review.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
4 Mr. Carothers.

5 ORAL ARGUMENT OF RICHARD A. CAROTHERS  
6 ON BEHALF OF RESPONDENT

7 MR. CAROTHERS: Mr. Chief Justice, and may  
8 it please the Court:

9 The Respondent in this case, the City of  
10 Roswell, its amicus, the Solicitor General, and the  
11 Eleventh, Fourth, and Eighth Circuits all agree that  
12 332(c)(7)(B)(iii) neither explicitly nor implicitly  
13 requires that reasons be provided in the written denial  
14 itself as long as there are reasons provided elsewhere  
15 in the written minutes or transcript.

16 In this case --

17 JUSTICE SOTOMAYOR: So when do you think the  
18 statute of limitations runs?

19 MR. CAROTHERS: That's a very good question.

20 JUSTICE SOTOMAYOR: The 30 days?

21 MR. CAROTHERS: I have -- I have pondered  
22 that because it is an issue in this case, but also, it's  
23 an issue going forward. It's not really an issue in our  
24 case because the 30 days, when it ran, there had already  
25 been the approval of the minutes, the written denial had

1    gone out, and the appeal was able to be timely. There  
2    seems to be a split in the Federal circuits as to  
3    whether that should be --

4            JUSTICE SCALIA:            Excuse me. Was -- was able  
5    to be timely, which means if all of that comes in 5 days  
6    before the deadline, it is still able to be timely? I  
7    thought they were given 30 days to decide whether --  
8    whether to go forward or not and you're saying it's  
9    enough if before the 30 days has totally expired,  
10   they -- they can figure out what the city council  
11   decided.

12           MR. CAROTHERS:            Justice Scalia, that is  
13   essentially correct, but what we are saying is we  
14   believe that the 30 days should run, as Justice Kagan  
15   suggested, from the approval of the minutes. If you  
16   have the minutes approved --

17           JUSTICE KENNEDY:           Well, in this case -- in  
18   this case, May 10th the minutes were approved, and May  
19   13th the suit was filed because the time ran out on May  
20   14th.

21           MR. CAROTHERS:            That's correct.

22           JUSTICE KENNEDY:           And you think that's  
23   sufficient?

24           MR. CAROTHERS:            I think it is only  
25   sufficient for this case.

1 JUSTICE KENNEDY: The 30-day period is so  
2 there can be a carefully reasoned decision whether or  
3 not to file a suit. Under your view, you have only 3  
4 days.

5 MR. CAROTHERS: Justice Kennedy, that --  
6 that is what happened in this case. That is not --

7 JUSTICE GINSBURG: I thought you were taking  
8 the position, in answer to the government, that says you  
9 have to have it contemporaneous because of the 30 days  
10 that the company has to make up its mind whether to seek  
11 judicial review. But I think you made the suggestion,  
12 which I then put to counsel, that just have the 30 days  
13 run from when the reasons are available. So instead of  
14 having it run from when they send you a letter that says  
15 denied, treat that as not final until the reasons are  
16 given. I thought that was your position.

17 MR. CAROTHERS: Justice Ginsburg, that is  
18 exactly what we're saying, and for three reasons. One,  
19 the approval of the minutes -- we've talked about  
20 substantial evidence, we've talked about the substantial  
21 evidence has to be affirmed by reasons given somewhere  
22 in the record. The way to know what that is, it doesn't  
23 talk about a letter. It talks about final action in  
24 (B) (iv) and, therefore, the final action of those  
25 minutes is the approval of those minutes.

1           Secondarily what that does is, when the  
2 minutes are approved, the applicant, if unsuccessful,  
3 has the opportunity to have 30 full days, knowing what's  
4 in the record, in order to file the appeal, and that  
5 dovetails with the recommendation of the Solicitor  
6 General about the contemporaneous minutes.

7           CHIEF JUSTICE ROBERTS:           So are you saying --

8           MR. CAROTHERS:           Excuse me.

9           CHIEF JUSTICE ROBERTS:           Are you saying that  
10 the actual decision is the minutes --

11          MR. CAROTHERS:           Yes.

12          CHIEF JUSTICE ROBERTS:           -- as opposed to the  
13 letter you've sent?

14          MR. CAROTHERS:           That is correct.

15          The letter is a more or less, while the  
16 Petitioner does not like this word, it is a  
17 notification. It is a statement that it has been  
18 denied. Why is that? Because, as this Court has  
19 referred to it and other courts have referred to it,  
20 this whole telecommunications jurisprudence across the  
21 country is a patchwork, and in this particular instance,  
22 there are jurisdictions that don't require any  
23 notification, there are jurisdictions that require  
24 something be entered on the minutes, there are  
25 jurisdictions that require a letter, there are

1 jurisdictions that require a certified letter.

2 JUSTICE KENNEDY: In your view, if they had  
3 waited 60 days before they approved the minutes, then we  
4 wait until then for the time period to run?

5 MR. CAROTHERS: That is correct, Justice  
6 Kennedy. The only -- the only impediment to any of this  
7 is the shot clock, and I think that -- and I think that  
8 if the 150 days starts to run, there's going to be a  
9 problem if the local government hasn't approved their  
10 minutes by that time. That may well not give the  
11 applicant a record that does not have substantial  
12 evidence in it.

13 JUSTICE BREYER: The facility placing --  
14 everyone loves cell phones, apparently.

15 (Laughter.)

16 JUSTICE BREYER: Nobody likes towers,  
17 apparently.

18 (Laughter.)

19 JUSTICE BREYER: So Congress passes a law.  
20 It says: You've got to have towers, I'm sorry, and the  
21 local community can stop it, but they can't stop it for  
22 one of three substantive reasons; and in addition, they  
23 have to show that their decision was rational, which is  
24 done -- or reasonable, which is done by having a record  
25 with substantial evidence. That's what this means to

1 me.

2 Now, your clients and others aren't used to  
3 being agencies, but they're being treated like agencies  
4 and, therefore, the simplest thing is to read this two  
5 things together, just what Justice Kagan said, write the  
6 decision and give your reasons because otherwise there  
7 is no way to know whether there's substantial evidence  
8 or not. It's in the same clause. It's in the same  
9 phrase. The words are right there. It says "decision  
10 supported by substantial evidence." I know -- that's, I  
11 think, the basic argument.

12 The Solicitor General doesn't go that far,  
13 but if we don't have simplicity, we'll have 2 million  
14 different ways of going about this between different  
15 cities and counties.

16 JUSTICE SOTOMAYOR: So why couldn't the city  
17 council or this legislative body have waited until its  
18 official minutes and sent the letter that day with the  
19 minutes?

20 MR. CAROTHERS: That they could have, and I  
21 think that is what the Solicitor General is  
22 recommending. That was certainly not the law at the  
23 time, but that that is -- the way to have  
24 contemporaneous minutes is to have the writing be  
25 basically at the time that it's approved.

1           One of the problems is -- and one of the  
2 problems with this decision to deny a request is in  
3 order to state those reasons, it has to have the very  
4 minutes approved in order to look at it and say, these  
5 are the reasons.

6           Now, I would suggest to this Court that that  
7 will only start a new inquiry, and that is the minutes  
8 -- excuse me, Justice Scalia.

9           JUSTICE SCALIA:           I don't understand -- I  
10 don't understand what you're saying, it requires a  
11 written decision. Okay. And the city council here  
12 issued a written decision to the phone company saying,  
13 we have decided to deny your request.

14          Now -- and you're saying that is not a  
15 written decision, you have to wait until the minutes are  
16 written up. So, what, were they lying when they said,  
17 we've decided?

18          MR. CAROTHERS:           I think what I'm saying,  
19 Justice Scalia, is that the writing that is sent --  
20 we've had a lot of verbiage in the briefs about what is  
21 a decision and how to characterize that decision and  
22 whether it has some sort of opinion to it or whether  
23 it's just, this is what we did. The statute -- in the  
24 -- requires substantial evidence in a written record which  
25 necessitates reasons. Those can only be ascertained by

1 the official minutes.

2 JUSTICE BREYER: But then you're agreeing  
3 with your opponents, it seems to me . You have the  
4 document, the document says "denied," and there it gives  
5 the reasons for denying so people can see if there's  
6 substantial evidence.

7 You're just saying it was the later  
8 document. They're saying it was the earlier document.  
9 I don't know.

10 MR. CAROTHERS: Well, Justice Breyer --

11 JUSTICE BREYER: But do you agree with them  
12 on that, that one document --

13 MR. CAROTHERS: I don't agree with him on  
14 that, Justice Breyer. But I agree with what you just  
15 stated, that the minutes, when approved, they have  
16 substantial --

17 JUSTICE BREYER: Well, I don't know if they  
18 should be called "the minutes." I'm not an expert on  
19 that area of city government. I don't know whether you  
20 want to call the document "minutes" or whether you want  
21 to call the document "written decision." That seems to  
22 be not before us, but what is before us is whether the  
23 decision has to have in it the reasons so that we can  
24 tell if it's supported by substantial evidence. You  
25 agree on that one?



1           MR. CAROTHERS:           Again, I agree, Justice  
2   Breyer, as you have stated it. I disagree that that  
3   particular decision is the one that is sent out right  
4   after the hearing, and in my proposal it wouldn't be  
5   sent right after the hearing. It would be sent after  
6   the minutes, so you would have the collective record  
7   which is referred to by the Eleventh Circuit, which  
8   could be --

9           JUSTICE SOTOMAYOR:       Well, that endorses more  
10   or less the SG's position. What you're saying, I think,  
11   in answer to the question presented, the written denial  
12   doesn't have to itself as a document, provide the  
13   reasons, but when it's sent it has to have attached to  
14   it, referenced, something that is available telling you  
15   the reasons.

16          MR. CAROTHERS:           Well, and I'm not sure it  
17   has to tell the reasons if it attaches that, because the  
18   reasons will be in there and it'll be up to --

19          JUSTICE SOTOMAYOR:       Something that --

20          MR. CAROTHERS:           -- the district court to  
21   either ascertain, glean, clearly indicate --

22          JUSTICE SCALIA:          And it's ineffective unless  
23   that exists. So that what was given here in writing was  
24   not a decision, but what? A we intend to decide when  
25   the minutes are finally written? A prediction? What

1 was it then --

2 MR. CAROTHERS: I would characterize --

3 JUSTICE SCALIA: -- that the phone company  
4 got?

5 MR. CAROTHERS: -- it as a notification of  
6 the denial, but the specific --

7 JUSTICE SCALIA: It hasn't been denied yet.  
8 You're saying it's not denied until the minutes are  
9 written --

10 MR. CAROTHERS: I would --

11 JUSTICE SCALIA: -- which is, you know, God  
12 knows when.

13 MR. CAROTHERS: Well, it has to be done with  
14 the minutes, and you've got the shot clock running, but  
15 you can't have -- you can't make the applicants --

16 JUSTICE SCALIA: Well, you shouldn't send  
17 anything out then because according to you, there has  
18 been no decision. You shouldn't send out a notice that  
19 we've decided.

20 MR. CAROTHERS: Going forward, Justice  
21 Scalia, that is our recommendation --

22 JUSTICE SCALIA: That's what you ought to  
23 do.

24 MR. CAROTHERS: -- and I think that if you  
25 adopt, as Omnipoint has and Helcher and some other

1 Federal cases, that, in fact, it should be the approval  
2 of the minutes, then I think that whole issue goes away.

3 JUSTICE KENNEDY: But it sounds like you're  
4 changing your position. Page 34 of the red brief, that  
5 given the plain wording of the statute, whether a  
6 document from a -- the question is, whether a document  
7 from a State or local government stating the application  
8 has been denied but providing no reasons can satisfy the  
9 statutory requirement. And the simple straightforward  
10 answer is yes.

11 So now you're changing your position.

12 MR. CAROTHERS: Justice Kennedy, I don't  
13 believe I am stating the position. What we're saying is  
14 it satisfies that portion of the statute. It doesn't  
15 satisfy the substantial evidence in the written record  
16 which has got to be -- which we contend, separated by  
17 the word "and," the conjunctive, that is a separate  
18 requirement. And one of the things I think that I want  
19 to -- the point I want to make is --

20 JUSTICE KENNEDY: But where -- but surely,  
21 under your view -- I'm not convinced that your position  
22 hasn't radically changed -- but surely under your view,  
23 what you've explained to us at page 34, the 30 days  
24 begins to run the minute the notice is given.

25 MR. CAROTHERS: Justice Kennedy, again, I

1 think when we use words like "notice" and "decision,"  
2 the letter -- or the statute says, "Decision in writing  
3 of the denial." That doesn't mean that is elevated to a  
4 decision by this Court or a decision by a lower court  
5 that has all of the findings and conclusions and the  
6 reasons, because the reasons are going to come from the  
7 minutes, and that's why we're advocating that the  
8 minutes be the start of the 30-day period, and there can  
9 be a confluence of the letter --

10 JUSTICE SOTOMAYOR: Could you --

11 JUSTICE ALITO: That may be what the -- what  
12 the statute means in light of the practicalities of the  
13 situation. Now, since it talks about substantial  
14 evidence review, there's an argument that a  
15 municipality, when it makes a decision like this, should  
16 be treated pretty much like a Federal administrative  
17 agency. But on the other hand, municipalities are  
18 sometimes very small. These -- these bodies are --  
19 consist of lay people who are not learned in the law,  
20 they may not have attorneys available to them who are  
21 very knowledgeable about Federal telecommunications law.

22 So can you say something about that  
23 situation? Is any of that true with respect to -- to  
24 Roswell? And what do you think Congress may have had in  
25 mind in a situation with respect to the treatment of

1 local governing bodies like Federal administrative  
2 agencies?

3 MR. CAROTHERS: Well, Justice Alito, that is  
4 a multi-tiered question. Let me see if I can answer it.

5 Number one, the amicus brief that was filed  
6 on behalf of the City of Roswell basically lays out the  
7 fact that you are exactly correct, there are lots of  
8 municipalities and local governments throughout this  
9 country that have trouble dealing with a pretty  
10 sophisticated Federal statute. The City of Roswell has  
11 a relative degree of sophistication, it has attorneys,  
12 and it has planners and can do that.

13 But no court has ever held, including this  
14 Court, that the Chenery-type analysis for what needs to  
15 be an administrative decision has an application to a  
16 local government. If you look, for instance, that --  
17 that -- there is lots of argument from Petitioner that  
18 there's something wrong with what Roswell did. And if  
19 you just look at, specifically, they had evidence in the  
20 record, they had people who said this, this, this, this,  
21 and this. You had four council members, three of whom  
22 said aesthetics, not right for the area, diminution of  
23 property value, and the other one --

24 JUSTICE KAGAN: Mr. Carothers, I wonder  
25 whether what Justice Alito pointed out about the nature

1 of local governments, which you agreed with, whether  
2 that doesn't suggest that we should try to keep our rule  
3 quite simple. In other words, given that nobody in  
4 small local governments has access to great lawyers or  
5 knows a lot about communication, that we should just set  
6 up a rule that enables them to comply simply.

7 And that rule, honestly, would be  
8 Mr. Fisher's rule. It would just say, in your decision,  
9 write a sentence or two saying why. Because otherwise,  
10 if we don't have that rule and every judge has to look  
11 through the minutes and the transcript and anything else  
12 in the record to decide whether a reason is clear  
13 enough, there are going to be a lot of local governments  
14 that are going to get kind of caught, and the judge is  
15 going to say, I'm sorry, it's not clear enough, even  
16 though if the government had spent just five minutes, it  
17 could have made it clear enough. And maybe we should  
18 just say, do that so that you don't get caught.

19 MR. CAROTHERS: Well, Justice Kagan, I -- I  
20 don't object to that as long as the minutes are the  
21 final decision and so the 30 days can run from there.  
22 But then you're going to have that decision that's not  
23 going to come out for a couple months until the city  
24 attorneys and the planners have time to digest the  
25 decision of the record in orders to formulate that.

1           And I will suggest to the Court that if, in  
2 fact, that occurs, it starts the process over because  
3 then the challenge is going to be the statements in the  
4 letter do not accurately reflect the minutes, they  
5 misstate the minutes, they mischaracterize the minutes.  
6 In fact, they're a post hoc rationalization of what was  
7 in the minutes. We are going to have yet another line  
8 of inquiry and challenge which could be avoided if we  
9 simply waited for the letter and approve the minutes --

10           JUSTICE SOTOMAYOR:           So that inquiry and  
11 challenge will be left up to judges to figure out what  
12 the minutes say, don't say, and what the reasons were.

13           MR. CAROTHERS:           Well, Justice Sotomayor,  
14 as -- as I read the jurisprudence, the fact is the  
15 substantial evidence in a written record and to see the  
16 reasons is pretty much left up to the district court.

17           JUSTICE SOTOMAYOR:           All right. Let's go  
18 back to, we had five members here. One didn't talk. Do  
19 you agree we don't count that person?

20           MR. CAROTHERS:           Correct.

21           JUSTICE SOTOMAYOR:           All right. Now, do we  
22 need a majority rule, a majority of the council people  
23 giving a reason?

24           MR. CAROTHERS:           I don't believe that is the  
25 case, Justice Sotomayor, and I will say it because of

1 this. It could be, but let's leave that situation. The  
2 situation we have here was we had three persons of a  
3 pretty like mind, the aesthetics, the land use, the  
4 diminution of property values, that made a determination  
5 and said, we -- we think that these are real bad. Then  
6 you have a pretty long motion by Dr. Price --

7 JUSTICE SCALIA: Well, they said that before  
8 the vote. We don't know why they voted. What -- what's  
9 the big deal of having a city council say, we deny this  
10 request for the following reasons: One, two, three?  
11 That would be very clear; there'd be no problem at all.

12 MR. CAROTHERS: Justice Scalia, I think that  
13 is exactly what happened in that -- in this case by the  
14 majority vote on Dr. Price's motion. Now, I will  
15 concede to you that the council members did not stand  
16 and say I'm voting for Dr. Price's motion because of  
17 this, this, and this.

18 JUSTICE ALITO: Well, suppose we issue an  
19 opinion in this case that says that the -- the formal  
20 instrument of denial must say in simple terms the reason  
21 or reasons for the denial. All right? Let's say we  
22 issue that opinion, and six months later something like  
23 this comes up in some rural municipality. Let's say  
24 they've got 1,000 people. And how likely is it that the  
25 members of the governing body there, or their attorney,



1 if they have an attorney, will be familiar with our  
2 decision in T-Mobile South v. City of Roswell?

3 MR. CAROTHERS: Well, I don't know the  
4 answer to that exactly, Justice Alito, but I will say  
5 that whatever the decision is in this case --

6 JUSTICE ALITO: You know, I know that  
7 everybody in the country hangs on our every word.

8 (Laughter.)

9 JUSTICE ALITO: And they're all going to  
10 read this opinion.

11 MR. CAROTHERS: What everybody in the  
12 country has, Justice Alito, is they have people knocking  
13 at the door to put up cell towers. So this is a topic  
14 that many, many cities are attuned to.

15 But what I am attempting to say and urge the  
16 Court is to adopt, I think, all of the concerns the  
17 Court raises. If the 30 days runs from the approval of  
18 the minutes, then you have the opportunity to have a  
19 writing --

20 JUSTICE SOTOMAYOR: Please articulate your  
21 rule, because you just said to us earlier that not every  
22 body of this type has -- has minutes, or minutes that  
23 become the statement of reasons. So what's the rule, a  
24 general rule about what's the final decision and when  
25 the time starts to run, assuming --

1           MR. CAROTHERS:           Justice Sotomayor, what I  
2 would -- what I would craft and -- and what I believe to  
3 be the appropriate rule is the denial letter simply says  
4 denied. That's what the statute says. It doesn't  
5 require any reasons. It could have required reasons.  
6 So put that issue aside. And then that the approval of  
7 the minutes be the final action that triggers the  
8 running of the 30 days.

9           JUSTICE SOTOMAYOR:       How does that rule --  
10 now we're forcing minutes on every -- on every city  
11 council to have contained the statement of reasons?

12          MR. CAROTHERS:           Justice Sotomayor, I don't  
13 know how to answer that. I don't know of a jurisdiction  
14 that does not have some form of minutes or ratification  
15 of the previous actions and discussions they've taken,  
16 which are generally approved at the next meeting.

17          I think, in fact, if they're going to have  
18 substantial evidence in the written record, whenever  
19 those minutes are approved, they had better get into  
20 doing minutes because that is what's going to be  
21 required.

22          JUSTICE BREYER:          Why -- why do we have to  
23 say? Why don't we take word for word almost what the --  
24 what the court said? What this statute requires is that  
25 there be a written denial -- well, we can forget whether

1     it's separate or not -- describing the reasons for the  
2     denial and containing a sufficient explanation to permit  
3     the court to evaluate the evidence, period.

4             Now, that's what the city has to do.             And if  
5     they produce something that's a mess because it's a  
6     98-page thing of minutes and the court can't figure out  
7     what it is, you'll get a decision like this.  If, in  
8     fact, somebody summarizes at the beginning, these are  
9     the reasons that we have denied and therefore we do deny  
10    it, it won't be a problem.

11            MR. CAROTHERS:             Well, Justice Breyer, I  
12    simply would argue that the minutes have to have  
13    substantial evidence, which is -- or have to have the  
14    reasons, which is supported by the substantial evidence.  
15    And if the court can't discern what those are, they're  
16    not going to survive the substantial evidence test.

17            JUSTICE SCALIA:            Counsel, you -- you spoke  
18    of the -- the statutory requirement of a denial letter.  
19    Where -- where is that?

20            MR. CAROTHERS:            Justice Scalia, the -- the  
21    statute indicates that in (B)(iii), any decision by a  
22    state or local government or instrumentality therefore  
23    to deny a request --

24            JUSTICE SCALIA:            Right.

25            MR. CAROTHERS:            -- shall be in writing.

1 That is what I referred to as the denial letter.

2 JUSTICE SCALIA: That's not the denial  
3 letter. That's what you're referring to as the minutes.  
4 You say it's the minutes that comply with that.

5 MR. CAROTHERS: No, Your -- Your Honor, I am  
6 saying that the minutes do comply with this --

7 JUSTICE SCALIA: Yes, and constitute it.

8 MR. CAROTHERS: But a simple notification  
9 letter of the denial does not comply with it.

10 JUSTICE SCALIA: There's no requirement of a  
11 notification letter, whatever. There's just that  
12 provision that any decision shall be in writing and  
13 supported by substantial evidence. So why are you  
14 imposing this obligation of a denial letter on these  
15 poor, ignorant council members?

16 (Laughter.)

17 MR. CAROTHERS: Your Honor, I am not trying  
18 to impose that on them, but we -- I think we have to  
19 take the statute as it's written. We have to have some  
20 meaning to what that is.

21 JUSTICE SCALIA: I'm taking it as it's  
22 written. You're making up a denial letter. There's --  
23 there's no requirement of a denial letter. So if,  
24 indeed, the decision is the minutes, you -- you don't  
25 have to do anything until the minutes are published.

1 MR. CAROTHERS: And I --

2 JUSTICE SCALIA: I suppose you have to give  
3 a copy of the minutes to -- to -- to the loser.

4 MR. CAROTHERS: That -- that is correct.

5 And, Justice Scalia, to the extent we're  
6 talking about the same thing, I believe that the  
7 decision from when the time should run is, in fact, that  
8 approval of the minutes, which has the reasons based  
9 upon the substantial record. I don't see that that,  
10 whether it's a denial, whether it's a notification,  
11 whatever it is, it doesn't have to have reasons. So  
12 really, it doesn't help the applicant and doesn't help  
13 the city, but we're trying to give the words in the  
14 statute some effect. We do not want to give them the  
15 effect that it is a decision and glorify something  
16 because a decision can be no.

17 JUSTICE SCALIA: Everybody else like you  
18 thinks that there has to be a denial letter, right?  
19 Is -- is that a unique perception that -- that you have  
20 come to, or is it generally thought that you have to  
21 have a denial letter?

22 MR. CAROTHERS: I think -- I think there is  
23 a perception, because of what the statute says, that  
24 there has to be a denial letter, but it doesn't have to  
25 have reasons. And if you don't have the reasons in the

1 denial letter, you -- it's not fair to the applicant to  
2 start the appeal time running for the 30 days.

3 JUSTICE KENNEDY: Did you take that position  
4 in the district court?

5 MR. CAROTHERS: Justice Kennedy, I'm  
6 struggling to answer that question because we didn't get  
7 very far in the district court. We never really got a  
8 chance to talk about substantial evidence because the  
9 court decided: I'm not going to reach that prong of  
10 (B)(iii); I'm going to say that I can't understand --  
11 excuse me. Thank you very much.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Fisher, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

15 ON BEHALF OF THE PETITIONER

16 MR. FISHER: Thank you. I would like to  
17 make a point about our rule and then turn to the  
18 practicalities.

19 First, to -- to -- I think that what came  
20 before me helped under -- helped explain why a separate  
21 letter specifying the reasons for denial is not only  
22 required by the statute, but is the only way to make it  
23 work.

24 If you look at the minutes that the city  
25 issued here, and they're in the back of the Joint

1 Appendix -- remember, as I think it's been noted, cities  
2 don't have to issue minutes, and so you're not always  
3 going to have minutes. But on the theory that the  
4 minutes here would have been enough, look at the  
5 minutes, and if you want to look later at J.A. 338,  
6 J.A. 336, and J.A. 340, there are some of the reasons,  
7 as the Solicitor General put it, potential reasons,  
8 offered by various council members before the vote.

9 But if you look at J.A. 340, you'll see that  
10 all of those are separated from the motion, so the  
11 motion doesn't incorporate any of the reasons, not even  
12 what Dr. Price said before she made her motion.

13 So imagine yourself a district judge getting  
14 this set of minutes. You don't know what the city's  
15 reasons were for denying the permit, and that's the  
16 problem that T-Mobile has and that's the problem the  
17 district judges have.

18 And I want to turn to Justice Alito's  
19 question -- and, Justice Kennedy, I think you also asked  
20 about the Federalism implications for local governments.

21 First of all, let me start with the City of  
22 Roswell. The City of Roswell's own code, and this is at  
23 J.A. 84, requires it to give a separate document with  
24 reasons if it denies an application to construct a cell  
25 site on city-owned property. All we're asking the city

1 to do is do what it already does with respect to  
2 applications for city-owned property.

3 Now, you also point out there are rural  
4 areas in the country that have smaller staffs and  
5 jurisdictions. At -- at page 13 of our reply brief we  
6 cite statutes from other States like New Hampshire,  
7 Nevada, Idaho, that already have as a matter of State  
8 law the rule that we pronounce -- I'm sorry, the rule  
9 that we propose. The rural jurisdictions in those  
10 States don't seem to have difficulty doing it, and I  
11 think the reason why is because, as has been said a few  
12 times today, it just requires a few sentences usually.  
13 Just tell us what the reasons are and tell the district  
14 court what the reasons are, so that when we get into  
15 court we can have the streamlined proceeding that  
16 Congress imagined, and that it can be done, as the  
17 statute itself requires, on an expedited basis.

18 That's all we're asking for today, and we  
19 think that any other rule is going to create problems at  
20 the lower -- I'm sorry, before you ever get to court and  
21 even more problems once we get to court.

22 JUSTICE KAGAN: Mr. Fisher, suppose that I  
23 think that you're right about that, but then the  
24 question is did Congress require that. And I take it  
25 that the SG is really saying, no, Congress required



1 reasons, it required that by saying that there was  
2 substantial evidence review, but that it didn't require  
3 the reasons to be in any particular form, and, indeed,  
4 there's a savings clause which says that all doubts go  
5 to the State and local governments in this area. So  
6 notwithstanding that this is going to actually get State  
7 and local governments into some trouble, and  
8 notwithstanding that district courts are going to  
9 struggle with it, we should go with the SG's rule rather  
10 than with yours.

11 MR. FISHER: We think the best reading of  
12 sub (iii) is that Congress actually did require this.

13 As the city itself pointed out, it separates  
14 the notion of a decision in writing from whether it has  
15 substantial evidence in the record that supports it. So  
16 when you ask what the decision in writing is, you  
17 need -- we think the best reading of that is that's the  
18 reasons. The reasons have to be supported by  
19 substantial evidence, and you can't ask the substantial  
20 evidence question until you know what the reasons are.

21 And I think also, for the other reasons that  
22 we've pointed out and the Chamber of Commerce pointed  
23 out, how the Communications Act uses the word "decision"  
24 in a particular way. It uses the word "decision" in  
25 other statutes to signify that an explanation is -- is

1 something embedded in that, not as -- as -- as is often  
2 the case, and the city itself characterized the denial  
3 letter today, I think aptly, as a notification.

4 Well, the Communications Act uses the words  
5 "notify" and "notification" to refer to other kinds of  
6 advisements that need to be given. That's not the word  
7 Congress chose here.

8 So, Justice Kagan, I agree, but if you look  
9 at this statute you might wonder to yourself if you  
10 misread the words in a vacuum which are -- which rule  
11 comes out of it, ours or the SG's.

12 But we know from City of Arlington, as this  
13 Court said, that the limitations in sub (iii) are  
14 limitations that Congress did intend to impose and the  
15 best reading of those limitations are the ones that we  
16 have given.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
18 The case is submitted.

19 (Whereupon, at 11:06 a.m., the case in the  
20 above-entitled matter was submitted.)

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