ORAL ARGUMENT REQUESTED

United States Court of Appeals
For the District of Columbia Circuit

No. 21-1075
(FCC-86FR11432)

Petition for Review of Order Issued by the
Federal Communications Commission

Children's Health Defense, Dr. Erica Elliot, Ginger Kesler, Angela Tsiang, Jonathan Mirin, Petitioners
v.
Federal Communications Commission and United States of America, Respondents

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PETITIONERS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a), Petitioners, through their undersigned counsel, submit this Certificate as to Parties, Rulings, and Related Cases.

I. Parties, Amici, and Intervenors

A. Petitioners

Children's Health Defense ("CHD")
Dr. Erica Elliot
Ginger Kesler
Angela Tsiang
Jonathan Mirin,

B. Respondents

Federal Communications Commission
United States of America

C. Intervenors

No parties have moved for leave to intervene at present.

D. *Amici*

No parties have been granted leave to file an *amicus* to date.

II. Decision Under Review

Report and Order, *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, FCC 21-10, WT Docket No. 19-71, 26 FCC Rcd 537 (January 7, 2021) (JA___). The order and adopted rules were published in the Federal Register on February 25, 2021, 86 Fed. Reg. 11432.

III. Related Cases

Nos. 20-1025 and 20-1138 (consolidated), *Environmental Health Trust, et al v. FCC, et al and Children's Health Defense, et al v. FCC et al*. involve a facial challenge to the FCC's general population emissions rules in 47 C.F.R. §1.301-1.320. The case now before the Court challenges a rule amendment to 47 C.F.R. §1.4000, the so-called "OTARD" rule, but it is not a collateral attack on the general population emissions rules. Rather, this matter involves persons who are or will be individually injured by wireless companies implementing the OTARD amendment, but whose injuries would have been subject to prevention or mitigation through previously-available local, state and federal substantive and procedural rights and remedies that the OTARD amendment eliminated.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Petitioners/Movants respectfully submit this Corporate Disclosure Statement as follows:

Only one Petitioner is not an individual. Children's Health Defense ("CHD") is a national non-profit 501(c)(3) organization whose mission is to end the epidemic of children's chronic health conditions by working aggressively to eliminate harmful exposures to environmental toxins via education, obtaining justice for those already injured and promoting protective safeguards. CHD has no

parent corporation, and no publicly-held company has a 10% or greater ownership interest in the organization.

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GLOSSARY

ADA-Americans with Disabilities Act

APA-Administrative Procedures Act

ARR-Addendum Record Reference

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CHD-Children's Health Defense

CPE-Customer Premises Equipment

EIRP- Effective Isotropic Radiated Power

ERP-Effective Radiated Power

FHA-Fair Housing Act

OTARD-Over The Air Reception Device

RF-Radio Frequency

RFR-Radio Frequency Radiation

WISPA-Wireless Internet Service Providers Association

STATEMENT OF JURISDICTION

The Court has jurisdiction under 47 U.S.C. §402(a) and 28 U.S.C. §2342(1) to review the Federal Communication Commission's ("FCC" or "Commission") Report and Order, *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, FCC 21-10, WT Docket No. 19-71, 36 FCC Rcd 537 (Jan. 7, 2021), 86 Fed. Reg. 11432 (Feb. 25, 2021).[1] The Commission *Order* followed a 2019 Notice of Proposed Rulemaking, 34 FCC Rcd 2695 ¶5 (2019),[2] and receipt of comments on the proposal.

Petitioners timely filed their Petition for Review in this Court on February 26, 2021 (Doc. #1887680).

STATEMENT OF ISSUES

The Notice of Proposed Rulemaking contemplated expansion of the current "OTARD" rule to, for the first time, allow carriers to place carrier-grade "hubs" and "relays"–equipment and additional powerful antennas–at a fixed wireless customer's location and then provide service to many other unrelated customers and premises over a wide area. Petitioners and others submitted comments objecting to the proposal. These commenters raised a number of important factual,

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1 (JA___)
2 (JA___)

policy and legal arguments in opposition. The rule change preempts a host of federal, state and local civil rights and property laws, all previously-applicable zoning requirements and any meaningful local control over placement, construction and modification of these systems. The rule change eliminates affected citizens' current rights to notice and opportunity to object to the installation at the state, local and federal level, even though the new system could have devastating effects on certain individuals residing within radio range of the system. Carriers can contract with a property owner to install a base station and powerful antenna and then unilaterally flood all properties and occupants over a wide area with Radio Frequency ("RF") radiation that unquestionably injures some citizens. Those harmed as a result have no legal recourse in advance of or after the resulting property and bodily invasions.

The FCC summarily rejected all the above-stated concerns in a single terse paragraph of the *Order* and adopted a modified version of the proposed rule.

This case raises the following issues:

1. Was the FCC's expansion of OTARD "protections" to include "hub" and "relay" equipment and the resulting preemption of other federal, state and local laws and rules within its authority under the Communications Act?

2. Did the FCC fail to adequately consider whether other federal or state laws preclude or provide significant policy reasons against the rule amendment?

3. Did the FCC act arbitrarily and capriciously, fail to engage in reasoned decision or otherwise violate the Administrative Procedure Act ("APA") with regard to the issues raised by Petitioners and others who made similar or related claims?

4. Did the Commission violate the APA or other laws by failing to address the unrebutted evidence that the amendment would directly lead to catastrophic harm for those who are uniquely or particularly injured by nonconsensual exposure to RF radiation in their homes?

5. Does the Commission's action violate or lend color of law to violations of Petitioners' procedural or substantive rights ("individual" or "civil rights") granted by other federal, state or local laws, including the ADA/FHA and their state equivalents?

6. Did the FCC violate the APA or other laws by failing to provide a process to resolve case-by-case requests for relief from nonconsensual or uninvited OTARD-based RF exposure or property intrusions?

STATEMENT OF THE CASE

A. Background

"Exposures due to fixed RF sources are both involuntary and long-term."[3] 15,090 individuals told the FCC through CHD's filings they object to involuntary RF radiation exposure from any newly-authorized OTARD system.[4] The CHD-related filers and others contended that the involuntary exposure will be a trespass, nuisance, assault, battery, or torture.[5] Around 6,320 pointed out that they and/ or their child are injured by RF radiation and further exposure to a system authorized by the proposal will significantly and perhaps even fatally worsen their condition.[6] Many credibly claimed they would have to abandon their home and observed that finding a new home would be almost impossible since all homes within reach of any OTARD system would also be unavailable to them.[7] All this evidence was uncontested and stands unrebutted.

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[3] *Reassessment of Radiofrequency Exposure Limits & Policie*s, Notice of Inquiry, 28 FCC Rcd 3498, 3581, ¶232 (2013).

[4] (JA-ARR-T1-FN4) ["ARR" is "Addendum Record References." There are three ARR Tables–T1, T2 and T3.]

[5] (JA-ARR-T1-FN5

[6] (JA-ARR-T1-FN6)

[7] (JA-ARR-T1-FN7)

Local governments, their telecommunications advisors and local residents objected to preemption of zoning/land use laws that address base stations and other telecommunications equipment that serve multiple users on different properties.[8] Homeowners' associations opposed federal elimination of restrictions against commercial activity in residential property.[9] Property owners and managers contended that the rule allowed their lessees "to sublease a portion of their leasehold to a fixed wireless provider."[10]

The *Order* wrongly failed to meaningfully address these comments or explain why the concerns they raised were outweighed by any perceived need. The Commission refused to acknowledge significant policy, legal and practical problems. Worse, the FCC brushed aside extensive uncontested demonstrations the rule change will have devastating effects on many thousands, if not millions, of people. The avowed goal–ubiquitous and redundant wireless service coverage–predominated and no other issue or concern was worthy of any consideration or balancing.

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[8] (JA-ARR-T1-FN8)
[9] (JA-ARR-T1-FN9)
[10] (JA-AAR-T1-FN10)

There was an astounding amount of evidence that RF radiation does make and has made people sick and/or exacerbates other pre-existing conditions. Those who filed below made credible claims of disability/handicap, and the record provides ample medical and scientific support for their claims. There is *no record evidence*, not even a scintilla, rebutting or undercutting these showings. As a matter of law the evidence in this case establishes that many have been sickened from RF exposure and this rule change will directly make their lives impossible, if it does not kill them outright.

Avoidance is the ***only*** means to prevent symptoms[11,12] Those affected therefore require avoidance in their homes,[13] but the rule completely deprives them any way to ensure that happens, or even know a system is contemplated for their area.[14] FCC did nothing about them, and in fact took affirmative steps that make it harder for them to know of the incipient threat. They will learn about the installation only when their symptoms get worse and they must flee.[15]

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[11] Radiation Sickness is also sometimes called "Microwave Sickness," "Electro-sensitivity," or "Electromagnetic Hyper-Sensitivity" ("EHS"). (JA-ARR-T1-FN11) This brief predominantly uses "Radiation Sickness."

[12] (JA-ARR-T1-FN12)

[13] (JA-ARR-T1-FN13)

[14] (JA-ARR-T1-FN14)

[15] (JA-ARR-T1-FN15)

Sufferers must already surmount tremendous difficulties, mistreatment, and discrimination. They cannot go into public spaces, access medical care, obtain public services, use public transportation, drive, fly, stay at a hotel or have a job.[16] Sick Children and teachers are forced out of schools and into social isolation. Finding a home has become almost impossible; some live in their cars, refugees with nowhere to go.[17]

Radiation Sickness sufferers face a dismal future: progressive worsening from unavoidable, ever-increasing and more intense exposure from multiple sources.[18] Many become desperate and hopeless because constant RF tortures them beyond their ability to survive or cope. Some contemplate suicide.[19] They deserve a life of dignity and a home where they are safe, but the FCC seems intent on depriving them of both.

The FCC's irrational zeal to deploy redundant wireless despite the human costs is best illustrated by the Commission's contorted efforts to insinuate the activity it wants to authorize into the OTARD rule. The newly-authorized systems

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[16] (JA-ARR-T1-FN16)
[17] (JA-AAR-T1-FN17)
[18] (JA-AAR-T1-FN18)
[19] (JA-ARR-T1-FN-19)

simply do not fit within the prior OTARD construct. The amended rule wreaks havoc with the licensing regime contemplated by the Communications Act[20] and its fundamental distinction between "service providers" (private or common carriers) and "service consumers" (end users). The amendment is antagonistic to Congress' prescribed regulatory requirements and policy.

The newly-authorized equipment will be much different than prior OTARD systems. The relationship between provider and property owner/lessor is different. The service being provided is different. Each new arrangement will affect many that have no relationship to the property where the equipment is placed. The carrier will effectively conscript large numbers of disabled individuals into "enjoying" the service on a nonconsensual basis. Shoehorning this activity into the OTARD regime leads to a wide range of difficult policy, legal and practical difficulties the FCC did not meaningfully confront.

The FCC's action is not authorized by the Communications Act, violates the APA[21] and is inconsistent with other laws and policies protecting public safety, civil and property rights and the disabled/handicapped. The amended rules illegally purport to override vested individual rights under the federal Constitution

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[20] 47 U.S.C. §151, *et seq*.

[21] 5 U.S.C. §701, *et seq*.

and are inconsistent with policies underlying, if not the text of, the Fair Housing Act ("FHA"),[22] the Americans with Disabilities Act ("ADA"),[23] and numerous state and local laws similar to and often more expansive than the FHA and ADA.

B. OTARD History

"OTARD" stands for "Over-the-Air Reception Devices." The original OTARD rule applied only to antennas used to receive video programming.[24] But in *Promotion of Competitive Networks in Local Telecommunications Markets*, First R&O and FNPRM, 15 FCC Rcd 22983, 23027–28, ¶¶97-100 (2000) ("*2000 R&O*") the Commission expanded the rule to apply to "customer-end antennas used for transmitting or receiving fixed wireless signals."[25] *Order* ¶3. The relief was limited, however, in that it did not allow "hub or relay antennas used to

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[22] 42 U.S.C. §3601, *et seq.*

[23] 42 U.S.C. §12101, *et seq.*

[24] This Court reviewed the OTARD rule in *Bldg. Owners & Mgrs. Ass'n Inter. v. FCC*, 254 F.3d 89, 98 (D.C. Cir. 2001) in that context.

[25] Fixed wireless providers deliver broadband service to consumers…primarily using wireless spectrum technology for the end connection to users…Typically, a fixed wireless provider receives broadband content from an external distribution point via fiber or microwave connections, then wireless transmitters on towers that are connected by licensed or unlicensed spectrum deliver the signals to the customer's fixed antennas.
In re Communs. Marketplace Report, 33 FCC Rcd 12558, 12647, ¶177 (2018)(notes omitted).

transmit signals to and/or receive signals from multiple customer locations." 15 FCC Rcd at 23028, ¶99.

The FCC again revised and slightly expanded the rule in 2004. *Promotion of Competitive Networks in Local Telecommunications Markets*, Order on Reconsideration, 19 FCC Rcd 5637 (2004) ("*2004 Reconsideration*"). This rule change allowed users to install "customer-end" "hub or relay"[26] CPE that would allow the user to distribute Internet access supported through the fixed-point-to-point arrangement to other users on the same premises. *2004 Reconsideration* ¶¶16-18 emphasized that this provision for consumer-grade hubs/relays did not "protect" carrier-grade base station[27] equipment.

After 2004 carrier-owned network facilities that support wide-area service to "multiple customer locations" were fully subject to applicable laws, including zoning, land-use, private covenants, contracts and homeowners' association rules. Civil and administrative actions were still allowed. *Order* ¶13.[28] The *Order*,

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[26] The 2000 and 2004 decisions did not define "hub" or "relay" but it is clear from the discussion that a "hub" is electronic equipment like a router or switch and a "relay" is an additional antenna that supports a wireless local area network.

[27] "[T]he term 'base station' describes fixed stations that provide fixed wireless service to users...". *In re Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, 12928, ¶150 (2014). *See also* 47 C.F.R. §1.6100.

[28] (JA___, ___)

however preempted all "restrictions" that "impair" installation and use of "hub or relay antennas," *e.g.*, traditional "base stations" that serve the public on a private carrier basis. *Order* ¶13; 47 C.F.R. §1.4000(a)(1)(i)-(iii), (a)(4), (a)(5).[29] No one will receive notice. Those who object have no process or means to advance their complaints and no way to protect themselves from the resulting property invasion and bodily insult.

C. Governing Statutes and Regulations

a. Communications Act

The United States controls "all the channels of radio transmission." 47 U.S.C. §301. The FCC oversees spectral assignments, issues the licenses[30] that are required prior to lawful use of radio communication, approves devices and facilities, and protects against interference. 47 U.S.C. §§301, 302a, 303, 305, 306, 307, 321, 308, 309, 318.

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[29] The new definition of "hub or relay antenna" in Amended rule 1.4000(a)(5) is the vehicle that extends OTARD "protection" to these powerful carrier-grade facilities.

[30] *See* 47 U.S.C. §153(49) (definition of "station license"). *Order* ¶26 & n.105 note that fixed wireless carriers use "unlicensed" Part 15 devices. But private carriers must still obtain a separate "private radio service license."47 U.S.C. §158, note (2018 "private radio services" fee schedule); 47 C.F.R. §101.3 (private carrier definition).

A significant part of the FCC's charge is to "promot[e] safety of life and property." 47 U.S.C. §151. This responsibility stands on equal ground with the beneficial radio-based exploitation of airwaves as a natural resource. *See* 47 U.S.C. §§151, 154(n), 254(c)(1)(A), 324, 332(a)(1) and (c)(7)(C)(iii)), 336(h)(4)(B), 925(b)(2)(C), 1455(a)(3); *Farina v. Nokia, Inc.*, 625 F.3d 97, 130 (3d Cir. 2010). The FCC must serve the "public interest," including consideration of utility and public health and safety. *KFKB Broad. Ass'n v. Fed. Radio Com.*, 47 F.2d 670, 671-672 (D.C. Cir. 1931); *see also Banzhaf v. FCC*, 405 F.2d 1082, 1096 (D.C. Cir. 1968).

The Act's savings clauses disfavor implied preemption. *See* 47 U.S.C. §§152 (notes), 253(b), 332(c)(7), 414, 601(c)(1). As explained in Part III.1, preemption cannot be justified based on Telecommunications Act of 1996 Section 207, Pub. L. No. 104-104, §207, 110 Stat. 56, 114 (1996) ("§207") or 47 U.S.C. §303(v), so this is not a case of express preemption by statute.

b. Other Pertinent Laws

i. Local Zoning/Land Use

Local zoning laws apply to base stations installed on private property. The *Order* specifically targets them for elimination. These zoning processes serve important civic purposes by providing a venue for local citizens to receive notice

of a project that may affect their rights.[31] Citizens can lodge an objection to any harm or threat posed by the project.

ii. Civil Rights Laws

The amended rule also preempts any opportunity for people to initiate requests and proceedings pertaining to disabled rights accommodation requests under the federal Fair Housing Act (FHA),[32] Americans with Disability Act (ADA)[33] or state law equivalents along with the administrative regulations promulgated by other federal and state civil rights agencies pursuant to those statutes. CHD Comments, pp. 2, 6, 14-17.[34] The federal ADA and FHA and most similar state laws reflect a strong policy and have overarching and sweeping remedial purposes.

The FHA, in 42 U.S.C. §3601, declares that "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." The ADA, in 42 U.S.C. §12101(a), finds, *inter alia* that "discrimination against individuals with disabilities persists in such critical areas

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[31] (JA-ARR-T1-FN31)
[32] 42 U.S.C. §3601, *et seq.*
[33] 42 U.S.C. §12101, *et seq.*
[34] (JA___)

as…housing [and] communication" and "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." One of the evils sought to be remedied was "outright intentional exclusion," 42 U.S.C. §12101(a)(5). The Attorney General, Housing and Urban Development (HUD) and other federal agencies administer these laws, through enforcement and specifically granted rulemaking authority. *See, e.g.*, 42 U.S.C. §§3608, 3614a (FHA); 42 U.S.C. §§12186, 12204, 12205 (ADA). HUD implemented FHA rules through 24 C.F.R. Part 100. The Attorney General has promulgated ADA implementing rules at 28 C.F.R. Part 36.

The FHA and ADA provide a minimum baseline of protections and entirely disclaim preemption of state-level laws targeting the same subject, expressly allowing states to go farther by way of coverage. 42 U.S.C. §3615 (FHA); 42 U.S.C. 12201(b) and 28 C.F.R. §36.103(c) (ADA). Many states have taken that opportunity. For example, California goes significantly beyond the federal baseline, through broader coverage and applicability to private companies.[35]

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[35] *See* Cal. Civ. Code §54, *et seq*.; Cal. Gov. Code. §12955.6. The state applies an independent definition of "disability." Cal. Gov. Code §12926; Cal. Gov. Code §12955.6; *Brown v. L.A. Unified Sch. Dist.*, 60 Cal. App. 5th 1092, 1103-1104

Oregon does too. Under Or. Rev. Stat. Ann. § 659A.145(2)(b) and (g) "a person" cannot "discriminate because of a disability of a purchaser" or "an individual residing" in a dwelling by "expelling a purchaser" or "refusing to make reasonable accommodations."

D. The Record Conclusively Established Severe Harm Would Flow From the Amendment

The *Order* ignores unrebutted evidence of human sickness from RF radiation exposure that this rule will make much worse. In addition to the 6,231 people who filed jointly with CHD and declared they are sick, more than 80 individuals directly advised the FCC that they and/or other family members developed Radiation Sickness or described consistent symptoms.[36]

Radiation Sickness describes a constellation of mainly (but not exclusively) neurological symptoms that manifest as a result of RF radiation exposure. It is a "spectrum condition." Some experience discomfort while others are entirely

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(Cal. Ct. App., 2021). California also strongly protects equal access to housing. Cal. Gov. Code §12955(d), (g). Subsection (k) makes it unlawful to "make unavailable or deny a dwelling." Cal. Gov. Code §12955.7 prohibits interference in the exercise or enjoyment of housing. Under Cal. Gov. Code §12955.8 a violation can be shown through discriminatory effects without regard to motivation. The implementing rules provide that disparate impact can constitute a discriminatory effect. 2 CCR §12060.

[36] (JA-ARR-T1-FN36)

debilitated. For some the symptoms can be life threatening.[37] The typical symptoms include headaches, memory, cognitive and sleep problems, heart palpitations and/or increased heart rate, ringing in the ears, fatigue, skin rashes, tingling, nose bleeds, unremitting flu-like symptoms, dizziness, and burning sensations. Exposure avoidance is the only effective management treatment.[38]

Many commenters below noted they are already excluded from any meaningful opportunity to participate in society and their home is the only safe space they have from constant irradiation. They specifically requested accommodation so they could at least have and maintain peaceful enjoyment of their own home–their final refuge.[39] If not they will have to leave and search for a new place in order to have a tolerable existence.[40] Several expressed reasonable fear they could not find another safe place to live given the touted coming ubiquity of these systems.[41]

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[37] (JA-ARR-T1-FN37)
[38] *See* footnotes 12-14 *supra.*
[39] (JA-ARR-T1-FN39)
[40] (JA-ARR-T1-FN40)
[41] (JA-ARR-T1-FN41)

SUMMARY OF ARGUMENT

1. All Petitioners in this appeal have standing to challenge the *Order*. Each is a "party aggrieved" under the Hobbs Act. 28 U.S.C. §2344.

2. All Petitioners have standing under Article III of the U.S. Constitution because the *Order* caused each of them particularized and concrete injury-in-fact that would likely be redressed by a favorable decision. *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015). The Petitioners identify and describe numerous and varied negative organizational and/or personal impacts from the *Order* in the declarations that accompany this Brief.

3. The *Order* did not establish that the Commission has the Congressionally-delegated powers to take the action below. The rule amendment is wildly dissonant with the basic premises underlying Congress' chosen regulatory regime and the statute's savings clauses.

4. The FCC did not engage in reasoned decision-making or base its decision on substantial evidence and it acted in an arbitrary and capricious manner in violation of the Administrative Procedure Act. An agency cannot lawfully ignore or fail to meaningfully respond to material evidence simply because the evidence presents a position with which the agency may disagree.

5. The FCC unreasonably failed to consider whether its action was consistent with other Congressionally-declared policies and goals, including express retention of local control for land use with regard to base station placement and state and federal civil rights for the disabled/handicapped.

6. The factual record is clear: there are many people with Radiation Sickness who will be significantly harmed by the rule change. There is no controverting evidence, so those propositions are established as a matter of law. Yet the *Order* completely failed to meaningfully address these showings and heedlessly moved forward with the change. By knowingly creating a threat to public health and safety, and by eliminating all previously-available notice and substantive and procedural remedies for those who will suffer, the FCC failed to meet its statutory obligation under the Communications Act to protect public health and safety.

7. The amended rule violates "negative rights" protected by the Constitution.

STANDARD OF REVIEW

This is an APA case. The Court's review is limited to the administrative record. 5 U.S.C. §706; 47 U.S.C. §402(g). *AT&T Corp. v. FCC*, 86 F.3d 242, 245 (D.C. Cir. 1996). It must "hold unlawful and set aside agency action, findings, and

conclusions" if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "unsupported by substantial evidence." 5 U.S.C. §706(2)(A), (E); *AT&T Corp.*, 86 F.3d at 245. Further, this Court must vacate any order that is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. §706(2)(B), (C). While judicial review under the APA is deferential, the Court's inquiry must be "searching and careful." *Brookings Municipal Tel. Co. v. FCC*, 822 F.2d 1153, 1164 (D.C. Cir. 1987).

Insofar as the question pertains purely to the FCC's administration of the Communications Act it may be entitled to some level of *Chevron* deference. To that extent the question is whether the provisions in issue are ambiguous and if so whether the FCC's interpretation is reasonable. *Bldg. Owners & Mgrs.*, 254 F.3d at 95. Titles I and III may grant a "very broad mandate," *FCC v. Prometheus Radio Project,* 141 S. Ct. 1150, 1155 (2021); *New York v. FCC*, 486 U.S. 57, 66 (1988); *Cellco P'ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012), but there is still some boundary. With respect to the issues before the Court, the Act is not ambiguous and the Commission's interpretation is not reasonable.

The Petitioners have raised serious constitutional issues: they argue the statute cannot be sensibly read to give the Commission the right and power to

consign individuals to constant misery, dysfunction and torturous pain in their own homes to the point they must evacuate for safer ground, if they survive. The Act does not give the FCC the right to sentence innocent people to death without any due process. The FCC's preemption overreach is "administrative absolutism not congenial to our law-making traditions." *Gutknecht v. United States*, 396 U.S. 295, 306 (1970). The Court must "construe narrowly all delegated powers that [so significantly] curtail" the "liberties of the citizen." 396 U.S. at 307. Stated another way, "[A] legislative choice burdening the exercise of fundamental right must pass strict scrutiny." *All. for Cmty. Media v. FCC*, 10 F.3d 812, 825, n.17 (D.C. Cir. 1993). The canon of constitutional avoidance trumps any *Chevron* deference that might otherwise be due when a serious argument has been raised. *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995).

Chevron deference is also not due when an agency purports to interpret or attempts to override statutory provisions entirely outside the statute the Commission is charged with administering, especially when, as is the case with the ADA, FHA and state equivalents, they are administered by several agencies. The court "must decide for [itself] the best reading." *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 155 (D.C. Cir. 2014).

The Commission must demonstrate, based on the record, "that wiping out all state or local requirements that are inconsistent with the [*Order's*] federal deregulatory approach' is necessary to give its reclassification[42] effect." *Mozilla Corp. v. FCC*, 940 F.3d 1, 85 (2019)(alteration in original). The Court must be satisfied that the FCC has explained how *each* of the laws it is displacing conflict with a legitimate outcome the Commission has authority to obtain and it must apply "traditional rules of statutory construction" to ascertain whether the newly-authorized activity falls within Congress' "clear and manifest intent" regarding preemption. *Massachusetts v. United States DOT*, 93 F.3d 890, 894-897 (D.C. Cir. 1996). The savings clauses Congress carefully inserted in the Communications Act very much bear on this question. *Gade v. Nat'l Solid Wastes Mgmnt. Ass'n.*, 505 U.S. 88, 111-112 (1992).

To date this Court has not expressly decided the level of deference to agencies' decisions on express or conflict preemption, *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 20 (D.C. Cir. 2017), but many courts of appeals have rejected *Chevron* deference and instead applied *Skidmore*-level[43] deference. *Del*

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[42] The *Order* "reclassified" hubs, relays and services by moving them into the "OTARD protected" class.

[43] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Grosso v. Surface Transp. Bd., 804 F.3d 110, 116-117 (1st Cir. 2015)(and cases cited therein).

"[W]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001); *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1131 (D.C. Cir. 2001). The Court must "construe the statute to avoid 'serious constitutional concerns.'" *Comcast Cable Communs., LLC v. FCC*, 717 F.3d 982, 992 (D.C. Cir. 2013).

The *Order* should have but did not explain how displacing and acting in a manner inconsistent with the policy behind federal and state laws protecting the disabled/handicapped is "within the scope of" and a "valid exercise of authority" and "something that Congress would have sanctioned." *United States* v. *Shimer*, 367 U.S. 374, 386 (1961).; *Capital Cities Cable v. Crisp*, 467 U.S. 691, 699 (1984); *New York v. FCC*, 486 U.S. 57, 69 (1988); *N.Y. State Com. on Cable Television v. FCC*, 749 F.2d 804, 807 (D.C. Cir. 1984); *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982), *cert. den*., 461 U.S. 938 (1983). Nor did the *Order* give any hint that affording

individual case-by-case relief to someone claiming severe harm is not practical or feasible.

The ultimate question is whether Congress intended that the Commission have unconstrained power to issue a license to kill and inflict indiscriminate pain, dysfunction and suffering without any procedural vehicle for case-by-case exemptions. The *Order* provides no illumination on this point. The Court must therefore independently determine the answer or vacate and remand to allow the Commission to confront the issue.

ARGUMENT

I. Standing

A. Hobbs Act

All Petitioners submitted comments.[44] Each is aggrieved. They have Hobbs Act standing.

B. Article III Standing

1. Individual Petitioners

Each Petitioner shows particularized and concrete injuries-in-fact traceable to the *Order* that are likely to be redressed by a favorable decision. *Vilsack*, 797

[44] (JA-ARR-T1-FN44)

F.3d at 8. Each suffers harm to a "legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (cleaned up). It is concrete if it is "real," "actually exists," and is not "speculative." *Id.* at 1548-1549. Each Petitioner has standing based on one or more of the injuries addressed below.[45]

The FCC failed to consider and make provision for those who will be harmed through exposure from these newly-authorized emission sources. Illness from toxic environmental agents in the face of agency action or inaction provides standing. *NRDC v. EPA*, 464 F.3d 1, 5-7 (D.C. Cir. 2006) (and cases cited therein). Petitioners already suffer from Radiation Sickness or other pre-existing conditions that are materially worsened by RF exposure. Elliot@6-7, 10, 24-26; Kesler@7, 30-33, 35, 37 44, 47; Tsiang@6, 7, 9, 1012, 2024, 27, 30, 45-46, 49, 55-56; Mirin@5, 7, 13-14, 17-19, 26, 64. These injuries are clearly both particularized and concrete.

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[45] Petitioners fall within the "zone of interests" protected by the substantive statutes in this case. *Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014). The Communications Act emphasizes protection of the public's health. The FHA and ADA prohibit discrimination, constructive eviction and other actions that foreclose access to housing.

Financial harm provides standing because money is property and requiring expenditure of personal funds injures a protected interest. *Czyzewski v. Jevic Holding Corp*., 137 S. Ct. 973, 983 (2017); *see also Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 616 (D.C. Cir. 2019); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017). Petitioners in this case will be required to expend substantial sums to minimize future exposures (*e.g.*, buying shielding to block radiation, moving homes) and may lose their livelihood. Elliot@11, 36-39; Kesler@6, 37, 47; Tsiang@47-49; Mirin@32, 58-59.

Deprivation of or interference with substantive or procedural personal rights or liberty interests also provides standing.; *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007); *Idaho, By & Through Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 591 (D.C. Cir. 1994). Those rights/interests include the ADA, FHA, related civil rights granted by state and local law, the right to bodily autonomy, and property rights. These other laws provide private causes of action, but the rule amendment takes them away. Elliot@5, 8, 11, 13, 22-24, 30-31, 33-35, 37, 39-44, 53-55; Kesler@5-6, 8-10, 38, 40-41, 46-47; Tsiang@5-6, 40-41, 43, 45-46, 48, 56; Mirin@4-7, 34-35, 38-39, 48-50, 52, 58-59, 61-64.

The Commission was directly alerted below–by Petitioners and many others–that their conditions will be made worse from the amendment. Kesler@7;

Tsiang@7; Mirin@7. The FCC had a duty to ensure procedural due process: notice and some mechanism for case-by-case individual relief. The Commission's elimination of notice and all state, local and other federal procedural rights and its denial of all requests below for a replacement process for notice and individual relief provide standing.

2. Organizational standing

An organization has standing to pursue claims on its own behalf if it meets the same standing requirements as an individual plaintiff. *Equal Rights Ctr. v. Post Props., Inc*., 633 F.3d 1136, 1138 (D.C. Cir. 2011). Injury-in-fact has two parts: "first, whether the agency's action or omission to act injured the organization's interest, and, second, whether the organization used its resources to counteract that harm." *Id*. (*quoting PETA v. U.S. Dep't of Agric*., 797 F.3d 1087, 1094 (D.C. Cir. 2015)). As part of the first inquiry, the organization must also demonstrate a "direct conflict between the defendant's conduct and the organization's mission." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996).

CHD's mission is protecting consumers and citizens and especially children, from harmful environmental toxins, including RF emissions. The FCC's decision "perceptibly impaired" CHD's ability to provide counseling, education, referral and other assistive services to members and/or followers, and the general public,

including Radiation Sickness sufferers and others exposed to RF. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Spann v. Colonial Vill., Inc*., 899 F.2d 24, 27 (D.C. Cir. 1990). Tachover@6, 14, 41-43, 50-56, 61-88. CHD suffers financial injury. It is required to redirect and dedicatehe far more resources to deal with the effects of the order. Tachover@62-65, 73-74, 76-87.

The FCC's failure to provide some means for the public and CHD to identify and locate existing and planned OTARD base stations results in an informational injury. *Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 618-20 (D.C. Cir. 2020); *Scientists' Inst. for Public Info.*, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973). CHD will not know where these systems are, so it cannot provide evaluations and analyses of them to test compliance with FCC emissions rules and report any violations for enforcement. *Anti-Vivisection Soc'y*, 946 F.3d at 619. Tachover@83. CHD cannot help its members determine whether their existing home is no longer safe, nor can it assist them in locating a new and safer place to live. Tachover@29, 41-44, 50--59, 63; 84 CHD cannot advise or represent its members in individual requests for relief because the rule eliminates them. Tachover@14, 50-57, 62-71, 75

Finally, CHD has standing to represent its members, all of whom have common relevant interests. *Equal Rights Ctr.*, 633 F.3d at 1138. To secure

"associational standing" an organization must show that: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to its purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *International Union, UAW v. Brock*, 477 U.S. 274, 282 (1986). CHD members Dr. Hoffman and Hertz have standing to sue in their own right but have requested that CHD protect their interests. Tachover@48.

3. The requested relief will redress the injury

By vacating and remanding the *Order*, this Court will provide the FCC another chance to responsibly address, explain and justify its determinations on the issues that were presented below but either ignored or dismissed without adequate reasoning and explanation. The Commission will be able to correct its omissions and, if it persists in granting this new authority, craft adequate procedural protections for notice and case-by-case adjudication of individual requests for relief.

II. APA/Reasoned Decisionmaking

Agency action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State*

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The agency must show a "rational connection between the facts found and the choice made." *Brookings Mun. Tel.*, 822 F.2d at 1165. It must take a "hard look" at "all relevant issues" and engage in "reasoned decisionmaking." *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984).

The *Order* fails several fundamental principles. First, an agency's decision must be supported by "substantial evidence" in the record. *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1111 (D.C. Cir. 2019). An "agency cannot completely ignore evidence that it does not like. It must review the "whole record," including "whatever in the record fairly detracts from the evidence supporting the agency's decision" and "it may not minimize such evidence without adequate explanation." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018).

Second, the agency must adequately respond to all material public comments, especially those "relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule [because they] cast doubt on the reasonableness of a position taken by the agency." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977). The agency has to "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution

led the agency to the ultimate rule." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983).

Several individual liberties and disability rights issues were squarely before the Commission. Each had uncontested factual predicates. Aside from its opaque comment in ¶38, the *Order* failed to deal with them in any meaningful way. The Commission was not just "tolerably terse" in this respect; it was "intolerably mute." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (1969). The agency action is not supported by substantial evidence when the record is read as a whole.

III. Points of Error

A. Review Point 1: The Commission Failed to Justify its Authority

The Commission gets a gold star for inventiveness. But it failed on the "thinking this through" part. The rule revision is ill-considered. The FCC did not examine whether and then explain how its action rule comports with the overall structure of the Communications Act and Congress' intentions. The rule shatters longstanding distinctions between carrier-providers and subscriber-users. It completely ignores important differences between a carrier's network facilities and a customer's on-premises equipment. It turns users into carriers, but without any regulatory oversight. The amended rule is oppugnant to the licensing and provider/user regime intended by Congress.

Powerful antennas will suddenly show up within a community, but no one will know in advance. If something goes wrong, it will be impossible to identify who is responsible. Even the Commission will have difficulty determining the proper party for enforcement since the *Order* and amended rule do not clearly advise what service rules or emissions limits apply or who is subject to them.

The rule parts dealing with more than wireless reception of pure video service cannot be justified on the "OTARD" preemption powers in §207 or 47 U.S.C. §303(v). *Order* ¶¶23-33, 39 also rely on 47 U.S.C. §§ 151, 154(i), 201(b), 202(a), 205(a), 251, 253, 316, 332, and 1302. The Commission did not adequately explain how its radical preemptive approach comports with or is permitted by these claimed sources of authority, especially given the express preemption limitations enunciated in the 1996 amendments, Pub. L. 104-104, §604, 110 Stat. 143(c)(1) relating to "no implied effects." *See* 47 U.S.C. §152, note.

The rule change eliminated a specific limitation driven by §207, which protects users' rights to purchase CPE for personal use "at that location" (*e.g.*, the location with the antenna). *Order* ¶¶3-4. *Order* ¶14 agrees a hub that serves multiple unaffiliated users is a provider "base station" as defined in 47 C.F.R. §1.6100(b)(1), but it now extends "end-user" CPE-like "protection" to carrier base stations.

Order ¶¶14, 20 n.81, amended 1.4000(a)(1)(A), (a)(2)(A), (a)(5) and other paragraphs pretend the Commission is merely expanding permitted use of basic end-user CPE that is already there, but that is simply not correct. End user CPE cannot project a strong signal out for miles or more and control thousands of other users' CPE. Only carrier network equipment can do that.

What the *Order* also fails to mention is that to affect this arrangement there must be more than just the existing point-to-point antenna that connects to the provider's backhaul network. Complicated base station equipment and a new and separate omni-directional antenna that creates a powerful wide area wireless network accessible from all directions and supports many thousands of customers are also required.[46] *See also Order* ¶14 and nn.43-48.[47]

The Court must vacate and remand for reassessment and a far better explanation of the intended scope and operation of the rule and then the Commission's authority to affect this radical scheme.

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[46] Starry plans to install up to three base stations in each location that covers 12,000-15,000 households within a one-mile, 360-degree service radius. (JA___)

[47] *Citing* (JA___, ___, ___)

1. Statutory authority

Order ¶¶23-33, 39 rely on §207, 47 U.S.C. §§ 151, 154(i), 201(b), 202(a), 205(a), 251, 253, 303, 316, 332, and 1302.[48] These provisions, however, do not support the action and in particular the sweeping preemption of all federal, state and local laws that in any manner "restrict" deployment.

The Commission has gone far afield from the 1996 Congressional OTARD directive and authorization. The OTARD rule's name speaks to "over-the-air *reception* devices," those with *receive*-only capability and it protected people's ability to *receive* a provider's video-based services using their own CPE. This was the state of the rule when it was before this Court in *Bldg. Owners & Mgrs.*, 254 F.3d 89. The *2000 R&O*, however, untethered the OTARD rule from §207's "receive" and "video" anchors when it extended protection to "customer-end antennas used for transmitting or receiving fixed wireless signals." *Order* ¶3, *citing 2000 R&O Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd at 23027–28, ¶¶97-100. The covered antenna did not have to

[48] *Order* ¶27 later disclaims power from Title I "ancillary authority." It also states "consistency" with the RAY BAUMS Act of 2018, Pub. L. No. 115-141, 132 Stat. 348, 1095 (codified at 47 U.S.C. §615 note)), and 47 U.S.C. §1302, but does not assert those laws grant rulemaking authority. The Commission ultimately rests on "broad authority under Title III (specifically Section 303)."

be receive-only, and it could be used to access non-video services. The rule amendment now under review is similarly untethered from §207's receive-only video focus so §207 does not apply. The Commission's authority must arise from the other parts of the Act identified in the *Order*.

Thus, the question is whether these other provisions permit obliteration of the traditional distinctions between carriers and customers, carrier networks and customer equipment, and the fundamental difference between providing a service and consuming a service, and then preemption of all local, state or federal laws that might get in the way.

2. The rule does not fit within remaining stated sources of authority

i. Act's regulatory structure

The Commission ultimately relies only on §§303, 316 and 332 for the source of its power. *Order* ¶27. Section 303 has been considered the widest grant, but it does not allow what the Commission is trying to do.

The plain text of §303(b) contemplates the rendering of "service." Section 303(l)(1) speaks to "duties to be performed" by "licensees." Subsections 303(d), (e), (f) and (r) seem to be the most applicable. The problem, however, is that what the *Order* contemplates is not consistent with law and, as shown below, the rule is wildly dissonant with other parts of the Act and other FCC rules. The remaining

subsections are about matters not in issue here, like video, enforcement and reallocation.

Section 316 pertains to modification of station licenses. The *Order* does not purport to modify any licenses, so it does not apply. Section 332 also does not support this action. For example, §332(a)(1) requires promotion of "life and property" and the *Order* entirely eschews any effort to do that, even though it received volumes of comments raising health, safety and property issues. Section 332(a)(3) and (4) once again speak to "services" and as explained below the rule does not adopt, and indeed obliterates, traditional "service" concepts. Section 332(c)(2) merely prohibits common carrier treatment for private mobile services, and no one suggested any such thing. Section 332(c)(3) statutorily preempts state regulation of "entry of or rates charged" by private mobile service but we are addressing fixed service. The rest of §332 is about commercial mobile service and personal wireless service, and *Order* ¶¶29-31 note those too are not in issue.

The fundamental problem is what the rule really *does*. The Act's structure clearly contemplates that there will be licensee private carrier service providers regulated by the Commission and end user customers that purchase and receive the service but are not themselves directly regulated. The amendment eliminates this construct.

ii. Rule revision allows different equipment used for different purpose

Each of the 2000, 2004 and 2021 orders extensively refer to "customer end equipment" but never define what that is. The surrounding discussion provides clarity. "Customer end equipment" is synonymous with "Customer Premises Equipment ("CPE") as defined by 47 U.S.C. §153(16).[49] *2000 R&O*, 15 FCC Rcd at 23034, ¶111. The 2000 and 2004 orders also make very clear that carrier base stations (electronics, including a router or switch, and powerful omni-directional antennas) are not CPE. The 2004 revision protected CPE, not base stations.

The Commission had two underlying theories in 2000 and 2004. First, it found that the same CPE used for video could and did often support other telecommunications, including Internet access, and it made little sense to prevent users from employing their "customer-end" equipment to its full functionality. *2000 R&O* ¶97. But it also recognized a legally-important corollary: "customer-end" CPE distributes network services to the users on that premises. *In the Matter of Continental Airlines*, 21 FCC Rcd. 13201, 13210 (2006). If equipment serves

[49] End user ownership is a fundamental aspect of the "customer premises equipment" definition and regulatory provenance. *See CCIA*, 693 F.2d at 205; *Second Computer Inquiry Final Decision*, 77 F.C.C.2d 384, 446, ¶159 (1980).

patrons on different premises it is no longer CPE. *See Order* ¶3, *2000 R&O* ¶109-115; *2004 Reconsideration* ¶¶13-18, 110-112; 47 U.S.C. §153.

A "carrier hub site" that allows the licensee to serve unrelated customers on *different premises* is not "customer premises equipment." It is instead a part of the carrier's network. There has never been a high-powered "user base station" that manages connections and supplies private wireless service to other unaffiliated customers under the Commission's rules and practice. Never before has the Commission even suggested that a carrier's *base station* could be end-user CPE.[50]

The Commission started this proceeding as the result of an *ex parte* filing[51] by the Wireless Internet Service Providers' Association ("WISPA"). *Order* ¶5; *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, NPRM, 34 FCC Rcd 2695, 2696, ¶5 (2019) ("*OTARD 2019 NPRM*"). WISPA clearly understood that base stations are not "customer-end equipment" (CPE): "OTARD originally focused on CPE because at the time the Commission believed that carrier hubs sites did not require the same relief."[52] Notice the

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[50] *2004 Reconsideration* ¶17 and *2000 R&O* ¶111 both emphasize the "fundamentally different character" of CPE and carrier network equipment. *See also Continental Airlines*, 21 FCC Rcd at 13211, ¶21.

[51] (JA___)

[52] (JA___)

reference to "carrier hubs sites" and the contradistinction with "CPE." All the commenting carrier comments agreed that the hub/relay/base station equipment they wanted "protected" would not be CPE because it would remain part of their network.[53] The request clearly sought relief that would change the nature of the equipment being authorized, by allowing CPE and base stations.

NPRM ¶10 asked whether the Commission should "clarify that it will interpret 'antenna user' to include fixed wireless service providers? For example, if a fixed wireless service provider leases space for a hub antenna on private property, should the Commission clarify that the service provider becomes the 'antenna user' with respect to that property?" *See also* Order ¶7. Bringing base stations within the rule necessarily requires a conclusion that the carrier is indeed "using" the antenna, to feed the base station ("hub") and the carrier-owned "relay" antennas that will service CPE located on other premises that have no relationship to the original customer. *Order* ¶¶20 and 30 reveal this is true. Paragraph 20 refers to providers' "placement of their antennas" and notes that "…service providers that use this equipment must continue to comply with other applicable Commission

[53] (JA___, ___, ___, ___, ____)

regulations, such as RF emissions requirements." Paragraph 30 finds that "wireless Internet service providers use hub and relay antennas…"

Strangely, however, ¶20 contends that "the revised rule will not treat service providers as 'antenna users.'" It provides no explanation how that can be so given the classification of the equipment now allowed and the fact that the "antenna" will be used to provide service to the public. If the "customer"/"property owner" is still the exclusive "antenna user" then the "customer"/"property owner" must be the one that is providing service to the public. That, in turn, means the "customer"/"property owner" is no longer a "customer" with "CPE." The "customer"/"property owner" is now a private carrier and must be directly regulated as such.

iii. Carriers assume regulatory responsibilities

Private carriers are not subject to Title II, but they still have regulatory responsibilities. Every wireless private carrier must obtain a "private radio services license,"[54] submit regular accounting reports and contribute to the Universal

[54] 47 C.F.R. §101.3 ("licensed" private carrier definition)

Service Fund.[55] "Broadband Internet Access Service" providers are subject to "Transparency" requirements.[56]

Carriers/licensees are responsible to the Commission for their users' activity, and the end-user CPE must always be controlled by the carrier/licensee's network.[57] The FCC's rules have always maintained the provider hub/user CPE construct to operationalize these carrier responsibilities. For example, carriers operate a "Hub" that provides service to "User Stations" as part of fixed "Point-to-Multipoint Service."[58] To give another example, the rules applicable to the 3.5 GHz band refer to carrier base stations (called "CBSDs"[59]) and "End User Devices" (*e.g.*, CPE).[60] Only licensees can use a CBSD. An "end user device" cannot be a CBSD (base station) and "may not be used as intermediate service links or to provide service…to other End User Devices or CBSDs." The emissions

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[55] 47 C.F.R. §54.706(a).

[56] 47 C.F.R. §8.1.

[57] 47 C.F.R. §§1.903(c), 22.305, 90.463(h), 101.603(a)(4), 101.135(b).

[58] 47 C.F.R. §§30.2 (definitions), 101.3 (definitions).

[59] *In the Matter of Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, 31 FCC Rcd 5011, 5014, 5055, ¶¶13, 161 (2016) equate CBSDs and base stations.

[60] 47 C.F.R. §96.3 (definitions).

from each "end user device" must be entirely controlled by the "associated CBSD."[61]

Under the rule revision the "antenna user" is now clearly a private carrier and must be a "licensee." But the *Order* does not acknowledge this monumental shift in the regulatory treatment of OTARD "users." To the contrary, it bills the revision as a "modest" "adjustment" and "expansion." *Order* ¶¶1, 27, n.110. There is an elephant hidden in the FCC's "modest adjustment" mousehole.

iv. If "antenna user" is still an "end user" and not the "carrier" then the on-premise equipment must comply with "CPE" emissions limits rather than "base station" emission limits.

The service and emissions rules for virtually every frequency band and service type allow higher power output for equipment under "operator" or "licensee" control. This is justified in part because the licensee is subject to direct regulation. The "consumer end" device, whether fixed, mobile or portable, typically has significantly lower allowed output and the consumer is not directly regulated.[62] The emissions rules directly contemplate that the base station will

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[61] 47 C.F.R. §96.41(c), (d).

[62] *See* 47 C.F.R. 27.50(a) ("base station" EIRP 2000 watts/5 MHz; "fixed customer CPE" EIRP 20 watts/5MHz; mobile/portable .25 watts/5MHz). "EIRP" means "Effective Isotropic Radiated Power." EIRP measures signal strength. The emissions rules also use a related measurement called "Effective Radiated Power" (ERP). *See* 47 C.F.R. §101.3 (definitions).

"enable," "manage" and "control" the operation and power output for all the CPE "associated" with it.[63] Licensee CBSDs in the 3.5 GHz band can operate at far higher power levels than "end user devices." CBSDs can operate with an EIRP up to 47, whereas end user devices are limited to an EIRP of 23.

Order ¶34 notes that "fixed wireless providers" must ensure that their equipment remains within the applicable exposure limits." But it does not specify whether the higher limits for hubs/base stations or the lower limits for CPE apply in this situation. The higher "base station" limits can only apply if the private carrier is the "antenna user" contrary to the claim in *Order* ¶20. If the equipment is CPE, however, then the lower limits must obtain, and the "end user device" rules prohibiting "service…to other End User Devices" also applies. But that is clearly not the Commission's expectation.

The *Order* is internally inconsistent. It turns subscribers into carriers, or alternatively, treats carriers like end users but it then fails to apply the rules and statutory provisions applicable to either type. The *Order* glosses over this problem without analysis, even though it was clearly raised in several parties' comments.[64]

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[63] 47 C.F.R. §2.106 US Footnotes, US88, US91; 47 C.F.R. 27.77.
[64] (JA-ARR-T1-FN64)

There is no way anyone can police emissions compliance, and if there is a violation there is no way to identify the responsible party. Who is the "licensee"?

3. *Order* fails to adequately justify sweeping preemption of local, state and other federal laws

The FCC claims the authority to sweep away all "restrictions" that prevent carriers from installing and then using this powerful equipment in a way that avoids meaningful regulation and without any concern for those directly affected by the system. Several of these "restrictions" come from or are specifically-approved federal civil rights laws.

An agency cannot repeal a federal statute like the Commission attempts here, *Merritt v. Cameron*, 137 U.S. 542, 551-52 (1890), especially since the ADA and FHA are administered by other federal agencies and enforced through the courts. *Hunter v. FERC*, 711 F.3d 155, 160 (D.C. Cir. 2013). But the Commission did not dedicate any consideration to whether its rule might conflict, interfere with or even overrule these federal and state regulations; indeed, as noted it did not even contemplate whether *its* expressed *policies* were consistent with those enunciated by Congress in the FHA and ADA and the state equivalents Congress also expressly blessed.

You cannot square the Commission's preemptive actions with Congress' statements of purpose and policy and their specific approval of similar and even

more expansive state disabled/handicapped protection. Although *Order* ¶34 mentions the ADA in passing, it does not address the FHA and it entirely fails to recognize or deal with the overall problem. More specifically, it did not even try to reconcile its action with the sweeping policy and purposes stated in these federal and state laws. That is a failure of reasoned decisionmaking. If the FCC thought that granting the accommodations sought by those below[65] would be an unreasonable barrier to wireless proliferation it should have said so. It likely did not because it is doubtful Congress would have sanctioned that choice and outcome so it ducked the issue.

In sum, the Commission's interpretation of its statutory authority is not reasonable. It is unintelligible and full of internal contradictions the *Order* does not come close to recognizing, much less explaining. The Court cannot discern the Commission's reasoning or even its basic rationale for how what it is *actually* doing fits within the authority granted through the provisions it cites.

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[65] (JA-ARR-T3)

B. Review Point 2: *Order* Fails to Consider Text, Policies and Purposes of FHA, ADA and State Equivalents

The record is replete with invocations of the FHA, ADA and state and federal disability rights and issues.[66] CHD dedicated a substantial portion of its comments on the topic.[67] A large number of people directly asserted they are disabled and RF exposure is the direct cause or exacerbates other illnesses.[68] All objected to involuntary exposure that will worsen their existing conditions.[69] Some specifically requested accommodation for themselves and others.[70] *Order* ¶34 denied these requests in one terse sentence.

1. *Order* failed to engage in reasoned decisionmaking

Clearly, ¶34 did not reflect *any* consideration of this important problem. It expressly refused to do so. There was no "hard look." This was arbitrary and capricious. *State Farm*, *Neighborhood TV*. Nor did the *Order* adequately respond to material public comments "relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule [because they] cast

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[66] (JA-ARR-T3)
[67] (JA___)
[68] (JA-ARR-T1-FN68)
[69] (JA-ARR-T1-FN69)
[70] (JA-ARR-T1-FN70)

doubt on the reasonableness of a position taken by the agency." *Home Box Office*. The *Order* does not "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Action on Smoking & Health*.

2. Refusal to confront unrebutted evidence

The *Order* entirely failed to confront the evidence of harm, all of which was unchallenged and unrebutted. There is *no evidence* in the record below that contradicts *any* of the factual claims that were made about the commenters' current health conditions, their causes, or their direct assertions that the rule change would lead to severe harmful effects on those that are sensitive to RF exposure.[71] These facts are, as a matter of law, completely established for purposes of this case, and the FCC cannot simply ignore or reject them merely because they were embarrassing to its goal. The refusal to deal with the issue has *no* evidentiary foundation and was arbitrary and capricious. *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1041-1043 (D.C. Cir. 2002), *amended on reh'g*, 293 F.3d 537 (2002).

[71] *See also* (JA-ARR-T1- FN71)

Order ¶34 notes the newly authorized activity will still require compliance with the FCC's general exposure requirement and limits. But that is beside the point. Petitioners are not here challenging those general requirements. They argue, and as noted the evidence is entirely unrebutted, that for whatever reason there are some individuals who cannot tolerate exposure allowed by the general population limits. This case is about specific individuals that will be harmed, not whether the emissions that sicken them comply with the FCC's general emissions regulations.

The Commission's refusal to resolve the question of what to do with the discrete questions before it was arbitrary and capricious and reflects a lack of reasoned decisionmaking.

3. Failure to address all relevant property interests

Order ¶¶32-33 provide some justification for preempting local zoning laws, deed restrictions and Homeowner's association bylaws. But it did not address the full context. This Court sustained a prior version of the rule in the face of various challenges by noting that the property owner had contractually surrendered significant control to tenants or leaseholders, and all the rule did was allow the tenant/leaseholder to install OTARD equipment for the tenant's own use. *Bldg. Owners & Mgrs.*, 254 F.3d at 98. Order ¶¶32, 33 heavily rely on that holding. But this is no response for those who–like the Petitioners–are disabled and own or rent

and reside on completely different properties and did not voluntarily enter any contractual relationship with the carrier or the owner or renter of the property that will hold the equipment. They have surrendered no rights in any manner, contractually or otherwise. Placement and operation of newly-authorized OTARD equipment will directly, severely harm and divest them of vested contract rights.

4. Failure to consider disabilities laws' text, purpose and policies

A major issue is whether the FCC has the statutory authority to preempt rights afforded by the FHA/ADA, and even if it does, whether it properly and fully addressed all the arguments contending it *should not* do so. The FCC does not administer these other laws. But when they are called to its attention it must, at least, ensure that its actions are consistent with and do not unduly frustrate or impede the Congressionally-enunciated purposes, policies and goals behind them.

The Communications Act does not extinguish rights under other federal statutes or even under state law. *Sierra v. City of Hallandale Beach, Fla*., 904 F.3d 1343, 1349-11350 (11th Cir. 2018); *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 429 (9th Cir. 2014). An agency implementing a particular regulatory regime and the statutory duty to act in the "public interest" must give at least some consideration to other federal statutes that are pertinent to its administrative decision. *Denver & R. G. W. R. Co. v. United*

States, 387 U.S. 485, 492 (1967); *McLean Trucking Co. v. United State*s, 321 U.S. 67, 79-80 (1944); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46 (1942). Congress' intent would be frustrated if each administrative agency is permitted to disregard statutes it does not administer. *Palisades Citizens Assn., Inc. v. CAB*, 420 F.2d 188, 191 (D.C. Cir. 1969)(Civil Aeronautics Board must consider impact on "persons and property on the ground below," including their state-law possessory and constitutional property rights."[72])

The *Order* failed to meaningfully speak to why it should preempt unrelated property owners' rights, all other state laws and regulations, and even federal laws and regulations benefitting those with an exposure-related disability/handicap. Indeed, other than the ADA it did not even mention them. Nor did the Commission discuss the obvious conflict between the proliferation and preemption policy expressed in the *Order* and the policies enunciated by Congress with regard to disability rights.

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[72] The *Palisades* court cited to *Griggs v. Allegheny Cty.*, 369 U.S. 84 (1962) and *United States v. Causby*, 328 U.S. 256 (1946) to observe that air traffic above private property can lead to a taking. 420 F.2d at 192. The FCC is, similarly, authorizing intrusions "destructive of the landowner's right to possess and use his land."

Even if the FHA and ADA do not themselves directly apply to the carriers and require accommodation (but see below) the FCC failed to reconcile its decision to preempt any state FHA/ADA equivalent that would apply to the carrier with the fact that the FHA and FHA both expressly allow states to impose broader coverage and remedies. The FCC chose to preempt in the precise situation Congress said should not be preempted but it never disclosed it was doing so and never explained why that was either permitted or good policy. It just ignored the entire topic.

5. Commenters raised substantial arguments FHA applies

There is a substantial argument the FHA directly applies here and prohibits the forcible exposures allowed by the revised rule. Several commenters expressly invoked disability rights, and thus the FHA.[73] CHD's comments provided an analysis and directly contended it applies.[74] The *Order* flatly refused to address the issue. There is no indication the FCC sought any guidance from the HUD or exercised any independent judgment on applicability. It just recklessly promulgated a rule that effectively preempted a federal statute and HUD's rules to the extent they do apply.

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[73] (JA-ARR-T1-FN73)

[74] (JA___)

The arguments below were not frivolous. Under FHA any person who harmfully exposes handicapped individuals interferes with their "exercise or enjoyment of rights granted or protected by" sections 42 U.S.C. §3604 or 3605 violates 42 U.S.C. §3617. 42 U.S.C. §3604(f)(1) makes it unlawful to "make unavailable or deny, a dwelling."

The carrier's placement of a hub or relay is a "residential real estate-related transaction" under 42 U.S.C. §3605(b)(1)(A). It is a financial arrangement with the location owner, involves construction and is a type of "improvement" that, when made operational, has a "discriminatory effect" as defined by 24 C.F.R. 100.500. *See also* 24 C.F.R. §100.115(a)(1); 24 C.F.R. 100.202. But even if it is not, the FHA applies to anyone that "objectively interferes with the enjoyment of the premises" or unreasonably interferes with a handicapped person's use and enjoyment to the point it drives them out. Here, OTARD systems will so sicken those who are sensitive they will not be able to stay in their home. In other words, the wireless system will "make [a dwelling] unavailable" and cause a constructive eviction in violation of 42 U.S.C. §3617.[75] Similarly, if someone with a handicap

[75] *See* 24 C.F.R. 100.400(b), (c)(1), (2). This regulation was promulgated under HUD's statutory rulemaking authority and is thus binding and assigned *Chevron* deference. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388

prefers to move to a specific place but cannot because it is flooded by OTARD radiation, that place is "unavailable" to them, contrary to the requirements of 42 U.S.C. §§3604 and 3617. It is a new type of "red-lining."

The FHA protects post-acquisition[76] situations and can extend to third parties that had nothing to do with the acquisition. Further, HUD rules include a "discriminatory effects" based test that allows liability to be established even if the practice "was not motivated by a discriminatory intent."[77]

6. Commenters raised substantial arguments ADA applies

There is a substantial argument the ADA directly applies and prohibits the forcible exposures allowed by the revised rule. Several commenters below asserted ADA applies and invoked its protections.[78] CHD's comments provided an analysis

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F.3d 327, 330 (7th Cir. 2004); *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1303-05& nn.41-43 (11th Cir. 1998). HUD interpretations are binding on the FCC.

[76] Every circuit court that has faced the question has held the FHA can apply to "post-acquisition" activity. *Bloch v. Frischholz*, 587 F.3d 771, 772, 779-80 (7th Cir. 2009) (en banc); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713-14 (9th Cir. 2009); *Cox v. City of Dallas*, 430 F.3d 734, 746 (5th Cir. 2005); *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1263-64, 1268 (11th Cir. 2002); *Michigan Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 985-86 (4th Cir. 1984).

[77] 24 C.F.R. §100.500.

[78] (JA-ARR-T1-FN78)

and directly contended it applies.[79] The *Order* flatly refused to address the issue. There is no indication the FCC sought any guidance from the DOJ or exercised any independent judgment on applicability. It just recklessly promulgated a rule that effectively preempted a federal statute and DOJ's rules to the extent they do apply.

The ADA arguments below were not frivolous. *Order* ¶¶12, 18 observe that OTARD-based wireless services are "used to receive video programming services."[80] Internet-based video platforms are subject to ADA Title III. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-201 (D. Mass. 2012). Wireless service is a virtual "place of exhibition and entertainment," "place of recreation," "sales or rental establishment," and "service establishment." 42 U.S.C. §12181(7)(C), (F), (I). Video delivery may not occur in a theater, but Congress provided flexibility to "keep pace with the rapidly changing technology of the times." H.R. Rep. 101-485 (II), at 108 (1990). This is so even if the ADA imposes greater or different obligations than FCC rules. *Netflix* at 203-208.

The ADA's text facially appears limited to those who affirmatively seek to "enjoy" a service establishment's offering, *e.g.*, be a "client or "customer." 42 U.S.C. §18182(a), (b)(1)(a)(v). But the DOJ and courts have not been presented

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[79] (JA___)

[80] *See* 47 C.F.R. 1.4000(a)(1)(ii)(A).

with a situation like that here, where a "service establishment" is forcing its "service" on a disabled person with devastating effects.

The carriers will flood disabled people's homes with RF radiation against their will, thereby affecting subscription by conscription. The uninvited and unwanted product comes over the property line. It permeates all areas and seeps through the walls, doors and windows. The disabled persons effectively become "clients and customers" on an involuntary basis because they have no choice but to "enjoy" the service's irradiation even though it harms them to no end. In this context, there is a plausible argument the ADA does apply and the service establishment must accommodate an objecting disabled person by *not* forcing the effects of the service on them.

7. Commenters raised substantial arguments regarding state equivalents apply

The FHA and ADA disclaim preemption of state-level laws targeting the same subject and even expressly allow states to go farther by way of coverage. 42 U.S.C. §3615 (FHA); 42 U.S.C. 12201(b) and 28 C.F.R. §36.103(c) (ADA). Many states have taken that opportunity and it is at least possible some state disability laws do prohibit the activity here even if the federal laws do not. For example, "a neighbor may be held liable for conduct that interferes with the exercise or enjoyment of a fair housing right by a person with a disability" in Ohio. *Ohio Civil*

Rights Comm'n v. Myers, 2014-Ohio-144, ¶37 (Ct. App., 2014). The amended rule, however, now directly preempts any and all such state laws, and the *Order* did so without *any* analysis or contemplation whether that was permissible or a proper policy choice. The *Order* sweeps them away purely because they are a "barrier" or "restriction" but gives no consideration whether they should be preserved given Congress' specific approval of more expansive state disabled/handicapped protection.

There are substantial arguments that FHA, ADA or more protective state equivalents apply or at least could potentially apply to OTARD-authorized activities. The OTARD rule preempts them without a word or passing thought. It is not the Court's job to decide the precise scope of these laws' applicability, *vel non*, in the first instance. That was, and still is, the FCC's job, after real consideration, analysis and maybe even solicitation of HUD's and DOJ's opinion, along with that of the state agencies that oversee state disability laws. Suffice it to say that the *Order* failed to grapple with these important issues in anything close to a responsible manner. The Court must vacate and let the Commission try again if it wants.

4. Other State Laws

The Commission was eager to expand its authority to the detriment of the states' police and other retained powers. But the *Order* failed to actually discuss more than a few of them. For example, it did not address the propriety of applying Rule 1.4000(a)(4)'s preemption of "criminal" actions relating to things like battery and child endangerment. These topics were discussed in CHD's comments[81] but went unmentioned.

In common law and most state statutes, harmful non-consensual irradiation is a "battery." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984); *Carlsen v. Koivumaki*, 227 Cal. App. 4th 879, 890, 174 Cal. Rptr. 3d 339, 351 (2014). Non-consensual irradiation of children can also constitute "child endangerment" that has criminal and civil penalties.[82]

The rule amendment expressly authorizes activity that can plausibly constitute battery and even child endangerment depending on the specific facts. The Commission's disregard for longstanding common law principles and the

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[81] (JA-ARR-T1-FN81)

[82] *See, e.g.*, California Penal Code §2073a(a) and (b); *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1224 (*Angie M.*).

welfare of children is astounding and irresponsible, especially given that it refused to even discuss the matter in the *Order*. The Court must vacate and remand and require the FCC to be far more upfront about how far this rule goes in terms of eliminating all state-law based remedies.

C. Review Point 3: Amended Rule Violates Petitioners' Individual Constitutionally-Protected Rights and Liberties

The Court must address the constitutional claims in two contexts. First, they are relevant to the standard of review. For this purpose the Court need only determine the claims are serious in order to apply strict scrutiny and the canon of constitutional avoidance, and to *not* engage in *Chevron* deference. *All. for Cmty. Media*, 10 F.3d at 825, n.17; *Chamber of Commerce*, 69 F.3d at 605. But second, and equally important, the Court must recognize the rights, but it does not have to decide exactly how they should be operationalized in the rule. The Commission must do that on remand. All that is necessary is a holding the amended rule burdens these rights and *Order* did not adequately address the issue.

Petitioners each have personal rights and liberties secured through the Constitution, including expressly-enumerated rights and others that have been recognized by the Supreme Court as fundamental, and thus protected as well. The First, Fourth, Fifth, Eighth, Ninth, and Tenth Amendments to the Constitution individually and collectively restrict federal government action that touches on the

liberties specifically or implicitly covered by these Amendments. The express rights and liberties involved here are "life," "property" and "liberty." The recognized penumbral right in issue is "privacy," which includes "bodily integrity" as a distinct concept beyond just deprivation of life or liberty as enunciated in the Fifth Amendment.

Substantive due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). It "specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (cleaned up). The liberty interests secured by the Due Process Clause include "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (quoting *Meyer v. Nebraska*, 262 U.S. 390 (1923)). These common-law privileges specifically embrace the right to bodily integrity and protect against state-sanctioned activity that would constitute an assault or battery under the common law, *Glucksberg*, 521 U.S. at 720, and the right not to be subjected to arbitrary and capricious government action that "shocks

the conscience and violates the decencies of civilized conduct." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998)(cleaned up).

These rights are personal, but often "phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago County Dep't of Soc. Servs*., 489 U.S. 189, 195 (1989); *Harris v. District of Columbia*, 932 F.2d 10, 13 (D.C. Cir. 1991). Thus, contrary to what Respondents may claim, Petitioners are not asserting "positive" rights to a "contaminant-free environment" nor are they asserting the government has a generalized Constitutional duty to protect their health or even property.

The rights asserted here are "negative" in nature. The Constitution does not allow the FCC to promulgate a legislative rule authorizing release of a harmful agent that the unrebutted evidence demonstrates will directly injure, and perhaps even kill the Petitioners, thus denying Petitioners' express and recognized negative rights.

"Individuals possess a constitutional right to be free from forcible intrusions on their bodies against their will, absent a compelling state interest." *Guertin v. Michigan*, 912 F.3d 907, 919 (6th Cir. 2019)(citations omitted). The amended rule directly authorizes the carriers to forcibly subject the Petitioners to suffer bodily

intrusions in the form of RF radiation.[83] The FCC has, in effect, handed out a license to kill. The carrier rights granted by the rule therefore directly result in deprivations of the Petitioners' rights. The federal government is allowing, indeed encouraging, carriers to maim, sicken, kill Petitioners, and ultimately drive them from their most cherished and constitutionally-protected space–the home.

As a result of the rule Petitioners will be made sick or sicker, thereby depriving them of their rights to both "liberty" and "life." The Petitioners will have to flee their homes, thus losing all use and enjoyment of their home, which is of course a type of property. The Petitioners are challenging a positive act, not a failure to act or protect from harm. The FCC actively and knowingly took action that transgresses the Petitioners' fundamental express and "penumbral" rights and liberties.

The record below resounds with individuals who claimed that the rule change would impede, impair and in some cases destroy their Constitutional liberty, property and privacy-related rights.[84] The FCC's indifference to the evidence of extreme suffering[85] should "shock the conscience." In a situation

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[83] 380 people objected to exposure based on general health concerns along with their other claims. (JA-ARR-T3-CM)

[84] (JA-ARR-T1-FN84)

[85] (JA-ARR-T1-FN85)

where the person was under government restraint it would constitute "cruel and unusual punishment." *Order* ¶34 refused to meaningfully respond to these individuals' assertions, but it did not in any manner attempt to refute them. It casually and cruelly rejected the claims with no analysis, and merely asserted the Commissions emissions rules apply and thus the OTARD rule revisions will not lead to "generally" "unsafe RF exposure levels." The Commission's action was nonetheless purposeful, knowing, calculated and deliberate.

Order ¶38 entirely misses the point. The commenters were not speaking in "general" terms. They were asserting *individual* concerns; they were claiming a distinct, personal injury, not abstract harms to the general population. The *Order* did not find that the rule revision will not individually harm *anyone* and it certainly did not find that those commenters in particular would not be harmed. Thus, the *Order* did not meaningfully address the individual rights issue.

D. Review Point 4: Amended Rule Violates Petitioners' Individual Procedural Due Process Rights

The rule takes away fundamental and substantive rights, or at least purports to authorize the deprivation. That cannot occur without adequate procedural due process: an individual hearing where each person can seek particularized relief in a judicial or quasi-judicial, adjudicatory context before the deprivation occurs.

Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Since fundamental rights are in issue, even higher procedural protections must be afforded.

Petitioners raise two distinct procedural due process arguments. First, since fundamental negative rights are at stake the FCC must allow for, or provide, for some kind of pre-deprivation hearing. Second, the amended rule eliminated procedural due process mechanisms associated with positive rights granted by federal and state disabilities laws and local zoning laws, which included access to state courts and local zoning boards that adjudicate permit requests. The rule removed all current state-level adjudicative *fora*[86] where Petitioners could exercise their First Amendment right to petition for "redress of grievances"[87] arising from OTARD-related "conduct touching interests 'deeply rooted in local feeling and responsibility,'" like zoning and related matters related to "protecting the health and well-being of its citizens." *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 741 (1983), *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959); *Farmer v. Carpenters*, 430 U.S. 290, 303 (1977).

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[86] Amended rule 1.4000(a)(4) prohibits any state proceedings, including administrative or judicial.

[87] The right of access to courts derives from the First Amendment "petition for redress" clause. *California Motor Transport Co . v. Trucking Unlimited,* 404 U.S. 508, 510 (1972).

Order ¶¶6, 12-13, 28 label valuable and salutary exercises in local civic engagement and recourse to local due process an "unreasonable barrier" that "restricts" deployment, but nowhere does the *Order* rationally discuss why it so devalues due process and civic involvement or make any real effort to explain why these fundamental American traditions must be swept away in the name of ubiquitous and redundant deployment. Even more fundamentally it never bothers to tell us why no "process" is or should be "due" to those who are harmed.[88]

The new rule effectively overrides disability rights procedures but it did not provide any substitute. The only remotely-available process is that spelled out in 1.4000(d)-(h), and it is clearly inappropriate for this context, and unreasonable on its face.[89] The process does not fit the situation and the FCC's expensive, labyrinthine and interminable waiver and declaratory ruling processes is unaffordable and practically inaccessible for unrepresented persons, especially those who are getting sicker each moment they are forcibly exposed.

The rule amendment violates Petitioners' procedural due process rights.

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[88] *But see* (JA-ARR-T1-FN88)

[89] (JA___)

CONCLUSION

The OTARD amendment encourages and facilitates internecion through the electromagnetic toxicants it forces on peoples' homes and bodies. To the Commission all those who suffer are mere "obstacles to deployment"[90] that must be cruelly stripped of all their rights, whatever the human costs. But the Constitution, Communications Act, and other laws prohibit this outcome. The Commission lacks authority to promulgate this rule change. The FCC must be required to recognize and fairly deal with those who, for whatever reason, cannot tolerate the RF radiation it has sanctioned and authorized.

The FCC must make adequate substantive and procedural accommodations for those who require exposure avoidance in their homes, and respect each citizen's fundamental rights. It must preserve procedural due process rights. The Commission should afford far more respect to interests "deeply rooted in local feeling and responsibility" like zoning and related matters related to "protecting the health and well-being of its citizens."

The Court must vacate the *Order* and associated rule amendments and remand to the FCC.

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[90] *Order* ¶27, n.10.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with requirements of Federal Rule of Appellate Procedure 32(g)(1) and this Court's Order dated May 27, 2021 because it contains 12,966 words according to the count of Microsoft Word.

/s/ *W. Scott McCollough*
W. Scott McCollough

CERTIFICATE OF SERVICE

I hereby certify that, on June 23, 2021, I filed the foregoing in the United States Court of Appeals for the District of Columbia Circuit via the CM/ECF system. I further certify that all parties are registered CM/ECF users, and that service will be accomplished via electronic filing.

/s/ *W. Scott McCollough*
W. Scott McCollough