ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1075

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHILDREN'S HEALTH DEFENSE, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** All parties appearing in this Court are listed in the Brief for Petitioners. *Amici* are Safe Technology Minnesota, Wired Broadband, Inc., and the 66 organizations listed on pages 4 and 5 of the Brief of Amici Curiae in Support of Petitioners.

(B) **Rulings Under Review.** The petition for review challenges the following order of the Federal Communications Commission (FCC or Commission): *Updating the Commission's Rule for Over-the-Air Reception Devices*, Report and Order, FCC 21-10, 36 FCC Rcd 537 (2021), *reprinted at* JA__–__.

(C) **Related Cases.** The order under review has not previously been before this Court or any other court. *Environmental Health Trust, et al. v. FCC*, *Environmental Health Trust, et al. v. FCC*, -- F.4th --, 2021 WL 3573769 *1 (D.C. Cir. Aug. 13, 2021) Case No. 20-1025 (D.C. Cir.) (decided Aug. 13, 2021), involves a challenge by Children's Health Defense and others who are not parties to this case of the FCC's decision in a separate proceeding not to propose changes to its limits on exposure to radiofrequency emissions. Respondents are aware of no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY

Act	Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.*
FCC or Commission	Federal Communications Commission
1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

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BRIEF FOR RESPONDENTS

INTRODUCTION

The FCC's over-the-air reception device rule prohibits state and local restrictions that unreasonably prevent or delay the placement of antennas "on property within the exclusive use or control of the antenna user." 47 C.F.R. § 1.4000(a)(1). Initially limited to reception of video programming signals, since 2004 the rule has also covered antennas that receive fixed wireless signals and relay the signals to antennas in different locations.

In the order on review, the FCC repealed the exclusion from the rule's coverage of antennas that "primarily" relay fixed wireless signals, while maintaining the rule's size and other requirements. *Updating the Commission's Rule for Over-the-Air Reception Devices*, 36 FCC Rcd 537 ¶ 1 (2021) (*Order*) (JA__). The FCC explained that the multi-purpose nature of modern antennas makes the exclusion obsolete and that its repeal will encourage the deployment of fixed wireless networks that provide high-speed Internet access and other services to consumers.

Children's Health Defense ("Children's Health") and four individual petitioners see this modest update as a sea change. Ignoring the rule's history and scope, they contend that the FCC exceeded its authority by sweeping away "all previously-applicable zoning requirements," Br. 18, and depriving persons who are allegedly sensitive to radiofrequency emissions from FCC-authorized equipment of forums to object to the placement of antennas on their neighbors' properties. Petitioners also argue that the FCC arbitrarily failed to address objections related to radiofrequency emissions, and that the revised rule violates their statutory, common law, and constitutional rights.

The petitioners have not demonstrated that they have standing to challenge the *Order*. Their affidavits do not show that the FCC's modest

amendment substantially increases the risk of alleged harm from exposure to radiofrequency emissions when compared to the preexisting rule, or that the injuries to Children's Health's organizational interests can be attributed to the rule change.

On the merits, the amended rule falls easily within the FCC's broad authority to regulate radio communications. The challenged action leaves unchanged the agency's radiofrequency exposure limits, including those applicable to antennas covered by the revised rule. The FCC was not required to reevaluate the limits in the context of this proceeding, or to rebut claims of harm from radiofrequency emissions, in order to reasonably conclude that the over-the-air reception device rule should be extended to antennas that primarily relay fixed wireless signals. Finally, petitioners have not shown that the rule implicates federal or state civil rights laws, or that they have a protected constitutional interest in the placement of antennas on their neighbors' properties.

JURISDICTIONAL STATEMENT

The FCC released the *Order* on January 7, 2021, and a summary was published in the Federal Register on February 25. 86 Fed. Reg. 11432. Petitioners timely filed a petition for review on February 26. The

Court has jurisdiction to review the *Order* under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). As set forth below, however, petitioners have not demonstrated that they have standing to challenge the *Order*. *See* § I *infra*.

STATEMENT OF THE ISSUES

1. Have petitioners demonstrated standing to challenge the *Order*?

If the Court reaches the merits, the following issues are presented:

2. Did the FCC act reasonably and within its statutory authority in updating the over-the-air reception device rule?

3. Does the revised rule violate petitioners' rights under federal, state, or common law?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Over-the-Air Reception Device Rule

a. "Through the Communications Act of 1934, as amended over the decades, 47 U.S.C. §§ 151 *et seq.*, Congress has given the Commission express and expansive authority to regulate … radio transmissions,

including broadcast television, radio, and cellular telephony, *id.* §§ 301 *et seq.* (Title III)." *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).

In 1996, Congress directed the FCC, "pursuant to Section 303 of the Communications Act of 1934" (the Act), to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of" various communications services. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 § 207 (1996 Act); 47 U.S.C. § 303. By removing local obstacles to the installation and use of communications devices, Congress sought "to promote competition and higher quality" in communications services and to encourage "'rapid deployment.'" *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (quoting 110 Stat. 56); *see also* 47 U.S.C. §§ 253 (removal of barriers to entry), 332(c)(7)(B) (limitations on state and local regulation of facilities for personal wireless services).

b. In response to Congress's direction, the FCC adopted the over-the-air device reception rule, which prohibits:

> Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, homeowners' association rule or similar restriction, on property

> within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance, or use of [covered devices].

47 C.F.R. § 1.4000(a)(1); *see Bldg. Owners and Managers Assn. Int'l v. FCC*, 254 F.3d 89, 91-92 (D.C. Cir. 2001) (affirming the rule's extension to leased property).

As adopted in 1996 and revised in 1998, the rule covered antennas used to receive: (1) direct broadcast satellite service, including direct-to-home satellite services, provided the antennas are one meter or less in diameter (or located in Alaska); (2) video programming services via multipoint distribution services,[1] provided the antennas are one meter or less in diameter or diagonal measurement; (3) television broadcast signals; and (4) masts that support covered antennas. 47 C.F.R. § 1.4000(a)(1)-(4) (1996), (1998).

A restriction "impairs" within the meaning of the rule if it unreasonably delays, prevents, or increases the cost of antenna installation, maintenance, or use. *Id.* § 1.4000(a)(3). The rule excepts

[1] Multipoint distribution services include "multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services." 47 C.F.R. § 1.4000(a)(1)(ii).

restrictions that serve "a clearly defined, legitimate safety objective" or are "necessary to preserve a prehistoric or historic district, site, building, structure or object" and are no more burdensome than needed. *Id.* § 1.4000(b). Pursuant to the safety exception, permits may be required for antennas and supporting masts that extend more than 12 feet above the roofline. *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 19276, 19299 ¶ 37 (1996) (*1996 Order*). The rule also provides for waiver at the request of local governments or associations "upon a showing … of local concerns of a highly specialized or unusual nature," and for a declaratory ruling by the FCC or a court of competent jurisdiction on whether a particular restriction is permissible or prohibited by the rule. 47 C.F.R. § 1.4000(d)-(h).

c. In 2000, the FCC extended the rule to antennas used "to receive or transmit fixed wireless signals" that meet the rule's size and other requirements. *Id.* § 1.4000(a)(1) (2000). It reasoned that "the same antennas may be used for video services, telecommunications, and internet access," and that limiting the rule to antennas used for video "impedes the development of advanced, competitive services," contrary to the 1996 Act's goals, and creates an incentive for carriers to offer different

services than the market might dictate. *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23027 ¶¶ 97-98 (2000) (*2000 Order*). The FCC limited the rule, however, "to antennas placed at a customer location for the purpose of providing fixed wireless service … to one or more customers at that location." *Id.* at 23028 ¶ 99.

d. In 2004, the FCC further extended the rule to "customer-end antennas used as hubs or relays" for fixed wireless signals. *Promotion of Competitive Networks in Local Telecommunications Markets*, 19 FCC Rcd 5637, 5643 ¶ 13 (2004) (*2004 Order*). In taking this step, the FCC was responding to a reconsideration petition from a service provider that deployed "networks using a 'point-to-point-to-point' architecture in which each customer device also serves as a relay device." *Id.* The FCC found that the equipment deployed in such networks and "mesh" networks "shares the same physical characteristics of other customer-end equipment, distinguished only by the additional functionality of routing service to additional users." *Id.* at 5643 ¶ 16. The FCC reasoned that the rule should not "disadvantage more efficient technologies." *Id.*

Nevertheless, the FCC limited the rule to antennas "installed in order to serve the customer on such premises." *Id.* at 5644 ¶ 17. "Thus,

the [rule] would apply to installations serving the premises customer that also relay signals to other customers, such as is typical in mesh networks, but would not apply to installations that are designed *primarily* for use as hubs for distribution of service." *Id.* n.42 (emphasis added).

2. The Radiofrequency Exposure Limits

a. When the FCC extended the over-the-air reception device rule to antennas used to receive or transmit fixed wireless signals, it emphasized that such antennas are subject to the agency's rules governing radiofrequency emissions. *2000 Order*, 15 FCC Rcd at 23035 ¶ 117. Radiofrequency emissions are generated by radio communications equipment, including antennas. At high levels, exposure to radiofrequency emissions can heat body tissue, producing "thermal" effects. FCC, RF Safety FAQs, https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety#Q5 (last visited Aug. 7, 2021). The FCC's rules specify limits to radiofrequency exposure from FCC-authorized equipment that are well below the levels that laboratory studies have shown can produce potentially harmful thermal effects. 47 C.F.R. § 1.1310; RF Safety FAQs #Q9. The limits reflect the FCC's judgment as

to "[the] proper balance between the need to protect the public and workers from exposure to excessive [radiofrequency emissions] and the need to allow communications services to readily address growing marketplace demands." *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 12 FCC Rcd 13494, 13497 ¶ 5 (1997); *Farina v. Nokia*, 625 F.3d 97, 126 (3d Cir. 2010) (exposure limits reflect the FCC's "expert balancing" of its statutory objectives); *see EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (affirming the agency's decision not to initiate an inquiry on the need to revise the limits); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000) (upholding the exposure limits against claims that they failed to reasonably protect public health).

Antennas covered by the over-the-air reception device rule cannot be sold in the United States until the FCC certifies that they comply with all applicable FCC rules and regulations, including the radiofrequency exposure limits. *See generally* 47 C.F.R. Pt. 2, Subpt. J (Equipment authorization procedures).[2] In addition, fixed wireless service providers

[2] Parties seeking FCC authorization for equipment that may exceed the exposure limits must prepare an environmental assessment for agency review in accordance with the National Environmental Policy Act. 47

must ensure that the equipment they install, maintain, or use to operate their networks, including antennas placed on their customers' premises, complies with the radiofrequency exposure limits. 47 C.F.R. § 1.1307(b).

b. In 2019, the FCC terminated an inquiry into whether to propose changes to its radiofrequency exposure limits. *Reassessment of FCC Radiofrequency Exposure Limits and Policies*, 34 FCC Rcd 11687, 11692-97 ¶¶ 10-16 (2019) (*2019 RF Order*). Based on the record in response to the inquiry, particularly the Food and Drug Administration (FDA)'s judgment that the available scientific evidence does not support the existence of negative health effects in humans from radiofrequency exposure at or below the current limits, the FCC determined that the current limits are safe and set at appropriate levels. *Id.*

Children's Health and others challenged the FCC's determination in that proceeding on a number of grounds. In a split decision, the Court held that the FCC "failed to provide a reasoned explanation for its determination that its guidelines adequately protect against the harmful effects of exposure to radiofrequency radiation unrelated to

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C.F.R. §§ 1.1306, 1.1307. Equipment that complies with the limits is categorically excluded from further environmental analysis with respect to human exposure to radiofrequency emissions. *Id.* § 1.1307.

cancer." *Environmental Health Trust, et al. v. FCC*, -- F.4th --, 2021 WL 3573769 *1 (D.C. Cir. Aug. 13, 2021). Without vacating the FCC's action terminating its inquiry, the majority directed the agency on remand "to provide a reasoned explanation for its determination that its guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer." *Id.* at *12.

Judge Henderson dissented. She argued that "the majority's limited remand runs afoul of our precedent on this precise subject matter." *Id.* at *15 (Henderson, J., dissenting) (discussing *EMR Network*, 391 F.3d 269). "In my view, the Commission, relying on the FDA, reasonably concluded no changes to the current [radiofrequency] exposure limits were warranted at the time." *Id.* at *16.

B. The Order on Review

In the order on review, the FCC extended the over-the-air reception device rule "to all hub and relay antennas that are used for the distribution of fixed wireless services to multiple customer locations, regardless of whether they are 'primarily' used for this purpose, as long as: (1) the antenna serves a customer on whose premises it is located, and (2) the service[s] provided over the antenna" "are not classified as

telecommunications services." *Order* ¶ 9 (JA__); 47 C.F.R. § 1.4000(a)(1), (a)(5). The FCC did not modify any other aspect of the rule. *Order* ¶¶ 9, 19 (JA__).

The FCC found that the "multi-purpose" nature of modern antennas renders obsolete the distinction the agency drew in 2004 to exclude certain antennas from the rule's coverage. *Id.* ¶ 11 (JA__); *see 2004 Order*, 19 FCC Rcd at 5644 ¶ 17 & n.42 (excluding antennas "designed primarily for use as hubs"). By removing local obstacles that discourage deployment of fixed wireless networks, the Commission explained that revised rule will allow service providers to deliver high-speed Internet access to customers more quickly, efficiently, and at reduced cost, particularly in rural and underserved communities. *Id.* ¶¶ 11, 15-17 (JA__, __-__).

In addition, the FCC responded to public comments claiming that the rule change would violate the rights of persons who wish to avoid exposure to radiofrequency emissions from relay antennas and asking that the FCC "establish a judicial remedy" and notification requirements regarding the placement of such antennas on behalf of such persons. *Order* ¶ 34 (JA__). The Commission emphasized that "[r]evising the

[over-the-air reception device] rule does not change the applicability of the [radiofrequency] exposure requirements, and fixed wireless providers must ensure that their equipment remains within the applicable exposure limits." *Id.* The agency concluded that general concerns regarding the radiofrequency exposure limits were "outside the scope of this proceeding." *Id.* nn.131, 133 (JA__).

On March 18, 2021, petitioners filed a motion for stay or, in the alternative, expedited review of the *Order*. The Court denied both requests on March 26. The revised rule went into effect on March 29.

STANDARD OF REVIEW

The "arbitrary-and-capricious standard" of the Administrative Procedure Act "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *see* 5 U.S.C. § 706(2)(A). "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *Prometheus*, 141 S. Ct. at 1158. A court's role is simply to "ensure[] that the agency has acted within a zone of reasonableness," including that it "has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

The "familiar framework" set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842–43 (1984), governs this Court's review of the Commission's interpretation of the Communications Act. *Cellco P'ship v. FCC*, 700 F.3d 534, 541 (D.C. Cir. 2012). Under that framework, unless Congress has spoken directly to the matter, courts are obliged to defer to an agency's reasonable interpretation of a statute it administers. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Petitioners contend that the Court instead should apply *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) deference, under which courts defer to an agency's reading only insofar as it has the power to persuade. Br. 37. In support, they cite *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 20 (D.C. Cir. 2017), which identified "some legal uncertainty in this circuit" following the Supreme Court's decision in *Wyeth v. Levine*, 555 U.S. 555 (2009), "about the appropriate level of deference a court owes to an agency's determination of its own preemption." But here, unlike *Wyeth*, *see* 555 U.S. at 576, Congress expressly authorized the FCC to preempt state law by mandating that the FCC promulgate the over-the-air reception device rule pursuant to its Title III authority. 110 Stat. at

114. *Chevron* accordingly remains applicable. In all events, the challenged action "survives under either standard of review." *Delaware*, 859 F.3d at 21.

SUMMARY OF THE ARGUMENT

To encourage the deployment of fixed wireless networks that provide high-speed Internet access and other services to consumers, the FCC reasonably amended its rule governing over-the-air reception devices to repeal the exclusion from the rule's coverage of antennas that "primarily" relay fixed wireless signals. This modest extension of the agency's longstanding rule was entirely reasonable, and petitioners' objections are unavailing.

I. At the outset, however, petitioners have not demonstrated standing. The individual petitioners' affidavits acknowledge neither the over-the-air reception device rule's history of covering some antennas that relay fixed wireless signals to different customer locations since 2004 nor the rule's (unchanged) size and other requirements. These defects prevent the individual petitioners from showing that the updated rule has caused them physical harm or that it substantially increases their risk of harm when compared to the preexisting rule. The individual petitioners also fail to show cognizable economic or procedural harm.

In support of organizational standing, Children's Health chiefly asserts injuries to advocacy activities that do not support standing. And because its allegations of injury to activities that are cognizable reflect the same disregard as the individual petitioners for the rule's history and limited scope, it cannot demonstrate injury that is "fairly traceable" to the *Order*.

II. On the merits, the *Order* lies squarely within the FCC's delegated authority and is a sensible update to the preexisting rule.

A. The FCC reasonably explained that updating the rule would align it with current technology and advance the 1996 Act's goals by encouraging the deployment of fixed wireless networks that provide high-speed Internet access and other useful communications services. The FCC relied on its express authority over antenna siting under Section 303(d) of the Act, as well as its broad authority to regulate radio spectrum and the services that use it. Congress recognized that authority in Section 207 of the 1996 Act when it directed the FCC to establish the rule pursuant to Section 303 of the Act.

B. The agency satisfied the requirements of the Administrative Procedure Act by explaining that the rule change does not alter its regulations limiting radiofrequency exposure. Antennas covered by the

updated rule remain subject to the radiofrequency exposure limits, and issues regarding the limits are outside the scope of the proceeding. The FCC was not required to reconsider the limits – or to rebut claims of harm from exposure within the limits – before updating the over-the-air reception device rule.

C. Petitioners seek to preserve local zoning laws to provide a forum for individualized objections to placement of antennas covered by the amended rule, but such a regime would be inconsistent with the FCC's key goals in updating the rule. The FCC has made clear that state and local requirements to protect the public from exposure to radiofrequency emissions fall within the over-the-air reception device rule's safety exception to the extent that they enforce the FCC's exposure limits, but otherwise are preempted. Allowing radiofrequency exposure-based objections to placement of antennas covered by the rule would permit local entities to second-guess the FCC's exposure limits, which reflect its judgment as to how to protect public health and allow the deployment of communications networks.

D. Petitioners' other objections misstate the rule's history and scope. The rule change did nothing to alter the regulatory treatment of fixed wireless service providers or antenna users. In addition to being

factually incorrect, petitioners' contention that the rule change blurred the lines between carriers and customers is legally irrelevant. There is no ambiguity that antennas covered by the updated rule are subject to the radiofrequency exposure limits for the general public.

III. Finally, petitioners have not shown that the rule change implicates civil rights, constitutional law, or tort laws. The rule, before and after the most recent rule change, preempts direct restrictions on antenna placement, *not* civil rights or tort laws. The terms of the Fair Housing Act and the Americans with Disabilities Act cannot be stretched to govern the siting of antennas on petitioners' neighbors' properties. And petitioners have no constitutionally protected interests in the placement of antennas on the property of others.

ARGUMENT

I. PETITIONERS HAVE NOT DEMONSTRATED STANDING.

"To establish standing, an organization, like an individual, must show an actual or imminent injury in fact that is fairly traceable to the challenged action and likely to be redressed by a favorable decision." *Am. Lung Assn. v. EPA*, 985 F.3d 914, 988 (D.C. Cir. 2021) (per curiam). Because neither Children's Health nor any of the individual petitioners are "directly subject to the challenged rule, their standing is substantially

more difficult to establish." *Id.* (internal quotations and citations omitted). None of the petitioners have demonstrated that they have standing to challenge the *Order* in this case.

A. The Individual Petitioners

The individual petitioners assert that they have standing based on alleged physical, economic, and procedural injuries. Br. 40-42. These claims fail.

1. Increased Risk of Harm

a. The individual petitioners state that they "already suffer from Radiation Sickness or other pre-existing conditions that are materially worsened by [radiofrequency] exposure." Br. 40.

The individual petitioners do not contend that their preexisting conditions are attributable to the rule change; instead, they allege that the rule change risks aggravating those conditions. Dr. Erica Elliot Aff. ¶ 10 (JA__) ("If one of my neighbors takes advantage of the option allowed by the amended rule, … the result would be devastating for me."); Ginger Kesler Aff. ¶ 6 (JA__) (same); Angela Tsiang Aff. ¶ 6 (JA__) (same); Jonathan Mirin ¶ 5 (JA__) (same). In increased-risk-of-harm cases, however, this Court requires a showing of "*both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that

increase taken into account." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (quoting *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295 (D.C. Cir. 2007)) (emphasis in original). As the Court explained, "'the constitutional requirement" that an injury be imminent "necessarily compels a very strict understanding of what increases in risk and overall risk levels can count as 'substantial.'" *Id.* at 915 (quoting *Pub. Citizen*, 489 F.3d at 1296).

To satisfy the first prong of the increased-risk-of-harm test, the individual petitioners must show that the revised rule "substantially increases the risk of" aggravating their conditions "when compared to the existing" rule. *Id.* at 915. They have not done so. Their submissions fail to acknowledge that the rule already covered some antennas that relay fixed wireless signals to different customer locations and that the updated rule left unchanged the preexisting size and other limitations. *See Order* ¶¶ 4, 9 (JA__, __). These failures prevent petitioners from showing "a *substantially* increased risk of harm" under the revised rule, let alone "a *substantial* probability of harm with that increase taken into account." *Food & Water Watch*, 808 F.3d at 914 (emphases in original); *see Elec. Privacy Info. Ctr. v. FAA*, 892 F.3d 1249, 1254-55 (D.C. Cir.

2018) (organization failed to show risk-based standing where it "offer[ed] only generic allegations that in light of the new regulations, more drones will operate in the areas where [its] members live and travel, leading ineluctably 'to invasions of privacy and the collection of sensitive personal information.'") (internal citations omitted).

For example, Petitioner Jonathan Mirin alleges that a service provider in his area recently withdrew a permit application "to install a fixed wireless radiation emitting tower close to our (new) home" due to local opposition but, as a result of the rule change, can now "bypass all local regulation by simply placing a base station and a powerful redistributing antenna at one of its current subscriber's premises." Mirin Aff. ¶¶ 47, 49 (JA__, __). But the rule does not preempt local permit requirements if the antenna or supporting mast extends more than 12 feet above the roofline. *1996 Order*, 11 FCC Rcd at 19299 ¶ 37; *see Order* ¶ 20 n.83 (JA__). Mirin does not allege the height of the tower for which the service provider sought a permit, whether the provider's network is configured to employ relay antennas, or indeed any other information that would support a finding that the provider could substitute an antenna covered by the revised rule for the proposed tower.

Moreover, even assuming the provider could do so, Mirin does not allege that it could not do so *before* the rule change. The rule has covered antennas that relay fixed wireless signals to customers in different locations since 2004, provided they were not "designed primarily" for that purpose. *2004 Order*, 19 FCC Rcd at 5644 ¶ 17 n.42. The FCC simply eliminated this condition in the *Order*, while maintaining the rule's size and other requirements. *Order* ¶¶ 9, 19 (JA__, __).

Similarly, Dr. Hoffman – a member of Children's Health Defense but not himself a petitioner – states that his family members "already have been injured by antennas" installed on the property next to his parents' house, and that the amended rule prohibits enforcement of local permit requirements against the property owner. Hoffman Aff. ¶¶ 11-12 (JA__-__). Again, however, the rule has never preempted local permit requirements if the antenna or supporting mast extends more than 12 feet above the roofline. The antennas in question are attached to a mast or pole that appears to extend more than 12 feet above the roofline of the neighbor's property, *see id.* ¶ 47 (JA__), in which case the rule (before and after the *Order*'s change) would not preempt local permit requirements.

In addition, the rule applies only to an antenna that "serves a customer on whose premises it is located." 47 C.F.R. § 1.4000(a)(5). Dr. Hoffman does not allege that each of the "four or five transmitting antennas" on the neighbor's property (which appears to be a single-family residence) meets this requirement. Hoffman Aff. ¶ 11 (JA__); *see id.* ¶ 47 (JA__). Accordingly, these allegations do not demonstrate that the injury is traceable to the amended rule. *See Elec. Privacy Info. Ctr.*, 892 F.3d at 1254 (no associational standing where organization failed to show that drones that allegedly harmed its members' privacy interests "are in fact authorized to fly under the small drone regulations challenged rather than" other agency regulations).

2. Economic Injury

The individual petitioners also assert that they "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." Br. 41. But as this Court has recognized, "plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending' because such injuries 'are not fairly traceable' to the conduct creating

that fear." *Food & Water Watch*, 808 F.3d at 919 (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 416 (2013)). Just as the plaintiffs in *Clapper* "could not repackage their 'first failed theory of standing' as a theory of costs," the individual petitioners here cannot "establish standing by incurring costs that 'are simply the product of their fear of'" radiofrequency exposure from antennas that may or may not be covered by the amended rule. *Id.* (quoting *Clapper*, 568 U.S. at 416-17).

3. Procedural Injury

Finally, the individual petitioners assert standing based on the loss of rights to "notice and some mechanism for case-by-case individual relief." Br. 42. Because they "'have failed to establish that they will likely suffer a substantive injury, their claimed procedural injury necessarily fails.'" *Food & Water Watch*, 808 F.3d at 921 (quoting *Sierra Club v. EPA,* 754 F.3d 995, 1002 (D.C. Cir. 2014)); *Summers v. Earth Island Inst.,* 555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.").[3]

[3] One petitioner alleges a substantive loss of rights: preemption of her homeowners' association rules that "limit[] occupancy and use of each private unit to residential purposes only." Dr. Erica Elliot Aff. ¶¶ 22-23

B. Organizational Standing

Children's Health asserts organizational standing based on harm to its mission, finances, and informational interests, Br. 42-43, but like the other petitioners, it has failed to identify a cognizable interest that is harmed by the relevant change in the rule.

Children's Health asserts that the rule change conflicts with its missions to help "the injured enforce their rights," "promote protective legislation," and "protect injured children" "by giving them a vehicle to speak up, educate, help create change and support others." Tachover Aff. ¶¶ 66-68, 73 (JA__-__, __). It further contends that the rule requires it "to invest additional resources toward advocacy, counseling, referrals, education, and other actions," *id.* ¶ 77 (JA__); *see id.* ¶¶ 76-83 (JA__-__); and impairs its "ability to learn about a planned system and help

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(JA__-__). Before the rule change, according to Dr. Elliot, these restrictions were prohibited only "insofar as the fixed wireless customer limit[ed] service to users on the same property." *Id.* ¶ 23 (JA__). "The amended rule means that we cannot enforce [the restrictions]." *Id.* That is incorrect. At least since 2004, the rule has not limited service to users on the same property. *See 2004 Order*, 19 FCC Rcd at 5644 ¶ 17 n.42 ("the [rule] would apply to installations serving the premises customer that also relay signals to other customers"). Thus, Dr. Elliot's alleged injury to her substantive rights is not "fairly traceable" to the change in the rule adopted by the *Order*. *Am. Lung Assn.*, 985 F.3d at 988.

communities and those affected use the democratic process to affect change." *Id.* ¶ 84 (JA__).

"It is well established that injury to an organization's advocacy activities does not establish standing." *Am. Lung Assn.*, 985 F.3d at 989. Nor is the "fact that an organization redirects some of its resources to litigation and legal counseling" sufficient "to impart standing upon the organization." *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)). Expenditures to educate the public regarding government action likewise do "not present an injury in fact." *Nat'l Taxpayers Union*, 68 F.3d at 1434. *See generally Food & Water Watch*, 808 F.3d at 919-21. To establish a cognizable injury, therefore, Children's Health "must allege that the defendant's conduct perceptibly impaired the organization's ability to provide services." *Id.* at 919.

It has failed to do so. Children's Health does contend that the rule change has forced it to divert resources to providing referrals to "doctors that can properly diagnose [children] so [their parents] can ask for accommodation" and "mitigation specialists" that shield homes from radiofrequency emissions, as well as providing shielding advice for those

who cannot afford an expert. Tachover Aff. ¶¶ 61, 77, 85 (__, __, __). But Children's Health fails to explain how the challenged rule change affects its referral activities. Instead, its supporting affidavit reflects the same misunderstanding of the rule's history and limited scope as those of the other petitioners. *See, e.g.,* Tachover Aff. ¶¶ 8 ("Until the rule was amended, [over-the-air reception device] systems were limited to fixed wireless use within the customer's property only"), 67 (JA__) ("base stations and antennas can now be installed without regard to state and local zoning and land use regulations").

Children's Health cannot show that its alleged injuries are fairly traceable to the amended rule when "even before [it] was enacted, they had a similar incentive to engage in many of the countermeasures that they are now taking." *Clapper*, 568 U.S. at 417. Just as "'fears of hypothetical future harm'" "'are not fairly traceable' to the conduct creating that fear," *Food & Water Watch*, 808 F.3d at 919 (quoting *Clapper*, 568 U.S. at 416), Children's Health cannot manufacture standing based on a misunderstanding of the FCC's amended rule.[4]

[4] Children's Health also asserts associational standing on behalf of its members. Br. 43-44. But as with the individual petitioners, Children's

II. THE FCC ACTED REASONABLY AND WITHIN ITS AUTHORITY.

Even if petitioners could demonstrate standing to challenge the *Order*, their claims fail on the merits. Petitioners contend that the FCC lacks authority to prohibit state and local restrictions on the placement of antennas that expose its members to radiofrequency emissions. Br. 46-63. But as we show below, the FCC had ample authority to adopt the reasonable rule change in the *Order*.

A. The Rule Change Is a Reasonable Exercise of the FCC's Broad Authority to Regulate Antenna Siting.

The over-the-air reception device rule prohibits restrictions that unreasonably prevent or delay the placement of antennas "on property within the exclusive use or control of the antenna user." 47 C.F.R. § 1.4000(a)(1). Since 2004, the rule has covered antennas that relay fixed wireless signals to customers at different locations. *2004 Order*, 19 FCC Rcd at 5644 ¶ 17 n.42. In the challenged *Order*, the FCC extended the rule to such antennas regardless of their primary function, without modifying the rule's size and other requirements. *Order* ¶ 9 (JA__). The

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Health's members have not shown a cognizable injury attributable to the rule change.

FCC's reading of the Act to authorize this rule change is entitled to deference. *Chevron*, 467 U.S. at 843.

The FCC explained that the *Order*'s "limited expansion" would align the rule with current technology and serve the 1996 Act's goals by encouraging competition and "the rapid deployment of fixed wireless networks." *Order* ¶¶ 10-11 (JA__). The distinction the agency drew in 2004 to exclude some relay antennas from the rule's coverage based on their "primary" function is now obsolete: "modern fixed wireless antennas are multi-purpose, and can function as receivers, repeaters, and transmitters." *Id.* ¶ 11 (JA__). Meanwhile, the need for the rule's protection grows as fixed wireless networks rely increasingly on smaller antennas that "are located much closer to each other." *Id.* ¶ 10 (JA__). By removing the requirement that a relay antenna not be used primarily for that purpose, the Commission explained, the rule change will provide "greater certainty and predictability," and allow providers to deliver high-speed Internet access service, particularly in rural and underserved communities, "more quickly, efficiently, and at reduced cost." *Id.* ¶¶ 11-17 (JA__-__).

The rule change also levels the competitive playing field for broadband-only fixed wireless service providers. *Id.* ¶ 12 (JA__). Such providers "lack the regulatory protections" available "to their competitors under Sections 253 and 332" of the Act, *id.* ¶ 27 n.110 (JA__); *id.* ¶ 31 (JA__), which limit state and local regulation of "telecommunications services" facilities and providers, including antennas used to provide such services. *Id.* ¶ 30 (JA__) (quoting 47 U.S.C. § 332(c)(7)(C)).[6] Regardless of the services provided, however, "the same types of restrictions on the same types of antennas unreasonably restrict deployment." *2000 Order*, 15 FCC Rcd at 23027 ¶ 97; *see Order* ¶ 12 (JA__) (rule change promotes "competition among broadband and video providers" and provides consumers "more choices").

The FCC relied for authority on Section 303 of the Act. *Id.* ¶¶ 24-27 (JA__-__); 47 U.S.C. § 303. Section 303 provides that the FCC, "as public convenience, interest, or necessity requires, shall," *inter alia*, "[d]etermine the location of classes of [radio] stations or individual

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[6] Under current Commission rules, broadband-only providers are not "telecommunications service" providers. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 43 (D.C. Cir. 2019) (affirming reclassification of broadband Internet access service as an information service rather than a "telecommunications service").

stations." *Id.* § 303(d). As the agency explained in rejecting a prior challenge to its authority to extend the over-the-air reception device rule to antennas that transmit fixed wireless signals, "Section 303(d) provides the Commission with express statutory authority to regulate antenna siting." *Continental Airlines*, 21 FCC Rcd 13201, 13217 ¶ 38 (2006).[7]

More generally, Title III of the Act grants the Commission broad authority to regulate radio spectrum and the services that use it, *Order* ¶ 26 (JA__), to "encourage the larger and more effective use of spectrum," *id.* (citing 47 U.S.C. § 303(g)), and to "'[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out'" the Act's provisions. *Id.* (quoting 47 U.S.C. § 303(r)). Relay antennas are essential elements of fixed wireless networks that use radio spectrum to receive and transmit advanced

[7] The FCC reasoned that the "Act defines the terms 'radio station' or 'station' as 'a station equipped to engage in radio communication or radio transmission of energy.'" *Continental Airlines*, 21 FCC Rcd at 13217 ¶ 38 (quoting 47 U.S.C. § 153(35)). "'Radio communication' is in turn defined as 'the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.'" *Id.* (quoting 47 U.S.C. § 153(33)). "These broad definitions of radio stations and radio communications encompass the antennas subject to the" over-the-air reception device rule. *Id.*

communications services. *Id.*; *see id.* ¶¶ 10-11 (JA__-__). The rule change was needed, the FCC found, to remove local obstacles that prevent fixed wireless service providers from deploying equipment critical to expanding their use of radio in the public interest. *Id.* ¶ 26 (JA__).[8]

The rule change also furthers the 1996 Act's goal "of increasing consumer access to video programming services." *Id.* ¶ 18 (JA__). Congress directed the FCC in Section 207 of the 1996 Act to "'promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception.'" *Id.* ¶ 25 (JA__) (quoting 110 Stat. at 114). As the Commission explained, "[c]onsumers increasingly stream video services over the Internet." *Id.* ¶ 18 (JA__). By fostering deployment of fixed wireless networks that provide high-speed Internet access, the rule change "will benefit consumers with better online video distribution." *Id.*

In sum, Title III "endow[s] the Commission with 'expansive powers' and a 'comprehensive mandate to encourage the larger and more effective

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[8] The FCC also noted that the rule change would further the FCC's mission to promote "'Nation-wide ... wire and radio communication service ... at reasonable charges'" and "deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." *Order* ¶ 26 n.107 (JA__) (quoting 47 U.S.C. §§ 151, 1302).

use of radio in the public interest." *Cellco P'ship*, 700 F.3d at 542 (quoting *NBC v. United States,* 319 U.S. 190, 216, 219 (1943) (internal quotations and citations omitted)). Congress recognized that authority in Section 207 of the 1996 Act when it directed the FCC to establish the over-the-air reception device rule "'pursuant to Section 303.'" *Order* ¶ 25 (JA__) (quoting 110 Stat. at 114). As the Commission concluded, the record before it showed that the rule change "will serve the public interest and promote larger and more efficient use of spectrum by increasing siting opportunities for [fixed wireless service] providers, decreasing costs associated with deploying needed infrastructure, and encouraging [such] providers to deploy broadband Internet access services in additional areas across the country." *Id.* ¶ 26 (JA __).

B. The FCC Reasonably Considered and Rejected Radiofrequency Exposure-Related Concerns.

Petitioners argue that the FCC gave short shrift to objections related to radiofrequency exposure and arbitrarily ignored evidence of harm to persons who are sensitive to radiofrequency emissions. *E.g.*, Br. 19, 33-34, 61-64. These arguments lack merit.

The FCC reasonably explained that the rule change "does not change the applicability of the" regulations governing radiofrequency

exposure. *Order* ¶ 34 (JA__). Fixed wireless service providers remain subject to the FCC's radiofrequency exposure limits, and issues regarding the exposure limits themselves are "outside the scope of this proceeding." *Id.* nn.131, 133 (JA__). Because the FCC "considered and rejected" objections related to radiofrequency exposure, it did "all that the [Administrative Procedure Act] requires." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (internal quotations and citations omitted).[9]

Petitioners complain that the FCC ignored its members' "unrebutted" claims of harm from radiofrequency exposure. Br. 20, 31; *id.* at 22, 34, 62, 75, 77; Amici Br. 10. But the FCC explained that the rule change had no impact on the applicability of the exposure limits. *Order* ¶ 34 & nn.131, 133 (JA__) (stating that the exposure limits themselves were "outside the scope of this proceeding."). Elsewhere, the

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[9] Amici's comparison of this case to *United Keetowah Band of Cherokee Indians in Oklahoma*, 933 F.3d 728, 744 (D.C. Cir. 2019), is unconvincing. Amici Br. 9-10. *United Keetowah* held that the FCC, in eliminating historic-preservation and environmental review for "small cell" wireless facility deployments, did not adequately address comments regarding the importance of such review, particularly "given that only the most vulnerable cases were still subject to individualized … review." 944 F.3d at 744. Here, in contrast, the rule change had no bearing on the applicability of the radiofrequency exposure limits. *Order* ¶ 34 (JA__).

Commission has determined that the limits "represent the best scientific thought" on the restrictions necessary to protect all members of the public. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd 15123, 15184 ¶ 168 (1996); *see Cellular Phone Taskforce*, 205 F.3d at 93 (rejecting the argument that the FCC failed to "consider individual vulnerabilities among members of the public"). The FCC was not required to reconsider that judgment – or rebut claims of harm from exposure within the limits – in updating the over-the-air reception device rule. *Grunewald v. Jarvis*, 776 F.3d 893, 905 (D.C. Cir. 2015) ("'[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities.'") (quoting *Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.,* 498 U.S. 211, 230 (1991)); *see FCC v. Schreiber*, 381 U.S. 279, 290 (1965) (affirming Congress's "delegation of broad procedural authority" to the FCC in 47 U.S.C. § 154(j)).

To be sure, the Court has now remanded the FCC's reaffirmation of the radiofrequency exposure limits for the agency to furnish a reasoned explanation for its judgment that the limits adequately protect against harmful effects unrelated to cancer. *Environmental Health Trust*, 2021

WL 3573769 at *12. But just as the exposure limits themselves, the remand is "outside the scope of this proceeding." *Order* ¶ 34 nn.131, 133 (JA__). "[A]n agency need not solve every problem before it in the same proceeding." *Mobil Oil Expl.,* 498 U.S. at 230-31 (agency was free to treat a particular issue in a "different proceeding" that "would generate more appropriate information and where the agency was addressing the question"); *City of Portland v. FCC*, 969 F.3d 1020, 1046-47 (9th Cir. 2020) (declining to second-guess the FCC's failure to reevaluate the exposure limits before adopting measures to promote wireless deployment). Particularly where, as here, the agency is addressing the exposure limits in a different proceeding, its decision not to do so here falls within its broad discretion. *Mobil Oil Expl.*, 498 U.S. at 230.

C. The FCC Was Not Required to Provide a Mechanism for Public Notice of Antenna Deployments.

Children's Health argues that zoning laws provide an important forum for its members "to receive notice of a project" and to "lodge an objection to any harm or threat posed by the project." Br. 28-29. But preserving the application of local zoning laws to provide such a forum would be inconsistent with the rule. *See, e.g., Satellite Broadcasting & Commc'ns Assn.*, 33 FCC Rcd 3797, 3816-17 ¶¶ 43-46 (2018) (rule

prohibited local ordinance requiring notification to city regarding existing antennas and removal of antennas no longer in service). As the FCC found, "local zoning laws and reviews have discouraged the deployment of modern hub and relay antennas," *Order* ¶ 13 (JA __), thereby increasing costs, *id.* ¶ 15 (JA __), and leading to a lack of "certainty and predictability," *id.* ¶ 16 (JA __). By extending the rule "to all fixed wireless antennas, no matter whether they operate primarily as receivers, hubs, or relays," *id.* ¶ 11 (JA __), the Commission "provide[d] fixed wireless broadband providers protection from unreasonable delays in the installation of fixed wireless hub and relay antennas or the unreasonable prevention of such installations or deployments," *id.* ¶ 14 (JA __).

Although Children's Health disavows any challenge to the FCC's radiofrequency exposure limits in this case, it further contends that "there are some individuals who cannot tolerate exposure allowed by the general population limits." Br. 63. To the extent that Children's Health seeks to preserve the application of local zoning laws to provide a venue for individualized objections to deployment based on radiofrequency exposure, however, they are subject to federal preemption. The FCC has

made clear that state and local requirements to protect the public from exposure to radiofrequency emissions fall within the over-the-air reception device rule's safety exception to the extent that they enforce the FCC's exposure limits, but otherwise are preempted. *2004 Order*, 19 FCC Rcd at 5642 ¶ 11. In an analogous context, "Congress has already shown the intention to override nonuniform state-law [radiofrequency exposure] standards that conflict with federal regulation of the wireless infrastructure." *Nokia*, 625 F.3d at 132 (discussing 47 U.S.C. § 332(c)(7)(B)(iv)). Relay antennas are integral to fixed wireless networks, and restrictions on their placement "can have similar effects on the effectiveness of" fixed wireless service "as regulations of the infrastructure." *Id.*; *see Order* ¶¶ 10-11 (JA__-__). The "inexorable effect of allowing" objections to antenna siting because some persons allegedly are sensitive to radiofrequency exposure that complies with the FCC's limits would be to permit local entities "to second-guess the FCC's balance of its competing objectives." *Nokia*, 625 F.3d at 134.

D. Petitioners' Other Objections Are Based on a Misunderstanding of the Rule's History and Scope.

Petitioners also mount objections to the updated rule that are grounded on a misunderstanding of its history and scope.

1. Petitioners contend that the FCC impermissibly extended the rule from "customer premises equipment" to "carrier base stations" that serve customers at different locations, and thereby turned antenna users (*i.e.*, customers) "into carriers … without any regulatory oversight." Br. 26; *id.* at 46-48, 52-57. These contentions are both factually incorrect and legally irrelevant.

First, the updated rule does not cover "carrier[] base stations." *Id.* at 26. The rule's scope is defined in terms of antennas that meet the rule's size and other requirements and transmit signals "to and/or from a fixed customer location." 47 C.F.R. § 1.4000(a)(2). The rule continues to require that "the antenna serves a customer on whose premises it is located." *Id.* § 1.4000(a)(5); *Order* ¶ 9 (JA__). Antennas exceeding one meter in size, and antennas and masts that extend more than 12 feet above the roofline, remain subject to local permit and other requirements. *Id.* ¶ 19 (JA__); *see 1996 Order*, 11 FCC Rcd at 19299 ¶ 37.

Second, the rule change did nothing to alter the regulatory treatment of fixed wireless service providers or antenna users. The FCC made clear that service providers remain responsible for ensuring that covered antennas comply with all applicable FCC regulations, and that

its "modest adjustment" to extend the rule to relay antennas regardless of their primary function did "not modify any other aspects of the" rule. *Order* ¶¶ 1, 9-10 (JA__, __-__); *id.* ¶¶ 19, 34 (JA__, __). "If something goes wrong" with an antenna covered by the amended rule, therefore, it will not "be impossible to identify who is responsible." Br. 47; *id.* at 59.

Petitioners' contention that the rule change blurred the lines between carriers and customers is also legally irrelevant. Although petitioners maintain that there are "important differences" between carrier and customer equipment under the Act, *id.* at 46, they identify none that bear on the FCC's authority to update the rule in this case. As a practical matter, the ability of modern wireless equipment to perform multiple functions makes distinctions between "carrier" and "customer" equipment based on "primary" function artificial. *Order* ¶ 11 (JA__). And as a legal matter, the Act does not limit the FCC's authority over antenna siting based on who installs, maintains, or uses the antenna. 47 U.S.C. § 303(d).

To be sure, the FCC generally limited the rule to "customer premises equipment" prior to the *Order*. Br. 52-53. The FCC did so largely to make clear that covered antennas fell outside the scope of

Section 332(c)(7), which "was intended by Congress to protect the authority over zoning traditionally vested in local governments." *2004 Order*, 19 FCC Rcd at 5643 ¶ 14 ; *see 2000 Order*, 15 FCC Rcd at 23032-34 ¶¶ 109-15 (interpreting Section 332(c)(7) as inapplicable to "customer-end antennas.").[10]

The amended rule avoids overlap with Section 332(c)(7) without relying on an artificial distinction between "carrier" and "customer" equipment. Instead, covered antennas must not be "used to provide any telecommunications services or services that are provided on a commingled basis with telecommunications services." 47 C.F.R. § 1.4000(a)(5); *Order* ¶¶ 29-31 (JA__-__). Antennas that meet this requirement fall outside the scope of Section 332(c)(7) by definition. *Id.* ¶ 29 (JA__) ("Section 332(c)(7) does not … apply to antennas used in connection with … broadband-only services"); *see* n.6 *supra*.

2. Petitioners contend that the *Order* obscures which power and radiofrequency exposure limits apply to relay antennas covered by the

[10] Section 332(c)(7) preserves local zoning authority (except as provided therein) over facilities for "'personal wireless service,'" which is defined, in relevant part, to mean "'telecommunications services.'" *Order* ¶ 30 (JA__) (quoting 47 U.S.C. § 332(c)(7)(C)).

updated rule. Br. 57-58. Not so. The exposure limits are independent of FCC limits on the operating power of equipment, which may vary by service.[11] Antennas covered by the updated rule are subject to the exposure limits for the general public, 47 C.F.R. § 1.1310(c), (e)(3), since the general public is not expected to be aware of or exercise control over exposure to radiofrequency emissions. *See id.; 2019 RF Order*, 34 FCC Rcd at 11728 ¶ 87 ("the occupational exposure limits apply only if a person has been trained and has sufficient information to be fully aware of the nearby [radiofrequency] sources and the necessity and means of avoiding overexposure."). Service providers remain responsible for compliance with those limits. *Order* ¶ 34 (JA__).

III. THE RULE CHANGE DOES NOT VIOLATE PETITIONERS' STATUTORY, COMMON LAW, OR CONSTITUTIONAL RIGHTS.

Petitioners argue that the rule change authorizes activity that violates its members' rights under federal and state civil rights laws, state tort laws, and the United States Constitution. Br. 59-79. But

[11] Higher-power equipment does not necessarily lead to greater radiofrequency exposure. In addition to power, distance from the equipment and the frequency on which the equipment operates are "major contributing variables." *2019 RF Order*, 34 FCC Rcd at 11710 ¶ 43.

petitioners have not shown that the rule change implicates civil rights laws, or that its members have a protected constitutional interest in the siting of antennas on their neighbors' properties. And the rule change does not affect any state tort claims based on radiofrequency exposure within the FCC's limits, which in any event would be preempted.

A. The Rule Does Not Implicate Civil Rights Laws.

1. Petitioners argue that the revised rule preempts "any opportunity for people to initiate requests and proceedings pertaining to disabled rights accommodation requests under the federal Fair Housing Act (FHA), Americans with Disabilit[ies] Act (ADA) or state law equivalents." Br. 29; *id.* at 59-60, 64, 79. That is not so. The rule, before and after the rule change, simply preempts restrictions on antenna installation and use – it has no effect on the application of the Fair Housing Act, the Americans with Disabilities Act, or their state equivalents.

The rule prohibits "state," "local," and "private" restrictions that unreasonably prevent, delay, or increase the cost of antenna placement, such as "zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, homeowners' association rule or similar restriction." 47 C.F.R. §§ 1.4000(a)(1), (3); *see 1996 Order*,

11 FCC Rcd at 19284-93 ¶¶ 13-27 (discussing the types of restrictions the rule is intended to prohibit). By its terms, the rule restricts no federal law. Nor has the FCC ever found the rule to preempt civil rights or other laws (state or federal) that do not directly "restrict the placement of antennas or any other aspect of antenna installation, use, or maintenance." *Letter from Maria Mullarkey, Asst. Div. Chief, Policy Div. to Bryan Tramont, Esq.*, 32 FCC Rcd 3794, 3795 (Media Bur. 2017) (dismissing a petition for declaratory ruling that the rule prohibited enforcement of a local law aimed at inside wiring of multiple occupancy buildings). In short, the FCC has never interpreted the rule to preclude a civil rights action that is otherwise viable under the Fair Housing Act, the Americans with Disabilities Act, or state law equivalents.

The FCC expressed no different intention in the *Order*. Instead, it emphasized that its "modest adjustment" of the rule to include relay antennas, regardless of primary function, did "not modify any other aspects of the" rule. *Order* ¶¶ 1, 9-10 (JA__). Notably, petitioners do not identify any proceeding under the Fair Housing Act, the Americans with Disabilities Act, or their state-law equivalents that the amended rule

allegedly preempts.[12] Because the rule change does not implicate civil rights laws, there was no call for the FCC "to reconcile its action" with such laws, Br. 60; *id.* at 64-66, or to solicit the views of federal and state agencies that administer them.

2. Petitioners also contend that the amended rule authorizes violations of federal and state civil rights laws. That contention lacks merit. Br. 66-71.

a. Petitioners argue that the placement of an antenna is a "residential real estate-related transaction" under the Fair Housing Act because "[i]t is a financial arrangement with the location owner, involves construction and is a type of 'improvement' that … has a 'discriminatory

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[12] Children's Health states that some commenters "specifically requested accommodation." Br. 32 & n.39; *id.* at 61 & n.70, 68 n.78; *e.g.*, Comments of McKenzie Jennings in WT Docket No. 19-71 (Oct. 2, 2019) (JA__) ("This is an official request under the [Americans with Disabilities Act] that you discontinue the legislative process pertaining to the [over-the-air reception device] rule."). The FCC is not a "public entity" within the meaning of the [Americans with Disabilities Act] provision that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132; *see id.* § 12131(1) (defining "public entity" as, *inter alia*, "any State or local government"); *Zingher v. Yacavone*, 30 F.Supp.2d 446 (D. Vt. 1997) (federal agency and its Secretary were not "public entities" under the Americans with Disabilities Act), *aff'd*, 165 F.3d 1015 (2d Cir. 1999).

effect' as defined by 24 C.F.R. § 100.500." Br. 67. But the Fair Housing Act expressly limits the term "residential real estate-related transaction" to transactions involving "loans" or "other financial assistance" "for purchasing, constructing, improving, repairing, or maintaining a dwelling" or "secured by residential real estate" and the "selling, brokering, or appraising of residential real property." 42 U.S.C. § 3605(b)(1)(A). "It would strain language past the breaking point to treat" the placement of an antenna on the user's property "as 'financial assistance'" to a neighbor who objects to the antenna – "let alone as assistance 'for purchasing … a dwelling.'" *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992) (insurance does not constitute "financial assistance" within the meaning of the Fair Housing Act) (quoting 42 U.S.C. § 3605(b)(1)(A)).

Alternatively, petitioners argue that "the [Fair Housing Act] 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." Br. 67 (citing 42 U.S.C.

§ 3617).[13] But petitioners provide no support for the proposition that the Fair Housing Act's prohibition on retaliation for the exercise of fair housing rights can be stretched to reach antenna siting. "Countless private and official decisions may affect housing in some remote and indirect manner, but the Fair Housing Act requires a closer causal link between housing and the disputed action." *Jersey Heights Neighborhood Ass'n. v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (plaintiffs failed to state Fair Housing Act claim based on siting of highway adjacent to their neighborhood).

b. Petitioners next argue that the revised rule authorizes violations of the Americans with Disabilities Act's prohibition on discrimination by "any place of public accommodation," arguing that wireless service falls within three of the 12 categories of places that qualify as "public accommodations." 42 U.S.C. §§ 12181(7), 12182(a). But the gravamen of their argument is that antennas used to relay fixed wireless services "will

[13] Section 3617 of the Fair Housing Act provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617.

flood [their] homes with [] radiation against their will." Br. 69-70. Antennas fit into none of the 12 statutory categories. 42 U.S.C. § 12181(7); *see Dominguez v. Banana Republic, LLC*, -- F.Supp.3d --, 2020 WL 1950496 *8 (S.D.N.Y. 2020) (retail store gift cards are not "places of public accommodation" under the ADA). Moreover, antennas "on property within the exclusive use or control of the antenna user," 47 C.F.R. § 1.4000(a)(1), may not be accessible to the public as required for "public accommodations." 42 U.S.C. § 12181(7); *see Sanzaro v. Ardiente Homeowners Ass'n., LLC*, 364 F.Supp.3d 1158, 1174 (D. Nev. 2019) (clubhouse to which "the general public did not have unrestricted, general, or even limited access" did not qualify as a public accommodation).

Nor can petitioners be reasonably characterized as "clients or customers" within the meaning of the Americans with Disabilities Act. 42 U.S.C. § 12182(b)(1)(A)(iv) ("individual or class of individuals" for purposes of the prohibition on discriminatory activities "refers to the clients or customers of the covered public accommodation"). Petitioners do not maintain that they are being discriminated against in "enjoyment

of … any place of public accommodation." *Id.* § 12182(a). Rather, they seek to prevent the placement of antennas on the property of neighbors.

c. Finally, petitioners identify no basis to conclude that the revised rule authorizes violation of state civil rights laws analogous to the Fair Housing Act and the Americans with Disabilities Act. *See* Br. 70-71. While "'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," *id.* (quoting *Ohio Civil Rights Comm'n v. Myers*, 2014 WL 201674, ¶ 37 (Ohio Jan. 17, 2014)), petitioners identify no decision that even suggests that a property owner's installation and use of an antenna in compliance with federal regulations can give rise to a cause of action for interfering with state fair housing rights.[14]

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[14] *Myers* held that allegations of a neighbor's harassing and intimidating conduct were sufficient to state a claim for interference with fair housing rights under Ohio Revised Code § 4112.02(H)(12), which (like the Fair Housing Act's retaliation prohibition, *see* n.13 *supra*) makes it unlawful for "any person" to "[c]oerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of … any right granted or protected by" the state fair housing law. 2014 WL 201674 ¶ 31. The harassing and intimidating conduct in that case does not bear comparison with the placement of antennas covered by the amended rule. *See id.* ¶ 39 ("The Commission alleged that [the neighbor] mocked Podiak's use of sign language, intentionally made noises that caused [her animal assistant] dogs to alert Podiak, and made false accusations to [the property manager] and the police regarding Podiak and her dogs.").

B. The *Order* Does Not Address Tort Claims Based on Radiofrequency Exposure, Which Would Be Preempted in All Events.

Petitioners contend that the amended rule authorizes radiofrequency exposure that may constitute a "battery," "child endangerment," and nuisance under state law. Br. 72-73. But, as we have explained, the updated rule left the Commission's existing radiofrequency exposure limits unchanged, and nothing in the rule suggests that the operation of state law would constitute a restriction on antenna placement covered by the rule. *See* § III.A.1 *supra*.

In all events, courts consistently have held that state law tort and other claims based on radiofrequency exposure within the FCC's limits are preempted by the FCC's radiofrequency exposure limits. *See Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 319-20 (6th Cir. 2017) (negligence and nuisance); *Nokia*, 625 F.3d at 125-26 (breach of warranty and unfair trade practices); *Cohen v. Apple, Inc.*, 497 F.Supp.3d 769, 780-87 (N.D. Cal. 2020) (state law disclosure and negligence); *Fontana v. Apple, Inc.*, 321 F.Supp.3d 850, 851 (M.D. Tenn. 2018) (strict liability and breach of warranty); *Stanley v. Amilithone Realty, Inc.*, 94 A.D.3d 140, 145-46 (N.Y. 2012) (nuisance); *Murray v. Motorola, Inc.*, 982 A.2d 764,

775-81 (D.C. 2009) (various tort claims); *Goforth v. Smith*, 991 S.W.2d 579, 583-84 (Ark. 1999) (nuisance, fraud, and violation of restrictive covenant); *but see Pinney v. Nokia, Inc.*, 402 F.3d 430, 458-59 (4th Cir. 2005) (state law claims alleging that cell phones were unsafe without headsets were not preempted).[15]

C. Petitioners Do Not Have a Protected Constitutional Interest in Antenna Placement.

Petitioners argue that the revised rule violates their substantive and procedural due process rights under the United States Constitution. Br. 73-79. This argument too lacks merit.

1. Substantive Due Process

a. According to petitioners, the rule change burdens their "'constitutional right to be free from forcible intrusions on their bodies against their will'" from radiofrequency exposure. Br. 75 (quoting *Guertin v. Michigan*, 912 F.3d 907, 919 (6th Cir. 2019)) (internal quotations and

[15] *Pinney* is the "outlier." *Cohen*, 497 F.Supp.3d at 787. "By focusing only on Section 332 and failing to consider the independent preemptive effect of the Commission's [radiofrequency exposure] rules, the court ignored the principle that, like statutes, the 'statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof.'" *Id.* (quoting *City of New York v. FCC*, 486 U.S. 57, 64 (1988)).

citations omitted). But courts consistently have refused to extend the "right to bodily integrity" to claims based on radiofrequency exposure. *Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 2020 WL 2198120, *8 (D.N.M. May 6, 2020) (collecting cases), *aff'd on other grounds*, 993 F.3d 802 (10th Cir. 2021); *Barnett v. Carberry*, No. 3:08CV714(AVC), 2010 WL 11591776, at *8 (D. Conn. Mar. 16, 2010) (similar), *aff'd*, 420 F.App'x 67 (2d Cir. 2011).[16]

Petitioners analogize their situation to *Guertin*, in which the Sixth Circuit held that government officials' role in the Flint water crisis violated Flint residents' right to bodily integrity. 912 F.3d at 921; Br. 75-76. The analogy is misplaced. In *Guertin*, officials deliberately introduced "life-threatening substances" into the water supply and concealed their actions from the public. *Guertin*, 912 F.3d at 921 (internal quotations omitted). The Sixth Circuit emphasized that "the Constitution does not guarantee a right to live in a contaminant-free, healthy environment," *Guertin*, 912 F.3d at 921-22, and distinguished cases like *Coshow v. City of Escondido*, 132 Cal. App. 4th 687, 709 (2005), which rejected a

[16] None of the substantive due process cases that petitioners cite (Br. 74-75) involved exposure to radiofrequency emissions.

challenge by "residents complaining about a city fluoridating its drinking water supply." *Guertin*, 912 F.3d at 922. "*Coshow* is particularly inapposite," the Sixth Circuit explained, "because it shows the push-and-pulls of competing policy decisions that generally fall outside the scope of a violation of the right to bodily integrity." *Id.* ("defendants make no contention that causing lead to enter Flint's drinking water was for the public good or that they provided notice to Flint residents about the lead-laced water."). Like *Coshow* – and unlike *Guertin* – the updated rule advances important public policy objectives, *Order* ¶ 26 (JA__), and the attendant radiofrequency limits reflect the FCC's "expert balancing" of its statutory objectives. *Nokia*, 625 F.3d at 126.

b. Petitioners also suggest that the revised rule authorizes unconstitutional takings. Br. 65 n.72. Courts that have considered takings claims based on radiofrequency exposure have rejected them. *See Merrick Gables Ass'n., Inc. v. Town of Hempstead*, 691 F.Supp.2d 355, 360-361 (E.D.N.Y. 2010) (dismissing complaint alleging that authorization of radiofrequency-emitting equipment on utility poles constitutes a taking); *Santa Fe All.*, 2020 WL 2198120, *8 (similar); *see also Barnett v. Carberry*, 420 F.App'x 67, 69 (2d Cir. 2011) ("no case

establishes a constitutional or common-law privacy or property right to be free from" radiofrequency emissions).

2. Procedural Due Process

Petitioners cites no authority for their argument that the Constitution requires notice and an opportunity to object to the placement of antennas on their neighbors' properties. Br. 77-79. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in liberty or property. Only after finding the deprivation of a protected interest do we look to see if the [government] procedures comport with due process." *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010) (internal quotations and citations omitted). As set forth above, petitioners have not shown that they have a protected liberty or property interest in antenna placement, or in avoiding exposure to radiofrequency emissions that complies with the FCC's limits. After all, the rule applies only to antennas on property "within the exclusive use or control of the antenna user," 47 C.F.R. § 1.4000(a)(1); it does not regulate the use of petitioners' property. *See also Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 818 (10th Cir. 2021) (affirming dismissal of procedural due process claims

based on elimination of local notice and hearing requirements prior to approval of new telecommunications facilities).[17]

CONCLUSION

The petition for review should be denied.

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Respectfully submitted,

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[17] Petitioners state in passing that the rule change violated their "First Amendment right to petition" state and local authorities regarding the effects of radiofrequency exposure. Br. 78. Preemptive rules – such as the one at issue here – do not violate the First Amendment. *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) ("although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject.").

[18] Filed with consent pursuant to D.C. Circuit Rule 32(a)(2).

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