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

RESPONDENTS' OPPOSITION TO MOTION FOR STAY

Children's Health Defense and four individuals (Children's Health) seek a stay pending appeal of a narrow revision to the Federal Communications Commission's (FCC or Commission) over-the-air reception device or "OTARD" rule. Because Children's Health satisfy none of the requirements for grant of such extraordinary relief, the Motion for Stay should be denied.

INTRODUCTION

As originally promulgated in 1996 and updated in 2000 and 2004, the over-the-air reception device rule prohibits local restrictions on the installation,

maintenance, and use of small antennas "on property within the exclusive use or control of the antenna user." 47 C.F.R. § 1.4000(a)(1). In the challenged order, the FCC again updated the rule to align it with current technology and to foster deployment of fixed wireless networks that rely on such antennas. *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, Report and Order, 2021 WL 100407 (January 7, 2021) (*Order*). The FCC rejected arguments that doing so would violate the rights of persons who wish to avoid exposure to radiofrequency emissions from communications devices. The FCC reasoned that the rule change would not alter the requirement that all FCC-regulated devices comply with the FCC's radiofrequency exposure regulations.

Children's Health contends that the rule change eliminates a ban on using antennas to relay signals to other locations, allows placement of wireless towers and other large structures on private property without State or local approval, and sweeps away protections against radiofrequency exposure. None of that is correct. The rule has covered "hub or relay" antennas that relay signals, as well as receive them, since 2004. It continues to apply only to small (one meter or less) antennas that serve users on the premises where they are located. And the rule change "does not change the applicability" of the radiofrequency exposure limits, *Order* ¶ 34, which the FCC has determined are safe and set appropriately to protect public health.

Children's Health does not challenge the FCC's radiofrequency exposure limits in this case, or dispute that the antennas at issue comply with those limits. It nevertheless contends that, by expanding the permissible uses of the hub or relay antennas covered by the over-the-air reception device rule, the FCC has injured its members who wish to avoid exposure to radiofrequency-emitting antennas.

Children's Health has not shown that it is likely to succeed on the merits. At the outset, Children's Health has not demonstrated a substantial likelihood that it or its members have standing. Children's Health provides only speculation that a hub or relay antenna will be deployed near one of its members because of the rule change. This speculation about potential *future* injury does not satisfy the burden for showing the injury-in-fact necessary for standing.

In all events, the State and local protections against radiofrequency exposure that Children's Health contends are at stake are subject to federal preemption. In addition, the Americans With Disabilities Act (ADA) and Fair Housing Act are inapplicable by their own terms to the circumstances here, and the injuries that Children's Health alleges do not implicate constitutionally protected interests.

Apart from its failure to demonstrate a likelihood of success on the merits, Children's Health has not shown the kind of actual or imminent injury to it or its members from the FCC's limited revision to the over-the-air reception device rule that would justify the extraordinary relief of a stay pending appeal. On the other

hand, Children's Health unduly discounts the significant third-party concerns and public interest benefits that the FCC found would result from the rule change, and that weigh decidedly against a stay.

The Motion for Stay should be denied.

BACKGROUND

1. The FCC adopted the over-the-air reception device rule at Congress's direction in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 207 (1996 Act). Originally adopted to protect the ability of consumers to view video programming services by means of direct broadcast satellite and other technologies, the rule applies to antennas "one meter or less in diameter or diagonal measurement," and prohibits restrictions that unreasonably delay, prevent, or increase the cost of installation and use of these small antennas. 47 C.F.R. § 1.4000(a)(1), (3). It covers State and local zoning, land use, and building regulations and private covenants, contract provisions, lease provisions, and homeowners' association rules. *Id.* § 1.4000(a)(1). The rule excepts restrictions needed for safety and historic preservation purposes. *Id.* § 1.4000(b).

In 2004, the FCC extended the rule to cover not only antennas that receive fixed wireless signals,[1] but also antennas that serve as hubs or relays to transmit

[1] Fixed wireless signals are "commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location." 47 CFR § 1.4000(a)(2).

signals. *Promotion of Competitive Networks in Local Telecommunications Markets*, Order on Reconsideration, 19 FCC Rcd 5637, 5642-43 ¶¶ 13-18 (2004) (*2004 Order*). The FCC reasoned that such antennas "share[] the same physical characteristics" as receive-only antennas, "distinguished only by the additional functionality of routing service to additional users," and that the rule should not "disadvantage more efficient technologies." *Id.* at 5643 ¶ 16. The FCC did not, however, extend the rule to antennas intended "primarily" for use as relay devices to transmit signals. *Id.* at 5644 ¶ 17 n.42. To be covered, antennas had to be "installed in order to serve the customer on such premises." *Id.* ¶ 17 (emphasis omitted). The exclusion of certain hub or relay antennas led to restrictions and disputes that discouraged fixed wireless network deployment. *Order* ¶¶ 14-15.

2. In the challenged *Order*, the FCC extended the over-the-air reception device rule to any hub or relay antenna used to receive fixed wireless signals and to transmit them to other locations, while retaining the requirement that "the antenna serves a customer on whose premises it is located." 47 C.F.R. § 1.4000(a)(5); *Order* ¶ 9. The FCC did not modify any other aspect of the rule. *Id.* The FCC found that expanding the uses of the hub or relay antennas covered by the rule would better align the rule with current technology. *Id.* ¶ 11. "[M]odern . . . antennas are multi-purpose, and can function as receivers, repeaters, and

transmitters, thereby eliminating the distinction" that the FCC "previously relied on in deciding to exclude some of these antennas." *Id.*

The FCC found that the revised rule would provide "greater certainty and predictability" that fixed wireless service providers need to build out their networks. *Id.* ¶ 16. By doing so, the FCC found that the rule change also would give consumers access to improved Internet service and more competitive choices, particularly in rural and underserved communities. *Id.* ¶¶ 1, 11-18.

3. The FCC rejected arguments that by removing barriers to deployment, the rule change would violate the rights of persons who wish to avoid exposure to radiofrequency emissions. *Id.* ¶ 34. At high levels, radiofrequency emissions can heat body tissue, producing "thermal" effects that can be harmful if the body cannot cope with or dissipate the excessive heat. FCC, RF Safety FAQs, https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety#Q5 (last visited March 17, 2021). The FCC's rules specify limits on human exposure to radiofrequency emissions well below the levels that laboratory studies have shown can produce thermal effects. *Id.* #Q9; 47 C.F.R. § 1.1310.[2] These limits apply to all FCC-regulated

[2] Both this Court and the Second Circuit have upheld the FCC's radiofrequency exposure limits against claims that they failed to reasonably protect public health. *See EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004), *cert. denied*, 545

devices, including antennas covered by the over-the-air reception device rule. *Order* ¶¶ 23 n.83 & accompanying text, 34; *2004 Order*, 19 FCC Rcd at 5642 ¶ 11.[3] The rule change, the FCC explained, "does not change the applicability of the" radiofrequency exposure limits, "and fixed wireless providers must ensure that their equipment remains within the applicable exposure limits." *Order* ¶ 34. The FCC declined to address concerns regarding the radiofrequency exposure limits themselves as "outside the scope of this proceeding." *Id.* nn.131, 133.[4]

ARGUMENT

To obtain a stay, Children's Health must show that (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm unless a stay is granted, (3) other parties will not be harmed if a stay is granted, and (4) a stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Children's Health has not

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U.S. 1116 (2005); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

[3] The FCC's rules also impose labeling, installation, and other requirements on devices to ensure safety from radiofrequency emissions. *See 2004 Order*, 19 FCC Rcd at 5642 ¶¶ 11-12; 47 C.F.R. §§ 1.1307(b)(1), 1.1310.

[4] In a separate case before this Court, Children's Health has joined a challenge to the FCC's recent decision not to propose changes to its radiofrequency exposure limits, where it raises many of the same legal arguments as it raises here. *See* Petitioners' Joint Opening Brief in *Environmental Health Trust, et al. v. FCC*, No. 20-1025 (D.C. Cir.) (argued Jan. 19, 2021), at pp. 88-96 (arguing that radiofrequency exposure violates constitutional, statutory and common-law-based rights).

shown that this "extraordinary remedy," *Winter v. NRDC*, 555 U.S. 7, 22 (2008), is warranted.

At the outset, we emphasize that the Motion rests on several critical misunderstandings. The FCC did *not* extend the over-the-air reception device rule to hub or relay antennas for the first time in the *Order*: the rule has covered them since 2004. *2004 Order*, 19 FCC Rcd at 5643 ¶ 16; *Order* ¶ 4; *see* Mot. 10-11. The rule remains limited to small ("one meter or less") antennas that serve users on the premises where they are located. *Order* ¶ 19. And the rule change does not remove devices that exceed the size restriction from State or local regulatory approval requirements. *See id.* ¶ 19 ("the OTARD rule only applies to antennas meeting the rule's size restriction"). In short, the challenged *Order* is a "modest adjustment," not a sea change. *Id.* ¶ 1.

I. CHILDREN'S HEALTH IS NOT LIKELY TO SUCCEED ON THE MERITS.

Children's Health does not challenge the FCC's radiofrequency exposure limits in this case or dispute that the antennas at issue comply with those limits. Mot. 3, 14. Children's Health has not shown that it or its members will be injured by the placement or use of a hub or relay antenna near them because of the rule change. It nevertheless argues that the *Order* deprives its members of current protections against exposure to radiofrequency emissions, in violation of statutory, constitutional and common law rights. Mot. 15-26. Its claims are meritless.

A. Children's Health Has Not Shown a Substantial Likelihood That It Has Standing.

Children's Health invokes a threat of *future* injury from the actions of third parties that is inadequate to support standing here. In the context of a stay motion, Children's Health must "show a substantial likelihood of standing under the heightened standard for evaluating a motion for summary judgment." *Elec. Privacy Info. Ctr. v. Presidential Adv. Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) (internal quotations and citations omitted). Standing requires "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 Assoc. v. EPA*, 985 F.3d 914, 988 (D.C. Cir. 2021).

To demonstrate injury, a litigant must establish at a minimum that its harms are "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), rather than "abstract," "conjectural," or "hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). A litigant claiming standing based on the expectation of future injury "confronts a significantly more rigorous burden to establish standing." *Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (internal quotation omitted); *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that [a]llegations of *possible* future injury are not sufficient") (internal quotations and citations omitted) (emphasis in original).

Standing also is "substantially more difficult to establish" where the alleged harm results from the actions of third parties. *American Lung Assoc.*, 985 F.3d at 988.

Children's Health has not shown a substantial probability that the rule change will cause third-party conduct that inflicts a concrete, imminent injury on its members. Children's Health contends that its members will suffer from radiofrequency exposure if a property owner near them takes advantage of the rule change to install a hub or relay antenna. *See* Mot. 7-9. But the supporting affidavits show only the possibility of that happening in the future. *See, e.g.*, Affidavit of Dr. Erica Elliot, App. Vol. 1, Tab C, ¶ 39 ("I am in constant fear that our community will allow the installation of wireless antennas."); Affidavit of Jennifer Baran, App. Vol. 1, Tab D, ¶ 45 ("If one of our neighbors takes advantage of the amended OTARD rule …, the radiation will affect our property."). Whether a hub or relay antenna actually will be placed in the vicinity of one of Children's Health's members or an individual movant as a result of the rule change – and when – are thus entirely matters of conjecture. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990) (affidavits that wildlife group members' use and enjoyment of land "in the vicinity" of land covered by challenged program would suffer were insufficient to show any actual injury); *Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, No. 18 CV 32 JAP-SCY, 2018 WL 1725616, at *4 (D.N.M. Apr. 6, 2018) (no standing where plaintiffs alleged their homes would be rendered

uninhabitable by radiofrequency emissions because no facilities had been approved or constructed).

While the other individual movants allege that a property owner may take advantage of the rule change to place a hub or relay antenna near them, one movant alleges that the rule change will preempt his efforts to seek "relief from nonconsensual exposure" through "local permitting activities related to fixed wireless applications that are still subject to local zoning." Mot. 11 (citing Affidavit of Jonathan Mirin, App. 1, Tab B, ¶¶ 31-39, 40-46, 50). He does not allege, however, that the applications concern hub or relay antennas that meet the rule's unchanged size restriction. *See* Mirin Affidavit ¶ 32 ("My efforts are directed at suggesting more appropriate siting for cell towers and fixed wireless towers").

Children's Health also asserts organizational standing based on increased legal counseling, referral, and advocacy activities on behalf of its members in response to the rule change. *See* Affidavit of Dafna Tachover, App. II, Tab L, ¶¶ 62-74. "That is precisely the kind of injury" to an organization's advocacy activities, "and expenditure of resources on such efforts," that "does not amount to injury in fact." *American Lung Assoc.*, 985 F.3d at 989.

B. Federal Law Preempts Radiofrequency-Based Tort Claims and State or Local Restrictions on Antenna Placement and Use.

Even if Children's Health could establish standing, its substantive claims fail. It is well settled that federal law preempts tort claims and State or local restrictions on antenna placement based on concerns regarding radiofrequency exposure of the kind raised by Children's Health.

"Congress has long vested in the Commission exclusive jurisdiction over radio communications, and that includes preemption of local jurisdictions in matters concerning [radiofrequency] safety." *2004 Order*, 19 FCC Rcd at 5642 ¶ 11. Children's Health does not challenge the FCC's radiofrequency exposure limits in this case, or contend that the devices at issue exceed those limits. Mot. 3, 14. The limits reflect the FCC's expert judgment "about how to protect the health and safety of the public while still leaving industry capable of maintaining an efficient and uniform wireless network." *Farina v. Nokia Inc.*, 625 F.3d 97, 125 (3d Cir. 2010) (internal quotations and citations omitted). Tort claims based on exposure within the FCC's limits conflict with that expert judgment. *Id.* at 126 ("Allowing juries to impose liability on cell phone companies for claims like Farina's [based on exposure within FCC limits] would conflict with the FCC's regulations.").

Accordingly, the tort claims based on radiofrequency exposure from hub or relay antennas asserted by Children's Health are preempted. Mot. 20; *see Farina*,

625 F.3d at 125-26; *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017) (1996 Act preempts negligence and nuisance claims based on radiofrequency emissions); *Fontana v. Apple, Inc.*, 321 F.Supp.3d 850, 851 (M.D. Tenn. 2018) (state law claims alleging that cell phone caused cancer preempted by federal law); *Goforth v. Smith*, 991 S.W.2d 579, 583-84 (Ark. 1999) (1996 Act preempted radiofrequency exposure-related issues in landowners' action against service provider and neighbor who leased land on which communications tower was to be built).

State or local zoning, permitting or other restrictions on antennas based on radiofrequency exposure that complies with FCC limits likewise are preempted by the over-the-air reception device rule, which expressly prohibits "zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, homeowners' association rule or similar restriction," that unreasonably prevents, delays, or increases the costs of antenna "installation, maintenance, or use" on the antenna user's property. 47 C.F.R. § 1.4000(a)(1); *see 2004 Order*, 19 FCC Rcd at 5642 ¶ 11 (clarifying that when FCC regulations impose professional installation and other requirements to ensure safety from radiofrequency exposure, "non-federal third parties are free to ensure that such requirements are followed," but that otherwise they "may not impose such restrictions for reasons of [radiofrequency] safety.").

C. Children's Health's Statutory, Constitutional, and APA Claims Lack Merit.

1. Statutory Claims

Children's Health argues that the FCC "could be liable" under the ADA and Fair Housing Acts for radiofrequency exposure from antennas deployed because of the rule change. Mot. 17; *id.* 16-18. But the ADA does not apply to federal agencies such as the FCC. *See* 42 U.S.C. §§ 12111(5)(B)(i) ("The term 'employer' does not include ... the United States"), 12131(1) (applying expressly to "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority."). Nor is an antenna a "'place of public accommodation'" under the ADA. Mot. 18 (quoting 42 U.S.C. § 12181(7)) (defining places of public accommodation to include "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment"). Children's Health's reliance on *National Association of the Deaf v. Netflix, Inc.*, 869 F.Supp.2d 196, 200-01 (D. Mass 2012) (action against Netflix for failure to provide equal access to its video streaming service), is misplaced because Children's Health does not seek equal access to the services of fixed wireless providers. Rather, it seeks to prevent providers and property owners from installing and using antennas on the owners' property.

There is also no merit to Children's Health's suggestion (Mot. 17) that placement of antennas is a "residential real estate-related transaction" within the meaning of the Fair Housing Act, since that term is limited to transactions involving "loans" or "financial assistance," or the "selling, brokering, or appraising of residential real property." 42 U.S.C. § 3605(b). "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 Assn. v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (plaintiffs failed to state a Fair Housing Act claim based on siting of a highway adjacent to their neighborhood). Nor does Children's Health identify any basis for concluding that its alleged harms would fall within the purview of State laws that are similar to the ADA and the Fair Housing Act. *See* Mot. 18-19.

2. Constitutional Claims

Children's Health cites several decisions to support its claims that the *Order* violates its members' interests in "liberty," "bodily autonomy," and "privacy," but none of the decisions on which it relies involve radiofrequency exposure. *See* Mot. 19-20. Courts have refused to extend the decisions upon which Children's Health relies to claims based on radiofrequency exposure. *See Santa Fe All.*, 2020 WL 2198120, at *8 (citing *Guertin v. State of Mich.*, 912 F.3d 907, 921-22 (6th Cir. 2019) ("The Constitution does not guarantee a right to live in a contaminant-free,

healthy environment.")); *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). Courts in analogous contexts also have refused to find a constitutional "right to be free from the introduction of an allegedly contaminated substance." *Coshow v. City of Escondido*, 132 Cal. App. 4th 687, 709 (2005) (rejecting claim against fluoride in drinking water, and citing cases involving, *inter alia*, tobacco smoke); *MacNamara v. Cty. Council*, 738 F.Supp. 134, 142 (D. Del.), *aff'd*, 922 F.2d 832 (3rd Cir. 1990) (finding, in challenge to location of electric substation, no "constitutionally protected liberty interest in a person's health").[5]

Because radiofrequency exposure does not implicate protected interests, Children's Health (Mot. 20-21) misplaces reliance on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which held that emergency health measures that "curtail constitutional rights" must allow exceptions in "extreme cases." *Cf. Coshow*, 132 Cal. App. 4th at 710 (in refusing to extend *Jacobson* to claim against fluoridated drinking water, reasoning that fluoridation is "clearly distinguishable from the

[5] Children's Health refers in passing to protected "property" rights. Mot. 15. Courts that have considered radiofrequency-based takings claims 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 at *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).

invasive and highly personalized medical treatments used in cases where the state sought to override a person's freedom to choose and where the Supreme Court has recognized a liberty interest in freedom from such unwanted medical treatment").

Children's Health cites no authority for its argument that procedural due process requires notice and the opportunity to object to the placement of hub or relay antennas. Mot. 22. "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's] procedures comport with due process." *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010) (internal quotations and citations omitted). Children's Health has not shown that its members have a protected interest in hub or relay antenna placement, or that they have been deprived of any protected interest by the rule change.[6] In all events, any due process requirements have been satisfied by the opportunities, of which Children's Health took advantage, to present its views, both in the proceeding below and in the FCC's inquiry whether to propose changes to its radiofrequency exposure limits.

[6] The notice that Children's Health contends is required by due process also clearly would be in tension with the rule's purpose of promoting deployment. *See, e.g.*, *Satellite Broadcasting & Commc'ns Assn.*, 33 FCC Rcd 3797, 3816-17 ¶¶ 43-46 (2018) (local ordinance requiring notification to city regarding existing antennas, and removal of antennas no longer in service, would violate OTARD rule).

3. Administrative Procedure Act

Children's Health argues that the FCC did not "meaningfully" address radiofrequency exposure in the *Order*. Mot. 23-25. The FCC responded to arguments regarding radiofrequency exposure from hub or relay antennas by explaining that the rule change would not alter the applicability of its radiofrequency exposure regulations, which the agency has determined adequately protect human health. *Order* ¶ 34 ("We therefore reject certain commenters' concerns that the OTARD rule revisions will generally lead to unsafe [radiofrequency] exposure levels"); *see id.* ¶ 20 n.83. *Id.* ¶ 34.

The FCC's response was sufficient to reveal "'what major issues of policy were ventilated ... and why the agency reacted to them as it did.'" *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) ("An agency need not 'discuss every item of fact or opinion included in the submissions made to it.'") (quoting *Del. Dept. of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 17 (D.C. Cir. 2015)). Because the FCC "considered and rejected" Children's Health's arguments, it did "all that the APA requires." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 258 (D.C. Cir. 2003) (per curiam)). And the agency rationally chose to adhere to its radiofrequency exposure limits in deciding to "incrementally" revise the over-the-air reception device rule. *Order* ¶ 34; *see 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 radiofrequency exposure limits before adopting measures to promote wireless infrastructure deployment).

II. CHILDREN'S HEALTH HAS NOT DEMONSTRATED IRREPARABLE HARM.

To establish irreparable harm, a moving party must show that it will suffer injury that is, *inter alia*, "both certain and great, actual and not theoretical." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal citations and quotations omitted). "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (emphasis in original).

The Motion for Stay is founded on generalized fears that a hub or relay antenna may be installed and used in the vicinity of Children's Health's members: whether there is a reasonable likelihood that such an antenna will be installed and used because of the rule change is conjectural. *See* pgs. [9-11] *supra*. "[I]t is bedrock law that injunctions 'will not issue to prevent injuries neither extant nor presently threatened, but only merely feared.'" *Sierra Club v. United States Army Corps of Eng'rs*, 990 F.Supp.2d 9, 41 (D.D.C. 2013) (quoting *Comm. in Solidarity*

With The People of El Salvador v. Sessions, 929 F.2d 742, 745–46 (D.C. Cir. 1991) (internal quotation marks and citations omitted)).

In addition, Children's Health "must show that the alleged harm will directly result from the action which [they] seek[] to enjoin." *Wisc. Gas Co.*, 758 F.2d at 674. The harm alleged here depends on the independent actions of third parties whose private agreements the over-the-air reception device rule protects. 47 C.F.R. § 1.4000(a)(1); *see Order* ¶ 20 ("fixed wireless service providers will still need to negotiate agreements with appropriate parties for the placement of their antennas in areas where the property owner or lessee has exclusive use or control."). And in the end, the alleged harm results from Children's Health's claim that the FCC's radiofrequency exposure limits, although "arguably safe for much of the population," Mot. 15, fail to protect individuals that are particularly sensitive to radiofrequency exposure. Thus, its real dispute is with the exposure limits themselves. But Children's Health has challenged the FCC's decision to leave those limits in place in separate litigation, *see* n.5 *supra*, and it disavows any dispute with those limits in this case. Mot. 3.

III. A STAY WOULD HARM THIRD PARTIES AND THE PUBLIC INTEREST.

As the COVID-19 pandemic has shown, Internet access is not merely a matter of convenience: it is increasingly an indispensable element of modern life. The country "faces a major challenge to ensure that the speed, capacity, and

accessibility of our wireless networks keeps pace" with "skyrocketing" demands. *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165, 169 (D.C. Cir. 2015). The updated over-the-air reception device rule will help to meet that challenge by "spur[ring] the rapid deployment of fixed wireless networks needed for 5G and other fixed wireless high-speed Internet services." *Order* ¶ 11.

Children's Health acknowledges, Mot. 27-28, but gives little weight to, the fact that the rule change will benefit fixed wireless service providers by providing the "certainty and predictability" needed to build out their networks rapidly and efficiently. *Order* ¶ 11-16. Consumers across the Nation, particularly those in rural and underserved areas, will benefit in turn from "faster access to advanced communications services and greater competition among service providers." *Id.* ¶ 11; *id.* ¶ 1. A stay would undermine these important advantages.

Further, a stay would harm the public interest by constraining the FCC's ability, in accordance with Congress's mandate, to ensure that "new and innovative technologies are readily accessible to the American people," 47 U.S.C. § 309(j)(3)(B), and to "encourage the provision of new technologies and services to the public." *Id.* § 157(a); *see id.* § 151. The over-the-air reception device rule is an important tool for advancing these objectives. *See Satellite Broadcasting & Commc'ns Assn.*, 33 FCC Rcd at 3798 ¶ 2. By obstructing the FCC's ability to

update the rule, a stay would limit the FCC's ability to carry out its statutory mandate to advance these important goals.

CONCLUSION

The motion for stay should be denied.

Dated: March 23, 2021

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, William J. Scher, hereby certify that on March 23, 2021, I filed the foregoing Respondents' Opposition to Motion for Stay with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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