ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21-1075

CHILDREN'S HEALTH DEFENSE, DR. ERICA ELLIOT, GINGER KESLER, ANGELA TSIANG, JONATHAN MIRIN
PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

EMERGENCY MOTION FOR STAY PENDING REVIEW OR IN THE ALTERNATIVE EXPEDITED REVIEW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

I. Parties and Amici

A. Petitioners

Children's Health Defense
Dr. Erica Elliot
Ginger Kesler
Angela Tsiang
Jonathan Mirin

B. Respondents

Federal Communications Commission
United States of America

C. Intervenors

No parties have moved for leave to intervene at present.

D. *Amici*

No parties have sought leave to file an *amicus* to date.

II. Decision Under Review

Report and Order, *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, FCC 21-10, WT Docket No. 19-71, __ FCC Rcd ___ (January 7, 2021). The order and adopted rules were published in the

Federal Register on February 25, 2021, 86 Fed. Reg. 11432. A copy of the challenged order is contained in Tab A of the Addendum.

III. Related Cases

Nos. 20-1025 and 20-1138 (consolidated), *Environmental Health Trust, et al v. FCC, et al* and *Children's Health Defense, et al v. FCC et al.* involve a facial challenge to the FCC's general population emissions rules in 47 C.F.R. §1.301-1.320. The case now before the Court challenges a rule amendment to 47 C.F.R. §1.4000, the so-called "OTARD" rule, but it is not a collateral attack on the general population emissions rules. Rather, it involves persons who would be injured by the amended rule's elimination of currently-available local, state and federal procedural rights and remedies, and by emissions authorized by 1.4000 that would flow from wireless companies implementing the amendment.

IV. Rule 26.1 Disclosure Statement

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

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

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

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 18(a)(1), PROCEDURAL STATUS AND RELIEF REQUESTED AND PROPOSED SCHEDULE

The undersigned certifies that this Emergency Motion for Stay or Summary Disposition complies with Circuit Rule 18(a).

Respondent FCC issued the *Order* under review on January 7, 2021. The *Order* amended the so-called "OTARD Rule" (Over-the-Air Reception Devices), which appears at 47 C.F.R. §1.4000.[1] Federal Register publication occurred on February 25, 2021. 86 Fed. Reg. 11432. Absent a stay the rule amendments will become effective on March 29, 2021. The Petitioners filed a Petition for Review in this Court on February 26, 2021. The Clerk issued the first procedural order establishing filing requirements on March 3, 2021 (Doc#1888231).

Petitioners also sought a stay from the agency pending judicial review on March 1, 2021. The Wireless Internet Service Providers Association opposed the stay request on March 8. The Commission's rules do not allow a reply. 47 C.F.R. §1.45(d). The FCC has not issued an order ruling on the stay request.

[1] This Court reviewed a prior version of the OTARD rule in *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 99 (D.C. Cir. 2001).

Movants now seek emergency relief from the Court, in the form of a stay pending review or, if necessary an administrative stay long enough for the Court to fully address the motion for stay *pendente lite*. Consistent with 47 U.S.C. §1657(a) and Circuit Rules 27(f), 47.2(a), Movants request expeditious consideration as necessary to ensure disposition before the rule amendment goes into effect. Finally, in the alternative, and only if a stay is denied, Movants request expedited merits briefing and argument in less time than would ordinarily be allowed, to mitigate the irreparable harm that would occur under the standard procedures used for review of agency decisions.[2]

The undersigned provided notice of this filing to counsel for Respondents who filed appearances in this matter on March 9, 2021. Counsel conferred on March 10, 2021. Subject to the Court's direction, Counsel agreed that Movants would file this Motion by March 18th, 10 days before the challenged rule amendment goes into effect. *C.f.* Circuit Rule 27(f) (7 days). The FCC's Opposition is due on March 24th and Movants Reply, if any, will be submitted on March 26th.

The parties were not able to reach agreement on a tentative schedule for expedited merits briefing and argument if the Court orders expedition. Given the

[2] Expedited merits treatment is not required by statute.

Court's calendar, it is unlikely the briefing cycle could be completed, and argument scheduled and conducted before the Court breaks in May. The only option is a special sitting during June. If the judicial stay is denied but expedited merits briefing and argument is granted, Movants propose the following schedule:[3]

Other Procedural Motions:	April 2, 2021
Certified Index to the Record:	April 5, 2021
Dispositive Motions:	April 5, 2021
Petitioners' Principal Brief:	April 20, 2021[4]
Respondent's Brief:	May 4, 2021
Petitioners' Reply Brief:	May 18, 2021
Argument in June	

[3] As noted, Respondents have not agreed to this schedule, and it is contested.

[4] This schedule does not include recourse to a Deferred Appendix. *See* FRAP R. 30(c)(1); Circuit Rule 30(c).

MOTION

INTRODUCTION

If the amended rule goes into effect the Movants and many others who have been afflicted by Radiation Sickness or other sickness caused or exacerbated by wireless technology ("wireless radiation"), will suffer immediate, irreparable (and for some life-threatening) injuries, that could not be undone, rectified or ameliorated later if the Court were to ultimately vacate the *Order* and rule amendment after review on the merits. Movants make a strong showing that they are likely to prevail. Others are not likely to be harmed, and the public interest strongly favors relief.

We first set out the core problem, so it is not lost amidst regulatory and technical jargon, or lofty aspirations about universal Internet access. It is not apparent from the *Order* but the rule, as amended, will involuntarily and forcibly expose Movants and those like them to harmful and possibly deadly radiation that makes them sick. They will be driven from their homes, with nowhere to go. Tachover@¶¶50, 53, 86-90; Mirin@¶¶6, 30, 43- 44, 48, 50; Elliot@¶¶5, 17-18, 52, 56; Baran@¶¶9, 47, 51; Kesler@¶¶6, 48, 49; Hoffman@¶¶7, 48; Tsiang@¶¶5, 48; Hertz@¶¶7, 31, 36, 40-42; Jelter@¶¶26-30, 33; Bray@¶22; Golomb@¶24. Many are already sick and some lack the necessary resources for partially-effective self-protection measures like shielding in the home. Many deliberately chose their

abode precisely because the radiation was not present or as pervasive. Tachover@¶¶53, 56, 83-84, 86, 11, 13; Mirin@¶¶17, 18, 48; Baran@¶¶36-39; Kesker@¶¶20-22, 47; Tsiang@¶¶27-28, 36, Hertz@¶¶23, 27, 36. Some have used presently-available state and local processes to oppose involuntary exposure or obtain accommodations. The rule change ends these local processes, destroying these meaningful rights. Tachover@¶¶9, 12-13, 57, 64, 81-82; Mirin@¶¶32-40, 49; Tsiang@¶¶25, 26-28, 30-31, 53; Hertz@¶34.

Movants will immediately suffer involuntary and harmful exposures from new and undisclosed radiation sources. Tachover@¶¶14, 53; Mirin@¶¶42, 50; Elliot@¶¶25-28, 45, 56; Baran@¶¶46, 50-52; Kesler@¶¶47-48; Hoffman@¶¶44-46; Tsiang@¶44; Hertz@¶33. This will seriously hurt the Movants and others like them, harm their sick children, force them to once again move, and drive them into a state of poverty and homelessness. Tachover@¶14, 53, 80, 84-87; Mirin@¶¶42-44, 48, 50; Elliot@¶¶5, 8, 51-52, 55-56; Baran@¶¶44-49, 50-54; Kesler@¶¶6,47-49; Hoffman@¶¶7, 44-48; Tsiang@¶¶5, 46-50; Hertz@¶¶33-36; Jelter@¶¶20, 33-35; Golomb@¶¶24,25. Movants and those like them already fear that an antenna will be installed nearby, but at present they have at least some recourse before various local, state and federal authorities. The rule will immediately bar those venues and processes as prohibited “restrictions” for purposes of 47 C.F.R. 1.4000(a)(1).

The FCC and those who support the amendment frankly state that the specific purpose of the rule change is to eliminate all presently-available *ex ante* and *post-hoc* local and state remedies, all requirements of advance notice and any process providing an opportunity for persons adversely affected by a project to object or obtain relief in advance. *Order* ¶13; Wireless Internet Service Providers' Comments, Docket 19-71, p. 8; Wireless Internet Service Providers' December 14, 2020 *ex parte*, p. 1. And that is exactly what it does: But what they do not mention is it goes even farther: it also preempts rights and remedies afforded by federal disability laws such as the Americans with Disabilities Act and the Fair Housing Act Amendments of 1988 and many state civil rights laws. Part I.B., *infra*.

Movants and those like them will immediately get sick from a radiation source they had no knowledge was coming, and will have no local, state or federal forum to prevent the new source of involuntary exposure. Tachover@¶¶9, 12, 14, 52-53, 57, 64, 81-82; Mirin@¶¶40-46; Elliot@¶¶41-45; Kesler@¶¶8, 22, 43-44. Simply put, adults and children will suffer and perhaps even die. Tachover@¶45-50, 52-54, 75; Mirin@¶21; Elliot@¶¶42, 47; Baran@¶¶27,34, 46; Hoffman@¶¶23, 45; Jelter@¶35; Bray@¶22; Golomb@¶26. And they will have no means to avoid or rectify these harms or obtain any remedy. These are significant, horrendous, substantive and due process harms and they are all irreparable. The Court must grant a stay pending review.

The OTARD rule

Paragraphs 3-5 of the *Order* recite the OTARD rule's history and the Wireless Internet Service Providers' Association petition that led to the *Order* and rule change. The rule preempts "[a]ny 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" including "civil, criminal, administrative, or other legal action of any kind" that "impairs the installation, maintenance, or use of" any "antenna" or "mast supporting such antenna" which meet certain size and use criteria. 47 C.F.R. §1.4000(a)(1)(i)-(iii), (4).The rule, however, has always had a specific limitation: the protected system could *only* be used to service users "at that location" and could not be used to service users "at multiple customer locations." *Order* ¶¶3-4; 47 C.F.R. §1.4000(a)(1)(2).

Systems intended to serve users at multiple customer locations are currently fully subject to applicable laws, including zoning, land-use, private covenants, contracts and homeowners' association rules. Civil and administrative actions are still allowed. *Order* ¶13; Wireless Internet Service Providers' Comments, Docket 19-71, p. 8; Wireless Internet Service Providers' December 14, 2020 *ex parte*, p. 1. On the day the rule goes into effect that limitation goes away and all due process rights and all vested contractual rights under state law are preempted.

The current rule also preserves requests and proceedings pertaining to disabled rights accommodation requests under the federal Fair Housing Act Amendments of 1988 (FHAA)[5] and Americans with Disability Act (ADA)[6] and administrative regulations promulgated by other federal agencies pursuant to those statutes. It preserves state law equivalents. *See* Part I.B. *infra*.

The rule change eliminates the "same property" restriction and allows a wireless provider to place base station equipment at the customer location that normally requires a local permit and compliance with state and local laws. Indeed, *Order* ¶13 frankly admits the specific purpose is to banish local and state laws and remedies for these arrangements. Petitioner Mirin is presently participating in a series of local permitting activities related to fixed wireless applications that are still subject to local zoning and is seeking relief from nonconsensual exposure. Mirin@¶31-39, 40-46, 50. On and after March 29, 2021 Petitioner Mirin and all those relying on local processes will immediately lose important procedurals rights.

The amendment allows antennas and masts with an omni-directional "hub or relay antenna." The rule amendment defines "Hub or relay antenna" in new 1.4000(a)(5). To put it as simply as possible, a "hub or relay" is additional "base

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[5] 42 U.S.C. §3601, *et seq.*
[6] 42 U.S.C. §12101, *et seq.*

station" equipment (electronics, including a router or switch, and omni-directional antennas) that creates a small but powerful wide area wireless network accessible from all directions by those within range of the new signal. One wireless provider indicated the equipment it will use has a one-mile, 360-degree service radius, far past the boundaries of the premises where the base station is located. Starry Comments, p. 7; *see also Order* ¶14 and nn.43-48, *citing* WISP.net Petition for Declaratory Ruling in Docket 19-270, and Declaration of David Rodeker; *Order* ¶¶14, 20 n.81; amended 1.4000(a)(1)(A), (a)(2)(A), (a)(5); Wireless Internet Service Providers Comments, p. 9; Wireless Internet Service Providers Reply Comments, p. 9.

This creates a significant problem. The wireless wide area network will inevitably and involuntarily expose many thousands to wireless radiation that can and does directly and seriously harm them in several different ways and they will have no notice or ability to object. Tachover@¶¶9, 12-14, 53, 57, 64, 80-90; Mirin@¶¶6, 26, 30, 42-44, 48-50; Elliot@¶¶8, 17, 28, 41-54, 55-57; Baran@¶¶9,44-56; Kesler@¶¶41-49; Hoffman@¶¶43-48; Tsiang@¶¶5-6, 38-54; Hertz@¶¶31-38, 40-41; Jelter@¶¶20, 35; Bray@¶¶17, 20-22; Golomb@¶¶24-28.

STANDARDS FOR DECISION

To obtain a judicial stay, Petitioners must demonstrate: (a) likelihood of success on the merits; (b) they are likely to suffer irreparable harm if relief is

withheld; (c) the balance of equities favors an injunction; and (d) a stay is in the public interest. *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958). The final two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Guedes v. BATFE*, 920 F.3d 1, 10 (D.C. Cir. 2019); *see also Pursuing America's Greatness v. FEC*, 831 F.3d 500, 5011 (D.C. Cir, 2016).

Each factor is weighed against the others, with no single factor dispositive, although the first two factors "are the most critical." *BATFE*, 920 F.3d at 10, *citing Nken*, 556 U.S. at 434. Thus, "injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits." *Petroleum Jobbers*, 259 F.2d at 925; *Holidav Tours*, 559 F.2d at 844.

The Court has not decided whether *Winter* precludes the "sliding scale" approach to weighing the four factors, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth*., 897 F.3d 314, 334 (2018), *Pursuing America's Greatness*, 831 F.3d at 505, n.1, but the four-factor test clearly requires a balancing of interests and harms. A compelling showing of irreparable harm heavily tips the scale, especially when it flows from unlawful agency action. *League of Women Voters of the*

United States v. Newby, 838 F.3d 1, 7 (D.C. Cir. 2016). Even so, a compelling showing of irreparable harm does not entirely dispense with a likelihood of success, which may be an independent requirement. *Winter*, 129 S.Ct. at 374-376; *Sherley v. Sebelius*, 644 F.3d 388, 393 (2011). If the two principal factors are met Movants must then show that the four factors, "taken together, warrant relief." *Pursuing America's Greatness*, 831 F.3d at 505.

ARGUMENT

I. Movants/Petitioners Are Likely to Succeed on the Merits.

Movants/Petitioners have strong merits arguments. The errors made by the FCC are multiple and clear, although some may require fuller treatment in the merits phase.

Movants emphasize this action does not constitute a facial challenge to the Commission's general population exposure limits and rules. The Court is processing a facial challenge to those limits in another case by the Children's Health Defense.[7] The present action seeks relief from amendments to a different rule in a manner that will harm the Movants and those like them that will be

[7] Nos. 20-1025 and 20-1138 (Consolidated), *Environmental Health Trust, et al v. FCC et al* and *Children's Health Defense, et al v. FCC, et al.* These consolidated actions challenge the Commission's decision to retain its general population exposure rules in 47 C.F.R. §§1.301-1.320.

negatively affected for various reasons by the rule amendment regardless of whether the general population limits are safe for most people.

A. Substantive Due Process – Personal and Property Rights

No reasonable person can seriously claim an individual that suffers debilitating adverse reactions from exposure to a specific toxin, even one that is arguably safe for much of the population, has no right to object to involuntary exposure, no right to notice of the threat, and no remedy for the potential or actual harms that flow from that exposure. Yet that is, ultimately, what the Commission appears to contend. The FCC seems willing, even anxious, to sacrifice thousands or even tens of millions of individually vulnerable people and children in the name of removing "barriers" to wireless "deployment." *Order* ¶13; *c.f.* Tachover@¶¶9-10, 13; Hertz@¶43; Elliot@¶¶8, 9, 19; Jelter@¶¶10,15-16, 19, 27, 35-36; Bray@¶¶15-19; Golomb@20-28.

Under present law there *is* a right to notice and *are* multiple venues and mechanisms for objection and accommodation for those adversely affected. The Commission's stated purpose of the amendment was to eliminate these presently vested rights and processes–which are often used to protect life and property–because they are "barriers" to deployment. *Order* ¶¶3, 12, 13, 26, n.109. But this it cannot do. There *must* be some means, some process, some venue for those who credibly claim adverse individual consequences from involuntary exposure and

seek accommodation. This does not mean the general population limits must be changed. It just means there must be an escape hatch for those who, for whatever reason, cannot survive under the general rules.

B. Statutory Rights – ADA/FHHA and state law equivalents

Local zoning laws presently apply to OTARD-based hub/relay arrangements. The *Order* specifically identified these local laws as the "barriers" it was removing. They provide a venue so local citizens can receive notice of a project that may affect them, lodge an objection to any harm or threat it poses and propose less harmful alternatives. The FCC deems these processes "unreasonable barriers" that inhibit deployment. *Order* ¶¶6, 12-13, 28.

The federal ADA and FHHA and most similar state laws also provide *additional* rights and remedies that directly apply to the service providers, independent of any local zoning laws. Although *Order* ¶34 mentions the ADA, it entirely fails to recognize or deal with the problem. We do not know if the FCC thinks these civil rights laws are unreasonable barriers too.

Under the ADA "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, or be subjected to discrimination by any such entity." 42 U.S.C. §12132; 35 C.F.R. § 35.130(b)(7)(i). The FHAA requires that public entities "make reasonable accommodations in rules, policies,

practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Zoning and permitting falls within the scope of the ADA and FHAA. Local authorities must make alterations to otherwise facially neutral laws if they uniquely burden a disabled person on account of his or her disability. *McGary v. City of Portland*, 386 F. 3d 1259, 1263, 1266 (9th Cir. 2004). State and local authorities must afford accommodations as part of any zoning/permitting action under federal law and many state equivalents.

Service providers have independent duties for "different location" private wireless services under the civil rights laws the amendment sweeps away. Under FHHA any person who harmfully exposes handicapped individuals interferes with their "exercise or enjoyment of rights granted or protected by" 42 U.S.C. §3617. The service provider's placement of a hub or relay is a "residential real estate-related transaction" under 42 U.S.C. §3605(b)(1)(A). An injured disabled person can file a civil action and recover actual, punitive and injunctive relief, along with attorneys' fees. There may even be civil or criminal liability. 42 U.S.C. §§3613(c), 3631(a), (a)(1). The Commission is encouraging and providing "color of law" authority under which countless horrible injuries will be inflicted on innocent people. Its action gives rise to potential civil and criminal liability under 42 U.S.C. §3631(a), (a)(1). The Commission could be liable.

ADA Title III also applies. *Order* ¶¶12, 18 observe that OTARD-based wireless services are "used to receive video programming services." *See* 47 C.F.R. 1.4000(a)(1)(ii)(A). The FCC therefore admits that these services fall squarely into the definition of a 42 U.S.C. §12181(7) "place of public accommodation." Internet-based video platforms are subject to ADA Title III. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-201 (D. Mass. 2012). The wireless service is a *virtual* "place of exhibition and entertainment," "place of recreation," "sales or rental establishment," and "service establishment." 42 U.S.C. §12181(7)(C), (F), (I). Video delivery may not occur in a theater, but Congress provided flexibility to "keep pace with the rapidly changing technology of the times." H.R. Rep. 101-485 (II), at 108 (1990). This is so even if the ADA imposes greater or different obligations than FCC rules. *Netflix* at 203-208. The Communications Act does not extinguish rights under other federal statutes or even under state law. *Sierra v. City of Hallandale Beach, Fla*., 904 F.3d 1343, 1349-11350 (11th Cir. 2018); *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc*., 742 F.3d 414, 429 (9th Cir. 2014).

Most states have similar civil rights laws that are not presently preempted for projects that serve multiple customer locations. *See, e.g.,* N.H. RSA Sections 354-A:10, 354-A:17, 354-A:27, New Hampshire RSA Ch. 353-B; Haw. Rev. Stat. Ch. 368, Ch. 489 and Ch. 515. Some states like California go beyond the federal

ADA baseline. Claims can be made under California law against private companies that are "business establishments" that discriminate against the disabled and refuse reasonable accommodations. *See* Cal. Civ. Code §§51 and 1296, 12926.1. California also strongly protects equal access to housing. Cal. Civ. Stat. §2915(d), (g) and (k). These state laws cover more private business operations than does ADA Title III and the portion of the FHHA involving real estate transactions. Further, some of these state laws have broader (or at least independent) definitions of what conditions qualify as a "disability." *Brown v. L.A. Unified Sch. Dist.*, 2021 Cal. App. LEXIS 138, *9-11 (Cal. Ct. App., Feb. 18, 2021).

The FCC is worried about "barriers" to deployment but seems unconcerned that those sickened from exposure also face extraordinary "barriers" every day. Tachover@¶¶47-50, 53-56, 74-75, 84-87; Mirin@¶¶16-19, 20-25; Elliot@¶¶11-19; Baran@¶¶33-40, 47; Kesler@¶¶13-14, 42-49; Hoffman@¶¶17, 22-23, 29-32, 38-42; Tsiang@¶¶51, 53; Hertz@¶¶17, 18, 37-40; Jelter@¶¶22-36; Bray@¶¶15, 17; Golomb@¶¶24-27; Architectural and Transportation Barriers Compliance Board, ADA Accessibility Guidelines for Recreation Facilities, 68 FR 56351 (Sept. 3, 2002).

C. Constitutional and common law liberty interests and rights.

Movants and those like them have "negative" individual liberty interests and the inherent right to "bodily autonomy" and "autonomy privacy." They have the

"right to be let alone." *United States v. Rumely*, 345 U.S. 41 (1953); *NAACP v. Patterson*, 357 U.S. 449 (1958); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Bodily integrity requires informed consent, and the right to refuse consent, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269-70 (1990). Movants do not consent to the FCC's "treatment."

In common law and most state statutes, harmful non-consensual irradiation is a "battery." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984); *Carlsen v. Koivumaki*, 227 Cal. App. 4th 879, 890, 174 Cal. Rptr. 3d 339, 351 (2014). Non-consensual irradiation of children can also constitute "child endangerment" that has criminal and civil penalties.[8]

Every person and every parent can refuse a bodily insult that threatens their lives or that of their children. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) held a state may require vaccines. The Court closed its opinion, however, with an important caveat: if the individual can show a *special sensitivity due to a medical*

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

condition there **must** be a *judicial* process for case-by-case exceptions to prevent inhumane or cruel "wrong or oppression." 197 U.S. at 38-39.

For many adults and children government-sanctioned exposure to RF/EMF radiation can rise to the level of cruelty and inhumane treatment described in *Jacobson.* For some it is effectively a death sentence. Tachover@¶¶15, 48-50, 53, 91; Mirin@¶¶16, 21, 23, 42, 50; Elliot@¶¶19, 23, 27-28, 45, 47 55-57; Baran@¶¶9, 27-28, 36, 46, 51; Hoffman@¶¶22, 45-46; Tsiang@¶53; Hertz@¶19, 38, 42; Jelter@¶¶22, 24, 35; Bray@¶14; Golomb@¶¶21, 22, 27-28. Some have died or committed suicide because constant RF exposure was torturing them beyond their ability to survive or cope. Tachover@¶¶75, 76; Hertz@¶19; Jelter@¶35; Bray@¶15; Golomb@¶26. Pervasive RF coupled with already-approaching ubiquity has caused them to lose hope of ever being able to participate in society or appear in public spaces because radiation is already prevalent. Tachover@¶¶47,53,56,74,76, 90; Mirin@¶¶7, 20-26, 48; Elliot@¶¶5, 19, 28, 45-54; Baran@¶¶9, 27, 34, 43-44, 49-54; Hoffman@¶¶38-48; Tsiang@¶¶23, 35, 47, 53; Hertz@¶¶18, 37-43; Kesler@¶¶48-49; Jelter;@¶¶31-35; Bray@¶¶15,17, 22; Golomb@¶¶22-25. Allowing further non-consensual exposure in peoples' homes–their last sanctuary–will sentence many to an impossible situation and turn their lives into a living hell from which there is no escape. The Communications Act

does not delegate the power to authorize death, cruelty or inhumane treatment without any means for case-by-case exemptions or judicial recourse.

The amended rule does not allow for exceptions for those who suffer cruel, inhumane or life-threatening conditions when they are involuntarily exposed. It violates both substantive and procedural due process.

D. Procedural Due Process.

There is a way to reconcile the seeming conflict between the goal for universal service in the Communications Act and the fact that heedless wireless expansion to obtain ubiquity will inevitably, and irreparably, harm certain individuals that cannot tolerate wireless radiation. The Commission can have its general standards and service/technology rules if they survive the other case where they are under review. But it must retain a means for "as applied" individually-based accommodations for those who for whatever reason are individually injured under the general rules. Rule 1.4000 *must* afford notice, opportunity to object and a process for reasonable accommodations. In other words, a means for case-by-case adjudication that is reasonably accessible to those raising these rights. The forum must be available, affordable, and fair. It must have the jurisdiction and power to provide appropriate relief on an *ex ante* and *ex post* basis.

E. APA Claims – arbitrary/capricious/reasoned decisionmaking/response to material comments

"The Administrative Procedure Act . . . permits . . . the setting aside of agency action that is 'arbitrary' or 'capricious.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing 5 U.S.C. § 706(2)(A)). Agency action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency must instead show a "rational connection between the facts found and the choice made." *Brookings Municipal Tel. Co. v. FCC*, 822 F.2d 1153, 1164-1165 (D.C. Cir. 1987). It must take a "hard look" at "all relevant issues" and engage in "reasoned decisionmaking." *Neighborhood TV. Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984).

An agency cannot completely ignore evidence that it does not like. It must review the "whole record," including "whatever in the record fairly detracts from the evidence supporting the agency's decision" and "it may not minimize such evidence without adequate explanation." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018). The agency must respond substantively and meaningfully to all material public comments, especially those "relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule [because they] cast doubt on the reasonableness of a position taken by the agency."

Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977). "Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the [Court's] deferential standards." *Genuine Parts*, 890 F.3d at 312. Rather, the agency must "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983).

The Order is arbitrary and capricious based on each of the flaws identified herein. *OTARD Order* ¶34 dismisses CHD's April 17, 2020 comments and CHD's May 19th Supplemental Filing transmitting members' concerns and objections in one brief and terse paragraph that mischaracterizes, misstates, misconstrues and summarily dismissed several of the points CHD and its members made. 15,090 people joined in CHD's filings. 6,231 declared they have been injured by wireless radiation. CHD's May 19, 2020 supplemental filing contended that the "Commission must also expressly address the problem of emissions that intrude on private property when the property owner has not consented to the intrusion." The *Order* does not satisfactorily address these issues. It leaves "important issues unresolved and suffer[s] for lack of reasoned decision-making." *Id.*

The Commission failed to meaningfully address the comments by CHD and its members detailing substantial injuries, setting out the plights they will face, expressing opposition to the rule change and expressly objecting to nonconsensual exposure. *Order* ¶34 does not explain why the Commission believes it can or should overrule these individual rights or the existing procedural avenues for individual relief it is foreclosing. The small discussion that is there is entirely inadequate given the importance to the members and others who individually took time to share the same concerns. This incorrect and inadequate discussion violates the APA's reasoned decisionmaking requirement.

Order ¶34 fails every aspect of the arbitrary and capricious test since it does none of the things required to pass muster. Movants are likely to prevail on review.

F. Statutory Interpretation Claims; Commission Authority

Order §§23-24 provide an extensive justification for the FCC's position that it does have statutory authority. These include §§154(i), 163(b), Title III generally, and §303 in particular, along with §207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, §207, 110 Stat. 56, 114 (1996). Petitioners disagree. The FCC has exceeded its statutory authority.

Insofar as the question pertains to the FCC's administration of the Communications Act it may be entitled to *Chevron* deference. The question will be whether the provisions in issue are ambiguous and if so whether the FCC's

interpretation is reasonable. *Bldg. Owners & Managers Ass'n*, *supra*. Petitioners contend that the Act is not ambiguous, and Commission's interpretation is not reasonable, as it relates to those individuals who are adversely affected by OTARD-based exposures in their homes. The statute cannot be sensibly read to give the Commission the right and power to consign those who for whatever reason have an individual adverse reaction to exposure to misery and torturous pain and deny them currently-vested procedural due process rights. The Act does not give the FCC the right to sentence innocent people to death without any due process.

The FCC is not eligible for *Chevron* deference when it purports to interpret or attempts to override statutory or Constitutional provisions entirely outside the statute the Commission is charged with administering, especially when, as is the case with the ADA, FHHA and state equivalents, they are administered by several agencies. The court "must decide for [itself] the best reading." *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 155 (D.C. Cir. 2014). The Court's task will be to decide if the Communications Act can be read to overrule or take precedence over the federal, state and local procedural and substantive civil rights laws the Commission's amended rule would expressly discard. Movants have made a strong showing the Act, while broad, does not go that far. They are likely to succeed on the merits when the Court considers this on a *de novo* basis.

II. Petitioners Satisfy the Other Requirements for a Stay.

A. Petitioners are irreparably harmed by the amendments to the OTARD Rule.

The test for the second factor is whether the claimed irreparable harm is "likely." *Winter*, 55 U.S. at 22. The injury "must be both certain and great; it must be actual and not theoretical [and…] of such imminence that there is a 'clear and present' need for equitable relief." *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 529 (D.C. Cir. 2019), *citing Chaplaincy of Full Gospel Churches*, 454 F.3d at 297, *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*per curiam*) and *Doe v. Mattis*, 889 F.3d 745, 782 (D.C. Cir. 2018).

B. The public interest and balance of equities favor a stay.

"In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (*quoting Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542 (1987)).

There is no public interest in perpetuating unlawful agency action. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). *See also League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The FCC will not be harmed by a stay. The Commission's intended beneficiaries are the wireless companies, and they will not be substantially harmed. They have no vested rights to these arrangements. At most they will forgo some

additional revenues and profits they would otherwise gain from the rule.[9] That is not substantial, and is certainly not irreparable, harm. "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Nat'l Lifeline Ass'n v. FCC*, Nos. 18-1026, 18-1080, 2018 U.S. App. LEXIS 25046, at *4 (D.C. Cir. Aug. 10, 2018), *citing Wis. Gas Co. v. FERC*. 758 F.2d 669, 674 (1985); *Petroleum Jobbers,* 259 F.2d at 925. The wireless internet providers did not have the right to this business opportunity before the rule amendment, and they cannot claim irreparable injury will flow from a stay in the effectiveness of the rule pending review.

The true balance is between those who would benefit from yet another choice[10] for broadband in the form of a hub/relay system is established near them, and those who would be harmed by that very same hub/relay system. Ultimately it comes down to whether the Court is willing to countenance absolute devastation of the lives of those who suffer from this condition to marginally benefit some of those who do not. Phrased this way the answer is obvious.

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[9] The *Order* does not contend that Congress *directed* or *mandated* this expansion of wireless provider rights.

[10] Everyone in the US has access to satellite data service, so this arrangement will merely expand competitive alternatives. Tachover@¶ 93; Mirin@¶28; Baran@¶¶41, 55; Hertz@¶42.

The harm to Movants is certain. It will be immediate, severe and irreparable. Their lives will be changed forever. With a stay the Movants and those like them can remain at home and continue under their current conditions. Tachover@¶53; Mirin@¶¶6, 21-26, 30,42-44, 48-50; Elliot@¶¶8, 17, 28, 38-54, 55-57; Baran@¶¶9,28-31, 40-56; Kesler@¶¶41-49; Hoffman@¶¶34-35, 43-48; Tsiang@¶¶5-6, 38-54; Hertz@¶¶31-38, 40-41; Jelter@¶¶20,35; Bray@¶17, 20, 22; Golomb@¶¶24, 25, 27, 28. If Petitioners lose on the merits, then Movants will have at least some opportunity to find other refuge after the decision and before issuance of the mandate.

The harm to those who want hub/relay service would, however, be temporary. If the FCC prevails on the merits the stay will be lifted, the rule will go into effect and those who want hub/relay based service can soon have it. Their gratification is merely delayed. Tachover@¶94-95.

CONCLUSION

The amended OTARD Rule is unlawful, will irreparably harm Petitioners, and is contrary to the public interest. This Court should stay the Rule pending review.

Respectfully Submitted

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Dated: March 18, 2021

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

Petitioners' Emergency Motion for Stay complies with the type-volume limitation and typeface requirements of FRAP 27(d)(2) and 32(a)(5) and (6) because the portions subject to length limits contain 5124 words and has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font size and Times New Roman type style.

_/s/_____
W. Scott McCollough

Dated: March 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2021, I electronically filed the foregoing Petitioners' Emergency Motion for Stay and exhibits in support with the Clerk of the Court by using the appellate CM/ECF System, hand-delivered four copies to the Court, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

_/s/_____
W. Scott McCollough