# United States Court of Appeals
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-1075
(FCC-86FR11432)

Petition for Review of Order Issued by the
Federal Communications Commission

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

## PETITION FOR PANEL REHEARING

Robert F. Kennedy, Jr.
Children's Health Defense
48 Dewitt Mills Road
1227 North Peachtree Pkwy, Suite 202
Peachtree City, Georgia 30269
EMAIL: rfk.fcc@childrenshealthdefense.org
TEL: 512.633.3498
FAX: 512.692.2522

W. Scott McCollough
McCollough Law Firm, P.C.
2290 Gatlin Creek Rd.
Dripping Springs, TX 78620
EMAIL: wsmc@dotlaw.biz
TEL: 512.633.3498
FAX: 512.692.2522

*Counsel for all Petitioners*

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## SUMMARY OF PETITION FOR PANEL REHEARING

Children's Health Defense, Dr. Erica Elliot, Ginger Kesler, Angela Tsiang and Jonathan Mirin ("Petitioners") hereby respectfully request panel rehearing of the opinion and judgment dated February 11, 2022. This petition is timely under Federal Rules of Appellate Procedure 40(a)(1)(a) and (b).

1. This case has the type of exceptional importance contemplated by Federal Rules of Appellate Procedure 35(a)(2) and (b)(1)(B). The Over-the-Air Reception Device rule amendment allowing placement of powerful carrier owned commercial hubs (base stations) to serve wide areas in lieu of less-powerful customer-owned equipment that primarily serves only the premises wreaks havoc with the licensing regime contemplated by the Communications Act and is antagonistic to Congress' prescribed regulatory requirements and policy. It completely ignores important differences between a carrier's network facilities and a customer's on-premises equipment. It turns users into carriers, but without any regulatory oversight. The amended rule cannot be reconciled with the licensing and provider/user regime intended by Congress.

More important, the amended rule's operation is ruining lives and driving people from their homes – the most constitutionally-protected place on Earth.

2. The panel should revisit and change the *sua sponte* holding on Slip op. pp. 7-8 that the argument the Commission lacks statutory authority under 47

U.S.C. §303 to discard the statutorily imposed distinction between carrier-owned commercial base station equipment and customer-owned end-use equipment was not adequately preserved. This ruling is premised on a clear misapprehension of the record evidence. Contrary to the statement on Slip op. p. 8 "other parties to the rulemaking" clearly and unequivocally *did* "expressly question the Commission's authority under §303." The *Order* shows the FCC was aware its authority to act under §303 was being challenged and that alone is sufficient.

The panel's misapprehension of the underlying facts and law directly lead to an error in the application of this Circuit's precedent relating to exhaustion and preservation of error for purposes of a petition for review. The panel must correct this error and then address the merits of the Commission's §303 authority.

3. The decision wrongly treats this matter as involving only a facial challenge to the amended rule. Dr. Erica Elliot, Ginger Kesler, Angela Tsiang and Jonathan Mirin clearly and unequivocally also raised discrete, as-applied individual property, liberty, autonomy and due process claims that the Court did not address or resolve.

4. The panel failed to rule on Petitioner Ginger Kesler and Petitioner Erica Elliot's individual as-applied claims the amended rule constitutes a taking and is unlawful. This issue was fully preserved and briefed but was overlooked

within the meaning of Federal Rule of Appellate Procedure Rule 40(a)(2). The Court must decide the issue.

5. The Court's holding the Commission could ignore Petitioners' claim that the *Order* and amended rule violates Petitioners' constitutional liberty, autonomy and due process rights was legal error. These are constitutional issues; they relate to the specific amended rule under challenge and later resolution in some other proceeding concerning a different rule will not rectify the current, ongoing deprivation of rights flowing from ***this rule***.

The Court should grant rehearing, address the merits and resolve them in Petitioners' favor. It should then vacate the *Order* and rule amendment and remand to the Commission.

## ARGUMENT

### I. This Case Involves Issues of Exceptional Importance

This case has the type of exceptional importance contemplated by Federal Rules of Appellate Procedure 35(a)(2) and (b)(1)(B). The amended rule "wreaks havoc with the licensing regime contemplated by the Communications Act[1] and its fundamental distinction between 'service providers' (private or common carriers) and 'service consumers' (end users). The amendment is antagonistic to Congress' prescribed regulatory requirements and policy." Petitioners' Brief pp. 24. The rule "shatters longstanding distinctions between carrier-providers and subscriber-users. It completely ignores important differences between a carrier's network facilities and a customer's on-premises equipment. It turns users into carriers, but without any regulatory oversight. *Id.* pp. 47, 51, 56-60, 61-62, 63-64. Further, the amended rule effectively overrides Congress' express retention of local jurisdiction over carrier base station placement, subject to "must approve" obligations relating to "minor modifications" to existing facilities. 47 U.S.C. §1455(a); Petitioners' Reply Brief p. 23.

More important, these newly approved facilities are ruining lives by causing injury and potential death and leading to constructive evictions from people's homes – "the most constitutionally protected place on earth." *United States v.*

[1] 47 U.S.C. §151, *et seq*.

*Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008). Petitioners' Brief pp. 20, 21-24. The Court must resolve the issues it wrongly avoids in the decision in order to obtain justice and save lives.

## II. The Decision Misapprehends Significant Factual and Legal Issues Related to Issue Preservation Resulting in Prejudicial Error

The panel should revisit and change the holding on Slip op. pp. 7-8 that Petitioners' argument the Commission lacks statutory authority under 47 U.S.C. §303 was not adequately preserved.[2] This ruling is premised on a clear misapprehension of the record evidence. Contrary to the statement on Slip op. p. 8 "other parties to the rulemaking" clearly and unequivocally *did* "expressly question the Commission's authority under §303" and the *Order* itself clearly shows the FCC was aware its §303 authority was being challenged. The Court therefore "overlooked or misapprehended a point of fact and law" within the meaning of Federal Rule of Appellate Procedure Rule 40(a)(2).

Local authorities and multi-tenant property owners directly contended the Commission lacked authority under §303 to bring commercial-grade carrier equipment within the rule.[3] Most did so primarily through arguments that

[2] The panel raised issue preservation *sua sponte*. While courts always have the duty to independently assess jurisdiction it is notable the FCC did not assert it had no opportunity to pass on this aspect of §303 authority. *See* FCC Brief pp. 29-44. Nor could it have plausibly made the claim since as shown below the *Order* itself extensively addressed this very topic.

[3] JA3109-3119, 3128-3132, 3156, 3190-3201, 3223-3225, 3847-3858.

Congress' adoption of "Section 207" in the 1996 amendments,[4] especially when read in concert with 47 U.S.C. §332(c)(7), did not authorize the action. Each of these commentors expressly asserted that carrier hubs are much different than customer-end equipment and nothing in the Communications Act – including §303 in whole or Section 207 in particular part[5] – allowed preemptive expansion of the rule to cover carrier hubs. These commenters opposing adding hubs (base stations) to the rule clearly and directly challenged the Commission's §303 authority.

47 U.S.C. §405(a) does not "require an argument to be brought up with specificity, but only reasonably 'flagged' for the agency's consideration." *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016) (quoting *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998)). The central question is "whether a reasonable Commission necessarily would have seen the question raised before us as part of the case presented to it." *Id.* If the issue is necessarily implicated by the argument made to the Commission, §405(a) does not bar review. *See, e.g., National Ass'n for Better Broadcasting v. FCC*, 830 F.2d 270 (D.C. Cir. 1987). The local authorities' and multi-tenant property owners' assertions that Section

[4] Pub. L. 104–104, title II, § 207, Feb. 8, 1996, 110 Stat. 114 (codified at 47 U.S.C. §303, note).

[5] The Court's error may simply stem from a failure to apprehend that Section 207 is codified as a note to §303 and directs the Commission to use its §303 powers. Any discussion of Section 207 authority necessarily brings along §303 authority.

207 – a part of §303 – did not allow the FCC to bring carrier-owned based stations into the rule was more than sufficient to "tee[] up" the issue before the Commission. *Time Warner*, 144 F.3d at 81. Petitioners have now raised "the same basic argument in a more polished and imaginative form." *Sw. Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1007-1008 (D.C. Cir. 1996). But the Petitioners' argument presented the same basic claims regarding authority under §303 the commenters made below.

In any event, the *Order* extensively addressed §303 authority, although its conclusions were erroneous. For example, *Order* ¶23 (JA0014) in the "legal authority" portion of the *Order* expressly mentions "hub sites" – which ¶14 (JA0007-008) twice agrees is a carrier-owned "base station" (*e.g.*, carrier equipment).[6] The FCC manifestly understood that its authority to expand "Over-the-Air Receiving Devices" preemption to cover carrier-owned commercial hub (base station) equipment was being questioned. *Order* ¶¶23-31 (JA0014-0019). The Commission's clear awareness satisfies the requirements of §405(a). *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972). Therefore, the issue is properly before the Court.

The panel's error regarding the facts of the case and the record below lead to prejudicial variance from this Circuit's precedent on exhaustion and preservation

[6] *See also*, *Order* ¶26, n.106 (JA0016).

of error in general and in the context of §405(a). As a result, the Court erred when it did not rule on the Commission's authority, thereby avoiding an issue that directly affects the individual Petitioners and millions of other people.

If the FCC thinks its governing statute is "obsolete"[7] it must apply to Congress; it cannot so cavalierly obliterate the boundaries and strictures in §303. For better or worse, the Act establishes a fundamental distinction between service providers (private or common carriers) and service consumers (end users). Pretending that powerful private carrier service is actually innocuous end-user (consumer) sharing[8] might "increase competition"[9] but the Commission does not have the authority to alter the well-established statutory carrier-provider/user-customer structure. *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 234 (1994), *citing Maislin Indus., U.S. v. Primary Steel*, 497 U.S. 116, 135 (1990).

The panel must grant rehearing, hold the issue of authority under §303 was preserved, and then decide the merits of the fully briefed and argued question.

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[7] *See Order* ¶11 (JA0006); FCC Brief pp. 2, 13, 30.

[8] *Order* ¶20 (JA0012); *but see* Petitioners' Brief pp. 51-60.

[9] *Order* ¶¶11 (JA006), 12 (JA007), 26 n107 (JA0016), 28 (JA0017). *But see* Petitioners' Reply Brief pp. 20-21 (explaining amendment provides significant competitive advantage to private carriers).

## III. The Panel Failed to Rule on Petitioners' Claim the Amended Rule Constitutes a Taking and is Unlawful

The Petitioners contend the amended rule constitutes an unlawful taking, but the opinion fails to rule on this claim.[10] The opinion asserts three times (Slip op. at 10, 11) that Petitioners were raising facial claims. That is true, but Kesler (on behalf of herself and two sons who also suffer from Radiation Sickness) and Elliot also raised very discrete "as-applied" challenges as to their own individual circumstances.[11] Petitioners' Brief p. 3 ("this matter involves persons who are or will be individually injured…"), p. 64 ("This case is about specific individuals that will be harmed"); p. 65 ("this is no response for those who–like the Petitioners–are disabled and own or rent and reside on completely different properties and did not voluntarily enter any contractual relationship with the carrier or the property owner or renter where the equipment is placed. They have surrendered no rights in any manner, contractually or otherwise. Placement and operation of newly-authorized equipment will directly, severely harm and divest them of vested contract rights").

Slip op. p. 4 recognizes that Petitioners asserted violations of their contractual property rights, which are protected by the Fifth Amendment. Page 5 finds that Petitioners Kesler and Elliot previously enjoyed the benefit of deed

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[10] Children's Health Defense raised this below, so the issue was preserved. JA0058, JA0062-0063, JA0065-0067.

[11] *See Abbott Laboratories v. Gardner*, 387 U. S. 136, 154 (1967) (allowing pre-enforcement challenges on an as-applied basis).

restrictions limiting antenna installation and commercial activities in their communities and had purchased their homes in reliance on those valuable restrictions. The opinion agrees that the rule amendment directly in issue preempts these restrictions. Petitioners have not – in clear contrast to the situation in *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 97-99 (D.C. Cir. 2001) – individually and voluntarily waived or contracted away their "right to exclude" in any manner.

The rule amendment is a *per se* taking for these Petitioners. Its operation prevents them from occupying or personally using their own property. At minimum it is a regulatory taking. Either way, the rule change affects an "identifiable class of instances" where application of the rule will necessarily constitute a taking. 254 F.3d at 97, *citing Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994) and *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 128 n.5 (1985). The "identifiable class" in this case is those who have the now-unenforceable restrictive covenants specifically targeted by the rule and must thereby suffer carrier base station antennas emitting radiation. This is a similar class to the one in *Bell Atlantic* where targeted "LECs" were forced to accept non-physical "virtual co-location" by third party carriers.

Electromagnetic energy may be incorporeal,[12] but it still has physical force and there is a clear physical effect on those property owners. For those like Kesler and Elliot it is so severe they become quite ill and often must flee. The intrusion may be a "nuisance" rather than a "trespass" but it is still destructive of the landowner's right to possess and use her land. *Palisades Citizens Assn., Inc. v. CAB*, 420 F.2d 188, 191 (D.C. Cir. 1969), *citing Griggs v. Allegheny Cty.*, 369 U.S. 84 (1962) and *United States v. Causby*, 328 U.S. 256 (1946).

Nor is the rule saved by the Tucker Act. *C.f.*, *BOMA*, 254, F.3d at 100-103 (Randolph, J. concurring). That is so because truly "just" compensation is not available – if at all. *See Qwest Corp. v. U.S.*, 48 Fed. Cl. 672, 694 (2001). If there is any compensation it is only for the diminution of fair market value or the loss in economic use and value flowing from the taken restrictive covenant. *A&D Auto. Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014). But the *actual damages* are far higher, indeed perhaps immeasurable, for those who must flee their home. They will have to search in vain for a like replacement with no nearby offending wireless facilities and no threat of one showing up unannounced in the

[12] The "intrusion" by electromagnetic energy is typically treated as "incorporeal" and not "physical" since it manifests through electrons. The Court of Federal Claims rejected a Tucker Act claim by a telecommunications company required to provide circuits to third parties as part of a virtual co-location arrangement. It directly held that invasion by "electrical impulses" was not a physical taking. *Qwest Corp. v. U.S.*, 48 Fed. Cl. 672, 694 (2001).

future. The rule's operation effectively renders them homeless regardless of their financial condition. Petitioners' Brief pp. 20, 23, 24, 32, 33, 68, 77.

The "*Order* failed to meaningfully speak to why it should preempt unrelated property owners' rights…" Petitioners' Brief p. 66.[13] This issue was fully preserved and briefed but was overlooked within the meaning of Federal Rule of Appellate Procedure Rule 40(a)(2). This must be corrected on rehearing, especially as to the Kesler and Elliot as-applied challenges.

These Petitioners may (or may not) be individually barred from any subsequent "as-applied" depending on how the opinion is construed. *Compare PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2060 (2019) *with Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (different *res judicata* outcomes). At minimum this Court should clarify whether Petitioners Kesler and Elliot are now precluded from bringing subsequent as-applied challenges in an appropriate venue, including under the Tucker Act, given the opinion's holding the case here involved only facial claims.

[13] *Order* ¶¶32-33 (JA0019-0020) address the interests of the property owners where the equipment will be placed, but nowhere does the *Order* consider the interests of nearby property owners that will also be affected, such as through invalidation of a restrictive covenant.

## IV. The Court's Holding the Commission Can Address Petitioners' Claim That the Order and Amended Rule Violates Petitioners' Constitutional Liberty and Autonomy Rights in Some Other Proceeding Was Legal Error

Slip op. pp. 8-9 holds the Commission can address Petitioners' claim that the Order and amended rule violates Petitioners' constitutional liberty and autonomy rights in some other proceeding. This was prejudicial legal error. These are constitutional liberty and autonomy issues brought by particular individuals whose own rights were directly violated by the specific amended rule under challenge. Petitioners' Brief pp. 74-78. In other words, contrary to the opinion's assertions on pp. 10-11 that the case involves only facial claims, the Petition raises both facial and as-applied challenges. Each individual Petitioner sought relief based on specific injuries particular to that person. Erica Elliot will get sicker and lose her prized home that she intentionally purchased specifically because of the restrictive covenant.[14] Ginger Kesler and two of her children will suffer the same fate.[15] Angela Tsiang's two sons will once again face serious health crises and may not survive.[16] Jonathan Mirin and his son will be forced to watch a wife and mother suffer another health collapse and perhaps even die.[17] These Petitioners – mothers, fathers, wives, husbands and one that is alone and up in years – are trying to save

[14] Petitioners' Brief Addendum II pp. 191-228.
[15] Petitioners' Brief Addendum II pp. 259-284.
[16] Petitioners' Brief Addendum II pp. 229-258.
[17] Petitioners' Brief Addendum II pp. 162-190.

themselves and their family. Their only option will be to leave their home and desperately search for another safe place. But with this rule there will be no home, no sanctuary, no refuge anywhere at all because no matter where they go a new antenna may show up unannounced at any time. Their "notice" will come later, in the form of renewed horrifying symptoms.

Petitioners were quite clear they were asserting individual rights and bringing a facial and an as-applied challenge. *See* Petitioners' Brief p. 74 ("Petitioners each have personal rights and liberties secured through the Constitution…"); p. 76 ("These rights are personal… the unrebutted evidence demonstrates will directly injure, and perhaps even kill, the Petitioners thus denying express and recognized negative rights…The amendment directly authorizes the carriers to forcibly subject the Petitioners to suffer bodily intrusions in the form of radiofrequency radiation"); pp. 76-77 ("The carrier rights granted by the rule therefore directly result in deprivations of the Petitioners' rights. The federal government is allowing, indeed encouraging, carriers to maim, sicken, kill Petitioners, and ultimately drive them from their most cherished and constitutionally-protected space–the home…As a result of the amendment Petitioners will be made sick or sicker, thereby depriving them of their rights to 'liberty' and 'life.' The Petitioners will have to flee their homes, thus losing all use and enjoyment of their home, which is of course a type of property. The Petitioners

are challenging a positive act, not a failure to act or protect from harm. The FCC actively and knowingly took action that transgresses the Petitioners' fundamental express and 'penumbral' rights and liberties.") (underline emphasis added).

The Court agreed individual rights were threatened and thus Petitioners have standing, Slip op at 5, but it did not resolve the liberty and autonomy claims on the merits. To the extent the Court intended to dispose of these constitutional issues as part of its holding the FCC has discretion to "relegate ancillary issues to separate proceedings" (Slip op. p. 9) that was plain error. The liberty/autonomy violations here are not "ancillary." They directly flow from ***this rule***. Later resolution in some other proceeding involving a different rule will not rectify the current, ongoing deprivation of these Petitioners' rights to life and liberty from ***this rule***.

The constitutional violations are ongoing and impact the Petitioners every day. Some may die and others will be driven from their homes before the FCC ever gets around to considering the serious adverse impact ***this rule*** has on people's lives. Allowing the FCC to vaguely hint it will handle the problem in a future proceeding involving some other rule "runs afoul of a basic principle of administrative law: an agency faced with a claim that a party is violating the law (here [individual liberty and property interests]) cannot resolve the controversy by promising to consider the issue in a prospective legal framework." *City of Miami v. FERC*, Nos. 20-1325, Consolidated with 20-1446, 2022 U.S. App. LEXIS 1259 at

*7 (D.C. Cir. Jan. 18, 2022)(to be reported at 122 F.4th 1039), *citing AT&T v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992) and *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 222, (1994)[bracketed text substituted]. The panel decision directly conflicts with a different panel decision (issued three weeks prior) and other D.C. Circuit and Supreme Court precedent.

These constitutional violations are ongoing and will continue. Any decision in some other rulemaking will operate only prospectively. The injury Petitioners are suffering today cannot be retroactively repaired through damages. The FCC knowingly did this to Petitioners and it cannot fairly be granted administrative scheduling discretion[18] regarding how, if ever, it will end these ongoing violations.

## V. The Opinion Failed to Resolve Petitioners' Procedural Due Process Claims

The decision did not mention, much less resolve, Petitioners' claim that the *Order* and the specific amended rule before the Court violate Petitioners' procedural due process rights.[19] Petitioners' Brief pp. 78-80; Petitioners' Reply Brief pp. 32-34. The problem here is particular to ***this rule*** and has nothing to do with any other rule or potential future proceeding. ***This rule*** allows unilateral facility placement and operation. ***This rule*** eliminates state law rights to notice and

[18] *But see* Slip op. p. 9, n4.

[19] Slip op. pp. 11-12 & n6 mention First Amendment issues but the Court did not squarely address the Fifth Amendment due process claims.

an opportunity for hearing. ***This rule*** violates Petitioners' Fifth Amendment due process right to a pre-deprivation hearing. Neither the emissions guidelines nor ***this rule*** provides a "relief valve for great wrongs in unique or individual cases." Petitioners' Reply Br. p. 33.

## CONCLUSION AND PRAYER

The Commission is not just "skating on thin ice." *C.f.* Slip op. p. 12, n6. The *Order*'s skate blades have no solid support in §303. Yet the amendment affects a hockey-style blindside stick-swinging sucker punch on the Petitioners and all those similarly situated. The FCC is knowingly, callously and purposefully putting Petitioners' lives at risk, driving them from their homes and forcing them to once again search – probably in vain – for a new place of refuge from involuntary toxin-induced suffering they have made every effort to avoid. The Court must blow its whistle, signal the penalty and end this administrative tyranny.

All the merits issues were fully briefed. The Court has all it needs to resolve the issues it failed to address, and it should do so. Petitioners respectfully request this Court to grant Panel Rehearing, resolve the issues the panel opinion erroneously did not address, find in favor of the Petitioners on those issues and then vacate the *Order* and rule amendment and remand to the FCC.

Respectfully Submitted,

*/s/ Robert F. Kennedy, Jr.*
Robert F. Kennedy, Jr.
Children's Health Defense
1227 North Peachtree Pkwy #202
Peachtree City, GA 30269
Phone: 512.633.3498
rfk.fcc@childrenshealthdefense.org

*/s/ W. Scott McCollough*
W. Scott McCollough
McCollough Law Firm, P.C.
2290 Gatlin Creek Rd.
Dripping Springs, TX 78620
Phone: 512-633-3498
wsmc@dotlaw.biz

Counsel for Petitioners

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with requirements of Federal Rule of Appellate Procedure 40(b)(1) and D.C. Circuit Rule 35(b) because it contains 3,805 words according to the count of Microsoft Word.

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

## CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2022 I filed the foregoing in the United States Court of Appeals for the District of Columbia Circuit via the CM/ECF system. I further certify that all parties are registered CM/ECF users, and that service will be accomplished via electronic filing.

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

# ADDENDUM TO PETITION FOR PANEL REHEARING

## 1. Panel Opinion

(Begins next page)

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued December 7, 2021 Decided February 11, 2022

No. 21-1075

CHILDREN'S HEALTH DEFENSE, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

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

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*W. Scott McCollough* argued the cause for petitioners. With him on the briefs was *Robert F. Kennedy Jr.*

*Stephen Diaz Gavin* was on the brief for *amici curiae* Safe Technology Minnesota, et al. in support of petitioners.

*William J. Scher*, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Todd Kim*, Assistant Attorney General, U.S. Department of Justice, *Justin D. Heminger* and *Allen M. Brabender*, Attorneys, and *Jacob M. Lewis*, Associate General Counsel, Federal Communications Commission.

Before: MILLETT and KATSAS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

RANDOLPH, *Senior Circuit Judge*: This is a petition for judicial review of an amendment to a regulation of the Federal Communications Commission. The regulation, as originally promulgated, authorized the installation on private property, with the owner's consent, of "over-the-air reception devices," regardless of State and local restrictions, "including zoning, land-use, or building regulation[s], or any private covenant, homeowners' association rule or similar restriction on property." Telecommunications Act of 1996; Preemption of Restrictions on Over-the-Air Reception Devices, 61 Fed. Reg. 46,557, 46,562 (Sept. 4, 1996) (codified at 47 C.F.R. § 1.4000(a)(1)). Back then, property owners used such antennas to receive direct satellite services, video programming, and television broadcast signals. *Id.* The regulation preserved local authority to impose "certain restrictions for safety and historic preservation purposes." Promotion of Competitive Networks in Local Telecommunications Markets, 15 FCC Rcd. 22,983, 23,027–28 (2000). The regulation also covered antennas capable of both receiving radio waves and transmitting signals. *Id.* at 23,027.

The FCC has amended its regulation several times. *See Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 91–93 (D.C. Cir. 2001). In 2004, the Commission determined that these antennas could serve not only a single property owner but also multiple customers in one location, provided the antennas were not "designed primarily for use as hubs for distribution of service." Promotion of Competitive Networks, 19 FCC Rcd. 5637, 5644 n.42 (2004). The 2004 order continued to stress that the regulation governed only "customer-end

equipment" serving "*the customer on such premises*." *Id.* at 5644. It did not cover carriers' locating "hub-sites on the premises of a customer in order to avoid compliance with a legitimate zoning regulation." *Id.*

In 2019, the Commission solicited comments on expanding coverage to include antennas that act as "hub sites" or relay service to other locations—thus, eliminating the 2004 prohibition on antennas "designed primarily for use as hubs for distribution of service." *See* Updating the Commission's Rule for Over-the-Air Reception Devices, 34 FCC Rcd. 2695, 2696, 2699 (2019). In its finalized order, the Commission expanded its regulatory preemption when: "(1) the antenna serves a customer on whose premises it is located, and (2) the service provided over the antenna is broadband-only." Updating the Comm'n's Rule for Over-the-Air Reception Devices, 36 FCC Rcd. 537, 540 (2021) [hereinafter Order] (amending 47 C.F.R. § 1.4000). The Order maintained several limitations, including the exemption for local "restrictions necessary for safety and historic preservation" and "requirements that antennas must be less than one meter in diameter or diagonal measurement." *Id.* at 540–41.[1] Local restrictions on antennas extending "more than twelve feet above the roofline" also continued to control land use. Preemption of Local Zoning Regulation of Satellite Earth Stations, 11 FCC Rcd. 19,276, 19,299 (1996); *see* Order at 540, 548 n.83.

Many comments, including those of the petitioners in this case, expressed concern about possible health effects from increased radiofrequency exposure. Petitioner Children's Health Defense (CHD) argued that the proliferation of commercial-grade antennas would increase the suffering of those with

[1] The Order stated that "there is no 'aesthetics exception' under" the rule. Order at 548.

radiofrequency sensitivity—violating their rights under the Americans with Disabilities Act (ADA), the Fair Housing Act (FHA), and the U.S. Constitution's protections of private property and personal autonomy. CHD also asserted that the amendments would deny affected individuals fair notice and an opportunity to be heard.

I.

The Commission suggests that none of the individual petitioners have Article III standing because they fail to show individualized risks of increased harm from the amendment of the regulation. The individual petitioners claim that they or their family members will suffer injury if new commercial-grade antennas get installed near their properties due to the Order's permissiveness. The Commission posits that fears of greater antenna proliferation from the Order are not enough. In the Commission's view, even if new antennas get installed near petitioners, it would not be apparent whether the deployments happened because of the Order.

The Commission is correct that anyone claiming injury from an agency's action or inaction, but who is not otherwise regulated directly, encounters some difficulty in establishing standing. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015). But "if the complainant is 'an object of the action (or forgone action) at issue' . . . there should be 'little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'" *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992)); *see also State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015). Here, two of the petitioners' interests are impacted directly by the Order.

The Order purports to preempt not only state and local regulations governing installation of relevant antennas, but also deed restrictive covenants. Order at 542–43. Petitioners Dr. Erica Elliott and Ginger Kesler allegedly suffer from radiofrequency sensitivity. They purchased homes in communities with restrictive covenants limiting antenna installation. Dr. Elliott's community has a charter requiring approval of new antennas and restricting the use of residential property for commercial activities. Ms. Kesler lives in an area with a homeowners' association; community by-laws and deed restrictions prohibit the installation of wireless antennas over two feet and commercial activity. Ms. Kesler purchased her home in part because of these restrictions.

Potential impairment of contractual or property rights can create an injury in fact. *See Sw. Power Pool, Inc. v. FERC*, 736 F.3d 994, 996 (D.C. Cir. 2013); *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004); *Idaho Power Co. v. FERC*, 312 F.3d 454, 460 (D.C. Cir. 2002). The restrictions just mentioned are, according to Dr. Elliott and Ms. Kesler, valuable because they prevent the installation of allegedly harmful commercial-grade antennas. By preempting these protections, the Order poses a direct threat to these petitioners' interests. These petitioners are thus an object of the Commission's Order—in the same way a municipality's zoning regulations would be an object of the Order. *See* Order at 542. Dr. Elliott and Ms. Kesler therefore have Article III standing. They need not show some greater probability of harm from the regulation of third parties. *Compare Defs. of Wildlife*, 504 U.S. at 561–62, *with Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295 (D.C. Cir. 2007). And because Dr. Elliott and Ms. Kesler are CHD members, and the other elements of standing are plainly satisfied on this record, CHD has associational standing. *See Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir.

2013).[2]

II.

A.

Petitioners' initial contention is that the Commission did not establish its statutory authority for amending the regulation to include "hub and relay antennas that are used for the distribution of broadband-only fixed wireless services" even if "they are primarily used for this purpose . . .." Order at 537; *see Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010).

Paragraph 26 of the Order identifies Section 303 of the Communications Act as granting it authority to "adopt rules governing services that use spectrum as well as rules applicable to antennas and other apparatus[es]." Order at 550–51 & n.102. Section 303(d) allows the Commission to "[d]etermine the location of classes of stations or individual stations." 47 U.S.C. § 303(d).

The Commission treats "antennas" as "stations." Footnote 102 of the Order cites the Commission's *Continental Airlines* decision, which explained why "antennas are 'stations' for [the] purposes of section 303(d)." Order at 550 n.102. *Continental Airlines* points to Act's definitions section. 21 FCC Rcd. 13,201, 13,217 & nn.107–08 (2006). The statute defines "'radio station' or 'station'" as "a station equipped to engage in radio communication or radio transmission of energy." 47 U.S.C. § 153(42). The phrase "radio communication" includes "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities,

[2] Because we conclude that CHD has associational standing, we do not address whether it has organizational standing.

apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." *Id.* § 153(40).

The definition of "radio communication" encompasses much of what is on the Internet—visual images, audio, and text. The technology involved here uses the radio-wave spectrum. Order at 550–51 n.102. And the Commission emphasizes the growth of online streaming services as a justification for expanding its antenna regulation. *Id.* at 545–46. The *Continental Airlines* decision's treating antennas as stations, with its reasoning anchored in the Act's text, survives any level of scrutiny. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). The Commission's citation of and reliance on *Continental Airlines* provided sufficient explanation for its authority to expand the regulation to hub-and-relay antennas carrying broadband Internet. *See* 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

Petitioners contend that Section 303 cannot support the Order. They claim that the Act erects a distinction between carrier equipment and end-user equipment—a distinction the Order obliterates. Whatever the merits of this argument, the issue is waived. Under 47 U.S.C. § 405(a), petitioners must "give the FCC a 'fair opportunity' to pass on a legal or factual argument." *Wash. Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983) (quoting *Alianza Fed. de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976)); *see also Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 21 (D.C. Cir. 2017); *Am. Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1177 (D.C. Cir. 1995).

Nowhere in CHD's ex parte submission or in the individual

petitioners' comments is the question of the Commission's authority under Section 303 raised. The closest CHD comes to presenting this issue is its statement: "Nor is this particular proposed rule reasonably necessary to the effective performance of the FCC's various responsibilities." J.A. 66. But this generality is not enough to preserve every conceivable claim of unlawful action. *See Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016) (citing *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004)).[3] Nor were the petitioners' arguments raised by other parties' comments that the Commission lacked statutory authority. The other parties to the rulemaking proceeding did not question the Commission's authority under Section 303. *Contrast Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 380 (D.C. Cir. 2020).

B.

Petitioners say the Order lacks a reasoned foundation because the Commission disregarded the human health consequences of its action. The Order's intended effect is to increase the number of antennas installed on private property. Petitioners assert that the result will be an increased risk of harm to individuals who are sensitive to radiofrequency electromagnetic radiation.

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[3] Even if petitioners did not become aware of the Commission's view that Section 303 provided promulgating authority until after the Order issued, that does not spare them of the obligation to give the Commission opportunity to address their arguments. In such instances, challengers must seek reconsideration from the Commission before raising the matter in this court. *See In re Core Commc'ns, Inc.*, 455 F.3d 267, 276–77 (D.C. Cir. 2006); *Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 182 (D.C. Cir. 1997); *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1169–70 (D.C. Cir. 1994).

The Commission dismissed these concerns by pointing to a 2019 order that studied the effects of exposure to wireless radiofrequency on human health and concluded that there was no need to implement stricter exposure limits. Order at 555 & n.133 (citing Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields, 34 FCC Rcd. 11,687 (2019)). The Commission also noted that concerns about possible health effects from radiofrequency were "more appropriately directed" at the radiofrequency rulemaking and, hence, the comments regarding adverse effects were "outside the scope of this proceeding." *Id.* at n.133.

Ordinarily, an agency may dispose of claims by relying upon other rulemakings. *See Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993). Agencies can also limit the scope of their rulemaking and "relegate ancillary issues to separate proceedings." *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 659 (D.C. Cir. 2019) (per curiam); *see also Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 231 (1991). The Commission therefore properly dispensed petitioners' health-and-autonomy-based claims by relying on its 2019 order.[4]

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[4] This court remanded a case contesting the 2019 order because the Commission did not give sufficient reasons for its conclusions regarding the impact of radiofrequency waves on human health. *See Env't Health Tr. v. FCC*, 9 F.4th 893, 910 (D.C. Cir. 2021). But this does not require a remand here. As explained, the Commission expressly limited the scope of its rulemaking and directed comments regarding radiofrequency and health to the 2019 order's rulemaking. Order at 555 n.133. Agencies generally have discretion to break up their process of regulating into separate rulemaking proceedings—they "do not ordinarily have to regulate a particular area all at once." *Transp. Div. of the Int'l Ass'n of Sheet Metal Workers v. Fed. R.R. Admin.*, 10 F.4th 869, 875 (D.C. Cir. 2021); *see Personal Watercraft*

Petitioners argue that the amendment to the regulation will violate the FHA and the ADA. It is unnecessary to go into any detail about how exactly the amendment would supposedly bring about these violations.[5] It is enough to point out that here, as in *Building Owners*, 254 F.3d at 100, petitioners are mounting a facial challenge. Whatever the validity of their FHA and ADA analyses, their allegations depend on the presence, within the range of a hub or relay antenna, of an individual who is adversely affected by radiofrequency radiation. The upshot is that there necessarily will be circumstances in which the amendment of the Order will have no adverse consequences because no such individual is in the vicinity. Yet in order to succeed in their facial challenge, petitioners had to show that there are no circumstances in which amendment of the regulation would be valid. *See Reno v. Flores*, 507 U.S. 292, 300–01 (1993); *INS v. Nat'l Ctr. for Immigrants Rts., Inc.*, 502 U.S. 183, 188 (1991); *Cellco P'ship v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012); *Air Transp. Ass'n of Am., Inc. v. U.S. Dep't of Transp.*, 613 F.3d 206, 213 (D.C. Cir. 2010); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 Geo. Mason L. Rev. 29, 75 n.193 (2019); Aaron L. Nielson, *D.C. Circuit Review - Reviewed: Thoughts from Judge Randolph*, Yale J. on Regul. Notice & Comment (Dec. 8, 2017), https://perma.cc/T87D-HCXY.

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*Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 544–45 (D.C. Cir. 1995). As such, it was not arbitrary for the Commission to direct petitioners to the 2019 order's rulemaking, which remains ongoing in light of our remand.

[5] Petitioners maintain in this court that the Commission's amendment will "preempt rights afforded by the FHA/ADA." This position is frivolous—a regulation can no more preempt a federal statute than a federal statute could preempt a provision in the Constitution.

Moreover, petitioners' arguments regarding the FHA and ADA are premised on the impact of radiofrequency exposure. But, as with petitioners' general concerns regarding health, the Commission sufficiently explained that its Order "does not change the applicability of the Commission's radio frequency exposure requirements" and that such concerns were more appropriately directed at its radiofrequency rulemaking. Order at 555 & n.133.

Petitioners also contend that the Order unlawfully preempts various state and local laws. In the Order, the Commission stated that it was now preempting local restrictions on the placement of antennas primarily used for hub and relay. *Id.* at 558. As we have discussed, the Commission treated these antennas as "stations," the location of which was within the Commission's regulatory authority under 47 U.S.C. § 303(d). The Supreme Court has instructed that the weight accorded an "agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." *Wyeth v. Levine*, 555 U.S. 555, 577 (2009). Given our conclusion crediting the Commission's explanation for its statutory authority in its *Continental Airlines* decision, the Commission may also preempt restrictions on the placement of the new category of antennas now included in the regulation. *See Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

Petitioners also raise concerns about the preemption of local ordinances or contractual provisions requiring property owners to provide notice to local governments or homeowners' associations before installing commercial-grade antennas. Although we uphold the Order against facial attack, we acknowledge that the Commission is treading on thin ice in asserting broad authority to preempt any notice requirements

affecting antenna installations.[6]

The petition is therefore denied.

*So ordered.*

[6] The Commission maintains that because local regulation of where these antennas are installed is preempted, there is no point in providing the local authorities or their citizens with notice of pending installations. But it does not follow that because citizens do not have a vote or a veto over the placement of an antenna on a neighbor's property, they are not entitled to know of the prospect. The First Amendment to the Constitution preserves the right of the people to petition the government for redress of grievances. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." (citation omitted)); *Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 738 (D.C. Cir. 2011) ("The right 'extends to [petitioning] all departments of the Government,' including administrative agencies and courts." (alteration in original) (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)); *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) (Burger, J.) ("[E]very person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition."); 2 Joseph Story, Commentaries on the Constitution § 1894, at 619 (Thomas M. Cooley ed., 4th ed. 1873) (1833) (emphasizing the centrality of petitioning for redress of grievances in republican government).

## 2. Certificate of Parties and *Amici*

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

### A. Petitioners

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

### B. Respondents

Federal Communications Commission
United States of America

### C. Intervenors

None

### D. *Amici*

Safe Technology Minnesota, Wired Broadband, Inc., WJ Thom Company, Whole Family Chiropractic, LLC, Virginians for Safe Technology LLC, Toxics Information, Santa Barbara Body Therapy Institute, No Spray Coalition, Inc., Kunze Productions, LLC, Families Managing Media, Inc., DAMS, Inc., 5G Free California, EMF Wellness, LLC, The Electromagnetic Safety Alliance, Inc., Eco-Learning Legacies LLC, Center for Electrosmog Prevention, Californians for Renewable Energy, Building Biology Institute, Bee Heroic LLC, Americans for Responsible Technology, Alliance for Natural Health, USA, Alliance for

Microwave Radiation Accountability, Inc., and A Voice for Choice Advocacy Inc. participated as *amicus curiae*.

### 3. Rule 26.1 Disclosure Statement

Pursuant to Circuit Rule 26.1, Petitioners 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.