ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1141

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

AMATEUR RADIO EMERGENCY DATA NETWORK,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

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

RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S OPPOSITION TO MOTION FOR STAY PENDING REVIEW

INTRODUCTION

The Federal Communications Commission respectfully opposes the motion by Amateur Radio Emergency Data Network (AREDN) to stay the Commission's *5.9 GHz Order*. The *Order* fulfills a pressing public need for increased Wi-Fi internet capacity by making an additional 45 megahertz of electromagnetic spectrum in the 5.9 GHz band available for Wi-Fi and other unlicensed uses in indoor environments. *Use of the 5.850–5.925 GHz Band*, 35 FCC Rcd. 13440 (2020) (*Order*). This newly available spectrum can be combined with adjacent unlicensed

spectrum to enable higher-capacity broadband networks, thereby allowing Wi-Fi networks to relieve congestion, deliver higher speeds, and otherwise keep pace with skyrocketing demand for wireless connectivity. The need for this additional Wi-Fi spectrum has become all the more critical due to Americans' increased reliance on remote connectivity in the wake of the COVID-19 pandemic.

AREDN contends that unlicensed use in this band will cause harmful interference to amateur-radio users, but it failed to present any supporting evidence in the proceedings leading up to the *Order*. *See Order* ¶ 92. In petitioning the agency for a stay pending reconsideration, AREDN argued that it would be harmed by *outdoor* Wi-Fi use—which the *Order* did not authorize, and instead sought further comment on—rather than the *indoor* use authorized by the *Order*. AREDN then rendered its agency stay request moot when it withdrew its petition for reconsideration. AREDN thus failed to develop or preserve the claims it raises here. *Cf.* 47 U.S.C. § 405(a); Fed. R. App. P. 18(a)(1) & (2)(A).

In seeking a judicial stay, AREDN fails to make the required showing of irreparable harm (or even that it has standing to assert the harm it alleges to its users), nor has it shown it is likely to prevail on the merits. Any stay would instead harm American consumers and the public interest by postponing relief for wireless networks that need ever-increasing amounts of spectrum to keep pace with demand, and by delaying the use of the reconfigured 5.9 GHz band for newer motor-vehicle safety technology. The motion for stay pending review should be denied.

BACKGROUND

1. Title III of the Communications Act of 1934 "endow[s] the Commission with 'expansive powers' and a 'comprehensive mandate to "encourage the larger and more effective use of radio in the public interest."'" *Cellco P'ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012); *see id.* at 542–43. Section 303 of the Act empowers the Commission to "assign bands of frequencies to the various classes of stations," to "prescribe the nature of the service to be rendered by each class of licensed stations," to "make such rules and regulations and prescribe such restrictions and conditions" as it deems necessary, and to "generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(b)–(c), (g), (r). In addition, Section 316 empowers the Commission to modify any spectrum license "if, in the judgment of the Commission, such action will promote the public interest, convenience, and necessity." *Id.* § 316(a)(1); *see Order* ¶¶ 52, 116–17.

The Commission may also authorize "unlicensed operation" at lower power levels if it determines that unlicensed use will not cause harmful interfere to licensed users. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 234 (D.C. Cir. 2008). Congress recently directed the Commission to "develop a national plan for making additional radio frequency bands available for unlicensed or licensed by rule operations." 47 U.S.C. § 1508(b).

2. In Section 5206(f) of the Transportation Equity Act, Congress directed the Commission to "consider * * * spectrum needs" for motor vehicles and to

"complete[] a rulemaking considering the allocation of spectrum." Pub. L. No. 105-178, § 5206(f), 112 Stat. 107, 457 (1998); *see Order* ¶¶ 6, 123. In 1999, the Commission allocated the 75 megahertz of spectrum between 5.850 and 5.925 GHz, known as the "5.9 GHz band," for vehicular communications. *Order* ¶ 6 & n.7.

The Commission initially adopted licensing and service rules based on a communications standard known as Dedicated Short-Range Communications, or "DSRC." *Order* ¶¶ 6–7. Two decades later, however, "the original concept for DSRC use of the band has not come to fruition." *Id.* ¶ 27. "DSRC-based service has evolved slowly" and "has barely been deployed." *Id.* ¶¶ 3, 7. "[D]eployments for the most part have been limited to government-funded demonstration projects," and "there currently is no deployment within the commercial consumer automobile market." *Id.* ¶ 31. Meanwhile, many anticipated features have switched to different technology that does not require this portion of the spectrum. *Id.* ¶¶ 32, 38. And many stakeholders have shifted focus from DSRC to a new standard known as Cellular Vehicle-to-Everything, or "C-V2X," which is based on modern cellular-communication protocols. *Id.* ¶¶ 3, 8, 102–103.

In the *Order* under review, the Commission repurposed the lower 45 megahertz of the 5.9 GHz band for indoor unlicensed operations. *Order* ¶¶ 14–25. Because the repurposed spectrum is directly adjacent to spectrum currently used for Wi-Fi, it will be possible for many existing devices to easily enable use of the new spectrum through software or firmware updates. *Id.* ¶ 22. Many consumers will

thus begin receiving the benefits of this new spectrum without having to replace their existing devices, *ibid.*, which will provide immediate relief for networks struggling to keep pace with skyrocketing demand for wireless connectivity. The Commission stated that it would consider requests to allow outdoor unlicensed use in the future and sought comment on appropriate parameters for outdoor use, *id.* ¶¶ 86, 169–185, but it has not yet authorized any outdoor Wi-Fi use of this spectrum.

The Commission adopted technical and operating rules for unlicensed devices in the 5.9 GHz band, including the indoor-only requirement. *Order* ¶¶ 59–86. Based on the record, it found that these rules will prevent harmful interference to other users. *See id.* ¶¶ 62–68, 80–85, 88–91, 92–94. As to amateur radio, the Commission explained that unlicensed use "will not cause harmful interference to amateur operations because of [unlicensed devices'] relatively low power * * * compared to amateur stations," and that no technical data in the record suggests otherwise. *Id.* ¶¶ 92–94.

The Commission reserved the upper 30 megahertz of the 5.9 GHz band for vehicular communications, finding that 30 megahertz will suffice to accommodate all the safety features that this spectrum is reasonably expected to be used for. *Order* ¶¶ 26–47, 118–120. The Commission further concluded that it should transition motor-vehicle operations in this spectrum from DSRC technology to C-V2X. *Id.* ¶¶ 96–106. The Commission has not finalized or set a timeline for that transition yet, and the *Order* seeks further comment to "develop a more complete record to

determine the appropriate date and procedures" to govern that transition. *Id.* ¶¶ 110; *see id.* ¶¶ 146–168.

The Commission determined that these changes will have enormous benefits for the American public by swiftly putting this spectrum to its highest and best use. *See Order* ¶¶ 14, 20, 27, 59. The *Order* undertakes a detailed cost–benefit analysis and conservatively estimates at least $17.2 billion in benefits to the American public over the years 2023 to 2025 alone. *Id.* ¶¶ 125–143 & App. C.

3. AREDN petitioned for reconsideration of the *Order* and asked the Commission to grant a stay pending reconsideration. *See* AREDN Pet. for Stay at 1 & n.2, OET Docket No. 19-138 (AREDN Agency Stay Pet.).[1] AREDN's agency stay request was based principally on claims that amateur-radio users would suffer harmful interference from outdoor Wi-Fi use of the 5.9 GHz band. *Id.* at iv, 5, 6–7, 9. It did not address interference from *indoor* use, except for a passing reference to situations where "indoor" devices could conceivably be used in "building loading docks" and "patios" that might function more like outdoor environments, *id.* at 5. AREDN later withdrew the underlying petition for reconsideration on which its request for a stay pending reconsideration was predicated. AREDN 6/21/21 Letter, OET Docket No. 19-138.[2]

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[1] Available at https://go.usa.gov/x6wT2

[2] Available at https://go.usa.gov/x6wTK

ARGUMENT

"[T]he extraordinary relief of a stay pending appeal" bears "stringent requirements." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 904 F.3d 1014, 1016, 1017 (D.C. Cir. 2018) (per curiam). To obtain a stay, AREDN must show that (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm without a stay, (3) a stay will not harm others, and (4) the public interest favors a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). AREDN has not come close to satisfying those exacting requirements.

I. AREDN FAILS TO SHOW IRREPARABLE HARM.

As a threshold matter, AREDN's stay motion does not meet the "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). To obtain relief, AREDN must show an injury "'both certain and great,' 'actual and not theoretical,' 'beyond remediation,' and 'of such *imminence* that there is a clear and present need'" for relief. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015). AREDN fails to show that it will suffer imminent and irreparable harm here.

A. AREDN Lacks Standing To Assert The Rights Of Amateur-Radio Users.

In the statement of standing attached to its petition for review, AREDN claims to have "associational standing" to sue on behalf of amateur-radio users allegedly harmed by the *Order*. Pet. for Review attach. A at 10–17. To establish associational

standing, however, AREDN must demonstrate that "at least one of its *members* would have standing to sue in his own right." *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003) (emphasis added); *see also Food & Water Watch v. U.S. Dept. of Agric.*, --- F.3d ---, 2021 WL 2546671, at *2 (D.C. Cir. 2021).

AREDN is not a membership organization of amateur-radio users. Instead, by its own description, it is "a 501(c)(3) non-profit educational and research organization" that "produces firmware and software for amateur radio licensees to form broadband networks." Mot. 3, 29. It bears none of "the indicia of a traditional membership association, such as a membership that finances the association's activities or plays a role in selecting its leadership." *Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 225 (D.C. Cir. 2018). Nor is AREDN "the functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002).

AREDN has tendered affidavits from several *users* of its technology, but none purport to be "members" of AREDN or demonstrate that they have any role in directing the organization's activities. Amateur-radio users are not "members" of AREDN merely because they use AREDN's technology. This Court has refused to allow association standing in similar circumstances. *See, e.g., Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002) (magazine could not assert associational standing on behalf of its readers because "readership is not the same as membership"); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (without "a definable membership

body," a "media watchdog" organization could not assert associational standing on behalf of "supporters" who "play [no] role in selecting [the organization's] leadership, guiding [its] activities, or financing those activities").

B. AREDN Fails To Show Harm To Amateur-Radio Users.

Even if AREDN could assert the rights of amateur-radio users, it has not shown that they will be injured by the *Order*.

1. The Commission has not yet authorized outdoor Wi-Fi use.

AREDN contends (Mot. 22 & Exh. 6) that amateur-radio users would suffer harmful interference from outdoor Wi-Fi use of the 5.9 GHz band. That concern is wholly premature, because the *Order* authorized only indoor use—not outdoor use. *See Order* ¶ 86. Although the *Order* expressed the Commission's intent to allow outdoor use in the future, the Commission has not yet authorized any outdoor Wi-Fi use of this spectrum. Any hypothetical concerns about interference from outdoor Wi-Fi use are contingent on future agency action that the Commission has not yet taken.

Rather than authorize outdoor unlicensed use at this time, the *Order* seeks further comment on what conditions and operating parameters should govern any outdoor use the Commission might authorize in the future. *Order* ¶¶ 86, 169–185. It is impossible at this stage to assess whether anyone might face interference from any future outdoor use when the relevant limits and operating parameters have not yet been determined. AREDN thus cannot show that any hypothetical outdoor use that

the Commission might authorize in the future would cause it "injury that is 'of such *imminence*' that equitable relief is urgently necessary." *Chaplaincy*, 454 F.3d at 298.

For similar reasons, AREDN is incorrect (Mot. 20–22) that the Commission's adoption of automated frequency coordination in the 6 GHz band means that the same protection is needed in the 5.9 GHz band. The *6 GHz Order*[3] required automated frequency coordination only for devices capable of operating outdoors and at higher power levels; the Commission has never found such coordination necessary for indoor unlicensed use like that authorized here. *Compare 6 GHz Order*, 35 FCC Rcd. at 3862 ¶ 22 (discussing devices that can "operate outdoors or indoors"), *with id.* at 3888 ¶ 98 (discussing "unlicensed indoor operations without the need for AFC").

2. Claims of harm from indoor use are forfeited and unsupported.

a. AREDN claims (Mot. 22 & Exh. 7) that its users will suffer harmful interference from indoor use, but it failed to make that argument below, so this contention is procedurally barred. Section 405(a) of the Communications Act precludes judicial review of any "questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass." 47 U.S.C. § 405(a); *see, e.g.*, *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 509 (D.C. Cir. 2020). AREDN's administrative

[3] *Unlicensed Use of the 6 GHz Band*, 35 FCC Rcd. 3852 (2020), *pets. for review pending, AT&T Servs., Inc. v. FCC*, Nos. 20-1190 *et al.* (D.C. Cir.).

stay request to the Commission argued that users would suffer irreparable harm if the Commission were to allow *outdoor* Wi-Fi use, *see* AREDN Agency Stay Pet. iv, 5, 6–7, 9, but presented no meaningful argument or analysis concerning *indoor* use.

Long after oppositions were due, AREDN purported to "supplement" its agency stay request on June 10 with a new "Link Performance Analysis" analyzing potential interference from "outdoor and indoor unlicensed operations." AREDN 6/10/21 Letter & attach.[4] That supplemental analysis was never properly before the agency, however, because the Commission's rules disallow reply filings in support of stay requests, and likewise disallow supplements to any petition for reconsideration without obtaining leave from the Commission (which AREDN never sought). 47 C.F.R. §§ 1.45(d), 1.429(d); *Dismissal of All Pending Pioneer's Preferences Requests*, 13 FCC Rcd. 11485, 11492 ¶ 16 (1998). AREDN's judicial stay motion now relies on a subsequent analysis dated June 11 (Mot. Exh. 7), which is a document it never presented to the Commission at any time.

To the extent AREDN's untimely interference analysis purports to raise concerns about indoor use, it was plainly outside the scope of the administrative stay petition, which addressed only outdoor use. A supplemental evidentiary exhibit containing technical calculations concerning an issue not raised in the underlying legal pleadings is insufficient to preserve that issue for review as required by Section 405(a). *See, e.g.*, *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 279–80 (D.C. Cir.

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[4] Available at https://go.usa.gov/x6wT8

1997) ("The Commission 'need not sift pleadings and documents to identify' arguments that 'are not stated with clarity' by a petitioner").

b. In any event, AREDN's analysis purporting to show unacceptable interference from indoor use is unrealistic and unsound. It assumes an entirely improbable antenna configuration in which a Wi-Fi access point deployed indoors is somehow located directly in the main beam of AREDN's receiver and oriented to transmit directly at it, even though AREDN generally relies on direct line-of-sight between its receiver and its own transmitter. *See* NCTA 6/25/21 Letter at 3, 5, OET Docket No. 19-138.[5] It assumes that all Wi-Fi devices are continuously transmitting, when Wi-Fi devices actually transmit only in short bursts of a few milliseconds and only a small percentage of the time. *Id.* at 5–6. It ignores the limited probability of channel overlap. *Id.* at 6. And it fails to model other important factors the Commission considers when analyzing potential interference. *Cf. 6 GHz Order*, 35 FCC Rcd. at 3898–902 ¶ 127–131 & tbls.4–6. The Commission has rejected "unrealistic or contrived" analyses like AREDN's. *Id.* at 3909 ¶ 150.

c. AREDN's discussion of the 2.4 GHz band (Mot. 18–20) compares apples to oranges. Experience in one spectrum band is not a reliable predictor of what will happen in a materially different band. The 2.4 GHz band has different propagation characteristics, different channel configurations, and different usage patterns, and thus cannot speak to any likelihood of harmful interference here.

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[5] Available at https://go.usa.gov/x6fEn

C. AREDN Fails To Show That Any Harm Could Not Be Remedied.

AREDN also fails to show that any potential interference would be irreparable. If the *Order*'s spectrum changes or the associated interference protections prove to be infirm, the Commission retains the power to revise them. *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."). "'The possibility that * * * relief will be available at a later date * * * weighs heavily against a claim of irreparable harm.'" *Chaplaincy*, 454 F.3d at 297–29.

AREDN contends that any harmful interference could not be remedied because support for 5.9 GHz Wi-Fi supposedly could not be "recalled" or "disable[d]" (Mot. 17–18), but the record indicates otherwise. Wi-Fi device manufacturers and operators "have committed, as an industry best practice, to remotely block device(s) from using certain channels and/or to reduce the operating power of the device(s) upon notification by the Commission of harmful interference" in certain circumstances, indicating that Wi-Fi functionality can be remotely modified or disabled. *Order* ¶ 68. The *Order* further anticipates that Wi-Fi in the 5.9 GHz band may be enabled by software or firmware updates to existing devices, *id.* ¶ 22, and any functionality that is added by software or firmware presumably can also be removed or modified by the same means. In fact, the FCC has previously required manufacturers to correct noncompliant devices by remotely issuing firmware updates. *See In re Ubiquiti Inc.*, 35 FCC Rcd. 11673 (Enf. Bur. 2020).

If devices nevertheless fail to comply with the Commission's rules, or if serious interference issues were nonetheless to arise, the Commission has significant power to address any problems. The Commission's Part 15 rules require unlicensed devices that interfere with any licensed service, including amateur-radio service, to correct the interference or cease operating. *Order* ¶ 93 (citing 47 C.F.R. § 15.5(c)). "[The] Commission's Enforcement Bureau has the ability to investigate reports of such interference"—including through field agents with spectrum-monitoring equipment—"and take appropriate enforcement action as necessary," and it regularly "works with entities at the federal, state, county, and local levels of government to resolve interference." *6 GHz Order*, 35 FCC Rcd. at 3909 ¶ 149 & n.397. Unlicensed "Wi-Fi devices have been deployed * * * in abundance" in the 2.4 GHz and 5 GHz bands for more than two decades, and "instances of harmful interference" in those bands "have been effectively identified and addressed." *Id.* at 3908 ¶ 147. Given the Commission's ability to successfully address problems in the past, there is no reason to think it has inadequate power to do so here.

II. AREDN IS NOT LIKELY TO PREVAIL ON THE MERITS.

On the merits, AREDN faces a "daunting" task to overcome the "deferential standard of review" that applies to the Commission's spectrum-management decisions. *NTCH, Inc. v. FCC*, 950 F.3d 871, 880 (D.C. Cir. 2020). When "the Commission is 'fostering innovative methods of exploiting the spectrum,' it 'functions as a policymaker' and is 'accorded the greatest deference by a reviewing

court.'" *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006) (quoting *Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001)).

AREDN argues (Mot. 14–17) that any transition from DSRC to C-V2X is inconsistent with provisions concerning motor-vehicle safety and operations that, in its view, give sole authority over vehicular communications to the Secretary of Transportation. Those arguments, which have nothing to do with AREDN or its amateur-radio users, are not likely to succeed.

1. AREDN's arguments challenging the Commission's authority to transition the spectrum from DSRC to C-V2X are premature, because the Commission has not yet taken final action on any such transition. The *Order* does express the Commission's intent to do so at some point in the future, but seeks further comment on what timing and procedures to employ. *Order* ¶¶ 110, 146–168. The spectrum currently remains designated for DSRC, and any transition is contingent on future action that the Commission has not yet taken. AREDN must await final agency action before it can raise this challenge. *See, e.g.*, *NASDAQ Stock Mkt. LLC v. SEC*, --- F.3d ---, 2021 WL 2429596 (D.C. Cir. 2021).

2. AREDN lacks standing to invoke the transportation statutes it seeks to rely on here because it falls outside the "zone of interests" protected by those statutes. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128–32 & n.4 (2014); *Twin Rivers Paper Co. v. SEC*, 934 F.3d 607, 616–18 (D.C. Cir. 2019).

Those statutes are concerned with protecting motor-vehicle users; they are not designed to protect the interests of AREDN or the amateur-radio users it purports to represent. AREDN and its users are not the "intended beneficiaries of the statute[s] at issue," nor do the interests of AREDN and its users "coincide systemically * * * with those of intended beneficiaries." *Twin Rivers*, 934 F.3d at 616 (internal quotation marks omitted). Because AREDN and its users are not within the zone of interests protected by the transportation statutes AREDN seeks to rely on, AREDN falls outside "the cause of action for judicial review conferred by the Administrative Procedure Act," *Lexmark*, 572 U.S. at 129, and cannot invoke those statutes here.

3. AREDN's challenge also fails on the merits. Section 5206(f) of the Transportation Equity Act, 112 Stat. at 457, "direct[s] the Commission to consider, in consultation with the Secretary[], spectrum needs for" motor vehicles and "to complete a rulemaking on [motor-vehicle] spectrum." *Order* ¶ 123. In managing this spectrum, the Commission exercises broad authority to "assign bands of frequencies to the various classes of stations," to "prescribe the nature of the service to be rendered by each class of licensed stations," and to "make such rules and regulations and prescribe such restrictions and conditions" as it deems necessary. 47 U.S.C. § 303(b)–(c), (r); *see Cellco*, 700 F.3d at 542–43.

Section 5206(f) comports with the FCC's established role as "the single government agency with unified jurisdiction and regulatory power over all forms of electrical communications." *FCC v. Nextwave Pers. Commc'ns, Inc.*, 200 F.3d 43,

53 (2d Cir. 1999) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 168 (1968)). A duty to "consult with" another agency leaves the ultimate responsibility in the hands of the Commission, rather than requiring the Commission to yield to the other agency's advice or giving that agency veto power over the Commission's decisions. *Cf. United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 750–51 (D.C. Cir. 2019); *see Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003) ("[C]onsultation is not the same thing as control over a project."); *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986) ("Consultation is not the same as obeying those who are consulted."). And though the Department of Transportation expressed disagreement with the Commission's modifications to the 5.9 GHz band, it never disputed the Commission's authority to make those changes.

Consistent with Section 5206(f), it is the Commission—not the Secretary of Transportation—that, exercising its own authority under the Communications Act, has previously prescribed licensing and service rules for vehicular communications. *See Order* ¶ 6.

4. AREDN relies (Mot. 14–16) on 23 U.S.C. § 517(a), but it appears to misread that statute. Section 517(a) does not make the Secretary responsible for setting standards for the vehicular communications industry. It instead appears to direct the Secretary to make federal highways compatible with the technology being used by industry. Subsection (a)(1) thus begins by cross-referencing a statute directing

government agencies to "use technical standards that are developed and adopted by voluntary consensus standards bodies,"[6] and subsections (a)(2) and (a)(3) direct the Secretary to seek interoperability and to support industry standards organizations.

Surrounding provisions confirm that Section 517(a) simply requires the Secretary to ensure that federal highways support whatever technology and standards are being used by industry, rather than directing the Secretary to prescribe standards that industry must follow. Section 517(c) empowers the Secretary to prescribe a "provisional standard" for vehicular communications, but only when no industry standard yet exists, and Section 517(d) provides that projects seeking funding from the Federal Highway Trust Fund should "conform to the * * * architecture, applicable standards, and protocols" identified under subsection (a). Under AREDN's reading, those provisions would be superfluous.

Notably, the language AREDN cites in Section 517(a) originated in Section 5206(a) of the Transportation Equity Act, 112 Stat. at 456—another subsection of the very same section that directed the Commission to consider allocating spectrum for vehicular communications in Section 5206(f). It would make little sense to read that language to give exclusive authority over vehicular communications to the Secretary, as AREDN claims, when the same section of the same act recognizes the Commission's authority over vehicular-communications spectrum.

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[6] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783.

AREDN seeks to rely (Mot. 8–9) on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), which held that the FDA could not regulate tobacco products because no statute purported to give it authority over tobacco products and Congress had repeatedly withheld that authority from it. Here, however, Congress has directed the FCC to consider allocating spectrum for vehicular communications and to prescribe licensing and service rules for the spectrum it assigns. *Order* ¶¶ 121 & nn.319–320, 123 & nn.329–330. By contrast, no statute purports to give the Secretary of Transportation any spectrum-management authority, and to do so would upset the Commission's longstanding and exclusive authority over all non-governmental spectrum.

5. AREDN's remaining arguments likewise fail.

AREDN argues (Mot. 16–17) that the *Order* would conflict with proposed rules from early 2017 that were based on the DSRC standard. But those rules were never adopted, so they cannot pose any conflict. Nor does AREDN identify an actual conflict with anything in 23 C.F.R. Part 940 (*see* Mot. 5), which in any event merely outlines conditions on the use of federal highway funds, *id.* § 940.7.

AREDN is incorrect that transitioning to C-V2X would require entities to "violate the terms of their FCC licenses" (Mot. 11). The *Order* relied on the Commission's authority to *modify* those licenses; it thereby conformed the licenses to any changes in its service rules. *See Order* ¶¶ 52, 116–117, 121 (citing 47 U.S.C. § 316).

Though AREDN observes (Mot. 10–11) that some state and local transportation departments have adopted the DSRC standard for their roadway equipment, they can reasonably be expected to update those standards if and when the spectrum transitions to C-V2X. Indeed, under the Supremacy Clause, any change in federal spectrum rules would supersede and preempt any inconsistent state or local requirements that remain.

III. A STAY WOULD HARM CONSUMERS AND THE PUBLIC INTEREST.

Finally, consideration of "harm to [other parties] and the public's interest weighs against a stay" here. *Citizens for Responsibility*, 904 F.3d at 1019.

This Court has recognized that "the use of wireless networks in the United States is skyrocketing" and that our country "faces a major challenge to ensure that the speed, capacity, and accessibility of our wireless networks keeps pace with these demands in the years ahead." *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165, 169 (D.C. Cir. 2015) (internal quotation marks omitted). Despite the Commission's efforts to make more spectrum available, demand continues to outpace supply. *Order* ¶¶ 5, 15–16. The COVID-19 pandemic has only made the need for such spectrum more vital as Americans have grown increasingly reliant on remote connectivity. *Id.* ¶ 16.

Thus, as the Commission determined, making this additional spectrum rapidly available for unlicensed use is critical "to ensure the efficient use of spectrum in the public interest." *Order* ¶ 123; *see id.* ¶¶ 14, 20, 25. That finding weighs heavily

against any stay, as the Commission's "'judgments on the public interest are entitled to substantial judicial deference.'" *NTCH*, 950 F.3d at 881.

AREDN's suggestion that this spectrum is unnecessary because the Commission recently made other unlicensed spectrum available in the 6 GHz band (Mot. 23–24) misses the mark. To access Wi-Fi in the 6 GHz band, manufacturers must develop and consumers must purchase entirely new devices, so the benefits of the 6 GHz band may not be fully realized for years. By contrast, because the 5.9 GHz spectrum "is adjacent to [an existing] band that supports unlicensed operations, equipment manufactures should be able to readily and cost-effectively manufacture devices" supporting it. *Order* ¶ 18. Indeed, because of the adjacency, many *existing* Wi-Fi devices will be able to enable use of the 5.9 GHz band by downloading a software or firmware update. *Id.* ¶ 22. The spectrum at issue here is thus "especially well-positioned to deliver immediate and potentially significant benefits," *id.* ¶¶ 18, 21, "saving years of delay compared to any other band and lowering costs across the board," *id.* ¶ 22.

A stay would also harm other parties and the public interest by delaying the eventual transition to C-V2X and the deployment of associated motor-vehicle safety technology. The best way to ensure that "vehicle related safety applications can be fully deployed quickly" is to allow automakers and others to "focus on building out the [C-V2X] infrastructure and equipping vehicles rather than continuing to divide resources across two competing standards." *Order* ¶¶ 100, 106. Likewise, the

processing of new vehicular-communications licenses has been on hold until the pending changes to the 5.9 GHz band take effect. *Id.* ¶ 53 n.150. "Further delay will not serve the American public." *Id.* ¶ 106.

CONCLUSION

The motion for stay pending review should be denied.

Dated: June 29, 2021

Respectfully submitted,

/s/ *Scott M. Noveck*

P. Michele Ellison
Acting General Counsel

Jacob M. Lewis
Associate General Counsel

Scott M. Noveck
Counsel

FEDERAL COMMUNICATIONS COMMISSION
45 L Street NE
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

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1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1):

   ☒ this document contains 5,129 words, *or*

   ☐ this document uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman, *or*

   ☐ this document has been prepared in a monospaced spaced typeface using _____ with _____.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondent
Federal Communications Commission