CASE No. 11-2156

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARTHUR FIRSTENBERG,

Plaintiff-Appellant,

v.

ORAL ARGUMENT REQUESTED

CITY OF SANTA FE, a municipality; and
AT&T MOBILITY SERVICES, LLC,

Defendants-Appellees.

On appeal from the United States District Court
For the District of New Mexico
The Honorable James A. Parker, Case No. 1:2011-cv-00008

APPELLANT'S OPENING BRIEF

Respectfully submitted,

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None.

STATEMENT OF JURISDICTION

On December 15, 2010 Plaintiff filed a Petition for Writ of Mandamus in the First Judicial District Court, Santa Fe County, New Mexico. (App. 9). The First Judicial District Court had jurisdiction under NMSA 1978 § 44-2.

On January 5, 2011, Defendant AT&T Mobility Services, LLC ("AT&T") removed the case to the United States District Court for the District of New Mexico pursuant to 28 U.S.C. §§ 1441 and 1446. (App. 180). The district court's jurisdiction rests on 28 U.S.C. § 1331, giving district courts original jurisdiction of civil actions arising under federal laws or the Constitution, and on 28 U.S.C. § 1441, allowing removal of state court actions that originally could have been filed in federal court.

This Court has jurisdiction under 28 U.S.C. § 1291 to review final orders of the district court. The district court entered its Order of Dismissal of Claims Against AT&T Mobility Services, LLC on April 8, 2011 (App. 251), and its Order of Dismissal of Claims Against the City of Santa Fe ("City") on April 25, 2011 (App. 274). Pursuant to Fed. R. Civ. P. 59(e), a motion for reconsideration of both orders was filed within 28 days, on May 6, 2011. (App. 297). The district court entered its Order denying the motion for reconsideration on July 5, 2011. (App. 357). Pursuant to Fed. R. App. P. 4(a)(4), the Notice of Appeal was timely filed within 30 days of that Order, on August 4, 2011. (App. 378).

STATEMENT OF THE ISSUES

1. Does an increase in intensity of radio frequency ("RF") radiation from a wireless telecommunications facility constitute a "more intense use" under § 14-3.6(B)(4)(b) of the City's Land Development Code ("LDC"), requiring a new application for a Special Exception, when the members of the City's Board of Adjustment considered it a more intense use, the LDC mentions RF radiation as an attribute of antennas, and the LDC authorizes the Board to limit radiation emissions that are "dangerous or offensive to residents of the district"?

2. The City, relying on § 704 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("TCA"), refused to consider the life-threatening impacts of RF radiation upon persons, such as Plaintiff, who are disabled by electromagnetic hypersensitivity ("EHS"), although such radiation threatens their ability to work, live in their homes, or remain in Santa Fe. Did the City deny Plaintiff procedural and substantive due process, and equal protection of the laws, when it permitted an intensification of RF radiation from existing cellular phone base stations without holding the hearings required by the LDC?

3. Individuals disabled with EHS must avoid exposure to RF radiation for medical reasons and are qualified individuals with a disability as defined by the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA").

Does the City's refusal to consider the impacts of RF radiation on such individuals in its zoning decisions violate Title II of the ADA?

4. Does TCA § 704 repeal the ADA?

A. Did the district court err in finding an implied repeal without first conducting a factual investigation to determine whether the two laws can coexist?

B. Did the district court err in ruling that TCA § 704 "preempts" the ADA, when TCA § 101 (47 U.S.C. § 255) requires telecommunications equipment and services to be accessible to persons who have a disability as defined by the ADA; TCA § 704 does not mention the ADA; and TCA § 601(c)(1) states that the TCA shall not be construed to supersede other Federal law unless expressly so provided in the TCA?

5. Is TCA § 704 unconstitutional? Does it violate Plaintiff's right to equal protection under the Fifth Amendment by precluding the City from regulating RF radiation that threatens his life because of his disability?

6. Did the district court abuse its discretion when it denied Plaintiff's motion for leave to amend his pleading?

STATEMENT OF THE CASE

On December 15, 2010 Plaintiff filed a Petition for Writ of Mandamus (App. 9) in the New Mexico District Court for the First Judicial District, which includes Santa Fe, seeking enforcement of the City's Land Development Code ("LDC").

The state district court issued an Alternative Writ of Mandamus, requiring Defendants ("AT&T" and the "City") to grant the requested relief or show cause why they should not do so. (App. 163). AT&T then filed a notice of removal to the federal district court based upon federal question jurisdiction. (App. 180).

In the federal district court, without filing any responsive pleadings, Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. (App. 186, 202). The district court granted both Defendants' motions to dismiss under Rule 12(b)(6). (App. 251, 274).

On May 6, 2011 Plaintiff timely filed a motion for reconsideration and a motion to amend his pleading. (App. 297, 308). Both motions were denied by the court below on July 5, 2011. (App. 357, 369). A Notice of Appeal was filed on August 4, 2011. (App. 378).

STATEMENT OF FACTS

The Record comprises the Mandamus Petition, amended twice; exhibits thereto; motions and responding papers; and the rulings of the court below.

Plaintiff is a resident of Santa Fe, New Mexico (the "City"). He has been diagnosed by nine doctors with a condition known as electromagnetic hypersensitivity ("EHS")[1]. (App. 170). He suffers painful and life-threatening

[1] Also called Electromagnetic Sensitivity ("EMS")

effects on his heart, lungs and nervous system when exposed to RF radiation[2] from cell phones, cell towers and other sources. (App. 36, 38, 50-65, 170-71). He is a "qualified individual with a disability," as defined in the ADA, 42 U.S.C. § 12131(2). (App. 38, 171). The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. § 12102(1)(A). A "qualified individual with a disability" means

> "an individual with a disability who, with our without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

Plaintiff has collected disability benefits from the Social Security Administration since 1992 based upon electromagnetic and chemical sensitivity. (App. 170).

Dr. Kenneth Jaffe, Plaintiff's primary physician for many years in Brooklyn, New York, writes that Plaintiff has "extreme reactions to electromagnetic fields, affecting his nervous system, heart and lungs." (App. 57). Dr. Erica Elliott, his primary physician in Santa Fe, says that

> "[e]xposure to WiFi, cell phones, and cell towers affects the rate and rhythm of his heart and can cause his airways to constrict, and to sometimes shut off entirely due to laryngeal spasm to the point that he experiences episodes of not being able to breathe. Microwave exposure also causes joint pains

[2] Also called "radio frequency emissions" or "RFEs" in the decisions below.

> throughout his body which makes it difficult for him to stand and to walk." (Exhibit 3 (Affidavit of Erica Elliott, M.D.) (App. 150)).

She adds that many of her patients with EHS are disabled as defined by the ADA because they

> "suffer significant impairment of one or more of their major life functions, namely their ability to stand, walk, think, and breathe. . . My patients with electromagnetic hypersensitivity syndrome suffer a wide array of disabling symptoms, including seizures, episodic malignant hypertension, heart arrhythmias, severe insomnia, intractable tinnitus, muscle spasms and twitching, migraine headaches, and neuropathy." *Id.*

> Another physician, Grace Ziem, M.D., explains similarly:

> "Individuals with significant or recurrent electromagnetic-induced or exacerbated symptoms qualify for reasonable accommodation under the Americans with Disabilities Act, when electromagnetic exposure in such individuals interferes with major life functions, such as neurologic function and other major life functions. Neurologic function impairment with EM-illness can interfere with the ability to walk, cause seizures, loss of consciousness, disrupt cardiac rhythm and other serious and even life-threatening impairments." (App. 38, 174).

Because of the proliferation of wireless technology, Plaintiff has previously fled five homes, three cities or towns, and two states in order to survive. (App. 51).

The United States Architectural and Transportation Barriers Compliance Board ("Access Board") is the federal agency, authorized by statute, that establishes and maintains minimum accessibility guidelines under the Architectural Barriers Act of 1968, Title II and Title III of the ADA, and TCA § 101, 47 U.S.C.

§ 255; provides technical assistance to individuals and entities with rights or duties under the ADA; and otherwise administers the federal laws concerned with the protection of people with disabilities. 29 U.S.C. § 792. The Access Board has developed a 97-page technical assistance manual, available on its website, for accommodating people with electromagnetic and chemical sensitivities. (App. 33-35, 174). In the introduction it cites a California survey finding that three percent of the population, *i.e.*, about nine million Americans, report electromagnetic sensitivity. (App. 33). Plaintiff is personally acquainted with approximately 2,000 such individuals in the United States and 100 such individuals in Santa Fe. (App. 51). The Petition alleges that the continual addition of RF radiation to the Santa Fe environment is destroying the lives of people with EHS as well as threatening their ability to work, live in their homes, or remain in Santa Fe. (App. 120-23, 126-28, 134, 136-38, 173-75).

The City has granted AT&T permits, called Special Exceptions, to operate a number of cell phone transmission towers, also called "cell towers" or "base stations." (App. 171). On November 15, 2010, without obtaining any additional permits, AT&T expanded its cell phone service by changing the signals from all of its base stations in the City from "2G" (second generation) to "3G" (third generation), thereby increasing the intensity of RF radiation throughout Santa Fe. (App. 171-72). Existing antennas were not replaced. But the change to 3G greatly

increased the bandwidth of their radio emissions, as well as increasing the average power of their emissions and their capacity to handle data and voice traffic. (App. 172). Plaintiff and others disabled by EHS have experienced EHS symptoms to a greater degree since this change by AT&T. (App. 176).

Normally, under the LDC, an increase in intensity of use of such facilities would require new hearings before the City's Board of Adjustment and new Special Exceptions:

> "(b) the special exceptions listed in this chapter, when granted, are considered granted for a specific use and intensity, any change of use or more intense use shall be allowed only if such change is approved by the Board of Adjustment under a special exception." (LDC § 14-3.6(B)(4)(b)).

However, at a November 17, 2010 Board of Adjustment hearing, the City Attorney's office took the position that the City did not have "jurisdiction" over such an intensification of use (App. 143) because of TCA § 704, which restricts the power of states and local governments to regulate wireless telecommunications facilities "on the basis of the environmental effects of radio frequency emissions." (47 U.S.C. §332(c)(7)(b)(iv)). This hearing concerned two base stations at which AT&T proposed to install new antennas. (App. 110, 173). Numerous citizens, including some with EHS, had appealed to the Board "based on how much radiation they are going to be emitting." (App. 113).

Members of the Board made clear that changes in the level of radiation emitted by a cell tower constitute a "more intense use." Commissioner Komis stated:

> C. Komis: "Well, what about the need for a public hearing regarding this intensification of this use." (App. 143)
>
> C. Komis: "So back to this intensification of use, because it may be more frequency . . .
> K. Brennan [City Attorney]: You do not have jurisdiction.
> C. Komis: We do not have jurisdiction over that intensification of use. However, if the cell tower went up another 10 feet, or if we changed the color, or the architecture, then we could . . ." (App. 145)

No Commissioner disagreed with Mr. Komis's interpretation. Commissioner Rooney stated:

> "C. Rooney: I agree with Mr. Komis here." (App. 145)

The Board dismissed the appeals, believing, as the City Attorney advised, that TCA § 704 created a "jurisdictional" obstacle, not because they thought there had been no "intensification of use" or disbelieved the numerous witnesses testifying about EHS:

> "C. Winston: . . . It's been very educational and helpful to listen to you tonight. Having said that, I am an attorney and an officer of the Court, and as such, if I know that this question falls outside of our jurisdiction, I cannot entertain it. It's not within our purview." (App. 142)
>
> "C. Komis: . . . I don't discredit any of your testimony." (App. 142)
>
> "C. Rooney: . . . And, I think these people are bringing up serious issues here." (App. 143)

> "C. Winston: Again, I think the confusion here is, it is a federal jurisdiction and it's a federal question and it's preempted by the federal government. "C. Rooney: Well, I don't think it should be preempted by the federal government." (App. 144)
>
> "C. Komis: I believe each and every one of you * * * I mean, I feel like my hands are tied . . ." (App. 144-45)
>
> C. Rooney: I agree with Mr. Komis here. I think that that's . . . legally we would have to deny the appeal, and morally I don't think that's the right thing to do." (App. 145)

On December 15, 2010 Plaintiff filed the Petition in state court, seeking an order directing the City to enforce LDC § 14-3.6(B)(4)(b) with respect to AT&T's expansion of service to 3G. (App. 9). Since the Board of Adjustment and City Attorney had already stated that they would not enforce LDC § 14-3.6(B)(4)(b), no administrative remedy was available. Under the LDC, a decision not to take enforcement action is not an appealable action. LDC § 14-3.17(A)(1)(c)(iv). Therefore, Plaintiff sought a writ of mandamus, directing the City to commence enforcement proceedings by giving notice to AT&T to discontinue its 3G broad-casts in the City within 30 days, and to apply for a Special Exception for each base station from which AT&T proposed to broadcast such signals. (App. 178). Plaintiff alleged that the City is required to enforce its LDC to fulfill its obligations to people with EHS under the ADA and the Fifth and Fourteenth Amendments. (App. 176-177).

Plaintiff amended his Petition twice—once to add specificity to his prayer for relief (App. 153), and once to correctly identify defendant AT&T Mobility Services, LLC, which he had incorrectly identified as AT&T, Inc. (App. 170).

After the state court issued an Alternative Writ of Mandamus (App. 163), AT&T removed the case to federal district court based on federal question jurisdiction. (App. 180).

The court below granted Defendants' motions to dismiss under Fed. R. Civ. P. 12(b)(6) (App. 186, 202), based on its determination that an increase in RF radiation does not qualify as a "more intense use" under the LDC (App. 260-62; 283), or, alternatively, based on preemption of local regulation of RF radiation by TCA § 704 (App. 262-65; 284-87). The court ruled that the ADA does not apply to the City's decisions regulating telecommunications facilities (App. 265-68; 287-90), and that in any case the TCA, which the court understood to prohibit the City from regulating RF emissions, "preempts" the ADA. (App. 268-70; 290-91).

The court below dismissed Plaintiff's constitutional claims. Because the disabled are not a suspect class, the court judged Plaintiff's Equal Protection claim under a "rational basis" standard, stating that "Plaintiff does not allege any facts to support a finding that the City's failure to regulate RFEs . . . was 'irrational and wholly arbitrary.'" (App. 293). With respect to Plaintiff's claim that the TCA violates the Fifth Amendment's Equal Protection component, the court ruled that

"Plaintiff has failed to sufficiently allege that in enacting the TCA, Congress discriminated against individuals with EMS because Congress lacked a rational basis for prohibiting local governments from regulating RFEs." (App. 294). With respect to the Procedural Due Process claim, the court ruled that "Plaintiff has not alleged that the City has taken his life, liberty or a protected property interest without notice, hearing or means of decision." (App. 295). With respect to the Substantive Due Process claim, the court ruled that "Plaintiff does not allege that the City failed to regulate AT&T's wireless transmissions intentionally or recklessly causing injury to Plaintiff by abusive behavior that shocks the conscience." (App. 273).

Plaintiff timely moved for reconsideration. He asserted that continued refusal to regulate RF radiation will be fatal to Plaintiff and to a significant percentage of people with EHS, a class that may number three percent of the population (App. 302). He further asserted that Congress, in enacting the TCA, could not have intended to condemn a class of citizens to death because of their disability. (App. 343). He asserted that he had adequately pleaded systematic discrimination (App. 306) as well as an intentional taking of life, liberty and property without a hearing. (App. 304-5). Plaintiff also moved to amend his pleading to state certain allegations more clearly and in more detail. (App. 308). Both motions were denied in Memoranda dated July 5, 2011. (App. 357, 369).

The court stated that amendment would be futile, since the City has no "power or authority to afford Plaintiff the due process he seeks" (App. 364); that the TCA provides both the City and Congress a "rational basis" to deny Plaintiff the equal protection of the laws (App. 365); and that even if preemption of the ADA would "condemn a class of citizens to death because of their disability," the court was powerless to address such a result. (App. 376).

Where important issues are presented concerning not only possible conflicts between federal statutes, but overriding constitutional questions, it is appropriate for a court to take notice of relevant non-judicial opinion. *Muller v. Oregon,* 208 U.S. 412, 419 (1908). Estimates of the prevalence of EHS range from 3.1% of the population, reported by the Swedish National Board of Health and Welfare, for Sweden[3]; to 3.2%, reported by the California Department of Health Services, for the state of California[4]; 5%, reported by researchers at the University of Bern, for Switzerland[5]; and 6%, reported by the Federal Office of Radiation Protection, for

[3] National Board of Health and Welfare (Socialstyrelsen). *Environmental Health Report*. Stockholm, Sweden, 2001,

[4] Levallois P, Neutra R, Lee G, Hristova L. Study of self-reported hypersensitivity to electromagnetic fields in California. Environmental Health Perspectives 110(suppl 4): 619-23, 2002.

[5] Schreier N, Huss A, Röösli M. The prevalence of symptoms attributed to electromagnetic field exposure: a cross-sectional representative survey in Switzerland. Sozial- und Präventivmedizin/Social and Preventive Medicine 51:202-209, 2006.

Germany[6]. On May 27, 2011, the Council of Europe adopted Resolution 1815, recommending that its 47 member nations "pay particular attention to 'electrosensitive' people who suffer from a syndrome of intolerance to electromagnetic fields and introduce special measures to protect them, including the creation of wave-free areas not covered by the wireless network."[7]

SUMMARY OF ARGUMENT

The district court's ruling has national implications for potential conflicts between federal statutes comprehensively regulating different spheres of activity: (a) the rights of the disabled and (b) telecommunications. The issues presented are not addressed in precedent. Several errors underlie the decision below:

To hold that the increase in intensity of AT&T's radio frequency signal was not a "more intense use" conflicts with the view of the members of the City's Board of Adjustment and rejects the accepted meaning of the words.

Concerning the interplay of the ADA and TCA § 704, the court below reasoned simply that an earlier act is repealed by a later one. It failed to make the necessary factual inquiry into whether they are capable of coexisting and whether Congress intended to repeal the ADA.

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[6] Schroeder E. Stakeholder perspectives on amending the 26th Federal Emission Control Ordinance. Results of the nationwide telephone survey ordered by the Federal Office of Radiation Protection. Schr/bba 04.02.26536.020, Munich, Germany, 2002.

[7] Resolution 1815 (2011) of the Parliamentary Assembly of the Council of Europe, ¶ 8.1.4, http://assembly.coe.int/Documents/AdoptedText/ta11/eRES1815.htm

The district court's further decision that, even if such preemption deprives people with EHS of liberty, property, and life itself, they are not protected by the Equal Protection Clause or the Due Process Clause ignores Supreme Court precedent strictly requiring a rational basis for discrimination against the disabled, requiring strict scrutiny for denial of fundamental rights, and imposing liability for violations of substantive due process.

All of Plaintiff's claims, legal and constitutional, fell before the single sentence of TCA § 704. Plaintiff asks this Court to decide whether one sentence in a comprehensive law has that much power. Plaintiff submits that it does not.

There were numerous errors: Where Plaintiff alleged that such preemption would "condemn a class of citizens to death because of their disability," the court asserted that Congress could draw lines that disproportionately burden the disabled and that the court was powerless under TCA § 704 to address such a result. Where Plaintiff alleged that the City had violated his Due Process rights, the court ruled that TCA § 704 deprives the City of the "power" and "authority" to grant Plaintiff due process. The court below failed to recognize that federal legislation may not authorize violations of due process or equal protection.

The decision that TCA § 704 "preempts" the ADA, if allowed to stand, will deny people with disabilities the protections afforded them by Congress. The court below disregarded the principle that implied repeal is highly disfavored and can

only be found when Congress so intended and provisions of two acts irreconcilably conflict. It failed to inquire into the scope of statutory conflict and the constitutional problems arising from a conclusion of repeal. Congress did not intend to repeal the ADA; instead, the TCA confirms and supplements the ADA and explicitly rejects implied repeals. And whether the ADA and TCA conflict cannot be ascertained in summary proceedings, as did the court below.

The district court's construction conflicts with Equal Protection and Due Process requirements. This Court should construe both statutes to avoid constitutional problems. Both statutes should be held effective; the ADA should be read to apply specifically to persons with disabilities, and the TCA to address effects on the general population.

ARGUMENT

A district court's dismissal under Rule 12(b)(6) is reviewed de novo. *Peterson v. Grisham*, 594 F.3d 723, 727 (10th Cir. 2010).

In judging the legal issues presented, the court must accept as true well-pleaded allegations in Plaintiff's pleadings, *Ellis v. Ogden City*, 589 F.3d 1099, 1102 (10th Cir. 2009), and attached exhibits, *GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 882 n.6 (10th Cir. 2005), *citing Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991), and drawing all reasonable inferences in favor of the nonmoving party. *Hull v. I.R.S.*, 656 F.3d 1174, 1177 (10th Cir. 2011).

I. The district court erred in finding that an increase in RF radiation does not qualify as a "more intense use" under § 14-3.6(B)(4)(b) of the LDC.

The court below held that the increase in intensity of AT&T's RF emissions with 3G service was not a "more intense use," requiring a further Special Exception under the LDC. So doing, the court gave no weight to the statements of the Commissioners on the Board of Adjustment, which administers the Special Exception provisions. Commissioner Komis specifically referred three times to the "intensification of use" (App. 142, 143, 145); Commissioner Rooney said, "I agree with Mr. Komis here." (App. 145). Commissioners Winston, Komis, and Rooney all stated that the Board would respond to citizen testimony about the impacts of RF radiation, but for TCA § 704—in other words, that the onset of 3G broadcasting was an increase in intensity, over which the Board would ordinarily have jurisdiction. (App. 142-45).

The court below interpreted "more intense use" to apply only to subjects specifically addressed in the LDC; the court mentioned tower height restrictions, tower design standards, setbacks, landscaping, weed and trash control, lighting, noise, signage, and equipment shelters (App. 261). It stated, erroneously, that the LDC "does not mention, much less limit, RF emissions." (*id.*). When Plaintiff pointed out four sections of the LDC that referred to RF radiation either explicitly or indirectly—including the section that defines an "antenna" and the section

authorizing denial of a Special Exception based on radiation (App. 298-300)—the court acknowledged that it had overreached, but did not alter its opinion:

> "The LDC addresses radio signals, electromagnetic waves, emissions of particulate matter and radiation. However, as discussed below, the Court's decisions expressed in the AT&T Opinion and in the City Opinion will not be altered" (App. 361).

The court still concluded that "the LDC does not specifically authorize the City to regulate RFEs" (App. 361). This too was error, since the LDC expressly empowers the Board of Adjustment to prohibit any use that is noxious, dangerous or offensive by reason of radiation. Prohibited uses include:

> "… any use or structure which the Board of Adjustment, on appeal and after investigation of similar uses or structures elsewhere, shall determine to be potentially noxious, dangerous or offensive to residents of the district or those who pass on public ways, by reason of odor, smoke, noise, glare, fumes, gas, vibration, threat of fire or explosion, emission of particulate matter, *interference with audio or television reception*, or *radiation*, or likely for other reasons to be incompatible with the character of the district." (LDC § 14-6.1(A)(3)) (*emphasis supplied*)

This Court reviews de novo a lower court's construction of state law. *United States v. DeGasso,* 369 F.3d 1139, 1144 (10th Cir. 2004). Since intensity of use is not defined in the LDC, "the general rule is that the word is to be interpreted in its ordinary, everyday sense." *United States v. Mayberry*, 774 F.2d 1018, 1020 (10th Cir. 1985). The ordinary use of this term is broad. In the LDC, "intensity" refers to floor area (§ 14-7.3(B)), number of plants in landscaping

(§ 14-5.5(A)(4)(b), brightness of light or color (Tables 14-8.7-2 and 14-8.7-3), and seating capacity. (§ 14-8.6(B)(3)(a)).

In other jurisdictions, "intensification of use" has been used to describe an increase in the number of tenants in rental cottages (*Cummings v. Tripp*, 204 Conn. 67, 96, 527 A.2d 230, 244 (1987)) or an increase in the amount of business or the frequency of use of a facility (*Heagen v. Borough of Allendale*, 42 N.J. Super. 472, 481, 127 A.2d 181, 185 (App.Div.1956)). Enlargement of an asphalt plant's maximum operating capacity was an illegal intensification of use (*APAC-Atlantic, Inc. v. City of Salisbury*, 709 S.E.2d 390 (N.C. App. 2011)), as was an increase in the number of animals in a feedlot (*Thieman v. Cedar Valley Feeding Co., Inc.*, 18 Neb. App. 302, 789 N.W.2d 714 (Neb. App. 2010)), an extension of hours of a grocery store (*Garb-Ko v. Carrollton Tp.*, 86 Mich. App. 350, 272 N.W.2d 654 (Mich. App. 1978)), and replacement of existing antennas and installation of new antennas on an existing telecommunications tower (*Century Cellunet of Southern Michigan Cellular, Ltd. v. Summit Twp.*, 250 Mich. App. 543, 655 N.W.2d 245 (Mich. App. 2002)).

The Board of Adjustment, using the term in its ordinary sense, thought that enhanced radiation was an intensification of use. This Court normally defers to an interpretation by the state agency charged with applying a statute. *Warnick v. Booher,* 425 F.3d 842, 851-52 (10th Cir. 2005). "[T]he courts have accorded

'substantial weight' to the interpretation of the agency charged with enforcement of the statute" (internal citation omitted). *County of Santa Fe v. Public Service Co. of N.M.*, 311 F.3d 1031, 1039 (10th Cir. 2002).

Moreover, the LDC defines an antenna as "[a]ny exterior transmitting or receiving device that may be mounted on a tower, building, structure and used in communications that *radiate or capture electromagnetic waves*, digital signals, analog signals, *radio frequencies* (excluding radar signals), wireless telecommunications signals or other communication signals" (*emphasis supplied*). LDC § 14-12. When radiation is part of the definition of antennas, and when the Board of Adjustment is specifically empowered to regulate radiation, it is contrary to reason to exclude radiation from the elements to which "more intense use" of an antenna may be applied.

II. The City's refusal to regulate injurious emissions violates Equal Protection requirements.

A. The City has determined that rights of persons who are hypersensitive to electromagnetic radiation shall not be considered when the City weighs whether to authorize RF emissions from antennas and towers. When a telecommunications provider decides to increase the intensity of emissions from its equipment, the City's deliberate position is that it will not listen to citizens who suffer from such disabilities and will not consider their interests.

The City's practice is plainly discriminatory. Such a policy violates the Equal Protection Clause of the 14th Amendment under both "rational basis" and "strict scrutiny" analyses.

Any "government practice or statute which restricts 'fundamental rights'… is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." *Regents of University of California v. Bakke*, 438 U.S. 265, 357 (1978).

Applying this standard, *Shapiro v. Thompson*, 394 U.S. 618, 627, 629-31 (1969), held invalid a one-year state residency requirement for welfare applicants because it "touches on the fundamental right of interstate movement," and in addition may deny to applicants "food, shelter and other necessities of life." TCA § 101, 47 U.S.C. § 254, titled "Universal Service," mandates the availability of advanced telecommunications services—and the RF radiation that they produce—everywhere in the United States. A mandate for universal dispersion of RF radiation *without exception*—which is how the City and the court below have interpreted it—means that people who must avoid exposure to such radiation already face severe obstacles and soon will be denied the right to travel or live *anywhere* in the country. This clearly infringes on the fundamental right to interstate travel and to secure the necessities of life and is at least as

constitutionally intolerable as the residency requirement for welfare applicants in *Shapiro v. Thompson*.

Even under "rational basis" scrutiny, this City policy cannot be upheld. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), holds invalid a city zoning regulation placing additional burdens upon the establishment of a group home for the mentally retarded.[8] Addressing the applicable standard, the Court stated:

> "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." (*id.* 446).

The Court held that purposes such as prevention of congestion were too attenuated from the classification, and an apparent dislike of the mentally retarded was an impermissible legislative purpose. (*id.* 448-50). Similarly, in *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528, 534-36 (1973), federal legislation denied food stamp assistance to any household that included unrelated persons. The agency offered the purpose to prevent fraud as a rational basis, but the Court held that "[t]he challenged statutory classification "is clearly irrelevant to the stated purposes of the Act" and that the discrimination did not constitute "a rational effort to deal with these concerns".

[8] The municipality required a special use permit, which was denied by its Planning and Zoning Commission. (473 U.S. at 436-37 & n. 4).

In *Romer v. Evans,* 517 U.S. 620 (1996), the Court again applied the "rational basis" test to state-law discrimination. A state constitutional amendment prohibited state action to protect homosexuals from discrimination. The Court found that the breadth of the classification "lacks a rational relationship to legitimate state interests" (at 632). The Court said further:

> "[The law] identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence… A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense…" (at 633).

This Court followed *Cleburne* in *Copelin-Brown v. New Mexico State Personnel Office*, 399 F.3d 1248 (10th Cir. 2005), where the plaintiff was disabled by migraine reactions to extended computer work. State rules allowed no post-termination hearing for persons who were discharged on account of disability. No credible justification was offered by the defendants:

> ". . . However, Defendants' answer, response to Plaintiffs motion for summary judgment, and appellate briefs fail to present any facts showing that the regulation in question eased administrative burdens." (at 1255)

Thus, "[w]hen there is an inadequate or a nonexistent connection between the classification and purpose, the Supreme Court has invalidated the classification under rational basis scrutiny." *Christian Heritage Academy v. Oklahoma Secondary School Activities Association,* 483 F.3d 1025, 1033 (10th Cir. 2007).

Here, too, the City has stood mute and offers no justification for its discriminatory policy. There is a "complete disconnect" (*id.*1034) between the City's refusal to consider the interests of persons disabled with EHS and any asserted legitimate state interest. Clearly, the City relies only on TCA § 704, which states:

> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." (47 U.S.C. § 332(c)(7)(B)(iv)).

The goal of this legislation, according to the court below, is "a desire for uniform federal standards applicable to telecommunications facilities." (App. 293). Such a goal is not rationally related to the denial to a class of people with disabilities of the right to be heard by their city government and to inhabit their homes and communities.

Thus, the lower court's interpretation of the TCA "identifie[d] persons by a single trait and then denied them protection across the board." (*Romer,* 517 U.S. at 633). The court ruled that "The TCA supercedes the ADA *as to Plaintiff*" (*emphasis supplied*) (App. 287), *i.e.,* as to persons with EHS. Since by TCA mandate, increasing levels of RF radiation are becoming ubiquitous, the denial of protection to persons with this trait is nationwide. Such persons increasingly cannot work (App. 123, 137, 173), travel (App. 60, 122, 123, 138), or visit libraries

(App. 123, 137), coffeehouses (App. 123), government buildings (App. 137) or most other public places.[9]

The City Attorney has advised the Board of Adjustment that it has "no jurisdiction" to consider the interests of persons suffering from EHS. (App. 145). The court below stated that the City, under TCA § 704, "has no power or authority to afford Plaintiff the due process he seeks." (App. 364). It also held that TCA § 704 constitutes a "rational basis" for the undeniable discrimination. (App. 365). The court's reasoning gives no weight to the discriminatory nature of the City's interpretation of TCA § 704, and forgets that the Supreme Court has "consistently held that Congress may not authorize the states to violate the Fourteenth Amendment." *Saenz v. Roe,* 526 U.S. 489, 507 (1999). *See also: Townsend v. Swank,* 404 U.S. 282, 291 (1971); *Shapiro v. Thompson,* 394 U.S at 618.

B. TCA § 704 addresses regulation by state or local governments of personal wireless service facilities on the basis of the "environmental effects of radio frequency emissions" where such facilities comply with the Federal Communications Commission's ("FCC's") regulations on such "environmental effects." TCA § 704 was adopted in response to telecommunications industry

[9] Persons with EHS are being denied access to cafes, restaurants, stores, libraries, hospitals, courthouses, government buildings, theaters, buses, trains, motels, hotels, and other public places. Proposed Third Amended Petition for Writ of Mandamus, ¶ 5 (App. 311).

complaints that local government zoning decisions based on concern about RF emissions were impeding their construction of a national wireless network:

> "A high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF standards in each community. The Committee believes the Commission rulemaking on this issue (ET Docket 93 62) should contain adequate, appropriate and necessary levels of protection to the public, and needs to be completed expeditiously. No State or local government, solely on the basis of RF emissions, should block the construction of sites and facilities or installation of equipment which comply with the Commission RF standards." H.R. Rep. No. 104-204, Committee on Commerce, 104th Cong., 1st Sess. 106-07 (July 24, 1995).

No mention of persons with disabilities occurs in the legislative history of this section.

Another section of the TCA, titled "Universal Service," mandates the availability of "advanced telecommunications and information services" in all parts of the United States. 47 U.S.C. § 254(b)(2).

Thus, without any mention and possibly without any awareness that it was impacting people with disabilities, Congress took from local governments the power to protect citizens from RF radiation, invested that power exclusively in the FCC, and mandated the universal presence of RF emissions from an increasing multitude of sources.

Then, acting on directions from TCA § 704(b) (110 Stat. 152), the FCC adopted purportedly binding RF emission regulations of a highly limited type. A rulemaking on "environmental effects" had commenced in 1993, In re *Guidelines*

for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Dkt. No. 93-62, 8 F.C.C.R. 2849 (April 8, 1993). The standards were proposed to define the radiation from FCC licensed facilities that would have no significant effect upon the environment, thus being categorically excluded from environmental analysis pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA").[10] Congress in the TCA required that the rulemaking be completed promptly. (TCA § 704(b), 110 Stat. 152). Regulations were issued on August 1, 1996. The FCC made clear that it is "not the expert agency for evaluating the effects of RF radiation on human health and safety." (8 F.C.C.R. at 2850). Therefore, it borrowed from standards and guidelines developed by other bodies. (*id.*). The FCC sought only to establish the RF radiation levels that other bodies had deemed safe for "workers and the general public." In re *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* Report and Order, ET Dkt. No. 93-62, 11 F.C.C.R. 15123, 15135 (August 1, 1996). The Report and Order does not state that the exposure limits are safe for all individuals.

Consequently, the FCC regulations do not address injurious effects upon the disabled. The FCC deemed its task completed when it adopted rules to protect the

[10] Under NEPA and FCC regulations, FCC actions that "may significantly affect the environment" (47 C.F.R. § 1.1307(a)) require the preparation of an Environmental Assessment.

general public and explicitly rejected requests to consider effects upon disabled individuals:

> "It would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and then adopt stricter standards than those advocated by federal health and safety agencies. This is especially true for such controversial issues as non-thermal effects and whether certain individuals might be 'hypersensitive' or 'electrosensitive.'"

In re *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934,* WT Dkt. No. 97-192, Second Memorandum Opinion and Order, 12 F.C.C.R. 13494, 13505 (Aug. 25, 1997).

Thus, at two initial stages of the process, disabled persons were already discriminatorily exposed to harm while being deprived of existing remedies for such harm. First, Congress assumed that the only solution to a claimed "problem" of local consideration of harmful effects of RF radiation emitted by local facilities—would be to preclude entirely such local consideration.

Second, the federal agency charged by Congress with developing a nationwide standard decided that it would be "impracticable" to investigate the injurious effects of RF radiation on persons with EHS—and so refused to consider them. Each of these decisions imposed a severe disadvantage on persons disabled with EHS without any valid justification.

In 1997 a national organization representing people with EHS challenged the validity of the FCC's regulations in court, *Cellular Phone Taskforce v. FCC*, 217 F.3d 72 (2d Cir. 2000), alleging violations of Title II of the ADA and Section 504 of the Rehabilitation Act of 1973. The court dismissed the case, ruling (a) that the ADA applies only to state and local governments, not to the FCC, and (b) that the Rehabilitation Act could not be invoked because petitioners were alleging that, because of RF radiation, they were being excluded from participation in programs, services, and activities of their local governments, not of the FCC. In effect, the court told petitioners to seek a remedy at the local level.

Plaintiff has done exactly that—only to be told by the City that it has no jurisdiction, and by the court below that the TCA has repealed the ADA as to people with his disability.

The City's interpretation of the product of these federal processes has a plainly discriminatory result: In any other zoning case, the Board of Adjustment may determine whether to grant a Special Exception based upon evidence that the proposed use would be

> "potentially noxious, dangerous, or offensive to residents of the district or those who pass on public ways, by reason of odor, smoke, noise, glare, fumes, gas, vibration, threat of fire or explosion, emission of particulate matter, interference with audio or television reception, or radiation, or likely for other reasons to be incompatible with the character of the district." (LDC § 14.6-1(A)(3)).

But when an EHS-disabled person objects that he is sensitive to radiation emitted by the proposed facility, he is classed separately; he is disadvantaged; he may not offer evidence, and if he does so it will be ignored. The disadvantage is substantial; indeed, it is conclusive against the disabled individual.

Therefore, if Plaintiff suffered from an allergy to chemicals planned for use in a facility under a Special Exception, he could present evidence of the effect of those chemicals on him and his health. If Plaintiff objected to noxious fumes to be emitted from a facility under a Special Exception, he could testify about the nature of the fumes and his own reaction to them, even if it exceeds the average person's response. It is only the facts of Plaintiff's EHS reactions, and those of other EHS-disabled persons, to RF emissions that are blocked from consideration.

Even if a cellular network is a legitimate governmental purpose, it cannot justify (a) denying persons disabled with EHS the right to have local bodies take account of their concerns in planning the network and (b) requiring that they pay the price of exposure to radiation that makes them ill.

The City's practice creates a new category of persons who are unentitled to public concern—an illegitimate motivation for governmental discrimination. *City of Cleburne,* 473 U.S. at 448-50. The City's policy silences a whole sector of the population on issues that are central to their survival. Such a policy curtails First

Amendment rights, among others, calling for strict scrutiny. *Police Department of the City of Chicago v. Mosley,* 408 U.S. 92, 96 (1972),

"When there is a proof that a discriminatory purpose has been a motivating factor in the decision… judicial deference is no longer justified." *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265-66 (1977). The City's intent to discriminate is expressly stated: the City asserts it does not have to "accommodate Plaintiff's disability [because of] express preemption by the Telecommunications Act" (App. 245).

Moreover, departure from normal procedures raises an inference of purpose, as when a landlord changes rules when a minority applicant appears (*Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032 (2d Cir. 1979)), or when a town declares a moratorium on new subdivisions upon learning of plans to build low income housing (*Village of Arlington Heights*, 429 U.S. at 267 n. 16, *citing Kennedy Park Homes Assn. v. City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970)).

Since the court below took judicial notice of Code provisions indicating that the City "recognized the TCA's preemption in other sections of the City Code" (App. 362), Plaintiff asks this Court also to take judicial notice of Ordinances No. 2010-14 and 2011-16, and the former City Code sections that they amended (supplied in the Addendum ("Add."), which show that the City added such

language to its Code (new §§ 27-2.13(K)(3) and 14-6.2(E)(4)(c)) only after persons with EHS demanded accommodation.

Further, five months after persons with EHS appealed the approval of AT&T antenna projects at Sites S205 and S215 (App. 109-47, 173-76), the City repealed the LDC provisions that had allowed such appeals (new §§ 14-6.2(E)(2)(b)(v), 14-6.2(E)(2)(b)(viii) and 14-6.2(E)(2)(b)(ix), added by Ordinance No. 2011-16 on May 25, 2011). The history is as follows:

1. Site S205 is on land leased from the City (App. 117); new § 14-6.2(E)(2)(b)(v) (Add. 122) exempts towers on City-owned property that were built prior to June 11, 2011 from the provisions of the LDC.

2. Site S215 involved antennas concealed in a chimney (App. 111); new § 14-6.2(E)(2)(b)(ix) (Add. 123) exempts hidden antennas from the provisions of the LDC.

3. Sites S205 and S215 both involved replacement of antennas with non-identical equipment (App. 110). New § 14-6.2(E)(2)(b)(viii) (Add. 123) exempts maintenance, repair, replacement, and improvements from the provisions of the LDC.

4. Sites S205 and S215 were both appealed for violations of state and federal laws and constitutions (App. 118). On April 13, 2011 the City Council deleted the provisions in the LDC that allowed individuals to appeal

decisions for violations of state and federal laws and constitutions. (Ordinance No. 2011-9, deleting wording in § 14-3.17(A)(2)(a)) (Add. 97, 115-16).

5. Another project was opposed under LDC § 14-6.2(E)(3)(v) (Add. 103), which prohibited antennas on historic properties designated as "contributing," significant," or "landmark." (City Council Minutes of May 11, 2011, Case No. H-11-004A) (Add. 144). Ordinance No. 2011-16 has deleted that provision.

6. The same application was denied by the Board of Adjustment for violation of LDC § 14-6.2(E)(1)(n) (Add. 98), which requires the City to provide remedies for the public health and safety impacts of communication towers. (Findings of Fact and Conclusions of Law, Case #2010-190, Feb. 15, 2011) (Add. 145-47). Ordinance No. 2011-16 has deleted that provision also. (Add. 121).

7. In the present case Plaintiff seeks an order to compel compliance with LDC § 14-3.6(B)(4)(b), which regulates intensity of use, employing the enforcement section of the telecommunications facilities ordinance, § 14-6.2(E)(11) (Add. 111-12). In 2011—after the court below issued its first opinion, now on appeal—the City deleted the enforcement provisions from that section of the LDC. (Ordinance No. 2011-9) (Add. 137). Three weeks

ago, on November 30, 2011, the City passed Bill No. 2011-42, amending LDC § 14-3.6(B)(4)(b), so that a new Special Exception is no longer mandatory for a more intense use.[11] (*See* old LDC § 14-3.6(B)(4)(b) (Add. 68) and new LDC § 14-3.6(C)(3) (Add. 143).

These changes are strong evidence of the City's desire, not just to intensify cell phone coverage, but to deny due process to the population that will thereby lose their homes and be driven from the City. As in *Romer v. Evans*, the "sheer breadth [of the discrimination] is so discontinuous with the reasons offered for it that the [policy] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." 517 U.S. at 632.

III. The City's decision to expose persons who are disabled by EHS to injurious radiation constitutes a procedural and substantive due process violation.

The City's refusal to consider the impacts of intensified radiation on people with disabilities denies due process. There is no question that the impacts are serious. Citizens have testified as to impacts of RF emissions on persons with

[11] In connection with these changes, it may be noted that under New Mexico Constitution, Art. 4, § 34, "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." *See County of Santa Fe v. Public Service Co. of N.M.*, 311 F.3d at 1041; *Owens v. International Business and Mercantile Reassurance Co.*, 1991 WL 137603, *7 (10th Cir. 1991) (*unpublished opinion*).

EHS, such as inability to breathe, cardiac effects, migraine headaches, muscle spasms, seizures and loss of consciousness. (App. 119-20). The individuals raising these issues are obviously responsible people. Plaintiff, Mr. Firstenberg, was a student at a University of California medical school when he suffered the injury that caused his EHS. (App. 53, 66). Others with EHS who testified before the Board of Adjustment include a physicist from Los Alamos National Laboratory (App. 133) and the Childhood Injury Prevention Coordinator for the New Mexico Department of Health. (App. 126). Plaintiff has previously lost several homes due to RF radiation (App. 51), and the City's refusal to act threatens to deprive him of another. Plaintiff's fee simple ownership of his home is the most basic of all protected property rights under due process analysis. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972).

Moreover, the City has been fully informed of the impacts of its policy upon a significant number of citizens. (App. 19-151). No one could claim that the City's conduct was unintentional. The City's failure to hold the hearings required by LDC § 14-3.6(B)(4)(b) establishes a violation of procedural due process for persons injured. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (*citation omitted*).

Further, certain government actions are barred "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Since *Rochin v. California,* 342 U.S. 165 (1952), federal courts have protected citizens against state conduct that "shocks the conscience" and "offend[s] even hardened sensibilities." (at 172). Conduct held violative of substantive due process includes failure to investigate claims of abuse of a child in state care, *Currier v. Doran,* 242 F.3d 905, 919-20 (10th Cir. 2001); failure to train subordinates to protect students from sexual abuse, *Sutton v. Utah State School for the Deaf and Blind,* 173 F.3d 1226, 1240-41(10th Cir. 1999); requiring a suicidal student to go home, where firearms were available, *Armijo v. Wagon Mound Public Schools,* 159 F.3d 1253, 1264 (10th Cir. 1998); and leaving a passenger of an impounded vehicle stranded in a dangerous location, *Wood v. Ostander,* 879 F.2d 583, 590 (9th Cir. 1989). A defendant is liable for deliberate indifference to the constitutional rights of persons affected. *City of Canton v. Harris,* 489 U.S. 378, 392 (1989). "Deliberate indifference" is more readily found where the defendant has time for actual deliberation. *County of Sacramento v. Lewis,* 523 U.S. 833, 851 (1998); *Radecki v. Barela,* 146 F.3d 1227, 1231 (10th Cir. 1998).

Specifically, it is a violation of substantive due process for a state recklessly to expose an individual to the danger of significant health risks.[12] In *Uhlrig v. Harder,* 64 F.3d 567 (10th Cir. 1995), this Court outlined liability for a substantive due process violation based upon the defendant's creation of a special danger to the plaintiff:

> ". . . Plaintiff must demonstrate that (1) Uhlrig was a member of a specifically definable group; (2) Defendants' conduct put Uhlrig and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking." (64 F.3d at 574).

See also: Medina v. City and County of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992); *Armijo v. Wagon Mound Public Schools,* 159 F.3d at 1263-64.[13]

Here, Plaintiff is a member of the specific group of persons disabled by EHS; the City's conduct has put the members of that group at high risk of injury from RF emissions; the risk is known, based on detailed presentations to the City; Defendants plainly acted in conscious disregard of that risk; and Defendants'

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[12] Judge Posner provides this metaphor: "If the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982).

[13] In *Armijo,* the Court noted that a plaintiff must show that the defendant "created the danger or increased the plaintiff's vulnerability to the danger in some way." (159 F.3d at 1263). Clearly, to authorize enhanced RF emissions increases Plaintiff's exposure to injury.

conduct shocks the conscience in light of the injurious consequences. People with EHS are being deprived of the right to earn a living (App. 123, 137, 173), reside in their own homes (App. 115, 118, 173), live in their own city (App. 115, 173), walk the streets (App. 118), participate in and receive the benefits of *any* of the services, programs and activities of their government (App. 222)[14]—even of the right to seek refuge *somewhere* where they can stay alive. (App. 341-42). To do this to people who have committed no crime, and to do it deliberately—to deliberately take an action whose predictable outcome, if the same policy were adopted nationwide, would be the annihilation of a class of human beings (App. 342-43)[15]—is conscience shocking.

In *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353, 2002 WL 1472197 (10th Cir. 2002) (*unpublished decision*), this Court upheld liability for a substantive due process violation in a situation much like this one. There, a sheriff required an employee to supervise painting of state vehicles in a makeshift facility, knowing the serious health hazards associated with the process and toxic paint being used. "Plaintiff was in a classic lose/lose situation." (at 358). The defendants had been warned of the health risk. The plaintiff contracted asthma, problems with memory, and spasms. (at 356). This Court emphasized that

[14] *See also* Proposed Third Amended Petition for Writ of Mandamus, ¶ 29 (App. 318-19).
[15] *See also* proposed Third Amended Petition, ¶¶ 4, 9 (App. 311, 312)

liability for reckless actions is particularly appropriate in such a case, where defendants had ample opportunity to deliberate:

> "The law recognizes a constitutional violation based on deliberate indifference where defendants create a dangerous situation, enjoy the luxury of making an unhurried judgment, have the chance for repeated reflection largely uncomplicated by competing obligations, and nevertheless take action which at 'best sanction[s], at worst intend[s]' Plaintiff's injury. *See Eddy v. Virgin Islands Water and Power Authority,* 955 F.Supp. 468, 475, *reconsidered,* 961 F.Supp. 113 (D.V.I. 1997)." (at 359).

The Court emphasized:

> "Concern about Plaintiff's and the inmates' welfare was not only possible, but one would think obligatory, given Defendants' position of authority over Plaintiff and the undisputed information given to Defendants about the serious safety and health hazards posed by the planned painting. . . . Such arbitrary action pursued without any reasonable justification makes the Defendants' deliberate indifference to the rights, health and welfare of the Plaintiff actionable." (at 359-60).

Sherwood is persuasive authority for this case. Plaintiff is a Santa Fe resident, a member of a vulnerable group—those who are disabled by EHS. He has presented to the City the range of health threats caused by RF emissions and his electromagnetic sensitivity. The City's officials have had ample opportunity to reflect upon the health impacts upon the Plaintiff and others similarly situated, who are numerous. The City's officials have nevertheless taken action which at best sanctions, and at worst intends Plaintiff's injury. The legislation, TCA § 704, does not shield Defendants, because Congress cannot authorize a constitutional violation. (See page 25, *supra*.)

The court below stated that Plaintiff had failed to allege "that the City failed to regulate AT&T's wireless transmissions intentionally or recklessly causing injury to Plaintiff by abusive behavior that shocks the conscience" (App. 273; *see also* App. 295-96) and that "the City's refusal to regulate RFEs has a legally-recognized *rational basis*, the City was following the Congressional mandate in the TCA to refrain from regulating RFEs." (App. 375, *emphasis supplied*). The court below appears to have relied upon TCA § 704 to excuse the City's action—forgetting that Congress cannot authorize or direct a constitutional violation. This is clear error and is inconsistent with this Court's view in *Sherwood,* which establishes liability here.

IV. The City's actions violate the Americans with Disabilities Act.

Plaintiff alleges that the City's action in refusing to consider his EHS disability and authorizing the increase in RF intensity violates Title II of the ADA, 42 U.S.C. § 12131 *et seq.* "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Tennessee v. Lane,* 541 U.S. 509, 524 (2004). Title II prohibits the exclusion from participation of, the denial of benefits to, or discrimination against any qualified person with a disability in the services, programs, or activities of a public entity. 42 U.S.C. § 12132. Title II applies to "anything a public entity does." 28 C.F.R. pt. 35, App. B

at 660 (2010). An act violates Title II when it has "the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(3)(i). *See Patton v. TIC United Corp.,* 77 F. 3d 1235, 1245 (10th Cir. 1996) (Violation occurs "regardless of whether the entity intended to discriminate against the disabled person.").

The Title II prohibition has been interpreted to apply to a state or city program that appears to affect all citizens similarly—but in fact adversely affects the disabled. *Heather K. v. City of Mallard,* 946 F.Supp. 1373 (N.D. Iowa 1996), holds that the city's regulation of open burning constituted a program, service or activity under Title II of the ADA, which could not lawfully be operated discriminatorily to injure a child with severe respiratory and cardiac conditions. The court followed *Crowder v. Kitagawa,* 81 F.3d 1480 (9th Cir. 1996), holding that Congress intended to prohibit both outright discrimination and "those forms of discrimination which deny disabled persons public services disproportionately due to their disability." (*Heather K.,* 946 F.Supp. at 1386, *quoting from Crowder,* 81 F.3d at 1484).

Under *Heather K.,* an open burning regulatory program that adversely affected the plaintiff violated Title II on two grounds: First, if it "has a discriminatory effect on the ability of persons with disabilities to take advantage of City services, programs, or facilities," at 1386, and, second, "*regulation* of 'leaf-

burning' or other open burning is the program, service, activity or benefit provided by the City, and hence that *regulation* of 'leaf-burning' or other open burning must comply with Title II of the ADA and regulations promulgated thereunder." (at 1387) (*emphasis original*).

The court below acknowledged that, but for the TCA, the City would have to regulate telecommunications facilities to avoid discriminating against persons with EHS. It distinguished *Heather K.* on the ground that the *Heather K.* court "was not asked to reconcile a federal statute like the TCA, which expressly prohibited the type of local regulation *mandated by the ADA.*" (App. 267) (*emphasis supplied*)).

A similar analysis has been used in other cases: *Crowder,* 81 F.3d 1480 (Pet quarantine program adversely affected visually impaired persons who lost use of guide dogs.); *Coalition of Human Advocates for K9's and Owners v. City and County of San Francisco,* 2007 WL 641197 (N.D. Cal. 2007) (*unpublished decision*) (City regulations requiring neutering of certain dogs discriminates against persons with disabilities who own or train guide dogs.). *Crowder* emphasizes the language of 42 U.S.C. § 12101(a)(5):

> "In section 12101(a)(5), Congress declared its intent to address 'outright intentional exclusion' as well as 'the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices.' It is clear that Congress intended the ADA to cover at least some so-called disparate impact cases of discrimination, for the barriers to full participation listed above are almost all facially neutral but may work to effectuate discrimination against disabled persons." (81 F.3d at 1483).

It is well established that ADA protection extends to municipal zoning actions. *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 361 & n. 2 (4th Cir. 2008); *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, 750 (7th Cir.2006); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 334-35 (6th Cir. 2002); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44-46 (2d Cir. 1997); *Cinnamon Hills Youth Crisis Center v Saint George City,* 2011 WL 61602, *4 (D. Utah 2011) (*unpublished decision*). The Supreme Court has specifically cited discrimination in zoning decisions as one of the problems Title II was designed to redress. *Tennessee v. Lane*, 541 U.S. at 524-25.

In *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999), the court explained:

> "[T]he Technical Assistance Manual [of the Department of Justice] expressly cites zoning as an example of a public entity's obligation to avoid discrimination:
>
> > "Illustration 1: A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.
>
> "*The Americans with Disabilities Act: Title II Technical Assistance Manual ("TA Manual")* § II-3.6100, illus. 1 (1993)."[16]

[16] As that court noted: "The Justice Department's interpretation of its own regulations, such as the Technical Assistance Manual, must also be given substantial deference and will be disregarded only if 'plainly erroneous or

The example given by the Justice Department is a case where, as here, Title II may require a municipality to modify its policy to prevent discrimination by private entities regulated by its zoning laws.

The obligations imposed by Title II are not optional. A public entity need not fundamentally alter the nature of a program or incur an undue financial or administrative burden, *Robertson v. Las Animas County Sheriff's Department,* 500 F.3d 1185, 1999 (10th Cir. 2007).[17] But, pointedly, "a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens," and such a determination "must be accompanied by a written statement

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inconsistent with the regulation.'" *Id.* at 732 n.11, quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)."

The Justice Department's implementing regulations contain several provisions bearing on the City's zoning function:

> "A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration— (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability."

28 C.F.R. § 35.130(b)(3)(i).

> "A public entity may not, in determining the site or location of a facility, make selections— (i) that have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination."

28 C.F.R. § 35.130(b)(4)(i).

[17] Applicable regulations state: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7).

of the reasons for reaching that conclusion." In such a case, "a public entity *shall* take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity" (*emphasis supplied*). 28 C.F.R. § 35.164. *See Robertson v. Las Animas County*, 500 F.3d at 1999. The City may not make zoning decisions that have the effect of denying persons with disabilities the benefits of all of the programs, services and activities of the City without proving that accommodation would be unduly burdensome, without justifying such a conclusion in writing, and without making every effort to mitigate such a decision. As in *Robertson*, the City here "took *no action* in response to" requests for accommodation. (*id.*) (*emphasis original*).

V. The TCA does not repeal the ADA.

Defendants assert that TCA § 704 repeals by implication the protections of ADA Title II. (App. 236-37). Such an argument faces major obstacles. Since courts—and state governments—may not "pick and choose among congressional enactments," *Morton v. Mancari,* 417 U.S. 535, 551 (1974), all federal statutes are to be enforced as the law of the land, unless clearly shown otherwise; thus, repeals by implication are strongly disfavored. *See also: Tennessee Valley Authority v. Hill,* 437 U.S. 153, 189 (1978) ("cardinal rule . . . that repeals by implication are not favored."); *Traynor v. Turnage,* 485 U.S. 535, 547 (1988); *J.E.M. Ag Supply,*

Inc. v. Pioneer Hi-Bred International, Inc., 534 U.S. 124, 137 (2001) (cites "overwhelming evidence needed to establish repeal by implication"); *Cook County v. Chandler,* 538 U.S. 119, 132 (2003) ("Inferring repeal from legislative silence is hazardous at best . . . "); *Branch v. Smith,* 538 U.S. 254, 273 (2003) ("repeals by implication are not favored"); *National Association of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662-63 (2007) ("' repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.' ")

So strong is the presumption against implied repeals that Justice O'Connor noted in 2003 that the Supreme Court "ha[s] not found *any* implied repeal of a statute since 1975. . . And outside the antitrust context, we appear not to have found an implied repeal of a statute since 1917" (*emphasis original*). *Branch v. Smith*, 538 U.S. 254, 293 (2003). This observation is still true.

There are

> "' two well-settled categories of repeals by implication —(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . .' " *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 154 (1976).

Accord: Elephant Butte Irrigation District v. U.S. Department of the Interior, 269 F.3d 1158, 1164 (10th Cir. 2001).

Here, Congress has not stated that it intends to repeal the ADA or any part of it. To the contrary, Congress illustrated its intent by including a specific provision in the 1996 TCA expanding the protections afforded disabled people to include a guarantee of access to telecommunications services and equipment.[18] Moreover,

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[18] Sec. 255. ACCESS BY PERSONS WITH DISABILITIES

(a) Definitions.--
As used in this section--

(1) Disability

The term "disability" has the meaning given to it by section 12102(2)(a) of Title 42.

(2) Readily achievable

The term "readily achievable" has the meaning given to it by section 12181(9) of Title 42.

(b) Manufacturing
A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.

(c) Telecommunications services
A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.

(d) Compatibility
Whenever the requirements of subsections (b) and (c) of this section are not readily achievable, such a manufacturer or provider shall ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

there is no possible claim that the TCA is intended as a substitute for the comprehensive remedial scheme of the ADA, because the TCA, and the Federal Communications Act as a whole, provide no remedies for persons adversely affected by the operation of federally-licensed facilities.[19]

Further, to find "irreconcilable conflict" the Court must examine both the requirements of the TCA and the scope of the ADA. The requirements of the TCA

> (e) Guidelines
> Within 18 months after February 8, 1996, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission. The Board shall review and update the guidelines periodically.
>
> (f) No additional private rights authorized
> Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

[19] One provision of the TCA specifically says that *no* additional private remedies are provided for the disabled, 47 U.S.C. § 255(f).

Save Our Summers v. Washington State Dept. of Ecology, 132 F. Supp. 2d 896 (E. D. Wash. 1999), relied on by the district court as supporting a repeal, actually does the opposite. In that case a remedy under the ADA was foreclosed by the "comprehensive remedial scheme" of the Clean Air Act. *Id.* at 902-903. The TCA cannot foreclose a remedy under the ADA because the TCA contains no remedial scheme at all. The *Save Our Summers* court further stated that an implicit finding that a later act (the ADA) superseded an earlier act (the Clean Air Act) was "inappropriate." *Id.* at 900.

have never been litigated in connection with the impact upon the disabled.[20] However, it is recognized that municipalities retain control over zoning decisions as to location of cell towers, *U.S. Cellular Telephone of Greater Tulsa v. City of Broken Arrow,* 340 F.3d 1122, 1137-39 (10th Cir. 2003). Municipalities may "balance the competing goals of… the provision of wireless services and other valid public goals such as safety and aesthetics." *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008). In short, "to abolish local control over zoning of personal wireless services" would be "to thwart democracy." *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 431 (4th Cir.1998), *quoted in U.S. Cellular Telephone of Greater Tulsa,* 340 F.3d at 1138. Municipalities also must have jurisdiction over impacts of RF radiation on disabled people to fulfill their responsibilities under the ADA.

What constitutes a "reasonable modification" under the ADA also requires probing factual investigation. What are the needs of the EHS? What is the range of possible accommodations that might suffice? What is the range of reasonable modifications in City policy? How might such modifications interact with the TCA? Such matters cannot be resolved on a motion to dismiss or for summary judgment.

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[20] The only previous case in which a disability claim was argued was *Cellular Phone Taskforce v. FCC*, 217 F.3d 72 (2d Cir. 2000), and the Second Circuit did not rule on the issue.

In *Robertson v. Las Animas County,* the Court held that "whether this exception [to the requirements of the ADA] applies here presents a question of fact," and it reversed the entry of summary judgment. (500 F.3d at 1199). *See also: A.P. v. Anoka-Hennepin Independent School District No. 11,* 538 F.Supp.2d 1125, 1141-44 (D. Minn. 2008); *Developmental Services of Nebraska v. City of Lincoln,* 504 F.Supp.2d 726, 739-40 (D. Neb. 2007); *Powers v. MJB Acquisition Corp.,* 993 F.Supp. 861, 868 (D. Wyo. 1998). *Staron v. McDonalds Corp.,* 51 F.3d 353, 355-58 (2d Cir. 1995), holds that whether a modification is reasonable requires a fact-specific inquiry that considers, among other factors, the effectiveness of a modification in light of the nature of the disability and the cost to the organization that would implement it, and is not appropriate for decision under Rule 12(b)(6).

The TCA itself specifically precludes any interpretation of repeal. TCA § 601(c)(1) reads:

> "NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." (TCA § 601(c)(1), 110 Stat. at 143 (1996) (*codified at* 47 U.S.C. § 152 note))

If a court found that the TCA and the ADA could not co-exist, § 601(c)(1) would require a court to find that the ADA, not the TCA, takes precedence. Citing § 601(c)(1), courts have held that the TCA does not impair the Administrative

Procedure Act (*Cellco Partnership v. FCC,* 357 F.3d 88, 100 (D.C. Cir. 2004)); the Sherman Act (*Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 330 F.3d 176, 186 (4th Cir. 2003)); state tort law (*Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1291 (11th Cir. 2002), *affirmed*, 374 F.3d 1044 (11th Cir. 2004)); state commission authority to interpret contracts between local telephone companies (*Bell Atlantic Maryland v. MCI WorldCom*, 240 F.3d 279, 303 (4th Cir. 2001)); and local government authority to require franchises from telephone companies providing television programming (*City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999)). *Pinney v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005), holds under § 601(c)(1) that the TCA does not preempt state tort law as to the health effects of radio frequency emissions. The Third Circuit, disagreeing with *Pinney*, found a preemption of state law despite § 601(c)(1) (*Farina v. Nokia*, 625 F.3d 97, 130-132 (3d Cir. 2010)), but that court was not asked to decide whether the TCA repealed another *federal* law.

There are other principles that refute any conclusion of implied repeal. There is "clear congressional recognition, within the framework of [TCA], of the unique status of" Americans with disabilities. *Morton v. Mancari,* 417 U.S. at 545-46. It would be "anomalous to conclude that Congress intended to eliminate," *id.* 548, the protections for the disabled, just enacted in the ADA, at the very same

time it was expanding the protections afforded the disabled in another section of the TCA, 47 U.S.C. § 255.

Moreover, a general enactment is not construed to repeal a statute addressed to a specific situation. *Radzanower*, 426 U.S. at 153. "' A specific statute controls over a general one without regard to priority of enactment.' " *Kay Elec. Co-op v. City of Newkirk.*, 647 F.3d 1039, 1044 (10th Cir. 2011), *quoting from Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). The ADA is intended to protect a minority of citizens—the disabled. TCA § 704 is concerned with the "environmental effects" of RF radiation upon the "general public." In *Morton* "[a] provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race." (417 U.S. at 550). Here, the ADA provision aimed specifically at protecting the lives of a disfavored minority—the disabled—can readily co-exist with a general rule prohibiting the denial of a construction permit based on general environmental concerns.

The decision in *Sierra Club-Black Hills Group v. United States Forest Service*, 259 F.3d 1281 (10th Cir. 2001), is instructive. The National Forest Management Act ("NFMA"), applicable throughout the United States, conflicted with the Norbeck Organic Act, a more specific law regulating forest management

on a small preserve. (*Id.* 1287). "The Forest Service can continue to establish management plans under both the Norbeck Act and the NFMA," the court said, "but the NFMA mandate must be supplemental and may not diminish (through balancing) the more specific mandate of the Norbeck Act." (*Id.* 1288-1289).[21]

There is another important principle: A court must make every effort to interpret a statute to avoid constitutional difficulties:

> " ' " When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." ' " *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 629 (1993) (*citations omitted*).

Thus, "[t]his long-established canon of construction [disfavoring repeals by implication] carries special weight when an implied repeal or amendment might raise constitutional questions." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981). The constitutional arguments in this brief show that to read TCA § 704 impliedly to repeal Title II of the ADA, thus authorizing the City's conduct, raises serious issues of Due Process and Equal Protection.

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[21] The court below misapplied *Sierra Club-Black Hills Group* in support of implied repeal. It asserted, erroneously, that the TCA is a more specific law. Moreover, the *Sierra Club-Black Hills Group* court properly gave effect to both laws in question; one did not repeal the other. The court ruled not that the Norbeck Act *repealed* the NFMA, but that the NFMA could not be *applied* in a way that effectively abolishes the mandates of the Norbeck Act, and that both laws had to be respected. 259 F.3d at 1287-89. And since the court did not have enough facts to determine how to do this, it remanded the case to the agency. (*id.* 1289).

Instead of finding repeal, courts must give force to both enactments. " ' When there are two acts upon the same subject, the rule is to give effect to both if possible.' " *Morton v. Mancari,* 417 U.S. at 551 (*citation omitted*). This Court has stated that

> "[e]ven when a later enacted statute is not entirely harmonious with an earlier one, we are reluctant to find repeal by implication unless the text or legislative history of the later statute shows that Congress intended to repeal the earlier statute and simply failed to do so expressly." *United States v. State of Colorado,* 990 F.2d 1565, 1575 (10th Cir. 1993).

Constitutional problems should be avoided, for example by a solution like that crafted in *Sierra Club-Black Hills Group*. The TCA "mandate must be supplemental and may not diminish (through balancing) the more specific mandate of" the ADA. (259 F.3d at 1289). How this may be accomplished will require a remand for fact-finding.

One possible remedy that Plaintiff proposed below would establish a radiation-free zone in Santa Fe (App. 343). Both statutes would be effective, but the ADA would govern the specific needs of persons with EHS. The FCC's regulations would not change, except that people with EHS would have a refuge where they could survive.[22]

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[22] There is precedent for this type of solution. To protect the National Radio Astronomy Observatory ("NRAO"), the State of West Virginia passed the Radio Astronomy Zoning Act on August 9, 1956. It prohibits the operation, within a distance of ten miles from any radio astronomy observatory, of electrical equipment that emits RF radiation, and provides for enforcement by West

VI. Section 704 of the TCA is unconstitutional

"Congress may not authorize the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. at 641 (1969). If the Court finds that TCA § 704 deprives people disabled with EHS of any remedy under local law, the ADA, or the Fourteenth Amendment, even if they are deprived of their lives, then § 704 is unconstitutional.

Equal Protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Either the TCA must be interpreted so that it does not deny fundamental rights or impose unjustified discrimination, or it is unconstitutional.

Virginia county prosecuting attorneys and West Virginia courts. WV Code § 37A. In addition, the FCC issued regulations in 1958 that created the National Radio Quiet Zone, under which anyone installing FCC-licensed equipment within a 13,000 square mile area of Virginia and West Virginia must first consult the NRAO. 47 CFR § 1.924(a).

Passage of the TCA in 1996 did not abolish the Radio Quiet Zone. The West Virginia law is more protective, within the Quiet Zone, than the FCC regulations, yet no one has interpreted it to contravene TCA § 704, which states that, in general "no state or local government" may place stricter requirements on wireless telecommunications facilities than the FCC. This solution is in the same spirit as the solution crafted by the court in *Sierra Club-Black Hills Group.* The TCA, a general law, did not contravene the West Virginia act, a more specific law.

Plaintiff does not suggest that this is the only possible accommodation for people with EHS. A determination of the range of possible solutions under which the TCA and the ADA can coexist requires an evidentiary hearing, which was inappropriately foreclosed by a Rule 12(b)(6) dismissal.

VII. The district court abused its discretion when it denied Plaintiff's Motion for Leave to Amend Pleading

The denial of a motion to amend a pleading is reviewed for abuse of discretion. "However, when denial is based on a determination that amendment would be futile, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Miller ex rel. S.M. v. Board of Education*, 565 F.3d 1232, 1249 (10th Cir. 2009).

Plaintiff asked leave to amend his pleading "to state more clearly, and in more detail," his allegations of intentional discrimination and of a taking of life, liberty and property without a hearing. (App. 308). He attached a proposed Third Amended Petition. (App. 310).

The court below denied leave to amend on grounds of futility. (App. 372). Its stated reasons—that the City had no "power or authority" to grant Plaintiff due process, and that the City had a "rational basis" to deny him equal protection—cannot withstand constitutional scrutiny, requiring reversal.

If the Court reverses the dismissal, it should also reverse the district court's decision to deny leave to amend. Fed. R. Civ. P. 15(a)(2) requires that a court freely give leave to amend "when justice so requires." "[D]ismissals under Rule 12(b)(6) typically follow a motion to dismiss, giving plaintiff notice and opportunity to amend his complaint. *Hall v. Bellmon*, 935 F.2d at 1109-10

(10th Cir. 1991). "[P]ro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings."[23] *Id.* at 1110 n.3.

CONCLUSION

Plaintiff has stated valid claims under City zoning law, the ADA and the Constitution. The allegations in Plaintiff's Petition for Writ of Mandamus establish the City's obligations to consider the impacts upon people with disabilities, such as Plaintiff, of transmitting antennas that fall under the City's land use regulations. This Court should allow those facts to be proven at trial.

WHEREFORE,

1. Plaintiff requests that the Court reverse the decision of the court below and remand the case for trial.

2. Plaintiff requests that the Court reverse the decision of the court below that the TCA § 704 repeals by implication the Americans with Disabilities Act.

3. If the Court is unable to resolve this matter on statutory grounds, it should find that TCA § 704 violates the Fifth Amendment and is unconstitutional.

4. The Court should also reverse the decision of the court below to deny Plaintiff's motion for leave to amend his pleading.

[23] Plaintiff appeared pro se below.

5. Plaintiff requests that the Court award him his costs and attorney's fees pursuant to 42 U.S.C. § 12205, and such other relief as the Court may deem proper.

ORAL ARGUMENT

Plaintiff-Appellant respectfully submits that the record is sufficiently complex and the issues are so important that the case should not be disposed of without oral argument. The parties are in controversy as to issues of state law, issues of the intersection of potentially conflicting federal law, and issues of constitutional law that have national significance. These matters require the fullest presentation by counsel to assist the Court.

Respectfully submitted,

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December 20, 2011

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 13,987 words:

Complete one of the following:

X: I relied on my word processor to obtain the count and it is Word 2007.

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

By: /s/Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that this brief has been submitted in PDF format to the Tenth Circuit's Electronic Case Filing System; is an exact copy of the written document filed with the Clerk; that all required privacy redactions have been made; and that the digital submission has been scanned for viruses with the ESET Smart Security 4.2.71.2 Virus Signature Database: 6715 (20111215) and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c) and Tenth Circuit Rule 25.3, I hereby certify that on this date, December 20, 2011, I caused the foregoing Brief and its Addendum to be filed upon the Court through the use of the Tenth Circuit CM/ECF electronic filing system, and this also served counsel of record. Seven hard copies of this Brief and Addendum and two hard copies of the Appendix were sent by Federal Express to the Office of the Clerk on this date. One hard copy of the Brief, Addendum and Appendix were sent by Federal Express to a counsel for each party listed below. The resulting service is consistent with the Service Method Report:

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