CASE No. 33,441

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ARTHUR FIRSTENBERG,

Petitioner-Appellant,

vs.

ORAL ARGUMENT REQUESTED

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

Respondents-Appellees.

On appeal from the First Judicial District Court, Division II,
County of Santa Fe, State of New Mexico,
The Hon. Sarah M. Singleton, Case No. D-101-CV-2010-04296

APPELLANT'S BRIEF IN CHIEF

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June 30, 2014

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Statement About Audio Transcripts

All hearings are recorded on a single audio (FTR) disk. References to the audio transcripts are to the exact time indicated by the FTR software.

Statement of Compliance

This brief complies with the limitations of Rule 12-213(F) NMRA. It is proportionally spaced and contains 11,000 words. The word count was obtained from a word processing program which is Microsoft Office Word 2003.

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INTRODUCTION

Appellees City of Santa Fe ("City") and AT&T Mobility Services, LLC ("AT&T") seek to establish a precedent that nothing—*not even the annihilation of a class of human beings*—shall be allowed to impede the unlimited growth of wireless telecommunications. Accordingly, when Appellant Arthur Firstenberg alleged that radio frequency ("RF") radiation is harmful, and that people who for medical reasons must not be exposed to it at all are being left with no place on earth where they can survive, Appellees decided not to deny his allegations. They wanted a ruling from the district court that it doesn't matter. And the court obliged. The Telecommunications Act of 1996 ("TCA") not only supersedes the Americans with Disabilities Act ("ADA"), wrote the court, but provides a "rational basis" for denying equal protection, and a valid reason for depriving injured parties of due process. Such a decision is unprecedented in American jurisprudence, and cannot be allowed to stand.

SUMMARY OF PROCEEDINGS

A. Nature of the Case

Whether caused by a heart condition, brain tumor, neurological disease, or genetic predisposition, medical intolerance to electromagnetic radiation is known as electromagnetic hypersensitivity ("EHS"). In 2010, Appellant filed this and a companion case, *Firstenberg v. Monribot* (now No. 32,549 in this Court), for two

reasons: (1) self-preservation, and (2) to assert, for the first time, the legal and constitutional rights of the class of people with this condition.

Both cases were heard and decided by the same district court judge: the Honorable Sarah M. Singleton. Appeals of both decisions are being briefed at the same time in this Court. In *Monribot,* a personal injury case against a neighbor under theories of nuisance and prima facie tort, Appellant seeks to establish that people with EHS have the right to live in their own homes. In the present case, via a petition for writ of mandamus, Appellant seeks to establish that people with EHS have the right to live in this world. In *Monribot*, the court decided, in effect, that EHS does not exist. In the present case, it decided that EHS does exist, but that people with EHS have no constitutional rights.

B. Course of the Proceedings

On or about November 15, 2010, AT&T began providing "3G" (third generation) cell phone service from base stations ("cell towers") in Santa Fe that it operates under zoning permits called "special exceptions." (RP 169-170, 746)[1]. These permits were issued under the City's telecommunications facilities

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[1] "RP" denotes pages of the Record Proper.

[2] Citations to the LDC are to provisions that were in effect at the time the Petition for Writ of Mandamus was filed. *See* New Mexico Constitution, Article IV, § 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."

ordinance, codified as § 14-6.2(E) of its Land Development Code ("LDC"), [2] which regulates antennas and towers.

On December 15, 2010, Appellant, a person with EHS, filed a Petition for Writ of Mandamus (RP 1),[3] alleging that the upgrade to "3G" increased ambient levels of RF radiation throughout Santa Fe, causing him and many others irreparable injury. He requested the district court to order that the City enforce LDC § 14-3.6(B)(4)(b), which prohibits an intensification of an existing use permitted by special exception unless a new special exception is obtained; and that the City commence enforcement proceedings as provided in LDC §§ 14-11.5(A) and 14-6.2(E)(11) (RP 153).[4] Application for a new special exception requires a public hearing before the Board of Adjustment. LDC § 14-3.6.

On December 22, 2010, the district court issued an Alternative Writ of Mandamus, requiring the City to grant the requested relief or show cause why it should not do so. (RP 157).

On January 5, 2011, AT&T removed the case to the U.S. District Court for the District of New Mexico, alleging federal question jurisdiction. (RP 182).

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[3] Subsequent references to the Petition are to the Second Amended Petition, filed December 29, 2010.

[4] The text of these LDC provisions is at RP 783-88.

Appellees allege that TCA § 704, which restricts the power of local governments to regulate wireless facilities "on the basis of the environmental effects of radio frequency emissions," preempts Appellant's claims, and prevents the City from enforcing its ordinance. Appellant alleged in his Petition that regardless of TCA § 704, the City must enforce its ordinance because failure to do so results in violations of the ADA and Fourteenth Amendment. (RP 175). Motions by the City and AT&T to dismiss for failure to state a claim (RP 271, 290) were granted by the U.S. District Court (RP 512, 553), but the decisions to dismiss were reversed by the Tenth Circuit (RP 678), finding lack of federal jurisdiction over a case that arises under a City ordinance. *Firstenberg v. City of Santa Fe*, 696 F.3d 1018 (10th Cir. 2012).

After remand to the First Judicial District Court of New Mexico, Appellees filed a Joint Answer to the Alternative Writ of Mandamus on January 28, 2013. (RP 745). No party having identified any disputed material fact, the parties agreed to submit the matter for decision on the pleadings. (Audio transcript, Dec. 4, 2012). Briefing on the legal issues followed (RP 753; 789; 842), and oral argument was heard on October 1, 2013 (RP 858). Instead of making its decision on that day, the district court ordered a further round of briefing, styled as proposed decisions (audio transcript, 9:50:48), to be served simultaneously by both sides on the court and on opposing parties (9:50:57). On October 15, 2013, Appellant filed his proposed decision and served it on the opposing parties. (RP 863). However,

Appellees submitted their joint proposed decision *ex parte*, without a certificate of service, and neither filed it with the clerk nor served it on Appellant.[5]

On October 30, 2013, the district court adopted Appellees' *ex parte* brief (RP 931) almost verbatim as the court's Decision (RP 889), denying Appellant's request for a writ of mandamus, as well as making novel interpretations of federal law with implications far beyond this case. Appellant timely filed his Notice of Appeal on December 2, 2013 (RP 908).

C. Summary of Relevant Facts

Board of Adjustment Hearing

On November 17, 2010, the City's Board of Adjustment ("Board"), held a public hearing (RP 101-139) on equipment replacement at two AT&T cell towers (sites S205 and S215), for which application had been made earlier that year. The applications had been approved administratively, and a group of citizens, including Appellant here, had appealed that decision to the Board. They asserted that the project would significantly increase the levels of RF radiation broadcast from those facilities, and that there were many Santa Feans disabled by EHS whose health was so severely affected by levels of RF radiation already existing in Santa Fe that any further increase would be likely to destroy their lives (RP 107), depriving them of the right to earn a living (RP 94, 114, 115, 129, 171) the right to reside in their

[5] Appellant later requested the brief from counsel for AT&T, and was provided it. By Appellant's motion of December 17, 2013 (RP 929), long after the district court entered judgment, it was added to the record (RP 948).

homes (RP 29, 43, 110, 115, 171), the right to live in their city (RP 39, 43, 80, 107, 171), walk the public streets (RP 110, 116-17, 120, 129), or participate in and receive the benefits of any of the services, programs, and activities of their government (RP 30, 129). They alleged that this would violate Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as non-discrimination clauses in the New Mexico Constitution (Article II, § 18) and the Santa Fe City Charter (Article II, § 2.02). (RP 110, 120). They urged that the project was an illegal intensification of use (RP 128) under LDC § 14-3.6(B)(4)(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.

The appeal was accompanied by 89 pages of exhibits including letters from 10 physicians and 19 other individuals, and official documents from the Social Security Administration and the U.S. Access Board. (RP 11-100). Among these documents is a letter from the General Counsel for the Access Board stating: "We have heard from thousand[s] of people across the country who are sensitized to chemicals and electromagnetic, radio, and cell phone emissions... There are many people with these and related disabilities whose condition is so severe that they cannot live in conventional housing." (RP 21). Another is the introduction to *Indoor Environmental Quality*, a 97-page report published in 2006 by the Access

Board and containing guidance on "best practices for accommodating individuals with multiple chemical sensitivities and electromagnetic sensitivities." (RP 25-27).[6]

Appellant, representing the group, presented the appeal orally to the Board at the public hearing. It would not "be ethical or lawful," he asserted, "if the City were to take a group of productive, law-abiding citizens, and systematically injure them, throw them out of their homes, and run them out of Santa Fe." (RP 107). He testified that there are an estimated 2,000 electrosensitive individuals in Santa Fe "who are so seriously affected by electromagnetic radiation that they are disabled as defined by the ADA." (RP 111). Extensive public testimony followed, almost all of it directed toward the intensification of RF radiation that would accompany the new equipment. Testimony regarding their own electrosensitivity was given by, *inter alia*:

- John McPhee, who is the Childhood Injury Prevention Coordinator for the New Mexico Department of Health, and is also New Mexico's representative to the Consumer Products Safety Commission. "[Y]ou can blindfold me, I can go right by [a] cell tower and know exactly where it is," he stated. (RP 118-120).

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[6] The full report is on the Access Board's website at http://www.access-board.gov/research/completed-research/indoor-environmental-quality.

- Caroline Walker, a former world record holder in the marathon, who lived in her car for eight years in order to avoid exposure to electromagnetic fields. (RP 115).
- Victoria Jewett, a librarian, who testified that she cannot work or go to most public places, because of WiFi, cordless phones, and other RF transmitters. (RP 114-15).
- Monika Steinhoff, a professional artist, who invested most of her savings in opening a downtown gallery and then had to close it after less than three months because of WiFi from neighboring vendors. (RP 116-18).
- Dr. William J. Bruno, a physicist at Los Alamos National Laboratory who was disabled by tinnitus, insomnia, memory problems and fatigue, caused by ambient RF radiation. (RP 125-26; *see also* RP 100).
- Noel Kaufmann, a piano tuner whose brain tumor caused him to be hypersensitive to cell phones, cordless phones, cell towers, and WiFi. (RP 112-13).
- Appellant here, who was a student at a University of California medical school when he suffered the injury that caused his EHS. (*see* RP 58).

Leah Morton, M.D., a family practice physician, testified that about 3% of her patients in Santa Fe have EHS (RP 129). Extrapolation to the total population of the city implies that 2,000 Santa Feans may have EHS. Erica Elliott, M.D., a family practice physician, submitted a written statement stating that she saw her

first EHS patient in 1995, and that the number of such patients in her practice has steadily risen. (RP 28).

City's Refusal to Rule on the Issues Presented

Following the public hearing the Board adopted Findings of Fact and Conclusions of Law. But based on instructions by the City Attorney that the City did not have "jurisdiction" to consider objections to an increase in RF radiation, the Board disregarded the principal allegations and virtually the entire contents of the written appeal, the written exhibits, Appellant's oral presentation, and the sworn public testimony; made no findings or conclusions on any issues related to EHS, RF radiation, or an intensification of use other than to state that it lacked jurisdiction; and approved the applied-for equipment. (RP 835-36, 838-39). The Board members, however, stated clearly and repeatedly that an increase in RF radiation is an intensification of use that would be prohibited were it not for the TCA:

> C. Komis: Well, what about the need for a public hearing regarding this intensification of this use.

(RP 135).

> 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.

(RP 136)

> 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...
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> ***
>
> C. Rooney: I agree with Mr. Komis here.

(RP 137). None of the four Commissioners disagreed.

The present case concerns an upgrade to "3G" technology that occurred not just at those two cell towers, but at all of AT&T's cell towers in Santa Fe, which number about twenty. The upgrade occurred on or about November 15, 2010. The City having refused, two days later, to take enforcement action against this type of an intensification of use, and there being no provision in the City Code allowing individuals to appeal a refusal to take enforcement action, Appellant petitioned the district court for a writ of mandamus. He attached to his Petition the 89 pages of written submissions (RP 11-100), the verbatim minutes of the November 17, 2010 Board hearing (RP 101-139), and a sworn affidavit of a Santa Fe physician (RP 140-143).

Undisputed Facts

"[A party's] answer to the alternative writ of mandamus, by failure to deny, admit[s]" the allegations therein. *State ex rel. State Highway Commission v. Quesenberry*, 1963-NMSC-113, ¶ 9, 72 N.M. 291. *See* Rule 1-008(D) NMRA. Because Appellees in the present case failed to deny any of Appellant's factual

allegations,[7] the wide-ranging opinion of the district court assumed their truth and ruled only on questions of law. The following allegations of Appellant are undisputed:

(a) AT&T operates a number of cell towers in Santa Fe under zoning permits called special exceptions. (Joint Answer to the Alternative Writ of Mandamus, ¶ 5 (RP 746)).

(b) On or about November 15, 2010, AT&T increased its RF emissions from its cell towers in Santa Fe. (*Id.*, ¶ 5).

(c) Appellant suffers from EHS, has been diagnosed with this condition by nine doctors, and has collected disability benefits from the Social Security Administration since 1992 on this basis (RP 168). Exposure to RF radiation affects his heart, lungs, and nervous system (RP 49), substantially limiting his ability to think, stand, walk, and breathe (RP 169). Because of the construction of cell towers nearby, he has previously fled five homes, three cities or towns, and two states in order to survive (RP 43). (Joint Answer, ¶ 4 (RP 745)).[8]

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[7] Because the Answer responds to the Petition as well as the Writ ("The Petition alleges no facts to support any such claim" (RP 747-48); "[H]is Petition does not state a claim under the ADA" (RP 748); "The Petition fails to state a claim upon which relief may be granted" (RP 751), the Court treats the Writ as though it contains the allegations set forth in the Petition. *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 15, 140 N.M. 168.

[8] Appellees deny that Petitioner is beneficially interested in the enforcement of the City's ordinance, but do not specifically deny any of his factual allegations about his disability.

(d) Appellant is a qualified individual with a disability as defined by the ADA. (RP 169).

(e) People with EHS suffer effects such as seizures, hypertension, heart arrhythmias, severe insomnia, tinnitus, muscle spasms and twitching, migraine headaches, respiratory distress, and loss of consciousness upon exposure to RF radiation (RP 30, 142). (Joint Answer, ¶ 7 (RP 747)).

(f) At the November 17, 2010 public hearing, a substantial number of people testified that RF radiation is causing themselves or others to be unable to work, travel, or escape life-threatening injury, and that any increase in ambient RF radiation would likely cause them to be unable to live in their homes and to be unable to live in Santa Fe. (Joint Answer, ¶ 7 (RP 747)).

Proceedings in the District Court

Appellees asserted that (a) the LDC does not regulate RF radiation (RP 794), and that in any case (b) the City has no authority to enforce its ordinance because RF radiation is federally regulated and TCA § 704 (codified at 47 U.S.C. § 332(c)(7)(B)(iv)) preempts all state regulations pertaining to such radiation:

> 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 [Federal Communications] Commission's regulations concerning such emissions.

(RP 796).

Appellant, disputing the first assertion, pointed to four provisions of the LDC where RF radiation is mentioned and/or regulated, in particular LDC § 14-6.1(A)(3), which requires the Board of Adjustment to prohibit uses that it determines 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 particular matter, interference with audio or television reception, or radiation, or likely for other reasons to be incompatible with the character of the district.

(RP 760-61).

Disputing the second assertion, Appellant argued that regardless of the TCA, the City must regulate RF radiation if necessary to fulfill its obligations as a public entity under Title II of the ADA, and in order not to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. He further argued that either TCA § 704 must be interpreted so that it does not deny fundamental rights, or it is unconstitutional under the Fifth Amendment. (RP 765-77).

In its decision the district court denied Appellant's petition for a writ of mandamus. Following a brief introduction, the court adopted almost verbatim the arguments submitted *ex parte* by counsel for AT&T, ruling that the LDC does not regulate RF radiation (RP 894-95), and that an increase in RF radiation is not an intensification of use (RP 893-94). But the district court's opinion does not stop at these narrow, targeted issues. It goes on to rule that the ADA does not apply to

zoning decisions that affect disabled third parties (RP 900-01), setting an alarming precedent for all people with disabilities. It states that the TCA supersedes the ADA (RP 897-99), setting a dangerous precedent for other situations where there is tension between a law that protects a class of people from discrimination and a law that protects commerce. It states that equal protection and due process violations cannot exist because TCA § 704 provides a "rational basis" for the discrimination (RP 903) and a valid reason to deprive injured parties of a hearing (RP 904)—thereby ruling that an act of Congress may abrogate fundamental constitutional protections.

ARGUMENT

As there are no disputed material facts, all the issues in this case are questions of law, subject to de novo review. *State ex rel. Shell Western E & P, Inc. v. Chavez,* 2002-NMCA-005, ¶ 7, 131 N.M. 445.

There are really two basic questions: (1) whether an unauthorized intensification of RF radiation is illegal under the LDC; and (2) if so, whether, as Appellees assert, the City is prevented from enforcing its Code by federal law. This second question, however, raises a number of sub-issues, arising under the TCA, the ADA, and the Fourteenth Amendment, that have dominated this case. If violations of the ADA and the Constitution result from the facts presented here—facts that Respondents have admitted by failure to deny—then if the TCA cannot be held to justify such violations, the City must enforce its ordinance.

I. AN INCREASE IN RF RADIATION IS A "MORE INTENSE USE" UNDER LDC § 14-3.6(B)(4)(b), REQUIRING A PUBLIC HEARING.

Appellant argued this issue at RP 760-64, 844-45, and 874-78.

The antenna permits at issue are by definition permits to emit RF radiation. Under the LDC, an "Antenna" is defined as a device that

> "radiate[s] or capture[s] electromagnetic waves, digital signals, radio frequencies (excluding radar signals), wireless telecommunications signals or other communications signals."

LDC § 14-12.1 (RP 788). However, antennas that are receive-only, i.e. do not radiate, are exempt from regulation and require no permits:

> This section shall not govern any tower, or the installation of any antenna, that is under 70 feet in height and... is used exclusively for receive-only antennas.

LDC § 14-6.2(E)(2)(a) (RP 785). Therefore a special exception issued under the City's telecommunications ordinance is explicitly, and by definition, a permit to emit RF radiation. That is the use authorized by the permit and any intensification of that use, by definition, is regulated by § 14-3.6(B)(4)(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.

(RP 783).

The district court's finding that "RF emissions are not regulated" by the LDC (Decision at 6) is equivalent to a finding that antennas are not permitted by

the City. It is clearly erroneous. A use that is permitted is *per se* regulated. And § 14-3.6(B)(4)(b) requires not only initial regulation but subsequent regulation. A factory that is permitted to emit odors, smoke, or noise is not permitted to emit *unlimited* amounts of odors, smoke, or noise. It is permitted to emit only the amount of odors, smoke, or noise that it emitted at the time the factory was permitted. Nor is a cell tower that is permitted to emit radiation, permitted to emit *unlimited* amounts of radiation. A special exception is granted for a "specific use and intensity, *any* change of use or more intense use" requires a new special exception. (*emphasis added*). The district court's argument that the *Federal Communications Commission* sets the limits on intensity of radiation, and that the City is therefore powerless to limit radiation under § 14-3.6(B)(4)(b) (RP 893) is an argument about preemption, not about what is contained in the LDC. The LDC, by its own terms, plainly permits and regulates RF radiation in numerous ways:

(a) § 14-12.1 defines an antenna as a device that emits or receives RF radiation.

(b) § 14-6.2(E)(2)(a) exempts from regulation antennas that receive but do not emit radiation.

(c) § 14-6.1(A)(3) prohibits any use that is "noxious, dangerous or offensive to residents of the district or those who pass on public ways" by reason of, *inter alia,* "radiation." (RP 784-85).

(d) § 14-6.2(E)(1)(h) requires the City to "[m]inimize any adverse impacts of towers and antennas on residential areas and land uses." (RP 818).

(e) § 14-6.2(E)(1)(n) requires the City to "provide remedies for the public health and safety impacts of communication towers." (RP 785).

The district court next attempts to make a distinction that is contrary to law and science: it claims that "RF emissions are not regulated" because the City regulates only "the physical structures and aesthetic impact of the facilities, including matters such as tower height, design, placement, landscaping, lighting, noise control, signage, and appearance." (RP 894). This is contrary to law because the LDC nowhere makes such a distinction. It is contrary to science because it is a distinction without a difference: "light" and "noise" are no more or less "physical" than RF radiation: light and RF radiation are just different frequencies of electromagnetic waves, and noise is acoustic waves; all can be disturbing and cause illness if raised to intense levels.

The district court next, citing *Hyde v. Taos Municipal-County Zoning Authority*, 1991-NMCA-114, ¶ 3, 113 N.M. 29, argues that it should defer to the interpretation the City gives its own ordinance. (RP 894). To the degree that the City's interpretation is contrary to the plain meaning of its ordinance, it is unreasonable and deserves no deference. *New Mexico Attorney General v. New Mexico Public Regulation Commission*, 2013-NMSC-042, ¶ 12, 309 P.3d 89; *New Mexico Board of Licensure for Professional Engineers and Professional Surveyors*

v. Turner, 2013-NMCA-067, ¶ 21, 303 P.3d 875**;** *Talamante v. PERA*, 2006-NMCA-032, ¶ 14, 139 N.M. 226 (no deference to agency's unreasonable interpretation of the meaning of "gainful employment"); *New Mexico Pharmaceutical Association v. State*, 1987-NMSC-054, ¶ 9, 106 N.M. 73 (agency's interpretation overturned because it was "clearly wrong.") Thus, the Board of Adjustment's finding that the LDC "does not regulate RF or the environmental effects of RF emissions" (RP 839), taken out of context, is erroneous and deserves no deference. But in the context of what every Board member said at the public hearing, that statement is simply a finding about the preemptive effect of the TCA. The Board plainly, repeatedly, and without dissent, considered an increase in RF radiation to be an intensification of use that would require Board permission were it not for the TCA. Appellant agrees that that plainly articulated opinion of the Board merits deference under *Hyde v. Taos Municipal-County Zoning Authority*.

II. AN ASSERTION OF FEDERAL PREEMPTION DOES NOT DEPRIVE THE CITY OF JURISDICTION TO HOLD A MANDATORY HEARING.

Not only do the district court's decisions on preemption violate federal and constitutional law (issues III-VII, *infra*), but it was unnecessary, and therefore improper, for the court to reach those issues. Issuance or non-issuance of a writ of mandamus did not require those determinations. "[O]rdinarily the Supreme Court

does not pass on questions unnecessary for a decision." *Srader v. Verant*, 1998-NMSC-025, ¶ 25, 125 N.M. 521, citing *Crist v. Town of Gallup*, 51 N.M. 286, 290 (N.M. 1947).

This issue was argued by Appellant in his Proposed Decision (RP 887-88).

Our Supreme Court distinguishes between "choice-of-forum preemption" and "choice-of-law preemption"; an assertion that a federal statute preempts state law does not displace state courts (or administrative bodies) as forums for adjudicating such an assertion. In *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, the defendant contended that the 1976 Medical Device Amendments, 21 U.S.C. § 360k(a), expressly preempted all state tort claims based on defective-product liability and deprived the district court of the authority to decide such claims. The Supreme Court disagreed:

> [A]ny preemptive effect is not directed at displacing state courts as forums for adjudicating claims that implicate the Medical Device Amendments.

1995-NMSC-036, ¶ 15. The Court explained:

> [T]he issue is not whether Congress intended to replace state law with a federal regulatory scheme but "whether jurisdiction provided by state law is itself preempted by *federal* law vesting exclusive jurisdiction over that controversy in another body."

1995-NMSC-036, ¶ 13, quoting *International Longshoremen's Association v. Davis*, 476 U.S. 380, 387-88 (1986) (*emphasis original*).

In TCA § 704, as in the Medical Device Amendments, Congress created a federal regulatory scheme that impacts state law, but did not vest jurisdiction over this controversy in any particular body. Indeed, TCA § 704 says the opposite: "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in *any court* of competent jurisdiction." (*emphasis added*). 47 U.S.C. § 332(c)(7)(B)(v). The trial court for adjudicating this zoning dispute and any issues connected with it is the Board of Adjustment.

The Board of Adjustment has jurisdiction to adjudicate the issues that arise in connection with an intensification of use, including issues regarding alleged federal preemption. Therefore the only issue the district court need have reached is whether an intensification of RF radiation is an intensification of use under the terms of the LDC, requiring a public hearing. It need not and should not have reached any federal issues in order to decide that the City's ordinance was or was not violated, and that therefore the requested writ of mandamus should or should not issue.

However, the district court not only reached the federal issues, it made unprecedented rulings concerning them that must be reversed.

III. A ZONING DECISION THAT INJURES THE DISABLED, EXCLUDES THEM FROM THE CITY'S SERVICES, PROGRAMS, AND ACTIVITIES, DEPRIVES THEM OF THEIR LIVELIHOODS,

AND DRIVES THEM FROM THEIR HOMES AND THEIR CITY, VIOLATES THE ADA.

Title II of the ADA prohibits discrimination against the disabled by public entities:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. "Public entities" include municipalities. 42 U.S.C. § 12131(1).

The district court's ruling on the ADA is two-fold. It ruled that the ADA does not protect disabled third parties in zoning decisions; and it ruled that even if it does, the ADA is repealed by the TCA with respect to people with EHS.

Appellant argued this issue at RP 765-70, 845-50, and 883-86.

A. The ADA Protects Disabled Third Parties From Discrimination in Zoning Decisions.

The district court ruled that in making zoning decisions that "regulate the conduct of private third parties," municipalities are not required "to prevent an alleged adverse impact on the disabled caused by that private activity." (RP 900).

The district court's ruling is erroneous. See *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48-49 (2d Cir. 1997) (disabled individuals,

affected by the city's refusal to approve facilities sought to be constructed by third parties, stated cognizable claims under the ADA); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 737 (9th Cir. 1999) (similarly). In *Kennedy v. Fitzgerald*, 102 F.Supp.2d 100, 102-104 (N.D.N.Y. 2000), a city refused to modify a zoning policy to allow an ice cream store to construct a wheelchair ramp. A disabled patron stated a cognizable claim under the ADA. See also *The Americans with Disabilities Act: Title II Technical Assistance Manual* [of the Department of Justice] § II-3.6100, illus. 1 (1993) (A zoning ordinance that has the effect of preventing wheelchair access to businesses would run afoul of the ADA). Appellant knows of no contrary authority.

The district court relied on *Safe Air for Everyone v. Idaho*, 469 F.Supp.2d 884 (D.Idaho 2006), which held that in regulating open burning a State need not accommodate disabled persons impacted by smoke, because regulation of such burning provides a net benefit to all citizens, including the disabled. "'[W]ere the State to not have developed a plan for regulating and managing the burning of fields, there would be no limit or restriction on such burning.'" (RP 900, quoting *Safe Air*, 469 F.Supp.2d at 890-91). However, the district court's reliance on *Safe Air* is misplaced, first, because there is contrary authority that is persuasive; and second, because *Safe Air* is not a zoning decision and the reasoning of the *Safe Air* court is completely inapposite here.

In *Heather K. v. City of Mallard*, 946 F.Supp. 1373 (N.D.Iowa 1996), a case factually similar to *Safe Air* but holding an opposite opinion, the city's ordinance permitting open burning affected a child with severe cardiac and respiratory conditions. The child stated a cognizable ADA claim because the city's regulation denied her access to city parks and sidewalks. And in *Sak v. City of Aurelia*, 832 F.Supp.2d 1026 (N.D.Iowa 2011), the court, following *Heather K.*, explained that

> the regulation of any activity by a city, by an ordinance, is, itself, a program, service, activity, or benefit of the City that Title II of the ADA will reach...
>
> Furthermore, 42 U.S.C. § 12132 prohibits more than just discrimination on the basis of disability in the services, programs, or activities of a public entity. It also states that "no qualified individual with a disability shall, by reason of such disability... be subjected to discrimination by any such entity."

(at 1042).

Moreover, the reasoning behind the *Safe Air* decision—i.e., that in the absence of the city's ordinance, there would be no restriction on open burning—does not apply to zoning decisions. It is not true that in the absence of Santa Fe's regulations, AT&T would be able to emit RF radiation at will. In the absence of zoning permits from the City, AT&T would not be able to operate its facilities at all.

B. Failure to Regulate RF Radiation Discriminates Against People With EHS.

It is difficult to imagine a more global and severe discrimination than that which is alleged—and which Appellees have admitted by failure to deny—in this case. The discrimination here is more pervasive, for example, than the prevention of wheelchair access to a public facility in *Kennedy v. Fitzgerald*, or the failure of a city to approve a treatment facility for the disabled, as occurred in *Innovative Health Systems, Inc.*, and in *Bay Area Addiction Research and Treatment.* It is more pervasive than the discrimination in *Heather K.*, which only occurred on the days on which burning was permitted; here, the discrimination occurs year-round, without respite.

The efforts of the district court to distinguish regulation of RF regulation from other types of City activities (RP 899-900) are unavailing. Title II applies to "anything a public entity does." 28 C.F.R. pt. 35, App. B at 660 (2010). The allegation that the City's intention is to provide a benefit, not to discriminate (RP 900-01) is also irrelevant. Violation occurs "regardless of whether the entity intended to discriminate against the disabled person." *Patton v. TIC United Corp.*, 77 F.3d 1235, 1245 (10th Cir. 1996).

The obligations imposed by Title II are not optional:

> 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) (*emphasis added*), or unless the modifications would cause undue financial and administrative burdens, 28 C.F.R. § 35.164. Further, "a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens," and in such 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." *Id.* (*emphasis added*). See *Robertson v. Las Animas County Sheriff's Department*, 500 F.3d 1185, 1195, 1199 (10th Cir. 2007). There is no allegation here that the requested accommodation would fundamentally alter the City's zoning program. And as in *Robertson*, the city "took *no action* in response to" requests for accommodation. *Id.* at 1199 (*emphasis original*).

C. The TCA Does Not Repeal the ADA

The City may disregard the ADA, said the district court, because compliance "would directly conflict with Section 704 of the TCA." (RP 897). Affirming such a decision could open up a floodgate of requests for courts to usurp the powers of the legislature through judicial weighing of the relative merits of federal laws that may be in tension with one another.

The district court ignored two important principles in its ruling. The first is that potentially conflicting federal statutes must be construed, if possible, so as to give force to both.

> "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. 535, 551 (1974) (*citation omitted*). So strong is the presumption against implied repeals that Justice O'Connor noted in 2003 that outside the antitrust context the Supreme Court "ha[s] not found an implied repeal of a statute… since 1917." *Branch v. Smith*, 538 U.S. 254, 293 (2003).

The second principle is that 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 California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 629 (1993) (*citations omitted*). To read TCA § 704 impliedly to repeal Title II of the ADA raises serious issues of Due Process and Equal Protection (see below).

A third principle was recognized by the district court but applied improperly: a specific statute takes precedence over a more general one:

> "'A specific statute controls over a general one without regard to priority of enactment.'"

Kay Electric Cooperative v. City of Newkirk, Okla., 647 F.3d 1039, 1044 (10th Cir. 2011), quoting *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

A law concerned with the effects of RF radiation on the general public—the TCA—must yield to a law concerned with effects of RF radiation only on the disabled—the ADA.

The district court disagreed, but gave no rational basis for doing so. According to the district court, the TCA is the specific statute, and the ADA the general one. (RP 898-99). Regulation of telecommunications facilities, said the court, is "more specific" than protection of the disabled. But, as Appellant told the court, this is like arguing that an orange is more specific than an apple. (Audio transcript, October 1, 2013, 9:13:30 - 9:13:41). The ADA—as the district court pointed out—"makes no mention of, and is not specifically directed at, local regulation of wireless facility RF emissions..." (RP 898). But by the same token—as the district court did *not* point out—TCA § 704 makes no mention of, and is not specifically directed at, protecting the disabled from discrimination. The two laws can only be compared under terms that are comparable.

The ADA is intended to protect a minority of citizens—the disabled. TCA §704 is concerned with the "environmental effects" of RF radiation, and the FCC has clarified that this means the effects upon 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 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 court properly gave effect to both laws; one did not repeal the other. "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.* 1288-89).

Similarly here, Title II of the ADA, prohibiting discrimination against persons with disabilities by public entities, and TCA § 704, prohibiting local regulation of wireless telecommunications facilities based on general environmental concerns, must both be accommodated, so that in zoning decisions the City may, and must, consider the impacts of RF radiation from telecommunications facilities upon the disabled, but need not consider the effects upon the general public if a facility complies with FCC exposure guidelines.

Appellant suggests one possible remedy (RP 769): the City could establish a radiation-free zone somewhere in Santa Fe. 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. Appellant does not suggest that this is the only possible accommodation for people with EHS. The full range of possible accommodations requires a fact-finding hearing.

An evidentiary hearing is necessary to fashion reasonable accommodations under the ADA. *Robertson v. Las Animas County*, 500 F.3d at 1197-1200; *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).

That evidentiary hearing should be held by the City, which is the entity responsible for compliance with Title II. *Robertson v. Las Animas County*, 500 F. 3d at 1999. As the Tenth Circuit ruled in its decision rejecting federal jurisdiction, this case was not brought under the ADA, but under a City ordinance. The proper remedy here is the one requested in the Petition for Writ of Mandamus: The City should require AT&T to apply for new special exceptions, and the City should hold the mandatory public hearing, as required by LDC § 14-3.6(B)(4)(b) . If the City determines that new special exceptions cannot be issued without fashioning accommodations for the disabled, then it should take evidence, as required by the ADA, in order to fashion such accommodations. Such a determination, and such accommodations, would not be preempted by the TCA. To find otherwise would violate the cardinal rules of statutory construction and would run afoul of the Fourteenth Amendment.

IV. THE CITY'S REFUSAL TO ENFORCE ITS CODE VIOLATES EQUAL PROTECTION

Appellant argued this issue at RP 770-73, 850-51, and 882-83.

It is important to emphasize that in their Answer, Appellees deliberately did not deny any of the allegations in the Petition for Mandamus. They did not deny that Appellant and thousands of other residents of Santa Fe have EHS; that RF radiation from cell towers injures and disables people, evicts them from their homes, exiles them from their city, and leaves them no place where they can survive.

Until now, AT&T's stance in litigation has been that the public has irrational *fear* of radiation and that its facilities do *not* injure people. "AT&T presented scientific evidence on radio frequency emissions (rfes) intended to allay residents' fears of adverse health effects." *Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490, 492 (1999). "There are no adverse effects from the proposed infrastructure on public health and safety." Post Hearing Brief, In re *New Cingular Wireless PCS, LLC Application for Certificate of Environmental Compatibility*, Docket No. 442, Connecticut Siting Council, May 9, 2014, p. 9.[9]

In the present case, AT&T, joined by the City of Santa Fe, has finally abandoned the fiction that its facilities are harmless and has boldly sought—and obtained from the district court—a breathtaking ruling stating that the Telecommunications Act of 1996 is inviolable and that the protections it affords to this industry are absolute, subject to no other considerations, laws, regulations, or

[9] www.ct.gov/csc/lib/csc/pendingproceeds/docket_442/442-20140509-cingposthrngbrief.pdf

constitutional provisions: the TCA, said the court, provides a "rational basis" for violating equal protection (RP 903), and a valid reason for violating due process (RP 904). The ruling that AT&T obtained from the district court allows it to continue to implement, without restraint, an unlimited expansion of its wireless telecommunications network that it now openly admits is injuring the general public and torturing an entire class of people. Counsel for AT&T wrote (RP 943), and the district court adopted as its Decision (RP 903), that "RF emissions... plainly can impact all persons to some extent." Counsel for AT&T wrote (RP 943-44), and the district court adopted as its Decision (RP 903), that "even if RF emissions may impact persons with EHS more than other persons"—even if, as Appellant alleges, and Appelles do not deny, it deprives them of their health, their livelihoods, their homes, and their lives—this "'does not mean that [Appellees] violated the Equal Protection Clause.'" (quoting *Lee v. City of Los Angeles*, 250 F. 3d 668, 687 (9th Cir. 2001). (RP 903).

If the wholesale elimination of an entire class of people does not violate the Equal Protection Clause, then nothing does.

U.S. Supreme Court precedents do not allow the Constitution to be eviscerated. 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, 638 (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, AT&T, and the district court interpret it—means that people who must avoid such radiation soon will be denied the right to travel or live *anywhere*. This 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*.

Contrary to the district court's decision (RP 901-02), the City's policy is not "facially neutral." Others similarly situated, but not having EHS, could object to injurious impacts of zoning decisions and have their disabilities accommodated (LDC §§ 14-3.17(B), 14-6.1(A)(3)), but not Appellant. If a cell tower were expanded so as to block wheelchair access to the sidewalk, or a strobe light were added to a tower causing seizures in persons with epilepsy, or increased noise

levels from its equipment cabinets disturbed neighbors, those concerns would be heard. But if an increase in RF radiation injures people with EHS, those concerns will not be heard. The City's practice creates a new category of persons who are unentitled to public concern, which itself violates the Equal Protection Clause. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50 (1985). The City's policy silences a whole sector of the population on issues that are central to their survival. Such a policy also curtails First Amendment rights, calling, again, for strict scrutiny. *Police Department of the city of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972).

The district court also erred in denying that the City is motivated by discriminatory animus against people with EHS. (RP 903). 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" (RP 359).

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, 1039 (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 v. Metropolitan Housing Corp.*, 429 U.S. 252, 267 and n. 16 (1977), citing *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970).

Here, as Appellant argued on October 1, 2013 (audio transcript, 8:57:04 - 8:59:58), the City has systematically repealed all of the provisions of the City Code under which people with EHS have sought protection, including the provisions invoked in the Petition for Mandamus in the present case:

1. AT&T's site S205, one of the two towers that were the subjects of the November 17, 2010 Board hearing, is on land leased from the City. (RA 109). Ordinance No. 2011-16, adopted May 25, 2011, enacted new LDC § 14-6.2(E)(2)(b)(v), exempting cell towers on City-owned property from the provisions of the LDC.

2. Site S215, the other subject tower, involved antennas concealed in a chimney. (RA 103). New § 14-6.2(E)(2)(b)(ix), in the same ordinance, exempts hidden antennas from the provisions of the LDC.

3. Sites S205 and S215 both involved replacement of antennas with non-identical equipment. New § 14-6.2(E)(2)(b)(viii), in the same ordinance, exempts replacement and improvements from the provisions of the LDC.

4. After the Hearing Examiner, on appeal from the Board's decision, submitted findings to the Governing Body[10] stating that RF radiation has a discriminatory effect under the ADA on people with EHS,

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[14] City Council minutes, April 13, 2011, pp. 6-7, www.santafenm.gov/archive_center/document/5154.

Ordinance No. 2011-9, adopted April 13, 2011, abolished the position of the Hearing Examiner.

5. After people with EHS appealed those towers and others on the basis of the ADA, the Fourteenth Amendment, and the New Mexico Constitution, Ordinance No. 2011-9 deleted the wording in § 14-3.17(A)(2)(a) and (b) that had provided for appeals "[t]o contest noncompliance of a final action with... state or federal constitutions, laws or regulations."

6. On January 19, 2011, the Board of Adjustment denied a cell tower application at St. John's Methodist Church based on § 14-6.2(E)(1)(n), which required the City to provide remedies for the public health and safety impacts of communication towers.[11] Ordinance No. 2011-16 repealed that provision.

7. That application involved antennas in a historic district on a building whose historic status was proposed as "contributing."[12] Ordinance No. 2011-16 repealed § 14-6.2(E)(3)(v), which had prohibited antennas on historically contributing, significant, or landmark buildings.

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[11] Board of Adjustment minutes, Jan. 19, 2011, pp. 28-30, www.santafenm.gov/archive_center/document/4927.

[12] Historic Design Review Board minutes, Feb. 22, 2011, pp. 506, www.santafenm.gov/archive_center/document/5010.

8. Ordinance No. 2011-16 also repealed § 14-6.2(E)(1)(h), which had required the City to minimize any adverse effects of towers and antennas.

9. Ordinance No. 2011-16 added a new provision, § 14-6.2(E)(4)(c), prohibiting the regulation of telecommunications facilities "on the basis of the environmental effects of radio frequency emissions."

10. Ordinance No. 2011-37, adopted November 30, 2011, repealed § 14-6.1(A)(3), which had specifically empowered the Board of Adjustment to prohibit objectionable radiation.

11. LDC § 14-3.6(B)(4)(b), which Petitioner in the present case requested the district court to order enforced, was amended by Ordinance No. 2011-37 so that a new special exception is no longer mandatory for an intensification of use.[13]

12. The entire enforcement section of the telecommunications facilities ordinance, § 14-6.2(E)(11) (RP 785-86), which Petitioner in the present case requested the district court to order implemented, was deleted by Ordinance No. 2011-16.

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[13] The City has amended this provision, now located at LDC § 14-3.6(C)(3), twice. Ordinance No. 2011-37 inserted the words "if appropriate," and Ordinance No. 2013-16, adopted March 27, 2013, amended the provision to refer to a "significant" (instead of "any") intensification of use.

These changes are undeniable 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. 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." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Moreover, even a policy that is "nondiscriminatory on its face" violates the Equal Protection Clause when it "exposes *only* [a particular class] to the risk" of adverse impact. In *M.L.B. v. S.L.J.*, 519 U.S. 102, 126-27 (1996), the Court struck down a state law imposing transcript costs upon an indigent person who appeals the termination of parental rights. The Court noted that the law violated Equal Protection even though the poor are not a suspect class. (519 U.S. at 126). The impacts of the law on poor people were "not merely *disproportionate* in impact. Rather, they are wholly contingent on one's" circumstance, "and thus "'visi[t] different consequences on two categories of persons'"; they apply to all within that class and "do not reach anyone outside that class." (at 127) (*italics original*) (*citation omitted*). In *M.L.B.*, people who could not afford transcript costs lost their parental rights. In the present case, people who cannot afford to be exposed to radiation lose their jobs, their homes, and often their lives.

V. THE CITY'S ACTIONS VIOLATE DUE PROCESS

Appellant argued this issue at RP 774-76, 851, and 880-82.

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. They include inability to breathe, cardiac effects, migraine headaches, muscle spasms, seizures, and loss of consciousness. Appellant has previously lost several homes due to RF radiation, and the City's refusal to act threatens to deprive him of another. Home ownership is the most basic of all protected property rights under due process analysis. *Board of Regents of State Colleges v. Roth*, 408 U.S. 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. No one can claim that the City's conduct is 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). Substantive due process is violated when the defendant "created the danger or increased the plaintiff's vulnerability to the

danger in some way." *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 (10th Cir. 1998). In *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995), the court outlined the elements necessary to show a violation:

> 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.

A government defendant is liable not just for its own affirmative actions, but for deliberate indifference to the constitutional rights of persons affected. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). 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 how 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 School*, 159 F.3d at 1264; leaving a passenger of an impounded vehicle stranded in a dangerous location, *Wood v. Ostander*, 879 F.2d 583, 590 (9th Cir. 1989); and placing an employee in a situation where he was exposed to toxic paint, *Sherwood v. Oklahoma County,* 42 Fed. Appx. 353, 358 (10th Cir. 2002).

All of the elements of a substantive due process violation are present here. Appellant is a member of the specific group of persons disabled by EHS. The

City's conduct has put members of that group at high risk of injury from RF emissions. The risk is known, based on detailed presentations to the City, and is admitted. The city has acted in conscious disregard of that risk. And the City's conduct shocks the conscience in light of the injurious consequences. People with EHS are being deprived of the right to earn a living, reside in their own homes, walk the streets, live in their own city, and escape life-threatening injury—even of the right to seek refuge *somewhere* where they can stay alive. 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—is conscience shocking.

The district court relied on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196-197 (1989) (RP 905-06), in arguing that the City has taken no action to put people with EHS at risk of injury, and is not liable for the actions of private parties. But in *DeShaney* the county officials simply returned a child to his father's custody; they did not authorize his father's conduct. (at 201). The district court has made the same error that it made concerning the Equal Protection Clause: the City has not just acquiesced in private conduct, but

has authorized it: in Santa Fe, no one may install an antenna or tower that emits RF radiation without zoning permission (LDC § 14-6.2(E)(2)). (RP 785).[14]

VI. THE TCA DOES NOT REPEAL THE FOURTEENTH AMENDMENT.

TCA § 704 runs like a drumbeat through the district court's decision. The TCA, said the court, preempts the City's ability to enforce its Code. The TCA, said the court, preempts the protections afforded the disabled by the ADA. And, even more amazingly, the district court did not stop at substantive analysis of Appellant's Fourteenth Amendment claims; it ruled that even if Appellant's arguments are correct, they are preempted by the TCA.

These unprecedented rulings on Equal Protection and Due Process must be reversed. TCA § 704, said the court, provides a "rational basis" for the City to discriminate against people with EHS, and a valid reason for the City to deprive injured, evicted, and exiled persons of due process. The district court forgets that "Congress may not authorize the states to violate the Fourteenth Amendment." *Saenz v. Roe*, 526 U.S. 489, 507 (1999); *Townsend v. Swank*, 404 U.S. 282, 291 (1971); *Shapiro v. Thompson*, 394 U.S. at 641.

Appellant argued this issue at RP 773, 776, 846, and 885.

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[14] At the time the Petition for Writ of Mandamus was filed, the only exceptions were antennas used exclusively for emergency services, LDC § 14-6.2(E)(2)(d), for the City's water department, *Id.*, or by amateur radio station operators, LDC § 14-6.2(E)(2)(a).

VII. SECTION 704 OF THE TCA IS UNCONSTITUTIONAL.

If the Court finds that TCA § 704 deprives people disabled with EHS of any remedy under City law, the ADA, or the Fourteenth Amendment when they are injured, tortured, and deprived of their livelihoods, their homes, their city, and their lives, then TCA § 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 it is unconstitutional.

Appellant argued this issue at RP 776-77 and 851.

VIII. THE DISTRICT COURT VIOLATED JUDICIAL ETHICS AND DUE PROCESS BY ADOPTING VERBATIM THE ARGUMENTS IN APPELLEES' *EX PARTE* BRIEF.

The district court's decision is not unbiased, because the district court did not even write its own decision: counsel for AT&T wrote it, and submitted it to the court *ex parte*.

"A judge shall not initiate, permit, or consider *ex parte* communications" that address substantive matters. Code of Judicial Conduct, Rule 21-209 NMRA.

This issue arose when the district court requested the parties to submit an additional round of briefing, styled as "proposed decisions," and adopted as its opinion the brief of Appellees, which was submitted *ex parte*. Appellees' proposed decision was neither filed with the clerk nor served on Appellant, and contained no

certificate of service, yet was accepted by the district court, which adopted it almost verbatim as its own decision. This question is preserved for review because there was no opportunity to raise it as an issue below. Rule 12-216(A) NMRA.

Appellant knows of no precedent in New Mexico or elsewhere for the filing of "proposed decisions" where there is no trial and the case is submitted for decision on the pleadings. Plaintiff also knows of no precedent where a judge has accepted an *ex parte* brief where there has been no trial. The following authorities pertain to briefs or proposed findings of fact submitted before or after a trial.

"We agree with the federal cases which, without exception, require adequate findings and insist on the exercise of an independent judgment on the part of the trial judge in making his own findings of fact rather than adopting those of one of the parties." *Mora v. Martinez*, 1969-NMSC-030, ¶ 6, 80 N.M. 88. In New Mexico, this rule has been relaxed; "the trial court... should generally avoid verbatim adoption" of the findings submitted by a party, but it is no longer, by itself, grounds for reversal. *Pollock v. Ramirez*, 1994-NMCA-011, ¶ 28, 117 N.M. 187. However, the situation here is unprecedented in New Mexico. There has been no trial. And the district court adopted verbatim not only the proposed findings but the proposed decision of one of the parties. Other jurisdictions, even in the context of a trial, have found a violation of due process under such circumstances:

> Due process is denied a party when a judge adopts a party's order verbatim, without previously conclusively ruling on the matters in it.

Bilzerian v. Shinwa Co. Ltd., 184 B.R. 389, 392 (M.D. Fla. 1995).

And submission of the ghostwritten opinion *ex parte* has merited not only reversal, but reprimand, discipline, or disqualification: *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961), *cert. denied*, 368 U.S. 825 (1961) (Preparation of the opinion by the attorney for either side involves "failure of the trial judge to perform his judicial function" and when there was no notice to the opposing side, it violated due process, warranting reversal of the judgment); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 710-11 (7th Cir. 1979) (Parties must serve their trial briefs on all other parties at the time they submit them to the court); *O'Connor v. Leapley*, 488 N.W.2d 421, 422 (S.D. 1992) (*Ex parte* submission of pretrial brief violated Code of Professional Responsibility for lawyers); *Peterson v. New Castle Corp.*, 2011 WL 5117884, n. 3 (D.Nev. 2011) (*Ex parte* briefs, without any certificate of service and not entered into the docket, are improper); *In re Wisconsin Steel Corp.*, 48 B.R. 753, 761, 764-65 (N.D. Ill. 1985) (Submission of a memorandum to the trial judge without a copy to the other side was improper, even where the court asked for it; both attorney and judge were disqualified); *In re Dekle*, 308 So.2d 5 (Fla. 1975) (Florida Supreme Court publicly reprimanded a sitting justice for using an *ex parte* legal memorandum from an attorney for *amici curiae* in the preparation of his opinion).

The acceptance of an *ex parte* brief by the district court, and its adoption verbatim as the court's own opinion, is by itself sufficient reason for reversal.

IX. APPELLANT HAS STANDING.

Appellant alleges that he is beneficially interested in the enforcement of the City's ordinance by virtue of his disability.

In *Firstenberg v. Monribot,* decided October 6, 2012, the district court dismissed the tort claims of Plaintiff (Appellant here) on summary judgment on the grounds that he was not able to show general causation, i.e. that EHS exists and is caused by electromagnetic fields. This potentially raises the issue of whether Appellant is collaterally estopped in the present case from alleging disability on the basis of EHS. However, Appellees not only did not assert issue preclusion, but they admitted, by failure to deny, the allegations about EHS that had been dismissed in the other case.

Since the same district court judge presided over both cases, Appellant thought it prudent to discuss the issue of collateral estoppel in the court below (RP 872-74). He noted that the court's ruling on general causation was not necessary to its decision in *Monribot*, since the court had also ruled in that case that even if EHS existed, Appellant had not established a level of exposure necessary to cause injury and so could not prove specific causation.[15] He also noted that *Monribot* is still

[15] Pages 5008-09 of the record proper in Case No. 32,549.

under appeal and under New Mexico precedents is therefore not a final decision for purposes of issue preclusion.

In any case, under Rule 1-008(C) res judicata is an affirmative defense that has been waived. "Generally the courts have held that failure to plead an affirmative defense results in the waiver of that defense; and it is excluded as an issue." *United Nuclear Corp. v. General Atomic Co*., 1979-NMSC-036, ¶ 65, 93 N.M. 105, *cert. denied*, 444 U.S. 911 (1979). The district court noted that it "need not reach these issues because Respondent does not contest standing and because the Court is not relying on the decisions or orders in *Firstenberg v. Monribot*." (RP 892).

CONCLUSION

The Court should reverse the decision of the district court denying the Petition for Writ of Mandamus.

The Court should also reverse the decision that the ADA does not protect disabled third parties from discrimination in zoning decisions; the decision that the TCA repeals or supersedes the ADA; the decision that discrimination against people with EHS does not violate the ADA or Fourteenth Amendment; the decision that the TCA provides a "rational basis" for denying equal protection to people with EHS; and the decision that the TCA provides a valid reason for denying people with EHS due process.

If the Court finds that TCA § 704 deprives people with EHS of any remedy under local law, the ADA, or the Fourteenth Amendment, then the Court should find that TCA § 704 violates the Fifth Amendment and is unconstitutional.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case involves issues of first impression in the United States. The requirements of TCA § 704 have never been litigated in connection with their impact upon the disabled. The only previous case in which the protections of the ADA and the Constitution were argued, *Cellular Phone Taskforce v. FCC*, 217 F.3d 72 (2d Cir. 2000), was a challenge to the validity of the FCC's regulatory guidelines for human exposure to RF radiation, and the Second Circuit did not rule on these issues. Appellant submits that the passage of 14 more years, during which wireless technology has spread everywhere, almost without exception, has now created a situation, involving the most basic of human rights, where these issues are no longer avoidable. Their resolution will affect the future, and very survival, of an entire class of people as well as the future of an important industry. These matters require the fullest presentation by the parties to assist the Court.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Arthur Firstenberg, being duly sworn, states under penalty of perjury that he mailed the foregoing motion to the following persons at the addresses indicated on this 30th day of June, 2014.

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Subscribed and sworn to before me this _____ day of June, 2014.

_____

Notary Public

My Commission Expires: _____