APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SANTA FE ALLIANCE FOR PUBLIC HEALTH AND SAFETY; ARTHUR FIRSTENBERG; MONIKA STEINHOFF, Plaintiffs - Appellants, v. CITY OF SANTA FE, NEW MEXICO; HECTOR H. BALDERAS, Attorney General of New Mexico; UNITED STATES OF AMERICA, Defendants - Appellees.	No. 20-2066

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:18-CV-01209-KG-JHR)

(Filed Mar. 30, 2021)

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Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **McHUGH**, Circuit Judge.

McHUGH, Circuit Judge.

Plaintiffs/Appellants Santa Fe Alliance for Public Health & Safety, Arthur Firstenberg, and Monika Steinhoff (collectively the "Alliance") advance a bevy of claims asserting Section 704 of the Telecommunications Act of 1996 ("TCA"), New Mexico's Wireless Consumer Advanced Infrastructure Investment Act ("WCAIIA"), the Amendments to Chapter 27 of the Santa Fe City Code ("Amendments to Chapter 27"), and three proclamations by the Santa Fe mayor violate

due process, the Takings Clause, and the First Amendment. Through its amended complaint, the Alliance contends the installation of telecommunications facilities—primarily cellular towers and antennas—on public rights-of-way expose its members to dangerous levels of radiation. The Alliance further contends these legislative and executive acts prevent it from effectively speaking out against the installation of new telecommunications facilities. The United States moved to dismiss under Federal Rules of Civil Procedure 12(b)(1), and (b)(6), and the City of Santa Fe ("Santa Fe") moved to dismiss under Rule 12(b)(6). The district court concluded that while the Alliance pled sufficient facts to establish standing to assert its constitutional claims, the Alliance failed to allege facts stating any constitutional claim upon which relief could be granted. The district court dismissed the Alliance's claims as against all defendants, including Hector A. Balderas, the New Mexico Attorney General.

We affirm the district court's dismissal of the Alliance's constitutional claims, albeit on partially different grounds. We hold the Alliance lacks standing to raise its takings claim and its due process claims not premised on an alleged denial of notice. This is because the alleged injuries supporting these claims are not "fairly traceable" to the passage of the TCA, WCAIIA, the Amendments to Chapter 27, or the mayoral proclamations. We further hold that while the Alliance satisfies the threshold for standing as to its First Amendment claims and its procedural due process claim premised on the WCAIIA and the Amendments

to Chapter 27 denying it notice, the district court properly dismissed these claims under Federal Rule of Civil Procedure 12(b)(6).

I. BACKGROUND

A. The Alliance's Amended Complaint

The Alliance's membership consists of Santa Fe residents concerned about the health and environmental effects of radio-frequency emissions from telecommunications facilities installed on public rights-of-way. The Alliance alleges the radio-frequency emissions contain dangerous levels of radiation. The Alliance further alleges that exposure to radio-frequency emissions resulted in its members experiencing the following health problems: headaches, nausea, insomnia, tinnitus, seizures, cancer, fatigue, neurological issues, respiratory issues, cardiac issues, laryngospasms, numbness in extremities, high blood pressure, and internal bleeding. As a result of installation of telecommunications facilities and the accompanying exposure to radiation, many Alliance members have fled their homes, abandoned their businesses, and either moved to remote sections of Santa Fe or taken up residence in their vehicles. The increasing presence of telecommunications facilities also constrains the ability of Alliance members to travel within Santa Fe city limits and to access government buildings and governmental services. The Alliance contends the impact from radio-frequency emissions will worsen as telecommunications companies upgrade the network in Santa Fe from 4G to 5G

and as citizens retrofit their residences into smart homes.

The Alliance attributes some of the rapid growth in telecommunications facilities on the public rights-of-way in Santa Fe to a series of federal, state, and local legislative enactments, as well as the three proclamations by the mayor. The amended complaint alleges the TCA precludes localities from regulating the placement and construction of telecommunications facilities based on the "environmental effects" of radio-frequency emissions. *See* 47 U.S.C. §§ 332(c)(7)(B)(iv). The Alliance contends the New Mexico Legislature passed the WCAIIA, exempting the installation of new telecommunications facilities on public rights-of-way from local land use review. Further, the Alliance asserts that Santa Fe, through the Amendments to Chapter 27, repealed (1) its land use regulations pertaining to radio-frequency emissions and public rights-of-way; and (2) provisions requiring notice to the public before installation of a telecommunications facility on a public rights-of-way. Finally, the amended complaint alleges the Santa Fe mayor issued three proclamations, suspending application of the Santa Fe Land Development Code to requests by telecommunications companies to build telecommunications facilities. The Alliance attributes the construction of seven short cell towers to the mayoral proclamations.

The Alliance filed a twenty-two-count amended complaint challenging the legislation and the mayoral proclamations. The amended complaint names as

defendants the United States; Hector Balderas, the New Mexico Attorney General; and Santa Fe.

Regarding the TCA, Count Eighteen raises a Fifth Amendment due process claim, arguing Congress lacked the authority to (1) delegate authority to the Federal Communications Commission ("FCC") to be the sole regulatory authority over radio-frequency emission levels; (2) preempt states and localities from adopting their own regulations on radio-frequency emission levels; and (3) prohibit states from providing legal remedies for injuries from radio-frequency emissions. Meanwhile, Count Nineteen contends Section 704 of the TCA, by prohibiting local government officials from relying upon any speech regarding the health impacts of radio-frequency emissions when reviewing applications for new telecommunications facilities, violates the First Amendment because it restricts the ability of the public to speak about the health impacts of radio-frequency emissions. Finally, Count Four alleges Section 704 of the TCA infringes the Alliance's First Amendment right to petition the government and access the courts.[1]

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[1] Additionally, Count Seventeen sought a declaration that the TCA did not preclude a locality from considering "health" effects when approving or denying the placement of telecommunications facilities because impacts on human health are not an "environmental effect" within section 332(c)(7)(B)(iv) of Title 47 of the United States Code. To the extent Count Seventeen advances a claim for relief rather than a mere legal argument supporting the Alliance's other claims against the TCA, it is not a constitutional claim, for it does not invoke any constitutional provision.

The amended complaint advances four claims against the WCAIIA and the Amendments to Chapter 27. Count One alleges Fourteenth Amendment due process violations based on both provisions eliminating public notice requirements before approval of a new telecommunications facility. Count Three raises a Fifth Amendment Takings Clause claim, alleging the placement of radio-frequency emitting telecommunications facilities on the public rights-of-way rendered homes and businesses "uninhabitable and unusable." App., Vol. I at 50. Count Four alleges the WCAIIA and the Amendments to Chapter 27 infringe on the Alliance's access to courts and its ability to assemble and to petition the government, in violation of the First Amendment. Finally, Count Twenty asserts the Amendments to Chapter 27 violate the Alliance's First Amendment right to free speech because they precluded the relevant city boards from regulating telecommunications facilities based on the health effects of radio-frequency emissions.

Lastly, the Alliance raises one federal constitutional claim, Count Two, relative to the mayoral proclamations, asserting a Fourteenth Amendment violation of procedural and substantive due process. In support of this claim, the Alliance alleges Santa Fe, in accord with the proclamations, signed contracts with a telecommunications company permitting the installation of telecommunications facilities without any notice to the public and that operation of these facilities

endangers the life, liberty, and property interests of Alliance members.[2]

B. Procedural History

The United States filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (b)(6), and the City of Santa Fe filed a motion to dismiss under Rule 12(b)(6). The New Mexico Attorney General, meanwhile, preserved a failure to state a claim defense in its answer to the Alliance's amended complaint; however, the New Mexico Attorney General never filed a Rule 12(b) motion to dismiss.

Nine months after completion of briefing on the motions to dismiss, the district court issued a memorandum opinion and order and a final judgment dismissing all counts of the amended complaint as against all three defendants.[3] The district court addressed the

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[2] Additional counts in the amended complaint raised claims under state law and the Santa Fe City Code. After concluding the Alliance failed to state any constitutional claims on which relief could be granted, the district court dismissed all constitutional claims and declined to assert supplemental jurisdiction. The Alliance does not contest the district court's decision to decline supplemental jurisdiction over the non-federal claims. Counts Fifteen and Sixteen, about which the Alliance does not advance any specific arguments on appeal, sought general injunctive relief against the WCAIIA, the Amendments to Chapter 27, and the mayoral proclamations.

[3] In issuing its memorandum opinion and order and final judgment, the district court committed two procedural errors. First, during the nine months between completion of briefing on the motions to dismiss and its ruling, the Alliance moved for a preliminary injunction and the parties completed briefing on this

United States' Rule 12(b)(1) motion first, concluding that while the Alliance lacked standing to bring claims under any provision of the TCA, it satisfied the standing threshold relative to its constitutional claims. Turning to the merits, the district court first addressed the Alliance's Fifth and Fourteenth Amendment due process claims—Counts One, Two, and Eighteen. Relative to Santa Fe and the New Mexico Attorney General, the district court concluded these actors did not violate

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motion. The district court, however, did not acknowledge the pending preliminary injunction motion, neither ruling upon it nor explicitly terminating the Alliance's motion. Second, although the New Mexico Attorney General never moved to dismiss under Rule 12(b)(6), the district court acted as though such a motion pended. This is problematic where the New Mexico Attorney General lacked any means for seeking dismissal at this juncture in the proceedings because (1) he waived the right to file a Rule 12(b) motion by filing an answer, *see* Fed. R. Civ. P. 12(b) (a motion asserting a Rule 12(b) defense "must be made before pleading if a responsive pleading is allowed"); *see also* 5B Charles Alan Wright & Arthur R. Miller, *Fed. Practice and Procedure* § 1357 at 408 (3d ed. 2004) ("Technically . . . a post-answer Rule 12(b)(6) motion is untimely and the cases indicate that some other vehicle, such as a motion for judgment on the pleadings or for summary judgment, must be used to challenge the plaintiff's failure to state a claim for relief."); and (2) a Rule 12(c) motion would have been premature because the pleadings were not closed where the other two defendants filed Rule 12(b) motions and had not filed answers, *see* Fed. R. Civ. P. 12(c) ("*After the pleadings are closed* . . . a party may move for judgment on the pleadings." (emphasis added)); *see also Gorenc v. Klaassen*, No. 18-2403-DDC-JPO, 2019 WL 2523566, at *2 (D. Kan. Jun. 19, 2019) (collecting authorities standing for the proposition that the pleadings are not "closed" until all defendants file an answer). Although the Alliance mentions these two issues in its briefing, and we agree the district court erred, the Alliance does not seek relief in the form of remand.

the Alliance's procedural or substantive due process rights because the TCA preempted state and local officials from considering the health effects of radio-frequency emissions in compliance with FCC standards. Next, the district court analyzed the Alliance's Count Three takings claim relative to the WCAIIA and the Amendments to Chapter 27, rejecting the claim on the ground that neither New Mexico nor Santa Fe physically occupied or regulated the property of any Alliance member. The district court then addressed the Alliance's First Amendment claims, observing that Alliance members frequently spoke against new telecommunications facilities and holding the Alliance had not stated valid claims because (1) nothing in the TCA, WCAIIA, or the Amendments to Chapter 27 regulated speech; and (2) the First Amendment does not include the right to have local officials adopt a speaker's preferred position.

The Alliance timely appealed. The Alliance seeks review of the district court's dismissal of its constitutional claims. The United States, the New Mexico Attorney General, and Santa Fe defend the district court's dismissal of the Alliance's amended complaint, with the United States also reasserting its argument that the Alliance lacks standing to bring its claims implicating the TCA.

II. DISCUSSION

We begin our analysis with the governing standard of review and an overview of the relevant federal,

state, and local laws pertaining to the regulation, approval, and construction of new telecommunications facilities. Thereafter, we address whether the Alliance satisfied the threshold for standing at the motion to dismiss stage. Lastly, we turn to whether the claims that survive our standing analysis state a claim upon which relief may be granted.

A. Standard of Review

Where a district court rules on a Federal Rule of Civil Procedure 12(b)(1) motion without taking evidence, we apply a de novo standard of review. *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 877 (10th Cir. 2017). We also "review a district court's rulings on Article III standing de novo." *Id.* at 878 (internal quotation marks omitted).

Similarly, this court reviews de novo a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Albers v. Bd. of Cnty. Comm'rs*, 771 F.3d 697, 700 (10th Cir. 2014). "[A]ll well-pleaded factual allegations in the complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006) (quotation marks omitted). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

B. Relevant Laws Governing New Telecommunications Facilities

Three tiers of laws—federal, state, and local—regulate the development and installation of telecommunications facilities. We describe aspects of each tier, as relevant to this appeal.

1. Telecommunications Act of 1996

Congress enacted the TCA "to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (quoting Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996)). To further this goal, the TCA struck a balance between preserving 'the traditional authority of state and local governments to regulate the location, construction, and modification' of wireless communications facilities like cell phone towers" and creating uniform standards governing new telecommunications facilities. *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 300-01 (2015) (quoting *City of Rancho Palos Verdes*, 544 U.S. at 115).

While the TCA did not infringe on a state's or locality's ability to enforce zoning laws governing items such as boundary-line offsets and aesthetics, it did impose "five substantive limitations" on the regulation of telecommunications facilities. *City of Arlington v. FCC*, 569 U.S. 290, 294 (2013).

As highlighted by this appeal, one area of tension regarding the expansion of wireless services has been public opposition to exposure to radiation from radio-frequency emissions. Section 332(c)(7)(B)(iv) of Title 47 of the United States Code, also referred to as Section 704 of the TCA, addressed the tension and possibility of varying standards governing radio-frequency and radiation emissions from community to community. The provision 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 [FCC's] regulations* concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added). Consistent with this preference for a uniform standard and delegation of authority, the FCC has promulgated regulations establishing the maximum permissible level of radio-frequency, radiation emissions from telecommunications facilities. 47 C.F.R. § 1.1310.

Recognizing that some localities might resist or subvert the limitation placed on their ability to regulate radio-frequency emissions, the TCA requires that a locality's denial of a telecommunications company's request to construct a telecommunications facility "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). In enforcing this requirement, the Supreme Court stated, "[i]n order to determine whether a locality's denial was supported by substantial evidence . . . courts must be able to identify the reason or reasons why the locality denied the application." *T-Mobile S., LLC*, 574 U.S. at 300. And where a locality fails to support its denial with substantial evidence, the telecommunications company may seek redress in state or federal court. 47 U.S.C. § 332(c)(7)(B)(v).

2. Wireless Consumer Advanced Infrastructure Investment Act

Similar to the TCA, the WCAIIA restricts a locality's ability to regulate some telecommunications facilities.[4] *See* N.M. Stat. Ann. § 63-9I-4(B). After enactment of the WCAIIA, localities in New Mexico may no longer subject "small wireless facilities"—cellular antennas and extensions with volume less than six cubic feet and that are attached to and do not extend

[4] No party points us to a decision by a New Mexico court interpreting the WCAIIA, and we have not located such a decision. Accordingly, we rely exclusively on the WCAIIA's text to understand its import relative to the regulation of new telecommunications facilities.

more than ten feet above an existing utility pole or structure in a public right-of-way—to any local "zoning review or approval." N.M. Stat. Ann. § 63-9I-4(C); *see also* N.M. Stat. Ann. § 63-9I-2(P)(1) (defining "small wireless facility"). Rather, unless a telecommunications company proposes to place a "small wireless facility" in a "historic district" or a "design district," a locality, while able to impose fees for the permitting process and for access to the public right-of-way, lacks the authority to preclude installation of the facility. *See* N.M. Stat. Ann. §§ 63-9I-4(B), (D); *see also* N.M. Stat. Ann. § 63-9I-3(H).

3. Amendments to Chapter 27 of the Santa Fe City Code

In November 2016 and August 2017, the Santa Fe City Council passed ordinances amending Chapter 27, the chapter governing telecommunications facilities in public rights-of-way. As a result of these amendments, the City Code establishes a system whereby telecommunications companies can apply for franchises to erect telecommunications facilities on the public rights-of-way. Santa Fe City Code § 27-2.4. A "director" reviews and negotiates the franchise applications before submitting an application to the "governing body" for adoption. *Id.* at § 27-2.4(B). Once the governing body adopts a franchise agreement, the telecommunications company must pay Santa Fe 2% of its gross charges for services provided within Santa Fe. *Id.* at § 27-2.5.

Regarding land use regulations, the August 2017 amendments established a process for creating uniform standards governing new telecommunications facilities on public rights-of-ways, phasing out facility-specific land-use-review at public meetings:

> the construction of new telecommunications facilities that conform to design parameters established from time to time by the land use department and are approved for use following a public hearing in the historic districts by the historic districts review board or outside the historic districts by the planning commission, provided that notice of the use of the approved design and of the proposed location is submitted to the city prior to commencement of the work and the city approves the proposed location of the facilities.

Id. at § 27-2.19(C). The Santa Fe City Code also recognizes the impact of the TCA, stating, "[t]he planning commission may not regulate the placement of telecommunications facilities on the basis of the environmental effects of radio frequency emissions where such telecommunications facilities comply with 47 C.F.R. 1.1310 et seq." *Id.* at § 27-2.19(E)(3).

C. Standings[5]

First, we outline the law governing the threshold inquiry of standing. Then, we apply this governing body of law to each type of claim raised by the Alliance.

1. Governing Law

We address standing on a claim-by-claim basis; a plaintiff may have standing to bring some, but not all, claims raised in a complaint. *See Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1279 (10th Cir. 1998). The Alliance, as the plaintiff invoking the federal court's jurisdiction, "bears the burden of establishing standing as of the time [it] brought this lawsuit and maintaining it thereafter." *Carney v Adams*, 141 S. Ct. 493, 499 (2020). To sustain this burden, a plaintiff must allege it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Our analysis here focuses on the first and second requirements from *Spokeo*. On the first requirement, "[t]o establish injury in fact, a plaintiff must show that

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[5] The Alliance contends this court cannot consider standing relative to its constitutional claims because the district court concluded the Alliance satisfied the standing threshold and the United States did not file a cross-appeal. This argument ignores well-established, black-letter law. The issue of Article III standing implicates federal jurisdiction and is a matter this court *must* consider *sua sponte*. *Rector v. City & Cnty. of Denver*, 348 F.3d 935, 942 (10th Cir. 2003).

[it] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). An injury is "concrete" if it "actually exist[s]" and is 'real' rather than 'abstract.'" *Id.* (quoting Webster's Third New International Dictionary 472 (1971)). "For an injury to be `particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* (quoting *Lujan*, 504 U.S. at 560). An injury is "imminent" if it is "certainly impending." *Clapper v Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (first quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010), then quoting *Lujan*, 504 U.S. at 565 n.2).

On the second requirement, to show that an injury is "fairly traceable" to the challenged conduct, a plaintiff must allege "a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005). As part of this showing, a plaintiff must establish that its injury was "not the result of the independent action of some third party not before the court." *Id.* (quoting *Lujan*, 504 U.S. at 560). This showing, however, does not require a plaintiff to establish that the defendant was the proximate cause of its injury. *Id.* Nor does it require a showing that a "defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Rather, at the motion to dismiss stage, a plaintiff can satisfy the "fairly traceable" requirement by advancing allegations which, if proven, allow for the conclusion

that the challenged conduct is a "but for" cause of the injury. *Petrella v. Brownback*, 697 F.3d 1285, 1293 (10th Cir. 2012) (citing *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 74-78 (1978)).

2. Application

a. Takings claim

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, provides that private property shall not be taken for public use, without just compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation and quotation marks omitted). In Count Three, the Alliance contends the WCAIIA and the Amendments to Chapter 27, by facilitating the placement of telecommunications facilities on the public rights-of-way, effect a taking of its members' homes and businesses. Specifically, the Alliance alleged that its members:

> are already refugees from cell towers and antennas and have already lost previous homes and businesses due to their proximity. The award of franchises by the City, and their exemption from land use regulations by the State, for the placement of wireless telecommunications facilities on the sidewalk directly in front of Plaintiffs' homes and businesses will render their present homes and businesses similarly uninhabitable and unusable and is an unlawful confiscation of property without compensation.

App., Vol. I at 50.

As an initial matter, to the extent the Alliance seeks redress for alleged *future* losses of homes and business, the taking had not occurred at the time the Alliance filed its amended complaint. Thus, any injury is speculative. And even if the placement of telecommunications facilities on public rights-of way could constitute a taking of adjoining private property, no just compensation was due to any particular individual for a yet-to-occur taking. *See Miller v. Campbell Cnty.*, 945 F.2d 348, 354 n.9 (10th Cir. 1991) (concluding taking did not occur when county passed resolution that would lead to taking of home but "rather the taking occurred when the plaintiffs were actually required permanently to vacate their premises"); *see also SK Fin. SA v. La Plata Cnty., Bd. of Cnty. Comm'rs*, 126 F.3d 1272, 1278 (10th Cir. 1997) (takings claim not ripe until denial of property right is final). Therefore, we lack jurisdiction to consider Count Three relative to future takings. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) ("The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993))).

Turning to the aspect of Count Three based on Alliance members already leaving their homes and business, here the Alliance alleges a specific injury that satisfies the first requirement for standing stated in *Spokeo.* However, the Alliance has not satisfied the second *Spokeo* requirement—that the injury is "fairly traceable" to the WCAIIA and the Amendments to

Chapter 27. While these two legislative acts made it slightly easier for telecommunications companies to obtain approval to construct new telecommunications facilities, the Alliance fails to allege facts capable of showing that "but for" these two legislative acts Santa Fe would not have approved the construction of the telecommunications facilities at issue. Notably, the Alliance does not allege members of the Santa Fe boards in charge of land use and zoning/planning were prepared to deny approval for new telecommunications facilities in the absence of the adoption of the WCAIIA and the Amendments to Chapter 27. Put another way, the allegations in the amended complaint do not create a substantial likelihood that construction of the telecommunications facilities causing Alliance members to leave their homes and businesses would not have occurred but for passage of the WCAIIA and the Amendments to Chapter 27. Therefore, we hold the Alliance failed to allege facts capable of satisfying the second requirement for standing under *Spokeo.*

b. Due process claims

Count One alleges the WCAIIA and the Amendments to Chapter 27 violate procedural and substantive due process. The substantive due process aspect of this claim hinges on the Alliance's contention that newly constructed telecommunications facilities present a threat to the health, life, and property of Alliance members. For the same reasons the Alliance's takings claim based on completed takings fails to satisfy the second *Spokeo* requirement for standing, so too

does the substantive due process aspect of Count One. Simply put, no allegation in the amended complaint supports the inference Santa Fe would not have approved new telecommunications facilities absent passage of the WCAIIA and the Amendments to Chapter 27.

We, however, reach a different conclusion as to the procedural due process aspect of Count One. The Alliance alleged that, as a result of these legislative acts, its members no longer receive notice prior to the approval of a specific telecommunications facility. This in turn, the Alliance alleges, deprives its members of an opportunity to be heard in opposition to further development of telecommunications facilities. While we discuss in Section III(D)(1) whether the Due Process Clause entitles the Alliance to the notice and opportunity to be heard it seeks, there can be no question the WCAIIA and the Amendments to Chapter 27 have directly altered the process used by Santa Fe to approve new telecommunications facilities. Specifically, the WCAIIA limits the ability of localities to regulate "small wireless facilities" in the public rights-of-way. N.M. Stat. Ann. § 63-9I-4(B), (C); *see also* N.M. Stat. Ann. §63-9I-3(H). And the Amendments to Chapter 27 altered Santa Fe's process for approving telecommunications facilities—creating a streamlined process where Santa Fe peremptorily adopts guidelines for telecommunications facilities rather than reviewing individual applications for the construction of new facilities at meetings open to the public. *Santa Fe City Code* § 27-2.19(C). Therefore, the Alliance has satisfied the

standing requirements relative to its Count One claim that the WCAIIA and the Amendments to Chapter 27 deprive its members of notice and an opportunity to be heard.

Turning to Count Eighteen, there the Alliance raises a procedural and substantive due process claim against the TCA. The Alliance alleges the TCA, by giving authority to the FCC to regulate radio-frequency emissions, preempts state and local regulation of those emissions, as well as the ability of state and local authorities to provide legal remedies for injuries attributable to radio-frequency, radiation emissions. We hold the Alliance lacks standing to advance this claim. The claim is contingent on New Mexico and/or Santa Fe, in the absence of the TCA, regulating radio-frequency emissions to a greater degree than the FCC does through 47 C.F.R. § 1.1310. But no allegations in the amended complaint make such an inference plausible. In fact, the amended complaint contains allegations suggesting New Mexico, although possessing knowledge about the dangers of radio-frequency emissions prior to passage of the TCA, did not enact measures to protect its citizens from radiation emanating from telecommunications facilities. *See* App., Vol. I at 13 (alleging that New Mexico has known for forty years that radio-frequency emissions are injurious). Accordingly, the amended complaint does not support the inference that but for the TCA, Alliance members could

successfully bring suit for injuries they attribute to radio-frequency emissions.[6]

Finally, in Count Two, the Alliance contends that three mayoral proclamations violated procedural and substantive due process by allowing for the construction of new telecommunications facilities without notice to the public. As background specific only to this count, in November 2017, the mayor declared an "emergency" in Santa Fe based on "insufficient telecommunications capacity." The proclamation authorized Santa Fe officials to "work with Verizon Wireless to install temporary and/or mobile wireless telecommunications facilities on City property pending review and approval of fixed wireless facilities within the City." App., Vol. I at 138. In December 2017, the mayor issued a

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[6] The concurrence concludes we set "too high a barrier for most plaintiffs to ever satisfy" and we "insulate the federal government's efforts to materially shape the decisions of local governments." Concurrence Op. at 2. We are not unsympathetic to the concurrence's concern about shielding federal legislation from review where a local government, rather than the federal government, is the final actor. But we do not review the amended complaint in a vacuum where local governments have always been constrained by the TCA. Not only, as the concurrence suggests, could the Alliance have alleged that local decision makers were inclined to reject applications for new telecommunications facilities absent the TCA but the Alliance also could have alleged instances, pre-TCA, where local officials, either in Santa Fe or elsewhere, rejected applications for new telecommunications facilities based on health effects. The amended complaint, however, alleges neither. Thus, we are left to speculate whether any local board would conclude the harms from the health effects alleged by the Alliance outweigh a community's needs for and the benefits stemming from upgraded wireless communication services.

second proclamation and a third proclamation, which are nearly identical to the November 2017 proclamation.

We conclude the Alliance lacks standing to advance its substantive due process claim based on the mayoral proclamations. Although the mayoral proclamations may have expedited the construction of certain telecommunications facilities, there is nothing in the amended complaint allowing for the inference that the same or similar facilities would not have been constructed but for the mayoral proclamations. Rather, the amended complaint repeatedly contends telecommunications facilities will be virtually everywhere, at least in urban settings, as the country transforms to a 5G network. The amended complaint goes so far as to allege that each wireless carrier operating in an area plans to install cellular towers "every 100 meters in every urban area in the world." *Id.* at 14. Thus, it cannot be said that the mayoral proclamations are the "but for" cause of the construction of new telecommunications facilities and the Alliance's members' accompanying exposure to radio-frequency emissions.

We also conclude the Alliance lacks standing to advance its procedural due process claim based on the mayoral proclamations. On this claim, we hold the Alliance fails to allege an injury fairly traceable to the mayoral proclamation. As alleged in Count One, the August 2017 Amendments to Chapter 27 eliminated notice and hearing requirements for the approval of specific new telecommunications facilities. Therefore, the mayoral proclamations could not have produced

any further injury regarding the elimination of notice and hearing requirements. In this sense, the Alliance cannot allege either an injury from the mayoral proclamations or that any lack of notice is fairly traceable to the proclamations.

c. First Amendment claims

In Count Four, the Alliance alleges the TCA, the WCAIIA, and the Amendments to Chapter 27 all infringe on its members' First Amendment right to petition the government by foreclosing the ability of local officials to consider their arguments about the health effects of exposure to radio-frequency emissions. Count Nineteen alleges the TCA infringes the First Amendment free speech rights of Alliance members because local officials have relied on the TCA to ignore and reject health-effect-related speech against new telecommunications facilities. Finally, in Count Twenty the Alliance alleges the Amendments to Chapter 27 violate its members' freedom of speech rights because the Amendments formally adopt the TCA's delegation of regulation of radio-frequency emissions to the FCC.

Although we address whether any of these counts state a claim upon which relief can be granted in Sections III(D)(3), (4), we conclude here that the Alliance advanced sufficient allegations to satisfy the standing requirements. Specifically, the Alliance cites to particular limitations in both the TCA and the Amendments to Chapter 27 precluding local officials from adopting the Alliance's preferred position on radio-frequency

emissions. Thus, if a party could advance a First Amendment claim based on government officials not adopting a particular spoken position, then the Alliance alleged an injury fairly traceable to the aforementioned legislative acts, an injury which this court could remedy by striking down the acts.

3. Summary

In summation, we hold the Alliance failed to allege facts satisfying the standing requirements as to its (1) Count Three takings claim; (2) Count One substantive due process claim; (3) Count Eighteen procedural and substantive due process claims; and (4) Count Two procedural and substantive due process claims.[7] We, however, hold the Alliance has, for purposes of the motion to dismiss stage, satisfied the standing requirements as to its (1) Count One, procedural due process claim; (2) Count Four, First Amendment, right to petition claim; (3) Count Nineteen, First Amendment, free speech claim; and (4) Count Twenty, First Amendment, free speech claim.

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[7] Where we affirm the dismissal of these claims for lack of standing rather than for failure to state a claim, the dismissal must transform from a dismissal with prejudice to a dismissal without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006) ("Since standing is a jurisdictional mandate, a dismissal with prejudice for lack of standing is inappropriate, and should be corrected to a dismissal without prejudice."). And it is in the purview of the district court to alter its judgment to reflect this change such that we remand to the district court for that limited purpose. *See id.* at 1219-20.

D. Rule 12(b)(6) Analysis

We analyze each of the claims surviving our standing inquiry under Federal Rule of Civil Procedure 12(b)(6), concluding the Alliance has not stated any claim upon which relief may be granted.

1. Count One Procedural Due Process Claim

As a refresher, in Count One, the Alliance alleges the WCAIIA and the Amendments to Chapter 27 violate its members' procedural due process rights by eliminating notice and hearing requirements prior to approval of new telecommunications facilities. Both the WCAIIA and the Amendments to Chapter 27 involve local control over zoning and land use. Moreover, the WCAIIA and the Amendments to Chapter 27 are also legislative acts. *See Onyx Props. LLC v. Bd. of Cnty. Comm'rs of Elbert Cnty.*, 838 F.3d 1039, 1045-46 (10th Cir. 2016) (stating that "the adoption of a general zoning law is a legislative act" and "adoption of a general zoning ordinance is legislative action"). Long ago, "the Supreme Court held that constitutional procedural due process does not govern the enactment of legislation." *Id.* (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)). This is sufficient to foreclose the Alliance's Count One procedural due process claim, and we affirm the district court's Rule 12(b)(6) dismissal of the claim.[8]

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[8] Even if the Amendments to Chapter 27 were not legislative acts and could be subjected to a procedural due process challenge, the Amendments merely streamlined the procedures for

2. Count Four Right to Petition Claim

In Count Four, the Alliance alleges the TCA, the WCAIIA, and the Amendments to Chapter 27 infringe its members' First Amendment right to petition the government because local officials cannot adopt their position in opposition to radio-frequency emissions and because its members cannot prevail in a legal claim seeking compensation for injuries allegedly attributable to radio-frequency emissions. In pertinent part, the First Amendment states: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. I. "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives. . . ." *Borough of Duryea v. Guarnieri*, 564

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approving new telecommunications facilities by enacting a system whereby Santa Fe adopted preset requirements governing new telecommunications facilities rather than approving such facilities one at a time. *Santa Fe City Code* § 27-2.19(C). Thus, even after the Amendments, Alliance members retained the ability to speak against new telecommunications facilities at meetings adopting or modifying the preset regulations governing those facilities. *See Onyx Props. LLC v. Bd. of Cnty. Comm'rs of Elbert Cnty.*, 838 F.3d 1039, 1045-47 (10th Cir. 2016) (observing due process does not necessitate individual hearings on enforcement of legislative acts, including municipal-wide zoning regulations); *see also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). Accordingly, while the Amendments may have decreased the number of hearings on the matter, they did not eliminate all hearings on the regulation of new telecommunications facilities.

U.S. 379, 388 (2011). To further this goal, the right to petition "extends to all departments of the Government" and includes the "right of access to the courts." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). But "the text of the First Amendment [does not] speak in terms of successful petitioning—it speaks simply of 'the right of the people . . . to petition the Government for a redress of grievances.'" *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 532 (2002) (omission in original) (quoting U.S. Const. amend. I).

To be sure, the Alliance alleges the relevant legislative acts prevent its members from succeeding on any of its efforts to petition the Santa Fe government regarding the health effects of radio-frequency emissions, but the amended complaint never identifies a provision of the TCA, WCAIIA, or the Amendments to Chapter 27 precluding any individual from, or penalizing any individual for, petitioning the government regarding radio-frequency emissions. Nor could the Alliance identify any such provision, as none exists. And the case law uniformly rejects the contention that the First Amendment guarantees any success when petitioning, rendering the Alliance's Count Four First Amendment claim frivolous. *See CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1285 (10th Cir. 2020) ("In fact, the framers recognized this in the First Amendment's text: '[T]he text of the First Amendment [does not] speak in terms of successful petitioning—it speaks simply of "the right of the people . . . to petition the Government for redress of grievances."'" (quoting *BE & K*, 536 U.S. at 532 (quoting U.S. Const. amend.

I))). Accordingly, we affirm the district court's Rule 12(b)(6) dismissal of this claim.

3. Counts Nineteen and Twenty First Amendment Free Speech Claims

In Count Nineteen, the Alliance alleges the TCA restricts its members' First Amendment right to free speech. And Count Twenty alleges the Amendments to Chapter 27 likewise restrict its members' First Amendment right to free speech. Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech."[9] U.S. Const. amend. I. Simply put, nothing in the TCA or the Amendments to Chapter 27 punishes, restricts, or prohibits any individual from speaking against radio-frequency emissions.[10] Accordingly, Counts Nineteen and Twenty of

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[9] Through the Fourteenth Amendment, the prohibition on government abridging the right to free speech has been incorporated to cover state and local governmental action. *See Schneider v. State of N.J., Town of Irvington*, 308 U.S. 147, 160 (1939).

[10] The Alliance argues it fears that if its members speak out against radio-frequency emissions at a hearing on a new telecommunications facility and Santa Fe does not approve construction of the new facility, a court, in resolving a suit by a telecommunications company, might attribute the denial of approval to public comments about the health effects of radio-frequency emissions. This argument is fallacious for three reasons. First, this asserted fear has not inhibited Alliance members from speaking at public hearings, for the amended complaint alleges Alliance members "have participated in every approval process and have testified to their injuries and losses at every public hearing for every proposed telecommunications ordinance and every proposed telecommunications facility in Santa Fe from 2005 until the present day." App., Vol. I at 36. Second, as the Alliance contends in other counts

the amended complaint do not advance plausible claims, and we affirm the district court's Rule 12(b)(6) dismissal of them.

III. CONCLUSION

We affirm the district court's dismissal of the Count One procedural due process claim and the claims advanced in Counts Four, Nineteen, and Twenty because, while the Alliance satisfied standing requirements at the motion to dismiss stage, none of the claims allege facts upon which relief may be granted. We further affirm the district court's dismissal of the Count One substantive due process claim and the claims in Counts Two, Three, and Eighteen on the alternative ground that the Alliance failed to satisfy the threshold standing requirements to advance these claims. We remand to the district court for the limited

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of its amended complaint, the Amendments to Chapter 27 eliminated hearings on specific new telecommunications facilities. Third, under the TCA and applicable Supreme Court precedent, any court reviewing a locality's denial of approval for a new telecommunications facility has no need to attribute the denial to particular public comments never adopted by the local officials. Rather, a locality's mere failure to document its reasons for denying an application to build a telecommunications facility entitles the telecommunications company to relief. *See* 42 U.S.C. § 332(c)(7)(B)(iii) (requiring that the denial of an application "be in writing and supported by substantial evidence contained in a written record"); *see also T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 300 (2015) ("In order to determine whether a locality's denial was supported by substantial evidence . . . courts must be able to identify the reason or reasons why the locality denied the application.").

purpose of modifying its judgment to reflect that these claims are dismissed without prejudice.

No. 20-2066, Santa Fe Alliance v. City of Santa Fe
LUCERO, J., concurring

Though I agree with the bulk of the majority's analysis, I write separately to note my respectful disagreement concerning the Alliance's standing to raise claims against the TCA. Because the TCA limits the decision-making discretion of state and local policymakers in a manner substantially likely to have produced the decisions and policies that caused the Alliance's alleged injuries, I would hold that the Alliance has standing to challenge the statute. The majority's holding to the contrary effectively allows the federal government to evade review by restricting the discretion of state and local officials and then claiming that the ultimate decision was the officials' alone. Rather than create such a loophole, I would affirm on the basis of sovereign immunity.

As the majority explains, the TCA prohibits state and local governments from regulating telecommunications facilities "on the basis of the environmental effects of radio frequency emissions." 47 U.S.C. § 332(c)(7)(B)(iv). Included within the category of "environmental effects" are harms to human health, such as the cancers and seizures that the Alliance asserts its members have suffered due to radio frequency emissions. Because of the TCA prohibition, the regulations

challenged by the Alliance could not have been otherwise on the basis of the harms the Alliance alleges.

Though the TCA forecloses considering these significant environmental effects,[1] the majority sees no reason to believe that state and local decision-makers would have paid them any mind in the absence of the TCA's fetters. The majority concludes that because there are "no allegations in the amended complaint [that] make such an inference plausible," the Alliance lacks standing to challenge the TCA.

To establish standing, a plaintiff must allege "a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." Nova Health Sys. v. Gandy, 416 F.3d 1149, 1156 (10th Cir. 2005). The Alliance meets this burden. It is substantially likely that if radio frequency emissions cause widespread and severe environmental harms, state and local decision-makers would regulate telecommunications facilities differently if not for the TCA. To hold otherwise because the Alliance cannot point to evidence from New Mexico or Santa Fe officials affirmatively declaring they would hypothetically regulate differently in the absence of the TCA is too high a barrier for most plaintiffs to ever satisfy. It also creates a loophole by which the federal government can significantly constrain local governmental decision-making, then escape judicial review of those constraints by arguing the ultimate

[1] We assume these effects are real at the motion to dismiss stage. See Wasatch Equality v. Alta Ski Lifts Co., 820 F.3d 381, 386 (10th Cir. 2016).

decision was the local government's and may have been the same even without the constraints. We should not insulate the federal government's efforts to materially shape the decisions of local governments from harms that those efforts plausibly bring about.

Though I would hold that the Alliance has standing to bring claims based on the TCA, I would also hold that those claims fail due to federal sovereign immunity. Sovereign immunity is a general shield for suits brought against the United States, its agencies, and its officers. No one may "pursue a suit against the Federal Government absent a congressional waiver of immunity." Wyoming v. United States, 279 F.3d 1214, 1225 (10th Cir. 2002). In the only potentially relevant exception to that broad shield, Congress waived sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702 (emphasis added). Nowhere in the Alliance's claims is it alleged that any agency or officer of the United States acted or failed to act. The named federal defendant is the United States in its entirety. The TCA is enforced by the FCC, but there is no allegation that the FCC played any role in the events that led to this suit. Under the plain text of § 702, the Alliance's claims do not fit within that waiver of sovereign immunity. See Trudeau v. Federal Trade Comm'n, 456 F.3d 178, 187 (D.C. Cir. 2006) ("[T]he [statute] . . . refer[s] to a claim against an

'agency' and hence waives immunity only when the defendant falls within that category. . . .").

Because I would affirm the district court's dismissal of the TCA-based claims on grounds other than those relied on by the majority, I respectfully concur.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SANTA FE ALLIANCE FOR PUBLIC HEALTH AND SAFETY, et al., Plaintiffs - Appellants, v. CITY OF SANTA FE, et al., Defendants - Appellees.	No. 20-2066 (D.C. No. 1:18-CV-01209-KG-JHR) (D. N.M.)

ORDER

(Filed May 27, 2021)

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge and **McHUGH**, Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SANTA FE ALLIANCE FOR PUBLIC HEALTH AND SAFETY; ARTHUR FIRSTENBERG; and MONIKA STEINHOFF, Plaintiffs, vs. CITY OF SANTA FE, NEW MEXICO and HECTOR BALDERAS, Attorney General of New Mexico; and the UNITED STATES OF AMERICA, Defendants.	Civ. No. 18-1209 KG/JHR

MEMORANDUM OPINION AND ORDER

(Filed May 6, 2020)

This matter comes before the Court upon Defendant City of Santa Fe's Amended Motion to Dismiss for Failure to State a Claim, (Doc. 21), filed February 11, 2019; Plaintiffs' response to Defendant City of Santa Fe's Motion to Dismiss, (Doc. 22), filed February 25, 2019; Defendant City of Santa Fe's reply, (Doc. 25), filed March 11, 2019; and Plaintiffs' surreply, (Doc. 38), filed April 10, 2019. Also before the Court is Defendant United States' Motion to Dismiss, (Doc. 46), filed May

31, 2019; Plaintiffs' response to the United States' Motion to Dismiss, (Doc. 56), filed July 8, 2019; Defendant United States' reply, (Doc. 57), filed July 31, 2019; Plaintiffs' surreply, (Doc. 61), filed August 7, 2019; and Plaintiffs' Notice of Supplemental Authority, (Doc. 71), filed January 21, 2020. Having considered the Motions to Dismiss, the accompanying briefs, and the relevant law, the Court grants both Motions to Dismiss.[1]

I. Background

Plaintiffs are residents of the City of Santa Fe who allege they have been injured by radio frequency (RF) waves emitted by wireless telecommunications facilities, such as cell towers and antennae that connect cell phones to the broader telecommunications network for calls and internet access. (Doc. 19) at 1-15. They state RF emissions (RFEs) are detrimental to human health and lead to increases in cancer, neurological and immunological disorders, and other diseases and symptoms. Plaintiffs also assert that RFEs harm the environment, causing changes in animal behavior, decreases in reproduction, increases in mortality, and negative impacts to the health of both animals and plants. *Id.*

Plaintiffs bring this action to challenge federal, state, and city laws regarding the permitting and regulation of wireless telecommunications infrastructure.

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[1] Because Defendants move for dismissal on substantially similar bases and incorporate each other's arguments, the Court considers the motions together.

Specifically, Plaintiffs challenge: (1) the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv)-(v) (Section 704), which prohibits states and municipalities from considering the environmental effects of RFEs when making siting decisions for wireless telecommunications facilities; (2) the City of Santa Fe's repeal of land use regulations and notice requirements regarding RF emitting telecommunications facilities (Ordinance Nos. 2016-42 and 2017-18); (3) three executive Proclamations issued by the Mayor of Santa Fe temporarily suspending the city's Land Development Code with respect to telecommunications properties on city-owned property; and (4) the State of New Mexico's Wireless Consumer Advanced Infrastructure Investment Act (WCAII), NMSA 1978, §§ 63-9I-4(C) and 63-9I-5(B) (Repl. Pamp. 2018), which permits RF emitting antennae and supporting structures in public rights-of-way. *Id.* at 2-3.

Plaintiffs argue these laws "remove all public protection from injurious facilities in the public right-of-way, infringe on the public's right to speak about a danger to their own health, eliminate all public participation into the siting of such facilities, and deprive injured parties of any remedy for their injuries." *Id.* at 14. Therefore, Plaintiffs "seek a declaration that these laws, and any other laws that may be enacted by their City, their State, or the United States, that would deprive them of any means of protecting themselves from RF radiation and of any remedy for injury by such radiation, are unconstitutional, and to enjoin enforcement of these laws." *Id.* at 15.

Plaintiffs assert the Court has jurisdiction over their federal claims under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgement Act), and 28 U.S.C. § 1343(a)(3) (civil rights claims), and that the Court may exercise supplemental jurisdiction over their state law claims pursuant to 28 U.S.C. § 1367. *Id.* at 22-23. Plaintiffs bring a total of twenty-two claims under federal and state law alleging violations of the United States and New Mexico Constitutions, New Mexico State Statutes, and Santa Fe's City Code and Charter. *Id.* at 37-67. Plaintiffs ask the Court to enjoin Defendants from enforcing Chapter 27 as amended by Ordinance Nos. 2016-42 and 2017-18, the WCAIIA, and Section 704 of the TCA. Plaintiffs also ask the Court to prohibit Defendants from granting any additional franchises and operating any cell towers or antennae erected under existing franchises or the Mayor's proclamations. *Id.* at 67-68. Finally, Plaintiffs ask the Court to enjoin the United States "from adopting or enforcing any law that prohibits States or local governments, with respect to wireless telecommunications facilities, from enforcing land use regulations in the public rights-of-way." *Id.* at 68.

Defendants move to dismiss all of Plaintiffs' claims for lack of standing and for failure to state a claim under Fed. R. Civ. P. 12(b)(1) and (b)(6). (Docs. 21 and 46).

II. Statutory and Legal Framework

The Telecommunications Act of 1996 (TCA) created uniform regulations for the wireless industry and vested enforcement and regulatory authority in the centralized Federal Communications Commission (FCC). 47 U.S.C. § 151. Section 704 of The TCA, codified at 47 U.S.C. § 332(c)(7), preserves local government control over "decisions regarding the placement, construction, and modification of personal wireless services facilities," but places several limitations on that power. 47 U.S.C. §§ 332(c)(7)(A) and (B); *see also FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984) (explaining the commerce clause confers on Congress the authority to regulate telecommunications). The limiting provision at issue here is clause iv, which prohibits local governments from regulating "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 [FCC's] regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv).

Chapter 27 of the Santa Fe City Code regulates telecommunications facilities in the City of Santa Fe. On November 9, 2016, the City adopted Ordinance 2016-42 to amend Chapter 27 to, in part, authorize franchisees to use public rights-of-way to provide telecommunications services. Ordinance 2016-42 (amending SFCC 1987 § 27-2.4(D) (2017)). On August 30, 2017, the City adopted Ordinance 2017-18, which repealed many franchise application requirements in order to streamline the land use review process for

telecommunications facilities in public rights-of-way. Ordinance 2017-18 (amending SFCC 1987 §§ 27-2.19(C), (E), and (G) (2017)). Similarly, the WCAIIA exempts both new antennae and supporting structures for antennae from land use review. NMSA 1978, § 63-9I-4(C) and § 63-9I-5(B) (Repl. Pamp. 2018).

In addition, on November 21, December 13, and December 26, 2017, the City Mayor issued Proclamations of Emergency due to "insufficient telecommunications capacity in the City, which have caused or are causing danger, or injury, or damage to persons and property within the City." (Docs. 19-5, 19-6, 19-7). Through these proclamations, the Mayor authorized the installation of temporary or mobile wireless telecommunications facilities on City of Santa Fe property, pending review and approval of permanent facilities, to allow emergency responders to better communicate with their departments, other agencies, and the public. Seven short cell towers have been built on City land pursuant to these proclamations. (Doc. 19) at 2-3, 20.

III. Standard of Review

In evaluating a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, or under Rule 12(b)(6) for failure to state a claim, the Court "accept[s] as true all well-pleaded factual allegations in the complaint and view[s] them in the light most favorable to [Plaintiffs]." *Garling v. United States Environmental Protection Agency*, 849 F.3d 1289, 1292 (10th Cir. 2017). Nevertheless, the Court will not credit

"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court is also not "bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (citing *Twombly*, 550 U.S. 544, 570 (2007)). In addition, the Court must "draw on its judicial experience and common sense" to determine whether the facts as alleged "permit the court to infer more than the mere possibility of misconduct." *Id.* at 679.

IV. Discussion

A. Plaintiffs' Standing

Federal courts are of limited jurisdiction, empowered by Article III of the Constitution to hear only cases or controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992); *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017). An "essential and unchanging part of the case-or-controversy requirement" is the "irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. "The burden of establishing a federal court's subject matter jurisdiction rests upon the party asserting jurisdiction." *Safe Streets Alliance*, 859 F.3d at 878. To satisfy this burden, Plaintiffs must show: (1) they have suffered an "injury in fact" that is (a) concrete and particularized

and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged actions of Defendants; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Collins v. Daniels*, 916 F.3d 1302, 1312 (10th Cir. 2019).

1. Injury in Fact

On January 11, 2018, Plaintiffs brought a similar suit against the City of Santa Fe challenging Ordinance Nos. 2016-42 and 2017-18 and the Mayor's 2017 proclamations. *Santa Fe Alliance, et al. v. City of Santa Fe*, Civ. No. 18-32 JAP/SCY. In that case, the Honorable James A. Parker found that Plaintiffs did not have standing to bring their claims because their allegations of physical harm were based on generalized statements of increased health incidents and risks related to the worldwide proliferation of RF radiation, which were not traceable to the challenged ordinances or proclamations. Civ. No. 18-32, Doc. 40, at 7-9. At that time, Plaintiffs alleged the possibility of future harm as a result of the City of Santa Fe's plans to authorize wireless telecommunications facilities on public rights-of-way. However, because Plaintiffs had "no information as to whether any new facilities would be placed near Plaintiffs' homes or businesses or in any locations that will result in concrete, actual, and particularized injury to Plaintiffs," the court concluded Plaintiffs' allegations were not sufficient to establish an injury in fact and dismissed Plaintiffs' claims without prejudice for lack of standing. *Id.* at 8.

Here, however, Plaintiffs have alleged specific injuries stemming from Defendants' actions. Specifically, Plaintiffs state Section 704 precluded City councilors from considering their testimony about RF effects at the hearings held on Ordinance Nos. 2016-42 and 2017-18. (Doc. 19) at 29-30. Plaintiffs claim this violated their due process and First Amendment rights and resulted in the City awarding franchises to five telecommunications companies and allowing the franchisees to install antennae on public rights-of-way. *Id.* at 33-34. Moreover, Plaintiffs Firstenberg and Steinhoff state that the towers built pursuant to the Mayor's proclamations have restricted their mobility and access to City services and functions, such as public meetings. *Id.* at 19-20, 31-32 (noting the towers are near a fire station, the City's Water Division, a public recreation center, a public community center, a public parking garage, the City's water treatment plant, and City hall). Therefore, because Plaintiffs now allege that RFEs from facilities that were authorized by Defendants are affecting them in concrete ways and will continue to do so, their injuries are concrete and particularized, actual and imminent, and not conjectural or hypothetical. *See Lujan*, 504 U.S. at 560; *cf. Ctr. for Biological Diversity v. United States Dept. of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (finding no standing because plaintiffs could "only aver that any significant adverse effects of climate change 'may' occur at some point in the future"). Accordingly, the Court finds that Plaintiffs have remedied the deficiencies in their previous lawsuit regarding their allegations of injuries in fact.

2. Traceable to Defendants' Actions

The United States argues Plaintiffs cannot establish standing because their injuries are not traceable to the actions of a federal agency or officer. (Doc. 46) at 17-24. Because Section 704 of the TCA does not mandate or prohibit any state or local action, and instead merely eliminates one factor from consideration when states and localities make decisions regarding the placement of wireless telecommunications facilities, the United States asserts that Plaintiffs' "quarrel lies, not with the United States, but with the State Defendants' independent land-use decisions." *Id.* at 20. Similarly, the United States argues it is immune from Plaintiffs' claims because Plaintiffs fail to allege that an agency or federal officer has acted improperly or failed to act. *Id.* at 22-24.

Congress enacted the TCA "to provide a pro-competitive, deregulatory national policy framework to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services." *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.2d 490, 493 (2d Cir.1999) (quoting H.R. Conf. Rep. No. 104-458, at 206 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 124). One way Congress sought to encourage the rapid expansion of telecommunication services was to reduce the impediments imposed by local governments on the installation of facilities for wireless service. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). Therefore, Congress added § 332(c)(7) to impose some limits on state and

local governmental authority to regulate the location, construction, and modification of such facilities. *Id.*

It has been well established that Congress did not exceed its constitutional authority by enacting these preemption provisions. *See City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) ("[T]he FCC has broad preemption authority [under the TCA]."); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001) ("Congress may preempt state and local governments from regulating the operation and construction . . . of personal wireless communications facilities."). In *Cellular Phone Taskforce*, the court addressed challenges to the FCC guidelines that established the health and safety standards of RF emissions and compliance guidelines under the National Environmental Policy Act. 205 F.3d at 96. The Court held the FCC acted reasonably in relying on the American National Standards Institute and National Council on Radiation Protection and Measurements and concluded the TCA's preemption provision did not violate the Tenth Amendment. *Id.* at 96-97.

Under this framework, a person may sue under the TCA if they are 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." 47 U.S.C. § 332(c)(7)(B)(v). However, Plaintiffs do not allege the facilities authorized by the City or the Mayor's proclamations exceed the RF emission limits established by the FCC or are otherwise inconsistent with the TCA. Therefore, Plaintiffs lack standing to sue under the TCA. *See Drago v. Garment*,

691 F.Supp.2d 490, 494 (S.D.N.Y. 2010) (holding plaintiff lacked standing under TCA to enjoin city from erecting wireless facilities because TCA does not allow party to "bring an action in federal court for the adverse effects flowing from the granting of a request to construct personal wireless service facilities").

In addition, when a person is adversely affected by an action or failure to act by a state or local government that is inconsistent with clause iv (which prohibits regulation on the basis of the environmental effects of radio frequency emissions), that party "may petition the [FCC] for relief." 47 U.S.C. § 332(c)(7)(B)(v); *see also* 47 U.S.C. § 151 (vesting TCA's enforcement and regulatory authority in the FCC). Accordingly, because the United States cannot enforce the provisions of the TCA, Plaintiffs lack standing to bring TCA claims against the United States. *See Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014) (finding no standing where plaintiff sought relief against defendant with no power to enforce challenged statute because "causation element of standing requires the named defendants to possess authority to enforce the complained-of provision"). The FCC is not a party to this case and Plaintiffs have not moved to add them as a party.[2]

The United States also contends it has not waived sovereign immunity for Plaintiffs' claims. While Congress has waived sovereign immunity in most suits

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[2] While Plaintiffs state in their response to Defendant United States' Motion to Dismiss that they would like to amend their complaint to add the FCC as a party, this request is not properly before the Court. *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion.").

against the United States for non-monetary relief, such suits require the party to "stat[e] a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702; *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005). Again, Plaintiffs do not bring this action against the FCC and do not claim that a federal official acted or failed to act. Consequently, the Court finds the United States has not waived sovereign immunity for claims alleging violations of the TCA. *See City of Rancho Palos Verdes, Calif. v. Abrams*, 544 U.S. 113, 127 (2005) (holding TCA precludes Section 1983 suits alleging violations of the Act).

Based on the foregoing, the Court concludes that Plaintiffs lack standing to bring claims under the TCA. However, Plaintiffs also raise constitutional claims that Defendants have violated their rights under the First, Fifth, and Fourteenth Amendments by enacting laws that prevent the consideration of environmental and health effects of RFEs when authorizing telecommunications facilities. *See* (Doc. 19) at 37-62 (Counts 1, 2, 3, 4, 18, and 19); (Doc. 56) at 19 (stating Plaintiffs' "injuries have been caused *directly* by the action of the United states in adopting Section 704 and by the FCC in enforcing it"). As such, Plaintiffs' claimed constitutional injuries are the result of Defendants' interpretation of and reliance on Section 704. Moreover, the United States' argument that Plaintiffs' injuries are caused by the State Defendants' independent land-use decisions is unavailing because "fairly traceable" does not require a defendant's action to be "the very last

step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (finding plaintiffs had standing to challenge federal law even though subsequent decisions by other governmental entities also caused harm, explaining "fairly traceable" prong "does not exclude injury produced by determinative or coercive effect upon the action of someone else"). Therefore, the Court concludes Plaintiffs' constitutional claims are fairly traceable to Defendants' actions. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007) ("The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court"); *Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987) (finding standing to sue state government official when challenging constitutionality of state statue); *Cellular Phone Taskforce*, 205 F.3d at 96-97 (considering challenge to constitutionality of the TCA).

3. Redressability

While no Defendant challenges Plaintiffs' standing on the basis of whether their injuries would be redressable by a favorable decision, Plaintiffs argue in their Notice of Supplemental Authority that they satisfy this prong. (Doc. 71). Plaintiffs rely on *Juliana v. United States*, where the Ninth Circuit found the plaintiffs lacked standing to bring broad constitutional claims challenging the government's use and authorization of fossil fuels. 947 F.3d 1159 (9th Cir. 2020). That court held that the plaintiffs sufficiently alleged injuries in fact that were caused by the defendants, but

found the injuries could not be redressed by the court because the remedy plaintiffs sought would require the court to demand action by the legislative and executive branches and engage in policy making, continuous supervision, and remediation. *Id.* at 1171-72 (stating "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan" which "would necessarily require a host of complex policy decisions entrusted . . . to the wisdom and discretion of the executive and legislative branches") (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128-29 (1992)).

Unlike the plaintiffs in *Juliana*, Plaintiffs here do not ask the Court to demand action by another branch of government or engage in policy making or supervision. Instead, Plaintiffs seek a ruling that laws that prevent local governments from considering the harmful effects of RFEs are unconstitutional. Accordingly, Plaintiffs are correct that their claims are distinguishable from those in *Juliana*, where the court emphasized the plaintiffs did not assert the violation of a procedural right or an otherwise "discrete and particularized injury necessary for Article III standing." *Id.* at 1174. Therefore, the Court finds Plaintiffs injuries will likely be redressed by a favorable decision. *See Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury.").

For the foregoing reasons, the Court concludes that the Plaintiffs have established standing to bring their constitutional claims but lack standing to bring claims under the TCA.

B. Plaintiffs' Federal Claims

Having found Plaintiffs have standing to bring their constitutional claims, the Court now considers Defendants' motions to dismiss these claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (Docs. 21 and 46).

1. Due Process Claims

Plaintiffs' First, Second, and Eighteenth Claims allege Section 704, the ordinances amending Chapter 27, the WCAIIA, and the Mayor's proclamations, violate Plaintiffs' substantive and procedural due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. (Doc. 19) at 37-40, 59-60. Specifically, Plaintiffs allege that the siting of wireless telecommunications facilities without consideration of their environmental and health effects prevents Plaintiffs from being safe at home, traveling the public streets, working, and otherwise providing for their basic needs. *Id.* Defendants argue these claims should be dismissed because Plaintiffs fail to establish a constitutionally cognizable life, liberty, or property interest. (Doc. 21) at 3-6; (Doc. 25) at 9-10; (Doc. 57) at 11-13; (Doc. 46) at 31-32.

The federal government by the Fifth Amendment, and the states by the Fourteenth Amendment, are prohibited from, among other things, depriving a party of life, liberty, or a protected property interest without due process of law. U.S. Const. amends. V; XIV, § 1. Procedural due process ensures a party will not be deprived of life, liberty, or property without engaging fair procedures to reach a decision, while substantive due process ensures a party will not be deprived of life, liberty, or property for an arbitrary reason regardless of the procedures used to reach that decision. *See Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1198 (10th Cir. 2000); *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998).

Plaintiffs assert that telecommunications facilities built on public rights-of-way harm their health, ability to travel, and ability to live in their homes. (Doc. 22) at 2-9. Therefore, Plaintiffs argue the laws allowing these facilities without consideration of their RFEs deprive Plaintiffs of their rights to life, liberty, and property. *Id.* at 38 ("The actions of the City and the State, separately and jointly, have deprived Plaintiffs of the reasonable expectation of a home without radiation."); *id.* at 39 ("The actions of the Mayor, as enforced by the City, have deprived Plaintiffs of the reasonable expectation of a home without radiation."). However, to have a constitutionally protected right under the due process clause, a party "clearly must have more than an abstract need or desire for it . . . [and] must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 409 U.S. 564, 577 (1972).

In addition, to have a legitimate claim of entitlement, there must be "a certainty or a very strong likelihood that the benefit would have been granted." *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 192 (2nd Cir. 1994).

In *Abraham v. Town of Huntington*, the plaintiffs similarly claimed the town deprived them of their procedural and substantive due process rights because it did not take into account the health effects of RFEs in approving telecommunications facilities on public rights-of-way near the plaintiffs' homes. 2018 WL 2304779, *1-2 (E.D.N.Y.). In considering these claims, the court noted that Section 704 of the TCA preempted the town from making a siting decision on the basis of the effects of RFEs. *Id.* at *8 ("Congress intended the FCC act as the exclusive regulator regarding RF interference."). As a result, the court reasoned that the plaintiffs' requested relief failed as a matter of law so long as there was no factual dispute that the RF interference fell within the FCC guidelines. *Id.* ("In other words, as long as there is no factual dispute as to whether the RF interference fall[s] within the FCC guidelines, an attempt by the Town to make a determination as to an application or permit based on the risks posed by RF interference would be preempted by federal law."). In addition, the court found the plaintiffs could not state a claim for procedural or substantive due process violations because "the Plaintiffs cannot show a constitutional entitlement to the denial of a permit for the installation of wireless facilities on public rights-of-way." *Id.* at *11 ("As the Court has determined that the Plaintiffs lack a valid property interest

in the approval of the installation of wireless facilities on public rights-of-way, the Court need not address the second requirement of a procedural or substantive due process claim.").

Here, Plaintiffs' due process claims fail for the same reasons. As explained above, the TCA has explicitly preempted states and localities from considering the environmental effects of RFEs in their siting decisions. Therefore, Plaintiffs' claims fail as a matter of law in that they assert the State, City, and Mayor, have violated their due process rights because they did not consider RFEs. Moreover, the Tenth Circuit has explained that for land use regulations to "be declared unconstitutional on due process grounds, the provisions must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare, and if the validity of the land classification is fairly debatable the legislative judgment must control." *Messiah Baptist Church v. County of Jefferson, State of Colo.*, 859 F.2d 820, 822 (10th Cir. 1988). The challenged laws here have been enacted to provide consistent and high-quality telecommunications services and technologies for public safety reasons. *See City of Ranchos Palos Verdes*, 544 U.S. at 115-16 ("Congress enacted the Telecommunications Act of 1996 to promote competition and higher quality in American Telecommunications services and to encourage the rapid deployment of new telecommunications technologies.") (citation omitted); Chapter 27-1(E) of the Santa Fe City Code ("The purposes of this chapter are to . . . enhance the ability of the providers

of telecommunications services to provide such services to the community quickly, effectively, and efficiently."); (Doc. 19-5, 19-6, 19-7) (Mayor's Proclamations of Emergency authorizing temporary or mobile wireless telecommunications facilities on City property to allow emergency responders to better communicate with their departments, other agencies, and the public because "an emergency exists in the City resulting from insufficient telecommunications capacity in the City, which have caused or are causing danger, or injury or damage to persons and property within the City").

In response to the City of Santa Fe's Motion to Dismiss, Plaintiffs rely on cases finding a fundamental right to "bodily integrity" to support their due process claims. (Doc. 22) at 5-6. For example, Plaintiffs rely on *Guertin v. State of Michigan*, where the plaintiffs alleged violation of their due process rights because government officials supplied lead-contaminated water that resulted in dangerously high blood-levels. 912 F.3d 907 (6th Cir. 2019). The Sixth Circuit explained that a constitutional right to bodily integrity means "individuals possess a constitutional right to be free from forcible intrusions on their bodies against their will, absent a compelling state interest." *Id.* at 919 (citation omitted). The Court held the plaintiffs sufficiently pled their due process claims and compared the case to nonconsensual intrusion cases involving forced medication or government experiments on unknowing and unwilling patients. *Id.* at 920-21 (explaining facts of case similar to cases where government is accused of "[i]nvoluntarily subjecting nonconsenting individuals

to foreign substances with no known therapeutic value – often under false pretenses and with deceptive practices hiding the nature of the interference").

Here, however, Plaintiffs do not claim their exposure to RFEs is unknowing. Instead, Plaintiffs are well-aware of RFEs and have made purposeful decisions to avoid it. (Doc. 19) at 16-20 (documenting Plaintiffs' actions taken to avoid RFEs). Plaintiffs also do not allege Defendants have acted under false pretenses or have hidden RFEs from them. *See Guertin*, 912 F.3d at 921 (emphasizing bodily integrity due process violation involved plaintiffs unknowingly receiving substances detrimental to their health while "government officials engaged in conduct designed to deceive the scope of the bodily invasion"); *see also Washington v. Harper*, 494 U.S. 210, 221-22 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."). No such allegations have been made here and Plaintiffs have not persuaded the Court to extend the right to bodily integrity to encompass a right to live in an environment free from RFEs. *See Guertin*, 912 F.3d at 921-22 ("[T]he Constitution does not guarantee a right to live in a contaminant-free, healthy environment."); *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1238 (3d Cir. 1980), *vacated on other grounds sub nom., Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) ("[T]here is no constitutional right to a pollution-free environment."); *Lake v. City of Southgate*, 2017 WL 767879, at *4 (E.D. Mich.) ("[W]henever federal courts have faced

assertions of fundamental rights to a 'healthful environment' or to freedom from harmful contaminants, they have invariably rejected those claims."); *Barnett v. Carberry*, 2010 WL 11591776, at *8 (D.Conn.), aff'd 420 Fed. Appx. 67 (2d Cir. 2011) ("[T]here is no recognized constitutional right to a healthful environment or to be free from a particular level of [electromagnetic field] exposure.").

For the reasons stated above, Plaintiffs due process claims must be dismissed because they have not alleged a violation of a constitutionally protected right.

2. Takings Claim

Plaintiffs also claim that the ordinances amending Chapter 27 and the WCAIIA have resulted in an unconstitutional taking because the placement of wireless telecommunications facilities on public rights-of-way "will render [Plaintiffs'] homes and businesses uninhabitable and unusable and is an unlawful confiscation of property without compensation." (Doc. 19) at 40 (Third Claim)

In order to state a claim for an unconstitutional taking, a plaintiff must allege either a physical taking, a "total regulatory taking," an interference with the plaintiff's rights in the property, or an improper land use condition. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005). Plaintiffs argue the challenged laws result in an unconstitutional taking because "RF radiation from a cell tower in front of someone's house is a permanent physical invasion of his or her property,"

and can "deny that person all economically beneficial or productive use of that property." (Doc. 22) at 8. However, in order to state a takings claim, a plaintiff must allege that, as the owner of the property, the plaintiff "has been called to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). Plaintiffs do not allege their property has been affected or that its value has decreased. Instead, Plaintiffs state that "no wireless telecommunications facilities in Santa Fe are on the sidewalk in front of homes and businesses." (Doc. 22) at 9. Because Plaintiffs do not claim a physical occupation of their property, or that their property has been singled out, restricted, or regulated in any way, the Court concludes their takings claim fails as a matter of law. *See, e.g.*, *United States v. 1,606.00 Acres of Land, Situated in Texas Cnty., State of Okla.*, 698 F.2d 402, 407 (10th Cir. 1983) ("Possible future taking of property cannot give rise to a present action, . . . and threat to condemn one's property does not constitute a taking."); *Long Island Lighting Co. v. Suffolk County, N.Y.*, 604 F.Supp. 759, (E.D.N.Y. 1985) (rejecting takings claim based on plaintiff's allegation that its property may be taken at future time).

3. First Amendment Claims (Right to Petition and Freedom of Speech)

Plaintiffs next claim their First Amendment rights to petition and for free speech have been violated because the ordinances amending Chapter 27,

the WCAIIA, and Section 704, prevent them from testifying about the harmful effects of RF radiation produced by telecommunications facilities. (Doc. 19) at 41 (Fourth Claim) and 60-63 (Nineteenth and Twentieth Claims). Plaintiffs assert that because Section 704 prohibits local regulation of telecommunications facilities on the basis of RFEs, Plaintiffs' speech about the effects of RFEs has been disregarded and unconstitutionally restricted. *Id.* at 62.

The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." *McDonald v. Smith*, 472 U.S. 479, 481 (1985). In addition, the First Amendment prohibits the government from suppressing speech on the basis of its content, including in advance of its actual expression. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 570 (1976) (explaining "prior restraint" on speech is law, regulation, or judicial order that preemptively suppresses speech or provides for its suppression at discretion of government officials and based on speech's content). However, "[t]o qualify as a content-based 'regulation of speech,' a statute must restrict speech or expressive conduct in the first place." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1104 (10th Cir. 2006); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("As a threshold requirement for the application of the First Amendment, the government action must abridge or restrict protected speech.").

None of the laws Plaintiffs are challenging prohibit speech on the effects of RFEs. Indeed, Plaintiffs state they "have participated in every approval process

and have testified to their injuries and losses at every public hearing for every proposed telecommunications ordinance and every proposed telecommunications facility in Santa Fe from 2005 to the present." (Doc. 19) at 26. In addition, Plaintiffs state that at the hearings held on Ordinance Nos. 2016-42 and 2017-18, "[t]he preponderance of the public testimony . . . was about health." *Id.* at 29. Plaintiffs have also filed multiple lawsuits about this issue. *See, e.g. Santa Fe Alliance, et al. v. City of Santa Fe*, Civ. No. 18-32 JAP/SCY, *Firstenberg v. City of Santa Fe*, Civ. No. 11-8 JAP/WDS. Therefore, Plaintiffs fail to state a claim that they have not been able to petition or speak about the health effects of RFEs.

Instead, the crux of Plaintiffs' First Amendment claims is that, because of the preemptive effects of Section 704, local government officials are unable to act on Plaintiffs' complaints. This, however, is not a proper basis for a First Amendment claim. *See Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment . . . suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."); *Initiative & Referendum*, 450 F.3d at 1101 ("The First Amendment ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail."); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) (rejecting idea of First Amendment challenge to preemptive statutes, stating "no one would argue that such limitations

violate the First Amendment rights of state voters who supported the preempted legislation"); *Jaeger v. Cellco P'nership*, 936 F.Supp.2d 87, 94 (D.Conn. 2013) (dismissing plaintiff's right to petition claim because she participated in council hearings and pursued her grievances in state and federal court, concluding "Jaeger has not been deprived of her right to petition the government; she has simply been an unsuccessful petitioner").

As for Plaintiffs' claim that people who are "injured, sickened and/or killed by [RF] radiation" are deprived of a remedy by Section 704's preemption provision, Plaintiffs may seek relief from Congress or the FCC as to allowable RFE levels. *See Cellular Phone Taskforce*, 205 F.3d at 90 (explaining FCC promulgated RF exposure limits in 47 C.F.R. § 1.1310, Table 1 and "is the entity with the express authority to regulate acceptable RF emissions levels for cellular tower facilities"); *Abraham*, 2018 WL 2304779, at *8 (explaining "Congress intended the FCC act as the exclusive regulator regarding RF interference," and "[t]he FCC has utilized its rulemaking authority to regulate RF interference" as set forth at 47 C.F.R. § 73.318). For example, under the Administrative Procedures Act, an "interested person" may petition a federal agency "for the issuance, amendment, or repeal of a rule," the agency must decide the petition "within a reasonable time," and the courts may review any "final agency action" for abuse of discretion. 5 U.S.C. §§ 553(b)-(e), 704, 706(1)-(2). Therefore, Section 704 does not prevent Plaintiffs from seeking more stringent RFE standards.

See Cellular Phone Taskforce, 205 F.3d at 90 ("The argument that the FCC should create greater safety margins in its guidelines to account for uncertain data is a policy question, not a legal one."); *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017) ("Allowing RF-emissions-based tort suits would . . . shift the power to regulate RF emissions away from the FCC and into the hands of courts and state governments."); *Patchak v. Jewell*, 109 F. Supp. 3d 152, 163 (D.D.C. 2015) (finding no infringement on right to petition where Congress withdrew federal jurisdiction for plaintiffs claims, "but he remains free to petition federal agencies . . . for relief"); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000) (explaining First Amendment right to petition "is merely a right to petition the appropriate government entity," not to "make every government employee a petition receiver"); *Bakay v. Yarnes*, 2005 WL 2454168, at *7 (W.D. Wash) (explaining First Amendment provides "absolute and fundamental right to petition the government through the political process" but does not provide a "similar right to bring lawsuits").

For these reasons, the Court concludes that Plaintiffs have failed to state a claim that their First Amendment rights have been violated.

4. Claim Regarding Term "Environmental" in Section 704

Plaintiffs' final federal claim is that, in prohibiting states from adopting stricter regulations than the FCC

regarding the environmental effects of RF radiation, Congress did not intend to include "health" as part of the term "environmental." (Doc. 19) at 58-59 (Seventeenth Claim); *see also* (Doc. 22) at 10 (asserting the "ordinary, dictionary" meaning of the term "environmental" does not include human health). Accordingly, Plaintiffs argue, Section 704 does not preempt state and local governments from considering how RF radiation affects human health when authorizing telecommunications facilities. *Id.* at 10-11. Defendants dispute Plaintiffs' interpretation of Section 704 and argue Plaintiffs do not state a claim for relief. (Doc. 21) at 10; (Doc. 46) at 12, 26 n.5.

When asked to construe a statute, the Court begins with its plain language. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."). Therefore, the Court must first determine if the language at issue has a plain and unambiguous meaning and, if it does, the Court's inquiry ends. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Section 332(c)(7)(B)(iv) provides, "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." The term "environmental effects" is defined as the "natural or artificial disturbance of the physical, chemical, or biological components that make up the environment." *See* Black's Law Dictionary, 238 (11th ed. 2019). Plaintiffs cite to no authority that this definition excludes humans. Instead, other courts considering this issue have held the term "environmental effects" includes effects on human health. *See Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 325 (2d Cir. 2000) (holding "environmental effects" in Section 704 includes effects on human health); *Cellular Telephone Co.*, 166 F.3d at 494 n.3 (same); *Firstenberg v. City of Santa Fe, N.M.*, 782 F.Supp.2d 1262, 1271 (D.N.M. 2011), *rev 'd on other grounds by* 696 F.3d 1018 (10th Cir. 2012) ("In § 332(c)(7)(B)(iv), Congress expressed a clear intent to preempt local governing authorities from regulating RFEs on the basis of their environmental and health effects."); *T-Mobile Northeast LLC v. Town of Ramapo*, 701 F.Supp.2d 446, 460 (S.D.N.Y. 2009) ("Environmental effects within the meaning of [§ 332(c)(7)(B)(iv)] . . . include health concerns about the biological effects of RF radiation.").

In addition, a review of the regulations under which the FCC sets acceptable RF emission levels makes plain that the FCC considers the human health effects of RF radiation. *See* 47 C.F.R. § 1.1310 (providing "specific absorption rate" used to evaluate human RF radiation exposure limits). Moreover, Plaintiffs'

request that the Court interpret the meaning of "environmental effects" in a manner that circumscribes the FCC's preemptive authority "is arguably an attempt [sic] usurp the FCC's authority to regulate RF emissions, a task Congress has delegated to the FCC." *Jaeger*, 2010 WL 965730, at *10. Because Congress has granted the FCC authority to regulate RFEs from telecommunications facilities, the proper procedure to challenge the FCC's policies concerning RFEs is to petition the FCC. *See* 47 C.F.R. § 1.1307(c) ("If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process.").

For these reasons, the Court concludes the plain meaning of the term "environmental effects" includes effects on human health. Additionally, to exclude the application of Section 332(c)(7)(B)(iv) from human health considerations is clearly at odds with congressional intent and FCC policy on RF emissions. Therefore, the Court concludes this claim fails as a matter of law.

V. Conclusion

For the reasons stated above, the Court finds that none of Plaintiffs' federal claims state a claim for relief. The Court notes that other courts have consistently

dismissed similar claims. *See Firstenberg*, 782 F.Supp.2d at 1271, *rev'd on other grounds by* 696 F.3d 1018 ("Because Plaintiff asked for relief that would require the City to regulate the transmissions from AT&T's base stations for the purpose of controlling the 'environmental effects' of [RFEs], Plaintiff's claim fails."); *Jaeger*, 2010 WL 965730, at *4 (D. Conn.), aff'd 402 Fed. Appx. 645 (2nd Cir. 2010) ("Because Jaeger's first four claims challenge the Council's siting determination on the basis of the effects of RF emissions, they fail as a matter of law; the Council is preempted by the TCA from denying an application on the basis of the effects of RF emissions that fall within the permissible range set by the FCC."); *Drago*, 691 F. Supp. 2d at 494 ("There is no language in the [TCA] to allow someone to bring an action in federal court for adverse effects flowing from the granting of a request to construct personal wireless service facilities."); *Abraham*, 2018 WL 2304779, at *8 ("[A]s long as there is no factual dispute as to whether RF interference fall within the FCC guidelines, an attempt by the Town to make a determination as to an application or permit based on the risks posed by RF interference would be preempted by federal law."); *cf. Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002) (holding TCA preempts regulation on basis of RFEs but does not preempt mutually agreed upon provisions in lease agreement even if terms of lease agreement embodied stricter RF emission limits than those provided by the FCC).

Having concluded all of Plaintiffs' federal claims should be dismissed, the Court declines to exercise

supplemental jurisdiction over Plaintiffs' state law claims. *See* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction."); *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998) ("[T]he court may, and usually should, decline to exercise jurisdiction over any remaining state claims."); *Lucero v. Gordon*, 786 Fed. Appx. 833, 836-37 (10th Cir. 2019) ("As a general matter, a court will decline supplemental jurisdiction if the underlying [federal] claims are dismissed before trial.").

IT IS THEREFORE ORDERED that Defendant City of Santa Fe's Amended Motion to Dismiss for Failure to State a Claim, (Doc. 21), and Defendant United States' Motion to Dismiss, (Doc. 46), are GRANTED and Plaintiffs' federal claims are DISMISSED with prejudice as to these Defendants.

IT IS FURTHER ORDERED that, because Plaintiffs' federal claims have been dismissed with prejudice, the Court DECLINES to exercise supplemental jurisdiction over Plaintiffs' state law claims, and those claims are DISMISSED without prejudice.

/s/ Kenneth Gonzales
UNITED STATES
DISTRICT JUDGE

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. City of Santa Fe Ordinance No. 2016-42, amending Santa Fe City Code ("SFCC"), Section 27. Section 2 of Ordinance No. 2016-42, adopted November 9, 2016:

"Subsection 27-2.4 SFCC 1987 (being Ord. #2010-14, §7, as amended) is amended to read:

" . . . D. *Franchise Granted*. Subject to compliance with this section and other applicable requirements of city code, a franchise granted under this section shall authorize an applicant to use public rights-of-way to provide telecommunications services."

2. City of Santa Fe Ordinance No. 2017-18, further amending Santa Fe City Code, Section 27. Section 1 of Ordinance No. 2017-18, adopted August 30, 2017:

"Subsection 27-2.19 SFCC 1987 (being Ord. #2010-14 § 15, as amended) is amended to read:

"27-2.19 Land Use Review.

" . . . C. No Application Required.

"(1) The following shall not require submittal of an application for review under this subsection:

"(a) the construction of new telecommunications facilities that conform to design parameters established from time to time by the land use department and are approved for use following a public hearing in the historic districts by the historic districts review board or

outside the historic districts by the planning commission, provided that notice of the use of the approved design and of the proposed location is submitted to the city prior to commencement of the work and the city approves the proposed location of the facilities;

" . . . E . . . (3) The planning commission may not regulate the placement of telecommunications facilities on the basis of the environmental effects of radio frequency emissions where such telecommunications facilities comply with 47 C.F.R. 1.1310 et seq.

" . . . G . . . (1) . . . "Telecommunications facilities are permitted in all zoning districts."

3. Wireless Consumer Advanced Infrastructure Investment Act, New Mexico Statutes Annotated 1978, Chapter 3, Article 9I, adopted September 1, 2018.

Section 63-9I-4C:

"A small wireless facility collocated on a utility pole or wireless support structure that extends ten feet or fewer above the pole or structure in a right of way in any zone is classified as a permitted use and is not subject to zoning review or approval."

Section 63-9I-5B:

"A new, replacement or modified utility pole associated with the collocation of a small wireless facility and installed in a right of way is not subject to zoning review and approval, except for that which pertains to the under-grounding prohibitions described in Subparagraph (c) of Paragraph (1) of Subsection C of this section,

unless the utility pole, as measured from the ground level, is higher than whichever of the following is greater:

"(1) ten feet plus the height in feet of the tallest existing utility pole, other than a utility pole supporting only one or more wireless facilities, that is:

"(a) in place on the effective date of the Wireless Consumer Advanced Infrastructure Investment Act;

"(b) located within five hundred feet of the new, replacement or modified utility pole;

"(c) in the same right of way and within the jurisdictional boundary of the authority; and

"(d) fifty or fewer feet above ground level; or

"(2) fifty feet."

4. Telecommunications Act of 1996, Section 704, subsections (iv) and (v):

47 U.S.C. Section 332(c)(7)(B)(iv):

"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. Section 332(c)(7)(B)(v):

"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. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief."

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

SANTA FE ALLIANCE FOR PUBLIC HEALTH AND SAFETY, ARTHUR FIRSTENBERG, and MONIKA STEINHOFF,

Plaintiffs,

vs.

No. 1:18-cv-01209-LF-JHR

CITY OF SANTA FE, NEW MEXICO; HECTOR BALDERAS, Attorney General of New Mexico; and the UNITED STATES OF AMERICA,

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Filed Jan. 29, 2019)

COME Now the SANTA FE ALLIANCE FOR PUBLIC HEALTH AND SAFETY ("ALLIANCE") and MONIKA STEINHOFF by and through their attorneys, and ARTHUR FIRSTENBERG, pro se, and in their Complaint against the CITY OF SANTA FE ("CITY"), NEW MEXICO ATTORNEY GENERAL HECTOR BALDERAS, and the UNITED STATES OF AMERICA ("UNITED STATES"), state as follows:

INTRODUCTION

1. For at least fifty years, the United States of America has known that radio frequency ("RF") radiation, even at extremely low levels of exposure, is injurious to human health and the environment, and that the continuous expansion of wireless telecommunications would endanger its population, including Plaintiffs, and the ecosystems and natural resources upon which they depend for their wellbeing and survival. Despite this knowledge, the United States enacted a law *prohibiting* States and municipalities from regulating wireless telecommunications on the basis of the environmental effects of RF radiation, which has been assumed to include health effects. This law is Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv) and (v) ("Section 704").

2. For at least twenty years, the City of Santa Fe has known that RF radiation, even at extremely low levels of exposure, is injurious to health and environment, and that the continuous expansion of wireless telecommunications would endanger Plaintiffs and the ecosystems and natural resources upon which they depend for their wellbeing and survival. Despite this knowledge, the City has repealed all of the protections it previously put in place to protect its residents from harm. It has repealed all land use regulations that previously ensured that RF radiation-emitting antennas could not be placed on sidewalks in front of homes and businesses, and it has repealed all notice requirements and all means of public participation in decisions that endanger Plaintiffs' health and their environment. The

ordinances by which these protections were repealed are Ordinances No. 2016-42 and 2017-18. Further, on November 21, 2017, the Mayor of Santa Fe issued the first of three executive Proclamations, which suspended the Land Development Code, including public notice requirements, with respect to telecommunications facilities on City-owned property. Seven short cell towers have been built on City land with no public process at all under the Proclamations.

3. For at least forty years, the State of New Mexico has known that RF radiation, even at extremely low levels of exposure, is injurious to health and environment, and that the continuous expansion of wireless telecommunications would endanger Plaintiffs and the ecosystems and natural resources upon which they depend for their wellbeing and survival. Despite this knowledge, the State of New Mexico passed a law providing that RF radiation-emitting antennas in the public rights-of-way are a permitted use, not subject to land use review, throughout New Mexico. This law, which went into effect on September 1, 2018, is the Wireless Consumer Advanced Infrastructure Investment Act ("WCAIIA"). Sections 4(C) and 5(B) of WCAIIA exempt both new antennas and new supporting structures for antennas from land use review. NMSA 1978 §§ 63-9I-4(C) and 63-9I-5(B).

4. Telecommunications companies, enabled by laws prohibiting the public from participating in decisions affecting their health, environment, and survival, are poised right now to roll out the fifth-generation wireless network (5G). This is acknowledged and

advertised to bring unprecedented societal change on a global scale. We will have "smart" homes, "smart" businesses, "smart" highways, "smart" cities and self-driving cars. Virtually everything we own and buy, from refrigerators and washing machines to milk cartons, hairbrushes and infants' diapers, will contain antennas and microchips and will be connected wirelessly to the Internet. Every person on Earth will have instant access to super-high-speed, low-latency wireless communications from any point on the planet, even in rainforests, mid-ocean and the Antarctic.

5. What is known to governments and to scientists working in the field of bioelectromagnetics, but is not widely known to the general public, is that this will also result in unprecedented *environmental* change on a global scale. The planned density of radio frequency ("RF") transmitters is extraordinary. In addition to millions of new 5G base stations on Earth and 20,000 new satellites in space, 200 billion transmitting objects, according to estimates, will be part of the Internet of Things by 2020, and one *trillion* objects a few years later.

6. In order to transmit the enormous amounts of data required for the Internet of Things, 5G technology, when fully deployed, will use millimeter waves, which are poorly transmitted through solid material. This will require every carrier to install base stations (also referred to herein as "cell towers") every 100 meters in every urban area in the world. The existence of multiple competing carriers means there will be a base station in front of every third to fifth house. Unlike

previous generations of wireless technology, in which a single antenna broadcasts over a wide area, 5G base stations and 5G devices will have multiple antennas arranged in "phased arrays," that work together to emit focused, steerable, laser-like beams that track each other.

7. Each 5G phone will contain dozens of tiny antennas, all working together to track and aim a narrowly focused beam at the nearest base station. The Federal Communications Commission ("FCC") has adopted rules permitting the effective power of those beams to be as much as 20 watts, ten times more powerful than the levels permitted for current phones. 47 C.F.R. § 30.202(b).

8. Each 5G base station will contain hundreds or thousands of antennas aiming multiple laser-like beams simultaneously at all cell phones and user devices in its service area. This technology is called "multiple input multiple output" or MIMO. FCC rules permit the effective radiated power of a 5G base station's beams to be as much as 30,000 watts per 100 MHz of spectrum, or equivalently 300,000 watts per GHz of spectrum, tens to hundreds of times more powerful than the levels permitted for current base stations. 47 C.F.R. § 30.202(a).

9. The FCC regulates the technical aspects of telecommunications only, has no statutory authority over health, and has repeatedly disclaimed any expertise or authority over health or environment. "[W]e have no expertise in the area of public health . . . " *Far East*

Broadcasting Company, Inc., 65 F.C.C.2d 496, 502 (1977). "The Commission's position is that it has neither the responsibility nor the authority to establish health and safety radiation standards." *Inquiry Concerning Biological Effects of Radio Frequency Radiation When the Use of Radio Frequency Devices is Authorized*, FCC 79-364, ¶ 20, 44 Fed. Reg. 37008, 37011 (1979). "[T]he commission has neither the expertise nor the primary jurisdiction to promulgate health and safety standards for RF and microwave radiation." *Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices,* FCC 82-47, ¶ 183, 47 Fed. Reg. 8214, 8228 (1982). "The Commission . . . is not the expert agency for evaluating the effects of RF radiation on human health and safety." *In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Notice of Proposed Rulemaking, FCC 93-142, ¶ 8, 8 FCC Rcd 2849 (1993). The sole purpose of the guidelines the FCC adopted in 1996 is "[t]o meet its responsibilities under NEPA." *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, FCC 96-326, ¶ 5, ET Docket No. 93-62 (1996). "[T]he Commission . . . is not a health and safety agency . . . " *Id.* ¶ 28.

10. In the FCC's authorizing statute, the Communications Act of 1934, as amended, the word "health" does not appear anywhere in connection with RF radiation. The FCC's RF exposure guidelines are neither mandatory nor enforceable. They are procedural only and serve only as cutoff values to define "Actions for which Environmental Assessments (EAs)

must be prepared." *Id.*, Appendix C, Part 1, § 1.1307; 47 C.F.R. § 1.1307. Health and safety are State functions, and as a zoning authority the City is obligated to safeguard the health of its citizens and may not abdicate this responsibility.

11. Even before 5G was proposed, scientists working in this field globally have presented at least 60 declarations, petitions and appeals to their governments calling for a halt to the expansion of wireless technology and a moratorium on new base stations. Already in 2002, the Freiburger Appeal, signed by over 3,000 physicians, warned that radiation from cell phones and cell towers was causing serious health impacts including "heart attacks and strokes among an increasingly younger population."

12. On May 11, 2015, 215 scientists from 41 countries, all of them researchers engaged in the study of biological and health effects of electromagnetic fields, addressed an International Appeal to Ban Ki-moon, the Secretary-General of the United Nations; to Margaret Chan, the Director-General of the World Health Organization; and to U.N. Member States. They stated that "numerous recent scientific publications have shown that EMF [electromagnetic fields] affects living organisms at levels well below most international and national guidelines."

13. More than 10,000 peer-reviewed scientific studies demonstrate harm to human health from low-level RF radiation. Effects include:

- Alteration of heart rhythm
- Altered gene expression
- Altered metabolism
- Altered stem cell development
- Cancers
- Cardiovascular disease
- Cataracts
- Cognitive impairment
- Diabetes
- DNA damage
- Impacts on general well-being
- Increased free radicals
- Learning and memory deficits
- Impaired sperm function and male infertility
- Miscarriage
- Neurological damage
- Obesity and diabetes
- Oxidative stress

14. Effects in children include autism, attention deficit hyperactivity disorder ("ADHD") and asthma.

15. Damage goes well beyond the human race, as there is abundant evidence of harm to diverse plant- and wildlife and laboratory animals, including:

- **Ants.** *Exposure to cell phones, cordless phones, or WiFi in the laboratory causes behavioral disturbances and mortality.*

- **Birds.** *Proximity to cell towers impairs reproduction and diminishes populations.*

- **Forests.** *RF radiation causes forest dieback, mimicking the effects of acid rain.*

- **Amphibians.** *Proximity to a cell tower in an urban laboratory caused 95 percent mortality; RF radiation has contributed to the extinction of scores of species worldwide.*

- **Fruit flies.** *Exposure to a cell phone in the laboratory impairs reproduction and causes mortality and genetic abnormalities.*

- **Honey bees.** *A ten-minute exposure to a cell phone in the laboratory causes digestion of food to come to a complete halt at the cellular level; RF radiation causes swarming and is a primary cause of colony collapse disorder.*

- **Insects.** *Insect populations in nature preserves and rainforests plummeted when cell towers were erected nearby.*

- **Farm Animals.** *Proximity to cell towers causes heart and circulatory failure and internal bleeding in cows, and abortions and reproductive failure in cows and pigs.*

- **Mice.** *Proximity to a cell tower in an urban laboratory impaired reproduction and caused irreversible sterility within five generations.*

- **Plants.** *RF radiation shortens life-span, impairs growth, and causes developmental abnormalities in duckweed plants.*

- **Rats.** *A two-hour exposure to a cell phone causes permanent brain damage.*

- **Trees.** *Aspen trees throughout Colorado no longer grow normally; only when shielded from RF radiation do they display the fall colors they were once famous for.*

16. These studies on humans, animals and plants, have been performed by the following:

- United States Army
- United States Navy
- United States Air Force
- United States Environmental Protection Agency ("EPA")
- Governments of other nations
- Thousands of scientists and researchers worldwide

17. The results of this medical and scientific research are publicly available and may be found in the following Senate Reports:

- *Oversight of Radiation Health and Safety*, Hearings before the Committee on Commerce, Science, and Transportation, United States Senate, Ninety-Fifth Congress, First Session, Serial No. 95-49 (June 16, 17, 27, 28, and 29, 1977);

- *The Health Effects of Cell Phone Use*, Hearing before the Committee on Appropriations, Subcommittee on Labor, Health and Human Services, and Education, and Related Agencies, United States Senate, One Hundred Eleventh Congress, Second Session, Senate Hearing 111-348 (September 14, 2009);

and in the following House of Representative Reports:

- *Research on Health Effects of Nonionizing Radiation*, Hearing Before the Subcommittee on Natural Resources and Environment of the Committee on Science and Technology, United States House of Representatives, Ninety-sixth Congress, First Session (July 12, 1979);

- *Potential Health Effects of Video Display Terminals and Radio Frequency Heaters and Sealers*, Hearings before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology, United States House of Representatives, Ninety-seventh Congress, First Session (May 12 and 13, 1981);

- *Tumors and Cell Phone Use: What the Science Says*, Hearing before the Subcommittee on Domestic Policy, U.S. House of Representatives, One Hundred Tenth Congress, Second Session (September 25, 2008);

and in the following EPA Reports:

- *Environmental Protection Agency's Role in Protecting the Public and the Environment from Nonionizing Radiation Exposure*, Document No. CED-77-95, B-166506 (July 6, 1977);

- *Efforts by the Environmental Protection Agency to Protect the Public from Environmental Nonionizing Radiation Exposures*, CED-78-79, B-166506 (March 29, 1978);

- *Biological Effects of Radiofrequency Radiation*, Joe A. Elder and Daniel F. Cahill, editors, Health Effects Research Laboratory, EPA-600/8-83-026F (276 pages, September 1984);

- Notice of Proposed Recommendations, *Federal Register*, Vol. 51, No. 146, pp. 27318-27339 (July 30, 1986). On page 27318, the EPA states: "***Effects occur in test animals exposed at RF radiation intensities found in the environment***" (emphasis added);

- *Health Effects of Transmission Lines*, Oversight Hearing before the Subcommittee on Water and Power Resources of the Committee on Insular and Insular Affairs, House of Representatives, One Hundredth Congress, First Session, Serial No. 11-22 (October 6, 1987). The "Summary of research performed by EPA scientists on low frequency modulation of RF radiation" appears on pages 166-168. It states on page 166 that "***it is not possible to assign a low intensity limit or threshold below which the exposures are without effect***" (emphasis added);

- *Evaluation of the Potential Carcinogenicity of Electromagnetic Fields: Review Draft*, Office of Research and Development, EPA/600/6-90/005B (393 pages, October 1990);

- EPA Science Advisory Board, Electric and Magnetic Fields Subcommittee, Report of the First

Subcommittee Meeting (Washington, DC, January 14-16, 1991);

- EPA Science Advisory Board, Electric and Magnetic Fields Subcommittee, Report of the Second Subcommittee Meeting (Washington, DC, April 12-13, 1991);

- EPA Science Advisory Board, Electric and Magnetic Fields Subcommittee, Report of the Third Subcommittee Meeting (Washington, DC, July 23-25, 1991);

- *An SAB Report: Potential Carcinogenicity of Electric and Magnetic Fields*, Radiation Advisory Committee's Nonionizing Electric and Magnetic Fields Subcommittee, EPA-SAB-RAC-92-013 (January 1992);

- *The Effects of Traffic Radar Guns on Law Enforcement Officers*, Senate Hearing 102-1024 (August 10, 1992);

- *Summary and Results of the April 26-27, 1993 Radiofrequency Radiation Conference*, EPA Office of Air and Radiation & Office of Research and Development, 402-R-95-011 (2 volumes, March 1995);

and in the following Food and Drug Administration Reports:

- Research into absorption of microwave radiation by DNA by Mays Swicord and Jose-Louis Sagripanti, National Center for Devices and Radiological Health, Food and Drug Administration, papers published in *Biopolymers* 21: 2453-2460 (1982); *Biopolymers* 22: 2513-16 (1983); *Bioelectromagnetics* 4: 21-42 (1983); *Physical Review Letters*

> 53: 1283-87 (1984); *International Journal of Radiation Biology* 50(1): 47-50 (1986); *Biophysical Journal* 47(6): 799-807 (1985); *and Radiation Research* 110(2): 219-31 (1987);

and in peer-reviewed scientific journals published worldwide.

18. The EPA has stated repeatedly that the human exposure guidelines that were adopted by the FCC on August 6, 1996 are protective only against shocks, burns, and gross heating and do not protect against chronic and low-level exposure. In a letter dated October 8, 1996 and addressed to David Fichtenberg, Norbert Hankin (Indoor Environments Divison, Office of Radiation and Indoor Air, Environmental Protection Agency) stated that the guidelines "are thermally based, and do not apply to chronic, nonthermal exposure situations." Again on March 8, 2002, in a letter addressed to Janet Newton (President, The EMR Network, Marshfield, Vermont), Mr. Hankin stated that "The FCC's current exposure guidelines, as well as those of the Institute of Electrical and Electronics Engineers (IEEE) and the International Commission on Non-Ionizing Radiation Protection, are thermally based, and do not apply to chronic, nonthermal exposure situations."

19. A June 17, 1999 letter, addressed to Richard Tell (Chair, IEEE Standards Coordinating Committee 28 (Subcommittee 4) Risk Assessment Work Group), stated that the FCC's guidelines are based on "thermal effects" and "acute exposures" and do not consider

"chronic exposure to RF radiation, including exposures having a range of carrier frequencies, modulation characteristics, peak intensities, exposure duration, etc., that does not elevate tissue temperature on a macroscopic scale." The letter was signed by the entire Radiofrequency Interagency Work Group ("RFIAWG"), consisting of W. Gregory Lotz (Chief, Physical Agents Effects Branch, National Institute of Occupational Safety and Health), Robert Cleveland (Senior Scientist, Office of Engineering and Technology, FCC), Larry Cress (Radiation Biology Branch, Center for Devices and Radiological Health, Food and Drug Administration), Robert A. Curtis (Director, OSHA Health Response Team, Occupational Safety and Health Administration), Joseph A. Elder (EPA), Norbert N. Hankin (EPA), and Russell D. Owen (Radiation Biology Branch, Center for Devices and Radiological Health, Food and Drug Administration). The letter was faxed to Plaintiff Firstenberg by Norbert Hankin (EPA) on September 9, 1999.

20. Peer-reviewed studies have recently been published, predicting thermal skin burns in humans from 5G radiation (Nasim I, Kim S, Human exposure to RF fields in 5G downlink, arXiv:1711.03683v1 (2017)) and resonant absorption by insects (Thielens A, Bell D, Mortimore DB, Exposure of insects to radiofrequency electromagnetic fields from 2 to 120 GHz, *Nature/Scientific Reports* 8:3924 (2018), reporting that insects absorb up to 100 times as much radiation at millimeter wavelengths as they do at wavelengths presently in use). Since insect populations have declined by

75 to 98 percent since the 1970s, even in protected nature areas, 5G radiation could have catastrophic effects on insect populations as well as on birds and other species that depend on them. A 1986 study by Om Gandhi at the University of Utah warned that millimeter waves are strongly absorbed by the cornea of the eye, and that ordinary clothing, being of millimeter-size thickness, increases the absorption of energy by the skin by a resonance-type effect.

21. Together, the new City ordinances, the new State Act, and Section 704 remove all public protection from injurious facilities in the public rights-of-way, infringe on the public's right to speak about a danger to their own health, eliminate all public participation into the siting of such facilities, and deprive injured parties of any remedy for their injuries. Plaintiffs are such injured parties. Plaintiffs and Plaintiffs members have been previously injured by RF radiation from cell towers, have been deprived of any remedy for their injuries, and have been deprived of any means of preventing further injury. They have been deprived of their right to due process guaranteed to them under the Fifth and Fourteenth Amendments to the United States Constitution. Additionally they have been deprived of their right to free speech and their right to petition the government for redress of grievances, guaranteed to them under the First Amendment. This Court is Plaintiffs' last resort to ensure their safety and their future from the harm perpetrated by Defendants.

22. Plaintiffs hereby seek a declaration that these laws, and any other laws that may be enacted by their City, their State, or the United States, that would deprive them of any means of protecting themselves from RF radiation and of any remedy for injury by such radiation, are unconstitutional, and to enjoin the enforcement of these laws.

PARTIES

23. Plaintiff **Alliance** is an organization of physicians, health care practitioners, psychotherapists, educators, artists and other citizens who reside and/or do business in the City of Santa Fe, and who have been personally and financially injured by wireless telecommunications facilities. The Alliance was formed in 2005 to educate the public about the health and environmental effects of electromagnetic radiation (EMR) from telecommunications facilities, and to advocate for policies and laws that protect the public health and environment from such radiation. Many of its members are environmental refugees, having fled homes that they had to abandon when a cell tower was erected nearby.

24. **Alliance member Janice R. Olch** is an architect. She and her daughter were injured by cell phone antennas on a water tank near her home in Hondo Hills. She sold her home and they moved to a more remote area in Santa Fe County where cell phone reception is poor and the lots are large enough that they are not exposed to WiFi signals from the neighbors.

Alliance member John McPhee is an official with the New Mexico Department of Health. He and his wife were injured by a community wireless transmitter in 2005 while residing in the Eldorado Subdivision south of Santa Fe. They moved back into the City in 2007 and took up residence on West Alameda Street. When the cell towers on the hill above their house were upgraded to 4G, they both began to experience headaches, nausea, chronic insomnia and loud ringing in their ears, and his wife started having seizures. Finally they purchased and moved into a house near Santa Fe High School, which gave them both relief and immediately reduced both the frequency and severity of his wife's seizures. **Alliance member Forrest Reed** is a civil engineer and environmental planner who used to work for the City of Santa Fe. She was injured in 2005 when Verizon Wireless concealed a cell tower, for which it had neither a building permit nor zoning permission, on the roof of a one-story building. The building was and is just a few houses away from Ms. Reed, and four of the cell tower's antennas are aimed toward at her home. Ms. Reed, who still lives in her home and cannot afford to move, hears the radiation, developed respiratory, neurological and cardiac problems after that cell tower was erected, and more recently has developed an unusual form of lung cancer. **Alliance member Lynn Jacob** was a caseworker for the City of New York for 22 years. She becomes irritable, tired and weak if she spends time in the vicinity of a cell tower or is exposed to WiFi. She has thyroid cancer which is presently stable and is afraid that any increase in radiation will encourage the growth and spread of her cancer. **Alliance**

member Nina Zelevansky is a retired psychotherapist and an artist who has lived in the City for many years. Like most of the members of the Alliance, she is unable to use a cell phone because when she does, her face feels like it is on fire and she cannot think. She is presently homeless because she has not been able to finding housing which is not exposed to WiFi and/or a cell tower. **The Alliance also includes** a psychologist and author who was homeless for the same reason for five years, a world class athlete who was homeless for the same reason for eight years who now lives in a remote area south of the City, a physicist who lives in the City who had to leave his job at Los Alamos National Laboratory and almost became homeless for the same reason, and many others. The Alliance also includes physicians who have patients who were injured and/or made homeless by cell towers. Most members of the Alliance have had their mobility and access to City services and functions restricted by the new towers that have been erected pursuant to the Mayor's Proclamations.

25. Plaintiff **Arthur Firstenberg** is the president of the Alliance and a homeowner and taxpayer within the City. He is a refugee from cell tower radiation. Until 1996 he lived in an apartment on the top floor of a six-story building in Brooklyn, New York. On November 14, 1996, Omnipoint Communications (now T-Mobile) began offering the first ever digital cell phone service in the city, provided by 600 newly erected cell towers, one of which was on the roof of a neighboring building. Immediately he was in agony and after

November 18, 1996 was completely unable to eat or sleep. During the night of November 21, 1996, he experienced paroxysmal laryngospasm: his vocal cords went into spasm three times so that he could not take a breath in or out. The next morning he left his apartment and the city to save his life. His relief was immediate. He moved upstate to Norwich, New York and lived there for two years. When a cell tower was built near his home in Norwich he moved to the village of Mendocino, California, where he lived from 1999-2004. When cell phone antennas were installed across Mendocino Bay, aimed directly at the village, he had to move back into his car. He arrived in Santa Fe in the summer of 2004 and rented a room in a house on Camino Principe. One year later Verizon Wireless added antennas to an existing cell tower a few blocks away at 1214 Camino Carlos Rey and he was forced into his car again. He lived in his car in Santa Fe for the next three years while searching for a place to live that did not threaten his life. His physician will testify that in addition to the aforementioned laryngospasm, his life-threatening injuries include cardiac arrhythmia and elevated cardiac enzymes, indicative of damage to cardiac and/or skeletal muscle. His physician will testify that RF radiation is the primary cause of the aforementioned injuries. He purchased his present home in 2008. Several of the towers built under the Mayor's Proclamations have now restricted his mobility and his access to City services and functions: the new tower on the roof of the Convention Center denies him access to that building, and the new antenna aimed at Council Chambers restricts his access to City

government; the new tower between the Water Division and the Chocolate Maven denies him access to City offices and a popular restaurant; the new tower at Fort Marcy Park denies him access to that park and the recreation facilities therein; the new tower in front of the Genoveva Chavez Community Center denies him access to that recreation center as well as government functions and public meetings held therein.

26. Firstenberg is president of the nonprofit organization Cellular Phone Task Force, which he cofounded in 1996 to call attention to the problem that had cost him his home and almost cost him his life. Today he communicates with ten thousand individuals and five hundred organizations representing refugees from wireless telecommunications facilities.

27. Plaintiff **Monika Steinhoff** is a homeowner and taxpayer within the City and an artist and owner of an art gallery. She was first injured by wireless technology when her cell phone started causing her hand to become numb and gave her an odd discomfort in her ear. In August 2010 she moved her art gallery to the Arcade on the Plaza but often was dizzy and nauseous there. She was well at home, where there was no cell phone service, but at work, where she was exposed to more than 20 WiFi signals from neighbors, she was exhausted at the end of the day, had migraines, heart palpitations, internal bleeding, and severe insomnia. She left in October 2010, moving the gallery to her house for several months. In the spring of 2011, she moved her gallery to Guadalupe Street in the Railyard district, one block from Hotel Santa Fe. Business and

sales were good, but a cell tower was erected on the roof of Hotel Santa Fe in 2013. She shielded the roof of her gallery as well as the large windows, which measurably reduced the radiation. But she still felt unwell inside, and worse outside in the street, and was forced to find yet another location for her gallery, on Canyon Road. Her doctor will testify that RF radiation is the primary cause of the aforementioned diagnoses, as well as the cause of her more recently elevated blood pressure. Several of the towers built under the Mayor's Proclamations have now restricted her mobility and her access to City services and functions: the new tower on the Convention Center denies her access to City Hall; she used to swim and work out at the Fort Marcy Complex but the new tower there denies her access; she is used to frequenting the Lensic Performing Arts Center for cultural and civic events at least once a month, but the new antennas across the street on the Sandoval Street Parking Garage have now made that impossible.

28. Defendant **City of Santa Fe** is a home rule municipality organized and incorporated pursuant to the laws of the State of New Mexico. Under these laws, the City is a zoning authority that controls all land uses within its borders and is obligated to protect the public health, safety and welfare As a result of both its exercise of control over land use and its failure to exercise control over land use, the City has caused injurious levels of RF radiation to blanket its population and has failed in its duty to protect the public health, safety and welfare as well as in its duty to protect the rights

of its citizens under the New Mexico and United States Constitutions.

29. Defendant **Hector Balderas** is the Attorney General of the State of New Mexico and is responsible for enforcing its laws. Because the Wireless Consumer Advanced Infrastructure Investment Act, NMSA 1978 § 63-9I (2018) ("WCAIIA") contains no enforcement provisions, failure of the City to comply with its provisions could only be remedied by a mandamus action or other enforcement action by the Attorney General. WCAIIA contravenes the obligation of the State of New Mexico under its Constitution to operate for the public good, to control pollution and to protect the public health, safety and general welfare As a result of WCAIIA, the State is causing injurious levels of RF radiation to blanket New Mexico and its beautiful environment, and is failing in its duty to protect the public health, safety and welfare as well as in its duty to protect the rights of its citizens under the New Mexico and United States Constitutions.

30. Defendant **United States of America** is the sovereign trustee of natural national resources, including forests and wildlife. Under its Constitution, the United States regulates interstate commerce. Under its Constitution, the United States is obligated to promote the public welfare. As a result of both its exercise of control over interstate commerce and its failure to exercise control over interstate commerce, the United States has caused injurious levels of RF radiation to blanket the nation, has substantially impaired its natural resources, has failed in its duty to promote the

public welfare, and has deprived Plaintiffs of fundamental constitutional rights. Plaintiffs may not be deprived of their life, liberty and property without due process of law. U.S. Constitution, Amendment Five.

JURISDICTION AND VENUE

31. This action is brought pursuant to the United States Constitution. It is authorized by Article III, Section 2, which extends the federal judicial power to all cases arising in equity under the Constitution and to controversies to which the United States is a party. A controversy exists between Plaintiffs and Defendants because Defendants have placed Plaintiffs in a dangerous situation, continue to infringe upon Plaintiffs' constitutional rights, and have abrogated their duty of care to ensure Plaintiffs' reasonable safety, among other violations of law. Plaintiffs have no adequate remedy at law to redress the harms herein.

32. This Court has jurisdiction under 28 U.S.C., § 1331 (federal question); 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act); 28 U.S.C. § 1343(a)(3), giving the federal district courts original jurisdiction of any civil action to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States; and 28 U.S.C. § 1367 (supplemental jurisdiction). Plaintiffs' federal claims raise questions under the Telecommunications Act of 1996, Pub. L. No. 104-104, and Amendments One, Five, and Fourteen of the United States Constitution.

33. Venue is proper in this judicial district by virtue of 28 U.S.C. § 1391(b). All Plaintiffs reside in this judicial district, all Defendants have offices in this judicial district, and the events, omissions and harms giving rise to this action arise in substantial part in this judicial district.

STATEMENT OF FACTS

34. RF radiation is in the part of the electromagnetic spectrum that is called "nonionizing radiation." Frequencies higher than about a million billion times per second are called "ionizing radiation." That includes part of the ultraviolet spectrum, and all X-rays and gamma rays. It is called "ionizing" because it contains enough energy to knock electrons off of atoms and create ions. Nonionizing radiation is generally not energetic enough to create ions. Radio frequency ("RF") radiation includes microwave radiation as well as lower frequencies that are also used in wireless telecommunications systems.

35. There is virtually no natural RF radiation. Ambient levels of RF radiation in most cities today, from cell phones, WiFi, cell towers, and other wireless technologies, are roughly ten million times as high as natural RF radiation from the Sun, and roughly one hundred billion times as high as RF radiation from a typical star. All RF signals used in telecommunications carry information in the form of low-frequency modulation, and almost all RF signals used today are digital, i.e. rapidly pulsed. No natural RF signals are

modulated, and none are rapidly pulsed. The biological effects of RF radiation used in wireless technologies are caused not only by the high frequency carrier wave but also by the low frequency modulation and the pulsations.

36. RF radiation penetrates into houses and into our bodies. More than 10,000 peer-reviewed studies on humans, animals and plants have found one or more biological and health effects of RF radiation. *See* ¶¶ 13-17, *supra.* The effects are both acute and chronic. The acute effects include headaches, dizziness, nausea, eye pain, insomnia, tachycardia, hypertension, irregular heartbeat, anxiety, depression, memory loss, nosebleeds, digestive problems, and ringing in the ears. The chronic effects include diabetes, cancer, and heart disease. The acute effects have driven an estimated 20 million people from their homes worldwide, based on government surveys and data from 500 organizations with whom Plaintiffs here correspond, and have created a large class of environmental refugees.

37. When the City drafted its first Telecommunications Facilities Ordinance in 1998, it included protections from the dangers of cell towers. It required that the City:

a. "ameliorate any impacts upon residents of the city of Santa Fe and the municipality of expanding needs for telecommunications facilities";

b. "minimize any adverse impacts of towers and antennas on residential areas and land uses";

c. "encourage the location of towers in non-residential areas";

d. "minimize the total number of towers throughout the community";

e. "gather information and provide remedies for the public health and safety impacts of communication towers";

f. "avoid potential damage to adjacent properties from tower[s];"

Santa Fe City Ord. No. 1998-16, § 15(F), (H), (I), (J), (N), and (O) (*see* Exhibit L, p. 15, lines 4-5, 8-9, 10, 11, and 23).

38. The 1998 ordinance applied to "[a]ll towers or antennas located within the city limits whether upon private or public lands," Santa Fe City Ord. No. 1998-16, § 17. All towers and antennas in residential or historic districts required a Special Exception and new towers were not a permitted use in any zoning district. (*See* Exhibit J). There were application requirements, notice requirements, noise requirements, height limitations, and setback requirements. A new tower had to be a minimum distance of one thousand feet from any existing tower. Santa Fe City Ord. No. 1998-16, § 21(D) (Exhibit L, p. 35, lines 23-25).

39. The ordinance provided that antennas and towers in the public rights-of-way had to comply with all of the same land use requirements as antennas and towers on private land, except there was an additional requirement that the applicant had to obtain a lease from the City, and that in deciding whether to grant or

deny the lease the City had to consider "[t]he effect . . . on public health, safety and welfare," *Id.*, § 41(E) (Exhibit L, p. 51, line 1).

40. The Santa Fe Task Force on Microwave Antennas, formed in February 2000, worked with the City for several years to minimize the impact of cell towers on public health. The Santa Fe Alliance for Public Health and Safety, a Plaintiff in this case, formed in 2005; its members, many of whom have been injured by cell towers and have previously lost homes and businesses due to the proximity of antennas, have participated in every approval process and have testified to their injuries and losses at every public hearing for every proposed telecommunications ordinance and every proposed telecommunications facility in Santa Fe from 2005 until the present day. Arthur Firstenberg, a Plaintiff in this case, was appointed by the Mayor in 2007 to a steering committee to advise the Information Technology and Telecommunications Department of the City of Santa Fe on the health effects of wireless Internet.

41. Despite knowing that RF radiation is hazardous, and despite additional knowledge about these hazards being supplied to the City by a succession of citizens' groups and their experts, the City began in 2010 to deliberately repeal the protections of the public health, safety and welfare that it had encoded in the 1998 ordinance and to systematically eliminate every reference to the health effects of RF radiation from the City Code. It revised Chapter 27 of the Santa Fe City Code ("Chapter 27") to exempt telecommunications facilities in the public rights-of-way from the land use

regulations of Santa Fe City Code, Chapter 14 ("Chapter 14") (*see* Exhibit B, § 27-2.2(A)). It revised Chapter 14 to eliminate the requirements that the City "gather information and provide remedies for the health and safety impacts of communication towers" (former § 14-6.2(E)(1)(n), *see* Exhibit J; provision deleted in current land development code, SFCC § 14-6.2(E)(1), *see* Exhibit K). The requirement to minimize "any adverse impacts of antennas and towers" (former § 14-6.2(E)(1)(h), *see* Exhibit J) was changed to "*land use* impacts of antennas and towers" (current § 14-6.2(E)(1)(d), *see* Exhibit K). New towers, which previously required a Special Exception in all zoning district (previous Table 14-6.1-1, *see* Exhibit J), were now made a permitted use in all zoning districts (current Table 14-6.1-1 and § 14-6.2(E)(5)(a), *see* Exhibit K). Leases were replaced with franchises, and franchisees no longer had to get approval of antennas on a site-by-site basis.

42. Chapter 27, as revised in 2010, still required that applicants for wireless telecommunications facilities in the public rights-of-way provide specific information about their RF emissions; required that any subsequent increase in RF emissions be subject to approval by the City; required applicants to certify compliance with the FCC's RF exposure guidelines; and authorized the City to retain an independent radio frequency engineer to verify such compliance. (Exhibit B, attached hereto, §§ 27-2.13(F)(1)(c) and 27-2.13(O) (2010)). However, in a pair of ordinances, adopted November 9, 2016 and August 30, 2017, the City repealed every one of those requirements, along with almost all

notice, hearing, and application requirements, for telecommunications facilities in the public rights-of-way.

- New wireless facilities no longer require submittal of an application at all if they conform to existing design standards;
- New facilities no longer require review by the Planning commission;
- Facilities in historic districts no longer require review by the Historic Districts Review Board;
- Information regarding radio frequency emission is no longer required;
- Proof, or even self-certification, of compliance with the FCC's radio-frequency exposure guidelines is no longer required;
- Public notice is no longer required;
- Notice to neighbors of planned facilities is no longer required.

Santa Fe City Ordinances No. 2016-42 and 2017-18 (attached hereto as Exhibits C and D).

43. The only requirement left for putting telecommunications facilities on Santa Fe's streets and sidewalks is the possession of a franchise. Franchises will be awarded to all telecommunications providers on a non-discriminatory basis, and franchisees will be permitted to erect unlimited numbers of antennas and towers wherever they please in the public rights-of-way with no public hearings, no public comment, no public notice, no notice to neighbors, no setback

requirements, no certification of compliance with the FCC's safety regulations, and without even submitting an application to the City. The only remaining requirement besides possession of a franchise is for telecommunications providers to comply with design guidelines that the City will have adopted. Santa Fe City Code § 27-2.19(C)(1)(a) (2018). (*See* Exhibit D, pp. 2-3). But even this minimal requirement is no longer being enforced because under the new State law, WCAIIA, such facilities are exempt from *all* land use requirements. NMSA 1978 §§ 63-9I-4(C) and 5(B) (2018) (*See* Exhibit H, pp. 12 and 19-20). City residents will have no warning before cell tower transmitters suddenly appear in front of their homes and businesses or outside their children's bedroom windows and school classrooms, and they will have no recourse.

44. The preponderance of the public testimony at the hearings held on Ordinances Nos. 2016-42 and 2017-18 was about health. However, the public was told that none of this testimony would be considered, and in fact none of it was considered.

> COUNCILOR HARRIS: . . . As we know, the whole health issue is not allowed to be a criteria.

November 9, 2016 City Council Minutes, page 66.

> COUNCILOR IVES: . . . the City's hands are tied by federal law, which prohibits us from prohibiting folks from being able to

> provide such services and from considering the health effects in the decisions we make . . .

Id., page 71.

> CITY ATTORNEY BRENNAN [before the public testimony]: . . . As you know, we cannot regulate construction, placement, modification of facilities, based on environmental effects.

August 30, 2017 City Council Minutes, page 46.

> CITY ATTORNEY BRENNAN [after the public testimony]: . . . a large percentage of the commentary tonight was about health . . . I can only reiterate the federal law is very clear on the point that in these cases, with the modification, placement or construction of wireless facilities, the decision cannot be made based on environmental effects, include health effects of EMFs.

Id., pages 60-61.

45. At the present time, almost all wireless telecommunications facilities in Santa Fe are on private property or City-owned property, and not in the public rights-of-way where people walk. ***None are located in front of homes and businesses.*** Because of previous litigation and the invalidation of successive versions of Chapter 27 by successive court decisions, no applications for telecommunications facilities in the public rights-of-way were processed by the City until 2018.

PRIOR LITIGATION

46. On December 8, 2016, Plaintiffs here, Alliance and Firstenberg, filed a Complaint for Declaratory Relief in state court, Case No. D-101-CV-2016-02801 in the First Judicial District of New Mexico, asking the court to issue an order declaring Chapter 27 as amended by Ordinance No. 2016-42 void and unenforceable and asking for injunctive relief. The Complaint was dismissed by the court as not ripe for review because no franchises had yet been awarded.

47. On November 21, 2017, the threat to Plaintiffs' lives was made more immediate when Mayor Javier Gonzales signed the first of three Proclamations (*see* Exhibit E, F and G) declaring a "State of Emergency" due to bad cell phone service. The Proclamations suspended the entire Land Development Code, including public notice requirements, with respect to telecommunications facilities on City-owned property. Seven cell towers have been built under the Proclamations: one at Fire Station 4 at 1130 Arroyo Chamiso Road; one at the City's Water Division at 801 West San Mateo Road in the driveway between the Water Division and the Chocolate Maven; one at Fort Marcy Park next to the Fort Marcy Complex recreation center; one in the parking lot in front of the Genoveva Chavez Community Center, 3221 Rodeo Road; one on the roof of the Sandoval Street Parking Garage at 220 West San Francisco Street: one at the City's water treatment plant at 1780 Upper Canyon Road; and one at 201 West Marcy Street on the roof of the elevator structure of the Santa Fe Community Convention Center's parking

garage, next to City Hall. One of the antennas on top of the elevator structure is aimed directly at Council Chambers, endangering the health of everyone who wants to participate in City government. Chapter 14 of the Santa Fe City Code—the Land Development Code—applies to "[a]ll towers or antennas located within the City's jurisdiction, whether upon private or public lands" with the exception of the public rights-of-way. Santa Fe City Code § 14-6.2(E)(2)(a) and (b)(1). None of the new towers erected pursuant to the Mayor's Proclamations are in the public rights-of-way. All land use regulations were suspended to build these towers.

48. The Mayor's First Proclamation of Emergency was issued and signed by the Mayor and City Clerk three weeks before other City officials or the public learned of it. The Proclamation was announced to the public on December 11, 2017. On December 12, 2017, the *Santa Fe New Mexican* ran a front-page story quoting Fire Chief Erik Litzenberg and Deputy Police Chiefs Andrew Padilla and Mario Salbidrez as stating that they knew of no instances of residents being unable to reach emergency services, or any compromise of police or fire service due to insufficient telecommunications facilities.

49. On January 11, 2018, Plaintiffs filed a complaint in this Court, Case No. 1:18-cv-00032, asking the Court to intervene to protect their homes and properties and to protect the public health, safety, and welfare that was immediately endangered.

50. On April 6, 2018, the Court dismissed the complaint without prejudice for lack of jurisdiction. The Court ruled that Plaintiffs had not alleged sufficient facts to support standing.

51. On May 7, 2018, Plaintiffs filed an amended complaint and a Rule 59 motion asking the Court to reconsider and reopen its judgment of April 6, 2018, having added additional allegations and greater detail to remedy the deficiencies pointed out by the Court.

52. On May 9, 2018, the factual and legal situation changed. The City awarded franchises to five telecommunications companies under the new City ordinances: Plateau Telecommunications, Inc.; Cyber Mesa Computer Systems, Inc.; Conterra Ultra Broadband, LLC; Computer Network Service Professional, Inc. dba NMSURF; and Mobilitie, LLC dba Broadband Network of New Mexico, LLC. At the public hearing, City officials discussed the implications of the new State law, the Wireless Consumer Advanced Infrastructure Investment Act, NMSA 1978 § 63-9I ("WCAIIA"), which was signed on March 2, 2018 and was due to go into effect on September 1, 2018. Large portions of the City's new ordinances, they said, were being preempted. At the same time, a number of bills were being introduced into Congress at the Federal level, whose purpose was to prohibit States and municipalities nationwide from regulating wireless telecommunications facilities in the public rights-of-way at all.

53. On May 23, 2018, since the Court had dismissed their complaint without prejudice, and because

either the State of New Mexico *or* its Attorney General was now a necessary party, Plaintiffs withdrew their Rule 59 motion and prepared to draft this fresh complaint, incorporating the new set of facts and laws and adding both the New Mexico Attorney General and the United States as defendants.

54. The installation of 5G throughout Santa Fe is imminent. Cyber Mesa, one of the new franchisees, is preparing right now to install antennas mounted on lamp posts in front of businesses at the four corners of Santa Fe Plaza. Cyber Mesa had announced they would be installed by December 31, 2018 but were delayed by the weather. NMSURF, another of the new franchisees, is preparing to install three antennas mounted on lamp posts along Saint Francis Drive, and one on a lamp post on Saint Michael's Drive. Mobilitie, another of the new franchisees and contractor for Sprint, is preparing to install the first four of hundreds of lamp post installations on the sidewalks of Santa Fe; and the City is right now processing additional applications for franchises from additional telecommunications providers.

55. Plaintiffs file this amended complaint today against the City of Santa Fe, the New Mexico Attorney General, and the United States of America. Since both the City and the State have now passed laws removing all public protection, all public process, and all notice requirements for injurious facilities in the public rights-of-way, both the City and the State or its Attorney General are necessary parties defendant. In addition, Section 704 of the Telecommunications Act of

1996, 47 U.S.C. § 332(c)(7)(B)(iv) and (v) prohibits states and municipalities from regulating telecommunications facilities on the basis of environmental effects, which has been interpreted as meaning health effects. Injured parties, such as Plaintiffs here, have been foreclosed from filing state tort actions for injury by such facilities, *see Farina v.* Nokia, 625 F.3d 97 (3rd Cir. 2010); *Murray v. Motorola*, 982 A.2d 764 (D.C.App. 2009), and no substitute federal remedy has been provided. Moreover, several bills have been introduced into Congress that would deprive states and local governments nationwide of the power to apply land use regulations to wireless facilities in the public rights-of-way at all, and the FCC has adopted regulations exempting wireless facilities in the public rights-of-way nationwide from the National Environmental Policy Act and the National Historic Preservation Act.

56. Together, the new City Ordinances (No. 2016-42 and No. 2017-18), the new State Act (WCAIIA), and Section 704 remove all public protection from injurious facilities in the public rights-of-way and deprive injured parties of any remedy for their injuries. The new FCC regulations compound this denial of constitutional rights, and the introduced Congressional bills would compound it even more. Plaintiffs are such injured parties. Plaintiffs ask the Court to issue an emergency injunction preventing the construction of an entirely new generation of radiating facilities on the sidewalks throughout Santa Fe, directly in front of homes and businesses, while this case goes to trial. Plaintiffs will prove, through the testimony of experts

in various fields of medicine and science, that these facilities pose an immediate threat to the health, wellbeing and future of all Santa Fe residents.

57. Attached hereto for the Court's convenience are Chapter 27 as adopted in 1998 (Exhibit A); Chapter 27 as revised in 2010 (Exhibit B); City Ordinance No. 2016-42 (Exhibit C); City Ordinance No. 2017-18 (Exhibit D); the Mayor's first proclamation of emergency (Exhibit E); the Mayor's second proclamation of emergency (Exhibit F); the Mayor's third proclamation of emergency (Exhibit G); the Wireless Consumer Advanced Infrastructure Investment Act (Exhibit H); and 47 U.S.C. § 332(c)(7)(B)(iv) and (v) (Exhibit I). Also attached are relevant sections of Chapter 14 as adopted in 1998 (Exhibit J) and as codified today (Exhibit K), and Ordinance No. 1998-16 (Exhibit L).

LEGAL CLAIMS

58. The City, as a zoning authority, has the responsibility to regulate telecommunications facilities for the public good. In fulfilling this responsibility, the City may not violate the fundamental Constitutional rights of its citizens. Any State law or federal law that requires the City to violate the Constitution, is itself unconstitutional, and therefore is not a bar to any of Plaintiffs' claims against the City.

FIRST CAUSE OF ACTION

(U.S. Constitution, Amendment Fourteen, and New Mexico Constitution, Article II, Section 18)

CHAPTER 27 AS AMENDED, AND WCAIIA, VIOLATE PROCEDURAL AND SUBSTANTIVE DUE PROCESS

59. All previous paragraphs are incorporated herein by reference.

60. Under Chapter 27 as amended by Ordinances 2016-42 and 2017-18, and also under WCAIIA, the construction of wireless telecommunications facilities on private property in all zoning districts is subject to at least notice and comment prior to construction, and an appeals process afterwards, but the construction of most wireless telecommunications facilities in the public rights-of-way in the same districts are not subject to notice, comment, or an appeals process. Notice and an opportunity to be heard are the minimum requirements for Procedural Due Process.

61. Chapter 27 as amended, and WCAIIA, also violate Substantive Due Process. The U.S. Constitution and the New Mexico Constitution guarantee the fundamental right of citizens to be free from government actions that harm life, liberty, and property. These inherent and inalienable rights reflect a basic societal contract. The rights to life, liberty, and property have evolved and continue to evolve as technological advances pose new threats to these fundamental rights.

62. Plaintiffs and Plaintiff's members are already refugees from cell towers. They have already been

injured by towers and antennas and have previously lost homes and businesses due to their proximity.

63. In enacting Ordinances Nos. 2016-42 and 2017-18, and in enacting WCAIIA, the City has determined to authorize, and the State has determined to require, the unrestrained and unprotected siting of wireless telecommunications facilities in front of thousands of residences and businesses despite knowing that the results of their acts endanger Plaintiffs' lives, liberties, and properties. Plaintiffs will no longer be safe at home or work or while traveling on the public streets.

64. For at least the past twenty years, the City has known about the danger to Plaintiffs' health and safety created by RF radiation, yet has repealed all protections from that danger. For at least the past forty years, the State has known about the danger. These deliberate actions by the City and State have resulted in injurious levels of RF radiation, which deprive Plaintiffs of their fundamental rights to life, liberty and property, their capacity to earn a living, safely raise families, and provide for their basic human needs. The City and State have each acted with deliberate indifference to the known danger. Given that the dangers are so substantial, the City's and State's deliberate indifference shocks the conscience.

65. The actions of the City and the State, separately and jointly, have deprived Plaintiffs of the reasonable expectation of a home without radiation. These acts of the City and State cannot and do not operate to

secure a more compelling state interest than Plaintiffs' fundamental, constitutionally guaranteed rights to life, liberty, and property.

66. Ordinances 2016-42 and 2017-18, and WCAIIA, are unconstitutional and therefore void.

SECOND CAUSE OF ACTION

(U.S. Constitution, Amendment Fourteen, and New Mexico Constitution, Article II, Section 18)

The Mayor's Proclamations of Emergency Violated Due Process

67. All previous paragraphs are incorporated herein by reference.

68. Under the Mayor's Proclamations of Emergency, the City suspended all land use regulations for cell towers on City-owned land for six months, regardless of height, aesthetics, zoning district, proximity to homes or businesses, or anything else, and regardless of whether they conformed to design standards or not. Under the Proclamations of Emergency, the City not only suspended land use regulations but signed a contract with Verizon Wireless for the erection of wireless telecommunications facilities on City-owned land without notice to anyone or an opportunity for anyone to be heard, as required by City zoning regulations and the U.S. and New Mexico Constitutions.

69. The Mayor acted with deliberate indifference to the known danger. Given that the dangers are so

substantial, the Mayor's deliberate indifference shocks the conscience.

70. The actions of the Mayor, as enforced by the City, have deprived Plaintiffs of the reasonable expectation of a home without radiation. These acts cannot and do not operate to secure a more compelling state interest than Plaintiffs' fundamental, constitutionally guaranteed rights to life, liberty, and property.

71. The Proclamations of Emergency violate the U.S. and New Mexico Constitutions and are therefore void.

THIRD CAUSE OF ACTION

(U.S. Constitution, Amendments Five and Fourteen)

CHAPTER 27 AS AMENDED AND WCAIIA ARE AN UNCONSTITUTIONAL TAKING

72. All previous paragraphs are incorporated herein by reference.

73. In enacting Ordinances Nos. 2016-42 and 2017-18, and in enacting WCAIIA, the City has determined to authorize, and the State has determine to require, the placement of wireless telecommunications facilities anywhere on the streets and sidewalks of Santa Fe without regard to their proximity to homes and businesses.

74. Plaintiffs and Plaintiffs members are already refugees from cell towers and antennas and have already lost previous homes and businesses due to their

proximity. The award of franchises by the City, and their exemption from land use regulations by the State, for the placement of wireless telecommunications facilities on the sidewalk directly in front of Plaintiffs' homes and businesses will render their present homes and businesses similarly uninhabitable and unusable and is an unlawful confiscation of property without compensation.

75. These actions by the City and State, separately and jointly, constitute a taking without just compensation, in violation of the Fifth and Fourteenth Amendments.

FOURTH CAUSE OF ACTION

(U.S. Constitution, Amendment One)

CHAPTER 27 AS AMENDED, WCAIIA, AND SECTION 704 VIOLATE THE RIGHT TO PETITION

76. All previous paragraphs are incorporated herein by reference.

77. Section 27 as amended and WCAIIA each deprive people threatened with injury by RF radiation from wireless telecommunications facilities of the right to protest such facilities, receive notice before such facilities are erected, or exercise their due process rights before such facilities are erected.

78. Section 704 deprives people of the right to testify about such injury, and deprives their local governments of the power to protect them from the injurious effects of RF radiation. Section 704 deprives people

injured, sickened, and/or killed by such radiation of access to state courts for redress for their injuries, and provides them no substitute federal remedy.

79. Plaintiffs and Plaintiff's members are such injured persons and are imminently threatened with further injury by the City's actions.

80. Section 704 is not a bar to Plaintiffs' claim against the City because the City may not violate the First Amendment.

81. Separately and collectively, Section 27 as amended, WCAIIA, and Section 704 violate the First Amendment's guarantee of the Right to Petition the Government for Redress of Grievances.

FIFTH CAUSE OF ACTION
(NMSA 1978 § 3-21-1(A) (2007))

The City Has Abdicated Its Responsibilities as a Zoning Authority

82. All previous paragraphs are incorporated herein by reference.

83. Cities have traditionally regulated utilities that occupy their rights-of-way in two ways: either by site-specific leases, by which the city retains control over the location of proposed facilities, or by franchises, by which cities give up that control.

84. In amending Chapter 27 by Ordinances 2016-42 and 2017-18, the City of Santa Fe not only has chosen franchises over leases, but has effectively

eliminated all other land use regulations, such that an application for a franchise is the only requirement before a telecommunications company can begin erecting unlimited numbers of telecommunications facilities in the City's public rights-of-way. The City has enacted an all-or-nothing ordinance. If the City grants a franchise, the applicant can erect unlimited numbers of antennas and towers without further interference. If the City denies a franchise, the applicant cannot operate in the City.

85. Under the federal Telecommunications Act, 47 U.S.C. §§ 253 and 332(c)(7)(B)(i)(I) and (II), a municipality's regulations may not (a) have the effect of denying telecommunications service, and (b) may not discriminate between providers of functionally equivalent services. Therefore, the way Chapter 27 is now structured, the denial of any franchise to any telecommunications company would violate federal law. With respect to telecommunications facilities, the City has given up all control over its streets and sidewalks.

86. State law provides that the City "is a zoning authority" for the purpose of "promoting health, safety, morals or the general welfare." NMSA 1978, § 3-21-1(A) (2007). Furthermore, the City Code states as follows: "The purposes of Chapter 14 are to: (A) implement the purposes of the general plan, including guiding and accomplishing a coordinated, adjusted and harmonious development of Santa Fe that will best promote health, safety, order, convenience, prosperity and the general welfare. . . ." Santa Fe City Code § 14-1.3(A) (2011). In addition, the City Code provides that "[t]he provisions

of Chapter 14 apply to all land, buildings and other structures, and their uses, located within the corporate limits of Santa Fe, including land owned by local, county, state or federal agencies to the extent allowed by law." Santa Fe City Code § 14-1.6 (2011).

87. The public rights of way in Santa Fe are enjoyed by all residents, and nearly every home or business has frontage on one or more public rights of way. The evisceration of land use regulations and zoning regarding public rights-of-way renders meaningless laws intended to protect the public health and safety.

88. In amending chapter 27, the City has breached its duty as a zoning authority to protect Plaintiffs' health and safety.

SIXTH CAUSE OF ACTION

(NMSA 1978, Section 3-21-1(B)(2) (2007))

CHAPTER 27 AS AMENDED PROVIDES FOR NON-UNIFORM ZONING REGULATIONS

89. All previous paragraphs are incorporated herein by reference.

90. State law provides that the City as a zoning authority may "regulate or restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land in each district. *All such regulations shall be uniform for each class or kind of buildings within each district*. . . ." NMSA 1978, Section 3-21-1(B)(2) (2007). (Emphasis added).

91. The purpose of uniform zoning laws is to protect private property and maintain order. Therefore "industries and structures likely to create nuisances" are excluded from residential districts. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926). A person who purchases a home in a residential district has the right to rely on a single, uniform set of zoning regulations that apply throughout that district, not just on three sides of his or her property but on *all* sides. Setback requirements, for example, that were enacted for reasons of health and safety would become meaningless if they applied only on three sides of a person's property and did not apply on the side abutting the public right-of-way.

92. Under Chapter 27 as amended by Ordinances Nos. 2016-42 and 2017-18 and under WCAIIA, telecommunications facilities in the public rights-of-way are exempt from the zoning regulations in SFCC 1987, Section 14-6.2(E) (2011) that apply to all other telecommunications facilities, as well as from the zoning regulations in SFCC 1987, Section 14-5.2 that apply to all other buildings and structures in historic districts. Chapter 27 as amended therefore provides two-tier zoning regulations for every district in Santa Fe: one set of regulations that apply to structures on private property, and a second, more relaxed set of regulations that apply to structures in the public rights-of-way.

93. Under Chapter 27 as amended, a tower or antenna on private land abutting one's property requires a site-specific application containing all the elements

required by Section 14-6.2(E) including: notification of all neighbors within 200 feet of the antenna or tower; compliance with setback requirements from property lines; for new towers in a residential district, an early neighborhood notification meeting and a public hearing before the planning commission; and for towers and antennas in a historic district, a public hearing before the historic districts review board. A tower or antenna in the public right-of-way in the same district abutting the same property requires neither a separate application, notification of neighbors, setback requirements from property lines, early neighborhood notification meeting, nor public hearing.

94. In amending Chapter 27, the City has breached its duty as a zoning authority to protect Plaintiffs' property as required by NMSA 1978, Section 3-21-1 (B)(2) (2007).

SEVENTH CAUSE OF ACTION
(N.M. Const., Article II, Section 4)

95. All previous paragraphs are incorporated herein by reference.

96. Article II, Section 4 of the New Mexico Constitution states: "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."

THE RIGHT TO PROTECTION OF PROPERTY

97. Ordinances Nos. 2016-42 and 2017-18 and WCAIIA deprive property owners of prior notice, an opportunity to comment and/or testify at a public hearing, a minimum setback distance from their property lines, and other protections from dangerous facilities being built on the sidewalk in front of their house.

98. Plaintiffs and Plaintiffs members are already refugees from cell towers and antennas and have lost previous homes and businesses due to their proximity. *See* ¶¶ 23-27, *supra*. The award of franchises by the City, and their exemption from land use regulations by the State, for the placement of wireless telecommunications facilities on the sidewalk directly in front of Plaintiffs' homes and businesses will render their present homes and businesses similarly uninhabitable and unusable.

99. Chapter 27 as amended by Ordinances Nos. 2016-42 and 2017-18 and WCAIIA, separately and jointly, violate the inalienable right to protect property possessed by Plaintiffs under Article II, Section 4 of the New Mexico Constitution.

THE RIGHT TO SAFETY AND THE RIGHT TO DEFEND Life

100. Chapter 27 as amended and WCAIIA repeal all previous restraints on the pollution of private property with radiation from cell towers and antennas.

Such radiation has been proven harmful to life in over 10,000 peer-reviewed studies. *See* ¶¶ 13-20, *supra.*

101. Plaintiffs and Plaintiff's members have already been injured and driven out of their homes by cell towers and antennas, and some have barely escaped with their lives. See ¶¶ 23-27, *supra.* Their health, safety, and survival depend on their being able to avoid RF radiation.

102. Chapter 27 as amended by Ordinances Nos. 2016-42 and 2017-18 and WCAIIA, separately and jointly, violate the inalienable rights to safety and to defend life possessed by Plaintiffs under Article II, Section 4 of the New Mexico Constitution.

EIGHTH CAUSE OF ACTION

(N.M. Const., Article XX, Section 21)

CHAPTER 27 AS AMENDED AND WCAIIA VIOLATE POLLUTION CONTROL REQUIREMENTS

103. All previous paragraphs are incorporated herein by reference.

104. Article XX, section 21 of the New Mexico Constitution is titled "Pollution control" and states: "The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state,

consistent with the use and development of these resources for the maximum benefit of the people."

105. The State of New Mexico has known for at least 40 years that non-ionizing radiation can pose a danger to humans and the environment. In the New Mexico Statutes, the definition of "pollution" includes "radiation," NMSA 1978 § 4-60-2 (1978), and the definition of "radiation" in the Radiation Protection Act includes, without restriction, "electromagnetic radiation." NMSA 1978 § 74-3-4(D). Moreover, "[i]t is unlawful, unless licensed by the department [of environment] as a medical imaging professional or radiation therapist, for any person to use ionizing *or non-ionizing* radiation on humans" (emphasis added). NMSA 1978 § 61-14E-7(A)(1).

106. Thousands of peer-reviewed studies have proven specific harm, caused by cell towers and other sources of RF radiation, to ants, birds, forests, amphibians, fruit flies, honey bees, other insects, farm animals, mice, rats, and trees. *See* ¶ 15, *supra.*

107. Ordinances No. 2016-42 and 2017-18 and WCAIIA repeal all previous restraints on the pollution of the environment with types of radiation proven to be harmful to humans, animals and plants. Ordinance 2017-18 even repeals self-certification of compliance with the non-mandatory safety guidelines set by the FCC for human exposure to RF radiation.

108. Chapter 27 as amended and WCAIIA, separately and jointly, abdicate the responsibility of

government under Article XX, section 21 of the New Mexico Constitution to control pollution.

NINTH CAUSE OF ACTION

(NMSA 1978, §§ 3-21-1(A) and 3-21-5(A)(3) (1970)
SFCC §§ 14-1.3 and 14-4.1(A)(2)

CHAPTER 27 AS AMENDED DAMAGES HEALTH AND THE GENERAL WELFARE

109. All previous paragraphs are incorporated herein by reference.

110. The protection of health and welfare is so fundamental to the function of government that this function is encoded in numerous provisions of law at every government level.

111. Section 3-21-1(A) of the New Mexico Statutes states: For the purpose of promoting health, safety, morals or the general welfare, a county or municipality is a zoning authority. . . ."

112. Section 3-21-5(A)(3) of the New Mexico Statutes states: "The regulations and restrictions of the county or municipal zoning authority are to be in accordance with a comprehensive plan and be designed to . . . (3) promote health and the general welfare."

113. Section 14-1.3 of the Santa Fe City Code states that "[T]he purposes of chapter 14 are to: (A) implement the purposes of the general plan, including guiding and accomplishing a coordinated, adjusted and harmonious development of Santa Fe that will best

promote health, safety, order, convenience, prosperity and the general welfare. . . . "

114. Section 14-4.1(A)(2) of the Code states that the "regulations for the development and use of structures and land" in the City's zoning districts "are made in accordance with the general plan and are designed to . . . promote health and the general welfare . . . "

115. However, instead of promoting health and the general welfare, Ordinances 2016-42 and 2017-18 have removed all previous protection from harmful technology and all ability of the Plaintiffs, who have already been injured severely by such technology, to protect themselves from it.

116. Chapter 27 as amended damages health, safety, and the general welfare, in violation of numerous State and City laws.

TENTH CAUSE OF ACTION
(NMSA 1978 § 3-21-6(B) (1970))

ORDINANCES 2016-42 AND 2017-18 ADOPTED ZONING CHANGES WITHOUT NOTICE TO NEIGHBORS

117. All previous paragraphs are incorporated herein by reference.

118. Section 3-21-6(B) of the New Mexico Statutes requires that "[w]henever a change in zoning is proposed for an area of more than one block, notice of the public hearing shall be mailed by first class mail to

the owners, as shown by the records of the county treasurer, of lots or [of] land within the area proposed to be changed by a zoning regulation and within one hundred feet, excluding public right-of-way, of the area proposed to be changed by zoning regulation."

119. Ordinances 2016-42 and 2017-18 effected changes in zoning for public rights-of-way without any notice to Plaintiffs, most of whom own land within one hundred feet of such rights of way, in violation of NMSA 1978, § 3-21-6(B) (1970).

ELEVENTH CAUSE OF ACTION

(Santa Fe City Charter, § 2.02)

CHAPTER 27 AS AMENDED VIOLATES THE HUMAN RIGHTS AND HUMAN DIGNITY OF THE RESIDENTS OF SANTA FE

120. All previous paragraphs are incorporated herein by reference.

121. Chapter 27 as amended deprives the residents of Santa Fe of the ability to protect themselves against types of radiation proven to be harmful to life and safety, contrary to Section 2.02 of the Santa Fe City Charter, which states that "[t]he human and civil rights of the residents of Santa Fe ***are inviolate*** and ***shall not be diminished or otherwise infringed*** . . . The governing body shall preserve, protect and promote human rights and human dignity . . . " (Emphasis added).

122. Many residents of Santa Fe, including Plaintiffs and their members, are refugees from RF radiation elsewhere, having previously been injured by towers and antennas, and having lost homes and businesses due to their proximity. Plaintiffs' ability to remain healthy, earn a living, raise their families, provide for their needs, and continue to live in Santa Fe is dependent on non-exposure to RF radiation.

123. Chapter 27 as amended deprives Plaintiffs of their human rights and human dignity in violation of section 2.02 of the Santa Fe City Charter.

TWELFTH CAUSE OF ACTION

(Santa Fe City Charter, § 2.03)

CHAPTER 27 AS AMENDED DAMAGES THE CITY'S ENVIRONMENT

124. All previous paragraphs are incorporated herein by reference.

125. Section 2.03 of the Santa Fe City Charter, titled "Environmental protection," requires that "the governing body shall protect, preserve and enhance the city's natural endowments . . . and promote and maintain an aesthetic and humane urban environment."

126. Thousands of peer-reviewed studies have proven specific harm, caused by cell towers and other sources of RF radiation, to ants, birds, forests, amphibians, fruit flies, honey bees, other insects, farm animals, mice, rats, and trees. *See* § 15, *supra.*

127. Ordinances No. 2016-42 and 2017-18 and WCAIIA repeal all previous restraints on the pollution of the environment with types of radiation proven to be harmful to humans, animals and plants. Ordinance 2017-18 even repeals self-certification of compliance with the non-mandatory safety guidelines set by the FCC for human exposure to RF radiation.

128. Chapter 27 as amended damages the City's environment, in violation of section 2.03 of the Santa Fe City Charter.

THIRTEENTH CAUSE OF ACTION

(NMSA 1978, § 30-8-1 (1963) and SFCC §§ 10-9.3 and 23-1.2(B)(3))

CHAPTER 27 AS AMENDED PROVIDES FOR THE CREATION OF PUBLIC NUISANCES

129. All previous paragraphs are incorporated herein by reference.

130. The amendments to Chapter 27 were adopted without lawful authority.

131. Under NMSA 1978, § 30-8-1, a public nuisance is a misdemeanor that consists of "knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either: A. injurious to public health, safety, morals or welfare; or B. interferes with the exercise and enjoyment of public rights, including the right to use public property."

132. Under Section 10-9.3(E) of the Santa Fe City Code, a public nuisance is "knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either (1) Injurious to public health, safety, morals or welfare; or (2) Interferes with the exercise and enjoyment of public rights, including the right to use public or private property."

133. Under Section 23-1.2(B)(3) of the Santa Fe City Code, a public nuisance is "any activity, function, status, or the result of such activity, function, or status whether participated in by one person or several, whether caused by machines, persons, or other devices, which affects the health, safety, and welfare of an individual, a neighborhood or community and degrades the quality of life for such individual, neighborhood or community," without regard for whether the nuisance was created by lawful authority.

134. Section 10-9.2 of the Santa Fe City Code requires "[t]he abatement of public nuisances for the protection of public health, safety, and welfare. . . ."

135. Chapter 27 as amended provides for the creation of public nuisances, not their abatement, in violation of State and City law.

FOURTEENTH CAUSE OF ACTION
(Ultra Vires)

MAYOR'S PROCLAMATIONS

136. All previous paragraphs are incorporated herein by reference.

137. The Mayor's Proclamations fall beyond the scope of his authority under the City Code, the City Charter, and State law.

138. The Mayor may proclaim a state of emergency pursuant to Section 20-1 of the City Code, the Riot Control Ordinance, if he "determines that a public disorder, riot, disaster or emergency exists in the municipality." Once an emergency is declared, the Mayor is authorized to "prohibit . . . activities the mayor reasonably believes should be prohibited to help maintain life, property or the public peace." Acts that may be so prohibited include being on the street after curfew, § 20-1.2(A); any designated number of people from assembling or gathering, § 20-1.2(B); the manufacture, use, or transportation of explosives, § 20-1.2(C); the transportation, possession or use of combustible materials except for normal home or commercial use, § 20-1.2(D); the possession of firearms in public, § 20.1-2(E); the sale of alcoholic beverages, § 20.1-2(F); or the use of designated streets of highways. § 20.1-2(G). This authority does not include ordering the installation of wireless telecommunications facilities in public rights of way while land use regulations are suspended. The fire chief and two deputy police chiefs stated to the media that there was no emergency and no interruption

of police or fire service due to insufficient telecommunications facilities. Section 20-1.4 of the Santa Fe City Code provides that a state of emergency "terminates automatically at noon on the third day after it becomes effective unless sooner terminated by proclamation of the mayor." The Mayor is not authorized to declare that any state of emergency will last for six months.

139. Section 5.01 of the City Charter and Section 2-1.3 of the City Code command the mayor to "cause the ordinances and regulations of the city to be faithfully and constantly obeyed," not to unilaterally suspend them. They allow the mayor to "perform other duties compatible with the nature of the office as the governing body may from time to time require," not as he unilaterally may decide. They give the mayor "the power conferred on the sheriffs of counties to suppress disorders and keep the peace"; the sheriffs are not conferred with the authority to order cell towers to be built.

140. The Proclamations are null and void.

141. Plaintiffs have standing to challenge the Proclamations because they have been injured by them. The Proclamations have caused them physical injury, deprived them of access to public facilities, and deprived them of access to City Hall and public hearings held therein.

FIFTEENTH CAUSE OF ACTION
(Injunctive Relief)

CHAPTER 27 AND WCAIIA

142. All previous paragraphs are incorporated herein by reference.

143. The enforcement of Chapter 27 as amended and WCAIIA should be preliminarily and permanently enjoined because of violations of City, State, and Federal laws, charter, and constitutions.

144. Plaintiffs and their members include persons previously physically injured and/or deprived of their homes and businesses by RF radiation from wireless telecommunications facilities. Until now they have enjoyed protection from further injury because such facilities have not been permitted in the public rights-of-way close to homes and businesses. Plaintiffs have already been further injured by the seven towers erected under the unlawful mayoral proclamations, and are threatened with more serious injury by the imminent erection of such facilities on the streets and sidewalks of Santa Fe in front of or in close proximity to their homes and businesses pursuant to chapter 27 as amended and WCAIIA.

145. Absent injunctive relief, citizens will have close-range RF radiation coming into their homes and bodies without notice, resulting in irreparable harm that is not remediable by monetary damages.

SIXTEENTH CAUSE OF ACTION
(Injunctive relief)

MAYOR'S PROCLAMATIONS

146. All previous paragraphs are incorporated herein by reference.

147. Under the Mayor's Proclamations of Emergency, without any public process and in total disregard of the Land Development Code, a contract was signed with Verizon Wireless, under which seven towers were erected on public property. The fact that the City subsequently conducted *pro forma* public proceedings on those seven towers does not legitimize a contract entered into illegally, nor legalize the seven towers erected without due process.

148. The contract with Verizon should be declared void, and operation of the seven towers built under that contract, or their replacements, should be preliminarily and permanently enjoined.

SEVENTEENTH CAUSE OF ACTION

"ENVIRONMENT" DOES NOT MEAN "HEALTH" IN SECTION 704 OF THE TELECOMMUNICATIONS ACT OF 1996

149. All previous paragraphs are incorporated herein by reference.

150. Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv) ("Section 704"), prohibits states from adopting stricter regulations than

the FCC regarding "the environmental effects of RF radiation."

151. If Congress had meant health it would have said so plainly.

152. The question of whether "environment" means health in Section 704 has never been litigated.

> When, as is the case here, a term is not defined by the statute, it is appropriate for the court to interpret the word in accordance with its ordinary, everyday meaning.

United States v. State of New Mexico, 536 F.2d 1324, 1327-28 (10th Cir. 1976). According to the common meaning of the words, "environment" does not mean or include "health."

> **environment** 1a. The totality of the natural world, often excluding humans.
>
> * * *
>
> **environmental** 1. Relating to or associated with the environment. 2. Relating to or concerned with the impact of human activities on the natural world.

The American Heritage Dictionary, Fifth Edition 596 (2011);

> **health** 1. The overall condition of an organism at a given time.

Id. at p. 810. If "environment" is interpreted to mean "health" in Section 704, this raises serious questions as to the constitutionality of Section 704. *See* Eighteenth,

Nineteenth, and Twenty-First Causes of Action, *infra*. Therefore the Court should interpret "environment" *not* to mean "health" per the dictionary definition so as to avoid the serious questions as to the constitutionality of Section 704.[1]

153. Section 704 is not a bar to any of Plaintiffs' Claims for Relief against the City because by plain language "environment" does not mean "health."

EIGHTEENTH CAUSE OF ACTION

(U.S. Constitution, Amendment Five – Due Process)

SECTION 704 OF THE TELECOMMUNICATIONS ACT OF 1996, 47 U.S.C. § 332(C)(7)(B)(IV) AND (V)

154. All previous paragraphs are incorporated herein by reference.

155. The FCC has no statutory authority over human health and its RF exposure guidelines are neither mandatory nor enforceable.

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[1] Even though Plaintiffs' position is that the plain meaning of the word "environment"—which does not include "health"—is applicable to Section 704, this in no way is to be construed to mean that destroying the environment survives constitutional scrutiny. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016):

> This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions—whether or not they violate any specific statutory duty—have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty.

156. The FCC has stated repeatedly that its RF exposure guidelines are procedural only and serve only to determine whether an FCC licensee must file an Environmental Assessment or not. *See* ¶¶ 9 and 10, *supra.* Non-mandatory regulations cannot have preemptive effect.

> Because these standards are merely advisory guidelines, they cannot constitute paramount federal law that preempts state law.

Sierra Pacific Holdings v. County of Ventura, 204 Cal.App.4th 509, 517 (Cal.App. 2012). Yet, Section 704 gives these regulations preemptive authority, prohibiting States and local governments from adopting any regulations more stringent than those adopted by the FCC.

157. Section 704 prohibits States and local governments, including State and local courts, from providing any remedy for Plaintiffs' injuries by RF radiation without providing a substitute federal remedy. This prohibition violates Substantive Due Process because it forecloses any and all remedies for injury by RF radiation.

158. Section 704 is not a bar to any of Plaintiffs' Claims for Relief against the City because the City may not violate the Fifth Amendment.

NINETEENTH CAUSE OF ACTION
(U.S. Constitution, Amendment One –
Freedom of Speech)

SECTION 704 OF THE TELECOMMUNICATIONS ACT OF 1996, 47 U.S.C. § 332(c)(7)(B)(IV) AND (V)

159. All previous paragraphs are incorporated herein by reference.

160. Section 704 prohibits States and local governments from regulating wireless telecommunications facilities *on the basis of* their environmental effects.

161. If the public speaks about RF radiation from a proposed telecommunications facility or testifies to their injuries by RF radiation, or says that they are refugees from towers and antennas, or even if scientists testify about their research on RF radiation, or doctors testify about their RF-injured patients, and their city council subsequently denies the application, Section 704 provides that the applicant can "commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v). *See Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490, 495 (2d Cir. 1999) ("A review of the record before us of the two hearings reveals that the bulk of the testimony addressed citizens' fears of adverse health effects from the cell sites . . . ").

162. If a city councilor gives voice to his or her concerns about RF radiation, the telecommunications company can likewise sue the city in any court of

competent jurisdiction. *See T-Mobile Northeast LLC v. Town of Ramapo*, 701 F.Supp.2d 446, 460 (S.D.N.Y. 2009):

> "[T]he Town has now admitted that one of the Planning Board's three stated reasons for denying T-Mobile's application was that the proposal raised health concerns . . . In Planning Board hearings on July 11, September 12, and October 17, 2006, town residents repeatedly spoke of their concern that T–Mobile's proposed facility would create a health hazard . . . The Court has no trouble concluding that the Town's decision was at least partly based on the environmental effects of the proposed tower's radio frequency emissions.

163. Section 704 is nothing more than a burden on the content of speech, and is therefore unconstitutional and void.

164. Plaintiffs have standing to challenge the constitutionality of Section 704 because for more than two decades, in Santa Fe and elsewhere, Plaintiffs and Plaintiff's members have been repeatedly instructed by their public officials and their city attorneys not to speak about health in public hearings about proposed wireless telecommunications facilities; have further been instructed that if they do speak about health, their speech will be disregarded; and their speech about health, including their own injuries and losses, has in fact always been disregarded. *See* Santa Fe City Council Minutes of November 9, 2016, pp. 66 and 71; Minutes of August 30, 2017, pp. 46 and 60-61.

165. Section 704 is not a bar to any of Plaintiffs' Claims for Relief against the City because the City may not violate the First Amendment.

TWENTIETH CAUSE OF ACTION
(U.S. Constitution, Amendment One)

CHAPTER 27 AS AMENDED VIOLATES FREE SPEECH

166. All previous paragraphs are incorporated herein by reference.

167. At the public hearings at which Ordinances 2016-42 and 2017-18 were adopted, Plaintiffs and Plaintiffs members were instructed by their City Attorney and their City Councilors not to speak about health; were further instructed that if they did speak about health, their speech would be disregarded; and their speech about health was in fact disregarded. *See* ¶ 44, *supra.*

168. Ordinance 2017-18 added the following clause to chapter 27:

> The planning commission may not regulate the placement of telecommunications facilities on the basis of the environmental effects of radio frequency emissions where such telecommunications facilities comply with 47 C.F.R. 1.1310 et seq.

SFCC 1987 § 27-2.19(E)(3) (2017). *See* Exhibit D, p. 5, lines 3-5.

169. Chapter 27 as amended violates the First Amendment Right to Free Speech, and also the process by which it was amended violated the First Amendment Right to Free Speech.

170. Chapter 27 as amended both contains unconstitutional language and was adopted by an unconstitutional process and is therefore void.

TWENTY-FIRST CAUSE OF ACTION
(Injunctive Relief)

171. All previous paragraphs are incorporated herein by reference.

172. A number of bills were introduced in the 115th Congress, including Senate Bill 3157, the STREAMLINE Small Cell Deployment Act, designed to streamline the deployment of 5G by exempting wireless facilities in the public rights-of-way from land use regulations nationwide.

173. The passage of any such federal bill would work the same violations of Free Speech, Due Process and the Right to Petition as the amended Chapter 27, WCAIIA, and Section 704.

174. The United States should be enjoined from passing or enforcing any bill that declares that local land use regulations do not apply to all wireless telecommunications facilities located in the public rights-of-way.

TWENTY-SECOND CAUSE OF ACTION
(Injunctive Relief)

SECTION 704 OF THE TELECOMMUNICATIONS ACT OF 1996, 47 U.S.C. § 332(c)(7)(B)(IV) AND (V)

175. All previous paragraphs are incorporated herein by reference.

176. For 23 years, Plaintiffs and all other parties similarly situated throughout the United States have been shut out of State and local governmental decisions authorizing the placement and construction of telecommunications facilities. They have been prohibited even from speaking about the damage to their health and the property. They have been injured, exiled from their homes and their cities, and denied any recourse or recompense for their injuries. The root cause of these violations of their fundamental rights is Section 704 of the Telecommunications Act of 1996, which purports to authorize States and local governments to violate the Constitution.

177. The operation of 47 U.S.C. § 332(c)(7)(B)(iv), which prohibits the consideration by State and local governments of the environmental and health effects of RF radiation, should be temporarily and permanently enjoined.

178. The operation of 47 U.S.C. § 332(c)(7)(B)(v), which provides that any telecommunications company that is adversely affected by a local government's regulation of cell towers on the basis of health may be heard in any court of competent jurisdiction on an

expedited basis – but that any citizen who is adversely affected by a local government's decision *not* to regulate cell towers on the basis of health may not be heard in any court whatsoever – should be temporarily and permanently enjoined.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court issue an Order and Judgment:

1. Declaring that Chapter 27 as amended by Ordinances Nos. 2016-42 and 2017-18, and WCAIIA, individually and jointly, violate the Procedural and Substantive Due Process requirements of the United States and New Mexico Constitutions.

2. Declaring that the Mayor's Proclamations of Emergency violated Procedural and Substantive Due Process.

3. Declaring that Chapter 27 as amended and WCAIIA, individually and jointly, are a taking without just compensation, in violation of the Fifth and Fourteenth Amendments.

4. Declaring that Chapter 27 as amended, WCAIIA, and Section 704, individually and jointly, violate the Right to Petition guaranteed by the First Amendment of the United States Constitution.

5. Declaring that by requiring franchises instead of leases, the City has unlawfully abdicated its responsibilities as a zoning authority.

6. Declaring that Chapter 27 as amended provides non-uniform zoning regulations for every zoning district, in violation of state law.

7. Declaring that Chapter 27 as amended and WCAIIA, individually and jointly, violate the inalienable right to safety guaranteed in New Mexico's Constitution.

8. Declaring that Chapter 27 as amended and WCAIIA, individually and jointly, violate the inalienable right to protect property guaranteed in New Mexico's Constitution.

9. Declaring that Chapter 27 as amended and WCAIIA, individually and jointly, violate the inalienable right to defend life guaranteed in New Mexico's Constitution.

10. Declaring that Chapter 27 as amended and WCAIIA, individually and jointly, damage the health, safety, general welfare, and environment in violation of Article XX, section 21 of New Mexico's Constitution.

11. Declaring that Chapter 27 as amended and WCAIIA, individually and jointly, abdicate the responsibility of government under Article XX, section 21 of the New Mexico Constitution to control pollution.

12. Declaring that Chapter 27 as amended damages health, safety and the general welfare in violation of NMSA 1978, section 3-21-1(A) and 3-21-5(A)(3), as well as sections 14-1.3 and 14-4.1(A)(2) of the Santa Fe City Code.

13. Declaring that Ordinances 2016-42 and 2017-18 unlawfully adopted zoning changes without notice to neighbors.

14. Declaring that Chapter 27 as amended violates the human rights and human dignity of the residents of Santa Fe in violation of the Santa Fe City Charter.

15. Declaring that Chapter 27 as amended damages the City's environment in violation of the Santa Fe City Charter.

16. Declaring that Chapter 27 provides for the creation of public nuisances in violation of City and State law.

17. Declaring that the Mayor's Proclamations, and the contract with Verizon Wireless entered into thereunder, are null and void.

18. Declaring that "environment" does not mean "health" in Section 704 of the Telecommunications Act of 1996.

19. Declaring that Section 704 violates the right to Due Process guaranteed by the Fifth Amendment of the United States Constitution.

20. Declaring that Section 704 violates the right to Free Speech guaranteed by the First Amendment of the United States Constitution.

21. Declaring that Chapter 27 as amended violates the right to Free Speech guaranteed by the First Amendment of the United States Constitution.

22. Declaring that the process by which Chapter 27 was amended violated the First Amendment Right to Free Speech.

23. Preliminarily and permanently enjoining the City, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with it who receive actual notice of the Order by personal service or otherwise, from enforcing Chapter 27 SFCC 1987 as amended by Ordinances 2016-42 and 2017-18; prohibiting the granting of any additional franchises pending the outcome of this lawsuit; and prohibiting the operation of any cell towers or antennas erected under existing franchises pending the outcome of this lawsuit.

24. Preliminarily and permanently enjoining the operation of any and all cell towers erected pursuant to the Mayor's Proclamations and the contract with Verizon Wireless entered into thereunder pending the outcome of this lawsuit.

25. Preliminarily and permanently enjoining Attorney General Balderas from enforcing WCAIIA pending the outcome of this lawsuit.

26. Preliminarily and permanently enjoining the United States, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with it who receive actual notice of the Order by personal service or otherwise, from enforcing 47 U.S.C. §§ 332(c)(7)(B)(iv) and (v) pending the outcome of this lawsuit.

27. Preliminarily and permanently enjoining the United States, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with it who receive actual notice of the Order by personal service or otherwise, from adopting or enforcing any law that prohibits States or local governments, with respect to wireless telecommunications facilities, from enforcing land use regulations in the public rights-of-way that would otherwise apply pending the outcome of this lawsuit.

28. Awarding costs, and reasonable attorneys' fees as provided under law.

29. Awarding such other relief as this Court considers just and proper.

Respectfully submitted,

/s/ Kathleen M. Prlich

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[Certificate Of Service Omitted]

APPENDIX F

[SEAL] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

WASHINGTON, D.C. 20460

JUN 19 1995

Richard M. Smith, Chief
Office of Engineering and Technology
Federal Communication Commission
1919 M Street, NW
Washington, DC 20554

Dear Mr. Smith:

Due to your pending rulemaking action, I am writing to inform you of the Environmental Protection Agency (EPA) schedule for development of *Guidelines for Limiting Public Exposure to Radiofrequency (RF) Radiation.*

The guidelines are substantially complete, and are beginning to enter the review phase. The review plan for the guidelines will include a 30 day pre-publication review by the RF Inter-Agency Work Group, a 60 day review by selected stakeholders, and final review by OMB (90 days). Issuance of the final guidelines should be in early 1996.

We have established an effective and inclusive process for completing the guidelines. Our approach is rooted in the November 1993 comments from EPA on the Federal Communications Commission (FCC) Notice of Proposed Rulemaking. Last year, selected

federal agencies, including the FCC, formed an RF Interagency Work Group to coordinate RF issues among federal agencies, provide technical input to the guidelines, and act as a sounding board to assess the general approach employed in the guidelines. Ongoing discussions about the guidelines with important stakeholders are also underway. For example, the upcoming meeting with the Electromagnetic Energy Alliance is an illustration of the dialogue which is necessary to insure that the guidelines are broadly accepted thereby affording the FCC the opportunity to reference these guidelines as part of their rulemaking.

Completion of the guidelines in a timely manner remains a priority of this office. In accomplishing this, the assistance and support of the FCC has been invaluable. In particular, Robert Cleveland has offered valuable technical review and insights which substantially improved the guidelines.

Sincerely,

/s/ E. Ramona Trovato

E. Ramona Trovato, Director
Office of Radiation
and Indoor Air