CASE No. 20-2066

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

ORAL ARGUMENT REQUESTED

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

Defendants-Appellees.

On appeal from the United States District Court
for the District of New Mexico
The Honorable Kenneth Gonzales, Case No. 1:18-cv-01209

APPELLANTS' REPLY BRIEF

Respectfully submitted,

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GLOSSARY

RF = radio frequency
RFEs = radio frequency emissions
TCA = Telecommunications Act
WCAIIA = Wireless Consumer Advanced Infrastructure Investment Act

INTRODUCTION

The crux of this case is simple: Are Plaintiffs' factual allegations sufficient to show injury in fact, traceability to Defendants' actions, and redressability by a favorable decision? If they are—and the district court's decision that they are is *res judicata* (App. 789-795) and not at issue in this appeal—then Plaintiffs should be allowed to prove these allegations at trial. They are sufficiently well-pleaded to state claims upon which relief may be granted.

Plaintiffs Firstenberg and Steinhoff and the members of Plaintiff Alliance have previously been deprived of their homes and/or businesses, their health, and some nearly their lives by cell towers that were erected close to where they lived or worked. (App. 25-30). Their allegations, which are concrete and particularized (App. 790), implicate the most fundamental of constitutional rights. These allegations are neither challenged, nor addressed, nor even mentioned anywhere in the responsive briefs of any of the Defendants.

The importance of this case to the health and well-being of the nation is obvious: Plaintiffs have previously been severely injured by cell towers, and they do not allege that they are in any fundamental way different from other human beings. They differ only in that cell towers were previously built very close to where they lived and worked, and that they have been injured thereby. The laws whose constitutionality they are challenging, if allowed to remain in effect, will

enable an imminent proliferation of antennas and towers on the streets and sidewalks of this country so extensive that every citizen will soon be exposed twenty-four hours a day at point blank range to facilities known to be injurious to all and lethal to many, thereby threatening not only the health and well-being of this nation but its very existence. It is essential that these facts be vetted at trial.

No trial court in this country to date has reached the merits of such allegations. No party injured by RF radiation from cell towers has ever been granted a remedy for their injuries by any court. No party threatened with such injury has ever been granted injunctive relief by any court. All such cases have been dismissed on grounds of preemption by 47 U.S.C. §§ 332(c)(7)(B)(iv) and (v), subclauses of Section 704 of the Telecommunications Act of 1996 (hereinafter referred to as "Section 704").

No court has previously decided whether Section 704 violates the constitutional rights of individuals. To protect their own homes, businesses, health and lives, as well as the health, well-being and very future of this nation, Plaintiffs here ask this Court to so decide. As injured parties, Plaintiffs have standing to bring this action on behalf of themselves. But they are also acting, in essence, as private attorneys general in representing the interests of millions of other people whose lives and livelihoods are at stake. In the present case, Plaintiffs are asking this Court to address an existential threat to this nation before it is too late.

I. Reply to the United States

The elephant in the room, which the United States would like to pretend is not there, is the factual question of whether cell towers injure and kill people. Are Plaintiffs' claims founded only on "fear," as the United States would have it (U.S. Br. 6), or are they founded on facts? Have Plaintiffs lost their homes and businesses to "fear" or because they were actually rendered uninhabitable by nearby cell towers? Were Plaintiffs injured and nearly killed by radiation from cell towers or not? (App. 25-30). Are Plaintiffs' experts credible or not? (App. 461-572). Does the scientific and medical literature support their claims or not? (App. 17-24). Is the health, well-being and future of the United States threatened by the proliferation of antennas on the streets and sidewalks next to children's bedroom windows or not? The allegations in Plaintiffs' Complaint are extensive, detailed, concrete, and particularized, and may not be disposed of on a motion to dismiss for failure to state a claim.

The United States has turned "health and well-being" into its opposite. Quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 742 (1983), it asks this Court to dismiss this case in order to uphold the "substantial State interest 'in protecting the health and well-being of its citizens.'" (U.S. Br. 28). Plaintiffs are before this Court for precisely the opposite reason: because preemption by Section 704, for the past twenty-four (24) years, has affirmatively *injured* the health and

well-being of this nation's citizens, and because such injuries, if Section 704 is not struck down, will shortly become universal and catastrophic.

A. Definition of "Environment"

The United States has turned the definition of "environment" into its opposite. The United States' contention that the "natural meaning" of the term "environmental effects" includes "health effects" is contradicted by every existing dictionary or Congressional definition, as shown in Appellants' Opening Brief, which quotes eighteen (18) separate definitions of these terms. (Appellants' Br. 38-40). The United States quotes *no* dictionary or law that has ever included the word "health" in the definition of "environment," or "health effects" in the definition of "environmental effects."

The United States' contention that a declaration that Section 704 is unconstitutional or that "environment" does not mean "health" would provide no remedy to Plaintiffs, because States would remain free to allow construction of injurious facilities in their public rights-of-way (U.S. Br. 16), is fallacious: injured parties would be restored their constitutional rights to petition to protect their health, speak about health, and go to court to ask for a remedy for their injuries, if those acts were not preempted.

B. Access to Courts

The United States' contention that "Section 704 does not preempt any state tort law" (U.S. Br. 28) is not supported by any authority. To the contrary: all courts that have considered the matter have concluded that state tort suits for injury by cell towers are preempted by Section 704. *See Jasso v. Citizens Telecom. Co. of California, Inc.*, 2007 WL 2221031, *8 (E.D. Cal. 2007):

> [E]quipment in issue here... consists of the wireless facilities explicitly described in section 332(c)(7)(B)(iv)... [T]he claims must be dismissed as barred by conflict preemption.

See also Robbins v. New Cingular Wireless PCS, LLC, 854 F.3d 315, 319-20 (6th Cir. 2017):

> The TCA furthers [Congress's] goals by preventing local governments from impeding the siting and construction of cell towers that conform to the FCC's RF-emissions standards. *See* 47 U.S.C. § 332(c)(7)(B)(iv).
>
> ... 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.

See also Goforth v. Smith, 991 S.W.2d 579, 584 (Ark. 1999):

> [F]ederal preemption limits private common-law actions as well as state action.

Accord Fontana v. Apple, Inc., 321 F. Supp. 3d 850, 851-52 (M.D. Tenn. 2018); *Stanley v. Amalithone Realty, Inc.*, 94 A.D.3d 140, 146 (N.Y. App. Div. 2012).

The United States' contention that Plaintiffs can obtain a remedy from the FCC or from Congress by petitioning to change the "allowable [radio-frequency

emission] levels" (U.S. Br. 26-27) fails because the constitutional deprivations alleged in this case have nothing to do with what the allowable or actual "levels" are. The unconstitutionality of Section 704 has nothing to do with the *levels* of radiation permitted by the FCC or emitted by the antennas, it has to do with the fact that when Plaintiffs nevertheless lose their health, homes, businesses, and lives, regardless of the levels, Section 704 *prohibits* them from going to court to ask for a remedy. Neither the FCC nor Congress is empowered to hear and judge tort claims for injury.

C. Free Speech

It is not, as the United States contends, a "purely speculative possibility" that a court will overturn the denial of a cell tower permit if people have spoken about health at a public hearing. (U.S. Br. 24). *See T-Mobile Northeast v. Loudoun County Bd. of Sup'rs*, 903 F.Supp. 2d 385, 390 (E.D. Va. 2012):

> [T]he Board expressly identified environmental effects of RF emissions as a basis for its decision. The Court holds that the Board's decision is therefore void under the Telecommunications Act and orders the Board to grant the Stephens Silo application.

See also T-Mobile Northeast LLC v. Town of Ramapo, 701 F.Supp.2d 446, 460 (S.D.N.Y. 2009), a case which was relied on by the district court in the present case (App. 806):

> 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… T–Mobile is entitled to summary judgment on this claim.

The United States' attempt to distinguish *Miami Herald Publishing Co. v. Tornillo* from the present case (U.S. Br. 24-25) is based on a misreading of that case. The Florida "right to reply" statute was held unconstitutional in that case not primarily, as the United States contends, because it compelled speech by the newspaper, but because it *suppressed* speech by the newspaper:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, *editors might well conclude that the safe course is to avoid controversy*.

418 U.S. 241, 257 (1974) (emphasis added).

D. Right to Petition

The United States' contention that Plaintiffs retain their First Amendment right to petition (U.S. Br. 25-29) ignores the facts of this case: Chapter 27 as amended and WCAIIA abolish land use regulations, public notice requirements, and application requirements for most antennas and towers in the public rights-of-way. This leaves Plaintiffs and the public with no way to even discover when a cell tower or antenna is going to be built outside their children's bedroom windows until after the fact, much less exercise their right to petition to prevent injury by such facilities.

E. Due Process

The United States' suggestion that Plaintiffs' Substantive Due Process claims are "nothing more than a repackaged right-to-petition claim" (U.S. Br. 29) conflates the First Amendment with the Fifth Amendment, and again ignores the elephant in the room, which is the actual loss of health and life caused by cell towers and antennas. Plaintiffs' right to petition, right to free speech, and takings claims are all secondary claims; the central issue of this case is the deprivation of life. These allegations are concrete not "abstract," facts not "concerns."

The Due Process issue that the United States presents to the Court in its Statement of the Issues, i.e., "Whether the Telecommunications Act violates the Fifth Amendment by depriving Plaintiffs of a fundamental right" (U.S. Br. 3), is presented as a matter of law but is really a factual issue. What the Court actually must decide is, "If the facts pleaded by Plaintiffs are true, do Plaintiffs have a plausible claim that the Telecommunications Act deprives Plaintiffs of a fundamental right?"

> [F]or purposes of resolving a Rule 12(b)(6) motion, we accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff.

Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009). Yet nowhere in its brief does the United States acknowledge any of the hundreds of factual allegations in Plaintiffs' Complaint. What the United States presents as "Factual Background"

(U.S. Br. 6-7) is really a summary of the legal posture and does not refer to a single factual allegation in this case. The arguments of the United States are therefore premature and can be decided only after Plaintiffs have had an opportunity to present their full case with evidence at trial.

F. Standing

The United States' contention that Plaintiffs have no standing to sue the United States because their injuries are traceable only to the "independent" decisions of New Mexico and Santa Fe (U.S. Br. 17) was decided adversely to the United States by the district court:

> [T]he 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").

(App. 794).

Because the United States filed no cross-appeal in this case, the district court's decision on this issue is *res judicata* and is not properly before this Court. *See Greenlaw v. United States*, in which the Supreme Court confirmed that "an appellate court may not alter a judgment to benefit a nonappealing party.... '[I]n more than two centuries of repeatedly endorsing the cross-appeal requirement, not

a single one of our holdings has ever recognized an exception to the rule.'" 554 U.S. 237, 244-45 (2008) (quoting *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 480 (1999)).

See also EF Operating Corp. v. American Bldgs., 993 F.2d 1046, 1049 (3d Cir. 1993):

> Thus, where an appellant files an appeal seeking review of a summary judgment for the appellee, the appellee must cross-appeal to contest the district court's adverse ruling on his motion to dismiss for lack of personal jurisdiction. Since [the appellee] did not cross-appeal, we have jurisdiction to review the district court's summary judgment ruling only.

(internal citation omitted). Similarly here: Plaintiffs' appeal seeks review of the district court's ruling granting Defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim; the United States must cross-appeal to contest the district court's adverse ruling on its Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

See also Naimie v. Cytozyme Laboratories, Inc., in which the Tenth Circuit granted a request to strike portions of the appellee's brief "that relate to issues [he] did not cross-appeal." 174 F.3d 1104, 1113 n. 8 (10th Cir. 1999).

Plaintiffs request that this Court strike the portions of the United States' brief related to subject matter jurisdiction, which includes the United States' arguments on standing and sovereign immunity. These portions are: the second paragraph of the Introduction (U.S. Br. 1-2); the second sentence of the Statement

of Jurisdiction (U.S. Br. 2); Issue 1 of the Statement of the Issues (U.S. Br. 3); the first two paragraphs of the Summary of Argument (U.S. Br. 11-12); and Point I of the Argument (U.S. Br. 13-20).

G. Sovereign Immunity

The United States, again disagreeing with the district court, contends that the United States is immune from a challenge to the constitutionality of a statute. (U.S. Br. 18-20). The district court, while ruling that the United States has not waived sovereign immunity for claims arising under the TCA (App. 793), held that Plaintiffs have standing to challenge the constitutionality of the TCA (App. 795). Again, the United States filed no cross-appeal and this issue is not properly before this Court.

Plaintiffs also note that none of the cases cited by the United States in support of its claim of sovereign immunity[1] involved a challenge to the constitutionality of a statute. And the Tenth Circuit cases cited by the United States do not support its position that the United States has waived sovereign immunity for non-monetary relief only with respect to lawsuits against agencies and officials, and not to lawsuits against the United States itself. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005), describing Section 702 of the

[1] *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002); *Kane County v. United States*, 772 F.3d 1205 (10th Cir. 2014); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005); *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178 (D.C. Cir. 2006); *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255 (D.D.C. 2018); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

Administrative Procedure Act as "'a general waiver of the government's sovereign immunity from injunctive relief'" (quoting *United States v. Murdock Mach. Engr. Co.*, 81 F.3d 922, 930 n. 8 (10th Cir. 1996)).

See also Robbins v. U.S. Bureau of Land Management, 438 F.3d 1074, 1080 (10th Cir. 2006) ("We have recognized that [the language in Section 702] 'waive[s] sovereign immunity in most suits for nonmonetary relief' against the United States, its agencies, and its officers" (quoting *Simmat*). *See also Jaffee v. United States*, 592 F.2d 712, 718 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979) ("Congress amended section 702 with a specific purpose of waiving sovereign immunity in equitable actions brought under section 1331"); *Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992) ("Contrary to the assertions of the federal defendants, this Court has repeatedly found that § 702 waives the sovereign immunity of the United States with respect to *any* action for injunctive relief under 28 U.S.C. § 1331" (emphasis in original)).

The only authorities to the contrary cited by the United States come from the D.C. Circuit and, as noted above, are not about standing to challenge the constitutionality of a statute.

Plaintiffs also note that the Federal Rules of Appellate Procedure permit challenges to the constitutionality of a Federal statute even when the United States is not a party:

> If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

Fed. R. App. P. 44(a). *See Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987), cited by the district court in support of standing to sue a state government official when challenging the constitutionality of a state statute (App. 794). Dismissal of the United States as a party would not affect the validity of this lawsuit as against the City and Attorney General Hector Balderas. Plaintiffs named the United States as a party in order to give the United States the opportunity to defend the constitutionality of Section 704.

Finally, the United States is incorrect that Plaintiffs "have not moved to add [the FCC] as a party." (U.S. Br. 19). When Plaintiffs filed this action they did not name the FCC as a party because the only federal issue in this case is the constitutionality of Section 704. However, the FCC is empowered to enforce Section 704 (*see* 332(c)(7)(B)(v)), and in briefing before the district court, Plaintiffs made the following request: "To eliminate any question about sovereign immunity or the absence of a necessary party, Plaintiffs request that the Court grant Plaintiffs leave to amend their complaint to add the Federal Communications Commission as a party defendant." (App. 403).

II. Reply to the City of Santa Fe

The City's confusing brief fails to address the issues in this case.

It is not clear why the City focuses on Plaintiffs' lack of standing under the TCA (City Br. 3-5). As Plaintiffs note in their Opening Brief (at 5), their Complaint is brought under the Constitution, not the TCA.

The City's single paragraph on access to courts should be disregarded because it states bare contentions without citation to any authority. Its hyperbolic reference to "the sheer volume of cases that the Alliance and its members has [*sic*] brought" fails to refer to any specific cases and ignores the fact that the few cases that have been brought were dismissed on the basis of preemption by Section 704, whose constitutionality Plaintiffs are challenging here.

The City's extraordinary contention that Plaintiffs do not have "a legitimate claim of entitlement" to their own lives (City Br. 10) needs no further comment. Nor does the City's absurd contention that a law cannot be declared unconstitutional simply because it has been in operation for twenty-four (24) years (City Br. 11). Many laws have been declared unconstitutional after many more years of operation than that. For example, Section 2(a) of the Lanham Act, Pub. L. 79-489, passed by Congress in 1946, was declared unconstitutional in 2017. *Matal v. Tam*, 137 S.Ct. 1744. The definition of the term "crime of violence" in the Firearm Owners' Protection Act, Pub. L. 99-308, passed by Congress in 1986, was

declared unconstitutional in 2019. *United States v. Davis*, 139 S.Ct. 2319. Section 309(c) of the Immigration and Nationality Act of 1952, Pub. L. 82-414, was declared unconstitutional in 2017. *Sessions v. Morales-Santana*, 137 S.Ct. 1678.

The City's quotations from *Guertin v. Michigan*, 2017 WL 2418007 (E.D. Mich. June 5, 2017) and 912 F.3d 907 (6th Cir. 2019), chosen to distinguish that case from the present case (City Br. 12), instead prove their similarity. The City, like the defendant in *Guertin*, has "ignored voluminous evidence" of harm. (App. 12). The City, like the defendant in *Guertin*, has "lied about the safety" of its actions and concealed those actions from the public. (App. 42). In both cases, "individuals received substances detrimental to their health." In both cases, "a government actor knowingly and intentionally introduced life-threatening substances into individuals without their consent." In both cases, "such substances have zero therapeutic benefit." The City has abolished all public process and public notice and made it impossible for Plaintiffs to be informed about or discover new sources of radiation except by getting sick and dying. (Plaintiffs' Opening Br. 31-33).

Reno v. Flores, 507 U.S. 292 (1993), cited by the City (City Br. 13-14), was a custody case, not a case that involved danger to life, and is inapposite.

Dolan v. City of Tigard, 512 U.S. 374 (1994), cited by the City (City Br. 19), instead supports Plaintiffs. The defendant city's action in *Dolan* was held to be an

unconstitutional taking under circumstances that burdened property to a much lesser degree than in the present case. Dolan was only required to grant a public pathway easement; her property was not made uninhabitable.

The City's argument that invalidating Section 704's preemption would "create unlimited liability" throughout the nation (City Br. 18), i.e., that the City cannot be held liable for passing an ordinance that injures its citizens because other cities are doing the same thing, is supported by no authority. "A policy is no less unconstitutional merely because everyone does it." *Pena v. Board of Educ. of City of Atlanta*, 620 F.Supp. 293, 300 (N.D. Ga. 1985). The fact that other cities are doing the same thing only highlights the importance of this case to the health and well-being of the nation, and is an additional reason for the allegations herein to be tested at trial.

The City's analysis of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), supports Plaintiffs' position on Section 704. As the City notes, the Supreme Court in *Marbury* did not issue the requested mandamus to the secretary of state (City Br. 6). It did not order his appointment because it declared the mandamus clause in the Judiciary Act of 1789 to be unconstitutional. Plaintiffs are not asking this Court to rule that "every wrong is redressable in the courts" (City Br. 6); they are asking this Court to follow *Marbury v. Madison* in ruling that a

conflict between a statute and the Constitution should be decided in favor of the Constitution.

The City's allegation that the City's contracts with Verizon were "approved in open meetings" (City Br. 13) is false. The contract with Verizon was approved on November 21, 2017 (App. 41, 138-139) and was not announced to the public until December 11, 2017 (App. 42). These are easily verified facts. Sanctions should be imposed on the City Attorney under 10th Circuit Rule 46.5(B)(3) and (C) for making a factual contention to this Court that is not supported in the record.

III. Reply to Attorney General Hector Balderas

Attorney General Hector Balderas confuses "health" with "safety." They are not the same thing. Wireless communications facilities promote public safety but damage public health. Attorney General Balderas' contention that WCAIIA "benefits the public safety" (Balderas Br. 3) is supported in the record, but his contention that it "further[s] the public's health" (Balderas Br. 9) is not. Rather, the detailed allegations of Plaintiffs show that WCAIIA damages the public health by causing cancer, diabetes, heart disease, seizures, and respiratory failure (App. 17-18, 25-30), and there are no allegations in the record to the contrary.

With regard to the Right to Due Process (Balderas Br. 5-8), Attorney General Balderas, like the United States, fails to challenge, address, or even mention the factual allegations in this case. Like the City and the United States, he

ignores the elephant in the room: the detailed allegations that Plaintiffs have been deprived of their homes, their businesses, their health, and nearly their lives by cell towers that were built in close proximity to where they lived and worked. (App. 25-30). This case is about facts, not "concerns." Plaintiffs undeniably have a fundamental right to their own lives, and Substantive Due Process means the government may not knowingly deprive them of their lives even in furtherance of a legitimate governmental objective. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008).

Attorney General Balderas, like the United States, presents his Counterstatement of Issues (Balderas Br. v) as matters of law, whereas they are really issues of fact. To decide whether WCAIIA "is a reasonable land-use regulation" requires a determination of whether, and how severely, cell towers are injurious to health and life. To determine whether WCAIIA is a taking of property requires a determination of whether the radiation from cell towers invades Plaintiffs' property and is injurious to health and life. Both of these issues depend on a resolution of underlying factual issues and are not ripe for adjudication at this stage of the proceedings.

With regard to the Right to Petition (Balderas Br. 9-10), Attorney General Balderas' statement that "Plaintiffs have not alleged that the WCAIIA prevented their members from communicating any grievance to elected officials" is

contradicted in the record. That is precisely what Plaintiffs have alleged. (App. 51). By abolishing all land use regulations for antennas in the public rights-of-way, WCAIIA has also deprived Plaintiffs of the right to be notified before such facilities are erected next to their homes. There is obviously no right to petition the government for redress of grievances concerning facilities about which Plaintiffs receive no notice.

Contrary to Attorney General Balderas' contention, nowhere in their Complaint do Plaintiffs demand "the right to live in an environment free of RFEs." (Balderas Br. 4). Rather, Plaintiffs demand the right not to have antennas on the sidewalks next to their homes and businesses. They demand the right to petition the government *not* to have such facilities next to their homes, and they demand the right to go to court to ask for a remedy when they are injured or killed by such facilities. Plaintiffs' Complaint does not ask for a particular "level" of radiation. Plaintiffs' Complaint does not concern antennas on distant hilltops or antennas on private property. The Complaint is concerned only with (1) antennas in the public rights-of-way, and (2) antennas erected illegally on City-owned property in violation of the City's land development code. And it challenges the constitutionality of Section 704 because the City and State have justified their deprivation of Plaintiffs' constitutional rights with respect to such facilities on the basis of preemption by that Federal law.

CONCLUSION

WHEREFORE, as requested by Plaintiffs in their Opening Brief:

1. The Court should reverse the judgment of the district court and remand the case for trial on Plaintiffs' State as well as Federal claims.

2. The Court should find that "environmental effects" does not mean "health effects" in Section 704.

3. Plaintiffs request that the Court award them their costs and attorneys' fees pursuant to 28 U.S.C. § 2412, and such other relief as the Court may deem just and proper.

Respectfully submitted,

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/s/ *Jonathan Diener*
Jonathan Diener

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I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

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/s/ *Jonathan Diener*
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CERTIFICATE OF SERVICE

I hereby certify that on this date of September 17, 2020, I served a copy of Appellants' Reply Brief electronically using the Court's ECF system on the following persons:

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