IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ARTHUR FIRSTENBERG,

Petitioner-Appellant,

No. _____

vs.

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

Respondents-Appellees.

_____

DOCKETING STATEMENT

Appeal from the First Judicial District Court
The Honorable Sarah M. Singleton
Case No. D-101-CV-2010-04296

_____

ARTHUR FIRSTENBERG
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January 2, 2014

Petitioner-Appellant Arthur Firstenberg submits this docketing statement pursuant to Rule 12-208 NMRA.

I. NATURE OF THE PROCEEDING

This appeal seeks review of the district court's denial of a request for a writ of mandamus. This civil action was brought by Arthur Firstenberg ("Petitioner") against the City of Santa Fe ("City") and AT&T Mobility Services, LLC (collectively, "Respondents"). The proceedings were as follows:

On or about November 15, 2010 AT&T began providing "3G" (third generation) cell phone service from cellular phone base stations ("cell towers") in Santa Fe that it operates under zoning permits called "special exceptions." On December 15, 2010 Petitioner filed a Petition for Writ of Mandamus, requesting the district court to order that the City enforce § 14-3.6(B)(4)(b) of its Land Development Code ("LDC"),[1] which prohibits an intensification of an existing use permitted by special exception unless a new special exception is obtained, and that the City commence enforcement proceedings as provided in LDC §§ 14-11.5(a) and 14-6.2(E)(11). Application for a new special exception requires a public hearing before the Board of Adjustment.

[1] Citations to the LDC are to provisions that were in effect at the time the Petition for Writ of Mandamus was filed. *See* New Mexico Constitution, Article IV, § 34, "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

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

On January 5, 2011 AT&T removed the case to the United States District Court for the District of New Mexico, alleging federal question jurisdiction because Petitioner's claims raised questions under the Telecommunications Act of 1996 ("TCA"), the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), and the United States Constitution. Motions to dismiss by the City and AT&T were granted by the U.S. District Court, but the decisions to dismiss were reversed by the Court of Appeals for the Tenth Circuit, citing lack of federal jurisdiction. *Firstenberg v. City of Santa Fe*, 696 F.3d 1018 (10th Cir. 2012).

After remand to the First Judicial District Court of New Mexico, Respondents filed a Joint Answer to the Alternative Writ of Mandamus on January 28, 2013. No party having identified any disputed material fact, the parties agreed to submit the matter for decision on the pleadings. Briefing on the legal issues followed, and oral arguments were heard on October 1, 2013. Instead of making its decision on that day, the district court ordered a further round of briefing, styled as proposed decisions, to be served simultaneously by both sides on the court and on opposing parties. On October 15, 2013, Petitioner filed his proposed decision and served it on the opposing parties. However, Respondents submitted their joint

proposed decision *ex parte*, without a certificate of service, and neither filed it with the clerk nor served it on Petitioner.[2]

On October 30, 2013, the district court adopted Respondents' *ex parte* brief almost verbatim as the court's Decision, denying Petitioner's request for a writ of mandamus, as well as making novel interpretations of federal law that Petitioner also asks this Court to review.

II. DATE OF JUDGMENT AND TIMELINESS OF APPEAL

Judgment was entered on October 30, 2013. New Mexico's courts were closed on November 29, 2013 for observance of Presidents' Day. Petitioner filed his notice of appeal on the next business day, December 2, 2013. The appeal is timely under Rules 12-201(A) and 12-308(A), NMRA.

III. STATEMENT OF THE CASE

This appeal seeks to reestablish the principle, enshrined in the Americans with Disabilities Act and abrogated by the district court, that members of minorities, and specifically people with disabilities, enjoy the same protections of their fundamental rights as other citizens, and that such rights cannot be infringed by commercial considerations—here, the desire for uniform federal standards for telecommunications facilities.

[2] Petitioner later requested the brief from counsel for AT&T, and was provided it. By Petitioner's motion of December 17, 2013, long after the district court entered judgment, it was added to the record.

Board of Adjustment Hearing

On November 17, 2010, the Board of Adjustment ("Board"), held a public hearing on equipment replacement at two cell towers operated by AT&T (sites S205 and S215), for which application had been made earlier that year. The applications had been approved administratively, and a group of citizens had appealed that decision to the Board. They asserted that the project would significantly increase the levels of radio frequency ("RF") radiation broadcast from those facilities, and that there were many Santa Feans with a disability known as electromagnetic hypersensitivity ("EHS") whose health was so severely affected by levels of RF radiation already existing in Santa Fe that any further increase would be likely to destroy their lives, depriving them "of the right to earn a living, the right to reside in [their] own home[s], the right to live in [their] own city, walk the public streets, or participate in and receive the benefits of any of the services, programs, and activites of [their] government." The appellants alleged that this would violate Title II of the ADA and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as non-discrimination clauses in the New Mexico Constitution and the Santa Fe City Charter. They urged that the project was an illegal intensification of use under LDC § 14-3.6(B)(4)(b):

> The special exceptions listed in this chapter, when granted, are considered granted for a specific use and intensity, any change of use or more intense use shall be allowed only if such change is approved by the Board of Adjustment under a special exception.

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

Petitioner, on behalf of the appellants, presented the appeal orally to the Board of Adjustment at the public hearing. It would not "be ethical or lawful," he asserted, "if the City were to take a group of productive, law-abiding citizens, and systematically injure them, throw them out of their homes, and run them out of Santa Fe." He testified that there are an estimated 2,000 electrosensitive individuals in Santa Fe "who are so seriously affected by electromagnetic radiation that they are disabled as defined by the ADA." His presentation was followed by extensive public testimony, almost all of which was directed toward the

intensification of RF radiation that would accompany the new equipment. Testimony regarding their own electrosensitivity was given by, *inter alia*, the Childhood Injury Prevention Coordinator for the New Mexico Department of Health, who is also New Mexico's representative to the Consumer Products Safety Commission; a former world record holder in the marathon; a librarian; a school teacher; a piano tuner; an owner of an art gallery; and a physicist at Los Alamos National Laboratory. A physician testified that 3% of her patient population have EHS.

City's Refusal to Rule on the Issues Presented

Following the public hearing the Board adopted Findings of Fact and Conclusions of Law, as is required before any Board decision is final and ripe for appeal. But based on instructions by the City Attorney that the City did not have "jurisdiction" to consider objections to an increase in RF radiation, the Board disregarded the principal allegations and virtually the entire contents of the written appeal, the written exhibits, Petitioner's oral presentation, and the sworn public testimony; made no findings of fact or conclusions of law on any issues related to EHS, RF radiation, or an intensification of use other than to state that it lacked jurisdiction; and approved the applied-for equipment.

The present case concerns an upgrade from "2G" to "3G" technology which occurred not just at those two cell towers, but at all of AT&T's cell towers in Santa

Fe, which number about twenty. The upgrade occurred on or about November 15, 2010. The city having refused, two days later, to take enforcement action against this type of an intensification of use, and there being no provision in the Santa Fe City Code allowing individuals to appeal a refusal to take enforcement action, Petitioner requested a writ of mandamus from the district court. He attached to his Petition the 89 pages of written submissions, the verbatim minutes of the November 17, 2010 Board of Adjustment hearing, and a sworn affidavit of a Santa Fe physician.

Undisputed Facts

"[A party's] answer to the alternative writ of mandamus, by failure to deny, admit[s]" the allegations therein. *State ex rel. State Highway Commission v. Quesenberry*, 1963-NMSC-113, ¶ 9, 72 N.M. 291 383 P.2d 255. *See* Rule 1-008(D) NMRA. Because Respondents in the present case failed to deny any of Petitioner's allegations of discrimination, injury, and loss of fundamental rights caused by RF radiation, the wide-ranging opinion of the district court assumed their truth and ruled only on questions of law. The district court's opinion addresses not only individuals' rights to protect themselves against RF radiation, but the very scope of civil rights protections available generally to injured parties under federal statutes and the Constitution, with implications far beyond the narrow facts of this case.

The following allegations of Petitioner are undisputed:

(a) AT&T operates a number of cell towers in Santa Fe under zoning permits called special exceptions.

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

(c) Petitioner suffers from electromagnetic hypersensitivity ("EHS"), has been diagnosed with this condition by nine doctors, and collects disability benefits from the Social Security Administration on this basis. Exposure to RF radiation affects his heart, lungs, and nervous system, substantially limiting his ability to think, stand, walk, and breathe. Because of the construction of cell towers nearby, he has previously fled five homes, three cities or towns, and two states in order to survive.

(d) Petitioner is a qualified individual with a disability as defined by the ADA.

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

(f) At the November 17, 2010 public hearing, a substantial number of people testified that RF radiation is causing themselves or others to be unable to work,

travel, or escape life-threatening injury, and that any increase in ambient RF radiation would likely cause them to be unable to live in their homes and to be unable to live in Santa Fe.

Arguments and Decision in the District Court

Respondents assert that (a) the LDC does not regulate RF radiation, and that in any case, (b) the City has no jurisdiction over RF radiation because RF radiation is federally regulated and TCA § 704 (codified at 47 U.S.C. § 332(c)(7)(B)(iv)) preempts all state regulations pertaining thereto:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

Petitioner points to four provisions in the LDC where RF radiation is mentioned and/or regulated, in particular LDC § 14-6.1(A)(3), which requires the Board of Adjustment to prohibit uses that it determines to be

> potentially noxious, dangerous or offensive to residents of the district or those who pass on public ways, by reason of odor, smoke, noise, glare, fumes, gas, vibration, threat of fire or explosion, emission of particular matter, interference with audio or television reception, or radiation, or likely for other reasons to be incompatible with the character of the district.

In addition Petitioner asserts that regardless of the TCA, the City must regulate RF radiation if necessary to fulfill its obligations as a public entity under Title II of the

ADA, and in order not to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. He further argues that either TCA § 704 must be interpreted so that it does not deny fundamental rights or impose unjustifiable discrimination, or it is unconstitutional under the Fifth Amendment.

In its decision the district court, following a brief introduction, adopted almost verbatim the arguments written by counsel for AT&T, ruling that the LDC does not regulate RF radiation (Decision, pp. 6-7), and that an increase in RF radiation is not an intensification of use (Decision, pp. 5-6). But the district court's opinion does not stop at these narrow, targeted issues. It goes on to rule that the ADA does not apply to zoning decisions that affect disabled third parties (Decision, pp. 12-13), setting an alarming precedent for all people with disabilities. It states that the TCA supersedes the ADA (Decision, pp. 9-11), potentially setting a precedent for other situations where there is tension between a law that protects a class of people from discrimination and a law that protects commerce. It states that equal protection and due process violations cannot exist because TCA § 704 provides a "rational basis" for the discrimination (Decision, p. 15) and a "valid reason" to deprive injured parties of a hearing (Decision, p. 16), allowing an act of Congress to abrogate fundamental constitutional protections.

IV. STATEMENT OF THE ISSUES PRESENTED BY THE APPEAL

As there are no disputed material facts, all of the issues in this case are questions of law, subject to de novo review. *State ex rel. Shell Western E & P, Inc. v. Chavez*, 2002-NMCA-005, ¶ 7, 131 N.M. 445, 38 P.3d 886.

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

1. Is an intensification of RF radiation an intensification of use under the City's Land Development Code, requiring an application for a new zoning permit and a public hearing?

This issue arose in Petitioner's opening brief, filed February 25, 2013. Petitioner cited LDC § 14-6.1(A)(3) (uses that emit offensive "radiation" are prohibited). He quoted the Board members themselves who, during the November 17, 2010 hearing, considered an increase in RF radiation to be an intensification of

use that would require Board permission were it not for TCA § 704. The City and AT&T responded that the LDC only regulates intensification of "physical" properties such as height, landscaping, lighting, noise, and signage. In his March 26, 2013 reply Petitioner pointed out that light and noise are no more or less "physical" than RF radiation: light and RF radiation are just different frequencies of electromagnetic waves, and noise is acoustic waves; all can be disturbing and cause illness if raised to intense levels. The district court held that RF radiation is not a "physical" or "aesthetic" aspect of land use and that its intensification is not an intensification of use.

2. Does an assertion of federal preemption deprive the City of the authority to hold an otherwise mandatory hearing and adjudicate claims of the affected public?

In their joint response brief the City and AT&T asserted that "any attempt to require the City to review the upgrade under *any* legal theory is preempted and foreclosed by federal law." (*emphasis original*). In his proposed decision, filed October 15, 2013, Petitioner directed the district court to *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶¶ 13-16, 120 N.M. 133, 899 P.2d 576, which distinguishes between "choice-of-forum preemption" and "choice of law preemption"; a federal statute that only preempts state law does not displace state courts (or administrative bodies) as forums for adjudicating claims that may

implicate the preemption. The district court's decision did not address this question.

3. Do the protections of the Americans with Disabilities Act apply to disabled third parties affected by the City's zoning decisions?

In his opening brief Petitioner cited *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44-49 (2d Cir. 1997); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730-32, (9th Cir. 1999); and *Kennedy v. Fitzgerald*, 2002 WL 1796816, *4 (N.D.N.Y. 2002) (*unpublished decision*) (upholding *Kennedy v. Fitzgerald*, 102 F.Supp.2d 100, 102-103 (N.D.N.Y. 2000)), in support of his assertion that disabled third parties affected by zoning decisions are protected by the ADA. He also cited *Heather K. v. City of Mallard*, 946 F.Supp. 1373, 1386-87 (N.D. Iowa 1996), which ruled that a city must protect disabled third parties even in non-zoning regulatory decisions (regulation of open burning). Respondents countered *Heather K.* with a contrary authority, *Safe Air for Everyone v. Idaho*, 469 F.Supp. 2d 884, 888 (D. Idaho 2006), but in his reply Petitioner pointed out that neither *Heather K.* nor *Safe Air for Everyone* is a zoning case, and that it is not disputed that municipal zoning actions are subject to the ADA. The district court, citing only *Safe Air for Everyone*, held that third parties are not protected by the ADA in zoning decisions.

4. Does a zoning decision that physically injures a specific class of disabled people, deprives them of access to virtually all of the City's services, programs, and activities, deprives them of their livelihoods, evicts them from their homes, and exiles them from their city, violate the ADA?

In his opening brief, Petitioner asserted that the discrimination at issue has to do with "the right to walk City sidewalks, enjoy City parks, use City facilities, live in one's own home, etc." Citing *Robertson v. Las Animas County Sheriff's Dept.*, 500 F.3d 1185, 1999 (10th Cir. 2007), *Staron v. McDonalds Corp.*, 51 F.3d 353, 355-58 (2d Cir. 1995), and other cases, he argued that the allegations require the City to hold an evidentiary hearing to fashion reasonable accommodations. AT&T and the City responded that there is no discrimination here because Petitioner is receiving the same benefit from the City's regulations as everyone else. "In the absence of the City's regulations," they said, "AT&T and others would be free to place wireless towers and antennas wherever they chose." Petitioner replied that in the absence of permits from the City, AT&T would not be able to operate its telecommunications facilities at all. The district court, citing *Safe Air for Everyone*, held that the ADA does not apply to this City policy.

5. Does such a zoning decision shock the conscience, violating substantive due process?

Citing the criteria established in *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995), Petitioner argued in his opening brief that to deliberately take an action whose predictable outcome, if the same policy were adopted nationwide, would be

the annihilation of a class of human beings, is conscience shocking and violates substantive due process. Respondents responded that the State is not liable for failure to protect individuals against private conduct. In his proposed decision, Petitioner reiterated that the City has not just acquiesced in private conduct, but has authorized it: in Santa Fe, no one may install an antenna or tower that emits RF radiation without zoning permission (LDC § 14-6.2(E)(2)).[3] The district court ruled that there was no substantive due process violation because the City "did not create" AT&T's RF emissions. The court did not address whether the City authorized them.

6. Does such a zoning decision, by depriving those injured of a mandatory public hearing, violate procedural due process?

This was raised in Petitioner's opening brief. Respondents asserted that the Due Process Clause does not apply to allegations that a "private person [AT&T] has violated an ordinance." In his reply, Petitioner reiterated that it is the action of *the City* in failing to enforce an ordinance requiring a public hearing that is at issue here. The district court held only that the TCA precludes a due process claim.

[3] At the time the Petition for Writ of Mandamus was filed, the only exceptions were antennas used exclusively for emergency services, for the City's water department, or by amateur radio station operators.

7. Does such a zoning decision restrict fundamental rights of the injured class, violating equal protection?

Citing *Regents of University of California v. Bakke*, 438 U.S. 265, 357 (1978), Petitioner asserted in his opening brief that the City's action restricts fundamental rights and violates equal protection under a "strict scrutiny" standard. Citing *Romer v. Evans*, 517 U.S. 620, 631-34 (1996), he argued that even under "rational basis" scrutiny, the City has violated equal protection because its refusal to consider the interests of persons with EHS is not rationally related to any legitimate state interest. He contended that the City's policy is not "facially neutral" because only people with EHS, and not people with other disabilities, are refused a hearing and accommodation by the City. Respondents denied that there is disparate impact; they asserted that "*all* persons," not just those with EHS, "are exposed to those emissions and their potential risks." (*emphasis original*). Petitioner replied that not all persons, but only those with EHS, experience "actual, immediate, real-time effects, amounting to torture, that occur within minutes of exposure, up to and including seizures, heart arrhythmias, loss of consciousness and cessation of breathing." And he cited *M.L.B. v. S.L.J.*, 519 U.S. 102, 126-27 (1996) (a law that is "nondiscriminatory on its face" but in fact impacts only a particular class (the indigent) violates the Equal Protection Clause).

In oral argument Petitioner cited, as evidence that discrimination by the City is intentional, the subsequent repeal of all sections of the City Code under which

people with EHS have previously sought protection, including the sections invoked in the Petition for Writ of Mandamus in the present case.

The district court failed to address the evidence of intentional discrimination, holding that "even if RF emissions may impact persons with EHS more than other persons," there is no equal protection violation because the TCA provides a "rational basis" for the discrimination.

8. Does the Telecommunications Act of 1996 repeal the ADA?

In his opening brief Petitioner cited *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (potentially conflicting federal statutes must be construed, if possible, so as to give force to both), and *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 629 (1993) (a court must make every effort to interpret a statue to avoid constitutional difficulties). Citing the rule that a specific statute takes precedence over a general one (*Kay Elec. Co-op v. City of Newkirk, Okla*., 647 F.3d 1039, 1044 (10th Cir. 2011), he argued that the ADA, applying only to the disabled, is the specific law, while the TCA, which regulates the effects of RF radiation on the "general public," is the general law. Respondents, disagreeing, alleged that regulation of wireless facilities is "more specific" than protection of the disabled, but Petitioner, in his oral argument, said that this is like arguing that an orange is more specific than an apple. The district court held that the TCA is more specific than the ADA and supersedes it.

9. Does TCA § 704 provide a "rational basis" for restricting fundamental rights, or a "valid reason" for depriving affected parties of a hearing?

This was raised by Petitioner in his opening brief, reply brief, and proposed decision, citing *Saenz v. Roe*, 526 U.S. 489, 507 (1999); *Townsend v. Swank*, 404 U.S. 282, 291 (1971); and *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (Congress may not authorize the states to violate the Fourteenth Amendment).

For each of the above issues Respondents' arguments, as recast in their proposed decision, were adopted verbatim by the district court. The district court failed to acknowledge almost all of the points and authorities in Petitioner's briefs.

10. Is Section 704 of the TCA unconstitutional?

In his opening brief, and again in his reply brief, Plaintiff asserted that if the TCA requires violations of due process and equal protection, then it is unconstitutional. Respondents disagreed in their response brief, but ignored this issue in their proposed decision, and the district court therefore did not rule on it.

11. Did the district court violate judicial ethics and due process when it adopted verbatim the arguments in Respondents' *ex parte* proposed decision?

This issue arose when the district court adopted as its opinion the *ex parte* brief of Respondents, and there was therefore no opportunity to raise it as an issue below.

12. Does Petitioner have standing?

This issue arises because in another case now pending in the Court of Appeals implicating Firstenberg's disability, *Firstenberg v. Monribot*, No. 32,549, Judge Singleton dismissed Firstenberg's tort claims on summary judgment after disqualifying his experts under *Daubert/Alberico*. Although Respondents here do not dispute Petitioner's allegations, and the district court said that it need not reach the issue of Petitioner's standing, standing is jurisdictional, *Williams v. Stewart*, 2005-NMCA-061, ¶ 23, 137 N.M. 420, 112 P.3d 281, and it arose when Petitioner addressed it in his proposed decision. In *Firstenberg v. Monribot*, the district court made two findings about general causation, each of which alone would have been sufficient to support the result: (1) that the evidence for the existence of EHS is not reliable; and (2) that plaintiff had not established what level of exposure is required to cause injury. In arguing that that the present case is not barred by collateral estoppel, Petitioner cited *Manlove v. Sullivan*, 1989-NMSC-029, ¶ 14, 108 N.M. 471, 775 P.2d 237 and *Restatement (Second) of Judgments* § 27 comment i and Illustration 15 (1982) (If a determination of two issues, each of which independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone).

Petitioner argued that the requirement of finality is also not met, because the dismissal of the prior case is presently on appeal. On this matter of law, there is a

split of opinion among the states. In several nearby jurisdictions, a pending appeal of a decision prevents its operation as res judicata. *Barnett v. Elite Properties of America, Inc.*, 252 P.3d 14, 22-23 (Colo.App. 2010); *Diederich v. Yarnevich*, 196 P.3d 411, 422 (Kan.App. 2008); *Louisiana Municipal Police Employees' Retirement System v. McClendon*, 307 P.3d 393, 399 and n.2 (Okla.App. 2013); *Boblitt v. Boblitt*, 118 Cal.Rptr.3d 788, 791 (Cal.App.3d 2010). New Mexico precedents, although stated in the negative, are consistent with these opinions: *State ex rel. Sofeico v. Heffernan*, 1936-NMSC-069, ¶ 62, 41 N.M. 219, 67 P.2d 240 ("So long as a judgment remains unappealed from," it is a bar to further suits upon the same action.) *Alvarez v. County of Bernalillo*, 1993-NMCA-034, ¶ 7, 115 N.M. 328, 850 P.2d 1031 ("When a party does not appeal... res judicata doctrine comes into play"); *In re Estate of Duran*, 2007-NMCA-068, ¶ 15, 141 N.M. 793, 161 P.3d 290 ("[A] judgment that is not appealed becomes 'res judicata as to any and all future litigation between the same parties' involving the question resolved," *quoting State ex rel. Sofeico*; *Rodriguez v. State ex rel. Rodriguez*, No. 31,532, mem. op. at 4-5 (N.M. Ct. App. Mar. 8, 2012) (unpublished decision) (Same).

V. LIST OF AUTHORITIES

Citations to the City's Land Development Code ("LDC") are to provisions that were in effect at the time the petition for writ of mandamus was filed. *See* New Mexico Constitution, Article IV, § 34, "No act of the legislature shall affect

the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

No contrary authority is known except where indicated below.

Issue 1

Is an intensification of RF radiation an intensification of use under the City's Land Development Code, requiring an application for a new zoning permit and a public hearing?

1. LDC § 14-3.6(B)(4)(b) (requiring a new permit for any intensification of use).

2. LDC § 14-6.1(A)(3) (prohibiting any use that is objectionable to neighbors or passersby that results from, *inter alia*, radiation).

3. LDC § 14-12.1 (defining "Antenna" as a device that "radiate[s] or capture[s] electromagnetic waves, digital signals, radio frequencies (excluding radar signals), wireless telecommunications signals or other communications signals").

4. LDC § 14-6.2(E)(2)(a) (exempting "receive-only antennas," i.e. antennas that emit no RF radiation, from regulation).

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

6. LDC § 14-6.2(E)(1)(n) (requiring the City to "provide remedies for the public health and safety impacts of communication towers").

7. LDC § 14-6.2(E)(11) (prescribing specific enforcement procedures for the City's telecommunications facilities ordinance).

8. LDC§ 14-11.5(a) (prescribing remedies for violations of the LDC).

9. *Allen v. McClellan*, 1965-NMSC-094, ¶ 6, 75 N.M. 400, 405 P.2d 405 ("[A]ll of the provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent").

10. *Folz v. State*, 1990-NMSC-075, ¶ 63, 110 N.M. 457, 797 P.2d 246 (When a term is not defined, a court is "required… to interpret it in its ordinary, everyday sense"). The ordinary use of the term "intensity" includes floor area (LDC § 14-7.3(B)); number of plants in landscaping (LDC § 14-5.5(A)(4)(b)); brightness of light or color (LDC Tables 14-8.7-2 and 14-8.7-3); and number of dwelling units, seating capacity, and loading facilities (LDC § 14-8.6(B)(3)(a)). "Intensification of use" has been used to describe an increase in the number of tenants in rental cottages (*Cummings v. Tripp*, 204 Conn. 67, 96, 527 A.2d 230, 244 (1987)) and an increase in the amount of business or frequency of use of a facility (*Heagen v. Borough of Allendale*, 42 N.J. Super. 472, 481, 127 A.2d 181, 185 (App.Div.1956)). Enlargement of an asphalt plant's operating capacity was an illegal intensification of use (*APAC-Atlantic, Inc. v. City of Salisbury*, 709 S.E.2d 390 (N.C. App. 2011)), as was an increase in the number of animals in a feedlot (*Thieman v. Cedar Valley Feeding Co., Inc*., 18 Neb. App. 302, 789 N.W.2d 714

(Neb. App. 2010)), an extension of hours of a grocery store (*Garb-Ko v. Carrollton Tp.*, 86 Mich. App. 350, 272 N.W.2d 654 (Mich. App. 1978)), and replacement of existing antennas and installation of new antennas on an existing telecommunications tower (*Century Cellunet of Southern Michigan Cellular, Ltd. v. Summit Twp.*, 250 Mich. App. 543, 655 N.W.2d 245 (Mich. App. 2002)).

11. *State, City of Albuquerque v. Pangaea Cinema LLC*, 2013-NMSC-044, ¶ 18, 310 P.3d 604 (A court must construe a municipal ordinance, if possible, to avoid constitutional questions).

The district court cites *Hyde v. Taos Municipal-County Zoning Authority*, 1991-NMCA-114 ¶ 3, 113 N.M. 29, 822 P.2d 126 (deference is given to the City's interpretation of its own ordinances), with which Petitioner agrees. The City's conclusory statement that the LDC does not regulate "the environmental effects of RF emissions" is consistent with the minutes of the Board of Adjustment meeting, at which the Board members explained that this policy is based on TCA § 704, and not on the plain meaning of "intensification of use," which otherwise would apply.

Issue 2

Does an assertion of federal preemption deprive the City of the authority to hold an otherwise mandatory hearing and adjudicate claims of the affected public?

1. *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶¶ 13-16, 120 N.M. 133, 899 P.2d 576 (distinguishing between "choice-of-law" preemption and

"choice-of-forum" preemption).

2. 47 U.S.C. § 332(c)(7)(B)(v) (The TCA does not vest exclusive jurisdiction over controversies about RF radiation in any particular body).

Issue 3

Do the protections of the Americans with Disabilities Act apply to third parties affected by the City's zoning decisions?

1. 28 C.F.R. pt. 35, App. B at 660 (2010) (Title II of the ADA applies to "anything a public entity does").

2. Municipal zoning decisions are subject to the ADA. *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 361 & n. 2 (4th Cir. 2008); *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, 750 (7th Cir. 2006); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 334-35 (6th Cir. 2002); *Cinnamon Hills Youth Crisis Center v Saint George City*, 2011 WL 61602, *4 (D. Utah 2011) (*unpublished decision*).

3. Municipal zoning decisions that affect disabled third parties are subject to the ADA. *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44-49 (2d Cir. 1997); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730-32 (9th Cir. 1999); *Kennedy v. Fitzgerald*, 102 F.Supp.2d 100, 102-103 (N.D.N.Y. 2000) (where city refused to modify zoning policy to allow store to construct wheelchair ramp, disabled patron stated a claim against the city under the ADA).

4. *The Americans with Disabilities Act: Title II Technical Assistance Manual* [of the Department of Justice] § II-3.6100, illus. 1 (1993) (A zoning ordinance that has the effect of preventing wheelchair access to businesses would run afoul of the ADA).

5. Even non-zoning decisions regulating private activity that affects disabled third parties are subject to the ADA. *Heather K. v. City of Mallard*, 946 F.Supp. 1373 (N.D.Iowa 1996); *Sak v. City of Aurelia*, 832 F.Supp.2d 1026, 1042 (N.D.Iowa 2011).

Safe Air for Everyone v. Idaho, 469 F.Supp.2d 884 (D.Idaho 2006) is a contrary authority regarding non-zoning decisions.

Issue 4

Does a zoning decision that physically injures an identifiable class of people, deprives them of access to virtually all of the City's services, programs, and activities, deprives them of their livelihoods, evicts them from their homes, and exiles them from their city, violate the ADA?

1. Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*

2. 28 C.F.R. § 35.130(b)(3)(i) ("A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration— (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability").

3. 28 C.F.R. § 35.130(b)(4)(i) ("A public entity may not, in determining the site or location of a facility, make selections— (i) that have the effect of

excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination").

4. *Tennessee v. Lane*, 541 U.S. 509, 524 (2004) ("Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights").

5. *Patton v. TIC United Corp.*, 77 F.3d 1235, 1245 (10th Cir. 1996) (Violation occurs "regardless of whether the entity intended to discriminate against the disabled person").

6. *McGary v. City of Portland*, 386 F.3d 1259, 1264-65 (9th Cir. 2004) (A municipality's regulatory program, even if facially neutral, may not unduly burden disabled persons).

7. *Heather K.*; reaffirmed in *Sak v. City of Aurelia* (A regulation that deprives disabled third parties of access to city parks and sidewalks states a claim under the ADA). *Safe Air for Everyone* is a contrary authority.

8. A public entity need not fundamentally alter the nature of a program or incur an undue financial or administrative burden, *Robertson v. Las Animas County Sheriff's Department,* 500 F.3d 1185, 1999 (10th Cir. 2007); 28 C.F.R. § 35.130(b)(7). But a public entity may not discriminate against the disabled without proving that accommodation would be unduly burdensome, without justifying such

a conclusion in writing, and without making every effort to mitigate such a decision. *Id.*; 28 C.F.R. § 35.164.

9. An evidentiary hearing is necessary to fashion reasonable accommodations under the ADA. *Robertson v. Las Animas County*; *A.P. v. Anoka-Hennepin Independent School District No. 11,* 538 F.Supp.2d 1125, 1141-44 (D. Minn. 2008); *Developmental Services of Nebraska v. City of Lincoln,* 504 F.Supp.2d 726, 739-40 (D. Neb. 2007); *Powers v. MJB Acquisition Corp.,* 993 F.Supp. 861, 868 (D. Wyo. 1998); *Staron v. McDonalds Corp.,* 51 F.3d 353, 355-58 (2d Cir. 1995).

Issue 5

Does such a zoning decision shock the conscience, violating substantive due process?

1. U.S. Constitution, Amendment Fourteen.

2. The City has authorized AT&T's operations. LDC § 14-6.2(E)(2) ("All towers or antennas located within the City limits whether upon private or public lands shall be subject to this section").

3. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (Certain government actions are barred "regardless of the fairness of the procedures used to implement them").

4. *Rochin v. California,* 342 U.S. 165 (1952) (Actions that "shock the conscience" violate substantive due process").

5. Violation of substantive due process exists if

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

Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995). *See also Radecki v. Barela*, 146 F.3d 1227, 1229-30 (10th Cir. 1998); *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001).

6. A state defendant is liable for deliberate indifference to the constitutional rights of persons injured. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989); *Currier v. Doran*, 242 F.3d at 919-20; *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1264 (10th Cir. 1998); *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1240-41 (10th Cir. 1999); *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353, 2002 WL 1472197 (10th Cir. 2002) (*unpublished decision*); *Wood v. Ostrander*, 879 F.2d 583, 587-88 (9th Cir. 1989).

7. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982):

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Respondents, disagreeing, cite *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196-197 (1989); *Graham v. Independent School*

Dist. No. 1-89, 22 F.3d 991, 995 (10th Cir. 1994); *Johnson v. Holmes*, 455 F.3d 1133, 1141 (10th Cir. 2006); *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1279 (10th Cir. 2003); and *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1263 (10th Cir. 2002), cases in which, however, the state actor neither authorized the injurious conduct nor created the dangerous situation.

Issue 6

Does such a zoning decision, by depriving those injured of a mandatory public hearing, violate procedural due process?

1. U.S. Constitution, Amendment Fourteen.

2. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner").

3. *Pater v. City of Casper*, 646 F.3d 1290, 1293 (10th Cir. 2011) (A homeowner's interests must be protected by due process).

4. When a municipality adopts a land use policy that affects a small percentage of persons, due process requires that they have a hearing. *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 896 (6th Cir. 1991); *Harris v. County of Riverside*, 904 F.2d 497, 502 (9th Cir. 1990); *Moreland Properties, LLC v. City of Thornton*, 559 F.Supp.2d 1133, 1160-61 (D.Colo. 2008).

For their contrary argument Respondents cite only *Doe v. Todd County School District*, 625 F.3d 459, 464 (8th Cir. 2010) (finding, where a hearing on a student's placement was not mandated by law and was requested from a school

board that had no authority over such placement, that "[p]ointless process is never due").

Issue 7

Does such a zoning decision restrict fundamental rights of the injured class, violating equal protection?

1. U.S. Constitution, Amendment Fourteen.

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

3. *Shapiro v. Thompson*, 394 U.S. 618, 629-31, 638 (1969) (Infringing on the right of interstate travel is a violation of equal protection).

4. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (Even under "rational basis" scrutiny, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational").

5. *Romer v. Evans,* 517 U.S. 620, 633 (1996) (A law that identifies persons by a single trait and denies them protection across the board violates equal protection).

6. *M.L.B. v. S.L.J.*, 519 U.S. 102, 126 (1996) (A law that is "nondiscriminatory on its face" but whose impacts fall only on a particular class (the indigent) violates equal protection).

7. Departure from normal procedures raises an inference of discriminatory purpose. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979) (landlord changes rules when a minority applicant appears); *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267 n. 16, *citing Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (town declares moratorium on new subdivisions upon learning of plans to build low income housing).

Discriminatory purpose is indicated here by the City's repeal, after persons with EHS demanded accommodation, of every City Code provision that they had invoked:

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

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

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

11. Sites S205 and S215 were appealed for violations of state and federal laws and constitutions. Ordinance No. 2011-9, adopted April 13, 2011, deleted the wording in LDC § 14-3.17(A)(2)(a) and (b) that had provided for appeals "[t]o contest noncompliance of a final action with... state or federal constitutions, laws or regulations" or "[t]o contest an interpretation of... state or federal constitutions, laws or regulations."

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

13. Ordinance No. 2011-16 repealed LDC § 14-6.2(E)(1)(n), which had required the City to provide remedies for the public health and safety impacts of communication towers.

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

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

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

17. The entire enforcement section of the telecommunications facilities ordinance, LDC § 14-6.2(E)(11), which Petitioner in the present case requested the district court to order implemented, was deleted by Ordinance No. 2011-9.

For their position that no equal protection violation has occurred, Respondents cite *Coalition for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008), a case in which no infringement of fundamental rights was alleged; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978), a case in which the state ordinance did not authorize the complained-of action; *Rylee v. Chapman*, 316 Fed. Appx. 901, 907 (11th Cir. 2009), an unpublished opinion in which no violation of fundamental rights was alleged; *Muller v. Culbertson*, 2011 WL 304484, *1 (10th Cir. Feb. 1, 2011), another unpublished opinion, in which there was no coherent allegation of discrimination; and *Lee v. City of Los Angeles*, 250

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

F.3d 668, 686-87 (9th Cir. 2001), a case in which the complained-of conduct was not intentional but due to a mistake.

Issue 8

Does the Telecommunications Act of 1996 repeal the ADA?

1. Repeals by implication are not favored. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978); *Traynor v. Turnage*, 485 U.S. 535, 547 (1988); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 137 (2001); *Cook County v. Chandler*, 538 U.S. 119, 132 (2003); *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007).

2. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("'When there are two acts upon the same subject, the rule is to give effect to both if possible'"(*citation omitted*)).

3. *Branch v. Smith*, 538 U.S. 254, 293 (2003) (Justice O'Connor, concurring) (Outside the antitrust context, the U.S. Supreme Court appears not to have found an implied repeal of a statute since 1917).

4. "'A specific statute controls over a general one without regard to priority of enactment.'" *Kay Elec. Co-op v. City of Newkirk, Okla.*, 647 F.3d 1039, 1044 (10th Cir. 2011). (*citation omitted*). *Accord Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Sierra Club-Black Hills Group v. United States Forest Service*, 259 F.3d 1281 (10th Cir. 2001).

5. In re *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, ET Dkt. No. 93-62, 11 F.C.C.R. 15123, 15135 (August 1, 1996) (The TCA is concerned with the effects of RF radiation on the "general public").

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

7. A court must construe a statute, if possible, to avoid constitutional difficulties. *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 629 (1993); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986).

8. TCA § 601(c)(1), 110 Stat. at 143 (1996) (*codified at* 47 U.S.C. § 152 note)) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments").

9. 47 U.S.C. § 255 (TCA requires telecommunications equipment and services to be accessible to persons who have a disability as defined by the ADA).

Issue 9

Does TCA § 704 provide a "rational basis" for restricting fundamental rights, or a "valid reason" for depriving affected parties of a hearing?

1. Congress may not authorize the States to violate the Fourteenth Amendment. *Saenz v. Roe,* 526 U.S. 489, 507 (1999); *Townsend v. Swank,* 404 U.S. 282, 291 (1971); *Shapiro v. Thompson,* 394 U.S 618, 641 (1969).

Issue 10

Is Section 704 of the TCA unconstitutional?

1. U.S. Constitution, Amendment Five.

2. Equal Protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976).

Issue 11

Did the district court violate judicial ethics and due process when it adopted verbatim the arguments in Respondents' *ex parte* proposed decision?

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

Petitioner knows of no precedent for the filing of "proposed decisions" where there is no trial and the case is submitted for decision on the pleadings. Plaintiff also knows of no precedent where a judge has accepted an *ex parte* brief

under such circumstances. The following authorities pertain to briefs or proposed findings of fact submitted before or after a trial.

2. *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 708-712 (7th Cir. 1979) (Parties must serve their trial briefs on all other parties at the time they submit them to the court).

3. *O'Connor v. Leapley*, 488 N.W.2d 421, 422 (S.D. 1992) (*Ex parte* submission of pretrial brief violated Code of Professional Responsibility for lawyers).

4. *Peterson v. New Castle Corp.*, 2011 WL 5117884, n. 3 (D.Nev. 2011) (*Ex parte* briefs, without any certificate of service and not entered into the docket, are improper).

5. *In re Wisconsin Steel Corp.*, 48 B.R. 753, 761 (N.D. Ill. 1985) (Submission of a memorandum to the trial judge without a copy to the other side was improper, even where the court asked for it; both attorney and judge were disqualified).

6. Findings and conclusions written by prevailing party and adopted verbatim are subject to greater scrutiny on appeal. *Ramey Construction Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 616 F.2d 464, 467-68 (10th Cir. 1980); *Edward B. Marks Music Corp. v. Colorado Mag., Inc.*, 497 F.2d 285, 287 (10th Cir. 1974); *Hagans v. Andrus*, 651 F.2d 622, 626 (9th Cir. 1981), *cert.*

denied, 454 U.S. 859 (1982); *In re Alcock*, 50 F.3d 1456 (9th Cir. 1995); *Andre v. Bendix Corp.*, 774 F.2d 786, 800-801 (7th Cir. 1985); *In re Complaint of Luhr Bros. Inc*., 157 F.3d 333, 338 (5th Cir. 1998), *cert. denied*, 526 U.S. 1050 (1999); *Orthopaedics of Jackson Hole, P.C. v. Ford*, 250 P.3d 1092, 1100-01 (Wyo. 2011).

7. *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970) (Adoption of proposed findings verbatim casts "maximum doubt" on those findings, and should be limited to cases where the subject matter is of a highly technical nature requiring expertise which the court does not possess).

8. *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961), *cert. denied*, 368 U.S. 825 (1961) (Preparation of the opinion by the attorney for either side involves "failure of the trial judge to perform his judicial function" and when there was no notice to the opposing side, it violated due process, warranting reversal of the judgment).

9. *In re Colony Square Company*, 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) ("Ghostwriting" of judicial orders by litigants "serves as an additional opportunity for a party to brief and argue its case and thus is unfair to the party not accorded an opportunity to respond").

10. *Roberts v. Ross*, 344 F.2d 747, 751-53 (3d Cir. 1965) (Court's verbatim adoption of one party's findings and conclusions was grounds for reversal

and remand); *Pennsylvania Environmental Defense Foundation v. Canon-McMillan School District*, 152 F.3d 228, 232-35 (3d Cir. 1998) (Same).

11. *Bilzerian v. Shinwa Co. Ltd.*, 184 B.R. 389 (M.D. Fla. 1995) ("Due process is denied a party when a judge adopts a party's order verbatim, without previously conclusively ruling on the matters in it").

12. *In re Dekle*, 308 So.2d 5 (Fla. 1975) (Florida Supreme Court publicly reprimanded a sitting justice for using an *ex parte* legal memorandum from an attorney for amici curiae in the preparation of his opinion).

Issue 12

Does Petitioner have standing?

1. *Manlove v. Sullivan*, 1989-NMSC-029, ¶ 14, 108 N.M. 471, 775 P.2d 237 (1989) (If each of two issues standing alone is sufficient to support the result, the judgment is not conclusive with respect to either issue).

2. *Restatement (Second) of Judgments* § 27 comment i and Illustration 15 (1982) (Same).

3. A pending appeal of a decision prevents its operation as res judicata. *Barnett v. Elite Properties of America, Inc.*, 252 P.3d 14, 22-23 (Colo.App. 2010); *Diederich v. Yarnevich*, 196 P.3d 411, 422 (Kan.App. 2008); *Louisiana Municipal Police Employees' Retirement System v. McClendon*, 307 P.3d 393, 399 and n. 2 (Okla.App. 2013); *Boblitt v. Boblitt*, 118 Ca.Rptr.3d 788, 791 (Cal.App.3d 2010).

4. A judgment is res judicata so long as it is not appealed from. *State ex rel. Sofeico v. Heffernan*, 1936-NMSC-069, ¶ 62, 41 N.M. 219, 67 P.2d 240; *Alvarez v. County of Bernalillo*, 1993-NMCA-034, ¶ 7, 115 N.M. 328, 850 P.2d 1031; *In re Estate of Duran*, 2007-NMCA-068, ¶ 15, 141 N.M. 793, 161 P.3d 290; *Rodriguez v. State ex rel. Rodriguez*, No. 31,532, mem. op. at 4-5 (N.M. Ct.App. Mar. 8, 2012) (*unpublished decision*).

VI. STATEMENT OF RECORDATION OF PROCEEDINGS

The entire proceedings were tape recorded.

VII. PRIOR OR RELATED APPEALS

Firstenberg v. Monribot, No. 32,549, pending in the Court of Appeals, has related factual issues concerning Firstenberg's disability.

Respectfully submitted,

Arthur Firstenberg
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AFFIDAVIT OF SERVICE

Arthur Firstenberg, being duly sworn, declares under penalty of perjury that he mailed the foregoing docketing statement to the following persons or entities at the addresses indicated on this 2nd day of January, 2014.

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_____
Arthur Firstenberg

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

_____
Notary Public

My Commission Expires: _____