

**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-KG-JHR

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

Defendants.

**PLAINTIFFS' MEMORANDUM OF LAW IN REPLY TO
CITY OF SANTA FE, HECTOR BALDERAS, AND THE UNITED STATES
AND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiffs’ specific allegations that they have been deprived of their liberty, their property, their health, and nearly their lives by cell towers in proximity to their homes and business is supported by 25 personal testimonials, and the affidavits of two of their doctors and six other world-class experts reviewing thousands of peer-reviewed scientific studies. The burden now shifts to Defendants, who, however, do not challenge *any* of Plaintiffs’ allegations, file *no* evidence at all, allege *no* facts, and instead rehash the legal arguments contained in the motions to dismiss filed by the City and the United States. Plaintiffs fully understand that if the two filed motions to dismiss (Doc. 21 and Doc. 46) are granted then there can be no preliminary injunction nor any other relief awarded by this Court with regard to those Defendants. But Plaintiffs also fully understand that should either or both motions to dismiss be denied—and with regard to the Attorney General of New Mexico who filed an Answer (Doc. 40) and not a motion to dismiss—the Defendants have indicated by these opposition papers they do not dispute any of Plaintiffs’ evidence or factual allegations.

Defendants’ unsupported responses contradict one another. These contradictions not only justify the injunctive relief being sought, but also demonstrate why dismissal of the complaint is unjustified. The United States says the Court has no jurisdiction over the United States because federal law has nothing to do with whether the City permits or prohibits *anything* (“The federal government does not dictate these local decisions” (Doc. 65 at 7)). But the New Mexico Attorney General says the City *must* permit antennas on the sidewalk in order to comply with federal law (“The Plaintiffs are asking the Court to find irreparable harm, when the Defendants are complying with existing federal law” (Doc. 67 at 5)). And the City says the Court *must*

invalidate federal law in order to grant Plaintiffs relief from the City (“[T]he Court would have to invalidate the federal law at issue”) (Doc. 66 at 5)). The Attorney General says the State cannot enforce WCAIIA (“The WCAIIA contains no enforcement provisions” (Doc. 67 at 5)). But the City says WCAIIA *forces* it to permit antennas on the sidewalks (“[T]he City of Santa Fe is attempting to comply with state and federal requirements imposed upon local governments” (Doc. 66 at 5)).

Each Defendant says it is someone else’s fault, and each Defendant says it has no choice but to deprive Plaintiffs of their lives, liberty and property as detailed in the expert affidavits Plaintiffs have submitted. The Court is free to take that evidence at face value, since no Defendant has contested any of it or introduced any evidence of their own. Plaintiffs have introduced detailed evidence of both general and specific causation, and once Plaintiffs have done that, the burden shifts to Defendants to contest that evidence. Defendants have not met their burden. A preliminary injunction should issue.

ARGUMENT

1. Plaintiffs’ Previous Filing Was Dismissed Without Prejudice

As already pointed out by Plaintiffs in their Opposition to City of Santa Fe’s Amended Motion to Dismiss (Doc. 22, p. 24), the City’s citations to *Santa Fe Alliance for Public Health and Safety v. City of Santa Fe*, Case No. 1:18-cv-00032-JAP-SCY are not relevant. That case was dismissed without prejudice on April 6, 2018 (*Id.*, Doc. 41) because at that time no franchises had yet been awarded and Plaintiffs had not alleged specific harm from specific facilities (*Id.*, Doc. 40 at 7). In December 2018, after Plaintiffs had experienced specific harm from specific facilities erected pursuant to the Mayor’s Proclamation of Emergency (Doc. 19, ¶¶

24, 25, 27), after five franchises had been awarded (Doc. 19, ¶ 52), and after three franchisees had announced the specific locations of some of their proposed facilities (Doc. 19, ¶ 54), Plaintiffs filed the present action, supplying the details that were missing from their previous filing and correcting other deficits to which Judge Parker had called their attention.

2. Plaintiffs Are Only Asking to Maintain the Status Quo

Plaintiffs filed the present action before there were any antennas on the sidewalks in Santa Fe. To Plaintiffs' knowledge, there are still no antennas on the sidewalks in Santa Fe. Contrary to the contention of the New Mexico Attorney General, a preliminary injunction against antennas on the sidewalk would maintain the status quo pending trial. It is Defendants who want to alter the status quo by locating antennas on sidewalks throughout Santa Fe before trial, thereby ensuring that even if Plaintiffs prevail at trial, the judicial process would be rendered futile (see point 5, *infra*).

Contrary to the contention of the New Mexico Attorney General, the relief Plaintiffs seek is therefore a typical preliminary injunction and is not subject to a heightened standard. As stated in *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 798 n. 3 (10th Cir. 2019), "if the plaintiffs lose on the merits after a trial, then [the city] may fully enforce its [] ordinance" (citing *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246-50 (10th Cir. 2001)).

3. Plaintiffs are Likely to Succeed on the Merits

In the context of constitutional claims, the first and second preliminary injunction factors are collapsed, "equating likelihood of success on the merits with a demonstration of irreparable injury." *Free the Nipple-Fort Collins*, 916 F.3d at 806. Here the likelihood of success on the merits depends on the evidence that antennas on the sidewalks would deprive Plaintiffs and

Plaintiff's members of their lives, liberty and property. In support of their Motion for Preliminary Injunction ("Motion"), Plaintiffs attached the affidavits of eight well-qualified expert witnesses, including two of Plaintiffs' doctors:

- Sharon Goldberg, M.D., of Santa Fe, specialist in internal medicine and an Editorial Board member of the scientific journal, *Electromagnetic Biology and Medicine* (Doc. 63-5);
- Leah Morton, M.D., of Santa Fe, specialist in family medicine in practice for over three decades, and one of Plaintiff Firstenberg's doctors, attesting to the causation of his injuries by cell towers (Doc. 63-4);
- Erica Elliott, M.D., of Santa Fe, specialist in family medicine and environmental medicine, in practice for over three decades and another of Plaintiff Firstenberg's doctors, also attesting to the causation of his injuries by cell towers (Doc. 63-8);
- Raymond Singer, Ph.D., of Santa Fe, neuropsychologist, neurotoxicologist and expert on electromagnetic field neurotoxicity (Doc. 63-7);
- Arthur Firstenberg, of Santa Fe, scientist, consultant to doctors, author of the first comprehensive book on the environmental effects of electricity, and president of the oldest and largest organization in North America devoted to reducing electromagnetic pollution (Doc. 63-3);
- Magda Havas, Ph.D., Professor Emeritus of Environmental Toxicology at Trent School of the Environment in Peterborough, Ontario, Canada, well-known researcher on the effects of cell phones and cell towers on health (Doc. 63-1);

- Alfonso Balmori, wildlife biologist in Valladolid, Spain and one of the world's foremost researchers on the effects of radio frequency ("RF") radiation on plants and animals (Doc. 63-2);
- Walter McGinnis, electrician, of Victoria, British Columbia, Canada, whose specialty is the measurement and mitigation of electric and magnetic fields and RF radiation in homes and businesses (Doc. 63-6).

Attached to Mr. Firstenberg's affidavit are 25 testimonials, solicited from him by the New Mexico Attorney General, written by Plaintiffs and Plaintiff's members who have been injured by, and lost homes and businesses to, cell towers (Doc. 63-15). Attached to Dr. Havas's affidavit is a bibliography of 67 peer-reviewed scientific studies and expert reports that she reviews in her affidavit (Doc. 63-26). Attached to Dr. Morton's affidavit are summaries of 11 peer-reviewed studies of the injurious effects of cell towers (Doc. 63-23); she reviews 17 additional studies in her affidavit, and summarizes the *BioInitiative Report*, a 1,470-page report that reviews 1,800 studies. Dr. Singer reviews 33 peer-reviewed scientific studies in his affidavit. Dr. Goldberg reviews 23 peer-reviewed scientific studies in her affidavit. Mr. Balmori's affidavit summarizes two decades of his own research on plants and animals, including a number of his own peer-reviewed studies.

Such a voluminous amount of evidence, standing by itself, is more than sufficient to establish that Plaintiffs are "substantially likely to succeed on the merits." *DTC Energy Group, Inc. v. Hirschfeld*, 912 F.3d 1263, 1270 (10th Cir. 2018) (quoting *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1141 (10th Cir. 2017), quoting *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016)). Plaintiffs stated in their Motion that this evidence is "so substantial and the

threatened harm to life, liberty and property so serious as to merit a preliminary injunction” (Doc. 63 at 17-18). However, given the controversial nature of this subject and the expectation that Defendants would answer with affidavits and evidence of their own, Plaintiffs relied on Tenth Circuit jurisprudence that allowed the issuance of a preliminary injunction under the modified standard of ““questions going to the merits... so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.”” *Prairie Band of Potawatomi Indians*, 253 F.3d at 1246-47 (quoting *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1195 (10th Cir.1990)).

The United States is correct that the modified standard was overruled by the Tenth Circuit in 2017. *New Mexico Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017). However, not only has the United States failed to introduce any evidence of its own, but neither the United States nor any other Defendant has made any attempt to refute, challenge, or even answer *any* of the voluminous evidence filed by Plaintiffs. In the absence of evidence to the contrary, Plaintiffs’ undisputed evidence is more than sufficient to satisfy the unmodified standard of a “substantial likelihood of success on the merits.” The Tenth Circuit faced a similar situation in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013):

[T]he government nowhere contested the *factual* adequacy or accuracy of [the plaintiffs’] allegations, and given that those allegations were established through a verified complaint, they are deemed admitted for preliminary injunction purposes. *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 542 (7th Cir.1998) (noting that “[v]erified complaints [are] the equivalent of affidavits”); 11A Charles Alan Wright et al., *Fed. Prac. & Proc.* § 2949 (2d ed., Apr. 2013 update) (“[T]he written evidence [in a preliminary injunction proceeding] is **presumed true if it is not contradicted.**”).

(italics in original; bold emphasis added).

The deprivations alleged here involve some of the loftiest and most fundamental values protected by the Constitution: the rights to life, liberty, freedom of speech, private property, and petition. To say, as the United States does, that “Plaintiffs do not even attempt to make a ‘strong showing’ that they are substantially likely to succeed on their novel First and Fifth Amendment challenges to the Telecommunications Act” (Doc. 65, p. 4), or to say, as the New Mexico Attorney General does, that a person’s interests in remaining healthy and alive, or remaining free to visit public spaces, or live safely at home, are not “cognizable life, liberty or property interests” (Doc. 67, p. 4) is nothing but bald-faced sophistry. If the United States or the New Mexico Attorney General believes that antennas on the sidewalk would cause no harm to Plaintiffs, they have not said so: they have not introduced any evidence, nor disputed any of the evidence in the affidavits of scientific researchers and physicians presented with Plaintiffs’ Motion.

4. Burden of Proof

Any “government practice or statute which restricts ‘fundamental rights’... is to be subjected to ‘strict scrutiny,’” *Regents of University of California v. Bakke*, 438 U.S. 265, 357 (1978). In such cases plaintiffs bear the initial responsibility of providing the factual basis for their motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). But “‘the government bears the burden of proof on the ultimate question of [the challenged Act’s] constitutionality.’” *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006), (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004)).

Even under intermediate scrutiny, and even on a motion for preliminary injunction, once plaintiffs have submitted evidence of a constitutional deprivation, it is the government’s burden to justify those deprivations. *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1073

(10th Cir. 2001) (“We hold that the burden remains on Utah to justify its speech restrictions”). Again under intermediate scrutiny, “The moving party may carry its initial burden either by producing affirmative evidence negating an essential element of the nonmoving party’s claim, or by showing that the nonmoving party does not have enough evidence to carry its burden of persuasion at trial.” *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002). “This burden-shifting approach applies even at the preliminary injunction stage.” *Hobby Lobby*, 723 F.3d at 1126. *See also Association of Community Organizations for Reform Now, (ACORN) v. Municipality of Golden, Colo.*, 744 F.2d 739, 746 (10th Cir. 1984) (“[T]hough duly enacted laws are ordinarily presumed constitutional, when a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality”); *Ashcroft v. American Civil Liberties Union*, 542 U.S. at 666 (On motion for preliminary injunction, strict scrutiny applies to the deprivation of fundamental rights and “[t]he government bears the burden of proof on the ultimate question of [a law’s] constitutionality”). Moreover, the government has “the burden to introduce specific evidence” justifying its law. *Id.* at 658. “[T]he burdens at the preliminary injunction stage track the burdens at trial.” *Gonzales*, 546 U.S. at 429.

A motion for preliminary injunction is evaluated on the evidence. The standard of review for denial of a preliminary injunction is abuse of discretion, *A.C.L.U. v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999); abuse of discretion occurs ““where there is no rational basis in the evidence for the ruling.”” *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003) (quoting *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1292 (10th Cir. 1999)). The likelihood of success on the merits is determined by the evidence, and “disputed

evidence should be viewed in the favor of the nonmoving party.” *Utah Licensed Beverage Ass’n*, 256 F.3d at 1073.

Here, the government Defendants have submitted *no* evidence, and have disputed none of Plaintiffs’ evidence. Their responses to Plaintiffs’ Motion do little more than repeat the legal arguments put forward in their motions to dismiss. The evidence filed by Plaintiffs showing an imminent danger to their lives, liberty and property stands unrefuted and unchallenged. Plaintiffs have met their burden. The nonmoving parties have failed to meet their burden and a preliminary injunction should issue.

The situation here is one where, if it occurred at trial, the plaintiff “presents evidence of such great extent and one-sidedness that he or she is entitled to a verdict as a matter of law.” *Logan v. Public Employees Retirement Association*, 163 F.Supp.3d 1007, 1024 n. 6 (D.N.M. 2016).

5. Absent a Preliminary Injunction, Plaintiffs Will Suffer Irreparable Harm Before Trial.

“Preliminary injunctions are meant ‘to protect [a] plaintiff from irreparable injury and to preserve the court’s power to render a meaningful decision after a trial on the merits... [T]he most compelling reason in favor of entering a [preliminary-injunction] is the need to prevent the judicial process from being rendered futile by [the] defendant’s action or refusal to act.” *DTC Energy Group, Inc.*, 912 F.3d at 1275 (McHugh, Circuit Judge, concurring) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2947 (3d ed. 2013) and citing *Greater Yellowstone Coalition*).

In *Greater Yellowstone Coalition*, a preliminary injunction was requested to prevent harm to bald eagle nests and juvenile bald eagles. The district court denied the request for an injunction because the harm was speculative and loss of nests before trial was not certain. The

Tenth Circuit reversed. “An ‘irreparable harm requirement is met if a plaintiff demonstrates a *significant risk* that he or she will experience harm that cannot be compensated after the fact by monetary damages’” (emphasis in original). 321 F.3d at 1258 (quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000)). Further, ruled the Court, “plaintiffs have shown a significant risk that irreparable harm will occur before the district court decides the merits of this case.” 321 F.3d at 1261.

Here, instead of bald eagle lives, human lives are at stake. Plaintiffs have alleged, and have filed uncontradicted evidence in support, that unless a preliminary injunction is granted, “Plaintiffs and Plaintiff’s members are in danger of losing their homes and their lives before trial.” (Doc. 63 at 2). As in *Greater Yellowstone Coalition*, absent a preliminary injunction, the judicial process would be rendered futile because even if the Plaintiffs prevail at trial, their homes and their lives would already be lost.

6. Balance of Equities and the Public Interest

“‘[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.’” *Hobby Lobby*, 723 F.3d at 1147 (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)).

As with the other preliminary injunction factors, the failure of Defendants to counter or even dispute any of Plaintiffs’ evidence regarding the harm to the public health, the environment, and Plaintiffs’ lives, liberty, and property, weighs heavily toward a finding that the balance of equities is in favor of Plaintiffs, and a that preliminary injunction is in the public interest. “The trial court must rely on the evidence before it in determining whether to grant a preliminary injunction.” *Maxim’s Ltd. v. Badonsky*, 772 F.2d 388, 391 (7th Cir. 1985). To the extent that

Defendants make balance of equities and public interest arguments, they are legal arguments only, supported by no evidence, and are without merit:

a. The assertions of the City and the New Mexico Attorney General that a preliminary injunction would violate 47 U.S.C. § 253(a), and the assertion of the City that an injunction would violate 47 U.S.C. § 1455(a)(1), are not correct. § 1455(a)(1) applies only to modifications of existing wireless facilities, not new wireless facilities. And as Plaintiffs have previously pointed out in their Opposition to City of Santa Fe’s Amended Motion to Dismiss (Doc. 22, pp. 17-18), § 253(a) is immediately followed by § 253(b), which states: “Nothing in this section shall affect the ability of a State to ... *protect the public safety and welfare...*” (emphasis added). Those sections are part of the Telecommunications Act of 1996. Contrary to the contentions of both the City and the New Mexico Attorney General, a preliminary injunction would be consistent with, not adverse to, the purposes of the Telecommunications Act, one of which is to protect the public safety and welfare. The only section of that Act which Plaintiffs seek to enjoin is the only section of that Act that is directly contrary to the public safety and welfare: Section 704.

b. The City’s argument that the economic policies behind the Telecommunications Act outweigh any “generalized harms” or “increases in symptoms” not only misstates Plaintiffs’ Motion, but also undervalues human life and public health. Plaintiffs allege not that RF radiation increases symptoms but that it is a *cause of major diseases for Plaintiffs as well as the general public*. (Doc. 63, p. 3). Laryngospasm, irregular heartbeat, elevated blood pressure, damage to heart muscle, crippling pains, and loss of six homes (Doc. 63, pp. 3-4) are not “generalized harms.” Nor are internal bleeding and loss of a business on Guadalupe Street (Doc. 63, p. 4). Nor

are seizures (p. 4) or lung cancer (p. 5). According to equitable principles, extensive loss of human lives and impairment of public health should outweigh pecuniary interests and the introduction of new technologies the need for which the City has introduced no evidence, let alone attempted to make any arguments weighing such need against the expected loss of life and health.

c. The New Mexico Attorney General's assertion that telecommunications providers have no opportunity to defend their interests in this proceeding (Doc. 67, p. 6) is not correct. The telecommunications companies may intervene in this lawsuit at any time under Fed. R. Civ. P. 24.

d. The New Mexico Attorney General's assertion that there is no need to enjoin the enforcement of WCAIIA because WCAIIA "contains no enforcement provisions," and that he would be without power to compel compliance by the City with a mandamus action (Doc. 67, p. 5), is absurd. Mandamus is a type of enforcement action which in this case would rely on WCAIIA for enabling authority. The Attorney General is the State's chief law enforcement officer and he is charged with enforcing all of the State's laws, including WCAIIA: the City needs to know that the proposed injunction would cover any of the State's powers to mandate the deployment of these antennas.

CONCLUSION

The unchallenged evidence filed by Plaintiffs meets their burden of showing (1) irreparable harm; (2) substantial likelihood of success on the merits; and (3) a balance of equities in their favor that is (4) in the public interest. None of the Defendants have filed any evidence to the contrary. All they have done is make legal arguments unsupported by evidence. A preliminary injunction should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date of October 1, 2019, I served the foregoing Memorandum on counsel of record for all parties via the CM/ECF system.

/s/ Adam Cherson

ADAM CHERSON