No. 19-_____

IN THE

Supreme Court of the United States

STEVE RAY EVANS,

Petitioner,

v.

SANDY CITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 2, 2020

QUESTIONS PRESENTED

In *McCullen* v. *Coakley*, 573 U.S. 464, 494 (2014), this Court held that before banning speech, a government must "show[] that it seriously undertook to address" its interests "with less intrusive tools readily available to it." And in *Frisby* v. *Schultz*, 487 U.S. 474, 480–481 (1988), the Court held that all "public streets," without further "particularized inquiry," are traditional public fora.

Applying these principles, several courts of appeals have struck down laws preventing the use of roadway medians for expressive conduct, such as political campaigning and soliciting donations. The Tenth Circuit departed from that line of authority by holding that Sandy City, Utah, could ban individuals from some medians to promote traffic safety, without first attempting to address its safety concerns through less intrusive measures.

The questions presented are:

1. Whether a government may ban expressive conduct without first trying to advance its interests using less speech-restrictive measures, as the Tenth Circuit held below, in conflict with decisions of this Court and the First, Third, Fourth, and Ninth Circuits.

2. Whether a government may ban all expressive conduct in or near roadways on the ground that doing so is necessary to eliminate the risk of traffic accidents, as the Tenth Circuit held below, in conflict with decisions of this Court and the First, Fourth, and Ninth Circuits.

PARTIES TO THE PROCEEDING

The petitioner (appellant below) is Steve Ray Evans.

The respondents (appellees below) who have been sued in their official capacities only are Sandy City, a municipal corporation; Kurt Bradburn, Mayor of Sandy City; Greg Severson, Acting Sandy City Police Chief; Robert Thompson, Sandy City Attorney; Douglas Johnson, Sandy City Prosecutor; R. Mackay Hanks, Sandy City Prosecutor; and Brooke Christensen, Alison Stroud, Kristin Coleman-Nicholl, Monica Zoltanski, Marci Houseman, Zach Robinson, and Cyndi Sharkey, Sandy City Council Members.*

The respondents (appellees below) who have been sued in both their individual and official capacities are C. Tyson, Sandy City Police Department; C. Pingree, Sandy City Police Department; J. E. Burns, Sandy City Police Department; and John Doe I–XX, Sandy City Police Department.

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* Pursuant to Supreme Court Rule 35.3, several Sandy City officials have been substituted for their predecessors in office, who were named in the proceedings below. Kurt Bradburn has succeeded Tom Dolan as mayor. Greg Severson has succeeded Kevin Thacker as police chief. Robert Thompson has succeeded Robert Wall as city attorney. Brooke Christensen has succeeded Scott Cowdell as the city councilor for District 1. Alison Stroud has succeeded Maren Barker as the city councilor for District 2. Monica Zoltanski has succeeded Chris McCandless as the city councilor for District 4. Marci Houseman, Zach Robinson, and Cyndi Sharkey have succeeded Steve Fairbanks, Linda Martinez Saville, and Stephen P. Smith as at-large city councilors.

RELATED PROCEEDINGS

Evans v. *Sandy City*, No. 2:17-cv-408 (D. Utah Oct. 12, 2017)

Evans v. *Sandy City*, No. 17-4179 (10th Cir. Dec. 3, 2019)

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Steve Ray Evans respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

INTRODUCTION

As this Court observed 75 years ago, "streets are natural and proper places for the dissemination of information and opinion." *Schneider* v. *New Jersey (Town of Irvington)*, 308 U.S. 147, 163 (1939). Medians and other raised features *within* streets—portions of the roadway that are set apart from the travel lanes, and often designed for individuals to stand while waiting for traffic to clear—are no exception to that rule. For decades, people in cities around the country have stood in medians to engage in a wide range of expressive conduct. These speakers come from every segment of society: politicians waving campaign signs during election season, citizens protesting government policies, and local businesses and charitable ventures advertising sales or fundraisers. Medians suit the needs of these speakers because they offer exposure to large numbers of vehicle occupants traveling in both directions along the road. Numerous courts have recognized that roadway medians, no less than the roads in which they appear, constitute traditional public fora.

In recent years, the homeless and other impoverished persons have increasingly turned to medians to communicate a particular message: asking passersby for spare change, otherwise known as panhandling. Medians are an especially useful location for panhandlers; indeed, in cities in which most commuters drive and foot traffic is sparse, medians might be the *only* locations in which the homeless can ask any significant number of their fellow citizens for charity.

On medians, the homeless can safely approach motorists while they are stopped at red lights. Unlike sidewalks, medians are located on the same side of the car as the driver, eliminating the need to walk into the travel lanes to retrieve donations.

The same visibility to motorists that benefits panhandlers, however, often causes a backlash among residents unhappy with the image that panhandling presents to visitors. In the past decade, and typically in response to panhandler-specific complaints, numerous cities have enacted some version of a law banning pedestrians from standing on medians. While these cities have attempted to justify their laws based on safety concerns, the evidentiary records in lawsuits challenging these laws consistently have demonstrated that the asserted safety concerns were exaggerated or pretextual. Accidents seldom occur on medians. Cities have been unable to explain why enforcing laws against the obstruction of traffic, jaywalking, or reckless driving would be insufficient to address such legitimate safety concerns as may exist. As a result, courts around the country repeatedly have struck down laws banning individuals from standing on medians.

Petitioner Steve Evans is before this Court because the Tenth Circuit, alone among the courts of appeals to have considered this issue, has upheld a ban on being present in medians. Reacting to complaints about panhandling on medians, respondent Sandy City, Utah, banned all pedestrians from being present on all unpaved medians and all medians less than three feet wide under all circumstances. The City's primary rationale for its particular law was that the City's prosecutor stood on a single median

and thought doing so was "scary" until it widened to more than three feet. The police captain also expressed concern that unpaved medians present a tripping hazard. The Tenth Circuit, over a dissent, accepted this thin evidentiary basis as sufficient to support Sandy City's law. According to the court of appeals, the City did not need to show that alternative measures, such as stepped-up enforcement of existing traffic safety laws, would fail to address its safety concerns. The court reasoned that because it is impossible to eliminate the risk of all accidents in the forum except by eliminating the forum itself, the City's law is narrowly tailored and survives intermediate scrutiny.

The Tenth Circuit's decision runs afoul of this Court's precedents and creates a lopsided split with the other courts of appeals on two important issues. The Court should grant Mr. Evans's petition and reverse the Tenth Circuit's decision, restoring uniformity to the law in this crucial area of free-speech rights.

First, the Tenth Circuit held that while a court applying the narrow-tailoring standard might find it "helpful" to consider whether alternative laws burdening less speech would achieve the government's goals, a government need not actually *try* such alternatives if simply banning speech would be more efficient. Pet. App. 22a. But "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). At least the First, Third, Fourth and Ninth Circuits have invoked that principle in striking down laws because the government leapt too quickly to banning speech.

Second, the Tenth Circuit's holding that Sandy City's law is narrowly tailored because only by banning persons from medians can they be protected from accidents runs afoul of this Court's recognition that *all* streets are traditional public fora. *Frisby* v. *Schultz*, 487 U.S. 474, 480–481 (1988). Obviously, there is *some* risk to pedestrians from standing in or near streets when traffic is present. But the evidence in this case—and in other cases around the country concerning similar laws—is that accidents involving pedestrians on medians are at most a freak occurrence. A government "may not," as Sandy City did here, "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen* v. *Coakley*, 573 U.S. 464, 486 (2014). As the First, Fourth, and Ninth Circuits have all held, the proper way to address traffic-safety risks is through laws targeting particularly dangerous conduct—*e.g.*, jaywalking, obstruction of traffic, and reckless driving—and not by criminalizing expressive conduct, as the Tenth Circuit allowed Sandy City to do here.

OPINIONS BELOW

The district court's opinion is unpublished; it is available at 2017 WL 6554408 and reproduced at Pet. App. 81a–93a. The Tenth Circuit's original opinion is published at 928 F.3d 1171 and reproduced at Pet. App. 43a–80a. The Tenth Circuit's order granting rehearing and its revised opinion on rehearing are reported at 944 F.3d 847 and reproduced at Pet. App. 1a–42a.

JURISDICTION

The court of appeals entered judgment on July 5, 2019. On July 9, 2019, Mr. Evans sought an extension of the time to file a petition for rehearing en banc; on July 10, 2019, the court granted Mr. Evans until August 19, 2019, to file such a petition. Mr. Evans filed his petition for rehearing en banc on August 19, 2019. On December 3, 2019, the Tenth Circuit denied the petition for rehearing en banc, granted panel rehearing *sua sponte*, and issued a revised opinion.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article 16, Section 299.1 of the Sandy City Traffic Code provides:

> **Medians.** It shall be illegal for any individual to sit or stand, in or on any unpaved median, or any median less than 36 inches for any period of time.

STATEMENT

I. Roadway medians throughout the country have been a traditional forum for expressive conduct.

1. Streets "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Using streets for public expression "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id.*; *see also Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009) ("This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets . . . ."). In light of their significance to the public's ability to engage in expressive activity, this Court has "repeatedly referred to public streets as the archetype of a traditional public forum." *Frisby*, 487 U.S. at 480; *see also, e.g.*, *Pleasant Grove*, 555 U.S. at 469; *Boos* v. *Barry*, 485 U.S. 312, 318 (1988); *Cornelius* v. *NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

As the Court explained in *Frisby*, these decisions "are not accidental invocations of a 'cliché,'" but the result of carefully considered judgment about streets' appropriate forum status. 487 U.S. at 480. As *Frisby* made clear, "all public streets," *as a class*, "are properly considered traditional public fora"—"[n]o particularized inquiry into the precise nature of any street is necessary." *Id.* at 481.

Today, streets "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." *McCullen*, 573 U.S. at 476. "With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site." *Id.* "Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out." *Id.*

2. Medians within roadways are particularly popular locations for expressive conduct because they allow individuals who lack substantial resources to communicate with potentially thousands of motorists each day. Courts around the country have recognized that medians are places where people "routinely" gather to engage in "protected speech, including political protests, election campaigns by politicians, and solicitations by individuals for charity." *Cutting* v. *City of Portland*, 802 F.3d 79, 83 (1st Cir. 2015) (quotation marks omitted); *see also Satawa* v. *Macomb Cty. Rd. Comm'n*, 689 F.3d 506, 520, 522 (6th Cir. 2012) (describing a median that was used "for a variety of expressive purposes," including as "a place where people have long been able to gather, sit, and communicate"); *Martin* v. *City of Albuquerque*, 396 F. Supp. 3d 1008, 1021 (D.N.M. 2019) (describing medians used for "panhandling, fundraising for organizations, advertising, and protesting"); *Thayer* v. *City of Worcester*, 144 F. Supp. 3d 218, 232 (D. Mass. 2015) (describing medians used for "[s]oliciting contributions" and political campaigning). In fact, "people have been engaging in" these types of expressive "activity on median strips for as long as [they] have been in existence"—including for "fundrais[ing]" and by "members of political campaigns, religious groups,

and [others] with a message"—due to medians' "ready access to the bustle of undifferentiated humanity." *Warren* v. *Fairfax Cty.*, 196 F.3d 186, 197 (4th Cir. 1999) (en banc). It is precisely because of this "ready access" that medians are the "preferred launching point[s] for expressive conduct" for such a wide variety of speakers. *Id.*

Based on this historic usage of medians for expressive conduct, courts consistently have held that medians, just like the streets in which they are located, are traditional public fora. Medians are "integral parts of the public thoroughfares" upon which citizens engage in public comment and debate, and therefore are among the locations that "constitute the traditional public fora." *Warren*, 196 F.3d at 189, 196. "There is," in short, "no question that public streets and medians qualify as traditional public for[a]." *Reynolds* v. *Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) (quotation marks omitted); *see also Cutting*, 802 F.3d at 83; *Sloman* v. *Tadlock*, 21 F.3d 1462, 1465, 1469 (9th Cir. 1994); *ACORN* v. *St. Louis Cty.*, 930 F.2d 591, 593, 594 (8th Cir. 1991); *Ater* v. *Armstrong*, 961 F.2d 1224, 1225, 1227 (6th Cir. 1992); *cf.* Pet. App. 10a–11a n. 2 (assuming without deciding that medians are traditional public fora).

3. Although medians, like the streets in which they are found, are traditional public fora, there obviously is some risk to pedestrians from being present in medians—at least when there is traffic nearby. But while one might expect that risk to be great, the actual evidence from lawsuits around the country consistently has shown that the risk of harm from standing in a median is *de minimis*.

One need look no further than the evidence in this case. Sandy City presented twenty-eight reports of "close calls" involving "pedestrians on medians in dangerous situations." Pet. App. 17a, 31a.[1] But these reports show the rarity with which perceived risks actually materialize. Of the twenty-eight reports, most "pertain[ed] to one small part of the city" and at best demonstrated "a problem . . . aris[ing] infrequently." Pet. App. 33a–34a (Briscoe, J., dissenting). Many of these complaints expressed only concerns with the "mere presence of individuals on medians," and otherwise contained no evidence of "traffic-safety concerns." Pet. App. 33a n. 8 (Briscoe, J., dissenting) (collecting reports concerning complaints about panhandlers). In fact, neither the district court nor the majority below identified a single report of a vehicle actually striking a pedestrian standing on a median. *See* Pet. App. 31a n. 5 (Briscoe, J., dissenting).

The evidence in this case is no outlier. The safety hazards from being present in a median have been explored in several cases around the country. In case after case, the evidence has been clear: the odds of a person standing on a median being hit by a car or causing an accident is negligible, even in the busiest streets. *See, e.g.*, *Satawa*, 689 F.3d at 525–526 (noting government's failure to produce evidence that family's use of a median had caused any traffic-safety problems in the sixty years it had been in use); *Reynolds*, 779 F.3d at 225 (referencing lack of "evi-

[1] The City identified twenty-nine reports, but one did not involve a median at all. Pet. App. 31a & n. 6 (Briscoe, J., dissenting).

dence in the record of actual problems caused by panhandling or soliciting from medians"); *Petrello* v. *City of Manchester*, 2017 WL 3972477, at *16, *21 (D.N.H. Sept. 7, 2017) (noting that there was "almost no evidence in the record that roadside exchanges," including those taking place on medians, "actually . . . endanger the public"); *Martin*, 396 F. Supp. 3d at 1035 (noting that, of hundreds of police reports supposedly documenting "vehicle-pedestrian conflicts" over four-year period, fewer than 10 reports involved accidents "where the pedestrian was occupying a median without violating other traffic laws").

To the extent any accidents involving pedestrians in medians do occur, they are best characterized as freak occurrences, caused by, for example, inclement weather or drivers suffering medical mishaps. Their circumstances are often extraordinary and can be attributed to factors other than mere pedestrian presence on medians. In one case, for example, the City of Portland, Maine, was able to identify only three reports of cars actually driving onto medians: one in the early-morning hours, another in "treacherous winter conditions," and none "actually involv[ing] pedestrians." *Cutting*, 802 F.3d at 91. But far more typically, cities—like Sandy City here—have simply come up empty-handed. In short, although city officials may have a gut instinct that pedestrian presence on medians is risky, these concerns rarely—if ever—have any basis in fact.

II. The Tenth Circuit upholds Sandy City's law banning expressive conduct in certain roadway medians.

1. Sandy City, like municipalities everywhere, counts among its residents persons who are impoverished or even homeless. These individuals may receive some aid from government and charitable organizations, but to supplement such aid they also frequently ask their fellow citizens for spare change. Such direct appeals by society's poorest for immediate cash donations date back to biblical times (seeking and giving "alms") and indisputably constitute speech protected by the First Amendment. *See, e.g.*, *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

Some view panhandling as a nuisance activity. The presence of panhandlers shines a spotlight on poverty or a lack of adequate social services in the community that can embarrass local government and civic leaders. Small businesses in downtown areas may assert that panhandlers drive away their customers. As a result, numerous localities around the country have passed laws in recent years designed to keep panhandlers out of high-profile areas, such as downtown business districts or roadway medians.

2. In 2016, Sandy City adopted an ordinance that makes it unlawful "for any individual to sit or stand, in or on any unpaved median, or any median less than 36 inches for any period of time." Sandy City Traffic Code, art. 16, § 299.1 (the Ordinance).

The Ordinance was enacted after the City received complaints about panhandlers and others standing on medians. C.A. App. 194–195. Sandy

City's Police Captain, Justin Chapman, and the City Prosecutor, Doug Johnson, "surveyed" the City's medians to determine how to address the issue. Pet. App. 20a, 29a–33a & n. 8. To conduct this survey, Mr. Johnson visited a single median and determined that standing there felt "scary" until the median widened to about three feet. Pet. App. 30a (Briscoe, J., dissenting) (quoting Mr. Johnson's deposition testimony). Captain Chapman visited numerous medians and felt that none of them would be safe to stand on; among other things, he concluded that standing on unpaved medians—which might simply be medians whose surface is "dirt" rather than pavement—was a tripping hazard. Pet. App. 30a–31a (Briscoe, J., dissenting) (quoting Captain Chapman's deposition testimony); *see also* Pet. App. 20a; C.A. App. 315.

3. After receiving numerous citations under the law, Steve Evans, a homeless man who regularly stands on medians to solicit donations, filed this lawsuit challenging the Ordinance on First Amendment grounds. The district court granted summary judgment for the City; a panel of the Tenth Circuit affirmed over a dissent by Judge Briscoe.

The Tenth Circuit held that the Ordinance satisfied the narrow-tailoring test that applies to content-neutral speech restrictions in traditional public fora. That test requires the government to prove that its speech restrictions do not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486. The court held that the Ordinance was narrowly tailored because it was "limited only to those medians where it is unsafe to sit or stand." Pet. App. 58a–

59a. The court also concluded that the City was not required to produce data or accident reports supporting the need for a ban because the "survey" conducted by Mr. Johnson and Captain Chapman demonstrated a "direct relationship . . . between the City's goal of promoting public safety and the restriction on speech it selected." Pet. App. 58a.

In reaching that conclusion, the court rejected Mr. Evans's argument that the City needed to prove that its asserted safety concerns could not adequately be addressed using less speech-restrictive alternatives, including enforcement of existing or new laws focused on jaywalking, obstruction of traffic, or public intoxication. According to the majority, under the Supreme Court's pre-*McCullen* decision in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), it would "not even reach the question of whether 'the government's interest could be adequately served by some less speech-restrictive alterative' if the Ordinance is not 'substantially broader than necessary' to promote the City's interest in public safety." Pet. App. 60a–61a (quoting *Ward*, 491 U.S. at 800). The court thus concluded that because "the restriction on speech is directly tailored to the danger," less speech-restrictive alternatives were irrelevant to the narrow-tailoring analysis. Pet. App. 61a–62a.

Judge Briscoe dissented, concluding that the Ordinance "places a substantial burden on speech" because it "prohibits all expressive activity at all times on many medians throughout Sandy City." Pet. App. 66a. As she explained, the record was inadequate to support such a citywide ban. First, she noted, the Ordinance was premised on nothing more than two City employees' anecdotal and subjective "feeling[s]"

about safety, rather than on substantial evidence. Pet. App. 68a–71a. Second, she observed that the Ordinance was not geographically tailored to the areas where there was a demonstrated safety concern. Pet. App. 71a–73a. Third, she reasoned that the Ordinance fails intermediate scrutiny because the City did not prove that alternative, less speech-restrictive measures would be inadequate to address safety concerns, pointing to "numerous alternative measures" that the City could have taken without banning speech. Pet. App. 73a–76a.

4. Following a petition for rehearing en banc, the panel withdrew and reissued its opinion, keeping its holding intact but slightly changing its reasoning. The majority removed its original statement that, unless an ordinance is "substantially broader than necessary" to promote the government's interests, it will "not even reach the question of whether [that] interest could be adequately served by some less-speech-restrictive alternative." Pet. App. 60a–61a (quotation marks omitted). In its place, the panel wrote that "*McCullen* taught us a less restrictive means analysis might be helpful in the narrow tailoring inquiry, but it did not modify *Ward*'s clear rule" that intermediate scrutiny does not require laws restricting speech to be "the least restrictive or least intrusive means of serving the government's interests." Pet. App. 22a (quotation marks omitted). The majority also added a paragraph explaining why, in its own view, "the less restrictive means identified by" Mr. Evans "are clearly inadequate." Pet. App. 22a–23a.

For her part, Judge Briscoe revised her dissent to address the majority's characterization of *McCullen*.

Pet. App. 37a–38a. "The majority characterizes *McCullen* as 'teaching' that 'less restrictive means analysis might be helpful in the narrow tailoring inquiry,'" she wrote, but "*McCullen*'s lesson is more affirmative than that." Pet. App. 37a (quoting Pet. App. 22a). Instead, *McCullen* requires that governments "demonstrate that alternative measures" burdening less speech "would fail to achieve [their] interests." Pet. App. 37a (quoting *McCullen*, 573 U.S. at 495). Because the City failed to "evaluat[e] [any alternatives] in the first instance," Judge Briscoe concluded, the City did not and could not "demonstrate [that such] alternatives [would] fail[] to achieve its interests." Pet. App. 37a–38a.

REASONS FOR GRANTING THE WRIT

Two features of the Tenth Circuit's decision warrant this Court's review. First, the Tenth Circuit held that "a less restrictive means analysis" is only potentially "helpful in the narrow tailoring inquiry"—a ruling that relieves the government of its burden to affirmatively demonstrate that it *actually tried* alternative measures before adopting an outright ban on speech in a traditional public forum. Pet. App. 22a. Second, the Tenth Circuit held that the government may shut down a traditional public forum altogether if that is the only way to avoid the risk of *any* accidents involving those present in the forum. Pet. App. 22a–24a.

Both of these holdings conflict with the decisions of other courts of appeals—including decisions striking down analogous median bans. And they are incompatible with this Court's own jurisprudence on free speech in traditional public fora, including

streets. In light of the large number of similar bans being enacted around the country, the Court should grant certiorari to resolve these conflicts.

I. The Tenth Circuit has split from four other courts of appeals over whether a government must show that it tried to use less restrictive alternatives before banning speech.

To ban expressive conduct in a traditional public forum, the government must prove that a law is "narrowly tailored to serve a significant government interest." *McCullen*, 573 U.S. at 477. That does not mean the government must adopt the "*most* appropriate" or "*least* restrictive" measures possible. Pet. App. 17a, 21a (emphases added) (quotation marks omitted). But it must do more than merely assert that its chosen means are more efficient than other alternatives. *McCullen*, 573 U.S. at 496. Instead, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *Id.* at 495. That is, the government must "show[] that it seriously undertook to address the problem" with such alternative measures, including laws already on the books or "methods that other jurisdictions have found effective." *Id.* at 494. In *McCullen*, for example, the Court struck down a Massachusetts law that "ma[de] it a crime to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any" abortion clinic in the state, *id.* at 469, because the state offered only its own say-so in support of its contention that alternative, less restrictive measures were in adequate, *id.* at 492–494.

In keeping with *McCullen*, decisions of the First, Third, Fourth, and Ninth Circuits have struck down bans on expressive conduct in traditional public fora—including medians—where the government failed to demonstrate it had tried alternative, less speech-restrictive measures. The Tenth Circuit, by contrast, held below that a government need not demonstrate that it tried such measures before completely shutting down a traditional public forum.

A. In line with *McCullen*, the First, Third, Fourth, and Ninth Circuits have held that a government must prove that alternative measures were tried and failed.

1. The narrow-tailoring requirement follows from a bedrock principle of First Amendment law. "If the First Amendment means anything," the Court has explained, "it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373. Consistent with that principle, the Court has long made clear that the government cannot forgo less speech-restrictive measures merely because a ban on speech is more efficient. "If it is said that [alternative] means are less efficient and convenient than deciding in advance what information may be disseminated . . . and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech." *Vill. of Schaumburg*, 444 U.S. at 639. Or, stated more "simply and emphatically": "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795 (1988).

2. The Court reaffirmed these principles most recently in *McCullen*. There, the Court recognized that Massachusetts had "undeniably significant interests in maintaining public safety on . . . streets and sidewalks," and that "buffer zones clearly serve[d] those interests." 573 U.S. at 487, 496–497. Nevertheless, the Court held that Massachusetts's law was not narrowly tailored because the state had "too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage." *Id.* at 490.

In particular, the Court explained, Massachusetts had ignored existing laws that could remedy its safety concerns. According to Massachusetts, buffer zones were necessary because serious safety issues can arise "when protestors obstruct driveways leading to the clinics." 573 U.S. at 492. But "[a]ny such obstruction," the Court explained, "can readily be addressed through existing local ordinances" prohibiting obstruction of public ways—not to mention "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." *Id.* Massachusetts countered that it had "tried [those] other laws already on the books," but the Court explained that the state's conduct told a different story: Massachusetts could "identify not a single prosecution brought under those laws within the last 17 years." *Id.* at 494. Given its failure to make use of existing laws, the Court held, Massachusetts could not demonstrate that its outright ban was narrowly tailored. *See id.*

The Court further observed that Massachusetts had failed to "show[] that it considered different

methods that other jurisdictions ha[d] found effective." 573 U.S. at 494. As the Court explained, a number of other jurisdictions had enacted laws specifically addressing harassment, threats, or physical force directed at people approaching abortion clinics. *See id.* at 491, 493. Yet Massachusetts had not attempted to implement any measures along these lines before opting for a blanket ban. *See id.* at 494. For that reason, too, the state could not demonstrate that a buffer zone was narrowly tailored. *See id.*

In reaching these conclusions, the Court rejected Massachusetts's suggestion that other laws were inadequate because they "require[d] a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove." 573 U.S. at 495. "[F]ixed buffer zones" might "make [the government's] job so much easier," the Court recognized, but "that is not enough to satisfy the First Amendment." *Id.* (quotation marks omitted). "To meet the requirement of narrow tailoring, the government *must demonstrate* that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 495 (emphasis added).

McCullen's bottom line is simple: "Given the vital First Amendment interests at stake, it is not enough for [the government] simply to say that other approaches have not worked." 573 U.S. at 496. Instead, the government must actually "show[] that it seriously undertook to address" its stated interests with narrower available alternatives. *Id.* at 494.

3. In keeping with *McCullen*, several courts of appeals have rejected government efforts to impose blanket bans on expressive conduct in or near public thoroughfares—including, specifically, on medians—where the government has failed to show that it first tried using less restrictive alternatives.

a. In *Reynolds*, the Fourth Circuit examined a Virginia county's ordinance that barred people from distributing printed materials, soliciting contributions, or selling merchandise on any road or street in the county—including the "shoulder" and "median" of any road or street. 779 F.3d at 225. The court did not doubt that a "significant" government interest was at stake—namely, "the County's interests in safety and unobstructed use of its highways." *Id.* at 229. But as in *McCullen*, the court held (in reviewing a grant of summary judgment for the county) that the government had failed to show that the ordinance was narrowly tailored. *See id.* at 231–232.

In doing so, the court explained that the government had failed to demonstrate that it had tried to address the problem with existing laws. As the plaintiff had argued, "the County could achieve its safety interest by enforcing existing traffic laws—such as those governing jaywalking, obstructing traffic, loitering, and the like—against any roadway solicitors who in fact obstruct traffic or otherwise cause problems." 779 F.3d at 230. Yet the county had "simply presented no evidence showing that it ever tried to *use* the available alternatives to address its safety concerns"—for example, by "prosecuting any roadway solicitors who actually obstructed traffic." *Id.* at 232. "Without such evidence," the court explained, "the County cannot carry its burden of

demonstrating that the [ordinance] is narrowly tailored." *Id.* "[T]he burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem." *Id.* at 231.

b. The First Circuit struck down a similar median ban in *Cutting*. The ordinance in that case prohibited any person from standing or sitting on any median in the city, unless in the process of crossing the street. *See* 802 F.3d at 82. Like the Fourth Circuit in *Reynolds*, the First Circuit held that the median ban was not narrowly tailored because "the City did not try—or adequately explain why it did not try—other, less speech restrictive means of addressing the safety concerns it identified." *Id.* at 91.

Here again, the city had eschewed "existing state and local laws that prohibit disruptive activity in roadways, such as prohibitions on obstruction of traffic, disorderly conduct, and abusive solicitation." 802 F.3d at 91. The city argued that those laws "'simply do not provide an adequate tool' because they are 'reactive, rather than proactive, and require a police officer to directly observe the illegal behavior before taking action.'" *Id.* (alterations omitted). But that was not enough "to show the need for the sweeping ban that the City chose": as the court explained, an outright ban "is obviously more efficient, but efficiency is not always a sufficient justification for the most restrictive option." *Id.* at 92.

c. The Third Circuit's decision in *Bruni* v. *City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016), likewise held that a city has an obligation to prove that it actually tried less restrictive measures before banning speech. There, the court considered a municipal or-

dinance imposing a fifteen-foot buffer zone around city healthcare facilities; the court vacated a district court decision that had upheld the ban based solely on the pleadings. *See id.* at 357 & n. 2. In describing the evidence that the city would need to present as the case progressed, the court explained that "[b]ecause the City has available to it the same range of alternatives that *McCullen* identified—anti-obstruction ordinances, criminal enforcement, and targeted injunctions—it must justify its choice to adopt the Ordinance." *Id.* at 369–370. And that meant "the City would have to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." *Id.* at 370. In other words, "the municipality may not forego a range of alternatives" unless it has "a *meaningful record* demonstrating that those options would fail to alleviate the problems meant to be addressed." *Id.* at 371 (emphasis added).

That requirement followed directly from *McCullen* itself. As the Third Circuit recognized, "it was not enough" in *McCullen* "for Massachusetts simply to say that other approaches have not worked." 824 F.3d at 367 (brackets omitted). Instead, Massachusetts "had to either back up that assertion with evidence of past efforts, and the failures of those efforts, to remedy the problems that existed outside of the Commonwealth's abortion clinics, or otherwise demonstrate its serious consideration of, and reasonable decision to forego, alternative measures that would burden substantially less speech." *Id.*

d. Finally, in *Comite de Jornaleros de Redondo Beach* v. *City of Redondo Beach*, 657 F.3d 936 (9th

Cir. 2011), the Ninth Circuit struck down a municipal ordinance barring individuals from "stand[ing] on a street or highway"—a term that "includ[ed] sidewalks, alleys, and other such locations"—to "solicit or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle." *Id.* at 940–942. According to the court, the ordinance failed intermediate scrutiny because the City had "a number of less restrictive means of achieving its stated goals," including "various other laws at its disposal" (*e.g.*, "laws against jaywalking") that would "allow it to achieve its stated interests while burdening little or no speech." *Id.* at 949. Thus, although *Redondo Beach* preceded *McCullen*, it rested on the same type of failures to consider alternative measures.

B. Departing from these decisions, the Tenth Circuit has relieved the government of its burden to show that it tried narrower alternatives.

Sandy City had numerous alternative measures it could have tried before jumping to an outright ban on expressive conduct in the outlawed medians, including stepped-up enforcement of existing laws on jaywalking, obstructing traffic, or public intoxication. *See* Pet. App. 35a–37a (Briscoe, J., dissenting). Yet, according to the Tenth Circuit, the City did not need to demonstrate that it had first tried such measures and that they had failed. That decision is impossible to square with the decisions of the First, Third, Fourth, and Ninth Circuits discussed above—and with *McCullen* itself.

The Tenth Circuit absolved the City of any obligation to employ existing laws on the theory that en-

forcement of such laws would not be "effective," reasoning that "a police officer would have to sit and watch a person on the median until they fell into traffic—[thus] defeating the City's goal of promoting public safety." Pet. App. 23a. But the First Circuit in *Cutting* rejected *that precise line of reasoning*: there, the First Circuit rebuffed the government's argument that it could bypass existing laws "because they are 'reactive, rather than proactive, and require a police officer to directly observe the illegal behavior before taking action.'" 802 F.3d at 91 (alterations omitted).

Moreover, unlike the Tenth Circuit, other courts of appeals have emphasized that the government must offer "evidence" to "*prove* that it actually *tried* other methods to address the problem." *Reynolds*, 779 F.3d at 231–232; *see also Bruni*, 824 F.3d at 371 ("[T]he municipality may not forego a range of alternatives . . . without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed."); *Redondo Beach*, 657 F.3d at 950 n. 9 (considering the evidence offered in support of municipality's assertion that existing laws were insufficient). Put simply, in none of those other circuits is the Tenth Circuit's rule—that the government need only *assert* that existing laws are not "proactive" enough—sufficient to sustain a law that closes off a traditional public forum entirely.

Ultimately, the Tenth Circuit's decision rests on its "characteriz[ation of] *McCullen* as 'teaching' that 'less restrictive means analysis might be helpful in the narrow tailoring inquiry.'" Pet. App. 37a (Briscoe, J., dissenting) (quoting Pet. App. 22a). But "*McCullen*'s lesson is more affirmative than that:

'[the City] must demonstrate that alternative measures that burden substantially less speech would fail to achieve [its] interests.'" Pet. App. 37a (Briscoe, J., dissenting) (quoting *McCullen*, 573 U.S. at 495) (alterations in original). As Judge Briscoe summarized in dissent, "the majority does the work the City should have done, by concluding the 'less restrictive means' are 'clearly inadequate.'" Pet. App. 38a (quoting Pet. App. 22a). But "to satisfy the requirement of *McCullen*, a governmental entity must perform this evaluation in the first instance. Any subsequent rationale a court may conjure up after the fact relieves the City of its burden and places it with the court." Pet. App. 37a–38a (Briscoe, J., dissenting).

Because the Tenth Circuit relieved the government of a burden that, in keeping with *McCullen*, other courts of appeals have imposed in like cases, the Court should grant Mr. Evans's petition.

II. The Tenth Circuit has created a split with three other courts of appeals concerning bans on expressive conduct in roadways and near vehicular traffic.

The decision below presents a second reason for this Court to grant Mr. Evans's petition: the Tenth Circuit's reasoning would enable the government to ban all expressive conduct on roads and on medians—both traditional public fora—in order to eliminate even the *de minimis* risk of traffic accidents. In so doing, the decision below runs afoul of *Frisby* and creates a conflict with three courts of appeals that have struck down bans on expressive conduct on roads and other areas—including medians—near ve-

hicular traffic. The Tenth Circuit's subordination of free speech to the avoidance of freak accidents—*i.e.*, the hypothetical risk of someone "tripping" on "dirt" and falling into traffic—also runs afoul of this Court's statement, reiterated from *Ward* through *McCullen*, that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 799); *see also Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Vill. of Stratton*, 536 U.S. 150, 165 (2002) ("We must . . . look . . . to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.").

A. Courts have recognized that the government may only prohibit access to streets and medians when individuals are engaged in dangerous conduct.

1. Although all streets are traditional public fora, *supra*, at 6–8, there also obviously is some risk to pedestrians when vehicles are moving nearby. Nevertheless, this Court explained in *Frisby* that a government cannot ban everyone from a traditional public forum unless everyone is engaged in dangerous conduct: "A complete ban" on expressive conduct within a traditional public forum "can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485.

While a government may not be required to "wait for accidents to justify safety regulations," Pet. App. 21a (citing *Traditionalist Am. Knights of the Ku Klux Klan* v. *City of Desloge*, 775 F.3d 969, 975 (8th Cir. 2014)), it may not simply ban all speech in roadways and medians in the name of safety. Narrow tailoring instead requires that a law furthering safety "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485.

2. Consistent with *Frisby*, a number of courts have recognized—including in the context of median bans—that the government may not outlaw expressive conduct in a traditional public forum simply because alternative measures come with a risk of accidents.

a. For example, in *Cutting*, the First Circuit struck down a median ban that Portland, Maine, attempted to justify in part as a means to "ensur[e] that people are not on median strips and thus are not positioned to be hit by passing cars." 802 F.3d at 90. "There simply [was] no way to abate the City's significant safety concern," the city argued, "except for an outright ban." *Id.* at 89 (alteration and quotation marks omitted). The First Circuit rejected this argument, because, among other things, the fact that "Portland's median strips, as a group, are traditional public fora" means that "Portland's medians, would seem to be—as a class—presumptively fit for the very activities that the City now contends are obviously dangerous." *Id.* at 91. In short, the city's "perfectly understandable desire to protect the public from the dangers posed by people lingering in medi-

an strips" did not justify its decision to ban expressive conduct in the city's medians. *Id.* at 92.

b. The Fourth Circuit likewise rejected a countywide ban on roadside solicitation, including from medians, even though it agreed that "roadway solicitation is generally dangerous." *Reynolds*, 779 F.3d at 225, 229. The county had emphasized that the "dangers of roadway solicitation are the same" on any road, and that those dangers were "present on all roads." *Id.* at 231. Despite acknowledging that the government's argument had "some appeal," *id.*, the Fourth Circuit recognized that it "must consider 'the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.'" *Id.* at 230 (quoting *Watchtower Bible*, 536 U.S. at 165). Having done so, the court found that the law "burdened more speech than necessary" and was not narrowly tailored in light of a "lack of evidentiary support" for the argument. *Id.* at 231–232.

c. Similarly, in *Kuba* v. *1-A Agricultural Ass'n*, 387 F.3d 850 (9th Cir. 2004), the Ninth Circuit rejected an attempt to restrict demonstrations to designated "free expression zones" in parking areas outside the Cow Palace, a California-owned "performance facility" near San Francisco. *Id.* at 852. The court acknowledged the risk that "demonstrators walking in front of moving cars could present a safety problem," *id.* at 861, but nonetheless concluded that "[t]he undeniable need for traffic regulations, and for enforcement of those regulations, does not demonstrate that there is a significant state interest

in banning the protestors entirely except in a few small zones." *Id.*[2]

3. In summary, although the government is not required to "wait for accidents to justify safety regulations," Pet. App. 21a (citing *Traditionalist Am. Knights*, 775 F.3d at 975), it may not eliminate a traditional public forum on the ground that doing so is the only way to avoid all conceivable risk of accidents, no matter how small. As numerous courts have recognized, narrow tailoring requires a law furthering safety (or any other significant governmental interest) to "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. 485.

B. The decision below departed from *Frisby* and the decisions of other courts.

The court below found, as a matter of law, that the various less speech-restrictive alternatives that the City could have used to further its asserted safety interest were "clearly inadequate" because these measures could not foreclose *all* risk of harm. Pet. App. 22a–24a. In the Tenth Circuit's view, the government may eliminate expressive conduct within these traditional public fora because it is "*not at all implausible* that a driver could strike someone standing on the median." Pet. App. 22a (emphases added). "The danger," the court opined, "stems from cars—whether it be one or one hundred—traversing

[2] Although *Kuba* was decided on state constitutional grounds, the court did so by "apply[ing] federal time, place and manner standards." *Id.* at 857–858.

a roadway in which pedestrians are standing . . . within striking distance." Pet. App. 22a. Alternatives to eliminating all pedestrian presence on the outlawed medians were inadequate, the court concluded, because even if those alternatives "may make it less likely one will be hit by a car," some risk would remain, and "[t]he City is not required to ignore" that "danger." Pet App. 23a.

The Tenth Circuit's decision is irreconcilable with decisions from other circuits striking down similar laws despite acknowledging some level of risk. *See supra*, at 27–29. If the Tenth Circuit were correct that the government may ban *all* expressive conduct in certain medians solely on the ground that it is "not at all implausible that a driver could strike someone standing on the median," Pet. App. 22a, then *Cutting*, *Reynolds*, and *Kuba* necessarily would have been decided differently. In each of those cases, the courts acknowledged that presence in and around vehicular traffic carried some level of risk for pedestrians. *See supra*, at 27–29. Yet in none of those cases was the existence of some conceivable risk sufficient to justify an outright ban on expressive conduct in these areas.

More generally, the Tenth Circuit's decision is incompatible with this Court's statements that *all* streets—without any "particularized inquiry"—are traditional public fora, and that in traditional public fora, "the government may not prohibit all communicative activity." *See supra*, at 6–8; *Perry*, 460 U.S. at 45. The Tenth Circuit's reasoning enables the government to eliminate all medians covered by the Ordinance at all times, in all circumstances, because only "keeping pedestrians off" these traditional pub-

lic fora would eliminate all risk that "pedestrians *could* be injured by passing traffic." Pet. App. 16a (emphasis added). But the government "may not by its own *ipse dixit* destroy the public forum status of streets." *United States* v. *Grace*, 461 U.S. 171, 180 (1983) (quotation marks omitted).

III. The questions presented are important, and this case is an ideal vehicle to resolve them.

Each of the two questions presented is important. The first question addresses a split over a fundamental element of the narrow-tailoring test—*i.e.*, the government's burden of proving that it did not decide to eliminate speech as a first, rather than last, resort. And the second question addresses an equally pressing conflict over the government's ability to eliminate all expressive conduct in traditional public fora based solely on a *de minimis* risk of accidents. The Tenth Circuit has now created a split of authority with several other circuits on each of these questions. Both splits in authority warrant resolution by this Court.

The importance of these questions is only underscored by the history of recent legislation in this area. Over the past several years, local governments across the country have enacted roadway, median, and sidewalk bans similar to Sandy City's, invariably in response to citizen complaints about panhandling. Many of these laws already have been the subject of litigation and have been declared unconstitutional by federal trial and appellate courts. *See supra*, at 9–11, 20–23. Many more have been enacted or are being considered. *E.g.*, Brooklyn Center, Minn., Code

of Ordinances § 25-1102 (median ban adopted June 25, 2018); Chesapeake, Va., Code of Ordinances § 66-17 (median ban adopted Dec. 12, 2017); Colorado Springs, Colo., City Code § 10.18.112 (median ban adopted Feb. 14, 2017); Springfield, Mo., City Code § 106-455 (median ban adopted Dec. 11, 2017).

This case is an ideal vehicle to resolve both questions presented. The Tenth Circuit's answer to both questions was essential to the decision below: the court's narrow-tailoring analysis turned on its holding that Sandy City did not need to demonstrate that it had tried to use alternative measures (including existing laws), and that the First Amendment allows the government to close off a traditional public forum if that is the only way to eliminate every "[]plausible" risk of injury. If the Tenth Circuit had adopted the position taken by the majority of the courts of appeals—which was reflected in the dissent below—then the outcome of the case necessarily would have been different.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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