No. 19-1091

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

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.[1]

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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[1] 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. 17-4179 (10th Cir. Dec. 3, 2019)

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

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The district court's unpublished opinion is available at *Evans v. Sandy City*, Case No. 2:17-cv-00408-BSJ, 2017 WL 6554408 (D. Utah Oct. 12, 2017). The Tenth Circuit's original opinion is published at 928 F.3d 1171 (10th Cir. 2019). The Tenth Circuit's order granting rehearing and its revised opinion on rehearing are reported at 944 F.3d 847 (10th Cir. 2019).

STATEMENT

Petitioner asks this Court to grant certiorari to resolve a manufactured circuit split on the issue of narrow tailoring. Although Petitioner presents this Court with two questions, the only question arising from the decision below is whether the Tenth Circuit properly applied this Court's narrow-tailoring requirements. Specifically, the issue is whether Sandy City must affirmatively try and eliminate all less-restrictive alternatives to promote safety before enacting its already narrowly tailored Ordinance. The answer is no. This Court has never required the government to enact, evaluate, and then reject less-restrictive alternatives, no matter how ineffective, before imposing reasonable restrictions on speech. Indeed, adopting such a requirement would transform intermediate scrutiny for time, place, and manner restrictions into something resembling strict scrutiny—a path this Court wisely rejected decades ago. *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989). There is no circuit split on this issue, and no justification for review here.

In 2016, Sandy City Police and Sandy City officials became increasingly concerned about the safety of pedestrians standing on medians in the middle of streets. The medians divide roadway traffic and are not built to support pedestrian traffic. This is especially true for unpaved medians, which are uneven and thereby pose an increased risk that the pedestrian would trip or fall into traffic.

Sandy City did not ban standing on all medians. Instead, it adopted a narrow ordinance to address its specific safety concerns: "It shall be illegal for any individual to sit or stand, in or on any unpaved median, or any median of less than 36 inches for any period of time." Sandy City, Utah, Code of Ordinances art. 16, § 299.22 (the "Ordinance").[2] Petitioner does not dispute that the Ordinance is content-neutral. Likewise, "[n]o one disputes the Ordinance serves a significant governmental interest in promoting public safety." *Evans v. Sandy City*, 944 F.3d 847, 856 (10th Cir. 2019). And there is no question that the goal of preventing pedestrians from being hit while on, or falling off of, unsafe medians is promoted by keeping pedestrians off unsafe medians. "[S]imple common sense," is sufficient to show that the Ordinance is narrowly tailored to achieve this goal. *Burson v. Freeman*, 504 U.S. 191, 211 (1992). The only issue is whether this particular Ordinance is sufficiently narrowly tailored on this particular record.

Petitioner first suggests that this Court's decision in *McCullen v. Coakley*, 573 U.S. 464 (2014), altered the narrow-tailoring requirement. It did not. Petitioner then points to several cases in the First, Third, Fourth, and Ninth Circuits to

[2] Sandy City's ordinances have since been renumbered, and the ordinance section is now numbered as § 14-10-13. The text of the ordinance is identical.

conjure a split of authority. But none exists for the simple reason that the Ordinance here was tailored far more narrowly than the ordinances in those circuits, and thus does not raise the same issues regarding less-restrictive alternatives.

Most concerning of all, any decision by this Court may be rendered advisory on remand because the Tenth Circuit assumed critical steps in the analysis in Petitioner's favor. Petitioner relies on *Frisby v. Shultz*, 487 U.S. 474, 481 (1988), for the proposition that "all public streets" are public fora. But here, neither the district court nor the Tenth Circuit ruled that the particular medians at issue here are public fora—both courts assumed without deciding that they were. And Petitioner has not asked this Court to decide that question. So even if this Court were to decide the questions presented in Petitioner's favor, the lower courts could on remand render that decision advisory by ruling that these particular medians are not public fora.

REASONS TO DENY THE PETITION

I. No Circuit Split Exists Because the Sandy City Ordinance Bans No Expressive Conduct

The first question presented begins by asking "Whether a government may ban expressive conduct . . ." and the second begins by asking "Whether a government may ban all expressive conduct . . . ." (Pet. for Cert. 1.) But unlike the cases on which Petitioner relies, the Ordinance here bans no expressive conduct on its face. Any impact on expressive conduct is purely incidental. It therefore does not

create a circuit split, because the ordinances at issue in the other circuits did directly target and ban expressive conduct.

A. The Sandy City Ordinance Bans No Expressive Conduct

Unlike the cases cited by Petitioner, the Sandy City Ordinance does not facially regulate or prohibit speech or expression. The Ordinance prohibits standing or sitting "in or on any unpaved median, or any median of less than 36 inches for any period of time." Sandy City, Utah, Code of Ordinances § 14-10-13. It is directed at public safety and prohibits all standing and sitting only on particular medians—pure conduct. Any impact on speech or expressive conduct is incidental and related solely to the regulation of a particular place, something true of most public safety ordinances and a wide range of other valid regulations. Individuals wishing to engage in speech may still do so on all medians deemed safe by the City, as well as all of the City's sidewalks, public parks, and other traditional public fora.

B. The Ordinances at Issue in the Other Circuits Banned Expressive Conduct

In contrast, the ordinances at issue in the other circuits did ban expressive conduct. In other words, those opinions cannot create a circuit split.

The ordinance in *Reynolds v. Middleton* prohibited distributing handbills/leaflets, soliciting money, and selling merchandise. 779 F.3d 222, 225 (4th Cir. 2015). The ordinance in *Bruni v. City of Pittsburgh* prohibited knowingly congregating, patrolling, picketing, or demonstrating near health care facilities. 824 F.3d 353, 357 (3d Cir. 2016). The ordinance in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* specifically prohibited soliciting business or

contributions. 657 F.3d 936, 941–42 (9th Cir. 2011). And the restriction in *Kuba v. 1-A Agricultural Association* prohibited "picketing, leafleting, collection of signatures or marching and any group activity involving the communication of expression, either orally or by conduct of views and/or grievances, and which has the effect and intent or propensity to express that view or grievance to others." 387 F.3d 850, 853 (9th Cir. 2004).[3]

Because these opinions concern direct restrictions on speech and expressive conduct, they deal with different issues and do not create a circuit split with the Tenth Circuit opinion at issue here.

II. No Circuit Split Exists Because No Circuit Has Held That a City Must Enact Every Less-Restrictive Means Before Rejecting Them

Petitioner presents this Court with two questions— (1) whether the government "may ban expressive conduct without first trying to advance its interests using less speech-restrictive measures" and (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." (Pet. for Cert. 1.) But neither of those questions accurately reflects the Tenth Circuit's holding below. The Tenth Circuit did not hold that the government may ban expressive conduct without trying or considering less-restrictive alternatives that equally serve the government's interest. Rather, it held that Sandy City had narrowly tailored the

[3] The only other circuit case cited by Petitioner is *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015). Although the ordinance in that case did not facially regulate speech, it is fundamentally different from this case for other reasons, including the exceptional breadth of the ordinance at issue, as discussed below.

Ordinance by rejecting more restrictive alternatives, and that in light of this narrow tailoring, no other alternatives were available that would achieve the City's interest. And the Tenth Circuit did not hold that the government may ban all expressive conduct in or near roadways—it held that Sandy City may prevent pedestrians from standing or sitting on a certain subclass of dangerous medians.

As this Court has noted, "our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) (citation omitted). "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* at 799 (alteration in original) (citation omitted).

This Court's holding in *McCullen* requires the government to "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). The "point is not that [the government] must enact all or even any of the proposed" alternative means. *Id.* at 493. Yet Petitioner attempts to broaden that holding, suggesting that it has changed this Court's longstanding precedent with respect to the government's burden under a narrow-tailoring analysis. Under Petitioner's reading of *McCullen*, the government must not only consider less-restrictive alternatives, it must also actually try each of the considered alternatives before implementing its means of choice. Petitioner's interpretation of *McCullen* effectively

transforms the narrow-tailoring requirement of intermediate scrutiny into a strict scrutiny "least-restrictive means" requirement—requiring the government to affirmatively eliminate all less-restrictive alternatives before implementing its chosen means.

In so doing, Petitioner also manufactures a circuit split, arguing that the Tenth Circuit has split from the First, Third, Fourth, and Ninth Circuits in applying *McCullen*. But the Tenth Circuit has not split from the other circuits and has not deviated from this Court's precedent. The Tenth Circuit, along with the other circuits, has properly applied *McCullen* to the particular fact scenarios presented to them.

A. The Tenth Circuit Properly Applied this Court's Narrow-Tailoring Analysis

The Tenth Circuit's opinion did not hold that the government could ban speech while ignoring readily available alternatives that would equally address its interests; nor did it hold that the government may ban all expressive conduct in roadways. The Tenth Circuit instead properly applied this Court's narrow-tailoring analysis in holding that the Sandy City Ordinance was narrowly tailored to serve a significant governmental interest, and that none of the hypothetical alternatives posited by Petitioner would achieve that interest. *Evans v. Sandy City*, 944 F.3d 847, 859 (10th Cir. 2019).

After receiving numerous complaints from concerned citizens, city officials "conducted a survey of the medians in Sandy City." *Id.* at 858. Based on its observations, the City chose to narrow the Ordinance to the most dangerous

medians—"those medians where it would be dangerous to sit or stand at any time of day, at any traffic speed or volume." *Id.* Doing so ensured pedestrian safety in dangerous areas, while also allowing for unrestricted speech on safe medians. The City expressly considered and rejected alternative variations of the Ordinance. For example, the City had considered—and police had encouraged—applying the Ordinance more broadly to all of the City's medians. (D. Ct. Doc. 62 (Aug. 11, 2017) ("I wanted it to be much more broad, something that said any area not basically constructed for pedestrian traffic because it's in the road.") (attached at Addendum A).) But the City chose to limit the Ordinance to unsafe medians only, leaving safe medians (as well as all of the City's sidewalks, parks, and other public fora) open and unrestricted.

Petitioner's suggestion that the Tenth Circuit should have required more—that the City first try and reject less-restrictive alternatives (to the extent they exist) before adopting an otherwise valid ordinance—is directly contrary to this Court's guidance in *McCullen* that the government need not "enact all or even any of the proposed" alternative means. 573 U.S. at 493. It need only demonstrate that any such alternatives "would fail to achieve the government's interests." *Id.* at 495. And the "government need not wait for accidents to justify safety regulations." *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 775 F.3d 969, 975 (8th Cir. 2014).

This is especially true given the nature of the safety concern here—preventing pedestrian accidents in roadways. The nature of the governmental

interest necessarily dictates the manner in which the government tries alternative means. In the abortion clinic buffer zone cases, for example, the government can more easily test less-restrictive means because the governmental interest—preventing congestion in front of clinics—can easily be addressed through a number of targeted means. *McCullen*, 573 U.S. at 493. There is no imminent threat of severe physical danger if the government's chosen means fails, and the government can reactively address problems like obstruction. But here, the risk of a failed ordinance is much greater—someone may fall into traffic and suffer injury or death. The governmental interests "are traffic and pedestrian safety rather than lessening obstacles to free circulation." *Traditionalist Am. Knights*, 775 F.3d at 977. The "relationship between the [Ordinance] and the government's interest in safety and traffic efficiency [is] sound" and is "therefore entitled to deference." *Id.* at 976 (quoting *Ass'n of Cmty. Organizations for Reform Now v. St. Louis Cty.*, 930 F.2d 591, 596 (8th Cir. 1991)).

The government need not show that it has selected the least restrictive means. *Ward*, 491 U.S. at 798. The government satisfies the narrow-tailoring requirement "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799 (alteration in original) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). And the Ordinance does not fail simply because there is "some imaginable alternative that might be less burdensome on speech." *Id.* at 797 (citation omitted).

But here, it is difficult to imagine an alternative that is substantially less burdensome but also equally effective at serving the governmental interest. For example, targeting specific medians would not be as effective at serving the governmental interest, because it would be leaving open demonstrably unsafe medians. It would force the government to wait for accidents to occur before regulating a particular median. And to qualify as restricting "substantially" less speech, the Ordinance would necessarily need to allow people to stand on substantially more unsafe medians, directly undermining the goal of the Ordinance.

Simply put, the Ordinance here is already narrowly targeted at unsafe medians. The narrower the ordinance, the less likely there are to be qualified alternatives that "appear capable of serving [the government's] interests." *McCullen*, 573 U.S. at 494. An already-narrow ordinance is not rendered invalid simply because a litigant can conjure some imaginable alternative, no matter how implausible or ineffective, that restricts less speech, and demand that it first be considered and tried. As the Tenth Circuit noted in its alternatives analysis below, "[w]hile we could posit an infinite number of potentially less restrictive alternatives, the Supreme Court instructs us that the validity of a content neutral regulation 'does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.'" *Evans*, 944 F.3d at 860 (quoting *Ward*, 491 U.S. at 800 (further citation omitted)).

As a result, given that the Ordinance here is already tailored "only to those medians where it would be dangerous to sit or stand at any time of day, at any traffic speed or volume," *id.* at 858, the "record here does not show an obvious, less burdensome alternative that [the City] should have selected." *Traditionalist Am. Knights*, 775 F.3d at 978. The City "could reasonably have determined that its interests overall would be served less effectively without [the Ordinance] than with it." *Id.* at 976 (quoting *Ward*, 491 U.S. at 801).

The Tenth Circuit explicitly noted the insufficiency of other alternative means in its opinion—"Sandy City might have considered limiting activity on the medians at night, when the dark makes it more difficult for drivers to see . . . [or] the City could have limited the Ordinance to times of day when traffic is busiest. But, to do both of these things . . . would essentially constitute a twenty-four-hour ban." *Evans*, 944 F.3d at 859. Or "the Ordinance could apply to medians where traffic speed is greatest. But again, whether a pedestrian is struck at 15 MPH or 50 MPH, injury is sure to result." *Id.*

The dissent suggested that the City "could enforce its existing laws on public intoxication and impeding traffic to reach the same result." *Id.* But this approach would again be too little, too late—"a police officer would have to sit and watch a person on the median until they fell into traffic—again defeating the City's goal of promoting public safety." *Id.* And to require as much is in direct conflict with the principle that the "government need not wait for accidents to justify safety regulations." *Traditionalist Am. Knights*, 775 F.3d at 975.

This analysis was a correct application of the narrow-tailoring test and, in particular, *McCullen*'s requirement that the government "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." 573 U.S. at 495. In this case, none of the identified alternatives "appear[ed] capable of serving [the City's] interests," nor were there any "different methods that other jurisdictions have found effective." *Id.* at 494. The Ordinance is narrowly tailored to only the most dangerous medians and imposes no restrictions on those medians deemed safe by the City, and any alternatives that burden substantially less speech would necessarily undermine the government's interest in keeping people off unsafe medians.

B. No Circuit Has Held That the Government Must Actually Enact Less-Restrictive Means Before Adopting an Ordinance

Petitioner claims that the Tenth Circuit's decision in this case conflicts with five cases in the First, Third, Fourth, and Ninth Circuits. But none of the ordinances at issue in those cases resemble the Ordinance at issue in this case. The Ordinance in this case is much more narrowly tailored than those in the other circuits. So not only does the decision below fail to create a circuit split, this Ordinance is essentially a model ordinance based on suggested alternatives in the other circuits.

Petitioner first points to *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015). The ordinance in *Reynolds* prohibited distributing handbills/leaflets, soliciting money, and selling merchandise in the highway, including all medians. *Id.* at 225. The ordinance specifically targeted speech on all medians, as well as the rest of the

highway. The court held that the ordinance was not narrowly tailored. *Id.* at 232. Although the court acknowledged that roadway solicitation is generally dangerous, it noted that, unlike this case, the government had not even considered "prohibiting roadway solicitation only at those locations where it could not be done safely." *Id.* And not only did the government have ample alternative means available, it had not enforced its previous ordinance in the 17 years prior to enacting a more restrictive ordinance. *Id.* at 228.

Petitioner next points to *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015). The "truly exceptional" ordinance in *Cutting* prohibited standing or sitting on all medians throughout the city, without exception. *Id.* at 87. The ordinance's broad definition applied to many medians that were obviously safe, including "medians that are roughly eight feet wide" and one in particular that spanned "several blocks and [wa]s as wide as fifty feet in various places." *Id.* at 88. As the court noted, it is "hard to imagine a median strip ordinance that could encompass more spaces within its definition." *Id.* Although the city argued the ordinance "ensur[ed] that people are not on median strips and thus are not positioned to be hit by passing cars," the court found that insufficient given the "wide array of median strips that are subject to the ban." *Id.* at 90–91. The court also noted that, unlike this case, the government had not even considered "an ordinance limited to the smallest or most dangerous medians, or even an ordinance with an exception for certain large park-like spaces." *Id.* at 92.

Petitioner next points to *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016). In *Bruni*, the court held that a statute requiring a 15-foot buffer outside abortion clinics was not narrowly tailored. The court noted that, under *McCullen*, "the application of intermediate scrutiny's narrow-tailoring analysis must depend on the particular facts at issue." *Id.* at 366. Notably, and unlike this case, the question of whether less-restrictive alternatives existed that would equally serve the government's interest was not at issue because the case involved an abortion clinic buffer zone, and thus "the City has available to it the same range of alternatives that *McCullen* identified." *Id*. at 369. Because there were such readily available alternatives, and because the government had failed 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," the court found that the ordinance was not narrowly tailored. *Id.* at 370 (citing *McCullen*, 573 U.S. at 495).

Petitioner next points to *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011). The *Comite de Jornaleros* ordinance prohibited solicitation on all city streets and highways, including all sidewalks and other obviously safe areas. The court found that the ordinance directly targeted protected speech, *id.* at 946, and was not narrowly tailored, because it restricted "significantly more speech than [wa]s necessary," *id.* at 948. For example, the ordinance applied to "children selling lemonade on the sidewalk in front of their home, as well as to Girl Scouts selling cookies on the sidewalk outside of their

school." *Id.* Unlike this case, the government had made no attempt to limit the ordinance only to those areas where it was unsafe to stand.

Finally, Petitioner points to *Kuba v. 1-A Agricultural Association*, 387 F.3d 850 (9th Cir. 2004). The court in *Kuba* invalidated a restriction limiting protests to those designated "free expression zones" in the parking lot of a state-owned "performance facility." *Id.* at 852. The court held that the restriction, which prohibited protesting within 75 feet of building entrances, was not narrowly tailored because it was not limited to the areas that implicated the government's interest in reducing congestion, instead including safe areas like the outer reaches of the parking lot. *Id.* at 862–63.

These cases recognize that the government must seriously consider less-restrictive alternatives that are available if they "appear capable of serving [the government's] interests" or if "other jurisdictions have found [them] effective." *McCullen*, 573 U.S. at 494. But none of these cases hold that the government must actually enact a less-restrictive alternative before rejecting it. And none of them hold that merely positing a hypothetical alternative that would not achieve the government's interests is enough to invalidate a narrowly tailored ordinance. Consequently, none of these cases create a circuit split with the Tenth Circuit's decision below.

III. No Circuit Split Exists Because the Ordinance Is More Narrowly Tailored Than the Ordinances in the Other Circuits, and in Fact Would Have Been Upheld by Those Circuits

Rather than create a split of authority, Petitioner's cases illustrate why the Ordinance in this case is, in fact, narrowly tailored. In the cases from other circuits,

the less-restrictive alternative would have looked much like this Ordinance, which is focused only on the medians the City determined are unsafe and is targeted at ensuring safety on those specific medians, not at prohibiting speech. Given the narrow tailoring of this Ordinance, there really are no less-restrictive alternatives that would burden substantially less speech while also achieving the government interest.

The ordinances at issue in the other circuits were all broader than the Sandy City Ordinance. The ordinance in *Reynolds* applied to "all County roads" and included "all medians." *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015). The ordinance in *Cutting* applied to all medians without exception, including some "park-like" medians up to 50 feet wide. *Cutting v. City of Portland, Maine*, 802 F.3d 79, 92 (1st Cir. 2015). The ordinance in *Bruni* created a 15-foot buffer zone around all hospitals and health clinics. *Bruni v. City of Pittsburgh*, 824 F.3d 353, 357 (3d Cir. 2016). The ordinance in *Comite de Jornaleros* applied to all streets and highways, including sidewalks and other safe areas. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 941–42 (9th Cir. 2011). And the restriction in *Kuba* limited all demonstrations at a large arena to three sharply circumscribed "free expression zones," none of which were located anywhere near the entrance to the venue. *Kuba v. 1-A Agricultural Ass'n*, 387 F.3d 850, 852–54 (9th Cir. 2004).

In stark contrast, the Sandy City Ordinance does not apply broadly to all roads, all sidewalks, or even all medians. It applies only to those medians that the

City deemed inherently unsafe. After careful examination of various types of medians throughout the city, the City determined that unpaved medians presented a particular danger of tripping or falling. And medians less than 36-inches wide presented a great risk of accidentally stepping or falling into traffic, as well as putting pedestrians at risk from cars veering off the road. Notably, the Sandy City Ordinance is precisely one of the alternative means suggested by the other circuits. *Cutting*, 802 F.3d at 92 (noting that the City of Portland had failed to consider "an ordinance limited to the smallest or most dangerous medians"). Unlike the cases cited by Petitioner, this Ordinance is specifically targeted at unsafe medians, directly furthering the precise governmental interest in maintaining safe roadways and preventing accidents caused by people falling off those medians.

IV. Any Decision by this Court Is Likely to Be Rendered Advisory on Remand

Finally, even were this Court inclined to issue further guidance on *McCullen*, this case is a poor vehicle to do so. On remand, either the district court or the circuit court could render any decision of this court advisory, because both those courts left a threshold question undecided. That threshold question is whether the particular narrow and unpaved medians in Sandy City, which are not intended for either pedestrian or vehicular traffic, are public fora.

Both questions presented assume—and are contingent upon—the notion that the narrow or unpaved medians here are public fora. In the lower courts, Petitioner maintained that these medians are public fora, while the City maintained that they are not public fora. No one questions the general principle that "streets and

parks . . . have immemorially been held in trust for the use of the public." *Frisby v. Schultz*, 487 U.S. 474, 480–81 (1988). But as the Tenth Circuit noted in dicta below, there is good reason to question whether this general principle extends to the City's particular narrow and unpaved traffic medians. *Evans v. Sandy City*, 944 F.3d 847, 854 n.2 (10th Cir. 2019) ("Although courts have concluded medians that resemble parks are traditional public fora, we have serious reservations extending such conclusions to the affected medians in this case, some of which are 17-inch traffic dividers that have hardly been 'by long tradition . . . devoted to assembly and debate.'" (citations omitted) (alteration in original)).

Neither lower court decided the question. Both assumed without deciding that these particular medians were traditional public fora. *Id.* at 853–54 ("The district court did not decide the issue, concluding the forum designation was not dispositive since the Ordinance was valid even under the stricter standard for traditional public fora. We agree with the district court. As we will explain, the Ordinance is a valid time, place, or manner regulation; thus, we need not decide if the affected medians are more appropriately classified as nonpublic fora.").

Nor does Petitioner ask this Court to decide the issue. Accordingly, in order to address the merits of the questions presented, this Court would be required to follow the lead of the lower courts and assume without deciding that the affected medians are traditional public fora. Because both the district court and the Tenth Circuit passed on this issue, this Court does not have an adequate record on which to make that determination.

Consequently, any holding would necessarily be contingent on a finding on remand that these medians are indeed public fora. A ruling from a lower court that these medians are not public fora would render this Court's decision advisory. *Camreta v. Greene*, 563 U.S. 692, 717 (2011) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945))).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

STEVE RAY EVANS, Plaintiff, vs. SANDY CITY, a municipal corporation; TOM DOLAN, Mayor of Sandy City; KEVIN THACKER, Sandy City Police Chief; ROBERT WALL, Sandy City Attorney; DOUGLAS JOHNSON and R. MACKAY HANKS, Sandy City Prosecutors; SCOTT COWDELL, MAREN BARKER, KRISTIN COLEMAN-NICHOLL, CHRIS MCCANDLESS, STEVE FAIRBANKS, LINDA MARTINEZ SAVILLE, STEPHEN P. SMITH, Sandy City Council Members; C. TYSON, C. PINGREE, J. BURNS and JOHN DOE I-XX, Sandy City Police Department, Defendants.	**REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)** Case No. 2:17-cv-408-BSJ Honorable Bruce S. Jenkins

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Defendants Sandy City, Tom Dolan, Kevin Thacker, Robert Wall, Douglas Johnson and R. Mackay Hanks, Scott Cowdell, Maren Barker, Kristin Coleman-Nicholl, Chris McCandless, Steve Fairbanks, Linda Martinez Saville, Stephen P. Smith, C. Tyson, C. Pingree, and J. Burns (collectively, "Sandy City," "Sandy," or "Defendants"), by counsel, respectfully file this reply in support of their motion for summary judgment.

INTRODUCTION

No one at Sandy City questions or wants to minimize the plight of the homeless. Both the Sandy City Council and the police officers involved in enforcing Sandy's ordinances are keenly aware of the needs of the homeless and the importance of protecting their rights. This lawsuit concerns none of those things, despite the content of Mr. Evans's lengthy opposition memorandum. This is a simple case about a simple ordinance. It does not turn on philosophical questions of homelessness, the works of Victor Hugo, or public plazas in ancient Egypt and Paris. It concerns the medians in Sandy City, barriers constructed solely for the purpose of dividing dangerous traffic on public roadways. This case also does not involve a law that prohibits "solicitation" or attempts to ban "panhandling," as much of Mr. Evans's briefing appears to have been drafted to address. It involves a straightforward and content neutral regulation that prohibits dangerous conduct on certain medians regardless of who is engaging in it or what they may have to say.

Despite Mr. Evans's arguments, the legal issues underlying his claims are not complicated. First, Mr. Evans's various First Amendment claims fail because the medians in Sandy subject to the Ordinance are not public forums; but even if they were, the Ordinance is a content neutral, narrowly tailored time, place, and manner restriction. The fact that it may affect

panhandlers more than other groups—because panhandlers are apt to engage in the type of dangerous conduct the Ordinance seeks to prevent—is insufficient to transform a content neutral law into one that is content based. Because the Ordinance was enacted for the express purpose of protecting pedestrian and traffic safety, a significant government interest, it survives First Amendment scrutiny.

Second, Mr. Evans's vagueness challenge, which is based on hypothetical scenarios regarding medians on which he was not standing, fails as a matter of law. A plaintiff cannot bring a facial vagueness challenge. The only question is whether *Mr. Evans* was violating the Ordinance when he was cited, or whether there is some vagueness in its application to *his* conduct. And on that point, there is no dispute—Mr. Evans was violating the Ordinance when he refused a warning and insisted on being given a ticket. As a result, thought experiments about whether certain other medians are "paved" or "unpaved" are immaterial here.

Third, Mr. Evans's equal protection claim fails because the Ordinance is subject to rational basis review and has a rational basis—the prevention of pedestrian/automobile accidents. Mr. Evans's reliance on "animus" cases fails because the Ordinance has a legitimate justification, and because there is no evidence whatsoever that the City Council enacted the Ordinance due to animus towards panhandlers.

Fourth, Mr. Evans's Dormant Commerce Clause claim fails because he has produced no evidence that panhandling in Sandy has *any* effect on interstate commerce, much less an effect that is clearly excessive in relation to the benefits of preventing traffic accidents.

Fifth, Mr. Evans's Eighth Amendment claim fails because the Ordinance does not criminalize status. It is a content neutral law that regulates *conduct* and applies to everyone equally.

There may be cases where some of Mr. Evans's arguments would be well taken. And certainly other jurisdictions have run afoul of the First Amendment by passing overbroad and content based restrictions that seek to ban all panhandling speech from public forums. But that is not this case. The Ordinance is a straightforward, narrow, and content neutral law that applies to everyone equally and serves the legitimate governmental interest of public safety. The Constitution does not prohibit legislative bodies from enacting reasonable regulations to protect their constituents. Because that is what Sandy City has done here, and because there are no disputed facts involved in that conclusion, Mr. Evans's claims should be dismissed.

REPLY REGARDING STATEMENTS OF FACTS

Though Mr. Evans sets forth a great many supposedly material facts, summary judgment does not turn on the volume of the opposition. Any purported disputes must specifically and directly demonstrate a factual conflict, and that conflict must be material. The various "disputes" identified by Mr. Evans do not satisfy that test.[1]

There are only a few facts necessary for this Court to resolve all of Mr. Evans's claims, and they are undisputed:

- The Ordinance on its face is a content neutral regulation that does not classify any group, does not regulate speech, and applies to everyone equally.[2]

[1] Mr. Evans's voluminous attachments and statement of facts contain numerous unauthenticated and inadmissible pieces of evidence. Pursuant to DUCivR 7-1(b)(1)(B), Defendants' objections to this evidence are attached hereto as Exhibit 1.

[2] Dkt. 45-1 (Ordinance text).

- The Ordinance applies only to certain medians in Sandy and does not apply at all to any of Sandy's sidewalks, public parks, or other public property.[3]

- The stated purpose for the City Council's adoption of the Ordinance was to prevent accidents involving pedestrians on medians and oncoming traffic.[4]

- Mr. Evans violated the Ordinance when he was cited for standing on paved medians that were approximately seventeen inches wide, and on an unpaved median covered in boulders, rocks, trees, and shrubs.[5]

That is all this case is about. Mr. Evans's digressions about medians in Europe and Africa, federal statistics about traffic accidents in other jurisdictions, and the opinions of anonymous individuals regarding homelessness posted years ago on the internet are not relevant or material to this case. Despite being given the opportunity to take expedited discovery and depose multiple witnesses, Mr. Evans has failed to produce any evidence that the Ordinance is anything other than what it purports to be. It is not some surreptitious attempt to criminalize homelessness or an embodiment of hidden animus by the Sandy City Council. All of the evidence adduced in the case supports the opposite conclusion—that there was a real and legitimate safety issue with pedestrians standing and walking on certain medians, and the City Council acted reasonably and responsibly to address that issue.

Because the public safety justification for the Ordinance is not frivolous or irrational, this Court need not conduct an inquiry into the minds of City councilmembers or other city officials

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[3] *Id*.

[4] Dkt. 45-3 at Ex. A.

[5] Dkt. 41 (Evans Declaration) ¶¶ 7, 9, 11, 13; Dkt. 58-1 (Amended Evans Declaration) ¶¶ 31, 33, 35, 37 and Exs. 1-A through 1-D thereto; Dkt. 45-3 (Meeting transcript) at Ex. A p. 5; Dkt. 58-9 (Burns Depo.) pp. 11-14, 33, 57-58, 61; Dkt. 58-6 (Johnson Depo.) pp. 27, 45; Dkt. 58-7 (Chapman Depo.) pp. 19; Dkt. 58-42 (photographs); Dkt. 58-45 (photographs).

in search of nefarious motives. But even if it were to do so, it would find the record replete with support for the City's position. Doug Johnson, the City Prosecutor, stated at his deposition that City officials approached him about drafting an ordinance because "[t]hey were having some problems with safety issues … and they were worried about people falling into traffic."[6] Police Captain Stephen Chapman testified that he was "asked to meet with other city officials to basically look at a safety concern that we had regarding pedestrians on or around medians."[7] When asked what spurred officials to request the ordinance, Captain Chapman stated:

> Cpt. Chapman: Again, my initial direction was not very specific. It was simply we are receiving a lot of complaints about people on medians that could be falling, could be tripping, could be hazard in traffic, and wanted me to work with the city prosecutor in putting together an ordinance like that. As far as the specific language went, I did have language that was differing from what was in there. I wanted it to be much more broad, something that said any area not basically constructed for pedestrian traffic because it's in the road. I wanted something to keep people safe. That was kind of my involvement. Can you repeat the question?
>
> Q: Maybe I can break it down a little bit. Let's backtrack before we go there and let me ask you, you said that you knew that there were these complaints about people on medians. Who did you hear that from?
>
> Cpt. Chapman: I received them personally many of them. Our dispatch also – because I was on patrol at the time I would hear them come in over the radio.
>
> Q: So you would get them, but you were instructed by the chief to create the ordinance because of these complaints?
>
> Cpt. Chapman: Yeah, because there was a recognition – because we had so many complaints regarding people almost falling, tripping into traffic and they were – most of the complaints we received were specifically on medians. If you drive down the street you see cars coming by how close they can get to people. So

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[6] Johnson Depo p. 7; *see also id*. pp. 12-13, 52-53; Burns Depo. p. 57; Chapman Depo. p. 10.

[7] Chapman Depo p. 7.

> that was the emphasis, that somebody is going to get hit. Those were the complaints, the lion share of the complaints that came in. I'm afraid this person is going to fall, or I've seen this person fall in front of my car and I almost hit them. The idea is to keep the pedestrians safe by not having them in an area where they are open to being hit by a vehicle.[8]

Like Captain Chapman, other Sandy City officials testified to receiving calls about the well-being of individuals standing on medians or about witnessing or hearing about close calls involving people on the medians.[9] In addition, Mr. Johnson and Captain Chapman testified that the focus was exclusively on safety when determining the minimum width acceptable for someone to stand on a paved median and when drafting the provision restricting people from standing on unpaved medians.[10] Indeed, Sandy City adopted the Ordinance based on the same safety concerns that led Sandy City police officials several years ago to request that the Sandy City Firefighters to stop conducting their Fill the Boot campaign on Sandy's medians.[11]

Moreover, Sandy City officials testified that they never discussed panhandlers or the homeless when drafting the Ordinance.[12] Indeed, the only comments regarding panhandlers occurred at the subsequent open meetings of May 17 and May 31, and involved one councilmember recognizing the effect the Ordinance might have on panhandlers and therefore talking about a way to direct more resources toward those in need.[13]

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[8] *Id*. pp. 9-10.

[9] Johnson Depo. pp. 12-13, 52-53; Dkt. 58-8 (O'Neal Depo.) pp. 15, 17-18.

[10] Johnson Depo. pp. 6-7; 52-53; Chapman Depo. pp. 17-18.

[11] Chapman Depo. p. 48.

[12] Johnson Dep. p. 49; Chapman Depo. p. 52; Burns Depo. pp. 24, 29, 46.

[13] Dkt. 45-3 at Ex. A.

In short, safety was not only the predominant consideration in drafting and adopting the Ordinance—it was the only concern.

Furthermore, Sandy City enforces the Ordinance evenhandedly and with the safety objective in mind:

> Q: You weren't involved in drafting, but were you privy to any sort of complaints that were made to the city regarding homeless individuals?
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> Deputy Chief O'Neal: Not homeless individuals. We do receive complaints on a regular basis of pedestrians in the roadway that case a traffic and safety issue.
>
> Q: When you say complaints, you're specifically talking about panhandlers?
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> Deputy Chief O'Neal: No.
>
> Q: So there have been complaints about other people that have been in the roadway?
>
> Deputy Chief O'Neal: Yes. We have various complaints on a day-to-day basis of people in the roadway, walking in the roadway, standing on medians, that type of thing.
>
> Q: To your knowledge, has anyone been cited for standing on a median for let's say protesting? …
>
> Deputy Chief O'Neal: No. If they're cited for standing on a median or in the roadway, they are cited for that offense. It has nothing to do with why they are there. It's the fact that they are there.[14]

Consequently, even if the legislative intent of the Sandy City Council or the thoughts of Sandy police officers were relevant to the legal analysis, there is no dispute regarding the express purpose of the Ordinance. And because that renders the Ordinance a legitimate public safety restriction well within the legislative discretion of the City Council, Mr. Evans's various arguments premised on evil intent and animus towards the homeless have no support in this record.

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[14] O'Neal Depo. pp. 15-16.

ARGUMENT

I. MR. EVANS'S FIRST AMENDMENT CLAIMS FAIL.

It is well-settled "that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). Even if Sandy's medians were public forums (and they are not, as discussed below), the Ordinance satisfies all three requirements.

A. The Ordinance is Content Neutral.

The Ordinance is content neutral and does not directly, or even indirectly, regulate speech. At most, the Ordinance can be said to have an incidental effect on the speech of those who wish to intimately communicate with drivers in moving vehicles while standing on a narrow or unpaved median. In other words, it governs conduct and, in so doing, only affects the *location* where people can engage in speech—i.e., not on unpaved medians or medians less than thirty-six inches. In this way it is no different than laws that restrict parking in fire lanes or restrictions on the use of fireworks east of Foothill Drive.

Mr. Evans argues that despite the unmistakable content-neutrality of the law, the Ordinance must nevertheless be subjected to strict scrutiny because it disproportionately affects panhandlers. Even if that were true—presumably because most people would not voluntarily stand on a treacherous median in the middle of oncoming traffic—that does not make the law content based. "[A] facially neutral law does not become content based simply because it may

disproportionately affect speech on certain topics. On the contrary, '[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *McCullen v. Coakley*, 134 S.Ct. 2518, 2531 (2014) (quoting *Ward*, 491 U.S. at 791). Put another way, "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (citation omitted) (emphasis in original).

Here, the justification for the Ordinance has nothing to do with the content of anyone's speech while standing on medians, or even whether they are speaking at all. Its justification is public safety—exactly the same justification the Supreme Court upheld as content neutral in *McCullen*. 134 S.Ct. at 2531. The fact that the statute at issue in *McCullen*, which restricted activity near abortion clinics, disproportionately affected abortion protestors did not make the law content based, just as the Ordinance's alleged disproportionate impact on panhandlers does not do so here. As in this case, "[w]hether petitioners violate the Act 'depends' not 'on what they say,' but simply on where they say it." *Id*. (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)).

Mr. Evans also argues that the Ordinance is content based because panhandling was referenced during the City Council discussion that led to passage of the Ordinance. But that too is not enough to make the Ordinance content based. A content neutral law can be deemed content based only when "the government has adopted a regulation of speech because of *disagreement with* the message it conveys." *Ward*, 491 U.S. at 791 (emphasis added). There is a significant difference between a legislator recognizing the *consequences* of a particular law and the *purpose* for which the law is enacted. "'Discriminatory purpose' … implies more than intent

as volition or intent as awareness of consequences." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

There is no evidence that the City Council adopted the Ordinance because it disagreed with the content of panhandlers' speech. The single councilmember who referenced panhandling did so only to note the *consequence* of the Ordinance in limiting the places where people could panhandle, and even then as part of a plea to increase services to the homeless.[15] Moreover, in determining how to address the safety concerns that justified the Ordinance, city officials stood on medians, measured them, and assessed the characteristics of medians safe enough for people to stand on without worrying they might be hit by a passing vehicle or fall into traffic.[16] The Ordinance does not ban standing or sitting on all medians, but only those deemed unsafe. It is worth noting that as part of this fact-finding, city officials did not assess panhandling activity, did not talk to residents or businesses about panhandlers, did not concern themselves with how panhandlers affected traffic, did not measure the signs that panhandlers held, and did not focus on panhandling at all—because none of that mattered to the purpose driving the Ordinance—public safety.[17]

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[15] Dkt. 45-3 at Ex. A.

[16] Johnson Depo. pp. 8-9; Chapman Depo. pp. 15-21; O'Neal Depo. pp. 17-18; Dkt. 45-3 at Ex. A p. 3.

[17] The sole case relied on by Mr. Evans for his content based argument, *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), is not helpful here. *Reed* involved a sign ordinance that was facially content based and discriminated among different types of speech in its statutory text. *Id*. at 2227. The Court specifically noted that the town would not have run afoul of the First Amendment if it had simply banned all signs, *id*. at 2232, with Justice Alito adding that an acceptable, content neutral alternative would be "[r]ules regulating the locations in which signs may be placed." *Id*. at 2233 (Alito, J., concurring). Both such alternatives are far more analogous to the Ordinance here than the facial classification struck down in *Reed*.

As a result, Mr. Evans's attempt to characterize the Ordinance as content based solely because of its alleged disproportionate effect fails. The Ordinance is a content neutral law that regulates conduct, not speech.

B. The Ordinance is Narrowly Tailored to Serve a Substantial Governmental Interest.

In addition to being content neutral, the Ordinance is also narrowly tailored to serve a substantial governmental interest.

There is no dispute that public safety, including preventing pedestrians from being hit by cars or trucks, is a substantial governmental interest. *See McCullen*, 134 S.Ct. at 2531; *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (recognizing legitimacy of interest in "maintain[ing] the orderly movement of the crowd" at a fair). The fact that Mr. Evans disagrees with that assessment and believes he is capable of safely standing amidst oncoming traffic is immaterial. "'The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Ward*, 491 U.S. at 800 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). "Instead, [courts] will give deference to a reasonable judgment by the City as to the best means" of achieving its goals. *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007); *see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 ("The judgment of the Legislative Branch cannot be ignored or undervalued simply because [plaintiff] casts it claims under the umbrella of the First Amendment.").

The Ordinance is also narrowly tailored to serve the City's interest in public safety. The Ordinance does not ban standing or sitting on all medians in Sandy. It does not ban standing or sitting on sidewalks, or curbsides, or public parks. And it does not regulate solicitation of money on private property, such as store parking lots. It applies only to those medians that City officials determined, after measuring the medians at issue, were unsafe to stand or sit on. These were not hypothetical concerns; they were borne out by years of police experience[18], close calls (including people who had fallen into traffic)[19], and specific reports[20] from worried citizens—concerns that are supported by the materials submitted by Mr. Evans documenting cases of pedestrian accidents on medians.[21] Mr. Evans's assertion that no one has been injured or died—yet—in Sandy while standing on a median is beside the point. Sandy does not need to wait until an accident happens to pass legislation seeking to prevent it.[22]

None of this is changed by Mr. Evans's assertions that the Ordinance may not be necessary in every single circumstance. As the Supreme Court has held, "our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" *Ward*, 491 U.S. at 797 (citation omitted). "Rather, the requirement of narrow tailoring is satisfied 'so

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[18] O'Neal Depo. pp. 17-18.

[19] Burns Depo. p. 57; Chapman Depo. p. 10; Johnson Depo. pp. 12-13, 52-53.

[20] Contrary to Mr. Evans's assertion, these reports concern safety and obstruction of traffic by people on medians, not the act of panhandling or its associated speech. *See* CAD Call Reports, attached hereto as Exhibit 2; Defendants' Responses to Plaintiff's First Set of Interrogatories, attached hereto as Exhibit 3, p. 7.

[21] *See* Dkt. 58-13, Dkt. 58-15.

[22] Mr. Evans attempts to argue that the Ordinance makes pedestrians less safe because they would be forced to wade into oncoming traffic while crossing the street, rather than pausing on the medians. That argument is incorrect. The law provides an exception for such circumstances, which would not violate the Ordinance. *See* O'Neal Depo. pp. 25-26; Dkt. 45-3 at Ex. A, p. 3.

long as the … regulation promotes a substantive government interest that would be achieved less effectively absent the regulation.'" *Id*. at 799 (citation omitted).

There is no question that the goal of preventing pedestrians from falling off unsafe medians is promoted by keeping pedestrians off unsafe medians. "Simple common sense," *Burson v. Freeman*, 504 U.S. 191, 211 (1992), is sufficient to show that the Ordinance is narrowly tailored to achieve this goal.

C. The Ordinance Leaves Ample Alternative Channels for Individuals Wishing to Engage in Speech.

Finally, the Ordinance satisfies the third time-place-manner requirement of leaving open adequate alternative channels for speech.

"The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647. At issue in *Heffron* was a rule imposed at the Minnesota State Fair that required anyone selling or distributing items or soliciting funds to do so from a "duly licensed location" on the fairgrounds. *Id*. at 643-644. The International Society for Krishna Consciousness (ISKCON) wished to have members roam the fairgrounds, distributing items and requesting funds. *Id*. at 644-645. The state fair rule prevented them from doing so and ISKCON challenged it on First Amendment grounds. The Supreme Court upheld the rule, stating "[w]e have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." *Id*. at 647-648 (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

Like Mr. Evans here, ISKCON argued that the rule did not leave ample alternative channels because it restricted its members' solicitations to booths, rather than allowing them to walk up to fairgoers and engage in their preferred form of direct communication and solicitation. *Id*. at 653. The Court rejected ISKCON's contention, holding ISKCON could still conduct activities "anywhere outside the fairgrounds" and within booths inside the fairgrounds. *Id*. at 654-55. The fact that ISKCON could not solicit money anywhere it pleased was not a constitutional violation.

As the Court's holding in *Heffron* shows, the Ordinance is not unconstitutional because Mr. Evans prefers to solicit drivers from narrow or unpaved medians. He may engage in the exact same speech from paved medians over thirty-six inches, from sidewalks, and at parks. Nearly every street with a median in Sandy also has two sidewalks on either side. There are acres and acres of public parks in the City. And there are more than 7,000 linear feet of medians to which the Ordinance does not apply. (One such section was only ten feet away from one of the locations where Mr. Evans was cited.)[23] Mr. Evans could engage in his particular speech in any of these locations. He does not have a constitutional right to do more.

And the crucial distinction on this point is that in asserting that these multiple other areas unaffected by the Ordinance are inadequate, Mr. Evans does not claim he would be unable to engage in his preferred *speech* there, nor that passing cars and pedestrians will be unable to see his message. He just believes that he will get less *money* in those places. But whether Mr. Evans's speech is effective in getting him money and whether he is allowed to engage in speech are two entirely different things. Mr. Evans cites no authority that the *receipt* of money is a form

[23] *See* Ex. 3 hereto p. 6; Dkt. 45-2 (Johnson Declaration) at ¶¶ 6, 10.

of speech.[24] And even if it were, it would be pure commercial speech, which garners less constitutional protection. *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 563 (1980).[25]

Furthermore, the test of ample alternative channels is not one comparing the effectiveness of two modes of speech, as the *Heffron* case demonstrates. There remain ample ways to communicate the very same message Mr. Evans seeks to communicate, including the "close and personal conversations" he says he prefers. (Dkt. 57 at 14). Such conversations could occur as easily, if not more easily and effectively, from sidewalks and parks, where he would also be able to communicate with people who are on foot. Mr. Evans's preference to engage with drivers in vehicles from a narrow or unpaved median is no different than ISKCON's preference to engage with fairgoers wandering around rather than from a set booth. That may be his desire, but it does not mean there are inadequate alternative channels for speech.

Finally, examining the interrelationship between Mr. Evans and drivers also helps to underscore the Ordinance's constitutionality. If a driver of a vehicle stopped her car in the middle of an intersection, blocking traffic, a police officer could ticket her—even if she did so with the express purpose of giving Mr. Evans money. The law preventing drivers from blocking

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[24] No matter how one construes the various holdings of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Court never said that. If it had, every commercial transaction would be subject to First Amendment scrutiny. And even if the act of giving money to Mr. Evans were seen as a form of speech by drivers (which is a stretch), Mr. Evans lacks standing to bring a claim on behalf of such hypothetical plaintiffs.

[25] In further support of treating Mr. Evans's speech as commercial, he himself has stated that panhandling "is the only way I can bring in enough money to meet my basic needs," (Dkt. 58-1 ¶ 39), and that "panhandling involves the exchange of money" and "involves a large sum of money." (Dkt. 57 pp. 48, 49). He has classified his panhandling as a form of "conduct[ing] business." (*Id*. p. 11.) Moreover, Mr. Evans argues that, "Panhandling is self-employment, because it is 'working for oneself as a freelancer than employer,' and it is an activity done for the purpose of compensation." (*Id*. p. 81.) By his own admission, then, Mr. Evans is using his signs to advertise his need and he has an economic motivation for his speech.

intersections does not violate the Constitution simply because it incidentally restricts a driver's ability to give Mr. Evans money. The Ordinance likewise does not violation the Constitution simply because it means someone cannot stand on certain medians to solicit money.

D. The Medians Regulated by the Ordinance are Not Public Forums and the Ordinance is Reasonable.

The Ordinance satisfies the requirements for a valid time, place, and matter restriction. In truth, however, this Court need not even reach that issue because Sandy's medians are not public forums.

"The mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984). The government may reserve property that is not by tradition or designation a public forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Sandy City has presented uncontradicted evidence that the medians regulated by the Ordinance were designed and constructed exclusively for traffic control purposes.[26] Mr. Evans's attempt to rebut that evidence with photographs of historical medians from across the United States and Europe says nothing about the medians at issue here. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (when assessing the type of forum involved the court must know "the history of the *particular* place" (emphasis added)). And if the Court reviews the

[26] Dkt. 45-2 (Johnson Declaration) ¶ 8.

photographs Mr. Evans has submitted of medians in Sandy, it will note the conspicuous absence in nearly every photograph of anyone (other than the people taking photographs) standing—let alone engaging in public speech—on any of the medians. If medians, including those in Sandy City, "are the modern plazas … used by pedestrians to be seen and heard for centuries … designed for pedestrians … as the places where pedestrians can still be seen and heard in the public sphere," (Dkt. 57 p. 3), why is no one standing on the medians in nearly every photograph presented by Mr. Evans? In other words, if medians are traditional public forums, where is the public?

Mr. Evans has presented no evidence suggesting that the medians covered by the Ordinance are anything other than traffic control devices designed to ensure the public's safety. The medians are therefore nonpublic forums, and because the Ordinance is reasonable, it does not violate the First Amendment.

II. MR. EVANS'S VAGUENESS CLAIM FAILS.

Mr. Evans spends much of his briefing arguing about the definition of "median," claiming no one knows what that term means, and posing hypotheticals about certain medians in Sandy on which no one has been cited that might be construed as "paved" or "unpaved."

None of this matters to this case. A vagueness claim must proceed as an as-applied challenge—the Supreme Court does not allow facial vagueness challenges. *Holder*, 561 U.S. at 20. The only question, therefore, is whether Mr. Evans's conduct clearly violated the Ordinance, not how the Ordinance might be applied in some other circumstance. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S.

489, 495 (1982). Importantly, "that rule makes no exception for conduct in the form of speech." *Holder*, 561 U.S. at 20.

This rule is fatal to Mr. Evans's vagueness challenge because there is no legitimate dispute that he was violating the Ordinance when he was cited. Two of his citations came when he was standing on medians in State Street, which are paved and approximately seventeen inches wide.[27] The other two came when Mr. Evans was standing on the median on Auto Mall Drive, an unpaved median covered with boulders, large rocks, trees, and shrubs.[28] Although Mr. Evans attempts to argue that there is some ambiguity about whether the Auto Mall Drive median is "paved" or "unpaved" (Dkt. 57 p. 31), a review of the photographs of that median submitted by Mr. Evans himself[29] shows that no reasonable person would consider the median "paved":

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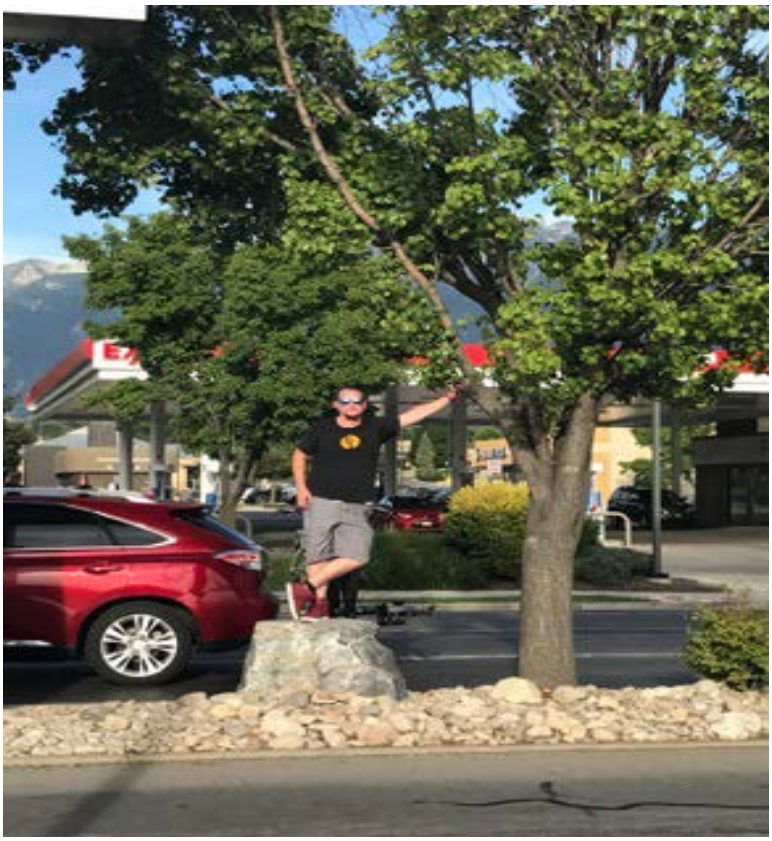
[27] Dkt. 41 (Evans Declaration) ¶¶ 11, 13; Dkt. 58-1 (Amended Evans Declaration) ¶¶ 35, 37 and Exs. 1-C and 1-D thereto; Dkt. 45-3 (Meeting transcript) at Ex. A p. 5; Dkt. 58-9 (Burns Depo.) pp. 11-14, 61; Dkt. 58-6 (Johnson Depo.) p. 27; Dkt. 58-7 (Chapman Depo.) pp. 19; Dkt. 58-45 (photographs).

[28] *Id*.; Dkt. 41 (Evans Declaration) ¶¶ 7, 9; Dkt. 58-1 (Amended Evans Declaration) ¶¶ 31, 33 and Exs. 1-A and 1-B thereto; Dkt. 58-9 (Burns Depo.) pp. 33, 57-58; Dkt. 58-6 (Johnson Depo.) p. 45; Dkt. 58-42 (photographs).

[29] Dkt. 58-42, Dkt. 58-45.



That is the end of the vagueness inquiry. It does not matter whether there is some ambiguity in how the Ordinance might be applied to some other median and some other hypothetical person. *United States v. Williams*, 553 U.S. 285, 305–06 (2008) (the Eleventh Circuit's "basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute"). It matters only whether Mr. Evans's conduct was clearly proscribed by the Ordinance. *Holder*, 561 U.S. at 21 (even if a "statute may not be clear in every application, the dispositive

point is that its terms are clear in their application to plaintiffs' proposed conduct"). Because it was, Mr. Evans cannot assert a vagueness challenge based on the conduct of others.[30]

Finally, even if this Court could entertain Mr. Evans's vagueness challenge, his heavy reliance on purported disagreements among certain police officers and prosecutors about how they would interpret certain types of medians is beside the point. Every single law involves some measure of interpretation and discretion by those enforcing it. That does not render the law unconstitutionally vague. "Condemned to the use of words, we can never expect mathematical certainty in our language." *Grayned v. City of Rockford,* 408 U.S. 104, 110, (1972). "While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 at 794; *see also Kovacs v. Cooper,* 336 U.S. 77, 79, (1949) (rejecting vagueness challenge to city ordinance forbidding "loud and raucous" sound amplification) (opinion of Reed, J.). For this reason, the Court has rejected challenges to laws based on the vagueness of terms or phrases such as "training" and "expert advice or assistance," *Holder*, 561 U.S. at 20; "in a manner that reflects the belief," *Williams*, 553 U.S. at 304–05; "protest, education, or counseling," *Hill v. Colorado*, 530 U.S. 703, 732 (2000); and "noise or diversion which disturbs or tends to disturb the peace or good order of such school session," *Grayned*, 408 U.S. at 108.

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[30] Like any person charged with violating a law, Mr. Evans can, in his criminal proceeding, seek to rely on a vagueness argument or on principles of statutory construction as a defense. In fact, because Mr. Evans's criminal proceeding is ongoing, and because he has already been convicted in Justice Court (Dkt. 58-1 ¶ 41), abstention doctrines counsel against a federal court reaching a different conclusion about Mr. Evan's specific conduct. *See Younger v. Harris*, 401 U.S. 37, 49-51 (1971).

There may be disagreements at the margins as to enforcement of the Ordinance, as there are with any law. Those questions are for another day. Mr. Evans cannot raise them in a vagueness challenge here.

III. MR. EVANS'S EQUAL PROTECTION CLAIM FAILS.

Rational basis review applies here because the Ordinance does not classify on any suspect basis. This is the "least exacting level of review." *Wasatch Equality v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1360 (D. Utah 2014). The law at issue is "'accorded a strong presumption of validity,' and it is the plaintiff's burden to overcome the presumption and show that the statute or law in question is *not* rationally related to a legitimate state interest." *Id*. (citation omitted). "[A] classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id*. (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)) (further citation omitted).

There is no question that the Ordinance satisfies this test. Its justification is public safety and the prevention of pedestrian traffic accidents, a legitimate interest supported by the record and the statements of the Deputy Police Chief at the City Council meeting.[31] Mr. Evans's assertion that Sandy is required to produce "statistics" to support this rationale is unsupported by the law. "In a case based on rational basis, defendants have 'no obligation to produce evidence to sustain the rationality of [the law].'" *Id*. (quoting *Heller*, 509 U.S. at 320) (alteration in original).

For similar reasons, Mr. Evans's invitation for this Court to second-guess the policy judgment of a legislative body and question whether standing on medians really poses a public

[31] Dkt. 45-3; *see also supra* notes 4, 6-14.

safety risk is unavailing. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Conclusory statements declaring it so are insufficient to meet this burden. Further, that the law might be overinclusive or underinclusive, or even both, makes no difference. *Vance v. Bradley*, 440 U.S. 93, 108 (1979); *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 590 (1979); *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109-110 (1949). The Supreme Court "defers to legislative determinations as to the desirability of particular statutory discriminations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Moreover, "[s]tates are accorded wide latitude … under their police powers and rational distinctions may be made with substantially less than mathematical exactitude." *Id*. at 303. In short, the Court has made clear that the judiciary does "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting Inc. v. Mo.*, 342 U.S. 421, 423 (1952).

To distinguish this authority, Mr. Evans seeks to rely on a narrow line of cases dealing with "animus" in which courts have concluded that laws are so irrational and without any legitimate justification that they must be the product of animus. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (law must be "so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus towards the class it affects"). That argument fails here on the law because the Ordinance *is* supported by a legitimate public safety rationale. *See Wasatch*

Equality, 55 F. Supp. 2d at 1368 ("In other words, if there is an independent basis (other than animus) to support a finding of rational basis it does not matter for Equal Protection Clause analysis purposes that animus may also have influenced the decision."). But it also fails on the facts because there is no evidence in the record that the City Council acted with animus towards homeless people. Quite the contrary. The only discussion of homelessness during that meeting was a plea by Mr. McCandless to *increase* aid to the homeless through means other than panhandling. Where "there are multiple grounds supporting a rational basis for [the entity's] restriction, Plaintiff's allegations of animus are irrelevant to the discussion." *Id*.

Mr. Evans's reliance on isolated statements in one appendix to the 2014 Sandy Citizen Survey Report, in which several residents mentioned panhandlers or the homeless, is similarly unavailing. As a factual matter, Mr. Evans has failed to show that any officials responsible for the Ordinance's adoption read Appendix G and, importantly, that they agreed with the four comments regarding panhandlers and the homeless or were acting based on those comments. After all, it is a 250-page Report that includes a separate appendix entitled "Greatest Issues Facing Sandy City," and there is no evidence linking that document to the adopters of the Ordinance.

But even if Mr. Evans had produced such evidence, the assertion would still fail as a matter of law. Statements by a few residents cannot satisfy a plaintiff's obligation to show animus. That would be akin to saying that a court should review transcripts of what residents say at town hall meetings to determine if a legislator acted out of animus. Moreover, Mr. Evans fails to explain why one resident complaining about panhandlers in an online survey conducted two years before the Ordinance's adoption should matter more than the numerous calls Sandy City

police received about the *safety* of people on medians.[32] At a bare minimum, those reports prove the Ordinance had a legitimate and wholly rational justification, which is alone sufficient to defeat a claim of animus.

For all of these reasons, the Ordinance passes the exceptionally low bar of rational basis review and does not violate the Equal Protection Clause.

IV. MR. EVANS'S DORMANT COMMERCE CLAUSE AND EIGHTH AMENDMENT CLAIMS FAIL.

A. The Dormant Commerce Clause Claim Fails.

With a Dormant Commerce Clause claim, "[t]he burden to show discrimination rests on the party challenging the validity of the statute." *Hughes v. Okla.*, 441 U.S. 322, 336 (1979). Mr. Evans cannot meet this burden. He has not shown that the Ordinance treats in-staters and out-of-staters differently or that it was adopted with the purpose or effect of treating out-of-staters differently—threshold issues when analyzing a law under the Dormant Commerce Clause. Moreover, this is not a case of a state burdening a particular form of employment or economic protectionism, nor is this about restricting Mr. Evans's ability to travel to, or reside within, the City of Sandy.

"If the challenged law does not discriminate, the challenger must rely on a second-tier inquiry, which employs the balancing test of *Pike*. That test states that '[the law] will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009) (internal citations omitted).

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[32] *See* Ex. 2 hereto.

Mr. Evans has proffered no evidence to support his contention that the law burdens interstate commerce—and the *Pike* balancing test "requires evidence." *Id*. at 1043. "Absent an evidentiary basis for concluding that the Utah statute fails the *Pike* balancing test," the court should reject Mr. Evans's Dormant Commerce challenge. *Id*. at 1044.

B. The Eighth Amendment Claim Fails.

Similarly, Mr. Evans has presented no authority supporting his Eighth Amendment claim. Mr. Evans agrees that he "challenges the Ordinance under only the third element of the Eighth Amendment, claiming the Ordinance punishes status, not conduct." (Dkt. 57 p. 5.)

Homelessness, however, is not a status akin to sexual orientation or addiction, but even if it were, Sandy City has not criminalized homelessness. The Ordinance prohibits the *conduct* of standing or sitting on a narrow or unpaved median. That is all it does—and the Supreme Court has made clear such a law raises no Eighth Amendment concerns. *Powell v. Texas*, 392 U.S. 514, 531-532 (1968) (plurality opinion)).

Despite agreeing that he is only challenging the Ordinance as criminalizing a status, not as imposing an excessive fine, Mr. Evans states that "[a] $50 fine may not seem like much, but it could be impossible to pay if an individual depends on panhandling for money." (Dkt. 57 p. 85.) No one doubts the truth of that statement, particularly Sandy City, which is why police officers sought only to warn Mr. Evans about the Ordinance. It is Mr. Evans who insisted that the officers cite him, rather than just give him a warning.[33] In any event, Mr. Evans has not raised a claim of excessive fine or punishment under the Eighth Amendment.

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[33] Burns Depo. pp. 11-13, 61-62.

V. SANDY CITY DEFENDANTS SUED IN THEIR INDIVIDUAL CAPACITIES ARE ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY.

Finally, Mr. Evans does not dispute that the police officers sued in their individual capacities are entitled to qualified immunity because their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). As a result, claims against those officers should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment to Defendants and dismiss each of the claims in Mr. Evans's Complaint.

RESPECTFULLY SUBMITTED this 11th day of August 2017.

/s/ David C. Reymann

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of August 2017, I filed the foregoing

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

via the CM/ECF system, which served the following:

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