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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The City's brief confirms the need for this Court to resolve two important questions of First Amendment law, both of which are the subject of splits in circuit authority. First, the City insists (at 2) that the government may rely on "[s]imple common sense"—*i.e.*, its own *ipse dixit*—to prove that measures burdening substantially less speech will not achieve the government's goal. And second, the City maintains (at 12) that officials may bar access to any median not "deemed safe by the City" on the ground that doing so is necessary to *completely* eliminate *any* risk of traffic accidents.

But those are the positions that put the Tenth Circuit at odds with other courts. Under *McCullen* v. *Coakley*, 573 U.S. 464 (2014), and the decisions of at least four circuits, the government's bare assertion that laws restricting substantially less speech will not achieve its goal are not enough to close off a traditional public forum. Instead, the government must try to enforce such other laws and demonstrate that they did not work. And under *Frisby* v. *Schultz*, 487 U.S. 474 (1988), and the decisions of at least three circuits, the government cannot simply cite a *de minimis* risk of accidents to eliminate roads, or medians within roads, as a forum for expressive conduct. Instead, the government must target *conduct* in or near roadways that is actually dangerous. Applying these principles, courts have repeatedly struck down roadway median bans like Sandy City's. The Tenth Circuit reached a different result only by applying a different test. This conflict warrants the Court's attention.

The City tries to distract from these splits. It identifies a number of irrelevant factual distinctions between this case and those on the other side, but these non sequiturs miss the point. The Tenth Circuit applied different *legal standards* than those applied elsewhere, and those standards were essential to its decision to uphold Sandy City's median ban.

To the extent the City *does* address the splits, it targets straw men of its own creation. The City argues that no circuit requires the government to try the *least* restrictive alternative before burdening speech. That is true—and beside the point. What other circuits *have* held is that the government must "*prove* that it actually *tried* other" readily available alternatives before completely shutting down a public forum. *Reynolds* v. *Middleton*, 779 F.3d 222, 231 (4th Cir. 2015); *see Cutting* v. *City of Portland*, 802 F.3d 79, 91 (1st Cir. 2015) (government must show that it "tr[ied]—or adequately explain why it did not try—other, less speech restrictive means"). The Tenth Circuit rejected that precise standard. Pet. App. 21a–24a.

The City concludes with a makeweight vehicle objection. But the City does not deny that the Tenth Circuit actually resolved the questions presented in upholding the constitutionality of Sandy City's median ban, or that a contrary ruling by this Court would require vacating that decision. The City offers no persuasive reason why the Court should tolerate these conflicts on important issues of First Amendment law.

The Court should grant certiorari and reverse.

ARGUMENT

I. This case implicates a deepening circuit split on two important questions.

The Tenth Circuit broke from numerous decisions invalidating bans on access to public fora—including median bans like Sandy City's. In doing so, the Tenth Circuit adopted two lines of reasoning that other courts have rejected. First, while other courts require the government to demonstrate that it actually tried measures burdening substantially less speech before shutting down a traditional public forum (or to demonstrate, with evidence, why such measures would not work), Pet. 20–23, the Tenth Circuit allowed Sandy City to jump right to banning speech, based on sheer speculation that other measures would be "inadequate," Pet. App. 22a. Second, while other courts have held that the government may not ban all expressive conduct in or near roadways on the ground that doing so is necessary to completely eliminate the risk of accidents, Pet. 27–29, the Tenth Circuit held that medians can be eliminated as a forum solely because it is "not . . . implausible" that an accident may occur there, Pet. App. 22a–23a.

This divergence among the courts of appeals is genuine and consequential, and it has only deepened since the petition was filed.

A. The circuit split has only grown more entrenched.

Recent developments underscore the need for this Court's intervention. As the petition explained (at 20–23), several circuits require the government to

show that it actually "tried to *use* the available alternatives to address its safety concerns." *Reynolds*, 779 F.3d at 232. The Fourth Circuit recently doubled down on that view. In *Billups* v. *City of Charleston*, 2020 WL 3088108 (4th Cir. June 11, 2020) (published), the court reiterated that the government is "obliged to demonstrate" that, "before enacting the speech-restricting law," "it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Id.* at *10. This burden, *Billups* explained, "is satisfied only when [the government] presents actual evidence supporting its assertions." *Id.* (punctuation omitted).

Applying those principles to a Charleston law that burdened speech by tour guides, the Fourth Circuit rejected Charleston's contention that narrower alternatives "would fail to adequately protect Charleston's tourism industry." *Id.* "[T]he City merely offer[ed] testimony from its officials regarding the predicted ineffectiveness of the suggested alternatives." *Id.* "Such testimony, without more," the court explained, "is not sufficient to satisfy the evidentiary standards established by *Reynolds* and *McCullen*." *Id.*

The Tenth Circuit's decision is impossible to reconcile with *Billups* and the decisions from other circuits discussed in the petition. In upholding Sandy City's Ordinance, the Tenth Circuit relied on *exactly* the sort of evidence that *Billups* rejected—city officials' subjective beliefs, in this case that medians are "scary," that dirt presents a "tripping" hazard, and that enforcing traffic-safety laws would not be as "effective" as eliminating expressive activity from me-

dians altogether. *See infra*, at 8–9. *Billups* thus confirms that the outcome in this case would have been different if it had arisen in another circuit. The Court should not tolerate such disuniformity on matters as core to our democracy as the free-speech rights protected by the First Amendment.

B. The City's efforts to downplay the splits distort the relevant decisions.

The City offers several arguments to explain away the splits. None has merit.

1. Citing *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), the City's principal argument is that "no circuit has held that a city must enact *every* less-restrictive means before rejecting them." Opp. 5 (capitalization omitted) (emphasis added). That argument attacks a straw man.

Petitioner has never suggested that the City must prove its Ordinance is "the least restrictive" one imaginable. Opp. 9. No court has adopted that rule. *See* Pet. 16. Courts *have* required, however, that the government prove that it "tr[ied]—or adequately explain why it did not try—other, less speech restrictive means." *Cutting*, 802 F.3d at 91. In the First, Third, Fourth, and Ninth Circuits, a government must "show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." *Bruni* v. *City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016);[1] *see also Reynolds*, 779 F.3d at

[1] A petition for certiorari is pending in *Bruni*. *See* No. 19-1184. The Court should grant Mr. Evans's petition regardless of its

232; *Comite de Jornaleros de Redondo Beach* v. *City of Redondo Beach*, 657 F.3d 936, 947 (9th Cir. 2011).

It is the Tenth Circuit's departure from *that* approach—not some imagined failure to adopt a least-restrictive-means analysis—that sets it apart from other courts of appeals. Unlike other circuits, the Tenth Circuit allows the government to ignore less speech-restrictive measures merely by asserting that such alternatives are less "effective." Pet. App. 23a. For example, the Tenth Circuit agreed that Sandy City did not even need even to *try* stepped-up enforcement of existing traffic-safety laws because those laws are "reactive[]" and require a police officer "to sit and watch a person on the median until they fell into traffic." Opp. 9, 11; *see* Pet. App. 23a. But the First Circuit rejected that argument nearly word-for-word in *Cutting*, holding that traffic-safety laws cannot be ignored on the theory that "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 (punctuation omitted). Sandy City's repeated references to *Ward* simply ignore the split.

The City similarly ignores the conflict between the Tenth Circuit's decision and this Court's admonition that "regulating speech must be a last—not first—resort." *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). As the Court has repeatedly emphasized, "considerations of [efficiency and con-

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decision in *Bruni*. At the very least, however, it should hold this case for *Bruni* if certiorari is granted there. *See* Pet. 21–22 (describing split between this case and *Bruni*).

venience] do not empower a municipality to abridge freedom of speech." *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 639 (1980); *see also McCullen*, 573 U.S. at 495 (same). Consistent with these decisions, *McCullen* struck down Massachusetts's buffer-zone law because "the Commonwealth ha[d] not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." 573 U.S. at 494. As the petition explained (at 20–23), *Cutting*, *Reynolds*, *Bruni*, and *Redondo Beach* follow directly from that consistent line of this Court's decisions. The City's persistent invocations of *Ward* fail to explain how the Tenth Circuit's approach can be reconciled with any of these decisions.

If anything, the City's insistence that *McCullen* adds nothing to *Ward*'s analysis only highlights the need for this Court's review. According to the City—and the Tenth Circuit—*McCullen* did nothing to "change" the narrow-tailoring inquiry or "create a new evidentiary requirement." Pet. App. 19a, 21a–22a; *see* Opp. 6. But other courts have held that *McCullen* "clarifies what is necessary to carry the government's burden of proof under intermediate scrutiny." *Reynolds*, 779 F.3d at 228; *see Billups*, 2020 WL 3088108, at *10 & n. 9 ("Read together, *Reynolds* and *McCullen* [require the government] to demonstrate that it actually tried or considered less-speech-restrictive alternatives[.]").

2. The City next argues that the Tenth Circuit's decision is consistent with those of other circuits because *McCullen* does not require the City to "enact" narrower measures—it "need only demonstrate that [those] alternatives would fail to achieve the gov-

ernment's interests." Opp. 8 (quotation marks omitted). But the City again glosses over the relevant decisions. *McCullen* shows that the narrow-tailoring requirement has bite: the City cannot merely *assert* "that the chosen route is easier" or "that other approaches have not worked." 573 U.S. at 495–496. Rather, the City must "*show*[] that it *seriously undertook* to address the problem with less intrusive tools readily available to it." *Id.* at 494 (emphases added). As the Fourth Circuit put it, *McCullen* "makes it clear that intermediate scrutiny does indeed require the government to present *actual evidence* supporting its assertion that a speech restriction does not burden substantially more speech than necessary." *Reynolds*, 779 F.3d at 229 (emphasis added). "[A]rgument unsupported by the evidence will not suffice to carry the government's burden." *Id.*

The City made no real attempt to satisfy its evidentiary burden here—and, on the City's motion for summary judgment, the Tenth Circuit blessed that failure as a matter of law. In support of its motion, the City offered just three pieces of "evidence" to justify its complete ban on access to certain medians:

- The city prosecutor visited a single median and felt standing was "scary" until the median widened to about three feet. Pet. App. 30a (Briscoe, J., dissenting).
- The city police captain visited medians and concluded that none of them felt safe to stand on, regardless of width. Pet. App. 30a–31a. He also had a "feeling" that unpaved medians—which might contain only dirt—presented a tripping hazard. *Id.*

- The City received twenty-eight citizen complaints reporting "close calls" involving pedestrians on medians—all but six of which related to a small, half-mile area near a single highway. Pet. App. 17a, 31a.

The Tenth Circuit relied on this scant evidentiary record to hold that enforcement of traffic-safety laws would be "clearly inadequate." Pet. App. 22a–23a. But the City presented no *evidence* that it actually tried enforcing such laws and that doing so did not work. The Tenth Circuit's decision thus squarely conflicts with other circuits' recognition that the government's mere say-so that targeting dangerous conduct will not work is an insufficient basis to eliminate a traditional public forum. To put a fine point on it: the First Circuit in *Cutting*, the Fourth Circuit in *Reynolds*, and the Ninth Circuit in *Redondo Beach* did not doubt that there is *some* risk in being present near moving vehicles. That much is obvious, and was obvious when *Frisby* held that all streets are traditional public fora. *See* 487 U.S. at 480–481. But applying the proper intermediate-scrutiny standard, those other circuits all held that mere invocation of traffic-safety risk does not spare the government the need to demonstrate, with evidence, that enforcement of traffic-safety laws does not work.[2] The Tenth Circuit's approach, as seen in its

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[2] The City relies (at 8–11) on *Traditionalist American Knights of the Ku Klux Klan* v. *City of Desloge*, 775 F.3d 969 (8th Cir. 2014). But that decision does not support the Tenth Circuit's holding. Unlike Sandy City's bare assertion that certain medians are "scary," the city in *Desloge* commissioned a study from a traffic consultant "identifying and evaluating any safety issues"

decision below, poses a grave risk to free speech by inverting *Thompson*'s requirement that governments "regulat[e] speech [as] a last—not first—resort." 535 U.S. at 373.

C. The City's proffered factual distinctions are legally irrelevant.

The City's attempt to distinguish other circuits' decisions on their facts also misses the mark.

1. The City argues (at 15–17) that no split exists because its Ordinance applies to a narrower set of medians than those at issue in other cases.[3] That argument overlooks the key point, which is that the Tenth Circuit employs a different *legal rule* than other circuits—a difference in methodology that cannot be chalked up to differences in factual posture. Again, Sandy City's evidence of narrow tailoring consisted of its bare assertion that alternative measures would not have been "effective." *See* Pet. App. 23a (accepting assertion that existing traffic-obstruction laws are inadequate because an officer must observe the obstruction). No other circuit would have found

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before passing its ordinance. *Id.* at 973. And even if *Desloge* could support the result below, that fact would only *deepen* the circuit split.

[3] The City likewise argues that the decision below is correct because the City "expressly considered and rejected alternative variations of the Ordinance" that would have applied "more broadly." Opp. 7–8. That gets it backwards: "the government must demonstrate that alternative measures that burden substantially *less* speech would fail to achieve [its] interests." *McCullen*, 573 U.S. at 495 (emphasis added). That Sandy City declined to pass an even more blatantly unconstitutional law says nothing about the Ordinance's constitutionality.

that "evidence" sufficient. *See, e.g.*, *Cutting*, 802 F.3d at 91–92 (rejecting *that very* argument).

2. The City next argues (at 3–5) that its Ordinance only incidentally burdens speech, while ordinances in other cities have facially regulated speech. But as the City concedes in a footnote (at 5 n. 3), *Cutting* involved an ordinance that "did not facially regulate speech"—and yet it reached the opposite conclusion as the decision below. Indeed, the law at issue in *McCullen* "sa[id] nothing about speech on its face." 573 U.S. at 476. Nonetheless, this Court had "no doubt" that the buffer zone was "subject to First Amendment scrutiny." *Id.* In keeping with this well-settled principle, *every* decision cited in the petition employed intermediate scrutiny—regardless of whether the law in question facially mentioned speech (as in *Bruni* and *Redondo Beach*), or simply banned presence in a public forum (as in *Cutting* and this case). The City's proposed distinction completely ignores that fact.

II. This case is an ideal vehicle to resolve the questions presented.

Finally, the City offers a last-ditch vehicle argument: that the Tenth Circuit assumed, without deciding, that Sandy City's medians are traditional public fora. Pet. App. 10a–11a n. 2. According to the City, a decision by this Court could be "rendered advisory" on remand if the Tenth Circuit holds that the City's medians are not public fora after all. Opp. 17–19.

That argument misunderstands what an "advisory opinion" is. The Tenth Circuit's resolution of the questions presented was essential to its decision. *See*

Pet. 32. That is, the judgment below does not rest on any other grounds that are independent of the First Amendment questions presented in the petition. *Contra* Opp. 19 (citing an opinion discussing adequate and independent state-law grounds). Thus, the City's speculation about the resolution of additional issues in a hypothetical future remand is simply irrelevant. Indeed, this Court routinely takes cases in which the court below assumed a key issue without deciding it, or in which further proceedings on remand are possible. *See, e.g.*, *Arizona* v. *Johnson*, 555 U.S. 323, 334 n. 2 (2009).

The premise of the City's argument also is wrong, because the Tenth Circuit is *not* "[l]ikely" to conclude that Sandy City's medians are not public fora. Opp. 17. This Court has categorically described "*all* public streets" as public fora *regardless* of their "precise nature." *Frisby*, 487 U.S. at 481 (emphasis added). And lower courts have consistently extended that principle to medians located within streets. *See* Pet. 7–8 (collecting cases). The Tenth Circuit could not reach a contrary conclusion on remand without flouting this Court's precedent and creating yet *another* circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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