No. _____

In The
# Supreme Court of the United States

CITY OF OKLAHOMA CITY, an Oklahoma municipal corporation, and William Citty, in his official capacity as Chief of the Oklahoma City Police Department,

*Petitioners*,

v.

Calvin McCraw, G. Wayne Marshall, Mark Faulk, Trista Wilson, Neal Schindler, Oklahoma Libertarian Party, and Red Dirt Report,

*Respondents*.

**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI


Amanda B. Carpenter,
*Counsel of Record*
200 N. Walker Ave.
STE 400
OKC, OK 73102
Tel.: (405) 297-2451
Fax: (405) 297-3851
*amanda.carpenter@okc.gov*

Catherine L. Campbell,
Phillips Murrah P.C.
Coporate Tower,
Thirteenth Floor
101 North Robinson Ave.
OKC, OK 73102
Tel.: (405) 235-4100
Fax: (405) 235-4133
*clcampbell@phillipsmurrah.com*

## QUESTIONS PRESENTED

For the purposes of protecting the health and safety of pedestrians on medians from encroaching traffic, and drivers from distractions caused by pedestrians on medians, the petitioner enacted an ordinance prohibiting sitting, standing or staying in medians where the speed on the adjacent streets is forty miles per hour or greater. Median users – including solicitors, political activists, and newspapers – claimed that the ordinance violated their First and Fourteenth Amendment rights. The Tenth Circuit Court of Appeals held that the petitioner failed to adduce evidence sufficient to establish that its ordinance was narrowly tailored to serve a significant government interest while leaving open ample alternative channels of communication.

Thus, the questions presented are:

1. Does the risk of death or serious bodily injury to a pedestrian sitting, standing, or staying on a median in a street with a speed limit of forty miles per hour or more constitute a significant government interest in protecting the health and safety of pedestrians even though a pedestrian death has yet to occur?

2. Does *McCullen v. Coakley*, 573 U.S. 464 (2014), dictate that the government must, in all cases, present evidence that it actually tried and failed to utilize less burdensome alternatives, even when, considering the nature of the articulated safety interest and the scope of the ordinance, less burdensome alternatives do not exist?

## STATEMENT OF RELATED CASES

- *McCraw et al. v. Oklahoma City, et al.*, CIV-16-0352-HE, U.S. District Court for the Western District of Oklahoma. Judgment entered December 19, 2018.

-*McCraw, et al. v. Oklahoma City, et al.*, 19-6008, United States Court of Appeals for the Tenth Circuit. Judgment entered August 31, 2020.

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## PETITION FOR WRIT OF CERTIORARI

The City of Oklahoma City and Chief William Citty, in his official capacity, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The Tenth Circuit's opinion reversing the district court's decision was issued on August 31, 2020, in Case Number 19-6008. Pet. App. 1a-46a (published at *McCraw v. Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020)). The district court's Judgment was issued on December 19, 2018. *Id.* at 76a.

## STATEMENT OF JURISDICTION

The Tenth Circuit's decision and opinion were entered on August 31, 2020. Pursuant to Supreme Court Order, issued on March 19, U.S. Sup. Ct. Filing Extension, 28 U.S.C.A., the time to file this petition was extended 150 days from the issuance of the lower court judgment to January 28, 2021. This Court jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution which provides, "Congress shall make no law ... abridging the freedom of speech." This case also involves the Fourteenth Amendment to the United States Constitution which provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

## INSTRODUCTION AND STATEMENT OF THE CASE

This case presents a significant question of First Amendment jurisprudence that has resulted in a split between panels in the Tenth Circuit and a split in the circuits: how much, and what type of evidence is sufficient to establish that the government's substantial interest in public safety is both real and that the regulation at issue will alleviate the identified harms in a direct way.

The City of Oklahoma City (the "City") has 8,000 lane miles of roadway, 1,029 of which have speed limits at or exceeding forty miles per hour. These higher-speed roadways move high volumes of traffic. On streets intended to accommodate pedestrians, the speed limit is generally twenty-five miles per hour.

In 2015, the City Council enacted an ordinance which prohibited standing, sitting or staying on any portion of a median less than thirty feet wide if less than 200 feet from the intersection except if for certain public uses (trails, parks, benches). Pet. App. 3a, 48a and 77a-83a. The City Council enacted the ordinance after investigating options and hearing a presentation by the chief of police who had, since at least 2010, voiced concern that medians were unsafe for pedestrian activities. *Id*. at 50a-51a and 68a. In formulating his opinion, the police chief conducted research, relied on staff-compiled statistics, and reviewed photographs from a number of randomly chosen medians. *Id*. at 50a. The photographs showed curb damage as well as extensive median damage from vehicles as they traveled onto and over the medians. *Id*. at 50a.

The chief of police explained that although roadsides (where state law prohibits the City from limiting pedestrian use) are dangerous to pedestrians, medians are more dangerous because a high percentage of automobile collisions could travel, and in some cases have traveled, onto and across medians. *Id.* at 50a-51a. The chief presented evidence of vehicles traveling across and on to medians. *Id.* at 50a. Additionally, medians are located in the midst of two-way traffic such that pedestrians on medians cannot pay attention to all directions of traffic. *Id.* at 50a-51a.

Claiming that the 2015 ordinance impermissibly restricted their constitutional rights, the respondents filed suit objecting that it constituted an outright ban on all median usage. *Id.* at 5a and 51a. The respondents challenged the City's restriction in general and specifically, objected to any restriction based on the width of City Medians *Id.* at 51a. To address these concerns, City staff conducted additional research concerning median conditions and widths. *Id.* at 6a and 51a-52a. The City amended the ordinance in 2017. *Id.* at 52a and 84a-88a. The City narrowed the application of the ordinance to address where pedestrians are most exposed and at risk of death or severe bodily harm. *Id.* at 71a. Specifically, the ordinance provides, "no person shall sit, stand, or stay on a median if the street abutting that median has a speed limit of 40 mph more." *Id.* at 5a, 53a-55a and 84a-88a. Individuals using crosswalks, government employees or contractors acting within the scope of their authority, others legally authorized to conduct work, and individuals presented with an emergency may sit, stand or stay in the subject medians but only as necessary. *Id.* at 54a-55a and 84a-88a. A number of medians throughout the City do

not meet this definition and remain available for all pedestrian uses. *Id.* at 55a.

Before amending the ordinance, the City consulted with an expert – an experienced police officer and accident reconstructionist who had personally investigated hundreds of accidents in which vehicles traveled onto and over medians. *Id.* at 6a-7a and 51a. He had previously photographed medians showing significant damage, including leveled directional and stop signs, deep tire marks, oil spots, and abandoned auto parts. He explained that the median curbs provide some protection, but at higher speeds, drivers are unable to respond to distractions as quickly, the more likely the vehicle is to travel onto the median, and the more likely any pedestrian standing in the way would be severely injured or killed. *Id.* at 6a-7a and 51a-52a. Although he could locate no data quantifying the risk to pedestrians who stand on medians in high speed roadways, ample evidence demonstrated that vehicles frequently travel onto and across medians in high speed roadways. *Id.* at 6a-7a and 51a-52a. Even one plaintiff testified he had witnessed a distracted driver drive onto a median. *Id.* at 68a. Since the number of pedestrians standing on medians and the percentage of pedestrian fatalities have steadily increased over the years, the expert concluded, one, that more pedestrians are exposed to danger on medians than in the past, and, two, that remaining stationary on a median increased exposure to danger to both pedestrians and passing drivers. *Id.* at 6a-7a, 51a-52a and 68a.

At the conclusion of a bench trial during which testimony evidence was received, the district court held that the ordinance was constitutional. *Id.* at 9a,

47a-48a, and 75a. The district court relied upon the testimony and exhibits presented, as well as common sense in finding the City had a significant government interest of protecting pedestrians and the ordinance was narrowly tailored; rejecting that the lack of empirical data was fatal to either the City's showing that the harms sought to be addressed were real, or that the ordinance furthered the City's interest in public safety. *Id*. at 67a-69a.

The respondents timely appealed, primarily arguing that because the City did not produce empirical evidence to support its justification for enacting the ordinance, it did not meet its burden of establishing the constitutionality of the ordinance. *Id.* at 9a. Inexplicably, although crediting evidence like the individual respondents' testimony that they felt safe on medians, the Tenth Circuit discounted the City's expert's experience-based testimony as insufficient because it did not constitute "impersonal hard evidence." *Id.* at 23a-24a. And, while acknowledging that other circuits have held that the government need neither wait for an accident to occur, nor compile data and statistics to support that the identified harm is real, the Tenth Circuit nonetheless determined that absent evidence that a pedestrian had been hit in a median, the City's concern about pedestrian and driver safety was purely hypothetical. *Id*. at 22a and 25a. For the same reason, the City could not establish that the ordinance remedied the perceived problem. *Id*. at 26a.

Second, the Tenth Circuit, distinguishing another Tenth Circuit panel's decision in *Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019), determined that the ordinance was overly broad because, unlike the ordinance in *Evans*, which banned pedestrians

from only portions of certain medians, the City's ordinance banned pedestrians from certain medians entirely. *Id*. at 27a. Third, the circuit court ruled that the City presented no evidence that it considered less restrictive methods, and thus, did not sufficiently substantiate that the ordinance was narrowly tailored. *Id*. at 29a.

The City timely files this Petition for Certiorari.

## REASONS FOR GRANTING THE WRIT

### I. The Tenth Circuit's Determination That The City Failed To Meet The Appropriate Evidentiary Standard Both Is Contrary To This Court's Precedent And Creates A Circuit Split.

#### A. The Tenth Circuit's Newly Announced Evidentiary Standard Cannot Be Squared With This Court's Precedent.

In holding that the City is forbidden to regulate pedestrian use of its medians unless and until either a pedestrian is injured by a vehicle while standing on one, or a driver causes an accident after being distracted by a pedestrian standing in a median, the Tenth Circuit ran afoul of this Court's long-standing precedent.

This Court has consistently held, the government "may rely upon any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002). For instance, in *Burson v. Freeman*, 504 U.S. 191, 208

(1992), even in a case in which voting rights – speech to which "the First Amendment has its fullest and most urgent application" – were at issue, the Court explained that it "never has held a State to the burden of demonstrating empirically the objective effects" of a speech regulation. *Id*. at 196, 208 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (internal quotations omitted)). In *Burson*, the Court approved the state's reliance on history, common sense, and one witness, noting that it would be "difficult for States to put on witnesses who [could] testify as to ... the exact effect" of the proposed law. *Id*. at 208. The Court ultimately approved a 100-foot "campaign-free zone" around polling places against a strict scrutiny challenge.

Similarly, in *Tenn. Secondary Sch. Athletic Ass'n*, 551 U.S. 291 (2007), the Court upheld a state rule prohibiting undue influence in the recruitment of student athletes against a First Amendment challenge. The Court concluded, based on common sense, not empirical data, that "the necessity [for the rule] is obviously present here." *Id*. at 300 (citing *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60-61 (1973) (Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist") (citation and internal quotation marks omitted)). *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) ("'[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether or, even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.'") (quoting *Fla. Bar. v. Went*

*For It, Inc.*, 515 U.S. 618, 628 (1995)); *Morse v. Frederick*, 551 U.S. 393, 441-42 (2007) (J. Stevens, dissenting) (observing that the majority did not require the government to provide evidence to support its claim that the student speech at issue would increase student drug use such that prohibiting it would forward the government's stated purpose of preventing illicit student drug use).

This Court has not required that the government present empirical evidence to justify regulation. Rather, common sense, experience and expert testimony may satisfy the government's burden to show that a real harm exists and that the regulation it proposed directly remedies that harm.

### B. The Tenth Circuit Created A Circuit Split Whether The Type Of Evidence On Which The City Relied Was Sufficient To Establish That The Harm It Sought to Remedy Was Real And That The Ordinance Directly Alleviated That Harm.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Applying this concept, other circuits (as well as another panel in the Tenth Circuit, in *Evans*, 944 F.3d 847), addressing the government's burden to justify regulation similar to the ordinance in this case, have uniformly refused to require the government provide either proof that an accident has occurred or extensive empirical data. Consequently, the Tenth Circuit created a split between circuits whether the

occurrence of an accident is the only valid justification for a public safety regulation.

In *Evans*, the city's ordinance prohibited standing or sitting "on any unpaved median, or any median less than 36 inches for any period of time." 944 F.3d at 851. In his testimony to the city council, the city police captain reported "several close calls" in which pedestrians had fallen into traffic from medians, and the city attorney, after surveying city medians, determined that because narrow medians did not provide adequate refuge from passing vehicles, and all unpaved medians did not afford secure footing and, both were dangerous for pedestrian use. 944 F.3d at 854-55, 858. Quoting *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge*, 775 F.3d 969, 975 (8th Cir. 2014), *Evans* rejected that the government, in failing to present empirical evidence that all affected medians were similarly dangerous, did not establish that the ordinance was narrowly tailored. *Id.* at 858. Instead, the First Amendment "does not require the government to wait for accidents to justify safety regulations." *Id.*

The Fourth Circuit reached the same conclusion on similar facts. In *Reynolds v. Middleton*, 779 F.3d 222, 224-25, 229 (4th Cir. 2015), the county enacted an ordinance that prohibited standing or sitting in any county roadway (including medians) to distribute handbills, solicit contributions, or to sell merchandise to passing vehicles. The government justified its regulation relying on a police chief's observation that the number of solicitors and complaints about them, were increasing, and that solicitors might step in front of cars or "inattentive driver[s] might 'run up onto the curb.'" *Id.* He based his opinion that roadway solicitation was dangerous,

not on traffic studies, but on his personal observations, credible reports of law enforcement officers and citizens, and his forty-plus years of experience. *Id*. at 224-25. The court concluded that "[e]ven without evidence of injuries or accidents involving roadway solicitors, we believe the County's evidence, particularly when it is considered along with a healthy dose of common sense, is sufficient to establish that roadway solicitation is generally dangerous .... And once we accept that roadway solicitation is dangerous, then it is apparent that the Amended Ordinance furthers the County's safety interests." *Id*. at 229.

As noted, the Eighth Circuit is in accord. The City of Desloge prohibited persons from soliciting or distributing literature "within a roadway [which] would distract drivers and result in the person in the [r]oadway being struck by the vehicle during its operation, or the vehicle striking another vehicle or property in an effort to avoid the person in the [r]oadway.'" 775 F.3d at 972. The evidence demonstrated that: (1) even with carefully designed measures to protect workers, construction and utility workers were involved in traffic accidents; (2) the NHTSA reported that 5,000 pedestrians are killed, and 71,000 injured on United States roads; (3) intersections are dangerous for pedestrians; (4) not all intersections are equally hazardous; (5) statistical analysis could be performed to determine the most dangerous times and locations; and (6) other distractions to drivers, such as texting, existed. *Id*. at 973.

The *City of Desloge* court observed that expert testimony, though unsupported "by expert resources focusing on the specific risks from roadway

solicitations and distributions," was nonetheless sufficient to establish that soliciting in roadways is inherently dangerous. *Id.* at 975. "The fact that a pedestrian had not yet been hit while distributing materials in the city did not mean that it was not dangerous, for a government need not wait for accidents to justify its safety regulations." *Id.* (citation and internal quotation marks omitted). *See also Luce v. Town of Campbell*, 872 F.3d 512, 517-19 (7th Cir. 2017) (a police officer's testimony regarding the negative effect on traffic of large banners affixed to an interstate highway overpass was sufficient to support the substantiality of the city's safety rationale underpinning the regulation at issue. The court required no "double-blind study, or linear regression analysis" to conclude that drivers may unexpectedly slow in an attempt to read banners, which impacts traffic flow and increased the risk that inattentive drivers may cause accidents).

The Tenth Circuit in this case departed sharply from its sister circuits in holding the City's stated safety interest was purely hypothetical. Here, the City relied on evidence similar to that presented by the governments in *Evans*, *Reynolds* and *City of Desloge*. Those courts would have concluded, consistent with this Court's precedent, that the City's evidence – which demonstrated unequivocally that vehicles often travel onto and over medians in high speed roadways thus supporting the commonsense conclusion that the longer a pedestrian is stationary on the median the higher the risk of being hit by a vehicle – was substantial and supported the reasonable inferences that the City drew. The Tenth Circuit, with a half-hearted nod to contrary circuit authority but without

attempting to distinguish it, unaccountably found otherwise.

The City seeks to protect pedestrians, not only when they step into traffic, but from vehicles intruding on the medians. The City also seeks to protect drivers from distractions created by pedestrians on medians. In enacting the ordinance, the City narrowed the ban on median activity to those medians where pedestrians were most exposed and at risk, and where distractions to drivers in speeding traffic was most dangerous. While the respondents disagree that these medians are dangerous, the City adduced evidence sufficient to establish that it is reasonable to believe they are. The Tenth Circuit imposed an inappropriate evidentiary standard in striking down the ordinance contrary to other circuits.

## II. The Tenth Circuit's Determination that *McCullen* Sets A New Evidentiary Standard For Narrow Tailoring Joins a Circuit Split.

Citing *McCullen v. Coakley*, 573 U.S. 464, 495 (2014), the Tenth Circuit determined that the City "failed to demonstrate that less burdensome alternatives would not achieve its interest in median safety ….[b]ecause the City presents us with no evidence that it contemplated the relative efficacy or burden on speech of any alternatives." 973 F.3d at 1074-75. In other words, the Tenth Circuit determined that *McCullen* requires the government to present evidence that it tried less burdensome alternatives even when suggested alternatives clearly do nothing to alleviate the harms the government is attempting to remedy.

In *McCullen*, a thirty-five-foot buffer zone surrounding the entrances to abortion clinics statewide was not narrowly tailored to serve the government's interest in safety, unobstructed use of sidewalks and patient access to healthcare. Notably, "[g]iven the vital First Amendment interests at stake, it is not enough for [the government] simply to say that other approaches have not worked." 573 U.S. at 496. Instead, the government must "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it" and must "demonstrate that [these] alternative measures ... would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 494-95.

The evidence in *McCullen* showed that, but for one day a week at one clinic in the state, patient access to clinics was unfettered and sidewalks were clear. Moreover, existing traffic ordinances prohibiting solicitation while walking or standing on a street or highway (including "medians, shoulder areas…ramps and exit ramps") sufficiently protected the government's safety interests in unobstructed sidewalks, driveways and roadways. *Id.* at 492-93. Finally, the record was silent that the government attempted to enforce a less restrictive earlier version of the regulation despite the government's claim that earlier regulation was too hard to enforce. *Id.* at 494. In light of these facts, the state's buffer zone statute failed narrow tailoring.

Circuit courts have grappled with *McCullen*'s language regarding less burdensome alternatives reaching different results. The Fourth Circuit in *Reynolds* held that, pursuant to *McCullen*, "the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to

address the problem" apparently in all cases. 779 F.3d at 231 (emphasis in the original). Because the government presented no evidence that it tried unsuccessfully to enforce existing ordinances prohibiting handbillers/solicitors from obstructing traffic, or that it considered the locations in the county where roadside handbilling/solicitation was most dangerous, the government failed narrow tailoring. *Id*. at 232.

On the other hand, in *City of Desloge*, the Eighth Circuit found that *McCullen* did not "increase[] the government's burden on an overbreadth challenge," or "announce a new rule." 775 F.3d at 978. Applying established principles, the court determined that the ordinance in that case did not fail narrow tailoring even though the city did not consider other alternatives – the relative dangers at each intersection, whether certain times of day were safer for such activity, or whether it was appropriate to solicit or distribute literature from parking lanes. None of these limitations would have alleviated the danger to pedestrians caused by the stated safety purpose – to prevent harm to pedestrians from stepping into the roadway to solicit or distribute.

Again, the Tenth Circuit opinion in this case is at odds with the Tenth Circuit in *Evans*, which aligns with the *City of Desloge*. In addressing the argument that *McCullen* requires the government to prove that it actually tried alternative methods, the *Evans* court declared that "*McCullen* taught us a less restrictive means analysis might be *helpful* in the narrow tailoring inquiry, but it did not modify *Ward*'s clear rule" that the government need not prove that its restriction on speech is the least restrictive alternative. 944 F.3d at 859 (citing *McCullen*, 573 U.S.

at 486 and *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (emphasis added)).

Further, although in *Evans* Sandy City did not establish that it tried other alternatives, it nonetheless met its burden of demonstrating that the median ordinance was narrowly tailored. *Id.* at 858-60. Like the court in *City of Desloge*, the *Evans* court distinguished its facts from *McCullen*'s facts where the Court identified "several less restrictive alternatives that would have plausibly achieved the government's stated interest." *Id.* at 859 (citing *McCullen*, 573 U.S. at 491–93). In contrast, the allegedly less restrictive means suggested in *Evans* – limiting activity during nighttime hours and/or busy traffic periods, or limiting the ban to the most problematic medians – were "clearly inadequate" because "[t]he danger stems from cars – whether it be one or one hundred – traversing a roadway in which pedestrians are standing precariously within striking distance." *Id.* The court ultimately determined that due to the nature of the safety interest to be protected, the suggested less burdensome alternatives were, as a matter of law, not adequate to protect that interest.

If *McCullen* did, indeed, enunciate a new standard requiring the government to present evidence that it actually tried less burdensome alternatives in every case, and even though they do not exist, the Tenth Circuit in this case is correct that the City failed to meet its evidentiary burden. However, *McCullen* cited *Ward*, 491 U.S. at 796 for its narrow tailoring analysis. According to *Ward*, because the government is entitled to some deference, in undertaking the analysis of alternatives, it need not demonstrate that it has tried or considered *every* less

burdensome alternative to its ordinance. 491 U.S. at 797, 800.

Reading *McCullen* and *Ward* together, a court must analyze, first, whether an alternative remedy would address the problematic activity, and, if it does, whether enforcement of such alternatives is likely to be practicable. *McCullen*, 573 U.S. at 495 (finding that it was not impractical to detect and prosecute violations of existing local ordinances). This Court's precedent indicates, as the Eighth Circuit has concluded, narrow tailoring does not require the government to identify, review and reject alternatives in cases where those alternatives could not possibly further the stated safety regulation.

Applied here, the City was not required to present evidence that it tried and failed alternatives – including further limiting the number of medians to which the ordinance applies, imposing hours of use, enforcing already-existing ordinances, or requiring pedestrians to stand back from the median curbs – because, given the articulated safety interests, no less burdensome alternative to banning pedestrians from dangerous medians exists.

For instance, consistent with a proper reading of *McCullen* and *Ward*, many circuits have not hesitated to strike down solicitation regulations that apply city or countywide holding that a total ban on site-specific solicitation sweeps far too broadly when considering the danger the government is seeking to ameliorate – in most cases, the dangers posed to pedestrians when they step off of medians into traffic. The evidence in each case demonstrated the danger to

pedestrians who entered traffic lanes existed at fewer than all locations at which speech was banned.[1]

In *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015), a regulation failed narrow tailoring because it was a city-wide ban with no consideration for the dangers created by the characteristics of particular medians. 802 F.3d at 89-90. The necessary close fit between the safety justification – preventing pedestrians from stepping, or unintentionally stumbling into traffic – and the ordinance was absent, not because the stated safety problem did not exist, but because the ordinance banned all activity in the medians, not just activity that could result in a pedestrian stepping, or unintentionally stumbling, into traffic. *Id*. at 90. Because a substantial amount of

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[1] *See also Wilkinson v. Utah*, 860 F. Supp. 2d 1284, 1290 (D. Utah 2012) (a city-wide ban on solicitation on or near roadways to prevent "dangers of physical injury and traffic disruption...when individuals stand in the center of busy streets" to solicit was overinclusive because it applied to all roads); *Rodgers v. Stachey*, Case No. 6:17-cv-6054, 2019 WL 1447497, at *9 (W.D. Ark. Apr. 1, 2019) (an ordinance designed to keep pedestrians from obstructing traffic was geographically overinclusive because it "applie[d] citywide, yet the City has introduced no evidence that 'physical interaction' between pedestrians and vehicles presents the same level of risk...on each and every street and roadway within city limits."); *Petrello v. City of Manchester*, No. 16-cv-8-LM, 2017 WL 3972477, at **19-22 (D.N.H. Sept. 7, 2017) (an ordinance enacted to promote driver safety by prohibiting leafletting/solicitation on *all* streets, sidewalks and medians was overinclusive because it prohibited roadside exchanges that did not obstruct traffic, and the city failed to demonstrate that issues related to roadside exchanges justified a city-wide ban); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass 2015) (noting that although the city could "point to specific medians and traffic islands where pedestrian use could be prohibited in the interest of public safety, a city-wide ban on all medians failed narrow tailoring).

protected activity would not result in the speaker stepping or falling into traffic from all medians, the ban was not appropriately tailored.

The ordinance in *Reynolds* likewise applied to all medians in the county. Because the evidence established, at most, a need to regulate roadway solicitation at busy intersections in the west end of the county – the most dangerous roads to pedestrians who might step into traffic – a countywide ban was overinclusive. 779 F.3d at 231.

In *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947-48 (9th Cir. 2011), the ordinance at issue prohibited standing on any street (defined to include roadways, medians, alleys, sidewalks and curbs). *Id*. at 941-42. The stated interest was promoting traffic flow and safety. *Id*. at 947. Plaintiffs identified prohibited speech that did not implicate traffic flow and safety. *Id*. at 948. Therefore, the ordinance was unconstitutional.

Compare cases in which circuit courts have upheld solicitation ordinances against constitutional challenge. In *Ater v. Armstrong*, 961 F.2d 1224 (6th Cir. 1992), and *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000), the Sixth and Seventh Circuits concluded that anti-solicitation ordinances met constitutional muster because they protected the asserted interest of protecting solicitors when they entered traffic lanes. In *Ater*, solicitation was permitted where traffic control signals designated the presence of solicitors. In *Gresham*, the ordinance at issue allowed passive solicitation, but banned active solicitation in a street, public place or park at night, at all times of the day in specified areas, and at all times if the approach was aggressive. The court observed that the city had "a legitimate interest in promoting the safety and

convenience of its citizens on [city] streets." *Id*. at 906. The court concluded, "[r]ather than ban all panhandling, however, the city chose to restrict it only in those circumstances where it is considered especially unwanted or bothersome...[thus] effectively narrow[ing] the application of the law to what is necessary to promote its legitimate interest." *Id*.

Last, compare cases where the courts determined that the alternative of banning activity on fewer medians was not adequate to protect the stated safety interest. The Tenth Circuit's analysis in *Evans* is consistent with the cases in other circuits. The ordinance in *Evans* applied, not to all medians in the city, but only to narrow and unpaved medians that the city determined were most dangerous. In refusing to invalidate the ordinance, the court stated, "[t]he City is not required to ignore the danger posed by standing on a 17-inch sliver of concrete just because lighter traffic may make it less likely one will be hit by a car." 944 F.3d at 859-60.

Correspondingly, the Eighth Circuit has upheld a ban on solicitation/distribution on all city roadways, including medians, without a showing of: (1) the relative danger present at any particular intersection; (2) whether certain times of day were safer for such activity; or (3) whether it was safer to permit distribution from parking lanes and medians, the court did so because the city's traffic safety concerns (pedestrian safety) "are present whenever a pedestrian steps into a roadway." *City of Desloge*, 775 F.3d 978.

The ordinance in this case is not a city-wide ban on all pedestrian use of all medians. Moreover, the City's stated safety interest is broader than the ones at issue in in *Reynolds, Cutting*, and *Comite de*

*Jornaleros de Redondo Beach*. The City's goal is not to protect pedestrians when they step or reach into traffic, but to protect them from traffic encroaching on medians. By drawing the line at medians in high speed roadways, the City has crafted a regulation that applies solely to those medians it has submitted substantial evidence to prove are the most dangerous.

The City's existing ordinances likewise do not address the dangers presented by standing on medians – even further than eighteen inches from the curb, an alternative the Tenth Circuit pronounced would be a less burdensome alternative. Instead, they only permit the City to cite disorderly conduct – intentional obstruction of a vehicle – or walking on a roadway in a careless/negligent manner so to endanger life/property and/or interfere with traffic. As the evidence showed, vehicles coming onto the medians often travel across them entirely, or even if the curb deflects them, portions of the vehicle may extend further than eighteen inches over the curb. Further, neither of these existing ordinances permit the City to cite a pedestrian who creates driver distraction while remaining on a median.

A prohibition on median use during nighttime hours is, similarly, not a viable alternative. *Id.* at 70a. The evidence showed that pedestrian accidents occur at all times of day. *Id.* at 29a-30a. Moreover, as the *Evans* court recognized, a nighttime ban does nothing to protect pedestrians staying on medians during daylight hours, or to protect drivers from the distraction caused by pedestrians, during daylight hours. 944 F.3d at 858.

The evidence the Tenth Circuit refused to credit, showed that all medians where the speed limit is forty miles per hour are equally dangerous to

pedestrians and drivers when pedestrians sit, stand or stay on them. The evidence also demonstrated that the roadsides were safer for pedestrian activity for a host of reasons. Nevertheless, the Tenth Circuit diverged from the reasoning of its sister circuit courts in determining that the City's ordinance was not narrowly tailored because it failed to actually try less burdensome alternatives which would have permitted pedestrians to remain the subject medians. Again, the circuits are split. However, this Court's precedent suggests that the Tenth Circuit imposed an inappropriate evidentiary standard in striking down the ordinance.

## III. The Issues Presented Are Important And Recurring.

As the number of lower and circuit court cases attest, government entities attempting to regulate the safety of pedestrians and drivers when pedestrians use roadways, including medians, have proliferated. In each of these many cases, the evidence has revealed an increase in the number of median users, and a similar increase in traffic volume and driver distraction. Many of the attempts to regulate roadway usage – including medians – have occurred in the last decade.

Without the Court's intervention and guidance, local governments will attempt to regulate, and lower courts will continue to struggle with the appropriate standards to apply, not only in median use and roadway solicitation cases, but in other narrow tailoring cases in which courts must apply *McCullen*.

## IV. This Case Is An Appropriate Vehicle For Resolving These Issues.

This case squarely presents the issues. Applying extant authority from both this Court and the Tenth Circuit's sister circuits, the City's ordinance would have withstood constitutional scrutiny and so, the Tenth Circuit's opinion clearly highlights the split in the circuits on the narrow tailoring analysis.

This Court's review is warranted to give both government entities and lower courts guidance about what type of evidence is required when regulating speech in the interest of the public.

## CONCLUSION

For the forgoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

/s/ Amanda B. Carpenter
Amanda B. Carpenter
Deputy Municipal Counselor-OKC
200 N. Walker Ave., STE 400
Oklahoma City, OK 73102
Tel.: (405) 297-2451
Fax: (405) 297-3851
amanda.carpenter@okc.gov

/s/ Catherine L. Campbell
Catherine L. Campbell
Phillips Murrah P.C.
Corporate Tower,
Thirteenth Floor
101 N. Robinson Ave.
OKC, OK 73102

Tel.: (405) 235-4100
Fax: (405) 235-4133
clcampbell@phillipsmurrah.com

*Counsel for Petitioners*