

**CASE NO. CIV-16-352-HE**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

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**CALVIN MCCRAW, ET AL.**

PLAINTIFFS

v.

**CITY OF OKLAHOMA CITY, ET AL.**

DEFENDANTS

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**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT  
AND BRIEF IN SUPPORT**

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Oklahoma City’s criminalization of “standing, sitting, or staying” on public medians throughout the municipality is an unconstitutional anti-panhandling solution in search of a traffic safety problem. Officials admitted to crafting a law to address “the panhandling issue,” but in response to concerns flagged by municipal counsel, papered over the vice of singling out unpopular speech for suppression by swinging to the opposite extreme. The City enacted sweeping measures suppressing the protected speech and activities of all citizens on pedestrian areas that federal courts overwhelmingly have concluded, “quite literally, lie[] at the heart of the Supreme Court’s quintessential example of the traditional public forum.” *Warren v. Fairfax Cnty.*, 196 F.3d 186, 196-97 (4th Cir. 1999) (en banc).

The City’s median ban is the latest in a line of laws purporting to regulate “conduct” in the name of public safety, but in purpose and effect criminalizing unpopular speech. *McCullen* struck down such a law burdening anti-abortion speech, and every lower court applying *McCullen* has struck down both blatant anti-panhandling measures and those masked as “traffic safety” regulations tailored to the medians where panhandlers prefer to speak. The undisputed facts and controlling law demand the same outcome here.

#### **STANDARD OF REVIEW AND BURDEN OF PROOF**

Summary judgment is warranted “where a statute fails the relevant constitutional test” in light of the undisputed material facts. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012); *see* Fed. R. Civ. P. 56(a). “When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *Id.* at 1131 (internal quotations omitted). A law that fails First Amendment review is facially invalid—“it can no longer be constitutionally applied to anyone.” *Doe*, 667 F.3d at 1122-27.

## STATEMENT OF UNDISPUTED MATERIAL FACTS (“SUMF”)

### I. Public Medians As Traditional Public Fora

1. For decades, on medians across Oklahoma City (“OKC”), political candidates and supporters have campaigned for local, state, and national offices (including City Council),<sup>1</sup> political activists have engaged in protests, rallies, and signature drives,<sup>2</sup> and citizens have placed campaign signs for political candidates and ballot measures.<sup>3</sup>

2. For decades, citizens have stood on OKC medians to fundraise from motorists. Firefighters have engaged in an annual Fill-the-Boot campaign for the MDA,<sup>4</sup> the poor have panhandled for necessities,<sup>5</sup> and vendors have distributed the street paper Curbside Chronicle.<sup>6</sup> Police Chief William Citty has admitted, “I’ll give to kids, and I’ll give to a football team, or I’ll give to somebody if they’re out there trying to raise funds.”<sup>7</sup>

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<sup>1</sup> See Ex. 4, Dep. of Stuart Chai (“Chai Dep.”) at 63; Ex. 2, Dep. of Brian Fowler (“Fowler Dep.”) at 89; Ex. 6, Dep. of Mark Faulk (“Faulk Dep.”) at 58-66, 70-76; Ex. 13, Aff. of Mark Faulk (“Faulk Aff.”), Dkt. No. 30-3, at ¶ 2. Depositions are lodged on CD.

<sup>2</sup> See Ex. 6, Faulk Dep. at 142, 144; Ex. 13, Faulk Aff. at ¶ 2; Ex. 9, Dep. of Tina Kelly (“Kelly Dep.”), Vol. 1 at 70-73, 75, 78-80, 86-88, Vol. 2 at 8; Ex. 16, Aff. of Tina Kelly (“Kelly Aff.”), Dkt. No. 30-6, at ¶ 3.

<sup>3</sup> See Ex. 1, Dep. of William Citty (“Citty Dep.”) at 172-173; Ex. 3, Dep. of Ken Morris (“Morris Dep.”) at 32-33; Ex. 4, Chai Dep. at 64; Ex. 20, Election Day Photos by Megan Lambert (“Lambert Election Day Photos”) Nos. 1-5.

<sup>4</sup> See Ex. 4, Chai Dep. at 64; Ex. 1, Citty Dep. at 198; Ex. 6, Faulk Dep. at 142; Ex. 2, Fowler Dep. at 88; Ex. 3, Morris Dep. at 32; Ex. 23, Firefighter Photos by Scott Carter (“Carter Firefighter Photos”).

<sup>5</sup> See Ex. 8, Marshall Dep. at 11, 23, 34, 94-95, 124; Ex. 12, Aff. of G. Wayne Marshall (“Marshall Aff.”), Dkt. No. 30-2, at ¶ 3; Ex. 7, Dep. of Calvin McCraw (“McCraw Dep.”) at 137-138, 187; Ex. 11, Aff. of Calvin McCraw (“McCraw Aff.”), Dkt. 30-1 at ¶ 2; Ex. 6, Faulk Dep. at 142; Ex. 9, Kelly Dep., Vol. 2 at 16.

<sup>6</sup> See Ex. 18, Aff. of Ranya O’Connor (“O’Connor Aff.”), Dkt. No. 30-9, at ¶ 3; Faulk Aff. at ¶ 7; Ex. 7, McCraw Dep. at 47; Ex. 11, McCraw Aff. at ¶¶ 3-5.

<sup>7</sup> Ex. 25, Video Rec: Sept. 29, 2015 OKC City Council Mtg. (4:13:39), *available at* <https://youtu.be/UHKrpXboF9s>. Videos are lodged with the Court on CD; the City has

3. For years, journalists have stood on OKC medians to report, photograph, and video news events in or near the roadway such as bridge collapses, accidents, and protests.<sup>8</sup>

4. For years, joggers, marathoners, and others have engaged in ordinary speech on OKC medians, such as chatting with fellow citizens, texting, and talking on the phone.<sup>9</sup>

5. The City has erected light poles on medians with fixtures for banners, which this Court has held to be designated public fora. *See Cimarron Alliance Found. v. City of Oklahoma City*, 290 F. Supp.2d 1252, 1260 (W.D. Okla. 2002).

6. Medians are open to the public, with crosswalks for pedestrian access, and paved or landscaped areas, sidewalks, trails, benches, art, playground equipment, and other improvements for pedestrian use and enjoyment.<sup>10</sup> Indeed, some medians are City parks.<sup>11</sup>

## II. From “The Panhandling Issue” To The Original Ordinance

7. In early August 2015, Councilwoman Meg Salyer convened a meeting with “businesses impacted by the panhandling issue.”<sup>12</sup> Chief Citty testified the “panhandling issue” involved “businesses or neighborhoods that were concerned about the number of people, the increased number of people panhandling in and around the corners of the

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authenticated the City Council meeting videos cited herein. *See* Ex. 34, Resp. of Defs. to Pls. Req. for Ad. No. 2.

<sup>8</sup> *See* Ex. 17, Aff. of Andrew Griffin ¶¶ 2-4; Ex. 6, Faulk Dep. at 142; Ex. 23, Media Photo by Scott Carter (“Carter Media Photo”).

<sup>9</sup> *See* Ex. 10, Dep. of Neal Schindler (“Schindler Dep.”) at 53, 59, 60-61, 104; Ex. 15, Aff. of Neal Schindler (“Schindler Aff.”) at ¶ 2-3; Ex. 5, Dep. of Trista Wilson (“Wilson Dep.”) at 43, 46, 50, 51-52, 57, 70, 109, 111, 112; Ex. 14, Aff. Trista Wilson (“Wilson Aff.”) ¶ 2.

<sup>10</sup> *See, e.g.*, Ex. 19, Lambert Median Photos Nos. 1-4, 9-24; Ex. 21, Median Photos By Amber Leal (“Leal Median Photos”; lodged on CD) Nos. 1, 6-10, 12-13, 16-18, 23, 25-42.

<sup>11</sup> *See, e.g.*, Ex. 21, “Leal Median Photos” Nos. 23, 37-42; *see also infra* nn. 30, 114 & accompanying text.

<sup>12</sup> Ex. 23, Email of Debi Martin (07-31-15).

intersection of 23rd and Pennsylvania” who “were driving, you know, business away.”<sup>13</sup>

8. On August 17, 2015, Municipal Counsel Kenneth Jordan emailed City officials that “Meg Salyer is working on changes to Code Section 32-458 to ban panhandling/soliciting on all medians.”<sup>14</sup> He noted the ban would have to “apply across the board to all solicitors (including firefighters, who now have a special exemption allowing them to walk in the street, even in lanes of traffic.”<sup>15</sup> Jordan followed up the next day:

The downside of adopting additional panhandling/soliciting regulations that could be unconstitutional would be a federal-court lawsuit by the ACLU (or some other civil rights attorneys) on behalf of panhandlers for violation of their First Amendment rights ....<sup>16</sup>

He warned the City “cannot *directly* regulate or discriminate against the content of the speech,” and noted the test for a content-neutral “‘time, place, or manner’ regulation.”<sup>17</sup>

6. In September 2015, Councilwoman Salyer told The Oklahoman that she received complaints “in the multiples every day” about panhandlers, and that “residents tell her their quality of life is destroyed every morning as they drive through the intersection of NW 23 and Pennsylvania Avenue.”<sup>18</sup> She said, “Why should that have to be in our community?”<sup>19</sup>

7. At the City Council meeting on September 15, 2015, Councilwoman Salyer

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<sup>13</sup> Ex. 1, City Dep. at 192, 196.

<sup>14</sup> Ex. 23, Email of Kenneth Jordan (08-17-15).

<sup>15</sup> *Id.*

<sup>16</sup> Ex. 23, Email of Kenneth Jordan (08-18-15).

<sup>17</sup> *Id.* (emphasis added; underscore original).

<sup>18</sup> Ex. 35 at 325, William Crum, *Oklahoma City Councilwoman Introduces Law on Panhandling*, The Oklahoman (Sept. 14, 2015), at <http://newsok.com/article/5446395>; Ex. 36, Ans. of OKC to First Amend. Compl. ¶ 13 (“Ans. OKC First Amend. Compl.”); Ex. 37, Ans. of William City to First Amend. Compl. ¶ 13 (“Ans. City First Amend. Compl.”).

<sup>19</sup> Ex. 35 at 325, Crum, *supra* n. 18; Ex. 36, Ans. OKC First Amend. Compl. ¶ 13; Ex. 37, Ans. City First Amend. Compl. ¶ 13.

introduced a draft ordinance that would extend the City's existing ban on "soliciting" motorists from roadways to also ban doing so from any "median."<sup>20</sup>

8. At the City Council meeting on September 29, 2015, Mayor Mick Cornett introduced a second draft, explaining that "this has to do with generally the panhandling issue."<sup>21</sup> This draft made it criminal to "stand, sit, or stay on ... any median for any purpose," but exempted crossing the roadway, law enforcement and other public employees, authorized construction or maintenance work, and "responding to any emergency situation," defined as "an unforeseeable occurrence of temporary duration."<sup>22</sup>

9. Municipal attorney Richard Smith pivoted the public justification, stating that "after this was introduced, we continued to research it," and "we decided that, first, this [is] really about traffic safety, it's not necessarily about panhandlers."<sup>23</sup> Thus, Mr. Smith explained, "we made it broad enough to keep everybody off."<sup>24</sup> He cited some pedestrian deaths but admitted that "we never got the exact location where the people were" on the roadway.<sup>25</sup>

10. Chief Citty was asked if he had "empirical data" to support the measure "ostensibly

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<sup>20</sup> See Ex. 24, Video Rec.: Sept. 15, 2015 OKC City Council Mtg., at 2:11:15, *available at* <https://youtu.be/zOYrSuOlOfw>; Ex. 29, Draft Ordinance, § 32-458(a) & (b) (09-15-15).

<sup>21</sup> Ex. 25, Video Rec: Sept. 29, 2015 OKC City Council Mtg., at 2:40:58, *available at* <https://youtu.be/UHKrpXboF9s>; Ex. 36, Ans. OKC First Amend. Compl. ¶ 30; Ex. 37, Ans. Citty First Amend. Compl. ¶ 30.

<sup>22</sup> Ex. 30, Draft Ordinance, §§ 32-1(14), 32-458(b) & (c) (09-29-15).

<sup>23</sup> Ex. 25, Video Rec: Sept. 29, 2015 OKC City Council Mtg., at 2:46:36; Ex. 36, Ans. OKC First Amend. Compl. ¶ 31; Ex. 37, Ans. Citty First Amend. Compl. ¶ 31.

<sup>24</sup> Ex. 25, Video Rec: Sept. 29, 2015 OKC City Council Mtg., at 2:47:00, 2:47:21; Ex. 36, Ans. OKC First Amend. Compl. ¶ 31; Ex. 37, Ans. Citty First Amend. Compl. ¶ 31.

<sup>25</sup> Ex. 25, Video Rec: Sept. 29, 2015 OKC City Council Mtg., at 2:47:28; Ex. 36, Ans. OKC First Amend. Compl. ¶ 31; Ex. 37, Ans. Citty First Amend. Compl. ¶ 31.

[as] a public safety measure and not a panhandling issue.”<sup>26</sup> He did not have any record of accidents involving pedestrians on medians; his department did not “dig” for such data.<sup>27</sup>

11. Councilmember Ed Shadid stated he had “a hard time believing that this is really about public safety,” as “panhandling has been the focus” and “the conversations I’ve had over the last year have been, ‘Well how could we survive a legal challenge?’”<sup>28</sup>

12. At the City Council meeting on December 8, 2015, the final draft of the ordinance (“Original Ordinance”) was introduced.<sup>29</sup> It revised the second draft to exempt medians “30 feet or more in width” and portions “more than 200 feet away from any intersection,” and added exemptions for persons on any “trail,” “park,” or “portions” of medians “containing benches or other improvements designed for use by the public.”<sup>30</sup>

13. Chief Citty gave a presentation at the meeting which he originally titled “Panhandler Presentation,” but the assistant city manager directed him to “rename it ‘Median Safety Presentation.’”<sup>31</sup> Chief Citty gave collision statistics that lumped together vehicle-vehicle and vehicle-pedestrian accidents citywide.<sup>32</sup> He stated that the latter was “not going to be

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<sup>26</sup> Ex. 25, Video Rec: Sept. 29, 2015 OKC City Council Mtg., at 4:12:14; Ex. 36, Ans. OKC First Amend. Compl. ¶ 30; Ex. 37, Ans. Citty First Amend. Compl. ¶ 30.

<sup>27</sup> Ex. 25, Video Rec: Sept. 29, 2015 OKC City Council Mtg., at 4:12:42; Ex. 36, Ans. OKC First Amend. Compl. ¶ 32(c); Ex. 37, Ans. Citty First Amend. Compl. ¶ 32(c).

<sup>28</sup> Ex. 25, Video Rec: Sept. 29, 2015 OKC City Council Mtg., at 4:20:31; Ex. 36, Ans. OKC First Amend. Compl. ¶ 32(e); Ex. 37, Ans. Citty First Amend. Compl. ¶ 32(e).

<sup>29</sup> Ex. 31, Ordinance No. 25,283 (“Original Ordinance”).

<sup>30</sup> Ex. 31, Original Ordinance, § 32-458(b) & (c). Mr. Smith explained the City had found those items and an operating fire station on medians. *See* Ex. 26, Video Rec: Dec. 08, 2015 OKC City Council Mtg., at 57:50, available at <https://youtu.be/mAPftDMA790>.

<sup>31</sup> Ex. 23, Email of Major T. Berry (Oct. 8, 2015); Ex. 38, Panhandler Presentation (Oct. 13, 2014); Ex. 1, Citty Dep. at 50-51.

<sup>32</sup> Ex. 26, Video Rec: Dec. 8, 2015 OKC City Council Mtg. at 1:01:45, 1:02:18; Ex. 36, Ans. OKC First Amend. Compl. ¶ 42; Ex. 37, Ans. Citty First Amend. Compl. ¶ 42.



very high.”<sup>33</sup> He presented no data on pedestrian-related accidents on medians.

14. The Ordinance passed by a Council vote of 7-2.<sup>34</sup>

15. On January 26, 2016, the Council introduced an amendment to the City’s “Aggressive Panhandling” ban to expand existing panhandling-free zones and create new ones.<sup>35</sup> Referring to the recently enacted Original Ordinance, Councilwoman Salyer stated: “The goal of this Council was to help try to find a way to redirect the dollars that are going out windows” to panhandlers.<sup>36</sup> On April 5, 2016, this amendment passed 7-2.<sup>37</sup>

### **III. No Empirical Data Or Published Research Supported The Original Ordinance.**

16. On summary judgment in November 2016, Defendants presented no empirical data or published research on accidents or risk of accidents involving pedestrians on medians.<sup>38</sup>

17. In response to an interrogatory, the City disclosed:

The 30 feet was derived by researching the average length of a car and truck. The average length of a truck was larger and determined to be 24-25 ft long. An additional 5 ft was added in order to help provide sufficient room for a pedestrian to get out of the way of a vehicle if one were to intersect the median.<sup>39</sup>

21. In his September 2017 deposition, Chief Citty, as Defendants’ sole traffic expert at the time, opined that “the wider [a median] gets, the more space there is,” and therefore “it

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<sup>33</sup> Ex. 26, Video Rec: Dec. 8, 2015 OKC City Council Mtg. at 1:02:27; Ex. 36, Ans. OKC First Amend. Compl. ¶ 42; Ex. 37, Ans. Citty First Amend. Compl. ¶ 42.

<sup>34</sup> Ex. 26, Video Rec: Dec. 8, 2015 Mtg. at 3:24:48.

<sup>35</sup> Ex. 33, Aggressive Panhandling Amendment (04-05-16).

<sup>36</sup> Ex. 27, Video Rec. Jan. 26, 2016 OKC City Council Mtg. at 1:46:46, *available at* <https://youtu.be/nE5quRo3TL0>.

<sup>37</sup> Ex. 28, Video Rec.: Apr. 5, 2016 OKC City Council Mtg. at 1:22:18.

<sup>38</sup> See Ex. 56, Dkt. No. 31, Obj. & Resp. of Defs. to Pls. Mot. for Sum. J. & Cr. Mot. for Sum. J. & Br. in Supp. at 32-34 (“Defs. Resp. Sum. J.”).

<sup>39</sup> Ex. 39, Defs. Resps. to Pls. First Set of Inter. No. 8.

provides a person a greater level of safety.”<sup>40</sup> He admitted to having no empirical data, scientific analysis, or published research to support this opinion.<sup>41</sup>

22. Regarding the 200 feet distance, Chief Citty related that his presentation originally collected statistics for 50 feet, but he “was asked—it was—basically a lot of it was from legal” (and none “other than legal”) to change the collision data to 200 feet “because 200 feet is the figure listed in the ordinance.”<sup>42</sup> No other distances were checked.<sup>43</sup>

23. Chief Citty testified he had no documentation of a pedestrian on a median being struck (“Well, no”<sup>44</sup>) or causing an accident (“I can’t think of one that’s ever—ever occurred”<sup>45</sup>). He did not conduct any empirical study or rely on any published research.<sup>46</sup>

#### **IV. Post-Hoc “Research” And The Revised Ordinance**

24. The Revised Ordinance was introduced at the City Council of October 24, 2017 and adopted without public discussion two weeks later.<sup>47</sup> It replaced the Original Ordinance’s tailoring with a ban on medians with adjacent speed limits of 40 mph or more (“40+ mph medians”).<sup>48</sup> It retained exceptions for “individuals responding to any emergency” and anyone performing “legally authorized work” on medians.<sup>49</sup>

25. The City admittedly “does not have a list of the medians where a person is prohibited

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<sup>40</sup> Ex. 1, Citty Dep. at 45.

<sup>41</sup> *Id.* at 45-46.

<sup>42</sup> Ex. 1, Citty Dep. at 66-68.

<sup>43</sup> *Id.* at 69.

<sup>44</sup> *Id.* at 123.

<sup>45</sup> *Id.* at 124; 173.

<sup>46</sup> *See id.* at 38-39.

<sup>47</sup> *See* Ex. 32, Ordinance No. 25,777 (“Revised Ordinance”) at 5.

<sup>48</sup> *Id.*, § 32-458(d).

<sup>49</sup> *Id.*, § 32-458(e)(2)-(4).

from sitting, standing, or staying under [the Revised Ordinance].”<sup>50</sup> Plaintiffs have compiled a non-exhaustive list of over 400 medians outlawed under the revised ban.<sup>51</sup>

26. In November 2017, Defendants represented that the City did not adopt the Revised Ordinance earlier because “[t]he City needed to complete necessary research for its amendment.”<sup>52</sup> In December 2017, Defendants represented that the City’s revision “is based upon the City’s continued research.”<sup>53</sup> The City failed to explain why this “research” was not or could not have been done *before* adoption of the Original Ordinance.<sup>54</sup>

27. Long on “findings” that recite general traffic statistics, such as pedestrian fatalities in hit-and-runs, the revised measure recites no accidents, other empirical data, or published studies specific to pedestrians on medians.<sup>55</sup> Defendants have produced none.<sup>56</sup> Neither the City’s Chief Traffic Engineer nor any other official has done such an empirical study.<sup>57</sup>

28. By contrast, before the City changes the speed limit at any intersection, the Chief Traffic Engineer would conduct an empirical study, including collision history, traffic volume, and roadway design, and make recommendations to the Traffic and Transportation Commission, which would review and forward recommendations to the City Council.<sup>58</sup>

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<sup>50</sup> Ex. 40, Def. City’s Resp. to Pls. Sec. Req. Prod. No. 5.

<sup>51</sup> See Ex. 41, List of Medians Banned Under The Revised Ordinance; see also Ex. 41, OKC Speed Limit Map (July 2017) (produced by City in discovery).

<sup>52</sup> Ex. 42, Dkt. No. 78, Resp. to Pls. Mot. to Amend at 8.

<sup>53</sup> Ex. 43, Dkt. No. 83, Defs. Mot. to Partially Dismiss Pls. Sec. Amend. Compl. at 6.

<sup>54</sup> See Ex. 42, Dkt. No. 78, Resp. to Pls. Mot. to Amend at 8; Ex. 43, Dkt. No. 83, Defs. Mot. to Partially Dismiss Pls. Sec. Amend. Compl. at 6.

<sup>55</sup> See *id.*, § 32-458(a).

<sup>56</sup> See Ex. 44, Pls. Prod. Req. Nos. 8-10; Ex. 45, Pls. Second Supp. Prod. Req. Nos. 2-3.

<sup>57</sup> See Ex. 4, Chai Dep. at 63.

<sup>58</sup> See Ex. 3, Morris Dep. at 26-30, 42, 57, 103, 123; Ex. 4, Chai Dep. at 15-16, 19, 41-45.

The City Council can also request traffic safety studies.<sup>59</sup>

29. The Revised Ordinance cites no accidents, other empirical data, or published study for the “finding” that persons standing, sitting, or staying on 40+ mph medians are in “grave danger of grievous bodily injuries or death from motor vehicles.”<sup>60</sup>

30. Only two other “findings” mention vehicle speed. The first references a Centers for Disease Control (CDC) report produced by Defendants.<sup>61</sup> This report recites alcohol impairment as a primary factor in pedestrian deaths from crashes (48%). It lists nighttime and speed as “additional risk factors,” citing an article published in 2009 for speed.<sup>62</sup> It recommends increasing pedestrian visibility at night with flashlights and reflective clothing and having pedestrians use crosswalks.<sup>63</sup> It does not raise any safety concerns with pedestrians staying on medians for any duration or recommend limiting that duration.<sup>64</sup>

31. The “findings” Defendants primarily rely on for the 40+ mph tailoring are speed-fatality statistics from the Federal Highway Administration (FHWA).<sup>65</sup> The 2010 FHWA publication produced by Defendants with those statistics<sup>66</sup> cited a 1987 U.K. Department

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<sup>59</sup> See Ex. 3, Morris Dep. at 29-30, 36, 45.

<sup>60</sup> *Id.* at § 32-458(a)(5).

<sup>61</sup> See Ex. 46, CDC, *Pedestrian Safety* (“Risk Factors” tab).

<sup>62</sup> *Id.* (“Risk Factors” tab).

<sup>63</sup> *Id.* (“Prevention” tab). Defendants’ designated expert Mr. Morris agreed that “pedestrian visibility to drivers is a traffic safety factor” and “wearing lighter clothing” would make pedestrians more visible to drivers. Morris Dep. at 107, 119. Studies reviewed by the FHWA have found that sufficient lighting significantly reduces the risk of auto-pedestrian fatalities. Ex. 47, FHWA, *Pedestrian Safety Program Strategic Plan* (May 2010) (“Pedestrian Safety”) at 47, 48, 138.

<sup>64</sup> See Ex. 46, CDC, *Pedestrian Safety* (all tabs).

<sup>65</sup> See Ex. 32, Revised Ordinance, § 32-458(a)(4).

<sup>66</sup> See Ex. 46, FHWA, *Pedestrian Safety*.

of Transportation study; the statistics do not reference pedestrians on medians.<sup>67</sup>

32. The “finding” that individuals on medians “create additional distractions” for drivers recites no empirical data or published study, and Defendants have produced none.<sup>68</sup>

## **V. Replacement Experts**

33. On December 22, 2017, counsel for Defendants first contacted Brian Fowler and Ken Morris to serve as paid traffic safety experts in this case.<sup>69</sup>

34. Master Sergeant Fowler is a former patrol officer and detective and current fatality investigator for the City who specializes in accident reconstruction.<sup>70</sup> He never studied or designed medians, authored any publications on pedestrians or medians, been consulted previously as an expert on traffic safety issues pertaining to pedestrians or medians, or been accepted by a court as an expert on such issues.<sup>71</sup> Throughout his OKCPD career, he never recommended the adoption of any restrictions relating to pedestrian activities on medians.<sup>72</sup>

35. Master Sergeant Fowler’s report lifted speed-fatality statistics from the FHWA report above and similar statistics from a 2000 issue of the Accident Reconstruction Journal, along with statistics from other publications.<sup>73</sup> None of these statistics are specific to pedestrians on medians,<sup>74</sup> and he did not review the data on which they were based.<sup>75</sup>

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<sup>67</sup> *Id.* at 15, 84.

<sup>68</sup> Ex. 32, Revised Ordinance, § 32-458(a)(9).

<sup>69</sup> *See* Ex. 2, Fowler Dep. at 8; Ex. 3, Morris Dep. at 8, 11; Ex. 48, Report of Brian Fowler at 5 (“Fowler Rep.”).

<sup>70</sup> *See* Ex. 48, Fowler Rep., CV at 2; Ex. 2, Fowler Dep. 25-27.

<sup>71</sup> *See id.* at 25, 37, 38, 40; 44.

<sup>72</sup> *See* Ex. 2, Fowler Dep. at 25-26, 29-30.

<sup>73</sup> *See* Ex. 48, Fowler Rep. at 2-4.

<sup>74</sup> *See id.*

<sup>75</sup> *See* Ex. 2, Fowler Dep. at 92.

None of the publications raise any concern with pedestrians staying on medians for any duration or make any recommendations to limit pedestrians from doing so.<sup>76</sup>

36. Master Sergeant Fowler did not conduct any empirical study in preparing his report.<sup>77</sup> He did not document or recall any accident involving a pedestrian on a median in OKC.<sup>78</sup> He could not quantify the risk of pedestrians on medians being struck or how it increases over time (“I haven’t done a statistical analysis”).<sup>79</sup> He was not aware of any data, research, or publication on such risks, but opined that it is “a matter of common sense.”<sup>80</sup>

37. As a former Traffic Engineer for Kent, Washington, Mr. Morris never made any recommendation to restrict pedestrians from remaining on medians.<sup>81</sup> He “absolutely” would have if there had been any safety concerns, but “that issue never came up” because “we didn’t have a significant number of accidents at any one location.”<sup>82</sup>

38. As former Chief Traffic Engineer for OKC, Mr. Morris never recommended that the City restrict pedestrian activity on medians.<sup>83</sup> He would have “if [he] had any safety concern.”<sup>84</sup> He did not raise any safety concerns regarding the Fill-the-Boot campaign.<sup>85</sup>

39. Mr. Morris’ report lifted pedestrian fatality statistics from the Governor’s Highway

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<sup>76</sup> See Ex. 47, FHWA, *Pedestrian Safety* at 1-173; Ex. 49, IIHS, *In Pedestrian Crashes, It’s Vehicle Speed at Matters The Most*, Accident Reconstruction Journal at 59 (March/April 2000).

<sup>77</sup> See *id.*

<sup>78</sup> See Ex. 2, Fowler Dep. at 84.

<sup>79</sup> *Id.* at 85-86.

<sup>80</sup> *Id.* at 85-87.

<sup>81</sup> See Ex. 3, Morris Dep. at 25.

<sup>82</sup> *Id.* at 25.

<sup>83</sup> See *id.* at 34-35.

<sup>84</sup> *Id.* at 37.

<sup>85</sup> See *id.* at 32.

Safety Association (GHSA) and the National Traffic Highway Safety Administration (NHTSA).<sup>86</sup> Neither are specific to pedestrians on medians.<sup>87</sup> Mr. Morris testified to making “an assumption” that a GHSA statistic included median locations,<sup>88</sup> but came to realize the statistic referred solely to accidents “in travel lanes.”<sup>89</sup>

40. Mr. Morris did not review the data for the statistics he lifted and does not know whether any involved a pedestrian on a median.<sup>90</sup> He did not conduct any empirical study and does not have any data on the risk to pedestrians from staying on medians.<sup>91</sup> He is not aware of any data or published studies on such risk.<sup>92</sup> He does not have any data on how distracting pedestrians on medians may be to drivers.<sup>93</sup> He has no documentation of any accident in which a pedestrian on a median was struck or caused an accident in OKC.<sup>94</sup>

41. Mr. Morris’s report does *not* defend the 40+ mph line-drawing.<sup>95</sup> He did not even investigate whether that line was supported by empirical data, did not review any literature discussing the safety significance of the 40+ mph rate of speed, and is not aware of any publication that would support that tailoring—other than the FHWA publication that he overheard Master Sergeant Fowler discuss in his deposition, but has not read.<sup>96</sup>

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<sup>86</sup> See Ex. 50, Rep. of Ken Morris (“Morris Rep.”) at 1.

<sup>87</sup> See *id.*

<sup>88</sup> Ex. 50, Morris Dep. at 73:3-11.

<sup>89</sup> Ex. 51, GHSA, Pedestrian Traffic Fatalities by State at 8 (2016 Prelim. Data); see Ex. 3, Morris Dep. at 75-76.

<sup>90</sup> See *id.* at 67, 82-83, 91.

<sup>91</sup> See *id.* at 111, 143-145.

<sup>92</sup> See *id.* at 88, 146.

<sup>93</sup> See *id.* at 112.

<sup>94</sup> See *id.* at 192-193.

<sup>95</sup> See Ex. 50, Morris Rep. at 1-3.

<sup>96</sup> See Ex. 3, Morris Dep. 205- 206.

42. Mr. Morris's report states that "the main issues" with auto-pedestrian accidents are not pedestrians staying on medians but pedestrians "walking too close to motor vehicles, being distracted by electronic devices such as smart phones, radios or other devises [sic]."<sup>97</sup> His report states that "driver distraction" from electronic devices presents "the same risk factors."<sup>98</sup> He has done no study and admittedly does not know "whether pedestrians on medians might be more or less distracting to drivers" than electronic devices inside cars.<sup>99</sup>

## **VI. Literature On The Safety Of Public Medians**

43. Defendants' experts have recognized the FHWA as a traffic safety authority.<sup>100</sup>

44. The FHWA publication with speed-fatality statistics relied on by Defendants and Master Sergeant Fowler also highlights several empirical studies on the safety medians provide pedestrians: a 2008 "detailed review of safety research related on various engineering treatments for pedestrians" by the FHWA found that "raised medians" are among "the best known CRFs [crash reduction factors] related to pedestrians";<sup>101</sup> a 2007 published study found pedestrian refuges and medians "to be especially effective in creating a safe environment for pedestrians";<sup>102</sup> a 2005 published study found that "[t]he presence of a raised median (or raised crossing island) was associated with a significantly lower pedestrian crash rate at multi-lane sites with both marked and unmarked

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<sup>97</sup> Ex. 50, Morris Rep. at 1.

<sup>98</sup> *Id.* at 2.

<sup>99</sup> *See* Ex. 3, Morris Dep. at 111-112.

<sup>100</sup> *See* Ex. 32, Revised Ordinance, § 32-458(a)(4); Citty Dep. 175; Ex. 2, Fowler Dep. at 186; Morris Dep. at 175; Ex. 48, Fowler Rep. at 3.

<sup>101</sup> Ex. 47, FHWA, *Pedestrian Safety* at 46-47.

<sup>102</sup> *Id.* at 86, 151.



crosswalks”;<sup>103</sup> and a 1994 published study finding that “raised median pedestrian accident rates are *significantly lower* than rates on undivided arterials” and “*damage severity* of motor vehicle accidents is lower for areas with raised medians than undivided areas.”<sup>104</sup>

45. Additionally, a 2012 FHWA memorandum, based on “a data-driven approach to safety improvements,” includes “medians and pedestrian crossing islands” on its list of “research-proven countermeasures” that “help save lives and prevent serious injury.”<sup>105</sup>

Another FHWA publication reports that medians “may reduce crashes by 46 percent and motor vehicle crashes by up to 39 percent.”<sup>106</sup> It recommends medians as refuge areas “where there are mixtures of significant pedestrian and vehicle traffic” and “intermediate or high travel speeds.” It further recommends that medians be “at least 4 feet wide (preferably 8 feet wide to accommodate pedestrian comfort and safety).”<sup>107</sup>

46. None of these FHWA publications raise safety concerns with pedestrians being on medians for any duration or recommend any durational limitations.<sup>108</sup>

47. None of Defendants’ purported experts address, cite, or claim to have considered any of the above FHWA publications or referenced studies on median safety.<sup>109</sup>

## **VII. Improvements And Volunteers—Including Children—On Medians**

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<sup>103</sup> *Id.* at 87, 153.

<sup>104</sup> *Id.* at 67, 156 (emphasis added).

<sup>105</sup> Ex. 52, FHWA, *Memorandum on Promoting the Implementation of Proven Safety Countermeasures 1-2* (Jan. 12, 2012).

<sup>106</sup> Ex. 53, FHWA, *Proven Safety Countermeasures: Medians and Pedestrian Crossing Islands in Urban and Suburban Areas* (FHWA-SA-12-011).

<sup>107</sup> *Id.* at 2.

<sup>108</sup> *See* Ex. 47, 52, 53.

<sup>109</sup> *See* Ex. 48, Fowler Rep.; Ex. 50, Morris Rep.

48. The City has put benches, sidewalks, trails, other paved areas, bicycle facilities, playgrounds, art, and “other improvements designed for use by the public”<sup>110</sup> on medians, including wide ones outlawed under the Revised Ordinance.<sup>111</sup> The City’s Chief Traffic Engineer testified that landscaping and “esthetic” objects are “a streetscape as beautification type project for the center median.”<sup>112</sup>

49. The *Oklahoma City Trails Master Plan*, part of the City’s comprehensive plan,<sup>113</sup> notes that some parks “are medians or open space areas”<sup>114</sup> and that “[w]ide medians provide excellent opportunities for trail development”<sup>115</sup> It explains that “ample rights of way and medians” provide “a facility separated from automobile traffic.”<sup>116</sup>

50. For years, a non-profit called OKC Beautiful has landscaped medians through past and current written agreements with the City,<sup>117</sup> including medians banned under both challenged measures.<sup>118</sup> The agreements require volunteers to be insured and sign releases,

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<sup>110</sup> Ex. 31, Original Ordinance, § 32-458(7).

<sup>111</sup> See Ex. 19, Lambert Median Photos Nos. 1-4, 9-15; Ex. 21, Leal Median Photos Nos. 1, 8-14, 12-13, 23, 25-42.

<sup>112</sup> Ex. 4, Chai Dep. at 54-55, 65-66, 69-71.

<sup>113</sup> See Ex. 35 at 38, Resolution Adopting Planokc (July 21, 2015).

<sup>114</sup> Ex. 35 at 145, 169, *Oklahoma City Trails Master Plan* (1997) (“*Trails Master Plan*”), available at <https://okc.gov/home/showdocument?id=2696>; Ex. 35 at 323, Planokc Website, Topic: Sidewalks & Trails, connectokc 15: Update and Implement the Trail Master Plan, available at <http://planokc.org/topics/sidewalks-trails/>; Ex. 21, Leal Median Photos Nos. 23-24, 37-42.

<sup>115</sup> Ex. 35 at 269, *Trails Master Plan*; see also *id.* at 269, 272.

<sup>116</sup> *Id.* at 266.

<sup>117</sup> See Ex. 54, OKC Beautiful Agmts.; Ex. 55, OKC Beautiful Website, *Landscapes*, at <https://www.okcbeautiful.com/programs/landscapes/>; Ex. 56, Defs. Resp. Sum. J at 12; Ex. 19, Lambert Median Photos Nos. 7-8, 21-22; Ex. 21, Leal Median Photos Nos. 6-7, 17-18.

<sup>118</sup> See Ex. 54, OKC Beautiful Agmts. at Bates Nos. 17-22, 31-46, 47-54, 55-66, 67-78, 101-108, 128-151.

with parents signing for children.<sup>119</sup> The releases neither mention nor require any training or precautions related to traffic safety.<sup>120</sup> Chief Citty testified that officers have not cited any volunteers, but they are no safer than unauthorized individuals on the same medians.<sup>121</sup>

### **VIII. Bus Stops, Sidewalks, Signs, And Street Corners**

51. The City has placed bus stop benches, other benches, and sidewalks close to 40+ mph roadways, including across from currently banned medians.<sup>122</sup> The City's Chief Traffic Engineer testified that "[t]here are benches all across the city positioned in much the same way," and that they are offset by at least 18 inches from the curb in a "clear zone," far enough that "someone can recover a vehicle."<sup>123</sup> He noted that "a barrier curb" is a "raised roadside feature" that guides traffic "to stay within a lane and to keep people from easily exiting the roadway and going off."<sup>124</sup>

52. Bus stop benches display ads visible to motorists.<sup>125</sup> Large signs, art objects, other displays, and trees on medians are visible to motorists and obstruct their views.<sup>126</sup>

53. Master Sergeant Fowler testified that sidewalks, street corners, and bus stops adjacent to the roadway worry him because of "the potential of being struck."<sup>127</sup> He does

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<sup>119</sup> See *id.* at Bates Nos. 18, 32, 34, 39-43, 48-49, 53-54, 56, 63-66, 68, 75-78, 102-103, 107-108, 129, 142, 147-151; Ex. 56, Defs. Resp. Sum. J. at 12.

<sup>120</sup> See *id.* at Bates Nos. 39-40, 53-54, 63-64, 75-76, 107-108, 147-148.

<sup>121</sup> See Ex. 1, Citty Dep. at 168-171.

<sup>122</sup> See Ex. 21, Leal Median Photos Nos. 2-5, 11, 14, 21-22; Ex. 2, Fowler Dep. at 175.

<sup>123</sup> Ex. 4, Chai Dep. at 73, 75-76.

<sup>124</sup> *Id.* at 76-77.

<sup>125</sup> See Ex. 21, Leal Median Photos Nos. 4-5, 11, 14, 21.

<sup>126</sup> See Ex. 19, Lambert Median Photos Nos. 1-9, 11, 13, 15-19, 22-24; Ex. 21, Leal Median Photos Nos. 1, 6-7, 15-16, 17-18, 20, 25-33; Ex. 4, Chai Dep. at 69-71.

<sup>127</sup> Ex. 3, Morris Dep. at 175-177.

not have any evidence that vehicles hit or run onto medians more or less frequently than street corners, sidewalks, and other things on the side of the roadway (“I have not looked into that”).<sup>128</sup> He agreed that vehicles at higher speeds have a greater likelihood than at lower speeds of “reaching sidewalks, street corners, yards, or other things adjacent to the roadway”; he did not have “any data suggesting any relative difference in frequency” with such vehicles reaching medians.<sup>129</sup> (Chief Citty also agreed that the proximity of sidewalks and street corners to the roadway concerned him “from a traffic safety perspective.”)<sup>130</sup>

54. Mr. Morris testified that pedestrians “waving a sign or making gestures” would be “distracting [to drivers] whether you are in the middle of the street, whether you are on the corner.”<sup>131</sup> Master Sergeant Fowler agreed that “signs and gatherings of people on street corners and sidewalks can also create visual obstructions.”<sup>132</sup>

### **IX. Data On Pedestrian And Bicyclist Accidents In Oklahoma City**

55. In the past decade, more pedestrians have been struck and killed by lightning throughout Oklahoma—one fatality in 2012—than by a vehicle on a median in the City.<sup>133</sup>

56. Defendants’ production of 510 auto-pedestrian accident reports for the past five

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<sup>128</sup> *Id.* at 82.

<sup>129</sup> *Id.* at 131, 134.

<sup>130</sup> Ex. 1, Citty Dep. at 144.

<sup>131</sup> Ex. 3, Morris Dep. at 118.

<sup>132</sup> Ex. 2, Fowler Dep. 106.

<sup>133</sup> *See* Ex. 35 at 8-28, National Weather Service (“NWS”) Website, *U.S. Lightning Deaths 2008-2017*, available at <http://www.lightningsafety.noaa.gov/victims.shtml>; *see also* Ex. 35 at 5, 6, NWS Website, *Lightning Fatalities By State, 2007-2016*, available at [http://www.lightningsafety.noaa.gov/stats/07-16\\_State\\_Ltg\\_Fatality\\_Fatality\\_Rate\\_Maps.pdf](http://www.lightningsafety.noaa.gov/stats/07-16_State_Ltg_Fatality_Fatality_Rate_Maps.pdf).

years (2012-2017)<sup>134</sup> yields the following data: *no pedestrian on median was hit or caused an accident*; 351 pedestrians were struck in the roadway, over 50 while jaywalking; 117 pedestrians were hit in parking lots and zones; 33 accidents involved children, 19 of whom ran into the street; and 28 accidents involved intoxication.<sup>135</sup> (The City has not outlawed jaywalking, but Mr. Morris testified that “it should be banned” for pedestrian safety.<sup>136</sup>)

57. The City authorizes bicycling on all roadways, regardless of speed limit.<sup>137</sup> The *Oklahoma City Bicycle Transportation Plan*, part of the City’s comprehensive plan,<sup>138</sup> calls for “actions and funding that will develop Oklahoma City to become a bicycle-friendly city.”<sup>139</sup> The City has 30.3 miles of “*on-street* bike lanes and signed shared roadway bike routes.”<sup>140</sup> Some are in 40+ mph roadways.<sup>141</sup>

58. Chief Citty agreed that “the risk of getting hit by traffic is likely to be greater in the bike lane than on the median.”<sup>142</sup> Auto-bicycle accident reports for the past five years<sup>143</sup> shows: 35 auto-bicycle accidents; 17 on 40+ mph roadways; at least 2 were fatalities; and

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<sup>134</sup> See Ex. 57, Auto-Pedestrian Accident Reports (lodged on CD).

<sup>135</sup> See *id.*, Appendix 1 (Index to Auto-Pedestrian Accident Reports).

<sup>136</sup> Ex. 3, Morris Dep. at 181-184; see Ex. 1, Citty Dep. at 125. Mr. Morris also testified that educating pedestrians on crossing streets and staying on medians would improve safety. See Ex. 3, Morris Dep. at 154.

<sup>137</sup> See Okla. City Mun. Code art. XIV.

<sup>138</sup> See Ex. 35 at 38, Resolution Adopting Planokc (July 21, 2015); Ex. 35 at 321, Planokc Website, Topic: Sidewalks & Trails, connectokc 11: Create a Destination-Based Priority Bike Network, available at <http://planokc.org/topics/sidewalks-trails/>.

<sup>139</sup> Ex. 35 at 41, 47, *Oklahoma City Bicycle Transportation Plan*, available at <https://okc.gov/home/showdocument?id=2698>.

<sup>140</sup> *Id.* at 24 (emphasis added).

<sup>141</sup> See, e.g., Ex. 22, Bicycle Lanes and Routes Photos by Amber Leal (“Leal Bicycle Photos”) Nos. 1-9.

<sup>142</sup> See Ex. 1, Citty Dep. at 204.

<sup>143</sup> See Ex. 58, Auto-Bicycle Accident Reports (lodged on CD).

at least 3 occurred on a bicycle lane or bicycle route, all on 40+ mph roadways.<sup>144</sup>

## **X. The Constitutional Burdens On Plaintiffs**

59. For years, on medians in OKC, Plaintiffs Calvin McCraw and G. Wayne Marshall have panhandled to make ends meet,<sup>145</sup> and Mr. McCraw has distributed Curbside Chronicle.<sup>146</sup> In their experience, it is easier and safer to solicit from the median than the street corner or sidewalk, as drivers would not need to lean across the passenger seat to give money and they would not need to step off the curb to close the distance.<sup>147</sup>

60. For years, on medians in OKC, Plaintiff Mark Faulk has campaigned and participated in political protests and rallies, and signature gatherers for Plaintiff Oklahoma Libertarian Party (“OLP”) have solicited signatures to qualify for the ballot in statewide elections.<sup>148</sup> As a minority party without funds for mass mailings or media outreach, OLP relies on medians as an effective low-cost means of reaching the voting public.<sup>149</sup>

61. Journalists for Plaintiff Red Dirt Report have regularly covered stories on medians throughout OKC.<sup>150</sup> Accidents, protests, and other news events occur in or near roadways

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<sup>144</sup> See *id.*, Appendix 2 (Index to Auto-Bicycle Accident Reports); see also Ex. 7, McCraw Dep. at 112:9-11, 118:4-12, 142:21-22.

<sup>145</sup> See Ex. 8, Marshall Dep. at 11, 23, 34, 94-95, 124; Ex. 12, Aff. of George Marshall (“Marshall Aff.”), Dkt. No. 30-2, at ¶ 3; Ex. 7, Dep. of Calvin McCraw (“McCraw Dep.”) at 137-138, 187; Ex. 11, Aff. of Calvin McCraw (“McCraw Aff.”), Dkt. 30-1 at ¶ 2.

<sup>146</sup> See Ex. 7, McCraw Dep. at 47; Ex. 11, McCraw Aff. at ¶¶ 3-5.

<sup>147</sup> See Ex. 8, Marshall Dep. at 28, 142-146, 167-169; Ex. 12, Marshall Aff. at ¶¶ 4, 8; Ex. 11, McCraw Dep. at 158-160; Ex. 7, McCraw Aff. at ¶¶ 6, 8; see also Ex. 6, Faulk Dep. at 107-108; Ex. 13, Faulk Aff. at ¶¶ 7-8; Ex. 18, O’Connor Aff. at ¶ 5.

<sup>148</sup> See Ex. 6, Faulk Dep. at 58-59, 66, 70-76; Ex. 13, Faulk Aff. at ¶¶ 2-3; Ex. 9, Kelly Dep., Vol. 1 at 70-71, 75, 85-86 Vol. 2 at 8, 13, 18, 20; Ex. 16, Kelly Aff. at ¶¶ 2-4.

<sup>149</sup> See Ex. 16, Kelly Aff. at ¶¶ 2-3.

<sup>150</sup> See Ex. 17, Griffin Aff. at ¶¶ 2-4.

regardless of speed limit; medians may provide the best vantage point and allow reporters to stay out of the way of emergency vehicles and personnel as well as traffic.<sup>151</sup>

62. Plaintiffs Neal Schindler and Trista Wilson run in the OKC Memorial Marathon (“Marathon”) to publicly honor the victims and responders of the OKC bombing, and both plan to train for it by running along its route, including along the currently banned medians on N. Lincoln.<sup>152</sup> They run on medians along the way because the grass is easier on their joints than concrete or asphalt.<sup>153</sup> During Marathons, Mr. Schindler has visited with supporters on medians.<sup>154</sup> An avid jogger, Ms. Wilson often traverses medians throughout OKC during runs, and sometimes stays on them to catch her breath, tie a shoe, chat with a jogging companion, or respond to a text or call.<sup>155</sup>

63. Messrs. Faulk, Marshall, and McCraw, and the OLP have used and would like to use “high visibility,” “high traffic” medians near intersections where they can efficiently and effectively reach a wide audience of motorists, including many of the over 400 medians currently banned, such as at N. Classen Ave. and Northwest Expy., N. Rockwell Ave. and Northwest Expy., N. MacArthur Ave. and Northwest Expy., NE 36th St. and N. Kelley Ave., N. May Ave. and W. Memorial Rd., N. Pennsylvania Ave. and NW 140th St., and

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<sup>151</sup> *See id.*

<sup>152</sup> *See* Ex. 10, Schindler Dep. at 36, 48 102-103; Ex. 15, Schindler Aff. at ¶¶ 2-3; Ex. 5, Wilson Dep. at 80-81, 111.

<sup>153</sup> *See* Ex. 10, Schindler Dep. at 52-53; Ex. 15, Schindler Aff. at ¶ 3.

<sup>154</sup> *See* Ex. 10, Schindler Dep. at 59-61; Ex. 15, Schindler Aff. at ¶ 3.

<sup>155</sup> *See* Ex. 5, Wilson Dep. at 43, 46, 50-51, 53-56, 57, 70, 109, 111-113; Ex. 14, Wilson Aff. at ¶ 2.

N. Lincoln Blvd. just south of the State Capitol.<sup>156</sup> Plaintiffs have observed that they are less visible standing on the street corner or sidewalk, where they would be farther from some motorists and blocked by parked cars, other motorists, and signs.<sup>157</sup>

64. High visibility, high traffic medians are vital public fora in a low-pedestrian city like OKC.<sup>158</sup> Mr. Faulk, now Oklahoma County Chair of the Democratic Party, testified that such medians are “the most effective places to campaign,” “to get your message out to as many voters as you can” within elective districts.<sup>159</sup> Ms. Tina Kelly, OLP Chair, testified that “every place that we can access the public is important,” and the wide medians within view of the State Capitol are “great” given their strategic location and traffic volume.<sup>160</sup>

65. Lower traffic medians are not as effective for reaching a wide audience.<sup>161</sup> As Mr. Marshall testified when asked about one of the City’s now “legal” medians, “You can stand out there all day and not make a dime because there is no traffic.”<sup>162</sup>

66. None of the Plaintiffs have been hit by a vehicle or caused an accident while on a

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<sup>156</sup> See Ex. 6, Faulk Dep. at 58-66, 70-76, 106, 129, 144-145; Ex. 13, Faulk Aff. at ¶ 3; Ex. 9, Kelly Dep., Vol. 1 at 70-73, 75, Vol. 2 at 8, 18-20; Ex. 16, Kelly Aff. at ¶¶ 3-4, 8; Ex. 8, Marshall Dep. at 34, 42, 51-52, 94-95, 98, 124, 167-169; Ex. 12, Marshall Aff. at ¶ 3; Ex. 7, McCraw Dep. at 72, 95-96, 115-117, 139; Ex. 11, McCraw Aff. at ¶¶ 5-6; see also Ex. 18, O’Connor Aff. at ¶ 3. Master Sergeant Fowler testified that “Traffic tends to migrate to the larger roadways” with higher speed limits. Ex. 2, Fowler Dep. at 110.

<sup>157</sup> See Ex. 6, Faulk Dep. at 59-65; Ex. 13, Faulk Aff. at ¶ 4; Ex. 16, Kelly Aff. at ¶ 5.

<sup>158</sup> See Ex. 8, Marshall Dep. at 147-148; Ex. 12, Marshall Aff. at ¶ 5; Ex. 7, McCraw Dep. at 150-151; Ex. 11, McCraw Aff. at ¶ 9.

<sup>159</sup> Ex. 6, Faulk Dep. at 59, 72, 106.

<sup>160</sup> Ex. 9, Kelly Dep., Vol. 1 at 85-86, Vol. 2 at 19; see Ex. 16, Kelly Aff. at ¶ 7.

<sup>161</sup> See Ex. 8, Dep. of Marshall at 51; Ex. 7, Dep. of McCraw at 60-61; Ex. 9, Dep. of Kelly, Vol. 2 at 18.

<sup>162</sup> Ex. 8, Dep. of Marshall at 51; see also Ex. 7, Dep. of McCraw at 60.



median, and none have seen a pedestrian on a median get hit or cause an accident.<sup>163</sup> None as drivers have found people on medians distracting.<sup>164</sup>

67. Plaintiffs are uncertain whether their speech and activities on medians would constitute an “emergency” exempted from criminal liability,<sup>165</sup> whether they may stand, sit, or stay on medians when they cannot see the posted speed limit.<sup>166</sup>

## ARGUMENT

### I. Public Medians Are Traditional Public Fora.

1. The Supreme Court has long recognized that streets, sidewalks, parks, and similar open public spaces are “quintessential public forums” which “have immemorially been held in trust for the use of the public, and, from time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (internal quotation marks omitted). “There, a listener often encounters speech he might otherwise tune out.” *McCullen v.*, 134 S. Ct. at 2529. Traditional public fora “occupy a special place in terms of First Amendment protection,” and “the government’s ability to restrict speech in such locations is very limited.” *Id.* (internal quotation marks omitted).

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<sup>163</sup> See Ex. 6, Faulk Dep. at 55, 113, 141, 147; Ex. 13, Faulk Aff. at ¶ 6; Ex. 9, Kelly Dep. at 15; Ex. 16, Kelly Aff. at ¶; Ex. 8, Marshall Dep. 42, 162, 163; Ex. 12, McCraw Dep. at 112; Ex. 10, Schindler Dep. at 98; Ex. 14, Wilson Dep. at 109, 110.

<sup>164</sup> Ex. 8, Marshall Dep. at 165, 166; Wilson Dep. at 109, 116.

<sup>165</sup> See Ex. 7, McCraw Dep. at 182-183, 185-187; Ex. 11, McCraw Aff. at ¶ 15; Ex. 10, Schindler Dep. at 68, 78; Ex. 5, Wilson Dep. at 68, 75-79, 112-113, 122; Ex. 14, Wilson Aff. at ¶ 3; Ex. 6, Faulk Dep. at ¶ 9; Ex. 17, Griffin Aff. at ¶ 6.

<sup>166</sup> See Ex. 32, Revised Ordinance, § 32-458(d); Ex. 6, Faulk Dep. at 127-129; Ex. 7, McCraw Dep. at 171; Ex. 5, Wilson Dep. 71-72, 105-107.

Traditional public fora are “areas that have historically been open to the public for speech activities.” *McCullen*, 134 S. Ct. at 2529. If “the actual public access and uses” reflect that “expressive activity would be appropriate and compatible with those uses, the property is a public forum” *First Unitarian*, 308 F.3d at 1125 (internal quotation marks omitted). That is because “the public has, through the extent and nature of its use of these types of government property, acquired, in effect, a ‘speech easement’ that the government property owner must now honor.” *Verlo v. Martinez*, 820 F.3d 1113, 1146 (10th Cir. 2016).

2. Medians share the “traditionally open character” of public streets and sidewalks. *Id.* They have long been open to the public, and access is facilitated by crosswalks and invited by expanses of lawn or pavement, as well as landscaping, art, monuments, signs, trails, and benches. See “SUMF” ¶ 6. See *Warren v. Fairfax Cnty.*, 196 F.3d 186, 196-97 (4th Cir. 1999) (en banc).

For decades, protected political, press, and personal speech have thrived on medians across OKC. See SUMF ¶¶ 1-5, 59-62. The City itself has dedicated forums for citizen speech on them. See SUMF ¶ 5. Similarly, in *Cutting v. City of Portland*, NO. 2:13-cv-359-GZS, 2014 WL 580155 (D. Me. Feb. 12, 2014), the district court made findings of fact that, “[p]rior to enactment of the Ordinance” banning sitting, standing, or staying on medians, “it was common to see individuals and groups standing on certain medians in the City in order to communicate with passersby, especially motorists”; “it was very common to see individuals standing on the medians for the purpose of soliciting personal donations from motorists for charity or panhandling”; and “[p]olitical campaigns routinely place signs with the names of their candidates or advocating a particular viewpoint on a

referendum in the medians.” *Id.*, 2014 WL 580155 at \*2. Other examples abound.<sup>167</sup>

3. Federal courts overwhelmingly have held medians to be traditional public fora. For example, in *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015), the First Circuit held that medians are traditional public fora based on the above findings. *Id.* at 83. *Cutting* followed *Warren*, in which the en banc Fourth Circuit adopted Judge Murnaghan’s dissent from a panel decision. *See Warren*, 196 F.3d at 189, 197. The court criticized the “novel attempt to carve out an exception from the public forum doctrine for property that, quite literally, lies at the heart of the Supreme Court’s quintessential example of the traditional public forum.” *Id.* at 196. The court continued:

If streets, sidewalks and parks are traditional public fora, then a court bears a heavy burden in explaining why property which is merely a combination of all three from the standpoint of physical characteristics, objective uses and purposes, and traditional and historic treatment, is not. Median strips, like sidewalks, are integral parts of the public thoroughfares that constitute the traditional public fora.

*Id.* These cases join a growing federal consensus that medians are traditional public fora.<sup>168</sup>

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<sup>167</sup> *See, e.g., Reynolds v. Middleton*, 779 F.3d 222, 224 (4th Cir. 2015) (panhandlers soliciting from public medians); *Satawa v. Macomb Cnty. Rd. Com’n*, 689 F.3d 506, 511 (6th Cir. 2012) (private citizens displaying crèche on public median); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 941-42 (9th Cir. 2014) (en banc) (day laborers soliciting from public medians); *Warren*, 196 F.3d at 197 (“Newspaper criers, local civic fundraisers, members of political campaigns, religious groups, and people with a message have often chosen median strips, with their ready access to the bustle of undifferentiated humanity, as their preferred launching point for expressive conduct”); *Thayer v. City of Worcester*, 144 F. Supp.3d 218, 225, 231 (D. Mass. 2015) (nonprofits and panhandlers soliciting from public medians); *ACORN v. City of New Orleans*, 606 F. Supp. 16, 18-19 (E.D. La. 1984) (activists distributing flyers and soliciting contributions from public medians); *see also* Fl. Stat. § 316.130(5) (excluding public medians from laws regulating roadway solicitation); Fairfax Cnty., Va. Code of Ordinances § 82-9-5(b) (same); St. Louis Cnty., Mo. Traffic Code § 1209.090 (same).

<sup>168</sup> *See, e.g., Redondo Beach*, 657 F.3d at 941, 945, 949 (treating ban on soliciting on streets, sidewalks, and public medians as restriction of “protected speech in a public

4. Defendants might argue that medians merely function as traffic control devices. But the fact that “the principal purpose of streets and sidewalks ... is to facilitate transportation, not public discourse,” has not defeated their status as traditional public fora. *ISKON v. Lee*, 505 U.S. 672, 696-97 (1992) (Kennedy, J., concurring in judgment). It is the “nature” and “public use” of the areas, rather than “the government’s own ‘ipse dixit,’” that determines their First Amendment status. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002) (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)); accord *Warren*, 196 F.3d at 195.

## II. The Revised Ordinance Triggers At Least Intermediate Scrutiny.

A restriction on protected speech in a traditional public forum triggers strict scrutiny if content based and intermediate scrutiny if content neutral. *Verlo*, 820 F.3d at 1134. Because a law that fails intermediate scrutiny fails strict scrutiny, this motion will apply the former to demonstrate that the Revised Ordinance fails both.<sup>169</sup>

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forum”); *Satawa*, 689 F.3d at 511, 521 (holding sixty-foot wide median between eight lanes of traffic to be traditional public forum because it “is enough” that “the median is a public space, which is, and apparently long has been, available to all comers”); *Petrello v. City of Manchester*, 2017 WL 3972477, \* 18 (D.N.H. Sept. 17, 2017) (finding areas “adjacent to the street, such as a sidewalk or median” to be “traditional public forums”); *Thayer v. City of Worcester*, 144 F. Supp.3d 218, 232 (D. Mass. 2015) (“Plaintiffs seek to engage in free expression in areas which have been recognized as traditional public forums, *i.e.* city sidewalks, streets, traffic islands and medians”); *ACORN v. City of New Orleans*, 606 F. Supp. 16, 20 (E.D. La. 1984) (treating ban on standing in roadway or public median to solicit funds as restriction of “First Amendment activity in a traditional public forum”); see also *Warren*, 196 F.3d at 197 (citing cases and noting that “every other court that has addressed the matter has treated medians for First Amendment purposes as part and parcel of the streets and sidewalks of which they form an integral part”); see also *Cimarron Alliance Found.*, 290 F. Supp.2d at 1260.

<sup>169</sup> A wave of recent federal court decisions have struck down anti-panhandling laws as content-based restrictions subject to strict scrutiny. See, *e.g.*, *Norton v. City of Springfield*,

### III. The Revised Ordinance Fails Intermediate Scrutiny.

#### A. The Revised Ordinance Substantially Burdens Protected Speech.

There can be no question that Plaintiffs’ campaign speech, political advocacy, personal conversations and communications, press coverage, and panhandling are fully protected by the First Amendment,<sup>170</sup> and that the Revised Ordinance “impose[s] serious burdens” on Plaintiffs’ protected speech. *McCullen*, 134 S. Ct. at 2535; *see* SUMF ¶¶ 59-65, 67. It bans medians where Plaintiffs can efficiently reach a high volume of voters and donors, engage in rallies and protests, converse during a jog or the Marathon, or cover a news event.<sup>171</sup> The exclusion of expressive activities on even a *single* median or other pedestrian area triggers First Amendment scrutiny.<sup>172</sup> Here hundreds have been outlawed.

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806 F.3d 411, 413 (7th Cir. 2015); *Petrello v. City of Manchester*, Civ. No. 16-cv-008-LM, 2017 WL 3972477, \*22-23 (D.N.H. Sept. 7, 2017); *Blitch v. City of Slidell*, 260 F. Supp.3d 656, 674 (2017); *Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-cv-1219-T-23AAS, 2016 WL 416282, \*6 (M.D. Fla. Aug. 5, 2016); *Thayer v. City of Worcester*, 144 F. Supp.3d 218, 238 (D. Mass. 2015); *McLaughlin v. City of Lowell*, 140 F. Supp.3d 177, 197 (2015); *Browne v. City of Grand Junction*, 136 F. Supp.3d 1276, 1294 (D. Colo. 2015).  
<sup>170</sup> *See Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (“Speech on matters of public concern is at the heart of the First Amendment’s protection” (internal quotations and ellipses omitted)); *United States v. Stevens*, 559 U.S. 460, 479 (2010) (“Most of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation” (internal quotations omitted)); *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334, 346 (1995) (campaign speech “occupies the core of the protection afforded by the First Amendment”); *Reynolds*, 779 F.3d at 225 (“There is no question that panhandling and solicitation of charitable contributions are protected speech”); *see also Thayer v. City of Worcester*, 144 F. Supp.3d 218, 233 (D. Mass. 2015) (collecting cases applying strict scrutiny to anti-panhandling ordinances).

<sup>171</sup> *See* SUMF ¶¶ 61-65.

<sup>172</sup> *See, e.g., Satawa*, 689 F.3d at 511 (single median separating eight lanes of traffic); *Warren*, 196 F.3d at 189, 196 (single landscaped mall or median); *First Unitarian*, 308 F.3d at 1131 (single pedestrian throughway). *See Cutting*, 802 F.3d at 87-92 (applying First Amendment scrutiny to citywide ban on standing, sitting, or staying on medians); *Thayer*,

**B. The Revised Ordinance Is Not Justified By A Significant Government Interest In Traffic Safety.**

1. The record is replete with undisputed, candid, and clear public statements and correspondence by City officials who drafted, introduced, supported, and voted on the median bans—including City Council members, Chief City, and municipal counsel—that the underlying goal was “to ban panhandling/soliciting from all medians” as unpopular speech, and that the tailoring has evolved to “survive a legal challenge.” See SUMF ¶¶ 7-18. The City would like to sweep the abundant evidence of discrimination under the rug. The Supreme Court has refused to do that with laws revised in litigation.<sup>173</sup> It has reaffirmed that “government motive,” “illicit legislative intent,” and “evidence of improper censorial motive” are relevant and “may be sufficient in certain circumstances to show that a regulation is content-based.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228-29 (2015).<sup>174</sup> Thus, the Sixth Circuit discredited a belated traffic safety justification for denying a permit for speech on a median, finding from the “sequence of events” that disagreement with the

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144 F. Supp.3d at 237-38 (same). Plaintiffs’ speech is also seriously burdened for the reasons discussed *infra* II.D.

<sup>173</sup> See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 861, 862, 866 (2005) (rejecting contention that government purpose from a series of enactments “should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject,” with rejoinder that “the world is not made brand new every morning,” and “scrutinizing purpose” from “text, legislative history and implementation” is “a key element of a good deal of constitutional doctrine”).

<sup>174</sup> *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-41 (1993) (plurality) (“In determining if the object of the law is a neutral one,” observing that “we may determine the city’s council’s object from both direct and circumstantial evidence,” including “statements by members of the city council”)

proposed speech was “the ‘real’ reason” for the denial.” *Satawa*, 689 F.3d at 523-24.<sup>175</sup>

Because the real reason here is to suppress panhandling, “strict scrutiny applies.” *Id.* at 524; *see Thayer v. City of Worcester*, 144 F. Supp.3d 233-34 (D. Mass. 2015).

2. Even assuming the traffic safety justification is genuine, the asserted interest is not significant because it is not supported by a shred of empirical evidence. The City has provided no documentation of a single accident involving a pedestrian on a median in the history of OKC. *See* SUMF ¶¶ 19, 27, 29, 32; 56. Nor have its designated experts. *See* SUMF ¶¶ 13, 16, 23, 36, 40. Neither the City nor its experts have reviewed any empirical data or conducted any empirical study assessing the risks of pedestrians getting into or causing accidents while on medians for any length of time, and none of the literature they relied on provides any empirical data or analysis specific to pedestrians on medians or raises any concerns regarding pedestrians staying on them. *See* SUMF ¶¶ 13, 16, 21, 23, 27, 29-32, 35-36, 39-42. By contrast, median-specific literature—which Defendants’ experts have not reviewed—recommends medians as safe pedestrian refuges, and Plaintiffs undisputedly have stayed on medians safely for decades. *See* SUMF ¶ 44-47, 66.

A speculative risk not shown to be greater than lightning striking is not a significant interest. *See* SUMF ¶ 55; *Sawata*, 689 F.3d 526 (“A hypothetical traffic-safety concern resting on aberrant behavior, which has never happened—nor has there been any record of

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<sup>175</sup> *Cf. Int’l Refugee Assist. Proj. v. Trump*, 857 F.3d 554, 572, 575-77, 591-92 (4th Cir. 2017) (considering statements by candidate, President-Elect, and President Trump and his advisors on Twitter, at rallies, in interviews, and in correspondence to “find that Plaintiffs have more than plausibly alleged that [an executive order’s] stated national security interest was provided in bad faith, as a pretext for its religious purpose”), *vacated on other grounds*, 138 S. Ct. 353 (2017) (moot after expiration of executive order).

it being threatened—in sixty years does not qualify as a significant government interest”).

**C. The Revised Ordinance Is Not Narrowly Tailored.**

**1. The Revised Ordinance Is Impermissibly Overinclusive.**

The ordinance fails narrow tailoring because they do not cleave to the “close fit between means and ends” demanded by the Supreme Court. *McCullen*, 134 S. Ct. at 2534.

*McCullen* invalidated a law that criminalized standing within 35 feet of abortion clinics statewide to prevent congestion-related problems from gatherings. “For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.” *Id.* at 2539.

*McCullen’s* lesson, as the Fourth Circuit has explained, is 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; argument *unsupported by the evidence* will not suffice to carry the government’s burden.” *Reynolds*, 779 F.3d at 229 (emphasis added).

Lower courts have heeded that lesson. In *Cutting*, like here, Portland contended that its citywide ban on standing, sitting, or staying on medians promoted traffic safety. *See Cutting*, 802 F.3d at 90. Portland pointed to fourteen damaged signs on medians and three reports over a four-year period of cars veering onto medians. *Id.* at 91. The First Circuit found that evidence of “limited value”; at most, they showed “the obvious proposition that cars sometimes veer off roads and hit medians.” *Id.* The particular circumstances of the three documented accidents (e.g., “treacherous winter conditions”) did not support a citywide ban, and moreover, “none of the three accidents involved pedestrians.” *Id.* As



“median strips, as a group, are traditional public fora” and “presumptively fit for the very activities that the city now contends are obviously dangerous,” the First Circuit concluded that “the ordinance is so sweeping that it does ban substantially more speech than necessary to serve the City's interest.” *Id.* Likewise, other circuit and district courts have stricken laws barring pedestrians from staying on medians and other public fora as fatally overinclusive relative to any empirically substantiated traffic safety problem.<sup>176</sup>

Here, first of all, the City failed to document a single accident involving a pedestrian on a median in the history of OKC, whereas it produced documentation of pedestrians and bicyclists frequently getting hit elsewhere. *See* SUMF ¶¶ 56, 58.<sup>177</sup> To make up for this

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<sup>176</sup> *See, e.g., Reynolds*, 779 F.3d at 231 (invalidating countywide ban on soliciting on medians because “[t]he Amended Ordinance applies to all County roads, regardless of location or traffic volume, and includes all medians, even wide medians and those beside traffic lights and stop signs ... Given the absence of evidence of a county-wide problem, the county-wide sweep of the Amended Ordinance burdens more speech than necessary”); *Redondo Beach*, 657 F.3d at 949 (invalidating solicitation ban on streets, sidewalks, and medians citywide because “the burden rests on the City to submit evidence in support of its position,” which “introduced evidence of traffic problems only with respect to a small number of major streets and medians”); *Petrello v. City of Manchester*, Civ. No. 16-cv-008-LM, 2017 WL 3972477, \*16, 21 (D.N.H. Sept. 7, 2017) (invalidating citywide ban on exchanging items with motorists from medians, sidewalks, or roadways because there was “almost no evidence in the record that roadside exchanges in the City actually obstruct traffic,” and “evidence of only one accident in Manchester that involved a roadside exchange”); *Thayer*, 144 F. Supp.3d at 237, 238 & n.9 (finding that city “failed to establish the need” for its “sweeping ban” on standing on medians, and that it may only “target specific traffic islands and medians based on location and pedestrian and vehicular traffic patterns” evidencing actual safety problems); *Wilkinson v. Utah*, 860 F. Supp.2d 1284, 1286, 1290 (D. Utah 2012) (granting summary judgment to challengers of statewide ban on sitting, standing, or loitering “on or near a roadway” to solicit from vehicles because it “regulates a wide range of situations that likely have no impact on safety”).

<sup>177</sup> *See Petrello*, Civ. No. 16-cv-008-LM, 2017 WL 3972477, at \*21 n.9 (dismissing city’s evidence of 247 “pedestrian accidents” over three-year period, as there was “no evidence connecting any of those accidents to [banned] roadside exchanges”).

evidence of absence, the City has designated three purported traffic safety experts, but they have presented no empirical data or empirical study specific to pedestrians on medians of any width, location, speed limit, or length of time. *See* SUMF ¶¶ 13, 16, 23, 36, 40. This lack of empirical evidence showing a problem with *any* median makes the Revised Ordinance fatally overinclusive in light of the *hundreds* of outlawed medians citywide.<sup>178</sup>

Furthermore, the 40+ mph line was not tailored to any empirical evidence or study of pedestrian-related accidents on 40+ mph medians. *See* SUMF ¶¶ 27, 29-31, 35, 41. The City and Master Sergeant Fowler relied on general speed-fatality statistics that did *not* address pedestrians on medians. *See* SUMF ¶¶ 30-31, 35.<sup>179</sup> Neither had empirical evidence disputing median-specific literature that medians are “research-proven countermeasures,” “especially effective in creating a safe environment for pedestrians,” and “help save lives and prevent serious injury,” particularly “where there are mixtures of significant pedestrian and vehicle traffic” and “intermediate or high travel speeds.” SUMF ¶¶ 55-56.

Finally, the 40+ mph line is overbroad in light of the Original Ordinance (and Chief

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<sup>178</sup> *See Reynolds*, 779 F.3d at 225 (countywide ban on soliciting on medians failed narrow tailoring where, besides citizen complaints from increased panhandling, “[t]here is no other empirical evidence in the record of actual problems caused by panhandling or soliciting from medians”); *Petrello*, Civ. No. 16-cv-008-LM, 2017 WL 3972477, at \*21 (citywide ban on exchanging items with motorists from medians, sidewalks, or roadway failed narrow tailoring where “the City compiled no relevant data and conducted no studies prior to passing the Ordinance” and therefore “has not established that roadside exchanges pose safety risks at even a handful of busy streets or intersections in Manchester”).

<sup>179</sup> *Cf. Craig v. Boren*, 429 U.S. 190, 203 (1976) (higher alcohol purchase age for males than females based on traffic safety failed intermediate scrutiny tailoring where “many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, *make no effort to relate their findings to age-sex differential as involved here*” (emphasis added)).

Citty’s) premise that wide medians are safe, including the very wide ones in view of the State Capitol with benches, sidewalks, and open spaces. *See* SUMF ¶¶ 6, 15, 20-21, 64.<sup>180</sup>

## 2. The Revised Ordinance Is Impermissibly Underinclusive.

Some laws leave untouched speech or conduct that implicates the asserted interest. “The absence of narrow tailoring is often revealed by such under-inclusiveness.” *Kitchen v. Herbert*, 755 F.3d 1193, 1221 (10th Cir. 2014). Underinclusivity is a red flag that the tailoring is not to further a facially neutral interest but to suppress disfavored speech. *See Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 802 (2011) (“Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint”).<sup>181</sup>

The Revised Ordinance is “wildly underinclusive.” *Id.* at 802. *First*, the City has not banned jaywalking, despite the City’s empirical data that more pedestrians have gotten hit and killed by vehicles while jaywalking than on medians, and despite Mr. Morris’s

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<sup>180</sup> *Sawata*, 689 F.3d at 510, 520, 526 (invalidating refusal to grant permit for speech on “median in the middle of busy eight-lane road, with a fifty mile per hour speed limit” based on “[a] hypothetical traffic safety concern” which “has never happened”); *Warren*, 196 F.3d at 196 (invalidating refusal to grant permit for speech on median at county government complex, “a particularly apt location in which to engage in political or otherwise protected speech” (internal quotation marks omitted)).

<sup>181</sup> *Brown* held that a state ban on the sale of violent video games to minors—purportedly to protect them from the harmful effects of exposure to violent content—failed narrow tailoring because the regulation did not also ban violent books, cartoons, and movies. *Id.* Similarly, *Reed* found a town’s sign code, which restricted temporary directional signs more than other signs, to be “hopelessly underinclusive.” *Reed*, 135 S. Ct. at 2232. “The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem,” and “has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety but that limiting other types of signs is not.” *Id.* at 2231-32.

testimony that “it should be banned.” *See* SUMF ¶ 56. *Second*, the City promotes bicycling on roadways, including those 40+ mph, despite Chief City’s testimony that “the risk of getting hit by traffic is likely to be greater in the bike lane than on the median,” which is confirmed by the City’s empirical data on auto-bicycle accidents. *See* SUMF ¶ 58. *Third*, the City has not banned pedestrians from standing, sitting, or staying on street corners or sidewalks next to roadways—and has placed benches throughout OKC close to roadways—despite its experts expressing concern about vehicles at higher speeds similarly “reaching sidewalks, street corners, yards, and other things adjacent to the roadway.” *See* SUMF ¶¶ 51, 53-54. *Fourth*, the City has permitted and continues to permit volunteers—including children—to landscape on medians, including those 40+ mph, without any required traffic safety training or precautions. *See* SUMF ¶ 50. *Fifth*, despite Mr. Morris’s opinion that electronic devices are “the main issues” with auto-pedestrian accidents—rather than pedestrians on medians—the City has not outlawed the use of all of those electronic devices. *See* SUMF ¶ 42. *Sixth*, the City has not removed its large signs, “esthetic” displays, light pole banners, trees, and other large objects from medians that may distract or obstruct the view of motorists, and the City continues to profit from ads on bus benches next to the roadway competing for motorists’ attention. *See* SUMF ¶¶ 48, 52.

The challenged measure is “gerrymandered with care” to outlaw where panhandlers have found it efficacious to solicit from motorists, while “leav[ing] appreciable damage to that supposedly vital interest unprohibited.” *Lukumi*, 508 U.S. at 542, 547; *see Reed*, 135 S. Ct. at 2232. It is unconstitutional. *See Petrello v. City of Manchester*, Civ. No. 16-cv-008-LM, 2017 WL 3972477, \*20-22 (D.N.H. Sept. 7, 2017) (ban on exchanging items with

motorists is underinclusive and fails narrow tailoring in penalizing pedestrians but not motorists).

**3. The City Has Not Seriously Undertaken Less Restrictive Alternatives Or Demonstrated They Would Not Work.**

Under *McCullen*, narrow tailoring *also* requires the government to “show[] that it seriously undertook to address the problem with less restrictive tools readily available to it,” and “the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests.” 134 S. Ct. at 2539-40; *see Reynolds*, 779 F.3d at 232 (“[I]n *McCullen*, however, the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem” and “must ‘*demonstrate*’” that they did not work (emphasis original)). The City has not undertaken any of the alternatives below, much less demonstrated that none of them would be as effective—if not *more* effective—than the Ordinances.

*First*, the City did not outlaw jaywalking. *See* SUMF ¶ 56; *cf. Redondo Beach*, 657 F.3d at 949 (“The City need only enforce laws against jaywalking” to promote “traffic safety and flow” while “burdening little or no speech” on medians and other public fora). *Second*, the City did not ban bicycling on all roadways or at least 40+ mph roadways. *See* SUMF ¶¶ 57-58. *Third*, the City did not try “limiting activity on medians only at night, when the dark makes it more difficult for drivers to see.” *Cutting*, 802 F.3d at 92; *see* SUMF ¶ 30. *Fourth*, the City did not enact “an ordinance limited to the few medians” where it “had identified safety hazards” based on accident data. *Id.* *Fifth*, the City did not outlaw only medians narrower than 8 feet, the FHWA-recommended width. *See* SUMF ¶

45. *Sixth*, the City did not require pedestrians to stay 18 inches away from the curb, in “the clear zone.” *See* SUMF ¶ 51. *Seventh*, the City did not enact “an ordinance with an exception for certain large park-like spaces,” such as medians along N. Lincoln Blvd., N. Classen Ave., Northwest Expy., N. Pennsylvania Ave., and N. May Ave., “where the City had not observed safety hazards but which are especially attractive sites for expressive activity.” *Cutting*, 802 F.3d at 92; *see* SUMF ¶ 63. *Eighth*, the City did not step up enforcement against public intoxication and intoxicated driving,<sup>182</sup> which are leading contributors to auto-pedestrian accidents. *See* SUMF ¶¶ 30, 56. *Ninth*, “[t]he City has various other laws at its disposal” to enforce to improve pedestrian safety *in* roadways, where they actually get hit frequently. *Redondo Beach*, 657 F.3d at 949; *see* SUMF ¶ 56.<sup>183</sup> *Tenth*, the City could have required pedestrians staying on medians to wear bright or reflecting clothing. *See* SUMF ¶ 30. *Eleventh*, the City could have banned use of distracting devices in vehicles. *See* SUMF ¶ 42.<sup>184</sup> *Twelfth*, the City did not campaign to educate children against running into streets. *See* SUMF ¶ 56.

Because the City failed to seriously undertake “a variety of approaches that appear

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<sup>182</sup> *See* Okla. City. Mun. Code § 30-85 (public intoxication); 47 Okla. Stat. 11-902 (driving while intoxicated).

<sup>183</sup> *See, e.g.*, Okla. City Mun. Code §§ 30-81 (“A person is guilty of disorderly conduct” when such person “(f) intentionally obstructs, impedes or in any way inhibits vehicles and/or pedestrian traffic upon any street, highway, or sidewalk”); 32-452(b) (“No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle, which is so close that it is impossible for the driver to yield”); 32-457(a) (“No pedestrian shall walk on a roadway, street, or highway in a careless or negligent manner and/or endanger anyone’s life, limb or property and/or interfere with the lawful traffic and/or use of the streets”); 32-458(c) (“[N]o individual shall stand, sit, or stay for any purpose in any portion of street or highway open for use by vehicular traffic”).

<sup>184</sup> State law only bans texting while driving. *See* 47 Okla. Stat. § 11-901d(A).

capable of serving its interests, without excluding individuals from areas historically open for speech and debate,” the Revised Ordinance fails narrow tailoring. *McCullen*, 134 S. Ct. at 2539-40; *see Cutting*, 802 F.3d at 92 (same); *Reynolds*, 779 F.3d at 231-32 (same); *Redondo Beach*, 657 F.3d at 949-50 (same); *Thayer*, 144 F. Supp.3d at 237-38 (same).

**D. No Ample Alternative Channels Exist.**

Defendants must prove the Revised Ordinance “leave[s] open ample alternative channels for communication” *in addition to* narrow tailoring, not *in lieu of* it. *McCullen*, 134 S. Ct. at 2529, 2540 n. 9; *see Cutting*, 802 F.3d at 92 n. 15. “The mere existence of an alternative method of communication cannot be the end of the analysis,” for “[w]hether an alternative is ample should be considered *from the speaker’s point of view*.” *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) (emphasis added). Thus, *McCullen* rejected the contention that sidewalk counselors could convey their messages beyond buffer zones, because they “believe they can accomplish [their] objective” more effectively through close interactions with “their intended audience.” 134 S. Ct. at 2527, 2536. Further, “the proffered alternatives must allow the speaker to reach his or her intended audience, in an equally effective manner as the prohibited speech, and without incurring meaningfully greater costs in time or money.” *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 955 (Smith, J., concurring). An alternative fails if it does not provide a “practical substitute,” particularly “for persons of modest means or limited mobility.” *Gilleo*, 512 U.S. at 57.

Despite what Defendants might argue, street corners and sidewalks are not practical substitutes for medians. *Cutting* credited observations similar to those of Plaintiffs:

A protestor standing on a median with a double-sided sign may—as appellee Wells

Staley–Mays asserts, based on his own experience—reach more people than he can standing on a sidewalk.... According to Cutting, sidewalks also present obstacles to expression that medians do not: cars parked along sidewalks block drivers’ views of him; storefronts and signs distract passersby from his message; and shop owners who line the sidewalks sometimes become agitated with his protest activities.

*Cutting*, 802 F.3d at 89; *see* SUMF ¶¶ 63-65. In addition, Plaintiffs’ testimony that it is more difficult and dangerous to make exchanges with drivers from the sidewalk or street corner is consistent with the decades of firefighters soliciting from medians, *see* SUMF ¶¶ 2, 59, and with the testimony of panhandlers credited by the First and Fourth Circuits.<sup>185</sup>

Furthermore, not all medians are created equal. Plaintiffs have found high visibility, high volume intersections to be “unusually cheap and convenient” locations to reach a large audience in a sprawling non-walking city such as OKC. *Gilleo*, 512 U.S. at 56; *see* SUMF ¶¶ 63-65. Wide medians along 40+ mph roadways are essential for grassroots political parties, candidates, activists, panhandlers, and other speakers who lack the resources, time, or numbers to make up for lost voters or donors elsewhere. *See* SUMF ¶ 60, 63-65. Also irreplaceable are wide medians just south of the State Capitol as symbolic locations for rallies and protests. *See* SUMF ¶¶ 63-64. Medians are also not fungible for Marathon runners such as Mr. Schindler and Ms. Wilson, who would like to train along its route, including on medians along N. Lincoln Blvd. *See* SUMF ¶ 62. And because news can break in or around roadways without regard to speed limit, Red Dirt Report may find outlawed

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<sup>185</sup> *See Cutting*, 802 F.3d at 89 (“In fact, appellee Alison Prior, who uses medians to panhandle, finds sidewalks so useless for her purposes that she now takes a bus to a different town in order to panhandle from medians”); *Reynolds*, 779 F.3d at 226 & n.2 (crediting “personal knowledge” of panhandler that forcing him from medians to sidewalks “results in the drivers[’] inability to hand him money because they cannot reach across the passenger seat and usually several more feet into Reynolds’ hand”).



medians provide the best or safest location from which to report. *See* SUMF ¶ 61.

Finally, the City’s Kafkaesque boast of decriminalizing over 100 medians with the Revised Ordinance confirms the sweeping overbreadth of the original ban. That boast can no more save the Revised Ordinance’s lack of narrow tailoring or ample alternatives than a ban covering 80% of sidewalks and parks in OKC that leaves the remaining 20% “free.”

#### **IV. The Revised Ordinance Is Void For Vagueness.**

A law is facially invalid on Due Process grounds if it “fail[s] to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited,” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), or to “establish minimal guidelines to govern law enforcement.” *Id.* at 358 (internal quotations omitted). “Because First Amendment freedoms need breathing space,” vagueness standards “are strict in the area of free expression.” *NAACP v. Button*, 371 U.S. 415, 432, 433 (1963).

1. The Revised Ordinance is impermissibly vague in exempting persons “responding to any emergency situation,” i.e., “an unforeseeable occurrence of temporary duration.”<sup>186</sup> It is not at all clear that this exemption applies to a candidate campaigning in an unexpectedly close election, an activist protesting an unforeseen event, a panhandler soliciting to pay for unexpected medical expenses, a reporter covering a breaking news event, or a jogger responding to an unanticipated text, call, cramp, or untied shoelace. To make matters worse, Defendants have arbitrarily represented that rescuing an escaped cat from a median does qualify as an emergency.<sup>187</sup> If so, why not the other examples?

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<sup>186</sup> *See* Original Ordinance §§ 32-1(14), 32-458(d)(4); Revised Ordinance, § 32-458(e)(4).

<sup>187</sup> Ans. OKC First Amend. Compl. ¶ 74; Ans. City First Amend. Compl. ¶ 74.

2. The Revised Ordinance applies to medians “if the *posted* speed limit for such street or highway is 40 mph or greater,” but goes on to state that, “if no speed limit is *posted* for such street or highway, then for the purpose of applying the restrictions imposed by this subsection, the speed limit of such street or highway shall be presumed to be 25 miles per hour.”<sup>188</sup> Counsel for Defendants suggested in multiple depositions that if a citizen cannot see the speed limit from their vantage point—even if it might be posted elsewhere—then it is not “posted” under the Revised Ordinance.<sup>189</sup> This Schrödinger’s cat-like reading—under which a median is both outlawed and not outlawed depending on whether a person has seen the posted speed limit—is hardly apparent from the text, which like other traffic regulations appears to be strict liability. It exposes a critical uncertainty with the line separating legality from criminality that chills speech and invites arbitrary enforcement.

#### **V. The Revised Ordinance Violates Due Process.**

“[T]he freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause,” and that freedom includes the right “to remain in a public place of [one’s] choice.” *City of Chicago v. Morales*, 527 U.S. 41, 53-54 (1999) (plurality). The City may not prohibit loitering on medians any more than on sidewalks. As discussed, the City has no significant or even legitimate interest in criminalizing loitering on medians.

### **CONCLUSION**

The Revised Ordinance should be facially invalidated and permanently enjoined.

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<sup>188</sup> Ex. 32, Revised Ordinance, § 32-458(d) (emphasis added).

<sup>189</sup> See Ex. 6, Faulk Dep. at 127-129; Ex. 7, McCraw Dep. at 171; Ex. 5, Wilson Dep. at 71-72, 105-107.

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**Certificate of Electronic Service**

I certify that, on the day of filing, the foregoing document was electronically transmitted through this Court's ECF filing system to all counsel who have entered an appearance in this case and registered to receive ECF notification via electronic mail.

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