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Legislative Council Service

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Information Memorandum

DATE: June 27, 2024 **DISCUSSION DRAFT**

TO: Representative Christine Chandler

FROM: Simon D. Suzuki, Staff Attorney

SUBJECT: TIME, PLACE AND MANNER RESTRICTIONS

You have requested information regarding potential First Amendment considerations for legislation affecting activities on public streets and medians. The following memorandum is submitted in compliance with that request. Any opinions expressed are those of the author and do not necessarily reflect the opinions of the New Mexico Legislative Council or any other member of its staff.

Question Presented

What is the relevant legal framework, under the First Amendment to the United States Constitution, for analyzing legislation that may affect free speech activities on public streets and medians?

Short Answer

Courts have held that public streets and medians are traditional public fora where protected speech and conduct are often engaged in. Legislation that affects conduct in or on these public spaces will likely be considered a *time, place and manner restriction*. If such a restriction is content-based, it will be subject to strict scrutiny and if it is content-neutral, it will be subject to intermediate scrutiny.

Time, Place and Manner Restrictions

The First Amendment provides, in relevant part, that: "Congress [or a state or one of its political subdivisions[1]] shall make no law... abridging the freedom of speech". While the First Amendment says "***no** law*", courts have long recognized that the United States Constitution permits some speech restrictions that are necessary for legitimate policy reasons.[2] A "time, place and manner restriction" is one example of a constitutionally permissible law through which a state may impose reasonable limitations on speech and expressive conduct in public places so long as the law passes intermediate scrutiny, meaning that the limitations are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information".[3]

Threshold Inquiry: Is the Affected Conduct "Speech"?

When reviewing any issue regarding free speech claims, a court must first determine whether the affected conduct actually constitutes speech protected by the First Amendment.[4] In the context of the First Amendment, "speech" is a broad concept that includes spoken words, writing, expressive conduct and the actions of creating, disseminating and receiving speech.[5] Speech may be protected, unprotected or less-protected. The United States Supreme Court has recognized some narrow categories of unprotected or less-protected speech that include incitement, true threats, fighting words, obscenity, defamation, fraud and perjury and speech integral to criminal conduct.[6] However, most speech and expressive conduct outside of these narrow categories will likely be protected. For example, courts have held that protesting, sharing

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[1]*Brewer v. City of Albuquerque*, 18 F.4th 1205 (10th Cir. 2021) ("By incorporation through the Fourteenth Amendment, this prohibition applies to states and their political subdivisions.").

[2]*Frohwerk v. U.S.*, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561 (1919) (citing *Schenck v. U.S.*, 39 S.Ct. 247 and *Robertson v. Baldwin*, 17 S.Ct. 326).

[3]*Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

[4]*Brewer, supra*.

[5]*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[6]*Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

political or religious ideas, covering the news, panhandling and even sharing personal conversations are all types of speech protected by the First Amendment and are types of speech often affected by restrictions of conduct in or on public streets and medians.[7] "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."[8]

The Forum Analysis: What Type of Public Does the Restriction Apply to?

If a court finds that the affected conduct is protected by the First Amendment, it will then conduct the "forum analysis", which was developed by the Supreme Court to determine the scope of both an individual's right to access a particular piece of public property and the state's authority to regulate that property. The central goal of this analysis is to gauge whether expressive activity is compatible with the important purposes of the public property.[9] For the purposes of this analysis, the Supreme Court recognizes three forum categories: the traditional public forum, the designated public forum and the nonpublic forum.[10] When analyzing the forum, the court will look at "the objective characteristics of the property".[11] A traditional public forum is a place "which, by long tradition or by government fiat, [has] been devoted to assembly and debate" and, of the three categories, is where the individual's right to access is greatest and where the government's power to regulate is most limited.[12]

A designated public forum is a place that is generally not open to the public for First Amendment activity but is created for public discourse "by purposeful governmental action".[13] A designated public forum may be opened and closed at the government's discretion, but when it

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[7] *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020).

[8] *Id*. (citing *United States v. Stevens*, 559 U.S. 460, 479, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)).

[9] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

[10] *Id*.

[11] *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

[12] *Id*. (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)).

[13] *Id*.

is open, the rules for traditional public fora apply.[14] All other public properties are nonpublic fora where the individual's right to access is most limited and where the government's power to regulate is greatest; however, a restriction of speech in a nonpublic forum must still be "reasonable ... and not an effort to suppress expression merely because public officials oppose the speaker's views".[15] Public streets, sidewalks and medians all share fundamental characteristics and have been characterized by the courts as "quintessential public fora".[16] "The typical traditional public forum is property which has the physical characteristics of a public thoroughfare ... [and] which has the objective use and purpose of public access or some other objective use and purpose inherently compatible with expressive conduct."[17]

Content Neutrality: What Level of Scrutiny is Warranted?

When the government restricts speech in a traditional public forum, its burden when defending the restriction depends on whether the restriction is content-based or content-neutral.[18] Content-based restrictions of speech receive strict scrutiny, whereas content-neutral restrictions receive intermediate scrutiny.[19] These different standards recognize a significant distinction between laws that intend to censor speech and laws that might have incidental effects on speech: the First Amendment tolerates the latter more than the former. A statute can be content-based either on its face or through a discriminatory purpose when it targets speech based on its communicative content.[20] A facially content-based restriction targets "specific subject matter [...] even if it does not discriminate among viewpoints within that subject matter", regardless of

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[14]*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*.

[15]*Forbes, supra*.

[16]*McCraw, supra*.

[17]*Id*.

[18]*Ward, supra*.

[19]*Id*.

[20]*Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

legislative intent.[21] A statute is content-based through a discriminatory purpose if it was adopted with a censorial motive or when "the specific motivating ideology or the opinion or perspective of the speaker" is the rationale for the restriction.[22] On the other hand, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others".[23]

Strict scrutiny requires the state to show that the restriction in question: 1) is narrowly tailored to promote a compelling governmental interest; and 2) that there is no less restrictive means of achieving that interest.[24] Intermediate scrutiny requires the state to show that the restriction: 1) is narrowly tailored to promote an important governmental interest; and 2) leaves open ample alternative channels of communication.[25] Although intermediate scrutiny is a lower standard than strict scrutiny, it is still a heavy burden. In cases where courts have acknowledged that restrictions on speech may be content-based, they have presumed content neutrality and apply intermediate scrutiny because the standard is stringent enough to safeguard the individual rights at issue. Therefore, this memorandum will focus on intermediate scrutiny and cases in which it was applied.

Applying Intermediate Scrutiny

The narrow tailoring analysis is the first step for intermediate scrutiny and is an incredibly fact-specific inquiry. A content-neutral restriction of speech is narrowly tailored if it "[does] not burden substantially more speech than is necessary to further the government's legitimate interests".[26] Courts will determine what the necessary burden on speech is by

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[21]*Id*. (citing *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991)) ("We have thus made clear that '[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment,' and a party opposing the government 'need adduce "no evidence of an improper censorial motive."'").

[22]*Id*.

[23]*Ward, supra*.

[24]*United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

[25]*Ward, supra*.

[26]*McCullen v. Coakley,* 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

measuring the scope of the restriction against the asserted state interest.[27] "[O]nly by discerning the interest to be served by a restriction can a court proceed to determine whether the restriction is sufficiently tailored to advance that interest."[28] When articulating its interest, the state is required to do more than simply posit the existence of some harm.[29] Instead, the state must demonstrate that the recited harms, specifically defined, are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[30]

Importantly, a state does not have to choose the least restrictive means to alleviate the harms.[31] Courts recognize that states are entitled to discretion when making policy decisions and are not required to exhaust every imaginable, less burdensome alternative to the restrictions they ultimately enact.[32] Rather, a restriction on speech must be "an appropriate fit" to the significant government interest it purports to advance.[33] However, to establish that its chosen restriction is an appropriate fit, the state ordinarily must show that it seriously considered alternative regulatory options that burden less speech, yet also have the potential of materially alleviating the harms.[34] The narrow tailoring prong is intended to guard against censorship, but, more significantly, prevents the government from too readily sacrificing speech for efficiency by demanding a close fit between the ends and the means.[35]

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[27] *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).

[28] *Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012).

[29] *Turner Broad. Sys., supra.*

[30] *Id.*; *Brewer, supra*.

[31] *Brewer, supra*.

[32] *Id.*

[33] *Id.*

[34] *Id.* (citing *McCullen, supra*).

[35] *McCullen, supra* (citing *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

A valid time, place, and manner restriction "leaves open ample alternative channels of communication".[36] To determine whether alternative channels of communication are adequate, courts assess the speaker's ability to reach his or her audience and will ask "whether, given the particular [state interest], the geography of the area regulated, and the type of speech desired, there are ample alternative channels of communication".[37] Although citizens do not have a right to convey their message in any manner they prefer, they do have a right to convey their message in a manner that is constitutionally adequate.[38] This part of the analysis, like narrow tailoring, is fact-specific and will rely on the evidence in the record of each case.

Median and Pedestrian Safety Measures

Between 2019 and 2021, the Tenth Circuit Court of Appeals (Court of Appeals) decided three cases arising from claims that municipal ordinances restricting conduct on roadway medians violated the First Amendment by impermissibly burdening speech. These cases establish, for the Tenth Circuit, that medians and similar features of public streets are traditional public fora and that conduct that typically occurs on medians, such as protesting, campaigning, soliciting donations, panhandling, etc., is protected by the First Amendment. Additionally, relying on United States Supreme Court precedent, the Court of Appeals' opinions in these cases refine the Tenth Circuit's approach to analyzing time, place and manner restrictions, specifically regarding the narrow tailoring requirement for intermediate scrutiny.

***Evans v. Sandy City*[39]**

The *Evans* case was decided in 2019 and concerned a municipal ordinance that prohibited any person from sitting or standing on unpaved medians or medians narrower than 36 inches. The plaintiff in *Evans* was a panhandler who sued to invalidate the ordinance, alleging it violated his First Amendment rights, after he received four citations for standing on narrow

[36] *Ward, supra.*

[37] *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212 (10th Cir. 2007).

[38] *Id.*

[39] *Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019).

medians. The Court of Appeals ultimately upheld the ordinance, and its opinion demonstrates the fact-intensive nature of intermediate scrutiny for time, place and manner restrictions.

The relevant facts of the *Evans* case are as follows.

1. The police department of Sandy City, Utah, had safety concerns about people falling into traffic. Specifically, the police had experienced what they characterized as several close calls where accidents involving pedestrians and vehicles could have been devastating.

2. After being notified about the police department's concerns, the city attorney gathered more information by surveying the medians within Sandy City and concluded that two types of medians were particularly dangerous: paved medians narrower than 36 inches and unpaved medians. The city attorney determined that narrow paved medians were dangerous to sit or stand on because they did not provide enough refuge from passing cars. He determined that unpaved medians were dangerous because, in Sandy City, unpaved medians typically had landscaping that included rocks, boulders and shrubs that presented trip-and-fall hazards.

3. The city attorney drafted the ordinance based on information he received from police and that he gathered through a survey he conducted. The ordinance was presented to the city council, where it was discussed. The discussion focused on public safety, but one councilor asked, "We're going to give homeless people citations?". Another councilor stated, in response to the police captain's explanation of the close calls, "I don't even know who stops there to give them anything in the middle of traffic as it's going.".

4. The ordinance as ultimately adopted made it illegal for any person "to sit or stand, in or on any unpaved median, or any median of less than 36 inches for any period of time". Approximately 7,000 feet of medians in Sandy City were unaffected by the ordinance. Some the medians that were affected by the ordinance were only partially affected.

5. The plaintiff, Mr. Evans, often panhandles from the medians in Sandy City, and after the ordinance was adopted, he received four citations for violating it. Two of the four citations were for standing on medians that were 17 inches wide. However, a mere 10 feet away from where Mr. Evans was cited, the same median widened to greater than four feet.

The court did not rule on either of the initial inquiries regarding speech and forum. The court assumed panhandling was protected by the First Amendment, and it did not rule on the forum issue because it determined a ruling on this point was unnecessary because it would not be

dispositive. Although the ordinance was facially content-neutral because it made no reference to speech, the plaintiff argued it was adopted with a discriminatory purpose to target panhandlers. As evidence for this claim, the plaintiff pointed to the two comments above that were made by city councilors when the ordinance was under consideration. Considering the other facts in the record regarding the drafting and adoption of the ordinance, the court determined that no reasonable fact finder could conclude that the city adopted the ordinance to target panhandlers and held that it was content-neutral.

The parties stipulated that the city had a significant interest in protecting pedestrians from cars, so when the court applied intermediate scrutiny, it focused on narrow tailoring and addressed each of Mr. Evans' arguments. Mr. Evans relied heavily on the United States Supreme Court case *McCullen v. Coakley*, which held that governments must provide real evidence to justify their public safety concerns, and argued that the ordinance:

1. placed a substantial burden on his speech because it required him to stand a substantial distance away from the most effective places to reach his target audience, effectively stifling his speech;

2. was not narrowly tailored because it was not "a close fit between ends and means" and that the city was required to compile any data, statistics or accidents reports to find that close fit; and

3. was not narrowly tailored because the city did not demonstrate that measures less burdensome on speech would not have advanced the city's interests.

The court was not persuaded by any of Mr. Evans' arguments, disagreed with his interpretation of *McCullen* and held that the ordinance was narrowly tailored. As to the first argument, the court focused on the facts regarding Mr. Evans' citations, specifically the two he received for standing on a narrow part of a median that widened to more than 36 inches only 10 feet away from where he was standing. The court reasoned that Mr. Evans would have still been able to access his target audience if he had relocated to the wider part of the median. As to the second argument, the court found that the ordinance was a close fit and did not burden substantially more speech than was necessary. Here, the court focused on the ordinance's limited scope — that many medians in the city were unaffected by the ordinance and that even among those that were, some were only partially affected. As to the third argument, the court rejected

the proposition that the city was required to prove that some hypothetical, less restrictive alternative would fail to achieve its public safety goals but acknowledged that evidence that the city considered less restrictive alternatives "might be helpful".

After determining that the ordinance was narrowly tailored, the court analyzed whether it left open adequate alternative channels of communication and concluded that it did. Again, the court focused on the facts surrounding Mr. Evans' citations for standing on partially affected medians and that throughout the city, approximately 7,000 linear feet of medians remained unaffected.

McCraw v. City of Oklahoma City[40]

McCraw was decided in 2020, and similar to *Evans*, the case arose from a municipal ordinance that affected conduct on roadway medians. However, unlike in *Evans*, the court in *McCraw* invalidated the ordinance at issue and found that it violated the First Amendment. The relevant facts of the *McCraw* case are as follows:

1. In the preceding years, the city council had made several amendments to the ordinance at issue. At first, it prohibited solicitation in roadways without a permit; it was then amended to eliminate the permit requirement but was extended to prohibit soliciting on medians that were either less than 30 feet wide or located less than 200 feet from an intersection. The final version of the ordinance at issue prohibited sitting or standing for any purpose on any portion of a median on a street with a speed limit of 40 miles per hour or greater, with some exceptions for emergencies and other official uses.

2. Before the ordinance was adopted, city officials pointed to panhandlers as the impetus. The ordinance's author cited complaints she received from citizens and businesses regarding panhandling and also said that her goal was "to help try to find a way to redirect the dollars that are going out windows" back to agencies that provide food and shelter. During the drafting and adoption process, other city officials characterized the ordinance as a ban on panhandling, and at the city council meeting where it was voted on, the chief of police gave a presentation that was originally titled "Panhandler Presentation" but was changed to "Median Safety Presentation" at the last minute.

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[40] *McCraw, supra.*

3. The medians in the city are structurally and geographically diverse and vary in length and width, with some spanning entire city blocks and other stretching only several car lengths. Some medians have trails, sidewalks, benches, art displays, large signs, landscaping or wide-open spaces, and one even contains an operating fire station. Further, the city had a history of the medians being used for various purposes, including city-sanctioned fundraisers.

4. The plaintiffs in *McCraw* included residents of the city, a minor political party and an independent news organization. The plaintiffs used the medians to panhandle, engage in protest or other expressive activity, mount political campaigns, cover the news, jog, run and have personal conversations.

5. At the trial in the district court, the city presented evidence that included a fatality investigator from the police department and accident reports. The investigator was able to testify about safety concerns generally, but provided no concrete data, and of the thousand of reports produced, none involved pedestrians struck on medians. Additionally, at the trial, the facts established that the ordinance applied to approximately 400 medians in the city and left only 103 unaffected. Further, of the 103 unaffected medians, 27 were off-limits under a separate aggressive panhandling ordinance.

In its review of the ordinance, the Court of Appeals did conduct the threshold inquiry as to protected speech and, citing precedent from the Tenth Circuit and the United States Supreme Court and persuasive authority from other circuits, it held that the following conduct was protected speech: leafleting and communicating ideas, solicitation of charitable donations and panhandling, distributing newspapers for sale and news gathering. The court rejected one plaintiff's claims that jogging was expressive speech; however, the court held that her other conduct — engaging in small talk and other communicative activities while she was out jogging or walking on the medians — was protected speech.

The court also conducted the forum analysis and concluded that the medians in the city were traditional public fora by looking at their actual characteristics and noting that many actually contained sidewalks, which it characterized as "quintessential" traditional public fora. The court also noted that medians in general share the same qualities as streets and sidewalks because they are sandwiched between them, creating a singular environment. Additionally, the record showed a "long tradition" of expressive activity on the city medians that included an

annual firefighter charity and political campaigning. Finally, the court pointed to the city's own municipal code, which defined "streets" to include medians.

The court did not make a ruling as to content-neutrality because it determined that the ordinance would not pass the lower standard of intermediate scrutiny. However, in a footnote, the court acknowledged the "troubling evidence" in the record that showed "animus against panhandlers in the passage of the original ordinances" and suggested that an examination of the facts surrounding the adoption of the ordinance at issue may have led to a finding of content-based intent.

When applying intermediate scrutiny, the court was unable to identify a real, non-conjectural harm to establish a significant governmental interest. In light of the speculative harms, the court held that the city failed to demonstrate that the ordinance was narrowly tailored and that it placed a severe undue burden on the plaintiffs' speech. The court compared the facts of this case to those reviewed in *Evans* and contrasted the generic justifications Oklahoma City provided with the specific ones Sandy City provided. The court also contrasted Mr. Evans' ability to move only 10 feet to be in compliance with the Sandy City ordinance to the *McCraw* plaintiffs' inability to find an effective place to reach their respective audiences.

The plaintiffs in *McCraw* made similar arguments to Mr. Evans' regarding the city's failure to explore other, less burdensome alternatives. On this issue, the court moved away from the position it took in *Evans*; however, it did not overrule *Evans*, but instead distinguished it. Specifically, because the ordinance in *McCraw* was so extensive, it required more precise justification. The court maintained that the city was not required to exhaust every alternative but had to consider alternatives to ensure the one it chose to adopt was the appropriate fit. A final point the court made in its narrow tailoring analysis was that the inclusion of exceptions for official or "legally authorized" activities demonstrated a "loose fit" rather than the "close fit" the First Amendment requires. For this point, the court focused on the fact that the city "authorized" a nonprofit, OKC Beautiful, that relies on volunteers to landscape medians. These volunteers are able to stand on the medians for substantial periods of time to engage in "unprotected" activity. To the court, this discrepancy was inexplicable and indicative of the city's failure to narrowly tailor the ordinance.

Finally, the court found that the ordinance did not leave open adequate alternative channels of communication. The court reached this conclusion after considering the facts in the record that showed the plaintiffs could not adequately convey their messages from sidewalks or other parts of the roadway because they would be out of the sightline of drivers. Additionally, the court considered the fact established at trial that "an extremely limited number" of medians were unaffected by the ordinance and again distinguished these facts with those in *Evans*, where the ordinance had a much more limited scope.

Brewer v. City of Albuquerque[41]

Brewer was decided in 2021 and was similar in facts and outcome to the *McCraw* case. In *Brewer*, the City of Albuquerque adopted a detailed and extensive ordinance that regulated pedestrian safety in and around the city's roadways, including medians "not suitable for pedestrian use" that included medians less than six feet in width located in a street with a speed limit of 30 miles per hour or faster or located within 25 feet of an intersection of a street with a speed limit of 30 miles per hour or faster; the landscaped area of medians; and medians identified by signage as not suitable for use by the city traffic engineer based on certain safety standards.

The plaintiffs in this case were city residents who would use the medians and other parts of the roadway to engage in political speech, solicit donations or panhandle and donate money, food and hygiene products to roadside solicitors. Their lawsuit alleged that the city's ordinance violated the First Amendment because it was overly broad and substantially restricted their speech without adequate justification. After hearing both parties' motions for summary judgment, the district court granted the plaintiffs' motion. Importantly, the district court's ruling was made in 2019, after the Court of Appeals decided *Evans* but before it decided *McCraw*. While it acknowledged the precedent established by *Evans*, the district court in *Brewer* ultimately applied *McCullen* in the way that the Court of Appeals refused to apply it in *Evans* — that *McCullen* required the city to present concrete, case-specific evidence beyond anecdotes and speculations to demonstrate that its restriction would actually achieve its asserted interests. Therefore, the city failed to meet its burden.

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[41] *Brewer*, *supra*.

During the summary judgment proceedings in the district court, the city relied on the following evidence:

1. testimony from a civil engineer about traffic engineering and roadway design principles, many of which the court characterized as theoretical and not relevant to local conditions;

2. 900 accident reports that were not relied on by the city during the ordinance's drafting and adoption process; these reports were reviewed by the plaintiffs' expert witness, who testified that:

a. only 401 of the reports involved pedestrians;

b. of the reports involving pedestrians, more than 50% involved a pedestrian making a lawful street crossing;

c. another 43% of the reports involved pedestrians making unlawful street crossings; and

d. only 6% involved behavior addressed by the ordinance, and most of these also involved substance abuse, mental illness or driver error; and

3. general statistical information that was included in the ordinance's preamble that referenced national traffic statistics and anecdotes from city police officers and other officials and a University of New Mexico study that focused on 10 intersections in Albuquerque with the highest number of pedestrian and bicycle crashes that also included five proposals to improve safety; however, none of the proposals included a blanket ban on pedestrian presence in certain areas.

The city initially challenged the plaintiffs' claims as to whether the conduct constituted protected speech, as well as the plaintiffs' argument as to forum; however, the city conceded these points on appeal. Additionally, the plaintiffs initially argued that the ordinance was content-based but did not dispute the point on appeal and instead argued that the ordinance would not pass intermediate scrutiny. So the court focused entirely on applying intermediate scrutiny, and when reviewing the ordinance for narrow tailoring, the court looked to the evidence presented in the district court and concluded that the harms the ordinance purported to address were not more than speculation and conjecture. When measuring the extent and scope of the

ordinance to the purported harms, the court burdened substantially more speech than was necessary.

By the time the Court of Appeals heard *Brewer*, it had decided *McCraw*, and to support its conclusion in *Brewer*, the court addressed the distinctions between *Evans* and *McCraw* in light of the United States Supreme Court precedent established by *McCullen.* Particularly, the court pointed to the different burdens on speech caused by each of the ordinances — the ordinance in *Evans* applied to only a fraction of the city's medians, whereas the ordinance in *McCraw* applied to most of the city's medians. Because of its limited scope, the ordinance in *Evans* was sufficiently justified by anecdotal evidence of harms. By contrast, like *McCraw*, the ordinance in *Brewer* was far more extensive, placed a more substantial burden on speech and required a more extensive justification. While *McCullen* did not establish a new evidentiary burden on governments to pursue the least-restrictive means, it did establish that when narrowly tailoring statutes or ordinances, governments should ordinarily undertake a less-restrictive-means analysis to seriously consider less burdensome alternatives.

Conclusion

In conclusion, the relevant legal framework under the First Amendment for analyzing legislation that may affect free speech activities on public streets and medians is a time, place and manner framework that requires states to prove that content-neutral restrictions on speech have been narrowly tailored to further a significant governmental interest and leave open adequate alternative channels of communication. The seminal case for this framework is *Ward v. Rock Against Racism,* and its most relevant progeny is *McCullen v. Coakley*. In the Tenth Circuit, *Evans*, *McCraw* and *Brewer* are particularly on point and instructive.