No. 16-1204

In the Supreme Court of the United States

CITY OF MEMPHIS, TENNESSEE,
Petitioner,

v.

LAKENDUS COLE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED – RESTATED BY RESPONDENTS

I. Whether there exists a fundamental right to travel locally through public spaces and roadways under the Due Process Clause of the Fourteenth Amendment, and, if so, what level of scrutiny applies?

II. If, a district court applies strict scrutiny after a civil trial involving a challenge to a municipal policy for violating fundamental rights, and the court of appeals applies intermediate scrutiny instead, can the district court's post-trial application of strict scrutiny be affirmed as harmless error?

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SUMMARY OF THE ARGUMENTS

Respondents submit this Opposition Brief in response to the Petition for a Writ of Certiorari filed by Petitioner City of Memphis.

This Court should decline to consider the Questions Presented raised by Petitioner because they are waived as they were not raised in the Sixth Circuit, and have only been raised in the first instance in the petition. Petitioner has never argued, until now, that the right to intrastate travel is not constitutionally protected, or that a "circuit split" is created by the Sixth Circuit's ruling in the instant case or in *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002). Moreover, Petitioner has never argued, until now, that the Sixth Circuit's harmless error ruling created a "circuit split" by conflicting with the rulings of other Circuits, as it now argues in the petition. Thus, the Sixth Circuit was never afforded an opportunity to rule on either Question Presented.

Petitioner, in seeking to elicit this Court's plenary review, erroneously argues that a "circuit split" exists with regard to each Question Presented. With respect to Petitioner's first Question Presented, no meaningful "circuit split" exists regarding the right to intrastate travel because the Third and Sixth Circuits have only recognized a narrow articulation of the right to intrastate travel, which these courts have described as a right of access to public spaces and roadways, while the Fifth, Tenth, Eleventh and D.C. Circuits' declination to recognize a constitutional right to intrastate travel occurred in the narrow context of

municipal residency requirements,[1] and a juvenile curfew, neither of which implicates a right of access to public spaces and roadways.

Additionally, this case is an exceptionally poor vehicle for deciding the first Question Presented. The jury's rejection of Petitioner's sole proffered governmental interest in carrying out the Beale Street Sweep severely limits any constructive analysis and ruling as to the appropriate level of scrutiny applicable to such a right.

With respect to Petitioner's second Question Presented, no "circuit split" exists regarding the Sixth Circuit's harmless error ruling. The only "jury instruction" at issue in the Sixth Circuit was Jury Question 4, a question on the jury verdict form. (Pet. App. 14.).[2] The error the Sixth Circuit ruled harmless was the district court's application of strict scrutiny, rather than intermediate scrutiny, to the factual finding made by the jury. (Pet. App. 17.). In contrast, the decisions cited by Petitioner from the First, Second and Tenth Circuits are inapposite as they concern

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[1] Even the Sixth Circuit has declined to recognize a constitutional right to intrastate travel in the context of municipal residency requirements. In *Wardwell v. Bd. of Ed. of City Sch. Dist. of City of Cincinnati*, 529 F.2d 625 (6th Cir. 1976), the Sixth Circuit rejected the plaintiff's argument that the Cincinnati school board's continuing residency requirement infringed on his constitutionally protected right to travel. *Id.* at 647.

[2] Jury Question 4 asked the jury to decide whether Petitioner carries out the Beale Street Sweep "without consideration to whether conditions throughout the Beale Street area pose[d] an existing, imminent, or immediate threat to public safety." (Pet. App. 14-15.).

erroneous jury instructions governing factual issues decided by those juries, but not the subsequent application of a legal standard by the district court. (Pet. 21-22.).

Moreover, the Sixth Circuit held that Petitioner "likely waived" any argument regarding Jury Question 4 "because it, in fact, agreed to the language used in Jury Question 4." (Pet. App. 15.). Therefore, as Petitioner agreed to Jury Question 4, the doctrine of waiver also makes the second Question Presented a poor vehicle for this Court's review.

STATEMENT OF THE CASE

This case concerns Petitioner's long-standing, routine custom and/or practice of police officers forcefully removing law-abiding citizens from Beale Street, an entertainment district located in Memphis, Tennessee, on weekends at or around 3:00 a.m. when the sidewalks and street are full of citizens socializing and enjoying music and entertainment. (Pet. App. 3.). Persons lawfully walking and standing on the street and sidewalks along Beale Street are forcibly removed and/or arrested and charged with crimes, including disorderly conduct. (Pet. App. 46-47.). As noted by Petitioner, this practice has been referred to as the "Beale Street Sweep." (Pet. 3.).

On August 12, 2012, Respondent Lakendus Cole was on Beale Street eating a slice of pizza that he had just purchased from a street vendor when police officers carrying out the Beale Street Sweep grabbed him, slammed him into a police car, placed him under arrest, and charged him with resisting arrest, disorderly conduct, and felony vandalism over $500

(due to the damage to the police car sustained when his body was violently slammed against it).[3] (Pet. App. 3.).

A. Proceedings in the District Court

Prior to trial, Respondents filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In denying the motion, the district court held that, pursuant to *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002), the Beale Street Sweep, as alleged, implicates the constitutionally protected fundamental right "to travel locally through public spaces and roadways." (Pet. App. 45.). The district court, however, declined to hold that municipal liability existed as a matter of law due to the existence of a disputed issue emanating from the divergent factual contentions of the parties as to the circumstances giving rise to the Beale Street Sweep. (Pet. App. 45.).

At trial, the jury resolved the factual dispute which existed at the time the district court denied summary judgment. In the verdict, the jury made four findings relevant to class relief: (1) that Petitioner had "through its police officers, carried out a custom and/or well-established practice mainly on weekends at or about 3:00 a.m. of preventing persons from standing and/or walking on the sidewalk or street of Beale Street prior to [and on or after] June 14, 2012"; (2) that this well-established practice "occurs without consideration to

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[3] At trial, the jury did not find that the Beale Street Sweep caused Plaintiff/Respondent Leon Edmond's arrest. Edmond did not appeal. As no issues were raised in the Sixth Circuit regarding Leon Edmond's individual claim, no discussion of proof exclusively related to Edmond's claim has been included herein.

whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety"; (3) that the well-established practice was "the cause of persons being prevented from standing and/or walking on the sidewalk or street of Beale Street"; and (4) that "since at least 2007, thousands of persons were cleared off of Beale Street pursuant to" that practice. (Pet. App. 46.).

With regard to Cole's individual claim, the jury made five findings: (1) that Cole had been removed from Beale Street pursuant to the Beale Street Sweep; (2) that "conditions throughout the Beale Street area did NOT pose an existing, imminent or immediate threat to public safety at the time the police officers initiated" the Beale Street Sweep; (3) that Cole was arrested without probable cause in violation of the Fourth Amendment; (4) that the Memphis Police Department used excessive force during Cole's arrest in violation of the Fourth Amendment; and (5) that the Beale Street Sweep caused the violations of his Fourth Amendment rights and damages. The jury awarded Cole $35,000.00 in compensatory damages. (Pet. App. 47.).

Following trial, the district court, in reliance on the factual finding made by the jury, ruled that the Beale Street Sweep violated Cole and the class members' constitutionally protected fundamental right "to travel locally through public spaces and roadways," entered a monetary judgment in favor of Cole, issued a declaratory judgment for the class ruling that the Beale Street Sweep is unconstitutional, and issued a permanent injunction and other forms of injunctive

relief prohibiting Petitioner from engaging in this unconstitutional practice. (Pet. App. 47, 65-69.).

B. Proceedings in the Sixth Circuit

Petitioner appealed to the Sixth Circuit and raised four (4) issues. First, Petitioner argued that the Beale Street Sweep was a mere inconvenience which "does not implicate the right to intrastate travel, and even if it does, the infringement is slight and, therefore, it should be reviewed for a rational basis." (Pet. App. 7.). Second, Petitioner argued that it was "error to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(2) when the precise members of the class were not ascertainable." (Pet. App. 11, 18.). Third, Petitioner argued that there was insufficient evidence to support the jury's findings that the Beale Street Sweep was the cause of Cole's arrest. (Pet. App. 23.). Fourth, Petitioner argued that the district court erred in placing the burden of proof on Petitioner, instead of Respondents, in Jury Question 4 which required the jury to determine whether the Beale Street Sweep occurs "when there are no circumstances present which threaten the safety of the public or MPD police officers." (Pet. App. 15.).

Importantly, Petitioner did not challenge in the Sixth Circuit <u>any</u> jury instruction given by the district court, other than the burden-shifting language of Jury Question 4 –which Petitioner does not raise as an issue before this Court.

The Sixth Circuit affirmed the district court on all four (4) issues raised by Petitioner. First, the court ruled that the Beale Street Sweep was "much more than an incidental or negligible inconvenience; it

clearly implicates the right to travel and should be subjected to heightened scrutiny," and that "[i]ntermediate scrutiny is appropriate in this case." (Pet. App. 11, 13.). Second, the Sixth Circuit held "that ascertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief [as sought in the case at bar]." (Pet. App. 23.). Third, the Sixth Circuit ruled that Petitioner forfeited the issue of sufficiency of evidence by failing to renew a Federal Rules of Civil Procedure Rule 50(a) motion for judgment as a matter of law as required by Rule 50(b), and even if the issue had been preserved, that there was sufficient credible evidence to support the jury's findings. (Pet. App. 23-24.).

Fourth, the Sixth Circuit found no merit in Petitioner's argument that Jury Question 4 improperly shifted the burden of proof because "intermediate scrutiny is appropriate and because the City bears the burden under that standard." (Pet. App. 15.). The Sixth Circuit also ruled that Petitioner "likely waived" any argument regarding Jury Question 4 "because it, in fact, agreed to the language used in Jury Question 4." (Pet. App. 15.).

The majority further analyzed the dissent's opinion that the district court's application of strict scrutiny was not harmless and required reversal based on the dissent's belief that Jury Question 4 was inextricably intertwined with the strict scrutiny standard. (Pet. App. 14-17.).[4] The majority disagreed with the dissent and reiterated that Jury Question 4 was a factual

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[4] Griffin, J. authored a separate opinion concurring in part and dissenting in part. (Pet. App. 2, 24.).

question based on Petitioner's purported governmental interest in conducting the Beale Street Sweep, and not a legal question tailored to any particular level of scrutiny. (Pet. App. 15, 17.).

Petitioner filed a Petition for Rehearing *En Banc*, seizing upon the issue raised by the dissent, and argued for the first time that the district court erroneously instructed the jury regarding the application of strict scrutiny to the Beale Street Sweep, and that the majority's harmless error ruling was erroneous based on prior decisions by the Supreme Court and the Sixth Circuit. (Resp. App. 8-16.). Petitioner did not specifically identify which jury instruction was purportedly erroneous, but presumably was referring to Jury Question 4, as no other "jury instruction" was at issue in the Sixth Circuit. The Sixth Circuit denied Petitioner's Petition for Rehearing *En Banc*. (Pet. App. 102.).

C. Misstatements of Fact in the Petition[5]

In the petition, Petitioner relies upon a factual contention the jury rejected. Specifically, Petitioner asserts that the Beale Street Sweep was a practice implemented for "safety and security" based on a "real-time determination" of the MPD. (Pet. 3.). At trial, in answering Jury Question 4 in the negative, the jury found that Petitioner, through its police officers, carries out the Beale Street Sweep without consideration to whether conditions on Beale Street poses an immediate threat to public safety. (Pet. App. 16.).

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[5] Respondents address any misstatements of law in the petition in the responsive arguments herein.

Moreover, at no time during these proceedings have Respondents challenged Petitioner's authority to clear Beale Street if circumstances exist which present a threat to public safety. To the contrary, Respondents challenged only Petitioner's routine custom and practice of forcefully removing persons from Beale Street around 3:00 a.m. on weekends when there is no existing, imminent, or immediate threat to public safety. Even at the conclusion of these proceedings, after the jury returned a verdict in favor of Cole and the class, the district court ruled that the injunctive relief ordered "does not prevent the MPD from conducting normal police work or clearing Beale Street under appropriate circumstances where an imminent threat exists to public safety throughout the Beale Street area." (Pet. App. 57.).

Additionally, with respect to the second Question Presented regarding the Sixth Circuit's harmless error ruling, Petitioner erroneously argues that, after the Sixth Circuit held that intermediate scrutiny should apply to the Beale Street Sweep, "[t]he majority went further and decided that, had the jury received proper instructions on intermediate scrutiny, it nevertheless would have reached the same verdict." (Pet. 21.). This is inaccurate. The Sixth Circuit made no such finding, and Petitioner makes no citation to the record in support of this assertion. Rather, the Sixth Circuit held the opposite – that the jury did not make a factual finding on whether the Beale Street Sweep satisfied strict scrutiny. (Pet. App. 17.). The district court made this ruling only after the jury decided the factual issues. *Id.* No question decided by the jury was tailored to any particular level of scrutiny, including Jury Question 4. *Id.*

REASONS FOR DENYING THE WRIT

I. Petitioner Failed To Preserve Issues It Now Raises For The First Time In The Petition

This Court should decline to consider Petitioner's Questions Presented because they are waived as they were not raised below, and have been raised for the first time in the petition.

As this Court has repeatedly admonished: "This Court is one of final review, not of first view." *Ford Motor Co. v. United States*, 134 S. Ct. 510, 187 L. Ed. 2d 470 (2013) (internal citations omitted); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari."); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("Upon reviewing the record, however, it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here.").

The Court's ordinary practice when an issue is not raised in the district court or Circuit court is to decline to address the issue. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.") (citing *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 175 (2004); *United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 494 (2001)).

With respect to the first Question Presented – whether there is a fundamental constitutional right to intrastate travel – at no time in the Sixth Circuit did

Petitioner raise this issue or assert that there is a "circuit split" with respect to the right to intrastate travel or otherwise challenge the Sixth Circuit's previous holding in *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002) recognizing the right to travel locally through public spaces and roadways as a fundamental constitutional right protected by the Fourteenth Amendment. Instead, Petitioner argued in the Sixth Circuit that the Beale Street Sweep does not burden the right to intrastate travel because it is only an "inconvenience," and that it should only be subjected to rational basis review. (Pet. App. 7.). Even the Petition for Rehearing *En Banc* failed to request that the Sixth Circuit, sitting *en banc*, reverse the panel's ruling recognizing a constitutional right to intrastate travel. (*See generally* Resp. App. 1.).

The second Question Presented – whether the Sixth Circuit's harmless error ruling conflicts with rulings of other Circuits – was also not raised below. The Petition for Rehearing *En Banc* sought *en banc* review of the Sixth Circuit's harmless error ruling as inconsistent with prior rulings of the Supreme Court and Sixth Circuit. However, Petitioner did not argue that the decision presented a conflict with the rulings of other Circuits.

II. This Case Is a Poor Vehicle For Review of the First Question Presented as Petitioner's Governmental Interest Was Rejected by the Jury

In the first Question Presented, Petitioner requests that this Court decide whether the right to intrastate travel is constitutionally protected, and if so, what level of scrutiny applies. (Pet. i.). However, this case lacks

the factual basis necessary for this Court to determine whether the Beale Street Sweep survives any level of scrutiny, because the jury at trial rejected the sole governmental interest advanced by Petitioner to justify the Beale Street Sweep.

As noted by the Sixth Circuit, "[w]hile the jury's finding that the policy occurred notwithstanding 'existing, imminent or immediate threat[s] to public safety' supports the conclusion that the policy fails strict scrutiny, it likewise supports a finding that the Sweep lacks the connection to public safety necessary to survive intermediate scrutiny." (Pet. App. 17.). Even if the Beale Street Sweep were analyzed under rational basis review, the practice must be "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

In the district court, Petitioner contended that the Beale Street Sweep is carried out only when conditions throughout the Beale Street area pose an existing, imminent, or immediate threat to public safety. (Pet. App. 14-15.). The jury rejected Petitioner's contention. (Pet. App. 46.). Thus, Petitioner failed to prove any governmental interest sufficient to satisfy any level of scrutiny.

III. No Circuit Split Exists Regarding the Right of Access to Travel Locally Through Public Spaces and Roadways

This case concerns only a narrow articulation of the right to intrastate travel which the Third and Sixth Circuits have described as a right of access "to travel locally through public spaces and roadways" protected by the substantive component of the Due Process

Clause of the Fourteenth Amendment.[6] (Pet. App. 45.). In an effort to manufacture a conflict among the Circuits where none exists, Petitioner compares Circuit decisions which do not implicate a right of access to public spaces and roadways, with the Third and Sixth Circuit's narrow rulings involving municipal policies which implicate a right of access. As set forth herein, of the Circuits that Petitioner alleges conflict with the Third and Sixth Circuits, the Fifth,[7] Tenth,[8] and Eleventh Circuits[9] have only considered municipal residency requirements which the Fifth Circuit referred to as the "right to commute."[10] The D.C.

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[6] *See e.g.,* (Pet. App. 8.); *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002) ("Moreover, while we can conceive of different articulations of a right to intrastate travel, the right we address—the right to travel locally through public spaces and roadways—is fundamentally one of access."); *Lutz v. City of York, Pa.*, 899 F.2d 255, 268-270 (3d Cir. 1990) ("state and local governments must enjoy some degree of flexibility to regulate access [to roadways]…").

[7] *Wright v. City of Jackson*, 506 F.2d 900, 901-02 (5th Cir. 1975).

[8] *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768 (10th Cir. 2010).

[9] Petitioner includes the Eleventh Circuit among those which have purportedly ruled the right of intrastate travel is not constitutionally protected based on the Eleventh Circuit's ruling in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)(en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

[10] *Wright v. City of Jackson, Mississippi*, 506 F.2d 900, 902 (5th Cir. 1975).

Circuit[11] decision cited by Petitioner considered only a juvenile curfew and explicitly limited its ruling to minors. Therefore, no meaningful Circuit split exists concerning the right of access to travel locally through public spaces and roadways at issue in this case.

As discussed by Petitioner, this Court has not expressly recognized a right to intrastate travel, and neither have its decisions foreclosed the recognition of such a right. (Pet. 8-10.).

The Third and Sixth Circuits have ruled that the right of access to public spaces and roadways is constitutionally protected. In 1990, the Third Circuit in *Lutz v. City of York, Pa.*, 899 F.2d 255 (3d Cir. 1990) upheld the City of York's anti-cruising ordinance, which prohibited driving repeatedly through a loop of certain major public roads through York's center. *Lutz,* 899 F.2d at 270. The Third Circuit ruled "that the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history'" and, therefore, is substantively protected by the Fourteenth Amendment Due Process Clause. *Id.* at 268. However, the Third Circuit noted that "state and local governments must enjoy some degree of flexibility to regulate access [to roadways]…" and ultimately concluded the ordinance survived intermediate scrutiny. *Id.* at 270.

In 2002, the Sixth Circuit in *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002) considered the constitutionality of an ordinance enacted by the City of

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[11] *Hutchins v. D.C.,* 188 F.3d 531, 539 (D.C. Cir. 1999).

Cincinnati which excluded individuals "for up to ninety days from the public streets, sidewalks, and other public ways in all drug-exclusion zones if the individual is arrested or taken into custody within any drug-exclusion zone for one of several enumerated drug offenses." *Johnson*, 310 F.3d at 487. Based on "the historical endorsement of a right to intrastate travel and the practical necessity of such a right" and the Third Circuit's ruling in *Lutz,* the *Johnson* Court recognized that the right to intrastate travel is a fundamental constitutional right; however, it noted "different articulations of a right to intrastate travel" and expressly limited its holding to "the right to travel locally through public spaces and roadways" which the Sixth Circuit ruled "is fundamentally one of access."[12] The Sixth Circuit also distinguished this articulation of the right to intrastate travel from that which was implicated by municipal continuing residency requirements.[13]

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[12] *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002) ("Moreover, while we can conceive of different articulations of a right to intrastate travel, the right we address—the right to travel locally through public spaces and roadways—is fundamentally one of access.")

[13] *Johnson*, 310 F.3d at 494 (6th Cir. 2002) ("At its simplest, this case does not involve a continuing residency requirement, it involves a constitutional challenge to an ordinance that excludes certain individuals from specified high crime areas of the City of Cincinnati, and presents issues of access not raised in *Wardwell*." In *Wardwell v. Bd. of Ed. of City Sch. Dist. of City of Cincinnati*, 529 F.2d 625 (6th Cir. 1976), the Sixth Circuit rejected the plaintiff's argument that the Cincinnati school board's continuing residency requirement infringed on his constitutionally protected right to travel. *Id.* at 647.

After ruling that the ordinance impacted a fundamental right to travel locally through public spaces and roadways, the Sixth Circuit in *Johnson* applied strict scrutiny based on its finding that the ordinance had a broader restriction than the ordinance in *Lutz*, and concluded that the ordinance infringed upon the fundamental right to intrastate travel because it denied access to the drug-exclusion zones "without regard to [the plaintiff's] reason for travel in the neighborhood," and meted out absolute exclusion from the zones "without any particularized finding that a person is likely to engage in recidivist drug activity" in the zones. *Id.* at 495, 503.

In the case *sub judice*, the Sixth Circuit relied, *inter alia*, upon its prior decision in *Johnson* and ruled the Beale Street Sweep implicated the substantive due process right of access to travel locally through public spaces and roadway. (Pet. App. 7-11.). Like the drug-exclusion zone ordinance in *Johnson* which broadly prohibited individuals access to an entire neighborhood, the Sixth Circuit held the Beale Street Sweep affected individuals' right of access to Beale Street: "the primary purpose of the Beale Street Sweep was to impede travel, and it resulted in the broad denial of access to a popular, two-block area of a public roadway and sidewalk." (Pet. App. 11.).

In contrast to the foregoing rulings of the Third and Sixth Circuits, the decisions of the Fifth, D.C., Tenth, and Eleventh Circuits which Petitioner cites in support of the purported "circuit split" concern municipal residency requirements and a juvenile curfew, and do not implicate a right of access to travel locally through public spaces and roadway.

For example, in *Wright v. City of Jackson*, 506 F.2d 900 (5th Cir. 1975), the Fifth Circuit ruled that the municipal employment residency ordinance at issue did not infringe any "fundamental constitutional 'right to commute.'"[14] Although it declined to apply the right to interstate travel precedence to intrastate travel, the Fifth Circuit did not expressly analyze, as suggested by Petitioner, whether the right to intrastate travel is constitutionally guaranteed. *Id.* Additionally, since Petitioner's inclusion of the Eleventh Circuit is based on its adopting as binding precedence prior decisions of the Fifth Circuit, the Eleventh Circuit has also not independently considered whether there is a constitutional right of access to travel locally through public spaces and roadway. (Pet. 16.).

While the Tenth Circuit ruled in *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768 (10th Cir. 2010) that the right to intrastate travel was not constitutionally protected, the case did not concern a right of access, but rather, as noted by Petitioner, "centered, in relevant part, on the defendant's non-resident admissions policies." (Pet. 17.) (citing *D.L.* at 776).

In *Hutchins v. D.C.,* 188 F.3d 531 (D.C. Cir. 1999), the D.C. Circuit, in considering a juvenile curfew, only analyzed whether minors have a 'substantive right of free movement' and ruled "that juveniles do not have a

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[14] *Wright*, 506 F.2d at 901-02 ("Since we can find no fundamental constitutional right to intrastate travel infringed by this ordinance, the City was not required to justify the ordinance under the compelling interest standard which must be met upon interference with a right to travel interstate. We, therefore, affirm the dismissal failure to state a claim.")

fundamental right to be on the streets at night without adult supervision." *Id.* at 538-539. The D.C. Circuit relied upon Supreme Court precedence and ruled that minors lack "the right to come and go at will" and that "the rights of juveniles are not necessarily coextensive with those of adults." *Hutchins* at 538-539 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993) and *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646 (1995)). Moreover, the D.C. Circuit specifically limited its decision to juveniles, noting that it was not determining "whether Americans enjoy a general right of free movement…." *Id.* at 538.

Petitioner also argues that "the Fourth, Seventh, and Ninth Circuits have openly doubted the right's existence." (Pet. 15.). However, as evidenced by Petitioner's own citations to these Circuits, none of the aforementioned Circuits have ruled whether or not there is a constitutional right to intrastate travel. *Id.* More importantly, none of the referenced Circuits have ruled on the narrower articulation of the right to intrastate travel at issue in this case – the right of access to travel locally through public spaces and roadways.[15]

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[15] See *Willis v. Town Of Marshall, N.C.,* 426 F.3d 251, 265 (4th Cir. 2005) ("Ultimately, however, we conclude that in this case, there is no reason to decide whether the right to intrastate travel or the right to access a public forum are fundamental rights protected by the substantive component of the Due Process Clause."); *Eldridge v. Bouchard*, 645 F. Supp. 749, 754-755 (W.D. Va. 1986) aff'd w.o. opinion, 823 F.2d 596 (4th Cir. 1987) ("…even if the plaintiffs had a fundamental right of intrastate travel, the present salary differential would not impinge that right because the differential has none of the attributes of a durational residency requirement."); *Doe v. City of LaFayette*, 377 F.3d 757, 770-71 (7th Cir. 2004);

IV. The Second Question Presented Is Waived And No Circuit Split Exists With Respect to the Sixth Circuit's Harmless Error Ruling

At the outset, this Court should decline to consider the second Question Presented because, as noted by the Sixth Circuit, Petitioner "likely waived" any argument regarding Jury Question 4. In the second Question Presented, Petitioner challenges the Sixth Circuit's harmless error ruling relating to the jury instructions at trial. Although Petitioner does not specifically identify the jury instruction it refers to in the petition, the only "jury instruction" at issue in the Sixth Circuit was Jury Question 4, a question on the jury verdict form. (Pet. App. 14.). However, any issue with respect to Jury Question 4 was waived because, at trial, Petitioner "agreed to the language used in Jury Question 4." (Pet. App. 15.). Therefore, the second Question Presented is likewise waived by Petitioner.

Additionally, Petitioner's second Question Presented is a misguided attempt to manufacture a "circuit split," where one does not exist, by comparing inapposite decisions of the Circuits. It is noteworthy that Petitioner makes no comparison of the legal standards giving rise to the harmless error doctrine utilized in the various cases comprising the alleged "circuit split." Thus, it is evident at the outset that the

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Andre v. Bd. of Trust. of Maywood, 561 F.2d 48, 53 (7th Cir. 1977) (declining to consider whether "a right to intrastate travel should be acknowledged"); *Lauran v. U.S. Forest Serv.*, 141 F. App'x 515, 520 (9th Cir. 2005)(noting only that "neither the Supreme Court nor the Ninth Circuit has recognized a protected right to *intra*state travel.").

purportedly disparate Circuit decisions originate from the unique facts of each case, and not in the legal standards applied.

Petitioner argues that the Sixth Circuit, after ruling the district court erred in applying strict scrutiny, "re-weighed the facts and evidence … and decided that, had the jury received proper instructions on intermediate scrutiny, it nevertheless would have reached the same verdict." (Pet. 20-21.). Petitioner further argues that "[t]he Sixth Circuit's decision affirmed as harmless erroneous jury instructions requiring the City to prove more than legally required." (Pet. 21.). Petitioner then cites decisions from the First, Second and Tenth Circuits purportedly declining to find as harmless jury instructions erroneously placing a higher burden on a litigant. (Pet. 21-22.).

Thus, Petitioner's argument is based on two premises: (1) Jury Question 4 was erroneously tailored to the strict scrutiny standard; and (2) the Sixth Circuit substituted its ruling on intermediate scrutiny for a finding of the jury. Both premises are factually incorrect.

The only "jury instruction" challenged on appeal by Petitioner and at issue in the Sixth Circuit was Jury Question 4. (Pet. App. 14.). Jury Question 4 asked the jury to decide whether Petitioner carries out the Beale Street Sweep "without consideration to whether conditions throughout the Beale Street area pose[d] an existing, imminent, or immediate threat to public

safety." (Pet. App. 14-15.).[16] As noted by the majority below in response to the dissent, Jury Question 4 was not rendered erroneous by virtue of the Sixth Circuit's application of intermediate scrutiny, because Jury Question 4 was not a legal question tailored to any particular level of scrutiny but rather a factual question meant to resolve Petitioner's contention that it has a governmental interest in conducting the Beale Street Sweep. (Pet. App. 17.). The jury found this contention to be without merit. (Pet. App. 46.).

Moreover, it was the district court, and not the jury, that ruled on the issue of whether the Beale Street Sweep survived strict scrutiny, and the Sixth Circuit's application of intermediate scrutiny disturbed only the ruling of the district court, and not a factual finding of the jury. The Sixth Circuit succinctly explained:

> Under both strict and intermediate scrutiny, the City bore the burden of justifying the Sweep to its stated goal of public safety. There is no indication in the trial transcript that the City lost at trial because it could not prove that the Sweep was the least restrictive means possible. Rather, the evidence adduced at trial and the jury's factual findings show that the timing and execution of the Sweep policy was tied to an arbitrary time, not to existing conditions on the ground. And without the requisite connection to public safety, the policy fails under intermediate

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[16] As noted by the Sixth Circuit, Petitioner "likely waived this argument [challenging the language of Jury Question 4] on appeal because it, in fact, agreed to the language used in Jury Question 4." (Pet. App. 15.).

> scrutiny. Moreover, the error in the district court's analysis affected only its own legal analysis, not the reliability of the jury's factual finding. (Pet. App. 17.).

The cases cited by Petitioner from the First, Second and Tenth Circuits do not create a "circuit split" as they concern erroneous jury instructions governing factual findings made by juries, and not a legal standard applied by the court. For example, in *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F.3d 26 (1st Cir. 2003), the First Circuit ruled in a copyright infringement and state law tort case that the jury instructions "distorted" the jury's award of damages because the instructions placed an erroneously higher burden on the defendant in proving the apportionment of damages. *Id.* at 40-50.

Also, in *Gordon v. N.Y. City Bd. of Educ.*, 232 F.3d 111 (2d Cir. 2000), the Second Circuit ruled in a Title VII retaliation case that the district court committed several reversible errors in the jury instructions regarding questions decided by the jury including whether the defendant's agents knew about a pending lawsuit at the time of the adverse employment action and whether the defendant's agents had a legitimate non-retaliatory reason. *Id.* at 115-119. The Second Circuit further ruled that the district court committed reversible errors in giving jury instructions regarding the *McDonnell Douglas* burden-shifting framework, and in failing to inform plaintiff's counsel of its intended jury instructions prior to closing statements which "destroyed counsel's credibility with the jury and Gordon's [the plaintiff's] ability to direct the jury's

attention to the appropriate evidence to decide her case." *Id.* at 118-119.

Additionally, in *E.E.O.C. v. Beverage Distributors Co., LLC*, 780 F.3d 1018 (10th Cir. 2015), the Tenth Circuit ruled that the erroneous jury instructions regarding the standard of proof applicable to the "direct threat" affirmative defense under the Americans with Disabilities Act "could have misled the jury" in reaching its finding that the plaintiff was not a direct threat to the health or safety of themselves or others. *Id.* at 1020-1022.

The jury instructions given by the district courts in the foregoing cases were erroneous and governed issues ultimately decided by juries, and not the district courts. Those cases do not create a "circuit split" with the Sixth Circuit decision in this case. Jury Question 4 was neither erroneous nor was it tailored to the level of scrutiny applied by the district court, and ultimately by the Sixth Circuit. Therefore, Petitioner's second Question Presented is not worthy of this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX 1

No. 15-5725, 15-5999

United States Court of Appeals for the Sixth Circuit

[Filed October 31, 2016]

Lakendus Cole, et al.,
Plaintiffs - Appellees
v.
City of Memphis, et al.,
Defendants - Appellants

Appeal from the United States District Court for the Western District of Tennessee at Memphis
Civil Case No. 2:13-cv-02117
(Honorable Jon P. McCalla)

PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Sixth Circuit Rules, Appellant makes the following disclosure:

1. Appellant is not a subsidiary or affiliate of a publically owned corporation; however, Appellant is a municipal corporation.

2. There is not a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

SO CERTIFIED, this, the 31st day of October, 2016.

/s/ Leo M. Bearman
LEO M. BEARMAN

[****Table of Contents and Table of Authorities Omitted in Printing of this Appendix.****]

STATEMENT AS TO WHY
EN BANC RELIEF IS WARRANTED

Pursuant to Rule 35, a party bringing a petition for rehearing en banc must begin with a statement that either:

> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or
>
> (B) the proceeding involves one of more questions of exceptional importance, each of which must be concisely stated.

Fed. R. App. P. 35(b)(1)(A), (B). Moreover, in the Sixth Circuit Internal Operating Procedures, this Court instructs that:

> A petition for rehearing en banc is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent. Alleged errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

6 Cir. I.O.P. 35. In accordance with these requirements, Appellant states as follows:

1. En banc consideration is necessary because the Panel majority's ruling contains a "precedent-setting error of exceptional public importance" that conflicts with prior decisions of the Supreme Court and this Court.

2. And, en banc consideration is necessary to secure uniformity with respect to the review standard that applies when a district court's jury instructions are legally erroneous.

Specifically, Appellant files this Petition to bring to the attention of the entire Court that the Panel majority's ruling conflicts with both the United States Supreme Court decision in *Bollenbach v. United States*, 326 U.S. 607, 613 (1946), and with prior published opinions in this Circuit. The Panel majority's ruling also presents a precedent-setting issue of exceptional public importance, holding that the jury charge was erroneous on an issue of constitutional significance but that this error was harmless.[1] As Griffin, J., in dissent, correctly stated: "[t]he district court instructed the jury using a different and more onerous standard" than what the law requires. (Opinion, Exhibit 1, p. 17.) "Because the jury's factual findings and the district court's legal ruling are inextricably intertwined and premised upon the incorrect legal standard," reversal is warranted. (*Id*.) Judge Griffin's dissent aligns nearly perfect with instructions from the Supreme Court: when the district court is "simply wrong" in providing the law to the jury, this is reversible error—**the error is not harmless**. *Bollenbach*, 326 U.S. at 613. The

[1] *See* 6 Cir. I.O.P. 35; Fed. R. App. P. 35(b)(1)(B).

Panel majority affirmed as harmless what was otherwise reversible error by the district court. In doing so, the Panel majority erred and then published its error as precedent. That this matter involves fundamental constitutional rights and compelling government interests renders the Panel majority's error one of exceptional public importance. But more to the point, the Panel majority's ruling, if left without review, risks allowing civil litigants to be deprived of their Fifth and Seventh Amendment rights to a fair and impartial trial. This is a legal issue of absolute public importance, and it is one that should further move the full Court to act.

Appellant also files this Petition because en banc consideration is necessary to secure uniformity with respect to which review standards apply when a district court charges the jury with legally erroneous law.[2] Securing uniformity is a fundamental goal of en banc consideration, as fundamental as the constitutional issues and rights involved in this Petition. This Court should therefore rehear this matter en banc and make uniform the review standards applicable to legally erroneous jury instructions, especially when fundamental constitutional rights are at stake. For these reasons and those explained in greater detail below, this Petition should be granted and this matter reheard by the full Court.

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[2] *See* Fed. R. App. P. 35(b)(1).

RELEVANT BACKGROUND

The facts and background relevant to this Petition are succinct. This case arises out of the arrest of Plaintiff Appellee in Memphis, Tennessee. During times relevant to this matter, Defendant Appellant City of Memphis had a practice of clearing Beale Street—the epicenter of tourism and entertainment in downtown Memphis—typically at 3:00 a.m. on some weekend nights. This practice was referred to as the "Beale Street Sweep." (Order on Class Cert. Mot., R. 88, Page ID # 780.)

In the early morning hours of August 26, 2012, while leaving a nightclub on Beale Street, Appellee was arrested for refusing to leave Beale Street. (Complaint, R. 1, Page ID ## 9-10.) In response, Appellee filed this lawsuit, a Section 1983 action on behalf of himself and others. (*Id*., Page ID # 3.) Appellee's lawsuit alleges the Beale Street Sweep violated his fundamental constitutional right to intrastate travel. (*Id*., Page ID ## 8-9.) Throughout this litigation, Appellant has defended the Beale Street Sweep as one necessitated by public safety, which this Court has recognized as a compelling government interest.[3]

One of the seminal issues at trial was the constitutional standard applicable to whether the Beale Street Sweep violated Appellee's due process rights. In charging the jury, the district court again redefined the Sweep "in order to be more consistent with the strict scrutiny standard that is applied to cases regarding violations of an individual's fundamental right to

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[3] *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002).

intrastate travel." (Order Denying Decert. Mot., R. 160, Page ID # 2062.) The district court's revised definition was:

> [T]he policy, procedure, custom, or practice by which police officers of the Memphis Police Department order all persons to immediately leave the sidewalks and street on Beale Street without consideration of whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety.

(*Id.*, Page ID # 2063.) In all, the district court erroneously instructed the jury, as the majority of the panel so ruled, using a different and more onerous constitutional standard than what the law requires. As a result, the jury—applying the wrong law—found in Appellee's favor. (Verdict Form, R. 129.)

Following the verdict and resulting judgment, Appellant timely noticed this appeal. (Not. of Appeal, R. 174; Am. Not. of Appeal, R. 192.) On October 17, 2016, a divided panel ruled that the district court applied the wrong constitutional standard. Nonetheless, the Panel majority affirmed the jury's verdict and resulting judgment, ruling that the district court's error was "harmless."[4] Judge Griffin dissented. With this Petition, Appellant respectfully asks this Court to vacate the Panel majority's decision and rehear this matter en banc.

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[4] *Cole, et al. v. City of Memphis, et al.*, 2016 WL 6068911 (6th Cir. Oct. 17, 2016). A copy of the opinion is attached as Exhibit 1.

EN BANC ARGUMENTS

A. This Court should grant en banc review because in this Circuit, "harmless error" is not an acceptable basis for affirmation of a jury verdict if a district court, especially if deciding a constitutional case involving fundamental rights, charges the jury with erroneous constitutional law and standards.

The Panel's majority decision contains a precedent-setting error of exceptional public importance. The underlying trial of this matter centered on the public's fundamental right to intrastate travel and Appellant's compelling interest in maintaining public safety. The district court instructed the jury that, because fundamental rights were at issue, the strict scrutiny standard applied.[5] The district court further tailored the jury instructions and verdict form to answer factual questions that were designed and informed by the "strict scrutiny" standard. The district court's instructions, however, were erroneous; the district court provided the jury with the wrong law because, as the Panel majority held, "intermediate scrutiny" was the proper standard. This was nonetheless "harmless error," according to the Panel's majority decision. For what appears to be the first time, a Sixth Circuit panel majority has ruled that it can be "harmless error" for a

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[5] Notably, the district court erred not only by instructing the jury as to this heightened standard, but also by relying on this heightened standard to deny Appellant's Motion for Summary Judgment. (Order, R. 121, Page ID # 1348 ("Consequently, the Court applies strict scrutiny to the constitutionality of the Beale Street Sweep.").)

district court, deciding a constitutional case, to charge the jury with incorrect constitutional law and incorrect constitutional standards. This ruling, it is respectfully submitted, is "a precedent-setting error of exceptional public importance." *See* 6 Cir. I.O.P. 35(a).

First, by publishing its decision, the Panel majority set precedent. *See, e.g.*, *United States v. Moore*, 2016 WL 3595723, at *5 (6th Cir. June 29, 2016) ("Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel.") (internal citations omitted).

Second, by relying on the "harmless error" doctrine and affirming as harmless what was otherwise reversible error by the district court, the Panel majority erred. When the district court is "simply wrong" in providing the law to the jury, explained the Supreme Court in *Bollenbach*, its mistake is grounds for reversal—**the error is not harmless**. *Bollenbach v. United States*, 326 U.S. 607, 613 (1946). "A failure to charge [the jury] correctly," later reiterated the Supreme Court, "is not harmless, since the verdict might have resulted from incorrect instruction." *Carpenters & Joiners v. United States*, 330 U.S. 395, 409 (1947). The law is the same in this Circuit: "We will reverse a judgment where the jury instruction fails accurately to reflect the law." *United States v. Blood*, 435 F.3d 612, 623 (6th Cir. 2006) (internal quotations and citations omitted); *see also Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 617 (6th Cir. 2007) (adopting identical standard in 1983 case). Moreover, as summarized by the Panel dissent, a district court will be reversed when it "applies the incorrect legal standard." (Opinion, p. 17 (collecting cases).)

Collectively, these holdings embody the protections afforded to civil litigants by the Fifth and Seventh Amendments, guaranteeing due process and fair trials. *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981). A jury applying an incorrect constitutional legal standard certainly cannot act impartially or with any degree of fairness otherwise required to ensure due process of law. This is why the jury's application of the incorrect legal standard is reversible error. Contrary to the Panel majority's holding, the error is not harmless.

Here, the jury was given and therefore applied an incorrect legal standard. The instructions given by the district court judge failed to accurately reflect the law. The Panel majority conceded this in passing, noting that the "district court was incorrect." (Opinion, p. 9.) The Panel dissent, however, confirms the extent and significance of the district court's error: "The district court instructed the jury using a different and more onerous standard" than what the law requires. (*Id*., p. 17.) "Because the jury's factual findings and the district court's legal ruling are inextricably intertwined and premised upon the incorrect legal standard," continued the Panel dissent, "I would reverse." (*Id*.) The Panel dissent is correct. Following Supreme Court and Sixth Circuit precedent, when a jury—or a district court—applies the wrong legal standard, the error is not harmless and reversal is warranted. The Panel majority "agre[ed] that the district court erred in its jury instructions and application of law" (*id*., p. 18), and yet, the Panel majority did not reverse. In affirming as harmless what was reversible error, the Panel majority committed error. *Cf. Bollenbach* at 615 (instructing appellate judges not to use "harmless

error" as a means for interjecting their own opinions as to the outcome of trials involving fundamental rights).

Lastly, the Panel majority's error was surely one of "exceptional public importance." "The Constitution of the United States was made by, and for the protection of, the people of the United States." *League v. De Young*, 52 U.S. 185, 203 (1850). Without meaningful appellate review, these constitutional protections are much more easily eroded by judicial decisions and jury verdicts, especially when those decisions and verdicts result from the application of incorrect constitutional standards. The Panel majority's holding is one of exceptional public importance because it restricts a future panel's ability to reverse a decision or verdict obtained by the application of incorrect constitutional standards. Moreover, lying at the heart of this case is the public's ability to travel within the state and Appellant's ability to make it safe for them do so. These issues further underscore the importance of this Petition and why it should be granted.

To summarize and state plainly why this full Court should act, while the jury surely had general knowledge of the issues in this case, the jury knew nothing about the legal standards applied in constitutional disputes.[6] The task of educating the jury fell upon the district court, and in this task, the district court erred. It gave the jury the wrong legal standards. Under the wrong legal standards, the jury then weighed every single fact and rendered its verdict.

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[6] *Cf. Carter v. Kentucky*, 450 U.S. 288, 302-03 (1981) ("Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.").

Agreeing with the outcome of trial, the Panel majority's decision excused the flawed process. Seventy years ago, in writing *Bollenbach*, Justice Felix Frankfurter flatly rejected this very practice:

> The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks.

Bollenbach at 613-14. The Panel majority, by applying "harmless error," took the function of the jury for itself, and it did so in a case where the constitutional rights of the public directly intersect with the compelling interests of government. Granting this Petition vacates the Panel majority's decision and cures its error.[7] The full Court should do just that and rightfully return to the jury its "function of measuring the evidence by appropriate legal yardsticks." *Bollenbach* at 614.

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[7] *See* 6 Cir. R. 35(b) ("A decision to grant rehearing en banc vacates the previous opinion and judgment of the court, stays the mandate, and restores the case on the docket as a pending appeal.").

B. This Court should grant en banc review and rectify the lack of uniformity with respect to review of legally erroneous jury instructions.

A fundamental goal of en banc consideration is to secure uniformity of the Court's decisions.[8] At present, when reviewing jury instructions calling for the application of erroneous law, panels of this Court have applied a grouping of fragmented standards. Starting with *Busacca*, a panel decision published in 1988, this Court would not reverse "unless the charge fails accurately to reflect the law." *United States v. Busacca*, 863 F.2d 433, 435 (6th Cir. 1988). Through a series of published panel decisions, the *Busacca* standard eventually made its way into *Blood*, another published panel decision.

In *Blood*, the *Busacca* standard shifted from conditional to affirmative, resulting in the following: "We will reverse a judgment where the jury instruction fails accurately to reflect the law." *Blood*, 435 F.3d at 623. The *Blood* court also identified a permissive standard: "In addition, we may reverse the trial court based on a faulty charge only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id*. (internal quotations and citations omitted).

Shortly after *Blood*, a panel published *Radvansky*, in which the *Blood* standards were plainly summarized as: "We will reverse a judgment where the jury instruction fails accurately to reflect the law. In addition, we may reverse the trial court based on a

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[8] Fed. R. App. P. 35(a)(1).

faulty charge only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Radvansky* at 496 F.3d at 617 (internal quotations and citations omitted).

Only a few years after *Radvansky*, a panel decided and published *Pivnick*. The *Pivnick* court neither used nor discussed in any way the *Blood* standards, or even the earlier *Busacca* standard. Rather, the *Pivnick* court reached back to *Wells*, a published decision from 2000. Following *Wells*, the *Pivnick* court stated the standard as the district court's error being "not so confusing, misleading, and prejudicial to the jury as to require reversal." *Pivnick v. White, Getgey & Meyer Co., LPA*, 552 F.3d 479, 488 (6th Cir. 2009) (quoting *United States v. Wells*, 211 F.3d 988, 1002 (6th Cir. 2000)). While the *Pivnick* standard is arguably permissive, it requires "confusing, misleading, **and** prejudicial," unlike the permissive *Blood* standard, which requires "confusing, misleading, **or** prejudicial."[9]

In 2015, *New Breed Logistics* was decided and published. The *New Breed* court cited *Pivnick* and restated the *Pivnick* standard as: "Erroneous jury instructions only require reversal if they are confusing, misleading, and prejudicial." *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1074-75 (6th Cir. 2015). The *New Breed* court further added that "[a]n erroneous jury instruction should not be reversed where the error is harmless." *Id*.

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[9] The emphasis in these quotations has been added to highlight the differences between them.

This lack of uniformity may have led to the Panel majority's decision containing, it is respectfully submitted, a precedent-setting error of exceptional public and constitutional importance. The Panel majority applied the *New Breed* standard. (Opinion, p. 9.) The *New Breed* standard, however, is incomplete. It does not contain the affirmative *Blood* standard: "We will reverse a judgment where the jury instruction fails accurately to reflect the law." *Blood*, 435 F.3d at 623. Without *Blood*, the Panel majority concluded that, although the jury had been wrongly instructed on the law, this error was harmless and not subject to reversal. As explained, this ruling was in error.

Conversely, the Panel dissent applied the affirmative *Blood* standard, avoided the error committed by the Panel majority, and correctly decided the appeal. The Panel dissent correctly relied on authorities requiring reversal without applying harmless error: "Reversal is appropriate when the trial court applies the incorrect legal standard . . . ." (Opinion, p. 17.) In doing so, the Panel dissent essentially applied the affirmative *Blood* standard: "We will reverse a judgment where the jury instruction fails accurately to reflect the law." *Blood*, 435 F.3d at 623. It then correctly concluded that the jury's verdict—which resulted from application of the "wrong law"—must be reversed. (Opinion, p. 17.)

In sum, with the benefit of uniformity, the Panel majority would not have overlooked *Blood* or otherwise construed *New Breed* to permit affirming as harmless what was reversible error by the district court. A uniform standard of review, however, does not presently exist. This Petition presents the full Court

with an opportunity to remedy this, and because securing uniformity is a fundamental goal of en banc consideration, this Petition should be granted.

CONCLUSION

The full Court should act to correct the Panel's majority precedent-setting error of exceptional public importance, and to secure uniformity with respect to which standard of review will apply when a jury is charged with incorrect law. For either reason or both, this Petition should be granted, the Panel majority's opinion should be vacated, and this appeal should be reheard by the full Court. Appellant also requests any additional relief the Court deems warranted under the circumstances.

This, the 31st day of October, 2016.

Respectfully Submitted,

CITY OF MEMPHIS

By Its Attorneys,

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

By: */s/ Leo M. Bearman*
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[******Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.******]