No. 16-1204

IN THE

Supreme Court of the United States

CITY OF MEMPHIS,

Petitioner,

v.

LAKENDUS COLE; LEON EDMOND, individually and as representatives of all others similarly situated

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

Leo M. Bearman
Lori H. Patterson
Zachary B. Busey
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
First Tennessee Building
165 Madison Avenue
Suite 2000
Memphis, TN 38103

E. Joshua Rosenkranz
Counsel of Record
Thomas M. Bondy
Matthew L. Bush
Michelle O'Meara
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. This Court Should Grant The First Question Presented To Address The Intrastate Travel Right. 2

A. The Courts of Appeals are divided. 2

B. The Sixth Circuit's decision is wrong and should be reversed. 6

C. There are no waiver or vehicle obstacles. 9

II. This Court Should Grant The Second Question Presented To Address Harmless Error. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Page(s)**

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993)...7

Cole v. Hous. Auth. of Newport,
435 F.2d 807 (1st Cir. 1970) 4, 5

Collins v. City of Harker Heights,
503 U.S. 115 (1992)...6

D.L. v. Unified Sch. Dist. No. 497,
596 F.3d 768 (10th Cir. 2010)...............................4

Di Bartelo v. Scott,
No. EDCV 12-00259-DSF, 2012 WL
3229385 (C.D. Cal. June 20, 2012)........................3

Fruitts v. Union Cty.,
No. 2:14-CV-00309-SU, 2015 WL
5232722 (D. Or. Aug. 17, 2015) 3

Garrison v. Glentz,
No. 1:04-CV-630, 2005 WL 2155936
(W.D. Mich. Sept. 7, 2005).....................................3

Hammel v. Tri-Cty. Metro. Transp. Dist.,
955 F. Supp. 2d 1205 (D. Or. 2013).......................3

Hutchins v. District of Columbia,
188 F.3d 531 (D.C. Cir. 1999)........................2, 4, 7

Johnson v. City of Cincinnati,
310 F.3d 484 (6th Cir. 2002)..............................5, 6

King v. New Rochelle Mun. Hous. Auth.,
442 F.2d 646 (2d Cir. 1971) 4, 5

Lanin v. Borough of Tenafly,
515 F. App'x 114 (3d Cir. 2013).........................3, 5

League of United Latin Am. Citizens v. Bredesen,
500 F.3d 523 (6th Cir. 2007).................................5

Lutz v. City of York,
899 F.2d 255 (3d Cir. 1990) 3, 5

Mem'l Hosp. v. Maricopa Cty.,
415 U.S. 250 (1974)..7

Northwest Airlines, Inc. v. City of Kent,
510 U.S. 355 (1994)..5

Nunez by Nunez v. City of San Diego,
114 F.3d 935 (9th Cir. 1997)..................................2

Ramos v. Town of Vernon,
353 F.3d 171 (2d Cir. 2003) 4, 5

Reno v. Flores,
507 U.S. 292 (1993)..7

Selevan v. N.Y. Thruway Auth.,
584 F.3d 82 (2d Cir. 2009) 3

Selevan v. N.Y. Thruway Auth.,
711 F.3d 253 (2d Cir. 2013) 5

Townes v. City of St. Louis,
949 F. Supp. 731 (E.D. Mo. 1996) 3

United States v. Baroni,
No. 2:15-CR-00193-SDW, 2016 WL 3388302 (D.N.J. June 13, 2016) 3

United States v. Williams,
504 U.S. 36 (1992)..10

Verizon Commc'ns, Inc. v. FCC,
535 U.S. 467 (2002)..9

Wright v. City of Jackson,
506 F.2d 900 (5th Cir. 1975)..................................4

INTRODUCTION

Picture Beale Street on a Saturday night. It's packed with partygoers. They're drinking outside or heading to one of any number of bars that stay open until 5a.m.

The area is generally peaceful, but it can become disorderly: "[Y]ou'd see people having fun. You would see intoxicated people. You would see people involved in fights, people having sex. You can see all kinds of things. And just in any given night, there were all kinds of different things that would happen. There were stampedes. There were circus-like atmosphere on some days. And other days, it was more like a European football game where the crowd kind of turns against one another." Dkt. 198 at 7:21-8:5.

So when necessary, the police take the most modest of steps to calm things down. They do not tell revelers they have to leave or stop drinking. Rather, generally around 3a.m., the police inform them that they may *keep drinking*, so long as they go inside a bar. Or, if they want, they can go home. They simply can't remain on that particular street. This practice is limited to only two blocks, generally for no more than two hours, and only on weekend nights. This is the kind of creative strategy the Memphis Police should be applauded for. It allows the fun of Beale Street while also turning down the temperature when appropriate.

The Sixth Circuit overturned this eminently sensible law enforcement practice, applying heightened scrutiny and holding it unconstitutional in violation

of the fundamental "right to intrastate travel." The court concluded that the police could perform their so-called "Sweep" *only* in response to an "existing, imminent, or immediate" threat—*i.e.*, an ongoing emergency—no matter whether it furthered public safety generally. That holding is fundamentally flawed and warrants this Court's review.

This Court has discussed in passing the purported intrastate travel right, but it has not squarely addressed it. Over time, the Courts of Appeals have sharply divided regarding whether the right exists and how even to approach the question. The time is ripe for this Court to resolve that split, and this case presents a perfect vehicle.

ARGUMENT

I. This Court Should Grant The First Question Presented To Address The Intrastate Travel Right.

A. The Courts of Appeals are divided.

1. Numerous courts acknowledge what Respondents deny: The "circuit courts are split as to whether the Constitution guarantees the fundamental right of intrastate travel." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 n.7 (9th Cir. 1997); *see Hutchins v. District of Columbia*, 188 F.3d 531, 537

(D.C. Cir. 1999) (plurality) ("The circuits are split on this question.").[1]

Despite that, Respondents assert that none of these circuits actually disagree with each other. They claim the cases fall into camps: courts that have found the right to intrastate travel in the context of access to public roadways and courts that have found no such right in other situations. Opp. 13.

The effort to sort cases into buckets only demonstrates just how amorphous and far-reaching the claimed right to intrastate travel is. It sweeps so broadly that it potentially implicates everything from Beale Street, to 75-cent bridge tolls, *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 87 (2d Cir. 2009), to "driving repeatedly around [in] a loop," *Lutz v. City of York*, 899 F.2d 255, 256 (3d Cir. 1990), to converting a two-way street into a one-way street, *Lanin v. Borough of Tenafly*, 515 F. App'x 114, 115 (3d Cir. 2013), and even to "the placement of large flower pots across the entry" to a block, *Townes*, 949 F. Supp. at 732.

---

[1] Many district courts have also acknowledged the split. *See, e.g.*, *United States v. Baroni*, No. 2:15-CR-00193-SDW, 2016 WL 3388302, at *9 (D.N.J. June 13, 2016); *Fruitts v. Union Cty.*, No. 2:14-CV-00309-SU, 2015 WL 5232722, at *6 n.8 (D. Or. Aug. 17, 2015); *Hammel v. Tri-Cty. Metro. Transp. Dist.*, 955 F. Supp. 2d 1205, 1210 (D. Or. 2013); *Di Bartelo v. Scott*, No. EDCV 12-00259-DSF, 2012 WL 3229385, at *5 (C.D. Cal. June 20, 2012); *Garrison v. Glentz*, No. 1:04-CV-630, 2005 WL 2155936, at *9 (W.D. Mich. Sept. 7, 2005); *Townes v. City of St. Louis*, 949 F. Supp. 731, 734 (E.D. Mo. 1996).

The abstract question whether the right exists does not depend on the underlying factual circumstances. Even the Sixth Circuit agrees: As authority for recognizing the right to intrastate travel, the court pointed to the First, Second, and Third Circuit cases our Petition cites, despite their widely differing factual settings. Pet. App. 7 n.3.

2. Respondents' attempt to categorize the cases also fails on its own terms. The only way they can make their taxonomy work is by ignoring the First and Second Circuit cases that contribute to the split. Their claimed framework falls apart if you include those cases.

Looking at *all* the cases confirms that the underlying factual context is irrelevant to deciding whether the intrastate travel right exists in the first place. For example, some courts have recognized the right where the underlying facts involved residency requirements. *See Cole v. Hous. Auth. of Newport*, 435 F.2d 807 (1st Cir. 1970); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971). Others have concluded the right does not exist where the underlying facts involved residency requirements. *See Wright v. City of Jackson*, 506 F.2d 900 (5th Cir. 1975); *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768 (10th Cir. 2010).

Similarly, some courts have recognized the right where the underlying facts involved a curfew. *See Ramos v. Town of Vernon*, 353 F.3d 171, 172 (2d Cir. 2003). Others have concluded the right does not exist where the underlying facts involved a curfew. *See Hutchins*, 188 F.3d at 536-38. The underlying facts are not driving whether the right exists.

3. Even in jurisdictions where the right is recognized, courts are all over the map as to the appropriate level of scrutiny.

The First Circuit applies strict scrutiny. *Cole*, 435 F.2d at 811.

The Second Circuit "[g]enerally" applies strict scrutiny, in particular when a law involves "invidious distinctions." *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 257-58 (2d Cir. 2013); *see King*, 442 F.2d at 648 (applying strict scrutiny). A "minor restriction on travel," however, is subject to less demanding scrutiny, potentially "the three-part test" from *Northwest Airlines, Inc. v. City of Kent*, 510 U.S. 355 (1994). *Selevan*, 711 F.3d at 258. And when minors are involved, the court appears to apply intermediate scrutiny. *Ramos*, 353 F.3d at 176 (applying intermediate scrutiny but "assum[ing] that were th[e] ordinance applied to adults, it would be subject to strict scrutiny").

The Third Circuit applies intermediate scrutiny, borrowing the "time, place, and manner" test from the First Amendment. *Lutz*, 899 F.2d at 269; *Lanin*, 515 F. App'x at 119.

And the Sixth Circuit applies three distinct levels of scrutiny: the "more severe [the] restriction," the greater the scrutiny. *Johnson v. City of Cincinnati,* 310 F.3d 484, 502 (6th Cir. 2002) (strict scrutiny); *see* Pet. App. 10-13 (intermediate scrutiny); *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 536 (6th Cir. 2007) (rational basis review).

The courts are deeply and irrevocably split on whether an intrastate travel right exists and how even to approach the question. The time is ripe for this Court to step in.

B. The Sixth Circuit's decision is wrong and should be reversed.

The Sixth Circuit conjured a right that this Court has never recognized, stretched it beyond the breaking point to encompass ordinary public safety measures, and then erroneously applied it to strike down Memphis' justified police activities. Respondents do not attempt to defend any part of that decision. Yet under the Sixth Circuit's reasoning and result, the City is now *permanently enjoined* from conducting its Sweep, which is narrowly aimed at maintaining public safety in a popular entertainment area. This Court should not allow that misguided decision to stand.

1. This Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Accordingly, this Court has demanded "utmost care" whenever "break[ing] new ground in this field." *Id.* The Sixth Circuit blew right past these warning signs when becoming "one of [the] few circuits" to conclude that intrastate travel is a fundamental right as part of substantive due process. Pet. App. 7; *Johnson*, 310 F.3d at 502.

This Court has cast doubt on whether such a right exists at all. In *Memorial Hospital v. Maricopa County*, the Court suggested that the right to travel did not simply mean the right to "movement." 415 U.S. 250, 255-56 (1974). It explained that while a bona fide residency requirement impacts "movement"—and potentially simply intrastate movement—such laws nonetheless pass constitutional muster. *Id.*

Two decades later, in *Bray v. Alexandria Women's Health Clinic*, this Court concluded that demonstrations around abortion clinics did not interfere with any right to travel. 506 U.S. 263, 276-77 (1993). The Court explained that "a purely intrastate restriction does not implicate the right of interstate travel," and so did not violate any constitutionally protected travel right. *Id.* at 277.

2. Even if some form of the right exists, the analysis must begin with a "careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302 (1993). The "more general … the right's description, *i.e.*, the free movement of people, the easier is the extension of substantive due process." *Hutchins*, 188 F.3d at 538.

"[I]f travel mean[s] merely movement," as the Sixth Circuit seems to suggest, a limitation as mundane as a traffic light would face heightened scrutiny. *Mem'l Hosp.*, 415 U.S. at 255. The City's practice here impacts only two blocks, generally for no more than two hours, and only on weekend nights. Cities across the country shut down streets for all sorts of legitimate reasons such as parades, traffic control, protests, and marathons. Under the Sixth Circuit's

reasoning, these cities all potentially violate the Constitution unless they can satisfy heightened scrutiny.

3. The Sweep does not impact any fundamental right and is therefore constitutional. But even if some heightened form of scrutiny applied, the bottom line would be the same, and the Sixth Circuit went astray on that point as well.

Far from containing "no evidence" regarding public safety, Pet. App. 16, the record overflows with testimony supporting the City's practice. Beale Street can get "packed" with "a zillion people" in a confined area. Dkt. 201 at 8:4-5, 10. Especially on weekends, "the later it gets, the more people and the more packed it gets." Dkt. 210 at 48:20-22. And it is "very rare" that those people are not drinking. Dkt. 202 at 28:5-7.

So while generally "people [are] having fun," safety issues arise. Dkt. 198 at 7:21-22. And "between 3:00 and 5:00[a.m.], things could get out of hand very easily." Dkt. 202 at 31:12-13. Multiple witnesses testified to "fights," "sexual assaults," "stampedes," and even "officers thrown through plate glass windows." *See, e.g.*, Dkt. 198 at 7:19-8:9; Dkt. 202 at 7:22, 8:4; Dkt. 210 at 19:23, 49:12. Stampedes are a particularly difficult challenge because once one begins, it is nearly impossible to stop. Dkt. 219 at 10:10-22

Against this backdrop, officers on the ground would "feel th[e] pulse" of Beale Street. Dkt. 210 at 20:6. If the situation warranted, a supervisor would make the decision generally around 2:30a.m. to announce that soon everyone would have to go home or

inside an establishment. *Id.* at 20:5-11. The purpose was to "try to thin th[e] crowd" to make the area safer. *Id.* at 20:9. If the announcements worked on their own, the police "[m]ay not have to" do anything further. *Id.* at 20:12. But sometimes the "Sweep" would still be required.

The Sweep was not "a regular thing." Dkt. 201 at 9:16-22. Supervisors would "decid[e] if a clearing … needed to take place." Dkt. 210 at 59:1-5. Specifically, the "major or lieutenant that's assigned to Beale Street" would make the call. Dkt. 199 at 4:23-24. When the Sweep occurred, it was "for safety," usually because "entirely too many people" were in the area or "because it got rowdy or fights have started." *Id.* at 5:2-4. But "[t]here were nights when it didn't have to take place and didn't." Dkt. 210 at 59:5-7.

The Sixth Circuit went astray in concluding the City violated the Constitution under these circumstances, and by extension that other localities likewise act unconstitutionally in pursuing analogous public safety measures.

C. There are no waiver or vehicle obstacles.

1. Respondents' claims of waiver are legally and factually wrong. They criticize us for failing to raise below whether the right to intrastate travel exists and for failing to document the contours of the split. Opp. 10-11. But the rule is that "[a]ny issue 'pressed *or passed upon* below' … is subject to this Court's [review]." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (emphasis added). "[T]his rule operates (as

it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41 (1992). The Sixth Circuit unquestionably addressed the issue, so nothing prevents this Court from considering it.

In any event, even though the district court was bound by Sixth Circuit precedent recognizing an intrastate right to travel, we argued to the Sixth Circuit that "[t]he District Court erred in finding that *Johnson* protects the right to intrastate travel as per se a fundamental right." Dkt. 39 at 15. We also contended that the Sweep "is appropriately analyzed under rational basis scrutiny." *Id*. at 20. And we were under no obligation *below* to "assert that there is a 'circuit split.'" Opp. 11.

2. We did not agree that the jury should only decide whether the Sweep was conducted because of an "existing, imminent, or immediate" threat to public safety. Opp. 7, 19. We submitted our own proposed jury form which asked more generally whether there were "circumstances present which threaten the safety of the public." Dkt. 149-1 at 1. And, consistent with rational basis review, our proposed question made clear that "*Plaintiffs* have the burden of proof." *Id.* (emphasis added). The district court rejected that language. Dkt. 213 at 29.

In any event, Question 4 was simply a "factual question[]" to assist the judge. Dkt. 141 at 2 (verdict form) (capitalization altered). It did not require the jury to reach any particular verdict. And we never

agreed that the jury's finding supported the conclusion that the Sweep was unconstitutional. That question put too high a burden on the City. *See* Dkt. 152 at 6. ("The City has a recognized compelling state interest in public safety. Contrary to the argument of the Plaintiff, the compelling state interest did not disappear with the jury finding that the sweep occurred when conditions throughout the Beale Street area did not pose an existing, imminent or immediate threat to public safety.")

3. This case is a perfect vehicle to address the question presented. It featured a full trial with over 20 witnesses. The district court noted the "extensive record." Pet. App. 31-32. And the district court's and Sixth Circuit's opinions total 69 pages. Pet App. 1-69. There has been more than enough factual and legal development for this Court's review.

II. This Court Should Grant The Second Question Presented To Address Harmless Error.

Whether or not this Court grants the second question presented, this Court can and should resolve the question whether the Constitution even recognizes a right to intrastate travel. But this Court should also decide the second question. The Sixth Circuit concluded the district court applied the wrong standard in finding the Sweep unconstitutional. The Sixth Circuit's decision to affirm anyway conflicts with other circuits requiring at least a remand in this situation.

Respondents agree that there would be a split on the harmless error question if only our description of

the record were not based on "two premises" that are "factually incorrect." Opp. 20. Our assertions are accurate.

1. We are correct that "Jury Question 4 was erroneously tailored to the strict scrutiny standard." *Id.* The City was required to prove not just that the Sweep aided in ensuring public safety generally. Rather, we needed to show an "existing, imminent, or immediate" threat, a standard formulated from thin air.

That standard reflects strict scrutiny. That is why the district court imposed it. The court concluded that "because the [Sweep] is conducted 'without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety,' the custom is not 'the least restrictive means to accomplish the City's goal.'" Pet. App. 47. "Consequently," the court concluded, "the Beale Street Sweep is in practice not narrowly tailored to achieve a compelling government interest." *Id.* The dissent was thus plainly correct that Question 4 was "inextricably intertwined and premised upon the incorrect legal standard of strict scrutiny." Pet. App. 26.

2. We are also correct that "the Sixth Circuit substituted its ruling on intermediate scrutiny for a finding of the jury." Opp. 20. The court believed that any error was harmless because "the evidence adduced at trial," separate from the "jury's factual findings," showed "that the timing and execution of the Sweep policy was tied to an arbitrary time, not to existing conditions on the ground." Pet. App. 17. Inexplicably,

the Sixth Circuit concluded that "[t]here 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," *id.,* even though that was precisely the district court's ruling, Pet. App. 47.

The Sixth Circuit "re-weighed the facts and evidence" in a way that was both legally improper and factually baseless. Pet. 20. The trial evidence showed that the conduct of the Memphis Police was reasonable and constitutional.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Leo M. Bearman
Lori H. Patterson
Zachary B. Busey
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
First Tennessee Building
165 Madison Avenue
Suite 2000
Memphis, TN 38103

E. Joshua Rosenkranz
Counsel of Record
Thomas M. Bondy
Matthew L. Bush
Michelle O'Meara
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

May 15, 2017