RECORD NO. 13-7063(L); 13-7064

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

TONIA EDWARDS; BILL MAIN,

***Plaintiffs – Appellants*,**

v.

DISTRICT OF COLUMBIA,

***Defendant – Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and Amici*. The parties in the District Court and in this Court are Tonia Edwards and Bill Main (Plaintiffs below; Appellants here) and the District of Columbia (Defendant below; Appellee here). As of this writing, no amici have appeared in this case.

B. *Rulings under review*. The rulings under review are (1) the February 14, 2011, Order of the District Court (Judge Paul L. Friedman) denying the plaintiffs' motion for a preliminary injunction, as well as the accompanying memorandum opinion of the same date, and (2) the March 28, 2013, Order of the District Court (Judge Paul L. Friedman) granting the defendant's motion for summary judgment, as well as the related memorandum opinion dated May 7, 2013.

C. *Related Cases.* To the best of their knowledge, counsel for Plaintiffs/Appellants are not aware of any previous or pending related cases in this Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

**Chief Authorities are Designated by an Asterisk*

CONSTITUTIONAL PROVISION

STATUTES

RULE

REGULATIONS

OTHER AUTHORITY

JURISDICTIONAL STATEMENT

This action was filed on September 16, 2010; the district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202, as well as 42 U.S.C. § 1983. On February 25, 2011, the district court entered an Order denying Plaintiffs' Motion for a Preliminary Injunction. (JA 72.)[1] On March 25, 2011, the Appellants filed a timely notice of appeal of that denial (JA 5 (docket no. 22)); this Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1292(a)(1).

On March 28, 2013, the district court issued an Order granting Defendant the District of Columbia's Motion for Summary Judgment, saying that "An opinion explaining the reasoning behind this decision [would] be issued soon." JA 183. On April 25, 2013, the Appellants (Plaintiffs below) filed a timely notice of appeal of that decision (JA 6 (docket no. 46)); this Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1291.[2]

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[1] "JA" refers to the parties' Joint Appendix.

[2] On August 25, 2013, this Court consolidated these two appeals. Because the request for a preliminary injunction will be effectively mooted by this Court's decision on the ultimate merits of the case, Appellants do not separately address their entitlement to a preliminary injunction.

On May 7, 2013, the district court issued an opinion explaining the reasoning behind its earlier grant of summary judgment. (JA 184.) While the district court had been divested of jurisdiction by the filing of a notice of appeal, this Court may consider the May 7 opinion to the extent the opinion was written in aid of the appellate process. *See generally Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1013-14 (6th Cir. 2003) (collecting authorities from multiple circuits).

STATEMENT OF THE ISSUES

This appeal raises two questions:

First, did the district court err in concluding that the District of Columbia's tour-guide licensing regulations—which expressly prohibit unlicensed individuals from saying certain things to tour groups—are a restriction on conduct instead of a content-based restriction on speech?

Second, did the district court err in upholding those regulations despite the absence of any record evidence that the licensing requirement addresses any actual problem or produces any actual public benefits?

Answering either of these questions in the affirmative requires that the district court's grant of summary judgment be reversed and that this case be remanded.

STATUTES AND REGULATIONS

The relevant statute and regulations in this case are Washington, D.C., official code section 47-2836, and D.C. Municipal Regulations Title 19, Chapter 12, both of which are set forth as an Addendum to this brief.

STATEMENT OF FACTS

Appellants Bill Edwards and Tonia Main own and operate "Segs in the City," a Segway-rental and tour business located in Washington, D.C., as well as in Annapolis and Baltimore, Maryland. (JA 168; 173.)[3] Their business model is essentially the same in all three cities: Plaintiffs both rent Segways to individuals for private use and also provide tours to small groups of people who have rented Segways. (JA 169; 174.) In D.C., Segs in the City provides a variety of tours along the city's streets and sidewalks. (JA 169; 174.) During the summer months (the business's busiest), about half of the tours are led directly by either Main or Edwards—the rest are conducted by independent contractors Plaintiffs hire for the summer. (JA 169; 174.)

Segs in the City operates in the context of a robust guided-tour market in Washington, D.C. While Segs in the City offers tours that feature

[3] Segways are self-balancing personal-transport vehicles. (JA 169.)

the city's monuments, embassies, or other sights, other companies offer tours ranging from ghost tours to food tours to movie tours (centered on points in the District that have been featured in major films) to many others. (JA 169; 174.)

Tour guides are, basically, a specialized kind of street performer. As groups walk (or ride) along a route in the District of Columbia, a tour guide tells stories (some true, some not) designed to educate, enlighten, and primarily to *entertain* their customers. (JA 170-71; 175-76; 179.)

A Segs in the City tour has two basic phases. First, the tour leader spends time training the group (which never has more than 10 people) in how to ride a Segway, including instruction in how to ride safely and how to comply with relevant safety regulations like speed limits. For the vast majority of customers, learning to ride a Segway is a fairly easy process, and people seem to really enjoy the experience. (JA 170; 174.) Then, the group puts their newfound knowledge to use, riding the Segways with their guide along one of several established tour routes. (JA 170; 175.) Each tour lasts between one and three hours, and Segs in the City operates up to five tours a day, seven days a week. (JA 169; 174.) As the group members ride, the tour leader communicates with them via a radio

earpiece (provided by Segs in the City), either to advise them about where the group is going next or to point out or tell a story about a nearby point of interest. (JA 171; 175-76.)

Most of this activity is perfectly legal in the District of Columbia. Segs in the City is required to have a basic business license (which it does), and the city has rules governing the use of the Segways themselves (which all of the business's tour guides, including Main and Edwards, follow). (JA 170; 175-76.) The problem arises when Main and Edwards try to communicate with their tour groups without a license—something District regulations not only prohibit, but actually criminalize.

D.C. Law Threatens Unauthorized Speakers With Criminal Punishment.

Washington, D.C., official code section 47-2836 makes it unlawful for anyone to "guide or escort any person through or about the District of Columbia, or any part thereof, unless he shall have first secured a license to do so." As of July 2010, new implementing regulations clarify the District's interpretation of what it means to be a "sightseeing guide": A "sightseeing tour guide" is anyone who either "**engages in the business of guiding or directing people** to any place or point of interest in the District" *or* "who, in connection with any sightseeing trip or tour, **describes, explains, or**

lectures concerning any place or point of interest in the District to any person." D.C. Mun. Regs. tit. 19 § 1200.11 (emphases added). While the regulations cover many different types of tours, they also make clear that the leaders of Plaintiffs' Segway tours—specifically—are forbidden from guiding without a license. *See* D.C. Mun. Regs. tit. 19 § 1201.3 (singling out tours conducted on "self-balancing personal transport vehicles, mopeds, or bicycles" in addition to walking tours). Acting as a tour guide without a license is punishable by up to 90 days in prison. D.C. Code § 47-2846; D.C. Mun. Regs. tit. 19, § 19-1209.2.

The District of Columbia's 30(b)(6) representative made clear in deposition that these regulations are aimed at *communication*, not at conduct:

> Q: . . . What's your understanding of who is required to hold a tour guide license in Washington, D.C.?
>
> A: Persons that are able to communicate with others regarding sights, dates, places, times, things of that nature of the District of Columbia, historical sights.

(JA 152; *see also id.* (agreeing that "the justification for individual licensure is present only when someone is answering questions on particular

topics").) The District's representative also confirmed that, regardless of who is physically escorting a particular tour, any individual who is providing the group with information about points of interest in the city must hold a tour-guide license. (JA 153.)

Obtaining a tour-guide license requires, among other things, that an individual pass a written examination testing her knowledge of Washington, D.C.'s general history and geography, and pay application fees totalling $200. (JA 144; 148.) While the District provides the written examination in both English and (through an automatic translation) in Spanish, people who are not proficient in English are categorically forbidden from obtaining a tour-guide license in D.C.[4] (JA 138-39.) There are other requirements for licensure, such as a prohibition on licensing anyone who has been convicted of a violent felony in the past five years, but those requirements are not directly at issue in this lawsuit, since neither Main nor Edwards is actually burdened by them (because neither is a felon). *See* D.C. Mun. Regs. tit. 19, § 1203.1(c). The obstacle about which Main and Edwards complain is the requirement that they pass an

[4] The record is silent as to what interest, if any, the District of Columbia has in preventing guides who speak only Spanish from communicating with groups of people who speak Spanish.

examination (and pay associated fees) before they may lead (or even describe things to) tour groups.

The record contains conflicting evidence regarding the scope of the written examination. In its interrogatory responses, the District of Columbia asserted that "the examination [was] not confined to a specific list of topics, nor [were] the questions drawn only from a specific list of publications." (JA 165-66.) But in its 30(b)(6) deposition, the District of Columbia's designee agreed that "the written examination covers 14 [specific] topics . . . drawn from nine [specific] sources." (JA 145-46; 148.) Whichever of these is true—however large a universe of information is covered by the test—a minimum score of 70% is required in order to obtain a license. (JA 1 45-46; 148.)[5] The questions and answers themselves were written by a committee of individuals drawn from the general public. (JA 140-41.) The District used only three criteria to decide whether an individual was qualified to sit on the question-writing committee: the individual (1) could not be a teacher, (2) needed to be willing to put in the

[5] A sample 100-question tour-guide examination was produced in discovery and has been filed under seal for the Court's convenience. Appendix Vol. 2. While this sample consists entirely of actual questions used for the examination, it does not, of course, include *all* questions that might be used for the examination.

time necessary for the committee, and (3) must not have committed any crimes. (JA 143.) No volunteer was rejected from the committee. (JA 142-43.)

In short, then, the tour-guide examination to which Plaintiffs object imposes a financial cost of $200 as well as the burdens associated with studying for an exam that either (1) covers 14 separate topics and requires the study of nine different publications, or (2) covers the entire universe of knowledge about the District of Columbia and requires the study of the entirety of the District's history. Either way, it is fair to say that the exam covers far more than Edwards and Main want to (or would be able to) discuss in their tours.

Significantly, the record contains no evidence that the licensing examination prevents or reduces any danger to the public health, safety, or welfare. During discovery in the district court, the plaintiffs conducted a deposition of the District pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure on (among other things) the topic of "[a]ny dangers, of which Defendant is aware, that unlicensed tour guides operating in Washington, D.C, pose to the public health, safety or welfare." (JA 158.) In response, the District identified only one danger to the public health,

safety, or welfare, which is that an unlicensed guide might have a prior criminal conviction. (JA 154.) Even when further prompted, the District's 30(b)(6) representative confirmed that this was the only possible danger of which she was aware. *Id.* The District further confirmed that it was unaware of any circumstance in which anyone had been harmed in any way by a tour guide in Washington, D.C. (JA 155.) In other words, the only risk that the District could identify in support of its mandatory licensing program was the danger of guides with prior criminal convictions—a concern totally unrelated to the examination requirement, and a concern that, in any event, has never resulted in any actual harm to any person in the city.

Main and Edwards Refuse to Obtain Tour-Guide Licenses.

Main and Edwards do not have, and refuse to obtain, a tour-guide license. (JA 170-71; 175-76.) Their refusal has several bases. First, the burdens associated with obtaining a license are significant: Paying $200 each and spending hours studying for the examination would constitute significant costs for Plaintiffs. (JA 171; 176.) While, as discussed above, it is not entirely clear how broad the scope of the exam is, it is beyond dispute that preparing for the test would require Plaintiffs to spend a significant

amount of time and effort studying to learn information that they do not believe would improve the quality of their tours. (JA 171; 176.) Segs in the City tours follow carefully drawn routes based on the demands of the National Park Service and traffic rules in Washington, D.C.—it would be wasteful for Plaintiffs to memorize facts about places their tours do not (and cannot) go. (JA 171; 176.)

Main and Edwards's decision to avoid the burdens of studying for and passing the tour-guide exam is not idiosyncratic. For example, the summary-judgment record contains testimony from Megan Buskey, a former Fulbright scholar with extensive expertise in American history who wanted to work as a tour guide but chose not to because of the burdens associated with the licensing exam. (JA 178-80.) In Buskey's eyes, she had three options: (1) "to spend a whole lot of time filling out paperwork and studying for the test," (2) "to give tours for free," or (3) "just to remain silent." (JA 179.) With the exception of a single 90-minute tour she gave in 2011, Buskey has chosen to remain silent in the face of the tour-guide licensing burdens. *Id.*

But even beyond the burdens the regulations impose, Plaintiffs' objection is one of principle: They do not believe the government has any

business deciding whether or not they are qualified to talk to their customers. (JA 171; 176.) When they filed their summary-judgment motion, their business employed several independent contractors as part-time guides, three of whom had successfully obtained tour-guide licenses.[6] (JA 170; 175.) As a result, their company employed people who could legally guide tour groups and describe points of interest to those tour groups—but Plaintiffs themselves were forbidden from doing either of these things on pain of imprisonment.

The reality is this: If Main or Edwards rode along on their business's tours (led by a licensed guide) without talking to their customers once the Segway training was complete, they would not need a license. Indeed, if Plaintiffs simply rode along on those tours while using their radios only to provide advice on the proper technique for riding a Segway, they would not need a license. They need a license if, and only if, they choose to communicate—to describe or lecture—about the District or particular points of interest therein.

[6] Main and Edwards have a principled objection to obtaining licenses themselves, but they were unwilling to ask their part-time workers to risk criminal penalties for conducting unauthorized tours. (JA 170; 175.)

SUMMARY OF ARGUMENT

This case is a challenge to the District of Columbia's tour-guide licensing requirement—a requirement that expressly prohibits people from "describ[ing], explain[ing], or lectur[ing]" to tour groups about points of interest in the city without first passing a test about the city's history. It is not a challenge to the District of Columbia's ability to regulate businesses generally or require them to obtain licenses. It is only a challenge to the District of Columbia's ability to forbid people from talking about particular topics with tour groups without first getting the government's blessing.

The district court's primary error in this case is its holding that the tour-guide license restricts only conduct rather than speech—that, in other words, the tour-guide license is just a rule about whether people can *walk around* with their customers, and that the fact that these people sometimes also talk to these customers is purely incidental. But the District of Columbia does not want to (and has not attempted to) restrict the simple act of walking around the city with other people for money. The District of Columbia does not impose burdens that are related to whether one can safely walk around with other people in the city (like limiting the size of tour groups or requiring guides to have special traffic-safety education).

Instead, it has restricted (explicitly in the text of its regulations) the ability to *communicate with* people who are walking around the city—literally making it illegal to "describe[ ]" things to them without a license—and it has imposed burdens that are related to whether would-be guides can convey useful and interesting information to their audience. There are many regulations that control moving around the city: It is illegal to drive, for example, without first proving to the government's satisfaction that one understands traffic rules and can operate a car adeptly enough to keep other people safe. The tour-guide license is different. It makes it illegal to talk to people without first demonstrating a sufficient level of historical knowledge. It is a restriction on *speech*, and it must be analyzed as such. *Cf. Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S. Ct. 2705, 2724 (2010) (explaining that, where "the conduct triggering coverage under the statute consists of communicating a message," a statute is a restriction of speech rather than conduct).

Moreover, the licensing requirement triggers strict scrutiny. The licensing requirement is content-based, in that it applies only when people discuss certain topics ("points of interest" in the District of Columbia), and it is speaker-based, in that licensed guides may say whatever they want

while unlicensed guides must remain silent under threat of criminal punishment. Since the speech of tour guides does not fall under any recognized exception to the ordinary rules governing core First Amendment speech, strict scrutiny applies. And since the tour-guide license cannot hope to survive under that standard, the district court's opinion must be reversed.

Even if the tour-guide license were content-neutral, however, the district court's grant of summary judgment to the government would have been error. Regardless of the proper standard of First Amendment scrutiny, the tour-guide license restricts free speech, and it is therefore the government's burden to justify that restriction. The district court's grant of summary judgment to the government despite the complete absence of record evidence that the tour-guide license prevents any harm to the public health, safety, or welfare was error. The record contains little more than the government's bare assertion that requiring tour guides to pass a multiple-choice test will benefit the public. But the government has an affirmative burden under *any* level of First Amendment scrutiny, and an assertion in the absence of evidence is insufficient to carry that burden. The district court's opinion should therefore be reversed.

ARGUMENT

The district court's opinion suffers from two independent reversible errors. First, it concluded that the tour-guide license was a restriction on conduct rather than a restriction on speech. Second, it upheld the license's burdens on speech despite the absence of record evidence justifying those burdens.

Standard of Review

A district court's grant of summary judgment is reviewed *de novo*, and all evidence must be considered in the light most favorable to the non-moving party. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 576 (D.C. Cir. 2013).

I. THE TOUR-GUIDE LICENSE RESTRICTS SPEECH, NOT CONDUCT.

As the district court correctly recognized, the core dispute in this case is whether the tour-guide–licensing requirement is a restriction on speech or a restriction on conduct. JA 193. The district court erred, however, in holding that the tour-guide license is a restriction on conduct with only an incidental effect on speech and therefore subject to review under *United States v. O'Brien*, 391 U.S. 367 (1968). This holding cannot be squared with binding precedent. Further, it disregards both the plain language of the challenged regulations *and* their practical effect.

The Supreme Court has made clear that distinguishing between "regulations of speech" and "regulations of conduct" is essentially a practical inquiry: If the "conduct" that triggers punishment under a law involves communicating a message, then the law is a regulation of speech and must be analyzed as one. *See generally Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S. Ct. 2705 (2010). In *Holder*, a group of citizens and organizations challenged the federal prohibition on providing "material support or resources" to designated terrorist organizations, alleging that they wanted to provide (among other things) "legal training, and political advocacy." *Id.* at 2713-14. In *Holder*, as in this case, the government claimed that "the only thing truly at issue in this litigation is conduct, not speech," and that the law was therefore subject only to *O'Brien* review. *Id.* at 2723. The Supreme Court squarely rejected this argument. While the Court acknowledged that a prohibition on providing material support to terrorists "*generally* function[ed] as a regulation of conduct," it noted that this was not the dispositive inquiry. *Id.* at 2724. Instead, the inquiry was whether, "as applied to the plaintiffs, the conduct triggering coverage under the statute consists of communicating a message." *Id.* (citing *Cohen v. California*, 403 U.S. 15 (1971)).

In other words, the question is not whether a law, in the abstract, is aimed in some metaphysical way at "speech" or "conduct." The inquiry is a practical one: whether the law's application to a particular plaintiff is triggered by what that plaintiff *says* instead of simply what that plaintiff *does*. And, in this case, the tour-guide license is triggered by Main's and Edwards's speech, as shown by both the text and the practical operation of the requirement. Indeed, Main and Edwards are in a stronger position than the plaintiffs in *Holder*: While the plaintiffs in that case challenged a general prohibition on aiding terrorist groups as it applied to their speech, the regulations at issue here are squarely directed at speech—and only speech.

This is made plain by the District's tour-guide regulations themselves. Looking at the regulations is particularly useful here because the text of the underlying enabling statute (which is essentially unchanged since 1932) provides little guidance on the speech/conduct question. It reads, in full:

> No person shall, for hire, guide or escort any person through or about the District of Columbia, or any part thereof, unless he shall have first secured a license so to do. The fee for each such license shall be $ 28 per annum. No license shall be issued

> hereunder without the approval of the Chief of Police. The Council of the District of Columbia is authorized and empowered to make reasonable regulations for the examination of all applicants for such licenses and for the government and conduct of persons licensed hereunder, including the power to required said persons to wear a badge while engaged in their calling.

D.C. Code § 47-2836.

On its own, this language tells us little about whether the law restricts speech or conduct—that question turns on what it means to "guide" or "escort." One could certainly imagine, for example, a licensing regime forbidding anyone from physically escorting customers around town without passing a traffic-safety test. A regime like that would obviously be a restriction on conduct, even if it might have an incidental effect on speech.

To figure out exactly what the District of Columbia means to restrict, we must turn to the implementing regulations. Those make clear that there are two categories of people who must have a license: (1) "any person who engages in the business of guiding or directing people to any place or point of interest in the District" *or* (2) "any person . . . who, in connection with any sightseeing trip or tour, describes, explains, or lectures concerning any

place or point of interest in the District to any person." D.C. Mun. Regs. tit. 19, § 1200.1.

The shift in language from the statute (which purports to restrict "escort[ing]" people) to the regulations (which do not) is instructive. The tour-guide regulations do not actually prohibit anyone from simply "escorting" someone about the city—presumably because this prohibition would sweep up any number of people (taxi drivers, bus drivers, legislative aides) who routinely escort their customers or employers around the city but don't engage in the kind of speech at which the tour-guide license is aimed. Instead, the regulations prohibit people who "guid[e] or direct[ ]" tour groups: that is, people who communicate advice and information about where to go.[7]

And the second category of people who need a license—those who "describe[], explain[], or lecture[]" about points of interest in connection with a sightseeing tour—is even more instructive. Based on the plain

[7] The District of Columbia's 30(b)(6) designee confirmed that the regulations were meant to target communication. (JA 152 ("Q: . . . What's your understanding of who is required to hold a tour guide license in Washington, D.C. A: Persons that are able to communicate with others regarding sights, dates, places, times, things of that nature of the District of Columbia, historical sights.").)

language of the regulation, anyone, regardless of whether they themselves guide or direct a group, is prohibited from *lecturing* to the group without first obtaining a license.

The district court, for its part, largely dismissed the second half of the regulations' definition, dealing with it only in a footnote. (JA 195.) In the district court's view, tour guides serve a "dual function": They *physically* "escort tour groups" around the city, and they additionally "typically communicate[] information and opinions about places of interest in Washington, D.C." (JA 104-95 & n.6.) In the district court's view, though, the tour-guide license is directed principally at the first of the two functions and affects the second only incidentally. But this view cannot be squared with the plain facts that:

(1) The city allows any number of people to physically escort others without passing a history test and obtaining a tour-guide license;

(2) The largest burden imposed by the tour-guide license takes the form of a multiple-choice history test, no portion of which addresses traffic safety or any other topic related to whether an applicant can safely escort groups around the city. This makes

sense only if the government is motivated by a concern that guides might not be sufficiently knowledgeable to lecture tour groups about history; and

(3) The regulations, in operation, explicitly impose restrictions on people who *lecture* or *describe things* to tour groups in addition to simply *guiding* or *directing* them.

The easiest way to understand the practical operation of the licensing requirement is to look at its treatment of tour buses. Tour buses in the District of Columbia can operate in one of two ways: First, they can have a "licensed sightseeing guide on board the vehicle during its sightseeing tours." D.C. Mun. Regs. tit. 19, § 1204.3. Alternatively, they can "utilize[ ] only audio recordings during the sightseeing tour," in which case no licensed guide is needed. *Id.* This second option comes with a proviso, however: If a driver of a sightseeing vehicle "talks, lectures, or otherwise provides sightseeing information to passengers while the vehicle is in motion[, she] must be licensed as a sightseeing tour guide." In other words, if a driver simply drives paying customers around the city, she is not required to have a tour-guide license. That is, even though she is physically *escorting* her passengers in the colloquial sense of

"accompany[ing them]," she is not "escort[ing]" them within the meaning of the tour-guide license.[8] The driver needs a tour-guide license if—and only if—she conveys "sightseeing information." D.C. Mun. Regs tit. 19, § 1204.3. If she drives in silence, she does not. If she drives while the bus's audio system plays a recording of her own voice, she does not. If she drives and tells passengers about the mechanical workings of the bus itself, she does not. If she drives and tells passengers her thoughts about the city's architecture, though, she does.[9]

In its preliminary-injunction opinion, the district court addressed this distinction by reasoning that it is nonetheless a distinction based on conduct: that a driver who simply *drives* is engaged in "the conduct of driving a bus" while a driver who conveys information is "engaged in the conduct of 'guiding or directing'" a tour group. *Edwards*, 765 F. Supp. 2d at

[8] Similarly, literally thousands of bus, taxi, and limousine drivers ply their trade in the District of Columbia without being required to first pass a history test.

[9] At the preliminary-injunction stage, the district court speculated that this discrepancy might be due to the fact that tour-bus drivers were required to hold a special license from the District of Columbia Taxicab Commission. *See Edwards v. Dist. of Columbia*, 765 F. Supp. 2d 3, 17 n.9 (D.D.C. 2011). Not only is there no evidence in the record to support this speculation, the Taxicab Commission's rules governing tour-bus drivers were repealed in 2012, without any concomitant change in the tour-guide license. 59 D.C. REG. 3158 (April 20, 2012).

16-17. But, as in *Holder*, labeling something "conduct" does not end the inquiry. As in *Holder*, the "conduct" that triggers the application of the licensing requirement consists entirely of speech—of saying "Out the left window, you'll see the Washington Monument" instead of saying "The bus has a full gas tank." And as in *Holder*, that makes the tour-guide license a content-based restriction on speech.

Edwards and Main, then, find themselves in a position parallel to the *Holder* plaintiffs. In *Holder*, the "conduct" that triggered the application of the law was speech that imparted a specific skill or "communicate[d] advice derived from 'specialized knowledge'"; speech conveying information derived from general knowledge was not criminalized. 130 S. Ct. at 2724. Here, the "conduct" that will trigger the licensing requirement is describing "points of interest" to a tour group; giving people in the group tips on Segway safety (like "Slow down!") does not require a license. And here, just as in *Holder*, that means the challenged law is a regulation of speech, not of conduct. Main and Edwards are free, of course, to train their customers in the proper use of a Segway without a tour-guide license. They are even free to trail along behind their customers as the customers roam about the city on their own or even take a tour led by one of Segs in

the City's licensed guides. But if they want to go along with a group and "describe[ ], explain[ ], or lecture[ ]" about points of interest in the city, they face imprisonment for their speech. Simply put, the only way to tell whether someone is acting as an unlicensed guide is to listen to what they say; that makes the licensing regulations a restriction on speech, not conduct.[10]

To be clear, there are any number of other regulations that affect tour guides without singling them out because of their speech. But contrasting these regulations with the tour-guide license makes the distinction clear. Consider, for example, a different kind of bus-driver licensing: The District

[10] A decision from the Eastern District of Louisiana evaluating a parallel tour-guide license illustrates the constitutional problem with defining "tour guides" by reference to their speech. In the Louisiana case, the court acknowledged that "the licensing scheme does, in operation, 'refer[ ] to the content of expression," but it found this reference to the content of tour guides' speech justified: "The only reason reference to the content of a tour guide's speech is necessary at all in [the law] or in the administration of the licensing scheme is because it would otherwise be difficult to describe the act, the conduct, requiring a license." *Kagan v. City of New Orleans*, No. 11-3052, 2013 U.S. Dist. LEXIS 95546, *12-*14, 2013 WL 3440154, *4 (E.D. La. July 9, 2013). This is exactly backwards, though. Restrictions on conduct that cannot be described without reference to the content of someone's speech are not restrictions on conduct at all; they are content-based restrictions on speech. *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (quoting *Ward v. Rock Against Racism*, 591 U.S. 781, 791 (1989) (internal quotation marks and emphasis omitted)).

of Columbia (like many states) requires a commercial driver's license (or CDL) to drive certain kinds of commercial vehicles, like buses. *See generally* http://www.dmv.org/washington-dc/apply-cdl.php. If a tour-bus driver were to bring a First Amendment challenge to the CDL law, on the grounds that it interfered with her ability to talk to her customers while she drove her bus, that challenge would be analyzed (and presumably upheld) under the standard articulated in *O'Brien*. While the CDL requirement has some *incidental* effect on speech, it is clearly focused on conduct—on driving and the safety concerns caused by driving.

The requirements of the tour-guide license are the opposite of this. They are triggered by *speech*—by whether or not someone "describes, explains, or lectures" about points of interest in the city. Sometimes the people who are doing the describing are *also* engaged in conduct (like driving around the city). Sometimes (as when they're riding along on a tour bus or simply lecturing to a tour group while it stands still) they are not engaged in any conduct besides simply speaking. And thousands of people engage in the same physical conduct (like taxi or bus drivers who escort people around the city every day) without triggering the tour-guide law's requirements because, while they surely "escort" people, they do not

convey sightseeing information.[11] In other words, the tour-guide law is analogous to a rule that said *nobody* needs a license to operate a bus *unless* they talk about history while they drive.

This conclusion is buttressed by the requirements for *obtaining* a tour-guide license. The requirements for a tour-guide license, as discussed above at 6-9, center around making sure an applicant can pass a multiple-choice test about the city and its history. If the tour-guide licensing requirement is simply a matter of regulating people who physically walk around with tour groups, testing their knowledge of historical facts and dates makes no sense. The only reason to make people pass a history test is to police their ability to talk about (and answer questions about) history. And that is exactly what the District is trying to do.[12]

This Court's previous analysis of regulations of conduct are instructive here. In *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011), this Court analyzed a local statute prohibiting "defacement" of public property

[11] To be sure, taxi and bus drivers must have a license to drive a taxi or bus, but they do not need a tour-guide license.

[12] The District of Columbia's 30(b)(6) designee confirmed as much, agreeing that the purpose of requiring a license when people communicate sightseeing information is to make sure these people are sufficiently qualified to "answer questions"—that is, sufficiently qualified to talk to their customers about the city. (JA 151.)

brought by political protestors who wanted to chalk the sidewalk in front of the White House. 642 F.3d at 1115. As Judge Kavanaugh pointed out in his concurrence, this was an easy case: "No one has a First Amendment right to deface government property." *Id.* at 1122 (Kavanaugh, J., concurring). Even in such an easy case, though, this Court's analysis contains lessons applicable here. For example, the *Mahoney* court found that the statute in that case was content-neutral because it prohibited certain activities (like defacing the sidewalk) regardless of any message a speaker wished to convey. *Id.* at 1118. In other words, Mr. Mahoney would be prohibited from chalking *anything* on the sidewalk, whether he wanted to write "This is the White House" or "Look to your left" or "Riding Segways is fun, " or whether he simply wanted to deface the sidewalk with chalk without conveying any message at all. *Id.*; *accord Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 516 (D.C. Cir. 2010) (upholding regulation "prohibit[ing] certain *forms* of expressive conduct" for reasons unrelated to their content (emphasis added)). That is not the case here. Edwards and Main, unlike Mr. Mahoney, are subject to criminal penalties only if they say "This is the White House" or "Look to your left"; they are not subject to any penalty if they simply say "Riding Segways is

fun" or communicate no message at all. D.C. Mun. Regs tit. 19, § 1200.1. Similarly, in *Mahoney*, the government prohibited anyone from defacing government property; it did not attempt to restrict the right to chalk the sidewalk to those who had proven themselves to be sufficiently talented artists. But here, the only people who may communicate about the city with tour groups are those who have demonstrated their aptitude in history, architecture, and related topics to the government's satisfaction. That is a restriction on speech and communication, not simply a restriction on the conduct of walking around the city, and it must be evaluated as one.

II. THE TOUR-GUIDE LICENSE IS SUBJECT TO STRICT SCRUTINY.

The tour-guide license is subject to strict scrutiny. It is content-based, in that it applies to people who speak on some topics but not on others. It is speaker-based, in that some people (licensed guides) may speak with impunity while others (those without a license) may not speak to paying customers at all. It restricts core First Amendment speech rather than commercial speech. And the restricted speech (information about "points of interest" in the District of Columbia) does not fall into any historically recognized exception to traditional First Amendment protection. Because

the district court did not find (and could not have found) that the tour-guide license meets the high standards of strict scrutiny, the opinion below should be reversed.

A. The Tour-Guide License Is Content-Based.

The tour-guide regulations are a classic example of illegitimate content-based restrictions on speech: laws that make it illegal to say certain things in a public forum without the government's prior permission.[13] They impose burdens (in the form of fees and a mandatory examination, for those who seek a license, and in the form of imprisonment for those who do not) on people whose speech contains particular content: information about points of interest in Washington, D.C. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995) ("[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."). The law singles out certain topics—topics that are the subject of everyday discourse—and makes it illegal to talk about them without obtaining the government's prior permission. There is perhaps no category of regulation

[13] The licensing requirements apply only in public spaces like streets and sidewalks, which are, of course, "quintessential traditional public fora." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 676 (1992).

toward which the Supreme Court has been more consistently hostile. *See*, *e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002) ("It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.")

The regulations are also content based because they cannot be "justified without reference to the content of the regulated speech." *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (quoting *Ward v. Rock Against Racism*, 591 U.S. 781, 791 (1989) (internal quotation marks and emphasis omitted)). Besides the $200 in assorted fees, the primary hurdle to licensure is the requirement that would-be guides pass a multiple-choice test covering topics like the District's history and architecture. In other words, the District of Columbia wants to make sure that the only people paid to talk about the city are people who know certain facts about the city that the government has deemed important.

There are, of course, conceivable content-neutral regulations of tour guides, like regulations restricting noise levels or the permissible size of

tour groups. *See generally Smith v. City of New Orleans*, No. 03-02531, 2006 U.S. Dist. LEXIS 4482, 2006 WL 286340 (E.D. La. Feb. 2, 2006), *aff'd*, 217 Fed. Appx. 354 (5th Cir. 2007) (unpublished) (upholding content-neutral restrictions on walking tours). But the regulations here are plainly aimed at improving the quality of what local tour guides say—a goal that is both content-based and, when applied to core First Amendment speech, deeply troubling. *See*, *e.g.*, *Davis v. FEC*, 554 U.S. 724, 744 n.8 (2008) ("[I]t would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech."); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").

The Supreme Court has repeatedly made clear that laws giving the government the power to decide who may speak and who may not—and to throw unauthorized speakers in jail—are anathema to the First Amendment. *See*, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 356 (2010) ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control

thought."). Because that is exactly what the tour-guide licensing regulations do, they are subject to the most stringent judicial review.

B. The Tour-Guide License Discriminates Among Speakers.

Besides imposing burdens based on the *content* of an individual's speech, the tour-guide license also triggers strict scrutiny because it allows some individuals (licensed guides) to speak freely while commanding others (the unlicensed) to remain silent. The Supreme Court has repeatedly struck down laws that ""impose[ ] a burden based on the content of speech and the identity of the speaker." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011). This is true even though—as in *Sorrell*—"the burdened speech results from an economic motive, [because] so too does a great deal of vital expression." *Id.*

Sorrell is particularly instructive here. That case involved a challenge to a Vermont law prohibiting the sale of certain pharmaceutical-prescriber-identifying information for marketing purposes. *Id.* at 2659. In that case, like this one, the government argued that the regulation reached conduct, not speech, because it was merely a prohibition on the commercial sale of certain information. *Id.* at 2666. The Court rejected that argument, looking at both at the face of the ordinance and "its practical operation," both of

which made clear that the law was "directed at certain content and [was] aimed at certain speakers." *Id.* at 2663; 2665; *see also id.* at 2667 ("So long as they do not engage in marketing, many speakers can obtain and use the information. But [pharmaceutical marketers] cannot.").

Similarly, here, the regulations single out particular information (about points of interest in Washington, D.C.) and identify certain people (unlicensed guides) who may not convey that information for pay. But the government may no more prohibit some people from selling information about points of interest in the city than it could impose a "ban on the sale of cookbooks, laboratory results, or train schedules" without a license. *Id.* at 2666-67 (quoting *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271-71 (2d Cir. 2010)). The tour-guide regulations, like the regulations in *Sorrell*, are a restriction on *who* may say *what*.

The district court, however, held that the tour-guide license is not speaker-based because "*all* persons who act as paid tour guides are subject to identical regulations." (JA 198.) But this simply evades the question. The tour-guide license divides would-be speakers into two groups: licensed tour guides (who may say whatever they want to paying customers) and *unlicensed* tour guides (who may not "describe" places or

points of interest on pain of criminal punishment). It is *that* distinction among speakers to which Main and Edwards object, and it is *that* distinction that must be justified with compelling evidence. And, as there is no such evidence in the record, it is that distinction that fails under the First Amendment.

C. The Tour-Guide License Restricts Ordinary Non-Commercial Speech.

The speech restricted by the tour-guide license—speech about points of interest in the District of Columbia—is core First Amendment speech, not commercial speech. It is, of course, true that the tour-guide license is only required if would-be guides are *paid* for their speech, but that a speaker is paid for his speech is of no constitutional significance. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away." (citation omitted)); *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 801 (1988) ("[A] speaker is no less a speaker because he or she is paid to speak.").

But *commercial speech* does not mean *any speech by people who are engaged in commerce*. "[T]he core notion of commercial speech [is] speech

which does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (internal quotation marks and citation omitted). Even where courts have extended the doctrine beyond this basic core, they have only done so to include things like "material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product." *See*, *e.g.*, *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009).[14]

D. The Tour-Guide License Does Not Fall Into Any Recognized Exception to the First Amendment.

Just as the tour–guide license does not fall into the Supreme Court's established commercial–speech doctrine, nor does it fall within any of the other categories of unprotected speech permissible under the Supreme Court's decision in *United States v. Stevens*, 559 U.S. 460 (2010).

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[14] Of course, as explained below, even commercial-speech restrictions must be justified by more evidence than the record in this case has to offer. If the District of Columbia only wanted to prevent people from *referring to themselves* as a "tour guide" without a license (instead of its current prohibition on working as one), it would still need to present evidence that calling oneself a tour guide was either misleading or otherwise dangerous to the public. *See*, *e.g.*, *Byrum v. Landreth*, 566 F.3d 442, 448-49 (5th Cir. 2009) (finding insufficient fit between consumer-protection goals and government restriction on the truthful use of the term "interior designer").

Stevens involved a federal law that criminalized the sale or possession of depictions of unlawful animal cruelty. *Id.* at 464. In defense of the law, the government argued that depictions of unlawful animal cruelty were analogous to child pornography, and the Court should therefore not apply ordinary First Amendment scrutiny to the law. *Id.* The Supreme Court rejected this argument, and outlined a specific procedure federal courts must follow in identifying categories of speech that are outside the normal bounds of the First Amendment.

As the Court explained, federal courts do not simply have a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment" on the basis of "an ad hoc balancing of relative social costs and benefits." *Id.* at 472. Instead, the appropriate inquiry is whether the given category of speech has *historically* been treated as unprotected. *Id.* The Supreme Court looked for evidence that depictions of unlawful animal cruelty had been historically unprotected and, finding none, subjected the law to ordinary First Amendment scrutiny. *Id.* This central holding of *Stevens* was subsequently reaffirmed in *Brown v. Entertainment Merchants Association*, which invalidated a ban on the sale or rental of violent video games to minors. 131 S. Ct. 2729, 2734 ("[N]ew

categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.").

The record contains no evidence that speech about points of interest in Washington, D.C. has been historically unprotected. Nor is there evidence that speech protections evaporate whenever the government employs its power of occupational licensing; indeed, the Supreme Court has stated precisely the opposite. *See Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781, 801 n.13 (1988) ("Nor are we persuaded by the dissent's assertion that this statute merely licenses a profession, and therefore is subject only to rationality review.").

The rule articulated by the Supreme Court in *Stevens* is straightforward: In the absence of a documented tradition of treating a category of speech as unprotected, that speech is considered fully protected. Simply put, there is no tradition of treating the speech of tour guides as excepted from the First Amendment, and there is no evidence in the record that would support creating such an exception for the first time in this case.

E. The Tour-Guide Licensing Scheme Fails Strict Scrutiny.

Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Nothing in the district court's opinion purports to find that the tour-guide license could survive strict scrutiny, and nothing in the record would support such a finding.

Indeed, a ruling that upheld the government's ability to restrict tour guides' speech for the purpose of quality control would be impossible to reconcile with the Supreme Court's First Amendment decisions. *See*, *e.g.*, *Davis v. FEC*, 554 U.S. 724, 743 n.8 (2008) ("[I]t would be dangerous for the government to regulate core political speech for the asserted purpose of improving that speech."). There is no case to support the proposition that the tour-guide license as written can survive strict scrutiny. Nor has the government claimed than it can. Because of the government's failure to support the District of Columbia's law under the standard of review to which it is subject, the district court's opinion must be reversed.

III. THE TOUR-GUIDE LICENSING LAW FAILS UNDER ANY LEVEL OF FIRST AMENDMENT SCRUTINY.

Even if the tour-guide license were not a content-based restriction on speech—if it were, instead, a content-neutral time, place, or manner restriction—it would still have to be justified by evidence. Indeed, there exists no standard of review under the First Amendment under which the government can prevail *without* presenting evidence. And the record in this case is devoid of evidence that supports the tour-guide license's burdens on Main and Edwards's speech.

A. All Restrictions on Speech Must Be Justified by Evidence.

As explained more fully above, the tour-guide license is a content-based restriction on speech and subject to strict scrutiny. But even if that weren't the case—even if it were subject to a lower level of scrutiny—the district court's opinion still could not stand.

Under any standard of First Amendment review, the government has an affirmative burden to present real evidence that a challenged restriction is protecting the public from a real harm. When analyzing content-neutral time, place, or manner restrictions, courts demand evidence that the law is

narrowly tailored to serve a legitimate government interest.[15] *See*, *e.g.*, *Lederman v. United States*, 291 F.3d 36, 44 (D.C. Cir. 2002) (noting that courts "closely scrutinize challenged speech restrictions to determine if they indeed promote[ ] the Government's purposes in more than a speculative way" (quotation marks and citation omitted)); *see also id.* ("the fact that a substantially less restrictive regulation [would] be equally effective in promoting the same ends may be relevant to the constitutional analysis" (quotation marks and citation omitted)).[16] When analyzing restrictions on

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[15] While the test described in *United States v. O'Brien*, 391 U.S. 367 (1968), which the district court held was controlling, is phrased differently from the test used for time, place, or manner restrictions, the Supreme Court has indicated that they are the same "intermediate scrutiny" standard. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010) (referring to the *O'Brien* test as "what we have since called intermediate scrutiny"); *accord Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 & n.8 (1984). And, as discussed in the main text, even intermediate scrutiny requires real evidence.

[16] This Court is hardly alone in requiring that the government present real evidence that it is protecting the public from harm in order to justify even a content-neutral restriction on speech. *See*, *e.g.*, *Horina v. City of Granite City*, 538 F.3d 624, 633-34 (7th Cir. 2008) ("[T]he government must . . . proffer *something* showing that the restriction actually serves a government interest, and we have struck down time, place, and manner restrictions where the government failed to produce 'objective evidence' showing that the restrictions served the interests asserted." (citation omitted)); *Pagan v. Fruchey*, 492 F.3d 766, 774 (6th Cir. 2007) (en banc) (rejecting "standard of 'obviousness' or 'common sense,' and "requir[ing] *some* evidence to establish that a speech regulation addresses actual harms with some basis

commercial speech, courts demand evidence that a law advances an asserted interest "in a direct and material way." *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) ("[The government's] burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

B. The Tour-Guide License Is Not Justified By Evidence.

The district court made two key errors in evaluating the proposed justifications for the tour-guide license. First, it misidentified the government's burden—that is, it misidentified what, specifically, the government needed to justify. Second, it failed to identify record evidence that actually *carries* that burden.

With respect to the government's burden, the district court said that the government was required "to demonstrate that an *unregulated tourism industry* would pose some social harm or that the regulations serve a useful

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in fact"); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (holding government must "present . . . substantial supporting evidence of harm . . . before an ordinance that threatens protected speech can be upheld" (internal quotation marks and citations omitted)).

purpose." (JA 201.) This was error. As discussed above, the District of Columbia can (and does) have regulations of tour guides, just as it has of any other business. For example, Plaintiffs can be required to have (and, in fact, Plaintiffs *do* have) a business license in order to conduct business within the District of Columbia.

What Plaintiffs challenge—and what the government must justify—is the prohibition on giving tours (including a prohibition on describing certain things to paying customers) without first passing a history test and bearing other, related burdens. The record is utterly devoid of evidence that *these* burdens on speech do anything at all to advance a legitimate government objective.[17] As discussed above, the only record evidence

[17] Indeed, the district court's opinion does not cite any record evidence in support of its finding that the tour-guide law is justified; instead it cites three of the government's briefs: its consolidated motion to dismiss and opposition to plaintiffs' motion for preliminary injunction (Docket No. 9) at 5-9; its opposition to the plaintiffs' summary judgment motion (Docket No. 39) at 9, and its motion for summary judgment (Docket No. 36) at 10. (JA at 18.) Of these, only the first contains any citation to evidence at all (which is addressed in text). The last two do not themselves cite any evidence—instead, each cites to the district court's preliminary-injunction opinion (or to Defendant's Statement of Undisputed Material Facts, the cited portion of which contained only a citation to the district court's preliminary-injunction opinion). And the district court's preliminary-injunction opinion, for its part, simply recounts the legislative history of the tour-guide license and points to an extra-record study showing that "the District

concerning the District of Columbia's beliefs and evidence regarding the dangers of unlicensed tour guides is the District's 30(b)(6) deposition testimony that guides with criminal convictions *might* pose a danger, although they never actually have. *See supra* at 9-10. Even if one credits the idea that ex-felon tour guides (as opposed to ex-felon street performers, hotel concierges, or pamphleteers) pose some particular threat to the public, that concern has nothing at all to do with the requirement that would-be guides pass a history test. The only thing justifying the history test is the government's simple assertion that multiple-choice tests make for better guides and better experiences for tourists. That is not enough.

Instead of rejecting the government's assertions as unsupported, though, the district court identified two categories of evidence that it believed supported the tour-guide license: (1) "legislative and anecdotal records detailing how [D.C.'s] licensing scheme emerged in response to public pressure in Washington to 'regulate unscrupulous businesses'"; and

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[of Columbia] is the third-most popular tourist destination in America . . . ." *Edwards*, 765 F. Supp. 2d at 7-10; 18-19. In other words, the evidence underlying the district court's conclusion that the tour-guide license actually advances a legitimate government purpose consists almost entirely of the district court's own assertion at the preliminary-injunction stage that this was the case.

(2) "[evidence of] how it provides for the general welfare of tourists and visitors, promotes the tourism industry, and ensures that tour guides have a minimum level of competence and knowledge." (JA 201.) Neither of these has any basis in the evidence; indeed, the only record evidence tends to *contradict* these assertions.

The district court's conclusion that the tour-guide license emerged in response to public pressure to "regulate unscrupulous businesses" is a quotation from the government's consolidated motion to dismiss and opposition to plaintiff's motion for a preliminary injunction (Docket No. 9). (JA 201.) And the citation for this assertion in the government's brief is an excerpt of a 1927 article from the *Washington Post* (a full copy of which is not in the record), which complained that the city had "been a fertile field for promoters of projects which, masquerading under the name of charity or welfare, have only served to pad the pockets of the originators of the scheme" and that tour guides "are said to watch for automobiles bearing out of town license plates, which they halt imperiously with upraised hand to solicit retention of their services." (Docket No. 9 at 7 (citing *Licensing Welfare Bodies*, The Washington Post, Oct. 12, 1927, at 6)).

Even accepting the newspaper article's assertions as true, however, they merely establish that nearly one hundred years ago newspapers were worried about unscrupulous or fraudulent charitable solicitation and that at least some people said self-styled tour guides were overly aggressive in soliciting business. But nowhere in the record is there evidence showing that people were being harmed (either one hundred years ago or today) because tour guides had not been required to pass multiple-choice tests about history or architecture. Nowhere in the record is there even a scintilla of evidence of any problems that could not be addressed by substantially less restrictive regulations that either (1) punish fraud or provide general regulations of business (like the business license that Main and Edwards already possess) or (2) restrict the manner in which guides may solicit business. The tour-guide license is neither of these.

Indeed, if this evidence were sufficient to justify prior testing and licensing of tour guides, it would also be sufficient evidence to justify the testing and licensing of all canvassers who solicit "under the name of charity or welfare." But a blanket restriction like that would clearly violate the First Amendment. *Cf. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (striking down ordinance prohibiting

"canvassers" from going on private property to promote any cause without first obtaining a permit); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1989) (striking down ordinance prohibiting professional fundraisers from retaining "unreasonable" or "excessive" fees). A blanket restriction on tour guides must meet the same fate.

Nor is there evidence in the record to suggest that the tour-guide license "provides for the general welfare of tourists and visitors, promotes the tourism industry, and ensures that tour guides have a minimum level of competence and knowledge." (JA 18.) There is nothing in the record to suggest that tour guides are better off listening to a licensed guide than they would be listening to Main or Edwards, or to people like Megan Buskey, the Fulbright scholar and history expert who would be able to talk to tour groups about the city if not for the tour-guide license. There is nothing in the record to suggest that the city government is somehow better at identifying competent guides than audiences would be at making their own decisions about whom to listen to. There is nothing to suggest that the tourism industry is any more or less vibrant because of the tour-guide license. There is nothing in the record to demonstrate that the licensing exam (which applies equally to people who want to talk about the

city's monuments as it does to people who want to lead tours of historically black neighborhoods or ghost tours that consist of nothing but folklore) does anything to improve the quality or competence of the guides themselves. Nor is there anything in the record to suggest that dramatically less-restrictive laws—like a voluntary-certification program under which guides who pass the city's preferred multiple-choice test can advertise themselves as "city-certified guides," allowing consumers to decide for themselves how much value to place on the multiple-choice exam—would result in any perceptible decrease in quality.

The only thing the record shows in this respect is the government's bare assertion (and the district court's crediting of the bare assertion) that licensing guides is somehow better for all involved than letting consumers decide for themselves which guides they would like to listen to. This is insufficient. *See, e.g.*, *Pearson v. Shalala*, 164 F.3d 650, 659 (D.C. Cir. 1999) (refusing to allow the government's assertions of possible consumer confusion to substitute for evidence that consumers were actually confused).

There is no evidence to suggest that problems complained of by the *Washington Post* in the 1920s continue to exist today (and scant evidence

that they ever existed at all). Similarly, there is no evidence to suggest that any problems that currently exist would be ameliorated by forcing would-be tour guides to take a history test before they are allowed to describe things to the public. And there is no evidence to suggest that a guide's ability to pass a multiple-choice examination on topics of the city's choosing has any correlation with whether that guide's customers are sufficiently entertained and satisfied with their experience. There is, simply put, *no evidence* to support the tour-guide license, and for that reason, the licensing requirement cannot survive any level of First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment to the government should be reversed, and this case should be remanded.

DATE: September 16, 2013

Respectfully submitted,

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Dated: September 16, 2013

/s/ Robert J. McNamara
Counsel for Appellants

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I hereby certify that on this 16th day of September, 2013, I caused this Brief of Appellants and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 16th day of September, 2013, I caused the required copies of the Brief of Appellants and Joint Appendix to be hand filed with the Clerk of the Court and a copy of the Brief of Appellants and Joint Appendix to be hand delivered upon Counsel for the Appellee at the above listed address.

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ADDENDUM

TABLE OF CONTENTS

Addendum Page

1 of 1 DOCUMENT

DISTRICT OF COLUMBIA OFFICIAL CODE

*** CURRENT THROUGH APRIL 1, 2013, AND THROUGH D.C. ACT 19-658. ***

DIVISION VIII. GENERAL LAWS
TITLE 47. TAXATION, LICENSING, PERMITS, ASSESSMENTS, AND FEES
CHAPTER 28. GENERAL LICENSE LAW
SUBCHAPTER I. SPECIFIC LICENSING PROVISIONS

D.C. Code § 47-2836 (2013)

§ 47-2836. Guides

(a) No person shall, for hire, guide or escort any person through or about the District of Columbia, or any part thereof, unless he shall have first secured a license so to do. The fee for each such license shall be $ 28 per annum. No license shall be issued hereunder without the approval of the Chief of Police. The Council of the District of Columbia is authorized and empowered to make reasonable regulations for the examination of all applicants for such licenses and for the government and conduct of persons licensed hereunder, including the power to require said persons to wear a badge while engaged in their calling.

(b) Any license issued pursuant to this section shall be issued as a General Services and Repair endorsement to a basic business license under the basic business license system as set forth in subchapter I-A of this chapter.

1 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1200 (2013)

19-1200. GENERAL DEFINITIONS.

1200.1 Whenever used in this chapter, the term "tour guide" or "sightseeing tour guide" shall mean any person who engages in the business of guiding or directing people to any place or point of interest in the District, or who, in connection with any sightseeing trip or tour, describes, explains, or lectures concerning any place or point of interest in the District to any person.

1200.2 Whenever used in this chapter, the term "sightseeing tour company" shall mean a business that employs a sightseeing tour guide.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116 (July 16, 2010).

NOTES:
REVISION NOTE: Chapter 12, adopted by Article 2 §§ 4(a) & (b), 5 to 7, 8 (a), (b), (c), (d) & (e), and 9 of the Police Regulations of the District of Columbia (January 1983), was replaced in its entirety on July 16, 2010.

2 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1201 (2013)

19-1201. GENERAL LICENSURE REQUIREMENTS.

1201.1 No person shall offer to act as a sightseeing tour guide on the roads, sidewalks, public spaces, or waterways of the District of Columbia unless the person holds a valid sightseeing tour guide license issued by the Department of Consumer and Regulatory Affairs (Department).

1201.2 No sightseeing tour guide shall engage in business or do business with a company or individual not properly licensed by the Department as a sightseeing tour company, if required by District law.

1201.3 No business or entity shall offer, for a fee, to conduct walking tours or tours where customers operate self-balancing personal transport vehicles, mopeds, or bicycles unless the business or entity is licensed by the Department as a sightseeing tour company.

1201.4 No person other than a licensed sightseeing tour guide shall, by the use of a uniform or part of a uniform, or by the use of insignia, device, word or words, or sign, indicate that he or she is engaged in the business of furnishing a sightseeing tour guide service, either on his or her own behalf or on behalf of another.

1201.5 No person, other than a licensed sightseeing tour company or sightseeing tour guide may use the words "sightseeing," "tours," "guide," or any combination of these words, to advertise the availability of sightseeing tour services. This prohibition shall not apply to the use of these words as part of the identifying lettering on vehicles coming into the District or to a tour that is not conducted for profit or compensation.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6117 (July 16, 2010).

3 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1202 (2013)

19-1202. APPLICATION FOR SIGHTSEEING TOUR COMPANY LICENSE; APPLICABLE REGULATIONS.

1202.1 An application for a license to engage in business as a sightseeing tour company shall be made to the Director of the Department of Consumer and Regulatory Affairs (Director) on a form prescribed by the Director.

1202.2 A sightseeing tour company shall apply for a General Business basic business license and shall be subject to the regulations in section 1203 of this chapter and the regulations in chapter 38 of Title 17 of the District of Columbia Municipal Regulations.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6117 (July 16, 2010).

4 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1203 (2013)

19-1203. APPLICATION FOR SIGHTSEEING TOUR GUIDE LICENSE.

1203.1 A person applying for a sightseeing tour guide license shall:

(a) Be at least eighteen (18) years of age;

(b) Be proficient in the English language; and

(c) Not have been convicted or have served all or part of a sentence within the past five (5) years for a felony, or an attempt to commit a felony, of the following types:

(1) A felony involving violence, the threat of violence, reckless driving, or any other action impacting the safety of others, if the Director determines that the record of such a felony indicates that licensure of the applicant as a sightseeing tour guide may pose a reasonable threat to the safety of others; or

(2) A felony involving a breach of trust or dishonesty, unless the Director determines that the applicant is a person of sufficient honesty and integrity to act as a sightseeing tour guide.

1203.2 An applicant for a sightseeing tour guide license shall make a sworn statement as to the veracity of the statements contained in his or her application and pay all required fees related to licensure.

1203.3 An applicant for a sightseeing tour guide license must pass an examination under the supervision of the Director, or the Director's designated agent, covering the applicant's knowledge of buildings and points of historical and general interest in the District.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6117 (July 16, 2010).

5 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1204 (2013)

19-1204. REQUIREMENTS FOR SIGHTSEEING TOUR COMPANIES.

1204.1 A sightseeing tour company licensee engaged in the operation of sightseeing tour vehicles in the District shall obtain the necessary approvals of the District Department of Transportation, the District Department of Motor Vehicles, and the Washington Metropolitan Area Transit Commission.

1204.2 The approval of sightseeing tour vehicles required by § 1204.1 shall be evidenced by the display on each vehicle of the applicable license(s) or certificate(s) issued by the relevant government agencies.

1204.3 A vehicle operated by a licensed sightseeing tour company shall have at least one (1) licensed sightseeing tour guide on board the vehicle during its sightseeing tours in the District. This requirement shall not apply to a vehicle that utilizes only audio recordings during the sightseeing tour; provided, that a driver of such a sightseeing tour vehicle who talks, lectures, or otherwise provides sightseeing information to passengers while the vehicle is in motion must be licensed as a sightseeing tour guide.

1204.4 Each sightseeing tour company shall ensure that its sightseeing tour vehicles comply with all District parking and traffic regulations.

1204.5 A sightseeing tour company licensee shall notify the Department within thirty (30) days after any change to the information provided on the application required by § 1202, including a change to the business address or telephone number of the licensee.

1204.6 The Director may, in connection with the consideration of a sightseeing tour company license application and from time to time during the license term, during regular business hours, require an applicant or licensee to make available to the Director, or the Director's agent, such information as the Director considers necessary to determine or verify whether the applicant or licensee has or retains the qualifications necessary for obtaining or retaining a license, or has violated or failed to comply with an applicable statute or regulation.

1204.7 Failure to make information available to the Director, failure to furnish to the Director information the Director is authorized to request by this chapter, or failure to furnish to the Director or to permit the Director to make copies of such records maintained by the applicant or licensee as the Director may specify, shall be grounds for denial, suspension, or revocation of a license.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as

further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6118 (July 16, 2010).

6 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1205 (2013)

19-1205. REQUIREMENTS FOR SIGHTSEEING TOUR GUIDES.

1205.1 A sightseeing tour guide, while engaged in performing services as a sightseeing tour guide, shall conspicuously wear a badge bearing the licensee's license.

1205.2 No sightseeing tour guide shall cause a customer to be taken to a point of interest without providing that the customer shall be taken from that location to the next point of interest to be visited in the course of the sightseeing tour. This provision shall not apply if:

(a) The customer fails to meet the sightseeing guide or vehicle at the predetermined time and location for departure to the next point of interest; or

(b) The customer makes other travel arrangements with the sightseeing tour guide

1205.3 No licensed sightseeing tour guide shall conduct a sightseeing tour unless the fees for the sightseeing tour have been disclosed in writing prior to the start of the tour.

1205.4 No sightseeing tour guide shall charge or attempt to charge a sum greater than the original charge for the tour, whether in payment for unsolicited merchandise, meals, or services, or for any other reason. This provision shall not apply if the customer specifically authorizes additional services from the sightseeing tour guide.

1205.5 A sightseeing tour guide licensee shall notify the Department within thirty (30) days after any change to the information provided on the application required by § 1203, including a change to the business address or telephone number of the licensee.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6119 (July 16, 2010).

7 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1206 (2013)

19-1206. COMPLAINT AND CONTACT INFORMATION.

1206.1 All sightseeing tour companies or sightseeing tour guides shall furnish each person on a sightseeing tour with a card or ticket containing the following:

(a) The name, address, and telephone number of a person or office authorized to receive complaints relative to the conduct or any part of a sightseeing tour; and

(b) The name, address, and telephone number of the person, firm, or corporation responsible for the conduct and management of the tour.

1206.2 The authorized person or office specified under § 1206.1(a) shall be available to receive complaints during the regular business hours of each day that sightseeing tours are conducted by the sightseeing tour company.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6120 (July 16, 2010).

8 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1207 (2013)

19-1207. PROHIBITION ON VENDING.

1207.1 No vending of any articles of merchandise shall be allowed by any licensee.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6120 (July 16, 2010).

9 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1208 (2013)

19-1208. DENIAL, SUSPENSION, OR REVOCATION OF LICENSES.

1208.1 The Director may refuse to issue or renew, or may suspend or revoke, a sightseeing tour guide license or a sightseeing tour company license issued under this chapter for any reason set forth in this chapter or D.C. Official Code § 47-2844.

1208.2 The Director also may refuse to issue or renew, or may suspend or revoke, a sightseeing tour guide license or a sightseeing tour company license issued under this chapter on any of the following grounds:

(a) Conviction of the licensee of a criminal offense involving fraudulent conduct;

(b) Willful or fraudulent circumvention of a provision of District law or regulation relating to the conduct of the business;

(c) Employment of a fraudulent or misleading device, method, or practice relating to the conduct of the business; or

(d) The making of a false statement in the license application.

1208.3 All qualifications set forth in this chapter as a prerequisite to the issuance of a license shall be maintained for the entire license period. Failure to maintain a qualification during the license period shall be cause for suspension or revocation of the license.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6120 (July 16, 2010).

10 of 10 DOCUMENTS

CODE OF D.C. MUNICIPAL REGULATIONS

*** This file includes all regulations adopted and published through the ***
*** D.C. Register, Vol. 60, Issue 33, August 2, 2013 ***

TITLE 19. AMUSEMENTS, PARKS AND RECREATION
CHAPTER 12. SIGHTSEEING TOUR COMPANIES AND GUIDES

CDCR 19-1209 (2013)

19-1209. PENALTIES.

1209.1 Each licensee shall be liable for all penalties provided for the violation of a provision of this chapter, whether the violation is committed by the licensee or the licensee's agent or employee.

1209.2 Pursuant to D.C. Official Code § 47-2846, a person violating any provision of this chapter shall, upon conviction, be fined not more than three hundred dollars ($ 300) or imprisoned for not more than ninety (90) days, or both.

1209.3 A person whose license as a sightseeing tour company or sightseeing tour guide has been suspended or revoked, and who, after due notice in writing of the suspension or revocation, fails or refuses to surrender the license and badge as directed, or who violates any provision of this chapter, shall, upon conviction, be fined not more than two thousand dollars ($ 2,000) or imprisoned for not more than ninety (90) days, or both.

1209.4 Civil fines, penalties, and fees may be imposed as alternative sanctions for an infraction of this chapter pursuant to titles I-III of the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801.01 et seq.) ("Civil Infractions Act"). Adjudication of an infraction of this chapter shall be pursuant to titles I-III of the Civil Infractions Act.

STATUTORY AUTHORITY: Unless otherwise noted, the authority for this chapter is paragraph 38 of section 7 of An Act Making Appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, approved July 1, 1902, Public, 218, *32 Stat 622,* as amended by An Act approved July 1, 1932, to amend section 7 [thereof] Public, No. 237, *47 Stat. 550,* and as further amended by An Act approved July 22, 1947, Public Law 215, *61 Stat. 402;* D.C. Official Code §§ 47-2836, 47-2851.03a(o), and 47-2851.20

SOURCE: Final Rulemaking published at 57 DCR 6116, 6121 (July 16, 2010).