No. _____

In The
Supreme Court of the United States

CANDANCE KAGAN; MARY LACOSTE;
JOYCELYN M. COLE; and ANNETTE WATT,

Petitioners,

v.

CITY OF NEW ORLEANS, LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. MELLOR
DANA BERLINER
ROBERT J. MCNAMARA*
PAUL M. SHERMAN
ROBERT EVERETT JOHNSON
INSTITUTE FOR JUSTICE
901 N. Glebe Road,
Suite 900
Arlington, VA 22203
(703) 682-9320
rmcnamara@ij.org

**Counsel of Record*

MATTHEW R. MILLER
INSTITUTE FOR JUSTICE
816 Congress Avenue,
Suite 960
Austin, TX 78701
(512) 480-5936

MARK E. HANNA
MOULEDOUX, BLAND,
LEGRAND & BRACKETT, LLC
701 Poydras Street
4250 One Shell Square
New Orleans, LA 70139
(504) 595-3000

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

A New Orleans ordinance requires aspiring tour guides to obtain a license before they may talk to paying customers about the history and points of interest in the city, a process that requires them to pass a multiple-choice history test and undergo a criminal background check and drug test. The Fifth Circuit upheld the ordinance under intermediate scrutiny despite citing no evidence regarding actual harms to the public, the law's tailoring, or the possibility of less burdensome alternatives. Shortly thereafter, the D.C. Circuit, deciding a challenge to a substantially identical law on a substantially identical factual record, expressly rejected the Fifth Circuit's holding. The question presented is:

> Whether New Orleans's tour-guide licensing requirements violate the First Amendment.

PARTIES TO THE PROCEEDINGS

The petitioners are Candance Kagan, Mary LaCoste, Joycelyn Cole, and Annette Watt, all tour guides in New Orleans, Louisiana. The respondent is the City of New Orleans, Louisiana.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Petitioners are all natural persons.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 753 F.3d 560. The Order and Reasons of the district court, App. 5, are reported at 957 F. Supp. 2d 774.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2014; a timely filed petition for rehearing en banc was denied on August 20, 2014. This petition is timely filed on November 18, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The plaintiffs below brought this action pursuant to 42 U.S.C. § 1983, alleging violations of the First Amendment's Free Speech Clause. The challenged ordinance, New Orleans City Code §§ 30-1551 to 30-1557, is reproduced in the Appendix at 30.

STATEMENT

This case is a First Amendment challenge to a New Orleans ordinance that makes it illegal to talk to paying tour groups in traditional public forums like streets or sidewalks without first meeting a series of burdensome requirements. In other words, New Orleans law "requires a license when points of interest and historic sites are explained or discussed" in a public place with people who have paid for the privilege. App. 12. Would-be guides must pass a written examination "designed to test the applicant's knowledge of the historical, cultural and sociological developments and points of interest of the city." App. 30. The law also requires these would-be guides to pay fees, and the City imposes two additional requirements that are not enumerated in the Code: a criminal background check and drug test. *See* App. 6. Speaking to tour groups without a license carries harsh penalties, including up to five months in jail. *See generally* New Orleans City Code § 30-78 (setting forth general penalties for violation of any municipal permitting requirements).

This sort of tour-guide licensing is rare, though not unique. There appear to be only about half a dozen jurisdictions in the country that impose licensing requirements similar to those in New Orleans.[1]

[1] The D.C. Circuit has identified five cities that appear to license tour guides in traditional public forums: Charleston, SC; New Orleans, LA; New York, NY; Savannah, GA; and Williamsburg, VA. *Edwards v. Dist. of Columbia*, 755 F.3d 996, 1004 n.5

(Continued on following page)

The overwhelming majority of American cities, including tourist meccas like Boston, Chicago, and San Francisco, do not impose any special licensure requirement on tour guides.

The plaintiffs below, a group of four local tour guides, challenged New Orleans's burdens as unconstitutional restrictions on their speech. The district court rejected their arguments and granted summary judgment to New Orleans without demanding any evidence to justify New Orleans's particular burdens on speech. App. 21-26.

(D.C. Cir. 2014). Philadelphia has a tour-guide licensing law on the books that appears to have never been enforced. *Id.* Through a careful search, Petitioners have been able to identify only one additional city – St. Augustine, FL – that might impose a testing requirement on would-be tour guides. *See* St. Augustine Code of Ord. § 17-121 to -129. The district court in this case also said that "the National Park Service . . . requires [people] to have a license when . . . they conduct tours for hire." App. 6. This is a misstatement of the law: The National Park Service's regulations apply only in certain federal military parks, and these regulations specifically limit guides to telling a "story . . . limited to the historical outlines approved by the superintendent." 36 C.F.R. § 25.2. These rules are nothing like the regulations at issue in this case, which regulate private citizens' ability to speak on particular topics in a traditional public forum. *Cf. Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 514-15 (D.C. Cir. 2010) (rejecting the proposition that, because national parks are called "parks," they all automatically qualify as traditional public forums).

The Fifth Circuit affirmed in a short published opinion. App. 1-4. The majority opinion[2] identified two reasons for its holding. First, it questioned whether the First Amendment applied to occupational licensing at all, since "[t]hose who have the license can speak as they please, and that would apply to almost any vocation that may be licensed." App. 3-4. Second, relying heavily on a "similar case" out of the District Court for the District of Columbia, the majority purported to apply intermediate scrutiny. App. 3. Its intermediate-scrutiny analysis consisted of a single sentence that simply asserted, without citing any evidence, (1) that the licensing requirements "effectively promoted the government interests" in promoting tourism and protecting visitors and (2) that without those requirements "the government interest would be unserved." App. 4.

The Petitioners filed a timely motion for rehearing en banc on June 16, 2014. While that motion was pending, two significant decisions were handed down. First, on June 26, 2014, this Court decided *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). In *McCullen*, like in this case, the challenged law governed speech on streets and sidewalks – "areas that have historically been open to the public for speech activities." 134 S. Ct. at 2529. In *McCullen*, like in this case, the challenged law was "truly exceptional" in that only five other jurisdictions nationwide had adopted

[2] Judge Jones concurred only in the judgment below but did not write separately. *See* App. 1.

similar restrictions. *Id.* at 2537 n.6. But in *McCullen*, this Court – unlike the majority opinion below – required the government to demonstrate with record evidence that less-restrictive alternatives "would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540.

The day after this Court decided *McCullen*, the D.C. Circuit handed down its decision in *Edwards v. District of Columbia*, which considered a tour-guide licensing restriction that was substantially identical to the New Orleans ordinance challenged here. 755 F.3d 996 (D.C. Cir. 2014). In *Edwards*, the D.C. Circuit struck down D.C.'s licensing requirement for tour guides, reversing the district-court decision on which the Fifth Circuit's opinion in this case was primarily based. The D.C. Circuit declined to decide whether a law that made it illegal for tour guides to speak without first passing a subject-matter test triggered strict scrutiny, instead finding that the challenged regulations failed even under intermediate scrutiny. *Id.* at 1000.

The D.C. Circuit expressly declined to follow the Fifth Circuit's ruling below, noting that the Fifth Circuit's opinion "either did not discuss, or gave cursory treatment to, significant legal issues." *Id.* at 1009 n.15. Specifically, the D.C. Circuit's opinion departed from the Fifth Circuit's in two ways. First, it rejected the idea that a licensing requirement for tour guides should be analyzed any differently than any other burden on speech in a public forum. *Id.* at 1000 n.3. Second, it applied a far more searching brand of

intermediate scrutiny: Using analysis that was consistent with (but, understandably, did not cite) the previous day's decision in *McCullen*, the D.C. Circuit demanded that the government point to record evidence demonstrating that its burdens on speech were achieving real benefits that could not be achieved through less-restrictive means. *Id.* at 1003-09. When no such evidence was forthcoming, the Circuit concluded:

> The District failed to present any evidence the problems it sought to thwart actually exist. Even assuming those harms are real, there is no evidence the exam requirement is an appropriately tailored antidote. Moreover, the District provided no explanation for abjuring the less restrictive but more effective means of accomplishing its objectives.

Id. at 1009.

Counsel for petitioners informed the Fifth Circuit panel of these intervening decisions by filing notices of supplemental authority under Federal Rule of Appellate Procedure 28(j). Nevertheless, the Fifth Circuit denied the petition for rehearing in this case without comment and allowed its initial published opinion to stand unmodified. App. 28-29. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted because (1) this case presents an opportunity to address two independent splits among the courts of appeals; (2) the Fifth Circuit's disposition of the First Amendment question in this case conflicts with relevant decisions of this Court; and (3) this case presents a good vehicle for deciding these issues.

A. The Decision Below Presents Two Independent Circuit Splits.

The Fifth Circuit's decision in this case presents two different splits of authority. First, it creates an acknowledged split with the D.C. Circuit, which has expressly rejected the Fifth Circuit's holding in this case. Second, it provides this Court with an opportunity to address a split of authority over how the First Amendment applies to laws styled as occupational licenses.

1. In reaching its decision below, the court of appeals relied heavily on a district-court decision from Washington, D.C., which considered the constitutionality of a substantially similar tour-guide licensing requirement. *See* App. 3. That decision, however, was subsequently reversed by the D.C. Circuit in *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). The D.C. Circuit's decision in *Edwards* and the Fifth Circuit's decision below are in direct – and acknowledged – conflict.

In *Edwards*, as here, the plaintiffs had argued that the city's tour-guide requirements failed under both strict and intermediate scrutiny. 755 F.3d at 1000. The D.C. Circuit declined to reach the strict-scrutiny question, however, finding that the regulations in that case failed under even intermediate scrutiny because there was no record evidence that the government's ends could not be achieved by less restrictive means. *Id.*

In *Edwards*, like in this case, the government hypothesized a series of dangers that untested and unlicensed guides might pose to consumers: Guides might defraud customers or lure them into unfamiliar circumstances or simply give a bad tour that gave the city's tourism industry a bad name. *Id.* at 1003. Unlike the Fifth Circuit, though, the D.C. Circuit rejected the government's "seemingly talismanic reliance on these asserted problems." *Id.*

The D.C. Circuit gave four independent reasons in support of its holding. First, "the record contain[ed] no evidence [that] ill-informed guides [were] indeed a problem for the District's tourism industry." *Id.* at 1003-04. Second, the challenged tour-guide regulations could not be justified by "common sense" because a mere handful of jurisdictions impose licensing requirements on tour guides, as compared to "the scores of other U.S. cities that have determined licensing tour guides is *not* necessary to maintain, protect, or promote the tourism industry." *Id.* at 1004 (citing *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). Third, even if one assumed that unlicensed guides

did pose a danger to the public, the record contained no evidence that requiring tour guides to pass a multiple-choice test actually furthered the government's interest in reducing that danger. 755 F.3d at 1005-07. Fourth and finally, there were obvious less-restrictive means the government could use to achieve its stated objectives, including (for example) punishing fraud or offering "a voluntary certification program – under which guides who take and pass the District's preferred exam can advertise as 'city-certified guides.'" *Id.* at 1009.

In reaching these conclusions, the D.C. Circuit did not ignore the Fifth Circuit's decision below – instead, it acknowledged and specifically rejected it. The D.C. Circuit declined to follow the Fifth Circuit's opinion because, it said, that opinion "either did not discuss, or gave cursory treatment to, significant legal issues." *Id.* at 1009 n.15.

These two cases represent a clear split of authority that is ripe for this Court's review. Under the D.C. Circuit's rule, content-neutral burdens on a tour guide's speech must be justified by real evidence – not necessarily voluminous statistical studies, but evidence sufficient to allow a court to conclude that there is a real danger that is actually being addressed by the challenged burdens and that could not be as easily addressed through less restrictive means. Under the Fifth Circuit's approach, these burdens are simply presumed valid and alternative regulatory options are ignored without any need for evidence at all.

2. The decision in this case also presents this Court with an opportunity to address a split of authority among lower courts over whether ordinary First Amendment doctrines apply to laws styled as occupational licenses. In its opinion below, the Fifth Circuit found no free-speech problem with New Orleans's law because, it was merely an occupational license: Once someone obtains a license, the majority said, they "can speak as they please, and that would apply to almost any vocation that may be licensed." App. 3-4.

This is not the first time a court of appeals has grappled with how to analyze speech restrictions as they relate to occupational licensing. The Ninth Circuit, for example, has developed a jurisprudence about the speech of licensed medical professionals in which some types of licensed speech are protected but others are not. *Compare Pickup v. Brown*, 740 F.3d 1208, 1229-30 (9th Cir. January 29, 2014) (holding that restriction on particular type of talk therapy was a limitation on "conduct" subject to rational-basis review) *with Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights."). By contrast, the Third Circuit has expressly rejected the Ninth's approach and adopted a rule under which all burdens on this kind of occupational speech are subject to heightened scrutiny. *See King v. Gov. of New Jersey*, 767 F.3d 216, 233-36 (3d Cir.

2014) (applying intermediate scrutiny to restriction on speech of licensed psychologists).

The confusion in this area arises largely from Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985). In *Lowe*, Justice White suggested a new First Amendment rule for occupational-licensing laws under which "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances" could be licensed and prevented from engaging in speech "incidental to the conduct of the profession" without raising any free-speech concerns. *Id.* at 232 (White, J., concurring in result). If a speaker did not "purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted," though, ordinary First Amendment doctrines would apply and prevent the licensing of that speech. *Id.*

This Court has never cited Justice White's concurrence, but, in the absence of more specific guidance from this Court, some lower courts have adopted it as controlling law. Specifically, the Fourth and Eleventh Circuits have used Justice White's *Lowe* concurrence to subject speech-licensing laws to rational-basis scrutiny. *See Locke v. Shore*, 634 F.3d 1185, 1191 (analyzing interior-design licensing law under Justice White's *Lowe* concurrence); *accord id.* at 1197 (Black, J., concurring in result) (interpreting the majority opinion to mean that the challenged law did not violate the First Amendment because the conduct regulated by the statute "involve[d] direct,

personalized communications with clients in which designers use their technical expertise to exercise judgment on behalf of clients"); *see also Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (adopting Justice White's "sound, specific guidelines for determining" when a licensing law is subject to First Amendment scrutiny).

Other courts of appeals reject this rule. The Third Circuit, for example, expressly rejects the idea that any restriction on occupational speech can be reviewed under anything less than heightened scrutiny. *See King v. Governor of N.J.*, 767 F.3d 216, 233-36 (3d Cir. September 11, 2014) (applying intermediate scrutiny to restriction on speech of medical professionals). The D.C. Circuit, by contrast, has suggested that the appropriate level of constitutional scrutiny would depend on the particular occupation being regulated. *See Edwards*, 1000 n.3 (distinguishing tour guides from "lawyers and psychologists").

This disagreement extends also to the state courts. For example, the Court of Appeals of Maryland has held that an individual who wanted to open a fortune-telling business was entitled to the full protection of the First Amendment. *See Nefedro v. Montgomery County*, 996 A.2d 850, 864 (Md. 2010) ("If Montgomery County is concerned that fortunetellers will engage in fraudulent conduct, the County can enforce fraud laws in the event that fraud occurs. The County need not, and must not, enforce a law that unduly burdens protected speech to accomplish its goal."). But the Fourth Circuit disagrees:

Analyzing a Virginia law burdening fortune-telling, the Fourth Circuit held that its "professional speech doctrine," derived from Justice White's *Lowe* concurrence, means a fortune-teller who provides "a personalized reading for a paying client" is not entitled to ordinary First Amendment protections. *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013).[3] As a result, the level of First Amendment protection to which a Maryland speaker is entitled will turn on whether that speaker litigates in state rather than federal court.

This case presents an opportunity to resolve this longstanding split of authority by either holding that ordinary First Amendment principles apply to occupational-licensing requirements just like they do to other laws or by announcing an exception to the ordinary doctrine. The petition for certiorari should therefore be granted.

---

[3] The Fourth Circuit's opinion in *Moore-King* acknowledged the Maryland state-court opinion, but distinguished it on the grounds that the Maryland court was considering a ban on compensated fortune-telling rather than a licensing requirement. *Id.* at 569-70. But the Maryland Court of Appeals did not premise its decision on the fact that the challenged law was a ban rather than a burden in the form of a licensing requirement – and nor should it have: "The Court has recognized that . . . the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) (internal quotation marks omitted).

B. The Decision Below Directly Conflicts With The Relevant Precedents Of This Court.

In addition to presenting a circuit split, the Fifth Circuit's decision below conflicts irreconcilably with the opinions of this Court. First, the decision below conflicts directly with this Court's recent decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), which was decided after the panel opinion in this case was issued. Second, the majority opinion in this case conflicts with this Court's repeated application of ordinary First Amendment principles to laws styled as licensing requirements.

1. The Fifth Circuit purported to apply intermediate scrutiny in the case below, but its one-sentence analysis of the challenged law failed to ask whether there were less burdensome alternatives available to achieve New Orleans's goals. That approach conflicts directly with this Court's recent decision in *McCullen v. Coakley*, which considered the constitutionality of a Massachusetts law that made it a crime to stand on a sidewalk or public way within 35 feet of the entrance to any place where abortions are performed. 134 S. Ct. at 2525. In that case, this Court held that Massachusetts's law failed intermediate scrutiny because the state was unable to point to record evidence "demonstrat[ing] that alternative measures that burden substantially less speech would fail to achieve the government's interest, not simply that the chosen route is easier." *Id.* at 2540.

McCullen's holding is consistent with this Court's repeated pronouncements that mere speculation and conjecture are never enough to carry a First Amendment burden. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden. . . ."); *see also United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."); *United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural. . . ." (internal citation omitted)).

McCullen also reaffirms this Court's judgment that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon*, 528 U.S. at 391. In particular, the Court placed significant weight on the fact that the law challenged in that case was "truly exceptional," by which the Court meant that only "five localities [have] laws similar to the [challenged law]." 134 S. Ct. at 2537 & n.6.

The holding of *McCullen* applies with equal, if not greater, force to New Orleans's ordinance. Unlike

the Massachusetts law at issue in *McCullen*, which was facially content neutral in that it applied to all speakers within the 35-foot buffer zone regardless of what they were speaking about, New Orleans's ordinance applies solely to those who talk about the history and points of interest in New Orleans. The New Orleans ordinance is almost exactly as unusual as the law challenged in *McCullen*; only five jurisdictions besides New Orleans currently enforce similar requirements. *See supra* at 2-3 & n.1. And the evidence supporting New Orleans's ordinance is even more sparse than the evidence this Court considered insufficient to justify Massachusetts's law; while Massachusetts claimed to have tried less-restrictive alternatives, to no avail, 134 S. Ct. at 2539, New Orleans does not claim to have even *considered* alternative options, let alone to have tried them and seen them fail. But none of this is acknowledged as even part of the relevant constitutional test by the majority's opinion below. *See* App. 3-4.

In fairness to the majority below, *McCullen* was decided after the panel issued its opinion. But, as discussed above, the holding of *McCullen* was consistent with decades of this Court's precedent. And the Fifth Circuit had the opportunity to correct its error through panel rehearing or rehearing en banc. Its failure to do so cannot be squared with this Court's precedent, and this Court should therefore grant certiorari.

2. The opinion below also conflicts with this Court's precedent because it says there can be no

First Amendment problem with a law that requires a license in order to speak, so long as "[t]hose who have the license can speak as they please." App. 3-4. This is incorrect as a matter of law: This Court has considered cases involving the intersection of occupational-licensing laws and free speech, and it has consistently rejected the idea that occupational licensure is "devoid of all First Amendment implication" or "subject only to rationality review." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 n.13 (1988).

The precedent most squarely on point is *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, in which this Court considered a challenge to a local law licensing door-to-door solicitation. 536 U.S. 150, 155-56 (2002). Significantly, not a single Justice suggested that the law should be subject to rational-basis scrutiny because it was a licensing requirement rather than a regulation of what door-to-door solicitors could say once they were licensed. *See* 536 U.S. at 164-65 (finding that the ordinance failed under any First Amendment standard of review); *id.* at 170-71 (Breyer, J., concurring) (noting that government must supply more than "'anecdote and supposition'" in support of speech burdens); *id.* at 171 (Scalia, J., concurring in the judgment) (joining the Court's conclusion that the licensing requirement violated the First Amendment); *id.* at 175-76 (Rehnquist, C.J., dissenting) (arguing that the Court should uphold the challenged law under intermediate scrutiny because of the seriousness of the Village's interest in crime control).

Simply put, this Court has never once said that occupational-licensing laws that limit speech should be treated differently from any other laws that limit speech – rather, it has said exactly the opposite. But the Fifth Circuit (following, though not citing, the path of some other courts of appeals) has treated licensing laws as a special exception to the First Amendment. *See supra* at 10-15. This recognition of a new exception to the scope of protected speech is in direct conflict with this Court's repeated pronouncements that the federal courts do not have a "free-wheeling 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." *United States v. Stevens*, 559 U.S. 460, 470, 472 (2010); *accord Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) ("[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 majority opinion below therefore conflicts irreconcilably with this Court's precedents – both this Court's clear holdings about how the First Amendment applies to licensing laws generally and this Court's clear prohibition on creating new exceptions to the First Amendment. The petition for certiorari should be granted to resolve this conflict.

C. This Case Presents A Clear Vehicle To Resolve An Important Issue.

Under the ruling below, would-be tour guides in New Orleans are subject to arrest and imprisonment for the crime of speaking to tour groups without obtaining prior permission from the government. The only reason their municipal government has this power is that they happen to live within the jurisdiction of the Fifth Circuit instead of the D.C. Circuit. The Court should grant certiorari in this case to clarify the free-speech rights of would-be speakers nationwide.

But this case also presents issues relevant far beyond the boundaries of New Orleans. The core question in this case – whether or how the First Amendment applies to occupational licenses – is of tremendous practical importance, yet it is an issue on which lower courts have failed to generate a uniform rule. The petition in this case should be granted because the record here presents an opportunity to clarify an important doctrinal question on a straightforward record: The case below was decided on cross-motions for summary judgment with no disputed facts. This Court may not have a similar opportunity anytime in the near future.

The question of how the First Amendment interacts with occupational licenses matters to literally millions of American workers. Nearly one third of the American workforce now needs a license to work, up from roughly one *twentieth* of the workforce in the

1950s. *See* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. Labor Economics 173, 175-76 (2013). Whether these licensed workers enjoy the full protection of the First Amendment is a question that matters not only to them, but to the federal, state, and local regulators who exercise power over these workers.

The majority opinion below creates serious uncertainty about the First Amendment rights of tour guides in New Orleans and elsewhere, and it exacerbates existing uncertainty about the First Amendment rights of literally millions of other Americans who work in licensed occupations. In short, this case presents an important issue on which there is serious doctrinal conflict in the lower courts, and it does so on a record free from factual disputes. The petition for certiorari should therefore be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. MELLOR
DANA BERLINER
ROBERT J. MCNAMARA*
PAUL M. SHERMAN
ROBERT EVERETT JOHNSON
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

*Counsel of Record

MARK E. HANNA
MOULEDOUX, BLAND, LEGRAND
& BRACKETT, LLC
701 Poydras Street
4250 One Shell Square
New Orleans, LA 70139
(504) 595-3000

MATTHEW R. MILLER
INSTITUTE FOR JUSTICE
816 Congress Avenue,
Suite 960
Austin, TX 78701
(512) 480-5936

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-30801

CANDANCE KAGAN; MARY LACOSTE; JOYCELYN M. COLE, erroneously named as Jocelyn M. Cole; ANNETTE WATT,

Plaintiffs-Appellants

v.

CITY OF NEW ORLEANS, Louisiana,

Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Jun. 2, 2014)

Before REAVLEY, JONES, and GRAVES, Circuit Judges.*

REAVLEY, Circuit Judge:

The City of New Orleans requires those who conduct tours for hire in the City to have a tour guide license. Four tour guides object to the license requirement on the ground that it violates their First

---

* Judge Jones concurs in the judgment only.

Amendment rights and seek a declaratory judgment and injunction for relief. The district court granted summary judgment for the City, and we affirm.

The New Orleans Code requires the license for a person to charge for tours to "the City's points of interest and/or historic buildings, parks or sites, for the purpose of explaining, describing or generally relating the facts of importance thereto." To obtain the license, the applicant must pass an examination testing knowledge of the historical, cultural and sociological developments and points of interest of the city, must not have been convicted of a felony within the prior five years, pass a drug test, and pay a $50 fee when first applying or $20 when renewing after two years. Violators are subject to punishment by up to five months imprisonment and $300 in fines.

Reviewing the law facially, we see its purpose to be clear. The City wants to promote and protect visitors there as they see and enjoy all of the attractions of New Orleans; its history and sights on to its food and music. Conventions bring thousands there and often program tours of the city. To put it simply, New Orleans thrives, and depends, upon its visitors and tourists. For the benefit of those visitors the City identifies those tour guides who have licenses and are reliable, being knowledgeable about the city and trustworthy, law-abiding and free of drug addiction.

Without contesting that as the only purpose or effect of the law, plaintiffs seek to abolish the license and will thereby defeat the purpose. They urge the

First Amendment freedom of speech as the problem. But no fault is found by the City in what tour guides do or say. They themselves want to speak and do the same. When a city exercising its police power has a law only to serve an important governmental purpose without affecting what people say as they act consistently with that purpose, how is there any claim to be made about speech being offended?

The district court of the District of Columbia decided in a similar case to go beyond that question to an intermediate scrutiny review with the same result. *Edwards v. District of Columbia*, 943 F. Supp. 2d 109, 118 (2013). So will we.

The First Amendment prevents government from restricting speech, unless it is unprotected as is obscenity and the promotion of violence. Laws that restrict expression because of its content are reviewed by strict scrutiny, requiring that the government has narrowly tailored the content restriction to a compelling interest without other means to do so. Plaintiffs insist on this strict scrutiny by arguing the New Orleans license law is content based. And they cite cases all of which affect speech. For example, their lead authority is *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2707 (2010), but that decision held that the law applied to conduct that triggered a message that provided material support to the terrorists in the form of speech. *Id.* at 2724. Whereas the New Orleans law in its requirements for a license has no effect whatsoever on the content of what tour guides say. Those who have the license can speak as

they please, and that would apply to almost any vocation that may be licensed. Tour guides may talk but what they say is not regulated or affected by New Orleans.

The Supreme Court's opinion in *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989) is instructive. There the government had regulated sound, and the Court said that even with messages conveyed, the regulation is content-neutral so long as the regulation is justified without reference to content or speech. *Id.* at 2754. Because that regulation was content-neutral and only reviewed with intermediate scrutiny, it satisfied the requirement of narrow tailoring "so long as the . . . regulation promotes a substantial interest that would be achieved less effectively absent the regulation." *Id.* at 2758 (quoting *United States v. Albertini*, 105 S. Ct. 2897, 2906 (1985)). New Orleans, by requiring the licensees to know the city and not be felons or drug addicts, has effectively promoted the government interests, and without those protections for the city and its visitors, the government interest would be unserved.

The judgment of the district court upholding the constitutionality of the New Orleans licensing scheme for tour guides is affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

CANDACE KAGAN, et al. **Plaintiffs**	**CIVIL ACTION**
VERSUS	**No. 11-3052**
CITY OF NEW ORLEANS **Defendant**	**Section "E"**

ORDER AND REASONS

Before the Court are cross-motions for summary judgment filed by plaintiffs Candance Kagan, Mary LaCoste, Joycelyn Cole, and Annette Watt (together, "Plaintiffs"), and defendant City of New Orleans (the "City").[1] For the following reasons, the City's motion is **GRANTED** and Plaintiffs' motion is **DENIED**.

BACKGROUND

Plaintiffs are tour guides in New Orleans, where they give walking tours of historical sites and points of interest. Some of their tours are educational, focusing on topics such as the history of the French Quarter; some are fanciful, focusing on topics like ghosts and vampires; and some are mostly gustatory or libationary, taking advantage of New Orleans' many restaurants and bars.[2] Participants pay for the

---

[1] R. Docs. Nos. 22, 25.

[2] R. Doc. No. 22-4, pp. 11, 16, 20-22; R. Doc. No. 22-5, pp. 18-19; R. Doc. No. 22-6, pp. 12-13, 20; R. Doc. No. 22-7, pp. 12-13.

tours at issue by paying either Plaintiffs or the organizations for which they work.[3] Like New York, the District of Columbia, Philadelphia, Savannah, Charleston, and the National Park Service, the City requires Plaintiffs to have a license when, in this way, they "conduct tours for hire." N.O. City Code § 30-1551.[4]

In order to obtain a license, prospective tour guides must pay a $50 fee, pass a written examination, clear a drug test, and undergo fingerprinting and a background check to ensure that they have not been convicted of a felony in the preceding five years.[5]

---

[3] R. Doc. No. 22-4, pp. 19-22; R. Doc. No. 22-5, pp. 18-19; R. Doc. No. 22-6, pp. 13, 20; R. Doc. No. 22-7, pp. 12-13.

[4] *See Edwards v. Dist. of Colum.*, 765 F. Supp. 2d 3, 10 n.6 (D.D.C. 2011) (collecting ordinances). Counsel for Plaintiffs in this matter filed a challenge to the D.C. ordinance, which failed, *see Edwards v. Dist. of Colum.*, 2013 WL 1881547, at *13 (D.D.C. May 7, 2013), as well as to the Philadelphia ordinance, which was dismissed on ripeness grounds, *Tait v. City of Philadelphia*, 410 F. App'x 506 (3d Cir. 2011).

[5] N.O. City Code § 30-1553(2)-(3) (written exam and no felonies in preceding five years); *id.* § 30-1557(1) ($50 fee); R. Doc. No. 22-8, p. 30 (background check); *id.* at p. 35 (drug test). The City also has the discretion to require a verbal examination and interview, N.O. City Code. § 30-1553(3), but there is no evidence the City has required this of Plaintiffs (or anyone else for that matter) and there is no evidence what this additional step would look like (in form, content, factors considered, decisions, etc.) if the City ever did require it. Consideration of this requirement is therefore not ripe. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987) (noting ripeness problems when "further factual development is required"). The Court will not address the fee either, as Plaintiffs do not suggest it is unconstitutional.

In order to maintain the license, tour guides must pay a $20 fee and successfully complete the drug test and background check, which requires another set of fingerprints, every two years.[6] The City asserts that this licensing scheme is necessary to ensure that: (1) tour guides have "sufficient knowledge to conduct tours of points of interest in the City"; (2) tour guides have no "criminal backgrounds that would pose a threat of harm or danger to tour groups"; (3) members of tour groups are protected from "behavior that may be associated with illicit drug use"; and (4) "unqualified individuals purporting to conduct reputable tours . . . [do not] swindle trusting tourists out of money."[7]

Plaintiffs believe those justifications are insufficient under the First Amendment, and they ask the Court for a declaratory judgment that the City's licensing scheme violates their right to free speech, both facially and as applied. They also request a permanent injunction prohibiting the City from enforcing the licensing requirement, $1.00 in nominal damages, and attorneys' fees.[8] The City requests a determination that its licensing scheme is constitutional under the First Amendment.[9]

---

[6] N.O. City Code § 30-1554 (renewal every two years); *id.* § 30-1557(2) ($20 fee); R. Doc. No. 22-8, pp. 32-33 (background check every two years); *id.* p. 35 (drug test every two years).

[7] R. Doc. No. 22-3, p. 3.

[8] R. Doc. No. 1, pp. 8-9.

[9] R. Doc. No. 25, p. 1.

STANDARD OF LAW

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *see also Celotex Corp. u. Catrett*, 477 U.S. 317, 322-23 (1986).

If the dispositive issue is one on which the moving party will bear the burden of proof at trial, the moving party "must come forward with evidence which would 'entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *Int'l Shortstop, Inc. u. Rally's, Inc.*, 939 F.2d 1257, 1263-64 (5th Cir. 1991). If the moving party fails to carry this burden, the motion must be denied. If the moving party successfully carries this burden, the burden then shifts to the non-moving party to show that a genuine issue of material fact exists. *Id.* at 322-23. Once the burden has shifted, the non-moving party must direct the Court's attention to something in the pleadings or other evidence in the record that sets forth specific facts sufficient to establish that a genuine issue of material fact does indeed exist. *Id.* at 324.

If the dispositive issue is one on which the non-moving party will bear the burden of proof at trial, however, the moving party may satisfy its burden by simply pointing out that the evidence in the record is insufficient with respect to an essential element of the non-moving party's claim. *See Celotex*, 477 U.S. at

325. The nonmoving party must then respond, either by "calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party" or by coming forward with additional evidence. *Celotex*, 477 U.S. at 332-33 & 333 n.3.

"An issue is material if its resolution could affect the outcome of the action." *DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005). When assessing whether a material factual dispute exists, the Court considers "all of the evidence in the record but refrains from making credibility determinations or weighing the evidence." *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398 (5th Cir. 2008); *see also Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 150-51 (2000). All reasonable inferences are drawn in favor of the non-moving party. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). There is no genuine issue of material fact if, even viewing the evidence in the light most favorable to the non-moving party, no reasonable trier of fact could find for the non-moving party, thus entitling the moving party to judgment as a matter of law. *Smith v. Amedisys*, 298 F.3d 434, 440 (5th Cir. 2002). In this case, the facts are not in dispute – only which facts are relevant and whether the parties have met the burdens of proof they would have at trial.

ANALYSIS

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech." U.S. CONST. amend I. The Supreme Court

has interpreted this to mean that "'as a general matter, . . . the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)). There is no suggestion that the City's licensing regime operates to restrict speech because of its message or ideas, what is otherwise called viewpoint discrimination. Plaintiffs instead argue that the licensing scheme is a content-based or subject-matter restriction on speech, and so it may be upheld only if "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Serv. Empls. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (internal quotation marks omitted). The City asserts that its licensing scheme is content neutral, and so it may be upheld so long as it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Id.*

I. Content Neutrality

In the first instance, it is unclear the City's licensing scheme regulates speech at all. The City Code provision imposing the license requirement makes no reference to speech and merely states that "No person shall conduct tours for hire in the parish who does not possess a tour guide license issued by the department of safety and permits." N.O. City Code § 30-1551. On its face, this regulates "conduct[ing] tours for hire," not speech. In order to find a

reference to speech, it is necessary to look to the City Code's definition of "tour guide," which is "any person duly licensed by the department of safety and permits to conduct one or more persons to any of the city's points of interest and/or historic buildings, parks or sites, for the purpose of explaining, describing or generally relating the facts of importance thereto." N.O. City Code § 30-1486. But that definition in Section 30-1486 does not itself impose any restrictions on speech or conduct, and the licensing requirement in Section 30-1551 does not incorporate the defined term "tour guide" – by, for example, stating that "'Tour guides' must possess a license when working for hire" or "No 'tour guide' shall conduct tours for hire without a license." The licensing requirement in Section 30-1551 instead applies to any "person" who "conduct[s] tours for hire." On its face, therefore, the portion of the City Code imposing the licensing requirement applies to conduct, not speech.

Plaintiffs have nevertheless adduced competent summary judgment evidence that the City's definition of "conduct[ing] tours for hire" in Section 30-1551 makes reference to speech in operation, because the relevant officials use language similar to the speech-based definition of "tour guide" in Section 30-1486 to inform what it means to "conduct" tours for hire and, thus, to determine when a license is required.[10]

---

[10] R. Doc. No. 22-8, p. 12 ("So when [the ordinance] says conduct, what does that mean? Conduct is if they are speaking, giving any type of historical background on certain sites.").

That the licensing scheme requires a license when points of interest and historic sites are explained or discussed is not sufficient to render it a content-based regulation of speech, however. "A content-based regulation has been defined as one that creates distinctions between 'favored speech' and 'disfavored speech.'" *Serv. Empls. Int'l Union*, 595 F.3d at 596. A content-based regulation "also can be identified when it creates a 'substantial risk of eliminating certain ideas or viewpoints' from the public forum." *Id.* (quoting *Horton v. City of Houston, Tex.*, 179 F.3d 188, 193 (5th Cir. 1999)). "If, on the other hand, the regulation is justified without reference to the content of the speech or serves purposes unrelated to the content, it is a content-neutral regulation, even if it has an incidental effect on some speakers or messages but not others." *Horton*, 179 F.3d at 193; *see Asgeirsson v. Abbott*, 696 F.3d 454, 459-60 (5th Cir. 2012) ("A regulation is not content-based, however, merely because the applicability of the regulation depends on the content of the speech. A statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech."). So while it has been said that "[a] regulatory scheme that requires the government to examine the content of the message that is conveyed is content-based," *Serv. Empls. Int'l Union,* 595 F.3d at 596, "'[t]he fact that a statute *refers* to the content of expression does not necessarily make it content-based if it was enacted for a valid purpose *other* than suppressing the expression due to a disagreement with the message conveyed or a concern over the

message's direct effect on those who are exposed to it.'" *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 308 (5th Cir. 2007) (quoting *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1278 (11th Cir.2001)) (emphasis in original). The City's tour guide licensing scheme does not create classes of "favored" and "disfavored" speech. It does not create a substantial risk of eliminating certain ideas or viewpoints. And while the licensing scheme does, in operation, "refer[ ] to the content of expression" because it applies only when persons conduct others for hire and "giv[e] any type of historical background on certain sites," it clearly was not enacted to suppress "expression due to a disagreement with the message conveyed or a concern over the message's direct effect on those who are exposed to it." *Steen*, 482 F.3d at 308. It was, instead, enacted to protect the City's tourism industry by protecting the safety of tour group participants and reducing the chance they will be swindled.[11] The City cites as an example of the problems unlicensed tour guides can cause, faux tour guides who are really "panhandlers" and "harass people into giving them money after they offer information."[12] The City has an interest in preventing this kind of conduct. Its interest is in preventing tourists from feeling

---

[11] The four justifications articulated by the City, *see supra* n. 7 and accompanying text, collapse into these two categories.

[12] R. Doc. No. 25-2, p. 26; *see also* R. Doc. No. 22-10, pp. 37-42 (describing other instances of unlicensed tour guides); R. Doc. No. 22-12, pp. 9-30 (discussing incidents in further detail).

scammed or harassed – not in policing what is said or heard.[13]

This is clear from the way the City's licensing scheme works. A tour guide may say whatever he or she wishes about a site, or anything else for that matter – the City does not regulate the content of tour guides' speech.[14] There are no scripts, no sacred cows of historical truth, no restraints on taste or opinion, and no topic (point-of-interest related or not) is off limits. *Compare United States v. Alvarez*, 132 S. Ct. 2537, 2540 (2012) (overturning a ban on a certain kind of false, non-commercial speech). The only reason reference to the content of a tour guide's speech is necessary at all in Section 30-1486 or in the administration of the licensing scheme is because it

---

[13] R. Doc. No. 22-10, pp. 41-42 ("Q: What does the City allege was the harm that occurred in each of these incidents [involving unlicensed persons caught conducting tours]?. . . . A: I couldn't speak specifically to these cases. But talking to our investigators prior to – once they let those individuals [participating in the unlicensed tours] know those individuals [conducting the unlicensed tours] were no licensed, they were – they were kind of upset."); *id.* at 43 (describing this as "scamming" the unwitting participants in the unlicensed tour); *id.* at 52-53 (describing City's interests).

[14] *E.g.*, R. Doc. No. 25-2, pp. 23-24 ("Has anyone with the City of New Orleans ever provided you a script that you must follow on any of your tours? No.. . . . [H]as anyone in the City of New Orleans ever told you that you cannot speak about a certain topic on your tours? No."). The testimony of all Plaintiffs is substantially the same. R. Doc. No. 25-3, p. 23; R. Doc. No. 25-4, pp. 21, 23; R. Doc. No. 25-5, pp. 15-16.

would otherwise be difficult to describe the act, the conduct, requiring a license.

Commercial tour guides are commercial tour guides because, in exchange for money, they lead people around while speaking about points of interest. The City must "refer" to that speech to define this conduct, *Steen*, 482 F.3d at 308, but it need not (and does not) "examine the content of the message" that speech conveys. *Serv. Empls. Int'l Union*, 595 F.3d at 596; *see Nat'l Assn. for Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1054 (9th Cir. 2000) ("California's mental health licensing laws are content-neutral; they do not dictate what can be said between psychologists and patients during treatment.").[15] And unlike in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010), "the conduct triggering coverage under the statute" does not "consist[ ] of communicating a message."[16] The conduct triggering coverage consists of an act – guiding people around the city for hire – that only incidentally

[15] The Court does not suggest that tour guides are comparable to doctors, lawyers, accountants, or even fortune tellers necessarily. *See Moore-King v. County of Chesterfield, Va.*, 708 F.3d 560, 568 (4th Cir. 2013). This part of the Ninth Circuit's holding relates to the content neutrality *vel non* of California's mental health statutes, not whether they deserve special deference because they regulate a profession.

[16] In *Humanitarian Law Project*, "Plaintiffs want[ed] to speak to [two foreign terrorist organizations], and whether they [could] do so under [under the statute] depend[ed] on what they sa[id]." 130 S. Ct. at 2723-24. Unlike in this case, that was a restriction on pure speech.

involves communicating a message. In this way, providing a tour is different from publishing a book or giving a lecture on New Orleans history, because those activities involve only speech. The entire difference, in fact, between buying a book or attending a lecture on New Orleans history and purchasing a tour is the act of being guided around.

That the City's licensing scheme is directed at the non-speech-related risks of this activity, namely that customers could be scammed or put in danger by their tour guides, is clear from the City's willingness to allow licensed tour guides to perform ghost and vampire tours. If the City's concern in protecting tourists from feeling "scammed" were that tour guides speak only some official version of truth (because of "disagreement with the message conveyed" otherwise) or in the potential harms of untrue speech directed at tour group participants ("the message's direct effect on those who are exposed to it"), the City would be hard pressed to permit tours focused on the supernatural. *Steen*, 482 F.3d at 308. That the City does allow such tours shows its true interest: making sure tour group participants get what they pay for, *viz.*, a safe tour, conducted by someone with a minimum quantum of professionalism.

The City's concern that tour group participants not feel scammed is therefore unrelated to concerns about the *content* of tour guides' *speech*. The City's concern is instead related to the *quality* of the *consumer's experience*, which a City dependent on tourism has a substantial interest in protecting. The City

protects that experience by weeding out tour guides too dangerous to lead strangers around a strange city and too unserious to be willing to study for a single exam.[17] People who meet those minimal qualifications are then free to provide whatever kinds of tours the market will support. As the City's licensing scheme is "justified without regard to the content of [tour guides'] speech," it is content neutral.[18] *Asgeirsson*, 696 F.3d at 459-60.

---

[17] Plaintiffs assert that if this is true, "then similar examinations could be required for book authors and newspaper editors." R. Doc. No. 22, p. 18. But authors and editors provide pure information; they do not, by virtue merely of putting their products into the stream of commerce, hold themselves out as possessing the knowledge or ability to provide a particular person with a particular service. A person who holds himself out as having the occupation of tour guide does make that representation, just as a person who holds himself out as a barber makes a representation that he knows how to cut hair. The First Amendment requires *information* be offered *caveat emptor*, but life could hardly go on if all *services* – that is, information plus conduct – had to be offered on that basis.

[18] Because the Court concludes that the City's licensing scheme is content neutral, the Court need not decide whether the professional speech doctrine, if one exists in the Fifth Circuit, applies. *See Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech."); *Thomas v. Collins*, 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring) ("A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views.").

II. Intermediate Scrutiny

The Fifth Circuit uses the test set out in *United States v. O'Brien*, 391 U.S. 367 (1968), to evaluate the constitutionality of content-neutral speech regulations. *Horton*, 179 F.3d at 194. The regulation must: (1) be "'within the constitutional power of the Government'"; (2) "'further[ ] an important or substantial governmental interest'"; (3) that is "'unrelated to the suppression of free expression'"; and (4) "'the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.'" *Id.* (quoting *O'Brien*, 391 U.S. at 377).

"As [the City's licensing scheme] is on balance a content-neutral rule, the third prong of the *O'Brien* test has been satisfied." *Horton*, 179 F.3d at 194. The City unquestionably has the power to license businesses as part of its police powers, meaning that the first prong is satisfied as well. *See Nat'l Assn. for Advancement of Psychoanalysis*, 228 F.3d at 1054 ("'It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings. . . .'" (quoting *Watson v. Maryland*, 218 U.S. 173, 176 (1910))); *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958) ("Certainly the licensing of sightseeing guides in a large metropolis falls within the police powers of the local government."). So, the second and fourth *O'Brien* factors remain.

Courts analyze the remaining *O'Brien* factors together and ask whether the challenged regulation

is "narrowly tailored to serve a significant government interest and . . . leave[s] open ample alternative channels of communication." *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992). The City's licensing scheme satisfies the last requirement, as Plaintiffs do not need a license to speak and lead tours whenever, wherever, and containing whatever they please, just so long as they do not charge for them.[19] *Edwards v. Dist. of Colum.*, 765 F. Supp. 2d 3, 19 (D.D.C. 2011) ("Prior to obtaining a license, plaintiffs still may engage in expressive activity by doing everything they do now except for conducting their tours for profit. The Court therefore concludes that the means of communication available to plaintiffs are adequate." (international [sic] quotation marks and alterations omitted)). Accordingly, the only question is whether the City has shown that it has a "substantial governmental interest" that is narrowly tailored, or in the language of the Supreme Court, "would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

---

[19] The City Code is clear on this point – only persons who conduct tours "for hire" must have a license – and Plaintiffs have not come forward with any evidence that the City in fact fails to respect this distinction. N.O. City Code § 30-1551; *see* R. Doc. No. 22-10, p. 12 ("Q: So if I'm conducting a free tour, I do not have to hold a tour guide license; if I'm not charging anyone any money for the tour, I don't have to have a license; is that correct? [Objection by City.] [A:] It's my understanding, that's correct. Yes.") (deposition of Malachi Hull, Deputy Director for the New Orleans Department of Safety and Permits).

A. The Testing Requirement

The City asserts that it has a substantial governmental interest in ensuring that tour guides have "sufficient knowledge to conduct tours of points of interest in the City" and in preventing "unqualified individuals purporting to conduct reputable tours . . . [from] swindl[ing] trusting tourists out of money."[20] Stated this way, the City's "interests in protecting the public from 'fraud, crime, and undue annoyance' are 'indeed substantial.'" *Int'l Soc'y for Krishna Consciousness of Houston, Tx. v. City of Houston, Tex.*, 689 F.2d 541, 550 (5th Cir. 1982). That is, protection of the City's tourism-based economy and its residents and visitors from false or misleading offers of a service, such as a tour guide who has no basis on which to "guide" anyone, is clearly a substantial interest. *Id.*; *see One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1288 (11th Cir. 1999); *Smith v. City of Fort Lauderdale, Fl.*, 177 F.3d 954, 956 (11th Cir. 1999); *United States v. Mahoney*, 247 F.3d 279, 286 (D.C. Cir. 2001). If individuals may hold themselves out as tour guides despite having no knowledge about the City or its points of interest, their customers – many of them the tourists vital to the City's economy – are likely to, in the City's language, "feel scammed."[21] Scammed tourists are not often repeat tourists.

---

[20] R. Doc. No. 22-3, p. 3.

[21] R. Doc. No. 22-10, p. 17.

Plaintiffs assert that this is not the City's true interest. Plaintiffs allege the City's true interest is in "[p]olicing the conveyance of accurate information."[22] As support, they cite one of the City's examples of tourists' complaints, namely ill-informed tour guides saying a particular house is "Brad Pitt's house, when it's not Brad Pitt's house."[23] But there is no evidence that the City seeks to enforce some orthodoxy about its history. The City does not police at all what tour guides actually say – nor could it, given that it would be difficult to decide what information is "accurate" about ghosts and vampires or the "best" spots to eat and drink. What the City tries to ensure is that a tour guide possesses some minimum quantum of information. It does so to increase the likelihood that tour group participants will get the tour they bargained for.

So, this is neither a case where "Government seeks to use its full power, including the criminal law, to command where a person may get his or her information," *Citizens United v. Fed Election Comm'n*, 130 S. Ct. 876, 908 (2010), nor one where government "seek[s] to keep people in the dark for what government perceives to be their own good." *33 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality opinion). This is a case about the sale of an

---

[22] R. Doc. No. 22, p. 17.

[23] R. Doc. No. 22, p. 17.

in-person service, not information.[24] Once a tour guide demonstrates sufficient knowledge to pass the test, he may sell his services. In the course of doing so, he may provide whatever information he likes.[25] The testing requirement simply helps to ensure that tour guides have some reasonable basis for holding themselves out as such – something even Plaintiffs agree should be the case.[26]

Plaintiffs' [sic] focus their attack on the testing requirement on the "substantial or important" interest prong of the test and do not seriously contest that the City's interest "would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 800. It is clear to the Court that the test furthers the City's interest. A test like that used by the City is the best way of weeding out cheats, because people unwilling

---

[24] Plaintiffs' reliance on *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), is therefore misplaced. That case concerned a prohibition on "pharmacies and other regulated entities from selling or disseminating . . . *information*." *Id.* at 2662 (emphasis). There was no challenge to a rule that "pharmacies" and the "other . . . entities" had to be "regulated" – heavily regulated, in fact, and usually with licensing requirements – to hold themselves out as competent to have and to give the information.

[25] Consistent with *Sorrell*, once properly licensed (or "regulated"), there is no prohibition on what information a tour guide may provide as part of selling his service.

[26] R. Doc. No. 22-4, p. 39 ("Q: Would you agree that a tour guide should have some basic competency to conduct a tour? A: Yes.") (deposition of Candace Kagan); R. Doc. No. 22-5, p. 30 (same, Mary LaCoste); R. Doc. No. 22-6, p. 26 (same, deposition of Joycelyn Cole); R. Doc. No. 22-7, p. 22 (same, deposition of Patricia Watt).

or unable to learn about the City's history are unlikely to pass the test. The City's testing requirement therefore passes intermediate scrutiny.

B. The Drug Testing and Background Check Requirements

The City asserts that it has a substantial governmental interest in ensuring the safety of tour group participants by protecting them from the "threat of harm or danger" posed by recent felons and from "behavior that may be associated with illicit drug use."[27] There can be no doubt that the government has a "substantial" interest in protecting persons from exploitation by recent felons and in protecting others from the harmful effects of illicit drugs. *See, e.g.*, *Nat'l Treasury Empls. Union v. U.S. Customs Serv.*, 27 F.3d 623, 630 (D.C. Cir. 1994); *Willner v. Thornburgh*, 928 F.2d 1185, 1193 (D.C. Cir. 1991). There also can be no doubt that those concerns are "real, not merely conjectural" in this context. *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1318-19 (D.C. Cir. 2000). Tour groups often have many out-of-town participants who cannot be expected to be familiar with the City and its neighborhoods. A predatory tour guide is therefore in a unique position to lead tourists into situations where the tour guide or others may victimize them, an unscrupulous tour guide is in a unique position to

[27] R. Doc. No. 22-3, p. 3.

expose tourists to drugs or drug-related activity, and an impaired tour guide is in a unique position to lead tourists into danger or leave them feeling scammed.

Plaintiffs do not seriously contend otherwise.[28] Instead, they assert that the drug screen and background check, for which fingerprinting is necessary, are not narrowly tailored to serve the City's interest. As evidence of this, Plaintiffs assert that emergency medical technicians, escorts, and private investigators perform services where the danger to the public of employing a felon is higher, yet the City does not require biennial fingerprinting for these licenses.[29] But the issue is not fingerprinting anymore than it is providing a name or birth date – those are simply the components of a reasonable background check. If the background-check requirement stands, so must any reasonable way in which the City chooses to perform it.[30]

---

[28] R. Doc. No. 22-4, p. 39 ("Q: Would you agree that the City has an interest in regulating public safety? A: To an extent, yes.") (deposition of Candace Kagan); R. Doc. No. 22-7, p. 22 ("Q: And would you agree that the City of New Orleans has an interest in protecting the public's safety? Q: Yes.") (deposition of Patricia Watt).

[29] R. Doc. No. 22, p. 21.

[30] Whatever the outer contours of the form of a reasonable background check, it is clearly permissible to require fingerprints at the time the background check is performed. There is no equally accurate way to verify the identity (and therefore the accuracy of the background check) of the applicant. This is as true when repeating a background check as it is when performing it initially.

In any event, a third of Plaintiffs' statement is wrong and the rest is misleading. Escorts *are* required to "furnish all the information required" for an "escort service license," which includes fingerprints in addition to considerably more background information than required of a tour guide. N.O. City Code § 30-532; *id.* § 30-502. That "license[ ] or permit[ ] . . . expire[s] on December 31 of each calendar year." *Id.* § 30-471. The actual requirements the City imposes on applicants for a private investigator's license do not appear in the record, and the City Code leaves them unclear. But the City does subject those applicants to a more demanding "good moral character" test before licensing and does require they find "not less than five reputable citizens of the city" to verify their application. N.O. City Code § 30-1148. Finally, in addition to all the other local regulations and fitness requirements they must satisfy, emergency medical technicians must "possess a state EMT permit and a national registry of EMT certification," *id.* § 62-92(c)(1), both of which require a background check and yearly or biennial renewal.[31]

Even a cursory examination of the relevant licensing guidelines reveals that Plaintiffs' suggestion

---

[31] State of Louisiana, EMS Certification Commission, Examination Disclosure Form, *available at* http://new.dhh.louisiana.gov/assets/oph/ems/forms/Examination.pdf; National Registry of Emergency Medical Technicians, National EMS Certification Requirements, *available at* https://www.nremt.org/nremt/about/reg.basic.history.asp.

– that the City imposes fewer requirements designed to protect public safety or uses less oversight when licensing escorts, emergency medical technicians, and private investigators – simply does not hold water. But if it did, the City's substantial interest in protecting tourists from predatory, unscrupulous, and impaired tour guides still "would be achieved less effectively absent the" background check using fingerprints. *Ward*, 491 U.S. at 800. That is all that is required.

The record is silent on the issue whether the City requires escorts, emergency medical technicians, and private investigators to pass a biennial drug screen. Plaintiffs assert that those occupations are not subject to this requirement, citing silence in the City Code. That is hardly conclusive, however, given that the City Code also does not impose the drug-testing requirement at issue.[32] Either way, the City does not have the burden of showing that its regulation is the least restrictive means or that it employs the same means of achieving its goal across widely differing kinds of conduct. It need only show that its goal of protecting tour group participants from the harmful behaviors associated with drug use "would be

[32] The Court notes that while it rejects Plaintiffs' First Amendment claim, it has not been asked to pass on, and will not pass on, whether the City validly enacted whatever basis it cites as its authority for requiring the drug test. The requirement does not appear in the City Code and does not appear to exist in any duly enacted departmental regulation.

achieved less effectively absent the" drug-testing requirement. *Ward*, 491 U.S. at 800. It clearly would.

CONCLUSION

The undisputed facts demonstrate that the City's licensing scheme for tour guides is content neutral and passes intermediate scrutiny. Accordingly, it is constitutional. Plaintiffs' motion for summary judgment is **DENIED**, and the City's motion for summary judgment is **GRANTED**.

New Orleans, Louisiana, this 9th day of July, 2013.

/s/ Susie Morgan
SUSIE MORGAN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 13-30801

CANDANCE KAGAN; MARY LACOSTE; JOYCELYN M. COLE, erroneously named as Jocelyn M. Cole; ANNETTE WATT,

Plaintiffs-Appellants

v.

CITY OF NEW ORLEANS, Louisiana,

Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Filed Aug. 20, 2014)

(Opinion 6/2/2014, 5 Cir., ___, ___, F.3d ___)

Before REAVLEY, JONES, and GRAVES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the

court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
UNITED STATES CIRCUIT JUDGE

RELEVANT STATUTES

Sec. 30-1551. – Required.

No person shall conduct tours for hire in the parish who does not possess a tour guide license issued by the department of safety and permits.

(M.C.S., Ord. No. 24435, § 1, 6-2-11)

Sec. 30-1552. – Exception.

Persons conducting tours on animal-drawn vehicles at the time of the passing of the ordinance from which this article was derived shall be exempted from the requirement of a tour guide license.

(M.C.S., Ord. No. 24435, § 1, 6-2-11)

Sec. 30-1553. – Requirements.

To be certified as a tour guide by the department of utilities, an applicant shall comply with the following requirements:

(1) The applicant must receive a passing score on a written examination designed by the department of safety and permits, with the assistance of the Greater New Orleans Tourist and Convention Commission, and administered by the department of safety and permits or their approved testing agency. The written examination is designed to test the applicant's knowledge of the historical, cultural and sociological developments and points of interest of the city.

(2) No person who has been convicted of a felony within five years preceding the date of application shall be permitted to receive a tour guide license.

(3) A verbal examination and an interview by applicants may be required at the discretion of the department of safety and permits.

(M.C.S., Ord. No. 24435, § 1, 6-2-11)

Sec. 30-1554. – Renewal.

All tour guide licenses must be renewed every two years.

(M.C.S., Ord. No. 24435, § 1, 6-2-11)

Sec. 30-1555. – Revalidation.

All tour guides licensed by the city at the time of the enactment of the ordinance from which this article was derived must have successfully completed a written examination issued by the department of safety and permits within 90 days of the offering of such examination in order to revalidate their license.

(M.C.S., Ord. No. 24435, § 1, 6-2-11)

Sec. 30-1556. – Identification.

All applicants certified by the department of safety and permits as tour guides shall be issued a certificate and an identification badge by the department.

The identity badge must be worn at all times when conducting tours.

(M.C.S., Ord. No. 24435, § 1, 6-2-11)

Sec. 30-1557. – Fees.

The tour guide license fees charged by the department of safety and permits shall be as follows:

(1) Initial license..... $ 50.00

(2) Renewal 20.00

(M.C.S., Ord. No. 24435, § 1, 6-2-11)