

In the
United States Court of Appeals
for the Fifth Circuit

CANDANCE KAGAN, MARY LACOSTE,
JOYCELYN COLE, and ANNETTE WATT,

Plaintiffs-Appellants,

v.

CITY OF NEW ORLEANS,

Defendant-Appellee.

On Appeal from the District Court
for the Eastern District of Louisiana, No. 11-3052

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties are listed in the Brief of Appellants. Appearing as *amicus curiae* is the Cato Institute.

B. Rulings Under Review

References to the rulings at issue appear in the Brief of Appellants.

C. Related Cases

Amicus curiae is unaware of any related cases.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief of Appellants.

RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae Cato Institute, a nonprofit corporation organized under the laws of Kansas, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

All parties have consented to the filing of this *amicus* brief.

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**STATE: STATUTES, RULES, REGULATIONS,
CONSTITUTIONAL PROVISIONS**

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Authorities on which we chiefly rely are marked with asterisks.

INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

Cato supports entrepreneurship and is skeptical of government interventions that stifle innovation. It therefore has a topical interest in the City of New Orleans' tour guide licensing scheme.

Cato also has an interest as a publisher; the sale of books is an important source of revenue and helps the Institute maintain its independence. Cato's publishing activities are implicated by the district court's decision upholding a licensing and testing requirement for speakers who charge for their speech.¹

¹ No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or

SUMMARY OF ARGUMENT

The government could not require book authors, lecturers, or documentary filmmakers to pass a history test before speaking or filming—even if the government’s purpose were solely to protect consumers from shoddy historical claims. Under well-settled First Amendment jurisprudence, such a scheme would be an impermissible content-based prior restraint. It would discriminate among speech based on subject matter (singling out speech about history). Moreover, it would be justified based on content, specifically aimed at affecting the content of the authors’, lecturers’, or filmmakers’ speech. That the government’s motivation may seem benign or benevolent would not save the scheme.

Likewise, the government may not impose content-based licensing and testing requirements on tour guides who speak about a particular subject matter (here, the City of New Orleans’ “points of interest and/or historic buildings, parks or sites”). The content of tour-guide speech is no less protected than speech in books, lectures, or documentaries.

Tour-guide speech also does not fall within any possible First Amendment exception for “professional-client” speech. Unlike lawyers,

submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief.

doctors, or psychotherapists, tour guides do not take the individual needs of their clients in hand or purport to exercise judgment on behalf of their clients. And potentially inaccurate tour guide speech, unlike potentially inaccurate speech by professionals, does not threaten great harm to clients’ physical, psychological, or financial interests.

For these reasons, the City of New Orleans’ licensing scheme is a content-based speech restriction that cannot survive strict scrutiny.

ARGUMENT

I. Speakers Cannot Be Required to Pass a History Test in Order to Speak

Say that the government decided that it wants to “protect” book consumers by requiring authors who write about history—or global warming, or the origin of the species—to pass a test before selling their books. Or that the government imposed the same requirement on people who give public lectures and charge for admission. Or that, before issuing a filming permit for a documentary on New Orleans history, the City of New Orleans required the director to pass a history test.²

² Filming in public is presumptively constitutionally protected activity, though subject to content-neutral time, place, and manner restrictions. See *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (holding that video recording government officials is constitutionally protected);

These restrictions would surely be unconstitutional prior restraints; the government would be requiring a license to speak, as a means of trying to regulate the content of that speech—something First Amendment doctrine forbids. Any regulations that “require speakers to obtain permits before speaking—prior restraints—are disfavored and must be confined by ‘narrow, objective, and definite standards.’” *Serv. Empls. Int’l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (quoting *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51 (1969)). And the desire to protect consumers from being sold shoddy history or science could not justify such a prior-restraint scheme. Courts apply a “‘heavy presumption’ of invalidity for prior restraints that grant the licensing authority broad discretion.” *Id.* (quoting *Forsyth County, Ga., v. Nationalist Movement*, 505 U.S. 123, 130 (1992)).

The City of New Orleans’ tour guide regulations are just such prior restraints that give broad discretion to city officials. Before they can speak to tour groups, guides are required to pass a “written examina-

ACLU v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”).

tion designed [and administered] by the department of safety and permits” regarding the “the historical, cultural and sociological developments and points of interest of the city.” N.O. City Code §§ 30-1486, 30-1553. Even if applicants pass this test, a “verbal examination and an interview by applicants may be required at the discretion of the department of safety and permits.” *Id.* § 30-1553. The regulations provide no limits on the discretion afforded to city officials in designing or administering the written test, or in conducting applicant interviews. This broad discretion renders the tour-guide licensing scheme presumptively invalid. *Serv. Empls. Int’l Union*, 595 F.3d at 596.

The district court reasoned that the testing requirement was permissible to prevent tour-guide ignorance. It accepted the City’s assertion “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.’” *Kagan v. City of New Orleans*, Civil Action No. 11-cv-03052 (SM-DEK), 2013 U.S. Dist. LEXIS 95546, *21 (E.D. La. July 9, 2013). According to the court, “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’ any-

one, is clearly a substantial interest.” *Id.* at * 22. “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.” *Id.* at *23. “The testing requirement simply helps to ensure that tour guides have some reasonable basis for holding themselves out as such.” *Id.* at * 24.

Yet exactly the same rationales could pertain to authors selling books—who consumers may assume have “sufficient knowledge” of their subject matters—as well as speakers charging admission for lectures or documentarians selling DVDs. A testing requirement for authors, lecturers, and documentarians could also be said to protect consumers’ right to “get [what] they bargained for” by ensuring that these speakers “have some reasonable basis for holding themselves out” as authoritative. Likewise, such a requirement could be said to protect the welfare of the publishing, public speaking, or documentary filmmaking industries—and thus the economy more broadly—on the theory that weeding out supposedly ignorant creators would increase consumer confidence in other creators, and increase aggregate consumer spending on books, lectures, or documentaries.

Under the First Amendment, however, such rationales cannot justify requiring authors, public speakers, or filmmakers to pass a test before they can lawfully speak. Such rationales likewise cannot justify a requirement tantamount to a prior restraint on speech for the particular sort of for-pay public speaker that is labeled a “tour guide.”

To be sure, the government may be able to regulate the non-speech conduct that sometimes accompanies speech. For instance, it might be permissible to require a documentarian to pass a test on New Orleans filming regulations or traffic-safety rules. That requirement could be justified by a government interest in ensuring that the filmmaker’s conduct does not pose a public safety hazard—but not to ensure that the speech is accurate. This type of reasoning can only justify the (reasonable) testing of tour guides on, say, the safe operation of Segways. It cannot justify the government’s requiring a speaker—be it an author, lecturer, documentarian, or tour guide—to pass a test on history or architecture before lawfully exercising the right to speak.

II. The City of New Orleans’ Licensing and Testing Scheme Is a Content-Based Prior Restraint on Speech

The City of New Orleans’ tour-guide-licensing scheme is a content-based prior restraint on speech, both because it identifies the restricted

speech by reference to its subject matter and because it is justified by a desire to regulate the content of tour guide speech.

A. The Licensing and Testing Scheme Is Triggered by the Content of Speech

A government action that is “based on the content of speech,” rather than being generally “applicable to all speech irrespective of content,” is content-based and subject to strict scrutiny. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (citations and quotation marks omitted). This is so even if the content classification is not based on any apparent censorious motive.

For instance, in *Carey v. Brown*, 447 U.S. 455 (1980), the Supreme Court considered a statute that generally prohibited the picketing of residences, but exempted labor picketing. *Id.* at 457. Because the law “discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator’s communication,” the Court reasoned that the restriction was on its face content-based. *Id.* at 460-61. Likewise, in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), the Supreme Court struck down as content-based an ordinance that banned picketing near schools, but excluded labor picketing. *Id.* at 94-98, 102.

Similarly, in *Regan v. Time, Inc.*, 468 U.S. 641 (1984), the Supreme Court struck down a federal law that banned photographic reproductions of federal currency, but excluded educational or newsworthy uses. *Id.* at 643-44. Despite the statute’s permissible purpose, and the absence of any visible governmental desire to suppress any viewpoint, the Court reasoned that the law was content-based because the exception for educational or newsworthy uses relied on evaluating “the content of the photograph and the message it delivers.” *Id.* at 648.

The City of New Orleans’ ordinance is similarly not facially neutral because it applies solely to a specific type of business that is engaged in a particular form of speech. *See Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 555 (5th Cir. 2006) (holding that, with regard to facial neutrality, “the City of Arlington’s ordinance [prohibiting public nudity] is not content neutral, because it targets only sexually oriented businesses”). The New Orleans ordinance defines “tour guide” as “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 (emphasis added). This classification is thus facially content-based; like the restrictions in *Carey*, *Mosley*, and *Regan*, it is based solely on the content of the tour guide’s communication.

B. The Licensing and Testing Scheme Is Justified With Reference to Content

The licensing and testing scheme is also content-based because it is justified by the communicative impact of the speech. *See Boos v. Barry*, 485 U.S. 312, 320 (1988) (“[C]ontent-neutral speech restrictions [are] those that are *justified* without reference to the content of the regulated speech.”) (emphasis in original) (quotation marks omitted); *see also Texas v. Johnson*, 491 U.S. 397, 411-12 (1989). As the district court correctly explained, “[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.” *Kagan*, 2013 U.S. Dist. LEXIS 95546, *11 (quoting *Illusions–Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 308 (5th Cir. 2007)).

In *Fantasy Ranch*, this Court held that facially content-based regulations that target specific businesses based on their speech could nev-

ertheless be considered content-neutral and reviewed under intermediate scrutiny when they do not target speech, but when their “predominate concern is for secondary effects.” 459 F.3d at 556. Since the predominate concern of the City of Arlington’s public-nudity ban was to combat the secondary effects of “prostitution, assault, [and] drug dealing,” rather than suppressing the symbolic speech of nude dancing, the Court upheld the ordinance. *Id.* at 557. It explained, however, that “[i]f the government’s interest is indeed related to the suppression of content, then that regulation of symbolic speech is subject to strict scrutiny.” *Id.* at 554.

The district court here failed to recognize that the testing and licensing requirement of tour guides is indeed directly related to the suppression of content—namely, the City’s stated concern that the content of the speech, in its view, may not be accurate. The City of New Orleans explicitly conceded that the purpose of the licensing scheme is to ensure that tour guides have “sufficient knowledge to conduct tours of points of interest in the City” and that “unqualified individuals purporting to conduct reputable tours . . . [do not] swindle trusting tourists out of money.” *Kagan*, 2013 U.S. Dist. LEXIS 95546, *21. The City seeks

through its licensing scheme to regulate the quality and content of tour-guide speech, by trying to protect the public from what the City thinks may be inaccurate information regarding New Orleans’ historical or cultural sites. Thus, the City’s licensing scheme is explicitly—and impermissibly—justified based on the content of the tour guides’ speech.

The Supreme Court has recognized that restrictions aimed at improving the quality of speech are presumptively unconstitutional. In *Davis v. FEC*, 554 U.S. 724 (2008), the Court rejected the argument that campaign finance limitations directed at wealthy candidates were justified by an interest in improving the quality of campaign speech. *Id.* at 743 n.8 (“[I]t would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech.”). Likewise, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the dissent argued that it was constitutional to require that literature about ballot measures identify its author, because the requirement would deter (without expressly outlawing) “mudslinging,” “innuendo,” and “dirty tricks.” *Id.* at 382–83 (Scalia, J., dissenting). But the majority nonetheless held that the restriction was content-based and unconstitutional. *Id.* at 357.

These decisions reflect the well-established principle that a government’s benign or even benevolent desire to regulate, censor, or otherwise change the content of speech is still a content-based restriction on speech. Just as “the desire to protect listeners from offense or other emotional harm is not a content-neutral interest,” *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Dist. of Columbia*, 972 F.2d 365, 374 (D.C. Cir. 1992), so too the City of New Orleans’ stated desire to protect tour participants from possibly erroneous historical information is not a content-neutral interest.

III. Tour Guides Are Not Professionals Who Are Subject to Lesser First Amendment Protection

There remains only one potentially plausible justification for applying less-than-strict scrutiny to the City’s testing and licensing requirement: the contention that tour guides are “professionals” subject to lesser First Amendment protection. But whatever the proper scope of any “professional-client speech” might be, it does not apply in this case.

The closest the Supreme Court has come to announcing a First Amendment test for professional-client speech has been in Justice White’s concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985) (White, J., concurring in the judgment). Under Justice White’s approach, the low-

er protection offered professional-client speech applies to “[o]ne who [1] takes the affairs of a client personally in hand and [2] purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances.” *Id.* at 232. This potential exception has never been recognized by this Court.

Tour guides, however, are not engaged in professional-client speech under any reasonable sense of the term. They are not privy to a customer’s personal, financial, medical, or psychological affairs. They do not take the affairs of a customer personally in hand and do not purport to exercise judgment on behalf of the customers. To the contrary, tour guides typically do all the speaking and, at most, may answer a few questions to satisfy the customers’ curiosity.

Moreover, professionals such as “[d]octors and nurses, lawyers and notaries, bankers and accountants, insurance agents and solicitors,” *Thomas v. Collins*, 323 U.S. 516, 549 (1945) (Roberts, J., concurring), deal with information of great importance to their clients’ physical, psychological, or economic needs. If a lawyer, doctor, or financial advisor makes a mistake, the mistake can mean “ruinous losses for the client.” *Lowe*, 472 U.S. at 229 (White, J., concurring in the judgment).

In stark contrast, if a tour guide makes a mistake about a historical detail, the mistake will at most misinform a customer about a relatively minor matter (unrelated to customers’ personal, financial, medical or psychological affairs)—just as an error in a history book, film, or lecture might misinform some readers, viewers, or listeners about some detail in which they are interested. Tour guides are not, and should not, be considered “professionals” subject to lesser First Amendment protection.

CONCLUSION

For the foregoing reasons, the City of New Orleans’ licensing scheme is a content-based speech restriction subject to strict scrutiny. This Court should thus reverse the decision below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Century Schoolbook.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of December, 2013, I caused this Brief of the Cato Institute as Amicus Curiae 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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