No. 14-585

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

New Orleans regulates tour-guiding businesses to protect tourists and the city's tourism industry. A licensing requirement ensures that visitors are not guided through the city by criminals, drug addicts, or swindlers. New Orleans does not regulate tours' content, nor does it prohibit the dissemination of unflattering or inaccurate information.

The question presented is whether the Fifth Circuit, assuming that intermediate scrutiny applied, correctly concluded that New Orleans presented sufficient record evidence to support its ordinance against Petitioners' First Amendment challenge.

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BRIEF IN OPPOSITION

INTRODUCTION

New Orleans regulates the tour-guiding industry to protect visitors to the city and the economic benefits they bring with them. These regulations require guides to pass a background check, a drug test, and an examination on New Orleans and its history before obtaining a license to give tours for hire. The licensing law does not regulate what tour guides say; it merely ensures, among other things, that professional tour guides have basic knowledge of the city and are not recent felons or drug addicts. Petitioners ask this Court to reverse the Fifth Circuit and invalidate this law—and a wide range of other occupational regulations—by adopting a sweeping First Amendment theory.

Petitioners have not given this Court a reason to do so. Their case hinges upon a purported split between the Fifth and D.C. Circuits, the only courts of appeals to consider this issue. But this "split" is fact-bound. Both courts of appeals agreed on the applicable legal standard: intermediate scrutiny. The different results stem from the unique facts underpinning each city's law. The District of Columbia produced no evidence that unlicensed tour guides were causing harm. New Orleans, by contrast, came forward with evidence that unlicensed tour guides were a real threat and that tourists had fallen prey to these guides. There is no split of authority.

Nor does this case implicate any conflict with this Court's cases or "a split of authority among lower courts over whether ordinary First Amendment doctrines apply to laws styled as occupational licenses." Pet. 10. Petitioners vigorously oppose the application of rational-basis review to licensing laws that incidentally affect expression. But the Fifth Circuit, like the D.C. Circuit, did not *use* rational-basis review; it applied intermediate scrutiny. Even if meaningful divisions exist within occupational-licensing jurisprudence, this case does not implicate them.

For similar reasons, Petitioners have isolated no conflict with this Court's precedents. Petitioners assert the City failed to prove that the claimed harms addressed by the regulation are real and that less-restrictive methods would not serve the same interest. But—again—that is a dispute on the application of law to facts, not a dispute regarding the applicable standard. And if that were not enough, this case has vehicle problems that would prevent the Court from addressing the question

presented. Petitioners have failed to present a legal question worthy of this Court's review. Certiorari should be denied.

COUNTERSTATEMENT

1. The City of New Orleans, like several other major American cities, requires professional tour guides to obtain a license before conducting paid tours. Pet. App. 6. These regulations protect the city's vital tourism industry by ensuring that services are provided by reputable and safe operators, protecting inherently vulnerable visitors. *See id.* at 20.

The City has had good reason to act. Its economy depends on revenue from out-of-town guests who may be unfamiliar with their surroundings and unaware of the dangers associated with certain areas and activities. These visitors seek the services of tour operators to help them navigate this unfamiliar territory, but complaints to the City have demonstrated that unscrupulous guides pose their own risks. *See* Pet. App. 14 n.13.

In response, New Orleans developed a licensing scheme to ensure that tour operators provide a safe service, have basic knowledge of the city, and do not have serious criminal records. *See* New Orleans, La., Code of Ordinances § 30-1551. The City Code provides that "[n]o person shall conduct tours for hire in the parish who does not possess a tour guide license." *Id.* To obtain a tour guide license, an applicant must pass a criminal background check, a written examination, and a drug test. Pet. App. 6. The initial licensing fee is $50, and the renewal fee is $20. New Orleans, La., Code of Ordinances § 30-1557(1)-(2). Licenses must be renewed every two years, a process that requires a new drug test and background check,

but not a new knowledge test. Pet. App. 7. Beyond these minimal requirements, tour guides are free to conduct their tours as they please. New Orleans does not regulate what tour guides say or where they go; "[t]here are no scripts, no sacred cows of historical truth, no restraints on taste or opinion, and no topic (point-of-interest or not) is off limits." Pet. App. 14.

2. Petitioners are individuals who provide walking tours of New Orleans' French Quarter, cemeteries, bars, and other sites. Pet. App. 5. Each is paid for her services, and each actually guides her customers from place to place as part of the tour. *Id.* at 6. They filed suit in federal court, arguing that New Orleans' licensing scheme—facially and as-applied—infringes on their First Amendment rights. *Id.* at 7.

Petitioners primarily advanced two contentions. First, Petitioners claimed that the City's licensing scheme is a content-based restriction on speech, such that it could be upheld only if it is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest. Pet. App. 10. Second, Petitioners argued that the City's scheme, even if content-neutral, still flunked intermediate scrutiny because the City had not proved that the licensing regulation was necessary and sufficiently tailored to address the harms it targeted. *See* C.A. R. 132-134.

3. The district court granted New Orleans summary judgment. At the outset, the district court noted that because the City facially regulates the "conduct [of] tours for hire," "it is unclear the City's licensing scheme regulates speech at all." Pet. App. 10. Nonetheless, the court concluded that, to the extent the licensing scheme implicates speech at all,

it is content-neutral because it "does not create classes of 'favored' or 'disfavored' speech" or "create a substantial risk of eliminating certain ideas or viewpoints." *Id.* at 13. In other words, although the City might have to " 'refer' " to tour guides' speech to define the conduct of tour guiding, it "need not (and does not) 'examine the content of the message' that [tour guides'] speech conveys." *Id.* at 15 (citations omitted).

The district court then went on to apply intermediate scrutiny, assessing whether New Orleans demonstrated it has a substantial government interest that is narrowly tailored insofar as the City's goals " 'would be achieved less effectively absent the regulation.' " Pet. App. 19 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989)). Evaluating each licensure requirement in turn—the knowledge test, the drug test, and the background check—the district court concluded that the regulation satisfied this Court's intermediate-scrutiny standard. Citing the City's evidence of real harms caused by unlicensed tour guides, the district court found that the licensing requirement advanced the City's interest "in preventing tourists from feeling scammed or harassed—not in policing what is said or heard." *Id.* at 13-14.

4. The court of appeals affirmed, substantially for the reasons given by the district court. Pet. App. 1-4. Like the district court, the court of appeals questioned whether the city's licensing scheme actually regulated speech. *Id.* at 3. But, like the district court, the court of appeals assumed that speech was at issue, *id.*, and addressed Petitioners' two claims: that the licensing scheme was content-based and

that, even if it was content-neutral, it failed intermediate scrutiny.

The court of appeals rejected both of Petitioners' claims. First, the Court disagreed that New Orleans' licensing requirement is content-based. Pet. App. 3. That is because "the New Orleans law in its requirements for a license has no effect whatsoever on the content of what tour guides say." *Id.* at 4. "Those who have the license can speak as they please, and that would apply to almost any vocation that may be licensed." *Id.* at 3-4. Second, the court of appeals found that the scheme was necessary and sufficiently tailored to satisfy intermediate scrutiny. *Id.* at 4. Echoing the district court's analysis, the court of appeals concluded that "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." *Id.*

The Fifth Circuit unanimously denied Petitioners' request to rehear the case, and the full court declined to rehear the case en banc. Pet. App. 28-29. This petition followed.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' CLAIMED SPLITS ARE ILLUSORY.

A. Any Disagreement Between The Fifth And D.C. Circuits Is Factbound.

Petitioners assert (Pet. 7-9) that certiorari is warranted to resolve a conflict between the decision below and the D.C. Circuit's decision in *Edwards* v. *District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

To be sure, *Edwards* reaches a different result. But that difference stems from different facts, not from different legal standards. Indeed, the decision below and *Edwards* agree on the proper intermediate-scrutiny standard. There is no split to resolve.

1. In *Edwards*, the D.C. Circuit considered a tour-guide licensing scheme that, like this one, prohibits anyone from being paid to " 'guide or escort any person through or about' " the city without a license. 755 F.3d at 999 (quoting D.C. Code § 47-2836). And like the decision below, the D.C. Circuit assumed that intermediate scrutiny applied to the tour guides' challenge to the regulations. *Id.* at 1002. Thus, both courts applied this Court's intermediate-scrutiny precedent, such as *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), and *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See* Pet. App. 4 (court of appeals discussing *Ward*); *id.* at 18 (district court discussing *O'Brien*); *Edwards*, 755 F.3d at 1002 (citing *Ward* and *O'Brien*). Moreover, the D.C. Circuit acknowledged that intermediate scrutiny does not demand extensive statistical studies or irrefutable proof: a regulator may " 'justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.' " *Edwards*, 755 F.3d at 1003 (quoting *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 555 (2001)).

The two courts differed in their assessment of the facts before them. Even though the D.C. Circuit found Washington, D.C.'s interest in protecting tourists and preventing fraud "substantial in the abstract," it castigated the District for offering no

evidence that unlicensed tour guides were, in fact, hoodwinking or otherwise troubling tourists. *Edwards*, 755 F.3d at 1003. All the District could produce was "deposition testimony that guides with criminal convictions *might* pose a danger," *id.*, and a single 1927 *Washington Post* article explaining that "self-styled tour guides were overly aggressive in soliciting business." *Id.* at 1004. The D.C. Circuit unsurprisingly rejected that nearly century-old documentation as irrelevant to current circumstances. *Id.*

This case is worlds apart. New Orleans came forward with specific instances of tour-guide fraud and crime, drawn from, among other things, City officials' and Petitioners' experiences in the field. The City submitted records of three separate investigations into complaints involving unlicensed tour guides attempting to solicit tourists. C.A. R. 158-160. Twice the violator resisted attempts by City investigators to obtain more information and fled the scene. *Id.* at 158-159. In one case, a violator tried to defraud tourists by passing off a supermarket rewards card as a tour-guide license. *Id.* at 159. And in yet another, an unlicensed tour guide solicited cemetery visitors by pretending to be a caretaker. *Id.* at 158-160.

The City also related complaints of impaired and unknowledgeable tour guides, explaining that tourists subjected to these providers have felt scammed. C.A. R. 454-455, 466. Even Petitioners described episodes where "panhandlers" posing as guides "harass[ed] people into giving them money after they offer information." *Id.* at 245. So pervasive was the problem that the City assigned investigators to patrol problem areas daily for unlicensed tour

guides. *Id.* at 588-589. That is a far cry from the yellowed newspaper article and speculation that Washington, D.C. produced in *Edwards*.

What's more, the cities themselves—and their tourist industries and crime problems—are quite different. This Court has recognized that New Orleans has a significant interest in limiting commercial activities in the French Quarter, which "tend to interfere with the charm and beauty of a historic area and disturb tourists and disrupt their enjoyment of that charm and beauty." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 304 (1976). And Louisiana courts have recognized that crime—and even violence—in the French Quarter is all-too-common, particularly against vulnerable tourists, who are unacquainted with their surroundings and away from familiar resources. *See State* v. *Tate*, 130 So. 3d 829, 832 (La. 2013) (involving the "armed robbery and attempted murder of a tourist outside the French Quarter"); *State* v. *Lewis*, 612 So. 2d 213, 214-215 (La. App. 4th Cir. 1992) (involving the murder of a tourist on his way to his French Quarter hotel); *State* v. *Dempsey*, 844 So. 2d 1037, 1040 n.4 (La. App. 4 Cir. 2003) (imposing consecutive sentences for armed robbery because victims were "particularly vulnerable" by virtue of their status as "tourists in the French Quarter"); *see also, e.g.*, *People* v. *Ramirez*, 727 N.Y.S.2d 599, 600 (N.Y. City Crim. Ct. 2001) ("Deserving of special protection in this matter are the especially vulnerable tourists * * * ."). This

compilation of specific evidence—present and past—sets this case apart from *Edwards*.[1]

2. What Petitioners decry as a split between the D.C. and Fifth Circuits reflects only that two courts applied the same legal test to two different situations and reached two different conclusions. But this Court "rarely" grants the writ "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Court, after all, "do[es] not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

And even if the differences between the Fifth and D.C. Circuit opinions did represent a split of authority, that split would be shallow and narrow. It would be shallow because only two courts of appeals have considered the First Amendment implications of tour-guide licensing regimes. And it would be narrow because the difference between the two courts' decisions turns entirely on their evaluation of the evidence put forth by the cities involved. If the Court is inclined to address the constitutionality of tour-

[1] The D.C. Circuit uncharitably dismissed the Fifth Circuit's opinion as not adequately addressing "significant legal issues." *Edwards*, 755 F.3d at 1009 n.15. But the *Edwards* court ignored that the Fifth Circuit had affirmed a comprehensive district court opinion that discussed the very issues the D.C. Circuit thought the court of appeals' decision overlooked. And even if the Fifth Circuit was terser than the D.C. Circuit panel would have liked, this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956).

guide licensing schemes, it should stay its hand until more circuits weigh in.

Trying to short-circuit this process, Petitioners claim that this Court "may not have a similar opportunity anytime in the near future" to address the question presented. Pet. 19. But Petitioners' own counsel is currently pursuing a similar lawsuit in Savannah, Georgia. *See* Alan Blinder, *Lawsuit May Reshape Tourist Industry in History-Rich Savannah*, N.Y. Times, Dec. 20, 2014. Petitioners' suggestion that this case may be the Court's last chance to evaluate the constitutionality of tour-guide licensing schemes rings false.

B. This Case Does Not Implicate Any Disagreement As To Whether Rational-Basis Review Applies To Occupational-Licensing Laws.

Perhaps recognizing the limited importance of their primary split, Petitioners argue that this case implicates a broader "split of authority among lower courts over whether ordinary First Amendment doctrines apply to laws styled as occupational licenses." Pet. 10. It does not. Neither the district court, nor the court of appeals, nor the D.C. Circuit ever held that occupational licensing is immune from First Amendment scrutiny. Thus, even if there were a disagreement among the circuits on that distinct issue, taking this case would do nothing to resolve it.

1. Petitioners claim (Pet. 10) that the court of appeals eschewed First Amendment scrutiny for occupational-licensing laws when it said that "[t]hose who have the license can speak as they please, and that would apply to almost any vocation that may be licensed." Pet. App. 3-4. But Petitioners rip that

sentence far out of context. The court of appeals was not saying that there was "no free-speech problem with New Orleans' law because it was merely an occupational license." Pet. 10. Rather, the court was explaining why it had concluded that the licensing scheme was content neutral. The Fifth Circuit's observation that tour guides "can speak as they please" relates directly to its conclusion that the licensing law did not "stifle[] speech on account of its message"—the definition of a content-based restriction. *See Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994). Petitioners' reading of the Fifth Circuit's sentence conflates the two distinct challenges they raised in that court: whether New Orleans's scheme is content-neutral and, if so, whether it passes intermediate scrutiny.

Indeed, Petitioners' reading of the Fifth Circuit's statement makes little sense. If, as Petitioners claim, the Fifth Circuit found that occupational-licensing laws are subject only to rational-basis review, there would have been no reason for the court to analyze New Orleans' scheme under intermediate scrutiny. *See* Pet. App. 3-4. Yet, of course, that is exactly what the Fifth Circuit did. *See id.* Neither the Fifth Circuit's sentence nor its opinion as a whole passed upon the question of whether occupational-licensing laws writ large are subject to rational-basis or intermediate-scrutiny review.[2] The court of appeals never even approached the question.

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[2] The petition is unclear as to whether Petitioners seek review of their claim that New Orleans' scheme is content-based. As the petition discusses only this Court's intermediate-scrutiny cases (Pet. 14-19), it appears that Petitioners have abandoned the argument. And although some of Petitioners' *amici* contin-

As a result, Petitioners' discussion (Pet. 10-11) of what they see as disharmony among the circuits on the appropriate level scrutiny for occupational-licensing laws is beside the point. Even if Petitioners are correct that the Ninth and Third Circuits disagree[3] about whether restrictions on therapists' professional, medicinal speech triggers heightened scrutiny, this case does not implicate the split in a way that would help Petitioners. That is because the Fifth Circuit aligned itself with the supposedly more Petitioner-friendly side of the alleged split: It applied intermediate scrutiny. *See* Pet. App. 3. And in any event, whether a State may forbid therapists from conducting a controversial course of medical treatment with minors says little about whether New Orleans may require tour guides to pass a criminal background check. The cases are factually inapposite.

This Court ultimately does not grant certiorari to resolve circuit splits in the abstract. If the Court believes that the conflicting standards applied in the

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ue to press the content-neutrality issue, *see* NFIB Br. 4-9, Cato Br. 8-13, *amici* cannot expand the issues beyond those presented in the petition. *See United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). In any event, no one claims that there is a division among the circuits as to whether tour-guide licensing schemes are content-neutral. The question would therefore not be fit for this Court's review.

[3] *Compare Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014) (concluding that rational-basis review applies to a State's ban of so-called "conversion therapy" by licensed therapists and upholding the ban), *with King* v. *Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014) (concluding that intermediate-scrutiny applies to a similar ban, but upholding the ban under the intermediate-scrutiny standard).

Ninth and Third Circuits' opinions warrant review, then the proper course would be to grant the pending petition from the Third Circuit's decision. *See King* v. *Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *petition for cert. filed*, 2014 WL 6847205 (Dec. 3, 2014) (No.14-672). *But see Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, No. 13-949 (June 30, 2014). What the Court should not do is grant review in this case, which applied the same heightened standard that Petitioners appear to advocate and involves a substantially different regulation.

2. The same is true of what Petitioners claim (Pet. 11-13) is "confusion" among the lower courts as a result of Justice White's concurrence in *Lowe* v. *SEC*, 472 U.S. 181 (1985). In *Lowe*, Justice White opined that "[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 prevented from engaging in certain speech "incidental to the conduct of the profession" without raising First Amendment concerns. 472 U.S. at 232 (White, J., concurring). This statement, Petitioners say, has led to disagreement in the lower courts regarding its scope and meaning. Pet. 11-13.

But, again, even if that is so, Petitioners never say how certiorari in this case can clear up the confusion they condemn. The Fifth Circuit never relied on—never even cited—*Lowe* for its holdings. Pet. App. 1-4. And the district court went one step further: It affirmatively disclaimed Justice White's views. *Id.* at 17 n.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 also Edwards*, 755 F.3d at 1000 n.3 (also finding *Lowe* inapplicable to tour-guide licensing laws). This appeal therefore is not the proper vehicle to resolve Petitioners' asserted circuit split involving a case on which neither court below relied.

3. Fundamentally, Petitioners seek review of issues this case does not involve. No doubt Petitioners would like this Court to make a broad statement regarding the application of the First Amendment to occupational-licensing laws. *Cf.* Pet. 19-20. But *this* case, involving a narrow, factbound challenge to a tour-guide licensing law, is not the proper vehicle to do it. The petition should be denied.

II. THE FIFTH CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S DECISIONS.

Petitioners' claim that the Fifth Circuit's decision conflicts with this Court's precedent also falls flat. By applying intermediate scrutiny to the City's tour-guide rules, the Fifth Circuit did not deviate from this Court's cases calling for heightened scrutiny of regulations on speech. And, for the same reason, the ruling does not conflict with *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014). *McCullen* does not change the intermediate-scrutiny landscape; it merely applies existing precedents to a different regulation of a different activity. The First Amendment guidelines employed by the Fifth Circuit—both as articulated and as applied—are perfectly consistent with this Court's caselaw.

1. Petitioners allege (Pet. 14-16) that the Fifth Circuit's decision conflicts with this Court's recent decision in *McCullen.* But *McCullen* applied, not

changed, this Court's intermediate-scrutiny framework. Both this Court and the Fifth Circuit below relied on the same intermediate-scrutiny case—*Ward*—to explain that a content-neutral law satisfies intermediate scrutiny "so long as the * * * regulation promotes a substantial interest that would be achieved less effectively absent the regulation." Pet. App. 4 (internal citation and quotation marks omitted); *McCullen*, 134 S. Ct. at 2534.

Applying that test, the Fifth Circuit here concurred with the district court that (1) the regulations "effectively promoted" the City's interests in protecting visitors and the economic benefits of the tourism industry and (2) that "without those protections * * * the government interest would be unserved." Pet. App. 4; *see also id.* at 19 (district court explaining the tailoring requirement). By contrast, the *McCullen* Court found that the 35-foot fixed buffer zones around abortion clinics in Massachusetts "burden[ed] substantially more speech than necessary to achieve the Commonwealth's asserted interests." *McCullen*, 134 S. Ct. at 2537. That the Fifth Circuit upheld one law under intermediate scrutiny and *McCullen* struck down a different law under intermediate scrutiny does not mean the Fifth Circuit's decision "conflicts directly" with *McCullen*. Pet. 14. Petitioners' displeasure with the court of appeals' application of properly stated rules of law is not the sort of complaint this Court grants certiorari to review. Sup. Ct. R. 10.

Attempting to identify a break in legal principles, Petitioners claim that the Fifth Circuit allowed New Orleans to satisfy intermediate scrutiny through "mere speculation and conjecture." Pet. 15. But Petitioners' argument ignores the significant evi-

dence New Orleans put forward to demonstrate that unlicensed tour guides put tourists and the City's reputation at risk. *See supra* at 8. Moreover, this Court's cases are clear that the proponent of a content-neutral regulation may rely on anecdotes, history, consensus, and common sense, just as New Orleans did here. *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 629 (1995). The robust empirical evidence Petitioners appear to demand is contrary to this Court's intermediate-scrutiny caselaw.[4]

Petitioners also protest (Pet. 14) that the Fifth Circuit did not demand "record evidence" that " 'alternative measures that burden substantially less speech would fail to achieve the government's interest.' " (quoting *McCullen*, 134 S. Ct. at 2540). But the words "record evidence" do not appear in *McCullen*; the Court did not suggest that proof of a sufficient fit between a government's goals and the means it uses to achieve them must come from documented policy failures as opposed to alternate forms of proof. *See Went For It*, 515 U.S. at 629. To the contrary, *McCullen* explicitly reaffirmed *Ward*'s teaching that—under intermediate scrutiny—the means a government chooses " 'need not be the least restrictive or least intrusive means of' serving the government's interests." 134 S. Ct. at 2535 (quoting *Ward*, 491 U.S. at 798). Petitioners' insistence that New Orleans cycle through less-restrictive means of regulating unscrupulous tour guides—what they

[4] Petitioners also emphasize (Pet. 2-3, 16) the supposed novelty of New Orleans' licensing scheme. But *McCullen* noted that this fact "of course does not mean that [a] law is invalid." 134 S. Ct. at 2537.

might be, the Petition never says—before enacting its current licensing regime is the sort of strict scrutiny *McCullen* expressly rejects.

As the courts of appeals to interpret *McCullen* have observed, there is no sign that Petitioners' preferred passage was meant "to change the law in narrow tailoring" in light of *McCullen*'s express reaffirmance of *Ward*. *Traditionalist Am. Knights of the Klu Klux Klan* v. *City of Desloge*, No. 13-3368, 2014 WL 7345481, at *9 (8th Cir. Dec. 24, 2014). And unlike *McCullen*, where this Court identified feasible alternatives that Massachusetts could have, but did not, employ, "the record here does not show an obvious, less burdensome alternative that the city * * * should have selected." *Id.*; *see also Pine* v. *City of W. Palm Beach*, 762 F.3d 1262, 1274 (11th Cir. 2014) (finding *McCullen* distinguishable where the record "contain[ed] no evidence of feasible alternatives" that would have furthered the government's legitimate goals). *McCullen*'s fit analysis therefore does not aid Petitioners.

To the extent Petitioners believe that *McCullen* has altered *Ward*'s tailoring test, though, this Court should give the lower courts more time to consider the case's implications. Given that Petitioners do not allege a split among the lower courts as to how to interpret *McCullen*, the Court has no cause to revisit a case that is barely a year old.

2. Petitioners separately allege (Pet. 16-18) that the Fifth Circuit's decision conflicts with this Court's holdings applying heightened scrutiny to restrictions on occupational speech. But that is simply a variation on Petitioners' misreading (*id.* at 10) of the Fifth Circuit's opinion. Contrary to Petitioners' claims, the

Fifth Circuit never endorsed the idea that occupational licensing laws are categorically " 'devoid of all First Amendment implication' " or " 'subject only to rationality review.' " Pet. 17 (quoting *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 n.13 (1988). In fact, the court of appeals expressly analyzed the City's licensing regime's effect on protected speech and applied intermediate scrutiny. *See* Pet. App. 3-4. What the court of appeals rejected was Petitioners' unprecedented argument that *strict scrutiny* should apply to a law with "no effect whatsoever" on the content of what licensees say. *Id.* at 3.

With the Fifth Circuit's opinion properly construed, Petitioners are left to refute an opinion the court of appeals did not write. Petitioners, for instance, say that the Fifth Circuit's decision contradicts *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002), where no justice suggested that a pamphleteering law "should be subject to rational-basis scrutiny." Pet. 17. Neither did any judge in the Fifth Circuit. Similarly, Petitioners say that this Court "has consistently rejected the idea that occupational licensure is " 'devoid of all First Amendment implication.' " *Id.* (quoting *Riley*, 487 U.S. at 801 n.13). So has the Fifth Circuit. Pet. App. 3-4. Petitioners' claim of a split with this Court's heightened-scrutiny cases is built entirely on a misreading of the decision below.

III. THIS CASE IS A POOR VEHICLE TO ADDRESS THE QUESTION PRESENTED, WHICH ITSELF IS OF LIMITED IMPORTANCE.

A. There Is A Threshold Question Of Whether New Orleans' Tour-Guide Licensing Scheme Regulates Speech At All.

The Fifth Circuit—correctly (*supra* at 15-19)—concluded that New Orleans' statute withstands intermediate scrutiny. But even if the Court were inclined to review that fact-laden conclusion, there is a threshold legal question that would prevent the Court from reaching it. As both the district court (Pet. App. 10-11) and court of appeals (*id.* at 3) observed, there is a serious question of whether New Orleans' licensing scheme regulates speech at all.

1. New Orleans' Code of Ordinances § 30-1551 provides that "[n]o person shall conduct tours for hire in the parish who does not possess a tour-guide license." Under the plain language of the prohibition, what triggers the City's licensing requirement is "conduct[ing] tours for hire"—in other words, the act of moving a group from place to place within the city in return for pay. That is a regulation on *conduct*, not a regulation on *speech*.

That reality is reflected in how New Orleans interprets and enforces its law. The City's Law Department—which advises local officials on the interpretation and enforcement of local laws—construes the ordinance to "require a license if a guide [leads] visitors on a walking tour without uttering a word." New Orleans C.A. Br. 7. By contrast, a person who wishes to teach a class or give a speech about New

Orleans and its history in a single location would not need a license. C.A. R. 405, 410-411.[5] It is therefore the *act* of shepherding visitors about the city in return for money—not the *speech* that guides engage in while doing so—that triggers the requirement that the person obtain a license. For good reason: The City's primary concern in licensing tour guides is that vulnerable tourists not be harmed criminals and charlatans. Pet. App. 16. That is, "the City's licensing scheme is directed at the non-speech-related risks" posed by guided tours. *Id.*

The City Code does define "tour guide" by reference to speech—a "tour guide" is "any person duly licensed * * * to conduct one or more persons to any of the city's points of interest and/or history buildings, parks or sites, for the purpose of explaining, describing or generally relating facts of importance thereto." New Orleans, La., Code of Ordinances § 30-1486. But the prohibition on conducting tours does not reference or otherwise integrate this definition. Therefore, as the district court recognized, "[o]n its face * * * the portion of the City Code imposing the licensing requirement applies to conduct, not speech." Pet. App. 11. And Petitioners do not sug-

[5] The Cato Institute incorrectly states that "New Orleans has made it a crime for someone to stand on a public sidewalk in front of a landmark and describe its cultural significance to paying customers without a license." Cato Br. 2; *see also id.* at 11. In the absence of a "tour," the license requirement does not apply. *See also* NFIB Br. 14 n.9 (making a similar error). Anyway, Petitioners all move their customers throughout the city, Pet. App. 5; if New Orleans—contrary to its representations—were to require that a stationary speaker obtain a license, the speaker could always bring an as-applied challenge to that application of the City's licensing scheme.

gest that heightened scrutiny applies to licensing laws that regulate conduct alone.

The district court nonetheless thought that the City's enforcement scheme in practice regulated speech because a City employee in a deposition defined "conduct" as "speaking, giving any type of historical background on certain sites." Pet. App. 11 n.10. That official, however, was not a lawyer and was not an appropriate authority to give a legal interpretation of the City's ordinances. *See* New Orleans C.A. Br. 7 n.21. Moreover, her testimony taken at face value would have defined the act the City prohibits as "speaking a tour for hire"—a definitional substitution that makes little sense. And besides, even if the witness's testimony were somehow construed as an admission, a Federal Rule of Civil Procedure 30(b)(6) "witness's legal conclusions are not binding on the party who designated" her. *S. Wine & Spirits* v. *Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013); *accord AstenJohnson, Inc.* v. *Columbia Cas. Co.*, 562 F.3d 213, 229 n.9 (3d Cir. 2009).

In its answers to interrogatories, the City unequivocally stated that it would require a silent tour guide to be licensed, confirming that it regulates the act of guiding visitors, not the speech that may be incidental to that act. *See* C.A. R. 151-152. The City's clear, consistent, and binding statement in its interrogatory refutes any doubt created by the City witness's muddled, uncertain, and non-binding answer to counsel's question. To the extent the district court thought that the witness's personal definition of "conducting" made the tour-guide ordinance a restriction on speech, the court was mistaken.

2. This dispute between the parties as to the scope and meaning of the City's licensing laws is a significant prudential barrier to the Court's review. If the Court were to grant the writ, New Orleans would be entitled to defend its judgment on this alternate ground. *See Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). And that would mean this Court would have to interpret New Orleans' ordinances for itself, a thorny question of Louisiana law well outside of the Court's bailiwick. It should avoid that tangle and simply deny the petition.

B. This Case Lacks Nationwide Importance.

Finally, the petition does not present a question of national importance warranting this Court's review. Petitioners say (Pet. 19) that the freedoms of "millions of Americans" hang in the balance. Of course, Petitioners do not think that millions want to work as unlicensed New Orleans tour guides. Rather, Petitioners claim is that "[n]early one third of the American workforce now needs a license to work," and that third has been harmed by federal courts "fail[ing] to generate a uniform rule" for whether or how the First Amendment applies to occupational licenses. *Id*.

That is yet another iteration—the third so far—of Petitioners' fundamental misreading of the Fifth Circuit's opinion as it relates to the First Amendment and occupational licensing. *See supra* at 11-15, 18-19. In reality, Petitioners have already gotten much of the result they desire: the district court, the Fifth Circuit, and D.C. Circuit all assumed that tour-guide licenses implicate First Amendment freedoms and applied intermediate scrutiny. The most this Court's review could achieve is a third opinion on the

sufficiency of the particular justifications New Orleans proffered for this particular regulation in this particular case.

That opinion—limited as it would be to tour-guide licensing schemes in cities with histories similar to New Orleans—would do little to develop the law. As Petitioners repeatedly note, only a handful of municipalities have licensing requirements like those in New Orleans, *see, e.g.*, Pet. 3, and one, Washington, D.C.'s, has been invalidated. And it is not as if Petitioners cannot work as tour guides without a judgment in their favor. Petitioners Kagan and Cole were eligible to renew their tour-guide licenses, but chose not to go to the trouble. C.A. R. 254-256, 328. And Petitioners LaCoste and Watt both currently possess valid tour-guide permits. *Id.* at 283, 360. Neither the Nation as a whole, nor these particular Petitioners, require this Court's review in order to carry on their chosen professions. The petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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