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

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Reading the Brief in Opposition, one would be hard-pressed to remember the actual First Amendment issue in this case: Tour guides in New Orleans are required (among other things) to pass a test on the aspects of history the government deems important before they can talk to their customers about the topics of their choosing. The Fifth Circuit allows government to police public discourse in this manner; the D.C. Circuit does not. This is an important split of authority, and this case presents a perfect vehicle to resolve that split. The petition for certiorari should therefore be granted.

I. THE CIRCUITS ARE SPLIT.

Respondent makes three key errors in its attempts to erase the circuit split established by the petition. First, Respondent is unable to defend the Fifth Circuit's opinion below without adopting legal positions that are squarely at odds with the D.C. Circuit's reasoning in *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). Second, it proffers supposed factual distinctions between the cases that are neither legally relevant nor even actual distinctions. Finally, it incorrectly asserts that this case does not present an opportunity for the Court to clarify the standard of review appropriate for laws that burden occupational speech. These flawed arguments only underscore the fact that this case presents a circuit split ripe for this Court's resolution.

A. Respondent's Brief Confirms The Legal Disagreement Between The Fifth And D.C. Circuits.

The D.C. Circuit, in deciding *Edwards*, refused to follow the Fifth Circuit's opinion below because of legal, not factual, disagreements with it. 755 F.3d at 1009 n.15. And Respondent's brief only underscores these disagreements. Tellingly, Respondent has found it impossible to justify the Fifth Circuit's analysis without explicitly and repeatedly taking legal positions that conflict with the D.C. Circuit's opinion in *Edwards*.

The crux of Respondent's argument is that there can be no split here because both courts of appeals to consider similar tour-guide licenses have invoked the phrase "intermediate scrutiny." Br. in Opp. (Opp.) 7. But using the same phrase does not mean applying the same standard. Again and again – in Respondent's discussion of less-restrictive alternatives, of the factual justifications for its tour-guide law, and even of its own interpretation of its ordinance – Respondent proves unable to defend the Fifth Circuit's reasoning without adopting legal positions that were directly rejected by the D.C. Circuit in *Edwards*. That is because the two opinions are irreconcilable.

1. Perhaps the clearest illustration of Respondent's disagreement with the D.C. Circuit's legal conclusions is Respondent's discussion of the possibility of less-restrictive alternatives. The petition pointed out that the Fifth Circuit's approach below

conflicts with (among other things) this Court's decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), because it fails to even discuss the question of whether New Orleans could achieve its goals while burdening significantly less speech.[1] Pet. 14-16. Respondent says this kind of analysis is simply unnecessary under intermediate scrutiny and that "the record here does not show an obvious, less burdensome alternative that the city * * * should have selected." Opp. 18 (internal quotation marks omitted).

The problem with Respondent's position is that the D.C. Circuit disagrees with this legal analysis: Indeed, the *Edwards* court specifically found that analysis of less-restrictive alternatives was necessary and that "proposing less restrictive means to achieve [the government's] objectives require[d] no creativity." *Edwards*, 755 F.3d at 1009 (listing several alternative regulatory measures). For example, a city that is concerned that unwitting tourists might fall in with underqualified guides could have a "voluntary certification program – under which guides who take and pass the [city's] preferred exam can advertise as 'city-certified guides'," which would ensure that tourists were fully informed without requiring the city to

[1] Contrary to Respondent's assertions, Petitioners do not suggest that *McCullen* "changed" the constitutional test. *See* Opp. 16. This Court has long required an inquiry into less-restrictive alternatives, even under intermediate scrutiny. *Cf. Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). *McCullen* and *Edwards* simply followed this longstanding rule. The problem is that the Fifth Circuit did not.

silence those who chose not to take its test. *Id.* Exactly the same alternative was proposed here. *See, e.g.*, C.A. R. 8 (proposing "a voluntary, rather than mandatory, tour guide certification system"). Despite this, no lower court has ever required (and Respondent has never offered) an explanation for eschewing this alternative. Instead, Respondent (along with the Fifth Circuit) says that no such explanation is necessary. The D.C. Circuit disagrees.

2. Respondent further suggests that this case can be distinguished from *Edwards* because the record here has evidence of misbehavior from unlicensed tour guides, including aggressive solicitation and "harass[ment]" of innocent tourists. Opp. 8-9. But the D.C. Circuit did not premise its holding on a belief that guides in Washington are scrupulously polite. Instead, it premised its holding on the fact that there was no reason to believe that "unscrupulous businesses, which engage in unfair or unsafe practices, could not be *more* effectively controlled by regulations that punish fraud or restrict the manner in which tour guides may solicit business" instead of making tour guides pass a history test. *Edwards*, 755 F.3d 1009.

Respondent simply disregards this clear holding requiring a fit between the asserted problem and the regulations actually imposed.[2] And Respondent

[2] This fit would, of course, have to be separately examined for each of the challenged provisions of New Orleans's tour-guide

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ignores this holding for a reason: It demonstrates that the Fifth Circuit came to a different conclusion in this case because it applied a different legal standard than the D.C. Circuit did in *Edwards*.

3. Finally, Respondent suggests that this case is different from *Edwards* because it presents a "thorny" threshold question of whether New Orleans's tour-guide law burdens speech at all. Respondent says there is a dispute between the parties about what New Orleans's tour-guide law regulates in the first place. On the one hand, the City Code's definition of "tour guide" and the 30(b)(6) testimony of the relevant enforcement authorities describe a restriction on conveying information to tour groups. Opp. 21, 22. On the other, New Orleans's counsel, in interrogatory responses, asserted that City Code is not triggered by speech because it would require a license of someone who "[leads] visitors on a walking tour without uttering a word" but not someone who "give[s] a speech about New Orleans and its history in a single location." Opp. 20-21.

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law: the history test, the background check, and the regular drug tests. *See generally Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (examining law's burdens on speech individually). Respondent (which barely acknowledges the existence of the history test) attempts to treat "licensing" as a single monolithic burden to be justified in the abstract, rather than as a set of concrete burdens whose tailoring can be analyzed.

But New Orleans's claim that its law applies to silent tours but not to stationary speakers is not a reason to deny the petition: It is, instead, *exactly* the same argument advanced by the District of Columbia in defense of its own tour-guide law. *See* 755 F.3d at 1008 (noting that "the District conceded Appellants could, without a license, lecture at a single point of interest" but that a license would be required if an individual silently led a group and "instead of speaking, distribute[d] pamphlets describing the various sites").

The trouble for Respondent is that the D.C. Circuit correctly viewed this interpretation as a *problem* for the law, not as a get-out-of-jail-free card for the government. After all, the D.C. Circuit reasoned, under this law, "what would stop unlicensed tour guides from stationing themselves at various points of interest throughout the city and lecturing for a fee?" *Edwards*, 755 F.3d at 1007-08. If the purpose of licensing is to prevent unqualified individuals from scamming tourists and harming the tourism industry, the D.C. Circuit held, then requiring a history test only of those who walked while they talked would be vastly underinclusive. *Id.* Respondent may well disagree with that reasoning – as did the Fifth Circuit. That simply means there is a split ripe for this Court's resolution.

These repeated conflicts between the law as stated by Respondent and the law as applied by the D.C. Circuit are dispositive. There is a split between the Circuits here, and this Court should resolve it.

B. There Are No Factual Distinctions Between The Decisions Of The Fifth And D.C. Circuits.

Respondent further suggests that this case and *Edwards* are "worlds apart" based on three categories of evidence. Opp. 8-9. Notably, none of this evidence was cited by the decision below. And for good reason: None of Respondent's evidence even provides a *difference* between the two cases, much less a legal distinction that would justify a different outcome in either case.

First, Respondent points to "three separate investigations into complaints involving unlicensed tour guides attempting to solicit tourists" – and notes that, twice, these unlicensed guides "fled the scene" rather than face prosecution. Opp. 8. Respectfully, this is not evidence of any problem to which the licensing law is tailored. This is evidence that the licensing law is sometimes *violated*, and that (unsurprisingly) violators would like to escape punishment. Moreover, this is not a distinction with *Edwards*, where the court also had evidence of similar lawbreaking because the plaintiffs themselves admitted to leading unlicensed tours. *Edwards*, 755 F.3d at 998, 999.

Second, Respondent points to anecdotal reports of aggressive solicitation of tourists by unlicensed guides and panhandlers. Opp. 8. But, as explained above, this is not a distinction between the cases: The *Edwards* court did not assume there was no bad

behavior on the part of tour guides. Instead, it simply held that there was no evidence to suggest that a mandatory history test was a sufficiently tailored way of addressing any of this behavior. *See supra* at 5-6.

Finally, Respondent suggests that these two cases are distinct because Washington, D.C., and New Orleans are "quite different" in terms of their tourist industry and "crime problems." Opp. 9. The idea that New Orleans and Washington, D.C., can be distinguished because only the former has a problem with violent crime cannot be taken seriously.[3] Moreover, this purported distinction is not only factually false, it is legally irrelevant: Respondent does not even pretend to draw a connection between preventing violent crime and, for example, forcing tour guides to take a history test.

Respondent's inability to identify any genuine factual distinction is telling: The records in this case and in *Edwards* are substantially identical. The courts of appeals reached different conclusions because they applied different legal standards, and this Court should grant certiorari to clarify what the proper standard is.

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[3] The District of Columbia has a dramatically higher violent-crime rate than does New Orleans. *See* F.B.I. Criminal Justice Information Services Division, *Crime in the United States 2013*, Table 8, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-8/table_8_offenses_known_to_law_enforcement_by_state_by_city_2013.xls/view (lasted visited Jan. 29, 2015).

C. This Case Implicates A Further Split About How Licensing Laws Are Reviewed.

Respondent also suggests that this case cannot possibly implicate a longstanding circuit split regarding the proper standard of review for occupational-licensing laws that restrict speech. Opp. 11-15. This is incorrect. To be sure, this Court could resolve this case the same way the D.C. Circuit did by holding that the tour-guide license fails under any First Amendment standard of review. But it will not necessarily do so. *Compare Edwards*, 755 F.3d at 1000 (declining to reach the plaintiffs' arguments for heightened scrutiny) *and Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002) (same) *with McCullen*, 134 S. Ct. at 2530 (deciding whether challenged law was content neutral before analyzing whether it was properly tailored).

There is plainly a disagreement between the D.C. Circuit and the Fifth Circuit over the standard of review – as shown above, their analysis is irreconcilable, despite Respondent's best efforts. In resolving that dispute, the Court will also have an opportunity to cast helpful light on the standard of review that applies to laws like this generally.[4]

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[4] Respondent's suggestion that the Petition somehow waives any argument for strict scrutiny, Opp. 12-13 n.2, is incorrect. The Question Presented in the Petition ("Whether New Orleans's tour-guide licensing requirements violate the First Amendment") clearly encompasses any standard of First

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And, as demonstrated by the petition, this is an issue on which the courts of appeals are split. Pet. 10-13. Again, Respondent attempts to wave away any disagreement by pointing out that the Fifth Circuit below said it was applying "intermediate scrutiny." Opp. 13. But a talismanic reliance on the phrase "intermediate scrutiny" cannot disguise the genuine disagreements among the Circuits here. Some courts demand real evidence to support the licensing of speakers, though even these courts use different standards of review. *Compare King v. Governor of New Jersey*, 767 F.3d 216, 238-39 (3d Cir. 2014) (applying *Central Hudson* scrutiny) *with Edwards*, 755 F.3d at 1005-08 (applying intermediate scrutiny). Other courts, like the court below, demand no such thing. Pet. App. 4; *see also Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1224 (11th Cir. 2014).

In sum, there is ongoing disagreement in the lower courts about when, if ever, occupational-licensing laws trigger serious First Amendment review. This case presents an opportunity to resolve that disagreement, and the petition for certiorari should therefore be granted.

Amendment review. *Cf.* Rule 14(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."). That question is squarely before the Court and will be answered if the Court either rules against Petitioners under intermediate scrutiny or (as it did in *McCullen*) addresses the strict-scrutiny question at the outset.

II. THIS CASE IS A SUITABLE VEHICLE TO RESOLVE AN IMPORTANT QUESTION.

This case presents an important First Amendment question. Respondent's arguments against granting certiorari to answer this question – either because this case presents an unsuitable vehicle or because another vehicle may come along soon – are both incorrect. The petition for certiorari should therefore be granted.

A. Respondent Is Unable To Identify An Actual Vehicle Problem.

The sole "vehicle" problem identified by Respondent is its contention that the Court would be unable to reach the First Amendment issues in this case because New Orleans says it is regulating only the conduct of physically escorting people around town. Opp. 20-22. But as explained *supra*, this argument is not a vehicle problem: The District of Columbia made *exactly* the same argument in *Edwards*, and the D.C. Circuit found that law unconstitutional. *Supra* at 7-8.

Moreover, there is no serious question that New Orleans's law is aimed squarely at speech. Even accepting Respondent's claims that it would apply the law to hypothetical silent tours,[5] there are still hundreds if not thousands of bus drivers, taxi drivers,

[5] Respondent does not contend that anyone actually gives "silent tours," in New Orleans or anywhere else.

and others who regularly conduct groups of people through New Orleans without first being required to pass a history test. And New Orleans imposes a history test on tour guides rather than on taxi drivers for a fairly obvious reason: Tour guides tend to talk about (or be asked about) history, and New Orleans is concerned about "unknowledgeable" guides interfering with the city's preferred tourist experience. Opp. 8.

Respondent identifies no actual vehicle problems with this case: no disputed facts, no standing or other jurisdictional problems, no obstacles whatsoever to deciding the Question Presented. The petition for certiorari should therefore be granted.

B. The Court Should Resolve The Important First Amendment Issue Presented By This Case.

This case presents an important question about when (if ever) government may use its licensing powers to ensure that particular audiences (in this case, tour groups) hear only from approved speakers. As long as the circuit split presented by this case persists, individuals will face serious uncertainty about their rights and local governments will face serious uncertainty about their powers.

And, once again, Respondent's own arguments illustrate this perfectly. Respondent assures the Court that there will be future opportunities to resolve this issue because "Petitioners' own counsel is

currently pursuing a similar lawsuit in Savannah, Georgia." Opp. 11. Respondent fails to inform the Court, however, that Savannah swiftly responded to that lawsuit by partially repealing its tour-guide license. *See* Eric Curl, *Savannah Revises Tour-Guide Ordinance*, Savannah Morning News, Dec. 23, 2014. Moreover, Savannah officials have informed the court in that case that they plan to "base [their] decision regarding settlement on the disposition of [the] currently-pending petition for certiorari in" this case. *See* 26(f) Report at 5, *Freenor v. Mayor & Aldermen of the City of Savannah*, No. 14-cv-00247 (Document 18).[6]

In other words, if certiorari is denied in this case, there may not be further court of appeals opinions to review – at least not anytime soon. In the meantime, tour guides (and others) in the Fifth Circuit will be forbidden from speaking until they meet whatever

[6] Respondent also suggests that the First Amendment issues in this case could be resolved by granting the petition in *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). *See* Opp. 14. The *King* petition presents a poor vehicle for review because the *King* court, applying *Central Hudson* scrutiny, found ample evidence to justify restricting the therapy at issue in that case. The split among the Circuits makes no difference to the outcome in *King* because the Circuits are unanimous that, under *Central Hudson* scrutiny or under something more deferential, the plaintiffs in *King* should lose. *Cf. Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Here, by contrast, Petitioners would prevail under a proper application of intermediate (or higher) scrutiny.

specifications the government deems necessary while guides in other areas will enjoy dramatically greater free-speech rights. This Court should take the opportunity to resolve this issue now.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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