Nos. 13—7063(L), 13—7064

In the United States Court of Appeals
for the District of Columbia Circuit

Tonia EDWARDS and Bill MAIN,
Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA,
Defendant-Appellee.

On Appeal from the District Court for the District of Columbia

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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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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 unnecessarily stifle innovation. Cato therefore has a topical interest in the D.C. tour guide licensing scheme.

Cato also has an interest as a publisher; the sale of books is an important source of revenue for Cato, 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]

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[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 submitting the brief. No person has contributed money that was intend-

SUMMARY OF ARGUMENT

The government could not require that book authors, public lecturers, or documentary filmmakers pass a history test before speaking or filming—even if the government's purpose were solely to protect consumers from shoddy historical claims.

Such a scheme would be a content-based prior restraint on speech. It would discriminate among speech based on subject matter (singling out speech about history). Moreover, it would be justified with reference to content, being aimed at affecting the content of the authors', lecturers', or filmmakers' speech. That the government motivation may seem benign would not keep the scheme from being content-based.

Likewise, the government may not impose a similarly content-based licensing and testing requirement on tour guide employees who speak about a particular subject matter (here, "places or points of interest in the District"). Tour guide speech is as protected as speech in books, lectures, or documentaries.

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ed to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. All parties have consented to the filing of this brief.

Tour guide speech also does not fall within any possible First Amendment exception for "professional-client" speech. Unlike lawyers, 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 D.C. licensing and testing scheme is a content-based restriction on speech subject to strict scrutiny under the First Amendment.

ARGUMENT

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

Say that the government decides 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 say that the government imposes the same requirement on people who give public lectures, and charge for admission. Or say that, before

issuing a filming permit for documentaries on D.C. history, D.C. requires the documentary directors to pass a history test.[2]

These restrictions would surely be unconstitutional prior restraints; the government would be requiring a license to speak, as a means of trying to affect the content of the speech—something First Amendment law does not allow. And the desire to protect consumers from being sold shoddy history or science could not justify such a prior restraint scheme.

The testing requirements for tour guides are no different, from a First Amendment perspective, from the unconstitutional testing requirements for authors, public speakers, or documentarians. Tour guides, after all, are speakers just as people giving a public lecture are speakers. Conversely, authors, lecturers, and documentarians are selling their speech just as tour guides are.

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[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); *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.").

The district court repeatedly argued that the testing requirement was permissible as a means of preventing tour guide ignorance. According to the court, "the examination requirement serves a basic consumer protection function by ensuring that persons selling their services—those of a knowledgeable and trustworthy guide—are at least minimally qualified to do so." *Edwards v. Dist. of Columbia*, Civil Action No. 10-1557 (PLF), 2013 WL 1881547, *11 (D.D.C. May 7, 2013). The requirement is aimed at making it likelier "that individuals who are paid to lead tourists to different places of interest in the District have some basic knowledge about those sites." *Id.* And it "provides for the general welfare of tourists and visitors, promotes the tourism industry, and ensures that tour guides have a minimal level of competence and knowledge." *Id.* at *10.

Yet exactly the same arguments could be made as to authors selling books (which consumers may assume come from "knowledgeable and trustworthy" sources), speakers charging admission for lectures, or documentarians selling DVDs. There too a testing requirement could be said to be aimed at protecting customers' "general welfare," and "ensur[ing] that [authors] have a minimal level of competence and

knowledge." Given the First Amendment, though, such an argument cannot justify requiring authors, public speakers, or filmmakers to pass a test in order to exercise their right to speak. Such an argument likewise cannot justify such a requirement for the particular sort of for-pay public speaker that is labeled a tour guide.

To be sure, when a speaker is engaged in non-speech conduct as well as speech, the government can often regulate the conduct. Thus, for instance, it might be permissible to require a documentarian seeking a filming permit to pass a test on D.C. filming regulations or traffic safety rules. That would be justified by a desire to make sure the filmmaker's conduct is safe, not that the speech is, in the government's view, accurate.

But, as Edwards pointed out in her opening brief, Brief of Appellants 25-27, such reasoning can only justify testing tour guides on, for instance, safe operation of Segways or on traffic safety rules. It cannot justify the government requiring a speaker to pass a test on history or architecture.

II. The District of Columbia's Licensing and Testing Scheme Is a Content-Based Prior Restraint on Speech

The District's 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 affect 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 omitted) (internal quotation marks omitted). And 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 permissible purpose of the statute, 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 D.C. regulation defines "tour guide" to include two classes of people: (1) "any person who engages in the business of guiding or directing people to any place or point of interest in the District," *or* (2) "[any person] who, in connection with any sightseeing trip or tour, describes, explains, or lectures concerning any place or point of interest in the District to any person." D.C. Mun. Regs. tit. 19, § 1200 (2013). Under the second prong of this test, a person connected with a sightseeing trip or tour is covered only if she is speaking about a "place or point of interest

in the District," as opposed to (say) just telling people how to use a Segway or informing them how long the tour will last. This classification is thus content-based, because, like the restrictions in *Carey*, *Mosley*, and *Regan*, it identifies the restricted speech by reference to its content.

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. *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) (internal quotation marks omitted). *See also Texas v. Johnson*, 491 U.S. 397, 411-12 (1989). Indeed, the district court acknowledged that a restriction is content-neutral only if "the government's regulatory interest is unrelated to the content of that expression." *Edwards*, 2013 WL 1881547, at *9. But the district court failed to acknowledge that the testing and licensing requirement is indeed justified by content—namely, by a desire to prevent what the government sees as speech with inaccurate content.

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.

And these decisions simply reflect the principle that a government's desire to change the content of speech, even for the better, is a content-based justification. 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 the desire to protect listeners from hearing erroneous historical claims is not a content-neutral interest.

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

There remains only one potential justification for applying less than strict scrutiny to the testing and licensing requirement: the argument that tour guides are "professionals" subject to lesser First Amendment protection. But whatever the proper scope of any such exception for professional-client speech might be, the district court was right to be skeptical about this argument in this case. *Edwards*, 2013 WL 1881547, *6 n.5.

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 lower 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.

Tour guides, though, are not professionals in this sense of the term. They do not take the affairs of a client personally in hand, and do not purport to exercise judgment on behalf of the customers. Typically, they

do all the speaking, so they are usually not even aware of their customers' affairs. At most, they 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). If a tour guide makes a mistake about a historical detail, the mistake will at most misinform a customer about a relatively minor matter—just as an error in a history book, documentary, or public lecture might misinform some listeners about some detail in which they are interested. Tour guides thus should not be considered "professionals" subject to lesser First Amendment protection.

CONCLUSION

For the foregoing reasons, the District's licensing scheme is a content-based speech restriction subject to strict scrutiny.

Respectfully Submitted,

s/ Erik Jaffe
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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 2,328 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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Dated: Sept. 20, 2013

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of September, 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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