No. 14-585

IN THE

Supreme Court of the United States

CANDANCE KAGAN, ET. AL.,

Petitioners,

v.

CITY OF NEW ORLEANS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a city require someone to get a license before they can speak for pay in public on certain historical or cultural matters?

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INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Cato Institute is a non-partisan 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 constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cato supports entrepreneurship and is skeptical of government interventions that stifle innovation. It therefore has a topical interest in the City of New Orleans's 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 court rulings that uphold licensing and testing requirements for speakers who charge for their speech.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* made a monetary contribution its preparation or submission. All parties were given timely notice of *amicus'* intent to file.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The City of 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—a license that can only be obtained by passing a written test. By definition, the ordinance is a prior restraint.

Prior restraints on speech, such as laws requiring an individual to obtain a license or permit before speaking, are "the most serious and least tolerable infringement of First Amendment rights." *Nebraska Press Association v. Stuart*, 472 U.S. 539, 559 (1976). This Court said that the "main purpose" of the First Amendment was to prevent such "prior restraints." *Patterson v Colorado*, 205 U.S. 454, 462 (1907). Given the substantial burden carried by a state seeking to justify such laws, courts uphold them only in "exceptional circumstances." *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

Moreover, whether they constitute prior restraints or not, laws limiting speech on the basis of "its message, its ideas, its subject matter, or its content" are presumed to violate the First Amendment. *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n of NY*, 447 U.S. 530, 537 (1980).

A law requiring an individual to obtain a permit before speaking on a particular topic, such as a city's

history, is therefore doubly suspect as both (1) a prior restraint (which could only be justified in "exceptional circumstances") and (2) a content-based restriction that would have to satisfy the rigors of strict scrutiny. The New Orleans ordinance is just such a law.

To obtain a permit, New Orleans tour guides must pass a "written examination 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 Fifth Circuit upheld the law in a four-page opinion declaring the ordinance to be a content-neutral speech regulation and thus subject only to intermediate scrutiny—which the regulation supposedly satisfied because "the government interest would be unserved" without the law's "protections." Pet. App. 4. This ruling was doubly wrong: (1) the court chose the incorrect legal standard by which to judge the permit requirement, and (2) it improperly applied that standard.

Moreover, the Fifth Circuit ruling is part of a circuit split. The D.C. Circuit, in a thorough 25-page opinion that struck down a law that was nearly identical, explicitly rejected the Fifth Circuit's ruling. *Edwards v. District of Columbia*, 755 F.3d 996, 1009 n.15 (2014). Although that court declined to decide whether strict scrutiny must apply to such laws, it held that the law could not survive intermediate

scrutiny and went so far as to "doubt the [law] could survive even rational basis review." *Id.* at 1000 n.3.

This case thus merits this Court's attention for three reasons. First, the right to speak cannot be conditioned on passing a history test. Second, the court below improperly held that tour-guide licensing laws are content-neutral. Finally, there is no reason to evaluate the law under a level of review less rigorous than strict scrutiny.

ARGUMENT

I. SPEAKERS CANNOT BE REQUIRED TO PASS A HISTORY TEST BEFORE SPEAKING

Say that the government decided 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 imposed the same requirement on people who give public lectures and charge for admission. Or say that, before issuing a filming permit for a documentary, the City of New Orleans required the director to pass a history test.

These restrictions would surely be unconstitutional prior restraints. The government would be requiring a license to speak as a means of trying to influence the content of that speech—something First Amendment doctrine forbids. As this Court has said, any law that "imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

The court below reasoned that the testing requirement was permissible to prevent tour-guide ignorance. It saw the ordinance's "purpose to be clear" because "New Orleans thrives, and depends, upon its visitors and tourists." Pet. App. 2. Accordingly, it accepted the City's interest in identifying guides who are "knowledgeable about the city." *Id.* at 2. "New Orleans, by requiring licensees to know the city . . . has effectively promoted [those] interests." *Id.* at 4. The Fifth Circuit thus echoed the district court it was affirming, which accepted the City's desire to "increase the likelihood that tour group participants will get the tour they bargained for." *Id.* at 21. "The testing requirement simply helps to ensure that tour guides have some reasonable basis for holding themselves out as such." *Id.* at 22.[2]

Yet exactly the same rationales could pertain to authors selling books—authors whom consumers assume are "knowledgeable" about their subject matters—as well as speakers charging admission for lectures or documentarians selling DVDs. A testing requirement for writers, lecturers, and filmmakers 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.

Such licensing schemes could be said to protect the welfare of the publishing, public-speaking, or

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[2] While the district court's ruling is of course not the rule of decision that this Court would be reviewing if it grants cert., that opinion is instructive because it provides a fuller elaboration of the reasoning (presumably) underlying the Fifth Circuit's scant opinion.

documentary-filmmaking industries, and thus the economy more broadly. A testing requirement, the theory would go, would weed out supposedly ignorant creators, boost 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. The government simply may not require licenses or satisfactory test scores from writers, publishers, directors, pamphleteers, or sidewalk preachers. Such rationales likewise cannot justify a requirement tantamount to a prior restraint on the speech of the particular sort of for-pay public speaker who is labeled a "tour guide."

The Fifth Circuit also theorized that the city ordinance was not really a regulation of speech because "the New Orleans law in its requirements for a license has no effect whatsoever on the content of what tour guides say." Pet. App. 3. "Tour guides may talk but what they say is not regulated or affected by New Orleans." *Id*. at 4. Or, as the district court found, the law is actually a regulation of a commercial activity. "The conduct triggering coverage consists of an act—guiding people around the city for hire—that only incidentally involves communicating a message." *Id*. at 15-16.

Under the district court's interpretation, the ordinance is different from requiring authors, publishers, and public speakers to obtain a permit "because those activities involve only speech. The entire difference, in fact, between buying a book or attending a lecture on New Orleans history and

purchasing a tour is the act of being guided around." *Id.* at 16. It is "the non-speech-related risks" of a tour that the ordinance is meant to protect against. *Id.*

But the test is not limited to, or even focused on, the "non-speech-related" matters related to being "guided around," such as urban navigation, first aid, or traffic safety—or even being able to walk backwards. The questions on history, architecture, and culture have nothing to do with "non-speech-related risks" and everything to do with the message that the guide will be communicating.

Indeed, the government may well be able to regulate the 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. Or a pamphleteer may be required to stay on the sidewalk and obstruct neither cars nor pedestrians. These requirements could be justified by a government interest in ensuring that the filmmaker's or activist's conduct does not pose a public-safety hazard—but not to ensure that her film or flyer is accurate.

Likewise, the government may be able to require the (reasonable) testing of tour guides on, say, the safe operation of Segways. *See*, *e.g.*, *Edwards*, 755 F.3d at 999. But the concern about non-speech-related aspects of a speaker's behavior cannot justify the government's requiring speakers—a category that certainly includes tour guides—to pass a test on history and architecture before lawfully exercising the right to speak.

II. THE LICENSING SCHEME IS A CONTENT-BASED PRIOR RESTRAINT ON SPEECH

The New Orleans ordinance requires anyone who wants to be a tour guide to obtain a permit allowing them "to conduct one or more persons to any of the city's points of interest . . . *for the purpose of explaining, describing or generally relating the facts of importance thereto*." N.O. City Code § 30-1486 (emphasis added). The court below found this to be a content-neutral law because it has "no effect whatsoever on the content of what tour guides say." Pet. App. 3.

Yet this Court has never held that a speech-restriction is content-neutral so long as it does not exercise editorial control over a speaker's message. Indeed, *amicus* is grateful that this Court did not apply the Fifth Circuit's logic when it decided *Lamont v. Postmaster General*, 381 U.S. 301 (1965). That case concerned a law imposing additional burdens (less rigorous than an exam) on the use of the Post Office's services that *only* applied to people who wanted to use the mails to send or receive "communist propaganda." Under the Fifth Circuit's reasoning, the law in *Lamont* was content-neutral, because, like the New Orleans ordinance, it did not actually control *what* pro-communist speakers could say—it only made it harder for them to speak at all.

This Court has repeatedly said that laws which do not control the content of a message are still content-based restraints if they disfavor speech on a particular subject or are justified in reference to the content of the affected speech. Under both tests, the New Orleans ordinance is a content-based speech regulation that should have triggered strict scrutiny.

A. The Licensing Scheme Creates a Disfavored Category of Speech

This Court has already declared that a law requiring someone to obtain a license before publicly speaking on a particular subject violates the First Amendment. In *Thomas v. Collins*, 323 U.S. 516 (1945), this Court struck down a Texas law requiring labor organizers, and labor organizers alone, to obtain a permit before speaking in public. Like the New Orleans ordinance, the Texas law made no explicit mention of speech. Instead it defined a labor organizer as anyone who "solicits memberships in a labor union or members for a labor union." *Id.* at 550. This Court had no difficulty identifying that law as a content-based restraint on speech:

> That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt . . . . As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly . . . . If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them.

Id. at 534, 539, 540. Since the First Amendment bars New Orleans from making it a crime to speak about the city's history, *Thomas* stands for the principle that the city cannot accomplish the same end by requiring *registration* of speakers, let alone requiring them to pass a test and obtain a permit.

This Court has also said that an otherwise neutral regulation of a method of communication is subject to strict scrutiny if it applies differently to messages based on their subject matter. Cities may thus restrict the use of external signs and billboards, but they may not ban *only* non-commercial signs. *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 514 (1981). Likewise, in *Carey v. Brown*, this Court rejected a statute that generally prohibited the picketing of residences but exempted labor picketing. 447 U.S. 455, 457 (1980). The law "discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication," so the Court found the restriction to be content-based on its face. *Id.* at 460-61. That ruling should have come as no surprise given that, in *Police Department of Chicago v. Mosley*, this Court struck down as content-based an ordinance that banned picketing near schools, but excluded labor picketing from the ban. 408 U.S. 92, 94-98, 102 (1972).

Similarly, in *Regan v. Time, Inc.*, this Court struck down a federal law that banned photographic reproductions of currency, but excluded educational or newsworthy uses. 468 U.S. 641, 643-44 (1984). Despite the statute's permissible purpose and the absence of any visible governmental desire to suppress any viewpoint, this 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.

In none of these cases did this Court find it relevant that the laws in question did not actually dictate the content of what speakers could say. The

fact that their application hinged on the content of speech was sufficient to trigger strict scrutiny.

The New Orleans ordinance is similarly content-based because it applies solely to those speaking on a particular subject. In New Orleans, it is legal to stand or drive near historical landmarks and speak on almost any topic, including for pay (such as by busking, where busking is allowed). The only speech you can't convey for money in those places is speech describing why those places are important.

B. The Licensing 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 in question. *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) (flag-burning). While the district court correctly recognized that "[t]he fact that a statute refers to the content of expression does not necessarily make it content-based," that exception only applies if the law "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.'" Pet. App. 12 (quoting *Illusions–Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 308 (5th Cir. 2007)). The courts below failed to recognize that the licensing and testing of tour guides is indeed directly related to the suppression of content: the City's stated concern that the speech may not be accurate.

The City of New Orleans explicitly conceded that the purpose of its 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." Pet. App. 7. The City seeks to regulate the content of tour-guide speech by trying to protect the public from what it thinks may be inaccurate information regarding historical or cultural sites. It thus explicitly justifies the scheme based on the content of the tour guides' speech.

But this Court has recognized that restrictions aimed at improving the content of speech are presumptively unconstitutional. In *Davis v. FEC*, for example, 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. 554 U.S. 724, 743 n.8 (2008) ("[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*, the Court held that a requirement that literature about ballot measures identify its author was content-based and thus unconstitutional, 514 U.S. 334, 357 (1985), even as the dissent argued that it would deter (without expressly outlawing) "mudslinging," "innuendo," and "dirty tricks," *id*. at 382–83 (Scalia, J., dissenting).

These rulings reflect the well-established principle that a government's benign or even benevolent desire to restrict, censor, or otherwise change the content of speech is still a content-based regulation. 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 New Orleans's stated desire to protect tour participants from possibly erroneous historical information is not a content-neutral interest.

The Fifth Circuit noted that "*Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989) is instructive. There the government had regulated sound, and the Court said that even with messages conveyed, the regulation is content-neutral so long as the regulation is justified without reference to content or speech. *Id.* at 2754." Pet. App. 4. *Amicus* agrees that *Ward* is instructive and wishes that the lower court had paid closer attention to its reasoning—particularly the part where this Court held that a law justified by the content of the speech it regulates should not be considered content-neutral.

III. THERE ARE NO OTHER VALID REASONS FOR APPLYING A LESSER STANDARD THAN STRICT SCRUTINY

Tour guides are undeniably engaged in conduct protected by the First Amendment when they describe the city to their customers—to the same extent as they would be if they published their musings as a travel guide or as a feature in a local newspaper, or filmed one of their tours and released it as a documentary. As discussed in Part I, *supra*, the government could not condition the right to publish books, articles, and films on passing a test.

Two arguments have been made for why tour guides should be treated differently than authors or documentarians, and why their speech merits less (or no) First Amendment protection.

The first argument is that tour guides are professionals, like doctors or lawyers, whose speech to clients may be regulated without offending the First Amendment. *See, e.g., Edwards,* 755 F.3d 996, n.3 (rejecting the government's claim that a permitting requirement for tour guides is no different than a "licensing scheme for lawyers and psychiatrists.").

The second argument is that whether or not they are professionals, guides are engaging in a commercial endeavor by charging for their services, and whether or not they have the right to speak, their right to engage in the business of speaking may be limited by permissible regulations of commercial conduct. Under this argument, the ordinance limits no speech because "[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. Additionally, the district court pointed to the fact that unpaid guides did not require a permit as evidence that the regulation can survive intermediate scrutiny because it leaves unrestricted other avenues for communication. *Id.* at 19.

Neither of these arguments is persuasive. If there is a "professional speech" doctrine, its reasoning cannot apply to tour guides. While "tour-guiding" might be described as a "profession" in casual conversation, it is not one in the particular sense of a "vocation requiring advanced education and training, esp. one of the three traditional learned

professions—law, medicine, and the ministry." Black's Law Dictionary 1403 (10th ed. 2014).

Nor is it relevant that guides are engaged in speech on a for-profit basis. This Court has consistently held that speech that is purchased, commissioned, or hired, is as protected by the First Amendment as speech that is given freely.

A. Tour Guides Are Not Professionals Like Doctors, Lawyers, Or Accountants

Some lower courts have held that laws regulating speech between professionals and their clients are not subject to strict scrutiny. *See*, *e.g.*, *Moore-King v. County of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Circ. 2013) ("Under the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment."). The closest this Court has come to announcing a First Amendment test for professional-client speech was Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 212 (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, however, are not engaged in professional-client speech under any reasonable sense of the term. Unlike doctors, lawyers, and accountants, guides are not privy to a customer's personal, financial, legal, or medical information, nor

do they take the affairs of a customer personally in hand, or purport to exercise judgment on each client's behalf. *See*, *e.g.*, *Edwards,* 755 F.3d 996, n.3 (holding that guides are not professionals because they do not exercise judgment to cater their services to a client's particular needs). To the contrary, tour guides typically do all the speaking, "provide virtually identical information to each customer," *id.,* and, at most, may answer some questions to satisfy tourists' 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 customers about a relatively minor matter (unrelated to their personal affairs)—just as an error in a history book, film, or lecture might misinform some readers, viewers, or listeners. Tour guides are not, and should not, be considered "professionals" of the kind whose speech is subject to lesser First Amendment protection in certain circumstances.

B. Tour Guides' Speech Is Protected Whether Or Not They Are Paid

1. There is no constitutional difference between paid and voluntary speech.

The First Amendment does not distinguish between compensated and uncompensated speech. It protects authors, publishers, and booksellers—whose entire business revolves around the "sale" of speech—the same way it protects those who distribute religious or political literature for free. The "free publication and dissemination of books and other forms of the printed word" are "constitutionally protected freedoms" and it "is, of course, no matter that the dissemination takes place under commercial auspices." *Smith v. California,* 361 U.S. 147, 150 (1959). *See also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.").

Nor is the protection offered by the First Amendment limited to those who sell speech in a concrete written form. Broadcasters who offer television programming to paying subscribers are "engaged in 'speech' under the First Amendment" *Leathers v. Medlock*, 499 U.S. 439, 444 (1991), as are film producers, *Citizens United v. FEC,* 558 U.S. 310 (2010), recording artists who sell records of their work, *FCC v. Pacifica Foundation,* 438 U.S. 726, 744 (1978), and the advertising-supported radio stations that broadcast those records, *id.* at 745.

This Court has thus never recognized a constitutionally significant difference between

speech bought-and-paid-for and speech freely offered. Such a distinction has no place in American constitutional law. As part of protecting speech in order to ensure a free marketplace of ideas, the First Amendment must protect speech in the *actual* marketplace. As Justice Frankfurter said, "[i]t would startle Madison and Jefferson and George Mason . . . to be told that any picture, whatever its theme and expression, could be barred from being commercially exhibited." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 518 (1952) (Frankfurter, J. concurring).

The question then is whether the First Amendment could tolerate an otherwise identical version of the ordinance that applied to tour guides who did not charge their patrons. Could the City make it a crime to give tourists free history lectures without passing an exam?

The answer must be "no." And if the First Amendment would not allow this law to be applied to volunteers, there is no reason that it could permissibly apply to speakers who are paid.

2. The First Amendment does not permit the imposition of a financial burden on speech based on its subject matter.

One of the grounds on which the district court found the ordinance permissible was because it did not restrict who could speak about New Orleans history, only who could charge money for doing so. Pet. App. 19. This Court has already held, however, that a law which forbids an individual from earning money by speaking about a single subject violates the First Amendment.

In *Simon & Schuster v. Crime Victims Bd.,* this Court struck down a "Son of Sam" law requiring that "an accused or convicted criminal's income from works describing his crime be deposited in an escrow account" to provide for compensation to his victims. 502 U.S. 105, 108 (1991). The Court held that a law "is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Id.* at 115.

Like the Son of Sam law, the ordinance here is impermissible because it "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specific content." *Id.* at 116." The burdens of the ordinance's permit requirement (financial and otherwise) apply only to speech about history and points of interest. Like criminals under a Son of Sam law, unlicensed individuals in New Orleans are still free to speak about the targeted speech, but they are not allowed to receive any income in return. Like the Son of Sam law, the ordinance is only permissible if it "is necessary to serve a compelling state interest, and is narrowly drawn to achieve that end." *Id.* at 118 (quoting *Arkansas Writers' Project*, *Inc. v. Ragland,* 481 U.S. 221, 231 (1987). Neither the City nor the courts below have offered any evidence that the ordinance meets those tests.

While the majority of this Court held that the Son of Sam law could only survive if it satisfied the requirements of strict scrutiny, some on the Court went further, arguing that the fact that the law imposed "severe restrictions on authors and publishers, using as its sole criterion the content of

what was written" was "itself a full and sufficient reason for holding the statute unconstitutional" and that a strict scrutiny analysis was "unnecessary and incorrect." *Id*. at 124 (Kennedy, J. concurring).

Here, as in *Simon & Schuster*,

> a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the [City] has the substantive power to prevent. No further inquiry is necessary to reject the [City's] argument that the statute should be upheld.

Id.

CONCLUSION

The New Orleans licensing scheme is a content-based speech restriction subject to and failing strict scrutiny. The petition should be granted.

Respectfully submitted,

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