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“Segs and the City” and Cutting-Edge Aesthetic Experiences: Resolving the Circuit Split on Tour Guides’ Licensing Requirements and the First Amendment

Marie J. Plechat[†]

I. INTRODUCTION

Tourism represents an important contributor to state and local economies.¹ The industry is growing within the United States, as domestic and international travel to and within states continues to increase and contribute to revenue.² Accordingly, some U.S. cities have sought to regulate operations of the industry, including the activities of official tour guides.³ City tour guides can play an essential role in influencing visitors’ perceptions of a city’s history, cultural customs, and anthropological development. This is especially the case given the rapid expansion of information technology, as tourists increasingly rely on human guides only where they seek a customized interactive experience on their visits to a particular locality.⁴

A circuit split currently exists between the Fifth Circuit and the D.C. Circuit regarding whether cities may impose rigorous licensing requirements on potential tour guides, which can include written examinations, personal background checks, and even drug tests.⁵ The

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¹ See, e.g., *Importance & Economic Impact of Domestic Tourism*, WORLD TRAVEL & TOURISM COUNCIL, <https://www.wttc.org/publications/2018/domestic-tourism/> [<https://perma.cc/EJW2-LKC3>].

² See, e.g., *U.S. Travel and Tourism Overview*, U.S. TRAVEL ASS’N, https://www.ustravel.org/system/files/media_root/document/Research_Fact-Sheet_US-Travel-and-Tourism-Overview.pdf [<https://perma.cc/TH9D-WJU9>] (updated Mar. 2020) (noting that U.S. domestic travel increased 1.9 percent from 2017 to a total of 2.3 billion person-trips in 2018).

³ *Id.*

⁴ For a longer discussion, see Betty Weiler & Rosemary Black, *The Changing Face of the Tour Guide: One-way Communicator to Choreographer to Co-creator of the Tourist Experience*, 40 TOURISM RECREATION RES. 364–78 (2015), <https://www.tandfonline.com/doi/pdf/10.1080/02508281.2015.1083742> [<https://perma.cc/W7VX-JHUD>].

⁵ *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (holding that a licensing scheme for tour guides was content neutral and that requiring guides to pass an examination and drug test furthered the city’s substantial interests in protecting the tourism industry and protecting the public from crime). *Contra* *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (holding that the District’s licensing scheme of for-hire tour guides was not narrowly tailored to further the District’s substantial interest in promoting the industry and economy, as necessary to constitute an acceptable limitation on protected speech under the First Amendment).

essential debate concerns whether the licensing requirements constitute an unacceptable limitation on protected speech in violation of the First Amendment, or if the tests represent a permissible exercise of the city's police powers in an effort to regulate the local tourism industry.⁶ Since the Supreme Court denied certiorari in *Kagan v. City of New Orleans*,⁷ the split endures among the federal courts of appeal.

A key development in Supreme Court jurisprudence since the Fifth Circuit's decision in *Kagan* and the D.C. Circuit's decision in *Edwards v. District of Columbia*⁸ is the Supreme Court's decision providing guidance regarding the appropriate treatment of professional speech with *National Institute of Family & Life Advocates v. Becerra (NIFLA)*⁹ in 2018. In that case, the Court struck down a statute implementing mandatory notice requirements for crisis pregnancy centers, and held that "professional speech" of individuals who perform services requiring a state license is not a separate category of speech exempt from the rule that content-based regulations are subject to strict scrutiny.¹⁰ Hence, if tour guides' speech is a form of "professional speech" as referenced in *NIFLA*, the decision could implicate the extent to which state and local governments may constitutionally regulate it.

This Comment will argue that tour guides' speech is not a form of professional speech. Thus, as will be explored, the circuit split should be resolved by applying the D.C. Circuit's reasoning in *Edwards* to strike down similar tour guide licensing schemes as unconstitutional violations of the First Amendment. These licensing statutes should be subject to heightened strict scrutiny review rather than intermediate scrutiny, because (1) the regulations are a content-based regulation of speech, (2) tour guides engage in political speech when they interact with tourists, and (3) burdensome licensing hurdles can constitute a form of compelled speech for tour guides.

Part II will outline the factual and legal background of the circuit split and relevant frameworks for First Amendment analysis. Part III will argue that tour guide speech constitutes protected political speech and that local licensing regulations should be subject to heightened strict scrutiny review. Part IV summarizes the argument and the broader context of the issue.

⁶ See, e.g., Kristin Tracy, "And to Your Left You'll See . . .": *Licensed Tour Guides, the First Amendment, and the Free Market*, 46 U. BALT. L. REV. 169 (2016).

⁷ *Kagan v. City of New Orleans*, 135 S. Ct. 1403 (2015).

⁸ 755 F.3d 996.

⁹ 138 S. Ct. 2361 (2018).

¹⁰ *Id.* at 2371–72.

II. FACTUAL AND LEGAL BACKGROUND

A. The Circuit Split

Two federal circuit courts of appeals are currently split regarding whether city tour guide licensing requirements restrict speech in violation of the First Amendment. On one side of the split is the Fifth Circuit in *Kagan v. City of New Orleans*,¹¹ a 2014 decision. In *Kagan*, the Fifth Circuit affirmed a district court ruling that granted summary judgment to the city of New Orleans against plaintiff tour guides who claimed that the city’s licensing scheme infringed upon their First Amendment free speech rights.¹² The city required its tour guides to: 1) “pass an examination on knowledge of the city’s historical, cultural, and sociological developments,” 2) not have been convicted of a felony within the past five years, 3) pass a drug test, and 4) pay a \$50 initial licensing fee.¹³ The court first noted that under a facial review of the city’s licensing law, the law furthered a clear purpose of “promot[ing] and protect[ing]” visitors and tourists by identifying “those tour guides who have licenses and are reliable, being knowledgeable about the city and trustworthy, law-abiding and free of drug addiction.”¹⁴ The law was thus a permissible exercise of the city’s police power serving an important governmental purpose.¹⁵

However, the Fifth Circuit proceeded to engage in intermediate scrutiny review in accordance with the District of Columbia district court’s analysis in the *Edwards* case (regarding the District’s law).¹⁶ The court distinguished the case law cited by plaintiffs-appellants—cases requiring strict scrutiny analysis because the relevant laws were content based—by reasoning that the New Orleans ordinance at issue was content-neutral.¹⁷ New Orleans’s licensing requirements, the Fifth Circuit noted, while somewhat rigorous, had “no effect whatsoever on the content of what tour guides say.”¹⁸ The court held that the law survived intermediate scrutiny review because it “promote[d] a substantial

¹¹ 753 F.3d 560 (5th Cir. 2014).

¹² *Id.* at 561.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 561–62.

¹⁶ *Id.* at 562 (citing *Edwards v. Dist. of Columbia*, 943 F. Supp. 2d 109, 118 (D.D.C. 2013)) (holding that a similar tour guide licensing scheme in the District of Columbia did not violate the First Amendment under intermediate scrutiny review because “[n]othing about the District’s interest in keeping visitors from dangerous, unethical, or uninformed guides [was] remotely related to the suppression of free expression, or intended to control the content of what . . . tour guide[s] may say during tours”).

¹⁷ *Id.*

¹⁸ *Id.*

interest that would be achieved less effectively absent the regulation.”¹⁹ By requiring tour guides to sustain a foundation of knowledge about the city and not be felons or drug addicts, the law promoted a government interest of city and visitor safety that would be unserved without the law’s protections. The New Orleans ordinance thus did not violate the First Amendment, so the licensing requirements could remain in effect.²⁰

On the other side of the split is the D.C. Circuit in *Edwards v. District of Columbia*,²¹ also decided in 2014. The case was similar to *Kagan* in its premise: a group of for-hire city tour guides, who owned and operated a Segway-rental and tour business called “Segs in the City,” brought a First Amendment challenge against the District, alleging that its licensing scheme for tour guides constituted an unacceptable limitation on protected speech.²² To qualify for an official license to work as a city tour guide, an applicant was obligated to:

- (1) be at least eighteen years old . . .
- (2) be proficient in English . . .
- (3) not have been convicted of certain specified felonies . . .
- (4) make a sworn statement that all statements contained in his or her application are true and pay all required licensing fees . . .
- and (5) pass an examination “covering the applicant’s knowledge of buildings and points of historical and general interest in the District.”²³

The plaintiffs specifically objected to the District’s regulations that levied civil and criminal penalties like fines on individuals who conducted a tour without first satisfying these requirements.²⁴ According to the plaintiffs, the exam requirement was particularly rigorous, as it consisted of 100 multiple-choice questions and drew from subject matter in fourteen different categories, including Architecture, Dates, Government, Historical Events, and Regulations.²⁵ Similar to the Fifth Circuit in *Kagan*, the district court held that the law survived intermediate scrutiny analysis and did not violate the First Amendment.²⁶

On appeal, the plaintiff-appellants presented two principal arguments: (1) the tour guide regulations were a content-based restriction on speech rather than a content-neutral restriction on conduct, and

¹⁹ *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

²⁰ *Id.*

²¹ *Edwards v. District of Columbia*, 755 F.3d 996, 998 (D.C. Cir. 2014).

²² *Id.* at 1000.

²³ *Id.*

²⁴ *Id.* at 999.

²⁵ *Id.* at 999–1000.

²⁶ *Id.* at 1000.

thus qualified for strict scrutiny review; and in the alternative, (2) even if the regulations were content-neutral, they would fail intermediate scrutiny review because there was an insufficient evidentiary basis to conclude that the regulations promoted a substantial government interest that would otherwise be achieved less effectively.²⁷ The *Edwards* court declined to decide the question of whether strict scrutiny should apply, as it agreed with the appellants’ second argument: the city’s regulations failed even under the more lenient intermediate scrutiny standard.²⁸

In its analysis, the D.C. Circuit assumed *arguendo* that the regulations were content-neutral and placed only incidental burdens on speech.²⁹ The court proceeded with analysis under the intermediate scrutiny standard, under which a government regulation is constitutional if:

- (1) “it is within the constitutional power of the Government”; (2) “it furthers an important or substantial governmental interest”; (3) “the governmental interest is unrelated to the suppression of free expression”; (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest;” and (5) the regulation leaves open ample alternative channels for communication

The court’s analysis fixated primarily on the government’s economic interest in promoting the tourism industry. Ultimately, the court held that the District’s law failed the second and the fourth prongs.³⁰ In respect to the second prong, the District had presented no evidence in the record that ill-informed tour guides (the issue that purportedly justified the multiple-choice exam) were in fact a problem for the city’s tourism industry,³¹ or that the exam regulation actually furthered the District’s interest in preventing the stated harms.³² As to the fourth prong, the District had provided no evidence that normal market forces, such as customer reviews on Yelp or tour guide companies’ own economic interests in attracting customers through high-quality tours, would not serve as an adequate defense to “seedy, slothful tour guides” on their own as an alternative to the regulation.³³ The District had also failed to provide evidence that less rigorous requirements would not be equally effective

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1001.

³⁰ *Id.* at 1009.

³¹ *Id.* at 1003.

³² *Id.* at 1005.

³³ *Id.* at 1006–1007.

in promoting their governmental interest.³⁴ Thus, there was no justification for the District's argument that the restrictive laws were the most effective means of accomplishing its stated objectives.³⁵

Additionally, the court found inconsistencies in the District's position. For example, while tour buses with pre-recorded audio narrations were exempt from the licensing requirement, the regulations still applied to guides who used audio guides or distributed pamphlets instead of speaking while on a guided walking or Segway tour.³⁶ The court held that the tour bus exemption was arbitrary and thus rendered the regulations impermissibly underinclusive, as they restricted speech for some groups but not others.³⁷ This could potentially lead the District to favor or disfavor a particular type of speech in its implementation of the policy. In addition, the court held that if the regulations are understood primarily as a restriction on conduct with only incidental effects on speech, then they were overbroad because they would forbid an unlicensed individual from lecturing to a tour guide even if accompanied by a fully licensed guide.³⁸ Thus, finding that the government regulations were not sufficiently narrowly tailored to directly advance the District's asserted interests, the court struck down the licensing scheme as unconstitutional under the First Amendment.³⁹

Since the Supreme Court denied certiorari in the tour guides' appeal of *Kagan*, the circuit split has not been resolved. Classifying and analyzing the appropriate constitutional framework for tour guide speech can help identify the proper legal outcome for a future reviewing court.

To frame the terms of the debate, the primary doctrinal question is whether the states' regulation of tour guides' speech is content-based or content-neutral. Content-neutral regulations limit speech without regard to the message that is being conveyed, while content-based restrictions limit speech *because* of the message conveyed.⁴⁰ Content-based laws are presumptively unconstitutional and subject to strict scrutiny,⁴¹ while content-neutral laws generally must survive only intermediate scrutiny.⁴² Determining how to classify tour guides' speech

³⁴ *Id.* at 1009.

³⁵ *Id.*

³⁶ *Id.* at 1008.

³⁷ *Id.*

³⁸ *Id.* at 1008–09.

³⁹ *Id.*

⁴⁰ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–90 (1983).

⁴¹ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

⁴² *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014).

thus informs the nature of the judicial scrutiny a regulation should receive and the likelihood it will be upheld.

B. *The National Institute of Family and Life Advocates v. Becerra*
Decision as it Relates to Tour Guide Speech

Although the Supreme Court has not issued a ruling on the tour guide licensing regime question, its decision in *NIFLA* in 2018 adds more color to discussion about occupational or professional speech. How the Court thinks about this type of speech could be relevant to the tour guide analysis. *NIFLA* involved a First Amendment action brought by two crisis pregnancy centers—pro-life centers that offer pregnancy-related services—in California against state and local officials.⁴³ The centers challenged a state law called the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) that required clinics that primarily served pregnant women to post certain notices at their facilities.⁴⁴ These notices included (1) for licensed clinics, a statement that California provided free or low-cost services, including abortions (with a phone number to call); or (2) for unlicensed clinics, a notice that the state of California had not licensed the clinic to provide medical services.⁴⁵ The state alleged that the purpose of the FACT Act was to “ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.”⁴⁶ However, the petitioners alleged that the notice requirements violated their First Amendment rights by compelling them to engage in speech about abortion, a practice which the crisis pregnancy centers opposed.⁴⁷

The Court held that the notice requirements violated the First Amendment and were unconstitutional, reversing the Ninth Circuit’s decision.⁴⁸ The Court commented specifically on the appropriate level of scrutiny for the notice requirement for the licensed medical clinics. It determined that California’s law was content-based because it “target[ed] speech based on its communicative content”—in this instance, the availability of abortions in the state.⁴⁹ Typically, content-based restrictions on speech are subject to an exacting strict scrutiny analysis on review, under which they “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly

⁴³ See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365 (2018) (*NIFLA*).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 2369.

⁴⁷ See *id.* at 2370.

⁴⁸ See *id.* at 2378.

⁴⁹ *Id.* at 2371 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

tailored to serve compelling state interests.”⁵⁰ However, the Ninth Circuit had not applied strict scrutiny even though the law was content-based because it found that the notice requirement regulated professional speech, which it reasoned was afforded less protection than other forms of speech.⁵¹ Under this less demanding level of scrutiny, the Ninth Circuit held that the California law did not violate the First Amendment.⁵²

The Court rejected the Ninth Circuit’s distinction of professional speech as a separate category of speech subject to different rules or a different standard of scrutiny.⁵³ The Court stated that “[s]peech is not unprotected merely because it is uttered by professionals.”⁵⁴ As the Court reasoned, less protection for professional speech has been afforded by the Court only in two distinct circumstances: (1) where a law requires professionals to disclose factual and noncontroversial information in their commercial speech;⁵⁵ and (2) where a law regulates professional conduct that incidentally involves speech, such as in a lawyer’s efforts to procure clients.⁵⁶ In the case of the crisis pregnancy centers, neither line of precedents was implicated.⁵⁷

The Court reasoned that in the context of professional speech, content-based regulations pose the same risks as in any other circumstance in which the state seeks to “suppress unpopular ideas or information” rather than to advance a legitimate regulatory goal.⁵⁸ Accordingly, there was no constitutional basis for affording this type of speech disparate treatment.⁵⁹ Because government policing of the content of professional speech threatens to infringe the “uninhibited marketplace of ideas” necessary to uncover the truth (and in the areas of medicine and public health, potentially save lives), content-based regulations must undergo strict scrutiny review as in other contexts.⁶⁰ Moreover, the category of professional speech could be difficult to define, and states could choose the amount of protection particular speech receives simply by requiring a license for that profession of the speaker.⁶¹

⁵⁰ *Reed*, 576 U.S. at 163.

⁵¹ *NIFLA*, 138 S. Ct. at 2337.

⁵² *Id.* at 2370.

⁵³ *Id.* at 2371–72.

⁵⁴ *Id.* (emphasis omitted).

⁵⁵ *Id.* at 2372 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

⁵⁶ *Id.* (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)).

⁵⁷ *Id.*

⁵⁸ *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

⁵⁹ *See id.*

⁶⁰ *Id.* at 2366 (citations omitted).

⁶¹ *Id.* at 2374.

Applying the strict scrutiny review it deemed appropriate, the Court held that the notice requirement was "wildly underinclusive" because it singled out crisis pregnancy centers by requiring the disclosures, excluding from its scope numerous other types of health centers and community clinics that educated women about health care services.⁶² The Court also noted that there were other ways that the state could have conveyed or publicized the information to women aside from requiring compelled disclosures for the clinics.⁶³ Consequently, the Court held that the law was not narrowly tailored to serve the compelling state interest that California asserted. The notice requirement was essentially a form of content-based compelled speech for the crisis pregnancy centers and could not withstand strict scrutiny review.⁶⁴

C. Defining Tour Guides' Speech: Relevant First Amendment Frameworks

In order to articulate a legal theory to resolve the circuit split concerning tour guides' speech, it is necessary to classify the exact nature of this speech. This analysis will help indicate the appropriate legal framework a court should use when weighing licensing schemes within the First Amendment's bounds. Ultimately, I conclude that political speech is the appropriate classification.

1. Occupational or professional speech

An initial question is whether tour guides' speech could be plausibly identified as occupational or professional speech. The Supreme Court held in *NIFLA* that professional speech is not a separate category subject to a distinct level of scrutiny,⁶⁵ and relevant academic commentary⁶⁶ suggests that tour guide speech may not fall into this category anyway (which could inform how we conceptualize the effect of the *NIFLA* decision on the circuit split).

In her article, *Licensing Knowledge*, Professor Claudia E. Haupt provides some color regarding what types of speech could plausibly be considered professional at all, as opposed to pure First Amendment speech.⁶⁷ Haupt argues for a distinction between passing along mere information, as a tour guide does, and giving actual professional advice,

⁶² *Id.* at 2375.

⁶³ *Id.* at 2376.

⁶⁴ *Id.* at 2375.

⁶⁵ *Id.*

⁶⁶ *See, e.g.*, Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501 (2019).

⁶⁷ *See id.*

as a doctor does.⁶⁸ She contends that professional speech (i.e., speech that could defensibly be subject to state licensing requirements that do not undermine First Amendment protections) goes beyond “the conveyance of raw information” and is instead

individualized to the situation of the client[,] . . . tied to a body of disciplinary knowledge from which it gains authority, and . . . occurs within a social relationship that is defined by knowledge asymmetry between speaker and listener, reliance on the speaker’s advice, and trust in the accuracy of that advice.⁶⁹

In Haupt’s view, tour guide speech is mere information conveyance rather than the offering of professional advice. Thus, state licensing requirements are less justified because the state lacks the viable objective of preventing tangible harm to consumers.⁷⁰

In another article, *The Limits of Professional Speech*, Haupt further articulates her argument for narrowing the boundaries of what we conceptualize as professional speech.⁷¹ She argues that the objective of licensing professionals’ speech is to ensure that clients receive “accurate, comprehensive, and reliable advice” that comports with modern scientific and academic knowledge of the relevant topic, and that the notion of “professional speech” should be defined narrowly to limit the scope of malpractice liability for some forms of “false speech.”⁷² Haupt argues that the required crisis pregnancy center disclosures in *NIFLA* should not have been analyzed by the Ninth Circuit under professional speech terms because the required disclosures regulated the delivery of medical services rather than the content of actual professional advice.⁷³

Under Haupt’s theory, an employee conveying *information* to his or her customers (like a tour guide does) would present a more viable First Amendment defense to a licensing requirement than would a professional conveying specialized disciplinary *knowledge* (like a doctor).⁷⁴ This “information vs. knowledge” distinction, assuming that tour guides

⁶⁸ *Id.* at 529–30.

⁶⁹ *Id.* at 529.

⁷⁰ *Id.* at 530.

⁷¹ Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J. FORUM 185 (2018).

⁷² *Id.* at 185; *see also* King v. Christie, 981 F. Supp. 2d 296, 319 (D.N.J. 2013)

(“[T]here is a more fundamental problem with [the argument that professional counseling is speech], because taken to its logical end, it would mean that any regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services.”).

⁷³ *See* Haupt, *supra* note 71, at 193–95.

⁷⁴ *See* Haupt, *supra* note 66, at 532–33.

do not provide "knowledge" in the same way doctors do, provides support to the D.C. Circuit's view in *Edwards* that city tour guides submit a colorable First Amendment claim against licensing schemes.

2. Commercial speech

Another relevant classification of speech for tour guides is commercial speech. This is because city tour guides are often employed by a private tour guide company rather than operating freelance or being employed by the city itself.⁷⁵ Commercial speech, for purposes of First Amendment analysis, is defined as expression related solely to the economic interests of the speaker and its audience.⁷⁶ Essentially, it does no more than propose a commercial transaction.⁷⁷ For example, advertisements for the prices of prescription drugs constitute commercial speech.⁷⁸ Commercial speech is protected by the First Amendment, but the Constitution accords it a lesser protection than it does other constitutionally safeguarded expression.⁷⁹ Under the four-part test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the government may regulate commercial speech if: (1) the speech at issue concerns lawful activity and is not misleading; (2) the asserted government interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the regulation is not more extensive than necessary to serve that interest.⁸⁰

In all likelihood, tour guides' speech cannot be classified as commercial speech. Beyond simply proposing an economic transaction to visitors, tour guides provide commentary on the geography, history, politics, and sociology of a given city, which serves to enrich tourists' intangible enjoyment of the destination rather than target their economic interests. It is thus unlikely that governments could use this framework to justify licensing requirements.

3. Political speech

There is a far more colorable argument for classifying tour guides' speech as political speech, which is afforded the strongest First Amendment protection. The Supreme Court has identified political speech as

⁷⁵ *Tour Guide Career*, IRESEARCH, <http://career.iresearchnet.com/career-information/tour-guide-career/> [<https://perma.cc/48KD-5ZSH>].

⁷⁶ *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

⁷⁷ *Id.*

⁷⁸ *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

⁷⁹ See, e.g., *Gibson v. Tex. Dep't of Ins.—Div. of Workers' Comp.*, 700 F.3d 227, 233–34 (5th Cir. 2012).

⁸⁰ *Central Hudson*, 447 U.S. at 566.

core First Amendment speech, critical to the functioning of the U.S. democratic system.⁸¹ As the Court has affirmed, “the practice of persons sharing common views banding together to achieve a common end”—such as marches and protest activities—is “deeply embedded in the American political process” and invokes particularly forceful First Amendment protections.⁸² Furthermore, the location of the activities matters, as restrictions on speech in a traditional public forum like streets and sidewalks are reviewed under the strictest level of scrutiny.⁸³

If tour guide speech constitutes a form of political speech, licensing restrictions are more likely to be analyzed under a rigorous strict scrutiny standard. In addition to protecting protest activities, courts have interpreted the First Amendment’s core political speech protections to prevent the government from making it difficult for people to talk to each other about political issues.⁸⁴ Political speech includes “interactive communication concerning political change,”⁸⁵ “advocacy of political reform,”⁸⁶ “handing out leaflets in the advocacy of a politically controversial viewpoint,”⁸⁷ and “persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues.”⁸⁸ Given that tour guides enter their posts with differing perceptions of a city’s history, cultural customs, and anthropological development colored by their personal experiences and ideological views, there is a plausible argument that tour guide speech constitutes protected political speech.

4. Compelled speech

An alternative or additional possibility is that tour guide licensing requirements are tantamount to compelled speech, impermissible under the First Amendment. The Supreme Court has held that just as the First Amendment can prevent the government from prohibiting speech, it can prevent the government from compelling individuals to express

⁸¹ See *Carey v. Brown*, 447 U.S. 455, 467 (1980) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”).

⁸² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (internal citation omitted).

⁸³ See *United States v. Kokinda*, 497 U.S. 720, 726 (1990).

⁸⁴ See, e.g., *Initiative & Referendum Inst. v. Walker*, 161 F. Supp. 2d 1307, 1313 (D. Utah 2001) (citing *Campbell v. Buckley*, 203 F.3d 738 (10th Cir. 2000)).

⁸⁵ *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988).

⁸⁶ *Id.* at 421 n.4.

⁸⁷ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995).

⁸⁸ See *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

certain views, or to pay subsidies for speech to which they object.⁸⁹ In *United States v. United Foods, Inc.*,⁹⁰ the Court held that assessments imposed on fresh mushroom handlers pursuant to a statute to fund advertisements promoting mushroom sales violated the First Amendment.⁹¹ In *NIFLA*, the Court struck down the crisis pregnancy center notice requirements because it found that they compelled individuals to speak a particular message, thus altering the content of their speech.⁹² Requiring aspiring tour guides to prepare for and pass a content-based examination about the city’s culture, history, and sociology (which was being required in both *Kagan*⁹³ and *Edwards*⁹⁴) or to pay a fee in order to qualify for a state license (as was the case in *Kagan*⁹⁵) could constitute compelled speech because these requirements force tour guides to express or subsidize a set of factual positions selected by the state.

Returning to *The Limits of Professional Speech*, Haupt argues that the disclosures required in *NIFLA* should be properly analyzed under the compelled speech doctrine articulated in *Zauderer v. Office of Disciplinary Counsel*,⁹⁶ rather than classified as a form of true professional speech.⁹⁷ In *Zauderer*, the Court subjected certain required consumer disclosures only to rational basis review, because the advertisers’ speech interests were outweighed by the state’s interest in preventing consumer deception or confusion.⁹⁸ In the tour guide context, the relevant question is whether and to what extent cities’ interest in preventing tourists’ confusion or deception outweighs tour guides’ interest in communicating their (potentially political) views during their tours.⁹⁹ If the cities’ interest prevails substantially, then the infringement upon the guides’ free speech protections should be subject to a lower standard of review, like rational basis review.¹⁰⁰ In *Zauderer*, the court identified the protection of consumers’ interest in information as they navigate the marketplace as the principal objective of the compelled

⁸⁹ *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

⁹⁰ 533 U.S. 405 (2001).

⁹¹ *Id.* at 416.

⁹² *Nat’l Inst. of Family and Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371 (2018) (internal citation omitted).

⁹³ *Kagan v. City of New Orleans*, 753 F.3d 560, 561 (5th Cir. 2014).

⁹⁴ *Edwards v. District of Columbia*, 755 F.3d 996, 999 (D.C. Cir. 2014).

⁹⁵ *Kagan*, 753 F.3d at 561.

⁹⁶ 471 U.S. 626 (1985).

⁹⁷ See Haupt, *supra* note 71, at 196–98; see also *supra* Section II.C.1.

⁹⁸ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

⁹⁹ See *id.*

¹⁰⁰ See *id.*

disclosures.¹⁰¹ The cities' interest in providing visitors with accurate information about the locale's history and culture could justify compelling potential guides to gain familiarity with certain information.

D. The Appropriate Level of First Amendment Scrutiny for Tour Guide Speech.

The key doctrinal question to inform future courts' consideration of tour guide regulations is what level of scrutiny should be appropriately afforded. The court in *Edwards* declined to rule on the question of whether they must undergo strict scrutiny review because it determined that the District of Columbia regulations did not survive even intermediate scrutiny.¹⁰² Intermediate scrutiny applies to content-neutral restrictions that place an incidental burden on speech.¹⁰³ While courts have formulated intermediate scrutiny differently, the regulation on speech is generally required to serve an "important" or "substantial" interest unrelated to the suppression of free expression.¹⁰⁴ Strict scrutiny, on the other hand, applies to government restrictions on the *content* of protected speech,¹⁰⁵ particularly political speech,¹⁰⁶ or the speech of disfavored speakers.¹⁰⁷ Strict scrutiny requires that the challenged statute be narrowly tailored to achieve a compelling government interest.¹⁰⁸

The level of scrutiny afforded to tour guide licensing requirements critically informs whether they will survive under the First Amendment. The key inquiry is whether the burdens imposed on would-be tour guides (like multiple choice exams) restrict the *content* of would-be tour guides' speech, or whether these burdens are content-neutral in nature. This further highlights the question of to what extent tour guide commentary is tantamount to political speech.

III. ARGUMENTS

A. Tour Guide Speech is an Important First Amendment Issue.

As an initial matter, it is important to establish that tour guide speech is a category that substantially requires First Amendment

¹⁰¹ See Haupt, *supra* note 71, at 196.

¹⁰² *Edwards v. District of Columbia*, 755 F.3d 996, 1000 (D.C. Cir. 2014).

¹⁰³ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

¹⁰⁴ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376–77, (1968); *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

¹⁰⁵ See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

¹⁰⁶ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

¹⁰⁷ See, e.g., *Turner Broad.*, 512 U.S. at 658.

¹⁰⁸ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

protections. Recent demographic and economic trends in the profession and the tourism industry generally illustrate the need for an ideologically diverse cohort of tour guides in the United States. First, domestic tourism to and within the U.S. is growing, so more people are visiting U.S. cities and listening to tour guides' speech.¹⁰⁹ For foreign visitors, the ideologies and views represented in a live tour have the potential to color perspectives of the U.S. more generally. For domestic tourists, exposure to a particular tour guide's viewpoint could either mitigate or reinforce the country's polarized political divide.

Second, academic research indicates that with the rapid expansion of information technology, visitors who do opt for human tour guides increasingly rely on them to provide interactive and personalized experiences rather than simply communicate facts.¹¹⁰ Tourists seeking raw information about the locale are more likely to rely on the Internet or other digital sources, so a human tour guide plays a growing role as a communicator and experience-broker, rather than a one-way presenter and entertainer.¹¹¹ In their article "The Changing Face of the Tour Guide," Professors Betty Weiler and Rosemary Black argue that tour guides broker visitors' experiences by facilitating encounters with certain physical access points and by channeling their communication expertise to empathize with each unique visitor.¹¹² Because tour guides assume growing communicative responsibility to add legitimate value to visitors' experiences over the Internet, there is greater room for interjection of guides' personal experiences with a particular location or cultural tradition—a practice which necessarily implicates speech.

Third, the current cohort of tour guides in the U.S. lacks substantial demographic diversity, which illustrates the importance of facilitating minority perspectives in the profession.¹¹³ In 2019, sixty-nine percent of tour guides in the U.S. were White.¹¹⁴ The next highest groups were "Other" (seven percent) and Hispanic, Latino, or Spanish (seven percent).¹¹⁵ Additionally, the majority of tour guides in the U.S. have some level of post-high school education: thirty-six percent hold a certificate or associate degree, twenty percent hold a bachelor's degree, and nine percent hold a master's degree.¹¹⁶ As a result, perspectives and

¹⁰⁹ See, e.g., U.S. TRAVEL ASS'N, *supra* note 2.

¹¹⁰ See Weiler & Black, *supra* note 4, at 364.

¹¹¹ See *id.* at 365.

¹¹² See *id.* at 366–69.

¹¹³ See *Tour Guide Demographics in the United States*, CAREER EXPLORER, <https://www.careerexplorer.com/careers/tour-guide/demographics/> [<https://perma.cc/XJ4A-LP5U>].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *What Education Do Tour Guides have?*, CAREER EXPLORER, <https://www.careerexplorer.com/careers/tour-guide/education/> [<https://perma.cc/WR54-2QLT>].

experiences from lower socioeconomic classes may be excluded from the profession and shielded from tourists.

Since tour guides do not necessarily represent a diverse range of perspectives to tourists under current industry demographics—and there is a growing responsibility for guides to provide personalized communicative expertise as information technology expands—it is important for guides to receive vigorous First Amendment protections and face fewer state-imposed barriers to entry into the profession.

B. Tour Guide Speech Does Not Constitute a Form of Professional Speech Over Which the Government’s Police Powers Should Justify Licensing Requirements.

Though the Supreme Court held in *NIFLA* that professional speech should not be analyzed under a different legal standard with respect to its First Amendment protections, a compelling question still arises regarding the bounds of what we conceive as professional speech and whether tour guide speech fits into this framework. In her scholarship, Cynthia Haupt advanced the claim that there is a distinction between passing along mere information as a tour guide and giving actual professional advice as a doctor.¹¹⁷ She argues that the notion of professional speech should be defined narrowly to encapsulate only the conveyance of knowledge to avoid impermissibly expanding the scope of the doctrine.¹¹⁸

Consistent with Haupt’s theory, tour guide speech should not be categorized as professional speech that could defensibly be subject to state regulations such as licensing requirements. However, in divergence from Haupt’s theory, tour guide speech does not constitute “mere information conveyance,” more similar to that of a sales cashier than that of a doctor. Given tour guides’ critical role in channeling their personal communication skills and unique backgrounds to personalize tourists’ experiences,¹¹⁹ tour guides’ speech should be classified as political speech rather than falling neatly at either end of Haupt’s proposed spectrum.¹²⁰

While the government should be permitted by its police powers to regulate the activities of pure *knowledge*-based professionals like doctors, whose giving of misinformation could risk serious harm to patients or clients, it should not be permitted to regulate the *information* tour guides give that often bleeds into guides’ personal opinions. Thus, to the

¹¹⁷ See generally Haupt, *supra* note 71.

¹¹⁸ *Id.*

¹¹⁹ See *supra* Section III.A.

¹²⁰ See *infra* Section III.C.

extent courts conceptualize professional speech as speech that the government can regulate, tour guide speech should not be grouped into this category at all. While tour guides are often employed by larger corporations or organizations, unlike doctors they communicate information to clients in a way that is necessarily informed by their own personalized experiences and not beholden to scientific research or the findings of the relevant knowledge community. While there is some degree of information asymmetry between tour guides and visitors regarding the history, norms, and culture of the relevant locale, the harms of misinformation to consumers are more likely psychic rather than entailing a risk of physical or medical harm, which should limit the scope of the government's viable interest in regulation. Moreover, even if tour guides' speech could plausibly be grouped with that of doctors or lawyers (under a similar theory of information asymmetry, perhaps), *NIFLA* would require heightened scrutiny of the speech assuming that it is content-based as this Comment argues that it is.¹²¹ Finally, because tour guide speech is political, and thus enjoys particularly forceful First Amendment protections,¹²² state restrictions in the form of strict licensing regimes must fail strict scrutiny review.

A potential counterargument is that tour guides are typically employed by companies, rather than operating freelance, and are thus operating in a professional capacity rather than in a personal capacity. Additionally, there is some risk of harm to their clients (tourists) if they communicate misinformation. However, tour guides cannot feasibly be subjected to malpractice liability like doctors can, and the risk of physical harm to clients is undoubtedly lower than in contexts like medicine. Tour guides should receive an even stronger First Amendment shield than doctors for communicating information that is not consistent with the accepted standard of knowledge, for example, if they happen to have an unconventional view. This is especially the case because doctors are less likely to convey political opinions or address ideological topics as they communicate knowledge to patients. And for tour guides, even without the threat of potential malpractice liability, the risk of receiving poor customer reviews and being subjected to natural market forces should sufficiently deter them from providing misinformation.

Another obvious weakness with Haupt's position is the difficulty in line-drawing between knowledge-based and information-based speech, which the ambiguity of classifying tour guides' speech aptly illustrates. While tour guide speech bears more closely to the conveyance of knowledge-based advice than Haupt concedes, it is ultimately an

¹²¹ See *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (*NIFLA*).

¹²² See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

oversimplification to reduce some forms of occupational speech as wholly devoid of interjections of the speaker's opinions. While governments can likely make stronger arguments in favor of regulating knowledge-based speech within the legal exercise of police powers, the distinction is largely inapposite in light of *NIFLA*'s rejection of professional speech as a legally distinguishable category.¹²³

C. Tour Guide Speech Constitutes Protected Political Speech.

Rather than being analyzed under the umbrella of professional or commercial speech, tour guides' speech should be classified as a form of political speech that must receive particularly forceful and heightened First Amendment protections.¹²⁴ Tour guides do not operate in a professional vacuum nor simply communicate information that is wholly detached from their personalized life experiences. Assuming that tour guides have lived in, spent time in, or acquired information about the relevant city by some means over the course of their lifetimes, tour guides' perceptions of a city's sociological development, political history, and esoteric customs are necessarily colored by their distinct personal and political ideologies. Moreover, tour guides' communication style and word choice reflects their personalities and psychological makeup, which academic literature indicates can be correlated with political preferences.¹²⁵ One study indicated that the frequency of particular words that people used on Twitter correlated with Democratic or Republican political affiliation.¹²⁶ For example, Democrats were more likely to use emotionally expressive words and focus on entertainment and culture rather than politics, while Republicans used swear words less frequently and highlighted their religiosity more often.¹²⁷ Democrats were also more likely to use first-person singular pronouns (perhaps reflecting their desire to emphasize uniqueness), while Republicans were more likely to use first-person plural and third-person masculine pronouns.¹²⁸ Since even tour guides who follow a script likely do not plan out every word ahead of time (especially when responding

¹²³ *NIFLA*, 138 S. Ct. at 2371–72.

¹²⁴ See *Claiborne Hardware*, 458 U.S. at 907.

¹²⁵ See, e.g., Jacob B. Hirsh et al., *Compassionate Liberals and Polite Conservatives: Associations of Agreeableness with Political Ideology and Moral Values*, PERSONALITY & SOCIAL PSYCHOL. BULL. 365, 655 (2010); Karolina Sylwester & Matthew Purver, *Twitter Language Use Reflects Psychological Differences Between Democrats and Republicans*, PLOS ONE (Sept. 16, 2015), <https://doi.org/10.1371/journal.pone.0137422> [<https://perma.cc/77U9-UKCE>].

¹²⁶ Sylwester & Purver, *supra* note 125, at 15–16 (“Language encodes who we are, how we think and what we feel. We show that, even in a noisy Twitter dataset, patterns of language use are consistent with findings obtained through classical psychology methods.”).

¹²⁷ See *id.* at 14.

¹²⁸ See *id.*

to visitors' questions), there is ample room for guides' personality traits and ideological preferences—to the extent that they are correlated with certain word choices or modes of diction—to bleed through and reach listeners. And this is especially the case with the increasing industry demand for guides to empathize and connect with visitors to provide interactive in-person experiences.¹²⁹

Political speech includes "interactive communication concerning political change,"¹³⁰ and the First Amendment protects the ability of people to talk freely to each other about political issues.¹³¹ Since tour guides—either explicitly or implicitly—communicate their understanding of certain political events or figures through their choice of rhetoric (and the words that they select could be correlated with ideological preference), there is a colorable argument that their speech could be classified as political. Accordingly, courts reviewing cities' licensing requirements should interpret the content of tours as a form of "interactive communication" relating to political issues,¹³² rather than simply a one-way transmission of information within an employee's workday as Haupt classified it. Acknowledging the expressive nature of tour guides' interactive communication with visitors—and the ideological views that are consciously or subconsciously transmitted—would require particularly forceful First Amendment protections and strict scrutiny review of regulations.¹³³ For example, tour guides could make comments about political figures in the city or describe a landmark in a particular way that reflects their ideologies. This designation as political speech would provide tour guides with the utmost First Amendment immunity from burdensome licensing schemes that could potentially have the effect of suppressing their speech. In resolving the circuit split, this would provide further support to the D.C. Circuit's ruling in *Edwards* striking down the licensing requirements.

A possible counterargument is that tour guides may largely stick to a script in communicating the content of their tours to clients, so there may not be much room for interjection of political preferences or ideology. However, as discussed above, tour guides' choice of rhetoric or diction regarding a particular historical or political event can subconsciously convey an implicit bias or internalized ideological viewpoint. And as indicated by academic literature, personality traits alone could reflect political attitudes, especially if visitors on the tours are

¹²⁹ See Weiler & Black, *supra* note 4, at 368–69.

¹³⁰ *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988).

¹³¹ See *Initiative & Referendum Inst. v. Walker*, 161 F. Supp. 2d 1307, 1313 (D. Utah 2001).

¹³² *Meyer*, 486 U.S. at 421–22.

¹³³ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

particularly perceptive.¹³⁴ For example, political conservatives are more likely to display resistance to change and acceptance of inequality, while political liberals are more likely to display openness and agreeableness.¹³⁵ These are certainly traits that visitors could perceive as they interact with their guides and ask questions, even if the guides generally stick to a script. Additionally, tour guides could choose to explicitly communicate their beliefs on a particular subject matter. More data regarding the script requirements for guides compared by U.S. cities could lend further credence to this argument. But given the level of personal engagement between tour guides and visitors and the likely opportunity for visitors to ask personalized questions, there is a strong case for the political speech designation even if the majority of a given tour follows a regular formula.

D. Regulation of Tour Guide Speech is Content-Based Rather than Content-Neutral, so the Proper Legal Standard for Evaluating Tour Guide Licensing Requirements is Strict Scrutiny.

Rather than the intermediate scrutiny review under which the D.C. Circuit struck down the District of Columbia's statute in *Edwards*, tour guide licensing requirements should be analyzed under a heightened strict scrutiny review. Strict scrutiny applies to government restrictions on the *content* of protected speech.¹³⁶ Even if cities' licensing schemes do not explicitly impose requirements on the information included in the tours, and the tour guides theoretically remain free to say what they wish, they can still impact the content of the tours that are ultimately permitted to proceed. This is because the requirements function as a mechanism allowing the state to select what types of people they will permit to become tour guides to begin with, which directly affects the content of the tours that reach visitors. Rigorous multiple-choice tests and high licensing fees could impose high costs of entry for would-be tour guides and could potentially incentivize some people interested in the profession to opt out. For example, potential guides of lower socioeconomic classes may be unable to afford the licensing fees, or individuals with lower education levels may not be sufficiently equipped to prepare for the written exams.

Possibly, individuals who would opt out because of the requirements could be individuals with politically dissenting views who may not educate or finance themselves within the conventional societal framework (which could be correlated with overcoming the licensing

¹³⁴ See, e.g., Hirsh et al., *supra* note 125, at 661–62.

¹³⁵ *Id.* at 661.

¹³⁶ See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

thresholds and succeeding in entering the profession). This seems especially plausible because most tour guides in the U.S. are currently white individuals with some level of post-high school education.¹³⁷ At the very least, there is certainly a colorable argument that the requirements select for people who are more educated, more affluent, and less likely to have committed a crime. Especially in light of my discussion above regarding implicit and explicit ideological rhetoric and biases, the licensing requirements could have the effect of favoring one form of political speech (i.e., one set of views) over others. For this reason, the licensing requirements are not content-neutral and should receive heightened strict scrutiny review.

The obvious counterargument is that the licensing statutes simply impose a set of requirements for tour guides and have no effect whatsoever on the content of what they actually say. However, given the current lack of educational (and thus socioeconomic) diversity in the profession,¹³⁸ it is highly plausible that the cumbersome nature of fees and exam requirements tend to favor some societal groups (i.e., more educated and affluent individuals) and impose higher upfront costs on others. And this may affect the content of the tours that the city ultimately allows to go forward.

E. Licensing Requirements for Tour Guides Constitute a Form of Compelled Speech.

There is a plausible argument that certain elements of the cities' licensing requirements, like written examinations and mandatory fees, constitute a form of compelled speech. Most likely, however, this classification would be largely fact dependent. Through its analysis of compelled disclosures, *NIFLA* again becomes relevant in this discussion. The licensing requirements are most likely to constitute compelled speech where they require potential tour guides to pass a written examination, thereby compelling them to learn a particular framework of understanding about the city's history, culture, and sociological realities. In both *Kagan* and *Edwards*, the relevant cities (New Orleans and the District of Columbia, respectively) required tour guides to pass written examinations. In *Edwards*, the examination addressed content from fourteen different categories, which included "Government," "Historical Events," and "Regulations."¹³⁹ As discussed above, a particular resident's perception of a particular historical event (e.g., the Civil War) or a state regulation could vary drastically from another's based on his or

¹³⁷ CAREER EXPLORER, *supra* note 113; *see also* CAREER EXPLORER, *supra* note 116.

¹³⁸ *See supra* Section III.A.

¹³⁹ *Edwards v. District of Columbia*, 755 F.3d 996, 999–1000 (D.C. Cir. 2014).

her identity, demographics, and personal experiences. By requiring tour guides to learn a state-selected set of facts (which could potentially bleed into ideologies) and implicitly representing them as the foundation for state-sanctioned tours, local government thus compel tour guides to endorse a certain set of views.

The same could be said for mandatory licensing fees (which were required in the facts of *Kagan*), which would analogously require tour guides to subsidize the continued state endorsement of this set of ideologies.¹⁴⁰ Similar to the Court's reasoning in *NIFLA*, which rejected a separate First Amendment framework of analysis for professional speech,¹⁴¹ the exam requirements and fees may constitute compelled speech and should not receive lessened First Amendment scrutiny simply because they occur in a professional context. Rather, they should be reviewed under strict scrutiny because they constitute a content-based regulation of speech.¹⁴²

Under the *Zauderer* framework that Haupt would require, cities' interest in avoiding confusion or deception of tourists likely does not outweigh tour guides' interest in communicating their personal views to visitors, which the written examinations in particular could have the potential to hinder. This is because the content of tours amounts to a form of political speech—which receives particularly forceful First Amendment protections—and risking tourist confusion is unlikely to cause constitutional harm. So the regulations should not receive a less rigorous standard of judicial scrutiny because the state's interest is obviously countervailing.¹⁴³ As a caveat to this point, evidence that tourist misinformation is rampant in a particular city as a result of unreliable guides—which does not currently appear to exist anecdotally or on a quantitative scale—could tip the scales in favor of the state's interest. Additionally, the applicability of the compelled speech doctrine here is again largely fact dependent. While the cities in both *Kagan* and *Edwards* required written examinations for tour guides, another city could theoretically impose other licensing requirements that do or do not violate the First Amendment without implicating the compelled speech doctrine at all.

A potentially compelling counterargument here is that the required written examinations and fees do not appear to alter the content of the tours themselves, after the guides ultimately receive their licenses (short of evidence that a city actually requires its guides to communicate the material reflected on the exams). While this argument

¹⁴⁰ See *United States v. United Foods, Inc.*, 533 U.S. 405, 411–12 (2001).

¹⁴¹ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018).

¹⁴² See *supra* Sections III.C–D.

¹⁴³ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

certainly limits the strength of the compelled speech argument, it is plausible that the nature of the material chosen for the exams colors the tour guides' understanding of the city's history, politics, and sociology, especially given the effects of recency bias that could compel tour guides to prioritize this new knowledge over previously existing ideological views or perceptions of the city. The presence of certain material on the examination could also imply to tour guides that they are discouraged from or expected not to expressly contradict this information in their tours (and guides have an incentive to follow actual or perceived state policies in order to avoid losing their jobs). Furthermore, while less apposite to the question of the circuit split itself (which concerns licensing requirements), tour guide companies' internal rules and employee expectations have the potential to inhibit a tour guide's speech or compel expression of a particular set of views.

F. The Circuit Split is Properly Resolved by Adopting the D.C. Circuit's Interpretation in *Edwards*.

In resolving the existing circuit split, the proper legal outcome is similar to the approach that the D.C. Circuit adopted in *Edwards*: rigorous licensing requirements imposed on potential tour guides constitute an unacceptable limitation on protected speech in violation of the First Amendment.¹⁴⁴ Moreover, although the *Edwards* court declined to decide the question, these licensing statutes should be subjected to heightened strict scrutiny review rather than intermediate scrutiny, because intensive licensing schemes can have the effect of altering the content of tour guide speech that is permitted to reach the tourist audience. The interest in safeguarding tour guides' First Amendment rights should outweigh the cities' police powers-based efforts to regulate the local tourism industry because tour guides engage in a form of vigorously protected political speech. This is an especially critical concern given the increasing reliance on human tour guides to provide communicative and personalized experiences to visitors.¹⁴⁵

¹⁴⁴ *Edwards v. District of Columbia*, 755 F.3d 996, 1009 (D.C. Cir. 2014).

¹⁴⁵ See Weiler & Black, *supra* note 4, at 364.

IV. CONCLUSION

Protecting tour guide speech matters. Tour guides can serve as the primary liaisons and gatekeepers to U.S. cities, and the ways in which they represent the locale can meaningfully shape the perceptions of visitors and their contacts at home, both domestically and abroad. Maintaining a diverse cohort of U.S. tour guides is important to ensure that a representative range of viewpoints on a city's culture, politics, and traditions are conveyed to tourists. Otherwise, the narrative of political discourse surrounding a city as portrayed to visitors could be controlled by the state. Because tour guide speech can convey the guides' ideological leanings through express statements, conscious or subconscious word choice, or even through their personalities, it should be properly classified as political speech. And because licensing requirements constitute a filtering mechanism that can select for particular education levels, socioeconomic classes, or even races, the speech regulations are content-based and should receive heightened strict scrutiny review. Additionally, while largely fact dependent in its applicability, the compelled speech doctrine may limit states' ability to require written examinations about the city or mandatory licensing fees.

There may still be room for cities and localities to retain some degree of regulatory authority over local guides without implicating the First Amendment. A possibility could be requiring all official tour guide companies to register with the city, so that the city has some ability to track which groups are representing ideas about the locale to the outside world. In order to maximize free speech protections, however, it may be wiser for cities to surrender regulatory power to the markets and allow private mechanisms like Yelp reviews or competitive pricing schemes to govern the success of particular types of tours or tour guides in the city. With constitutionally shielded political discourse at stake, perhaps states should loosen their regulatory grip on their local branding and permit the "Segs and the City"-s of the world to roam free.