

---

---

FIRST AMENDMENT — FREEDOM OF SPEECH — D.C. CIRCUIT HOLDS UNCONSTITUTIONAL DISTRICT OF COLUMBIA’S TOUR GUIDE LICENSING REGULATION. — *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

In recent years, businesses have launched successful First Amendment challenges to regulations affecting commercial speech<sup>1</sup> in a number of high-profile cases.<sup>2</sup> Some scholars have found the increasing protection of formerly disfavored commercial speech troubling and have expressed concern that a deregulatory commercial speech doctrine might infect jurisprudence in other types of First Amendment cases concerning economic activity, thereby jeopardizing economic regulations more broadly.<sup>3</sup>

Recently, in *Edwards v. District of Columbia*,<sup>4</sup> the D.C. Circuit held unconstitutional the District of Columbia’s tour-guide licensing regulation,<sup>5</sup> which required all prospective for-hire tour guides to, among other requirements, pass an examination “covering the applicant’s knowledge of buildings and points of historical and general interest in the District.”<sup>6</sup> The court found that the District had not met its burden of demonstrating that the exam requirement was narrowly tailored to advance a significant government interest. Although *Edwards* was not a commercial speech case, it did uphold a challenge to a commercial regulation and so might be looked at askance by opponents of potent First Amendment protection for corporations.<sup>7</sup> But

---

<sup>1</sup> Commercial speech is that “which does ‘no more than propose a commercial transaction.’” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (internal quotation mark omitted). It has historically received “a lesser protection” than other categories of speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

<sup>2</sup> *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

<sup>3</sup> *See* Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> [<http://perma.cc/5WYN-C9NR>].

<sup>4</sup> 755 F.3d 996 (D.C. Cir. 2014).

<sup>5</sup> D.C. MUN. REGS. tit. 19, §§ 1200–1209 (2010). Washington, D.C., like several other American cities with significant tourism industries, has a statutory requirement that all for-hire tour guides be licensed. *See* D.C. CODE § 47-2836 (2014).

<sup>6</sup> D.C. MUN. REGS. tit. 19, § 1203.3. The other four requirements are that the applicant must: (1) be at least eighteen years old; (2) be proficient in English; (3) not have been convicted of certain specified felonies; and (4) make a sworn statement that all statements contained in his or her application are true and pay all required licensing fees. D.C. MUN. REGS. tit. 19, §§ 1203.1, 1203.2.

<sup>7</sup> *See* Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 175, 177–80, 191 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (observing that arguments about commercial speech, which “appear to have no special philosophical or historical affinity with the First Amendment, find themselves transmogrified into First Amendment arguments,” *id.* at 191).

while the District's regulation was directed at economic activity, not speech as such, expressive speech is inherently part of the tour-guide occupation and the court rightly recognized this constitutional interest. Even though it was correct to apply a searching form of review, the court in *Edwards* nonetheless applied intermediate scrutiny in a way that was distinctly nondeferential to the government.

Tonia Edwards and Bill Main own and operate a Segway-rental and tour business in Washington, D.C., called "Segs in the City."<sup>8</sup> For decades, a D.C. statute has required that all for-hire tour guides be licensed.<sup>9</sup> The current form of the regulations implementing this law was promulgated in 2010.<sup>10</sup> Edwards and Main objected to these regulations,<sup>11</sup> which imposed civil and criminal penalties for conducting a for-profit tour without first, inter alia, passing an exam.<sup>12</sup>

Asserting both a facial and an as-applied First Amendment challenge to this regulation, Edwards and Main filed a motion for a preliminary injunction in the United States District Court for the District of Columbia.<sup>13</sup> The district court concluded that the plaintiffs had not demonstrated that they were likely to prevail on the merits of their claim and denied the preliminary injunction.<sup>14</sup> However, the court also denied the District's motion to dismiss and allowed the parties to proceed to discovery.<sup>15</sup> At the close of discovery, both the plaintiffs and the District of Columbia filed motions for summary judgment.<sup>16</sup> Judge Friedman first determined that the tour-guide licensing regulation "targets the non-expressive conduct of guiding, directing and, more broadly, escorting, a commercial sightseeing trip or tour, and only incidentally burdens speech."<sup>17</sup> He then applied the intermediate scru-

---

<sup>8</sup> *Edwards*, 755 F.3d at 998–99. Segs in the City offers tours of Washington, D.C., in which a tour group, led by a guide, travels the streets on rented Segways. *Id.* at 999. Using radio earpieces, the tour guide directs the tour participants and tells them stories about the points of interest they pass. *Id.*

<sup>9</sup> See Act of July 1, 1932, 47 Stat. 550, 558 ¶ 38.

<sup>10</sup> See 57 D.C. Reg. 6117 (July 16, 2010).

<sup>11</sup> *Edwards*, 755 F.3d at 999.

<sup>12</sup> *Id.* at 998. The examination consisted of one hundred multiple-choice questions drawn from fourteen categories, including Landmark Buildings, Presidents, and Historical Events. *Id.* at 999–1000. Violators of the law and its implementing regulations may be subject to a \$300 fine and ninety days in prison. D.C. MUN. REGS. tit. 19, § 1209.2 (2010); D.C. CODE § 47-2846 (2014).

<sup>13</sup> *Edwards v. District of Columbia*, 765 F. Supp. 2d 3, 6, 11–12 (D.D.C. 2011).

<sup>14</sup> *Id.* at 20. Edwards and Main contended that the District's tour-guide licensing scheme was a content-based prior restraint on speech that could not survive strict scrutiny review, while the District argued that the regulation implicated only doctrinally disfavored commercial speech or, in the alternative, was content neutral and survived intermediate scrutiny review. *Id.* at 12. The district court judge determined that the regulation was content neutral and thus subject to intermediate scrutiny review. *Id.* at 17–18.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Edwards v. District of Columbia*, 943 F. Supp. 2d 109, 112 (D.D.C. 2013).

<sup>17</sup> *Id.* at 118.

tiny standard from *United States v. O'Brien*,<sup>18</sup> under which a law must advance an important or substantial interest unrelated to the suppression of free speech while restricting no more speech than is essential to the furtherance of that interest.<sup>19</sup> Finding that the regulation furthered the “substantial and legitimate regulatory interests” of “promot[ing] the tourism industry” and “ensur[ing] that tour guides have a minimal level of competence and knowledge,”<sup>20</sup> the district court granted summary judgment for the District.<sup>21</sup>

On appeal, the D.C. Circuit reversed the grant of summary judgment for the District of Columbia and remanded the case with instructions to grant the plaintiffs’ motion for summary judgment.<sup>22</sup> Writing for the panel, Judge Brown<sup>23</sup> began her opinion with a barb for the District by noting that questions on how the regulations “actually accomplish their intended purpose . . . render[ed] the government’s counsel literally speechless” during oral argument.<sup>24</sup> As an initial matter, Judge Brown noted that the court did not need to determine whether the regulations amounted to a content-based or a content-neutral restriction on speech because the regulations could not withstand even intermediate scrutiny.<sup>25</sup>

In its intermediate scrutiny analysis, the court focused on the aspects of the *O'Brien* test that “[c]ollectively . . . query whether the challenged regulations are narrowly tailored to further a substantial government interest,”<sup>26</sup> that is, whether they “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>27</sup> Judge Brown recognized that the District has a substantial interest in promoting its tourism economy, but she determined that the District had provided no evidence, not “studies, anecdotal evidence, history, consensus, or common sense,”<sup>28</sup> indicating that “ill-informed

---

<sup>18</sup> 391 U.S. 367 (1968).

<sup>19</sup> *Edwards*, 943 F. Supp. 2d at 121 (citing *O'Brien*, 391 U.S. at 377). While content-based regulations are subject to strict scrutiny, “[c]ontent-neutral regulations do not pose the same ‘inherent dangers to free expression’ that content-based regulations do, and thus are subject to a less rigorous analysis.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994)).

<sup>20</sup> *Edwards*, 943 F. Supp. 2d at 122. The district court found that the District had “provided credible evidence in support of its regulatory interests, including legislative and anecdotal records.” *Id.*

<sup>21</sup> *Id.* at 124–25.

<sup>22</sup> *Edwards*, 755 F.3d at 1009.

<sup>23</sup> Judge Brown was joined by Judges Henderson and Wilkins.

<sup>24</sup> *Edwards*, 755 F.3d at 998.

<sup>25</sup> *Id.* at 1000.

<sup>26</sup> *Id.* at 1002.

<sup>27</sup> *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (internal quotation marks omitted). Because the regulations did not satisfy these factors, the court found it unnecessary to decide whether the regulations left open sufficient alternative channels of communication. *Id.* at 1009 n.14.

<sup>28</sup> *Id.* at 1004.

guides are indeed a problem for the District's tourism industry."<sup>29</sup> She dismissed a 1927 *Washington Post* article, written only a few years before the law in question was enacted, that expressed concern that "self-styled tour guides were overly aggressive in soliciting business" as "underwhelming . . . decades-old evidence [that] says nothing of the present state of affairs."<sup>30</sup> She likewise rejected the idea that the existence of five other cities with important tourism industries and similar licensure requirements provided persuasive evidence of the substantiality of the District's asserted interest, because "scores of other U.S. cities . . . have determined licensing tour guides is *not* necessary."<sup>31</sup>

Even assuming the District has a substantial interest in preventing ill-informed or unscrupulous tour guides because of the threat they pose to the District's tourism industry, Judge Brown found that there was no evidence the exam requirement actually furthered the District's interest in preventing that harm.<sup>32</sup> Once guides had become licensed, the regulation did not prevent them from "call[ing] the White House the Washington Monument" or otherwise saying whatever they wish.<sup>33</sup> Nor does passing a multiple-choice exam ensure that a tour guide would be less likely to treat tourists unfairly: surely, quipped Judge Brown, "success on the District's history exam cannot be thought to impart both knowledge *and* virtue."<sup>34</sup> As a result, she found the regulation to be so underinclusive as to be arbitrary.

Furthermore, she insisted, there was no evidence to suggest that "market forces are an inadequate defense to seedy, slothful tour guides."<sup>35</sup> Tour guides' own self-interest is enough incentive for them to provide a good customer experience because "bad reviews are bad for business."<sup>36</sup> After noting that it "requires no creativity" to propose less restrictive means that would be no less effective,<sup>37</sup> Judge Brown

---

<sup>29</sup> *Id.* at 1003. In some situations, Judge Brown observed, the government's alleged interest is not "susceptible to empirical evidence," but since the District's premise that untested tour guides would harm the tourism industry implies a measurable "economic" harm, this case was not such an exception. *Id.* at 1005 (quoting *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 16 (D.C. Cir. 2009)) (internal quotation marks omitted).

<sup>30</sup> *Id.* at 1004.

<sup>31</sup> *Id.* The other cities with enforced tour-guide licensing requirements are Charleston, South Carolina; New Orleans, Louisiana; New York, New York; Savannah, Georgia; and Williamsburg, Virginia. *Id.* at 1004 n.5.

<sup>32</sup> *Id.* at 1005.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1007.

<sup>35</sup> *Id.* at 1006.

<sup>36</sup> *Id.* at 1007.

<sup>37</sup> *Id.* at 1009. For example, there was no evidence that unscrupulous tour guides could not be more effectively controlled by regulations punishing fraud or restricting the manner in which tour guides may solicit business. Additionally, there was no evidence to suggest that a voluntary certification program, under which those who passed the exam could advertise as "city-certified," would provide any worse of a consumer experience. *Id.*

concluded that “there is no evidence the exam requirement is an appropriately tailored antidote.”<sup>38</sup> Therefore, the court sustained the plaintiffs’ facial and as-applied challenges to the regulations.<sup>39</sup>

The *Edwards* court was correct to recognize the constitutional interest at stake because the D.C. regulation necessarily affected expressive speech. Additionally, *Edwards* is not susceptible to the accusation, leveled at recent commercial speech jurisprudence, that the constitutional interest was overstated. But although it employed an appropriate standard of review — intermediate scrutiny — the court in *Edwards* applied that standard in a particularly aggressive way. Instead of giving deference to the legislature’s discretion, the opinion’s rhetoric suggests that a regulation is on thin ice unless the government can show why the governmental interest allegedly furthered by the regulation could not plausibly be satisfied by the free market.

Although most regulation of commercial activity is subject to the rational basis test, which asks merely whether the enactment in question is rationally related to a legitimate governmental justification, the *Edwards* court was correct to recognize the heightened constitutional interest at stake under the District’s tour-guide licensing rule. As the trial court observed, “[e]xpressive materials do not lose their First Amendment protection merely because they are offered for sale. . . . Indeed, the [Supreme] Court long ago reminded us that the pamphlets of Thomas Paine were not distributed free of charge.”<sup>40</sup> By definition, a tour guide engages in expressive speech, with the potential to be educational, entertaining, or both.<sup>41</sup> The speech affected by the tour-guide licensing requirement, moreover, was diverse and could quite plausibly include “core political speech”<sup>42</sup>; it would not be surprising if a tour guide’s description of the significance of landmarks around the capital of the United States included discussion of governmental offi-

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Edwards v. District of Columbia*, 765 F. Supp. 2d 3, 13 (D.D.C. 2011) (second and third alterations in original) (quoting *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 953–54 (D.C. Cir. 1995)) (internal quotation marks omitted).

<sup>41</sup> The regulation at issue defined a sightseeing tour guide to include anyone “who, in connection with any sightseeing trip or tour, *describes, explains, or lectures* concerning any place or point of interest in the District.” D.C. MUN. REGS. tit. 19, § 1200.1 (2010) (emphasis added). The regulation’s definition of a tour guide also includes other nonspeech activities, including “guiding or directing.” *Id.* Thus, the tour guide occupation is part of a subset of occupations that inherently involve expressive speech. In contrast, for example, although hair stylists might speak to their customers while carrying out their services, they do not by definition engage in expressive speech when they perform services for pay.

<sup>42</sup> “Core political speech” may be described as any “interactive communication concerning political change,” *Meyer v. Grant*, 486 U.S. 414, 422 (1988), and is speech for which First Amendment protection is “at its zenith,” *id.* at 425 (quoting *Grant v. Meyer*, 828 F.2d 1446, 1457 (10th Cir. 1987)) (internal quotation mark omitted).

cial and activities, and perhaps even political views. Therefore, the regulation burdened a constitutionally protected right and thus required more searching review than the rational basis test.

However, despite *Edwards*'s recognition of the constitutional interest at stake, it should not, at least doctrinally, add to critics' worries about the recent trend toward enhanced protection of corporate speech. In recent years, businesses have had high-profile successes in leveling First Amendment challenges against regulations burdening commercial speech, a phenomenon that has troubled some scholars.<sup>43</sup> For example, in *Sorrell v. IMS Health Inc.*,<sup>44</sup> the Supreme Court struck down a law restricting the sale of pharmacy records that reveal individual doctors' prescribing patterns to pharmaceutical companies, which use the information to aid their marketing.<sup>45</sup> The Court found that the law was content based and did not withstand heightened scrutiny because it burdened the speech of pharmaceutical marketers and did not directly advance the state's policy goals of lowering the costs of medical services and promoting public health.<sup>46</sup> Justice Breyer's dissent in *Sorrell* argued that a primary purpose of the First Amendment is to protect the "marketplace of ideas," not commercial speech.<sup>47</sup> He warned that to apply heightened scrutiny to the regulation of commercial activities whenever they involve speech — as they so often do — "threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty."<sup>48</sup> Critics of recent commercial speech jurisprudence might have feared that the *Edwards* court would extend this approach beyond commercial speech by accepting the plaintiffs' argument that the tour-guide licensing requirement is a content-based restriction on speech.<sup>49</sup> In that case, the

---

<sup>43</sup> See, e.g., LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE 84 (2014) ("In an information age, as the line between economic transactions and speech blurs, the [protective approach to commercial speech] might imperil whole swaths of financial, corporate, consumer, and medical regulation."); Tamara R. Piety, "A Necessary Cost of Freedom"? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1 (2012); Wu, *supra* note 3 ("[T]he First Amendment has become the darling of economic libertarians and corporate lawyers who have recognized its power to immunize private enterprise from legal restraint.").

<sup>44</sup> 131 S. Ct. 2653 (2011).

<sup>45</sup> See *id.* at 2659.

<sup>46</sup> See *id.* at 2670–71; see also, e.g., *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (holding that a rule requiring cigarette manufacturers to display graphic warning images on all cigarette packages was unconstitutional after applying intermediate scrutiny and finding that the FDA did not provide substantial evidence that the rule directly advanced a substantial government interest), *overruled by* *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014).

<sup>47</sup> See *Sorrell*, 131 S. Ct. at 2679 (Breyer, J., dissenting) (internal quotation marks omitted).

<sup>48</sup> *Id.*

<sup>49</sup> Indeed, Judge Brown, who wrote the decision in *Edwards* as well as the majority opinion in *R.J. Reynolds*, is a fervent supporter of economic liberty. See *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring) ("America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic inter-

regulation, even though it “only incidentally burden[ed] speech,”<sup>50</sup> would have been subject to strict scrutiny. Instead, the *Edwards* opinion exercised restraint by avoiding the question of whether strict scrutiny applied.<sup>51</sup>

Nonetheless, in applying intermediate scrutiny, the *Edwards* court moved away from the deference that standard of review typically affords to the government’s case.<sup>52</sup> The court’s skeptical attitude was evident in the way it glossed over the District’s interest in its citizens and visitors having access to tour guides with some basic level of knowledge, as distinct from an interest in promoting the tourism industry.<sup>53</sup> Such access is not necessarily something the market would take care of, because a good consumer experience on a tour does not require that the tour have educational value — many consumers might value entertainment over learning, and a visitor might not even be able to discern whether a tour guide’s anecdotes were accurate or not. Admittedly, the District’s brief did not articulate this interest as clearly as it might have.<sup>54</sup> But a judge applying intermediate scrutiny with a deferential mindset could have identified the District’s argument that the exam “weed[s] out tour guides too . . . unserious to be willing to study for a single exam,”<sup>55</sup> and that tourists “are entitled to minimal competence standards for tour guides,”<sup>56</sup> as expressing the educational interest. Instead of looking carefully at the government’s briefing to ensure it had considered all the governmental interests asserted therein, the *Edwards* court fixated on the economic governmental interest in promoting the tourism industry.

---

ests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.”)

<sup>50</sup> *Edwards v. District of Columbia*, 943 F. Supp. 2d 109, 118 (D.D.C. 2013).

<sup>51</sup> See *Edwards*, 755 F.3d at 1000.

<sup>52</sup> See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997) (“Even in the realm of First Amendment questions where [the legislature] must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end . . . .”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (noting that “courts must accord substantial deference to the predictive judgments” of the legislature because such judgments are required for “[s]ound policymaking”); J.I.B., Comment, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court’s Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162, 1162 (1997) (suggesting that the First Amendment substantial evidence standard of review in the first *Turner* decision maintains judicial scrutiny while allowing Congress “room to maneuver”).

<sup>53</sup> See *Edwards*, 755 F.3d at 1006.

<sup>54</sup> See Brief for Appellee District of Columbia at 42–48, *Edwards*, 755 F.3d 966 (Nos. 13-7063, 13-7064), 2013 WL 6047162, at \*42–48.

<sup>55</sup> *Id.* at 36, 2013 WL 604712, at \*36 (quoting *Kagan v. City of New Orleans*, 957 F. Supp. 2d 774, 780 (E.D. La. 2013)) (internal quotation marks omitted).

<sup>56</sup> *Id.* at 45, 2013 WL 604712, at \*45.

As a result, the court conflated the concepts of *knowledgeable tour guide* and *good consumer experience*. In response to the District's argument that the exam requirement furthers its interests by ensuring that the pool of tour guides consists of people at least informed enough to have passed an exam,<sup>57</sup> the court expounded its view on the economics of sightseeing tour guides.<sup>58</sup> According to the court, a tour company's "desire to . . . maximize a return on its capital investment" and the presence of "numerous consumer review websites, like Yelp and TripAdvisor" already are strong incentives to provide "a quality consumer experience."<sup>59</sup> This retort suggested that the government's burden was to convince a skeptical court why market forces would not take care of the governmental interests at stake: "Perhaps most fundamentally, what evidence suggests market forces are an inadequate defense to seedy, slothful tour guides?"<sup>60</sup> As a result, the *Edwards* court's analysis of whether the rule was narrowly tailored continued the skeptical approach the court demonstrated in its identification of the governmental interests served by the regulation.

Thus, whether or not *Edwards* reached the correct outcome, the opinion's tone and the weight it afforded to its account of how market forces should render the regulation unnecessary injected an antiregulatory and distinctly nondeferential sensibility into the opinion — a sensibility that could signal how the D.C. Circuit might view the government's evidentiary burden in similar future cases.<sup>61</sup> In a First Amendment challenge to a content-neutral regulation, courts typically constrain themselves to evaluating the government's case with deference. By instead challenging the government to convince it of the necessity of the regulation, the *Edwards* court departed from that standard.

<sup>57</sup> See *Edwards*, 755 F.3d at 1006.

<sup>58</sup> See *id.* at 1006–07.

<sup>59</sup> *Id.* at 1006. The court went on to quote Adam Smith in *The Wealth of Nations* for the "timeless principle," *id.* at 1007, that "[i]t is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest," *id.* (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 11 (Laurence Dickey ed., Hackett Publ'g Co. 1993) (1776)) (internal quotation marks omitted).

<sup>60</sup> *Id.* at 1006. Indeed, this suggestion was so strong that the court saw fit to include a footnote disclaimer: "Naturally, market forces are but one factor among a group of relevant considerations when determining the constitutionality of a government's regulation." *Id.* at 1007 n.10. However, going by the text of the opinion, the market forces explanation was the primary, if not the only, factor the *Edwards* court used in deciding that there was a "substantial mismatch" between the regulation's stated objective and the means it employed. *Id.* at 1007.

<sup>61</sup> For an argument that a similar outlook is behind a broader shift in the way the D.C. Circuit has recently approached questions of administrative law, see Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. (forthcoming 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2460822](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460822) [<http://perma.cc/R9WQ-GS8L>].