UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

KIMBERLY BILLUPS, MICHAEL WARFIELD, and MICHAEL NOLAN,

Plaintiffs,

v.

CITY OF CHARLESTON, SOUTH CAROLINA

Defendant.

Civil Action No. 2:16-cv-00264-DCN

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Defendant City of Charleston ("City") enforces a tour-guide licensing scheme that makes it illegal for anyone to describe points of interest and tell stories to paying customers without first obtaining a special license from the City. To get the government's permission to talk, would-be guides must first master the material contained in the City's 490-page training manual and pass a 200-question written exam. Those who do pass the written test must also take an oral exam involving government officials evaluating their speech on a pass-or-fail basis. On January 28, 2016, Plaintiffs Kimberly Billups, Michael Warfield, and Michael Nolan filed this action, alleging the City's licensing law violates the First Amendment.

On March 7, 2016, the City filed a Motion to Dismiss the Verified Complaint in this action. For the reasons explained below, that Motion must be denied.[1]

STANDARD OF REVIEW

The inquiry in a motion to dismiss is straightforward: A court must take all facts in the complaint as true (and make all reasonable inferences in favor of the plaintiffs), and determine whether the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 328 (4th Cir. 2014). Courts need not determine that a plaintiff's victory is probable—only that the facts pled (if true) entitle the plaintiff to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

ARGUMENT

The central issue before the Court on the City's Motion to Dismiss is whether Charleston's tour-guide licensing law can survive First Amendment scrutiny. It cannot. Nor can

[1] Separately, the Plaintiffs have filed a motion for a preliminary injunction, which is now fully briefed and set for a hearing before this Court on April 19, 2016. *See* Notice of Hr'g on Mot. for Prelim. Inj. (ECF 16).

the City *avoid* First Amendment scrutiny. Because the government can only meet its burden with actual evidence—evidence Plaintiffs have alleged does not exist—dismissal is improper.

In Section I, Plaintiffs address the most straightforward basis for denying the City's Motion: Under any level of First Amendment scrutiny, the City will have to meet an evidentiary burden in this case, and the Complaint specifically alleges that no evidence exists that could meet that burden. The City's brief simply ignores both of these things: It disregards binding precedent about the applicable evidentiary burden, and it disregards the relevant allegations of the Complaint. Those omissions, by themselves, require the Court to deny the City's Motion in its entirety.

In Section II, Plaintiffs discuss a more fundamental error in the City's Motion, which is that it misapprehends the relevant First Amendment precedents, and, as a result, ends up simply reaffirming that the City's tour-guide licensing law is subject to strict scrutiny. The City's brief ultimately, albeit inadvertently, makes clear not just that its Motion cannot be granted, but also that its licensing law is a content-based restriction on speech that must ultimately be enjoined by this Court.

I. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT CHARLESTON'S TOUR-GUIDE LICENSING LAW VIOLATES THE FIRST AMENDMENT.

As detailed in the Complaint, Plaintiffs would like to tell stories about Charleston to paying tour groups, but they are forbidden from doing so unless they can pass the City's licensing examinations. Ver. Compl. for Decl. and Inj. Relief ("Compl.") ¶¶ 31–81. Even if these burdens on Plaintiffs' protected speech were perfectly content-neutral burdens—and, as discussed below, they are not—they would be subject to at least intermediate scrutiny.[2]

[2] To the extent the City suggests that the First Amendment is inapplicable because its licensing requirements apply only to *paid* speech, that argument is foreclosed by precedent. *See*, *e.g.*,

McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Reynolds v. Middleton*, 779 F.3d 222, 225–26 (4th Cir. 2015).

Under intermediate scrutiny, the government has an affirmative evidentiary burden. It must be able to demonstrate to a court that, for example, a law is narrowly tailored to address a real harm and that obvious less-restrictive alternatives would be inadequate to address that harm. *McCullen*, 134 S. Ct. at 2535–39; *Reynolds*, 779 F.3d at 229; *accord Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 169 (2002) (invalidating a licensing requirement for door-to-door solicitors because, among other things, there was no evidence that the requirement advanced the government's asserted interest in crime prevention).[3]

The City ignores all of these cases and instead asserts that it is "'entitled to advance its interests by arguments based on appeals to common sense and logic . . . .'" Def.'s Mem. of Law in Supp. of Mot. to Dismiss ("City's MTD") at 13 (quoting *Ross v. Early*, 746 F.3d 546, 556 (4th Cir. 2014)). The flaw in the City's argument is that it relies entirely on cases like *Ross*, ignoring the Supreme Court's more recent decision in *McCullen*. The Fourth Circuit, though, has recognized that *McCullen* "clarifie[d] what is necessary to carry the government's burden of

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United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 468 (1995) (noting that a "prohibition on compensation [for expression] unquestionably imposes a significant burden on expressive activity"); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away.").

[3] The City suggests in a footnote that the tour-guide licensing law should be analyzed as commercial speech. Def.'s Mem. of Law in Supp. of Mot. to Dismiss ("City's MTD") at 17 n.95. This is incorrect: Telling stories to tourists for compensation is not "speech proposing a commercial transaction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980); *see also Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291 (4th Cir. 2013). Even if this were a commercial-speech case, though, it would make no difference to the analysis. Just as under other forms of intermediate scrutiny, the government has an affirmative evidentiary burden in commercial-speech cases. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

proof under intermediate scrutiny" and that "argument unsupported by the evidence will not suffice" to demonstrate that a law is narrowly tailored. *Reynolds*, 779 F.3d at 228–29. Similarly, unless the relationship between a statute and an asserted interest is "obvious" (as is the relationship between concerns about congestion and rules preventing people from standing in roadways), evidence is also required to show that a law furthers the government's interest. *Id.* at 228 n.4. To the extent the older cases cited by the City suggested otherwise, those suggestions have been abrogated.[4] *See id.* at 228 (citing *Ross* as one example of pre-*McCullen* decisions that were "not . . . entirely clear about what the government must present in order to carry its burden" under intermediate scrutiny).

The City's repeated invocations of "common sense" ring especially hollow because "Charleston is one of only approximately five cities in the United States that require tour guides to pass an examination before they may work as guides." Compl. ¶ 83. Courts have repeatedly made clear that the government's evidentiary burden in intermediate-scrutiny cases varies depending on how common a challenged regulation is. In *McCullen*, for example, the Supreme Court cautioned that unusual laws require extra scrutiny because their rarity suggests that the government "has too readily forgone options that could serve its interests just as well, without substantially burdening" protected speech. 134 S. Ct. at 2537 & n.6 (noting that the law challenged in that case was "truly exceptional" because, as here, only five localities had similar laws); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will

[4] Indeed, even in *Ross* the court relied on actual evidence. In the paragraph immediately following the sentence quoted in the City's brief, the *Ross* panel notes that "undisputed evidence reveals that the sidewalks [in the area being regulated] suffer from severe congestion" that would be alleviated by rules creating a protestor-free passageway for pedestrians. *Ross*, 746 F.3d at 556.

vary up or down with the novelty and plausibility of the justification raised."). If tour-guide licensing is "common sense," it is incumbent upon Charleston to explain why this sense has eluded officials in cities like Boston, Philadelphia, or Chicago—something that (at least at this stage of the litigation) it cannot do.

Regardless of how large or small the City's evidentiary burden may be, though, that burden cannot be met in the context of a motion to dismiss. The government cannot present evidence to satisfy its burden at this stage of the litigation. Nor have Plaintiffs alleged facts in their Complaint that support the government's argument for dismissal. To the contrary, the Complaint specifically alleges that there is no evidence that would allow the tour-guide licensing law to survive intermediate scrutiny: It alleges that there is no evidence that the City's requirements advance any government interest or prevent any harms. Compl. ¶¶ 90–102. And the Complaint also alleges that there is no evidence the City's goals could not be achieved by means that restrict substantially less speech. *Id.* ¶¶ 82–89. Taking those allegations as true, the tour-guide law fails intermediate scrutiny, and the City's Motion must be denied.[5]

II. THE CITY'S LICENSING LAW IS SUBJECT TO STRICT SCRUTINY, WHICH IT CANNOT HOPE TO SURVIVE.

As discussed above, the City's motion can be denied in its entirety solely on the basis of intermediate-scrutiny analysis. But applying intermediate scrutiny understates the constitutional infirmity of the City's tour-guide license: Under binding precedent, the tour-guide licensing law is a content-based restriction on speech and therefore subject to strict scrutiny—a standard the

[5] As discussed in Plaintiffs' preliminary-injunction briefing, two federal appellate courts have reviewed First Amendment challenges to tour-guide licensing laws like Charleston's. Pls.' Mem. of Law in Supp. of Mot. for Prelim. Inj. Relief (ECF 5-1) at 21–22. Unsurprisingly, both of those cases were resolved on full summary-judgment records rather than on motions to dismiss. *See generally Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) and *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014).

City cannot hope to meet. The City entirely ignores the relevant caselaw, however, and instead relies on the false premise that the First Amendment does not apply to laws that regulate businesses. *See, e.g.*, City's MTD at 8. In the alternative, then, the City's motion to dismiss should *also* be denied because (under the facts alleged in the Complaint) the tour-guide licensing law fails under strict scrutiny.

A. The Tour-Guide Licensing Law Is Subject To Strict Scrutiny.

A law can be content-based (and therefore subject to strict scrutiny) for two independent reasons. First, a law is content-based if, on its face, "it draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). A law is equally content-based if it "cannot be justified without reference to the content of the regulated speech." *Id.* (citation and internal quotation marks omitted). Charleston's tour-guide licensing law fails on both counts.

First, the City's licensing requirement is imposed only on people who travel through Charleston with tour groups *while providing tourism information* like historical facts or entertaining stories; walking around with a tour group without providing such information requires no license. *See* Charleston, S.C., Code §§ 29-58; 29-2 (definition of "tour guide"). In other words, the "conduct triggering coverage under the statute consists of communicating a [particular] message," which means it is subject to strict scrutiny. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)[6]; *see also Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001).

The easiest way to see this is to compare the City's regulation of tour guides (who must be licensed) and tour escorts (who need not be). *Compare* Charleston, S.C., Code § 29-58 *with*

[6] While the Supreme Court in *Humanitarian Law Project* did not use the phrase "strict scrutiny," the Court has subsequently clarified that it was using strict scrutiny in that case. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (citing *Humanitarian Law Project* as an application of strict scrutiny).

§ 29-261(a). Unlike tour guides, tour escorts are not subject to the licensing law even though they get paid to help tourists get from place to place. *See id*. § 29-261(a). A tour escort is allowed to say things like "wait until this light turns green" or "we are heading to that church up there." But if a tour escort instead tells stories about the old slave market, or describes a building's historic significance, the licensing law applies. *See id*. § 29-58. Laws that draw these kinds of distinctions based on the content of a person's speech are subject to strict scrutiny.

Second, and equally important, the tour-guide licensing law is also content-based because it cannot be justified without reference to the content of the regulated speech. The City's official justification for the licensing requirement is "to provide accurate, factual and updated information to its visitors and residents" through licensed guides. Compl. ¶ 21 (citation omitted). And the City's Motion to Dismiss offers no alternative content-neutral justification for the requirement—instead, it *reaffirms* this purpose, arguing that the licensing law's purpose is to confirm that tour guides have "sufficient knowledge to conduct tours," and that its licensing law "ensure[s]" that only those with "a base level of competency" will be allowed to do so. *See* City's MTD at 13. In other words, the City is licensing tour guides because it hopes that tour guides who pass its tests will lead better tours and say better things to tourists than an unlicensed guide might. But restrictions on who may speak that reflect this kind of "content preference" are equally subject to strict scrutiny. *Reed*, 135 S. Ct. at 2223 (citation omitted).

In short, the tour-guide license is required only of people who talk about certain topics (history rather than traffic safety), and it is enforced as part of an explicit effort to improve (in the City's estimation) the quality of guides' speech on these topics. Under the plain dictates of Supreme Court precedent, the law is subject to strict scrutiny.

B. There Is No "Business Regulation" Exception To The First Amendment.

The City almost entirely ignores the relevant First Amendment cases and instead attempts to avoid First Amendment scrutiny by repeatedly claiming its tour-guide licensing law regulates "business" and not speech.[7] *See* City's MTD at 7–9. But there is no general exception to the First Amendment for "business" regulation or even occupational licensing. Indeed, the Supreme Court has had innumerable opportunities to create such an exception, and it has consistently refused to do so. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2655 (2011) (holding that a commercial regulation will be subject to heightened scrutiny if it "imposes a burden based on the content of speech and the identity of the speaker"); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 & n.13 (1988) (rejecting the proposition that "licensure [is] devoid of all First Amendment implication"). The City's brief points to no case that has adopted its suggested rule, apparently inviting this Court to be the first. The Court should decline that invitation: Courts must exercise extreme caution when recognizing categorical exceptions to ordinary First Amendment doctrine. The Supreme Court has made clear that these categories are narrow and well-defined, and that courts do not have "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

The closest thing to a doctrinal hook for the City's proposed exception to the First Amendment is the Fourth Circuit's so-called "professional-speech doctrine"—but even that doctrine (which the City does not cite) is far afield from tour-guide licensing. Courts in the Fourth Circuit have held that restrictions on speech in the form of professional licensing may not

[7] The City's argument rests on the incorrect premise that the licensing law does not implicate speech because guides "charge for their services." *See* City's MTD at 9. But as Plaintiffs explained above, that tour guides get paid for their speech is immaterial. *See supra* at n.2.

be subject to strict scrutiny where the speakers in question (1) personally take on their client's "affairs," (2) claim to exercise "judgment" on their client's behalf, and (3) base that judgment on the client's "individual needs and circumstances."[8] *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (citation omitted); *see also Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560 (4th Cir. 2013) (applying professional-speech doctrine to personalized spiritual counseling). This doctrine is controversial, and, as other courts have recognized, "[a]ssuming that the professional speech doctrine is valid, its application should be limited" to situations involving a true fiduciary relationship between speaker and client. *Serafine v. Branaman*, 810 F.3d 354, 359–60 (5th Cir. 2016). But tour guides tell stories and jokes to groups of people; they are entertainers far more akin to stand-up comedians than to trusted personal advisors. They are not fiduciaries in any sense of that word. *Cf. Edwards v. Dist. of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014) (noting that the professional-speech doctrine cannot be applied to tour guides, who "provide virtually identical information to each customer" rather than taking a client's affairs into their own hands).

Simply put, there is no blanket exception to the First Amendment for "business" regulations or occupational licensing. And none should be created here. The Court should follow binding Supreme Court and Fourth Circuit precedent, all of which dictates that the City's Motion be denied.

CONCLUSION

For the foregoing reasons, the City's Motion to Dismiss should be denied.

[8] This exception to standard First Amendment analysis, while binding on this Court, is contrary to Supreme Court precedent, which subjects the regulation of specialized advice to the same strict scrutiny that applies to any other regulation of speech. *See Humanitarian Law Project*, 561 U.S. at 26–28.

Dated this 24th day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2016, I caused the foregoing Plaintiffs' Opposition to Defendant's Motion to Dismiss to be filed via ECF and that the Court's ECF system automatically served counsel for Defendant.

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