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' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Tour guides cannot tell stories in Charleston without the government's permission. To gain that permission, would-be guides must pass the City's 200-question written exam, a test designed to show mastery of the government's preferred content. And to retain permission to talk, tour guides must continue proving they can pass the City's exam every three years or else attend courses on topics chosen by the government.

Charleston's tour-guide licensing law is patently unconstitutional. Plaintiff Michael Nolan has been prohibited from telling stories on tours since 2015. Kimberly Billups and Michael Warfield began giving tours shortly after the filing of this lawsuit, but continue to challenge the constitutionality of forcing tour guides to regularly prove to the government that they are still "knowledgeable" enough to continue talking.

The record evidence shows that this law is subject to strict scrutiny: On its face, as enforced, and as described by its own witnesses, the licensing law is a content-based restriction on speech. And even if that were not true, the City's law could not survive even intermediate scrutiny: Not only do unlicensed guides pose no real danger to the public, there are several equally effective less-restrictive means by which the City can address its interests, none of which the City has so much as considered. Under any level of scrutiny, therefore, the law violates the First Amendment, and Plaintiffs are entitled to summary judgment and a permanent injunction.

STATEMENT OF FACTS

A. The City of Charleston Enforces A Storytelling License.

The City of Charleston ("City") requires a license to talk. "[A]ct[ing] or offer[ing] to act as a tour guide" is illegal unless one "has first passed a written examination and is licensed . . . as a registered tour guide." Charleston Code § 29-58 ("licensing law" or "law"). An individual

giving a narrated tour without the City's permission to talk in the form of a tour-guide license can be fined up to $500, spend up to thirty days in jail, or both. *Id.* § 1-16(a).

The City's tour-guide licensing requirement is triggered when someone talks to a tour group for compensation. People "doing any talking" are required to obtain a tour-guide license but someone "just driving" or "transporting" people can do so without a tour-guide license. Plaintiffs' Statement of Undisputed Material Facts ("SUMF") ¶ 40. For example, a person paid to drive people around while playing a recorded tape of a licensed tour guide talking about Charleston is not required to have a tour-guide license; such a person would not be giving a guided tour because "the cassette can't answer a question." *Id.* ¶ 41. Similarly, when a licensed tour guide created an iPad app that used GPS to provide users with an automated "tour" of Charleston, and then installed the units in buses and rickshaws, the City did not require drivers of those vehicles to obtain tour-guide licenses because the iPad, rather than the driver, was providing the information on the tour. *See id.* ¶ 43. As the City testified in its 30(b)(6) deposition, giving a tour means "[b]eing paid for hire to expound on the history of our city[,]" *id.* ¶ 15, and when the City's enforcement officials seek to identify a tour guide in a group of people they look for "the one speaking to the crowd at all times[,]" *id.* ¶ 39.

Forcing tour guides to pass a test before talking on tours is unusual. Only a tiny handful of American cities join Charleston in doing so: St. Augustine, Florida; New Orleans, Louisiana; New York, New York; and Williamsburg, Virginia. *See* St. Augustine, Fla., Code § 17-124; New Orleans, La., Code § 30-1553(1), (3); N.Y.C, N.Y., Admin. Code § 20-244; Williamsburg, Va., Code § 9-333(2)(b). Of the cities Charleston's own website identifies as "peer cities" for tourism purposes, only *one* (New Orleans) similarly licenses tour guides. SUMF ¶ 26.

Most U.S. cities use less burdensome regulations to address concerns with tour guides, including in many places requiring them to obtain a business license before operating.[1] In some places (such as Philadelphia, Baltimore, Chicago, and San Antonio), private organizations provide *voluntary* certification programs for tour guides, which allow knowledgeable guides to hold themselves out to the public as certified tour guides without giving the government power to fine or imprison people for unauthorized talking. *Id.* ¶ 138. Some cities, including the City of Savannah, have hired tour guides themselves to lead tours and talk about points of interest deemed important by the city. *Id.* ¶ 140. Many cities also maintain a city-owned Visitors Center that provides information to visitors, such as recommending places to consider visiting and individual tour guides that city employees believe will provide a good depiction of the city. *Id.*

B. The City's Tour-Guide Licensing Law Burdens Plaintiffs' Speech.

Plaintiffs Kimberly Billups, Michael Warfield, and Michael Nolan (together, "Plaintiffs") are current and would-be tour guides subject to the City's licensing law. SUMF ¶¶ 1, 5, 7, 10, 12–13. Kimberly Billups is a licensed tour guide who leads in-character tours of Charleston under the business name "Charleston Belle Tours." *Id.* ¶ 1. Michael Warfield is a licensed tour guide who leads pub tours and ghost tours. *Id.* ¶ 7. Michael Nolan, meanwhile, spent over two

[1] *See e.g.*, Los Angeles, Cal., Code § 21.03; Chicago, Ill., Code § 4-4-020; Philadelphia, Pa., Code § 19-2602; San Antonio, Tex., Code § 31-17; San Diego, Cal., Code § 31.0121; Dallas, Tex., Code § 44-22; San Jose, Cal., Code § 4.76.170; Jacksonville, Fla., Code § 772.101; San Francisco, Cal., Bus. & Tax Regs. Code § 853; Fort Worth, Tex., Code § 20-1; Seattle, Wash., Code § 6.208.010; Denver, Colo., Code § 53-296; Washington, D.C., Code §§ 47-2851.02, 47-2851.03d; Portland, Or., Code §§ 7.02.005-7.02.882; Las Vegas, Nev., Code § 6.02.060; Louisville-Jefferson Cty., Ky., Code § 110.02; Albuquerque, N.M., Code § 13-1-3; Tucson, Ariz., Code § 19-2; Fresno, Cal., Code § 7-1002; Sacramento, Cal., Code §3.08.010; Kansas City, Mo., Code §§ 40-61, 40-165; Mesa, Ariz., Code § 5-10-300; Atlanta, Ga., Code § 30-52; Virginia Beach, Va., Code § 18-5; Omaha, Neb., Code § 19-1; Miami, Fla., Code § 31-26; Oakland, Cal., Code § 5.04.020; Tulsa, Okla., Code § 21-102; *see also* Mass. Gen. Laws ch. 110 § 5 (2017) (requiring that Massachusetts businesses, including those in Boston, apply for and obtain business certificates prior to operation).

decades working as an editor in book publishing before retiring in Charleston in 2015. *Id.* ¶ 12. But for the City's licensing requirement, Michael would lead tours addressing Charleston's African-American experience and specialty neighborhood tours for people thinking of moving to Charleston. *Id.* ¶ 125. Plaintiffs filed this lawsuit to vindicate their rights under the First Amendment after each was barred from talking to paying customers about Charleston under the City's licensing law.[2] After the filing of this lawsuit, the City amended the passing score for the tour-guide written exam to 70%, and informed Kimberly Billups and Michael Warfield that they retroactively qualified for a license based on their previous exam scores. *Id.* ¶¶ 4, 9. Michael Nolan took the City's November 2015 exam but remains ineligible for a tour-guide license. *Id.* ¶ 12.

Each of these Plaintiffs has been and is being harmed by Charleston's tour-guide licensing law. Both Kimberly Billups and Michael Warfield must either attend City-approved classes or retake the City's written exam in order to avoid losing their tour-guide license every three years. *Id.* ¶ 123. Michael Nolan is barred from speaking as a tour guide unless he passes the City's written exam and obtains a tour-guide license. *Id.* ¶ 124.

C. Tour Guides Must Navigate The City's Multi-Stage Bureaucratic Process.

Tour guides seeking to earn a living by talking about Charleston's history, points of interest, or even ghosts must navigate a multistage bureaucratic process. First, tour guides must register with the City and pay a $50 fee for two attempts at passing the City's tour-guide licensing exam. *Id.* ¶ 44. Second, to study for the exam the City produces its own tour guide training manual—*The City of Charleston Tour Guide Training Manual* (Historic Charleston

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[2] Plaintiffs filed this civil-rights lawsuit on January 28, 2016 to challenge the constitutionality of Charleston Code §§ 29-58 to -63, and § 29-66, together with the definitions of "registered tour guide" and "temporary tour guide" contained in § 29-2. *See* ECF 1 (Compl.).

Found. eds., 2011) ("*Training Manual*")—and offers it for sale at its Tourism Commission Management Office for $45 (plus tax). *Id.* ¶ 78. As detailed in Part D.1., *infra*, passing the tour-guide exam requires proving one's mastery of content contained in the 490-page Manual.[3] Third, tour guides must sit for a 2-hour written examination consisting of 200 matching, multiple choice, and true/false questions. *Id.* ¶ 44; *see also* Charleston Code § 29-58. The City's tour-guide exam is "meant to test … knowledge of the city and its history[,]" Charleston Code § 29-59(b), and is based upon materials approved by the City of Charleston Tourism Commission ("Tourism Commission"), *id.* § 29-59(a). Passing the exam requires correctly answering 140 questions (70%). *Id.* § 29-59(f). Finally, individuals who pass the tour-guide exam must first present a business license to the City's revenue collections division before being issued a "registered tour guide license card." *Id.* § 29-61(a).

The City's tour-guide license remains valid for three years once issued. *Id.* § 29-63. After the three-year term ends it becomes illegal for tour guides to continue talking to tour groups, *see id.* § 29-58; tour guides are once again "treated as a new applicant" and required to retake and pass the City's 200-question written exam, *id.* § 29-63. The City offers to extend the expiration date only if licensed tour guides complete four "continuing education programs" selected or approved by the Tourism Commission while their license is still active.[4] *Id.*

The City's multi-stage, bureaucratic tour-guide licensing law has directly prevented people from talking on tours. Plaintiff Michael Nolan would be leading tours that discuss the African-American experience in Charleston, but is prohibited from doing so because the City

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[3] Certain content from the City's 490-page Manual "marked with a palmetto tree symbol [is] of noted importance as it relates to the material guides will be tested" on. SUMF ¶ 93.

[4] Tour guides who maintain a license for twenty-five consecutive years are no longer subject to an expiration date and are "exempt from further examination and education requirements." Charleston Code § 29-63.

requires that he first pass the government's history test. SUMF ¶¶ 45, 125. And Michael is not alone: For example, Paula Reynolds, a tour guide who leads multi-day, multi-city tours, twice led tour groups to Charleston and on both occasions she was barred from providing commentary herself—even when the licensed guide she *did* hire never showed up. *Id.* ¶¶ 27–28, 45. The undisputed evidence shows that Charleston's licensing requirement for tour guides has silenced and continues to silence would-be speakers.

D. Charleston Regulates Tour Guides In An Effort To Influence The Content of Tour Guides' Speech.

Charleston officials consistently demonstrate that their primary concern in regulating tour guides is with what tour guides *say*, not with what tour guides *do*. This is evidenced by both the written examination required in order to obtain a tour-guide license and by Charleston officials' other conduct with respect to tour guides.

1. Tour Guides Must Prove Mastery of Topics Charleston Officials Want Them To Talk About In Order To Get Permission To Speak.

Tour guides in Charleston are required to pass a 200-question written exam designed to test their knowledge of the city and its history. *Id.* ¶ 44; Charleston Code §§ 29-58, -59(b). All questions on the City's tour-guide written exam are drawn from a 490-page book called the *The City of Charleston Tour Guide Training Manual* ("*Training Manual*"). SUMF ¶ 57. The City considers the study of its *Training Manual* as "proper training and background" for tour guides in Charleston. *Id.* ¶ 78.

The City's purpose in administering the written exam is to influence the content of tour guides' speech—specifically, to make it more likely that guides convey the City's preferred information to tour groups, either in their ordinary presentations or in response to questions from the group. This is evident from the face of the *Training Manual* itself: The City's *Training*

Manual informs would-be tour guides that the "honor of introducing" visitors to Charleston "goes to a special few who . . . have mastered her most telling stories." *Id.* ¶ 32.

But this was also consistently confirmed in deposition testimony from the people responsible for creating the *Training Manual* and enforcing the law. As one of the *Training Manual*'s original authors explained, "[t]he [written] exam is proof that guides have a basic knowledge of what they *should be talking about* in the city, what they *should be telling people*, [and] what people should be getting" on tours.[5] *Id.* ¶ 50 (emphasis added). And in Charleston's deposition conducted pursuant to Rule 30(b)(6), the City's designee (longtime Charleston Mayor Joseph Riley) repeatedly described the justification for the tour-guide exam (and the content included in the *Training Manual*) as being driven by a desire to influence how a guide speaks and answers questions: Mayor Riley testified, for example, that tour guides must study Charleston's history in order to pass the written exam because they "would be talking about the city's history and . . . be asked about the city's history." *Id.* ¶ 51. He further explained that the City's written exam also emphasizes architecture because tour guides "should be able to explain that" as well as explain "the periods of architecture." *Id.* ¶ 52. And he testified that the purpose for requiring the passage of a written exam is to protect Charleston's "quality and integrity" and to ensure that the city's visitors are hiring tour guides who are "knowledgeable" and can "*answer their questions* about architecture and history" when touring Charleston. *Id.* ¶ 49 (emphasis added).

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[5] This author, Rhetta Mendelsohn, also testified to her extensive history as a city official, serving on the City of Charleston Tourism Commission ("Tourism Commission") for almost a decade, she was Chair of the Commission's Tour Guide Subcommittee, and "helped to write the tour guide book that the guides study today and participated in the giving of the test for many years[.]" SUMF ¶ 50.

The "most telling stories" that a tour guide must master in order to get a tour-guide license comprise a huge amount of information. The City's 30(b)(6) witness testified that "mastering the most telling stories" includes "everything from its founding to the wars, to its historic preservation leadership, to its extraordinary architecture." *Id.* ¶ 32. The *Training Manual* itself narrates an official history of Charleston over the course of ten chapters. *Id.* ¶ 90.[6] The "Historical Overview" chapter consists of 83 pages covering everything from Charleston's archaeology and Native Americans to the Revolutionary War, Civil War, and natural disasters. *Id.* ¶¶ 90–91. The *Training Manual* also dedicates 257 pages to Charleston's architecture, historic preservation, and a street-by-street building inventory originally compiled by an architectural historian named Robert Stockton[7] for the 1984 edition of the City's tour guide training manual. *Id.* ¶¶ 90, 92. The *Training Manual*'s discussion on African-American history totals 14 pages and is a subsection of a chapter titled "Cultural Influences." *Id.* ¶ 94.

Overall, the *Training Manual* itself is meant to reflect information that the City and City officials believe is important. The City paid the Historic Charleston Foundation $20,000 to produce the *Training Manual* following a request for bids seeking "qualified persons . . . to interpret the city's history[.]" *Id.* ¶¶ 79–80. The City's 30(b)(6) witness testified that the Historic Charleston Foundation worked with members of the Tourism Commission to discuss "things that

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[6] The *Training Manual* consists of ten chapters: (1) Facts and Figures, 17 pages; (2) Historical Overview, 83 pages; (3) Architecture and Preservation, 36 pages; (4) Cultural Influences, 39 pages; (5) City Visits, 23 pages; (6) Charleston Harbor Points of Interest, 13 pages; (7) Lowcountry Visits, 7 pages; (8) Uniquely Charleston, 30 pages; (9) Charleston Gardens, 14 pages; (10) Street by Street Building Inventory, 221 pages. *Id.* ¶ 90. There is no information about ghosts in the *Training Manual*.

[7] Meeting minutes of the Tourism Commission reflect the following quote by Robert Stockton contained in a prior edition of the City's tour-guide training manual: "History is not an exact science. It is created, recorded, and interpreted by human beings." *Id.* ¶ 82.

might be put in the book[,]" and that the City's Tourism Director or her staff regularly attended the Historic Charleston Foundation's meetings concerning the *Training Manual*. *Id.* ¶ 83.

2. The City's Concern About Tour Guides' Speech Takes Many Forms And Spans Over Three Decades.

Beyond the written examination itself, the City's behavior over the course of more than thirty years makes clear that its regulation of tour guides is based primarily on concerns about the content of what tour guides say. The evidence of this takes several forms, including official communications with tour guides and enforcement actions, the oral exam requirement, and requiring approval of written scripts before issuing temporary tour-guide licenses. Each is addressed below.

Official Communications and Enforcement

The City's 30(b)(6) witness admitted the City "[s]ometimes follows up" if there is a complaint about something a licensed guide said on a tour. *Id.* ¶ 119. For example, the City's Tourism Director "sent a memo to the carriage operators asking them to adhere to the information in the notes,"[8] after learning that tour guides were "giving out wrong information on homes they passed." *Id.* ¶ 120. The City also produced a document called "Information for New Tour Guides" in which it tells licensed tour guides that they are "responsible to say, 'the legend is,' or 'tradition says'…etc. when sharing information that is not factual[.]" *Id.* ¶ 117. The document tells tour guides that "if someone asks a question and [you] do not know the answer — *PLEASE DO NOT* — make up an answer, tell them you do not know but will research the answer and contact them with the results[.]" *Id.* (emphasis in original). The City's Tourism Director has

[8] The City's 30(b)(6) witness testified that the "notes" refer to previous editions of the City's official tour guide training manual. *Id.* ¶ 120.

also informed the Tourism Commission that the City tells guides "not to tell people stories unless they were sure about the facts." *Id.* at 118.

The Oral Exam

At the time this lawsuit was filed tour guides who scored an 80% or higher on the written exam were also required to pass an oral exam to qualify for a tour-guide license. *Id.* ¶ 46; *see also* Charleston Code § 29-59(f) (2016). The oral exam, graded on a pass or fail basis, consisted of "acting as a tour guide" by "providing information about various locations" whether the exam was given "on a bus or the most recent version of flashing the sites on a screen." SUMF ¶¶ 62, 64. The oral exam tested guides on various sites around Charleston including landmarks flagged with the palmetto tree symbol in the *Training Manual*. *Id.* ¶ 62. Passing both a written and oral exam was thought to be "a more complete examination" because guides are required to "[n]ot just write it, but speak it." *Id.* ¶ 63. The City has been aware since at least 1984 that "[t]here had been some discussion . . . regarding the legality of the oral exam." *Id.* ¶ 75.

The City informed the Tourism Commission that when it came to evaluating guides taking the oral exam, "it was not a matter what was said but what was not said about the areas they were in at the time." *Id.* ¶ 72. On one occasion, a tour guide took the oral exam on a bus while it drove through an area "full of points of interest such as Rainbow Row" and "failed" because the guide "spoke only about the ebb and flow of the tides . . . and began to talk about the Exchange Building but his time was up." *Id.* ¶ 73. Over thirty people took the oral exam that day and "10 individuals failed" based upon "what they talked about[.]" *Id.* ¶ 65. In her deposition, Rhetta Mendelsohn[9] admitted that if a tour guide did not pass the oral exam it could be because

[9] Ms. Mendelsohn testified that she graded the City's oral exam over ten times. *Id.* ¶ 68.

they did not talk about the most important facts, even if what they *did* talk about was factually correct. *Id.* ¶ 71.

Temporary Tour-Guide License

At the time this lawsuit was filed, the City also issued "temporary" tour-guide licenses. *Id.* ¶ 103; *see also* Charleston Code § 29-60 (2016). The "temporary" licenses allowed a would-be guide to talk to tour groups prior to pass the City's written exam. *Id.* at ¶¶ 103–05. Qualifying for the "temporary" tour-guide license required having a sponsoring employer that operated a licensed tour company, passing the City's temporary tour-guide licensing written exam, and having one's sponsor file a written script with the City "to be used by the temporary guide," so that the script could be "approved for accuracy" by the City. *Id.* ¶¶ 104–105; *see also* Charleston Code §§ 29-60(a)(1)–(2), (e) (2016). Written scripts filed with the City were reviewed by members of the Tourism Commission's Tour Guide Subcommittee; if those individuals were not available the City's Tourism Director would review the script. SUMF ¶ 106. Plaintiff Kimberly Billups attempted to obtain a temporary license but was unable to find a sponsoring employer after meeting with two licensed tour operators. *Id.* ¶ 3.

The City's 30(b)(6) witness admitted that the written scripts submitted for approval were to adhere to the City's official tour guide training manual. *Id.* ¶ 108; *see also id.* ¶ 109 (City's Tourism Director informing Tourism Commission that "the approved script should come from the approved tour guide manual"). The same witness also testified that a temporary tour guide was required to "adhere to a script" when talking on tours.[10] *Id.* ¶ 110; *see also id.* ¶ 104 (Tourism Director noting that temporary tour guide "is supposed to memorize a script").

[10] Meeting minutes for the Tourism Commission reflect that Vanessa Turner Maybank, the City's Tourism Director, informed the Commission that a "temporary tour guide should not

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Both the oral examination requirement and the temporary tour-guide license were repealed in 2016 not long after this lawsuit was filed. *Id.* ¶¶ 77, 115. The record strongly suggests that the City only did so *because of* this lawsuit. Indeed, the City conducted a "comprehensive" overhaul of the tour-guide licensing law in 2015 but left both provisions intact.[11] *See id.* ¶¶ 76, 114.

E. Charleston Possesses No Evidence That Its Tour-Guide Licensing Law Achieves Any Public Benefits.

The City has no evidence that its tour-guide licensing law protects the public. The City's 30(b)(6) witness testified that the City is "not aware of any harm caused by a licensed tour guide" and "not aware of any harm caused by unlicensed tour guides."[12] *Id.* ¶ 127. And the City has never investigated or studied any alternatives to requiring mandatory tour-guide testing and licensing. *Id.* ¶ 131. The City set forth three purposes for its tour-guide licensing law in its interrogatory responses and 30(b)(6) deposition: (1) protecting Charleston's tourism economy from unknowledgeable tour guides; (2) protecting against deceptive solicitation or swindling; and (3) protecting visitors from tour guides that may engage in criminal activity. *Id.* ¶ 132.

None of these purposes is supported by evidence. First, the City's 30(b)(6) witness testified that the City has no evidence that the absence of the written-exam requirement would harm Charleston's tourism economy. *Id.* ¶ 135. Second, the City's 30(b)(6) witness admitted that the City is not aware of any tour guides, licensed or unlicensed, who have falsely purported to

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deviate from the approved script" and that temporary tour guides "do not have free reign [sic] to develop their own spiel." *Id.* ¶ 111.

[11] The City's 30(b)(6) witness admitted that the City formed the opinion that the oral exam requirement and temporary tour-guide license should be eliminated only after the filing of this lawsuit. *Id.* ¶¶ 77, 115.

[12] The City's 30(b)(6) witness also testified that tour guides who do not deliver accurate information are "not apt to be very successful in that line of work over time." *Id.* ¶ 134.

conduct knowledgeable tours, and that it has no evidence that there exists a risk that unqualified individuals will falsely purport to conduct knowledgeable tours and swindle tourists out of money.[13] *Id.* ¶ 149. Third, the City's 30(b)(6) witness admitted that the City has no evidence that requiring tour guides to take its licensing exam makes it less likely that a tour guide will lead someone somewhere and commit a crime against them.[14] *Id.* ¶ 154. Fourth, the City has no evidence that steps taken by other cities to ensure tourists are accurately informed and safe would not (on their own or in combination with each other), adequately advance its interests. *See id.* ¶ 138 (voluntary certification credentials); ¶ 141 (deceptive solicitation ordinances and enforcing rules against misleading tour-guide solicitation); ¶ 140 (city-owned Visitors Centers that recommend tour guides deemed knowledgeable); *id.* (cities hiring tour guides); *see also supra* at n.1 (requiring tour guides to obtain a general business license).

STANDARD OF REVIEW

The inquiry for the Court at summary judgment is whether, based on the undisputed material facts, the moving party is entitled to judgment as a matter of law. *See, e.g.*, *S. Appalachian Mountain Stewards v. A&G Coal Corp.*, 758 F.3d 560, 562 (4th Cir. 2014). Where the government suppresses speech, though, the government bears the burden to demonstrate the constitutionality of its speech restriction at summary judgment just as it would at trial. *See, e.g.*, *Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015). Thus, it is Plaintiffs' burden in this motion to demonstrate through undisputed facts that the ordinance challenged here restricts speech; once they do so, it will be the City's burden to justify that restriction on speech. *Id.*

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[13] The City's 30(b)(6) witness also admitted that the written exam is not designed to deter deceptive solicitation. *Id.* ¶ 148.

[14] The City's 30(b)(6) witness also admitted that the written-exam requirement is not designed to deter fraud or any sort of other harm that is criminal. *Id.* ¶ 152.

ARGUMENT

Charleston's tour-guide licensing law is incompatible with the First Amendment. The City enforces a content-based regulation of speech that is subject to strict scrutiny: Tour guides are singled out based on their expressive activity, and they face fines and even jail time if they talk to paying tour groups without first being subjected to a licensing law designed to influence what they say on those tours. No recognized exception to the First Amendment exempts Charleston's tour-guide licensing law from ordinary free-speech analysis, and it is therefore flatly unconstitutional.

While this Court found the preliminary-injunction record insufficient to determine whether strict scrutiny applied here, the summary-judgment record leaves no such doubt. The record now makes clear that Charleston's law applies *only* to people who convey particular information to paying tour groups and that Charleston's motivation is avowedly to influence the content of tour guides' speech: Charleston wants to ensure that guides are "knowledgeable" about topics the City deems important so that guides will (among other things) answer questions by relaying the City's preferred information. On its face, in its enforcement, and as it is described by the City's own witnesses, it is a content-based law whose purpose is to influence the content of regulated speech. It is subject to strict scrutiny.

Even if that were not the case, though, the law would still be subject to at least intermediate scrutiny—a standard it would still fail. It is axiomatic that the government may not restrict speech based on supposition and speculation—in a First Amendment case, it must come forth with at least some evidence that it is addressing a real problem in a real way. The City, however, has none: It cannot provide evidence that its licensing requirement addresses any real problem, and it cannot provide any evidence explaining why its licensing requirement protects

the public better than any number of less-restrictive licensing schemes actually enforced in other cities. Its inability to present this evidence is fatal. The City cannot show its burdens on speech are narrowly tailored or even necessary. For that reason alone, Plaintiffs are entitled to summary judgment.

I. Charleston's Tour-Guide Licensing Law Imposes A Content-Based Restriction On Speech And Is Therefore Subject To Strict Scrutiny.

Charleston's tour-guide licensing law regulates speech. It regulates speech based on the content of that speech. And such content-based regulations are subject to strict scrutiny unless they fall within the few narrowly defined exceptions to regular First Amendment analysis, none of which apply here. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790–92 (2011).

A. The Licensing Law Regulates The Speech Of Tour Guides.

The first requirement for the application of strict scrutiny is that a law regulates *speech*. A law regulates speech wherever the "conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *see also* ECF 27 (Order) at 9 (citing *Humanitarian Law Project*, 561 U.S. at 28). This Court has previously held that the First Amendment applies in this case because tours "do constitute, or at least implicate" speech within the meaning of the First Amendment. *See* ECF 27 at 9–11.

The record confirms that the City's licensing requirement is triggered by speech. When asked to explain who must have a tour-guide license, City officials pointed to speech as the dividing line:

- The individual "doing any talking" is required to obtain a tour-guide license but not someone "just driving" or "transporting" people. SUMF ¶ 40.

- A person paid to drive people around while playing a recorded tape of a licensed tour guide talking about Charleston is not required to have a tour-guide license because "the cassette can't answer a question." *Id.* ¶ 41.
- Mayor Tecklenburg, testifying as one of the City's 30(b)(6) witnesses, described giving a tour as "[b]eing paid for hire to expound on the history of [Charleston]." *Id.* ¶ 42.
- Another 30(b)(6) witness explained that the City's enforcement officials, when seeking to identify the person in a tour group required to be licensed, look for "the one speaking to the crowd at all times." *Id.* ¶ 39.

All of these—whether framed as "talking" or "answer[ing] a question" or "expounding" or "speaking"—are clear admissions that the City's licensing requirement is aimed at and triggered by pure speech.

Plaintiffs Kimberly Billups and Michael Warfield lead tours to tell stories, and Michael Nolan would do the same but for the licensing law. *Id.* ¶¶ 1, 7, 13. "[A] requirement that one must register before he undertakes to make a public speech . . . is quite incompatible with the requirements of the First Amendment." *Watchtower Bible & Tract Soc'y of N.Y. Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002) (quoting *Thomas v. Collins*, 323 U.S. 516, 540) (1945)) (internal quotation marks omitted); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). If demanding that tour guides get a license to talk does not regulate "speech," then "it is hard to imagine what does fall within that category." *Bartnicki*, 532 U.S. at 527.

B. The Licensing Law Is Content Based.

The application of strict scrutiny has a second requirement: A law must regulate speech because of its *content*. In *Reed v. Town of Gilbert*, the Supreme Court explained that a law may

be content based in two ways. 135 S. Ct. 2218 (2015); *see also* ECF 27 at 12–13. First, a law is content based if the law's application depends upon the content of speech. *Reed*, 135 S. Ct. at 2227. The second way a law is content based—even if it appears content neutral on its face—is if the law is motivated by the government's desire to influence the content of speech. *Id.*; *see also United States v. Eichman*, 496 U.S. 310, 315 (1990). The City's tour-guide licensing law is subject to strict scrutiny under either approach because its application depends on the content of the regulated speech and because Charleston's motivation in licensing tour guides is to influence the content of the guides' speech.

1. The Law's Application Turns on the Content of Regulated Speech.

Charleston's tour-guide licensing law is triggered by speech of a particular content. At the preliminary injunction stage, this Court believed the first prong of *Reed* was not met because the City's broad definition of "tour or touring" meant it could apply regardless of whether a guide spoke or what they spoke about. *See* ECF 27 at 13–14. The content-based distinction is much clearer on this summary judgment record, which demonstrates that the City's licensing law only applies to people who speak to paying tours groups about particular topics.

First, the City's own interpretation of its licensing law confirms that it is triggered by speech communicating a particular message. Meeting minutes of the Tourism Commission reflect that the City's Corporation Counsel briefed the Commission on the Code's definition of "tour or touring," and stated that "if it was not a circumstance where there was a tour guide *giving different pointers as to what buildings were of historic significance*, it does not fall under the definition of touring as enacted by the ordinance." SUMF ¶ 31. (emphasis added).

Second, the City's 30(b)(6) witness testified that a person does not need a tour-guide license if he or she is being paid to take people around while a recorded tape of a licensed tour

guide talking about Charleston is playing; this is because "the cassette can't answer a question." *Id.* ¶ 41. Under the licensing law, a bus driver can talk with passengers about traffic safety without needing a tour-guide license, but if the driver begins answering questions about the Old Slave Mart or "expound[s] on the history of [Charleston]," he must hold a tour-guide license. *See id. at ¶¶ 41–42; see also Charleston Code 29-58*. The only way to determine whether the law applies, then, is to examine the content of what a driver says: A driver who expounds on the history of Charleston needs a tour-guide license, while a driver who expounds on the importance of wearing one's seatbelt does not.

Significantly, this clear testimony about how the law works is not hypothetical—it is an accurate description of how Charleston actually enforces the licensing requirement. A licensed tour guide named Tommy Dew, a witness for the City, *see* SUMF ¶ 29, testified that when he approached the City about installing iPads loaded with a touring app in buses and rickshaws, the City responded enthusiastically and never required, or even suggested, that the drivers of those vehicles needed tour-guide licenses. *Id.* ¶ 43. Mr. Dew's app provided an automated "tour" of Charleston with real-time, historical commentary about points of interest using GPS technology; he installed iPads loaded with his app in buses and a rickshaw. *Id.* In other words, Mr. Dew's customers were actually receiving a sightseeing tour, but Mr. Dew's drivers would not need a tour-guide license—*so long as* those drivers were not themselves "giving different pointers as to what buildings were of historic significance." *See* SUMF ¶ 31.

Simply put, through its own witnesses' candid description of the law and through its actual history of enforcement of the law, the City confesses that the "conduct triggering coverage

under the statute consists of communicating a [particular] message," *Humanitarian Law Project*, 561 U.S. at 28, which means it is subject to strict scrutiny.[15]

2. The Law's Purpose Is to Influence the Content of Tour Guides' Speech.

The tour-guide licensing law is content based because it is also motivated by the City's desire to influence the content of speech. *See Reed*, 135 S. Ct. at 2227. Put differently, the law cannot be "justified without reference to the content of the regulated speech." *Bartnicki*, 532 U.S. at 526 (internal quotation marks and citation omitted). The record makes clear that the City's current licensing law (both in the form of its written exam and its continuing-education requirements) are aimed directly at influencing the content of the speech it regulates. This is clear from the record based on the tour-guide licensing law as it exists, and it is only made clearer in light of the City's decision to hastily repeal other speech-based provisions of the law in direct response to this lawsuit.

a. The licensing law as it stands is motivated by the content of regulated speech.

On its face, the licensing law creates two classes of speakers: those who have passed the written exam and satisfied the City's continuing-education requirements, and those who have not. Precedent counsels skepticism of such speaker-based rules because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). For that reason, the law "demand[s] strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994); *see also Reed*, 135 S. Ct. at 2230. And this is just such a case:

[15] 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).

The City restricts the right to speak to paying tour groups to those who have met its requirements *precisely because* it believes meeting those requirements will make a guide more likely to say things that the City finds congenial.

Indeed, what *other* motivation could the City have for requiring licensees to pass a test about history and architecture? The City does not force would-be tour guides to demonstrate mastery of certain aspects of history and architecture because it wants tour guides to have this knowledge hidden away in their secret hearts. The City forces would-be tour guides to demonstrate mastery of certain aspects of history and architecture because it wants tour guides to be able to *communicate the information they have been forced to master*.

And the record demonstrates that this is *precisely* the City's motivation here. When called upon to justify the written exam, the City's witnesses consistently justified the requirement by reference to the content of the regulated speech. The City's 30(b)(6) witness testified that the purpose of the City's written exam is to protect Charleston's "quality and integrity" and to ensure that when visitors hire tour guides they have someone "knowledgeable" about Charleston who can "answer their questions about architecture and history[.]" SUMF ¶ 49. This is a *justification based on speech*: Answering questions is speech, and the City wants people who ask tour guides questions on topics it thinks are important to get (what the City believes are) good answers. *See, e.g.*, *id.* at ¶ 52 (30(b)(6) witness testifying that if tour guides cannot answer questions about "the Russell House" and its architecture a tourist may not "go[] back to [Charleston,]" and that if a tour guide giving a *pub tour* cannot answer questions about St. Michael's Church by referencing that "George Washington went there[,]" the guide has "ripped off" the visitor and damages the "city's reputation").

Other witnesses for the City similarly admit that its chosen regulatory mechanism—testing tour guides using a subject matter test—is meant to influence what tour guides talk about on tours. Rhetta Mendelsohn, who helped write and edit the *Training Manual* (and spent nearly a decade on the Tourism Commission), testified that the "exam is proof that guides have a basic knowledge of what they *should be talking about* in the city, what they *should be telling people*, [and] what *people should be getting*" on tours. *Id.* ¶ 50 (emphasis added). And the City expressly concedes that it chooses topics to cover on the exam based on what it believes tour guides ought to be able to *say*: In its 30(b)(6) deposition, for example, the City explained that the written exam emphasizes architecture because guides "should be able to explain that" on tours as well as address the "periods of architecture." *Id.* ¶ 52. This understanding of the law as being motivated by a desire to ensure that tour guides can say things the City wants said is in keeping with how the City has consistently described the law. Indeed, the City's own *Training Manual*, which sets out the information the City deems important, *id.* ¶¶ 78–80, argues that tour guides "serve as the city's ambassadors" and that their "knowledge" is "representative of the City." *Id.* ¶ 14. The City's desire to be represented by well-informed ambassadors is understandable—but that does not mean it can achieve its goals by restricting the speech of unlicensed individuals. Under the First Amendment, individual citizens are accorded the right to decide who they want to listen to; governments do not have the right to limit the universe of speakers to those who are acceptable "ambassadors."[16]

Not only does the City *describe* the law in a way that shows the City's concern with the content of regulated speech, its enforcement of the law demonstrates exactly the same thing. The City admits it "[s]ometimes follows up" if there is a complaint about something said on a

[16] *See, e.g.*, *Citizens United*, 558 U.S. at 356 (limiting universe of speakers to those government has approved "uses censorship to control thought").

licensed tour. *Id.* ¶ 119. For example, after learning that tour guides were "giving out wrong information on homes they passed" the City's Tourism Director[17] sent a memo to carriage operators asking them to "adhere to the information" in the government's tour-guide training manual. *Id.* ¶ 120. This behavior is perfectly consistent with a regulatory regime that is based on the content of regulated speech—and *only* with a regulatory regime that is based on the content of regulated speech.

This concern with speech is not an isolated incident. The City produced in discovery a document titled "Information for New Tour Guides" in which it tells guides that they are "responsible to say, 'the legend is,' or 'tradition says' . . . etc. when sharing information that is not factual[.]" *Id.* ¶117. The City's 30(b)(6) witness admitted that certain stories in the *Training Manual* are identified as myths to ensure that tour guides identify those stories as myths when talking to tour groups. *Id.* ¶ 95 ("that's why it's in the book"). The City even tells tour guides to *not* answer questions from tourists if they "do not know the answer[,]" *id.* ¶ 117, and instructs tour guides to "tell them you do not know but will research the answer and contact them with the results[.]" *Id.* Meeting minutes of the Tourism Commission reflect that the City's Tourism Director informed the Commission that the City tells guides "not to tell people stories unless they were sure about the facts." *Id.* ¶ 118.

The City also seeks to influence tour guides' speech through the law's continuing-education requirements. For example, when the City received complaints that licensed tour guides were not talking enough about African-American history, the City responded by increasing the number of continuing-education courses that addressed African-American history. *Id.* ¶ 101. The only way that tour guides can avoid having to retake the City's 200-question

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[17] The City's Tourism Director can revoke an individual's tour-guide license by bringing a request to do so before the Tourism Commission. SUMF ¶ 34.

written exam every three years is by completing four continuing-education courses; of those four, tour guides must take two from the City's course list.[18] *Id.* ¶¶ 97–99.

The record evidence is consistent and overwhelming: The City consistently *describes* its tour-guide license as a means to influence the content of regulated speech. The City consistently *justifies* its tour-guide license as a means to influence the content of regulated speech. And the City consistently *uses* its tour-guide license as a means to influence the content of regulated speech. This is because the tour-guide license is meant to influence the content of regulated speech. It is therefore subject to strict scrutiny.

b. The Hastily-Repealed Oral Examination and Script-Approval Requirements Are Further Evidence of the City's Speech-Based Motivations.

This conclusion is only buttressed by the fact that the City's licensing law—up until this First Amendment challenge was brought—contained two additional speech-centric provisions: an oral exam, and a requirement that "temporary" tour guides submit scripts for official government approval. While Charleston speedily repealed these provisions in response to this lawsuit, they remain evidence of what Charleston seeks to achieve by licensing tour guides.

<u>The Oral Exam</u>

First, the City's original requirement that would-be guides pass not just a *written* but also an *oral* licensing exam confirms that the licensing law is aimed at speech rather than conduct. Until Plaintiffs filed this lawsuit, the City forced tour guides to stand up in front of government officials and talk for three minutes in order to get permission to talk in public as tour guides.[19] *Id.* ¶¶ 46, 62. The City's 30(b)(6) witness testified that requiring guides to pass an oral exam, *after*

[18] The City's 30(b)(6) witness also testified that the City sometimes selects topics for its continuing-education courses based on feedback that people visiting Charleston "came to hear" certain "information" but didn't when "they were on a tour[.]" *Id.* ¶ 100.
[19] The oral exam was graded on a "pass/fail" basis. *Id.* ¶ 64.

scoring 80% or higher on the written exam, was thought to be "a more complete examination" because guides were required to "[n]ot just write it, but speak it." *Id.* ¶ 63.

Second, the record confirms that the City was using its oral exam to license tour guides who articulated its preferred content, and denied licenses to tour guides who did not. *See, e.g.*, *id.* ¶¶ 65, 72–73. Rhetta Mendelsohn graded the oral exam over ten times and admitted in her deposition that a tour guide could fail the oral exam for not talking about what a grader believed were the *most important* facts, even if what they *did* talk about was factually correct. *Id.* ¶¶ 68, 71 (also admitting that not identifying most important facts "would be counted against them"). The City echoed this approach to grading the oral exam; Tourism Commission meeting minutes reflect a city official stating "it was not a matter [of] what was said but what was not said" by tour guides during the oral exam. *Id.* ¶ 72. Ms. Mendelsohn testified that this approach to grading ensured that "people who give tours in this city know the facts . . . and what's important to present." *Id.* ¶ 70.

Simply put, the only natural inference is that the City required an examination in which would-be guides *spoke out loud* because the City is concerned with regulating what tour guides *say*. Repealing this requirement in an effort to avoid judicial scrutiny does nothing to change that inference—and the record suggests that this is precisely what happened here. The City's 30(b)(6) designee confirmed that—despite conducting a complete overhaul of its tour-guide ordinance in 2015—the City had no intention to repeal the oral-exam requirement until faced with this lawsuit. *Id.* ¶ 77.

Script Review Requirement

The City's speech-based motivation for requiring licensure is further confirmed by another repealed portion of the tour-guide law: the requirement of approval of a written script in

order to work as a "temporary" tour guide. Prior to the filing of this lawsuit, the City offered a "temporary" tour-guide license to those who had not yet taken its exam, conditioned on its approval of a written script that the temporary guide would follow.

The City's justification for this requirement is telling: The City's 30(b)(6) witness justified its need to review and approve scripts for the temporary license by reference to its *written exam*, and, specifically that a tour guide had yet to pass the 200-question exam. *Id.* ¶ 107 (testifying the City required script approval "so that the person who had not been able to take the full exam" had information to present on tours). In the absence of a passing score on the written exam, the City demanded direct approval of the specific words a temporary tour guide would say. *Id.* ¶¶ 104–05, 108–11; *see also* Charleston Code § 29-60(e) (2016).

These admissions by the City confirm a straightforward conclusion: The City's position was (and is) that a person who has passed its written examination can be trusted to speak to paying tour groups—to serve, in the City's view, as its "ambassador." Someone who has not passed the exam cannot be trusted to speak without an approved script (and, with the recent repeal of the temporary license, therefore cannot be trusted at all). This simply *further* confirms that the City limits the universe of speakers to licensed guides precisely because it believes licensed guides will say *better things* (in the City's estimation), and that the City's licensing requirement is therefore subject to strict scrutiny.

C. Speech to Paying Tour Groups Does Not Fall Within Any Exception to Regular First Amendment Doctrine.

Speech to paying tour groups falls within no recognized exceptions to regular First Amendment doctrine. Courts must exercise extreme caution when recognizing categorical exceptions that call for diminished scrutiny, as "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative

social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010). As demonstrated below, none of the established exceptions to ordinary First Amendment analysis apply to tour guides: The speech restricted by Charleston's tour-guide law is not commercial speech; it occurs only in traditional public forums; it is not professional-client speech; and it does not fall into any other recognized exception to ordinary First Amendment doctrine.

Tours are not commercial speech. Laws falling within this category of speech only receive intermediate scrutiny. *See, e.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995). But this exception applies only to "speech proposing a commercial transaction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (internal quotation marks and citation omitted). Here, "the City's license requirement burdens the speech prospective tour guides plan to share with customers *after* the transaction has been agreed to." ECF 27 at 21 n.16 (emphasis in original).

Tours of Charleston do not occur within a government-created forum. Several cases depart from the application of strict scrutiny on the basis that government has greater latitude to regulate speech in a government-created forum. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (concluding that a charity drive conducted in a federal workplace was not a public forum). This exception does not apply in this case. The City regulates tour guides *only* in public forums like sidewalks. *See* Charleston Code § 29-2 (definition of "tour guide" covers "any part of the districts" or "historic areas of the city"); SUMF ¶ 35 (law does not apply on private property); *cf. Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) ("speech in public areas is at its most protected on public sidewalks"). Charleston is not a government-created theme park where public officials can

restrict speech to its chosen "ambassadors"; it is a living city where all residents have a right to speak out if they wish.

Nor do tour guides engage in speech subject to the Fourth Circuit's professional-speech doctrine. In the Fourth Circuit, courts have held that restrictions on speech may not be subject to strict scrutiny where the speakers in question (1) personally take on a 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." *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (quotation marks omitted); *see also Moore-King v. Cty. of Chesterfield*, 708 F.3d 560 (4th Cir. 2013) (applying professional-speech doctrine to personalized spiritual counseling). Tour guides do none of these things: They do not take on a client's affairs, substitute their own judgment for their clients' judgment, or exercise that judgment based on a client's particular needs. They do not conduct financial transactions for their clients; they tell them entertaining stories. *See Edwards v. District of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014) (rejecting application of professional-speech doctrine to tour guides); *cf. Serafine v. Branaman*, 810 F.3d 354, 359–60 (5th Cir. 2016) (cautioning that the professional-speech doctrine must be narrowly applied lest it swallow the entire First Amendment).

Finally, tours do not fall within any other category of unprotected speech. Courts recognize a few remaining categories of unprotected speech: for example, obscenity, incitement, and fighting words, *see Brown*, 564 U.S. at 791, but tours fall into none of these. And courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472. Instead, this Court should apply strict scrutiny to the City's tour-guide-licensing law. The City's law regulates speech on the basis of its content, and no exceptions to standard First Amendment doctrine apply.

II. The Tour-Guide Licensing Law Fails Under Any Degree Of First Amendment Scrutiny.

As demonstrated above, Charleston's tour-guide law is subject to strict scrutiny, a "demanding" standard it cannot hope to meet. *See Brown*, 564 U.S. at 799. But even if strict scrutiny does not apply, Charleston's law is subject to *at least* intermediate scrutiny, which is itself a searching form of review that demands "a close fit between ends and means." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014).

A. At a Minimum, The Law Is Subject To Intermediate Scrutiny.

As this Court has already concluded, Charleston's law is subject to at least intermediate scrutiny. *See* ECF 27 at 21. This holding is correct, and no court has concluded to the contrary. The D.C. Circuit, in *Edwards*, reserved the question whether strict scrutiny applied and held that D.C.'s tour guide law could not satisfy intermediate scrutiny. 755 F.3d at 1000. And while the Fifth Circuit, in *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (2014), intimated that some lower level of scrutiny might apply, that court also ultimately applied intermediate scrutiny.[20] There is no reason to apply anything less here.

B. The Law Cannot Survive Either Strict Or Intermediate Scrutiny.

Regardless of which standard of First Amendment review the Court applies, the basic form of the analysis is the same: Charleston is required to identify a public interest for the law, and it must show that this interest is advanced by the law without burdening too much speech. Applying strict scrutiny, this means that a law must be "justified by a compelling government interest" and "narrowly drawn to serve that interest." *Brown*, 564 U.S. at 799. Applying

[20] The Fifth Circuit in *Kagan* suggested (but did not hold) that the First Amendment might be entirely inapplicable because the law does not "affect[ ] what people say." 753 F.3d at 561. This suggestion is hard to square with binding precedent. A law that bars certain people from speaking undoubtedly "affects what people say." *See, e.g.*, *Riley*, 487 U.S. at 802; *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002).

intermediate scrutiny, it means a law must be "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534 (citation omitted).

As this Court has previously discussed, *see* ECF 27 at 30–32, the Fifth and D.C. Circuits have reached opposite conclusions about the constitutionality of tour-guide licensing under an intermediate-scrutiny standard. The Fifth Circuit concluded that it was sufficient that New Orleans had asserted an interest in "requiring the licensees to know the city and not be felons or drug addicts" and that licensing by its nature achieved that result. *Kagan*, 753 F.3d at 562. The D.C. Circuit, on the other hand, looked to see whether there was evidence of any harms caused by unknowledgeable or unscrupulous tour guides; whether those harms were actually addressed by licensing; and whether those harms could be addressed in some less restrictive way. *Edwards*, 755 F.3d at 1003–09.

At the preliminary-injunction stage, this Court held that *Edwards* provides a better illustration of intermediate-scrutiny analysis required in the Fourth Circuit. ECF 27 at 30 (citing *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015)). That continues to be the case: To survive summary judgment, Charleston must be able to present "evidence that (i) [unlicensed] tour guides posed a threat to its interests . . . and (ii) it did not forego readily available, less intrusive means of protecting those interests." ECF 27 at 31 (citing *McCullen*, 134 S. Ct. at 2437).

In its preliminary-injunction opinion, this Court expressed uncertainty that plaintiffs would ultimately prevail at trial because (1) the record was not clear that the law substantially burdened speech and (2) the record was not clear that Charleston was burdening speech *unnecessarily* in light of its interests. The record on summary judgment addresses both concerns, and it is clear the City has no evidence that could carry its burden on either point.

1. The Licensing Requirement Significantly Burdens Speech.

The summary-judgment record demonstrates that the tour-guide licensing requirement imposes a substantial burden on speech. Most obviously, the record demonstrates that people—now and in the past—are remaining silent rather than speaking solely because of the licensing requirement. SUMF ¶¶ 2–3, 8, 12–13, 28, 124. For example, Plaintiff Michael Nolan wants to talk to paying tour groups, to share his thoughts and opinions and ideas about the city he lives in. And he is refraining from speaking solely because of the licensing law.

At the preliminary-injunction stage, the Court suggested that this was not a significant burden on speech because "paid tour guide speech is not a form of expression that '[has] historically been [] closely associated with the transmission of ideas.'" ECF 27 at 38 (citing *McCullen*, 134 S. Ct. at 2536). Plaintiffs respectfully suggest that this is incorrect: Tour-guide speech is *exactly* the kind of speech the Supreme Court referred to in *McCullen* as "closely associated with the transmission of ideas"—it is "normal conversation . . . on a public sidewalk." 134 S. Ct. at 2536. Michael Nolan wants to talk about the city he lives in to a willing audience on a public sidewalk—and, as the Supreme Court has repeatedly held, the fact that he wants to be paid to do so does not factor into the degree of First Amendment protection he should be accorded.[21] Silencing would-be speakers who want to engage in conversations and discussions on public sidewalks—which this law undisputedly actually does—is a serious burden on protected speech that deserves serious First Amendment scrutiny.

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[21] Many iconic First Amendment cases have involved speech undergirded by a profit motive. *See generally United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995) (honoraria for speeches and articles); *Simon & Schuster Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (book publishing); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (movie theaters); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspaper industry); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away"); *accord Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

C. None of the City's Proffered Justifications Survive Intermediate Scrutiny.

None of the City's proffered justifications for its licensing law survive even intermediate scrutiny. At the preliminary-injunction stage (where the Rules of Evidence and prohibitions on hearsay were relaxed), the Court could rightly take notice of things like "a Google search for 'fake tour guides.'" ECF 27 at 40. Similarly, at that stage, the Court expressed concern that the record lacked specificity about how comparable cities regulate tour guides. *Id.*; *see also id.* at 41 (refusing to accept "market forces" standing alone as a less-restrictive alternative to tour-guide licensing). The summary-judgment record is different: The City is unable to present anything more than its inadmissible Google searches—indeed, its 30(b)(6) witness repeatedly confirmed that it has no evidence that unlicensed tour guides actually present any threat to the public health or safety, SUMF ¶¶ 127–28, 135, 142, 149, 154—and the record contains more complete evidence of how other cities actually regulate tour guides in less restrictive ways without suffering any ill effects whatsoever. As a result, every one of the City's justifications fails.

Below, Plaintiffs briefly discuss each of the justifications for the tour-guide law proffered by the City's attorneys in their interrogatory responses: the idea that tour guides need "sufficient knowledge" to lead tours, the idea that licensing prevents fraud or deception by tour guides, and the idea that forcing guides to take a written test about history and architecture deters criminal behavior by tour guides. Each falls far short of the City's intermediate-scrutiny burden.

1. The License Cannot Be Justified By A Desire That Tour Guides Have "Sufficient Knowledge" To Lead Tours.

The City cannot justify its licensing law through its desire to ensure that tour guides have "sufficient knowledge" to lead tours. As an initial—and dispositive—matter, this is a *speech-based* justification that must be subjected to strict scrutiny. *See supra* at 20–23. The City wants tour guides to be knowledgeable about particular topics because the City wants tour guides to

speak about particular topics and to answer questions about particular topics. *See* SUMF ¶ 52 (City's testimony that a pub-tour guide who is asked about St. Michael's Church and fails to mention that "George Washington went there" has "ripped off" the visitor and damaged the "city's reputation"). But, as a general proposition, the government cannot regulate speech for the purpose of improving the quality of that speech—and it *certainly* cannot do so without surviving strict scrutiny. *Cf. Davis v. FEC*, 554 U.S. 724, 743 n.8 (2008) ("it would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech").

Even if intermediate scrutiny applied, though, the City cannot advance its desire to ensure that tourists hear from sufficiently knowledgeable guides by choosing the draconian measure of silencing guides it deems insufficiently knowledgeable. This is particularly true here because the record reflects that there are many, many ways for cities to ensure that visitors receive correct information from knowledgeable individuals without silencing those it deems unqualified. Cities—including nearby Savannah, Georgia (which does not require a tour-guide license)—sometimes pay guides themselves to provide the government's desired information to visitors. SUMF ¶ 140. Cities sponsor visitor centers that provide information directly to tourists and that steer tourists to guides of whom the city approves. *Id.* And cities work with the private sector to create certification programs that allow tourists to accurately identify which guides are knowledgeable and which are not.[22] Indeed, Charleston itself has a similar voluntary-certification program that allows tourists to accurately identify whether a vendor is selling "local" goods—but

[22] Significantly, the record also establishes that voluntary-certification programs like these are not purely the creature of the free market. *Cf.* ECF 27 at 41–42. In Philadelphia, for example, the city enforces laws against deceptive solicitation by tour guides. SUMF ¶ 141. A guide who falsely wore a badge indicating that he was a "certified tour guide" would be violating that law and subject to punishment—by the city government, not by the invisible hand.

it has no explanation for why a similar program could not work for identifying whether a tour guide is "knowledgeable." *Id.* ¶ 139.

To survive intermediate scrutiny, it is the City's burden to come forward with some kind of evidence demonstrating why these far-less-burdensome regulations, all of which actually exist in tourist-heavy cities like Savannah, Philadelphia, and others, would not adequately advance its interests. It cannot do this, and so the licensing law fails intermediate scrutiny.

2. The License Cannot Be Justified As A Means Of Preventing Deception Or Fraud By Tour Guides.

The City fares no better by claiming that tour-guide licensing helps deter fraud or deception by tour guides. Once again, the City claims it has no evidence that anyone has ever actually been harmed by an unlicensed tour guide. *Id.* ¶¶ 127–28, 149. And, again, the City cannot provide any plausible explanation for why it cannot regulate deception or fraud through less restrictive means than prohibiting unlicensed guides from talking to paying tour groups.

The most obvious less-restrictive alternative is to directly regulate fraud or deception. Indeed, the City actually has a law on the books prohibiting exactly this kind of fraudulent solicitation. *Id.* ¶ 150. The record establishes that other cities, like Philadelphia, directly regulate fraudulent solicitation by tour guides without experiencing any problems. *Id.* at 141. And the City can provide no explanation for why this existing law would be insufficient. Not only is a restriction on fraudulent solicitation less restrictive than the existing licensing law (in that it does not require the City to silence unlicensed guides), restrictions on solicitation are also far more narrowly tailored: By enforcing its rules against fraudulent solicitation, the City can punish tour guides who falsely promise a historical tour while delivering something else, but allow someone who (like Plaintiff Michael Warfield) leads pub tours to truthfully say "I don't know a lot about

history, but I will tell you really funny jokes about the city while we walk between pubs" (something that is currently illegal without a license).

Similarly, the City can provide no evidence that its licensing system deters the kind of "'fake tour guide' scam" the Court referred to in its preliminary-injunction opinion. ECF 27 at 40–42. The only plausible way that the licensing regime deters such a "scam" is that it requires all tour guides to have (and display) their tour-guide license. But exactly the same effect could be achieved by a requirement that all tour guides have (and display) a basic business license—which is *already the law in Charleston*. SUMF ¶¶ 36, 38; *see also* Charleston Code § 29-62(b). Tour guides in Charleston are required to have a business license and to display their business license—and Charleston's 30(b)(6) designee confirmed that the business-license requirement allows the City to track down people who engage in fraudulent transactions. SUMF ¶¶ 36–38. Other cities rely on exactly this kind of business-license requirement, including at least two cities, Boston and San Francisco, *see supra* at n.1, that the City itself considers "peer cities" for tourism purposes. *Id.* ¶ 26.

Simply put, Charleston can put forward no evidence that its licensing requirement actually deters fraud or deception, and it can provide no explanation for why more direct regulations of fraud and deception like those that have proven sufficient in other cities would not suffice here. At best, the licensing requirement is redundant with other requirements—and a purely redundant requirement cannot justify restricting protected speech.[23]

[23] Purely redundant licensing requirements cannot even survive rational-basis review. *See, e.g.*, *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 891–93 (W.D. Tex. 2015) (declaring licensing requirements for hair braiding schools unconstitutional and finding the government's justifications for challenged laws were already being directly addressed by other requirements).

3. The License Cannot Be Justified As A Means Of Preventing Criminal Behavior By Tour Guides.

Finally, Charleston's interrogatory responses suggest that the licensing requirement might deter criminal behavior by tour guides. Perhaps the most efficient way to dispose of this suggestion is simply to note that Charleston's own 30(b)(6) designee disavowed it. SUMF ¶¶ 152–53 (licensing exam not designed to prevent crime). And it is unsupported by evidence: The City possesses no admissible evidence that anyone, anywhere has ever been harmed by a criminal tour guide. *Id.* ¶¶ 127–28. And even if it did, the City possesses no evidence whatsoever that this kind of criminal behavior is effectively deterred by requiring people to take a history test before talking to paying tour groups. *Id.* ¶ 154. In the absence of such evidence and of some explanation for why Charleston—unlike Boston, Philadelphia, Savannah, and other tourist cities across the country—needs a licensing exam to prevent crime, this justification fails intermediate scrutiny as well.

CONCLUSION

The City of Charleston's tour-guide licensing law fails both strict scrutiny and intermediate scrutiny. Plaintiffs' motion for summary judgment should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2017, I caused the foregoing Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment to be filed via ECF and that the Court's ECF system automatically served counsel for Defendant.

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