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' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FINKEL LAW FIRM LLC
Sean A. O'Connor
4000 Faber Place Drive, Suite 450
North Charleston, SC 29405
Tel: (843) 576-6304
Fax: (866) 800-7954
Email: soconnor@finkellaw.com

Local Counsel for Plaintiffs

INSTITUTE FOR JUSTICE
Arif Panju* (TX Bar No. 24070380)
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Robert J. McNamara* (VA Bar No. 73208)
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: rmcnamara@ij.org

Attorneys for Plaintiffs
*Admitted Pro Hac Vice

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Statutes and Codes

INTRODUCTION

The City has failed to meet its heavy burden under the First Amendment. Its opening brief ignores the record evidence that its tour-guide licensing law is content-based and therefore subject to strict scrutiny—and, as a result, its brief makes no attempt to justify the law under strict scrutiny. Moreover, the City's brief misstates the relevant standard of review under intermediate scrutiny—and, as a result, it simply fails to introduce evidence of the sort the Supreme Court and the Fourth Circuit have held is required to survive under that standard. The City offers no evidence proving the licensing law furthers its stated interests; it offers no evidence demonstrating that less-restrictive alternatives used by other cities would not sufficiently address its interests; and it fails to offer evidence proving its licensing law is narrowly tailored. Simply put, the City's motion fails, both on the law and on the facts, and this Court should instead grant summary judgment in favor of Plaintiffs.

COUNTERSTATEMENT OF FACTS

While the material facts are not in dispute, the City's statement of facts is incomplete and therefore misleading in several respects. Plaintiffs respectfully refer the Court to their Memorandum of Law in support of summary judgment for a complete statement of the relevant facts. *See* ECF No. 39-1 ("Pls.' MSJ") at 1–13. Here, Plaintiffs briefly identify the material deficiencies in the City's recitation of the facts—first, that a great deal of the evidence relied upon in the City's brief is entirely inadmissible and, second, that the City entirely ignores huge portions of the record evidence, including dispositive concessions made by its own witnesses.

A. Most of the City's Evidence Is Inadmissible.

The City's brief is replete with citations to inadmissible evidence in the form of unsupported hearsay consisting of news articles, opinion testimony from witnesses not proffered

(or qualified) as experts, and an entire public-opinion survey prepared by individuals who were not proffered as experts (or, indeed, as witnesses of any kind in this case).

First, the City invokes over 100 pages of inadmissible news articles (apparently collected by counsel for purposes of this lawsuit) that reference various mishaps and maladies that have befallen tour groups in various places around the world. *See* ECF No. 40-1 ("Def.'s MSJ") at 27 n.145. Similarly, the City also invokes testimony from one of its witnesses, Esther Banike, concerning a report she once read, in an attempt to claim that unlicensed tour guides can literally lead people off a cliff. *See id.* Ms. Banike had no firsthand knowledge of this frightening alleged event and admits she is merely relaying things she read or heard somewhere. ECF No. 50-7 ("Banike Tr.") at 162:13–163:23, 164:6–165:6, 166:18–167:5. All of these assertions are classic hearsay—unsworn out-of-court statements offered for their truth. *See* Fed. R. Evid. 801(c). And the evidence offered by the City is a perfect illustration of *why* this kind of hearsay is inadmissible: The question before the Court is whether tour-guide licensing would make mishaps like these less likely to occur, and the fact that they are presented only as hearsay prevents the parties (or the Court) from evaluating them in that light. Did these events actually happen? How many of them would have been prevented by mandatory tour-guide licensing? How many of them took place in jurisdictions that *already* require tour-guide licensing (and are therefore evidence that guide licensing does *not* work to prevent these problems)? None of these questions can be answered by hearsay newspaper articles, and so the articles provide the Court with no assistance in resolving this case.[1]

[1] Even if the Court were to accept evidence that there have been problems with some tour guides somewhere in the world (possibly licensed, possibly unlicensed, possibly in cities that license guides, possibly in cities that do not), it does not mean that such problems exist or are even likely to occur in Charleston. The City's own 30(b)(6) witness confirmed as much when conceding the City has no evidence of there being any risk that (in the absence of guide licensing) unqualified

Second, the City relies on inadmissible opinion testimony from a fact witness in an attempt to construct a post-hoc justification for licensing tour guides based on Charleston's tourism market. Virtually all of the cited testimony from Helen Hill, the executive director of the Charleston Area Convention and Visitors Bureau ("CACVB"), consists of impermissible opinion testimony from a lay witness and thus violates Rule 701 of the Federal Rules of Evidence.[2] The City also relies on testimony from Ms. Banike in which she opines about whether an unsatisfactory customer experience can constitute "stealing" and about the effectiveness of less-restrictive alternatives to mandatory licensing.[3] The City makes no attempt at laying a foundation for Ms. Hill's or Ms. Banike's opinions as being within the bounds of Rule 701. Nor do these opinions meet Rule 701's rigorous foundational standard: The opinions are speculative and thus not rationally based on each witness's perceptions. *See U.S. v. Perkins*, 470 F.3d 150, 156 (4th Cir. 2006) (finding lay opinion testimony "elicited in response to hypothetical questions based on second-hand accounts" inadmissible for failing to satisfy Rule 701's personal knowledge requirement). Such evidence is inadmissible and unhelpful to the Court.

---

guides will falsely purport to conduct knowledgeable tours and swindle tourists out of money. ECF No. 47-1 ("Riley Tr.") at 138:3–138:9. Moreover, because so little is known about these possible incidents around the world, the City must show that attempts to use the criminal laws or other enforcement mechanisms to prevent fraud or injury would not be effective. It fails to do so.

[2] *See* Def.'s MSJ at 4, n.9 (invoking Ms. Hill's opinion concerning what visitors are "most likely to be interested in"); *id.* at 16 n.93 (same); *id.* at 22 n.120 (invoking Ms. Hill's opinion about import of City's reputation when visitors select a vacation destination); *id.* (invoking Ms. Hill's opinion about impact of negative tour guide experiences on City's reputation); *id.* at 26 n.140 (same); *id.* at 22 n.120 (invoking Ms. Hill's opinion about visitors choosing Charleston as vacation destination because of "authentic experience" as opposed to "fabricated" one).

[3] *See* Def.'s MSJ at 26 n.141 (invoking Ms. Banike's opinion about whether a type of unsatisfactory customer experience can constitute "stealing"); *id.* at 29 n.153 (invoking Ms. Banike's opinion about effectiveness of less-restrictive alternatives to mandatory licensing); *see also id.* at 26 n.141 (invoking Rhetta Mendelsohn's opinion about tour groups' customer experience).

Third, the City's attempt to rely on the CACVB's Charleston Area Survey Report ("Survey Report") is similarly inadmissible and unhelpful.[4] The City relies on the Survey Report in an effort to show that the written exam it requires of would-be tour guides is related to "the topics most tourists want to learn about when visiting Charleston." Def.'s MSJ at 24–25; *see also id.* at 16. But the Survey Report itself is, of course, a *survey* that attempts to draw general conclusions about the population from interviews with a small sample—and, as such, it is classic expert testimony. But the City has not even offered the testimony of a person who could discuss the design of the Survey Report or vouch for the reliability of that design or discuss how accurately one can draw conclusions about the general population based on the interviews in the Survey Report, *much less* qualified such a person as an expert. The only witness to discuss the Survey Report, Ms. Hill, had no role in designing or conducting the survey and, unsurprisingly, was unable to answer basic questions about the Survey Report's methodologies during her deposition and admitted that she did not collect or analyze any of the data.[5] ECF No. 50-6 ("Hill Tr.") at 31:23–33:10 (stating the College of Charleston was responsible for the report); 43:1–45:5 (Ms. Hill did not design the report); *see also id.* 34:15–35:3, 43:1–9 (Ms. Hill cannot defend the report's methodology).

[4] *See* Def.'s MSJ at 3 n.6 (invoking Ms. Hill's conclusions based on the CACVB's studies); *id.* at 22 n.120 (invoking Ms. Hill's conclusions based on her "organization's studies" involving why people visit Charleston and her opinion on the importance of the City's reputation to visitors); *see also id.* at 24, 24 n.132 (citing conclusion from Survey Report).

[5] Even if the Court were to accept the Survey Report, using unknown methodology that no one can vouch for (did the surveyors ask about interest in specific topics such as African-American history, or pubs, or even ghosts?), all it shows is that many tourists are interested in history, *generally*, not in specific topics tested on the City's exam. And the mere fact that people are interested in speech about history does not mean it may be regulated. People are interested in newspapers, political speech, Twitter, and movies. But those speakers may not be licensed either.

B. The City Omits Relevant Facts.

Stripping away the inadmissible evidence in the City's brief, we are left with a series of bare assertions—all of which are directly contradicted by relevant evidence that the City's brief simply fails to discuss.

For example, the City asserts that tourism is an "important facet" of Charleston's economy (Def.'s MSJ at 5) and claims that it licenses tour guides to protect its tourism industry (*id.* at 14), implicitly inviting the Court to assume that the success of the tourism industry has something to do with tour-guide licensing. In fact, however, Mayor Joseph Riley—the City's former long-serving executive—testified as a 30(b)(6) witness that the City has no evidence that Charleston's tourism economy would suffer any harm in the absence of its tour-guide licensing exam. ECF No. 47-1 ("Riley Tr.") at 138:17–139:2. The City's brief also asserts that about five million people visit Charleston each year, Def.'s MSJ at 4, but cites no evidence that people visit Charleston because the City licenses tour guides. The mere fact that a large number of people visit Charleston is not evidence that they visit *because* of licensing or would stop visiting in its absence.

The City asserts that protecting Charleston's tourism industry "includes protecting tourists from unqualified or unscrupulous guides[,]" *id.* at 14, but the City omits testimony from Mr. Riley in which—speaking on behalf of the City—he concedes that the written licensing exam tour guides are required to pass is not designed to deter deceptive solicitation, Riley Tr. 124:3–5, not designed to deter fraud, *id.* at 122:15–17, not designed to deter any sort of other harm that is criminal, *id.* at 123:13–15, and not designed to make it less likely that a tour guide will lead someone somewhere and commit a crime against them, *id.* at 117:14–118:1. Similarly, Mayor Riley conceded at deposition that the City has no evidence that there exists a risk that (in

the absence of guide licensing) unqualified guides will falsely purport to conduct knowledgeable tours and swindle tourists out of money. *Id.* at 138:3–9. Simply put, the City uniformly conceded at its 30(b)(6) deposition that all of its assertions about the dangers of unlicensed tour guides are just that—assertions unsupported by evidence. At summary judgment, the City simply repeats these assertions without mentioning that it has not even a scintilla of admissible evidence to support them.

Similarly, the City's brief simply ignores the many other tools the City has at its disposal to advance its interests—including laws the City *already has on the books*. For example, the City claims that tour-guide licensing is necessary because of its "substantial interest" in protecting the public from deceptive business transactions and solicitations. Def.'s MSJ at 21. But the City's brief neglects to mention that the City currently regulates this very conduct under Charleston Code of Ordinances, Chapter 21, Article XI ("Deceptive, Misleading, and Aggressive Commercial Solicitation"). Also ignored is evidence that this "substantial interest" is being selectively invoked: Mayor Riley admitted that the City has no interest in whether vendors are being truthful to Charleston's visitors when they claim that their products are made locally. Riley Tr. 56:13–19. But invoking an interest in preventing the deceptive solicitation of Charleston's visitors when tour guides sell speech, but not when vendors sell merchandise, is evidence that the City is targeting speech, not that the licensing law is necessary.

In addition to having no evidence to show that the tour-guide licensing law advances the City's asserted interests, the City's brief ignores the extensive record evidence showing that the tour guide license is triggered by speech on a particular topic and that the City's motivation for licensing tour guides is based entirely on the guides' speech. First, the City's brief ignores meeting minutes of the City of Charleston Tourism Commission ("Tourism Commission"),

produced in discovery, that reflect the City's Corporation Counsel briefing the Commission on the City Code's definition of "tour or touring" and stating 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." ECF No. 47-7 (Pls.' Ex. 7) at 1–2. Second, the City also fails to mention that its own 30(b)(6) testimony confirmed that the law is triggered by speech on a particular topic—that an individual does not need a tour-guide license if that person is being paid to silently take people around while playing a recorded tape of a licensed tour guide talking about Charleston (because "the cassette can't answer a question"), Riley Tr. 57:12–22, but that, "[i]f you hired a driver to drive you around town and you pay them *to give you information about the city*, then they should have a license[.]" *Id.* at 58:5–9 (emphasis added).[6]

Similarly, the City flatly asserts that it has no interest in what tour guides say on tours and no mechanism to regulate speech (*see, e.g.*, Def.'s MSJ at 8), ignoring evidence demonstrating that City officials consistently acted as if they were extremely interested in what licensed tour guides said on tours. For example, the City's 30(b)(6) witness admitted that, if there is a complaint about something said on a tour, the City "[s]ometimes follows up" on those complaints. ECF No. 47-3 ("Maybank Tr.") at 129:22–25. The City also neglects to mention that Tourism Commission meeting minutes reflect that the City's Tourism Director briefed the Commission about sending "a memo to the carriage operators asking them to adhere to the

[6] This testimony was not isolated; the manager of the Tourism Management Division, Davida Allen, also identified the person "doing any talking" on a tour as needing a tour-guide license, but not someone "just driving and or transporting" people. ECF No. 47-8 (Pls.' Ex. 8) at 1; *see also* ECF No. 47-4 ("Riccio Tr.") at 21:17–20 (confirming Ms. Allen is City official responsible for answering questions about whether or not a tour-guide license is required). And this matches how the City has actually enforced its law, requiring a license of people who speak about points of interest but not of people who silently conveyed passengers around the city while a recording provided the relevant narration. *See* Riley Tr. 57:12–22, 58:1–9.

information in the notes,"[7] after being notified that tour guides were "giving out wrong information on homes they passed." ECF No. 50-1 (Pls.' Ex. 28) at 7.[8] Nor does the City's brief mention that its Tourism Director once informed the Tourism Commission that "[t]he Tourism Management Office ask[s] guides not to tell people stories unless they were sure about the facts." ECF No. 50 (Pls.' Ex. 27) at 10. The City's brief also overlooks a document it produced called "Information for New Tour Guides"; in it, the City tells licensed guides that they are "responsible to say, 'the legend is,' or 'tradition says' . . . etc. when sharing information that is not factual[,]" and instructs tour guides to not answer questions during tours if they "do not know the answer" but to instead "tell them you do not know but will research the answer and contact them with the results[.]" ECF No. 49-8 (Pls.' Ex. 26) at 1–2.

Even the City's attempt to distance itself from aspects of its tour-guide licensing law ignores the summary-judgment record. The City asserts it did not prepare the *City of Charleston Tour Guide Training Manual* ("*Training Manual*"), *see* Def.'s MSJ at 2, yet omits that the *Training Manual* itself reflects that the City's Tourism Director and a committee "met for months to review the guide for content and accuracy[,]" ECF No. 50-11 (Pls.' Ex. 38) at 4, and its 30(b)(6) testimony confirms the City had discussions with the Historic Charleston Foundation about "things that might be put in the book," Maybank Tr. 27:16–20.[9] The City further asserts it does not prepare the written licensing exam, Def.'s MSJ at 16, but neglects to mention its own

[7] The City's 30(b)(6) witness testified that references to the "notes" in meeting minutes of the Tourism Commission refer to the City's official tour-guide training manual in use at the time. Maybank Tr. 51:1–10.

[8] *See also* Maybank Tr. 128:25–129:2 (admitting that, "if [the minutes] said that there was a memo sent, there was a memo sent").

[9] The City also asserts it does not require prospective tour guides to purchase the *Training Manual*, Def.'s MSJ at 20, yet neglects to mention its 30(b)(6) testimony conceding that guides need to study the *Training Manual* because "[t]hat's what they're being tested on[,]" Riley Tr. 67:15–67:23, and that it is the source of all questions on the exam, Maybank Tr. 77:12–77:19.

30(b)(6) testimony admitting the City reviewed each exam question "to ensure that the questions were consistent" with the information in the *Training Manual*, Maybank Tr. 77:12–19.[10] And the City's brief describes the oral exam and temporary tour guide script-approval requirements as "training mechanism[s]" meant to build the "confidence" of would-be tour guides, Def.'s MSJ at 19, but omits the extensive evidence about both requirements that reflect the City's content-based purpose for licensing tour guides, *see* Pls.' MSJ at 10–12; *see also infra* at 17–20.

ARGUMENT

The City's Motion for Summary Judgment fails to address—and concedes—significant portions of the First Amendment analysis. First, the City fails entirely to engage with the array of evidence showing that its law is triggered by and justified by concerns about speech on particular topics, *see supra* pp. 6–9 and therefore fails to even attempt to explain how the law would survive strict scrutiny. The City also fails to apply the correct standard for intermediate scrutiny, *see infra* pp. 21–22, leading the City to misapprehend (and fail to meet) its evidentiary burden.

Below, Plaintiffs first explain that the City's tour-guide licensing law is subject to strict scrutiny. The record evidence shows that the City's licensing law targets speech with particular content and leaves no doubt that the City's tour-guide licensing law cannot be justified without reference to the content of the regulated speech.

Even if strict scrutiny did not apply, however, the City's law would still fail under intermediate scrutiny. The City's brief simply misstates the correct standard for intermediate scrutiny, leading it to ignore the evidentiary burden that the Fourth Circuit made clear the

[10] The City also neglects to mention that its licensing law tasks a City official with "prepar[ing] and administer[ing] the written examination." Charleston Code § 29-59(b).

government must bear after *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). As a result of this legal error, the City simply fails to introduce the kind of evidence needed to meet this burden.

Finally, Plaintiffs address a new argument the City's counsel has raised in favor of the tour-guide law: the idea that the licensing law is designed to "raise[] the costs of entry into the tour market," reducing the number of tour guides and (the City's brief claims) thereby improving their quality. Def.'s MSJ at 23. But even if this were the City's motivation (and no witness has testified that it is), the First Amendment does not allow government to regulate speech for the purpose of reducing the amount of speech or the number of speakers. For all these reasons, the City's motion must be rejected, and summary judgment should be granted in favor of Plaintiffs.

I. The Tour-Guide Licensing Law Is a Content-Based Restriction on Speech.

On its face, as enforced, and as described by the City's own witnesses, the tour-guide licensing law is a content-based restriction on speech.[11] The City, however, ignores controlling Supreme Court precedent on the content-based question—*Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)—and makes no attempt to satisfy its burden under strict scrutiny.[12] While this Court found the preliminary-injunction record insufficient to determine whether strict scrutiny applied here, the record on summary judgment leaves no doubt and addresses every concern the Court raised.

Strict scrutiny first requires that a law regulate 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

[11] In their Motion for Summary Judgment, Plaintiffs explain that the City's law is plainly content based (and therefore subject to strict scrutiny) under the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Pls.' MSJ at 16–25.

[12] This Court itself cited *Reed* seven times when ruling that the First Amendment applies in this case and to evaluate whether the licensing law was content based on the preliminary-injunction record. *See* ECF No. 27 ("Order") at 9, 12–13, 15.

U.S. 514, 527 n.11 (2001). In its summary-judgment brief, Plaintiffs identify the record evidence establishing that the licensing requirement is triggered by speech, including testimony from the City's 30(b)(6) witnesses and communication from the City's Tourism Management Division explaining that individuals who are "doing any talking" are required to obtain a tour-guide license but not individuals who are "just driving" or "transporting" people. Pls.' MSJ at 15–16 (quotation marks omitted).[13] This evidence is consistent with the Court's holding earlier in this litigation, finding that the First Amendment applies here because tours "do constitute, or at least implicate, speech within the meaning of the First Amendment[.]" *See* ECF No. 27 ("Order") at 10 n.5 (internal quotations omitted).

The application of strict scrutiny also has a second requirement: A law must regulate speech because of its *content*. In *Reed*, the Supreme Court explained that a law may be content based in two ways. 135 S. Ct. at 2227; *see also* Order at 12–13. First, a law is content based if the law's application depends upon the content of speech. *Id*. 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). Rather than cite *Reed*, the City contends *Kagan v. City of New Orleans*[14] controls. *See* Def.'s MSJ at 13–14. But *Reed* is binding, and *Kagan* is not. As demonstrated below, the City's tour-guide licensing law is subject to strict scrutiny under both approaches: The law's application depends on the content of the regulated speech, and the City's motivation in licensing tour guides is to influence the content of guides' speech.

[13] *See also* ECF No. 47-8 (Pls.' Ex. 8) at 1; Riley Tr. 57:12–22, 58:1–9; ECF No. 47-2 ("Tecklenburg Tr.") at 30:14–19 (stating a "tour escort" was "managing the movement of the group rather than giving a tour" via speech), 31:5–8 (giving a tour, on the other hand, involves "expound[ing] on the history" of the city).

[14] 753 F.3d 560 (5th Cir. 2014).

A. The Record Confirms That the Licensing Law Targets a Specific Category of Speech.

The record on summary judgment establishes that the licensing law targets a specific category of speech. Such content-based distinctions are subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227. On the preliminary-injunction record, this Court was "unable to discern what form or function of speech" fell within the City's definition of "tour or touring"—noting that perhaps even a silent tour could fall within the definition's scope—and thus found no facial distinction to support strict scrutiny. Order at 14–15. The summary-judgment record resolves this ambiguity.

First, the City's own interpretation of its licensing law confirms that it is triggered by speech communicating a particular message. The speech falling within the City's definition of "tour or touring" was the subject of a briefing before the Tourism Commission, with meeting minutes produced in discovery reflecting that the City's Corporation Counsel stated "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." ECF No. 47-7 (Pls.' Ex. 7) at 1–2 (emphasis added). Targeting this specific category of speech draws a facial distinction subject to strict scrutiny. *See Reed*, 135 S. Ct. at 2227 ("Some facial distinctions based on a message . . . are more subtle, [such as] defining regulated speech by its function or purpose.").

Second, the City's 30(b)(6) testimony also confirms that the licensing law is triggered by speech communicating a particular message. As the City's designee, Mayor Riley testified that a person does not need a tour-guide license if they are being paid to take people around while a recorded tape of a licensed tour guide talking about Charleston is playing; he explained that "the cassette can't answer a question." Riley Tr. 57:12–22. By contrast, "[i]f you hired a driver to drive you around town and you pay them *to give you information about the city*, then they should

have a license[.]" *Id.* at 58:5–8 (emphasis added). The record therefore clarifies that a silent tour, such as that referred to by the Court in its preliminary-injunction opinion, *see* Order at 14–15, does not require a license, but a license *is* required when a person begins talking about Charleston.

According to the City's Corporation Counsel and its 30(b)(6) witness, then, the only way to determine whether the law gets triggered is to examine the *content* of what an individual says. Someone providing information about the city or expounding on Charleston's historic buildings needs a tour-guide license, but a driver who remains silent while a tape plays a recording of this same information does not need a license.[15] In other words, the "conduct triggering coverage under the statute consists of communicating a [particular] message," which means the licensing law is subject to strict scrutiny. *Humanitarian Law Project*, 561 U.S. at 28; *see also Bartnicki*, 532 U.S. at 526–27, 527 n.11.

B. The Record Reveals That the City's Motivation for Testing and Licensing Tour Guides Is Speech.

The City of Charleston also licenses tour guides specifically because it is concerned about the content of their speech. Earlier in this litigation, the Court found the preliminary-injunction record "not convincing enough" to warrant the application of strict scrutiny, *see* Order at 20, but allowed discovery to proceed. The record on summary judgment is much clearer: The licensing law is aimed directly at influencing the speech that it regulates, and it has been used to influence the speech that it regulates. Not only is this true based on the tour-guide licensing law

[15] Significantly, this clear testimony about how the law is triggered is not hypothetical, but an accurate description of how Charleston actually enforces its tour-guide licensing law. Plaintiffs' opening brief cites testimony from a fact witness for the City, a tour guide named Tommy Dew, confirming that the City allowed unlicensed individuals to silently transport passengers on buses or rickshaws equipped with iPads loaded with Mr. Dew's touring app, which provided real-time commentary about historical points of interest. *See* Pls.' MSJ at 18.

as it exists, but 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.

First, the City's witnesses *described* and *justified* the licensing law during discovery as a means to influence 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[.]" Riley Tr. 122:23–123:4. Answering questions is speech. Wanting tour guides to articulate (what the City believes are) good answers when asked questions on topics it believes are important is a *justification based on speech*. For example, the City's 30(b)(6) witness testified that tour guides should be able to answer questions about "the Russell House" and its style of architecture because a tour guide's inability to answer such questions may lead a tourist to not "go[] back to [Charleston]." Riley Tr. 54:14–55:8. The City's 30(b)(6) witness further testified that even if a tour guide wants to talk only on *pub tours*, that guide must be able to answer questions about St. Michael's Church by referencing that "George Washington went there[,]" because failing to say this would mean that the guide has "ripped off" the visitor and thus damaged the "city's reputation." *Id.* 48:18–49:21. Both of these examples involve the City referencing speech of a particular content in order to justify the licensing law.

Indeed, the City also justifies the law by reference to the content of regulated speech in its summary-judgment brief. For example, the City asserts that "[m]isinformation" from "unqualified tour guides" would erode the "quality experience" it claims serves as the foundation of the City's reputation as a tourist destination. Def.'s MSJ at 26. This is yet another justification for the law that refers to what tour guides say. The City's desire to protect tourists

from "misinformation" may be sincere, but it is inconsistent with the First Amendment. Robust public debate requires tolerating even false ideas; the "ordinary course in a free society" is that "[t]he remedy for speech that is false is speech that is true." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion); *see also id.* at 2553–55 (Breyer, J., concurring) (listing statutes "to show that few . . . , if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter"). The government can convey accurate information through speech of its own: signs, publications, or even its own government-paid tour guides. The government can also promote historical education by making its continuing education program voluntary and only allowing tour guides who participate to identify themselves as City-certified tour guides. But the government cannot silence tour guides who it does not think will be sufficiently accurate arbiters of historical truth.

Second, the City *uses* its tour-guide licensing law as a means to influence the content of the speech it regulates. The City admitted in its 30(b)(6) deposition that it "[s]ometimes follows up" if there is a complaint about something said on a licensed tour. Maybank Tr. 129:22–25. For example, the City's Tourism Commission meeting minutes reflect that the City's Tourism Director once "sent a memo to the carriage operators asking them to adhere to the information" in the government's tour-guide training manual after being notified that tour guides were "giving out wrong information on homes they passed." ECF No. 50-1 (Pls.' Ex. 28) at 7. This behavior is perfectly consistent with a regulatory regime that is concerned not only about what tour guides are able to talk about, but also about what they actually *do* talk about after being licensed.[16]

[16] The record contains several other examples. 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[.]" ECF No. 49-8 (Pls.' Ex. 26) at 1–2. The City even tells tour guides to *not* answer questions from tourists if they "do not know the answer[,]" and instructs tour guides to "tell them you do not know but

Other witnesses for the City similarly admit that the licensing law 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),[17] 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. ECF No. 48-1 ("Mendelsohn Tr.") at 61:11–61:14 (emphasis added). The City even concedes that it tests certain topics on the written 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 architecture is emphasized on the written exam because guides "should be able to explain that" on tours as well as address the "periods of architecture." Riley Tr. 54:5–54:13. As this Court noted in denying the City's motion to dismiss, "[g]iven the written examination's focus on certain topics, it is fair to say . . . that the licensing regime is an attempt to restrict speech that does not convey such information." Order at 17–18. Given the summary-judgment evidence described above, it is fair to *conclude* that the licensing regime is an attempt to restrict speech that does not convey such information.

The record evidence demonstrating the City's content-based purpose is overwhelming. Earlier in this case, the Court suggested that the City's purpose for the licensing law could be content neutral and that it was "entirely possible that the City designed its licensing regime to filter out would-be swindlers by ensuring that individuals . . . actually knew what they were

---

will research the answer and contact them with the results[.]" *Id.* at 2. The City's 30(b)(6) witness also 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. Maybank Tr. 133:4–8 ("that's why it's in the book"). Finally, 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." ECF No. 50 (Pls.' Ex. 27) at 10.

[17] Ms. Mendelsohn testified that she spent nearly a decade on the City's Tourism Commission, s*ee* ECF No. 48-1 ("Mendelsohn Tr.") at 6:15–6:18, that she chaired the Commission's Tour Guide Subcommittee, *id.* at 20:10–20:16, and that she "helped to write the tour guide book that the guides study today and participated in the giving of the test for many years," *id.* at 6:20–6:22.

talking about" before being allowed to talk on tours. Order at 18–19. The City invokes this suggestion in its brief. *See* Def.'s MSJ at 14. But the record reveals that the licensing law is not *designed* to do such a thing. The City's 30(b)(6) witness conceded that the written licensing exam is not designed to deter fraud, Riley Tr. 122:15–17, not designed to deter deceptive solicitation, *id*. at 124:3–5, and not designed to deter any sort of other harm that is criminal, *id.* at 123:13–15. The record *does* demonstrate, however, that the licensing law is designed to force would-be tour guides to prove mastery of certain aspects of history and architecture because the City wants tour guides to be able to *communicate the information* they have been forced to master.[18] The law is therefore subject to strict scrutiny.

Third, the hastily repealed oral examination and script-approval requirements are further evidence of the City's speech-based motivations.[19] The City's explanation that both requirements were simply "training mechanism[s]" meant "to assist prospective tour guides and to build their confidence[,]" is severely lacking, *see* Def.'s MSJ at 19, and the City's attempt to dissuade this Court from considering the repeal of both provisions as evidence of a statutory intent to influence the content of tour guides' speech, *id.* at 18–19, only serves to confirm that the law is subject to strict scrutiny.[20]

---

[18] This is further illustrated by the relationship between the City's written exam and its continuing-education program. The only way that tour guides can avoid having to retake the City's 200-question written exam every three years is by completing four continuing education courses, Charleston Code § 29-63; of those four, tour guides must take two from the City's own course list, *see* ECF No. 49-3 (Pls.' Ex. 21) at 1–2. When members of the Tourism Commission complained that licensed tour guides did not talk enough about African-American history, the City responded by increasing the number of continuing-education courses that addressed African-American history. Mendelsohn Tr. 63:3–14.

[19] As described below and in Plaintiffs' Motion for Summary Judgment, both the oral examination and the script-review requirement matter here because they provide evidence of the City's speech-centric motivations. *See* Pls.' MSJ at 23–25.

[20] The City's claim that the oral exam and temporary tour-guide license had no effect on the Plaintiffs is patently false. *See* Def.'s MSJ at 18–19. The crux of the City's argument is that,

The City used its oral exam to license tour guides who articulated its preferred content, while denying licenses to tour guides who did not. For example, Ms. Mendelsohn graded the oral exam over ten times, *see* Mendelsohn Tr. 55:14–18, and admitted during 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.* at 47:3–25.[21] The City's Tourism Management Division confirmed this approach to grading the oral exam when briefing the Tourism Commission. ECF No. 48-8 (Pls.' Ex. 17) at 3 ("[I]t was not a matter what was said but what was not said about the areas they were in at the time."). Tourism Commission meeting minutes also reflect that the City deemed tour guides unqualified to talk on tours because those guides failed the oral exam based upon "what they talked about[.]" ECF No. 48-5 (Pls.' Ex. 14) at 1. The City's characterization of the oral exam as a confidence builder simply cannot be squared with the summary-judgment record.[22]

The City's content preference is also reflected by the temporary tour-guide license's script-approval requirement. The City's 30(b)(6) witness justified needing to review and approve written scripts before issuing temporary licenses by reference to the City's *written exam*, and, specifically to the fact that a tour guide had yet to take the 200-question exam. Riley Tr. 93:12–93:22. The only way a tour guide could legally talk on tours without passing the written

---

although passage of the oral exam was required to qualify for a license, the oral exam did not harm the Plaintiffs because none of them ultimately sat for the oral exam. But the mere fact that none of the Plaintiffs ultimately *took* the oral exam does not mean the Plaintiffs did not spend time *studying for* that exam—as, in fact, they did. ECF No. 39-3 ("Nolan Decl.") at ¶¶ 3–5; ECF No. 39-4 ("Billups Decl.") at ¶¶ 5–7; ECF No. 39-6 ("Warfield Decl.") at ¶¶ 6–7.

[21] *See also* Mendelsohn Tr. 48:1–20 (admitting that not identifying the most important facts "would be counted against [would-be guides]").

[22] Showing that the oral exam was far from a confidence builder, Tourism Commission meeting minutes also reflect that guides who were given a second chance to pass the oral exam, after failing on their first attempt, "did not always pass" and thus failed to qualify for a license. ECF No. 48-6 (Pls.' Ex. 15) at 1.

exam was to confine their speech to content the government approved of, and only the content the government approved of.[23] The City may well consider such a scheme a "training mechanism" for tour guides, *see* Def.'s MSJ at 19, but it is one that cannot be squared with the First Amendment.

The oral exam and script-approval requirements reflect that the City's motivation for licensing tour guides is speech and, more specifically, speech of a particular content. In an attempt to distance itself from those speech-based requirements, the City claims the oral exam and script-approval requirements were repealed because "the City determined the provisions were unnecessary to the City's purpose." Def.'s MSJ at 2. But this assertion cannot be squared with the City's position just a few months prior to the filing of this lawsuit. The City fails to explain why these "unnecessary" provisions were not repealed when its entire tour-guide ordinance was overhauled pursuant to what the City's 30(b)(6) witness described as a "comprehensive study" undertaken as part of the City's 2015 Tourism Management Plan update. *See* Riley Tr. 153:7–24; *see also* Charleston, S.C., Ord. 2015-164, § 12 (Nov. 10, 2015). The evidence strongly suggests these provisions were repealed in response to Plaintiffs' lawsuit, and Mayor Tecklenburg, as the City's 30(b)(6) designee, conceded that the City formed the opinion that the oral exam and temporary tour-guide license should be eliminated only *after* the filing of this lawsuit. ECF No. 47-2 ("Tecklenburg Tr.") at 21:14–25, 22:10–16. To the extent the repealed provisions *were* evidence that the City's licensing law targets tour guides' speech, they *remain* evidence that the law targets speech. The government cannot make its speech-based

[23] *See* Charleston Code§ 29-60(e) (2016) (requiring temporary tour-guide scripts to be "approved for accuracy" before issuance of a license); Maybank Tr. 122:1–8 (admitting scripts were to adhere to City's official tour-guide training manual in use at the time); *id.* at 121:1–14 (testifying that temporary guides had to "adhere to a script" when talking on tours); ECF No. 49-6 (Pls.' Ex. 24) at 2 (Tourism Commission meeting minutes reflecting that "the approved script should come from the approved tour guide manual").

motivations vanish by passing an ordinance, and suggesting otherwise only underscores the post-hoc nature of the justification the City offers.

***

As demonstrated above, Charleston's tour-guide law is subject to strict scrutiny. Strict scrutiny is a "demanding" standard that the City cannot hope to meet. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). To survive this demanding standard, a law must be "justified by a compelling government interest" and "narrowly drawn to serve that interest." *Id.* The City's failure to even attempt defending its licensing law under strict scrutiny means the City has, for all intents and purposes, ceded the case.

II. Charleston's Tour-Guide Licensing Law Cannot Survive Even Intermediate Scrutiny.

Strict scrutiny is fatal to the City's law for all the reasons just discussed. As Plaintiffs' argued in their opening brief, however, it is also true that the City's law is unconstitutional *regardless* of the applicable standard. *See* Pls.' MSJ at 28–35. Even if these burdens on Plaintiffs' protected speech were perfectly content-neutral burdens—and, as discussed above, they are not—they would be subject to at least intermediate scrutiny.[24]

Intermediate scrutiny remains a demanding standard. In *McCullen v. Coakley*, the U.S. Supreme Court made clear that courts applying intermediate scrutiny under the First Amendment must consider things like the evidence supporting the government's assertions, the unusualness of a challenged law, and the availability of less-restrictive alternatives. 134 S. Ct. at 2535–39. And the Fourth Circuit has already recognized that *McCullen* establishes the proper standard of

[24] As this Court has already concluded, Charleston's law is subject to at least intermediate scrutiny. *See* Order at 21.

review in intermediate-scrutiny cases. *See Reynolds v. Middleton*, 779 F.3d 222, 228 (4th Cir. 2015).

Below, Plaintiffs explain how the City's failure to correctly state the correct standard leads it to misunderstand—and fail to satisfy—its evidentiary burden.

A. The City Misstates the Correct Standard.

The City's intermediate-scrutiny analysis is based on the wrong standard. Instead of relying on the standard required by the Fourth Circuit in *Reynolds v. Middleton*, the City frames its analysis by largely relying on *Ross v. Early*, 746 F.3d 546 (4th Cir. 2014), and *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012). *See* Def.'s MSJ at 21, 28 n.151. But *Reynolds* specifically departs from these earlier Fourth Circuit cases and "clarifies what is necessary to carry the government's burden of proof under intermediate scrutiny" in light of *McCullen*. *See Reynolds*, 779 F.3d at 228. Ignoring *Reynolds* leads the City to ignore its evidentiary burden and instead assert that it is "'entitled to advance its interests by arguments based on appeals to common sense and logic,'" *see* Def.'s MSJ at 21 (quoting *Ross*, 746 F.3d at 556); it also leads the City to attempt satisfying the narrow-tailoring inquiry with mere assertions that less-restrictive alternatives do not work, *see* Def.'s MSJ at 28–29. Failing to apply the required standard means the City ignores key aspects of the intermediate-scrutiny analysis under *Reynolds*.

The City needs evidence to satisfy its burden under intermediate scrutiny. The government must prove that its licensing law is "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534 (citation omitted). And under *Reynolds*, that means the government is not relieved "of its obligation to present evidence showing that the speech regulation furthers its asserted interests" if the relationship is not as "obvious" as that in

McCullen (where prohibiting people from gathering in roadways obviously furthered concerns about traffic congestion). 779 F.3d at 228 n.4. Further, "the burden of proving narrow tailoring requires the [government] to *prove* that it actually *tried* other methods to address the problem." *Id.* at 231 (emphasis in original). "[I]t is not enough for [the government] simply to say that other approaches have not worked."[25] *McCullen*, 134 S. Ct. at 2540. Finally, the government must also "present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary[.]" *Reynolds*, 779 F.3d at 229. To the extent the older cases cited by the City suggest otherwise, those suggestions have been abrogated.[26]

B. The City Gets the Standard Wrong and Therefore All of Its Justifications Fail.

The central issue before the Court with intermediate scrutiny is whether the City can meet its evidentiary burden. It cannot. The summary-judgment record provides no support for the City to satisfy its burden. Plaintiffs' opening brief provides a full analysis of why the justifications for the tour-guide licensing law proffered by the City cannot survive intermediate scrutiny. *See* Pls.' MSJ at 31–35. Instead of restating that analysis here, Plaintiffs explain why the City's failure to apply the correct standard is fatal to each of its proffered justifications.

The City's brief raises two primary justifications for its licensing law: (1) the idea that tour guides need to be "knowledgeable" to lead tours; and (2) the idea that licensing prevents

[25] In *Reynolds*, the government's failure to provide evidence "showing that it ever tried to *use* the available alternatives to address its safety concerns" was fatal. 779 F.3d at 232 (emphasis in original).

[26] Notably, 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. 746 F.3d at 556.

fraud or deception by tour guides. *See* Def.'s MSJ at 21–23.[27] Because the government can only meet its burden with actual evidence—evidence that, as discussed below, does not exist—granting the City's Motion is improper.

1. The City Admits That Speech Is the Mechanism Allegedly Harming Its Interest.

The City cannot justify its licensing law by its desire that tour guides be "knowledgeable" enough to talk to tour groups. As an initial—and dispositive—matter, this is a *speech-based* justification that must be subject to strict scrutiny. *See* Pls.' MSJ at 19–23. What the City describes in its brief as being "knowledgeable" enough to talk on tours it described in its 30(b)(6) deposition as tour guides having the "*proper* training and background" through the "study of that big book" (i.e., the *City of Charleston Tour Guide Training Manual*). Riley Tr. 35:5–22 (emphasis added). But the government cannot regulate speech for the purpose of improving the quality of that speech, *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"), and the City cites to no authority so much as suggesting that it is constitutionally permissible to do so.

Even if analyzed under intermediate scrutiny, though, the City's desire that guides be "knowledgeable" enough to talk on tours cannot justify the licensing law. First, the City offers no evidence suggesting that tour guides like Plaintiff Nolan are not "knowledgeable" enough to lead tours in Charleston unless they pass the City's written exam. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (striking down ban on CPA solicitation in part because the government

[27] A third justification (deterrence of criminal behavior) was raised by the City during discovery, *see* Riley Tr. 116:23–117:2, but appears to have been abandoned in its opening brief. Plaintiffs address this interest in their opening brief and explain why the City cannot defend its licensing law under intermediate scrutiny as a means to prevent criminal behavior. *See* Pls.' MSJ at 35.

provided no evidence such solicitation "create[d] the dangers" the government "claim[ed] to fear"). To borrow from *Sorrell v. IMS Health*, "[m]any are those who must endure speech they do not like, but that is a necessary cost of freedom." 564 U.S. 552, 575 (2011). Second, the City's brief cites to no evidence proving it seriously considered, and reasonably rejected, different methods that other jurisdictions have found effective at steering people toward guides it deems "knowledgeable" enough. *See McCullen*, 134 S. Ct. at 2539–40. Instead, the City's own 30(b)(6) testimony confirms it never investigated or studied *any* alternatives to requiring mandatory tour-guide licensing, or any alternatives to requiring passage of its written licensing exam. Riley Tr. 149:3–11. But under *Reynolds*, the City must present evidence to "*prove* that it actually *tried* other methods to address the problem" it claims needed correcting. *Reynolds*, 779 F.3d at 231 (emphasis in original). The City's failure to do so is dispositive.

Even assuming the City did try other methods, the City fails to address why far less restrictive alternatives—used in other tourist-heavy cities to steer visitors toward guides deemed qualified—are inadequate. Simply stating that other approaches would not work, without presenting evidence supporting such assertions, is insufficient. *See McCullen*, 134 S. Ct. at 2540. And such alternatives do exist in tourist-heavy cities: the City of Chicago partners with Chicago's tour-guide association (which operates a volunteer certification program), allowing the City to refer people to tour guides it deems qualified, Banike Tr. 60:8–62:16; nearby Savannah sometimes pays guides themselves to provide the government's desired information to visitors, ECF No. 39-5 ("Reynolds Dec.") at ¶ 33; and cities also sponsor visitor centers that provide information directly to tourists and also steer them to guides they deem qualified, *id.* ¶¶ 34–35. But the City here follows the same path that failed the government in *Reynolds*: It presents "no evidence showing that it ever tried to *use* the available alternatives to address its . . .

concerns." 779 F.3d at 232 (emphasis in original). Accordingly, under *Reynolds* and the summary-judgment record, the law cannot be justified by the City's desire to limit who can talk on tours to those it deems "knowledgeable" enough.

2. The City Cannot Defend the Licensing Law Under Intermediate Scrutiny as a Means to Prevent Fraud or Deception.

The licensing law fares no better when justified by the City's desire to prevent fraud or deception. It is not obvious that forcing someone to pass a written exam covering topics such as history and architecture makes that person more virtuous. And because it is not obvious, under *Reynolds*, the City has an "obligation to present evidence showing that the speech regulation furthers [this] asserted interest[]." *Id.* at 228 n.4. Yet the City offers no evidence to satisfy this inquiry. Instead, the summary-judgment record reflects that the written exam accomplishes no such thing: The City's 30(b)(6) witness admitted that the purpose of the written exam is not to deter fraud, Riley Tr. 123:6–123:9, nor is the exam designed to deter fraudulent activity, *id.* at 122:15–17, or even deceptive solicitation, *id.* at 124:3–5.

Once again, the City admits to never having investigated or studied *any* less-restrictive alternatives. *Id.* at 149:3–11. But assuming that it did, the City would still fail to meet its burden because it offers no evidence showing why obvious less-restrictive alternatives that directly regulate fraud or deception are inadequate. First, the City actually has a law on the books prohibiting exactly this kind of fraudulent solicitation. *See* Charleston Code Ch. 21, art. XI ("Deceptive, Misleading, and Aggressive Commercial Solicitation").[28] Second, the City's interest in deterring fraud and deception could be furthered in a less-restrictive manner by

[28] Charleston's deceptive solicitation ordinance applies to "services" rendered in the City, *see* Charleston Code § 21-231(c), and one of its stated purposes is to address deceptive and misleading solicitation by individuals "urging upon residents and visitors the use of their services through oral communication" *id.* at § 21-230(c).

requiring the display of a general business license. The City's 30(b)(6) witness confirmed that the City's own business-license requirement allows it to track down people who engage in fraudulent transactions. Riley Tr. 73:21–74:2. And requiring tour guides to display a business license is a plausible less-restrictive alternative that would allow the City to deter the kind of "fake tour guide scam" the Court referred to in its preliminary-injunction opinion. Order at 42. Many cities regulate tour guides by simply requiring a general business license, *see* Pls.' MSJ at 3 n.1, including Boston and San Francisco, which the City itself considers "peer cities" for tourism purposes, ECF No. 47-5 (Pls.' Ex. 5) at 4.[29] Accordingly, the City has not met its burden under intermediate scrutiny to prove its licensing law can be justified by an interest in preventing fraud or deception.

C. Virtually Every U.S. City Currently Uses a Less-Restrictive Alternative.

Most cities in the United States do not license tour guides.[30] Charleston is joined by only four other U.S. cities in prohibiting tour guides from speaking on tours without a special license. *See* St. Augustine, Fla., Code § 17-122; New Orleans, La., Code §§ 30-1553(1), (3); NYC, N.Y., Admin. Code § 20-244; Williamsburg, Va., Code § 9-333(2)(b). During the preliminary-injunction stage, this Court suggested that for such a consideration to provide support for Plaintiffs' concern, the proper group for comparison "is not all other U.S. cities, but other U.S. Cities with comparable tourism industries." Order at 40. To that end, the summary-judgment record shows that five cities that do not license tour guides are deemed "peer cities" for tourism

[29] The City's Department of Planning, Preservation, and Sustainability collaborated with the College of Charleston to compile the list of Charleston's "peer cities" for tourism. ECF No. 47-5 (Pls.' Ex. 5) at 3.

[30] In their opening brief, Plaintiffs identified 29 cities—including Boston and San Francisco, two of Charleston's "peer cities" for tourism—that regulate tour guides by simply requiring a general business license. *See* Pls.' MSJ at 3 n.1.

purposes by the City itself: Boston, San Francisco, Savannah, Boulder, and Aspen. *See* ECF No. 47-5 (Pls.' Ex. 5) at 4.

Charleston's licensing law is unusual. In *McCullen*, 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 vary up or down with the novelty and plausibility of the justification raised."). If tour-guide licensing is "common sense," it is incumbent upon the City to at least explain why this sense has eluded officials in cities the City *itself* considers its "peer cities" for tourism purposes—something that it cannot do.

III. Erecting Barriers to Limit the Number of Speakers Is Unconstitutional.

As demonstrated above, and in Plaintiffs' Motion for Summary Judgment, the summary-judgment record decisively answers all of the questions the Court identified at the preliminary-injunction stage, and answers them decisively in Plaintiffs' favor. In their summary-judgment briefing, however, counsel for the City introduces a new argument not addressed at the preliminary-injunction stage, claiming that the true purpose of the tour-guide license is to raise "barriers to entry" in the tour-guide market, reducing the number of guides and therefore (assertedly) increasing their quality. Def.'s MSJ at 22–23.

This justification finds no support in the record: No witness testified that this was the City's purpose in licensing tour guides, and there is no evidence in the record that making it harder to be a tour guide will, in and of itself, generate any public benefits. Moreover, such a

justification is squarely at odds with the First Amendment: Government may not regulate speech in an avowed attempt to reduce the quantity of speech. Even attempting to achieve a content-neutral goal "by reducing speech [is] not a permissible strategy." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring).[31] "[I]t does not suffice to say that inconvenience will reduce demand" when regulating speech. *Id.* at 450. As Justice Kennedy's *Alameda Books* opinion makes clear, even where the government is allowed to regulate speech to police its "secondary effects" (as is the case with certain types of pornographic commercial businesses), the government cannot set out to reduce the total amount of regulated speech that occurs. *Id.* The same rule controls here: Even if it were true that the City can make more money from tourism by reducing the number of people talking about the city's history and architecture (and the record provides no reason to believe this is so), that would not empower City officials to deliberately regulate would-be speakers into silence. Counsel's late-developed justification for the tour-guide license as a "barrier to entry" can therefore be safely rejected.

CONCLUSION

The City of Charleston's tour-guide licensing law fails both strict scrutiny and intermediate scrutiny. Defendant's Motion for Summary Judgment should be denied.

Dated: February 24, 2017.

[31] Justice Kennedy was the deciding vote in *Alameda Books* and his concurring opinion is regarded as the controlling view. *See N.W. Enterprises Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) ("Justice Kennedy's concurrence in *Alameda Books*, a vote necessary to the Court's judgment, emphasizes that the [government] may not use its regulation to eliminate businesses as a means to reduce their secondary effects.").

Respectfully submitted,

/s/ Sean A. O'Connor
Sean A. O'Connor
(District Court ID No. 7601)
FINKEL LAW FIRM LLC
4000 Faber Place Drive, Suite 450
North Charleston, SC 29405
Tel: (843) 576-6304
Fax: (866) 800-7954
Email: soconnor@finkellaw.com

Local Counsel for Plaintiffs

/s/ Arif Panju
Arif Panju* (TX Bar No. 24070380)
INSTITUTE FOR JUSTICE
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Robert J. McNamara* (VA Bar No. 73208)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: rmcnamara@ij.org

Attorneys for Plaintiffs
*Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2017, I caused the foregoing Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment to be filed via ECF and that the Court's ECF system automatically served counsel for Defendant.

/s/ Sean A. O'Connor
Sean A. O'Connor (District Court ID No. 7601)
FINKEL LAW FIRM LLC
4000 Faber Place Drive, Suite 450
North Charleston, SC 29405
Tel: (843) 576-6304
Fax: (866) 800-7954
E-mail: soconnor@finkellaw.com

Local Counsel for Plaintiffs