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

KIMBERLY BILLUPS, MICHAEL WARFIELD AND MICHAEL NOLAN, PLAINTIFFS, vs. CITY OF CHARLESTON, SOUTH CAROLINA, DEFENDANT.	**C.A. NO. 2:16-CV-00264-DCN** **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The underlying theory of Plaintiffs' case is that their chosen occupation involves communication and thus stringent constitutional protection from government regulation.[1] Plaintiffs argue the City's regulation of their occupation and desire for a base level of competency necessarily constitutes a content-based regulation requiring strict First Amendment scrutiny. Commentators have recognized that Plaintiffs' theory is untenable. Under Plaintiffs' reasoning, "the First Amendment could be invoked against nearly any regulation."[2] Because all occupations involve some level of human communication, Plaintiffs' theory subjects all business regulation to the most vigorous constitutional scrutiny. Any business that files tax forms, drafts corporate contracts, sells or advertises commercial products communicates in their business. If Plaintiffs' argument is taken to its logical conclusion, most regulation would trigger strict scrutiny under the First Amendment. This absurd result cannot be applied in this case, and the

[1] Plaintiffs' Memorandum in Opposition to the City's summary judgment motion offers no new evidence and few new arguments from those presented in their Memorandum in Support of their own Motion for Summary Judgment. The City therefore fully incorporates herein the arguments, authorities and exhibits included in Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.

[2] Shanor, Amanda, *Business Licensing and Constitutional Liberty*, 126 Yale L.J. Forum 314 (2016), attached as Ex. U.

City's motion for summary judgment should therefore be granted.

I. The City's tour guide licensing ordinance is content-neutral and therefore subject to intermediate scrutiny.

This Court has previously held, "the City's licensing regime is not content-based on its face."[3] A facial review of the ordinance is necessarily limited to a review of the "plain language" of the ordinance.[4] The plain language of the ordinance has not changed since the Court's prior ruling, and there is no reason for a different result now.[5]

This Court has recognized that the tour guide ordinance does not reference "speech" at all.[6] Any effect the ordinance has on speech is derivative of the ordinance's regulation of "touring" conduct. Plaintiffs' content-based contention is untenable because it "would effectively remove the distinction between speech and conduct, and require almost every regulation to pass strict scrutiny under the First Amendment."[7]

In order to subject the tour guide ordinance to strict scrutiny, Plaintiffs must show that the

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[3] *See*, Order, dated July 1, 2016, 194 F.Supp.3d 452, 464 (herein referenced by citation to the Federal Supplement, 3d series version, 194 F.Supp.3d 452 (D.S.C. 2016)) (hereinafter referred to as "Order") (noting that the City's ordinance does not reference "speech" and holding "it is very difficult to functionally define the speech required to perform 'tour guide services' or 'act[] as a guide' without circularly referring to speech made in the course of such conduct."). *See also*, Charleston City Code ("City Code") § 29-58.

[4] *Satellite Broad. And Commc'ns Ass'n v. F.C.C.*, 275 F.3d 337, 353–54 (4th Cir. 2001)(stating that the Court's review at this state is to "examine the plain terms of the regulation to see whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates").

[5] *See*, Defendant's Memo. in Opp. [Dkt. 62] pp. 1-8 for a full analysis of this issue. Tour services do not necessarily have to involve speech to be covered by the City's licensing regime. Maybank Aff. dated February 23, 2017, ¶ 4-5 [Dkt. 62-1]. The conduct covered by the licensing regime includes the guide's selection and design of the route the tour will take through the City. *Id*. at ¶ 4.

[6] Order, 194 F.Supp.3d at 463.

[7] Order, 194 F.Supp.3d at 464 (addressing the holding in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), and holding that it could not have meant, as Plaintiffs argue, "that every law restricting conduct also imposes a content based restriction on speech made in the course of such conduct.").

City imposed the ordinance with a content-based purpose or justification.[8] Plaintiffs cannot do so. Plaintiffs ignore the three factors the Court identified for this analysis.[9] All three factors show the City's purpose was content-neutral. The Ordinance's legislative findings and the stated purpose both confirm the City's content-neutral purpose.[10] The final factor – the inevitable effect of the ordinance – may be the most compelling evidence regarding the City's purpose. The City applied its licensing regime only to those charging money for tour guide services. The City's focus on only commercial tour services is strong evidence that the City's purpose was tied to helping ensure customers get what they pay for.

If the City's purpose was to influence the content of speech on certain topics, logic holds that the City would have included a mechanism in the ordinance to regulate what is said about those topics. The City did not do so. With or without a license, people can say whatever they want about the City or its history. The fact the City left itself with no power to regulate the content of speech is compelling evidence that the City's purpose for its licensing regime was content-neutral.

Plaintiffs argue that because the City wants tour guides for hire to have a base level of competency, the ordinance is necessarily content-based. The City's desire to weed out unqualified or unscrupulous would-be guides is tied to the desires of consumers, and does not

[8] Order, 194 F.Supp.3d at 464.

[9] This Court has previously held that "in making this assessment the court may consider [(1)] formal legislative findings, [(2)] the statute's stated purposes, as well as [(3)] the 'inevitable effect' of the statute." Order, 194 F.Supp.3d at 464, citing *Sorrell v. IMS Health,* 131 S.Ct. 2653, 2664 (2011).

[10] *See*, Charleston City Code §29-1. *See also*, Defendant's Memo. in Opp. pp. 8-9.

make the ordinance content-based.[11] A desire for competency shows the City's content-neutral purpose is to make it more likely tour guide customers get what they are paying for.[12]

As established in its prior memoranda, the City's focus on certain topics in its written exam, tour guide training manual and other materials does not show a content-based purpose.[13] The difference between what is promised and what is delivered is the core of the City's interest, not the content of the information itself. Consistent with its content-neutral purpose, the City takes the desires of the tour guide market as its starting point.[14] The record developed during discovery establishes that the licensing regime's focus on Charleston's history and historic attractions is properly calibrated to ensure paying customers get what they pay for. The City's

[11] Order, 194 F.Supp.3d at 466 ("Certainly a desire to 'protect the City's tourism economy and its residents and visitors from false or misleading offers of service for compensation' is not content-based by its own terms. It is entirely possible that the City designed its licensing regime to filter out would-be swindlers by ensuring that individuals providing 'tour guide services' actually knew what they were talking about and had some understanding of the topics they discussed.").

[12] The City's desire for competency does not create an issue of fact for trial. *Kagan v. City of New Orleans, La.*, 753 F.3d 560 (5th Cir. 2014, *cert denied*, 135 S.Ct. 1403 (2015). Plaintiffs have no evidence to refute that Charleston tourists value competency regarding Charleston's history and architecture on tours they pay for. Plaintiffs also misconstrue the Supreme Court's holding in *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). The statute at issue in *Alvarez* criminalized certain false statements without a link to some other specified harm (fraud, for purposes of securing money, etc.). *Alvarez* abrogated precedents which held that knowingly false speech merits no constitutional protection. The *Alvarez* Court, however, did not hold, as Plaintiffs suggest, that all false speech is constitutionally protected. Instead, the Court merely rejected the "*categorical* rule ... that false statements receive no First Amendment protection." *Alvarez*, 132 S. Ct. at 2545 (plurality opinion) (emphasis added); *see id.* at 2254–55 (Breyer, J., concurring in the judgment); *id.* at 2563 (Alito, J., dissenting). Indeed, the Court concluded that where false or inaccurate speech is made to effect a fraud or securing moneys or other valuable considerations, it is well-established that the government may restrict speech without affronting the First Amendment. *Alvarez*, 132 S. Ct. at 2547–48; *see id.* at 2555 (Breyer, J., concurring in the judgment); *id.* at 2561 (Alito, J., dissenting).

[13] *See*, Defendant's Memo. in Opp., pp. 10-18.

[14] Order 194 F.Supp.3d at 466 ("An attempt to tailor the written examination to the conditions of the tour guide market takes the desires of tourism industry participants as its starting point, and thus, does not evince a content-based desire to influence the types of speech being traded in that market.").

history and historic attractions are its main attraction for tourists.[15] The Charleston Area Convention and Visitors Bureau's 2015 Survey Report concludes "the Charleston area's ***history and historic attractions*** have remained and will presumably continue to be ***the most important factor*** in visitors' decision to visit Charleston."[16]

Hellen Hill, the Executive Director of the CACVB, testified that the organization's studies found that the number one reason people visit Charleston is positive recommendations from friends and family, and that the City's reputation is "critical" to visitors decision to select Charleston as a tourist destination.[17] Mrs. Hill further testified that negative tour guide experiences can damage the City's reputation as a top tourist destination.[18] Mrs. Hill also testified that visitors chose Charleston because they believe they will have an authentic experience rather than a "fabricated" one.[19]

Recognizing the strength of this evidence, Plaintiffs argue the Court cannot consider it. Plaintiffs argue Mrs. Hill's testimony is "inadmissible opinion testimony."[20] Plaintiffs are wrong. Mrs. Hill's testimony is easily admissible under Rule 701 of the Federal Rules of

[15] Deposition of Hellen Hill [Dkt. 41-3] (Hereinafter referred to as "Hill Dep."), p.40 ("Visitors to Charleston are most likely to be interested in history").
[16] 2015 Charleston Area Visitor Intercept Survey Report dated Dec. 9, 2016, at "City of Charleston Prod. 03527" [Dkt. 43-1] (emphasis added). *See also*, Affidavit of Helen Hill ¶ 6, attached as Ex. V.
[17] Hill Dep. pp. 46-48. *See also*, Hill Affidavit ¶ 6.
[18] Hill Dep. p. 64. *See also*, Hill Affidavit ¶ 6.
[19] Hill Dep. p. 55.
[20] Plaintiffs' Memo. in Opp. [Dkt. 61] pp. 3-4.

Evidence.[21] Initially, Plaintiffs incorrectly describe Rule 701 as imposing a "rigorous foundational standard".[22] The modern trend under Rule 701 is to exclude lay opinions only when they are superfluous and of no value to the jury.[23] Given that the Court has identified the desires of the tour guide market as important in this case, Mrs. Hill's testimony is helpful to understanding facts at issue in this case.

Moreover, Mrs. Hill's testimony is based on her years of experience and extensive

[21] See, FRE Rule 701. A witness who employs only processes used by ordinary persons for forming opinions or drawing inferences may testify to those opinions or inferences as a lay witness even though in the opinion-forming or inference-drawing process they have used particularized knowledge or information they gained in their everyday experience, but that ordinary persons do not possess. *See Texas A&M Research Found. V. Magna Transp., Inc.*, 338 F.3d 394, 402–03 (5th Cir. 2003). *See also, Soden v. Freightliner Corp.*, 714 F.2d 498, 510–12 (5th Cir. 1983); *U.S. v. Riddle*, 103 F.3d 423, 428–29 (5th Cir. 1997). Significantly, the court is given broad discretion in deciding admissibility of lay opinions. *See e.g., U. S. v. Borrelli*, 621 F.2d 1092 (10th Cir. 1980), cert. denied 101 S.Ct. 365, 449 U.S. 956, 66 L.Ed.2d 222. After all, the distinction between a statement of fact and one of opinion is, at best, one of degree with no recognizable line to mark the boundary. *See United States v. Cuti*, 720 F.3d 453, 458 (2d Cir. 2013).

[22] Plaintiffs' Memo. in Opp., p. 3.

[23] *See*, Moise, Warren, *The Clumsiest Tool Ever Furnished to a Judge for Regulating Examination of Witnesses: The Rule Against Lay Opinions*, S.C. Lawyer, March 2017, pp. 16-17, citing, Wigmore, Evidence § 1918 (Chadbourn rev. 1978) (concluding "with the help of cross examination, jurors can separate wheat from chaff where lay opinions are concerned."), attached as Ex. W.

involvement in the Charleston tourism community.[24] Mrs. Hill has been the Chief Executive Officer ("CEO") of the CACVB for 26 years.[25] Over the past 30 years, she has continuously and regularly communicated directly with visitors to Charleston, tour operators, tour directors, and leaders from organizations similar to CACVB in different cities about Charleston as a tourist destination.[26] As CEO of the CACVB, it is her job to assess how the City is perceived as a tourist destination by visitors and those who impact the area's tourism industry.[27] Over the past 30 years, she worked to develop information about the factors that motivate visitors to choose Charleston as their travel destination, because it is critical to effectively marketing of the City tourist destination.[28] Thus, Plaintiffs' arguments regarding Mrs. Hill's testimony are baseless.[29]

Plaintiffs' argument regarding the admissibility of the CACVB 2015 Survey Report similarly fails. By way of background the CACVB has contracted with and paid the College of

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[24] *See generally*, Hill Affidavit. *See, Texas A&M Research Found. V. Magna Transp., Inc.*, 338 F.3d 394, 402–03 (5th Cir. 2003) (witness involved in a particular business may testify to lay opinions and inferences concerning their business affairs); *Henderson v. Corelogic National Background Data, LLC*, 2016 WL 354751 (E.D. Va. 2016) (admitting lay opinion testimony of company employees regarding a database under Rule 701 and holding "'particularized knowledge that the witness has by virtue of his position' [] is a permissible foundation for lay testimony."). *Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1052–53 (D.N.D. 2006) ("[p]ersonal knowledge or perception acquired through review of records prepared in the ordinary course of business, or perceptions based on industry experience, is a sufficient foundation for lay opinion testimony.") (citing *Burlington N. R.R. Co. v. State of Nebraska*, 802 F.2d 994, 1004–1005 (8th Cir.1986); *see e.g., Farner v. Paccar, Inc.*, 562 F.2d 518, 520 (8th Cir.1977) (allowing lay opinion testimony of truck operator with extensive experience in the industry regarding the proper use of safety chains); *Gravely v. Providence Partnership*, 549 F.2d 958, 961 (4th Cir.1977) (allowing lay opinion testimony of company's president regarding relative safety of conventional versus spiral staircase)).

[25] Hill Affidavit ¶ 2.

[26] Hill Affidavit ¶ 4.

[27] Hill Affidavit ¶ 5.

[28] Hill Affidavit ¶ 5.

[29] The same analysis applies to Plaintiffs' challenge to portions of Esther Banike's testimony. *See*, Plaintiffs' Memo. in Opp. p. 3. Esther Banike's testimony referenced by Plaintiffs is likewise based on her extensive experience as a leader with a world-wide perspective on the tour guide industry. *See generally*, Affidavit of Esther Banike, attached as Ex. X. *See also, infra*. p. 13.

Charleston's Office of Tourism Analysis to conduct surveys of visitors to the City since 2005.[30] The surveys seek information about visitors' motivation, and the sources of information and factors most important to their decision to choose Charleston as their travel destination.[31]

The survey reports easily satisfy Rule 803(6) and are admissible as business records of the CACVB.[32] The survey reports are kept in the course of CACVB's regularly conducted business and are routinely obtained and kept as part of CACVB's usual practice.[33] The College of Charleston prepares the survey reports at or near the time that the surveys are obtained from the visitors.[34] The survey reports are prepared based on information obtained by a person with knowledge of said information and in the regular course of business.[35] CACVB relies on the information in the survey reports in its ordinary and regular course of business of promoting tourism in the City of Charleston.[36] Thus, the surveys are admissible under Rule 803(6). Moreover, courts regularly admit survey evidence because the information is "the most practical and useful way of assessing public opinion."[37]

Plaintiffs' last ditch effort to save their failed claims with evidentiary objections fails. The evidence in the record establishes the content-neutral purpose for the City's licensing regime.

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[30] Hill Affidavit ¶¶ 7, 9.
[31] Hill Affidavit ¶ 7.
[32] See, Fed. R. Evid. 803(6). The CACVB's surveys are conducted, made, and kept in the regular course of CACVB's business, are a regular practice of CACVB and there is no indication that the survey at issue here is unreliable. Hill Affidavit ¶ 10; *e.g.*, *Doali-Miller v. SuperValu, Inc.*, 855 F.Supp.2d 510 (D. Md. 2012); *U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040 (9th Cir. 2009); *U.S. v. Grossman*, 614 F.2d 295 (1st Cir. 1980).
[33] Hill Affidavit ¶ 10.
[34] Hill Affidavit ¶ 10.
[35] Hill Affidavit ¶ 11.
[36] Hill Affidavit ¶ 11.
[37] *Nestle Co. Inc. v. Chester's Market, Inc.*, 571 F.Supp. 763, 773-76 (D. Conn. 1983), vacated on other grounds by 609 F.Supp. 588 (D. Conn. 1985).

II. The City's tour guide licensing ordinance survives intermediate scrutiny and does not violate the First Amendment.

Plaintiffs argue "the City's intermediate-scrutiny analysis is based on the wrong standard."[38] Plaintiffs are wrong. The City bases its intermediate-scrutiny analysis on this Court's well-reasoned July 1, 2016 Order.

This Court's July 1, 2016 Order denied both Plaintiffs' Motion for Preliminary Injunction and Defendant's Motion to Dismiss.[39] Pursuant to those motions, the parties argued their respective interpretations of what is required from the City to survive intermediate scrutiny. The Court's Order thoroughly analyzes the applicable U.S. Supreme Court and Fourth Circuit case law authorities and establishes the law of this case. The Order's interpretation of intermediate scrutiny guided the City through discovery, and the City incorporated the Order's analysis in the City's summary judgment arguments.

Plaintiffs seek to rehash this issue and reject the Court's interpretation of intermediate scrutiny in this case. Plaintiffs argue the City cannot rely on "appeals to common sense and logic" to show the Ordinance advances a significant government interest.[40] This Court need only reference its July 1, 2016 Order to reject Plaintiffs' argument.[41] Equally puzzling is Plaintiffs' argument that the *Reynolds* Court abrogated the Fourth Circuit's prior holding in *Ross v. Early*.[42] Indeed, the *Reynolds* court cites to *Ross* for the proposition that "a healthy dose of common

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[38] Plaintiffs' Memo. in Opp. p. 21.
[39] Order, 194 F.Supp.3d 452 (D.S.C. 2016).
[40] Plaintiffs' Memo. in Opp. p. 21.
[41] Order, 194 F.Supp.3d at 468 (quoting, *Reynolds v. Middleton*, 779 F.3d 222, 226–27) ("The [*Reynolds*] court then discussed the ways in which the government may establish the existence of a "significant governmental interest," noting that an evidentiary record is not always necessary and that "common sense and the holdings of prior cases have been found sufficient to establish" government interests in the past. . . The court also found that, in light of the Supreme Court's recent decision in *McCullen*, "objective evidence is not always required to show that a speech restriction furthers the government's interests.'").
[42] Plaintiffs' Memo. in Opp. pp. 21-22.

sense" shows the regulation at issue advanced the government's interests in that case.[43]

Plaintiffs are also out of step with this Court as to the "narrowly tailored" requirements. The Court's July 1, 2016 Order recognized that the "crucial question" in the intermediate scrutiny analysis is whether the City's licensing regime constitutes an excessive burden on speech.[44] This Court held that "the City's licensing regime imposes only a minor burden on speech".[45] "This fact must be considered in determining whether the City has burden[ed] substantially more speech than is necessary to further the government's legitimate interests."[46]

The fact the City's ordinance imposes only a slight burden on speech lessens the City's burden to satisfy intermediate scrutiny. In *Watchtower Bible and Tract Soc'y of N.Y. v. Vill. Of Stratton*, the Court noted that "had this provision been construed to apply only to commercial activities and the solicitation of funds arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud."[47] Here, the City's ordinance is limited to tour guides for hire and is narrowly tailored to meet the City's interest in protecting residents and visitors from false or misleading offers of service for compensation.

Plaintiffs argue that nothing other than testimony of individual victims of unscrupulous and unqualified tour guides will be sufficient to meet the City's burden. Plaintiffs are wrong. In

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[43] *Reynolds*, 779 F.3d at 229, citing *Ross*, 746 F.3d at 556 (explaining that the government "is entitled to advance its interests by arguments based on appeals to common sense and logic"). Plaintiffs cite to no authority holding that *McCullen* abrogated the Fourth Circuit's prior First Amendment holdings. *See Reynolds*, 779 F.3d at 228–29 (noting that *McCullen* clarified – not changed – the showing required under intermediate scrutiny). The law at issue in *Ross* imposed a much smaller burden on speech than the law in *McCullen* or *Reynolds*. Therefore, the government more easily satisfies the required showing when the law is less burdensome.

[44] Order, 194 F.Supp.3d at 470.

[45] Order, 194 F.Supp.3d at 476.

[46] Order, 194 F.Supp.3d at 476 (quoting McCullen, 134 S.C.t at 2535).

[47] *Watchtower Bible and Tract Soc'y of N.Y. v. Vill. Of Stratton*, 536 U.S. 150 (2002).

Reynolds, the Fourth Circuit recognized testimony from the Sheriff that the City received "reports" of roadway solicitations as sufficient to implicate government's interest in that case.[48] Plaintiffs' argument also ignores the impracticality of identifying such victims, and the extreme cost of bringing in witnesses from around the country and the world to testify. The law does not impose such a requirement to satisfy intermediate scrutiny given the ordinance's slight burden on speech.[49]

Plaintiffs ignore the significance of the ordinance's slight burden on speech. Instead, Plaintiffs compare *Reynolds* and *McCullen* to the present case and argue for the same result. Plaintiffs' argument attempts to fit a square peg in a round hole.[50] The laws at issue in both *Reynolds* and *McCullen* were substantially more burdensome on speech than the occupational

[48] *Reynolds*, 779 F.3d at 224–25, 231. *See also*, Order, 194 F.Supp.3d at 472 (noting *Reynolds* reliance on "reports" to hold the government's interests may be at risk). The Court in *Reynolds* struck down the regulation because of readily available effective alternatives but held these reports were sufficient to implicate the government's interest. The record in *Reynolds* did not contain any sworn first hand witness accounts of the reported roadway solicitations to establish this point. Indeed, a review of the Court record from *Reynolds* shows the government submitted only three exhibits in support of its motion for summary judgment, including City Council Minutes from one meeting, the Sheriff's deposition transcript, and the Sherriff's affidavit.

[49] Order 194 F.Supp.3d at 476.

[50] This Court has previously distinguished this case from *Reynolds* and *McCullen*: "The court first observes that the licensing regime burdens a rather small range of speech – namely, speech given in connection with hired tour guide services. . . . This is not a case like *McCullen* or *Reynolds*, where speakers where absolutely prohibited from engaging in certain forms." Order, 194 F.Supp.3d at 475. *See*, *Reynolds*, 779 F.3d at 230–31 ("The Amended Ordinance prohibits all forms of leafleting, which is one of the most important forms of political speech); *McCullen*, 134 S.Ct. at 2536 ("[H]anding out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression; no form of speech is entitled to a greater constitutional protection").

license here and in *Kagan*.[51]

Under the narrowly tailored prong of intermediate scrutiny analysis, "the City must provide some evidence that: (i) unqualified tour guides pose[ ] a threat to its interests in protecting its tourism industry from fraud and deceit; and (ii) it did not forego readily available, less intrusive means of protecting those interests."[52] The City has satisfied this test.

This City has produced evidence that unqualified tour guides pose a threat to top tourist destinations.[53] The City provided this Court with numerous news reports of unscrupulous or unqualified tour guides creating problems in other top tourism destinations.[54] The Supreme

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[51] *See, Reynolds*, 779 F.3d at 230–31; *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). In arguing that Charleston's ordinance fails intermediate scrutiny, Plaintiffs ask this court to ignore the Supreme Court's denial of certiorari in *Kagan v. City of New Orleans*. Plaintiffs' Counsel in this case presented the same arguments regarding intermediate scrutiny in the petition for writ of certiorari in *Kagan* and the Supreme Court rejected the petition. See, *Kagan v. City of New Orleans*, 135 S. Ct. 1403 (Feb. 23, 2015); *Kagan v. City of New Orleans*, Petition for a Writ of Certiorari, 2014 WL 6478975 (filed Nov. 18, 2014). The petition in *Kagan* argued that the Supreme Court's holding in *McCullen* increased the evidentiary standard required for government to survive intermediate scrutiny as a basis for the argument that the Fifth Circuit erred in upholding New Orleans' tour guide ordinance. Despite the plaintiffs' *McCullen*-based argument, the Supreme Court denied certiorari in *Kagan* (despite a circuit split on the issue). *McCullen* does not invalidate the Fifth Circuit's holding in *Kagan*. The regulation at issue in *McCullen* constituted a complete ban on speech in a traditional public forum. *McCullen*, *supra*. The regulation addressed by the *McCullen* Court was a significant burden on speech because it made it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance to an abortion clinic. *Id.* By contrast, here as in *Kagan*, the ordinance's narrow regulation – requiring a license to charge money for tour services – easily satisfies intermediate scrutiny.

[52] Order, 194 F.Supp.3d at 472 (citing, in relevant part, *McCullen*).

[53] Order, 194 F.Supp.3d at 493. The Court recognized that "the government need not prove that its interest have actually been harmed before implementing a content-neutral regulation." Order, 194 F.Supp.3d at 493, (citing *Reynolds*, 779 F.3d at 224–25, 231). This is logical in the present case because the City's licensing regime was in place for over thirty years before Plaintiffs filed this challenge. By contrast, in both *Reynolds* and *McCullen* the regulations at issue were challenged shortly after enactment. The success of the regulation at eliminating the threatened harm necessarily makes showing the existence of the harm difficult.

[54] *See*, sample of numerous news reports regarding problems with unscrupulous tour guides in tourist destinations, attached as Ex. F to Defendant's Memo [Dkt. 42-1]. Esther Banike also testified that she has reviewed these reports and similar reports have been made to her in the course of her service as an officer with the WFTGA. See Banike Affidavit, ¶¶ 14-15.

Court has relied on similar news reports to show the risk posed to the government's interests in response to a First Amendment challenge.[55]

Esther Banike testified regarding reports of unscrupulous and unqualified tour guide harm made to the World Federation of Tourist Guide Associations. Specifically, Mrs. Banike is a national and worldwide leader in the tourist guide profession.[56] Mrs. Banike is an officer on the Board of the World Federation of Tourist Guides Associations ("WFTGA"), and testified to reports of problems regarding unqualified tour guides in other locations.[57] The WFTGA is a non-profit professional organization of tourist guide associations around the world with a mission to improve the quality and reputation of the profession.[58] The WFTGA maintains a website and features information on a section of the website titled Guideapedia.[59] Mrs. Banike served as the Executive Board Member in charge of Guideapedia from 2013 until 2016.[60]

Members and Area Representatives of WFTGA who are knowledgeable about the tourism industry submit information to WFTGA on behalf of the members.[61] WFTGA member representatives provide the information on Guideapedia based on their personal knowledge of the information and in the regular course of their duty as a representative of a WFTGA member.[62] Mrs. Banike testified that a great majority of the problems reported to WFTGA are the negative

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[55] *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 393–94, 120 S.Ct. 897, 907–08 (2000). *See also*, authorities and arguments asserted in Defendant's Memo. in Opp. p. 27, n. 117.
[56] Banike Affidavit ¶¶ 2-4.
[57] *See generally*, Banike Affidavit. *See also*, Esther Banike Dep. [Dkt. 41-1] at pp.149–51, 161, 164, 166.
[58] Banike Affidavit, ¶ 5.
[59] Banike Affidavit, ¶ 8.
[60] Banike Affidavit, ¶ 9.
[61] Banike Affidavit, ¶ 8. Mrs. Banike further testified: "WFTGA maintains the information provided by its members and posts the information on Guideapedia. WFTGA relies on the accuracy of information its members and Area Representatives provide." *Id.*
[62] Banike Affidavit, ¶ 9. Mrs. Banike further testified that the Guideapedia record is "routinely made, kept and updated in the course of WFTGA's usual business practice." *Id.*

impact that unqualified, unlicensed guides have on the reputation of tourism in their area.[63] Accordingly, the City has submitted significant evidence that unqualified and unscrupulous tour guides pose a threat to its interests.[64]

Finally, Plaintiffs get the last factor to intermediate scrutiny wrong. Plaintiffs argue the City is required to show it attempted to use Plaintiffs' proposed alternatives.[65] The City is not required to do so because those alternatives would be "less effective" than the City's licensing regime.[66] The Court has held that this "analysis may be guided by whether the alternative regulation would cover the problematic activity" and "whether enforcement of such alternatives

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[63] Banike Affidavit, ¶ 14. Mrs. Banike further testified that more than a third of the WFTGA members who provided information to WFTGA reported a problem with unknowledgeable guides. *Id*. at ¶ 10.

[64] This Court previously held at the preliminary injunction stage that much less evidence constituted sufficient evidence showing "some non-speculative reasons for believing its interests are at risk." Order, 194 F.Supp.3d at 477. Plaintiffs recognize the strength of the City's evidence and argue the Court cannot consider it. Plaintiffs are wrong. Mrs. Banike's testimony regarding reports made to and kept by WFTGA are admissible. Her testimony is admissible under Rule 803(6) as testimony regarding records of regularly conducted activity. *See, U.S. v. Flenoid*, 718 F.2d 867 (8th Cir. 1983) (admitting testimony regarding the contents of company records under Rule 803(6)); *Atkinson v. McLaughlin*, 462 F.supp.2d 1038, 1053 (D.N.D. 2006). Moreover, Mrs. Banike's testimony would be admissible as lay opinion testimony under Rule 701. "Personal knowledge or perception acquired through review of records prepared in the ordinary course of business, or perceptions based on industry experience, is a sufficient foundation for lay opinion testimony." *Burlington N.R.R. Co. v. State of Nebraska*, 802 F.2d 994, 1004-05 (8th Cir. 1986); *Henderson v. Corelogic National Background Data, LLC*, 2016 WL 354751 (E.D.Va. 2016) (holding "'particularized knowledge that the witness has by virtue of his position' [] is a permissible foundation for lay testimony."); *Atkinson v. McLaughlin*, 462 F.Supp.2d 1038, 1053 (D.N.D. 2006) (also admitting testimony regarding contents of records under rule 701); 125 B.R. 932 (D. Md. 1991). Finally, Mrs. Banike's testimony regarding the WFTGA's collection of reports from its members is admissible as survey evidence. *Nestle Co. Inc. v. Chester's Market, Inc*., 571 F.Supp. 763, 773-76 (D. Conn. 1983), vacated on other grounds by 609 F.Supp. 588 (D. Conn. 1985).

[65] Plaintiffs' Memo. in Opp. pp. 24-25.

[66] *See*, Order, 194 F.Supp.3d at 470 ("This standard does not require that the regulation employ 'the least speech-restrictive means of advancing the [g]overnment's interests.' *Turner Broad. Sys.*, 512 U.S. 622, 662, 114 S.Ct. 2445. However, it does require that the government's interests 'be achieved less effectively absent the regulation.' *Id*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746).

is likely to be practicable."[67] The City has shown in its prior briefs that Plaintiffs' proposed alternatives fail this test.[68]

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[67] Order, 194 F.Supp.3d at 474, citing *McCullen*, 134 S.Ct. at 2538, 2540.
[68] *See*, Defendant's Memo. in Opp. pp. 27-30.