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' SUPPLEMENTAL MEMORANDUM

The Court currently has two motions pending before it in this constitutional challenge to Charleston's tour-guide licensing law: Plaintiffs' Motion for a Preliminary Injunction and Defendant's Motion to Dismiss. On April 14, 2016, Defendant the City of Charleston filed papers with the Court that (1) informed the Court that some proposed amendments to the tour-guide law challenged here had passed first (but not yet second) reading in front of the City Council and (2) requested permission from the Court for the parties to file supplemental memoranda to "inform the Court of the impact of the proposed amendments to the ordinance on the parties' respective positions." Defendant's Notice to the Court and Consent Motion for Leave to File Supplemental Memoranda (ECF 21) at 2. The Court granted that motion. ECF 22.

Having reviewed the proposed amendments, Plaintiffs' position is unchanged: Charleston's tour-guide law (both as it stands today and as it would exist under the proposed amendments) violates the First Amendment. Plaintiffs' Motion for a Preliminary Injunction should therefore be granted and Defendant's Motion to Dismiss should be denied.

ARGUMENT

The simplest explanation of "the impact of the proposed amendments to the ordinance" on the motions currently pending before this Court is that there is none. At most, the proposed amendments reflect Charleston officials' apparent belief that their tour-guide ordinance cannot be defended as written—as indeed it cannot. But even if the proposed amendments were successful in fixing the constitutional flaws in Charleston's law—and, as discussed below, they are decidedly not—they remain *proposed* amendments. Regardless of Charleston's future intentions, the Court must evaluate the law as it actually exists. If the law as it stands violates the First Amendment, Plaintiffs are entitled to a preliminary injunction allowing them to speak immediately. *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) ("[I]t is well established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

More broadly, though, Charleston's proposed amendments simply fail in their efforts to save the tour-guide license from unconstitutionality. As amended, the law is still subject to strict scrutiny. And, even if subject to only intermediate scrutiny, the law as amended still fails the intermediate-scrutiny standard articulated by *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

I. The Law As Amended Would Still Be Subject To Strict Scrutiny.

Charleston's proposed amendments to its tour-guide ordinance seem primarily aimed at removing some of the elements of the law that Plaintiffs' earlier briefing in this case identified as triggering strict scrutiny. These efforts have failed. The law as amended would still be subject to strict scrutiny for two reasons: The licensing law's purpose is still to influence the content of

what tour guides say, and the licensing requirement is still triggered by the communication of a particular message.

A. Charleston Licenses Tour Guides Because It Is Concerned About What Tour Guides Say.

As explained in Plaintiffs' brief in support of their Motion for Preliminary Injunction, even a facially neutral law is considered content-based and subject to strict scrutiny if it cannot be justified without reference to the content of regulated speech or if it imposes restrictions based on the identity of a speaker out of a desire to influence the content of what is said. Pls.' Mem. of Law in Supp. of Mot. for Prelim. Injunc. Relief (ECF 5-1) ("P/I Brief") at 12–14. And here, ample evidence shows that the City's purpose is to influence the content of speech:

(1) The City itself says so, repeatedly, in its *Tour Guide Manual*. P/I Brief at 12.

(2) The City requires would-be guides to take a written exam about the city and its history, which can only be understood as a desire to ensure that guides can (and will) tell stories or answer questions based on the information the City deems important. P/I Brief at 13.

(3) The City then requires an *oral* examination for would-be guides, which, again, can only be justified by a concern about what tour guides talk about. *Id.*

(4) The City's offers a temporary tour-guide license to those who have not yet taken its examination, but the issuance of such a temporary license hinges on City officials' approving the actual content of a script from which the temporary guide will work. *Id.* Again, this requirement illustrates that the City's concern is with what guides *say*.

(5) Finally, the City actually reaffirmed in its preliminary-injunction briefing that the purpose of the licensing is to restrict the universe of guides to those who have mastered "the City's most important historical facts" and to ensure that only people

whom the City believes have "sufficient knowledge" are permitted to conduct tours. *See* Pls.' Reply in Supp. of Mot. for Prelim. Injunc. Relief (ECF 17) at 6.

In response, the City proposes to remove two of these elements: the oral examination and the temporary tour-guide license. This proposal does not save the law from strict scrutiny for two independent reasons.

First, to the extent things like the oral examination and the script-approval requirement are evidence of the City's speech-centric motivations, their original enactment remains evidence of the City's speech-centric motivations. Hastily repealing them in response to a lawsuit does nothing to change that.

Second, even if the law had never included things like the oral examination or the script-approval requirement, the record contains more than enough evidence to trigger strict scrutiny. As amended, the law still requires tour guides to pass a subject-matter examination demonstrating knowledge of the elements of Charleston's history that the city government thinks are important. There is no conceivable justification for such a requirement except the obvious one: Charleston officials want to ensure that guides can and will talk about the things Charleston officials think are important. And city officials have been forthright enough to confirm that this is their motivation in writing: The *Tour Guide Manual* explicitly says that the "honor of introducing" visitors to Charleston "goes to a special few who . . . have mastered her most telling stories" and that the city's *goal* in licensing guides is to "provide accurate, factual and updated information to its visitors and residents." P/I Brief at 12.[1]

[1] As noted above, the City not only does not dispute that this is its motivation, it *confirms* that this is its motivation in its opposition to Plaintiffs' Motion. *See* Pls.' Reply in Supp. of Mot. for Prelim. Injunc. Relief (ECF 17) at 6.

However laudable Charleston's goals may be, they are *content-based* goals, and the City may not achieve them by restricting the speech of those it deems unqualified unless it satisfies strict scrutiny. That is true under the law as it stands, and that will be true in the event Charleston adopts its proposed amendments.

B. The Amended Law Is Still Content-Based On Its Face.

Plaintiffs' preliminary-injunction briefing made clear that the tour-guide license is *also* subject to strict scrutiny because it is content-based on its face: Whether a tour-guide license is required depends not on whether someone is physically accompanying a tour group but on whether that person is telling stories or relaying information about Charleston to that group. P/I Brief at 11. As an example of the content-based distinctions drawn by the law, Plaintiffs pointed to the difference between tour "guides" and tour "escorts": "Guides" accompany tour groups while proving sightseeing information, while "escorts" accompany tour groups and ensure the group travels safely, obeys traffic regulations, and abides by city law. *Id.* Only guides—that is, only those providing the regulated information—require a license. *Id.*

Again, the City seems to have responded to this argument by attempting to repeal the particular example highlighted in Plaintiffs' briefs: The proposed amendments simply eliminate any reference to tour "escorts." *See* Aff. of Vanessa Turner Maybank (ECF 21-1), Exh. A. But, again, this is not enough.

Even as amended, the law is triggered by content because the licensing requirement applies only to people who convey particular information to tour groups. Section 29-111 of the amended law, for example, still requires that "tours on small buses must be *conducted by* a

registered tour guide."[2] *See* Aff. of Vanessa Turner Maybank (ECF 21-1), Exh. A at 5 (emphasis added). In other words, the person providing information to the people on the bus must have a license. But, so far as the face of the code reveals, the person *driving* the bus does not need a tour-guide license unless he is also "conducting" the tour—that is, if he is talking to his passengers about the things they see instead of just urging them to put on their seatbelts.

Simply put, the licensing requirement hinges on whether a person is providing particular information to a tour group. The City's proposal to simply repeal any parts of the code that have been specifically singled out in the briefing in this case does nothing to change that.

II. The Law As Amended Would Still Fail Intermediate Scrutiny.

Even if the amended law were completely content-neutral, it would still be a burden on Plaintiffs' speech that is subject to at least intermediate scrutiny. P/I Br. at 17–22. And it would still fail intermediate scrutiny for all the same reasons. *See id.*

Charleston's proposed amendments fiddle with the licensing scheme at the margins—lowering the passing score by ten points and increasing the frequency with which the test is offered—but do nothing to change the nature of the primary burden the scheme imposes. Before talking to paying tour groups, a would-be guide must master almost 500 pages of material and then pass a written test. The City, obviously, believes this material is important—but Plaintiffs disagree. The Plaintiffs have already spent countless hours attempting to memorize facts and minutiae that city officials think are important—*see* Verified Complaint for Declaratory and Injunctive Relief (ECF 1) ¶¶ 37, 51, 67—and they are unwilling to spend more time memorizing things they do not want to talk about in order to get permission to speak to paying tour groups about the subjects they *do* care about. If the City wants to forbid Plaintiffs from talking to these

[2] The use of "registered" instead of "licensed" appears to be a scrivener's error; Plaintiffs are unaware of a separate category of "registered" tour guides.

groups without memorizing its preferred information, the City has to justify this burden on their speech under, at a minimum, intermediate scrutiny. Both the Supreme Court and the Fourth Circuit have unambiguously held that the government needs to present actual evidence to meet this burden. *McCullen*, 134 S. Ct. at 2539–40; *Reynolds v. Middleton*, 779 F.3d 222, 228–29 (4th Cir. 2015).

And this it cannot do. The record contains no evidence that the testing and licensing requirement directly advances a substantial government interest; no evidence that it does so in a narrowly tailored way; no evidence that less-restrictive alternatives (like the regulations used by almost every other city in America) would be insufficient. *See* Pls.' Reply in Supp. of Mot. for Prelim. Injunc. Relief (ECF 17) at 7–9. In the absence of evidence on each of these points, the law fails intermediate scrutiny, and Plaintiffs are entitled to a preliminary injunction. *Id.*

CONCLUSION

As explained in previous briefing, the City's existing licensing requirement for tour guides violates the First Amendment. Even if Charleston ultimately decides to adopt its proposed amendments to the law, those amendments do nothing to remedy the law's constitutional problems. Plaintiffs' Motion for a Preliminary Injunction should be granted and Defendant's Motion to Dismiss should be denied.

Dated this 15th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2016, I caused the foregoing Plaintiffs' Supplemental Memorandum to be filed via ECF and that the Court's ECF system automatically served counsel for Defendant.

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