UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

MICHELLE FREENOR, STEVEN FREENOR, DAN LEGER, JEAN SODERLIND, and GHOST TALK, GHOST WALK LLC,

Plaintiffs,

v.

MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,

Defendant.

Civil Action No. 4:14-cv-00247-WTM-GRS

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

Pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7 and 56, Plaintiffs Michelle Freenor, Steven Freenor, Dan Leger, Jean Soderlind, and Ghost Talk, Ghost Walk LLC hereby move for entry of summary judgment permanently enjoining the City of Savannah's tour guide licensing law and special tax on tour businesses and awarding $1 in nominal damages for the violation of Plaintiffs' rights under the First Amendment.

INTRODUCTION

Jean Soderlind hires people to tell ghost stories for her ghost tour business. But Jean is not at liberty to hire just any storyteller. Jean can only hire people who have a special tour guide license issued by the City. Indeed, because Jean *herself* is unlicensed, she is prohibited from telling stories on her own tours. Violation of this law is punishable by fines or even time in jail.

Jean has sued to challenge the City's licensing regime. She is joined by a professor of history who is barred from leading tours about history, as well as two licensed guides who object

to jumping through arbitrary bureaucratic hurdles in order to continue speaking. Their claim is simple: The government cannot make you get a license to tell stories, just as it could not require a license to work as a journalist or stand-up comedian.

The City's avowed aim is to improve the quality of tour guides; by requiring that guides pass a multiple choice history test, it hopes to ensure that tourists hear from "knowledgeable" sources. Ultimately, that is all the Court needs to know. "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought." *Citizens United v. FEC*, 558 U.S. 310, 356 (2010). Under the First Amendment, the government does not get to decide if someone is qualified to speak. That judgment has to be made by the listener.

Even if that were not true, the City's law could not survive even intermediate scrutiny. As the D.C. Circuit concluded in the course of invalidating a similar law in *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014), not only is there no reason to believe that unlicensed guides pose a real danger to the public, there are innumerable less-restrictive means by which the government might improve the quality of tour guides. Mandatory licensing fights hypothetical dangers by the most heavy-handed means available and thus flunks First Amendment review.

Licensing also is not the only burden imposed on tour guides, who are subjected to a speech tax (which the City calls a "preservation fee") not imposed on *any* other activity. This tax impermissibly singles out tour businesses for special burdens on the basis of their speech and therefore runs afoul of fundamental First Amendment principles articulated in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S 575 (1983).

Plaintiffs do not object to being subjected to the *same* burdens that apply to all economic activity, including obtaining a general business license and paying generally applicable taxes.

But Plaintiffs cannot be subjected to special burdens—including the tour guide license and speech tax—that apply *only* because Plaintiffs make their living through the spoken word.

STATEMENT OF FACTS

A. The City Of Savannah Requires A License To Talk.

In the City of Savannah, it is unlawful to "act or offer to act as a tour guide for hire within the city or play an acting role during a tour for hire" without "a tour guide permit." Savannah Code § 6-1508.[1] An individual who gives a narrated tour without a tour guide license can be fined up to $1,000 or sentenced to up to 30 days in jail. *See id.* § 6-1550 (citing *id.* § 1-1013). The City actively enforces this regulation of speech and regularly fines guides who give tours after their licenses expire. Statement of Undisputed Material Facts ("SUMF") ¶¶ 22-23.

The City's permitting regime is aimed at people who talk to tour groups for compensation. People who play "acting role[s]" are required to obtain a tour guide license even if they stand in one place and do not walk with the group, SUMF ¶ 27, whereas "tour escort[s]" may physically escort groups *without* a license, so long as they do so "without giving a narrated tour." Savannah Code § 6-1502(s); *see also* SUMF ¶¶ 24-26. Meanwhile, cab drivers normally can transport tourists around the City without a tour guide license but *are* required to have a tour guide license if they are "driving [tourists] around and telling them what's going on." SUMF ¶ 28. As the City's head of tour guide enforcement testified, the person in any tour group who is required to have a tour guide license is "[t]he person that's doing the speaking." *Id.* ¶ 29.

B. The City's Law Burdens Plaintiffs' Speech.

Plaintiffs are current and would-be tour guides subject to the City's licensing law. SUMF ¶¶ 1-4. Dan Leger and Michelle Freenor are licensed tour guides who give tours as (respectively)

[1] The pertinent Savannah ordinances are included as Exhibits 12-14 to the Declaration of Robert E. Johnson in Support of Plaintiffs' Motion for Summary Judgment ("Johnson Dec.").

"Savannah Dan" and "Savannah Belle." *Id.* ¶¶ 1, 3. Steven Freenor is married to Michelle; he teaches history at a nearby high school and college, and he would lead tours but for the City's licensing requirement. *Id.* ¶ 2. Jean Soderlind, meanwhile, used to be a licensed tour guide but allowed her license to expire because she did not want to deal with the administrative hassle of annual renewals. *Id.* ¶ 4. Jean runs a ghost tour company, but she is not allowed to give ghost tours herself and instead pays licensed guides to talk to her customers. *Id.* ¶ 4.

Each of these Plaintiffs has been harmed by Savannah's law. Michelle and Steven have been forced to turn away willing listeners because Steven cannot serve as a guide on days when Michelle is not able to lead a tour. SUMF ¶ 67. Jean likewise has been forced to turn away potential audience members because she cannot hire unlicensed guides or step in herself to lead a tour during periods of high demand; while Jean sometimes physically accompanies tours led by her company's guides, it would be unlawful for Jean to tell a ghost story. *Id.* ¶¶ 69-71. Meanwhile, Dan's plans to open a specialty tour business have been frustrated by the fact that many qualified guides do not want to get a license. *Id.* ¶ 72.[2] Most fundamentally, Steven and Jean are barred from speaking as tour guides unless they jump through a series of hoops to obtain a license, while Dan and Michelle must satisfy additional requirements just to continue speaking. *Id.* ¶¶ 63, 65, 69.

C. Becoming A Tour Guide Is A Multi-Stage Bureaucratic Process.

The bureaucratic requirements imposed by the City to speak as a tour guide include an application, licensing fee, background check, and multiple-choice history test. SUMF ¶ 30.[3]

[2] Pursuant to the Court's confidentiality order, D.E. 22, Plaintiffs have filed under seal all materials detailing the exact nature of Dan's confidential business plans.

[3] At the time this lawsuit was filed, tour guides also were required to undergo examination by a doctor to ensure that they were "qualified" to lead a tour. SUMF ¶ 34. The City eliminated this requirement in response to Plaintiffs' constitutional challenge. *Id.*

1. Application and Fee — A would-be tour guide must submit an application to the City providing personal information including place of birth, duration of residence in Savannah, Social Security number, race, weight, and age. SUMF ¶ 31.

Applicants also must pay a $10 fee for the license. SUMF ¶ 30. Until recently, each guide required only a single license, but in 2014 the City announced that it was changing its unwritten enforcement policies to require guides who lead tours for multiple companies to obtain a separate license for each. *Id.* ¶ 18.

2. Licensing Exam — Applicants for tour guide licenses are required to take and pass an exam administered by the City and "designed to test the applicant's knowledge of history and architecture of the city." Savannah Code § 6-1514(a). City officials have "sole discretion" to determine the exam's "time, place and manner." *Id.*

The City's tourism regulators have exercised this discretion by requiring would-be guides to take a 100-question exam, which is administered in a public lobby that can be "noisy at times." SUMF ¶¶ 36, 42. The exam includes ten questions requiring guides to identify the City's squares on a map, ten questions about the City's tour guide ordinances, and 80 questions about history and architecture. *Id.* ¶ 36. The history and architecture portion is entirely multiple choice. *Id.* Because a passing score is 80 percent, it is impossible to pass the exam without correctly answering a substantial majority of questions on the history and architecture portion. *Id.*

If an applicant disagrees with the City's answer to a question, the dispute is adjudicated by a city employee named Cynthia Pelote. SUMF ¶ 43. In every instance in which an applicant has disputed the City's answer to a question, Ms. Pelote has rejected the challenge. *Id.* ¶ 44.

3. Background Check —Applicants for tour guide licenses are required to undergo a criminal background check, even though the City has no knowledge of ever having refused to

issue a tour guide license based on an applicant's criminal background. SUMF ¶ 91. Applicants must jump through logistical hoops to satisfy this requirement: They must go in person to the police station and pay a $20 fee to initiate the process. *Id.* ¶ 32.

Felonies and misdemeanors bar issuance of a license only if they occurred within the past three years, and, for misdemeanors, the crime *also* must be a "crime of moral turpitude" to serve as a bar. Savannah Code § 6-1511. The determination whether an individual has committed a "crime of moral turpitude" rests within the discretion of Ms. Pelote—the same employee who resolves disputes about the accuracy of the exam. SUMF ¶ 59. The City has no written policies to guide this determination. *Id.* ¶ 58. The City has twice considered revising the law to replace the term "moral turpitude" with a "clearer definition," but it has never done so. *Id.* ¶ 57.

4. *Annual Renewal* — Tour guides are required to renew their license on an annual basis. This means that guides must: pay $10 each year for every tour company for which they work; go in person to the police station every year to get a background check; pay $20 every year for a background check; and go in person every year to the City's offices to be issued a license. SUMF ¶ 60. After three years, tour guides also are required to pass another history test. *Id.* ¶ 61.

D. Tour Guides Must Learn Savannah's Official History.

All questions on the City's tour guide licensing exam are drawn from an over-100 page document called the *Tour Guide Manual* (hereinafter, the "*Manual*"). SUMF ¶ 38.

The *Manual* narrates an official history of Savannah from the pre-Columbian era to the present. For instance, the *Manual* teaches that "the primary reason why the Spanish came to the Western Hemisphere was to convert all inhabitants to Roman Catholicism," whereas "the French came to the New World seeking gold." Johnson Dec. Ex. 16 at 5. The *Manual* also teaches that Savannah's founder was a "social reformer" and lists eight "primary reasons for the founding of the Colony of Georgia." *Id.* at 6. The *Manual* touches on a range of other historical topics, such

as the "status of African-Americans residing in Savannah during the antebellum period," *id.* at 15, and civil rights, *id*. at 24. The *Manual* also includes facts about specific locations in the City, such as the name of the architect who designed the Jepson Center for the Arts, *id.* at 32 ("Moshe Safdie"), the donors of Wormsloe Fountain, *id.* at 46 ("descendants of Noble Jones"), and the year that the Salzburger Monument of Reconciliation was dedicated, *id.* at 73 ("1996").

The *Manual* was drafted by a local university professor named Dr. Barbara Fertig, working in consultation with a committee of City regulators and the heads of what Dr. Fertig describes as "important tour companies in Savannah." SUMF ¶ 46.[4] Dr. Fertig testified that she is "aware that different people have different views about historical questions" and explained that the *Manual* "reflects my views." *Id.* ¶ 47. City employees commenting on the draft also made suggestions that reflected their personal perspectives; for instance, one employee "was somewhat swayed by the fact that I work for the local government" when she suggested that the *Manual* include more material about the government's history. *Id.* ¶ 49. The City's 30(b)(6) witness conceded that "different people would have different perspectives" on what information ought to be included in the *Manual*. *Id*. ¶ 48.

Employees of the City have been harshly critical of the *Manual*. For instance, the head of the City's Research & Library Division wrote in an email that, "no matter how much work is done on this, it is still a seriously flawed document." SUMF ¶ 52. Dr. Fertig was less critical of the *Manual* itself, but she was very critical of the City's decision to test potential guides using a multiple-choice test; she told regulators "the complexity of history is not easily transmitted to a multiple choice format." *Id.* ¶ 39. Dr. Fertig testified that "I personally could not have done well on that test even after writing the questions myself." *Id.* ¶ 40.

[4] None of the Plaintiffs were invited to participate in this committee. SUMF ¶ 46.

E. The City Also Taxes Tour Businesses For Their Speech.

Whenever a guide gives a tour in Savannah, the guide (or the guide's employer) must pay a tax based on the size of the audience. *See* Savannah Revenue Ordinance art. T, § 3(A)-(B). The amount of the tax is $1 for each audience member and 50 cents for each child between age twelve and four; there is no tax for children age three and below. *Id.*

Like the licensing requirement, this tax is targeted to the expressive activity of tour guides; the City is clear that the "tours" on which this tax is imposed are the same "tours" where a guide is required to have a license. SUMF ¶ 108. The ordinance itself is likewise clear that the obligation to pay the tax is triggered by the presence of a "tour narration," as it states that the tax does not apply to dinner cruises so long as "no tour narration is provided." Savannah Revenue Ordinance art. T, § 3(B).

Tour businesses owe this speech tax regardless of whether they are actually compensated by their audience members. Tour businesses that give tours for voluntary tips, paid at the end of their tours, are required to pay the tax for each audience member—regardless of whether the audience member pays anything at all for the tour. SUMF ¶¶ 109, 111.

The City labels this tax a "preservation fee," implying it is necessary to pay for upkeep of the City's historic spaces. SUMF ¶ 113. But the City could readily raise money through a general tax on economic activity; the City is considering enacting just such a tax. *Id.* ¶ 119. Moreover, while the City identifies certain infrastructure projects as "paid for" by the preservation fee, the City acknowledges that those projects benefit residents as well as tourists. *Id.* ¶ 115. The tax thus singles out tour businesses for a special burden, while providing a benefit that is widely shared.

STANDARD OF REVIEW

The inquiry for the Court at summary judgment is whether, under the uncontested facts, the moving party is entitled to judgment as a matter of law. *See, e.g., Williamson Oil Co. v.*

Philip Morris USA, 346 F.3d 1287, 1298 (11th Cir. 2003). In a First Amendment case, however, the government always bears the ultimate burden to prove that its law is constitutional. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014). Where, as here, "the nonmoving party bears the burden of proof at trial," the moving party may carry its burden at summary judgment "by showing that there is an absence of evidence to support the nonmoving party's case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004). At that point, "[t]o survive summary judgment, the nonmoving party . . . must come forward with evidence." *Id.* In other words, even at summary judgment, the burden ultimately remains on the government in a First Amendment case to come forward with evidence to justify its restriction on speech.

ARGUMENT

Savannah's tour guide licensing law is inconsistent with the First Amendment. It is a content based regulation of speech that is subject to strict scrutiny: It singles out tour guides because of their expressive activity and subjects them to regulation designed to (in the City's view) improve the quality of the information they convey. And no categorical exception to ordinary strict scrutiny analysis applies. Tour guides' speech occurs in a public forum; is not "commercial" speech; and does not provide professional advice.

Even assuming intermediate scrutiny somehow could apply, Savannah's law *still* could not be sustained. The City has no evidence of any real harm that would arise in the absence of licensing. And, even putting that aside, the government has available less restrictive means to promote its aims: The City can sanction unsavory behavior through targeted consumer protection laws, and the City can promote knowledge of history by creating a voluntary certification that guides can choose to obtain as a marker of quality. Licensing imposes disproportionate burdens to address hypothetical problems and therefore cannot survive First Amendment review.

The City's special tax on tour businesses is equally unconstitutional. The City forces tour businesses to pay a tax for every member of an audience—in other words, a speech tax—but imposes no such burden on other economic activity. The law singles out tour businesses for special burdens but provides benefits that are more broadly shared. Because the City has no compelling justification for singling out tour businesses in this manner, the City's tax on the expressive activity of tour businesses runs afoul of the First Amendment.

I. Savannah's Tour-Guide Licensing Law Is A Content-Based Regulation Of Speech And Is Therefore Subject To Strict Scrutiny.

Content-based regulations of speech are subject to strict scrutiny unless they fall within certain narrowly-defined exceptions to regular First Amendment analysis. *See, e.g., Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011). Because Savannah's law regulates speech on the basis of its content and does not fall within any recognized exception to the usual analysis, Savannah's law must be subjected to strict scrutiny.

A. The Tour Guide Licensing Law Is A Regulation Of Speech.

The first requirement for strict scrutiny to apply is that the 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 U.S. 514, 527 (2001). Here, because the "conduct" that triggers regulation is talking to tourists, Savannah's law regulates speech.

On its face, the City's tour guide licensing law is targeted to the expressive activity of tour guides. The class of people required to obtain a license is drawn to include anyone paid to talk about Savannah to a tour group; even a person who "play[s] an acting role during a tour for hire" is required to have a tour guide license. Savannah Code § 6-1508. At the same time, the law defines a separate category of "tour escorts" who do not give a "narrated tour" and are not

required to have a tour guide license, although they *are* paid to lead tourists from place to place. *Id.* § 6-1502(s). The defining characteristic of a tour guide under the law—the primary characteristic that triggers the licensing obligation—is that a tour guide *talks*.

While tour guides also sometimes work to physically move tourists from place to place, the record confirms that it is primarily speech that triggers the obligation to be licensed. Asked to explain who must have a license, City employees pointed to speech as the dividing line:

- An "individual driving the trolley talking about points of interest" *would* be required to obtain a tour guide license. SUMF ¶ 27.
- People who "assist in moving people from Point A to Point B" and "mak[e] sure that the individuals who are involved with that tour make it to their destination safely" would fall within the definition of a tour escort and would *not* be required to get a tour guide license so long as they were working alongside a licensed guide. *Id.* ¶ 24, 25.
- Individuals "dressed in period costumes that get onto the vehicle, talk in character, and then get off the vehicle and the vehicle continues on its tour" *would* be required to obtain a tour guide license even if they were working alongside a licensed guide. *Id.* ¶ 27.
- A cab driver would *not* be required to have a tour guide license if a passenger "paid to get transported from Point A to Point B" but *would* be required to have a license if the cab driver was "driving [tourists] around and telling them what's going on." *Id.* ¶ 28.

As the official who oversees enforcement of the tour guide licensing law explained, when asked how enforcement officials identify the person in a tour group required to be licensed, the tour guide is the "person that's doing the speaking." *Id.* ¶ 29.

If demanding that tour guides get a license to talk does not regulate "speech," then "it is hard to imagine what does fall within that category." *Bartnicki*, 532 U.S. at 527. After all, "'a

requirement that one must register before he undertakes to make a public speech . . . is quite incompatible with the requirements of the First Amendment.'" *Watchtower Bible & Tract Soc'y*, 536 U.S. at 164 (quoting *Thomas v. Collins*, 323 U.S. 516, 539-40 (1945)); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988). The City cannot justify requiring a license to talk by redefining speech as a species of "conduct."[5]

B. The Tour Guide Licensing Law Is Content Based.

The second requirement for strict scrutiny to apply is that the law regulate speech because of its *content*. Just last Term, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Supreme Court explained that this inquiry has two prongs. First, regulation is content based if the law's application depends upon the content of speech. *Id.* at 2227. But that does not end the inquiry. Second, even if a law on its face appears content neutral, the law *still* is content based if its purpose is to influence the content of speech. *Id.*; *see also United States v. Eichman*, 496 U.S. 310, 315 (1990). Savannah's tour guide licensing law is content based for both of these reasons.

First, the application of Savannah's tour guide licensing law turns on the content of speech. Specifically, the law applies to *tours*, *i.e.*, speech that points out particular locations within Savannah and then imparts information (be it true or fictionalized) about those locations. By requiring a license to give a tour—but not to engage in other forms of speech on the public streets—Savannah has singled out a particular type of speech for special burdens.

The law's treatment of tour "escorts" confirms this commonsense understanding of what it means to be a tour guide. The City admits that tour escorts can "talk to tourists about when to

[5] This analysis is confirmed by the City's asserted rationale for the licensing law. As discussed in detail in the following section, the City of Savannah forces tour guides to take a history test precisely because it hopes to influence the content of the information that guides "convey to tourists." And, as the Supreme Court explained in *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989), a regulation that is undergirded by a purpose to alter the content of speech is necessarily a regulation *of speech*.

cross the street without being required by [the City] to obtain a tour guide license." SUMF ¶ 26. But, at the same time, the City insists that "one would not 'purport to work as a tour escort'" under the tour guide licensing law "if one was going to give a narrated tour." *Id.* In other words, the difference between a tour guide and a tour escort is not only *speech*, but actually speech with certain *content*. Tour guides are not just people who talk, but people who give "narrated tours." The City's regulation of narrated tours is content based.

Second, the purpose of Savannah's tour guide licensing law relates to the content of speech. *See Eichman*, 496 U.S. at 315. Or, put another way, the City's law cannot be "'justified without reference to the content of the regulated speech.'" *Bartnicki*, 532 U.S. at 526. The City regulates tour guides because it is worried about what tour guides otherwise will say.

On its face, the licensing law draws distinctions between two classes of speakers—those who have satisfied the City's licensing requirements and those who have not—and precedent teaches that courts must be particularly suspicious that speaker-based distinctions harbor content-based rationales. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United*, 558 U.S. at 340. For that reason, the law "demand[s] strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994); *see also Reed*, 135 S. Ct. at 2230. This is such a case. By limiting the universe of speakers to those who have memorized and regurgitated the City's official version of Savannah history, the City plainly hopes to ensure that tour guides draw upon that official narrative in their speech to tourists.

This purpose is obvious from the mere fact of the City's history test: What *other* purpose could the test possibly have? But even putting that aside, the City is relatively open about what it has in mind. The City's interrogatory responses state that tour guide licensing is intended to

ensure that tour guides "have sufficient knowledge to conduct tours of points of interest in the City." SUMF ¶ 76. The City's 30(b)(6) witness clarified further, explaining that promoting the knowledgeability of tour guides is important because guides are then "more able to convey to tourists information that would be useful to the tourist and help them understand Savannah." *Id.* ¶ 77. Savannah's avowed aim is to influence the information conveyed by tour guides. That is a purpose to regulate the content of speech.

On the flip side, the record is also clear that the City aims to suppress speech that it views as undesirable. As evidence that the law is necessary, the City's 30(b)(6) witness pointed to an unlicensed individual who was supposedly "scamming" tourists because he was "saying that he was going to be providing a tour of Savannah" but was talking about "the book [*Midnight in the*] *Garden of Good and Evil* as well as other party activities." SUMF ¶ 100.[6] The witness also stated that, from a "marketing" perspective, it is important to have the right kinds of people work as tour guides, specifically those who "project what the city is all about." *Id.* ¶ 20. That goal—to ensure that tour guides "project" the right image for the City—is manifestly content based. *Cf. Eichman*, 496 U.S. at 315-16 (1990) (purpose to "preserve the flag's status as a symbol of our Nation and certain national ideals" rendered law content based).

Ultimately, Savannah's law is about limiting the sources of information available to tourists to those the City deems trustworthy. But, under the First Amendment, the decision whether to trust a speaker must be made by the audience, *not* by the government. *See, e.g.*, *Citizens United*, 558 U.S. at 356 (limiting universe of speakers to those government has

[6] These "party activities" were deemed objectionable by a tourist because they involved homosexual conduct. SUMF ¶ 100. Notably, the individual giving the tour was himself featured as a character in the book *Midnight in the Garden of and Good and Evil*, meaning that he was cited for giving an unlicensed tour about his own life experiences. *Id.* ¶ 101.

approved "uses censorship to control thought"). However well-meaning the City may profess to be in pursuit of its goal, the City cannot be allowed to decide who is or is not qualified to speak. The City's attempt to limit the universe of tour guides to the "right" kinds of speakers is a form of censorship, is inherently content based, and is subject to strict scrutiny.

C. Tours Do Not Fall Within Any Category Of Speech Entitled To Diminished First Amendment Scrutiny.

While the foregoing two requirements are generally all that is necessary to trigger strict scrutiny, the law does recognize discrete categories of speech that warrant less rigorous review. The Supreme Court, however, has warned courts to exercise extreme caution when recognizing such categorical exceptions, as "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an *ad hoc* balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010). Speech by tour guides falls within no recognized exception to the standard First Amendment analysis, and there is no warrant for this Court to invent a new exception here.

1. Tours Do Not Occur Within A Government-Created Forum.

Many cases departing from the application of strict scrutiny hold that the government has greater leeway to regulate speech in a government-created forum. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). This exception manifestly does not apply, as Savannah's tour guide licensing law only applies to public spaces like the streets and sidewalks, SUMF ¶ 19, which are "quintessential traditional public fora." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 676 (1992).

In fact, forum analysis serves to confirm the unconstitutionality of the City's law. One characteristic unique to a government-created forum is the ability of the government to exclude speakers who are not part of the "class of speakers for whose especial benefit the forum was

created." *Cornelius*, 473 U.S. at 806; *see also, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 48 (1983). The City's licensing law, in effect, transforms the streets of Savannah into a limited forum by excluding everyone outside a defined "class of speakers." This kind of limitation might be appropriate if Savannah was a government-run theme park. But Savannah is a living community, not a limited forum created by the government.

2. Tours Are Not Commercial Speech.

Courts have recognized a category of speech, called "commercial speech," that is subject only to intermediate scrutiny. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995). These precedents, however, apply only to "'speech proposing a commercial transaction.'" *Cent. Hudson v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980). The speech licensed by the City consists of stories about history, ghosts, food, movies, or other topics; it does not propose a transaction and therefore is not commercial speech. SUMF ¶¶ 6-8.

That tour guides are paid for their speech is irrelevant. "[T]he degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988); *see also Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011). Many iconic precedents have involved speech undergirded by a profit motive. *See, e.g., Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105 (1991) (book publishing); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (movie theaters); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspaper industry).

3. Tours Do Not Involve A Professional "Fiduciary Relationship."

The Eleventh Circuit also has recognized an additional category of speech escaping the rigors of strict scrutiny, involving "professional speech," which involves speech "in furtherance of" a profession "within the confines of a fiduciary relationship." *Wollschlaeger v. Gov. of Fla.*, 2015 WL 4530452, at *21 (11th Cir. Jul. 28, 2015); *see also Locke v. Shore*, 634 F.3d 1185,

1191 (11th Cir. 2011) ("direct, personalized speech with clients").[7] Tour guides do not have a fiduciary relationship with their audience; they are more like standup comedians than doctors or lawyers. *See Edwards*, 755 F.3d at 1000 n.3. Tour guides speak to a group, not a client, and they tell the same stories repeatedly. SUMF ¶ 12. When guides respond to questions, they concern commonplace topics like where to shop or where to eat. *Id.* ¶ 13. Tour guides do not take anyone's financial, medical, or legal affairs into their hands. *Id.* ¶ 14. They tell stories.

Once again, this exception ultimately confirms the need to apply strict scrutiny. In *Wollschlaeger* the Eleventh Circuit held that intermediate scrutiny applied "despite the fact that [the law] discriminate[d] on the basis of the speaker's identity" only because the "entire class of speech gets diminished First Amendment protection." 2015 WL 4530452, at *24. Savannah's law likewise discriminates between speakers, but, unlike in *Wollschlaeger*, that discrimination cannot be justified by the existence of a fiduciary relationship between professional and client.

4. Tours Do Not Fall Within Any Other Category Of Unprotected Speech.

Courts have recognized a few other historically-grounded categories of unprotected speech—*i.e.*, obscenity, incitement, and fighting words—but speech by tour guides plainly does not fall in any of those categories. *See Brown*, 131 S. Ct. at 2734. And there also is no basis for this Court to fashion some new categorical exception to the First Amendment tailored to fit tour guides. Courts have no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472. There is no longstanding tradition of treating speech by tour guides as outside the First Amendment, and so this Court is not at liberty to invent a new exception to the ordinary standards for First Amendment review.

[7] This exception to standard First Amendment analysis is contrary to Supreme Court precedent, which subjects regulation of professional advice to the same strict scrutiny that applies to any other regulation of speech. *See Holder*, 561 U.S. at 26-28.

II. Savannah's Tour Guide Licensing Law Fails Any Potentially Applicable Level Of Scrutiny.

It is "rare" that a law will ever survive strict scrutiny, which is (to put it mildly) a "demanding" standard. *Brown*, 131 S. Ct. at 2738. But even if strict scrutiny somehow does not apply, Savannah's law *still* cannot survive. At a minimum, Savannah's tour guide licensing law must be subject to intermediate scrutiny, which is itself a searching form of review that demands "a close fit between ends and means." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014).[8]

A. At A Minimum, Savannah's Tour Guide Licensing Law Is Subject To Intermediate Scrutiny.

Even putting aside the attributes of Savannah's law that call for strict scrutiny, the law at a minimum requires intermediate scrutiny. This is true for at least two separate reasons.

First, tour guides talk for a living, and even content neutral laws that "single out" entities that engage in protected expression "are always subject to at least *some* degree of heightened First Amendment scrutiny." *Turner Broad. Sys.*, 512 U.S. at 640-41 (emphasis added) (applying intermediate scrutiny to content neutral regulations that "impose special obligations upon cable operators"). Although Savannah's law is subject to strict scrutiny because it regulates tour guides to influence the *content* of their speech, at the very least intermediate scrutiny is required.

Second, any "regulation of the time, place, or manner of protected speech" requires at least intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). A requirement to get a license before speaking certainly restricts the time, place, and manner of speech. *See Riley*, 487 U.S. at 802. In *Riley*, the Supreme Court thus analyzed a licensing requirement for professional fundraisers as a time, place, or manner restriction, while reserving

[8] Indeed, as the D.C. Circuit concluded—when considering the constitutionality of D.C.'s tour guide licensing law—the statute could not even survive the bare minimum of rational basis review. *See Edwards*, 755 F.3d at 1000 n.3.

the question whether more searching scrutiny might apply. *Id.; see also id.* 801 n.13. Savannah's licensing law demands a higher level of scrutiny than the law at issue in *Riley*, which, after all, did not include a testing requirement designed to influence the content of the licensed speech. But, if nothing else, Savannah's law requires intermediate scrutiny as a time, place, or manner limit on speech.

For these reasons, while courts have declined to conclusively address the level of scrutiny applicable to tour guide licensing laws, none have applied anything less than intermediate scrutiny. The D.C. Circuit, in *Edwards*, reserved the question whether strict scrutiny applied and held that D.C.'s tour guide law could not satisfy intermediate scrutiny. 755 F.3d at 1000. And while the Fifth Circuit, in *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (2014), intimated that some lower level of scrutiny might apply, that court also ultimately applied intermediate scrutiny.[9] Likewise, here, given the obvious First Amendment implications of a law restricting who can tell stories about Savannah, the law cannot be subject to anything less than intermediate scrutiny.

B. Savannah's Tour Guide Licensing Law Cannot Survive Either Strict Or Intermediate Scrutiny.

Regardless of whether strict or intermediate scrutiny applies, the basic analysis for this Court is the same: Savannah must put forth a legitimate interest for the law and must show that the interest is advanced by its law. Under strict scrutiny, the challenged law must be "justified by a compelling government interest" and "narrowly drawn to serve that interest." *Brown*, 131 S. Ct. at 2738. Under intermediate scrutiny, meanwhile, the law must be "'narrowly tailored to

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

serve a significant governmental interest.'" *McCullen*, 134 S. Ct. at 2534. In either case, there must be a close fit between the law's stated purpose and means chosen.

The Fifth and D.C. Circuits have reached opposite conclusions about the constitutionality of tour guide licensing under an intermediate scrutiny standard. The Fifth Circuit concluded that it was sufficient that New Orleans had asserted an interest in "requiring the licensees to know the city and not be felons or drug addicts" and that licensing by its nature achieved that result. *Kagan*, 753 F.3d at 562. The D.C. Circuit, on the other hand, looked to see whether there was evidence of any harms *caused by* unknowledgeable or unscrupulous tour guides; whether those harms were *actually addressed* by licensing; and whether those harms could be addressed in some *less restrictive* way. *Edwards*, 755 F.3d at 1003-09. In other words, the two circuits split over whether a court can simply take the government at its word that the problems it asserts are real and must be solved through background checks and history tests.

Of the two alternatives, only the D.C. Circuit's approach follows precedent. The law is clear that courts applying intermediate scrutiny must exercise searching review to ensure that the government does not "burden substantially more speech than necessary" in pursuit of its asserted interest. *McCullen*, 134 S. Ct at 2537. This standard yields two further implications: First, courts must examine potential less restrictive alternatives to see if the government could advance its aims while burdening substantially less speech. *Id.* at 2538 (considering "less intrusive means of addressing [government's] concerns"). And courts also must examine the record evidence to see if the harms asserted by the government are real and sufficiently widespread to make the law's burden on speech truly "necessary." *Id.* at 2539 (contrasting scope of problem with scope of intrusion on speech and concluding law "is hardly a narrowly tailored solution"); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982) ("[T]he interference with speech must be in proportion to the

interest served."); *Wollschlaeger*, 2015 WL 4530452, at *28 (government must "demonstrate narrow tailoring"). The Fifth Circuit's decision fails to undertake this analysis.[10]

In its interrogatory responses, the City of Savannah identified only two purposes served by the tour guide licensing law: (1) to ensure that guides have "sufficient knowledge" to lead tours and (2) to ensure that guides do not have criminal backgrounds that could pose a danger to tourists. SUMF ¶ 76. Neither of these asserted interests can justify Savannah's law.

1. Guides With "Sufficient Knowledge" To Lead Tours.

The City asserts that its law is necessary to ensure that tour guides "have sufficient knowledge to conduct tours of points of interest in the City." SUMF ¶ 76. This asserted interest cannot justify Savannah's law for at least four reasons.

First, at the threshold, this is not a legitimate interest. The City may be correct that some tour guides—lacking "knowledge" of history—would say things that no historian believes. But even false speech is protected by the First Amendment, as "some false statements are inevitable if there is to be an open and vigorous expression of views." *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). Particularly when it comes to a sensitive topic like history, the line between true and false speech must be drawn by the listener, on the ground that the "'best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *Id.* at 2550 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The record in this case demonstrates that the drafting of Savannah's official history, in the *Tour Guide Manual*, was a political process influenced by the personal predilections of the individuals involved. *Supra* pp. 6-7. Under the First Amendment, that is not how truth is found.

[10] The Fifth Circuit cited *Ward*, 491 U.S.781, as support for its approach, but that case explicitly reaffirms that government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799.

Second, the record is devoid of any evidence that the City's law actually advances its asserted interest. The City claims that guides should be "knowledgeable," but about *what*? Tour guides speak to a broad variety of topics, including many that are not tested by the City—such as ghosts, gardens, and Hollywood movies. SUMF ¶ 8. The City's exam has little to do with the actual business of being a tour guide, which is more about telling a good story than it is about accurate recitation of facts and figures. *Id.* ¶¶ 7, 10, 37; *see also Edwards*, 755 F.3d at 1007.

Third, the City has no evidence that unknowledgeable tour guides would be a real problem in the absence of licensing. *See McCullen*, 134 S. Ct. at 2539. Like any industry, tour guides are subject to market forces. If a tour guide does a bad job, tourists will not recommend the guide, and the guide will have trouble finding work. SUMF ¶¶ 78-79; *see also Edwards*, 755 F.3d at 1006 ("[W]hat evidence suggests market forces are an inadequate defense to seedy, slothful tour guides?"). And this dynamic is accelerated by the internet, which allows tourists to post and access reviews of tour guides on online travel sites. SUMF ¶ 79; *see also Edwards*, 755 F.3d at 1006-07 ("Put simply, bad reviews are bad for business."). Against this backdrop, it is significant that the majority of citations issued to unlicensed tour guides are directed to guides who previously *passed* the City's exam—and thus possess whatever knowledge the City deems important—but then allowed their licenses to lapse. SUMF ¶ 23.

This lack of evidence is compounded by evidence that unknowledgeable guides are not a significant problem in other cities. *See Edwards*, 755 F.3d at 1004 (any evidence of harm is "diminished to the vanishing point by the scores of other U.S. cities that have determined licensing tour guides is *not* necessary"). Marybeth Seifert, a tour guide with experience in cities that do not license tour guides, testified that she has never seen a single problem with a guide that would be cured by licensure. SUMF ¶ 75.

Fourth, and finally, the City has available less restrictive alternatives. Specifically, the City could rely on voluntary certification, which would allow (but not require) guides to become certified as a marker of quality. *See Edwards*, 755 F.3d at 1009. Ms. Seifert, who has obtained voluntary certification in two cities, testified that, in her experience, voluntary certificates are actually *more* useful than mandatory licensing to signal the passion that makes a good tour guide. SUMF ¶ 84. Dr. Fertig, the author of the City's tour guide exam, testified that the voluntary certification program offered by the Friends of the Cabildo in New Orleans (on top of that City's mandatory licensing requirement) is superior to Savannah's regime. *Id.* ¶ 86. The President and CEO of the Savannah Historical Society testified that his organization would be willing to offer voluntary certification. *Id.* ¶ 85. And even the City's 30(b)(6) witness testified that the City is looking into voluntary certification as an alternative, is not aware of any problems that have arisen in cities that employ voluntary certification as an alternative to licensure, and has not drawn any conclusions about voluntary certification at this time. *Id.* ¶¶ 82-83.

2. Tour Guides With Criminal Backgrounds.

The City's second justification for its law is that licensing is necessary to prevent individuals with criminal backgrounds from leading tours. SUMF ¶ 76. This justification fails for three independent reasons.

First, the record demonstrates that this interest is not in fact advanced by the City's law. There is no reason to believe that forcing guides to pass a multiple-choice test deters crime. And the background-check requirement achieves no real benefits in practice: Even a felony bars a license only if it occurred within the past three years. SUMF ¶ 55. Misdemeanors, meanwhile, pose a barrier only if a city employee deems them "crimes of moral turpitude," a vague standard that yields apparently standardless discretion. *Id.* ¶¶ 56-58. Perhaps unsurprisingly, the City is unaware of *ever* having denied a license based on an applicant's criminal background. *Id.* ¶ 91.

Second, there is no evidence of widespread criminal behavior by tour guides or that criminal behavior would increase in the absence of a licensing requirement. The City's 30(b)(6) witness was aware of only one individual with a criminal background who had ever applied to lead tours of Savannah, and that individual was *granted* a license. SUMF ¶ 92.

The record provides no basis for believing that licensing guides reduces crime. Most other cities do not license tour guides, and the City is aware of no evidence of problems that have arisen in those cities. SUMF ¶ 74. And, while the City claims to worry that guides with criminal backgrounds might interact with tourists, it blithely allows countless *other* occupations that come into contact with tourists—including waiters, hotel workers, and (most notably) "tour esorts"—to work with no background checks at all. *Id.* ¶ 105. There is nothing in the record to even suggest that Savannah's tour guides pose unique dangers that justify requiring a license to talk.

Third, and finally, the City has available less-restrictive alternatives. If the government is worried about harassment or other misbehavior by tour guides, the narrowly tailored solution is to make that *particular* behavior unlawful. *See Wollschlaeger*, 2015 WL 4530452, at *28 (upholding such a targeted law). Most obviously, criminal behavior is independently unlawful. *See Edwards*, 755 F.3d at 1009 (citing "regulations that punish fraud or restrict the manner in which tour guides may solicit business"); *see also McCullen*, 134 S. Ct. at 2538 (treating "generic criminal statutes" as less restrictive alternatives). The City has stated that it is worried that unlicensed guides might solicit business on the streets or seek to defraud tourists. But both those things are independently unlawful and would remain unlawful regardless of the constitutionality of the City's licensing law. SUMF ¶¶ 89-90. These alternatives would be more than sufficient to protect tourists; even the City's 30(b)(6) witness testified that fines and monetary sanctions "work" to control misconduct by tour guides. *Id.* ¶ 88.

III. Savannah's Tax On Tours Singles Out Speech For Special Burdens.

In *Minneapolis Star & Tribune Co.*, the Supreme Court held that a tax that singles out First Amendment activity for special burdens—in that case, a tax on ink and paper—requires special justification. 460 U.S. at 582 (1983) ("A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest."); *see also Sentinel Comm'ns. Co. v. Watts*, 936 F.2d 1189, 1206 (11th Cir. 1991) (demanding special justification for burdens imposed on newsracks but not on other vending machines). Under this precedent, the City's special tax on tour guides cannot be sustained.

There is no question that Savannah's tax on tour guides singles out the First Amendment activity of tour guides for "special treatment." *Minneapolis Star*, 460 U.S. at 582. On its face, the law is targeted to speech; whether a tour is required to pay the tax depends on whether it includes a "narration." *See* Savannah Revenue Ordinance art. T, § 3(B). In practice, moreover, the tax targets speech for all the same reasons that the City's tour guide licensing law targets speech. The City's 30(b)(6) witness explained that the "tours" that are required to pay the tax are the same tours that must be led by a licensed tour guide—to wit, those that involve communicating with tour groups about the city. SUMF ¶ 108.

While that fact alone is enough to show that the tax is targeted to speech, the details of the tax's operation confirm the point. The tax does not simply take a portion of tour guides' revenues, but actually taxes tours based on the size of their audience. SUMF ¶ 106. Tour guides are required to pay $1/head even if some members of the audience pay *nothing* for the tour. *Id.* ¶ 109. In other words, a tour guide who speaks to fifteen people and is paid only a single dollar would have to pay $15 for the privilege of having spoken. The City's law imposes a penalty for attracting an audience—a penalty plainly targeted to First Amendment activity.

The City cannot justify this burden for the simple reason that it cannot point to "a counterbalancing interest of compelling importance *that it cannot achieve without differential taxation*." *Minneapolis Star*, 460 U.S. at 585 (emphasis added). The City's interest in raising revenue can readily be achieved through a general tax. The City has in fact considered raising additional revenue through a tax on economic activity in the historic district, and the City has proffered no explanation why such a tax cannot be enacted. SUMF ¶¶ 119-20. The *benefits* paid for through the City's tax on tours accrue to residents and to other businesses. *Id.* ¶¶ 115-18. The City cannot uniquely burden speech by tour guides to achieve those general benefits.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be granted.

Dated this 30th day of July, 2015. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 30, 2015, I caused the foregoing Motion to be filed via ECF and that the court's ECF system automatically served counsel for Defendant.

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