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

The City of Savannah requires a license to talk, a kind of restriction on free expression that the Supreme Court has deemed "offensive—not only to the values protected by the First Amendment, but to the very notion of a free society." *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 165-66 (2002). To justify this "dramatic departure from our national heritage and constitutional tradition," *id.* at 166, the City must show a dramatic need. The City must identify a governmental interest of overriding importance and demonstrate that licensing is necessary to advance that interest.

In a half-hearted attempt to carry this heavy burden, the City's opening brief assembles a hodgepodge of speculation and anecdote. The City points out that tourism is an important industry in Savannah but does not attempt to prove that tourism would decline in the absence of licensing. The City block-quotes deposition testimony from its chief regulator about the need to protect tourists from "unsavory" characters, yet neglects to mention that the City has *never once*

denied a tour guide license based on the results of a background check. The most concrete "evidence" offered by the City concerns two individuals who have given unlicensed tours—one of whom is *currently licensed* by the City as a tour guide. The City identifies some legitimate concerns with these individuals but never explains why licensing is required to address those concerns. The assorted instances of tour guide misconduct cited by the City either are not addressed by licensing or could be (and already are) addressed more effectively by more targeted means.

Ultimately, the only defense of licensing offered by the City that might make some small amount of sense is one that cannot be squared with the First Amendment: The City licenses tour guides because it believes that licensing improves the content of tour guides' speech. The City's brief is open about this aim. The City highlights the testimony of one witness that tour guides address the "fundamental tenets of our city's history," Def's MSJ at 21, as well as the testimony of another witness that the City's *Tour Guide Manual*—the official history that tour guides are required to study to pass the City's licensing exam—contains "the basic information that tour guides should use," *id.* at 10.[1] Under the First Amendment, however, the City cannot regulate speech about history to improve its quality. The decision who and what to believe is a decision that must be made by listeners, not imposed by the government through testing and licensing, as "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[1] Citations to "D.E." refer to entries on the docket in this case. Citations to "Def's MSJ" refer to Defendant's Brief in Support of Motion for Summary Judgment (D.E. 33). Citations to "Pltfs' MSJ" refer to Plaintiffs' Motion for Summary Judgment and Supporting Memorandum (D.E. 30). Citations to "SUMF" refer to Plaintiffs' Statement of Undisputed Facts and Conclusions of Law (D.E. 31). Citations to "Response to Def's SUMF" refer to Plaintiffs' Response to Defendant's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried, And Conclusions Of Law, which is filed concurrently with this memorandum.

Many tour guides go to great lengths to learn history, and the First Amendment allows the City to promote that process through *voluntary* testing and certification. But tour guides also must be free to ignore the City's version of history in favor of the sources and courses of study that they personally find meaningful. The City's stated aim is to burden that freedom by forcing every tour guide to memorize and pass an exam on the officially sanctioned history that is codified in the City's *Tour Guide Manual*. If that is allowed, the City could just as easily force actors to study Shakespeare, require ministers to study C.S. Lewis, or mandate that every newspaper columnist pass a multiple choice test on the works of H.L. Mencken.

Indeed, this parade of horribles is even closer to the actual facts of this case than it may at first appear: The City includes "actors that are dressed in period costumes" within the definition of "tour guide" so long as they talk to tour groups—even if those actors stay in a single location and do not walk with the group from place to place. SUMF ¶ 27.

Under the First Amendment, the government cannot decide who is qualified to talk in the public sphere. The City's motion for summary judgment should be denied.

COUNTERSTATEMENT OF FACTS

Plaintiffs respectfully refer the Court to their Motion for Summary Judgment for a complete statement of the relevant facts. *See* Pltfs' MSJ at 3-8. While the material facts are not in dispute, the City's statement of facts is incomplete and therefore misleading in several respects.

The City asserts that tourism is "vital" to Savannah's economy, Def's MSJ at 5, 6, inviting the assumption that the success of the tourism industry has something to do with tour guide licensing. In fact, however, Bridget Lidy—the City's chief regulator and 30(b)(6) witness—testified that the City has no evidence that licensing increases the number of tourists that visit Savannah. SUMF ¶ 73. Ms. Lidy amended this statement after the deposition to read that "we know that with tour guide licensing in place we had 13 million visitors last year." *Id.*

But the mere fact that a large number of people visit Savannah is not evidence that they visit *because* of licensing or would stop visiting in its absence.

The City also quotes Ms. Lidy's testimony that licensing provides "protection for our visitor," Def's MSJ at 6, but the City omits *other* testimony from Ms. Lidy in which—speaking on behalf of the City—she concedes that this protection could be provided in less restrictive ways. Ms. Lidy conceded that fines and monetary sanctions "work" to control misconduct by tour guides, SUMF ¶ 88, and that the City is not aware of any problems that have arisen in cities that rely on voluntary certification instead of licensing, *id.* ¶ 83. While the City highlights concern that a "convicted child molester" might lead tours of Girl Scouts, the City also fails to mention Ms. Lidy's concession that the City is unaware of a convicted child molester ever seeking to lead a tour in Savannah or in any city that lacks tour guide licensing. *Id.* ¶ 103.

The City makes much of the fact that homeless individuals—including Jerry Spence, a man who was featured as a character in the book *Midnight in the Garden of Good and Evil*—sometimes approach tourists on the street and offer to give tours. Def's MSJ at 7, 9. But the City neglects to mention that the City currently outlaws in-person solicitation by tour guides, meaning the City does not need tour guide licensing to prevent this conduct. SUMF ¶ 102. The City also mentions that Mr. Spence has falsely claimed to be associated with Plaintiff Jean Soderlind's tour company. Def's MSJ at 7. But the City does not mention that such conduct can be regulated under laws prohibiting consumer fraud. SUMF ¶ 89.

The City highlights an individual named Brad Spinks, who gave an unlicensed tour in January 2015 and allegedly "did not show up for a second tour that day which had been booked in advance." Def's MSJ at 8. But, again, the City's account is woefully incomplete: The City does not mention that—subsequent to these incidents—the City actually issued a tour guide

license to Mr. Spinks (who remains licensed today). Response to Def's SUMF ¶ 41; *see also* SUMF ¶ 98. Moreover, while the City makes much of the fact that Mr. Spinks booked a tour and then failed to arrange for a guide to show up to lead the tour, the City ignores and fails to mention Ms. Lidy's testimony that the City is "very concerned" that revoking Mr. Spinks's tour guide license would not actually address this misconduct, as Mr. Spinks could continue to book tours to be led by *other* guides even if his tour guide license was revoked. SUMF ¶ 97.

The City quotes Plaintiff Jean Soderlind's statement in an email that she would not "want drunks driving trolleys and . . . druggies walking tours." Def's MSJ at 8. But, again, the City fails to mention critical facts: The City does not mention that trolley drivers are separately required to have a driver's license—and are *not* required to have a tour guide license so long as they are not narrating the tour. Response to Def's SUMF ¶¶ 37-38. And as for "druggies walking tours," the City has no knowledge of *ever* denying a tour guide license on the basis of a background check; when an individual with a drug-related criminal history applied to work as a tour guide, the City issued that person a license. SUMF ¶ 91-92; Response to Def's SUMF ¶ 39.

Finally, the City quotes at length from the testimony of Dr. Barbara Fertig, the author of the City's *Tour Guide Manual* and licensing exam, including Dr. Fertig's irrelevant personal opinions about the desirability of licensing. Def's MSJ at 9-11. But the City omits the most significant aspects of Dr. Fertig's testimony. Dr. Fertig testified that she was "never satisfied with the questions that were drafted, although I was responsible for them," as it was her "belief that the way in which a person proves that they are a competent interpreter of the City's history and culture is not through multiple choice questions." D.E. 30-8 ¶ 11. Dr. Fertig testified that she administered the questions that she drafted to her students, that many students failed the exam although she considered them knowledgeable about history, and that "I personally could not have

done well on that test even after writing the questions myself." *Id.* ¶ 13. Dr. Fertig also conceded that "different people have different views about historical questions" and testified that the version of history that tour guides are required to study "reflects my views." *Id.* ¶ 9.

ARGUMENT

I. Savannah's Tour Guide Licensing Law Violates The First Amendment.

Plaintiffs' Motion for Summary Judgment laid out the relevant First Amendment doctrine and explained how that doctrine applies to the City's law. Strict scrutiny applies because the City regulates speech, Pltfs' MSJ at 10-12, and does so on the basis of content, *id.* at 12-15. No exception to strict scrutiny applies: the regulated speech does not occur in a government-created forum, *id.* at 15; is not commercial speech, *id.* at 16; and does not occur within a professional fiduciary relationship, *id.* at 16. At a minimum, moreover, the law must be assessed under an intermediate scrutiny standard. *Id.* at 18. And the law cannot satisfy *either* strict or intermediate scrutiny, as the City has no evidence that licensing promotes its asserted interest, has no evidence of widespread harms that would arise in the absence of licensing, and disregards available less-restrictive alternatives—including voluntary certification and targeted consumer-protection laws. *Id.* at 19-24. In other words, tour guide licensing imposes disproportionate burdens to address hypothetical harms and is not justified by any demonstrated public need.

The City's Motion for Summary Judgment does not address—and even concedes—significant portions of the First Amendment analysis. The City nowhere argues that its licensing law targets conduct, as opposed to speech; the City evidently agrees that its law targets speech. *See, e.g.*, Def's MSJ at 3 (explaining that a "walking tour" is defined by statute as "[a] guided narrated tour"). The City also evidently agrees that its law regulates speech "on the public streets and in the public realm," rather than a government-created forum. *Id.* at 6. And the City nowhere argues that its law should be assessed as a regulation of commercial speech; to the contrary, the

City highlights that tour guides speak about "fundamental tenets of our city's history." *Id.* at 21. The City also does not address significant aspects of the narrow tailoring analysis: The City does not identify a compelling interest to justify its law, does not attempt to show that the harms it identifies are significant or widespread, and does not even attempt to grapple with potential less restrictive alternatives.

Without restating the entire First Amendment analysis, this response brief covers the issues that the City *does* actually address. The brief opens by explaining that strict scrutiny is required under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), notwithstanding the City's invitation to disregard controlling Supreme Court precedent. *Infra* pp. 8-11. The City would have this Court disregard *Reed* based on the Fifth Circuit's failure to apply strict scrutiny in *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014), but *Kagan* is contrary to *Reed* and therefore not good law. *Infra* pp. 11-13. The City also cites the Eleventh Circuit's application of intermediate scrutiny in *Wollschlaeger v. Gov. of Fla.*, 2015 WL 4530452 (11th Cir. Jul. 28, 2015), but *Wollschlaeger* addressed the standard applicable to professional speech uttered within the context of a fiduciary relationship and is irrelevant to this case. *Infra* pp. 13-14.

Having established that strict scrutiny applies, the brief next turns to the City's suggestion that its law might satisfy strict scrutiny—the most rigorous possible standard of review. *Infra* pp. 14-17. The City cites *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), as support for this proposition, but *Williams-Yulee* addressed a narrow restriction targeted to the government's compelling interest in maintaining confidence in the judiciary. The City has failed to identify a similarly compelling interest, much less establish that a blanket license requirement for every single tour guide in Savannah is the least restrictive regulation available.

Finally, the brief explains that the City's licensing law must be struck down even under an intermediate scrutiny standard—as the D.C. Circuit concluded when it struck down D.C.'s tour guide licensing law in *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). *Infra* pp. 17-24. The City urges this Court to follow the Fifth Circuit's application of intermediate scrutiny in *Kagan*, rather than the D.C. Circuit's in *Edwards*; but, of the two, only *Edwards* is consistent with Supreme Court authority setting forth the standard to be applied in intermediate scrutiny cases. *Id.* at 18-21. The City also urges this Court to distinguish *Edwards* based on the "circumstances of this case," but all of the evidence cited by the City in its brief is woefully inadequate to carry the City's burden. *Id.* at 21-24. Ultimately, the City's arguments only underscore the lack of any justification sufficient to uphold a requirement that every tour guide in Savannah apply for a license to talk.

A. Strict Scrutiny Applies. This Court Should Decline The City's Invitation To Disregard On-Point Supreme Court Authority.

Plaintiffs' Motion for Summary Judgment explained that the City's law is plainly content based (and therefore subject to strict scrutiny) under the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Pltfs' MSJ at 12. The City evidently agrees that *Reed* is relevant, as it block-quotes seven paragraphs of the decision—amounting to a full page of its brief. Def's MSJ at 13-14. Indeed, the City "anticipate[s]" that Plaintiffs will argue that its law is content based, "*particularly* following the U.S. Supreme Court's decision last month in *Reed*." *Id.* at 12 (emphasis added). Having correctly identified *Reed* as on-point authority, the City offers no convincing explanation why *Reed* does not require application of strict scrutiny.

1. Strict Scrutiny Is Required Under Both Prongs Of *Reed*.

The Supreme Court in *Reed* held that strict scrutiny is required "*either* when a law is content based on its face *or* when the purpose and justification for the law are content based."

135 S. Ct. at 2228 (emphases added). The City's arguments in its opening brief only serve to confirm that the law is subject to strict scrutiny under both prongs of this analysis.

First, strict scrutiny is required because the City's tour guide licensing law applies to speech because of the topic discussed. *See* Pltfs' MSJ at 12-13.

Reed holds that laws that draw distinctions even between broad categories of speech are content based. So, the Court found that a municipal sign code was content based because a "sign [that] informs its reader of the time and place [of] a book club" would be "treated differently from a sign expressing the view that one should vote for [a particular candidate] in an upcoming election." 135 S. Ct. at 2227. Likewise, in an earlier case, the Eleventh Circuit held that a sign ordinance was content based because it would allow signs "for the purpose of 'guiding traffic and parking'" but not signs with a "political message." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264 (11th Cir. 2005).

The City's licensing law draws a similar distinction. The City does *not* require a license for a category of people called tour escorts, although escorts can walk with tour groups and can even "talk to tourists about when to cross the street without being required by [the City] to obtain a tour guide license." SUMF ¶ 26. Instead, the City singles out people (including "actors") who convey information about the sights and attractions of Savannah—in other words, people who conduct a "guided narrated tour." Def's MSJ at 3 (statutory definition of "walking tour"). The City's opening brief drives home the conclusion that a "narrated tour" is a distinct category of speech, as the City argues that "fundamental tenets of our city's history" run as themes "through probably all of the tours." Def's MSJ at 21. The distinction between speech addressing "when to cross the street" as opposed to "fundamental tenets of our city's history" is no less content based

than the "differentiation between temporary directional signs and other types of signs" that triggered strict scrutiny in *Reed*. 135 S. Ct. at 2231.

Second, strict scrutiny is required because the City's justifications for the law refer to the content of the regulated speech. *See* Pltfs' MSJ at 13-15.

Reed holds that, even where a law is not content based on its face, strict scrutiny is required if the law "cannot be justified without reference to the content of the regulated speech." 135 S. Ct. at 2227; *see also United States v. Eichman*, 496 U.S. 310, 315 (1990) (similar). Laws that discriminate between categories of speakers are even more likely to trigger strict scrutiny on this basis, as "speech restrictions based on the identity of the speaker are all too often simply a means to control content." 135 S. Ct. at 2230 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Strict scrutiny is required whenever a "speaker preference reflects a content preference." *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)).

Here, the justification offered by the City for discriminating between licensed and unlicensed tour guides plainly refers to the content of speech. The City argues that "requir[ing] tour guides to know the City . . . [is] in keeping with the narrow tailoring of the ordinances" because "it's inescapable to talk about the history" on a guided tour. Def's MSJ at 20-21. In other words, the City's argument for narrow tailoring is that it makes sense to require tour guides to pass a history test because guides speak about history. And the *Tour Guide Manual*—as well as the test based on the *Manual*—contains "the basic information that tour guides should use" when they talk about history. *Id.* at 10. In other words, by controlling *who* speaks to tourists the

City hopes to control and (in its view) improve the content of *what* is said. That kind of content based rationale demands strict scrutiny.[2]

The City's desire to protect tourists from ill-informed tour guides may be sincere, but it is inconsistent with the First Amendment. Robust public debate requires tolerating even false ideas; the "ordinary course in a free society" is that "[t]he remedy for speech that is false is speech that is true." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion); *see also id.* at 2553-55 (Breyer, J., concurring). The government can convey accurate information through signs, publications, or even its own government-paid tour guides. The government also can promote historical education through voluntary certification. But the government cannot silence tour guides who it does not think will be sufficiently accurate arbiters of historical truth.

2. The Fifth Circuit's Decision In *Kagan* Is Not A Basis To Disregard *Reed*.

Rather than engage with the substance of *Reed*, the City urges this Court to disregard the Supreme Court's decision because the Fifth Circuit upheld New Orleans' tour guide licensing law in *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014). *See* Def's MSJ at 14-15. Notably, the D.C. Circuit declined to follow *Kagan* because it "either did not discuss, or gave cursory treatment to, significant legal issues." *Edwards v. District of Columbia*, 755 F.3d 996, 1009 n.15 (D.C. Cir. 2014). And, indeed, this short, sparsely-reasoned decision from the Fifth Circuit is not a basis to disregard controlling Supreme Court authority.

The City makes much of the fact that the Supreme Court denied a petition for certiorari seeking review of *Kagan*. Def's MSJ at 14-15. This is wrong: "For at least eight decades the Supreme Court has instructed us, time and again, over and over, that the denial of certiorari does

[2] The City even intimates that unlicensed guides are more likely to say things that tourists find offensive, as the City cites an incident in which a tourist was offended by an unlicensed guide's stories about "homosexual things." Def's MSJ at 8. Laws that single out speech that the public finds offensive are inherently suspect. *See Texas v. Johnson*, 491 U.S. 397, 411-12 (1989).

not in any way or to any extent reflect or imply any view on the merits." *Powell v. Barrett*, 541 F.3d 1298, 1312 n.5 (11th Cir. 2008) (citing cases). The Supreme Court denies certiorari for all manner of reasons that have nothing to do with the merits; for instance, the Court may have believed that the opinion in *Kagan* was too sparsely reasoned to facilitate review.[3]

The City does not attempt to reconcile the rationale of *Kagan* with the holding of *Reed*, instead simply block-quoting a substantial portion of the Fifth Circuit's opinion. Def's MSJ at 15-16. Nothing the Fifth Circuit said, however, would justify departure from *Reed*. The Fifth Circuit treated New Orleans' licensing law as content neutral because the "requirement[ ] for a license has no effect whatsoever on the content of what tour guides say," as "[t]hose who have the license can speak as they please." 753 F.3d at 562. But much the same could have been said of the sign code at issue in *Reed*: The plaintiffs in *Reed* were free to advertise the time and place of their event; their complaint was that they had to comply with regulations applicable only to that category of signs, including that their sign "be no larger than six square feet" and be "displayed no more than 12 hours." 135 S. Ct. at 2225. It was irrelevant to the analysis that these requirements did not actually dictate the content of the signs; instead, the critical question was whether the law's burdens were imposed *on the basis of* the content of the signs. *Id.* at 2227. The analysis of the Fifth Circuit in *Kagan* is thus flatly inconsistent with *Reed*.

In fact, the Supreme Court has repeatedly rejected the suggestion—advanced by the Fifth Circuit in *Kagan*—that a law must control the content of speech to qualify as content based. In *United States v. Playboy Entertainment Group*, 529 U.S. 803, 808 (2000), for instance, the

[3] The City's reliance on the fact that the Supreme Court did not grant, vacate, and remand *Kagan* in light of *Reed* is doubly curious, as the Supreme Court denied the petition in *Kagan* before issuing its decision in *Reed* and the petitioners in *Kagan* quite understandably did not ask the Court to remand in light of a decision that had not yet been issued. *See* Petition for a Writ of Certiorari, *Kagan v. City of New Orleans*, No. 14-585 (Nov. 18, 2014).

Supreme Court invalidated a law requiring use of certain signal-blocking technology for "adult" television programming between the hours of 6 a.m. and 10 p.m. and explained that it was "of no moment that the statute does not impose a complete prohibition" on adult content, as "[t]he Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id.* at 812; *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (similar). The City's law burdens speech by requiring that it be licensed, and the City imposes that burden on tour guides *both* on the basis of the content of speech *and* with a purpose to affect the content of what tour guides say. Under *Reed*, such a law is necessarily content based.

3. This Is Not A Professional Speech Case. The Eleventh Circuit's Decision In *Wollschlaeger* Is Inapposite.

In addition to block-quoting *Kagan*, the City quotes extensively from the Eleventh Circuit's decision in *Wollschlaeger v. Governor of Florida*, 2015 WL 4530452 (11th Cir. Jul. 28, 2015). *See* Def's MSJ at 17-19. *Wollschlaeger* applied intermediate scrutiny to a regulation restricting speech by doctors within the confines of the doctor-patient relationship; here, the City appears to contend that decision justifies applying "a level of scrutiny less than strict" to tour guides as well. *Id.* at 19. But *Wollschlaeger* is easily distinguished: The Eleventh Circuit rooted its application of intermediate scrutiny in the characteristics of the doctor-patient relationship, and tour guides have nothing approaching that kind of relationship with their audience.

Wollschlaeger is—quite explicitly—a case about speech "uttered by a professional in furtherance of his or her profession and within the confines of a professional-client relationship." 2015 WL 4530452, at *18. The court emphasized the power imbalance between doctors and their patients, as a patient "must place his or her trust in the physician's guidance." *Id.* at *1. In the court's view, this power differential justified a greater degree of regulation: "Within a fiduciary or quasi-fiduciary relationship, the government has a strong interest in policing the boundaries of

the relationship to protect the weaker party." *Id.* at *19. The court was clear, however, that its departure from strict scrutiny was bounded by its rationale: "Outside the confines of such relationships, the government's interest in protecting the listener wanes, and instead the interest of the [speaker's] audience in obtaining information reaches its zenith." *Id.*

Wollschlaeger is irrelevant here, as tour guides do not have a fiduciary relationship with their audience. *See Edwards*, 755 F.3d at 1000 n.3. Tour guides speak to groups, not individuals, and they tell stories rather than giving advice. *See* SUMF ¶¶ 12-14. Plaintiff Dan Leger testified that "[t]he most 'individualized' advice that I would give would be to ask people about their food preferences to make a better restaurant recommendation." D.E. 30-1 ¶ 24. Plaintiff Michelle Freenor, meanwhile, contrasted her job as a tour guide with her prior career as a nurse: "As a nurse, if I did a bad job somebody could die. As a tour guide, if I do a bad job a tourist might get bored." D.E. 30-2 ¶ 19. A tour guide has far more in common with a stand-up comic than with a doctor or a lawyer—a fact that is confirmed by the inclusion of an "actor" within the statutory definition of "tour guide." Savannah Code § 6-1502(a). If an actor who dresses up in costume to talk to tourists qualifies as a "professional," then the "professional speech" category will swallow the First Amendment. That is not—and cannot be—the law.

B. Savannah's Tour Guide Licensing Law Cannot Survive Strict Scrutiny, Notwithstanding The Supreme Court's Decision In *Williams-Yulee*.

Perhaps aware of the inadequacy of its response to the argument for strict scrutiny, the City argues that its licensing law is constitutional even if strict scrutiny applies. Def's MSJ at 20. That would be extraordinary: It is "rare" that a law survives strict scrutiny, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011), as "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The Supreme Court has applied strict scrutiny to invalidate laws protecting children from sexually-explicit material, *Playboy*

Entm't Grp., 529 U.S. at 811-13; laws barring video recordings of small animals being crushed to death by high heeled shoes, *United States v. Stevens*, 559 U.S. 460, 465 (2010); and even laws prohibiting advocacy of "crime, sabotage, violence, or unlawful methods of terrorism," *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969). It would be surprising—even shocking—if tour guide licensing was able to survive where these laws have failed.

The City cites *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), in support of its contention that tour guide licensing survives strict scrutiny, but, as discussed below, that case only highlights the inadequacy of the City's showing. A law satisfies strict scrutiny if it is "justified by a compelling government interest" and "narrowly drawn to serve that interest." *Brown*, 131 S. Ct. at 2738. Savannah's law cannot survive that rigorous standard.

1. Savannah's Asserted Interests Are Not "Compelling."

At the outset, strict scrutiny requires that the interest asserted to justify a law rise to the level of "compelling," *i.e.*, an "urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). In *Williams-Yulee*, the Supreme Court found a compelling interest in "preserving public confidence in the integrity of the judiciary." 135 S. Ct. at 1666. Other interests deemed compelling have been similarly weighty, including the "right to vote freely," *Burson v. Freeman*, 504 U.S. 191, 199 (1992), and "combating terrorism," *Holder*, 561 U.S. at 28. These are interests that go to the very existence of our system of governance.

The City has not identified any interest even approaching that level of importance. The City stresses the importance of tourism to Savannah's economy, *see* Def's MSJ at 5-6, but economic boosterism does not qualify as compelling interest. *See Pottinger v. City of Miami*, 810 F. Supp. 1551, 1581 (S.D. Fla. 1992) ("[T]he City's interest[s] in promoting tourism and business . . . are at most substantial, rather than compelling, interests."). Savannah's desire to promote the accuracy of tour guides' speech also falls short; government's interest in policing

the accuracy of speech is limited to "defamation, fraud, or some other legally cognizable harm." *Alvarez*, 132 S. Ct. at 2545 (plurality opinion); *see also id.* at 2555 (Breyer, J., concurring). Nor has the City demonstrated a compelling interest in promoting the character and integrity of tour guides. The Supreme Court has found a compelling interest in promoting the integrity of judges, *see Williams-Yulee*, 135 S. Ct. at 1666, but, unlike judges, tour guides are not responsible for safeguarding the rule of law. Tour guides are storytellers. The City has *no* compelling interest that could justify requiring guides to get a license before they tell their stories.

2. Savannah's Law Is Not Narrowly Tailored.

Savannah's tour guide licensing law also fails strict scrutiny because it is not narrowly tailored. Under a strict scrutiny standard, only the least restrictive regulation available will pass review: "If a less restrictive alternative would serve the Government's purpose, the legislature *must* use that alternative." *Playboy Entm't Grp.*, 529 U.S. at 813 (emphasis added).

The government has available numerous other, less-restrictive means to promote its asserted interests. The City can foster tourism in all manner of ways—advertising, special events, or other forms of promotion. If the City is specifically concerned about the accuracy of tour guides' speech, the City can sponsor a program for guides to *voluntarily* become certified as experts in history. *See* SUMF ¶¶ 80-86; *see also Brown*, 131 S. Ct. at 2740 ("voluntary rating system" provides less restrictive alternative to regulation). Nor is licensing necessary to address the City's purported concern with "unsavory" characters leading tours guides; rather than license guides, the City can directly prohibit the kinds of misconduct underlying its concern. *See, e.g.*, *Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (invalidating licensing requirement for door-to-door solicitation because "[f]rauds may be denounced as offenses and punished by law"). None of the narrow infractions identified by the City justify wielding the cudgel of licensing to silence tour guides' speech.

Once again, comparison with *Williams-Yulee* (cited by the City) proves to be instructive. In that case, the Supreme Court found that a ban on personal solicitation of contributions by candidates for judicial office was narrowly tailored because the government identified a "narrow slice of speech" that it considered problematic and prohibited that particular speech. 135 S. Ct. at 1670-71. Here, by contrast, the City cites narrow concerns with solicitation, fraud, and historical inaccuracy, and yet the City has *entirely prohibited* speech by unlicensed guides. That blanket ban is not even remotely tailored to the purported harms identified by the City.

C. If Intermediate Scrutiny Applies, This Court Should Follow *Edwards* And Not *Kagan*. Savannah's Law Cannot Survive Even Intermediate Scrutiny.

The Court can stop reading at this point; strict scrutiny applies—and is fatal to the City's law—for all the reasons just discussed. As Plaintiffs argued in their opening brief, however, it also is true that the City's law is unconstitutional *regardless* of the applicable standard. *See* Pltfs' MSJ at 19-24. Intermediate scrutiny remains a demanding standard. In *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014), the Court applied intermediate scrutiny to strike down laws intended to prevent harassment of women seeking an abortion by making it a crime to stand within 35 feet of the entrance to an abortion clinic. Other laws invalidated under intermediate scrutiny include longstanding bans on lawyer advertising, *Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977), laws prohibiting advertisement of the price of liquor, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996), and even laws designed to protect the confidentiality of medical information, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667-72 (2011).

The D.C. Circuit, in *Edwards*, "assume[d], arguendo" that intermediate scrutiny applied and nonetheless struck down D.C.'s tour guide licensing law. 755 F.3d at 1001. Yet the City has remarkably little to say about the decision. The sum of the City's argument occupies a single sentence: "Under the circumstances of this case, however, and considering the (very) recent

expression of the 11th Circuit in *Wollschlaeger*, this Court should rule similarly to the 5th Circuit's opinion in *Kagan*." Def's MSJ at 20. As explained above, *Wollschlaeger* is entirely distinct, as it addresses speech by doctors within the confines of the doctor-patient relationship—a context that bears no relationship to speech by a tour guide. *Supra* pp. 13-14.[4] And nothing about the "circumstances of this case" or the rationale of *Kagan* justifies disregarding the D.C. Circuit's decision in *Edwards*; to the contrary, only *Edwards* is consistent with Supreme Court precedent setting forth the standard to be applied in intermediate scrutiny cases.

1. *Edwards* Properly Applies Intermediate Scrutiny. *Kagan* Does Not.

While the City urges this Court to follow *Kagan* rather than *Edwards*, of the two only *Edwards* can be squared with Supreme Court precedent. *Kagan* conducts its intermediate scrutiny analysis in a single sentence: The Fifth Circuit reasoned that "New Orleans, by requiring the licensees to know the city and not be felons or drug addicts, has effectively promoted the government interests, and without those protections for the city and its visitors, the government interest would be unserved." 753 F.3d at 562. That cursory analysis is irreconcilable with the Supreme Court's application of the intermediate scrutiny standard.

Edwards—unlike *Kagan*—critically evaluated the evidence proffered by the government to support its asserted interest. The government in *Edwards* adduced *some* evidence to support tour guide licensing, but the D.C. Circuit evaluated that evidence and found that it amounted to "speculation and senescent stories." 755 F.3d at 1005. The D.C. Circuit concluded that "the record contains no evidence ill-informed guides are indeed a problem." *Id.* at 1003. This

[4] Moreover, the law at issue in *Wollschlaeger* was far more narrowly tailored than the law at issue here. The law prohibited doctors from asking patients about firearm ownership "when the physician lacks a good-faith belief that the information is relevant." 2015 WL 4530452 at 27. The Eleventh Circuit found a close fit between this prohibition and the state's asserted interest, as "extracting private information from a patient, knowing such information to be irrelevant to the provision of medical care, is a real harm." *Id.* at 28.

approach is required by Supreme Court precedent: In *McCullen*, for instance, the Supreme Court did not blindly credit the government's concern with harassment at abortion clinics; instead, the Court surveyed the record to determine the scope of the problem, ultimately concluding that "a problem shown to arise only once a week in one city at one clinic" was insufficient. 134 S. Ct. at 2539; *see also, e.g., Edenfield v. Fane*, 507 U.S. 761, 776 (1993) (government must show "a serious problem" that is addressed "in a material way" by the challenged law). Yet the Fifth Circuit in *Kagan* did not discuss the evidence in that case and apparently assumed that the problems cited by the government were real and sufficiently widespread to justify licensing. The Fifth Circuit's attitude of blind trust cannot be squared with Supreme Court law.

The court in *Edwards*—but not *Kagan*—also considered the availability of less restrictive alternatives. The D.C. Circuit noted that "unscrupulous businesses" could potentially be "*more* effectively controlled by regulations that punish fraud or restrict the manner in which tour guides may solicit business," and the court also noted the availability of "voluntary certification" as an alternative. 755 F.3d at 1009. Again, this approach is consistent with Supreme Court precedent: In *McCullen*, the Supreme Court found that the government's concerns could be addressed through "less intrusive means," including "available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." *McCullen*, 134 S. Ct. at 2538; *see also, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985) (where harms can be addressed "case-by-case," a "broad prophylactic rule[ ]" is impermissible).[5] Yet the Fifth Circuit in *Kagan* failed to address *any* of the less restrictive alternatives discussed in *Edwards*. The Fifth

[5] To be sure, intermediate scrutiny (unlike strict scrutiny) does not demand that government employ "the least restrictive or least intrusive" approach available; nonetheless, 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." *McCullen*, 134 S. Ct. at 2535 (emphasis added).

Circuit blithely asserted that the "government interest would be unserved" without licensing, 753 F.3d at 562, but the Fifth Circuit did not even attempt to explain why that would be so.[6]

Finally, the court in *Edwards*—but not *Kagan*—considered the degree of "fit" between the government's law and asserted aim. The D.C. Circuit found a basic mismatch: If the law was intended to promote the accuracy of speech, it was vastly underinclusive insofar as it did not actually prohibit tour guides from saying anything untrue. *See* 755 F.3d at 1005. And the law also swept too broadly when judged against the government's asserted interest in protecting against unscrupulous guides, as the law "would forbid an unlicensed person from lecturing to a tour group, even if that group is being escorted by a fully licensed guide." *See id.* at 1008-09. Again, this analysis is required by Supreme Court precedent. So, for instance, in *McCullen*, the Supreme Court found that a "buffer zone" designed to prevent harassment was unconstitutional because it "unnecessarily [swept] in innocent individuals and their speech." 134 S. Ct. at 2538; *see also, e.g., Sorrell*, 131 S. Ct. at 2668 (addressing issues of "fit" under intermediate scrutiny standard). Yet the Fifth Circuit in *Kagan* utterly failed to address any of these questions; there is not even a hint in the opinion that the Fifth Circuit conducted this analysis.[7]

Ultimately, the Fifth Circuit in *Kagan* appeared to have been swayed by a belief that courts should not second-guess economic regulation enacted by states or their municipalities; so, the court emphasized that the law was a valid exercise of the "police power." 753 F.3d at 561.

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[6] The alternatives discussed in *Edwards* are equally applicable here. The City's 30(b)(6) witness testified that fines and monetary sanctions "work," SUMF ¶ 88, while the President and CEO of Historic Savannah Foundation—also the City's own witness—testified that voluntary certification is a "really good idea," *id.* ¶ 85. The City conceded that it is aware of no problems that have arisen in cities that use voluntary certification. *Id.* ¶¶ 82-83.

[7] Both of the D.C. Circuit's observations apply equally here. The City trumpets that it has not "ever told Plaintiffs what can or cannot be said on a tour." Def's MSJ at 11. And the City's 30(b)(6) witness conceded that a person who falls within the definition of a "tour guide" would have to be licensed even if the tour was already being led by a licensed guide. SUMF ¶ 27.

The City repeats that point here, citing a series of state-law authorities on the scope of the City's regulatory authority. *See* Def's MSJ at 16-17 (citing, among other cases, *People v. Bowen*, 175 N.Y.S.2d 125 (N.Y. Sp. Sess. 1958)). But the scope of the City's state-law authority is irrelevant if the exercise of that authority infringes the First Amendment. As the Supreme Court explained, in the course of invalidating a law requiring a license to engage in door-to-door solicitation: "Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these *may not abridge* the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Schneider*, 308 U.S. at 160 (emphasis added). The Fifth Circuit fundamentally erred when it placed the power of the state to regulate ahead of the First Amendment.

2. Nothing About The "Circumstances Of This Case" Justifies Departure From The Rationale Of *Edwards*.

While the City invokes the "circumstances of this case" to distinguish *Edwards*, nothing about the facts of this case justifies a different result. The City has no evidence that licensing increases the number of visitors to Savannah, *see* SUMF ¶ 73; the City is not aware of ever denying a tour guide license on the basis of a background check, *id.* ¶ 91; and the City is not aware of ever suspending or revoking a tour guide license, *id.* ¶¶ 94-95. The City has introduced no evidence that the accuracy of tour guides' speech is a significant concern for tourists, and the City has no cogent explanation why the character and integrity of guides is such a significant concern that it justifies the unusual burden of an annual background check—a burden the City does not impose on other hospitality workers or even *its own* employees. *Id.* ¶ 105.

While the government has pieced together a handful of purported dangers to justify its licensing law, these are isolated harms that—even if there were evidence they existed—could be easily addressed in much less restrictive ways:

a. Child Molesters: The City worries that child molesters might lead tours of Girl Scouts. Def's MSJ at 7. This is a speculative concern: The City has no evidence that child molesters have ever sought to lead tours in Savannah, SUMF ¶ 103, and, in any event, Girl Scouts do not go on tours without an adult scout leader, *id.* ¶ 104. Moreover, this concern is particularly misplaced because the City's law provides that even the most serious of felonies will bar a license for a period of *three years*; a convicted child molester could obtain a license, so long as his offense occurred three years and one day prior. *See* SUMF ¶¶ 55-56. A much more effective approach would be to simply prohibit child molesters from leading tours of children.

b. Homeless People Soliciting Visitors: The City worries about aggressive solicitation by homeless people seeking to lead tours. Def's MSJ at 9. But the City already prohibits in-person solicitation for tours, Savannah Code § 6-1535, and Plaintiffs do not challenge that ban. The City also can enforce laws specifically targeting harassment or other misconduct. The potential for aggressive in-person solicitation is not a reason to force *every single* tour guide in Savannah to get a license before they can tell their stories.

c. Fraudulent Solicitations: The City describes an incident in which a homeless individual solicited audience members for a tour by falsely claiming that he was affiliated with Plaintiff Jean Soderlind's tour company. Def's MSJ at 7. The City proffers no evidence that this is a widespread problem. And, regardless, the City can easily address this concern by enforcing laws prohibiting false advertising and consumer fraud; the City does not need to subject every tour guide in the City to a multiple choice history test in order to address fraudulent solicitations.

d. Tours By Unlicensed Guides: The City cites a single tourist complaint that a tour "was not conducted by a licensed guide." Def's MSJ at 9. Of course the fact that people give tours without a license cannot be an independent basis to uphold a licensing law; otherwise, the law

would create its own justification. The City's 30(b)(6) witness testified that she was not aware of any problem with this tour, apart from the fact that it was led by an unlicensed guide. Response to Def's SUMF ¶ 40. Furthermore, the City employee responsible for enforcement testified that the majority of citations for unlicensed tours are issued to guides who have *already passed* the City's licensing exam and simply allowed their license to lapse. SUMF ¶ 23.[8] That is hardly evidence of a widespread problem justifying the licensing law.

e. "No Show" Tours: The City also cites a single instance where tourists arranged for a tour in advance but then no tour guide showed up. Def's MSJ at 8. The City presents no evidence that this problem is widespread and—even more significantly—never attempts to show that its licensing law actually addresses this concern. If the City means to suggest that it could revoke the licenses of guides who engage in this kind of behavior, it surely is relevant that the City has *never once* revoked or suspended a tour guide license. SUMF ¶¶ 94-95. Moreover, the City conceded that you do not need a tour guide license to book tours, provided the tours will be led by a licensed guide; accordingly, even revoking someone's license would not stop that individual from continuing to arrange "no show" tours. *Id.* ¶ 97.

f. Jerry Spence: The City identifies one particular individual, named Jerry Spence, who has been ticketed for giving unlicensed tours. Def's MSJ at 8. The majority of the City's complaints about Mr. Spence—involving in-person solicitation and false advertising—are addressed by the foregoing discussion. *Supra* p. 22. But the City also raises the further concern that Mr. Spence once gave a tour "about Lady Chablis and other homosexual things that go [on] in Savannah," which "offended" a tourist. Def's MSJ at 8. The fact that speech offends listeners,

[8] Indeed, the individual who was the subject of the complaint cited in the City's brief had already passed the exam at the time he led the tour. Response to Def's SUMF ¶ 41.

however, is not a justification for censorship. *See, e.g., Cohen v. California*, 403 U.S. 15, 22-25 (1971). Ultimately, the City's reliance on this evidence only confirms the content based nature of the City's purpose for its law, and thus its impermissibility under the First Amendment.

g. Brad Spinks: The City also focuses on the conduct of Brad Spinks, another "unlicensed tour guide." Def's MSJ at 8. The specific conduct of Mr. Spinks—leading an unlicensed tour and booking a "no show" tour—is addressed above. *Supra* pp. 22-23. But one other fact about Mr. Spinks bears emphasis: The City subsequently issued a tour guide license to Mr. Spinks, and Mr. Spinks remains licensed today. Response to Def's SUMF ¶ 41. This is telling. The City cites—as a prime justification for its law—evidence about the conduct of an unlicensed individual the City *subsequently decided to license*. The City's own best evidence for its law ultimately goes to show that licensing does not actually address the City's asserted harms.

II. Savannah's Preservation Fee Violates The First Amendment.

The requirement to obtain a license is not the only burden imposed by the City on tour guides; they also are required to pay a so-called "preservation fee" for each member of their audience. As explained at length in Plaintiffs' Motion For Summary Judgment, this special financial burden on tour guides singles out tour guides' expressive activity for special burdens and therefore is unlawful under *Minneapolis Star & Tribune Co. v. Comm'r of Revenue*, 460 U.S. 575 (1983).

The City argues that this Court should decline to reach this issue under the doctrine of "comity." Def's MSJ at 22-23. Comity is a non-jurisdictional doctrine that "counsels lower federal courts to resist engagement in certain cases," including challenges to the "constitutionality of state taxation." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010). This doctrine, however, does not apply when a challenged law "impinge[s] on fundamental rights." *Id.* at 426. The First Amendment is, of course, a fundamental right, meaning a case (like

this one) involving a First Amendment challenge is not an appropriate candidate for application of the comity doctrine.[9]

On the merits, the City offers only the most cursory defense of the preservation fee. According to the City, the preservation fee does not actually single out speech for special burdens, as it "applies to sightseeing tour companies, both those that provide narrated tours *and those that do not* provide narrated tours." Def's MSJ at 22 (emphasis added). This is incorrect; the text of the statute makes clear that the preservation fee applies only to narrated tours. The preservation fee is charged to the very same tours that require a licensed guide, *see* SUMF ¶ 108, and the City's own law defines a "walking tour" as "[a] guided *narrated tour* conducted on foot by a licensed tour guide on sidewalks in squares," Savannah Code § 6-1502(q) (emphasis added). The statute imposing the preservation fee further provides that the fee "shall not apply to . . .

[9] Notably, the City mentions but does not actually invoke the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, although that statute imposes a bar that is closely related to the doctrine of comity and *does* apply to First Amendment claims. *See, e.g., California v. Grace Brethren Church*, 457 U.S. 393, 416-17 (1982). The City has good reason not to rely on the TIA: Courts hold that the TIA bars challenges to "taxes," which raise general revenue, but does not bar challenges to "regulatory fees," which "rais[e] money placed in a special fund to help defray . . . regulation-related expenses." *San Juan Cellular Telephone Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, J.); *see also Hedgepeth v. Tennessee*, 215 F.3d 608, 613 (6th Cir. 2000) (explaining that the TIA does not apply to "fees" that "benefit the regulated entities" or "defray the cost of regulation"); *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 670 (11th Cir. 1984) (TIA does not apply where "statute challenged is regulatory rather than revenue raising in purpose"). The provision of the Georgia Constitution that the City cites as authority for the preservation fee makes clear that it is a regulatory fee and not a general tax; that provision allows municipalities to create "special districts" within a municipality, to provide "services within such districts," and to levy special fees "to pay, wholly or partially, the cost of providing such services therein." Ga. Const. art. IX, § II, para. VI (2015). That kind of special fee, collected for a limited purpose, is a regulatory fee outside the scope of the TIA.

While the limited purpose of the preservation fee prevents application of the TIA, it does not save the law from invalidity under the First Amendment. Although the law is meant to pay for a limited set of services provided in the Historic District, tour guides are not the only ones who use or enjoy the Historic District. When paying for services in the Historic District, the City cannot single out tour guides alone for a special financial burden.

persons boarding a tour boat for dining and on-board entertainment purposes where a sightseeing tour is not the focus or emphasis of the event *and where no tour narration is provided*." Savannah Revenue Ordinance art. T, § 3(B) (emphasis added). The City's assertion that the preservation fee does not single out speech finds no support in the record.[10]

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment should be denied.

Dated this 8th day of September, 2015. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 8, 2015, I caused the foregoing Motion to be filed via ECF and that the court's ECF system automatically served counsel for Defendant.

s/ Robert Everett Johnson

[10] The City also cites case law discussing the doctrine of "[u]nderinclusiveness," which applies where a law is challenged on the ground that it "abridg[es] *too little* speech." Def's MSJ at 24 (quoting *Williams-Yulee*, 135 S. Ct. at 1668-72). This case law is irrelevant, as Plaintiffs do not argue that the preservation fee should be charged to a broader universe of speakers. Rather, Plaintiffs argue that the City cannot single out speech for special burdens, while exempting a broader universe of economic activity—much of which does not involve speech at all.