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

KIMBERLY BILLUPS, MICHAEL WARFIELD, and MICHAEL NOLAN, **Plaintiffs,** **v.** **CITY OF CHARLESTON, SOUTH CAROLINA,** **Defendant.**	Civil Action No. 2:16-cv-00264-DCN

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

As Plaintiffs have already explained in earlier summary-judgment briefing, Charleston's testing and licensing requirements violate the First Amendment. *See* Pls.' Mem. of Law in Supp. of Mot. for Summ. J., ECF No. 39-1 ("Pls.' MSJ"); *see also* Pls.' Br. in Opp'n to Def.'s Mot. for Summ. J, ECF No. 61. Plaintiffs do not belabor these arguments below. Instead, consistent with Local Civil Rule 7.07 (D.S.C.), Plaintiffs confine themselves to two points in response to the arguments raised by Defendant's response brief. First, Defendant has failed to so much as cite the Supreme Court's controlling precedent on strict scrutiny, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and, as a result, it presents arguments and evidence that only reinforce the conclusion that the tour-guide licensing law is content-based and subject to strict scrutiny. Second, Defendant misstates and misunderstands its evidentiary burden under intermediate scrutiny—and, as a result, fails to provide the Court with any evidence sufficient to meet that burden. For both of these reasons, Plaintiffs' Motion for Summary Judgment should be granted.

I. The City's Tour-Guide Licensing Law Is Subject to Strict Scrutiny.

Perhaps the most striking part of the summary-judgment briefing in this case is that, two briefs into cross-motions for summary judgment, Defendant City of Charleston ("City") has failed to even cite the controlling precedent governing when a law is deemed "content based," *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). *Reed* makes clear that the content-based inquiry is a practical one that applies strict scrutiny to any regulation of speech that is based on the content of regulated speech. Sometimes, strict scrutiny is triggered by the fact that a law, on its face, makes a content-based distinction, whether obvious distinctions based on particular messages or "more subtle" distinctions based on the speech's function or purpose. *Id.* at 2227. But a law is equally content based (and subject to strict scrutiny) if it "cannot be justified without reference to the content of the regulated speech." *Id.* (citation and internal quotation marks omitted).

Because the City fails to grapple with (or acknowledge) *Reed*, its brief in opposition to summary judgment only serves to reinforce the conclusion that the City's tour-guide licensing law is subject to strict scrutiny under either of *Reed*'s tests.

A. The Licensing Law Is Content Based on Its Face.

The record on summary judgment establishes that the City's licensing law is content based on its face because it is triggered by speech about points of interest about Charleston. *See* Pls.' MSJ 17–19. At the preliminary-injunction stage, this Court rejected the idea that the law was content-based on its face because requiring a license for "conducting of . . . sightseeing" might require a license of people who were not talking about Charleston at all—after all, the Court reasoned, "one might imagine a tour that simply takes visitors along a scenic route, without discussing particular points of interest[.]" Order at 14, ECF No. 27. But the summary-

judgment record makes abundantly clear that someone leading the sort of "silent tour" envisioned by the Court in its preliminary-injunction opinion ***would not need a tour-guide license***. Instead, the record confirms that the licensing requirement is triggered by the *content* of what an individual says. According to the City, "[i]f you hired a driver to drive you around town and you pay them *to give you information about the city*, then they should have a license[.]" Riley Tr. 58:5–8, ECF No. 47-1 (emphasis added). But, if the same driver silently takes a visitor around Charleston while a recorded tape of a tour guide provides the same information through the speakers, a tour-guide license is *not* required because "the cassette can't answer a question." *Id.* at 57:12–22. In other words, the "conduct triggering coverage under the statute consists of communicating a [particular] message," which means the licensing law is subject to strict scrutiny. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

In short, Plaintiffs' opening brief established that the tour-guide licensing requirement applies only to those who provide information about the city of Charleston—to those who speak on a particular topic. But because it fails to engage with *Reed*, the City's brief misapprehends the importance of this fact and therefore misunderstands the significance of the evidence in the record.

For example, in Plaintiffs' opening brief, they point out that a local tour guide, Tommy Dew, started a business that provided (via a GPS-enabled iPad) automated tourism commentary to customers riding through Charleston in vehicles. Pls.' MSJ 18. In response, the City spends nearly three pages of its brief explaining that Mr. Dew never successfully made any money from his business venture. *See* Def.'s Mem. in Opp'n to Pls.' Mot. for Summ. J. 5–7, ECF No. 62 ("Def.'s Br."). But the relevance of Mr. Dew's business venture is not its success or failure. Exactly three facts about Mr. Dew's business matter: (1) It is undisputed that Mr. Dew

developed a GPS-enabled touring app that provided real-time historical information about Charleston, Dew Tr. 52:12–21; 53:6–19; 53:25–55:1, ECF No. 50-5; (2) it is undisputed that Mr. Dew informed the City that he planned to install his real-time touring app on vehicles that customers used to move about the city of Charleston, *id.* at 56:8–17; 60:21–61:7; 66:20–67:1; 70:10–25; and (3) it is undisputed that the City did not require the person driving those vehicles to hold a tour-guide license because the app (not the driver) would be providing their customers with a real-time narrative about nearby historical sites, *id.* at 56:18–57:4; 58:2–59:11; 60:7–61:14; 72:8–15. In other words, Mr. Dew designed a "silent tour" where paying customers could ride with a silent driver while receiving sightseeing information, and the City (consistent with how it described the law's enforcement in its 30(b)(6) testimony) did not require the silent drivers to obtain a tour-guide license. Mr. Dew's business may well have failed, but it is still proof that the licensing requirement is triggered by whether a person is talking about Charleston, not whether a person is physically escorting a paying customer around town.

Similarly, Plaintiffs' opening brief points to meeting minutes from 2003, which record a briefing to the Tourism Commission in which Dwayne Green, an attorney for the City, advises that a person only needs a tour-guide license under the law if "there was a tour guide giving different pointers as to what buildings were of historic significance[.]" *See* Pls.' Ex. 7 at 1–2, ECF No. 47-7. In response, the City produces an affidavit from Mr. Green in which he denies ever making the quoted statement. *See* Green Aff. ¶¶ 4–5, ECF No. 62-3.

But once again, the City misses the point. Even if one entirely accepts Mr. Green's current testimony,[1] his affidavit simply reaffirms what the rest of the evidence shows. Green's

[1] The City testified in its 30(b)(6) deposition that Tourism Commission meeting minutes "were transcribed from a tape" and also reviewed for accuracy by the City's Tourism Director. *See* Maybank Tr.19:3–19, ECF No. 47-3.

affidavit concludes by averring that the licensing requirement applies to anyone engaged in "*guided* sightseeing for hire." *Id.* ¶ 7. Exactly. The licensing requirement applies if someone is providing guidance—that is, conveying information about the city to paying customers. It does not apply (as the City confirms in its 30(b)(6) testimony) if someone drives their customers around the city playing a recorded tour on a cassette tape. It does not apply (as the City confirms through its enforcement history) if someone drives their customers around while an iPad app uses GPS to provide relevant narration. *Driving sightseers around Charleston* does not trigger the licensing requirement. Driving sightseers around Charleston *while talking to them about the city* does. The record evidence on this point is overwhelming, uniform, and undisputed.

In sum, this Court initially found that the licensing law was not facially content based because it might apply to a wide variety of people who are not talking about points of interest in Charleston, like people leading "silent tours." The record confirms, again and again, that this is not true. Because the City has repeatedly disavowed the foundational assumption of the Court's initial ruling on this point, the Court should find, based on the full record, that the licensing law is content based on its face.

B. The Licensing Law Is Also Content Based Because It Cannot Be Justified Without Reference to the Content of Tour Guides' Speech.

Even if the tour-guide licensing law were not content based on its face (which, as described above, it is), it would still be subject to strict scrutiny because it cannot be justified without reference to the content of the regulated speech. *Reed*, 135 S. Ct. at 2227. At the preliminary-injunction stage, the Court found the record "not convincing enough" to warrant the application of strict scrutiny, *see* Order at 20, but allowed Plaintiffs to further develop the record. The record on summary judgment is much clearer and overwhelming. *See* Pls.' MSJ 19–25.

The City responds to this record primarily by arguing that the Court must ignore it. In the City's view, the Court may consider three (and only three) pieces of evidence: formal legislative findings, a statute's formal statement of purpose, and the "inevitable effect" of the law. *See* Def.'s Br. 8–9. To be sure, these three things are *relevant*, but the City provides no authority for the proposition that these three factors are the *exclusive* means of determining whether a law can be "justified without reference to the content of the regulated speech." It would be a strange rule indeed if cities could immunize themselves from First Amendment scrutiny by scrupulously policing their formal legislative statements—and, indeed, that is not the law. Courts do not look only to whether the government has formally articulated a neutral justification for a law; they look to whether a law can *actually be justified* without reference to the content of the regulated speech. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 158 (2002) (weighing testimony from city official when evaluating constitutionality of ordinance under the First Amendment); *Cincinnati v. Discovery Network*, 507 U.S. 410, 429–30 (1993) (demanding a "neutral justification" rather than a "naked assertion" for specific challenged regulation); *United States v. Eichman*, 496 U.S. 310, 315 (1990) (evaluating content-based justification raised in government's brief); *accord Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) (examining both formal legislative statements of purpose and the "practical operation" of the law).

And, here, all the justifications offered by the City or by its witnesses come back to the content of tour guides' speech. The City says that it wants to avoid tourists being "ripped off"—but it makes clear that being "ripped off" means things like not being told (on a pub tour) that "George Washington went" to St. Michael's Church. Riley Tr. 48:18–49:21, ECF No. 47-1. The City says that it wants to protect Charleston's "quality and integrity," but it makes clear that

the licensing law does so by ensuring that tour guides can "answer [customers'] questions about . . . architecture and history." *Id.* at 122:23–123:4. The City says that it is worried about the tourism economy, but it makes clear that it thinks guide licensing protects the tourism economy because a tourist might not "go[] back to Charleston" if her tour guide cannot correctly answer questions about "the Russell House" and its architectural style. *Id.* at 54:14–55:8.

These are not isolated statements; they are part of a consistent pattern. Indeed, as far as the record reveals, *every time* the City has been called upon to justify its licensing law in any context other than a legal brief in this action, it has done so by reference to the content of the regulated speech. Its Tour Guide Training Manual tells readers that the "honor of introducing" visitors to Charleston "goes to a special few [licensed guides] who . . . have mastered her most telling stories." Pls.' Ex. 38 at 3, ECF No. 50-11. The City says it includes or excludes subjects from its written exam based on its beliefs about what guides should be able to say on tours. Riley Tr. 54:5–54:13, ECF No. 47-1 (explaining that architecture is emphasized on the written exam because guides "should be able to explain that" on tours as well as address the "periods of architecture"). In a 2014 press statement issued by the City, then-Mayor Riley is quoted saying that visitors to Charleston "expect and assume they will be *given correct information*, and our tour guide regulations are designed to achieve that goal" and that guide licensing helps the city "correct . . . the spreading of false information." *See* Ex. A.[2] The list goes on.

City officials consistently justify the law as an attempt to improve the content of tour guides' speech because the law *actually is* an attempt to improve the content of tour guides' speech. And that conclusion is perfectly consistent with the City's overall behavior. The City is

[2] Both parties' summary-judgment submissions contain Mayor Riley's deposition transcript (as the City's 30(b)(6) witness), though neither includes the underlying exhibit being discussed in Riley Tr. 158:4–159:8, ECF No. 47-1. A true and correct copy of that exhibit is attached to this brief as Exhibit A.

concerned about tour guides' speech, and so it makes tour guides take a test about topics the City thinks are important. The City is concerned about tour guides' speech, and it has produced documents telling licensees they are "responsible to say" phrases such as "the legend is," or "tradition says" before sharing "information that is not factual[.]" Pls.' Ex. 26 at 2, ECF No. 49-8. The City is concerned about tour guides' speech and so it has sent "a memo to the carriage operators asking them to *adhere* to the information in the" City's Tour Guide Training Manual. Pls.' Ex. 28 at 7, ECF No. 50-1(emphasis added). The City is concerned about tour guides' speech and so it has "followed up with" tour guides after hearing complaints that those guides have shared "false or incorrect information." Def.'s Br. 13 n.63. The City is concerned about tour guides' speech, and so (up until a few weeks after this lawsuit was filed) it required would-be tour guides to pass an oral examination in which they were judged on what they actually said.[3]

All of this evidence makes sense if the City is trying to do what it is obviously trying to do: influence (and, by its lights, improve) the content of what tour guides say on their tours and in response to questions. If that is what the City is doing—and it is—then *Reed* and its predecessors dictate that strict scrutiny applies.

II. The City Applies the Wrong Standard for Intermediate Scrutiny and Therefore Fails to Meet Its Burden.

The City not only ignores binding precedent under strict scrutiny but it also fails to apply the correct standard under intermediate scrutiny. Even if these burdens on Plaintiffs' protected speech were perfectly content-neutral burdens—and, as discussed above, they are not—they would be subject to at least intermediate scrutiny. As Plaintiffs argued in their opening brief, the

[3] There is no evidence that the City believed the oral exam was unnecessary *prior to* the filing of this lawsuit. The City suggests that Plaintiffs' arguments about the oral exam are "moot" because it repealed the oral-exam requirement after being sued. Def.'s Br. 14. But the oral examination is evidence of the City's speech-centric concerns. Evidence cannot become "moot."

City's licensing law is unconstitutional *regardless* of the applicable standard. *See* Pls.' MSJ 28–35.

Intermediate scrutiny is a demanding standard. The U.S. Supreme Court made clear in *McCullen v. Coakley* that courts applying intermediate scrutiny under the First Amendment must consider things like the evidence supporting the government's assertions, the unusualness of a challenged law, and the availability of less-restrictive alternatives. 134 S. Ct. 2518, 2535–39 (2014). And the Fourth Circuit recognized the same in *Reynolds v. Middleton* when it detailed the evidentiary burden the government must satisfy under intermediate scrutiny after *McCullen*. 779 F.3d 222, 228 (4th Cir. 2015).

Reynolds controls the analysis. But with two briefs in on cross-motions for summary judgment, the City refuses to accept that *Reynolds* supersedes earlier Fourth Circuit caselaw and imposes a real evidentiary burden on a First Amendment defendant.

For example, the City incorrectly asserts that it is "'entitled to advance its interests by arguments based on appeals to common sense and logic,'" *see* Def.'s Br. 19 (quoting *Ross v. Early*, 746 F.3d 546, 556), even though *Reynolds* clearly establishes that a defendant has an "obligation to present evidence showing that the speech regulation furthers its asserted interests" unless the relationship between regulation and interest is as "obvious" as that in *McCullen* (where prohibiting people from gathering in roadways had an obvious physical connection to concerns about traffic congestion). *Reynolds*, 779 F.3d at 228 n.4. But it is *not* obvious that Charleston's practice of making would-be tour guides take a history test results in any benefit not seen in Savannah or Boston or any of the many jurisdictions that do not require such a test.[4]

[4] As recognized in a recent White House report, most empirical research on the topic shows that occupational licenses like Charleston's tour-guide license are frequently not associated with quality improvements. *See* The White House, *Occupational Licensing: A Framework for*

Because it is not obvious, binding caselaw holds that the City has an evidentiary burden on this point—and the City's refusal to introduce any evidence on this point is therefore dispositive.

Applying the wrong standard also leads the City to attempt satisfying the narrow-tailoring inquiry with mere assertions that less-restrictive alternatives do not work. *See* Def.'s Br. 28–29. But in *Reynolds*, the Fourth Circuit made clear that the "burden of proving narrow tailoring requires the [government] to *prove* that it actually *tried* other methods to address the problem." 779 F.3d at 231 (emphasis in original). "[I]t is not enough for [the government] simply to say that other approaches have not worked."[5] *McCullen*, 134 S. Ct. at 2540. But the City admits it never investigated, let alone tried, any alternatives. Riley Tr. 149:3–11, ECF No. 47-1.

Reynolds also holds that the government must also "present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary[.]" 779 F.3d at 229. Again, the City's brief attempts to meet this burden with the power of assertion, blithely claiming that, "[a]s the ordinance does not control what licensed tour guides say, the ordinance does not burden more speech than necessary to further the government's legitimate interests." Def.'s Br. 21. But that simply does not follow. Charleston could burden less speech in any number of ways: It could, for example, require Plaintiff Nolan to disclose to all potential customers that he is not a licensed tour guide or even that he has failed the City's licensing exam. That would burden less speech than the current ordinance, under which Plaintiff Nolan cannot

---

Policymakers at 58 (July 2016) ("In fact, in only two out of the 12 studies [reviewed] was greater licensing associated with quality improvements."), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (last visited Mar. 14, 2017). At minimum, widespread studies concluding that licensing requirements do not improve quality mean that it is not "obvious" that Charleston's requirement does so.

[5] In *Reynolds*, the government's failure to provide evidence "showing that it ever tried to *use* the available alternatives to address its safety concerns" was fatal. 779 F.3d at 232 (emphasis in original). Here, the record establishes that the City has not considered, much less tried, less-restrictive means of advancing its interests.

talk to paying tour groups at all. *See, e.g.*, *Pearson v. Shalala*, 164 F.3d 650, 657 (D.C. Cir. 1999) ("In more recent cases, the [Supreme] Court has . . . repeatedly point[ed] to disclaimers as constitutionally preferable to outright suppression." (citing cases)). Why has the City chosen the more-burdensome path of forbidding Plaintiff Nolan from engaging in paid speech rather than the "constitutionally preferable" path of requiring him to apprise his customers of his qualifications? We are left to wonder—which means the City has failed to meet its burden under *Reynolds*.

Simply put, the City has failed to meet *any* of the burdens it was required to meet under *Reynolds*. Instead of meeting its burdens, it has bare assertions (either from its attorneys or from witnesses not proffered as experts) that tour-guide licensing works and a series of newspaper articles purporting to demonstrate that sometimes bad things happen to tourists. Def.'s Br. 25–30. But this is not enough—particularly because none of the City's newspaper articles provide any basis for concluding that tour-guide licensing would result in *fewer* bad things happening to tourists. Precedent imposes a real burden on a defendant in this context, particularly where (as here) the unusualness of the challenged restriction "raise[s] concern that the [government] has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which [Plaintiffs] wish to engage." *McCullen*, 134 S. Ct. at 2537 & n.6 (noting that the law challenged in that case was "truly exceptional" because only five localities had similar laws).[6] If tour-guide licensing is "common sense," the City must at least

[6] Charleston is joined by only four other tourist-heavy U.S. cities in prohibiting tour guides from speaking on tours without a special license. *See* St. Augustine, Fla., Code § 17-122; New Orleans, La., Code §§ 30-1553(1), (3); NYC, N.Y., Admin. Code § 20-244; Williamsburg, Va., Code § 9-333(2)(b). The City disputes that its law is unusual because it has identified two small jurisdictions near Charleston—Aiken and Beaufort—that have largely copied the Charleston City Code in relevant part. But as this Court has suggested, for such a consideration the proper group

explain why this sense has eluded officials in other jurisdictions or at least provide some basis for suspecting that those cities' less-restrictive approach has led to problems not found in Charleston. The City does not try to do this, and neither does it try to meet the other evidentiary burdens detailed above. This evidentiary default is dispositive, and this Court should therefore grant Plaintiffs' Motion for Summary Judgment.

CONCLUSION

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

Dated: March 17, 2017.

Respectfully submitted,

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

Local Counsel for Plaintiffs

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

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

Attorneys for Plaintiffs

*Admitted Pro Hac Vice

---

for comparison "is not all other U.S. cities, but other U.S. cities with comparable tourism industries." Order at 40.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of March, 2017, I caused the foregoing Plaintiffs' Reply in Support of Motion for Summary Judgment to be filed via ECF and that the Court's ECF system automatically served counsel for Defendant.

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

Local Counsel for Plaintiffs