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' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

Plaintiffs Kimberly Billups, Michael Warfield, and Michael Nolan have a passion for history and want to tell stories about Charleston as tour guides. But the City of Charleston has decided that tour guides cannot talk without its permission. To get the government's permission to talk, would-be guides must pass written and oral exams that test one's mastery of the material contained in a 490-page government-approved training manual. People (like Plaintiffs) who have not met the City's prerequisites are prohibited from telling stories to paying tour groups on pain of fines and even jail time.

These burdens on speech are unconstitutional. The City's licensing law singles out tour guides based on the content of their expressive activity. It then determines who gets permission to talk by weighing whether the information would-be guides are able to convey matches the information the government has approved. The application of the City's tour-guide law turns on the content of speech, and the law's purpose is to influence the content of what Charleston's tour guides talk about. Because the Constitution does not allow government to arrogate to itself the power of deciding who is (or is not) qualified to speak, Plaintiffs respectfully ask this Court to grant a preliminary injunction restraining the City of Charleston from enforcing its tour-guide-licensing law.

FACTUAL BACKGROUND

The City of Charleston ("City") requires a license to talk. It is illegal to "act or offer to act as a tour guide" unless one is "licensed . . . as a registered tour guide or a temporary tour guide." Charleston, S.C., Code ("Charleston Code") § 29-58. The City restricts the "honor of introducing" visitors to Charleston—and obtaining the government's permission to begin talking—"to a special few who . . . have mastered her most telling stories." Panju Decl. Ex. 1

(City of Charleston Tour Guide Training Manual at 3). Persons wishing to speak about diverse topics such as the many perspectives on Charleston's history, points of interest, or even interesting ghosts—and to do so as tour guides—must all navigate the multistage bureaucratic process described below. Plaintiffs Kimberly Billups, Michael Warfield, and Michael Nolan (collectively, "Plaintiffs"), all attempted doing so; and all failed to make it through that process because they did not score high enough on the government's subject-matter test. Verified Compl. Declaratory & Injunctive Relief ("Compl.") ¶¶ 36–39, 50–55, 66–68. Each Plaintiff has a deep passion for storytelling and wants to tell their own stories about Charleston to paying customers. *Id*. ¶¶ 31–33, 40–41, 44–46, 48, 57, 60–61, 63–64, 69. But without the government's permission, they can be fined up to $500, spend up to a month in jail, or both, if they talk without a license. Charleston Code § 1-16(a).

A. Charleston's Storytelling License.

Only after proving their ability to write and talk about what Charleston government officials deem important can would-be tour guides obtain permission to begin telling their own stories. To get a permanent tour-guide license, a would-be guide[1] must register with the City, pay a fee, and pass two rounds of licensing exams.[2] Both exams "are meant to test the applicant's knowledge of the city and its history." *Id*. § 29-59(b).

[1] Licensed tour guides who allow their license to expire are also "treated as a new applicant" and thus must "comply with all the provisions . . . then in effect including the requirement of examination." Charleston Code § 29-63. They may extend the three-year expiration date of their license by taking yearly continuing education lectures. *Id*. Tour guides with 25 years or more of experience "as a Charleston Licensed Guide" are exempt from the recertification process. *See* http://www.charleston-sc.gov/DocumentCenter/View/10413.

[2] Before taking any exams, all applicants must register with the City's Tourism Management Office and pay a $50 fee. *See* Panju Decl. Ex. 3 (Tour Guide Examination Information). The City prepares the written and oral exams and they are based on materials approved by the Charleston Tourism Commission. Charleston Code § 29-59(a).

First, the City requires passing a written exam, which consists of 200 multiple-choice, matching, and true/false questions, administered over the course of two hours. *See* Panju Decl. Ex. 3 (Tour Guide Examination Information). The exam questions are drawn from *The City of Charleston Tour Guide Training Manual*[3] (hereinafter, the "*Manual*"). *See id*.; *see also* Charleston Code § 29-59(a). The *Manual* is a 490-page book that covers everything from architecture and plants to colonial history and celebrity trivia. *See* City of Charleston Office of Tourism Mgmt., *Manual* (Historic Charleston Found. eds., 2011). Applicants who achieve a score of 80 percent or higher on the written exam qualify for a second round of testing: an oral exam. Charleston Code § 29-59(g).

The oral exam involves government officials grading applicants on their verbal descriptions and storytelling about randomly selected sites around Charleston. *See* Panju Decl. Ex. 3 (Tour Guide Examination Information). Would-be tour guides get called on "at random" and are required "to act as a guide" for three minutes inside a conference room. *See id*. Government officials grade the oral exam on a pass or fail basis. Charleston Code § 29-59(f).

Because the written and oral exams are only administered four times a year, Charleston's law also allows would-be guides to obtain a temporary tour-guide license while they wait for the next licensing exam. *Id*. §§ 29-59(d), 29-60. Temporary tour-guide licenses are only available to people who are sponsored and employed by persons operating an existing tour company. *Id*. § 29-60(a)(1).[4] The City requires a separate written exam for the temporary license, and the City

[3] The purpose of the *Charleston Tour Guide Training Manual* "is to provide a wealth of knowledge for prospective and current licensed tour guides" about Charleston's history in order to advance the "city's goal to provide accurate, factual and updated information to its visitors and residents." Panju Decl. Ex. 1 (City of Charleston Tour Guide Training Manual at 482).

[4] A temporary license "automatically expire[s]" when the license holder stops working for her sponsoring employer. Charleston Code § 29-60(c).

also requires that the sponsoring employer provide it with a script for the temporary tour guide so it can be "approved for accuracy" by the government. *Id.* §§ 29-60(a)(2), (e).

The City's licensing law is unusual. Perhaps that explains why only a tiny handful of American cities—St. Augustine, Florida; New Orleans, Louisiana; New York, New York; Williamsburg, Virginia; and Charleston itself—require a test before a would-be guide can tell stories. *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); Charleston Code § 29-58. In some places (such as Philadelphia and Baltimore), private organizations provide *voluntary* certification programs for tour guides, which allows knowledgeable guides to hold themselves out to the public as certified tour guides without giving the government power to fine or imprison people for unauthorized talking. *See* Panju Decl. Ex. 2 at ¶¶ 4, 9–11. Unlike Charleston, the vast majority of cities do not subject tour guides to mandatory testing and licensing before they can begin telling stories.

B. The City's Tour-Guide-Licensing Law Burdens Plaintiffs' Speech.

Plaintiffs Billups, Warfield, and Nolan want to talk to paying customers about Charleston. Compl. ¶¶ 31, 33, 42, 48, 60–61. They filed this lawsuit because they are barred from doing so under the City's tour-guide-licensing law and are being denied their rights under the First Amendment. *See* Compl.

Plaintiff Kimberly Billups spent much of 2015 trying to turn her passion for history into a thriving business. *Id.* ¶¶ 31, 34. Kimberly wants to offer in-character walking history tours of Charleston. *Id.* ¶ 33. To get her business up and running, she conducted research, printed business cards for her new business, "Charleston Belle Tours," and set up a credit-card-processing account. *Id.* ¶¶ 33–34. She even purchased a historic-styled antebellum dress that

she plans to wear on tours. *Id.* ¶ 34. The only remaining obstacle to her business is Charleston's licensing law. *Id.* ¶ 40–41. After learning about the City's law, Kimberly spent several weeks studying for the tour-guide-licensing exam. *Id.* ¶ 37. She scoured the topics in the training *Manual*, reviewed practice questions on the Internet, and practiced reciting material in the *Manual* to her husband in the lead-up to the November 2015 licensing exam. *Id.* Despite all of her studying and preparation, Kimberly did not score above the requisite 80 percent; she scored a 70 percent and failed to qualify for the mandatory oral exam or for a tour guide license. *Id.* ¶ 38. Accordingly, she is prohibited from talking to Charleston's visitors and residents as a tour guide and Charleston Belle Tours cannot open for business. *Id.* ¶ 39.

Plaintiff Michael Warfield wants to work as a tour guide to supplement his income and continue fostering his interest in colonial history. *Id.* ¶ 48. He is a native New Yorker and a Charlestonian by choice who spends many hours working as an unpaid volunteer at a historic landmark and museum in Charleston's historic district. *Id.* ¶¶ 44–45. Spending time telling stories about Charleston's history paid off when Michael was offered a job leading ghost and pub tours in the evenings by a local tour company. *Id.* ¶ 48. Soon after, he learned about the City's tour-guide-licensing law, borrowed a copy of the *Manual*, and began studying. *Id.* ¶¶ 49– 50. An insurance broker by trade, Michael used many of the same study techniques that he used to pass the Series 7 exam administered by the Financial Industry Regulatory Authority: He studied the *Manual* for weeks, reviewed all the topics, and wrote out historical facts and figures on a board near his desk. *Id.* ¶¶ 45, 51. Michael has tried to pass Charleston's tour-guide-licensing exam twice. *Id.* ¶¶ 50, 55. He scored a 73 percent on the August 2015 exam and failed to qualify for the oral exam or for the City's tour-guide license. *Id.* ¶ 53. Following that test, Michael called the city's Tourism Management office and asked what to focus on so he could

pass on his next try; he was told to study all the material in the 490-page *Manual*. *Id*. ¶ 54. Michael redoubled his efforts and continued studying for over two months, determined to pass the test on his second attempt. *Id*. ¶ 55. He then took the November 2015 licensing exam and scored a 67 percent. *Id*. Accordingly, Michael cannot accept a job offer to talk about ghosts and pubs as a tour guide.

Plaintiff Michael Nolan spent his career telling stories. *Id*. ¶¶ 60–61. He retired with his wife to Charleston in July 2015 and immediately began exploring the history of the city he now calls home. *Id*. His many years helping authors tell their stories as an editor in book publishing, along with his interest in staying fit by continuing to explore Charleston, led him to try supplementing his retirement income by telling stories as a tour guide. *Id*. Michael spent six weeks studying for the City's tour-guide-licensing exam. He studied the material in the *Manual*, created flash cards using a smartphone app to practice questions, and even rode his bike all over town to practice matching particular facts with specific buildings. *Id*. ¶ 67. Michael took the November 2015 licensing exam and scored a 64 percent. *Id*. ¶ 68. He was barred from taking the mandatory oral exam and from obtaining a tour-guide license.

All three Plaintiffs seek to vindicate their rights under the First Amendment and are challenging the constitutionality of the City's tour-guide-licensing law, Charleston Code §§ 29-58 to -63, § 29-66, together with the definitions of "registered tour guide" and "temporary tour guide" contained in § 29-2 (collectively, the "licensing law" or "law"). *See* Compl. They filed this civil-rights lawsuit on January 28, 2016, so that they may begin talking about topics of their choice with paying customers without first obtaining a special license from the government. *See id*. ¶ 1.

ARGUMENT

Plaintiffs' argument is straightforward: Under the First Amendment, people are allowed to talk about a city and its history—and they do not need the government's permission to do so. The City of Charleston enforces a tour-guide-licensing law that cannot be squared with the First Amendment or Supreme Court precedent. Tour guides must pass written and oral exams before being permitted to talk about Charleston, and they are barred from doing so if their answers on these tests fail to satisfy the government's testing officials. That patently violates the First Amendment. The law singles out tour guides based on their expressive activity, and it does so specifically because the government is worried about the *content* of what tour guides say to tour groups. It does not serve a compelling government interest. It is not narrowly tailored. And no categorical exception to ordinary strict scrutiny analysis applies.

Even if the Court assumes the law to be content neutral, it is still subject to intermediate scrutiny and fails that standard as well. There is no evidence that the public is endangered when tour guides tell their stories or that the City's mandatory licensing exams address any substantial government interest; nor is there any evidence that even suggests that the City cannot avail itself of less restrictive means to promote its aims. Consumer protection laws and voluntary certification are but two of the numerous less restrictive alternatives to burdening the free exercise of speech. Under the First Amendment, the government simply cannot force people to pass a test, let alone two, before they can begin speaking.

A party seeking a preliminary injunction must establish four elements: (1) that plaintiffs will likely succeed on the merits; (2) that plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiffs' favor; and (4) that the granting of the injunction is in the public interest. *Winter v. Natural Resources Defense*

Council, Inc., 555 U.S. 7, 20 (2008); *see also Cantley v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 771 F.3d 201, 207 (4th Cir. 2014). Plaintiffs easily meet all of these requirements.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

All three Plaintiffs seek to earn a living by talking to the public about Charleston. The City bars them from telling their stories as tour guides because they have not passed the government's written and oral exams. But the government cannot suppress speech this way, nor can it act as a gatekeeper to public discussion. Accordingly, Plaintiffs demonstrate, in Part A, below, that they are likely to succeed on the merits of their First Amendment claim because the City's tour-guide-licensing law cannot survive strict scrutiny; in Part B, Plaintiffs show why the law also fails intermediate scrutiny.

A. Charleston's Tour-Guide-Licensing Regime Is an Unconstitutional Content-Based Restriction on Speech and Is Subject to Strict Scrutiny.

The City's licensing law singles out speech with particular content for unique burdens. It imposes those burdens on Plaintiffs—and every would-be tour guide in Charleston—out of a desire to protect the public from speech with purportedly undesirable content. Nothing could be more incompatible with the First Amendment.

Such content-based regulations of speech are subject to strict scrutiny unless they fall within the few narrowly defined exceptions to regular First Amendment analysis. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733–34 (2011). In this case, strict scrutiny applies because the law (1) regulates speech, (2) does so on the basis of its content, and (3) does not fall within any recognized exceptions.

1. The law regulates the speech of tour guides.

The application of strict scrutiny first demands that a 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). In Charleston, the tour-guide-licensing law regulates speech because the "conduct" triggering the regulations is *talking* to tourists.

The City's licensing law, on its face, targets expressive activity. The law is drawn to single out a class of people based on whether or not they are engaging in a particular type of speech: guided tours. A "tour guide" is defined as "any person who acts or offers to act as a guide for hire through any part of the districts." Charleston Code § 29-2. The licensing law applies whether one gets paid to talk about Charleston with a person on a tour or simply offers to do so. *See id*. § 29-58. It matters not whether a tour guide is talking while standing on her own two feet or while sitting inside a vehicle if "the primary purpose of riding in such vehicles is not transportation, but touring the historic areas of the city." *Id*. § 29-2 (definition of "tour guide"). A person becomes subject to the licensing law once a message is communicated, not when someone is moving from place to place.

The City's regulation of tour "escorts" demonstrates how the City's licensing law is regulating speech. The City does not define the term "tour escort" but mandates the use of an "escort" when tour groups exceed twenty people. *See id*. § 29-261(a). Unlike tour guides, tour escorts are not subject to the licensing law even though they work alongside tour guides and get paid to help tourists get from place to place. *Id*. Indeed, the line between tour guides (who talk about points of interest and must be licensed) and tour escorts (who do not talk about points of interest and need not be licensed), is drawn on the basis of their speech. Determining whether the licensing law gets triggered requires the following inquiry: Who is doing the talking and what are they talking about?

The City regulates the speech of tour guides even when operating under a temporary license. Not only does the law require the filing of a "script to be used by the temporary tour guide," but the "script must be approved for accuracy" by the City's tourism director (or her designee). *Id.* § 29-60(e). When the government requires approval of words and text, it is unmistakable that speech is the target.

If demanding that tour guides get a license does not regulate "speech," then "it is hard to imagine what does fall within that category." *Bartnicki*, 532 U.S. at 527. In the end, "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 of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002) (quoting *Thomas v. Collins*, 323 U.S. 516, 539–40) (1945)) (internal quotation marks omitted); *see also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988). All three Plaintiffs seek to earn a living as tour guides by talking to tourists about Charleston. It is precisely for this reason that they have run squarely into the City's licensing law.

2. The law is content based.

Strict scrutiny also has a second requirement: A law must regulate speech because of its *content*. In its last Term, the Supreme Court explained this inquiry in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Under *Reed*, a law can be deemed content based for either of two separate reasons. First, a law is content based if its application turns on the content of regulated speech. *Id.* at 2227. And, second, even if a law appears content neutral on its face, the law is *still* content based if its purpose is to influence the content of speech. *Id.* For the following reasons, strict scrutiny is required under *Reed*.

First, the law's application unquestionably turns on content. The City's tour-guide-licensing law applies to persons speaking during *tours*. Charleston Code § 29-58. That speech necessarily involves tour guides pointing out particular locations within Charleston and communicating information (either true or fictionalized) about those locations to persons "participat[ing] in sightseeing." *See id*. § 29-2 (definition of "tour or touring").[5] By licensing persons who provide tours on public right-of-ways[6]—but not when they engage in other forms of speech at those same public forums—the City has singled out a certain type of speech for special burdens. *See, e.g.*, *Cahaly v. LaRosa*, 796 F.3d 399, 405 (4th Cir. 2015) (applying *Reed* to find anti-robocall statute content based because it "applie[d] to calls with a consumer or political message" but not those "made for any other purpose"). Here, if a person falls within the law's requirements, it is due to the content of their speech.

For example, one must evaluate the content of what a tour "escort" is discussing in order to determine whether she must have a tour-guide license to talk. Indeed, the line dividing tour guides from tour escorts is not only *speech*, but actually speech with certain *content*. The City requires that all walking tours with over twenty people "be divided into more than one group," one accompanied by a tour guide and the other by a tour escort; the groups must "take different routes to the same destination" or "maintain sufficient distance" from each other. *See* Charleston Code § 29-261(a). If a tour escort talks with her group about why the City Code requires them to take a different route to reach their next destination, that is legal; but if a tour escort instead tells stories about various historical sites along the way to the next destination, that is illegal without a

[5] The City defines a "tour" as "the conducting of or the participation in sightseeing in the districts for hire or in combination with a request for donations." Charleston Code § 29-2 (definition of "tour or touring").

[6] Public streets are "quintessential traditional public fora." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 676 (1992); *see also Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) ("[S]peech in public areas is at its most protected on public sidewalks . . . .").

tour-guide license. *Compare* Charleston Code § 29-261(a) *with* § 29-58. In other words, it is the content of speech that dictates whether the licensing law applies.

The City also examines the content of speech before issuing its tour-guide licenses. For a permanent license, the City subjects would-be tour guides to an oral exam and requires them "to act as a guide for three (3) minutes" while discussing "various sites around the City." *See* Panju Decl. Ex. 3 (Tour Guide Examination Information); *see also* Charleston Code §§ 29-58, -59(b). To determine whether a would-be tour guide passes the oral exam, the government's testing officials must scrutinize the content of what she discussed. Charleston Code §§ 29-59(f), (h). Similarly, for a temporary license, the content of the "script to be used by the temporary tour guide" must be examined by government officials and "approved for accuracy." *Id*. § 29-60(e). Doing so entails reading the script and analyzing its content. Both requirements illuminate the straightforward conclusion that the City scrutinizes the content of a would-be tour guide's speech to determine whether or not she can begin speaking.

Second, the purpose of Charleston's licensing law is to influence the content of speech. This purpose is readily apparent from the City's own comments in the *Manual*. Potential tour guides are told that the "honor of introducing" visitors to Charleston "goes to a special few who . . . have mastered her most telling stories." Panju Decl. Ex. 1 (City of Charleston Tour Guide Training Manual at 3). The City tells tour guides that they "serve as the city's ambassadors" and that their "knowledge" is "representative" of the City. Panju Decl. Ex. 1 (City of Charleston Tour Guide Training Manual at 482). When it comes to tour guides, "it is the *city's goal* to provide accurate, factual and updated information to its visitors and residents." *Id*. (emphasis added). Clearly, the City is concerned about the content of speech: what stories have been mastered and what knowledge and information tour guides will share with Charleston's visitors.

Or, put another way, the City regulates tour guides because it is worried about what tour guides will say.

The City's purpose of influencing the content of tour guides' speech becomes obvious when one considers the mechanism it uses. All would-be guides must pass a 200-question written exam before they even qualify to take an oral exam. Both rounds of testing are "meant to test the applicant's knowledge of the city and its history," Charleston Code § 29-59(b), and are based on materials approved by the government, *id*. § 29-59(a). What possible justification could there be for requiring tour guides to take written and oral history exams *other than* "the city's goal [of] provid[ing] accurate, factual and updated information to [Charleston's] visitors and residents"? *See* Panju Decl. Ex. 1 (Charleston Tour Guide Training Manual at 482); *cf. Reed*, 135 S. Ct. at 2227 (noting that laws that "cannot be 'justified without reference to the content of the regulated speech[ ]' . . . must also satisfy strict scrutiny").

The effect of this licensing requirement is to create two classes of speakers. Licensees—people who have passed the City's test and who are therefore among its "special few" ambassadors authorized to talk as tour guides—may say anything they want to tour groups. Unlicensed individuals like Plaintiffs may not. And the City draws this distinction between these two groups precisely because it believes people in the first group will say *better things* (by the City's lights) than people in the second group. The Supreme Court has repeatedly warned against regulatory attempts to limit the universe of authorized speakers because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). For that reason, "laws favoring some speakers over others demand 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 just such a case.

The City's law is *triggered* by, *motivated* by, and *justified* by the content of an individual's speech. It has both the purpose and the effect of limiting the sources of information available to the public to those the City deems trustworthy. The government simply cannot be allowed to decide who is or is not qualified to speak. Under the First Amendment, that 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 approved "uses censorship to control thought"). The City's tour-guide-licensing regime is thus subject to strict scrutiny.

3. Tours do not fall within any exception to regular First Amendment doctrine.

Tours fall within no recognized exceptions to regular First Amendment doctrine. Courts must exercise extreme caution when recognizing categorical exceptions that call for diminished scrutiny, 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). And, as demonstrated below, none of the established exceptions to ordinary First Amendment analysis apply to tour guides.

Tours of Charleston do not occur within a government-created forum. Several cases depart from the application of strict scrutiny on the basis that government has greater latitude 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 does not apply here. The City regulates tour guides "through any part of the districts" including the "historic areas of the city," *see* Charleston Code § 29-2 (definition of "tour guide"); these streets and sidewalks are public spaces

and "quintessential traditional public fora." *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 676. And of all public fora, "speech in public areas is at its most protected on public sidewalks." *Schenck*, 519 U.S. at 377. Charleston is a living community, not a limited forum created by the government.

Tours are not commercial speech. Courts subject this category of speech only to intermediate scrutiny. *See e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995). But this exception applies only to "speech proposing a commercial transaction." *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980). In this case, the speech licensed by the City does not propose a commercial transaction; instead, it consists of stories about history and historical figures, points of interest, ghosts, pubs, movies, and other subject matter. That tour guides get paid for their speech is immaterial[7]: "[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). The City's tour-guide-licensing law does not regulate commercial speech.

Nor do tours involve speech subject to the Fourth Circuit's professional-speech doctrine. In the Fourth Circuit, courts have held that restrictions on speech may not be subject to strict scrutiny where the speakers in question (1) personally take on a client's "affairs," (2) claim to exercise "judgment" on their client's behalf, and (3) base that judgment on the client's

[7] Many iconic First Amendment cases have involved speech undergirded by a profit motive. *See generally United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995) (honoraria for speeches and articles); *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (book publishing); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (movie theaters); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspaper industry).

"individual needs and circumstances."[8] *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (quotation omitted); *see also Moore-King v. Cty. of Chesterfield*, 708 F.3d 560 (4th Cir. 2013) (applying professional-speech doctrine to personalized spiritual counseling).

As other courts of appeals have recognized, "[a]ssuming that the professional speech doctrine is valid, its application should be limited" to situations involving a true fiduciary relationship between speaker and client. *Serafine v. Branaman*, No. 14-51151, 2016 WL 129306, at *2 (5th Cir. Jan. 12, 2016). And here, tour guides do not come close to satisfying any of the three characteristics of the Fourth Circuit's professional-speech doctrine. First, tour guides do not take anyone's financial, medical, or legal affairs into their own hands. Second, tour guides do not purport to exercise judgment on behalf of anyone and never establish a fiduciary relationship with their audience. Third, tour guides tell stories and jokes to groups of people, and their speech is ordinarily not tailored to any individual's needs: They typically provide virtually identical information to each customer and repeat the same stories, none of which involve the individuals taking the tour. *Edwards v. District of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014). Tour guides are more like lecturers or standup comedians than doctors or lawyers.

Finally, no other category of unprotected speech would encompass tour-guide speech, either. Courts recognize a few remaining categories of unprotected speech that include obscenity, incitement, and fighting words, *see Brown*, 131 S. Ct. at 2734, but tour guides' speech fall into none of these. And courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472. Instead, this

[8] This exception to standard First Amendment analysis, while binding on this Court, is contrary to Supreme Court precedent, which subjects the regulation of specialized advice to the same strict scrutiny that applies to any other regulation of speech. *See Holder*, 561 U.S. at 26–28.

Court should apply strict scrutiny to the City's tour-guide-licensing law. It regulates speech, it does so on the basis of the speech's content, and no exceptions to standard First Amendment doctrine apply.

B. The Law Cannot Survive Any Potentially Applicable Level of Scrutiny.

The City's tour-guide-licensing law cannot survive strict scrutiny. Strict scrutiny is a "demanding standard"; regulations on the content of protected speech are presumptively invalid. *Brown*, 131 S. Ct. at 2738. It is the government's burden to prove that the law is justified by a compelling government interest and that it is narrowly drawn to serve that interest. *Id*. Those infrequent cases when government meets this burden involve weighty issues such as preserving the integrity of the judicial system. *See, e.g., Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015). This is not such a case. "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Here, the City can never meet this standard.

But even assuming strict scrutiny does not apply, the City's tour-guide-licensing law, at a minimum, requires intermediate scrutiny. And as discussed in Part I.B.2, below, there is no plausible argument under either strict scrutiny or intermediate scrutiny that the City's law is tailored to serve any sufficient government interest. Any argument to the contrary strikes at the heart of the very purpose of the First Amendment.

1. At a minimum, the law is subject to intermediate scrutiny.

The minimum applicable standard of review in this case is intermediate scrutiny.

Tour guides earn a living by speaking to others. They communicate stories and information. And even content-neutral laws that "single out" entities engaging 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"). There can be no question that the tour-guide-licensing law imposes serious burdens on people who want to speak as tour guides and that it results in some would-be guides refraining from speaking at all. *See supra* at 2–6. Any burdens on speech—even if they are perfectly content neutral and even if the government's motives in regulating are unrelated to speech (and, as discussed above, neither of these things is true of Charleston's law)—must survive at least intermediate scrutiny. This is because "[t]he government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience . . . . [B]y demanding a close fit between ends and means, [intermediate scrutiny] prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (quoting *Riley*, 487 U.S. at 795).

2. The law cannot survive under strict scrutiny or intermediate scrutiny.

The City's tour-guide-licensing law fails under either strict scrutiny or intermediate scrutiny. Although the levels of scrutiny differ, the form of analysis under either standard is basically the same: The City must put forth a sufficient interest for its licensing law and provide sufficient evidence to show that the law actually advances that interest. Both standards also require a close fit between the law's stated purpose and the means chosen. The only difference is the stringency of a court's examination of these factors: When applying strict scrutiny, the City's law must be "justified by a compelling government interest" and "narrowly drawn to serve that interest." *Brown*, 131 S. Ct. at 2738. And when applying intermediate scrutiny, the law must be "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at

2534 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). The City's tour-guide-licensing law fails under both.

The City has no compelling or significant interest in policing the qualifications of people who talk to visitors and residents about Charleston, including its history, points of interest, legends, or even ghosts. In the Supreme Court's extensive precedents discussing permissible regulation of First Amendment activity, there is no suggestion that the government may require a permit to speak in order to improve the *quality* of the speech. *See Watchtower Bible & Tract Soc'y*, 536 U.S. at 164–69 (striking down law forbidding any door-to-door advocacy without first obtaining a permit); *Thomas*, 323 U.S. at 539–40 (invalidating permit requirement for union recruitment speech); *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628–32 (1980) (summarizing cases). Allowing the City to license tour guides as a means to meet its "goal to provide accurate, factual and updated information to its visitors and residents"[9] would allow that same justification to support the mandatory licensing of radio hosts, comedians, or virtually any other speaker. Such a justification for licensing speakers would gut the First Amendment.

Even if one were to assume that government has a sufficient interest in the quality of tour guides' speech, the City's law is not narrowly tailored. Plaintiffs Billups, Warfield, and Nolan—like all tour guides—want to speak on an extensive range of subjects. But the City's licensing law regulates *all* speech by tour guides on the ground that *some* of this speech might create problems that its licensing regime might address. Put another way, by requiring two rounds of testing of *everyone* wishing to speak about broad topics like history, legends, or ghosts in

[9] Panju Decl. Ex. 1 (City of Charleston Tour Guide Training Manual at 482).

Charleston, the City's law lacks any nexus between a particular guide's speech and the particular knowledge required to pass the exams.

Nor is there any other interest that could justify Charleston's licensing law. Tour guides do not endanger the public when they speak. 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." *Edwards*, 755 F.3d at 1004. Even assuming that tour guides do pose a threat to the public, there is no connection between that possible harm (whatever it may be) and a requirement that tour guides pass a subject-matter test and an oral exam on Charleston's history, architecture, and points of interest (or, in the alternative, submit their scripts for approval in order to obtain a temporary license).

But even if there were a threat posed by tour guides, and even if that threat could actually be ameliorated by mandatory guide testing, Charleston's law would *still* fail intermediate scrutiny because there is no evidence that the government could not achieve its ends using a less-restrictive alternative. If the City wishes to protect consumers from unwittingly taking a tour with a guide who has not passed a written history test, it could address that concern with a voluntary-certification program. For example, both Philadelphia and Baltimore, two cities with well-known historic districts, have voluntary-certification programs for tour guides, under which guides who meet certain criteria are allowed to advertise themselves as "certified guides," and there is no evidence that their visitors or residents have suffered as a result. *See supra* at 4. Alternatively, if the City wants to make sure that tourists visiting Charleston hear the kinds of stories the government thinks are appropriate, it could hire its own tour guides, ensuring that an "official" version of history is available for interested visitors. Or, the City could offer government-sponsored education for guides to ensure voluntary training is available. Any of

these less-restrictive alternatives avoid the constitutionally unsound practice of allowing the government to pass judgment on speakers' qualifications before they can address their fellow citizens in a public forum.

Whatever justifications Charleston puts forth for its tour-guide-licensing law, this Court will undoubtedly be guided (to the extent it applies intermediate scrutiny) by two federal appellate decisions evaluating similar challenges to similar tour-guide laws, *Edwards*, 755 F.3d 996 and *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014). While the facts of each case are similar and while each court purported to apply intermediate scrutiny, their analysis could not be more different: In *Kagan*, the Fifth Circuit devoted only two pages of analysis to the constitutional question, concluding 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 it simply assumed that licensing, by its very nature, would sufficiently advance that interest. *Kagan*, 753 F.3d at 562. In stark contrast, the D.C. Circuit declined to follow the Fifth Circuit and struck down D.C.'s law after looking 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. The difference is plain: The Fifth Circuit took the government at its word, but the D.C. Circuit followed precedent and properly weighed evidence when applying First Amendment analysis.[10]

This Court should follow the same path the *Edwards* court followed. Evidence matters in First Amendment cases. The Supreme Court has squarely held that courts applying intermediate scrutiny under the First Amendment must consider things like the evidence supporting the

[10] The D.C. Circuit "decline[d] to follow [*Kagan*] . . . because the opinion either did not discuss, or gave cursory treatment to, significant legal issues." *Edwards*, 755 F.3d at n.15.

government's assertions, the unusualness of a challenged law, and the availability of less-restrictive alternatives. *McCullen*, 134 S. Ct. at 2535–39. All of these considerations were evaluated by the D.C. Circuit in *Edwards* and ignored by the Fifth Circuit in *Kagan*.[11] And the Fourth Circuit has already recognized that *McCullen* establishes the proper standard of review in intermediate-scrutiny cases in *Reynolds v. Middleton*, 779 F.3d 222, 228 (4th Cir. 2015). Relying on *McCullen*, the Fourth Circuit in *Reynolds* made clear that the government must "present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary." *Id*. at 229. Both the Supreme Court's decision in *McCullen* and the Fourth Circuit's decision in *Reynolds*, then, require this Court to reject the analysis in *Kagan* and instead follow the analysis in *Edwards.* And under the intermediate-scrutiny test articulated by *Edwards*, Charleston's law can fare no better than did the District of Columbia's.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY WITHOUT A PRELIMINARY INJUNCTION.

Plaintiffs easily meet the irreparable injury requirement for a preliminary injunction. Talking with fellow citizens about Charleston on city sidewalks is a classic exercise of free speech. That is exactly what Plaintiffs seek to do and are being barred from doing. *See* Compl. ¶¶ 31–81. As noted earlier, speech in public spaces "is at its most protected on public sidewalks." *Schenck*, 519 U.S. at 377. It has long been established that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Newsom ex rel. Newsome v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And as the Fourth Circuit has recognized, a

[11] The Supreme Court's decision in *McCullen* was handed down on June 26, 2014, nearly a month after the Fifth Circuit's June 2, 2014, decision in *Kagan*. *Kagan* is simply impossible to reconcile with the Supreme Court's analysis in *McCullen*.

plaintiff's claimed irreparable harm is "inseparably linked" to her claim of a violation of her First Amendment rights. *Id*. at 254. Here, Plaintiffs have been denied their right to free speech for at least six months, and counting.

Plaintiffs Kimberly Billups and Michael Warfield are prepared to begin earning a living as tour guides within a day or two if this Court issues a preliminary injunction. Compl. ¶¶ 6–7, 40, 57. Kimberly is not presently working. *Id*. ¶ 42. For months, she has been ready with a stack of business cards bearing the name of her own walking tour business, Charleston Belle Tours, a credit-card-processing account, and a replica period outfit all ready to go. *Id*. ¶ 34. Michael is also ready and has a job offer to tell ghost stories and provide pub tours in Charleston's historic district. *Id*. ¶ 48. Indeed, Kimberly and Michael have everything they need to work as tour guides except the government's permission to talk.

III. THE BALANCE OF HARDSHIPS WEIGHS IN PLAINTIFFS' FAVOR.

It is readily apparent that the injury to Plaintiffs Billups, Warfield, and Nolan far outweighs any possible harm to the City. Unless the City is enjoined from enforcing its tour-guide-licensing law, Billups, Warfield, and Nolan will continue facing the same choice they have been confronting: They can risk citations, fines, and arrest by the City for talking to tourists about Charleston, *see* Charleston Code §§ 1-16(a), 29-58, or they can definitely avoid these sanctions by continuing not to speak. Both the possibility of sanctions and the abstention from speech represent significant harms to the Plaintiffs. *See, e.g.*, *City of Lakewood*, 486 U.S. at 757–58 (self-censorship of speech caused by law treated as a harm). Additionally, Billups must also continue foregoing the opening of Charleston Belle Tours, Warfield cannot accept an offer of employment to lead ghost and pub tours, and Nolan must forgo supplementing his retirement

income by working as a tour guide. On the other hand, the City has no interest in enforcing an unconstitutional law.

IV. GRANTING AN INJUNCTION WILL NOT DISSERVE THE PUBLIC INTEREST.

A law drawn to single out speech based on its content only to saddle it with a set of regulatory burdens offends the very purpose of the First Amendment. It is clear that granting the preliminary injunction will not disserve the public interest. Curtailing constitutionally protected speech, which sits at the heart of our constitutional freedoms, cannot advance the public interest. *See ACLU v. Reno*, 217 F.3d 162, 180-81 (3rd Cir. 2000), *vacated on other grounds sub nom. Ashcroft v. ACLU*, 535 U.S. 564 (2002).

CONCLUSION

The City of Charleston's tour-guide-licensing law is blatantly unconstitutional. It fails strict scrutiny. It fails intermediate scrutiny. And it is currently preventing Plaintiffs from speaking to paying customers on the topics of their choice. The motion for preliminary injunction should be granted.

Dated this 2nd day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of February, 2016, a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF** was sent via overnight mail service to the following Defendants:

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