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

KIMBERLY BILLUPS, MICHAEL WARFIELD, and MICHAEL NOLAN, Plaintiffs, vs. CITY OF CHARLESTON, South Carolina, Defendant.	Civil Action No. 2:16-cv-00264-DCN **DEFENDANT'S POST-TRIAL MOTION AND SUPPORTING MEMORANDUM** *****Hearing Requested*****

Defendant, City of Charleston, South Carolina (the "City"), pursuant to Fed. R. Civ. P. 52(b), 59(e), and/or 60(b), respectively, and, on the grounds set forth below, hereby moves this Honorable Court (1) to amend its findings,[1] and/or make additional findings, and amend its judgment[2] to favor the City; (2) to otherwise alter or amend the judgement to favor the City; and/or (3) to otherwise grant the City relief from the judgement.

ARGUMENT

I. Most respectfully, the Decision is flawed, and by virtue of the Court's authority under Rules 52(b), 59(e), and/or 60(b)(5) or (6), it should be corrected accordingly:

A. The Decision misapplies the Fourth Circuit opinion in *Reynolds v. Middleton*.[3]

The Decision is based on the Court's view that *Reynolds* establishes an absolute evidentiary standard that necessarily strikes the licensing ordinance down as violative of the First

[1] The Court's "findings" refers to ECF No. 115, Findings of Fact and Conclusions of Law, filed August 3, 2018 (hereafter "the Decision").
[2] The "judgment" refers to ECF No. 116, Judgment in a Civil Action, entered August 6, 2018. Hereinafter, the Court's findings and judgment are referred to collectively as the "Decision."
[3] 779 F.3d 222 (4th Cir. 2015).

Amendment, unless the City produces evidence that it actually tried, or at least considered, less speech-restrictive alternatives.[4] The Decision, however, relies on a misapplication of *Reynolds*.

Before it rendered the Decision, the Court twice had occasion to analyze *Reynolds*: first in its order of July 1, 2016, denying Plaintiff's motion for a preliminary injunction and the City's motion to dismiss,[5] and a second time in its order of September 25, 2017, denying the parties' cross-motions for summary judgment.[6] Respectfully, the view of *Reynolds* espoused in these prior orders is irreconcilable with the view now taken in the Decision.[7]

[4] *See, e.g.*, The Decision, ECF No. 115 at 22 ("In the summary judgment order, the court established that the City has a 'significant interest' in protecting its tourism industry and its visitors. . . . The issue now becomes whether the licensing law materially advances and is narrowly tailored to serve those interests and whether it leaves ample alternative channels of communication. To answer this, the court is required to consider whether the City has provided "actual evidence" it did not forego readily available, less intrusive means of protecting those interests. It is forced to conclude that the City has failed to provide evidence to satisfy the evidentiary burden of 'prov[ing] that it actually tried other methods' as required by Reynolds . . . .") (emphasis in original); *id.* at 22 n.4 ("Unfortunately, Reynolds dictates the outcome in this case."); *id.* at 22–23 ("Because the City has failed to present any evidence that it ever actually 'tried' to solve the problem of harm caused to tourists and the tourism economy by unscrupulous tour guides through less intrusive, readily available methods as required by Reynolds, the court has no choice but to find that the licensing law fails the requirements of narrow tailoring.").

[5] ECF No. 27 (the "2016 Order").

[6] ECF No. 79 (the "2017 Order").

[7] The Court's findings include this footnote: "Curiously, the City failed to even mention this holding of Reynolds in its proposed order. Ignoring recent binding precedent does not make it go away. The City, like this court, is bound by Reynolds. Unfortunately, Reynolds dictates the outcome in this case." (The Decision, ECF No. 115 at 22 n. 4). The City, however, did not ignore *Reynolds* in its proposed order (See page 22 analyzing the *Reynolds* holding, and page 26-28 applying this Court's reasoning from its prior orders to hold that the proposed alternatives were not as effective as the City's licensing regime). Respectfully, the Court's criticism of the City's treatment of *Reynolds* is unwarranted; especially given the Court's failure to explain previously what *Reynolds* requires from the City. The City therefore asks that the Court re-examine the Decision in this regard and remove or clarify this point, so the City's argument is fairly represented.

Without explanation for the change in its application of *Reynolds*, the Decision flips the Court's prior rulings on what the City must show to survive intermediate scrutiny.[8] The Decision cites no newly issued authority for the change.[9] The Court's rulings in its prior Orders in this case show the flaws in the Decision. The City's Motion points the Court to its own prior analysis in this case—which, the City submits, applies with no less force now than it did before.[10]

1. **A proposed less restrictive option does not constitute an "alternative" if it is not readily available and/or would not be *at least as effective* as the licensing ordinance.**

This Court has consistently recognized throughout this litigation that the less restrictive alternative inquiry from *Reynolds* presupposes that the proposed alternatives "would be at least as effective in achieving the legitimate purpose that the [challenged regulation] was enacted to serve."

From the 2016 Order

[8] In addition, prior to trial the Court's pretrial conference agenda outlined the questions for trial for intermediate scrutiny. The pre-trial agenda made no mention that the City must present evidence that it "actually tried" or considered the Plaintiffs' proposed alternatives. The Court's pretrial conference agenda outlined intermediate scrutiny as follows: "Having determined that the licensing scheme is a content-neutral scheme, court must determine if the licensing scheme can meet requirements of intermediate scrutiny. Is [sic] law narrowly tailored? Look at whether the scheme burdens substantially more speech than necessary. The licensing scheme need not be the 'least restrictive or least intrusive means" of serving the government's interests, but it must not regulate speech in such a manner that "a substantial portion of the burden on speech does not serve to advance its goals.'" (See Pretrial Conference Agenda, attached as Exhibit A). Both parties agreed at the pretrial conference that the Court's agenda accurately outlined the issues for the trial. The Decision, however, does not directly address whether the licensing law creates a burden on tour guide speech that is substantially greater than necessary to advance the City's goal of ensuring all tour guides have the base level of knowledge necessary to provide the services tourists pay for.

[9] The Decision cites no post-*Reynolds* case to explain the Court's changed position.

[10] The substance of the evidence presented at trial is stronger for the City than the record the Court reviewed for its prior Orders. In every instance where the 2017 Order finds there is evidence from which a reasonable fact finder could find in the City's favor, the trial record contains that evidence and often additional supporting evidence.

> The Fourth Circuit recently examined how a court must apply the intermediate scrutiny analysis in Reynolds . . . . The Reynolds court . . . f[ou]nd that McCullen[v. Coakley, 134 S.Ct. 2518 (2014)] requires "the government to present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary; argument unsupported by the evidence will not suffice to carry the government's burden." Id. at 229 . . . .[11]
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> ***The court . . . rejects any suggestion that the government must prove that it attempted to implement, or even considered, every possible less restrictive alternative a plaintiff or court might imagine.*** . . . First, such a requirement would be in clear tension with the Supreme Court's repeated insistence that intermediate scrutiny does not require "'the least restrictive or least intrusive means of' serving the government's interests." McCullen, 134 S. Ct. at 2535 (quoting Ward[v. Rock Against Racism, 491 U.S. 781, 798 (1989)].[12]
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> ***Importantly, the less restrictive alternative inquiry presupposes that the proposed alternatives "would be at least as effective in achieving the legitimate purpose that the [challenged regulation] was enacted to serve."*** Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 190 (4th Cir. 2013) (quoting Reno v. ACLU, 521 U.S. 844, 874 (1997)). ***To the extent a particular alternative fails this test, the government is under no obligation to present evidence that it actually examined or attempted to implement that alternative.*** See id. (affirming denial of preliminary injunction where "the existing evidence was altogether inadequate to demonstrate [the efficacy of the] less restrictive alternatives proposed by [plaintiff]"). If plaintiffs could prevail by simply identifying some speculative less restrictive alternative, regardless of whether that alternative would actually work, the First Amendment would hardly allow for any regulation at all. [13]
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[11] 2016 Order, ECF No. 27 at 22–23.
[12] 2016 Order, ECF No. 27 at 32–33 (emphasis added).
[13] 2016 Order, ECF No. 27 at 34–35 (emphasis added).

> Taken altogether, the McCullen Court's analysis indicates that while the government must certainly demonstrate that any proposed less restrictive measures were inadequate to advance its interests, ***this does not necessarily require evidence that the government actually implemented or specifically evaluated such alternatives. Instead, the analysis may be guided by whether the alternative regulation would cover the problematic activity,*** see McCullen, 134 S. Ct. at 2538 (analyzing provisions of existing local ordinances and laws of other jurisdictions), ***and whether enforcement of such alternatives is likely to be practicable***. See id. at 2540 (finding that problems were not so widespread, difficult to detect, or difficult to prosecute that enforcement through more specific regulations would be impracticable).[14]
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> ***While the record does not show that the City gave any consideration to the less-restrictive alternatives proposed by plaintiffs, questions remain as to whether such proposals would protect the City's interests as well as the licensing requirement.***[15]
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> From the 2017 Order
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> Plaintiffs last argue that ***the City simply has not provided any evidence that it actually attempted to address its concerns using any alternative, less-restrictive means. Plaintiffs appear to be correct in this assertion. However, this does not render the licensing scheme unconstitutional.***[16] As the court explained in its 2016 Order, the City must show that "it did not forego readily available, less intrusive means of protecting those interests." 2016 Order at 31. But the City is not required to show that it "tried or considered every less burdensome alternative." Bruni, 2016 WL 3083776, at *12 (emphasis in original).
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> Plaintiffs have highlighted several possible alternatives [to the licensing ordinance] . . . . ***Of course, the available alternatives requirement implicitly assumes that the alternatives would actually work.***[17]

[14] 2016 Order, ECF No. 27 at 34–35 (emphasis added).
[15] 2016 Order, ECF No. 27 at 43 (emphasis added).
[16] The Court's conclusion in the 2017 Order is inexplicably and diametrically opposed to that underlying the Decision.
[17] 2017 Order, ECF No. 79 at 26 (emphasis added). Here again the City is compelled to respectfully point out that this view is plainly at odds with that expressed in the Decision.

This Court's prior Orders recognize that an alleged less restrictive option is not a readily available alternative if it is not as effective at achieving the government's purpose. The reason this case proceeded through discovery and past summary judgment was the Court's recognition that the City was "under no obligation to present evidence that it actually examined or attempted to implement" Plaintiffs' alleged alternatives because they were not as effective.[18] Given the Court's reluctance to be a "black-robed ruler overriding citizens choices",[19] the Court's sound logic in its prior Orders should not be abandoned at this late stage of the case. Reading *Reynolds* to mean that the government must first try an "alternative" that would not fully address the government's concern or that was impractical to enforce will lead to absurd results.[20]

This reading of *Reynolds* is even more unsound when it is applied to successful thirty plus year old regulations.[21] The First Amendment surely does not strike down an otherwise narrowly tailored regulation simply because when it was enacted decades prior to a court challenge the legislature did not first try or consider other alternatives – especially when those alternatives are impractical and/or less effective. Simply put, the Court had it right when it held

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Compare, the Decision, ECF No. 115 at 27–28 ("But the City presented no evidence that it had ever actually tried to use the deceptive solicitation ordinance to combat complaints from tourists. This is what Reynolds demands, not a post-hoc explanation for why an alternative would be impractical.").

[18] 2016 Order, ECF No. 27 at 34.

[19] The Decision, ECF No. 115 at 32, n. 10.

[20] Indeed, the list of regulations that burden speech that could be struck down under this reading of *Reynolds* is startling. Consider whether the State of South Carolina "actually tried" less restrictive options before requiring a license for registered dieticians, nurses, doctors, lawyers, and other occupations that involve speech – many of which are much more burdensome regulations on speech than the City's licensing law here. The Decision's view of *Reynolds* would require the Court to also strike down these licenses if the government did not "actually try" less restrictive alternatives first.

[21] The Decision, ECF No. 115 at 23, n. 5 ("Of course, almost all of the First Amendment jurisprudence that is applicable in this case post-dates the City's first Tourism Management Plan. Thus, the court cannot fault the City for not "trying" alternatives since the state of the law in 1983 did not require it do so.").

that intermediate scrutiny does not require governments to "actually try" or even consider less restrictive options that will not be as effective at achieving the governments purpose.[22]

2. The unrefuted evidence at trial shows Plaintiffs' proposed less restrictive alternatives were not both readily available to the City and at least as effective in achieving the City's purpose.

The evidence throughout this litigation has shown that the Plaintiffs' proposed alternatives would be impractical to enforce against tour guides and/or would not be as effective in achieving the City's purpose.

From the 2016 Order

> Plaintiffs . . . complain that the City has failed to present evidence that it considered less-restrictive alternatives. . . . The court agrees that the City has failed to present any evidence that it took specific efforts to examine any such alternatives. ***However, the court remains unconvinced that the plaintiffs' proposed measures would adequately protect the City's interests***.[23]

From the 2017 Order

> ***The City has presented evidence that each of plaintiffs' alternative proposals would be either impracticable or less effective than the current licensing scheme***.[24]

The Court's Decision likewise acknowledges the City submitted evidence at trial to show the Plaintiffs' proposed alternatives were less effective and impractical to enforce. "Admittedly, the ***City presented plentiful testimony during the bench trial about why the City feels that alternatives would not be as effective as the licensing law.***"[25]

a. The City's evidence is not a post hoc explanation.

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[22] The Supreme Court has held that intermediate scrutiny does not require "'the least restrictive or least intrusive means of' serving the government's interests." *McCullen*, 134 S. Ct. at 2535 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).
[23] 2016 Order, ECF No. 27 at 41–42 (emphasis added).
[24] 2017 Order, ECF No. 79 at 26 (emphasis added).
[25] The Decision, ECF No. 115 at 26 (emphasis added).

The Decision incorrectly characterizes the evidence the City presented at trial as "a post-hoc explanation for why an alternative would be impractical."[26] The Court previously cited the same reasoning in its prior orders with no mention of a post hoc concern: "The City has presented evidence that each of plaintiff's alternative proposals ***would be either impracticable or less effective*** than the current licensing scheme."[27]

The City had no obligation to try or consider the proposed alternatives because they were not readily available and/or as effective as the City's licensing regime. If an alternative is impractical to enforce, it is not ***readily available*** to the City. Moreover, the evidence shows the proposed alternatives are ***not as effective*** in achieving the City's legitimate purpose. *Reynolds* requires only that the City "demonstrate that [such] alternative measures . . . would ***fail to achieve the government's interests***, not simply that the chosen route is easier."[28] The City did so at trial. The ***unrefuted evidence*** at trial from three separate witnesses was that the City has ***"no other way"*** to achieve its goal of ensuring all tour guides had baseline knowledge without a mandatory licensing regime.[29] Plaintiffs offered no evidence to refute this testimony. For that reason, the City had no obligation to present evidence that it actually tried or even considered Plaintiffs' proposed alternatives.

The evidence at trial shows that each of Plaintiffs' proposed alternatives are impractical to enforce and/or less effective than the City's licensing regime.

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[26] *Id.* at 28.
[27] 2017 Order, ECF No. 79 at 26. (emphasis added).
[28] 779 F.3d at 232 (emphasis added).
[29] Former Mayor Riley, who the Court identifies as credible and qualified to testify on the City's tourism industry, testified there was "no other way" to ensure tour guides had basis knowledge. (Tr. 118:1-4). Mrs. Banike testified that she could not "think of ***any way except for a mandatory licensing exam***" to ensure that all tour guides had the basic knowledge to provide a competent service for paying customers." (Tr. 566:4-8). Plaintiffs' own witness, Paula Reynolds, likewise conceded that there is no alternative to mandatory licensing to ensure that all tour guides have a base level of knowledge. (Tr. p 179-180).

b. Voluntary Licensing

The evidence has consistently shown voluntary licensing is not as effective as a mandatory licensing scheme.

From the 2016 Order

> Plaintiffs also suggest the City adopt a voluntary licensing program, but note only two other cities where such programs exist, and in both instances, the programs are run by private organizations. . . . To the extent plaintiffs suggest the City rely on a private organization to establish a voluntary certification program, the court considers such a suggestion indistinguishable from reliance on "market forces." To the extent plaintiffs suggest that the City establish its own voluntary certification program, the record contains no indication that any other jurisdictions have adopted this approach, much less jurisdictions with similar tourism markets. As set forth above, the court does not believe that the City was required to identify and examine every possible method of addressing its concerns before implementing the licensing regime. Ward, 491 U.S. at 797 (recognizing that narrow tailoring analysis does not require "sifting through all the available or imagined alternative means of [achieving the desired end]") . . . . Consequently, the court finds that the use of privately run voluntary certification programs in two other cities does not clearly establish such programs as "readily available," adequate alternatives.[30]

From the 2017 Order

> Esther Banike, a longtime tour guide and Executive Secretary of the World Federation Tourist Guide Associations, who testified that voluntary certification programs are less effective than mandatory exams because, under a voluntary scheme, not all tour guides are held to the same standard. . . . With respect to plaintiffs' suggestion that the City operate or hire its own tour company, the City has presented evidence that Savannah, Georgia does not actually utilize this approach, . . . and even if they did, the court is not convinced that one municipality's (sic) adoption of an alternative would preclude a reasonable trier of fact from concluding that alternative was not "readily available."

[30] 2016 Order, ECF No. 27 at 41–42.

The evidence at trial was even stronger. The trial record establishes that a voluntary licensing scheme will not be as effective as the City's mandatory licensing regulations. Plaintiffs' witness Paula Reynolds concedes that there is no alternative to mandatory licensing to ensure that all tour guides have a base level of knowledge.[31] Daniel Riccio, a former Charleston police officer, testified that a voluntary program would be less effective because bad actors would be the least likely to enroll in a voluntary program.[32] Mr. Ricco further testified that in his experience those who are likely to attempt to swindle tourists are looking for a "quick buck" and would not go to the trouble of completing a voluntary program.[33]

Executive Vice President of the WFTGA and long-time tour guide, Esther Banike testified that voluntary certification programs are less effective than mandatory exams because, under a voluntary scheme, not all tour guides are held to the same standard.[34] Ms. Banike further testified that the only way to be assured that all of the guides have basic foundation knowledge was a mandatory exam.[35]

The Decision found "it a bit ironic that Banike asserts this position in light of the fact that her hometown Chicago has a voluntary certification program and a 'booming' tourist economy."[36] Respectfully, this view of Ms. Banike's testimony is unfair.

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[31] Tr. p 179-180.
[32] Trial Tr. at 263-264.
[33] Trial Tr. at 263-264. Mayor Riley likewise testified that a voluntary program would not be effective to advance the City's interests. Trial Tr. at 136.
[34] Trial Tr. at 564, 566. Former mayor Riley also testified a voluntary certification program could not serve the same goal as the City's licensing exam. Trial Tr. at 136.
[35] Trial Tr. at 563, 566 (Ms. Banike's testimony was that she could not 'think of any way except for a mandatory licensing exam' to ensure that all tour guides had the basic knowledge to provide a competent service for paying customers, and that that "[a] voluntary certification program would not . . . achieve this goal.")
[36] The Decision, ECF No. 115 at 29 at n.9 (citing Tr. 537:15–18, 572:16–18.)

First off, as for a ***voluntary*** certification program not achieving the goal of ***ensuring*** that ***all*** tour guides have the base-level knowledge to provide a competent service for paying customers, her logic is unassailable. By definition, a ***voluntary*** program offers no such ***assurance.*** Ms. Banike testified that Chicago's voluntary certification only reaches 25% to 30% of the tour guides.[37] Thus, the evidence shows that a voluntary certification program leaves 70% to 75% of tour guides completely unregulated. The record establishes that a voluntary licensing program would not be as effective as the City's mandatory licensing scheme.

And as for her testimony about Chicago's "'booming' tourist economy,"[38] here is what she actually said:

> Q. How would you describe the City of Chicago's tourism economy?
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> A. Booming right now.
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> Q. It's not going down the tubes?
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> A. No. The mayor put a mandate out there, get it up to over 50 million people, and we exceeded that. ***But probably because of conventions and meetings***.[39]

Ms. Banike attributed the booming Chicago tourism economy to a factor unrelated to the presence or absence of a mandatory licensing exam: Chicago's draw as a to business hub for conventions and meetings—not the draw of its history and historic sites like Charleston. A fair reading of her testimony shows that she drew a distinction between strong tourism in Charleston,

[37] Tr. 541:2-11.
[38] *Id.*
[39] Tr. 572:16–22.

which is more susceptible to tour guides performance, and cities like Chicago that draw visitors in large part due to their business attractions.[40]

Finally, the Decision incorrectly relies on privately run voluntary certification programs in Baltimore and Chicago.[41] The Decision fails to recognize the importance of the fact that these programs are run by private entities.[42] Plaintiffs submitted no evidence at trial that other *cities* have instituted government run voluntary certification of tour guides. Plaintiffs also failed to submit evidence showing how Baltimore, Chicago or others are "similarly situated cities, in terms of size and tourism".[43] In fact, the evidence at trial was unrefuted that no other city is similarly situated to Charleston in these respects.[44] The Decision also fails to acknowledge that

[40] Ms. Banike testified that certain locales attract unqualified guides, specifically: "historical significance,", "beautiful architecture," "affluent tourists", and "great weather". Tr. 557:1-558:6. The Court's findings have taken judicial notice that Charleston possesses all of these attractions. The Decision, ECF No. 115, p. 19, para. 4.

[41] The Decision, ECF No. 115, p. 29-30.

[42] The Court has previously found this important. 2016 Order, ECF No. 27 at 41–42 ("To the extent plaintiffs suggest the City rely on a private organization to establish a voluntary certification program, the court considers such a suggestion indistinguishable from reliance on "market forces." To the extent plaintiffs suggest that the City establish its own voluntary certification program, the record contains no indication that any other jurisdictions have adopted this approach, much less jurisdictions with similar tourism markets").

[43] The Decision, ECF No. 115, p. 29 (stating without citation to the record for support: "But there are certainly similarly situated cities, in terms of size and tourism, and it is to these cities that [sic] Court now turns."). The Court has previously stated that for other cities regulations to be relevant actual evidence is required that shows the similarities. 2016 Order, ECF 27 at 40-41, n. 23, quoting *Edwards*, 755 F.3d at 1004 ("[A]n indiscriminate survey of the laws of other jurisdictions without marshaling any evidence about why those laws were enacted and how the regulations are enforced is not sufficient.") (emphasis in original).

[44] Helen Hill testified that there was no city in the United States with a tourism industry that was "substantially similar" to Charleston's. (Tr. 468:22-469:3). Former Mayor Riley likewise testified that there was no City similarly situated to Charleston. Trial Tr. at 147-149 ("There's no city [that] has the scale of Charleston, the intimacy of Charleston, the beauty of Charleston, the historic preservation goals, requirements of Charleston, the history of Charleston the diversity of Charleston, the delicacy of it, there is no other city in America that has it"). Plaintiffs offered no refuting evidence on this point.

three cities in South Carolina alone have tour guide licensing regimes.[45] Moreover, other cities throughout the country such as New Orleans, Williamsburg, New York, and others likewise have mandatory tour guide licensing regulations. Thus, the Decision's analysis regarding voluntary certification as a readily available and an effective alternative is flawed.

c. Deceptive Solicitation

The evidence has also shown throughout this litigation that enforcement of the City's deceptive solicitation ordinance against tour guides is impractical and not as effective as a mandatory licensing scheme.

From the 2016 Order

> [T]here is reason to think using available consumer protection laws would be ineffective, since the entire basis of a "fake tour guide" scam is that unqualified tour guides are indistinguishable from other tour guides, and therefore, difficult to detect. McCullen, 134 S. Ct. at 2540 (distinguishing Burson, where use of targeted prosecutions would have been ineffective because the problematic activities were "difficult to detect"). In light of these considerations, the court finds the "existing evidence [] altogether inadequate to demonstrate that less restrictive alternatives proposed by [plaintiffs] 'would be at least as effective in achieving the legitimate purpose that the [licensing regime] was enacted to serve." Centro Tepeyac, 722 F.3d at 190 (quoting Reno v. ACLU, 521 U.S. at 874).[46]

From the 2017 Order

> The evidence also fails to conclusively establish whether the City could accomplish its goals through enforcement of fraudulent solicitation statutes. It is questionable whether the City's fraudulent solicitation statute, which prohibits the making of "deceptive or misleading oral or written statement[s] or representation[s]" and "misrepresent[ing] the nature of [a] products [,]" Charleston Code § 21-232(a)–(b), covers all of the activity the City is concerned about—particularly, tour guides who are simply unknowledgeable, but not necessarily fraudulent. Even if the City

[45] Beaufort City Code § 7-11, et. seq.; Aiken City Code §§ 46-148; 255.
[46] 2016 Order, ECF No. 27 at 42.

> could enact a statute that covered the problematic activity, the City has presented evidence from Daniel Riccio, a former Charleston police officer, who avers that, in his experience, "tourist[s] who are victimized while traveling . . . are unlikely to pursue prosecution of the person who harmed them." . . . Plaintiffs have presented evidence that the city of Philadelphia, Pennsylvania utilizes this method, . . . but again, one city's decision to adopt an alternative approach is hardly conclusive evidence of the approach's viability.[47]

The trial record strengthens the Court's points from its prior Orders. Importantly, the City's deceptive solicitation statute, which prohibits the making of "deceptive or misleading oral or written statement[s] or representation[s]" and "misrepresent[ing] the nature of [a] products [,]" Charleston Code § 21-232(a)–(b), ***does not cover all of the activity the City is concerned about—particularly, tour guides who are simply unknowledgeable, but not necessarily fraudulent***. The deceptive solicitation ordinance also fails to achieve the City's purpose because it is a reactive measure that requires a victim to be harmed before any action can be taken, as compared to a preventative measure like the licensing regime.[48] Moreover, the City's deceptive solicitation ordinance was not in place for the City to try as an alternative at the time the City enacted the tour guide licensing ordinance

In addition, the City presented evidence from Daniel Riccio, a former Charleston police officer, who testified that the deceptive solicitation ordinance would be difficult to enforce against tour guides.[49] He also testified that in his experience, tourists who are victimized while traveling are reluctant to return to the City to pursue prosecution.[50] Former Mayor Riley

[47] 2017 Order, ECF No. 79 at 26–27 (emphasis added).
[48] Tr. at 263 (Dan Riccio testified that the City's licensing regime is a proactive measure to prevent harm from occurring).
[49] Tr. at 259-260. Mr. Riccio further testified that enforcement would be impractical because it would require the City to monitor the sales pitch and the tours of tour guides to determine if there was a violation. Trial Tr. at 266.
[50] Trial Tr. at 262, 264.

likewise testified that the City's deceptive solicitation ordinance would not be effective against tour guides because of the smaller amount of money involved as compared to the victims of fraudulent time share sales.[51] Former Mayor Riley further testified that it would be necessary for tourists to already be harmed for the City to enforce the deceptive solicitation ordinance – the tourist must go on the tour with the unqualified or unscrupulous guide before they know they have received a poor quality tour and been harmed.[52] Plaintiffs offered no evidence to refute these points.

The Decision states that the City provided no evidence why its tourism enforcement officers "could not also police unscrupulous tour guides."[53] The Decision fails to recognize that such enforcement would require officers to monitor a tour guide's sales pitch to her customers and subsequently monitor her speech during the tour to determine if the guide provided what was promised. Such a speech monitoring program would constitute a more substantial burden on tour guide speech than the City's qualification exam, and would fly in the face of the First Amendment. Thus, the record shows enforcement of the deceptive solicitation ordinance against tour guides is not a practical or effective option for the City.

d. Business license

The proposed alternative of simply revoking business licenses from unscrupulous or unqualified guides was not even addressed by the Court in its prior orders given it is clearly not as effective as the City's licensing regime. The City presented evidence at trial that this option would not be effective to address the City's purpose. Mr. Riccio testified that revoking a business license would not be an effective alternative because it would be easy to establish a new

[51] Trial Tr. at 140-141.
[52] Trial Tr. at 141-142.
[53] The Decision, ECF No. 115 at 27, n. 8.

entity and obtain a new business license.[54] Revoking a business license thus does not prevent the harm from occurring in the first place because it is reactive rather than preventative, and it does not prevent harm from reoccurring in the future because a new business license is easy to obtain. Plaintiff's offered no evidence at trial to counter this evidence.

3. The Decision does not account for the fact that "the licensing scheme imposes only a modest burden on speech makes it highly unlikely that the alternatives would burden "substantially less speech."[55]

The Court's previous Orders recognize that even if Plaintiffs' proposed alternatives were as effective, the City was not required to consider those alternatives because they did not burden "substantially less speech" than the City's licensing ordinance.

From the 2016 Order

> ***Even if these alternatives were effective, the fact that the licensing scheme imposes only a modest burden on speech makes it highly unlikely that the alternatives would burden "substantially less speech."*** McCullen, 134 S. Ct. at 2540 (emphasis added).[56]

From the 2017 Order

> ***Finally, even if some of these alternative methods would be just as effective as the City's current licensing scheme, it seems very unlikely that any of these alternatives would burden "substantially" less speech than the current law, given that the current law burdens very little speech to begin with.***.[57]

The Court's Decision failed to apply this important principle. In fact, the Court's Decision did not find that the Plaintiffs' proposed alternatives burdened "substantially less speech" than the City's licensing scheme – this key point was simply not addressed.

[54] Trial Tr. at 264.
[55] 2016 Order, ECF No. 27 at 42–43 (emphasis added).
[56] 2016 Order, ECF No. 27 at 42–43 (emphasis added).
[57] 2017 Order, ECF No. 79 at 26–27 (emphasis added).

Moreover, the Court did not find that the licensing scheme imposed a significant burden on speech. Rather the Court's Decision only recognized that the City's licensing scheme imposed "real" burdens.[58] The mere finding that some burden on speech exists, does not make Plaintiffs' proposed alternatives "substantially less" burdensome on speech that the City's licensing regime. Thus, based on this point alone the Court should amend its Decision in favor of the City.

4. The Decision does not account for the fact that "[t]he matters at issue in this case are simply not of the same character" as those at issue in *Reynolds* and *McCullen*.

The Court recognizes in prior Orders that the City's licensing ordinance imposes a much slighter burden and regulates much narrower and different form of speech than the regulations at issue in *Reynolds* and *McCullen*.

From the 2016 Order

> Still, on the record before it, the court does not find that plaintiffs are likely to prevail at trial, especially under the heightened standard applicable here. The court first observes that the licensing regime burdens a rather small range of speech—namely, speech given in connection with hired tour guide services. Charleston City Code § 29-58. ***This is not a case like McCullen or Reynolds, where speakers were absolutely prohibited from engaging in certain forms of speech in certain locations. . . . Unlicensed individuals may engage in tour guide speech as much as they desire, so long they do not charge for it. Moreover, paid tour guide speech is not a form of expression that "[has] historically been [] closely associated with the transmission of ideas."*** McCullen, 134 S. Ct. at 2536. Thus, burdening such speech only marginally impedes on "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broad. Sys., 512 U.S. at 641.[59]

[58] The Decision, ECF No. 115 at 32.
[59] 2016 Order, ECF No. 27 at 36–38.

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Thus, at this stage of the litigation, the record suggests that the City's licensing regime imposes only a minor burden on speech. This fact must be considered in determining whether the City has 'burden[ed] substantially more speech than is necessary to further the government's legitimate interests.'" McCullen, 134 S. Ct. at 2535 (quoting Ward, 491 U.S. at 799) . . . .[60]

From the 2017 Order

The only issue that plaintiffs can seriously dispute under the intermediate scrutiny analysis is whether the licensing law burdens substantially more speech than necessary. The court has already held that "governments have a legitimate and substantial interest in preventing fraudulent or misleading commercial operations and protecting their industries." 2016 Order at 25 . . . . It is also difficult to see how plaintiffs can argue that the licensing scheme does not advance the City's interest. It seems clear that forcing prospective tour guides to learn the information in the Manual would help ensure that the city's tour guides are knowledgeable enough to provide the services that their customers expect.

Thus, the only real argument is whether the City's regulation "burden[s] substantially more speech than is necessary to further the government's legitimate interests." Turner Broad. Sys., 512 U.S. at 662 (quoting Ward, 491 U.S. at 799). ***As an initial matter, the court is not convinced that the City's licensing regime creates a particularly significant burden on speech at all, much less a burden that substantially exceeds that which is necessary to further the City's legitimate interests. As the court observed in the 2016 Order, "the licensing regime burdens a rather small range of speech—namely, speech given in connection with hired tour guide services."*** Charleston City Code § 29–58. The City's licensing laws ***do not prevent*** any person from discussing any issue in any location. Instead, ***they prevent unlicensed persons from conducting certain forms of speech in specific parts of the city under very specific conditions***—namely, for payment. The court has already examined the ***contrast between this case and cases like McCullen and Reynolds,*** where

[60] 2016 Order, ECF No. 27 at 38–39.

speakers were absolutely prohibited from engaging in certain forms of speech in certain locations.[61]

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Plaintiffs point out that "people—now and in the past—are remaining silent rather than speaking solely because of the licensing requirement," but this argument is simply not responsive to the issue. This case is well past the question of whether some speech is burdened; *the question now is whether a substantial amount of speech is unnecessarily burdened.* Discovery has closed and plaintiffs have identified four people whose speech has been burdened—themselves and a tour guide named Paula Reynolds who leads multi-city tours through Charleston and is unable to conduct the Charleston portion of the tour herself. . . . When this number is compared to the number of prospective tour guides who pass the exam every year, ***a reasonable trier of fact could find that the City's licensing regime simply does not place a very significant burden on speech.***

Furthermore, the court remains convinced that "paid tour guide speech is not a form of expression that '[has] historically been [] closely associated with the transmission of ideas,'" McCullen, 134 S. Ct. at 2536, and thus, the City's licensing laws do not present a particularly grave threat to principles underlying the First Amendment. Plaintiffs disagree and argue that paid tour guide speech "is exactly the kind of speech the Supreme Court referred to in McCullen as 'closely associated with the transmission of ideas'—it is 'normal conversation . . . on a public sidewalk.'" . . . ***But the very fact that plaintiffs wish to be paid is one of the many reasons that their "conversations" with their customers cannot seriously be considered "normal"—normally, people do not pay for conversation.*** There may some forms of paid speech that are also closely associated with the transmission of ideas—newspapers, speeches, books, movies, etc.—***but plaintiffs cannot compare their paid tours with the conversations at issue in McCullen. . . . The matters at issue in this case are simply not of the same character.*** Thus, the court concludes that ***the substantial burden inquiry must be framed by the initial observation that the City's regulations impose a rather small burden on a form of speech that is not "closely associated with the transmission of ideas."*** McCullen, 134 S. Ct. at 2536.

[61] 2017 Order, ECF No. 79 at 21–23 (emphasis in original via underline) (emphasis added via italics) (footnote omitted).

> ***The City has also provided evidence that the magnitude of speech it unnecessarily burdens is very limited*** because most of the tours in Charleston focus on the subjects discussed in the Manual and continuing education classes. . . . Plaintiffs have highlighted the existence of certain "nonhistorical" tours, such as ghost and pub tours, but there is testimony that even these tours draw on the city's history. . . . To the extent the City's licensing scheme burdens prospective tour guides who wish to give tours that draw on the material tested by written examination, those burdens are *necessary* for the scheme to advance the City's interest in protecting consumers. Concededly, the licensing scheme may place burdens on prospective tour guides who wish to give tours that do not draw on information addressed in the Manual, ***but a reasonable trier of fact could find that very few prospective tour guides fall into this category.***[62]

No evidence at trial changes the Court's prior conclusion that the City's licensing ordinance is of a different nature than the regulations at issue in *Reynolds* and *McCullen*. The Court's Decision pointedly branded "this case [a]s an example of the First Amendment run amok" and, in expressing its frustration at being (in its view) handcuffed by the existing legal landscape, "propos[ed] that courts should be able to consider the type of speech in determining the level of protection that it deserves . . . ."[63] The City is, of course, in full agreement with the Court in "question[ing] whether the paid tour guide speech that is at issue in this case is the type of speech that the First Amendment is intended to protect."[64] However, the City is far more

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[62] 2017 Order, ECF No. 79 at 23–26 (emphasis in original via underline) (emphasis added via italics) (footnote omitted).

[63] The Decision, ECF No. 115 at 32 n. 10.

[64] *Id.* Indeed, the City does not concede that paid tour guide speech is a type of speech that the First Amendment is intended to protect. It is certainly true that some form of speech or communication is necessarily involved in being a paid tour guide, but the speech attendant to this particular context should itself be considered as mere conduct. In analyzing the relationship between paid tour guide speech and the First Amendment, this transactional dynamic must be remembered: the needs of the purchasers take precedence over the wants of the sellers. In other words, insofar as the *business* of *paid* tour guiding is concerned, what a given guide wants to talk about is not nearly as important as what customers want to pay to hear. When it comes to paid tour guide speech, the speech itself is the service that the customers are paying for, and that service can be of no value to paying customers unless it can be competently performed.

optimistic about whether Court is empowered to prevent the First Amendment from running amok in this case: it can—and, most respectfully, it should.

In stark contrast to the instant case, both *Reynolds* and *McCullen* concerned forms of speech the protection of which goes to the very heart of the First Amendment, i.e., forms of speech that "have historically been more closely associated with the transmission of ideas than others."[65] And, again, as this Court itself observed in the 2017 Order, "the substantial burden inquiry must be framed by the initial observation that the City's regulations impose a rather small burden on a form of speech that is not 'closely associated with the transmission of ideas[;]'"[66] "[t]the City has . . . provided evidence that the magnitude of speech it unnecessarily burdens is very limited because most of the tours in Charleston focus on the subjects discussed in the Manual and continuing education courses[;]"[67] "[t]o the extent the City's licensing scheme burdens prospective tour guides who wish to give tours that draw on the material *tested by* written examination, those burdens *are necessary* for the scheme to advance the City's interest in

[65] *McCullen*, 134 S.Ct. at 2536; *id.* ("And 'handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression'; '[n]o form of speech is entitled to greater constitutional protection.'" (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)); *id.* ("When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden."); *id.* at 2540 ("Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked."); *see also Reynolds*, 779 F.3d at 230 ("The Amended Ordinance," i.e., the ordinance at issue in the case (*Reynolds*), "prohibits all forms of leafleting, which is one of the most important forms of political speech, . . . as well as soliciting any kind of contribution, whether political or charitable, or selling or attempting to sell goods or services."); *id.* at 231 ("As the Court explained in *McCullen*, however, the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem. 'Given the vita First Amendment interests at stake, it is not enough for [the government] simply to say that other approaches have not worked.'") (quoting *McCullen*, 134 S.Ct. at 2540) (emphasis original to *Reynolds*).

[66] 2017 Order, ECF No. 79 at 25.

[67] 2017 Order, ECF No. 79 at 25.

protecting consumers[;]"[68] and while, "[c]oncededly, the licensing scheme may place burdens on prospective tour guides who wish to give tours that do *not* draw on information addressed in the Manual, *but a reasonable trier of fact could find that very few prospective tour guides fall into this category*[,] . . . even if some of the[] alternative methods [Plaintiffs raised] would be just as effective as the City's current licensing scheme, *it seems very unlikely that any of these alternatives would burden "substantially" less speech than the current law, given that the current law burdens very little speech to begin with.*"[69]

This Court is empowered to prevent this from being a case where the First Amendment runs amok. Surely, this much authority is necessarily implied in both *Reynolds* and *McCullen*. If it is the sad reality that the City faced an unfair evidentiary standard that foretold the result of this litigation from the start—let not this Court be the one to say so. If indeed *Reynolds* requires the First Amendment to run amok, let the court that decided *Reynolds* be the one to say so. In the meantime, let that court, and indeed the licensing law itself, have the benefit of what is at the very least a very substantial doubt.

II. In the interest of judicial economy, regardless of its ruling on intermediate scrutiny, the Court should conclude that the City enacted the licensing ordinance for a content-neutral purpose.

The Court's 2017 Order identified the question whether the City enacted its licensing ordinance for a content-neutral or content-based purpose was a key fact issue to be decided at trial.[70] As such, extensive evidence was submitted at trial to address this question (all of which

[68] 2017 Order, ECF No. 79 at 25 (emphasis added).
[69] 2017 Order, ECF No. 79 at 25–26 (emphasis added).
[70] 2017 Order, ECF No. 79

the City incorporates herein by reference).[71] The Court's findings of fact support the conclusion that the City enacted the licensing ordinance for a content-neutral purpose:

> The stated purpose of the City's tourism ordinances is to "maintain, protect and promote the tourism industry and economy of the city." SUMF ¶ 4.[72]
>
> ***
>
> The City does not dictate the type of content that tour guides talk about. Tr. 52:7–9. It does not provide tour guides with a script to follow on tours. Tr. 52:10–12. It does not force tour guides to say certain things on tours. Tr. 52:13–15. There is no provision in the licensing law that would allow the City to monitor what tour guides say on their tours. Tr. 118:16–21. The City does not review what tour guides say once they are fully licensed. Tr. 218:13–14. The City has never taken corrective action against a guide "in any way" based on the content of the tour. Tr. 365:21–24.[73]
>
> ***
>
> The City conducted surveys in partnership with the Charleston Chamber of Commerce about the "constant" draw of historic sites and the history of Charleston for tourists, which was "formative" in creating the tourism management plan. Tr. 513:19–514:12. The City considered these studies to determine why tourists traveled to Charleston prior to the enactment of the licensing law. Tr. 529:24–530:8. These studies conducted by the Chamber of Commerce confirmed that the draw was history and historic sites, which was the impetus for enacting the licensing law. Tr. 516:15–7.[74]
>
> ***
>
> It is not unreasonable for the City to expect that tour guides will receive questions from tourists about architecture and historic preservation. Tr. 73:18–23. Mayor Riley has 42 years of experience talking to visitors about what "they saw, what they liked, what was interesting." Tr. 74:21–75:4. As such, he is a credible source with considerable expertise on what tourists look for and what they ask about in tours.

[71] *See* ECF No. 115 at 21–22.
[72] The Decision, ECF No. 115 at 2, para. a.
[73] The Decision, ECF No. 115 at 5, para. j.
[74] The Decision, ECF No. 115 at 4-5, para. g.

The Court's findings of fact contain no support for a conclusion that the City enacted the licensing ordinance "because of disagreement with the message".[75] Rather, the Court's findings support the conclusion that the City's true motive was to ensure that tour guide customers received the benefit of their bargain.

The four day trial in this case was focused largely on the motivation for the City's enactment of the licensing ordinance. If this case is appealed, it could be years before it is remanded back for further proceedings. For the sake of judicial economy, the City asks that the Court conclude based on its findings of fact that the licensing ordinance was enacted for a content-neutral purpose.

CONCLUSION

For the foregoing reasons, and whether by (1) making amended or additional findings and amending the Decision accordingly, (2) otherwise altering or amending the Decision, and/or (3) granting the City relief from the Subject Decision otherwise, the City asks that this Honorable Court take this opportunity to correct the errors above identified and to reverse course and decide this matter in favor of the City, upholding the licensing law as constitutional under the First Amendment of the United States Constitution.

[75] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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