No. 19-1044

In the United States Court of Appeals
for the Fourth Circuit

KIMBERLY BILLUPS; MICHAEL NOLAN;
MICHAEL WARFIELD
Plaintiffs-Appellees,

v.

CITY OF CHARLESTON, South Carolina,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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Rule 26.1 Disclosure Statement

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Interest of *Amicus Curiae*[1]

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Summary of Argument

The tour-guide licensing regime set forth by Charleston City Code § 29-58 is a content-based speech regulation. It regulates speech about the city's landmarks and likely its history, forcing those who want to speak about these topics for money to overcome burdensome licensing hurdles. Those who want to speak for money about other subjects, on the other hand, may freely do so without taking a test or getting licensed.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

All parties have consented to the filing of this brief.

Content-based regulations of speech are "presumptively unconstitutional," and must be struck down unless they pass strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The City of Charleston's tour-guide licensing law discriminates based on the content of speech in two ways. First, the law, on its face, only regulates speech about Charleston's historical landmarks, without regulating speech on other subjects. *Id.* at 2227. Second, the purpose of the licensing law is to improve the quality of tour guides' speech; thus, the law cannot be justified without reference to the speech's content. *Id.* Because the City's licensing law is a content-based regulation, it must pass strict scrutiny, *id.* at 2228, which it cannot do.

Indeed, the government cannot, and does not, require licenses for other paid speech, except for narrow categories of professional-client speech that may endanger the life, liberty, or financial well-being of clients. Authors, documentary film makers, and paid lecturers, for instance, cannot be forced to pass tests on the subject matter of their speech before they are allowed to speak. Tour guides, who also speak in exchange for money, should be similarly shielded from speech-restrictive and unconstitutional licensing requirements like § 29-58.

Argument

I. The City's Licensing Law Is a Content-Based Regulation of Speech.

The first step in analyzing the constitutionality of a speech regulation is to determine whether it is content-based or content-neutral. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). This step is "logically antecedent to the narrow-tailoring prong, because it determines the appropriate level of scrutiny." *Id.*

A regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. This may be true if the regulation either (1) facially regulates speech based on its content or (2) "cannot be justified without reference to the content" of the speech. *Id.* The licensing law fits within both of these categories.

A. The City's Licensing Law Is Facially Content-Based.

Restrictions that "[define] regulated speech by particular subject matter" are facially content-based. *Id.* For example, in *Reed v. Town of Gilbert*, a city code restricted the size, timing, and location of signs based on whether they conveyed political, ideological, or directional messages. *Id.* at 2224–25. The sign code defined the regulated speech by subject matter,

treating speech differently depending on the content the signs conveyed. *Id.* at 2227. Thus, the sign code was facially content-based. *Id.*; *see also*, *e.g.*, *Central Radio Company, Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (sign code was facially content-based because it applied to secular flags and emblems, as well as art that referenced a product or service, but exempted governmental and religious flags and emblems, and art that did not reference a product or service); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) ("anti-robocall" statute was facially content-based because it only targeted political and consumer-related phone calls).

Like the sign code in *Reed*, Charleston's licensing law is facially content-based because it regulates a particular category of speech. On its face, the code requires one to pass an examination and become licensed in order to "act as a tour guide." (J.A. 106 ¶ 5.) The City's licensing law defines tour guides as people who guide people in "touring the historic areas of the city," which entails "the conducting of or the participation in sightseeing." (J.A. 106 ¶ 7–8.) In leading sightseeing tours of Charleston's historic areas, tour guides would necessarily speak about the landmarks they visit and their related history. Regulating one's ability to become a

tour guide thus targets paid speech about this exact subject matter. Therefore, as in *Reed*, the City's licensing law regulates speech based on content.

A law is also content-based if it requires enforcers to "examine the content of the message that is conveyed to determine whether" the regulation applies. *McCullen*, 573 U.S. at 479 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). Here, if tourists hired a limo driver to chauffeur them around Charleston, the City would need to examine the content of the driver's speech to determine if the licensing law applied. If the driver were hired merely to drive the tourists and perhaps answer questions about local restaurants and other businesses, the licensing law would not apply. If the driver's role were instead to discuss landmarks that the limo passed, the driver would be considered a tour guide and would be subject to the licensing law.[2] Because the City's licensing law only applies to paid speech about Charleston's landmarks, it is facially content-based.

[2] In fact, Charleston's own city attorney, at a 2003 meeting of the City of Charleston Tourism Commission, said "if it was not a circumstance where there was a tour guide giving different pointers as to what buildings were of historic significance, it does not fall under the definition of touring as enacted by the ordinance." (J.A. 743–44.)

The City claims it does not monitor viewpoints expressed by tour guides once they are licensed, but this is irrelevant to whether the law is content-based. A law that regulates an entire *category* of speech is content-based, even if viewpoints within that category are not specifically regulated. *Reed*, 135 S. Ct. at 2230. The licensing law regulates paid speech about the city's landmarks, and is thus facially content-based.

B. The City's Licensing Law Is Content-Based Because It Cannot Be Justified Without Reference to the Content of the Speech that It Regulates.

Courts also recognize that laws are content-based when they "cannot be 'justified' without reference to the content of the regulated speech." *Id.* at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Here, the City's justification for its licensing law is based on the content of tour guides' speech.

The City could regulate tour guides in countless ways without reference to the content of speech. For example, the City could require tour guides to pass a test about navigating horse-drawn carriages on busy streets. It could also require tour guides to keep their walking tours on the sidewalk to respect the flow of traffic. The purpose of such laws would

be to protect the safety of the tour guides, visitors, and others, a purpose that would apply regardless of the content of the tour guides' speech.

Instead, the licensing law requires tour guides to master the government-issued manual about Charleston's historical landmarks, thus encouraging tour guides to convey certain messages during future tours. Although it does not restrict what tour guides actually say once licensed, the City requires its tour guides to be familiar with the City's perspectives on Charleston's landmarks and history before they can speak about these topics. Because the City intends to improve or alter the content of tour guides' speech, the licensing law is content-based.

The Supreme Court has stated that a law would be content-based "if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *McCullen*, 573 U.S. at 481 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). Here, the City's concern is precisely that tourists will react negatively to what the City perceives as "unqualified" tour-guide speech, causing tourists to "go home and tell people [they] got ripped off in Charleston." (J.A. 253:23–25.) This concern about tourists' reactions to speech indicates that the City's licensing law is justified based on content.

Indeed, the Supreme Court has recognized that restrictions aimed at improving the quality of speech are presumptively unconstitutional. In *Davis v. FEC*, 554 U.S. 724 (2008), the Court rejected the argument that campaign finance limitations directed at wealthy candidates were justified by an interest in improving the quality of campaign speech. *Id.* at 743 n.8 ("[I]t would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech."). Likewise, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the dissent argued that it was constitutional to require that literature about ballot measures identify its author because the requirement would deter (without expressly outlawing) "mudslinging," "innuendo," and "dirty tricks." *Id.* at 382–83 (Scalia, J., dissenting). But the majority nonetheless held that the restriction was content-based and unconstitutional. *Id.* at 357.

And these decisions simply reflect the principle that a government's desire to change the content of speech, even for the better, is a content-based justification. Just as "the desire to protect listeners from offense or other emotional harm is not a content-neutral interest," *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. D.C.*, 972 F.2d 365, 374

(D.C. Cir. 1992), so the desire to protect listeners from hearing erroneous historical claims is not a content-neutral interest.

II. The First Amendment Prohibits Governments from Licensing Other Similar Paid Speech.

Authors are free to publish books about virtually any topic. Documentary filmmakers can release documentaries on any subject, and speakers in lecture halls can speak about anything to their paying audiences. If these various speakers are uninformed or unqualified to speak about their respective topics, citizens may receive incorrect information and might feel that they have not gotten their money's worth.

But surely the First Amendment prohibits governments from requiring a license and a competency test to write books, make documentaries, or give speeches (at least setting aside individualized professional advice to clients, where the clients' life, liberty, or property is at stake). And this is so even though most authors and many documentarians and lecturers charge money for their speech. The government must instead rely on market forces, not on governmental compulsion, to drive ill-informed speakers out of the marketplace.

Tour guides speak about a particular subject matter in exchange for money, just like authors, documentary filmmakers, and paid lecturers.

Just as the government cannot require the latter categories of paid speakers to pass a test prior to speaking, so Charleston likewise cannot require this of tour guides who seek to speak about the city's sights.

Some content-based regulations of "commercial speech" may be more easily justified than regulations of other speech. But such commercial speech is "'usually defined as speech that does no more than propose a commercial transaction,'" *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013) (en banc) (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)), though it might also include a slightly broader range of advertising, especially when it promotes a specific product or service. *Id.* Though the speech of tour guides is delivered for money, it is not commercial speech (just as a typical book or film may be distributed for money but does not thereby become commercial speech).

Conclusion

Section 29-58 is a content-based regulation of speech because it only regulates speech about a particular subject matter and because its purpose is to alter the content of that speech.

Because the licensing law is content-based, this Court should apply strict scrutiny when reviewing its constitutionality. Strict scrutiny requires that laws use the "least restrictive means of achieving a compelling [government] interest." *McCullen*, 573 U.S. at 478. "'[I]t is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665–66 (2015) (citation omitted).

Section 29-58 cannot survive strict scrutiny. Protecting tourists from incorrect content about the city's landmarks is not a compelling interest. Even if it were, there are less speech-restrictive means of achieving it, like simply allowing tourists to leave negative reviews online to encourage future visitors to hire other tour guides instead. Or, alternatively, the city could use a certification system that does not prohibit unlicensed tour guides but merely informs customers that a guide has passed the city's tests. Thus, § 29-58 violates the First Amendment.

Respectfully Submitted,

s/ Eugene Volokh

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May 9, 2019

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s/ Eugene Volokh

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