

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

KIMBERLY BILLUPS, MICHAEL)	C.A. NO. 2:16-CV-00264-DCN
WARFIELD AND MICHAEL NOLAN,)	
)	
PLAINTIFFS,)	
)	
vs.)	DEFENDANT’S SUPPLEMENTAL
)	MEMORANDUM
CITY OF CHARLESTON, SOUTH)	
CAROLINA,)	
)	
DEFENDANT.)	
_____)	

The Defendant, City of Charleston, (hereafter “Defendant” or “the City”) hereby files this supplemental memorandum concerning Plaintiffs’ Motion for Preliminary Injunction and Defendant’s Motion to Dismiss.

Proposed Amendments to the Ordinance

Plaintiffs’ Complaint against the City asserts a First Amendment challenge to the City’s tour guide ordinance.¹ At first reading on April 12, 2016, City Council voted unanimously to approve the amendments to the tour guide ordinance.² City Council has scheduled the second and final readings of the proposed amendments to the tour guide ordinance for the April 26, 2016 City Council meeting.³

The amendments accomplish the following:

- Reduce the score required to pass the written examination from eighty to seventy percent.⁴

¹ Plaintiffs’ Complaint, ¶ 3, citing City Code § 29-2, §§ 29-58 to -63 and §29-66.

² Clerk of Council’s Affidavit, attached as Exhibit A.

³ Clerk of Council’s Affidavit, attached as Exhibit A.

⁴ See Certified copy of the Proposed Ordinance Amendments attached to the Clerk of Council’s Affidavit, attached as Exhibit A.

- Eliminate the oral portion of the examination.⁵
- Increase the frequency of the written examination from once every three months to twice a month.⁶
- Eliminate the “temporary tour guide” license procedures and related provisions, (including the provision requiring employers of temporary tour guides to file employee scripts with the City).⁷
- Revise the provision that provided for the use of an “escort” for large walking tour groups for safety purposes to clarify that when the number of people on walking tours for hire is larger than twenty people, the people must be divided into groups not to exceed twenty and each group must be accompanied by a licensed tour guide.⁸
- Clarify that walking tours of school groups larger than twenty people are exempted from the requirement that each separate group of twenty have a licensed tour guide if each group has a school chaperone.⁹
- Revise the continuing education provisions to require four continuing education programs in three years to extend a tour guide license without reexamination, and to establish the title of tour guide emeritus for tour guides who have held their license for twenty-five years continuously.¹⁰

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

These amendments maintain the City's goal of increasing the likelihood that those holding themselves out as tour guides for hire have a base level of competency to provide the touring services they are charging for, while addressing many of Plaintiffs' concerns regarding the ordinance. Plaintiffs allege generally that the requirements of the ordinance are too burdensome.¹¹ Plaintiffs allege that the testing is too difficult for them.¹² The amendments address this concern by reducing the score required to pass the written examination from eighty to seventy percent, and eliminate the oral exam. Two of the three Plaintiffs were able to score seventy or above on the written exam and thus would have passed under the amended provisions.¹³

Plaintiffs also complain that the test is not offered with enough frequency.¹⁴ The amendments address this concern by increasing the frequency of the written examination from once every three months to twice a month.¹⁵ The amendments' increase in testing frequency allows the City to eliminate the "temporary tour guide" license and related provisions, which

¹¹ Plaintiff's Memo. in Support of Motion for Preliminary Inj., pp. 3-6.

¹² Plaintiff's Memo. in Support of Motion for Preliminary Inj., pp. 5-6 (noting Plaintiffs received the following scores on their first attempt at taking the written exam: Kimberly Billups scored a 70 percent, Michael Warfield scored a 73 percent, and Michael Nolan scored a 64 percent).

¹³ *Id.*

¹⁴ Plaintiffs' Memo. in Support of Motion for Preliminary Inj, p.3.

¹⁵ See Certified copy of the Proposed Ordinance Amendments attached to the Clerk of Council's Affidavit, attached as Exhibit A.

include the provision Plaintiffs attack requiring employers of temporary tour guides to file employee scripts with the City.¹⁶

Plaintiffs' argument that the ordinance is "content based" relies largely on Plaintiffs misunderstanding of the current ordinance's provision regulating the size of walking tours for hire.¹⁷ Specifically, Plaintiffs cite to the use of paid "escorts" on tours larger than twenty people for safety purposes.¹⁸ Plaintiffs argue that the ordinance is content based because it allows paid "escorts" to work on tours without a license if they limit what they say to tour groups to giving directions.¹⁹ Plaintiffs misunderstand the ordinance. The walking tour provision relates to the safety of large walking tour groups. The provision is intended to exclude school groups due to the fact that school children are always accompanied by teachers or volunteers who supervise the children's navigation along and across streets, and are not charging for their services.²⁰

The amendments thus clarify the walking tour provision. The amendments remove the term "escort" from the ordinance. The amendments re-state that walking tours for hire must have a licensed tour guide, and if the group is larger than twenty people the groups must be divided into groups not to exceed twenty and each group must be accompanied by a licensed tour guide. The amendments clarify that the only exception is walking tours for hire of school groups

¹⁶ Plaintiffs' Memo. in Support of Motion for Preliminary Inj, pp. 10, 12, 20. *See also*, City's Memo. in Opp. to Plaintiff's Motion for Preliminary Injunction, p 18, n. 94 (noting that under the current temporary license procedure the City accepts a copy of the script when the sponsoring company's employee is being issued a temporary license, but the City has never rejected a script received pursuant to the temporary license provision, and the City cannot control whether a temporary licensee working for a tour company follows that company's script, and has never done so, and that the tour companies are free to decide what they want their employees to say during their tours.)

¹⁷ Plaintiff's Memo in Opp. to Defendant's Motion to Dismiss, pp. 6–7; Plaintiff's Reply in Support of Motion for Preliminary Inj., pp. 4–5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See, City's Memo. in Opp. to Motion for Preliminary Inj., p. 15, n. 80.

larger than twenty people. Such school groups are exempted from the requirement that each separate group of twenty have a licensed tour guide if each group has a school chaperone to manage the children's safety while walking on the public rights-of-way to avoid impending vehicular or pedestrian traffic.

Plaintiffs can therefore no longer assert the flawed argument that the ordinance's reference to "escorts" makes the regulation "content-based". The ordinance is not content based. Anyone charging for touring services must obtain a license regardless of what they say on their tour. There is no exemption based on what is said on a paid tour. The ordinance contains no mechanism to control what licensed tour guides say on their tours. The license requirement is triggered by a tour guide charging for their services. The ordinance simply requires a base level of competency to charge for tour guide services. Thus, the ordinance is justified without reference to the content of what tour guides say.

The amendments further align Charleston's Ordinance with New Orleans' Ordinance that survived a First Amendment challenge in *Kagan*

With the amendments Charleston's tour guide ordinance further mirrors the City of New Orleans's tour guide ordinance.²¹ In *Kagan v. City of New Orleans*, the Fifth Circuit affirmed the District Court's holding that New Orleans tour guide ordinance did not violate the First Amendment.²² The Supreme Court thereafter denied the *Kagan* petition for writ of certiorari.²³

²¹ Similar to the New Orleans tour guide ordinance, with the amendments the City's ordinance simply requires prospective tour guides for hire to pass a written examination with a score of 70 percent or higher. *See*, Plaintiffs Statement of Material Facts, *Kagan v. City of New Orleans*, 2012 W.L. 10829221, ¶ 20.

²² *Kagan v. City of New Orleans*, 957 F.Supp.2d 744 (E.D. La. 2013), *aff'd*, 753 F.3d 560 (5th Cir. 2014), *cert denied*, 135 S. Ct. 1403 (Feb. 23, 2015).

²³ *See*, *Kagan v. City of New Orleans*, 135 S. Ct. 1403 (Feb. 23, 2015); *Kagan v. City of New Orleans*, Petition for a Writ of Certiorari, 2014 WL 6478975 (filed Nov. 18, 2014).

Plaintiffs make no attempt to distinguish *Kagan*, and cannot do so. This Court therefore should follow the sound reasoning in *Kagan* to uphold Charleston’s ordinance in this case.

Plaintiffs have the burden on their Motion for Preliminary Injunction

The amendments to the ordinance do not change Plaintiffs’ burden on their Motion for Preliminary Injunction. Plaintiffs’ argument demanding that the City produce certain evidence at this stage of the litigation attempts to flip the preliminary injunctive standard on its head. The burden for preliminary injunctive relief is shouldered by the moving party—the Plaintiffs—not the City.²⁴ Here, whether or not the amendments are enacted Plaintiffs fail to meet this high burden to be entitled to preliminary injunctive relief.²⁵

The ordinance does not regulate speech. Rather, it establishes minimum qualifications to charge for tour guide services. To the extent, however, the Court finds the ordinance does regulate speech; any “burden” on speech is narrowly tailored to address the City’s interest in establishing minimum qualifications to charge money for tour services. The ordinance does not control what is said on paid tours but rather is limited to a qualifications test. The amendments to the ordinance make the law even less burdensome by eliminating the oral exam, reducing the score required to pass the written exam, and by substantially increasing the frequency when the exam is administered.

Just as important is what the amendments do not change. The amendments maintain the City’s goal of increasing the likelihood that those holding themselves out as tour guides for hire

²⁴ The “[p]laintiff bears the burden of establishing that each of these factors supports granting the injunction.” See *MJJG Rest., LLC v. Horry Cnty., S.C.*, 11 F. Supp. 3d 541, 550, 556 (D.S.C. 2014) (further holding preliminary injunctions involve “the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.”); see also *Manning v. Hunt*, 119 F.3d 254, 263–64 (4th Cir. 1997) (“[A] preliminary injunction is an extraordinary remedy, to be granted only if **the moving party clearly establishes** entitlement to the relief sought.”) (citation omitted) (emphasis added).

have a base level of competency to provide the touring services they are charging for. Plaintiffs' arguments that the City's ordinance does not further its interests fail. An ordinance that tests qualifications to charge money for occupational services necessarily furthers the City's interest in establishing minimum qualifications for that occupation. Moreover, the Fourth Circuit in *Reynolds* recently held that objective evidence is not necessary to show that a "speech restriction" furthers the government interest.²⁶

Moreover, Charleston's success as the top tourist destination is evidence that its ordinances work to further its interests.²⁷ The ordinances regulating occupations in the tourism industry have been in place for decades contributing to the success of the industry. Tourism publications have ranked Charleston the top City to visit in the country and the City has received high rankings for top destinations in the world.²⁸

Charleston's attraction as a tourist destination shows the flaw in Plaintiffs argument that only New York, New Orleans and a few other cities have similar tour guide licenses. Charleston chose to protect and promote its history, architecture, cultural resources, and other desirable

²⁵ See, the City's Memo. in Opp. to Plaintiff's Motion for Preliminary Inj.

²⁶ See *Reynolds v. Middleton*, 779 F.3d 222, 228 (4th Cir. 2015).

²⁷ The *Reynolds* Court also held the existence of a substantial government interest can be established by case law. See *Reynolds v. Middleton*, 779 F.3d 222, 228 (4th Cir. 2015). See also, *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (holding New Orleans has a substantial government interest in promoting and protecting the tourism industry through its tour guide license test); *Center for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu*, 455 F.3d 910, 922 (9th Cir. 2006) (acknowledging Hawaii's substantial interest in protecting and promoting the tourism industry); *Smith v. City of Ft. Lauderdale, Fla.*, 177 F.3d 954, 955–56 (11th Cir.1999) (recognizing Florida's substantial interest in promoting tourism—"one of Florida's most important economic industries"). There is no reason for a different conclusion here. Moreover, a simple google search for "fake tour guides" provides over ten pages of search results of articles warning travelers to top worldwide tourist destinations to beware of fake tour guides seeking to swindle trusting tourists out of their money.

²⁸ Affidavit of Joseph P. Riley Jr. (hereinafter referred to as "Riley Affidavit"), ¶ 3, attached as Ex. 1 to the City's Memo. in Opp. to Plaintiff's Motion for Preliminary Inj.

characteristics to create a tourism economy. Charleston's success has made it a top destination for worldwide travelers. Tourism is thus a critical segment of Charleston's economy. Whether the number of cities that have decided to protect their tourism industry through a tour guide license is large or limited has no impact on the constitutionality of such ordinances. Ordinances regulating the tourism industry serve the important purpose of maintaining, protecting, and promoting the tourism industry and economy of Charleston, upon which so many citizens and the City rely.

Conclusion

Based on the arguments contained herein, and those asserted in the City's memoranda previously filed with the Court, the City respectfully requests that this Court grant the City's Motion to Dismiss and deny Plaintiffs' Motion for a Preliminary Injunction.

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South Carolina*

Charleston, South Carolina

Dated: April 15, 2016

Exhibit A

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

KIMBERLY BILLUPS, MICHAEL)
WARFIELD AND MICHAEL NOLAN,)
)
 PLAINTIFFS,)
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 vs.)
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 CITY OF CHARLESTON, SOUTH)
 CAROLINA,)
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 DEFENDANT.)
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C.A. NO. 2:16-CV-00264-DCN

AFFIDAVIT OF VANESSA TURNER
MAYBANK

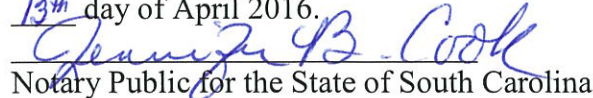
I, Vanessa Turner Maybank, being duly deposed and sworn, state as follows:

1. I am a citizen and resident of Berkeley County, South Carolina. I am over the age of eighteen (18) years, am competent to testify to the matters contained herein, and have personal knowledge of all the information contained in this affidavit.
2. I am employed with the City of Charleston (“the City”) as the City Clerk of Council.
3. At the City Council meeting on April 12, 2016, the City Council voted unanimously to approve at first reading amendments to City Code §§ 29-2, 29-58, 29-59, 29-60, 29-61, 29-63, 29-66, 29-111, 29-261. The document attached hereto as Exhibit A is a certified copy of the proposed amendments to the City Code. City Council has scheduled the second and final readings of the proposed amendments for the April 26, 2016 City Council meeting.

FURTHER, YOUR DEPONENT SAYETH NAUGHT.


Vanessa Turner Maybank

Sworn to and subscribed before me this
13th day of April 2016.


Notary Public for the State of South Carolina

My commission expires: 3/22/22

CERTIFIED TO BE A TRUE COPY
Vanessa T. Maybank
Vanessa T. Maybank, Clerk of Council



Ratification Number _____

AN ORDINANCE

TO AMEND VARIOUS SECTIONS OF CHAPTER 29 OF THE CODE OF THE CITY OF CHARLESTON RELATING TO LICENSED TOUR GUIDES INCLUDING: TO DELETE THE CATEGORY OF TEMPORARY TOUR GUIDE; TO AMEND THE TOUR GUIDE EXAMINATION REQUIREMENTS TO ELIMINATE THE ORAL EXAMINATION REQUIREMENT; TO OFFER THE EXAMINATION ON A TWICE-MONTHLY BASIS; TO CHANGE THE PASSING GRADE ON THE EXAMINATION FROM EIGHTY PERCENT TO SEVENTY PERCENT; TO REQUIRE THAT REGISTERED TOUR GUIDES COMPLETE FOUR (4) CONTINUING EDUCATION PROGRAMS IN THREE (3) YEARS TO EXTEND THEIR TOUR GUIDE LICENSE WITHOUT REEXAMINATION; TO ESTABLISH THE TITLE OF TOUR GUIDE EMERITUS FOR A REGISTERED TOUR GUIDE WHO HAS HELD THEIR LICENSE FOR TWENTY-FIVE (25) YEARS CONTINUOUSLY; AND TO EXEMPT SCHOOL GROUPS FROM THE REQUIREMENT THAT WALKING TOURS FOR HIRE CONSISTING OF MORE THAN TWENTY (20) PEOPLE SHALL BE ACCOMPANIED BY A LICENSED TOUR GUIDE.

BE IT ORDAINED BY THE MAYOR AND COUNCILMEMBERS OF CHARLESTON, IN CITY COUNCIL ASSEMBLED:

Section 1. Chapter 29, Article I, Section 29-2 of the Code of the City of Charleston is hereby amended by deleting in its entirety the definition of "Temporary tour guide."

Section 2. Chapter 29, Article III, Section 29-58 of the Code of the City of Charleston is hereby amended by deleting the following struck through text so that hereafter Section 29-58 shall read as follows:

"Sec. 29-58. - License – Required.

No person shall act or offer to act as a tour guide in the city for hire unless he or she has first passed a written ~~and an oral~~ examination and is licensed by the city's office of tourism management as a registered tour guide. ~~or a temporary tour guide.~~"

Section 3. Chapter 29, Article III, Section 29-59 of the Code of the City of Charleston is hereby amended by deleting the following struck through text

and adding thereto the following underlined words so that hereafter Section 29-59 shall read as follows:

"Sec. 29-59. - Tour guide: application, examination and grant or denial of license.

- (a) The written and oral examinations shall be based upon materials approved by the tourism commission which shall be made available to the public by the manager of arts and history/tourism commissions for a fee.
- (b) The manager of arts and history/tourism commissions shall prepare and administer the written and oral examinations which are is meant to test the applicant's knowledge of the city and its history.
- (c) At the time of the examinations, applicants shall provide to the manager of arts and history/tourism commissions with the following:
 - (1) Current driver's license or state-issued identification;
or;
 - (2) A recent photograph; and other proof of identification to the satisfaction of the manager of arts and history/tourism commissions; and
 - (3) A receipt indicating proof of payment for examination; and
 - (4) ~~Such other information as the manager of arts and history/tourism commissions may from time to time require.~~
- (d) The examinations shall be given ~~no less than four (4) times per calendar year.~~ every other week at a time and place to be determined by the manager of arts and history/tourism commissions; however, in case of hardship, the examination may be scheduled sooner.
- (e) The examinations shall be uniform for all persons taking the examination on the same day.
- (f) ~~A passing grade for the written examination shall be at least eighty (80) percent of the questions that the applicant answers correctly and the oral examination shall be graded on a pass/fail basis.~~ An applicant shall receive a passing grade for the examination when seventy (70) percent of the questions asked are answered correctly. An applicant must receive a passing

grade on both the written and oral examination before being granted a registered tour guide license.

~~(g) Applicants must pass the written examination before being permitted to take the oral examination. Applicants who pass the written examination but fail the oral examination shall only have to repeat the oral examination.~~

~~(h) (g) It shall be the duty of the manager of arts and history/tourism commissions to grade review each examination and to determine whether or not to grant or deny a registered tour guide license to an applicant if a passing grade has been attained.~~

~~(i) (h) Individuals found cheating on either portion of the tour guide license examination shall receive a failing grade on the examination and shall be disqualified from re-taking the examination for a period of one (1) year."~~

Section 4. Chapter 29, Article III, Section 29-60 of the Code of the City of Charleston entitled "Temporary tour guide— license and conditions for grant or refusal of license" is hereby amended by deleting this section in its entirety.

Section 5. Chapter 29, Article III, Section 29-61 of the Code of the City of Charleston is hereby amended by deleting the following struck through text and adding thereto the following underlined words so that hereafter Section 29-61 shall read as follows:

"Sec. 29-61. – Tour Guide and ~~temporary tour guide~~; license issuance.

(a) Upon successfully meeting all the requirements of sections 29-59 and 29-60 of this article and after verification of a business license, the applicant shall be issued a registered tour guide license card ~~or temporary tour guide license card~~ by the revenue collections division.

(b) First time tour guide applicants ~~and temporary tour guide applicants~~ shall collect their tour guide license ~~or temporary tour guide license~~ from the revenue collections division within thirty (30) days of being notified by the manager of arts and history/tourism commissions of their approval for a license. All unclaimed licenses pursuant to this section shall automatically expire on the 31st day after notification by the tourism management department.

- (c) The registered tour guide license and temporary tour guide license-card shall remain the property of the city and must be returned upon expiration, revocation, or suspension.”

Section 6. Chapter 29, Article III, Section 29-63 of the Code of the City of Charleston is hereby amended by deleting the following struck through text and adding thereto the following underlined words, which shall read as follows:

“Sec. 29-63. - Renewal and expiration of registered tour guide license; reexamination.

The license of a registered tour guide shall expire on the third anniversary after its issuance. An applicant for reissuance of a license after expiration shall be treated as a new applicant and shall comply with all the provisions of this Chapter then in effect including the requirement of examination; provided, however, that a licensee who has renewed ~~the his or her business license~~ annually by 31st of January with the revenue collections division during each of the three (3) years and has completed ~~such~~ four (4) continuing education programs in three (3) years as are ~~required~~ offered or approved by the tourism commission shall be entitled to extend the expiration of the license without reexamination for another three (3) years. A licensee maintaining a valid tour guide license for a period of twenty-five (25) consecutive years, shall achieve the status of tour guide emeritus, shall be issued a permanent tour guide license with no expiration date, and shall be exempt from further examination and education requirements.”

Section 7. Chapter 29, Article III, Section 29-66, subsection (a) of the Code of the City of Charleston is hereby amended by deleting the following struck through text so that hereafter subsection (a) shall read as follows:

“Sec. 29-66. - Revocation of license.

- (a) Failure to abide by the provisions of this chapter or any of the ordinances of the City of Charleston or laws of the state in any manner affecting or regulating the activities of the licensee while acting as a tour guide shall be grounds for the suspension

for a reasonable time or the revocation of a registered tour guide license. ~~or a temporary tour guide license.~~"

Section 8. Chapter 29, Article IV, Section 29-111 of the Code of the City of Charleston is hereby amended by deleting the following struck through text, so that hereafter Section 29-111 shall read as follows:

"Sec. 29-111. – Tour guide required.

All tours on small buses must be conducted by a registered ~~or temporary~~ tour guide, and a tour guide card shall be displayed in the lower left hand corner of the front windshield, in plain view clearly visible from outside the vehicle."

Section 9. Chapter 29, Article VII, Section 29-261, subsection (a), of the Code of the City of Charleston is hereby amended by deleting the following struck through text and by adding thereto the following underlined words so that hereafter Section 29-261 shall read as follows:

"Sec. 29-261. – Limits on size; additional tour guides.

(a) All walking tours for hire conducted from the public right-of-way shall consist of no more than twenty (20) persons per group, excluding the licensed tour guide. Any walking tour for hire conducted from the public right-of-way consisting of more than twenty (20) people shall be divided into more than one groups not to exceed twenty (20) and each group shall be accompanied by a licensed tour guide, and shall be accompanied by an additional person, known as an escort, who may or may not be a licensed tour guide. Each group shall take different routes to the same destination or maintain sufficient distance between another group so as not to impede pedestrian traffic. This section shall not apply to school groups that exceed twenty (20) people. School groups exceeding twenty (20) people may be accompanied by either a licensed tour guide or a chaperone for every group of twenty (20) people, or fraction thereof, that exceeds an initial twenty (20) people to manage the school groups while walking on the public rights-of-way to avoid impeding vehicular or pedestrian traffic."

Section 10. This Ordinance shall become effective upon ratification.

Ratified in City Council this ____ day of _____ in the Year of Our Lord, 2016, in the ____th Year of the Independence of the United States of America.

By: _____
John J. Tecklenburg
Mayor, City of Charleston

ATTEST:

By: _____
Vanessa Turner Maybank
Clerk of Council