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

KIMBERLY BILLUPS, MICHAEL WARFIELD AND MICHAEL NOLAN,	)	**C.A. NO. 2:16-CV-00264-DCN**
PLAINTIFFS,	)	
vs.	)	**DEFENDANT CITY OF CHARLESTON'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**
CITY OF CHARLESTON, SOUTH CAROLINA,	)	
DEFENDANT.	)	

Defendant City of Charleston, South Carolina (hereinafter "the City" or "Charleston" or "Defendant") hereby submits this Memorandum of Law in support of its Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

This case arises out of Plaintiffs' failure to pass the City's occupational license test establishing minimum qualifications for tour guides to charge for their services in the historic areas of Charleston. The constitutionality of occupational licenses for businesses is well established. "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose . . . there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed . . . for the protection of society."[1] Courts have long recognized municipalities' power to require a license for tour guides.[2] "Certainly the licensing of sightseeing guides [for hire] in a large

[1] *Dent v. West Virginia*, 129 U.S. 114, 121-122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).
[2] *See People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958). *See also*, *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014); *Washington Tour Guides Assoc. v. National Park Service*, 808 F. Supp. 877 (1992).

metropolis falls within the police powers of the local government."[3]

Recognizing the weakness of their challenge to such a common business regulation as an occupational license, Plaintiffs' Complaint overstates the provisions in the City's ordinance in an effort to support their First Amendment arguments. Plaintiffs allege the requirement that tour guides who charge for their services meet minimum qualifications constitutions a violation of their rights to free speech. Plaintiffs are wrong. The ordinance does not regulate speech. With or without a tour guide license Plaintiffs may communicate whatever message about the City of Charleston they want.

Charleston requires no license for individuals to speak about Charleston or engage in free tour guide services. The license requiring minimum qualifications is only necessary if tour guides seek to charge for their services.

Importantly, the ordinance does not regulate the message that is conveyed on licensed tours. The ordinance does not control what licensed tour guides say. Tour guides are free to present whatever message they wish on their tours. The ordinance has no restraints on opinion and no topic is off limits. Accordingly, the ordinance does not violate Plaintiffs' First Amendment rights.

STATEMENT OF FACTS

Plaintiffs' claim arises out of their inability to obtain a tour guide license from the City as a result of Plaintiffs' failure to pass the City's occupational license test for tour guides to charge for their services in the historic areas of Charleston.[4] The City ordinances regulating the tourism

[3] *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958).
[4] *See generally* Plaintiffs' Complaint.

industry and tour guides have been in place for decades.[5]

Specifically, the City of Charleston regulates tours for hire conducted in designated districts in the City.[6] Only those tour guides who charge for their services are required to licensed.[7] No license is required for free touring or storytelling.[8] Individuals may conduct whatever tour activities they like without a tour guide license as long as they are not charging for their services.[9]

The City Code provision Plaintiffs challenge specifically states as follows:

> 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 oral examination and is licensed by the city's office of tourism management as a registered tour guide or a temporary tour guide.[10]

The City Code makes clear that seeking money for tour guide services is the trigger for the license requirements.[11] Notably, the City Code defines "tour or touring" as "the conducting of or the participation in sightseeing in the districts ***for hire or in combination with a request for donations***."[12] Likewise, the City Code defines a "tour guide" as "any person who acts or offers to act as a guide ***for hire*** through any part of the districts, including but not limited to pedestrians and persons within automobiles, motor vehicles or horse-drawn vehicles when the primary purpose of riding in such vehicles is not transportation, but touring the historic areas of the city."[13] Accordingly, the City's tour guide ordinance requiring a license applies only to those

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[5] *See* Code of the City of Charleston, South Carolina (hereinafter referred to as "City Code") Sec. 29-1 (enactment date of Ord. No. 193-22 as noting the May 10, 1983).
[6] City Code Secs. 29-1, -2.
[7] City Code Secs. 29-2, -58.
[8] City Code Secs. 29-2, -58.
[9] *See generally* Chapter 29 "Tourism" of the City Code.
[10] City Code Sec. 29-58.
[11] *Id.*
[12] City Code Sec. 29-2 (emphasis added).
[13] City Code Sec. 29-2.

charging for sightseeing services in the applicable areas of the City.[14]

The City's occupational license test establishes minimum qualifications for tour guides to charge for their services in the historic areas of Charleston.[15] Specifically, to conduct tours for hire in designated city districts, an individual must pass a written examination to receive a tour guide license from the City.[16] The purpose of these city code ordinances regulating tours and tour guides for hire is, in relevant part, to "maintain, protect and promote the tourism industry and economy" of the City of Charleston.[17] Once an individual demonstrates sufficient knowledge to pass the tour guide test, he or she has shown qualifications to sell his or her services to the public and is thereafter issued a City of Charleston tour guide license.[18]

Importantly, the City does not regulate the message that is conveyed on tours.[19] In fact, no section of the City Code provides for: any regulation of the information or messages provided during tours for hire or any restraints on opinions or facts stated during such tours.[20]

As noted above, Plaintiffs' claim arises out of their inability to become licensed tour guides for hire.[21] According to the Complaint, Plaintiffs registered for and took the November 9, 2015 tour guide written examination.[22] Because Plaintiffs failed to pass the written examination they did not take the oral examination. As a result of failing to pass the written exam, Plaintiffs were unable to obtain a tour guide license.[23]

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[14] *See* City Code Secs. 29-2, -58.
[15] *See* City Code Secs. 29-58 to -61.
[16] City Code Sec. 29-58.
[17] *See* City Code Sec. 29-1.
[18] *See* City Code Secs. 29-1, -2, and -58 to -61.
[19] *See generally* Chapter 29 "Tourism" of the City Code.
[20] *See generally* Chapter 29 "Tourism" of the City Code.
[21] *See generally*, Plaintiffs' Complaint.
[22] Plaintiffs' Complaint, ¶¶ 36, 38, 55, 68. Plaintiff Warfield also took the August 2015 tour guide written examination. Plaintiffs' Complaint ¶ 52.
[23] Plaintiffs' Complaint ¶¶ 38, 55, 57, 68.

Plaintiffs allege that they have suffered monetary damages, albeit speculative, as a result of their failure to obtain tour guide licensure. In brief, Plaintiff Billups contends she is barred from opening up a tour business because she has failed to meet the requirements to obtain a tour guide license.[24] Whereas Plaintiffs Warfield and Nolan allege, respectively, that they are unable to accept or seek, respectively, jobs as tour guide with tour companies here in Charleston in order to supplement their respective incomes.[25]

In sum, Plaintiffs all allege that the City "prohibits" them from speaking and telling stories as a tour guide in Charleston because they have "not been issued a [ ] license allowing [them] to do so."[26] The Complaint contends that the City's tour guide licensing requirement for commercial tours has prevented them from leading tours and, thereby, prevented them from exercising their First Amendment right to speak about the City of Charleston.[27] Importantly, however, Plaintiffs fail to allege that the licensure requirement is not required merely for "speaking", but instead required for offering and/or providing tour services *for hire*.[28] Indeed,

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[24] Plaintiffs' Complaint ¶¶ 6, 39, 41.

[25] Plaintiffs' Complaint, ¶¶ 48, 57, 60–61, 64, 78. Notably, however, neither Plaintiff Warfield nor Plaintiff Nolan have alleged they applied for a temporary tour guide license with the City. *See generally* Plaintiffs' Complaint. For employees of a licensed tour company, the City has a temporary license procedure. *See* City Code Sec. 29-60. The tour companies prepare scripts for their employees to follow during the company tours. *See* City Code Sec. 29-60(e). Accordingly, the City requests a copy of the script the company prepared when the sponsoring company's employee is being issued a temporary license. *Id.* However, the City does not regulate whether a temporary licensee working for a tour company follows that company's script. *Id.* The temporary tour guide license allows for temporary licensure until an individual can obtain full licensure as a tour guide for hire.

[26] Plaintiffs' Complaint ¶ 43.

[27] Plaintiffs' Complaint ¶ 73. Interestingly, Plaintiffs' attempt to claim that without a license, they are "unable to meaningfully share their opinions, thoughts, and knowledge about Charleston" with individuals who wish to take tours of the City. However, such an allegation is misleading, as without a license Plaintiffs are free to "share their opinions, thoughts, and knowledge about Charleston" with individuals as long as Plaintiffs are not paid for providing the tour.

[28] *See* City Code Secs. 29-2, -58.

according to the Complaint, the Plaintiffs' underlying purpose for becoming a tour guide is to earn money, not to engage in speech.

Based on these allegations, Plaintiffs assert a § 1983 First Amendment claim against the City seeking declaratory and injunctive relief.[29] Specifically, Plaintiffs allege that the City of Charleston's City Code Secs. 29-2, 29-58 to -63, and -66, together, violate "Plaintiffs' rights to free speech as guaranteed by the First Amendment to the U.S. Constitution."[30] Plaintiffs allege that the First Amendment "protects the right to earn a living by speaking on topics of one's choice[.]"[31]

Defendant City of Charleston's Motion to Dismiss is based on the ground that Plaintiffs' Complaint fails, as a matter of law, to state a claim upon which relief can be granted against the City. Defendant's Motion is further based on the following grounds:

I. Plaintiffs' First Amendment Claim Fails Because the City Ordinance Does Not License or Regulate Speech, But Regulates Business Under the City's Police Powers.

II. To the Extent the Ordinance Regulates Speech, It Is Content Neutral and Survives Intermediate Scrutiny.

STANDARD OF REVIEW

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss for "failure to state a claim upon which relief can be granted."[32] When considering a Rule 12(b)(6) motion to dismiss, the court must accept the plaintiff's factual allegations as true and draw all reasonable inferences in the plaintiff's favor.[33] Nevertheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal

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[29] Plaintiffs' Complaint ¶¶ 2, 3, A & B.
[30] Plaintiffs' Complaint ¶¶ 3, 105.
[31] Plaintiffs' Complaint ¶ 104.
[32] FRCP, Rule 12(b)(6).

conclusions."[34] On a motion to dismiss, the court's task is limited to determining whether the complaint states a "plausible claim for relief."[35] A complaint must contain sufficient factual allegations in addition to legal conclusions. Although Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," "a formulaic recitation of the elements of a cause of action will not do."[36] The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[37] "Facts pled that are 'merely consistent with' liability are not sufficient."[38]

ARGUMENT AND CITATION OF AUTHORITY

I. Plaintiffs' First Amendment Claim Fails Because the City Ordinance Does Not License or Regulate Speech, But Regulates Business Under the City's Police Powers.

It is well established that local governments have the power to regulate occupations under the police powers.[39] The U.S. Supreme Court determined long ago that although "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, . . . there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed . . . for the protection of society."[40]

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[33] *See Burnett v. Mortg. Elec. Registration Sys., Inc.,* 706 F.3d 1231, 1235 (10th Cir. 2013).
[34] *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955 (2007) (holding the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements).
[35] *Id*. at 679.
[36] *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
[37] *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570).
[38] *A Soc'y Without a Name v. Virginia,* 655 F.3d 342, 346 (4th Cir. 2011) (quoting *Iqbal,* 556 U.S. at 678).
[39] *Watson v. Maryland*, 219 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the state extends to the regulation of certain trades and callings[.]")
[40] *Dent v. West Virginia*, 129 U.S. 114, 121-122, 9 S. Ct. 231, 233, 32 L.Ed. 623 (1889).

Courts have long recognized municipalities' power to require a license for tour guides.[41] "Certainly the licensing of sightseeing guides [for hire] in a large metropolis falls within the police powers of the local government."[42] "Guides must be persons of knowledge and integrity—not steerers of fly-by-night operators. It is a matter of public concern and interest that they be carefully supervised, [and the City] has the power to license these [tour] guides and to prescribe reasonable standards and qualifications as prerequisites to the granting of the licenses."[43]

Charleston's occupational license sets minimum qualifications for tour guides to charge for their services.[44] It is indisputably within the City's police powers to do so. Plaintiffs' Complaint mischaracterizes the City's occupational license for tour guides as an effort to control speech in an attempt to implicate the First Amendment. The ordinance, however, does not regulate speech. The ordinance regulates only the business transaction of charging for tour guide services.

In *Detroit Automotive Purchasing Services, Inc. v. Lee*, the court rejected a First Amendment challenge to an occupational business license analogous to the one here.[45] The plaintiffs in *Lee* operated an automotive purchasing service, and challenged a Maryland license requirement for automobile salesman under the First Amendment.[46] The *Lee* court rejected the plaintiffs' claim that the license requirement implicated the First Amendment.[47] The *Lee* court ruled that the licensing requirement did not affect the salesmen's speech but rather only regulated

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[41] See *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014).
[42] *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958).
[43] *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958).
[44] City Code Secs. 29-58 to -61.
[45] *Detroit Automotive Purchasing Services, Inc. v. Lee,* 463 F. Supp. 954 (D. Md. 1978).
[46] *Id.*

the business transaction, noting that the salesmen were free to speak about car information with or without the license.[48] The regulation only required the plaintiffs to have the license in order to process the sales transaction.[49] The Court held "in view of the prior rulings on the constitutionality of the licensing requirement, plaintiffs' attack on the licensing requirement under the First Amendment is ineffective."[50]

There is no reason for a different result here. Charleston requires no license for individuals to speak about Charleston or engage in free tour guide services. Individuals without a license are free to speak about Charleston and its history and tour the city with others as often as they like without any prohibition from the City's ordinance. The license requiring minimum qualifications is only required for tour guides who charge for their services.[51]

Furthermore, the ordinance does not regulate the message that is conveyed on licensed tours.[52] The ordinance has no device to control what licensed tour guides say.[53] Tour guides are free to present whatever message they wish on their tours.[54] The ordinance establishes no restraint on opinion and no topic is off limits.[55] Accordingly, the ordinance only regulates the business transaction and does not violate Plaintiffs' First Amendment rights. Therefore, Plaintiffs' First Amendment claim fails and their Complaint should be dismissed as a matter of law.

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[47] *Id.* at 971-72.
[48] *Id.* at 972. ("The particular licensing provisions in question do not prevent DAPS from providing consumers with information on the price of new automobiles. The provisions do prevent unlicensed brokers from making arrangements on behalf of clients to purchase particular vehicles.")
[49] *Id.*
[50] *Id.*
[51] City Code Secs. 29-2, -58.
[52] *See also generally* Chapter 29 "Tourism" of the City Code.
[53] *Id.*
[54] *Id.*

II. To the Extent the Ordinance Regulates Speech, It Is Content Neutral and Survives Intermediate Scrutiny.

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[56] "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[57] The Supreme Court has consistently stated that a statute, law, regulation or ordinance will be considered content-neutral so long as it is "justified without reference to the content of the regulated speech."[58] Where a regulation "was adopted for the purpose unrelated to the suppression of expression, *e.g.*, to regulate conduct . . . a court must apply a less demanding intermediate scrutiny."[59]

Charleston's ordinance is content neutral. The trigger for the license is whether a tour guide is charging for the services not the content of what the tour guide says.[60] No license is required for noncommercial touring or storytelling.[61] Individuals may conduct whatever tour activities they like without a tour guide license as long as money is not charged.[62]

Moreover, the tour guide ordinance concerns qualifications, not speech.[63] The City does not regulate the message that is conveyed on licensed tours.[64] The City does not police, monitor, or control what licensed tour guides say.[65] Tour guides are free to present whatever message

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[55] *Id.*
[56] *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 433 (4th Cir.2007) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989)).
[57] *Ward*, 491 U.S. at 791.
[58] See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).
[59] *MJJG Rest., LLC v. Horry Cnty., S.C.*, 11 F. Supp. 3d 541 (D.S.C. 2014).
[60] *See* City Code Secs. 29-2, -58.
[61] *Id.*
[62] *See generally* Chapter 29 "Tourism" of the City Code.
[63] *See generally* Chapter 29 "Tourism" of the City Code.
[64] *See generally* Chapter 29 "Tourism" of the City Code.
[65] *See generally* Chapter 29 "Tourism" of the City Code.

they wish on their tours.[66] The City ordinance applies no restraints on opinion stated during tours and no topic is off limits.[67] The City ordinance provides no mechanism to monitor or regulate speech during the tours, and it has not done so.[68]

Revealing the weakness of their First Amendment claims, Plaintiffs' exaggerate the scope of the City's tour guide ordinance throughout their Complaint.[69] The Court should ignore Plaintiffs' over exaggeration of the ordinance's requirements. The Supreme Court has made clear that when analyzing the constitutionality of a municipal or state law courts "should consider any limiting construction that a state court or enforcement agency has proffered."[70] Accordingly, this Court should instead consider the City's interpretation of the ordinance as providing no power to regulate the content of licensed tour guides' speech.

Merely defining the conduct to be regulated— i.e. tour guides for hire—does not make an ordinance content based.[71] In *Kagan v. City of New Orleans*, the court rejected an identical argument made by the plaintiffs in that case.[72] The plaintiffs in *Kagan* alleged New Orleans' tour guide licensing ordinance violated their free speech rights arguing the ordinance was content based because it singled out speech by tour guides. The court held that defining the conduct to

[66] *See generally* Chapter 29 "Tourism" of the City Code. For instance, as Plaintiffs' allege, the City allows ghost tours about non-factual information. *See* Plaintiffs' Complaint ¶ 22.
[67] *See generally* Chapter 29 "Tourism" of the City Code.
[68] *See generally* Chapter 29 "Tourism" of the City Code.
[69] Plaintiffs' Complaint ¶¶ 43, 59, 70, 73–75, 80, 81, 105.
[70] *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989).
[71] *Covenant Media of SC v. City of North Charleston,* 493 F.3d 421 (4th Cir. 2007) (rejecting the plaintiff billboard company argument that the city's sign ordinance violated the first amendment, and holding "to the extent that the Sign Regulation required looking generally at what type of message a sign carries to determine where it can be located, this 'kind of cursory examination' did not make the regulation content based"); *Nat'l Assn. for Advancement of Psychoanalysis v. Cal. Bd. of Psych*., 228 F.3d 1043, 1054 (9th Cir.2000) ("California's mental health licensing laws are content-neutral; they do not dictate what can be said between psychologists and patients during treatment.").

be regulated did not make the ordinance content based:

> Commercial tour guides are commercial tour guides because, in exchange for money, they lead people around while speaking about points of interest. The City must "refer" to that speech to define this conduct but it need not (and does not) "examine the content of the message" that speech conveys. . . . "the conduct triggering coverage under the statute" does not "consist [ ] of communicating a message." The conduct triggering coverage consists of an act—guiding people around the city for hire—that only incidentally involves communicating a message.[73]

The Court further held that New Orleans' interests were not related to the content of the speech but rather the qualifications of those charging for their services:

> That the City's licensing scheme is directed at the non-speech-related risks of this activity, namely that customers could be scammed or put in danger by their tour guides, is clear from the City's willingness to allow licensed tour guides to perform ghost and vampire tours. If the City's concern in protecting tourists from feeling "scammed" were that tour guides speak only some official version of truth (because of "disagreement with the message conveyed" otherwise) or in the potential harms of untrue speech directed at tour group participants ("the message's direct effect on those who are exposed to it"), the City would be hard pressed to permit tours focused on the supernatural. That the City does allow such tours shows its true interest: making sure tour group participants get what they pay for, viz., a safe tour, conducted by someone with a minimum quantum of professionalism. The City's concern that tour group participants not feel scammed is therefore unrelated to concerns about the content of tour guides' speech. The City's concern is instead related to the quality of the consumer's experience, which a City dependent on tourism has a substantial interest in protecting. The City protects that experience by weeding out tour guides too dangerous to lead strangers around a strange city and too unserious to be willing to study for a single exam. People who meet those minimal qualifications are then free to provide whatever kinds of tours the market will support. As the City's licensing scheme is "justified without regard to the content

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[72] *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).
[73] *Kagan*, 957 F. Supp. 2d at 779.

of [tour guides'] speech," it is content neutral.[74]

The same reasoning applies in the present case. The trigger for the Charleston ordinance to apply is not speech, but the charging of money for tour services. Moreover the ordinance seeks to protect and promote the City's tourism economy and its residents and visitors, which inherently includes protection from false or misleading offers of service for compensation, such as a tour guide for hire who has insufficient knowledge to guide paying customers through the City. These common sense regulations ensure 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.[75] Accordingly, the City's ordinance is justified without regard to the content of the tour guides speech, and it is therefore content neutral.[76]

"A content-neutral regulation passes constitutional muster if it furthers a substantial government interest, is narrowly tailored to further that interest and leaves open ample alternative channels of communication."[77] The City's tour guide licensing scheme meets all three standards.

The City is "entitled to advance its interests by arguments based on appeals to common sense and logic, particularly where, as here, the burden on speech is relatively small."[78] The City's licensing ordinance promotes the City's interest in protecting and promoting the tourism industry. Specifically, the ordinances ensure that tour guides who charge for their services have sufficient knowledge to conduct tours of points of interest in the City. It is common sense that tourists, whether here in Charleston or another City, expect a level of security, competence and

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[74] *Id.* at 779–80.
[75] *See Kagan*, 957 F. Supp. 2d at 782.
[76] *Id.* at 778–80.
[77] *Wag More Dogs*, 680 F.3d at 369.
[78] *Ross v. Early*, 746 f.3D 546 (4th Cir. 2014).

knowledge from tour providers.[79] As the City is largely dependent on a healthy tourism industry, it goes without saying that the City has a substantial interest in protecting the consumers' experience in the tour guide industry.

Consequently, it is axiomatic that the City has a substantial interest in preventing unqualified individuals from charging fees and falsely purporting to conduct knowledgeable tours from swindling trusting tourists out of money.[80] Indeed, as recognized by courts, Charleston, like any other government entity, has a substantial interest in protecting the public from deceptive business transactions and solicitations for money from unqualified fly by night swindlers.[81] Clearly this interest extends to protecting the City's tourism economy and its residents and visitors from false or misleading offers of service for compensation, such as a tour guide for hire who has insufficient knowledge to guide paying customers through the city.[82]

Charleston's licensing requirement is narrowly tailored to meet the City's interests. The Court in *Kagan* held that New Orleans' tour guide testing ordinance was narrowly tailored.

> This is a case about the sale of an in-person service, not information. Once a tour guide demonstrates sufficient knowledge to pass the test, he may sell his services. In the course of doing so, he may provide whatever information he likes. The testing requirement simply helps to ensure that tour guides have some reasonable basis for holding themselves out as such—something even Plaintiffs agree should be the case. . . . It is clear to the Court that the test furthers the City's interest. A test like that used by the City is the best way of weeding out cheats, because people unwilling or unable to learn about the City's history are unlikely to pass the test. The City's testing requirement therefore passes intermediate scrutiny.[83]

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[79] *See Kagan*, *supra*.
[80] Plaintiffs attempt to misapprehend the foundation of the City's ordinance. *See* Plaintiffs' Complaint, ¶¶ 82–102.
[81] *See Bowen*, 11 Misc. 2d at 464–65; *see also Kagan*, 957 F. Supp. 2d at 781.
[82] *Id.*
[83] *Kagan*, 957 F. Supp. 2d at 782.

There is no reason for a different result here. The license test does not burden substantially more speech than is necessary to further the government's legitimate interests.[84] Indeed, the tour guide license test concerns qualifications not speech. The City's tour guide ordinances, like other common occupational licenses, make clear the licensure requirements are in place to ensure only that individuals charging for services are qualified to perform them. The ordinance's tour guide testing is a common sense way to ensure that tour guides are qualified to charge the public fees for their services. As with any occupational license that regulates a commercial transaction, once an individual demonstrates sufficient knowledge to pass the tour guide test, he or she has shown qualifications to sell his or her services to the public.[85]

The City's ordinance also leaves open ample alternative channels of communication.[86] In *One World One Family Now v. City and County of Honolulu*, the plaintiff challenged an ordinance the prohibited it from selling their message bearing T-shirts on sidewalks under the First Amendment.[87] The Court held Honolulu's ordinance left ample alternative channels of communication because it only forbid the ***selling*** of the T-shirts. The court noted "plaintiffs' volunteers may hand out free T-shirts to passers-by." The Court rejected the plaintiffs attempt to argue that selling was a unique form of expression. "Various other traditional means of

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[84] *See Ward*, 491 U.S. at 799; *see also Kagan*, *supra*. To the extent Plaintiffs may attempt argue, based on their allegations in Paragraphs 82–102 of their Complaint, that the city's ordinance is not narrowly tailored because the City could issue a voluntary license test, this argument fails because the government "need not regulate using the least restrictive or least intrusive means available to achieve its goals." *Ross v. Early*, 746 F.3d 546, 557 (4th Cir. 2014) (citing *Ward* at 798). Stated differently, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* (citing *Ward* at 800).

[85] *See* City Code Sec. 59-61.

[86] See *One World One Family Now v. City and County of Honolulu,* 76 F.3d 1009, 1014-15 (9th Cir. 1996); *Kagan v. City of New Orleans,* 957 F.Supp.2d 744 (E.D. La. 2013), *affirmed,* 753 F.3d 560 (5th Cir. 2014), *cert denied*, 135 S. Ct. 1403 (Feb. 23, 2015).

dissemination would get across the exactly same idea. Thus, we do not believe the sale of message-bearing T-shirts is so 'uniquely valuable or important [a] mode of communication' as to be without effective substitute."

The *Kagan* Court applied the same reasoning to the New Orleans license requirement for tour guides. "The City's licensing scheme satisfies the last requirement, as [p]laintiffs do not need a license to speak and lead tours whenever, wherever, and containing whatever they please, just so long as they do not charge for them."[88]

Likewise, Plaintiffs may communicate whatever message about the City of Charleston they want with or without a tour guide license. The only limitation is that they cannot ***charge money*** for tour guide services without a license.[89] No license is required to speak about Charleston or to engage in free tour guide services.[90] Even for individuals with a license, the ordinance does not regulate the message that is conveyed on tours.[91] Indeed the tour guide ordinance does not regulate speech whatsoever.[92] The ordinance has no device to control what licensed tour guides say.[93] Based on the City's ordinances, it is clear that tour guides are free to present whatever message they wish on their tours, as the ordinance has no restraints on opinion and no topic is off limits.[94]

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[87] *One World One Family Now v. City and County of Honolulu*, *supra*.
[88] *Kagan*, 957 F.Supp.2d at 781.
[89] City Code Sec. 29-58.
[90] *Id.*
[91] *See generally* Chapter 29 "Tourism" of the City Code.
[92] City Code Secs. 29-58 to -61.
[93] City Code Secs. 29-58 to -61; *see also generally*, Chapter 29 "Tourism" of the City Code.
[94] City Code Secs. 29-58 to -61; *see also generally*, Chapter 29 "Tourism" of the City Code.

CONCLUSION[95]

Based on the foregoing reasoning and citation of authority, Defendant City of Charleston respectfully requests that this Court grant its Motion to Dismiss with prejudice.

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[95] Alternatively, the City's ordinance survives First Amendment scrutiny as a regulation of commercial speech. As argued above, Charleston's ordinance does not regulate the content of tour guides' speech. Therefore, the ordinance is content neutral if it regulates speech at all, which it does not. To the extent the Plaintiffs may attempt to argue the ordinance is content based, it regulates no more than commercial speech. Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Courts have long recognized a "common-sense distinction" between commercial speech and other forms of expression. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978). Commercial speech occupies a "subordinate position in the scale of First Amendment values." *Ohralik*, 436 U.S. at 456, 98 S. Ct. 1912. While the parameters of commercial speech are typically defined as that which "does not more than *propose* a commercial transaction[,]"courts recognize this is not a bright line rule. *Moore-King v. Cty. of Chesterfield, Va.*, 708 F.3d 560, 568 (4th Cir. 2013) (noting that certain aspects of a plaintiff who is running a fortune telling business involves proposing a transaction—"she is, after all, running a business"). To the extent Plaintiffs argue that Charleston's tour guide ordinance to charge for their services is found to regulate speech and content based, the ordinance regulates at most commercial speech. *See Washington Tour Guides Ass'n v. National Park Service*, 808 F.Supp. 877 (D.D.C. 1992) (applying the commercial speech test to reject the plaintiff's First Amendment challenge to a regulation prohibiting engaging in or soliciting in tour guide services without a permit). The same reasoning the Court applied in *Washington Tour Guides Ass'n* applies here. The City's ordinance focuses on preventing unqualified individuals from charging fees and falsely purporting to conduct knowledgeable tours from swindling trusting tourists out of money. Thus, the thrust of the ordinance seeks to regulate the proposal of the tour services, and increase the likelihood that the consumer will get what they bargained for. Accordingly, to the extent the ordinance is alleged as content based – which it is not – it regulates only commercial speech.

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