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

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

INTRODUCTION

Plaintiffs' challenge to the Defendant City of Charleston's (hereinafter "the City" or "Charleston" or "Defendant") occupational license under the First Amendment relies on the false premise that the ordinance controls what tour guides say.[1] Plaintiffs' argument ignores critical facts about the ordinance. The ordinance does not control speech. The plain language of the ordinance shows it does not control the message conveyed by licensed tours guides and has no mechanism to control what licensed tour guides say.

Plaintiffs also ignore critical law. 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.[2] The Supreme Court recently denied the *Kagan* petition for writ of certiorari,

[1] See, e.g. Plaintiffs' Memo in Support of Motion for Preliminary Injunctive Relief, p. 1 ("The City of Charleston requires a license to talk"); p.2 ("Only after proving their ability to write and talk about what Charleston government officials deem important can would-be tour guides obtain permission to begin telling their own stories.").

[2] *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).

which was prepared by the same lawyers that represent Plaintiffs here.[3] The *Kagan* petition for writ of certiorari presented arguments identical to those Plaintiffs assert here. Yet Plaintiffs make no attempt to distinguish *Kagan*. Because Plaintiffs cannot plausibly allege that the City's ordinance violates the First Amendment Plaintiff's Complaint should be dismissed.[4]

ARGUMENT AND CITATION OF AUTHORITY

I. Plaintiffs' First Amendment Claim Fails Because the City's Ordinance Does Not Regulate Speech.

The constitutionality of occupational licenses establishing minimum qualifications to practice an occupation is well established.[5] Courts have repeatedly approved such licenses for tour guides.[6] Recognizing their First Amendment claim fails if the ordinance does not regulate speech, Plaintiffs present an argument based on an inaccurate description of the law. Plaintiffs' arguments are based on the fallacy that the ordinance controls what licensed tour guides can say on their tours. Plaintiffs argue "speech triggers the City's tour-guide licensing law."[7]

Plaintiffs are wrong. Charleston's ordinance is limited to setting minimum qualifications for tour guides to be licensed and charge for their services; the ordinance does not regulate speech.[8] The ordinance does not control the message that is conveyed on licensed tours.[9] The ordinance has no mechanism to control what licensed tour guides say.[10] Tour guides are free to

---

[3] 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).
[4] *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).
[5] *Dent v. West Virginia*, 129 U.S. 114, 121-122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).
[6] *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 (D.D.C. 1992).
[7] Plaintiff's Reply in Support of Motion for Preliminary Injunctive Relief, p. 2.
[8] City Code Secs. 29-58 to -61.
[9] *See also generally* Chapter 29 "Tourism" of the City Code.
[10] *Id.*

present whatever message they wish on their tours.[11] The ordinance establishes no restraint on opinion and no topic is off limits.[12] In this way, the law is indistinguishable from other common minimum qualification occupational licenses.

Because the constitutionality of occupational licenses is well settled, Plaintiffs have not cited cases finding occupational licenses violate the First Amendment.[13] Plaintiffs also fail to distinguish *Detroit Automotive Purchasing Services, Inc. v. Lee*, where the court rejected a First Amendment challenge to an occupational license analogous to the one here.[14] The *Lee* court held that the license in that case did not implicate the First Amendment because the licensing law did not control what could be said and was limited to regulating the sales of automobiles.

To support their argument that the City's ordinance regulates speech, Plaintiffs argue speech motivated by profit is protected.[15] However, this argument misses the point. The ordinance does not control speech; it merely regulates who can charge money for tour services. With or without a tour guide license individuals may communicate whatever message about the City of Charleston they want.[16] The ordinance has no device to control or ban what is said.[17]

Unlike the City's ordinance, the regulations in the cases Plaintiffs cite impose a significant burden on speech.[18] The cases Plaintiffs cite involve a total prohibition of certain

---

[11] *Id.*
[12] *Id.*
[13] Besides the *Edwards* holding by the D.C. Circuit Court of Appeals, Plaintiffs provide no examples of occupational licenses that have been held to violate the First Amendment.
[14] *Detroit Auto. Purchasing Servs., Inc. v. Lee,* 463 F. Supp. 954 (D. Md. 1978).
[15] Plaintiffs' Reply in Support of Motion for Preliminary Injunctive Reliev, p. 3; Plaintiffs' Memo. in Opp. to the City's Motion to Dismiss (hereinafter "Plaintiffs' Memo. in Opp."), pp. 2–3, n. 2.
[16] City Code Secs. 29-2, -58.
[17] *Id.*
[18] *Id.*

speech under certain circumstances,[19] or laws that were invalidated due to allowing the government unbridled discretion to approve or deny an application.[20] Accordingly, the cases Plaintiffs cite are distinguishable and unpersuasive.

Plaintiffs' reliance on *Holder v. Humanitarian Law Project*, is equally unconvincing.[21] Plaintiffs cite to *Humanitarian Law Project* for the proposition that a law regulates speech when the "conduct triggering coverage under the statute consists of communicating a [particular] message."[22] However, the law banning support to terrorist organizations at issue in *Humanitarian Law Project* has no similarity to Charleston's occupational ordinance. The law at issue in *Humanitarian Law Project* imposed a criminal ban on providing certain material support or information to certain terrorist groups.[23] The activities the plaintiff's sought to engage in were (1) *training* these terrorists groups' members to use international law to resolve disputes, (2) *teaching and advising members to petition* the United Nations and other representative bodies for

---

[19] *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011) (involving law forbidding the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of doctors by pharmacies for certain purposes); *U.S. v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 115 S. Ct. 1003 (1995) (involving law that imposed a complete ban on receipt of honoraria by government employees for speech unrelated to their official duties in government); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct. 501 (1991) (involving state law requiring complete government forfeiture of all income from any speech or other works by a criminal describing his or her crime); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268 (1975) (involving a local ordinance that provided for a complete ban of certain movies at certain movie theater locations); *N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) (involving libel law effectively banning certain speech by imposing sanctions and/or damages for expression of critical of official conduct of public officials as applied to non-commercial speech about "matters of the highest public interest and concern").

[20] *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772, 108 S. Ct. 2138 (988) (holding a city ordinance regulating the location where news racks could be placed unconstitutional because the city's mayor had *unbridled discretion* to approve or deny permit application and "unbounded authority to condition the permit on any additional terms he deemed necessary and reasonable")

[21] 561 U.S. 1 (2010).

[22] Plaintiffs' Memo in Opp., p.6.

relief, and (3) *engaging in political advocacy* on behalf of citizens living in the countries the groups are located and coordination with the terrorists groups concerning such advocacy.[24] The court found that because the law banned conduct intended to communicate a message it implicated the First Amendment.[25]

Unlike the criminal ban in *Humanitarian Law Project,* the occupational license here includes no ban on any speech. The law here is triggered by charging money for services. Charging money is not conduct that is intended to communicate a message. Plaintiffs therefore cannot plausibly allege that the tour guide ordinance is triggered by speech. Accordingly, because the ordinance does not regulate speech, Plaintiffs' First Amendment claim fails.

Refusing to recognize that the ordinance does not control speech, Plaintiffs argue that the only way for an occupational license to escape First Amendment scrutiny is to satisfy the Fourth Circuit's "professional speech exemption".[26] The Fourth Circuit's professional speech doctrine exempts regulations controlling speech of professionals if the speech constitutes "personal advice in a private setting to a paying client".[27] The Fourth Circuit has recently acknowledged that it has not "delineate[d] the precise boundaries of permissible occupational regulation under the professional speech doctrine."[28] The Fourth Circuit has never held that all occupational licenses, even ones that do not control speech, must satisfy the "professional speech exemption" to avoid First Amendment scrutiny. Indeed, if such were the case common occupational licenses

---

[23] 561 U.S. 1, 8–9 (2010) (holding the federal criminal statute constitutional because it did not violate the plaintiffs' freedom of speech rights guaranteed under the First Amendment).
[24] *Id.* at 2, 36–38.
[25] *Id.* at 27–28 (finding that because the plaintiffs wanted to speak to these terrorists groups, "and whether they may do so under [the criminal statute] depends on what they say", the conduct triggering coverage under the criminal statute consisted of communicating a message and, thus, fell under First Amendment scrutiny).
[26] Plaintiffs' Memo. in Opp., pp. 8–9.
[27] *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013).

for "non-professional" occupations would arguably be subject First Amendment scrutiny.

Under Plaintiff's theory South Carolina's occupational licenses for insulation contractors, painting contractors, mason contractors, drywall contractors, HVAC contractors, massage therapists, child care workers, security guards, truck drivers, school bus drivers, auctioneers, cosmetologists, barbers and many more would all violate the First Amendment. Because all occupations involve some level of human communication, Plaintiffs' theory turns all business regulation into a constitutional question. Indeed, virtually every business activity requires the use of language and communication. Any business that files tax forms, drafts corporate contracts, sells or advertises commercial products communicates in their business. If Plaintiffs' argument is taken to its logical conclusion, all marketplace communication would create a First Amendment question. Every time a product manufacturer is sued in strict liability for an inadequate warning, every time a commercial lease is legally required to contain a specific term, every time a particular contract is deemed to violate antitrust laws, the Court would be required to scrutinize the action under the First Amendment. This absurd result cannot be applied in this case.

Like any other occupational license, Charleston's ordinance regulates occupational conduct and not protected speech. The ordinance does not control what licensed tour guides say during their tours. Plaintiffs' First Amendment claim therefore fails and their Complaint should be dismissed as a matter of law.

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

To the extent Charleston's ordinance is found to regulate speech, the ordinance's regulation is content neutral. The trigger for the license is whether a tour guide is charging for

[28] *Id*. at 570.

the services, not the content of what the tour guide says.[29] Tour guides are free to present whatever message they wish on their tours.[30]

Plaintiffs' "content based" argument is illogical. Plaintiffs argue that because the ordinance identifies the occupation requiring a license – sightseeing services – the ordinance is content based.[31] Plaintiffs are wrong. The ordinance's identification of the conduct to be regulated does not render it content based.[32] Because all common occupational licenses identify the conduct to be regulated, under Plaintiffs reasoning they are all content based regulations subject to strict First Amendment scrutiny. Plaintiffs, however, cite no case where a court imposed strict scrutiny on an occupational license. Indeed, Plaintiffs cannot do so.

---

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

[30] *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.

[31] Plaintiffs' Reply in Support of Motion for Preliminary Injunctive Relief, pp. 5–6; Plaintiffs' Memo. in Opp., pp. 6–7. Plaintiffs' citation to *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015), is readily distinguishable. The ordinance at issue in *Reed* was a "Sign Code" that "identifie[d] various categories of signs based on the type of information they convey, then subject[ed] each category to different restrictions." *Reed*, 135 S. Ct. at 2224. The code imposed more stringent restrictions on certain categories of signs based on the content those signs conveyed. *Id.* Specifically, the Court said the Sign Code was content-based because it defined the differing categories and, thereby applied the differing restrictions, based on the message the sign conveyed—whether the message was one directing people to a church, one "designed to influence the outcome of an election," or one that "communicat[ed] a message or ideas." *Id.* at 2227. The Court found that the "restrictions in the Sign Code that apply to any given sign depend *entirely on the communicative content* [*i.e.*, message] of the sign." Here, however, the regulation depends entirely on the conduct of the individual—whether they offer tour guide or sightseeing services *for hire*—and not the content of any "message" they provide on a tour. Moreover, the Court in *Reed* repeatedly relied on the fact that the code at issue "single[d] out signs bearing a particular *message*", which is not the case here.

[32] *Covenant Media of SC v. City of N. 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.").

Plaintiffs also fail to distinguish *Kagan v. City of New Orleans*.[33] In *Kagan*, the Fifth Circuit affirmed the District Court's holding that New Orleans' tour guide ordinance did not violate the First Amendment.[34] The Supreme Court recently denied the petition for writ of certiorari, which presented the identical arguments made by the Plaintiffs here.[35] Accordingly, the Fifth Circuit's opinion in *Kagan* remains good law.

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 in *Kagan* held that defining the conduct to be regulated did not make the ordinance content based.[36] The *Kagan* 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.[37]

Plaintiffs do not attempt to distinguish Charleston's ordinance from New Orleans' ordinance because they cannot do so. Just like New Orleans, Charleston 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.[38] Accordingly, the City's ordinance is justified without regard to the content of the tour guides speech, and it is

---

[33] *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).
[34] *Id.*
[35] See, 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).
[36] *Kagan*, 957 F. Supp. 2d at 779.
[37] *Id.* at 779–80.

therefore content neutral.[39]

Charleston's ordinance also survives intermediate scrutiny. In arguing that Charleston's ordinance fails intermediate scrutiny, Plaintiffs again ask this court to ignore the Supreme Court's denial of certiorari in *Kagan v. City of New Orleans*. Plaintiffs' Counsel in this case presented the same arguments regarding intermediate scrutiny in the petition for writ of certiorari in *Kagan* and the Supreme Court rejected the petition.[40] The petition in *Kagan* argued that the Supreme Court's holding in *McCullen* increased the evidentiary standard required for government to survive intermediate scrutiny as a basis for the argument that the Fifth Circuit erred in upholding New Orleans' tour guide ordinance. Despite the plaintiffs' *McCullen*-based argument, the Supreme Court denied certiorari in *Kagan* (despite a circuit split on the issue).[41]

McCullen does not invalidate the Fifth Circuit's holding in *Kagan*. The regulation at issue in *McCullen* constituted a complete ban on speech in a traditional public forum.[42] The regulation addressed by the *McCullen* Court made it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance to an abortion clinic.[43] The law in *McCullen* therefore constituted a significant burden on speech, unlike the common occupational license at issue here and in *Kagan*. Therefore, the government in *McCullen* could not show its complete ban on speech in a traditional public forum was narrowly tailored to meet its asserted interests.

By contrast, here as in *Kagan*, the ordinance's narrow regulation – requiring a license to charge money for tour services – easily satisfies intermediate scrutiny. As a healthy tourism

---

[38] *See Kagan*, 957 F. Supp. 2d at 782.
[39] *Id.* at 778–80.
[40] 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).
[41] *Id.*
[42] *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).
[43] *Id.*

industry is vital to Charleston's economy, Charleston has a substantial interest in protecting the consumers' experience in the tour guide industry.[44] The City therefore has a substantial interest in preventing unqualified individuals from charging fees and falsely purporting to conduct knowledgeable tours and thereby swindling trusting tourists out of their money.

The ordinance is narrowly tailored as it does not regulate speech at all. The only limitation imposed is that individuals cannot ***charge money*** for tour guide services without a license. No license is required to speak about Charleston or to engage in free tour guide services. Even for individuals with a license, the ordinance does not regulate the message that is conveyed on tours. The ordinance is limited to an occupation qualifications test. People unwilling or unable to learn about the City's history are unlikely to pass the test. Thus, the test increases the likelihood that paying consumers get what they bargained for.[45]

As the ordinance does not control what licensed tour guides say, the ordinance does not

[44] *See Reynolds v. Middleton,* 779 F.3d 222, 228 (4th Cir. 2015) (holding the existence of a substantial government interest can be established by case law). *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").

[45] *See Reynolds v. Middleton,* 779 F.3d 222, 228 (4th Cir. 2015) (holding objective evidence is not necessary to show that a "speech restriction" furthers the governments' interests).

burden more speech than necessary to further the government's legitimate interests.[46] Indeed, the tour guide license test concerns qualifications to charge money for services, not speech.

Plaintiffs' arguments regarding *Reynolds v. Middleton*[47] and *Watchtower v. Village of Stanton*[48] are unconvincing.[49] Plaintiffs again attempt to fit a square peg in a round hole to further their argument. The laws at issue in both *Reynolds* and *Watchtower* were substantially more burdensome that the occupational license here and in *Kaga*n.[50] The laws at issue in *Reynolds* and *Watchtower* prohibited a wide range of speech, including leafleting political speech, and were not limited to just commercial activities.[51] Indeed, the Court in *Watchtower* noted that "had this provision been construed to apply only to commercial activities and the solicitation of funds arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud."[52] Accordingly, Charleston's ordinance furthers a substantial government interest, and is narrowly tailored to further that interest.

Notably, Plaintiffs do not contest that the ordinance leaves open ample alternative

---

[46] *Ward*, 491 U.S. at 799. 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). Moreover, the *McCullen* holding did not overrule the Fourth Circuit's holding in *Ross* as Plaintiffs attempt to argue. See *Reynolds*, 779 F.3d at 228–29 (noting that *McCullen* clarified – not changed – the showing required under intermediate scrutiny). The law at issue in *Ross* imposed a much smaller burden on speech than the law in *McCullen.* Therefore, the government more easily satisfies the required showing when the law is less burdensome.

[47] *Reynolds v. Middleton,* 779 F.3d 222 (4th Cir. 2015).

[48] *Watchtower Bible and Tract Soc'y of N.Y. v. Vill. Of Stratton*, 536 U.S. 150 (2002).

[49] See Plaintiffs' Reply in Support of Preliminary Injunctive Relief, pp. 7–9; Plaintiffs' Memo. in Opp., pp. 3-4.

[50] See *Reynolds*, 779 F.3d at 230–31; *Watchtower*, 536 U.S. at 165.

[51] See *Reynolds*, 779 F.3d at 230–31; *Watchtower*, 536 U.S. at 165.

channels of communication.[53] Plaintiff's fail to distinguish *One World One Family Now v. City and County of Honolulu*, where the Court held Honolulu's ordinance that prohibited selling of message bearing T-shirts left ample alternative channels of communication because it only forbid the ***selling*** of the T-shirts.[54] Here, 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.[55] The ordinance therefore leaves ample alternative channels of communication for Plaintiffs. Accordingly, Charleston's

[52] *Watchtower*, 536 U.S. at 165.
[53] 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 (2015).
[54] *One World One Family Now v. City and Cnty. of Honolulu,* 76 F.3d at 1014–15.
[55] City Code Sec. 29-58.

ordinance survives intermediate scrutiny, and Plaintiffs' First Amendment claim fails.[56]

[56] Because the ordinance does not control speech, the commercial speech doctrine is inapplicable. However, to the extent the Court finds that the ordinance regulates speech, the ordinance alternatively is subject to only intermediate scrutiny because it regulates at most commercial speech. Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience" and courts have long recognized a "common-sense distinction" between commercial speech and other forms of expression. *See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561, 100 S. Ct. 2343 (1980); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56, 98 S. Ct. 1912 (1978) (further noting that commercial speech occupies a "subordinate position in the scale of First Amendment values."). While the parameters of commercial speech are typically defined as that which "does no 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"). Indeed, at least one court has applied the commercial speech doctrine in response to a First Amendment challenge to uphold a law prohibiting tour guide services without a permit. *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 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 who are unfamiliar with the town out of money. This interest matches the rationale underpinning the commercial speech doctrine. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563, 564 n.6. The City's ordinance requires a license to offer to charge money for tour guide services. (See definition of "tour guide" at Sec. 29-2). Accordingly, the ordinance's requirement that an individual obtain a license to hold themselves out as a tour guide for hire fits comfortably within the commercial speech doctrine – holding oneself out as a tour guide for hire to the public is communication that proposes a transaction. Plaintiffs argue the commercial speech doctrine does not apply here because "tours are not commercial speech." (*See* Plaintiff's Reply to Motion for Preliminary Injunction, p. 10). Plaintiffs' argument is based on the premise that the City's ordinance controls "speech involving stories about history, historical figures, ghosts, pubs, and famous movie sets (among other subject matter discussed on tours)." *Id.* However, Plaintiffs' argument that speech during tours is not commercial speech misses the point. The ordinance does not regulate the message that is conveyed on licensed tours. The ordinance is a qualifications test that increases the likelihood that those holding themselves out as tour guides for hire are qualified to do so. Thus, to the extent the ordinance regulates speech—which it does not—the ordinance falls within the commercial speech doctrine, and is subject to intermediate scrutiny, which it easily survives as analyzed above.

CONCLUSION

Based on the foregoing reasoning and the authority cited in Defendant's Memorandum in Support, Defendant City of Charleston respectfully requests that this Court grant its Motion to Dismiss with prejudice.

YOUNG CLEMENT RIVERS, LLP

By: s/Carol B. Ervin
Carol B. Ervin, Esquire, Federal ID No. 734
E-mail: cervin@ycrlaw.com
Brian L. Quisenberry, Esquire, Federal ID No. 9684
E-mail: bquisenberry@ycrlaw.com
Stephanie N. Ramia, Esquire, Federal ID No. 11783
E-mail: sramia@ycrlaw.com
P.O. Box 993, Charleston, SC 29402-0993
25 Calhoun Street, Suite 400, Charleston, SC 29401
Telephone: (843) 724-6641
Fax: (843) 579-1325

Attorneys for the Defendant City of Charleston, South Carolina

Charleston, South Carolina

Dated: April 4, 2016