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'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The Defendant, City of Charleston, South Carolina (hereinafter the "City", "Charleston" or "Defendant"), hereby submits this Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.[1]

ARGUMENT AND CITATION OF AUTHORITY

I. The City's tour guide licensing ordinance is content-neutral and therefore subject to intermediate scrutiny.

A. The City's tour guide ordinance is not content based on its face.

This Court has previously held, "the City's licensing regime is not content-based on its face."[2] The tour guide ordinance 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 examination and is

[1] The City fully incorporates herein the memorandum filed in support of the City's Motion for Summary Judgment, including the "Statement of Facts" section and all supporting exhibits. The City notes that Plaintiffs attach to their Motion for Summary Judgment four new "declarations", which do not constitute sworn and notarized affidavits (*See*, Declaration of Michael Nolan, Declaration of Kimberly Billups, Declaration of Paula Reynolds, and Declaration of Michael Warfield).

[2] *See*, Order, dated July 1, 2016, 194 F.Supp.3d 452, 464 (herein referenced by citation to the Federal Supplement, 3d series version, 194 F.Supp.3d 452 (D.S.C. 2016)) (hereinafter referred to as "Order").

> licensed by the city's office of tourism management as a registered tour guide or a temporary tour guide.[3]

Charging money for tour guide services is the trigger for the license requirement.[4] The tour guide ordinance 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."[5] Likewise, "tour guide" is defined 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 with 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."[6]

The tour guide ordinance does not reference "speech" at all.[7] Any effect the ordinance has on speech is derivative of the ordinance's regulation of "touring" conduct. As the Court previously recognized, "it is very difficult to functionally define the speech required to perform 'tour guide services' or 'act[] as a guide' without circularly referring to speech made in the

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[3] Charleston City Code ("City Code") § 29-58.

[4] *Id.*; *see also* City Code § 29-2; Riley Aff., ¶ 6, attached as Ex. H to Defendant City of Charleston's Memorandum in Support of Summary Judgment (hereinafter referred to as "Defendant's Memo.") [Dkt. 43-2]; Turner Maybank Affidavit ¶ 7, attached as Ex. M to Defendant's Memo. [Dkt. 44-4]. Plaintiffs mischaracterize Tourism Commission meeting minutes from July of 1999, implying the discussion at the meeting concerned citation of unlicensed tour guides. *See*, Plaintiffs' SUMF ¶ 122 [Dkt. 39-2]. At this meeting, the Commission did not discuss the citation of unlicensed tour guides. Maybank Affidavit dated February 23, 2017, ¶ 11, attached as Exhibit A. The Commission discussed the City's prohibition of certain business operations in residential districts during nighttime hours. *Id.* ¶ 11. The concern at the meeting was that the tour guides who were cited for conducting nighttime business operations in a residential area later claimed in court they were offering their services for free, which was a way to get out of the citation. *Id.* ¶ 11. The City must balance the interests of the tourism industry with the interests of residents, and protecting the peace and quiet of nighttime hours for residents is important. *Id.* ¶11. Once the City was told the night tours were allegedly conducted for free, the City dismissed the citations. *Id.* ¶11. The citations discussed at this meeting did not concern unlicensed tour guides. *Id.* ¶11.

[5] Charleston City Code § 29-2.

[6] Charleston City Code § 29-2.

[7] Order, 194 F.Supp.3d at 463.

course of such conduct."[8]

Plaintiffs' argument ignores this Court's sound reasoning. Plaintiffs continue to argue that because the ordinance identifies "touring" as the conduct requiring a license, the ordinance is necessarily content based.[9] Defining the conduct to be regulated does not render a law content based.[10] This Court wisely rejected Plaintiffs' premise that "every law restricting conduct also imposes a content-based restriction on speech made in the course of such conduct."[11] Plaintiffs' contention is untenable because it "would effectively remove the distinction between speech and conduct, and require almost every regulation to pass strict scrutiny under the First Amendment."[12]

B. The licensing regime's application does not "turn on content".

A facial review of the ordinance is, of course, limited to a review of the "plain language" of the ordinance.[13] Plaintiffs seek to get around the plain language of the ordinance by ignoring it. Rather than analyze the ordinance's terms, Plaintiffs argue "the City's licensing law only

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[8] Order, 194 F.Supp.3d at 463.

[9] Plaintiffs' Memorandum of Law in Support of Summary Judgment [Dkt. 39-1], pp. 17-18 (hereinafter referred to as "Plaintiffs' Memo").

[10] Order, 194 F.Supp.3d at 463-64. *See* also, *Covenant Media of SC v. City of North Charleston*, 493 F.3d 421 (4th Cir. 2007) (rejecting the plaintiff billboard company's 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.").

[11] Order, 194 F.Supp.3d at 464. Moreover, under Plaintiffs' reasoning, all common occupational licenses would be content-based and subject to strict scrutiny. Despite presenting such an argument, Plaintiffs cite no case where a court imposed strict scrutiny on an occupational license.

[12] Order, 194 F.Supp.3d at 464.

[13] *Satellite Broad. And Commc'ns Ass'n v. F.C.C.*, 275 F.3d 337, 353–54 (4th Cir. 2001)(stating that the Court's review at this state is to "examine the plain terms of the regulation to see whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates").

applies to people who speak to paying tour groups about particular topics."[14] The express language of the ordinance proves the argument fails. The ordinance does not reference "speech" at all. Tour guide conduct is covered by the ordinance regardless of whether or not the guide speaks about "particular topics".

Undeterred by the lack of any supporting language, Plaintiffs cite hypotheticals to support their contention. Plaintiffs reference hypothetical situations regarding whether taxi drivers or bus drivers would be covered under the ordinance, and argue coverage under the licensing regime depends on what is said to passengers.[15]

Plaintiffs misunderstand the City's ordinance. The ordinance does not cover "transportation services".[16] The plain language of the ordinance explains that the question of whether the ordinance applies to a particular vehicle depends on the "primary purpose" of the individual's service.[17] Bus and/or taxi drivers who charge for transportation are not covered by the ordinance because they are not charging for sightseeing services.[18] Rather, they charge for the service of operating their vehicle and taking their passengers from point A to point B.[19]

[14] Plaintiffs' Memo. p. 17.
[15] Plaintiffs' Memo. p. 18.
[16] Maybank Aff. dated February 23, 2017, ¶ 5.
[17] City Code § 29-2 ("tour guide" is defined 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 with 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.")
[18] Maybank Aff. dated February 23, 2017, ¶ 5. Moreover, touring services is conduct, and does not necessarily involve speech. "Touring services" include guiding customers through the City for the purpose of sightseeing. *Id*. at ¶ 4. The conduct covered by the licensing regime thus includes the guide's selection and design of the route the tour will take through the City. *Id*. at ¶ 4. The services may also include the directions a guide gives during the tour, and any information the guide provides relevant to the type of tour the guide is charging for. *Id*. at ¶ 4.
[19] Maybank Aff. dated Feb. 23, 2017, ¶ 5.

Thus, Plaintiffs' hypotheticals are not relevant to the City's ordinance.[20]

Plaintiffs inaccurately describe the testimony of Tommy Dew, a private tour guide, who was asked about a walking tour software application ("app") he marketed for use on an iPhone and a modified version of that app that was installed on free trolleys.[21] Plaintiffs incorrectly allege that Mr. Dew hired bus and rickshaw drivers to conduct unlicensed tours with his app and argue this shows the ordinance turns on what people say.[22] Plaintiffs are wrong. Mr. Dew never used the self-guided tour application in buses or rickshaws as part of his tour business, and never hired bus or rickshaw drivers.[23]

Mr. Dew helped design a self-guided walking tour app for the Apple iPhone in 2008, which served as an electronic guidebook.[24] The self-guided app was not successful and the company closed in 2012.[25]

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[20] Moreover, Plaintiffs have no evidence their hypothetical situations have ever actually occurred in Charleston.

[21] Plaintiffs' Memo. p. 18.

[22] Plaintiffs' Memo. p. 18 (asserting Plaintiffs' argument and stating "Mr. Dew's customers were actually receiving a sightseeing tour, but Mr. Dew's drivers would not need a tour-guide license – so long as those drivers were not themselves 'giving different pointers as to what buildings were of historic significance'").

[23] Dew Affidavit dated February 23, 2017, ¶ 9, attached as Exhibit B.

[24] Dew Aff. ¶ 1. ("I started another business called City Slicker, LLC (City Slicker) in 2008, not long after Apple released a revolutionary new product, the iPhone. Each iPhone contained location services (specifically, both GPS and WiFi triangulation system) technology. City Slicker produced a software application ("app") that could be downloaded to an iPhone. Once the app was downloaded and activated, it used the location services technology on the iPhone to show the iPhone user's location on a map. City Slicker developed a software program that was essentially a digitized book with a series of chapters about the City of Charleston. The chapters on the app addressed dining, lodging, parking, restrooms, tours, museums and public transportation, etc. in the City. The "tours" chapter allowed the app user to take a virtual walking tour of 20 sites in the City's historic area. As the app user walked through the City of Charleston and approached one of the 20 sites an icon would appear, which if pressed, would start a video about the building or structure at that location. I prepared all the content for the app and each video was a very short film of me talking about the site. The app allowed the user to take a self-guided walking tour using the app in lieu of a guidebook ('City Slicker app')").

[25] Dew Aff. ¶ 8.

Mr. Dew found that prospective customers did not want to pay for information on an app that could be searched on the internet and generally expected apps to be free.[26]

Prior to closing his company, Mr. Dew had an iPad installed on a friend's rickshaw in order to test the viability of using the app while riding in a rickshaw.[27] After several test rides on the rickshaw with an iPad over the course of a couple days, it was clear to Mr. Dew that the app did not operate well on the rickshaw.[28] The iPad was removed from the rickshaw after a couple of days and the effort to adapt the app for use on rickshaws was abandoned.[29] No paying passengers used the app on the rickshaw for touring.[30]

In 2011, a modified version of Mr. Dew's app was installed on the DASH trolleys operated by Charleston Area Regional Transportation Authority ("CARTA").[31] The purpose of the modified DASH app was to show the location of the trolley in relation to sites and businesses

[26] Dew Aff. ¶ 8.
[27] Dew Aff. ¶ 4.
[28] Dew Aff. ¶ 4. ("There was no way to power the iPad, the battery drained quickly and the iPad screen was exposed to sunlight which created glare that made it difficult to see the screen. The iPad's exposure to rain on the rickshaw was also problematic.")
[29] Dew Aff. ¶ 4.
[30] Dew Aff. ¶ 4. Moreover, neither Mr. Dew nor the rickshaw company sought, and the City never granted, approval to charge money for use of the app on a rickshaw. *Id*. at ¶4.
[31] Dew Aff. ¶ 5. "City Slicker produced a modified app with limited features for the free trolleys ("DASH" app). The app was modified so that as historic sites were passed, the screen automatically showed a photo of the site or a video of me standing in front of the site (with no audio sound). The purpose of the modified DASH app was to show the location of the trolley in relation to sites and businesses along the DASH route. I proposed the DASH app to Mayor Riley as an orientation tool that could be used to help trolley riders become acquainted with their location and what was in the immediate vicinity. Mayor Riley agreed tourists and anyone unfamiliar with the City would find the location information on the DASH app helpful. Sometime thereafter the DASH app was subsequently installed on the DASH trolleys." Dew Aff. ¶ 5.

along the DASH route.[32] The DASH trolleys are free trolleys that CARTA operates through the downtown historic district.[33] No fee was charged to any passenger riding a DASH trolley that was fitted with Mr. Dew's app.[34] The iPads and large screen used with the DASH app were pulled off the DASH trolleys near the end of 2012, about one year after they were installed.[35]

Finally, Plaintiffs cite to a short excerpt from the Tourism Commission minutes from March of 2003 summarizing a presentation by Dwayne Green, who worked at that time as the City's Assistant Corporation Counsel.[36] Mr. Green denies the excerpt Plaintiffs cite accurately describes his statements at the meeting.[37] Moreover, Mr. Green testifies that he "did not intend

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[32] Dew Aff. ¶¶ 5-7. "The DASH app was installed on the trolleys by installing an iPad in a cabinet behind the driver's seat at the front of the bus. A large screen linked to the iPad was mounted at the top of the cabinet. The screen showed a map of the City and a dot on the map showing the location of the trolley. The app displayed photos and a few very short videos (approximately 10 seconds or less) on the large screen automatically as the DASH trolley approached certain locations. Another difference between the City Slicker app and the DASH app on the trolley buses is that the DASH app had no audio. The sound on the iPad was turned off and the sound control could not be accessed by a user. Therefore, the videos showed an image of me in front of a site but there was no sound associated with the video image. The iPad on the trolley was interactive but seldom used because it was readily accessible only to passengers sitting immediately behind the trolley driver. Trolley riders could not control what was shown on the large screen, but could use the iPad screen to search items within the app. For example, a trolley rider who happened to be sitting immediately behind the driver could reach into the cabinet and tap the tour chapter of the app on the iPad. The app then provided access to brief text information and images I had prepared about historical sites, which would display on the iPad (as opposed to the large) screen. The experience of the DASH app for trolley riders was therefore visual, not auditory." Dew Affidavit ¶ 7.

[33] Dew Aff. ¶ 5. "The DASH app was only installed on DASH trolleys that ran the routes departing from the Visitors Center in downtown Charleston. The DASH routes are set and the driver of the trolley has no discretion to deviate from the routes. The drivers of the DASH trolleys are employees of CARTA and had no employment relationship with me, Tommy Dew's Walking Tours or the City of Charleston. There are three (3) DASH routes: one route travels west from the Visitors Center, another runs east from the Visitors Center and the third runs south along King Street. All three of these routes are free; in other words, no fee is charged for riding the trolley on those routes." Dew Affidavit ¶ 6.

[34] Dew Aff. ¶ 6.

[35] Dew Aff. ¶ 7.

[36] Plaintiffs' Memo. p. 17.

[37] Green Affidavit dated February 22, 2017, ¶ 5, attached as Exhibit C.

to convey, and do[es] not believe [he] told the Commission, that one identified a tour guide or someone engaged in touring by the content of what they said to tourists who hired them." [38]

Plaintiffs cannot avoid the plain language of the ordinance. The ordinance's application does not turn on the content of a tour guide's speech. The ordinance is not content based on its face.

C. The City did not impose the tour guide ordinance with a content based purpose or justification.

In order to subject the tour guide ordinance to strict scrutiny, Plaintiffs must show that the City imposed the ordinance with a content-based purpose or justification.[39] Plaintiffs cannot do so. This Court has previously held that "in making this assessment the court may consider [(1)] formal legislative findings, [(2)] the statute's stated purposes, as well as [(3)] the 'inevitable effect' of the statute."[40]

As to the first factor this Court identified, the City Council's legislative findings for this ordinance provide:

> **Sec. 29-1. - Findings of fact.**
>
> The city council finds and declares that because the number of tourists coming to the city in recent years has increased dramatically, it is in the public interest that sightseeing vehicles, tour guides and certain commercial passenger vehicles which travel in the old city district and old and historic district of the city be regulated under the police power of the city. It is the purpose of such regulation to maintain, protect and promote the tourism

[38] Green Aff. ¶ 6.

[39] Order, 194 F.Supp.3d at 464 (citing *Sorrell*, 131 S. Ct. at 2664) ("In making this assessment the court may consider formal legislative findings, the statute's stated purposes, as well as the 'inevitable effect' of the statute."); *Cf. Ward*, 491 U.S. at 791; *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645–46.

[40] Order, 194 F.Supp.3d at 464, citing *Sorrell*, 131 S.Ct. at 2664. The *Sorrell* Court focused on whether the statute at issue in that case was "designed to impose a specific content-based burden", and looked to the legislative findings, the statute's stated purpose, and the inevitable effect of the statute to make this determination. The *Sorrell* Court did not cite to evidence outside these three factors.

> industry and economy of the city and, at the same time, to maintain and protect the tax base and land values of the city, to reduce unnecessary traffic and pollution and to maintain and promote aesthetic charm and the quality of life for the residents of the city. The City Council finds, further, that the numbers of unregulated tour vehicles and other commercial vehicles entering the city for the purpose of touring the historic districts are having adverse effects upon the health, safety and welfare of the citizens of the city and that traffic accidents, damage to property, traffic congestion and other problems require the enactment by the city of a comprehensive tourism management ordinance. The council also finds that responsibilities for tourism management are of sufficient scope and complexity to justify a separate ordinance and organizational entity from that required for the administration of the arts and history interests of the city.[41]

The legislative findings thus confirm the City's content neutral purpose for its ordinance. Nothing in the legislative findings suggest a content based purpose for the ordinance.

As for the second factor, the ordinance's stated purpose provides clear and direct support for the City's position. The ordinance states "It is the purpose of such regulation to maintain, protect and promote the tourism industry and economy of the city…"[42]

As for the third and final factor, the City's licensing regime permits tour guides to speak on whatever topic they wish.[43] The ordinance contains no mechanism for the City to monitor or control what tour guides say on their tours.[44] The City has no power under the ordinance to prohibit a tour guide from saying certain things on tours.[45] Accordingly, the "inevitable effect" of the ordinance imposes no restriction on the content of speech, and shows the ordinance was imposed with a content-neutral purpose.

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[41] Charleston City Code §29-1

[42] Charleston City Code §29-1.

[43] *See generally*, Chapter 29 of the City Code. *See also* Order, 194 F.Supp.3d at 466, citing *Kagan v. City of New Orleans, La.*, 753 F.3d 560 at 562 ("[T]he New Orleans law in its requirements for a license has no effect whatsoever on the content of what tour guides say. Those who have the license can speak as they please. . . ").

[44] *See generally*, Chapter 29 of the City Code.

[45] *See generally*, Chapter 29 of the City Code.

Recognizing the weakness of their claim when compared to the three factors the Court identified, Plaintiffs choose to ignore them.[46] Plaintiffs instead go to great lengths to argue that the City's alleged "preference" for accuracy shows a content based purpose.[47] Plaintiffs' contention fails to recognize that simply showing the City's desire for a "base level of competency" is not enough to establish a content-based purpose.

> [W]hile content-based preferences could be embedded in the City's desire to ensure that all tour guides possess a 'base level of competency,' that desire could also be entirely content-neutral. Certainly a desire to 'protect the City's tourism economy and its residents and visitors from false or misleading offers of service for compensation' is not content-based by its own terms. It is entirely possible that the City designed its licensing regime to filter out would-be swindlers by ensuring that individuals providing 'tour guide services' actually knew what they were talking about and had some understanding of the topics they discussed.[48]

The City's desire to weed out unqualified or unscrupulous would-be guides does not make the ordinance content based. It is consistent with the City's content neutral purpose to make it more likely tour guide customers get what they are paying for.[49]

Plaintiffs argue that the written exam is intended to influence the content of tours because it focuses on certain topics such as the City's history.[50] Plaintiffs are wrong. First, the Historic Charleston Foundation – not the City – prepared the exam and decided what questions would be included.[51] The questions on the exam reflect the topics visitors likely expect guides in

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[46] Plaintiffs' Memo. pp. 19-23.
[47] Plaintiffs' Memo. pp. 19-23.
[48] Order, 194 F.Supp.3d at 466, citing *Kagan v. City of New Orleans, La.*, 753 F.3d 560 (5th Cir. 2014, *cert denied*, 135 S.Ct. 1403 (2015) (finding the city's desire to "identif[y] those tour guides who . . . are reliable, being knowledgeable about the city and trustworthy, law-abiding and free of drug addiction" to be content-neutral).
[49] Plaintiffs have no evidence to refute that Charleston tourists value competency regarding Charleston's history and architecture on tours they pay for.
[50] Plaintiffs' Memo. p. 21.
[51] Maybank Dep. pp. 45-46; 74-75, attached as Ex. B to Defendant's Memo [Dkt. 40-3].

Charleston to address.[52] The questions on the exam and the continuing education classes offered take the desires of the tourism industry participants as its starting point. It is undisputed the City's history and its historic attractions are the top reason why tourists visit Charleston. Therefore, the focus on these topics is calibrated to the desires of the marketplace.[53] The exam does not evidence a content-based desire to influence the type of speech being traded in the tourism market. [54]

Plaintiffs mischaracterize the testimony of Rhetta Mendelsohn, and quote only limited excerpts of her statement regarding why the exam is important to argue the exam is designed to control speech.[55] The full quote of Ms. Mendelsohn testimony shows she believes the licensing exam helps ensure customers get what they pay for on tours.[56] She further testified that the exam is a safeguard against unqualified or unscrupulous tour guides because it tends to weed out any applicant who is unwilling or unable to be qualified to give paying customers what they want.[57]

Plaintiffs also incorrectly argue that the fact the City published the Historic Charleston Foundation's Tour Guide Manual shows that the licensing ordinance is content-based. Plaintiffs

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[52] Maybank Dep. pp.35–36, 83, 85 (testifying that the topics on the test, which were developed by the Historic Charleston Foundation, are relevant to the topics visitors to Charleston are interested in).

[53] Charleston Visitor Survey Report at City of Charleston Prod. 003527 (The Charleston Area Convention and Visitors Bureau's 2015 Survey Report concludes "the Charleston area's history and historic attractions have remained and will presumably continue to be the most important factor in visitors' decision to visit Charleston."); Hill Dep. p. 40., attached as Ex. E to Defendant's Memo [Dkt. 41-3] ("Visitors to Charleston are most likely to be interested in history").

[54] Order at p.*8.

[55] Plaintiffs' Memo. p. 21.

[56] Mendelsohn Dep. p. 61, attached as Ex. S to Defendant's Memo [Dkt. 46-2] ("The exam is proof that guides have a basis knowledge of what they should be talking about in the city, what they should be telling people, ***what people should be getting – what people are paying for***. ***All the test does is ensure that people have a basic knowledge that they need to conduct business in the city, trying to ensure that people get their money's worth*** and that the guides are following the laws of the city.")

[57] Mendelsohn Affidavit dated February 22, 2017, ¶ 6, attached as Exhibit D.

are wrong. The City did not require a prospective tour guide to purchase the manual.[58] Moreover, the manual was not prepared by the City.[59] The Historic Charleston Foundation prepared the manual and selected its contents.[60] The manual is a resource that provides information about Charleston, in particular the City's history and culture.[61] Plaintiffs have no evidence the City's purpose in hiring the Historic Charleston Foundation to prepare the manual

[58] Maybank Dep. pp. 44-45.

[59] Plaintiffs imply that the City prepared the training manual to support their argument. Plaintiffs are wrong. Plaintiffs cite to Rhetta Mendelsohn's testimony that she served on the Tourism Commission for several years and that she "helped to write the tour guide book". (Plaintiffs' Memo., p. 7 n. 5). However, Ms. Mendelsohn did not contribute to the manual in her capacity as a member of the Tourism Commission. Ms. Mendelsohn served on the Charleston Tourism Commission from 2001 through 2009. (Mendelsohn Aff. ¶ 3). She was not on the Commission at the time the training manual was published in 2011. (Mendelsohn Aff. ¶¶ 3-4). She served on the Historic Charleston Foundation Board of Trustees from 2006 – 2015. (Mendelsohn Affidavit ¶ 4). Ms. Mendelsohn described her contribution to the manual as follows: "In compiling information for the Training Manual, the HCF obtained input from professors at the College of Charleston and various experts in the Charleston area on a range of topics. I have studied and given tours about the history of Jews in Charleston for decades, so I contributed to the section of the Training Manual entitled "Charleston's Jewish Community". I submitted my advice and written contributions to HCF. HCF received and considered all input from the various collaborative sources. It is my recollection that HCF employees edited and made final decisions as to the content in the Training Manual it submitted to the City." (Mendelsohn Aff. ¶ 5).

[60] Maybank Dep. pp.30–31, 35–36, 44, 47, 59 (stating that the Historic Charleston Foundation prepared the manual and highlighted points of interest based on them being things that most people ask about as a result of the organizations heavy interaction with visitors to Charleston; further providing that the Manual was an option, not a requirement). "[B]y providing the tour guide manual, the City provides an opportunity to those people who want to become qualified guides to have a mechanism of studying to get a feel for the overall history of the City so that when they become licensed the City is confident that they understand what the City is all about. They can say whatever they want to say." Maybank Dep. pp.131–32.

[61] Maybank Dep. pp.32–34. Others besides prospective tour guides have purchased the Manual. Maybank Dep. p.32.

was to dictate or influence the content of tour guide speech.[62]

The fact that the City's employees occasionally informed tour guides of customer complaints and provided recommendations to avoid the complaints does not evidence a content based purpose.[63] The same is true regarding the City's distribution of a handout requesting that tour guides provide accurate information.[64] The City has no power to require a licensed guide to follow the City's suggestions or requests.[65] The City's efforts to request accuracy and quality from tour guides is consistent with the City's content neutral purpose to make it more likely

[62] Ms. Mendelsohn testified that in her experience, the Training Manual contains the topics that tourists are most likely to want to hear to get what they pay for on their tours. ("I am very familiar with the Training Manual. I frequently use the Training Manual as a resource in preparation for tours or for finding answers to questions. I have more than thirty years of experience leading tours in Charleston. As a result of that experience, I know the topics that tourists typically ask about and what tourists are interested in hearing and learning about. I can and do attest that the Training Manual provides information that a tour guide should know in order to give a paying tourist their money's worth on a tour. . . . The Charleston Area Convention and Visitors Bureau ("CACVB") has published data about what attractions hold the most appeal for tourists in Charleston. The City's history and architecture rank at the top on tourists' list of things in which they hold interest. Information that is particularly significant to the City's history and architecture and about which tourists most frequently ask is noted in the Training Manual marked with a palmetto tree symbol.") (Mendelsohn Aff. ¶¶ 6-7).

[63] Maybank Aff. dated February 23, 2017, ¶ 7. ("In rare instances the City has received complaints from tourists regarding tour guides providing false or incorrect information. These customers communicated that they did not feel they were getting what they paid for and logged a complaint with the City. The only way the City finds out what is said on tours is through such complaints. The City does not monitor or regulate speech during the tours, and has not done so. As a courtesy to our visitors and citizens who log a complaint about a tour guide who could be identified, our office has followed up with the tour guide to let them know about the complaint, and to suggest ways to avoid complaints in the future to help better provide customers what they are paying for. The tour guide was free to disregard our suggestions and conduct their tour however they wanted.").

[64] Maybank Aff. dated February 23, 2017, ¶ 8 ("The City has in the past provided a document to newly licensed tour guides with helpful tips for their tour business. The handout, titled "Information for New Tour Guides", requested that the guides avoid providing false information to their customers. The City's handout sought to increase the likelihood that paying customers receive what they are paying for – likely a factually accurate tour").

[65] Maybank Aff. dated February 23, 2017, ¶ 9. "The ordinance provides the City no mechanism to control what is said on tours. The City cannot revoke a license due to the City's disagreement with a tour guide's speech, and has not done so." *Id.*

customers get what they pay for.[66]

Plaintiffs also base their content-based argument on the ordinance's former provisions concerning the oral exam and temporary license script.[67] These provisions, however, have been repealed and are therefore no longer a part of the licensing requirements.[68] Therefore, Plaintiffs' challenges to the oral exam and temporary license script provisions are moot. [69]

The City repealed the oral exam and temporary tour guide script provision because it

[66] The same is true for the continuing education courses offered for re-certification of licensed tour guides. The undisputed purpose for the continuing education courses is to keep their knowledge updated so as to help assure that tour guides would continue to give the tourists paying for their services what they paid for. Riley Dep. pp.44, 96–100, attached as Ex. D to Defendant's Memo [Dkt. 41-2]; Maybank Dep. pp.130 (stating that when putting together lists of available continuing education courses, the City tries to include some of the topics that people, including tour guides, have asked about or wanted more information on). *See also*, Mendelsohn Aff. ¶ 10 ("From time to time, members of the Tourism Commission recommended courses be made available for continuing education purposes on certain topics that were being raised by tourists. For instance, the Tourism Commission recommended that more continuing education courses be presented on African American history in Charleston because of the high level of interest. Due to tourists' high level of interest on this topic, tour guides should be knowledgeable about this history so they are qualified to provide the services tourists are paying for.")

[67] Plaintiffs' Memo. pp. 23-25.

[68] Tecklenburg Dep. pp.21–22, attached as Ex. A to Defendant's Memo [Dkt. 40-2]; *see also* City Ordinance Ch. 29, Art. III (indicating repeal of §29-60 and other certain amendments); City Ordinance Ratification No. 2016-054.

[69] *See e.g.*, *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601 (4th Cir. 2001)(holding the plaintiffs challenge to the repealed provisions were moot because there was no evidence that the City intended to re-enact repealed provisions); *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566 (4th Cir. 2007) (holding the challenge to the repealed statute at issue was moot because there was no evidence the statute was likely to be re-enacted and the provisions were not applied to the plaintiffs before repeal); *Naturist Soc'y v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992) (citing several U.S. Supreme Court cases finding where a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot as to those features). Here, the City determined the repealed provisions were unnecessary. Tecklenburg Dep. pp.21–22. Thus, there is no evidence the City is likely to re-enact the repealed provisions given its determination. Accordingly, Plaintiffs' arguments based on these provisions are moot.

determined the provisions were unnecessary to its legitimate purpose.[70] Plaintiffs have no evidence the City repealed the provisions to hide some content-based purpose for the tour guide licensing regime. Plaintiffs' argument that the fact the repeal occurred after their lawsuit proves the City's motivation for the repeal was "speech-based" is off base.[71] The City inaugurated a new Mayor into office in January of 2016.[72] Mayor Tecklenburg identified the need for potential changes to the ordinance *before* he became Mayor.[73] The repeal of these provisions occurred only a few months after he took office. After a fresh look at the ordinance, Mayor Tecklenburg determined the oral exam and the temporary license were unnecessary.[74]

The repealed provisions are irrelevant to whether the current ordinance violates the First

[70] Tecklenburg Dep. pp.21–22 (Testifying that the City repealed the oral exam because "I just didn't think it was necessary," and testifying the City repealed the temporary license requirements "because there was no need to have temporary tour guide licenses anymore in my view").
[71] Plaintiffs' Memo. pp. 23-25.
[72] Tecklenburg Dep. p. 11.
[73] Tecklenburg Dep. pp. 17-18, 26.
[74] Tecklenburg Dep. pp. 21-22, 25-28; See also, footnote 70. Plaintiffs also reference the City's 2015 amendments to the Tourism Ordinance. The 2015 Amendments did not concern the tour guide licensing regime. The 2015 Amendments to the Tourism Ordinance focused on reallocation and/or reorganization of duties between City staff and codified those changes in duties. *See* City of Charleston Ordinance, Ratification No. 2015-164, attached as Ex. E. These changes, in relevant part, included the establishment of a new department entitled "Department of Livability and Tourism" as well as new positions and/or titles within the Department and the City staff. *Id.* The Amendments did not study or analyze whether any of the tour guide licensing provisions were unnecessary because that was not the focus of the 2015 review.

Amendment. All three Plaintiffs concede the repealed provisions had no effect on them.[75] Thus, any arguments or evidence regarding these provisions should not be considered by the Court in evaluating the constitutionality of the current ordinance.[76]

Notably, the City's ordinance is indistinguishable from that at issue in *Kagan v. City of New Orleans*, where the court found a tour guide licensing ordinance that required applicants to

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[75]Pltf. Billups Dep. p.54–55, attached as Ex. J to Defendant's Memo [Dkt. 44-1] (Q. So that old provision never really affected you, correct? A. Correct. Q. And you said that beyond exploring potential sponsors, you did not take the tour, the temporary tour guide exam, correct? A. That's correct. Q. All right. And you were never asked to submit a script when you applied for your license, correct? A. Correct. Q. All right. So that provision doesn't really apply to you either, right? A. I never did it. No. Q. So it doesn't apply to you? A. No."); Pltf. Warfield Dep. pp.59–60, attached as Ex. K to Defendant's Memo [Dkt. 44-2] ("Q. So you weren't required to take an oral exam? A. No. Q. You understand that had been removed from the ordinance, right? A. Well, I figured that out when they gave me the license and didn't make me do it. Q. So you understand that, right? A. Yes. Q. And since the oral exam, you weren't required to take it, that doesn't have any effect on you, right? A. No. Q. Did you apply to take a temporary exam? A. No. Q. Did you want a temporary license? A. No. Q. So you never applied to be a temporary tour guide? A. No. Q. And you were never asked to submit a script to the City, correct? A. No. Q. So that provision doesn't apply to you either? A. No."); Pltf. Nolan Dep. 51, attached as Ex. L to Defendant's Memo [Dkt. 44-3] ("Q. When you took the exam, you didn't take an oral exam, right? A. No. Q. And you understand that that has been removed from the ordinance? A. I agree. Q. So you agree that that is not relevant to your case? A. Right. Q. And you didn't apply for the temporary exam, right? A. No. Q. You didn't seek to be a temporary tour guide? A. No. Q. So that's not relevant to your case either, right? A. No. Q. And you didn't have to submit a script? You weren't asked to submit a script? A. No.").

[76] Even if the Court considers the repealed provisions, which it should not, the repealed provisions do not show a content-based purpose. The evidence in the record as to the oral exam shows it was conducted to help tour guides build confidence and develop their skills. (Riley Dep. pp.84–86, 89–90; Maybank Dep. pp.92–105). The evidence in the record as to the purpose of the temporary tour guide license is undisputed. Mayor Riley testified that the temporary license's purpose was to support the carriage tour operators during times of staff turnover because of the prior infrequency of the written exam (i.e., two times per year). (Riley Dep. p.91; Maybank Dep. pp.109–115, 117 (further noting that tour guide companies had freedom to develop their own script for purposes of sponsoring a temporary tour guide and scripts were not required to contain any certain information)) Further, the script provision at issue called for submission of the script prepared by the employing company, not by the City. The tour companies were free to include the information they wanted in their script and the City never rejected a script. (Riley Dep. pp.163–64; Maybank Dep. p.115). These repealed provisions were in place as a training mechanism to assist prospective tour guides and to build their confidence in becoming a tour guide so as to help ensure they could provide quality tour services to visitors paying for such services. (Riley Dep. pp.84–86, 89–90, 93–96; Maybank Dep. pp.92–105).

pass a written exam to be content-neutral.[77] The Supreme Court thereafter denied the *Kagan* petition for writ of certiorari.[78] Plaintiffs make no attempt to distinguish *Kagan*, and cannot do so. Indeed, Plaintiffs cite to no authority holding that a tour guide licensing regime constitutes a content-based regulation under the First Amendment.

This Court therefore should follow the sound reasoning in *Kagan* to uphold Charleston's ordinance in this case. The language of the ordinance itself states that the City's purpose for the tour guide license is "[t]o maintain, protect and promote the tourism industry and economy of the

[77] *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 (2015) ("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 of [tour guides'] speech,' it is content-neutral.") *Id.* at 779–80.

[78] 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) The *Kagan* petition for writ of certiorari that was denied by the Supreme Court presented arguments identical to those Plaintiffs assert here (by the same law firm, Institute for Justice). Yet Plaintiffs make no attempt to distinguish *Kagan*. In addition, the district court in *Edwards v. Dist. of Columbia*, 943 F. Supp. 2d 109, 121 (D.D.C. 2013), *rev'd* 755 F.3d 996 (D.C. Cir. 2014), also found D.C.'s tour guide licensing requirement to be content-neutral. Notably, the D.C. Circuit Court of Appeals did not address the district court's finding on this issue and "assume[d], arguendo, the validity of the District's argument that the regulations are content-neutral and place only incidental burdens on speech." *Edwards*, 155 F.3d at 1001. No petition for certiorari was filed in the *Edwards* case.

city."[79] Prior to its enactment decades ago, the City recognized that Charleston's tourism industry and activities were growing rapidly.[80] The City also determined it was important to manage the rapidly growing tourism industry for the benefit of its citizens and visitors.[81]

Protecting the City's tourism industry includes protecting tourists from unqualified or unscrupulous tour guides. The City's licensing requirement filters out would-be swindlers by ensuring that individuals providing tour guide services for hire actually had some understanding of Charleston.[82] The ordinance's purpose is therefore to protect the quality of the City, its reputation and its economy.[83] The Fifth Circuit Court of Appeals found such a purpose in a tour guide licensing ordinance to be content-neutral.[84] This overriding municipal purpose is unrelated to the content of a tour guide's speech and is, therefore, content-neutral.[85]

II. The City's tour guide licensing ordinance survives intermediate scrutiny and does not violate the First Amendment.

A. The City's licensing ordinance advances the City's substantial interest.

This Court has previously held that the City has a substantial interest in this case.[86] The Court recognized "the City's interest in speech is derivative of its primary interest in preventing

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[79] City Code § 29-1; *see also* Riley Dep. p. 34 (stating the licensing requirement is an economic-based decision).
[80] Riley Dep. pp.18–20.
[81] Riley Dep. pp.18–20.
[82] Riley Dep. pp. 21-22, 29, 31–32, 55; *see also* Maybank Dep. pp.26, 136 (describing in part the rationale for the tourism ordinances—to protect the tourism industry and the visitors who come to Charleston); Pltf. Nolan Dep. pp.54–56 (stating that tourism is a big part of Charleston's economy and that poor quality tours could affect peoples' perception of the City).
[83] Riley Dep. pp.131–32.
[84] *Kagan*, 753 F.3d at 561–62 (finding the City of New Orleans' desire to "identif[y] those tour guides who . . . are reliable, being knowledgeable about the city . . ." to be content-neutral).
[85] *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 646-47.
[86] Order, 194 F.Supp.3d at 468-469, citing *Riley*, 487 U.S. at 782, 108 S.Ct. 2667 ("[A] State's interest in protecting [ ] the public from fraud is a sufficiently substantial interest to justify a narrowly tailored regulation."); *Kagan*, 753 F.3d at 561–62 (finding government interest in protecting tourism industry and visitors).

"false or misleading offers of service for compensation."[87] The Court articulated the City's substantial interest perfectly.

> The problem is not simply that unqualified guides may provide visitors with false information, it is that they may do so under the guise of providing "accurate" information, and that such behavior may harm visitors, residents, and the industry overall. ***The difference between what is promised and what is delivered is the core of the City's interest***, not the content of the information itself.[88]

This Court also previously held that the City's licensing regime advances the City's substantial interest.[89] Based on Fourth Circuit precedent, 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."[90] As this Court recognized "[f]ew would doubt that the regime advances the City's interests with respect to all tour guides who discuss the topics covered by the exam."[91] The licensing regime advances the City's interest in preventing

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[87] Order, 194 F.Supp.3d at 469.

[88] *Id.* (emphasis added). The *Reynolds* Court 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").

[89] Order, 194 F.Supp.3d at 469-70.

[90] *Ross v. Early*, 746 F.3d 546 (4th Cir. 2014). The Fourth Circuit in *Reynolds* held that objective evidence is not necessary to show that a "speech restriction" furthers the government interest. *Reynolds v. Middleton*, 779 F.3d at 228.

[91] Order, 194 F.Supp.3d at 469. Plaintiffs imply that the City's licensing regime is not effective at advancing its interests by referencing the fact that City Council Chambers is open to the public and Charleston employs a docent who provides historical information to Chamber visitors. *See*, Plaintiffs' SUMF ¶¶ 145-146. Plaintiffs emphasize that the docent is unlicensed. *Id.* at 145. Importantly, the docent does not charge visitors for her services. Maybank Aff. dated February 23, 2017, ¶ 10. Because tourists are not paying money, the City's interest in ensuring tourists get what they pay for is not affected.

unqualified individuals from misleading potential customers.

> By forcing prospective tour guides to commit time and energy into studying for the written examination, the license requirement effectively raises the costs of entry into the market. This would tend to dissuade fly-by-night tour operations, by making their schemes less profitable. It also demonstrates that candidates have some general ability to learn and associate information with various Charleston locations. While plaintiffs doubtlessly regard these measures as both excessive and imprecise, it does seem that ***prospective tour guides who can obtain a license under this regime are more likely to be knowledgeable and qualified, and less likely to take advantage of misinformed tourists, than those who cannot***.[92]

The Court's logic is sound and shows the City's licensing regime advances its substantial

[92] Order, 194 F.Supp.3d at 470 (emphasis added). Plaintiffs cite to Mayor Riley's statement that the written exam itself was not designed to deter crime as proof the licensing regime does not advance the purpose of preventing unscrupulous tour guides. Plaintiffs take Mayor Riley's quotes out of context. Mayor Riley repeatedly testified that the City designed the licensing regime, in pertinent part, to filter out would-be swindlers by ensuring that individuals providing tour guide services for hire actually had some understanding of Charleston. (Riley Dep. pp. 21-22, 29, 31–32, 55). Mayor Riley also testified that he knew that the exam made it less likely that a tour guide customer would be a victim of a crime: "[Tour guide fraud] has never been our experience. The tour guides are licensed. That's not going to happen. They've got their profession to stand up for and to protect and their license to protect, but somebody unlicensed and unqualified may have nothing to protect, to ***risk either being deceptive or try to go do something worse.***" (Riley Dep. pp. 117-18). Mayor Riley also testified that "the benefit of having a licensing requirement for tour guides in the City of Charleston is that you ***prevent the five million visitors who come here from being scammed*** by people who don't know anything about the City's history with any kind of depth and knowledge and take their money, and also then have people that could be out there dressed or ***acting like they're tour guides that want to do something untoward***." (Riley Dep. p. 123). Mayor Riley further testified that "***if you didn't have the exam*** and the five million people coming to Charleston – you know, if anybody could be out there soliciting tourists then ***you're going to get some people into that activity that want to do more than give them fraudulent tours***." (Riley Dep. pp. 122-23). Plaintiff's ignore this Court's point that if a tour guide studies for and passes the exam than he or she is likely to be qualified and knowledgeable, and less likely to scam tourists than those who do not.

interests.[93]

B. The City's licensing regime is not an excessive burden on speech.

As the Court previously noted "the licensing regime burdens a rather small range of speech – namely, speech given in connection with hired tour guide services."[94] 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. As the ordinance does not control what licensed tour guides say, the ordinance does not burden more speech than necessary to further the government's legitimate interests.[95] Indeed, the tour guide license test concerns qualifications to charge money for services, not speech.

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[93] Moreover, Charleston's success as the top tourist destination is evidence that its ordinances are effective to advance its interests. 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. (Riley Aff. ¶3; Hill Dep. p. 26). Charleston chose to protect and promote its history, architecture, cultural resources, and other desirable characteristics to create a tourism economy. Tourism is thus a critical segment of Charleston's economy. *See also*, Riccio Affidavit dated February 23, 2017, ¶ 6, attached as Exhibit F ("I have often been in the position of investigating crimes committed against tourists during my career in law enforcement. It is my observation that tourists who have been defrauded or are the victim of theft tend to suffer a strong negative emotional reaction to the experience. Tourists who are victims of a physical crime may suffer an even greater emotional reaction").

[94] Order, 194 F.Supp.3d at 475.

[95] *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*. *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.

Notably, Plaintiffs do not contest that the ordinance leaves open ample alternative channels of communication.[96] 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.[97]

Plaintiffs incorrectly dispute the Court's prior holding that "paid tour guide speech is not a form of expression that '[has] historically been [] closely associated with the transmission of ideas."[98] Charging money to provide a tour of Charleston is not "normal conversation . . . on a public sidewalk" as Plaintiffs' argue.[99] "[T]he First Amendment does not guarantee a speaker the right to any particular form of expression[.]"[100]

The City's licensing regime imposes no significant burdens on speech that "do[] not

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[96] *See One World One Family Now v. City and Cnty. of Honolulu,* 76 F.3d 1009, 1014–15 (9th Cir. 1996) (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); *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 (2015).

[97] City Code § 29-58.

[98] Order, 194 F.Supp.3d at 476. *See* Plaintiffs' Memo. at p.30.

[99] *See* Plaintiffs' Memo. at p.30.

[100] *McCullen,* 134 S. Ct. at 2536. Although some forms of expression—i.e. general conversation and free leafleting on a public sidewalk in petition campaigns—have been more closely associated with the transmission of ideas and First Amendment concerns, paid tour guide speech has not. Indeed, as noted by the Court, this is not a case of absolute prohibition or stifling of all forms of expression or speech on a public sidewalk like *McCullen* or *Reynolds* where speakers were absolutely prohibited from engaging in certain forms of speech (*e.g.*, communication of politically controversial viewpoints, matters of public concern, or roadside solicitation). 194 F. Supp. at 475–76 (citing *McCullen,* 134 S. Ct. at 2535 (noting the "serious burdens" imposed by the abortion facility "buffer zone" regulations, which "carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways"); *Reynolds,* 779 F.3d at 231 (finding that roadside solicitation ordinance "prohibit[ed] all forms of leafletting, which is one of the most important forms of political speech ... as well as *soliciting* any kind of contribution, whether political or charitable, or selling or attempting to sell goods or services") (emphasis added)).

serve to advance [the City's] goals".[101] The Court has previously held "the content of the Charleston tourism market [is] relevant in determining whether the licensing regime burdens more speech than necessary."[102] The evidence in the record shows that "themed" tours such as pub and ghost tours discuss or draw upon the City's history, and that customers on such themed tours are likely to ask historical questions and expect their guide to be able to provide basic historical facts.[103] Plaintiffs admit that by and large tours draw upon the City's history.[104] Indeed, Plaintiffs Billups and Warfield currently provide tours based in large part on the City's history.[105] The Charleston Area Convention and Visitors Bureau's 2015 Survey Report concludes "the Charleston area's ***history and historic attractions*** have remained and will

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[101] Order, 194 F.Supp.3d at 476 (stating that the court must determine "whether the City has 'burden[ed] substantially more speech that is necessary to further the government's interests."), quoting *McCullen*, 134 S.Ct. at 2535.

[102] Order, 194 F.Supp.3d at 476.

[103] Dew Aff. ¶ 10 ("As a tour guide in Charleston for many years, I am familiar with the tour guide market in the city. In my experience, pub and ghost tours as well as other 'themed' tours in Charleston, either discuss or draw upon the City's history as part of the tours. Tourists on themed tours are likely to ask historical questions during their tour and likely to expect their guide to be able to provide basic historical facts in order to receive their money's worth on their tour"). *Cf.* Order, 194 F.Supp.3d at 476 n.22; Banike Dep. pp.176–77, attached as Ex. C to Defendant's Memo [Dkt. 41-1] (testifying that most tourists are interested in learning about the history and culture of a subject area from a tour guide). *See also*, Riley Dep. p.49 (testifying that such tours inherently and inevitably touch on topics by the tour guide exam and manual—history, locations, landscape, culture, etc.; if one takes such a tour and the tour guide cannot answer basic questions about Charleston, then the customer is likely going to feel ripped off and unhappy about their tour, which in turn damages the City's reputation and thereby its tourism industry and economy).

[104] Pltf. Billups Dep. pp.77–79, 87–89 (admitting, in pertinent part, that history influences the content of her tour and Charleston's history is a large part of why people visit the City); Pltf. Warfield Dep. pp.30–33, 62 (agreeing that a lot of tourists who come here are interested in Charleston's history and, further, that both pub and ghost tours draw and/or touch on the City's history); Pltf. Nolan Dep. 19–20, 24. *See also* Plaintiffs' witness Paula Reynolds Dep. p.207, attached as Ex. Q to Defendant's Memo [Dkt. 45-4] (admitting that most ghost tours are based on historical information, as well as knowledge of the area and culture).

[105] Pltf. Billups Dep. pp.77–79, 87–89; Pltf. Warfield Dep. p.62 (testifying that he plans to do history tours since they are such a big part of the tourism/tour market here in Charleston); *see also* Pltf. Billups' Website and Marketing Material, attached as Ex. R to Defendant's Memo [Dkt 46-1].

presumably continue to be ***the most important factor*** in visitors' decision to visit Charleston."[106] The topics included in Charleston's licensing exam closely follow the topics most tourists want to learn about when visiting Charleston.[107] Accordingly, the record establishes that the City's licensing exam is properly calibrated to ensure paying customers get what they pay for.[108] Thus, the City's tour guide ordinance does not burden substantially more speech than is necessary.

Under the narrowly tailored prong of intermediate scrutiny analysis, "the City must provide some evidence that: (i) unqualified tour guides pose[ ] a threat to its interests in protecting its tourism industry from fraud and deceit; and (ii) it did not forego readily available, less intrusive means of protecting those interests."[109] The City has satisfied this test.

First, the City has produced evidence that unqualified tour guides pose a threat to

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[106] Charleston Visitor Survey Report, attached as Ex. G to Defendant's Memo [Dkt. 43-1], at "City of Charleston Prod. 03527" (emphasis added).

[107] Maybank Dep. pp.21–22, 35–36, 83, 85 (testifying that the topics on the test, which were developed by the Historic Charleston Foundation, are relevant to what visitors to Charleston are interested in); *see also* 2015 Charleston Visitor Survey Report, at pp.03522–523. Tourists generally are interested in learning from a tour guide—in large part about the history and culture of the subject area. Banike Dep. pp.176–77; Mendelsohn Dep. pp. 75–76. Mendelsohn, p.61 ("All the test does is ensure that people have basic knowledge that they need to conduct [tour] business in the City, trying to ensure that people get their money's worth [with regard to tours] and that the guides are following the laws of the City."). To the extent Plaintiffs attempt to argue that the continuing education requirements do not serve to further the City's interests, Plaintiffs are wrong. The continuing education courses are in place to ensure tour guides remain qualified throughout their tour guide career, thereby ensuring consumers remain protected. Indeed, these courses help assure that tour guides continue to have the basic knowledge and understanding to be able to give the tourists who are paying for these services what they've paid for. Riley Dep. pp.40, 96–100 (testifying that the purpose of the continuing education courses is to deepen and enhance tour guides' knowledge on a wide variety of topics concerning Charleston, and relates back to the quality of the City's tourism industry and the expectation of visitors to Charleston). Moreover, Plaintiffs agree that continuing education and staying abreast of relevant information is important and helps perform the job of a tour guide. Pltf. Billups Dep. p.130.

[108] *See*, Order, 194 F.Supp.3d at 472 quoting *McCullen*, 134 S.Ct. at 2535 (holding that the "element of calibration goes to the very heart of the constitutional requirement that the regulation 'not burden substantially more speech than is necessary to further the government's legitimate interests.'").

[109] Order, 194 F.Supp.3d at 472 (citing, in relevant part, *McCullen*).

Charleston's interests.[110] The City has "some non-speculative reasons for believing its interests are at risk".[111] Misinformation or unqualified tour guides would erode the quality experience that is the foundation of the City's reputation as a top destination.[112] A visitor who pays for a tour to learn information about Charleston and receives misinformation and/or is misguided would be unsatisfied with their experience.[113] Consequently, tours given by unqualified tour guides are likely to result in a bad experience which can adversely affect visitors' opinions of Charleston, thereby harming its reputation.[114]

Esther Banike, an officer on the Board of the World Federation of Tourist Guides Associations, testified to reports of problems regarding unqualified tour guides in other

[110] Order, 194 F.Supp.3d at 493 (citing *Reynolds*, 779 F.3d at 224–25, 231)("the government need not prove that its interests have actually been harmed before implementing a content-neutral regulation.").
[111] Order, 194 F.Supp.3d at 477.
[112] Banike Dep. pp. 152–55; Riley Dep. 31–33. Hellen Hill, the Executive Director of the CACVB, testified that the organization's studies found that the number one reason people visit Charleston is positive recommendations from friends and family, and that the City's reputation is "critical" to visitors decision to select Charleston as a tourist destination. Hill Dep. p. 46-48. Mrs. Hill further testified that negative tour guide experiences can damage the City's reputation as a top tourist destination. Hill Dep. p. 64. Mrs. Hill also testified that visitors' chose Charleston because they believe they will have an authentic experience rather than a "fabricated" one. Hill Dep. p. 55. *See also*, Riccio Aff. ¶ 6 ("I have often been in the position of investigating crimes committed against tourists during my career in law enforcement. It is my observation that tourists who have been defrauded or are the victim of theft tend to suffer a strong negative emotional reaction to the experience. Tourists who are victims of a physical crime may suffer an even greater emotional reaction").
[113] Banike Dep. pp.157, 176–77 (noting that when people do not get what they paid for due to unqualified tour guides, "[t]hat's harm. That's stealing."); Mendelsohn Dep. pp. 75–77, 80. Riley Dep. 31-33; Hill Dep. pp. 46-48, 55, 64.
[114] *See* Mendelsohn Dep. p.77.

locations.[115] The City has also provided this Court with numerous news reports of unscrupulous or unqualified tour guides creating problems in other top tourism destinations, including, Los Angeles, CA; Anaheim, CA; New York, NY; San Francisco, CA; New Orleans, LA; Philadelphia, PA; Savanah, GA; Jamaica; Thailand; China; Indonesia; Japan; India; Turkey; Saudi Arabia; Israel; Costa Rica; Uganda; Italy; Istanbul; and Sri Lanka.[116] The Court can consider these articles to determine whether unqualified and unscrupulous guides pose a risk to

[115] *See* Banike Dep. pp.149–51 (testifying of instance where a person claimed to be a certified tour guide in Chicago, but was not and had fake badge pictured on the individual's website). Further, as Secretary of the World Federation of Tourist Guide Associations, Esther Banike has received reports of incidents involving harm to tourists in other countries as a result of the unqualified tour guide's actions. Specifically, she received a report of an unsanctioned guide overseas in a country/location where one was required to have a license, who approached a couple on street, but unfamiliar with terrain where this couple wanted to go and one of them slipped off a cliff and was seriously injured (still in the hospital). *See* Banike Dep. pp. 161, 164, 166.

[116] See, sample of numerous news reports regarding problems with unscrupulous tour guides in tourist destinations, attached as Ex. F to Defendant's Memo [Dkt. 42-1].

the City's interests.[117]

The City can also show that its interest "would be advanced less effectively absent" its licensing regime.[118] The Court has held that this "analysis may be guided by whether the alternative regulation would cover the problematic activity" and "whether enforcement of such alternatives is likely to be practicable."[119]

The alternatives Plaintiffs propose to Charleston's licensing regime are less effective.[120]

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[117] The U.S. Supreme Court has relied on newspaper reports to show the risk posed to the government's interests. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 393–94, 120 S.Ct. 897, 907–08 (2000). In *Nixon*, the state of Missouri submitted news reports to show large unregulated campaign contributions created potential harm to the state's interests in response to a First Amendment challenge to the state's campaign finance law. *Nixon* 528 U.S. at 393–94 (2000). The Supreme Court cited these news reports to support the finding that Missouri met their burden, and upheld the constitutionality of the state law. *Id.* Therefore, this Court can consider the news reports submitted by the City. Also, as a general rule, newspaper articles and news reports are self-authenticating and therefore admissible under FRE 902(6). *See also e.g.*, *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 395-97 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009) (News and magazine articles submitted by group in support of group's motion for summary judgment on its petition challenging decision of Department of the Interior (DOI) that group was not an Indian tribe were self-authenticating and, thus, were admissible); *Nestle Co. v. Chester's Mkt., Inc.*, 571 F. Supp. 763, 776 n.9 (D. Conn. 1983), *reversed on other grounds*, 756 F.2d 280, on remand, 609 F. Supp. 588 (D. Conn. 1985). Furthermore, even if inadmissible at trial, news reports may be considered by the Court at summary judgment. *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993) (finding news articles may be considered at summary judgment even if inadmissible at trial); *White v. City of Birmingham , Ala.*, 96 F. Supp. 3d 1260, 1274 (N.D. Ala. 2015) (same, plus finding news articles from newspaper website are analogous to traditional newspaper articles and, thus, self-authenticating under FRE 902(6)); *Davis v. Housing Auth. of Birmingham Dist.*, 2015 WL 1487199, at *2 (N.D. Ala. Mar. 31, 2015) (same).

[118] *See* Order, 194 F.Supp.3d at 470 ("This standard does not require that the regulation employ 'the least speech-restrictive means of advancing the [g]overnment's interests. '*Turner Broad. Sys.*, 512 U.S. at 662, 114 S.Ct. 2445. However, it does require that the government's interests 'be achieved less effectively absent the regulation.' *Id*. (quoting *Ward*, 491 U.S. at 799, 109 S.Ct. 2746.").

[119] Order, 194 F.Supp.3d at 474, citing *McCullen*, 134 S.Ct. at 2538, 2540.

[120] Plaintiffs' proposed alternative that the City hire its own tour guides is based on the allegation that the City of Savannah, Georgia employs tour guides "to provide the government's desired information." (Plaintiffs' Memo. p. 32). Plaintiffs premise, however, is false. Affidavit of Bridget Lidy, Director of Tourism Management for the City of Savannah Georgia, attached as Ex. G.

Plaintiffs suggest that the City's law prohibiting fraudulent solicitation would be as effective as the City's licensing regime at preventing unqualified and unscrupulous tour guides from harming the City's interests. Plaintiffs are wrong. The law prohibiting fraudulent solicitation cannot reveal unqualified or unscrupulous tour guides until after a tourist has suffered a negative experience and felt scammed and thereafter reported it to authorities. Tourists are the most likely victims of tour guide scams. Because tourists reside outside the area, they will be less likely to report crimes and return to assist with conviction at trial.[121] Given the likely absence of victim testimony, prosecution of tour guide fraud under the fraudulent solicitation law would be ineffective.[122] As this Court has previously found, general consumer protection laws are insufficient because the entire basis for a "fake tour guide" scam is that unqualified tour guides are indistinguishable from other tour guides, and therefore difficult to detect.[123] Thus, fraudulent solicitation laws are less effective and impracticable to enforce.[124]

Likewise, a "voluntary certification" program would also be less effective in achieving

[121] Riccio Aff. ¶ 7 ("Despite the deeply negative experiences experienced by tourist who are victimized while traveling, it is my observation that these individuals are unlikely to pursue prosecution of the person who harmed them. This is true whether the harm suffered by the tourist is civil or criminal in nature. It is my observation that people are reluctant to commit to travel and incur expenses for lodging and meals to pursue prosecution of a criminal charge that occurred while they were out of town. It also is my observation that people are highly unlikely to incur expenses and travel to a location to pursue recovery of monetary losses, unless the amount of the loss sustained is greatly in excess of their travel expenses and the defendant has the ability to pay.). Riley Dep. p 116 (explaining that a visitor subjected to a bad experience will likely be traveling home soon thereafter and is unlikely to be able to follow up on a scam artist, or an incompetent or unknowledgeable tour guide to report it).
[122] Riccio Aff. ¶ 7.
[123] Order, 194 F.Supp.3d at 478.
[124] Order, 194 F.Supp.3d at 478, citing *McCullen*, 134 S.C.t. at 2538, 2540.

the City's legitimate purpose.[125] By its very nature a "voluntary certification" program is not as effective at "cover[ing] the problematic activity"[126] The unscrupulous are the most likely to forgo the voluntary program and thereby dodge this means of testing their qualifications.[127] The Secretary for the World Federation of Tourist Guide Associations testified that voluntary certification is not as effective as a mandatory exam requirement because all tour guides are not held to the same standard under a voluntary scheme.[128]

A mere business license requirement would not be as effective in weeding out the unscrupulous because this minimal requirement would not present the same costs of entry to the market as the City's tour guide license. Unscrupulous tour guides would not have to commit time and energy into studying for the written examination, and the tool to dissuade fly-by-night tour operators would be lost. Without the examination, the City would have no vehicle for tour guide candidates to demonstrate some general ability to learn and associate information with various Charleston locations. The City would have no way to determine if candidates are likely to be knowledgeable and qualified. Accordingly, a general business license requirement is not as effective as the tour guide license.

Plaintiffs' argument that only New York, New Orleans, St. Augustine, Florida, and

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[125] Moreover, Plaintiffs' argument that the City's ordinance is not narrowly tailored because the City could issue a voluntary license test fails. The government "need not regulate using the least restrictive or least intrusive means available to achieve its goals." *Ross v. Early*, 746 F.3d at 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).

[126] *McCullen*, 134 S.Ct. at 2538, 2540 (holding that "whether the alternative regulation would cover the problematic activity" should be considered by the Court).

[127] Order, 194 F.Supp.3d at 477-78 (noting that these programs are indistinguishable from reliance on "market forces.").

[128] Banike Dep. p.177. Moreover, a licensing requirement such as Charleston's creates a standard among tours and tour guides, and develops as well as constitutes a threshold of knowledge regarding the City. Dew Dep. p.44, attached as Ex. T to Defendant's Memo [Dkt. 46-3].

Williamsburg, Virginia have similar tour guide licenses is flawed in several respects.[129] Most importantly, the argument is inaccurate. Plaintiffs apparently did not do a thorough search of laws across the country. Indeed, a simple search of just South Carolina municipalities identifies three cities with tour guide licensing regimes: Charleston, Beaufort and Aiken.[130] Thus, Plaintiffs' argument that "only a tiny handful of American cities join Charleston" cannot be trusted as accurate.[131]

Moreover, Plaintiffs fail to recognize the importance of the tourism industry in Charleston. Charleston chose to protect and promote its history, architecture, cultural resources, and other desirable 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. Charleston is also unique given the importance of its tourism economy and large number of visitors relative to its size when compared to other U.S. cities. Plaintiffs fail to show how the number of cities that have decided to protect their tourism industry through a tour guide license is significant to the constitutionality of such ordinances. Charleston's 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 foregoing reasoning and citation of authority, Defendant City of Charleston respectfully requests that this Court deny Plaintiffs' Motion for Summary Judgment and grant Defendant's Motion for Summary Judgment.

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[129] Plaintiffs' Memo. p. 2.
[130] Beaufort City Code § 7-11, et. seq. attached as Ex. H; Aiken City Code §§ 46-148; 255, attached as Ex. I.
[131] Plaintiffs' Memo. p. 2.

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: February 24,2017