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 MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF**

The Defendant, City of Charleston, South Carolina (hereinafter the "City", "Charleston" or "Defendant"), hereby submits this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief.

INTRODUCTION

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

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[1] *Dent v. West Virginia*, 129 U.S. 114, 121–122, 9 S. Ct. 231, 233, 32 L.Ed. 623 (1889).
[2] See *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958). See also, *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014), *cert denied*, 135 S.Ct. 1403 (2015); *Washington Tour Guides Assoc. v. National Park Service*, 808 F. Supp. 877 (1992).

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

Recognizing the weakness of their challenge to such a common business regulation as an occupational license, Plaintiffs overstate the ordinance's restrictions in an effort to support their First Amendment arguments.[4] Plaintiffs allege that the City's ordinance requiring minimum qualifications to charge for tour guide services violates their rights to free speech. Plaintiffs are wrong. The ordinance does not regulate speech. With or without a tour guide license Plaintiffs may communicate whatever message about the City of Charleston they want.

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

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

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[3] *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958).

[4] Plaintiffs repeated mischaracterization of the City's tour guide ordinance and exaggeration of the scope of the regulation reveals the weakness of their claims. Plaintiffs arguments refuse to acknowledge basic facts about the City's ordinance such as (1) the license requirement is triggered by charging for services, (2) the ordinance contains no mechanism to control the speech of licensed tour guides, and (3) the ordinance does not restrict communication, it restricts only whether individuals can charge for tour services. Rather than acknowledge these basic facts and present an argument based on them, Plaintiffs incorrectly describe the ordinance as a ban on certain speech. For example, see Plaintiffs' Memo, 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."). Plaintiffs present similar exaggerations and mischaracterizations throughout their argument presumably because they can allege no facts to support their claim that the City's ordinance regulates speech.

STATEMENT OF FACTS

Charleston is a unique city with rich history.[5] Charleston's 18th and 19th century architecture and its harmonious streetscapes have long been a draw for visitors.[6] Twenty years ago, there were 3.2 million visitors to the tri-county area and in 2012, that number reached an estimated 4.8 million.[7] 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.[8]

Tourism thus represents an important facet of Charleston's economy.[9] It provides jobs and economic opportunity for our residents while showcasing our city and its cultural resources to people around the world.[10] Accordingly, common sense regulations such as City 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.[11]

The City ordinances regulating the tourism industry and tour guides have been in place for decades.[12] The City regulates the tourism industry in a manner that provides for continued success and prosperity while protecting the public, in particular the tourists that visit the City of Charleston.[13]

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[5] Affidavit of Joseph P. Riley Jr. (hereinafter referred to as "Riley Affidavit"), ¶ 3, attached as Ex. 1.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Riley Affidavit, ¶ 4, attached as Ex. 1.
[10] *Id.*
[11] *Id.*
[12] City Code Sec. 29-1; Riley Affidavit, ¶ 5, attached as Ex. 1.
[13] Riley Affidavit, ¶ 5, attached as Ex. 1.

The City requires a license only for tour guides who charge for their services.[14] No license is required for free touring or storytelling.[15] Individuals may conduct whatever tour activities they like without a tour guide license as long as they are not charging for their services.[16]

The City Code provision Plaintiffs challenge specifically states as follows:

> No person shall act or offer to act as a tour guide in the city ***for hire*** unless he or she has first passed a written and oral examination and is licensed by the city's office of tourism management as a registered tour guide or a temporary tour guide.[17]

The City Code makes clear that seeking money for tour guide services is the trigger for the license requirements.[18] The City Code defines "tour or touring" as "the conducting of or the participation in sightseeing in the districts ***for hire or in combination with a request for donations***."[19] Likewise, the Code defines "tour guide" as "any person who ***acts or offers to act as a guide for hire*** through any part of the districts, including but not limited to pedestrians and persons 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."[20]

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[14] City Code Secs. 29-2, -58; Riley Affidavit, ¶ 6, attached as Ex. 1; Affidavit of Vanessa Turner Maybank (hereinafter "Turner Maybank Affidavit"), ¶ 3, attached as Ex. 2.
[15] City Code Secs. 29-2, -58; Riley Affidavit, ¶ 6 , attached as Ex. 1; Turner Maybank Affidavit, ¶¶ 3, 7, attached as Ex. 2.
[16] Riley Affidavit, ¶¶ 6, 7, attached as Ex. 1; Turner Maybank Affidavit, ¶¶ 3, 6, attached as Ex. 2.
[17] City Code Sec. 29-58.
[18] *Id.*; *see also* City Code Sec. 29-2; Riley Affidavit, ¶ 6, attached as Ex. 1; Turner Maybank Affidavit, ¶ 7, attached as Ex. 2.
[19] City Code Sec. 29-2.
[20] City Code Sec. 29-2. (Emphasis added).

The tour guide ordinance concerns qualifications, not speech.[21] The purpose of the ordinance is to promote the quality of the paying consumer's experience, and increase the likelihood that paying consumers get what they bargained for.[22] The requirement that tour guides pass an examination is a common sense way to ensure that tour guides are qualified to charge the public fees for their services.[23] People unwilling or unable to learn about the City's history are unlikely to pass the test.[24] Thus, the test increases the likelihood that tour guides charging for tour services will provide consumers what they bargained for.[25] Once an individual demonstrates sufficient knowledge to pass the tour guide test, he or she has shown qualifications to sell his or her services to the public.[26]

The number of tour guide licenses issued varies each year depending on the number of applicants and the knowledge of those that apply.[27] Last year the City issued 59 tour guide licenses.[28] To ensure minimum competency, the City requires those applying for a tour guide license to pass an exam consisting of written multiple choice and oral questions that test the

[21] Riley Affidavit, ¶¶ 9–11, attached as Ex. 1; Turner-Maybank Affidavit, ¶¶ 4, 6, attached as Ex. 2; *see generally* Chapter 29 of the City Code.
[22] Riley Affidavit, ¶ 11, attached as Ex. 1; Turner-Maybank Affidavit, ¶ 4, attached as Ex. 2. The former Director of Tourism's statement in the City's Tour Guide Training manual is consistent with the purpose of increasing the likelihood that paying consumers get what they bargained for. The manual states in part "The purpose of this guide is to provide a wealth of knowledge for prospective and current licensed tour guides about Charleston's ever-changing history. Charleston's history is intrinsically linked to the history of our country, and it is the city's goal to provide accurate, factual and updated information to its visitors and residents." Tour Guide Training Manual, p. 482, attached to Plaintiffs' memo at ECF Entry No. 5–2, Ex 1.
[23] Riley Affidavit, ¶¶ 8, 11, attached as Ex. 1; Turner Maybank Affidavit, ¶ 4, attached as Ex. 2.
[24] Riley Affidavit, ¶ 11, attached as Ex. 1; *see also* Turner Maybank Affidavit, ¶ 4. , attached as Ex. 2.
[25] Riley Affidavit, ¶ 11, attached as Ex. 1; Turner Maybank Affidavit, ¶ 4, attached as Ex. 2.
[26] Riley Affidavit, ¶ 11, attached as Ex. 1; Turner Maybank Affidavit, ¶ 4, attached as Ex. 2.
[27] Turner Maybank Affidavit, ¶ 5, attached as Ex. 2.
[28] *Id.*

applicant's knowledge of the City's most important historical facts.[29] The exam is prepared by the Historic Charleston Foundation for the City of Charleston Office of Tourism, and administered by the Manager of the City's Tourism Commission.[30]

The City does not regulate the message that is conveyed on licensed tours.[31] The City does not police, monitor, or control what licensed tour guides say.[32] Tour guides are free to present whatever message they wish on their tours.[33] The City applies no restraints on opinion stated during tours and no topic is off limits.[34] The City has no mechanism to monitor or regulate speech during the tours, and has not done so.[35] The City cannot revoke a license due to the City's disagreement with a tour guide's speech, and has not done so.[36]

The City's license requirement promotes the City's interest in ensuring that tour guides who charge for their services have sufficient knowledge to conduct tours of points of interest in the City because these guides have direct contact with visitors to the City.[37] It is common sense that tourists, whether here in Charleston or another City, expect a level of security, competence

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[29] *Id.*; *see also* Riley Affidavit, ¶ 11, attached as Ex. 1. In 2015 over fifty percent of applicants passed the written portion of the exam. No applicant who has passed the written portion has been denied a license due to the oral questions. *See* Turner-Maybank Affidavit, ¶ 5, attached as Ex. 2.

[30] Turner-Maybank Affidavit, ¶ 5, attached as Ex. 2.

[31] Riley Affidavit, ¶¶ 9–11, attached as Ex. 1; Turner Maybank Affidavit, ¶ 6, attached as Ex. 2; *see also generally* Chapter 29 of the City Code.

[32] Riley Affidavit, ¶¶ 9–11, attached as Ex. 1; Turner Maybank Affidavit, ¶ 6, attached as Ex. 2; *see also generally* Chapter 29 of the City Code.

[33] Riley Affidavit, ¶¶ 9–11, attached as Ex. 1; Turner Maybank Affidavit, ¶ 6, attached as Ex. 2; *see also generally* Chapter 29 of the City Code.

[34] Riley Affidavit, ¶ 9, attached as Ex. 1; Turner Maybank Affidavit, ¶ 6, attached as Ex. 2. For instance, the City allows ghost tours about non-factual information. *Id.*

[35] Turner Maybank Affidavit, ¶ 6, attached as Ex. 2; *see also* Riley Affidavit ¶¶ 9–10, attached as Ex. 1.

[36] Turner Maybank Affidavit, ¶ 6, attached as Ex. 2.

[37] Riley Affidavit, ¶ 7, attached as Ex. 1.

and knowledge from tour providers.[38] As Charleston is largely dependent on a healthy tourism industry, it has a substantial interest in protecting the consumers' experience in the tour guide industry.[39]

The City has an interest in preventing unqualified individuals from charging fees and falsely purporting to conduct knowledgeable tours from swindling trusting tourists out of money.[40] Indeed, Charleston, like any other governmental entity, has a substantial interest in protecting the public from deceptive business transactions and solicitations for money from unqualified fly by night swindlers.[41] This interest extends to protecting the City's tourism economy and its residents and visitors from false or misleading offers of service for compensation, such as a tour guide for hire who has insufficient knowledge to guide paying customers through the city.[42] 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.[43]

Plaintiffs registered for and took the November 9, 2015 tour guide written examination.[44] Plaintiffs failed to pass the examination.[45] Plaintiffs do not allege that the City has prohibited them from communicating their desired message. Rather, Plaintiffs cite to their desire to "earn a

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[38] *Id.*
[39] Riley Affidavit, ¶¶ 7–8, attached as Ex. 1.
[40] Riley Affidavit, ¶ 8, attached as Ex. 1; *see also* Turner-Maybank Affidavit, ¶ 4, attached as Ex. 2.
[41] Riley Affidavit, ¶ 8, attached as Ex. 1.
[42] *Id.*
[43] *Id.*
[44] Plaintiffs' Complaint, ¶¶ 38, 55, 68. Plaintiff Warfield also took the August 2015 tour guide written examination. Plaintiffs' Complaint ¶ 52.
[45] Plaintiffs' Complaint ¶¶ 38, 55, 68.

living" in the tourism industry, and their effort to set up their operation with actions such as preparing business cards and setting up credit card processing accounts.[46]

On January 28, 2016 Plaintiffs filed their Complaint against the City alleging that the City's ordinance violates their first amendment rights. On February 2, 2016, Plaintiffs filed their Motion for a Preliminary Injunction requesting that this Court enjoin the City from enforcing its ordinance.

PRELIMINARY INJUNCTION STANDARD

"[A] preliminary injunction is an extraordinary remedy, to be granted only if the moving party ***clearly establishes*** entitlement to the relief sought."[47] "By requiring a district court to cast judgment, while acting on an incomplete record, the preliminary injunction remedy is inherently problematic."[48] As such, preliminary injunctions involve "the exercise of very far-reaching power to be granted only sparingly and in limited circumstances."[49] The Fourth Circuit has set out a four-factor balance of hardships test that governs the court's decision whether to grant preliminary injunctive relief: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.[50] The "[p]laintiff bears the burden of establishing that each of these factors supports granting the injunction."[51] Indeed, the plaintiff must make a clear showing of these factors to be

[46] Plaintiffs' Complaint ¶¶ 6-7, 34, 42, 48.
[47] *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997) (citation omitted) (emphasis added).
[48] *Al-Abood v. El-Shamari*, 71 F. Supp. 2d 511, 514 (E.D. Va. 1999) (citing *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994)).
[49] *MJJG Rest., LLC v. Horry Cnty., S.C.*, 11 F. Supp. 3d 541, 550 (D.S.C. 2014).
[50] *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).
[51] *Id.*

entitled preliminary injunctive relief.[52]

Here, Plaintiffs seek to enjoin the City from enforcing its Tour Guide Licensing Ordinances, however, they fail establish the requisite elements entitling them to preliminary injunctive relief. Accordingly, their motion should be denied.

IRREPARABLE HARM

The Fourth Circuit has consistently noted that "[t]he irreparable harm to the plaintiff and the harm to the defendant are the two most important factors in determining whether to grant or deny a preliminary injunction."[53] Indeed, failure to make a clear showing of irreparable harm is by itself a sufficient ground upon which to deny a preliminary injunction.[54]

The required irreparable harm must be "neither **remote nor speculative**, but actual and imminent."[55] In other words, the plaintiffs must make a "clear showing" of irreparable harm,[56] and the harm must be likely and not merely possible.[57] "The party seeking injunctive relief must show that "the injury complained of [is] of such ***imminence*** that there is a 'clear and present' need for equitable relief to prevent irreparable harm."[58]

The City recognizes that the determination of irreparable harm is often inseparably linked

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[52] *See MJJG Rest., LLC*, 11 F. Supp. 3d at 556; *Manning*, 119 F.3d at 264.
[53] *Direx Israel*, 952 F.2d at 812.
[54] *E.g., Direx Israel,* 952 F.2d at 812; *Manning*, 119 F.3d at 266.
[55] *Direx Israel,* 952 F.2d at 812.
[56] *Id.* (citation and quotation omitted).
[57] *Winter v. NRDC*, 129 s. Ct. 365, 3758 (Nov. 12, 2008); *Munaf v. Green*, 553 U.S. 674, 690 (2008). "The injury must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (also holding the injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time.").

to the merits of the claimed violation of the constitutional right.[59] Plaintiffs' motion fails to establish irreparable harm, however, because the crux of Plaintiffs' alleged harm is not the deprivation of speech – indeed, the challenged ordinance does not affect Plaintiffs' ability to speak. The only harm Plaintiffs identify stems from their desire to charge money for their services.

Irreparable harm is "an injury that cannot be undone through monetary relief."[60] It is "well settled that economic loss does not, in and of itself, constitute irreparable harm."[61] Thus,"[w]here the harm suffered by the moving party may be compensated by an award of money damages at judgment, courts generally have refused to find that harm irreparable."[62] Specifically:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.[63]

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. No license is required for individuals to show tour

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[58] *Id.* (quoting, *Ashland Oil, Inc. v. FTC,* 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976) (emphasis in original)) "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin". *Id*. at 674.
[59] *Brown ex rel. Brown v. Cabell Cnty. Bd. of Educ.*, 605 F. Supp. 2d 788, 793 (S.D. W.V. 2009).
[60] *Verbena United Methodist Church v. Chilto Cnty. Bd. of Educ.*, 765 F. Supp. 704, 714 (M.D. Ala. 1991).
[61] *Wisconsin Gas Co.*, 758 F.2d AT 674.
[62] *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).
[63] *Id.* (citing *Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 953 (1974)).

guests around Charleston and then talk to them about points of interest. Accordingly, Plaintiffs' alleged harm does not relate to their speech. Rather Plaintiffs alleged harm constitutes alleged losses of money, time and energy relevant to engaging in the tour guide business.[64] Plaintiffs, therefore, have failed to establish irreparable harm and their Motion for preliminary injunction should be denied.

<u>HARM TO THE CITY, THE BALANCE OF HARDSHIPS, AND PUBLIC INTEREST</u>

Plaintiffs' motion fails as a matter of law because Plaintiffs cannot show the threatened injury outweighs the harm it would cause the City, and Plaintiffs' requested injunction would be adverse to the public interest.

Even assuming Plaintiffs could establish an immediate threat of irreparable harm, which they cannot, Plaintiffs must show that the threatened injury outweighs the harm the proposed injunction would cause the City. This, Plaintiffs cannot do. The Plaintiffs' fears are at best speculative, but the City is presumed to suffer significant harm as a matter of law if this Court issues an injunction.

"[A]ny time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury."[65] Moreover, an injunction would deprive the City of an important mechanism to protect the public from deceptive solicitations from unqualified individuals posing as tour guides and seeking money from unsuspecting tourists.

Plaintiffs' self-interest, not the public interest, is at the root of their Complaint. The

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[64] See Plaintiffs' Memorandum In Support, p. 23. To support their irreparable harm argument Plaintiffs cite to their desire to "earn a living", and their effort to set up their operation with actions such as preparing business cards and setting up credit card processing accounts. Plaintiffs' Memorandum In Support, p. 23. These are the type of alleged harms that the Fourth Circuit has recognized are inappropriate for a preliminary injunction. *See Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

underlying purpose of their challenge is to make money, not to benefit the public.[66] Tourism represents an important facet of Charleston's economy. Tourism provides jobs and economic opportunity for our residents while showcasing the City and its cultural resources to people around the world. Common sense regulations such as ordinances regulating the City's tourism industry serve the important purpose of maintaining, protecting, and promoting the tourism industry and economy of the City, upon which so many citizens and the City rely. These regulations therefore serve the City and the public's interest.

LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs' motion fails because Plaintiffs cannot make a clear showing that they are likely to succeed on the merits of their claim. "Because a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by '**a clear showing**' that, among other things, it is likely to succeed on the merits at trial."[67] Specifically, the Fourth Circuit requires that if the balance does not tip "***decidedly***" in favor of the plaintiff, the plaintiff must submit "***clear and convincing***" proof of likelihood of success in order to obtain a preliminary injunction.[68] Plaintiff fails to meet this high standard.

A. The ordinance does not license speech, but regulates business under the City's police powers.

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[65] *New Motor Vehicle Bd. of Ca. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

[66] In fact, two of the Plaintiffs admit that each receives retirement benefits, and seek the injunction merely to attempt to "supplement" their respective retirement incomes by becoming a tour guide for hire.

[67] *MJJG Rest.*, 11 F. Supp. 3d at 556 (emphasis added).

[68] *Direx Israel,* 952 F.2d at 813("clear and convincing" proof of likelihood of success required); *Mycalex Corp. v. Pemco Corp*., 159 F.2d 907, 912 (4th Cir. 1949); *see also Maxim's Ltd. v. Badonsky*, 772 F.2d 388, 391 (7th Cir. 1985) (the judge must "require a fairly clear-cut probability of success if he did not find that harm to the plaintiff outweighed harm to the defendant *to a significant degree*) (emphasis added).

It is well established that a local government has the power to regulate occupations under its police powers.[69] The U.S. Supreme Court determined long ago that although "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, ... there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed ... for the protection of society."[70]

Courts have long recognized municipalities' power to require a license for tour guides.[71] "Certainly the licensing of sightseeing guides [for hire] in a large metropolis falls within the police powers of the local government."[72] "Guides must be persons of knowledge and integrity—not steerers of fly-by-night operators. It is a matter of public concern and interest that they be carefully supervised, [and the City] has the power to license these [tour] guides and to prescribe reasonable standards and qualifications as prerequisites to the granting of the licenses."[73]

Charleston's occupational license sets minimum qualifications for tour guides to charge for their services. Accordingly, it is indisputably within the City's police powers. Plaintiffs overstate the ordinance's restrictions in an attempt to implicate the First Amendment. The ordinance, however, does not regulate speech. The ordinance regulates only the business transaction of charging for tour guide services.

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[69] *Watson v. Maryland*, 219 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the state extends to the regulation of certain trades and callings[.]")
[70] *Dent v. West Virginia*, 129 U.S. 114, 121-122, 9 S. Ct. 231, 233, 32 L.Ed. 623 (1889).
[71] See *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014), *cert denied*, 135 S. Ct. 1403 (2015).
[72] *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958).
[73] *Id.*

In *Detroit Automotive Purchasing Services, Inc. v. Lee*, the court rejected a First Amendment challenge to an occupational business license analogous to the one here.[74] The plaintiffs in *Lee* operated an automotive purchasing service, and challenged a Maryland license requirement for automobile salesman under the First Amendment.[75] The *Lee* court rejected the plaintiffs' claim that the license requirement implicated the First Amendment.[76] The *Lee* court ruled that the licensing requirement did not affect the salesmen's' speech but rather only regulated the business transaction, noting that the salesman were free to speak about car information with or without the license.[77] The regulation only required the plaintiffs to have the license in order to process the sales transaction.[78] The Court held "in view of the prior rulings on the constitutionality of the licensing requirement, plaintiffs' attack on the licensing requirement under the First Amendment is ineffective."[79]

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

Furthermore, the ordinance does not regulate the message that is conveyed on licensed tours. The ordinance affords no mechanism for the City to control what licensed tour guides say.

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[74] *Detroit Automotive Purchasing Services, Inc. v. Lee,* 463 F. Supp. 954 (D. Md. 1978).
[75] *Id.*
[76] *Id.* at 971-72.
[77] *Id.* at 972. ("The particular licensing provisions in question do not prevent DAPS from providing consumers with information on the price of new automobiles. The provisions do prevent unlicensed brokers from making arrangements on behalf of clients to purchase particular vehicles.")
[78] *Id.*
[79] *Id.*

Tour guides are free to present whatever message they wish on their tours. The ordinance has no restraints on opinion and no topic is off limits. Accordingly, the ordinance only regulates the business transaction and does not violate Plaintiff's First Amendment rights. [80]

B. To the extent the ordinance regulates speech, it is content neutral and survives intermediate scrutiny.

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[81] "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[82] The Supreme Court has consistently stated that a statute, law, regulation or ordinance will be considered content-neutral

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[80] Plaintiffs incorrectly identify the code's reference to an "escort" in a separate ordinance section as an exception to the license requirement. Plaintiffs are wrong. The reference to an "escort" in Sec. 29-261, is not an exception to the ordinance's requirement that individuals who are paid to provide tours be licensed. (Turner Maybank Affidavit, ¶ 8, attached as Ex. 2). Section 29-261 states that that an "escort" should accompany walking tour groups of more than twenty people. The ordinance further states the "escort" may or may not be a licensed tour guide. Section 29-261 does not define the term "escort". (Turner Maybank Affidavit, ¶ 8). Section 29-261 was enacted in 1998 after the Tourism Management Plan Update (1998 Tourism Management Plan) noted a concern with large walking tour groups and recommended an "escort" accompany such groups for safety purposes. (Turner Maybank Affidavit, ¶ 8). The 1998 Tourism Management Plan noted that "[t]he groups are often too large to fit on narrow sidewalks and spill into streets, causing safety concerns. Large groups also tend to impede use of the sidewalks by other pedestrians. . . . Groups walking to and from a destination associated with a large bus tour must have the bus company escort assist in directing visitors. (Turner Maybank Affidavit, ¶ 8). The escort's purpose is to assist in controlling the group's members for purpose of traffic and safety management. (Turner Maybank Affidavit, ¶ 8). Escorts accompanying walking groups perform the function of making sure the group walks safely from one point to another, without causing a hazard for other pedestrians or motorists. (Turner Maybank Affidavit, ¶ 8). Unlicensed escorts cannot engage in touring services. (Turner Maybank Affidavit, ¶ 8). All tour guides that charge for their services must obtain a tour guide license. (Turner Maybank Affidavit, ¶ 8).

[81] *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 433 (4th Cir. 2007) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989)).

[82] *Ward*, 491 U.S. at 791.

so long as it is "justified without reference to the content of the regulated speech."[83] Where a regulation "was adopted for the purpose unrelated to the suppression of expression, *e.g.*, to regulate conduct . . . a court must apply a less demanding intermediate scrutiny."[84]

Charleston's ordinance requiring tour guide for hire to be licensed is content neutral. The trigger for the license is whether a tour guide is charging for the services not the content of what the tour guide says. No license is required for noncommercial touring or storytelling. Individuals may conduct whatever tour activities they like without a tour guide license as long as money is not charged.[85]

Moreover, the tour guide ordinance concerns qualifications, not speech. The City does not regulate the message that is conveyed on licensed tours.[86] The City does not police, monitor, or control what licensed tour guides say.[87] Tour guides are free to present whatever message they wish on their tours.[88] The City applies no restraints on opinion stated during tours and no topic is off limits.[89] The City has no mechanism to monitor or regulate speech during the tours, and it has not done so.[90] The City has no power to revoke a license due to the City's

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[83] *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).
[84] *MJJG Rest., LLC v. Horry Cty., S.C.*, 11 F. Supp. 3d 541 (D.S.C. 2014)
[85] *See* Chapter 29 of City Code; *see also* Tuner Maybank Affidavit, ¶¶ 3, 6, attached as Ex. 2. Thus, Plaintiffs are wrong when they describe the ordinance as "deciding who is and is not qualified to speak." The ordinance does not prevent anyone's speech. The ordinance applies only to test the qualification of tour guides who charge money.
[86] Turner Maybank Affidavit, ¶ 6, attached as Ex. 2.
[87] Turner Maybank Affidavit, ¶ 6, attached as Ex. 2.
[88] Turner Maybank Affidavit, ¶ 6, attached as Ex. 2.
[89] For instance, the City allows ghost tours about non-factual information. Turner Maybank Affidavit, ¶ 6, attached as Ex. 2.
[90] Turner Maybank Affidavit, ¶ 6, attached as Ex. 2.

disagreement with a tour guide's speech, and has not done so.[91]

Revealing the weakness of their First Amendment claims, Plaintiffs exaggerate the scope of the City's tour guide ordinance throughout their brief. Although the City's ordinance has no mechanism to control or monitor speech of licensed tour guides, Plaintiffs nevertheless argue without basis that the purpose of the ordinance is to control tour guides' speech.[92] The Court should ignore Plaintiffs' mischaracterization of the ordinance's requirements. The Supreme Court has made clear that when analyzing the constitutionality of a municipal or state law courts "should consider any limiting construction that a state court or enforcement agency has proffered."[93] Accordingly, the City's interpretation of the ordinance as providing no power to

[91] Plaintiffs exaggerate the City's tour guide ordinance throughout their brief. Although the City's ordinance has no mechanism to control or monitor speech of licensed tour guides, Plaintiffs nevertheless argue without basis that the purpose of the ordinance is to control the tour guides speech. The Court should ignore Plaintiffs overstatement of the ordinance's requirements. Moreover, the Supreme Court has made clear that when analyzing the constitutionality of a state law courts "should consider any limiting construction that a state court or enforcement agency has proffered." Accordingly, the City's interpretation of the ordinance as providing no power to regulate speech of licensed tour guides should be controlling here.

[92] Plaintiff's Memo in Support, p. 11-14.

[93] *Ward*, 491 U.S. at 795-96.

regulate the content of licensed tour guides' speech should control.[94]

Plaintiffs argue the ordinance is content based because "by licensing persons who provide tours on public right-of-ways but not when they engage in other forms of speech at those same

[94] Plaintiffs also cite the temporary license provision arguing that the ordinance is content based. Plaintiffs have not applied for a temporary tour guide license under the City Code. (Turner Maybank Affidavit, ¶ 10, attached as Ex. 2). Moreover, the temporary tour guide license provision does not regulate speech. For employees of a licensed tour company, the City has a temporary license procedure that includes a temporary license test. (Turner Maybank Affidavit, ¶ 9) It is customary for the tour companies to prepare scripts for their employees to follow during the company tours. (Turner Maybank Affidavit, ¶ 9) The City accepts a copy of the script when the sponsoring company's employee is being issued a temporary license. (Turner Maybank Affidavit, ¶ 9) The City has never rejected a script received pursuant to the temporary license provision. (Turner Maybank Affidavit, ¶ 9) The City cannot control whether a temporary licensee working for a tour company follows that company's script, and has never done so. (Turner Maybank Affidavit, ¶ 9) The tour companies are free to decide what they want their employees to say during their tours. (Turner Maybank Affidavit, ¶ 9) Finally, the Supreme Court has made clear that when analyzing the constitutionality of a municipal or state law courts "should consider any limiting construction that a state court or enforcement agency has proffered." *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989). Thus, the City's own limitation on the temporary license provision should control.

public forums the City has singled out a certain type of speech for special burdens."[95] Plaintiffs are wrong. Merely defining the conduct to be regulated – i.e. tour guides for hire - does not make an ordinance content based.[96]

In *Kagan v. City of New Orleans*, the court rejected an identical argument made by the plaintiffs in that case.[97] The plaintiffs in *Kagan* alleged New Orleans' tour guide licensing ordinance was content based because it singled out speech by tour guides. The *Kaga*n court held

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[95] Plaintiff's Memo. p. 11. Plaintiffs cite to the recent case *Calahy v. Larosa*, 796 F.3d 399, 401–02 (4th Cir. 2015), but that case is easily distinguishable. The statute at issue in *Calahy* prohibits all ["qualifying"] robocalls with three exceptions based on the "content" of those acts (*i.e.*, phone calls and the messages contained therein). In other words, the statute prohibits all the conduct based on the message espoused within the conduct, providing three exceptions to the rule. *Id.* Such a statute controls speech on the basis of the speech's content. Not all tour guiding services are prohibited; only where tours are provided for hire does the government regulate the tours and the tour guides in those instances are required to obtain a license from the City. The purported government control is based on conduct, not the message conveyed by the conduct. In addition, the *Cahaly* court found the anti-robocall statute to be content-based because the statute makes content distinctions on its face. The statute prohibiting all robocalls that are "for the purpose of making an unsolicited consumer telephone call" or are "of a political nature including, but not limited to, calls relating to political campaigns" with three exceptions based on express or implied consent of the called party: (1) call was in response to express request of the person called; (2) call is primarily connected to an existing debt or contract of the called party" and (3) when the call solicitor has an existing or previous business relationship to the party called. *Id.* at 402, 404–05. The *Cahaly* court found that the anti-robocall statute applies on its face to calls with a consumer or political message but does not reach calls made for any other purpose. *Id.* at 404–405. Here, however, the ordinance does not provide a facial distinction between the content of the message conveyed by a tour guide; rather, the distinction is based on the act of offering to conduct a tour or mandating to be paid if one does conduct a tour in the City. Nowhere does the ordinance reference the content of the tour in making this conduct-based distinction. Unlike what Plaintiffs argue, speech is not referenced nor is a certain "type of speech" singled out. Rather, a person falls within the ordinance if he or she offers to or does conduct a tour for hire.

[96] *Covenant Media of SC v. City of N. Charleston,* 493 F.3d 421 (4th Cir. 2007) (rejecting the plaintiff's 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.").

that defining the conduct to be regulated did not make the ordinance content based:

> Commercial tour guides are commercial tour guides because, in exchange for money, they lead people around while speaking about points of interest. The City must "refer" to that speech to define this conduct but it need not (and does not) "examine the content of the message" that speech conveys. . . . "the conduct triggering coverage under the statute" does not "consist [ ] of communicating a message." The conduct triggering coverage consists of an act—guiding people around the city for hire—that only incidentally involves communicating a message.[98]

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

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

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[97] *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).
[98] *Id*. at 779.

of [tour guides'] speech," it is content neutral.[99]

The same reasoning applies in the present case. Charleston's ordinance is not initiated by speech, but by the charging of money for tour services. The licensing ordinance is narrowly directed at the non-speech-related risks of tour guide activity. Moreover the ordinance seeks to protect the City's tourism economy and its residents and visitors from false or misleading offers of service for compensation, such as a tour guide for hire who has insufficient knowledge to guide paying customers through the City. 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.[100] Accordingly, the City's ordinance is justified without regard to the content of the tour guides speech, and it is therefore content neutral.[101]

"A content-neutral regulation passes constitutional muster if it furthers a substantial government interest, is narrowly tailored to further that interest and leaves open ample

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[99] *Id.* at 779-80.

[100] Riley Affidavit, ¶ 8, attached as Ex. 1. Moreover, if the City wished to regulate the content of a tour's message it could have easily have created an ordinance that prohibited tours that deviated from a certain message, but it did not do so. Riley Affidavit, ¶ 10.

[101] 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.

alternative channels of communication."[102] The City's tour guide licensing program meets all three standards.

The City is "entitled to advance its interests by arguments based on appeals to common sense and logic, particularly where, as here, the burden on speech is relatively small."[103] The City's licensing ordinance promotes the City's interest in ensuring that tour guides who charge for their services have sufficient knowledge to conduct tours of points of interest in the City because these guides have direct contact with visitors to the City. It is common sense that tourists whether here in Charleston or another City expect a level of security, competence and knowledge from tour providers. As a healthy tourism industry is an important sector of the City's economy, the City has a substantial interest in protecting the consumers' experience in the tour guide industry.[104]

The City therefore has a substantial interest in preventing unqualified individuals from charging fees and falsely purporting to conduct knowledgeable tours from swindling trusting

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[102] *Wag More Dogs*, 680 F.3d at 369. The Fourth Circuit has held that even at the summary judgment stage, [o]bjective evidence is not always required to show that a speech restriction furthers the government's interests." *Ross v. Early*, 746 f.3D 546 (4th Cir. 2014).
[103] *Ross v. Early*, 746 F.3d 546 (4th Cir. 2014).
[104] *See 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").

tourists out of money.[105] Indeed, Charleston, like any other government entity, has a substantial interest in protecting the public from deceptive business transactions and solicitations for money from unqualified fly by night swindlers. This interest extends to protecting the Charleston's tourism economy and its residents and visitors from false or misleading offers of service for compensation, such as a tour guide for hire who has insufficient knowledge to guide paying customers through the city.[106]

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

> This is a case about the sale of an in-person service, not information. Once a tour guide demonstrates sufficient knowledge to pass the test, he may sell his services. In the course of doing so, he may provide whatever information he likes. The testing requirement simply helps to ensure that tour guides have some reasonable basis for holding themselves out as such—something even Plaintiffs agree should be the case. . . . It is clear to the Court that the test furthers the City's interest. A test like that used by the City is the best way of weeding out cheats, because people unwilling or unable to learn about the City's history are unlikely to pass the test. The City's testing requirement therefore passes intermediate scrutiny.[107]

There is no reason for a different result here. The license test does not burden

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[105] Plaintiffs misrepresent the City's ordinance to support their argument that the City has no significant interest for its ordinance. (See Plaintiffs' Memo., p. 19). Plaintiff argues the City requires a permit "to improve the quality of speech", and argues that the City is regulating "the qualifications of people who talk to visitors and residents about Charleston." (See Plaintiffs' Memo., p. 19). Plaintiffs fail to acknowledge that the ordinance only regulates the qualifications of tour guides ***who charge*** for their services. Plaintiffs fail to acknowledge the ordinance does not regulate what licensed tour guides say on their tours. Plaintiffs leave out these critical facts because they show the weakness of their argument.

[106] Riley Affidavit, ¶ 8, attached as Ex. 1.

[107] *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).

substantially more speech than is necessary to further the government's legitimate interests.[108] Indeed, the tour guide license test concerns qualifications, not speech.[109] The ordinance is related to the quality of the paying consumer's experience, and increasing the likelihood that paying consumers get what they bargained for.[110]

The ordinance, like other common occupational licenses, is in place to ensure only that individuals charging for services are qualified to perform them.[111] The ordinance's requirement that tour guide testing pass an exam about Charleston's history is a common sense way to ensure that tour guides are qualified to charge the public fees for their services.[112] People unwilling or unable to learn about the City's history are unlikely to pass the test.[113] Thus, the test increases the likelihood that tour guides charging for tour services will provide consumers what they bargained for.[114] As with any occupational license that regulates a commercial transaction, once an individual demonstrates sufficient knowledge to pass the tour guide test, he or she has shown qualifications to sell his or her services to the public.[115]

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[108] *Ward*, 491 U.S. at 799. Plaintiffs' argument that the city's ordinance is not narrowly tailored because the City could issue a voluntary license test fails because the government "need not regulate using the least restrictive or least intrusive means available to achieve its goals." *Ross v. Early*, 746 F.3d 546, 557 (4th Cir. 2014) (citing *Ward* at 798). Stated differently, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* (citing *Ward* at 800).
[109] Riley Affidavit, ¶ 11, attached as Ex. 1.
[110] Riley Affidavit, ¶ 11, attached as Ex. 1.
[111] Riley Affidavit, ¶ 11, attached as Ex. 1.
[112] Riley Affidavit, ¶ 11, attached as Ex. 1.
[113] Riley Affidavit, ¶ 11, attached as Ex. 1.
[114] Riley Affidavit, ¶ 11, attached as Ex. 1.
[115] Riley Affidavit, ¶ 11, attached as Ex. 1. Moreover, the narrowness of the City's regulation is shown by the alternative more intrusive approaches the City could have taken. The City could have easily have created an ordinance that prohibited tours that deviated from a certain message, but it did not do so. Riley Affidavit, ¶ 10.

The City's ordinance also leaves open ample alternative channels of communication.[116] In *One World One Family Now v. City and County of Honolulu*, the plaintiff challenged an ordinance that prohibited them from selling their message bearing T-shirts on sidewalks under the First Amendment.[117] The *One World* Court held Honolulu's ordinance left ample alternative channels of communication because it only forbid the ***selling*** of the T-shirts.[118] The court noted "plaintiffs' volunteers may hand out free T-shirts to passers-by."[119] The court rejected the plaintiffs attempt to argue that selling was a unique form of expression.[120] "Various other traditional means of dissemination would get across the exactly same idea. Thus, we do not believe the sale of message-bearing T-shirts is so 'uniquely valuable or important [a] mode of communication' as to be without effective substitute."[121]

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

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[116] 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).

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

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Id*

just so long as they do not charge for them."[122]

Likewise, Plaintiffs may communicate whatever message about the City of Charleston they want with or without a tour guide license.[123] The only limitation is that they cannot ***charge money*** for tour guide services without a license.[124] No license is required to speak about Charleston or to engage in free tour guide services.[125] Even for individuals with a license, the ordinance does not regulate the message that is conveyed on tours. Indeed the ordinance does not regulate speech whatsoever.[126] The ordinance has no device to control what licensed tour guides say.[127] Tour guides are free to present whatever message they wish on their tours. The

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[122] *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). Plaintiffs discount the *Kagan* opinion, even though the plaintiffs in *Kagan* petitioned for certiorari to the Supreme Court, and it was denied. Plaintiffs cite the D.C. Circuit's opinion in *Edwards v. District of Columbia* to support their First Amendment Arguments. Plaintiff's Memo. p. 20-21. The D.C. Circuit opinion is inapplicable. The D.C. Circuit largely based its holding on its finding that the District of Columbia's ordinance was "fatally under-inclusive" because it exempted certain bus tours from its license requirement. See, *Edwards*, 755 F.3d 996, 1007-08. By contrast, Charleston's ordinance contains no exception for similar bus tours. City Code Sec. 29-58; 29-2. Furthermore, the *Edwards* Court reasoned that the District of Columbia could not justify its qualification testing for tour guides based on protecting potential customers because those individuals could protect themselves through "websites such as Yelp or TripAdvisor". *Id*. at 1006-07. Further quoting *The Wealth of Nations* from 1776, the court reasoned that just like the "butcher, brewer, and baker" tour guides should be able to regulate themselves out of their own self-interest. *Id*. at 1007. The *Edwards* court was hostile to the rationale underlying most common sense occupational licenses. South Carolina alone licenses dozens of occupations including preschool teachers, athletic trainers, opticians, midwifes, mobile home installers, insulation contractors, painting contractors, mason contractors, drywall contractors, HVAC contractors, massage therapists, child care workers, security guards, truck drivers, school bus drivers, auctioneers, cosmetologist, barbers, lawyers, doctors, nurses, architects and many more. Under the *Edwards* court rationale, most occupational licenses that are now common in our modern society would fail to be justified. Accordingly, the *Edwards* opinion should not be followed in this case.

[123] Riley Affidavit, ¶ 6, 9, attached as Ex. 1.

[124] Riley Affidavit, ¶ 6, attached as Ex. 1.

[125] Riley Affidavit, ¶ 6, attached as Ex. 1.

[126] Riley Affidavit, ¶ 9-10, attached as Ex. 1.

[127] Riley Affidavit, ¶ 9, attached as Ex. 1.

ordinance has no restraints on opinion and no topic is off limits.[128] Therefore, Plaintiffs have ample alternative channels for communicating their speech.

Accordingly, Plaintiffs fail to make a clear showing that Charleston's tour guide ordinance violates Plaintiff's First Amendment Rights, and therefore, Plaintiffs' motion for a preliminary injunction should be denied.[129]

CONCLUSION

Based on the foregoing reasoning and citation of authority, Defendant City of Charleston respectfully requests that this Court deny Plaintiffs' Motion for Preliminary Injunctive Relief and grant Defendant such further relief as the Court finds just and proper.

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[128] Riley Affidavit, ¶ 9, attached as Ex. 1.

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

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