

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

KIMBERLY BILLUPS, MICHAEL
WARFIELD, and MICHAEL NOLAN,

Plaintiffs,

v.

CITY OF CHARLESTON, SOUTH
CAROLINA

Defendant.

Civil Action No. 2:16-cv-00264-DCN

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

A. THE PLAINTIFFS

Kimberly Billups

1. Kimberly Billups is a licensed tour guide who leads in-character tours of Charleston under the business name "Charleston Belle Tours." Declaration of Kimberly Billups ("Billups Dec.") ¶ 2. Kimberly's tours primarily focus on telling stories about the history of Charleston. *Id.*

2. Kimberly took the City of Charleston's ("City") November 2015 tour-guide-licensing written exam, scored a 70 percent, and was barred from taking the mandatory oral exam because she had scored below an 80 percent; accordingly, she did not qualify for the City's tour-guide license. *Id.* ¶¶ 8-9.

3. Because Kimberly did not qualify for the City's tour-guide license, she inquired with the City about obtaining a temporary tour-guide license. *Id.* ¶ 11. The City informed

Kimberly that she needed to secure a sponsoring employer, pass a written exam for the temporary tour guide license, and have her sponsor file a written script with the City so it could review and approve the script she had to use when giving tours. *Id.* Kimberly met with two tour operators in Charleston in order to satisfy the City’s requirement that she find a sponsoring employer as a condition for obtaining a temporary tour-guide license. *Id.* ¶ 12. Kimberly was unable to find a sponsoring employer and therefore could not obtain a temporary tour-guide license. *Id.*

4. In May 2016, the City informed Kimberly that it had amended the passing score for the tour-guide-licensing written exam to 70 percent, and that she had retroactively qualified for a tour-guide license based on her score on the City’s November 2015 exam. *Id.* ¶ 13.

5. Kimberly remains subject to the City’s requirement that tour guides retake the licensing exam every three years in order to renew their tour-guide license, or in the alternative that they take continuing-education courses on topics chosen and approved by the City if they seek to avoid having to retake the licensing exam. Charleston Code § 29-63; *see also* Billups Dec. ¶ 14.

6. Kimberly does not want to retake the City’s licensing examination every three years, or complete continuing education courses, as a condition of maintaining her ability to talk to tour groups in Charleston. Billups Dec. ¶ 15.

Michael Warfield

7. Michael Warfield is a licensed tour guide who leads pub tours and ghost tours of Charleston. Declaration of Michael Warfield (“Warfield Dec.”) ¶ 2. Michael’s tours provide information on different pubs and ghost stories. *Id.*

8. Michael took the City's August 2015 tour-guide-licensing written exam, scored a 73 percent, and was barred from taking the mandatory oral exam because he had scored below an 80 percent; accordingly, he did not qualify for the City's tour-guide license. *Id.* ¶ 8. Michael also took the City's November 2015 tour-guide-licensing written exam, scored a 67 percent, and was barred from taking the mandatory oral exam because he had scored below an 80 percent; accordingly, he once again did not qualify for the City's tour-guide license. *Id.* ¶ 10.

9. In May 2016, the City informed Michael that it had amended the passing score for the tour-guide-licensing written exam to 70 percent and that he now qualified for a tour-guide license based on his score on the City's August 2015 exam. *Id.* ¶ 13.

10. Michael remains subject to the City's requirement that tour guides retake the licensing exam every three years in order to renew their tour-guide license, or in the alternative that they take continuing-education courses on topics chosen and approved by the City if they seek to avoid having to retake the licensing exam. Charleston Code § 29-63; *see also* Warfield Dec. ¶ 14.

11. Michael does not want to retake the City's licensing examination every three years, or complete continuing education courses, as a condition of maintaining his ability to talk to tour groups in Charleston. Warfield Dec. ¶ 15.

Michael Nolan

12. Michael Nolan retired in Charleston with his wife in July 2015 after having spent over two decades of his career working as an editor in book publishing. Declaration of Michael Nolan ("Nolan Dec.") ¶ 2. Michael has never been a licensed tour guide. *Id.* ¶ 3. Michael took the City's November 2015 tour-guide-licensing written exam, scored a 64 percent, and was

barred from taking the mandatory oral exam because he had scored below an 80 percent; accordingly, he did not qualify for the City’s tour-guide license. *Id.* ¶ 6.

13. Michael does not want to retake the City’s tour-guide licensing written exam. *Id.* ¶ 8. Michael would lead tours in Charleston but for the requirement that he take and pass the City’s tour-guide-licensing written exam. *Id.*

B. THE TOUR INDUSTRY

14. In the City’s view, tour guides “serve as the city’s ambassadors” and their “knowledge” is “representative” of the City. Declaration of Arif Panju (“Panju Dec.”) Ex. 38 (“Tour Guide Training Manual”) at 482. The City’s 30(b)(6) witness testified that acting as an ambassador for the City means “to be a good representative, to bring credit ... so if you ... had a tour, that [the tour guide] represented the city well, the quality of the city[.]” Panju Dec. Ex. 1 (“Riley Tr.”) at 32:20–33:2.

15. It is commonly understood that “tour” involves visiting locations to hear stories or information pertaining to those locations and that “tour guide” is a person who talks about points of interest to audience members on a tour. Billups Dec. ¶ 2; Warfield Dec. ¶ 16; Nolan Dec. ¶ 10. The City’s 30(b)(6) witness testified that a tour guide is an individual “[b]eing paid for hire to expound on the history of our city.” Panju Dec. Ex. 2 (“Tecklenburg Tr.”) at 31:5–31:8. People go on tours to be entertained and to hear stories about the locations they are visiting. Billups Dec. ¶ 16; Warfield Dec. ¶ 16; Nolan Dec. ¶ 10.

16. Tour guides tell stories for a living. *See* Billups Dec. ¶ 16 (“When I give a tour, I aim to paint a picture of history for my customers by telling stories.”); Warfield Dec. ¶ 16 (“My primary goal is to entertain my customers by telling good stories about pubs and ghosts.”); Nolan

Dec. ¶ 2 (“After spending many years helping authors tell their stories through writing, I want to tell my own stories as a tour guide by talking.”).

17. All tour guides make their tours unique through their manner of delivery and their choice of stories; tour guides approach their material from their own perspective. Billups Dec. ¶ 16; Warfield Dec. ¶ 16.

18. Most people who go on tours are travelling on vacation, and they take tours to be entertained. Billups Dec. ¶ 16; Warfield Dec. ¶ 16. The City’s 30(b)(6) witness testified that tour guides tell “jokes about various things” and “[t]hat’s all a part of their tour,” and that may be why someone “picked [a] particular company over another company.” Panju Dec. Ex. 3 (“Maybank Tr.”) at 131:16–131:20.

19. Tours in Charleston focus on a broad array of topics, including history, ghosts, pubs, gardens, movies, and architecture. Billups Dec. ¶ 17; Warfield Dec. ¶ 17.

20. The City’s 30(b)(6) witness testified that licensed tour guides and historic preservation are “inextricably” related due to Charleston’s “national leadership in historic preservation,” Riley Tr. 50:20–51:6, and that historic preservation is “something that tour guides would study on their exam and would expect [sic] to be knowledgeable about,” *id.* at 51:19–51:22.

21. The City’s 30(b)(6) witness testified that Charleston’s leading tourist attraction is its collection of historic buildings and that tour guides need to know about them “[b]ecause that’s so important in the understanding of why this is such an extraordinary city to live [sic] and to visit, and visitors would expect somebody ... to be able to explain that.” Riley Tr. 53:1–53:13.

22. The City’s 30(b)(6) witness also testified that, with respect to the City’s historic buildings being a tourist attraction, by requiring guides to “tak[e] the test and then the

recertification” the City has “done its due diligence to make sure that [tour guides] grab that and understood [sic] that and can be tested on that, because it’s a very important part.” Riley Tr. 53:14–53:24.

23. Tour guides generally talk to a group of people, not a single individual. Billups Dec. ¶ 17; Warfield Dec ¶ 17. Tour guides also repeatedly tell the same stories on their tours. Billups Dec. ¶ 17; Warfield Dec ¶ 17. If tour guides *do* talk to just one or two individuals on a tour, they tell the same kinds of stories that they would tell a larger group on a tour. Billups Dec. ¶ 17; Warfield Dec ¶ 17.

24. Tour guides do not normally provide individualized advice. Billups Dec. ¶ 18; Warfield Dec ¶ 18. When questions are posed by people on tours, those questions generally concern topics like the history of Charleston, where to eat, or where to go shopping. Billups Dec. ¶ 18; Warfield Dec ¶ 18. The most individualized advice that a tour guide would normally give consists of providing a recommendation on where to eat, shop, or visit while in Charleston after soliciting information about a person’s personal interests or preferences. Billups Dec. ¶ 18; Warfield Dec ¶ 18.

25. Tour guides are entertainers, not professionals. *See* Billups Dec. ¶ 19 (“Anyone can be a tour guide because history is everywhere; you can entertain people by sharing the stories you have heard from others or read in books.”); *id.* ¶ 19 (“A tour guide is not like a doctor or a lawyer because if I do a bad job a tourist might get bored, but no one gets hurt.”); Warfield Dec. ¶ 19 (“I don’t give investment advice, legal advice, counseling, medical advice, or anything in that category. No one will suffer financial loss or personal hardship if I get a name or date wrong.”); *id.* (“I do not give professional advice, what I talk about on tours is a mix of entertainment and history.”).

26. The City's website contains a report called *Benchmark Measurements of Tourism Development* in Charleston and Peer Cities, produced by the College of Charleston and dated November 6, 2014. Panju Dec. Ex. 5 ("Peer Cities Report"). The College of Charleston worked with the City's Department of Planning, Preservation, and Sustainability and generated a list of peer cities of Charleston for the report; the peer cities located in the United States are Savannah, GA; Boulder, CO; Aspen, CO; Boston, MA; New Orleans, LA; and San Francisco, CA. *Id.* at 4.

27. Paula Reynolds, a tour guide who leads multi-day, multi city tours and who has also worked as a tour operator and tour director, Declaration of Paula Reynolds ("Reynolds Dec.") ¶ 7, testified that she is not aware of any jurisdiction (including Charleston) that requires a special occupational license to work as a tour operator, that is, to design a tour or decide where it goes, *id.* ¶ 21, and that sometimes maps a precise, mile-by-mile route the bus will follow in each city during the tour, *id.* ¶ 13. Ms. Reynolds also testified that she is not aware of any jurisdiction (including Charleston) that requires a specialty license to work as a tour director, that is, to travel with a group helping it execute the tour operator's itinerary, *id.* ¶ 22, and that sometimes maps a precise, mile-by-mile route the bus will follow in each city during the tour, *id.* ¶ 13.

28. Ms. Reynolds testified that on two occasions she has escorted tour groups in Charleston herself: a 21-day tour in September 2015 that began in New Orleans and ended in New York (with a stop in Charleston), and a student tour in June 2015 of (primarily) Charleston and Savannah. Reynolds Dec. ¶ 10. Ms. Reynolds testified that on both occasions, due to Charleston's tour-guide-licensing law, she was not legally allowed to provide commentary to her tour group while in Charleston and had to hire a licensed step-on guide to join the group on the tour bus to provide commentary. *Id.* ¶¶ 14–16. Ms. Reynolds testified that during the June 2015 tour, the licensed tour guide she hired in Charleston largely focused on architecture, a topic that

the students on her tour did not have an interest in and that she would not have covered if allowed to provide commentary herself. *Id.* ¶ 15. Ms. Reynolds also testified that during the September 2015 tour, the licensed tour guide she had hired failed to show up and that her tour group just walked around the city without a tour guide instead because she was “not allowed to provide commentary.” *Id.* ¶ 15.

29. The City’s witnesses consist of the following individuals: (1) Joseph P. Riley Jr., former Mayor of City of Charleston; (2) Vanessa Turner Maybank, City Clerk of Council; (3) Dan Riccio, Director of Livability and Tourism; (4) Mayor John Tecklenburg, Mayor of the City of Charleston; (5) Esther Banike, a certified tour guide in the City of Chicago; (6) Tommy Dew, a licensed tour guide in Charleston, South Carolina; (7) Rhetta Mendelsohn, a licensed tour guide in Charleston, South Carolina, and former commissioner on the City of Charleston Tourism Commission and Chair of its Tour Guide Subcommittee; and (8) Helen Hill, Chief Executive Officer of the Charleston Area Convention and Visitors Bureau. Panju Dec. Ex. 6. (“Defendant City of Charleston’s Supplemental Responses to Plaintiffs’ Interrogatories”).

C. CHARLESTON’S TOUR-GUIDE-LICENSING LAW

30. Charleston’s Code of Ordinances (“Charleston Code”) provides that “[n]o 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 licensed by the city’s office of tourism management as a registered tour guide.” Charleston Code § 29-58 et seq. (“licensing law”).

31. The Charleston Code of Ordinances 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.” Charleston Code § 29-2 (definition of “tour or touring”). Meeting minutes of the City of Charleston Tourism Commission reflect a statement interpreting the City Code’s

definition of “touring” by the City’s Assistant Corporation Counsel, Mr. Dwayne Green, and stating “if it was not a circumstance where there was a tour guide giving different pointers as to what buildings were of historic significance, it does not fall under the definition of touring as enacted by the ordinance.” Panju Dec. Ex. 7 (Minutes of City of Charleston Tourism Commission, March 26, 2003) at 1–2.

32. In *The City of Charleston Tour Guide Training Manual* (Historic Charleston Found. eds., 2011) (“Training Manual”), would-be tour guides are informed that the “honor of introducing” visitors to Charleston “goes to a special few who . . . have mastered her most telling stories.” Tour Guide Training Manual at 3. The City’s 30(b)(6) witness testified that “mastering the most telling stories” includes “everything from its founding to the wars, to its historic preservation leadership, to its extraordinary architecture.” Riley Tr. 65:15–66:1.

33. An individual giving a narrated tour without a tour-guide license can be fined up to \$500, spend up to thirty days in jail, or both. Charleston Code § 1-16(a).

34. The City’s 30(b)(6) witness testified that the City’s Tourism Director has the power to revoke a tour-guide license by bringing a request to do so before the City’s Tourism Commission. Maybank Tr. 24:12–24:20.

35. The City’s tour-guide-licensing law applies only to public spaces like the streets and sidewalks. Panju Dec. Ex. 4 (“Ricchio Tr.”) at 22:17–22:19. The City’s 30(b)(6) witness admitted that it is not illegal for an unlicensed tour guide to work on private property. *Id.* at 22:13–22:16.

36. The tour-guide license required by Charleston Code § 29-58 is different from a business license. *See* Charleston Code § 29-61(a). Tour businesses—like other businesses operating in Charleston—are separately required to obtain a business license. Riley Tr. 74:3–

74:7; *see also* Charleston Code § 29-61(a). The City requires “verification of a business license” before it will issue a tour-guide license. Charleston Code § 29-61(a).

37. The City’s 30(b)(6) witness testified that requiring a business license “protects the public” because “the public know[s] you’ve been granted a license to conduct business in the city.” Riley Tr. 71:12–71:17. Business licenses issued by the City expire after one year and must be renewed in order to continue engaging in business. *Id.* at 74:14–74:23.

38. The City’s 30(b)(6) witness testified that if fraud is being committed, including “a criminal action or something like that,” then one “could lose a business license[.]” *Id.* at 74:8–74:12. The City’s 30(b)(6) witness also testified that holders of a business license are “supposed to display their license,” *id.* at 73:8–73:10, and “if you’ve got a business license you would be ... locatable” if the City receives a complaint, *id.* at 73:21–74:2.

Who Is Required To Be Licensed

39. The City’s 30(b)(6) witness testified that an enforcement officer looking at a tour group would identify the tour guide by observing to see who is “the one speaking to the crowd at all times.” Riccio Tr. at 17:7–17:20.

40. Davida Allen, the manager of the City’s Tourism Management Division, responded to an inquiry about whether one needs a tour-guide license by identifying the person “doing any talking” as needing a license, but not someone “just driving and or transporting” people. Panju Dec. Ex. 8 (Davida Allen, official communication dated Feb. 3, 2015); *see also* “Riccio Tr.” at 123:7–123:20 (testimony of 30(b)(6) witness identifying Davida Allen as the City official responsible for answering questions about whether or not a tour-guide license is required).

41. A person paid to drive people around while playing a recorded tape of a licensed tour guide talking about Charleston is not required to have a tour guide license. Riley Tr. 57:12–57:22. Specifically, the City’s 30(b)(6) witness testified that such a person would not be giving a guided tour and that “the cassette can’t answer a question.” *Id.* But “[i]f you hired a driver to drive you around town and you pay them to *give you information about the city*, then they should have a license because ... you’re paying them for the services of a tour guide[.]” *Id.* 58:5–58:9 (emphasis added).

42. The City’s 30(b)(6) witness testified that a person working as a tour escort (permitted under Charleston Code § 29-261(a) prior to April 26, 2016), “wouldn’t be able to give a tour” and “was just kind of managing the movement of the group rather than giving a tour.” Tecklenburg Tr. 30:14–30:19. By contrast, giving a tour means “[b]eing paid for hire to expound on the history of our city.” *Id.* at 31:5–31:8.

43. Tommy Dew, a licensed tour guide and witness for the City, testified that when he approached the City about installing his touring app in buses and rickshaws the mayor responded with enthusiasm. Panju Dec. Ex. 32 (“Dew Tr.”) at 56:8–56:17; 66:20–67:1. Mr. Dew’s app was called City Slicker and provided an automated tour of Charleston consisting of real-time historical commentary and information about points of interest using GPS technology on iPhones and iPads. *Id.* at 52:12–52:21; 53:6–53:19; 53:25–55:1. Mr. Dew also testified that as his plan moved forward, iPads loaded with his City Slicker app were installed in buses and a rickshaw, and that the City never once required or suggested that the drivers of those vehicles needed to obtain a tour-guide license. *Id.* 56:18–57:4; 58:2–59:11; 60:7–61:14; 72:8–72:15.

The Application Process

44. In order to obtain a tour-guide license, a tour guide must register with the City; pay a \$50 fee for two attempts at passing the City’s tour-guide-licensing exam; take a two-hour written examination consisting of 200 matching, multiple choice, and true/false questions; and pass the exam by scoring a 70 percent or higher. Panju Dec. Ex. 9 (official 2017 Tour Guide Examination Information); *see also* Charleston Code §§ 29-58, 59. Individuals who pass the tour-guide-licensing exam must also present a business license to the City’s revenue collections division before being issued a “registered tour guide license card.” Charleston Code § 29-61(a). If first-time tour guides fail to collect their license within thirty days of receiving notice from the City, the license expires by operation of law on the thirty-first day. *Id.* at 29-61(b).

45. The City’s tour-guide-licensing law has directly prevented people from talking on tours. Plaintiff Michael Nolan would be leading tours that discuss the African-American experience in Charleston, but he is prohibited from doing so because the City requires that he first pass its tour-guide written exam. Nolan Dec. ¶ 8. And Paula Reynolds twice led tour groups to Charleston and was on both occasions barred from providing commentary herself due to the City’s tour-guide-licensing law. Reynolds Dec. ¶¶ 10, 14–16.

46. At the time this lawsuit was filed, tour guides were also required to pass an oral exam before qualifying for a tour-guide license. *See* Charleston Code § 29-59(g) (2016); *see also* Maybank Tr. 107:10–107:13. In order to qualify for the oral exam, tour guides were required to pass the written exam with a score of 80 percent or higher. Charleston Code § 29-59(f) (2016).

The Written Exam

47. Charleston’s Code of Ordinances provides that the tour-guide written exam “is meant to test the applicant’s knowledge of the city and its history.” Charleston Code § 29-59(b).

48. In addition to testing tour guides on Charleston's history, Maybank Tr. 82:21–82:23, the City's 30(b)(6) witnesses testified that the written exam also contains questions about famous Charlestonians, *id.* 83:8–83:9, festivals, *id.* 83:7–83:8, various colleges in Charleston, *id.* 83:12–83:13, and architecture, Riley Tr. 54:5–54:7.

49. The City's 30(b)(6) witness testified that “the purpose for the exam ... is to protect the quality and integrity of this special, unique American city” and ensure that visitors who hire tour guides “have somebody that is knowledgeable” about Charleston and “can also answer their questions about architecture and history with reasonable knowledge and accuracy.” Riley Tr. 122:23–123:5.

50. Rhetta Mendelsohn is a licensed tour guide who served on the City of Charleston Tourism Commission (“Tourism Commission”) for almost a decade. Panju Dec. Ex. 10. (“Mendelsohn Tr.”) 6:15–6:18. She was Chair of the Tourism Commission's Tour Guide Subcommittee, *id.* at 20:10–20:16, and “helped to write the tour guide book that the guides study today and participated in the giving of the test for many years,” *id.* at 6:20–6:22. Ms. Mendelsohn testified that “[t]he exam is proof that guides have a basic knowledge of what they should be talking about in the city, what they should be telling people, what people should be getting[.]” Mendelsohn Tr. 61:11–61:14.

51. The City's 30(b)(6) witness testified that tour guides must study the City's history in order to pass the written exam “because ... they would be talking about the city's history and they would be asked about the city's history.” Riley Tr. 76:16–76:20.

52. The City's 30(b)(6) witness testified that the City's written exam emphasizes architecture because “you come to Charleston to see the beautiful architecture” and tour guides “should be able to explain that,” including “the periods of architecture.” Riley Tr. 54:5–54:13.

The City's 30(b)(6) witness also testified that tour guides should be able to answer questions about the Russell House, and its style of architecture, because failing to do so when asked may lead a visitor to say: "I'm not going back to [Charleston]." *Id.* at 54:14–55:8. The City's 30(b)(6) witness further testified that if a tour guide giving a pub tour cannot answer "basic questions about the city's history" (such as answering questions about St. Michael's Church by referencing the fact that "George Washington went there"), then the visitor has been "ripped off" and that damages the "city's reputation." *Id.* at 48:18–49:21.

53. Following the filing of this lawsuit, the City's Director of Communications informed a reporter for CNBC that the licensing exam's questions test a tour guide's knowledge of "the City's most important historical facts." Panju Dec. Ex. 11 (official communication dated March 4, 2016, between Jack O'Toole, Director of Communications and Kate Rogers, NBC Universal).

54. The City contracted with the Historic Charleston Foundation to produce the *Training Manual*, "which will be used as a study guide and an informational resource for individuals seeking" the City's tour-guide license. Panju Dec. Ex. 12 (Agreement between City of Charleston and Historic Charleston Foundation for Tour Guide Manual). The contract also included producing "a bank of at least 300 objective test questions based on information in" the *Training Manual*. *Id.*

55. The City's 30(b)(6) witness testified that applicants for the City's tour-guide license need to study the *Training Manual* because "[t]hat's what they're being tested on." Riley Tr. 67:15–67:23.

56. The City's 30(b)(6) witness admitted that the written exam ensures that tour guides are "more likely" to know the information in the Training Manual when talking on tours and that "[t]hey would have mastered it." Riley Tr. 69:11–69:24.

57. City's 30(b)(6) witness testified that all questions on the tour-guide-licensing exams are drawn from the City's 490-page Training Manual, and that the answer key for the licensing exam "comes from" the Training Manual. Maybank Tr. 77:12–77:19. The City's 30(b)(6) witness also testified that the City reviewed the exams "to ensure that the questions were consistent" with information contained in the Training Manual. *Id.*

58. The City's 30(b)(6) witness testified that the City requires that tour guides pass its written exam in order to "ascertain that they have the knowledge" of the City's history and architecture "so as to be able to explain and answer questions about the city" posed by people on tours. Riley Tr. 76:1–76:9.

59. The City official tasked with "prepar[ing] and administer[ing] the written examination" is the "manager of arts and history/tourism commissions." Charleston Code § 29-59(b). The written exam is graded by a "staff member in the tourism office" and the grading is "double-checked by a separate staff member." Maybank Tr. 86:3–86:6.

60. The City's tour-guide-licensing exam is currently administered at the City's Livability/Tourism Office located at 75 Calhoun Street. Panju Dec. Ex. 9 (official 2017 Tour Guide Examination Information).

61. The Plaintiffs testified that the written licensing exam they took was irrelevant to the kinds of tours that they seek to lead. *See* Billups Dec. ¶ 9 ("The City's written exam was irrelevant to what I wanted to talk about on my tours (and is still irrelevant to what I talk about on tours today), and it only kept me from starting my business."); Warfield Dec. ¶ 11 ("The

City's written exam is all about memorizing historical facts and trivia, and I felt that it was irrelevant to the ghost and pub tours I wanted to give. I also felt like the questions asking me to match a group of street addresses to a group of names of architects that designed the buildings, and to a group of names of architectural styles, was a waste of my time."); Nolan Dec. ¶ 7 ("The tours I would lead do not consist of the kinds of facts that are tested on the City's licensing exam.").

The Oral Exam

62. The City's 30(b)(6) witness testified that the oral exam consisted of "acting as a tour guide" by "providing information about various locations . . . whether we were on a bus or the most recent version of flashing the sites on a screen." Maybank Tr. 99:9–99:16. Tour guides taking the oral exam were called on "at random" and required to "act as a guide" for three minutes. Panju Dec. Ex. 13 (official 2016 Tour Guide Examination Information). During the oral exam, tour guides were tested on "various sites around the City including but not limited to landmarks punctuated with the Palmetto Tree in the Training Manual." *Id.*; *see also* Maybank Tr. 99:9–99:16.

63. The City's 30(b)(6) witness testified that requiring the passage of two exams, written and oral, was thought to be "a more complete examination" because tour guides would be required to "[n]ot just write it, but speak it." Riley Tr. 89:9–89:21.

64. The City's oral exam was graded "on a pass/fail basis." Charleston Code § 29-59(f) (2016) ("oral examination shall be graded on a pass/fail basis").

65. The City's 30(b)(6) witness admitted that there have been applicants for the tour-guide license who passed the written exam but failed the oral exam. Maybank Tr. 96:11–96:16; *see also* Panju Dec. Ex. 37 (Def.'s Response to Pls. Request for Admission Nos. 3–4). On one

occasion, over thirty individuals were tested by the City and “10 individuals failed the oral exam” based upon “what they talked about[.]” Panju Dec. Ex. 14 (Minutes of City of Charleston Tourism Commission, June 25, 2008) at 1. Meeting minutes of the City’s Tourism Commission also reflect a statement from the Chair of the Tour Guide Subcommittee about the City’s providing a second attempt at passing the oral exam to tour guides who failed on their first attempt, stating that “they did not always pass but some do make it through the second time.” Panju Dec. Ex. 17 (Minutes of City of Charleston Tourism Commission, September 26, 2012) at 1.

66. Meeting minutes of the City’s Tourism Commission contain an excerpt from a letter by the City’s Assistant Corporation Counsel stating that “[t]he grading of the oral exam should be done by a member or members of the Commission, who are not licensed tour guides” so as to “ward off any allegation that the grader of the exam has an interest in curtailing the number of guides in the City.” Panju Dec. Ex. 16 (Minutes of City of Charleston Tourism Commission, February 1, 1984) at 4, ¶ 3. At this meeting of the City’s Tourism Management Commission, Mayor Joseph P. Riley Jr. introduced Vanessa Turner-Maybank as the “newly appointed Tourism Management Director.” *Id.* at 1.

67. The City’s 30(b)(6) witness testified that the oral exam was “usually” graded by “three people” who were the “tour guide representatives of the [T]ourism [C]ommission[.]” Maybank Tr. 101:19–101:24.

68. Rhetta Mendelsohn testified that the City’s oral exam was “[a]lways” graded by licensed tour guides. Mendelsohn Tr. 49:3–49:5; *see also id.* at 55:14–55:18 (admitting to having graded the oral exam over ten times). Ms. Mendelsohn also testified that the City picked the people who graded the oral exam. *Id.* at 22:5–22:16.

69. The City's 30(b)(6) witness testified that "[t]here really wasn't a criteria" for grading the oral exam. Maybank Tr. 102:17–102:19.

70. Rhetta Mendelsohn testified that tour guides taking the oral exam "were advised to talk about where they were . . . and not give us a prepared speech." Mendelsohn Tr. 39:14–39:16. Ms. Mendelsohn also admitted that it was important for tour guides taking the oral exam to identify the most important facts, as opposed to whatever facts they wanted to talk about, "[t]o make sure people who give tours in this city know the facts . . . and what's important to present." Mendelsohn Tr. 46:14–47:2.

71. Rhetta Mendelsohn admitted that if a tour guide did not pass the oral exam it could be because they did not talk about the most important facts in the area where the exam was being conducted, even if what they did talk about was factually correct. *Id.* at 47:3–47:25; *see also id.* at 48:1–48:20 (admitting that if tour guides taking the oral exam did not identify the most important facts in the area "it would be counted against them").

72. Meeting minutes for the City of Charleston Tourism Commission reflect a statement by the City's Tourism Coordinator (Karen Keadle) of what was evaluated during the oral exam: "[I]t was not a matter [of] what was said but [of] what was not said about the areas they were in at the time." Panju Dec. Ex. 17 (Minutes of City of Charleston Tourism Commission, June 26, 1996) at 3; *see also* Maybank Tr. 105:20–106:4 (City's 30(b)(6) witness testifying that Karen Keadle was an official in the City's Tourism Division).

73. Meeting minutes for the City of Charleston Tourism Commission reflect that, on one occasion, a tour guide took the oral exam on a bus while it drove through an area "full of points of interest such as Rainbow Row" and "failed" because the guide "spoke only about the

ebb and flow of the tides ... and began to talk about the Exchange Building but his time was up.” Panju Dec. Ex. 14 (Minutes of City of Charleston Tourism Commission, June 25, 2008) at 1–2.

74. The City’s Tourism Commission was briefed by the City’s Corporation Counsel about a complaint received from an individual “who had issues about failing the oral portion of the tour guide test” and “how the oral test was administered[.]” *Id.* at 1. The City’s Corporation Counsel also informed the Commission that the individual wanted to take the exam again but “was concerned about the grading of the oral portion of the test.” *Id.*

75. As early as 1984, the City’s Tourism Commission was aware that “[t]here had been some discussion in the past regarding the legality of the oral exam.” Panju Dec. Ex. 16 (Minutes of City of Charleston Tourism Commission, February 1, 1984) at 4, ¶ 5.

76. The City’s 30(b)(6) witness testified that in 2015 the City engaged in a “comprehensive study” prior to amending its tour-guide-licensing law during the update of its Tourism Management Plan. Riley Tr. 153:7–153:24. In the 2015 amendment to its tour-guide-licensing law that followed, the City did not eliminate its oral exam requirement. *See* Charleston, S.C., Ordinance 2015-164, § 12 (Nov. 10, 2015).

77. The City’s 30(b)(6) witness admitted that the City formed the opinion that the oral exam should be eliminated only after the filing of this lawsuit. Tecklenburg Tr. 24:14–21:25. The City eliminated the oral exam requirement on April 26, 2016. *See* ECF 26 (Def.’s Notice to the Court).

The City of Charleston Tour Guide Training Manual

78. To aid study for its licensing exam, the City advertises its own tour-guide training manual—*The City of Charleston Tour Guide Training Manual*—and offers it for sale for \$45 plus tax at its Tourism Commission Management Office. Panju Dec. Ex. 9 (official 2017 Tour

Guide Examination Information). The City's Tourism Management Plan, in a section addressing "Tour Guides and Education," states that the City "should provide tour guides with the opportunity for proper training and background." Panju Dec. Ex. 20 (City of Charleston 1998 Tourism Management Plan Update) at 25. The City's 30(b)(6) witness testified that "proper training and background" refers to "study of that big book" (the i.e., Training Manual). Riley Tr. 35:5–35:22.

79. In 2007, the City entered into a contract with the Historic Charleston Foundation to produce the Training Manual and 300 test questions for \$20,000. Panju Dec. Ex. 12 (Agreement between City of Charleston and Historic Charleston Foundation for Tour Guide Manual).

80. The City's 30(b)(6) witness testified that the City had put out a bid request "for qualified persons who would be able to interpret the city's history and put it in a guidebook." Maybank Tr. 27:10–27:15. The City awarded the bid to the Historic Charleston Foundation. *Id.* at 27:16–27:17.

81. The City's 30(b)(6) witness testified that the Training Manual updated a previous edition of the City's official tour-guide training manual. Maybank Tr. 49:3–49:15. The City's 30(b)(6) witness also testified that the previous editions of the City's tour-guide training manual were referred to as the tour guide "notes." *Id.* at 51:1–51:10; *see also* Mendelsohn Tr. 32:21–32:24.

82. Tourism Commission meeting minutes reflect a quoted excerpt by Robert Stockton from a previous edition of the City's tour-guide training manual stating, "History is not an exact science. It is created, recorded, and interpreted by human beings." Panju Dec. Ex. 19 (Minutes of City of Charleston Tourism Commission, February 27, 1985) at 3.

83. The City's 30(b)(6) witness testified that, in producing the Training Manual, the Historic Charleston Foundation "worked with" members of the City's Tourism Commission to discuss "things that might be put in the book." Maybank Tr. 27:16–27:20. These meetings were also attended by the City's Tourism Director or members of her staff. *Id.* 32:1–32:11.

84. Rhetta Mendelsohn testified that she helped "edit and write" portions of the Training Manual and "helped in general with putting together" the Training Manual. Mendelsohn Tr. 23:7–23:16. She also testified that "[t]here were a lot of people involved in the writing" of the Training Manual, *id.* 23:22–23:24, including a "former tour guide" who also formerly worked as a school teacher, *id.* 26:7–26:10, and that putting together the Training Manual was a collaborative process, *id.* 27:16–27:17.

85. Rhetta Mendelsohn testified that she was on the board of the Historic Charleston Foundation during the time when they were working on the Training Manual. Mendelsohn Tr. 22:17–22:22. During the same period of time, Ms. Mendelsohn testified that she was also a member of the City's Tourism Commission and chaired the Commission's Tour Guide Subcommittee. *See* Mendelsohn Tr. 32:3–32:10.

86. People working on drafting the Training Manual necessarily made judgments about what information was worth including; for instance, Rhetta Mendelsohn testified that they wanted the Training Manual to be "comprehensive" and "difficult" and to "cover everything we thought tour guides in the city needed to know about," but that although "[i]t could have been volumes and volumes and volumes . . . [i]t had to be reduced to a usable size and still have enough information in it." *Id.* at 24:18–25:3.

87. Rhetta Mendelsohn also testified that she wrote the portion of the Training Manual covering Jewish history in Charleston, assisted with "general editing" and fact checking,

and that she worked on “rewriting some of the articles throughout” because they “were too lengthy[.]” *Id.* at 24:4–24:17.

88. The City’s 30(b)(6) witness admitted that the City went through a review process of the material for the Training Manual with the Charleston Historic Foundation prior to publication. Maybank Tr. 30:9–30:20; *see also* Panju Dec. Ex. 20 (Minutes of City of Charleston Tourism Commission, Dec. 3, 2008) at 1 (reflecting the City Tourism Director’s statement that the City’s contract for the Training Manual includes providing “draft copies to the City to review for corrections and suggestions”). The individuals participating in the review process include some members of the City’s Tourism Commission and of the City’s Arts and History Commission. Maybank Tr. 30:9–30:20.

89. The City’s 30(b)(6) witness testified that “history doesn’t change, but history expands” and that several things were included in the “new edition of the manual,” such as Hurricane Hugo, certain people seen “on TV who were residents of Charleston[.]” changes in the “culture of the city[.]” and “additional venues” that have been built. Maybank Tr. 27:21–28:10.

90. The Training Manual consists of ten chapters: (1) Facts and Figures, 17 pages; (2) Historical Overview, 83 pages; (3) Architecture and Preservation, 36 pages; (4) Cultural Influences, 39 pages; (5) City Visits, 23 pages; (6) Charleston Harbor Points of Interest, 13 pages; (7) Lowcountry Visits, 7 pages; (8) Uniquely Charleston, 30 pages; (9) Charleston Gardens, 14 pages; (10) Street by Street Building Inventory, 221 pages. Tour Guide Training Manual at 5–6.

91. The “Historical Overview” chapter covers topics ranging from Charleston’s archaeology and Native Americans to the Revolutionary War, Civil War, World Wars I and II, and Charleston’s natural disasters. *Id.* at 5.

92. The “Street by Street Building Inventory” chapter totals 221 pages, *id.* at 6, and is an “updated and expanded” version of information compiled from architectural historian Robert Stockton; the chapter consists of hundreds of entries about “Charleston’s neighborhoods, streets, and individual properties[,]” *id.* at 261.

93. The Training Manual’s opening page for its “Street by Street Building Inventory” chapter advises tour guides that certain entries “marked with a palmetto tree symbol are of noted importance as it relates to the material guides will be tested” on. *Id.* Rhetta Mendelsohn testified that the purpose of identifying certain content in the Training Manual using a palmetto tree symbol “was to call attention to ... information that we thought was important” and “could possibly be on the test.” Mendelsohn Tr. 29:7–29:14; *see also id.* at 29:15 (“Those are things you needed to know.”).

94. The Training Manual’s section on African-American history consists of 14 pages and is part of a chapter titled “Cultural Influences.” Tour Guide Training Manual at 5.

95. The City’s 30(b)(6) witness admitted that certain stories are identified as myths in the Training Manual because the City wants to ensure that tour guides identify those stories as myths when talking to tour groups. Maybank Tr. 133:4–133:8 (“that’s why it’s in the book”).

96. Rhetta Mendelsohn testified that the City was responsible for approving the final draft of the Training Manual. Mendelsohn Tr. 32:14–32:20.

License Renewal and Continuing Education

97. The City’s tour-guide license remains valid for three years once issued. Charleston Code § 29-63. Once a tour-guide license expires it becomes illegal for a tour guide to continue working as a tour guide. *Id.* § 29-58. Tour guides are once again “treated as a new applicant” and required to retake and pass the City’s 200-question tour-guide exam. *Id.* § 29-63.

98. The City offers to extend the expiration date of a tour-guide license if a licensed tour guide completes four “continuing education programs[,]” offered or approved by the City’s Tourism Commission. Charleston Code § 29-63.

99. The City charges tour guides \$40 to take the continuing-education courses; it selects the topics for the courses, organizes them, and informs tour guides that two of the four courses may be from “outside sources” so long as they are “pre-approved by the Tourism Commission[.]” Panju Dec. Ex. 21 (Tour Guide Recertification Course Information, City of Charleston, 2015 & 2016).

100. The City’s 30(b)(6) witness testified that the City sometimes selects topics for tour-guide continuing-education courses based on feedback that people on tours “came to hear” certain “information” but did not when “they were on a tour” while in Charleston. Maybank 130:19–130:24.

101. Rhetta Mendelsohn testified that members of the City’s Tourism Commission complained that licensed tour guides were not talking enough about African-American history. Mendelsohn Tr. 63:3–63:10. Ms. Mendelsohn also testified that, to address this concern, the City began offering more continuing education courses on African-American history. *Id.* at 63:11–63:14; *see also* Panju Dec. Ex. 24 (Minutes of City of Charleston Tourism Commission, Jan. 27, 1993) at 3 (reflecting statement of City’s Tourism Director discussing continuing education courses about African-American history and that “the Mayor wanted tour guides to be able to speak to this subject”).

102. Tour guides who maintain their license for twenty-five consecutive years are no longer subject to an expiration date for their license and are “exempt from further examination and education requirements.” Charleston Code § 29-63; *see also* Panju Dec. Ex. 7 (Minutes of

City of Charleston Tourism Commission, March 26, 2003) at 4, ¶ 2 (reflecting statement of Tour Guide Subcommittee Chair Rhetta Mendelsohn that “it was just a nice gesture”).

The Temporary Tour-Guide License

103. At the time this lawsuit was filed, the City also issued “temporary” tour-guide licenses allowing an individual to talk to tour groups under certain conditions. Charleston Code § 29-60 (2016). Temporary tour-guide licenses were only available to people who were “sponsored and employed” by persons operating a “licensed tour company[.]” *Id.* at § 29-60(a)(1) (2016).

104. In order to qualify for the City’s temporary tour-guide license, tour guides were required to pass “a temporary tour guide examination” administered by the City. *Id.* at § 29-60(a)(2) (2016). Meeting minutes of the City of Charleston Tourism Commission reflect a statement from the City’s Tourism Director expressing that the temporary tour-guide licensing exam “was created as a hardship factor” for companies seeking to hire tour guides “when they needed one[.]” and noting that a temporary tour guide “is supposed to memorize a script[.]” Panju Dec. Ex. 23 (Minutes of City of Charleston Tourism Commission, Feb. 27, 2008) at 1–2.

105. The City also required that the temporary tour-guide license applicant’s sponsor file a script with the City “to be used by the temporary tour guide[.]” Charleston Code § 29-60(e) (2016). The written scripts had to be “approved for accuracy” by the City before it would issue a temporary tour-guide license. *Id.* at § 29-60(e), (g).

106. The City’s 30(b)(6) witness testified that the Tourism Commission’s “tour guide subcommittee, if available, would come in and look at the script.” Maybank Tr. 113:19–113:23. The City’s 30(b)(6) witness also testified that if the Tour Guide Subcommittee was not available to look at the script, the City’s Tourism Director would review the script. *Id.* at 113:24–114:5.

107. The City's 30(b)(6) witness testified that the City required approval of a written script before issuing a temporary tour-guide license "so that the person who had not been able to take the full exam . . . had basic information" to present when giving tours. Riley Tr. 93:12–93:22.

108. The City's 30(b)(6) witness admitted that the temporary tour-guide scripts submitted for approval were to adhere to the City's official tour-guide training manual in use at the time. Maybank Tr. 122:1–122:8.

109. Meeting minutes for the City of Charleston Tourism Commission reflect a statement by the City's Tourism Director (Vanessa Turner Maybank) that "the approved script should come from the approved tour guide manual." Panju Dec. Ex. 24 (Minutes of City of Charleston Tourism Commission, Oct. 22, 1997) at 2.

110. The City's 30(b)(6) witness testified that if an individual was issued a temporary tour-guide license the law required that tour guide to "adhere to a script" when talking on tours. 121:1–121:14; *see also* Charleston Code § 29-60(e) (2016) (requiring approved script "to be used by temporary tour guide").

111. Meeting minutes for the City of Charleston Tourism Commission reflect a statement by the City's Tourism Director (Vanessa Turner Maybank) that a "temporary tour guide should not deviate from the approved script" and that temporary tour guides "do not have free reign [sic] to develop their own spiel." Panju Dec. Ex. 24 (Minutes of City of Charleston Tourism Commission, Oct. 22, 1997) at 2.

112. The City's 30(b)(6) witness testified that an individual could only be issued a temporary tour-guide license one time. Maybank Tr. 109:15–109:18.

113. The City's temporary tour-guide license remained valid until the date of the City's next "regularly scheduled" written exam for a permanent tour-guide license (unless it was issued within two weeks of a written exam), or for a period of six months, whichever occurred first.

Charleston Code § 29-60(b) (2016). A temporary tour-guide license also “automatically expire[d]” when the license holder stopped working for the sponsoring employer. *Id.* at § 29-60(c) (2016).

114. The City’s 30(b)(6) witness testified that in 2015 the City engaged in a “comprehensive study” prior to amending its tour-guide-licensing law during the update of its Tourism Management Plan, Riley Tr. 153:7–153:24. In the 2015 amendment to its tour-guide licensing-law that followed, the City did not eliminate its temporary tour-guide license. *See* Charleston, S.C., Ordinance 2015-164, § 12 (Nov. 10, 2015).

115. The City’s 30(b)(6) witness admitted that the City formed the opinion that the temporary tour-guide license should be eliminated only after the filing of this lawsuit. Tecklenburg Tr. 22:10–22:16. The City eliminated the temporary tour-guide license on April 26, 2016. *See* ECF 26 (Def.’s Notice to the Court).

City’s Official Communication With Licensees and Enforcement

116. The City’s Clerk of Council Department “is responsible for documenting, recording and interpreting the history of the City of Charleston.” Panju Dec. Ex. 25 (Clerk of Council homepage on Charleston-sc.gov). The Department consists of three divisions, including the Division of Tourism Management. *Id.* Vanessa Turner Maybank is identified as the “Department Head/Chief Tourism Official” on the City’s website for its Clerk of Council Department. *Id.* As one of the City’s 30(b)(6) witnesses, Ms. Maybank testified that she was the City’s Tourism Director from 1984 to 2015, Maybank Tr. 15:17–15:22, and has served as staff to the City’s Tourism Commission since 1984, *id.* 18:14–18:20.

117. The City’s Division of Tourism Management produced a document called “Information for New Tour Guides” in which it tells licensed tour guides “if someone asks a question and [sic] do not know the answer — *PLEASE DO NOT* — make up an answer, tell them

you do not know but will research the answer and contact them with the results[.]” Panju Dec. Ex. 26 (Information for New Tour Guides, City of Charleston) (emphasis in original). The “Information for New Tour Guides” document also tells licensed tour guides that they are “responsible to say, ‘the legend is,’ or ‘tradition says’ ... etc. when sharing information that is not factual[.]” *Id.*

118. Meeting minutes of the City of Charleston Tourism Commission reflect a statement by the City’s Tourism Director stating that “[t]he Tourism Management Office ask[s] guides not to tell people stories unless they were sure about the facts.” Panju Dec. Ex. 27 (Minutes of City of Charleston Tourism Commission, Dec. 2, 1998) at 10.

119. The City’s 30(b)(6) witness admitted that if there is a complaint about something said on a tour the City “[s]ometimes follows up” on those complaints. Maybank Tr. 129:22–129:24.

120. Meeting minutes of the City of Charleston Tourism Commission reflect that the City’s Tourism Director informed the Commission that she “sent a memo to the carriage operators asking them to adhere to the information in the notes,” after being notified that carriage tour drivers were “giving out wrong information on homes they passed.” Panju Dec. Ex. 28 (Minutes of City of Charleston Tourism Commission, June 23, 1999) at 7; *see also* Maybank Tr. 128:25–129:4 (City’s 30(b)(6) witness admitting that “if [the minutes] said that there was a memo sent, there was a memo sent”). The City’s 30(b)(6) witness also testified that references to the “notes” in Tourism Commission meeting minutes refer to the City’s official tour-guide training manual in use at the time. *Id.* at 51:1–51:10.

121. The City’s 30(b)(6) witness testified that if City enforcement officials see a tour being given by a guide not wearing a badge identifying them as a licensed tour guide, “if at all

possible” they allow the tour to conclude and follow up with the guide afterwards. Riccio Tr. 13:17–13:22. The City’s 30(b)(6) witness testified that there has never been an instance where the City’s enforcement officials enforced the City’s tour-guide ordinance against an unlicensed tour guide. *Id.* at 14:15–14:19.

122. Meeting minutes of the City of Charleston Tourism Commission dated July 28, 1999, reflect a statement from Carl Stent, the City’s Assistant Deputy Corporation Counsel, stating that the City’s enforcement officers had to be “advised to refrain from issuing citations for those tours that are conducted free of charge” and that the tour-guide-licensing law was “catch[ing] a lot of harmless conduct and creates serious constitutional problems.” Panju Dec. Ex. 29 (Minutes of City of Charleston Tourism Commission, July 28, 1999) at 6, ¶¶ 3–4.

D. BURDENS ON PLAINTIFFS FROM CHARLESTON’S LICENSING LAW

123. As licensed tour guides, Plaintiffs Kimberly Billups and Michael Warfield are required to renew their licenses every three years. Billups Dec. ¶ 14; Warfield Dec. ¶ 14. This entails paying \$50 to retake, and pass, the City’s written exam. Billups Dec. ¶ 14 ; Warfield Dec. ¶ 14. The only way Kimberly and Michael can avoid having to retake the written exam is by paying \$40 to attend four continuing-education courses prior to their licenses’ expiration, on topics that the City or the City’s Tourism Commission selects or approves. Billups Dec. ¶ 14 ; Warfield Dec. ¶ 14.

124. Plaintiff Michael Nolan is unable to speak as a tour guide in Charleston to paying customers despite the fact that he spent over two decades working as an editor in book publishing and has studied history his entire adult life. Nolan Dec. ¶¶ 2, 7. Michael has already spent \$50 to take the City’s November 2015 licensing exam and \$45 plus tax to purchase the

City's Training Manual, but he cannot lead a tour in Charleston because he has not passed the written exam required to qualify for a tour-guide license. *Id.* ¶¶ 4, 6–7.

125. But for the City's licensing law, Michael Nolan would lead tours of Charleston during his retirement, including tours of Charleston's historic district that discuss the history of the city's African-American experience and specialty tours for people thinking of moving to Charleston. *Id.* ¶ 8. For example, one of the stories Michael seeks to share involves the residents of a once vibrant African-American neighborhood, around Calhoun Street and up to the Cooper River, who were displaced when the first homes in Ansonborough began to be renovated. *Id.*

126. Kimberly Billups's tour business is being harmed by the City's tour-guide-licensing law because she cannot hire unlicensed guides to serve as a substitute guide when she is unable to lead tours. Billups Dec. ¶ 20. As a result, Kimberly has been forced to turn away willing listeners for her tours in Charleston. *Id.*

E. THE CITY'S PURPORTED JUSTIFICATION FOR ITS LICENSING LAW

127. The City's 30(b)(6) witness testified that the City is "not aware of any harm caused by a licensed tour guide" and "not aware of any harm caused by unlicensed tour guides." Riley Tr. 129:11–129:20.

128. The City's 30(b)(6) witness admitted the City has no evidence that cities that do not license tour guides are more likely to have harms to public health, safety, or welfare because they do not require passage of a licensing exam. Riley Tr. 130:4–130:11; *see also id.* at 131:22–131:24. The City's 30(b)(6) witness also testified that it has no evidence that the harms the City claims may occur in the absence of its tour-guide-licensing requirement actually exist in other cities. Riley Tr. 142:9–142:13.

129. The City, in its interrogatory responses, admitted that “[b]y forcing tour guides to commit time and energy into studying for its written examination, the license requirement effectively raises the costs of entry into the market.” Panju Dec. Ex. 30 (City’s Response to Plaintiffs’ Interrogatory No. 6).

130. Paula Reynolds, a tour guide with experience in cities that do not license tour guides, testified that she has never seen or even heard of a problem in a city that does not license tour guides that would have been helped by tour-guide licensing. Reynolds Dec. ¶ 37.

131. The City’s 30(b)(6) witness admitted that the City has never investigated or studied any alternatives to requiring mandatory tour-guide licensing or any alternatives to requiring tour guides to pass a written licensing exam. Riley Tr. 149:3–149:11.

132. The City, in its interrogatory responses and 30(b)(6) deposition, set forth three purposes for the tour-guide-licensing law. First, licensing protects Charleston’s tourism economy from “unqualified” tour guides who have not “studied the history” and do not “know anything about it in detail.” Riley Tr. 108:18–109:9. Second, that licensing protects against “false or misleading offers of service for compensation.” Panju Dec. Ex. 30 (City’s Response to Plaintiffs’ Interrogatory No. 5). The City’s 30(b)(6) witness testified that this harm could be described as “deceptive solicitation” or “swindling.” Riley Tr. 106:25–106:107:5. Third, licensing prevents guides from meeting someone and then “commit[ing] a crime.” Riley Tr. 116:23–117:2.

Unknowledgeable Tour Guides

133. The City’s 30(b)(6) witness described the City’s licensed tour guides as a “cadre of people out there that have this information and knowledge” and that are able to “give accurate information about the city.” Riley Tr. 81:18–81:24.

134. The City's 30(b)(6) witness admitted that a tour guide who does not deliver accurate information "is not apt to be very successful in that line of work over time." Riley Tr. 81:3–81:11.

135. The City's 30(b)(6) witness admitted that the City has no evidence that the absence of the written exam requirement would harm Charleston's tourism economy. Riley Tr. 138:17–139:2.

136. Minutes from a meeting of the City's Tourism Commission reflect a statement from Mrs. Rentiers of Gray Line Tours stating, "she has heard just as much misinformation from people who have passed the tour guide exam as from those who have not." Panju Dec. Ex. 31 (Minutes of City of Charleston Tourism Commission, July 29, 1992) at 2.

137. Today, many tourists find tour guides through online travel review websites like TripAdvisor and Yelp; The Chief Executive Officer of Charleston's Convention and Visitors Bureau testified that such travel review websites were listed as the top resource used by people planning a trip to Charleston because "people get good information there." Panju Dec. Ex. 33 ("Hill Tr.") at 3:9–3:12; 45:11–46:1. If tourists are unhappy with a tour guide's performance, they will often leave a negative review on a travel website, where it will then be available for consideration by other tourists in the market for a tour guide. *See, e.g.*, Dew Tr. 89:19–91:7 (testifying about effect of eight negative online reviews for Tommy Dew Walking Tours critical of Tommy Dew's characterization of slavery during tours). In his deposition, Mr. Dew testified that negative reviews online do not harm Charleston's tourism industry; rather, negative reviews send a signal to consumers about the business being reviewed and "potentially make people not want to do my tour[.]" *Id.* at 90:6–91:7.

138. Voluntary certification provides an alternative to mandatory licensing. *See* Reynolds Dec. ¶¶ 6, 30 (describing voluntary certification in Baltimore and Philadelphia); *see also* Panju Dec. Ex. 34 (Deposition of Esther Banike) (“Banike Tr.”) at 31:18–32:25 (describing voluntary certification in Chicago) and 102:2–103:10 (describing voluntary certification in San Antonio).

139. The City’s 30(b)(6) witness testified that the City has a voluntary certification program that allows tourists to accurately identify whether a vendor is selling locally made goods. Riley Tr. 149:13–149:22; 150:11–150:25; 151:12–151:15. The vendors participating in the program are given a credential by the City in the form of a tile that recognizes their products are made in Charleston. *Id.* at 150:22–150:25. The City’s 30(b)(6) witness admitted that the voluntary certification program helps people identify vendors who sell products made in Charleston, *id.* at 150:14–150:21, and also admitted that vendors who sell products that are *not* made in Charleston cannot qualify for the voluntary certification credential but are still permitted to vend at the market, *id.* 151:16–151:20. The City’s 30(b)(6) witness testified that the City does not have an interest in what street vendors say to Charleston’s visitors, *id.* at 56:10–56:12, and also testified that the City does not have an interest in whether vendors are being truthful when they tell visitors on tours that their products are made in Charleston, *id.* at 56:13–56:19.

140. Cities also do other things to ensure that tourists get information a city deems high quality. Some cities, including the City of Savannah, hire guides themselves to lead tours and talk about points of interest deemed important by the city. Reynolds Dec. ¶ 33. Many cities also maintain a city-owned Visitors Center that provides information cities think is important, including to tour groups, such as recommending sites or destinations believed to be of particular

quality or importance, and recommending tour guides who a city believes will provide a good depiction of the city. *Id.* ¶¶ 34–35.

141. Paula Reynolds testified that Philadelphia and Baltimore have voluntary certification programs for tour guides. Reynolds Dec. ¶¶ 31–32. The Baltimore program involves tour guides taking a voluntary day long class and completing an examination before earning the Baltimore Heritage credential. *Id.* ¶ 6. Ms. Reynolds also testified that tour guides in Philadelphia are required to have a business license and are subject to an ordinance regulating the solicitation of services on sidewalks. *Id.* ¶ 31. Ms. Reynolds further testified that she is aware of Philadelphia city authorities enforcing restrictions on tour-guide solicitation, including by policing whether tour guides are engaging in false or misleading advertising. *Id.*

142. The City possesses no evidence that voluntary certification is less effective than mandatory licensing as a means to promote the knowledgeability of tour guides. *See* Panju Dec. Ex. 30 (City’s Response to Plaintiffs’ Interrogatory No. 10) (identifying no evidence).

143. Rhetta Mendelsohn testified that she has “only once” heard of a tour guide providing inaccurate information on a tour, Mendelsohn Tr. 76:16–76:19, and it involved a licensed tour guide giving a carriage tour in Charleston. Mendelsohn Tr. 80:13–81:13.

144. Meeting minutes of the City’s Tourism Commission reflect that the Commission received its “first formal complaints about wrong information” involving licensed tour guides in 1985 by way of two letters, including one submitted by the Chairman of the City’s Arts and History Commission (formerly in charge of tour guides), and that the letters complained about “erroneous information given by carriage and bus tour guides.” Panju Dec. Ex. 35 (Minutes of City of Charleston Tourism Commission, Jan. 23, 1985) at 4).

145. Rhetta Mendelsohn testified that the City employs an individual named Lindsay Partin to provide tours of the City's Council Chamber, Mendelsohn Tr. 71:13–71:17, that this person is not a licensed tour guide, nor does the City require the person holding the position to be a licensed tour guide, *id.* at 72:12–72:21. Ms. Mendelsohn admitted that the Council Chamber is part of the city's history and that it is covered in the Training Manual. Mendelsohn Tr. 74:1–74:6. Ms. Mendelsohn also testified that this City employee's job at the Council Chamber is to “talk to people” about topics including the “city council chambers, about the building,” and the art owned by the City, including “four presidential portraits[,]” “portraits of former mayors[,]” and “portraits of people who were important to the city[.]” *Id.* at 73:13–73:25; *see also* Panju Dec. Ex. 14 (Minutes of City of Charleston Tourism Commission, June 25, 2008) at 3 (reflecting a statement by the City's Director of Tourism that “Ms. Partin has been told that when guides come into the chamber she could do their tour” and that part of her responsibilities is “giving tours”); Panju Dec. Ex. 36 (Minutes of City of Charleston Tourism Commission, June 27, 2007) at 1 (reflecting that Ms. Partin was hired by the City's Tourism Director and has worked as the Council Chamber docent since at least June 27, 2007).

146. Rhetta Mendelsohn testified that the City employee currently responsible for giving tours of the Council Chamber, Ms. Partin, is “not polite enough, not knowledgeable enough, not representing the city well enough[,]” and that she is “an embarrassment.” *Id.* at 72:3–72:11.

147. The City's 30(b)(6) witness admitted that, even if a tour guide does not want to talk about anything in the Training Manual or tested on the exam, they should be knowledgeable about the city and its history because “the visitor always is going to ask questions.” Riley Tr. 79:12–79:23.

Deceptive Solicitation by Tour Guides

148. The City's 30(b)(6) witness admitted that the City's written exam is not designed to deter deceptive solicitation. *Id.* at 124:3–124:5.

149. The City's 30(b)(6) witness admitted that the City is not aware of any tour guides, licensed or unlicensed, who have falsely purported to conduct knowledgeable tours. Riley Tr. 135:9–135:13. The City's 30(b)(6) witness also admitted that the City has no evidence that there exists a risk that unqualified individuals will swindle tourists out of money by charging fees and falsely purporting to conduct knowledgeable tours. Riley Tr. 138:3–138:9.

150. The City's Code of Ordinances contains a deceptive solicitation ordinance. *See* Charleston Code Ch. 21, Article XI (“Deceptive, Misleading, and Aggressive Commercial Solicitation”). The City's deceptive solicitation ordinance prohibits making “deceptive or misleading oral or written statement[s] or representation[s] in the course of soliciting or attempting to solicit persons[,]” Charleston Code § 21-232(a), and also prohibits a solicitor from “misrepresent[ing] the nature of the products they are promoting . . . [.]” *id.* § 21-232(b). The City's deceptive solicitation ordinance defines “product” as including “any tangible or intangible item” including “services.” *Id.* § 21-231.

151. South Carolina has in force a consumer protection law, the purpose of which is to make “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . unlawful.” South Carolina Code Title 39, Ch. 5 (“Unfair Trade Practices”). The statute defines “trade” and “commerce” to include the “advertising, offering for sale, sale or distribution of any services . . . tangible or intangible[,]” and regulates “any trade or commerce” that “directly or indirectly” affects people in South Carolina. *Id.* § 39-5-10(b).

Criminal Behavior By Tour Guides

152. The City’s 30(b)(6) witness admitted that the purpose of the written-exam requirement is not to deter fraud. Riley Tr. 123:6–123:9. The City’s 30(b)(6) witness also admitted that the written-exam requirement is not designed to deter any sort of other harm that is criminal. *Id.* at 123:13–123:15.

153. The City’s 30(b)(6) witness testified that “[t]he licensing exam is not a means to deter the crime.” Riley Tr. 120:7–120:11. The City’s 30(b)(6) witness also admitted that the written exam is not designed to deter fraudulent activity. *Id.* at 122:15–122:17.

154. The City’s 30(b)(6) witness admitted that the City has no evidence that requiring tour guides to take its licensing exam makes it less likely that a tour guide will lead someone somewhere and commit a crime against them. Riley Tr. 117:14–118:1.

Dated this 27th day of January, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2017, I caused the foregoing Plaintiffs' Statement of Undisputed Material Facts to be filed via ECF and that the Court's ECF system automatically served counsel for Defendant.

/s/ Sean A. O'Connor

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