



Plaintiffs could not show the licensing requirement was implemented for a content based purpose. The parties have now completed discovery, including the exchange of thousands of pages of documents and conducting over a dozen depositions. Plaintiffs can produce no evidence that the purpose of the City's licensing regime is to control the content of tour guides' speech. It is undisputed that the City repealed the "oral exam" and "temporary license" provisions in April of 2016 because the City determined the provisions were unnecessary to the City's purpose.<sup>3</sup> It is further undisputed that the Historic Charleston Foundation – not the City – prepared the written exam and the tour guide manual.<sup>4</sup>

The July 1, 2016 Order analyzed the licensing regime under intermediate scrutiny, and made clear that the City's interest in protecting the public from fraud is a sufficiently substantial interest to justify narrowly tailored licensing regulation.<sup>5</sup> In order to prevail on its argument that the licensing ordinance is narrowly tailored, the Order notified the parties that "the City must provide some evidence that (i) unqualified tour guides posed a threat to its interest in protecting its tourism industry from fraud and deceit and (ii) it did not forego readily available, less intrusive means of protecting those interests.

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<sup>3</sup> Tecklenburg Dep. p. 20-22, attached as Ex. A. (testifying regarding the oral exam "its, I think, intended to have been part of training for a tour guide, and I kind of felt like that once we knew someone was qualified and can pass the test that their training ought to be with whoever they were employed with. Or maybe they would be self-employed. It really wouldn't matter. But I didn't see where that should be the city's responsibility. It just seemed unnecessary to me.", and testifying regarding the temporary license script provision "there was no need to have temporary tour guide licenses anymore in my view. If we were giving the test more often it just eliminated the necessity to even have a temporary tour guide license.").

<sup>4</sup> Maybank Dep. pp. 34-36; 45-46; 74-75, attached as Ex. B.

<sup>5</sup> Order, p. \*10 ("The problem is not simply that unqualified guides may provide visitors with false information, it is that they may do so under the guise of providing 'accurate' information, and that such behavior may harm visitors, residents, and the industry overall. The difference between what is promised and what is delivered is the core of the City's interest, not the content of the information itself.").

As to the first issue listed, unqualified or unscrupulous tour guides would erode the quality experience that is the foundation of the City's reputation as a top destination.<sup>6</sup> As the Court previously held, the City has "some non-speculative reasons for believing its interests are at risk".<sup>7</sup> It is well reported that in other top tourism areas, unscrupulous tour guides pose a threat to consumers. Numerous news reports show a substantial problem with fake or unscrupulous tour guides taking advantage of vulnerable tourists.<sup>8</sup>

As to the alternative measures Plaintiffs propose, such as a voluntary licensing program or "market forces", those alternatives fail to adequately protect the City's interests. Indeed, only a mandatory licensing exam reaches all potential tour guides (including the unqualified or unscrupulous) in the market that could potentially harm the City's interest.

The record developed during discovery establishes that the City's tour guide licensing exam's focus on Charleston's history and historic attractions is properly calibrated to ensure

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<sup>6</sup> Banike Dep. pp. 152–55, attached as Ex. C; Riley Dep. 31–33, attached as Ex. D. Hellen Hill, the Executive Director of the CACVB, testified that the organization's studies found that the number one reason people visit Charleston is positive recommendations from friends and family, and that the City's reputation is "critical" to visitors decision to select Charleston as a tourist destination. Hill Dep. p. 46-48, attached as Ex. E. Mrs. Hill further testified that negative tour guide experiences can damage the City's reputation as a top tourist destination. Hill Dep. p. 64. Mrs. Hill also testified that visitors' chose Charleston because they believe they will have an authentic experience rather than a "fabricated" one. Hill Dep. p. 55. A visitor who pays for a tour to learn information about Charleston and receives misinformation and/or is misguided would be unsatisfied with their experience. Banike Dep. pp.157, 176–77 (noting that when people do not get what they paid for due to unqualified tour guides, "[t]hat's harm. That's stealing.").

<sup>7</sup> Order at p.\*17.

<sup>8</sup> See, sample of numerous news reports regarding problems with unscrupulous tour guides in tourist destinations, at Ex. F. See Banike Dep. pp.149–51 (testifying of instance where a person claimed to be a certified tour guide in Chicago, but was not and had fake badge pictured on the individual's website). Further, as Secretary of the World Federation, Esther Banike has received reports of incidents involving harm to tourists in other countries as a result of the unqualified tour guide's actions. Specifically, she received a report of an unsanctioned guide overseas in a country/location where one was required to have a license, who approached a couple on street, but unfamiliar with terrain where this couple wanted to go and one of them slipped off a cliff and was seriously injured (still in the hospital). See Banike Depo. pp. 161, 164, 166.

paying customers get what they pay for. The City’s history and historic attractions are its main attraction for tourists.<sup>9</sup> The Charleston Area Convention and Visitors Bureau’s 2015 Survey Report concludes “the Charleston area’s *history and historic attractions* have remained and will presumably continue to be *the most important factor* in visitors’ decision to visit Charleston.”<sup>10</sup> There is no evidence that “non-historical tours” are “especially prevalent in Charleston.”<sup>11</sup> Thus, the ordinance does not burden substantially more speech than is necessary, and the ordinance survives intermediate scrutiny. Accordingly, this Court should grant the City Summary Judgment as to Plaintiffs’ claims.

### **STATEMENT OF FACTS**

Charleston is world renowned for its unique quality, history and architecture.<sup>12</sup> Tourism publications have ranked Charleston the top City to visit in the country and the world.<sup>13</sup> Charleston’s 18th and 19th century architecture and its harmonious streetscapes have long been a draw for visitors.<sup>14</sup> Forty years ago, the City of Charleston recognized the rapid growth of tourism to the area and determined the importance of managing tourism for the benefit of its residents and visitors.<sup>15</sup> Today approximately five million visitors a year come to the Charleston area, many of which visit the City’s historic downtown area.<sup>16</sup>

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<sup>9</sup> Hill Dep., p.40 (“Visitors to Charleston are most likely to be interested in history”),

<sup>10</sup> 2015 Charleston Area Visitor Intercept Survey Report dated Dec. 9, 2016, at “City of Charleston Prod. 03527” (emphasis added), attached as Ex. G. (hereinafter referred to as “Charleston Visitor Survey Report”).

<sup>11</sup> See, Order, p. \*16.

<sup>12</sup> Riley Dep., pp. 21–34, 122; Maybank Dep. p.83; *see also* Affidavit of Joseph P. Riley Jr. (hereinafter referred to as “Riley Aff.”), ¶ 3, attached as Ex. H; Hill Dep. p.26.

<sup>13</sup> Riley Aff., ¶ 3; Hill Dep. p. 26.

<sup>14</sup> Riley Dep. p.52 (testifying concerning the 1994 Tourism Management study’s findings as to historic preservation); Riley Aff. ¶ 3; *see also* 2015 Charleston Area Visitor Intercept Survey at p.03522–523; Hill Dep. p. 40.

<sup>15</sup> Riley Dep. pp.18–21.

<sup>16</sup> Riley Dep. p.107; *see also* 2015 Charleston Visitor Survey Report, at pp.03522–3523.

Tourism thus represents an important facet of Charleston's economy.<sup>17</sup> It provides several thousand jobs and economic opportunity for our residents while showcasing our city and its cultural resources to people around the world.<sup>18</sup> Accordingly, City ordinances regulating the tourism industry serve the important purpose of maintaining, protecting, and promoting the tourism industry of Charleston, upon which so many citizens and the City rely.<sup>19</sup>

The City's ordinance regulating tour guide licensing and the tourism industry have been in place for over 35 years.<sup>20</sup> The City regulates the tourism industry in a manner that provides for its continued success and prosperity while protecting the public, in particular the tourists that visit the City of Charleston.<sup>21</sup>

The City requires a license only for tour guides who charge for their services.<sup>22</sup> No license is required for free touring or storytelling.<sup>23</sup> Individuals may conduct whatever tour activities they like without a tour guide license as long as they are not charging for their

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<sup>17</sup> Riley Dep. pp.14, 18, 29. In 2012, tourism contributed to approximately 16% of the City's economy. College of Charleston Overview of Tourism Industry in Charleston presentation dated February 18, 2014, at "City of Charleston Prod. p.03111", attached as Ex. I. Moreover, even Plaintiffs concede that the tourism industry is a big part of Charleston's economy and that each tour guide is part of the tourism industry and therefore impacts Charleston's economy. *See* Deposition of Plaintiff Kimberly Billups (hereinafter "Pltf. Billups Dep.") p.89, attached as Ex. J; Deposition of Plaintiff Michael Warfield (hereinafter "Pltf. Warfield Dep.") p.78, attached as Ex. K; Deposition of Plaintiff Michael Nolan (hereinafter "Pltf. Nolan Dep.") pp.54–55, attached as Ex. L; Riley Aff., ¶ 4.

<sup>18</sup> Riley Dep. p.29.

<sup>19</sup> Riley Dep. pp. 21–22, 29, 31–32, 34, 55; Maybank Dep. p.26 (stating it is necessary to have a qualified tour guides and system for qualifying them because tourism is an important industry in Charleston and the City desires to protect that industry since it is plays a big role of the City's economy, as well as the visitors that come to Charleston); *see also* Charleston City Code § 29-1.

<sup>20</sup> Charleston City Code Ch. 29 and §29-1; Riley Aff., ¶ 5.

<sup>21</sup> Riley Dep. pp.18–20, 34; Maybank Dep. p.26; Riley Aff., ¶ 5.

<sup>22</sup> Charleston City Code §§ 29-2, -58; Riley Aff., ¶ 6; Affidavit of Vanessa Turner Maybank (hereinafter "Maybank Aff."), ¶ 3, attached as Ex. M.

<sup>23</sup> Charleston City Code §§ 29-2, -58; Riley Aff., ¶ 6; Maybank Aff., ¶¶ 3, 7. *See also* Pltf. Billups Dep. p.73 (Plaintiff Billups admitting she understood that she could have given free tours without/prior to receiving her license).

services.<sup>24</sup> The Historic Charleston Foundation prepares the licensing exam and decides what questions are included.<sup>25</sup>

The tour guide ordinance at issue 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.<sup>26</sup>

The above provision makes clear that seeking money for tour guide services is the trigger for the license requirements.<sup>27</sup> The tour guide ordinance defines “tour or touring” as “the conducting of or the participation in sightseeing in the districts *for hire or in combination with a request for donations.*”<sup>28</sup> Likewise, “tour guide” is defined as “any person who *acts or offers to act as a guide for hire* through any part of the districts, including but not limited to pedestrians and persons with automobiles, motor vehicles, or horse-drawn vehicles when the primary purpose of riding in such vehicles is not transportation, but touring the historic areas of the City.”<sup>29</sup> The tour guide ordinance does not reference “speech” at all.<sup>30</sup> The ordinance regulates the conduct of “touring” and not any particular form of speech.

In 2016, the City amended and/or repealed certain provisions of its tour guide licensing regime. The provision establishing the passing score for the written exam was lowered to 70 percent, and the provision setting the frequency of the exam's administration was markedly increased.<sup>31</sup> The oral exam, temporary tour guide license and tour escort provisions were

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<sup>24</sup> Charleston City Code §§ 29-2, -58; Riley Aff., ¶¶ 6, 7; Maybank Aff., ¶¶ 3, 6.

<sup>25</sup> Maybank Dep. pp. 45–46; 74–75.

<sup>26</sup> Charleston City Code § 29-58.

<sup>27</sup> *Id.*; see also City Code § 29-2; Riley Aff., ¶ 6; Turner Maybank Aff., ¶ 7.

<sup>28</sup> Charleston City Code § 29-2.

<sup>29</sup> Charleston City Code § 29-2. (Emphasis added).

<sup>30</sup> Order at p. \*6.

<sup>31</sup> Mayor Tecklenburg Dep. pp.17–20.

repealed.<sup>32</sup> As a result, Plaintiffs were not subjected to the oral exam and were not required to submit a script.<sup>33</sup> Plaintiffs admitted these repealed provisions had no effect on them.<sup>34</sup>

Following the amendments to the ordinance, Plaintiffs Billups and Warfield received tour guide licenses from the City.<sup>35</sup> Both Billups and Warfield are currently working as tour guides.<sup>36</sup>

The tour guide ordinance concerns qualifications, not speech.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> To ensure minimum competency, the City requires those applying for a tour guide license to pass an exam consisting of written multiple choice questions that test the applicant's knowledge of the topics most likely to be sought by

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<sup>32</sup> Mayor Tecklenburg Dep. pp.21–22.

<sup>33</sup> The script was in the temporary license provision of the Ordinance. Plaintiffs never applied for a temporary tour guide license and that section of the Ordinance is now repealed.

<sup>34</sup> Pltf. Billups Dep. p.54–55 (admitting that the old exam process, with the oral exam, did not affect her, she never took the oral exam, and she was never asked to submit a script and, thus, that provision did not, nor does it currently, apply to her); Pltf. Warfield Dep. pp.59–60 (admitting that the oral exam had no effect on him; he was never asked to submit a script and, thus, that provision never applied to him); *see also* Pltf. Nolan Dep. 51 (admitting that neither the oral exam or temporary tour guide license, including the script provision, are relevant to his case).

<sup>35</sup> *See* Pltf. Billups Dep. pp.52–54; Letter to Billups dated May 2, 2016 (City Bates #445) and Tour Guide Co. License for Charleston Belle Tours (Pltfs 510), attached together as Ex. N; Pltf. Warfield Dep. pp.54–55; Letter to Warfield dated May 2, 2016 (City Bates #452) and Registered Tour Guide License (Pltfs 508), attached together as Ex. O.

<sup>36</sup> Pltf. Billups Dep. p.54; Pltf. Warfield Dep. p.56–58

<sup>37</sup> Mayor Riley Dep. pp. 21–22, 29, 31–32, 55, 131–32; *see also* Maybank Dep. pp.26, 132; *see generally* Chapter 29 of the Charleston City Code; Riley Aff., ¶¶ 9–11; Maybank Aff., ¶¶ 4, 6.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; *See also* Deposition of Secretary of World Federation of Tourist Guide Associations Esther Banike (hereinafter “Banike Dep.”) p.157 (stating that where an unqualified tour guide gives a bad tour, “[p]eople are expecting certain things and think they are getting it. Eventually, they’ll find out that they didn’t get what they paid for. That’s harm. That’s stealing.”).

tourists.<sup>40</sup> People unwilling or unable to learn about the City’s history and culture are unlikely to pass the test.<sup>41</sup> Thus, the test increases the likelihood that tour guides charging for tour services will provide consumers what they bargained for.<sup>42</sup> 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.<sup>43</sup>

The City does not regulate the message that is conveyed on licensed tours.<sup>44</sup> The City does not police, monitor, or control what licensed tour guides say.<sup>45</sup> Tour guides are free to present whatever message they wish on their tours.<sup>46</sup> The City applies no restraints on opinion stated during tours and no topic is off limits.<sup>47</sup> The City has no mechanism to monitor or regulate speech during the tours, and has not done so.<sup>48</sup> The City cannot revoke a license due to

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<sup>40</sup> Mayor Riley Dep. pp. 21–22, 29, 31–32, 55, 131–32; *see also* Riley Aff., ¶ 11. The exam is prepared by the Historic Charleston Foundation for the City of Charleston, and administered by a staff member of the City’s Office of Tourism. Maybank Dep. pp.21–22, 74. The City’s staff member compiles the exam results with the assistance of the City’s Tourism Commission. *Id.* Notably, Plaintiffs admit that history is a big part of why people visit Charleston and that the City’s history is a part of their tours. Pltf. Billups Dep. pp.87–89; Pltf. Warfield Dep. pp.30, 62 (further testifying that he plans to do history tours since they are such a big part of the tourism/tour market here in Charleston); Pltf. Nolan Dep.19–20, 24.

<sup>41</sup> Riley Dep. 31; Maybank Dep. pp. 32–34, 43; *see also* Riley Aff., ¶ 11; Maybank Aff., ¶ 4.

<sup>42</sup> Riley Dep. pp. 21–22, 29, 31–32, 55, 122–23, 140; Riley Aff., ¶ 11; Maybank Aff., ¶ 4.

<sup>43</sup> *Id.* The number of tour guide licenses issued varies each year depending on the number of applicants and the knowledge of those that apply. Maybank Aff., ¶5.

<sup>44</sup> Riley Dep. pp.29, 53; Maybank Dep. p.117; *see also generally* Chapter 29 of the City Code; Riley Aff., ¶¶ 9–11; Maybank Aff., ¶ 6.

<sup>45</sup> Riley Dep. pp.29, 53; Maybank Dep. pp.117, 134–35; Pltf Billups Dep. pp.95–96; Pltf Nolan Dep. p.61; Pltf Warfield Dep. pp.83–84; Riley Aff., ¶¶ 9–11; Maybank Aff., ¶ 6.

<sup>46</sup> Maybank Dep. pp. 134–35, 140; Mayor Riley Dep. p.53; *see also generally* Chapter 29 of the City Code; Riley Aff., ¶¶ 9–11; Maybank Aff., ¶ 6.

<sup>47</sup> Maybank Dep. pp. 134–35, 140; Riley Dep. p.53; Riley Aff., ¶ 9; Maybank Aff., ¶ 6. For instance, the City allows ghost tours about supernatural events or myths. *Id.*

<sup>48</sup> Mayor Riley Dep. 53; Deposition of Dan Riccio (hereinafter “Riccio Dep.”) pp.13, 15, attached as Ex. P; *see also* Maybank Aff., ¶ 6; Riley Aff. ¶¶ 9–10.



the City's disagreement with a tour guide's speech, and has not done so.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> It is common sense that tourists, whether here in Charleston or another City, expect a level of security, competence and knowledge from tour providers.<sup>53</sup> 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.<sup>54</sup> These common sense tourism regulations ensure that those holding themselves out as tour guides for hire have a base level of

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<sup>49</sup> Riley Dep. p.167; Maybank Dep. pp. 24–25; *see also* Maybank Aff., ¶ 6; *see also generally* Chapter 29 of the City Code.

<sup>50</sup> *See Riley v. Nat'l Fed. Of Blind of N.C., Inc.*, 487 U.S. 781, 781 (1988); *Kagan*, 957 F. Supp. 2d at 781; Riley Dep. Pp.106-07; *see also* Riley Aff., ¶ 8; *see also* Maybank Aff., ¶ 4.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; *see also* Pltf. Warfield Dep. pp.33–34, 79–80 (admitting that if someone is paying for a tour, it is fair for that person to expect the tour guide, such as himself, to know what he or she is talking about when conducting a tour, and that holding oneself out as knowledgeable about something, but actually knowing nothing about the subject and then charging someone to provide knowledge on the subject could be misleading); Pltf. Nolan Dep. p.54–55 (Admits that if a customer is paying someone that's knowledgeable about a topic, but that someone is not knowledgeable on the topic then it would be unfair for that person to charge the customer).

<sup>53</sup> Mayor Riley Dep. pp.21–22, 51. *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”).

<sup>54</sup> Riley Dep. pp. 21-22, 29, 31–32, 55, 122–23; Maybank Dep. p.82; *see also* Riley Aff., ¶¶ 7–8.

competency to provide the touring services they are charging for, thereby protecting and furthering the City's interests.<sup>55</sup>

The City's Motion for Summary Judgment is based on the grounds that there is no genuine issue of material fact which would entitle Plaintiffs to recovery. The City's tour guide licensing ordinance is constitutional and does not violate the First Amendment. The City's Motion is further based on the following grounds:

- I. The City's tour guide ordinance is content neutral and therefore subject to intermediate scrutiny.
- II. The City's tour guide licensing ordinance survives intermediate scrutiny and does not violate the First Amendment.

#### **SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."<sup>56</sup> Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>57</sup> "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."<sup>58</sup> A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."<sup>59</sup> While a court "must

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<sup>55</sup> *Id.*

<sup>56</sup> *See* Fed. R. Civ. P. 56(a).

<sup>57</sup> *See O'Neal v. Wal-Mart Stores East, L.P.*, 2013 WL 809244 (D.S.C. Mar. 5, 2013); Fed. R. Civ. P. 56(c).

<sup>58</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>59</sup> *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). If the non-movant's evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249–50.

assume the truth of all statements by the party opposing summary judgment,” it need not consider wholly conclusory statements for which no supporting evidence is offered.<sup>60</sup> “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate.”<sup>61</sup> “[T]he mere existence of some alleged factual dispute between parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact.”<sup>62</sup>

### **ARGUMENT AND CITATION OF AUTHORITY**

It is well established that local governments have the power to regulate occupations under the police powers.<sup>63</sup> 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.”<sup>64</sup> Courts have long recognized municipalities’ power to require a license for tour guides.<sup>65</sup> “Certainly the licensing of sightseeing guides [for hire] in a large metropolis falls within the police powers of the local government.”<sup>66</sup>

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<sup>60</sup> See *Greene v. Dalton*, 164 F.3d 671, 674–75 (D.C. Cir. 1999)

<sup>61</sup> *Monahan v. Cty. of Chesterfield*, 95 F.3d 1263, 1265 (4th Cir. 1996).

<sup>62</sup> *Ballenger v. N.C. Agric. Extension Serv.*, 815 F.2d 1001, 1005 (4th Cir. 1987) (emphasis added).

<sup>63</sup> *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[.]”).

<sup>64</sup> *Dent v. West Virginia*, 129 U.S. 114, 121-122, 9 S. Ct. 231, 233, 32 L.Ed. 623 (1889).

<sup>65</sup> 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).

<sup>66</sup> *People v. Bowen*, 175 N.Y.S. 2d 125, 128 (N.Y. Sp. Sess. 1958) “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.” *Id.*

The Court’s July 1, 2016 Order holds that “regulation of tour guide services implicates speech, and some form of First Amendment scrutiny is necessary.”<sup>67</sup> A First Amendment analysis of Charleston tour guide ordinance shows it does not violate Plaintiffs’ constitutional rights as a matter of law.

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

Content neutrality is the first part of a multipart constitutional analysis.<sup>68</sup> “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.”<sup>69</sup> “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.”<sup>70</sup> The Supreme Court has consistently stated that a statute, law, regulation or ordinance will be considered content neutral so long as it is “justified without reference to the content of the regulated speech.”<sup>71</sup> 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.”<sup>72</sup>

As this Court previously held, “the City’s licensing regime is not content-based on its face.”<sup>73</sup> Thus, in order to subject the ordinance to strict scrutiny, Plaintiffs must show that the

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<sup>67</sup> Order, p. \*5.

<sup>68</sup> *MCCullen v. Coackley*, 134 S. Ct. 2518, 2530 (2014).

<sup>69</sup> *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)).

<sup>70</sup> *Ward*, 491 U.S. at 791.

<sup>71</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir. 2012) (“A regulation is not content-based, however, merely because the applicability of the regulation depends on the content of the speech.” (citing *Renton, supra*)).

<sup>72</sup> *MJJG Rest., LLC v. Horry Cnty., S.C.*, 11 F. Supp. 3d 541 (D.S.C. 2014).

<sup>73</sup> Order, p.\*6.

ordinance was imposed with a content-based purpose or justification.<sup>74</sup> Plaintiffs cannot do so.

Charleston’s tour guide licensing ordinance has a content neutral purpose.<sup>75</sup> Notably, the City’s ordinance is indistinguishable from that at issue in *Kagan v. City of New Orleans*, where the court found a strikingly similar ordinance including a written exam content neutral.<sup>76</sup> Specifically, in *Kagan* the court held that New Orleans’ interests were related not to the content of the speech but, rather, to the qualifications of those charging for their tour 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

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<sup>74</sup> Order, p.\*6 (citing *Sorrell*, 131 S. Ct. at 2664) (“In making this assessment the court may consider formal legislative findings, the statute’s stated purposes, as well as the ‘inevitable effect’ of the statute.”); *Cf. Ward*, 491 U.S. at 791; *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645–46.

<sup>75</sup> *Cf. Ward*, 491 U.S. at 795–96 (finding that when analyzing the constitutionality of a state law courts “should consider any limiting construction that a state court or enforcement agency has proffered.”).

<sup>76</sup> *Kagan v. City of New Orleans*, 957 F.Supp.2d 744 (E.D. La. 2013), *aff’d*, 753 F.3d 560 (5<sup>th</sup> Cir. 2014), *cert denied*, 135 S.Ct. 1403 (2015). In addition, the district court in *Edwards v. Dist. of Columbia*, 943 F. Supp. 2d 109, 121 (D.D.C. 2013), *rev’d* 755 F.3d 996 (D.C. Cir. 2014), also found D.C.’s tour guide licensing requirement to be content-neutral. Notably, the D.C. Circuit Court of Appeals did not address the district court’s finding on this issue and “assume[d], *arguendo*, the validity of the District’s argument that the regulations are content-neutral and place only incidental burdens on speech.” *Edwards*, 155 F.3d at 1001.

out tour guides too dangerous to lead strangers around a strange city and too unserious to be willing to study for a single exam. People who meet those minimal qualifications are then free to provide whatever kinds of tours the market will support. As the City's licensing scheme is “justified without regard to the content of [tour guides’] speech,” it is content neutral.<sup>77</sup>

There is no reason for a different result here. The language of the ordinance itself provides that the City’s purpose for the tour guide license, is “[t]o maintain, protect and promote the tourism industry and economy of the city.”<sup>78</sup> Prior to its enactment decades ago, the City recognized that Charleston’s tourism industry and activities were growing rapidly.<sup>79</sup> The City therefore determined it was important to manage the rapidly growing tourism industry for the benefit of its citizens and visitors.<sup>80</sup>

Protecting the City’s tourism industry includes protecting tourists from unqualified or unscrupulous tour guides. The City designed the licensing requirements, in pertinent part, to filter out would-be swindlers by ensuring that individuals providing tour guide services for hire actually had some understanding of Charleston.<sup>81</sup> The ordinance’s purpose is therefore to protect the quality of the City, its reputation and its economy.<sup>82</sup> The Fifth Circuit Court of Appeals found such a purpose in a tour guide licensing ordinance to be content neutral.<sup>83</sup> This overriding municipal purpose is unrelated to the content of a tour guide’s speech and, thus, content

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<sup>77</sup> *Id.* at 779–80.

<sup>78</sup> Ordinance § 29-1; *see also* Mayor Riley depo pp.34 (stating the licensing requirement is an economic-based decision).

<sup>79</sup> Mayor Riley Dep. pp.18–20.

<sup>80</sup> Mayor Riley Dep. pp.18–20.

<sup>81</sup> Mayor Riley Dep. pp. 21-22, 29, 31–32, 55; *see also* Maybank Dep. pp.26, 136 (describing in part the rationale for the tourism ordinances—to protect the tourism industry and the visitors who come to Charleston); Pltf. Nolan Dep. pp.54–56 (stating that tourism is a big part of Charleston’s economy and that poor quality tours could affect peoples’ perception of the City).

<sup>82</sup> Mayor Riley Dep. pp.131–32.

<sup>83</sup> *Kagan*, 753 F.3d at 561–62 (finding the City of New Orleans’ desire to “identif[y] those tour guides who . . . are reliable, being knowledgeable about the city . . .” to be content-neutral).

neutral.<sup>84</sup>

Further, the written exam itself is indicative of the City’s interest in ensuring that tour guides have a base level of competency, and is not intended to influence the content of tours.<sup>85</sup> As the court found in *Kagan*, the City’s interests are not related to the content of the speech but rather the qualifications of those charging for their services.<sup>86</sup> Moreover, the City’s ordinance does not and cannot control what tour guides say on tours.<sup>87</sup> Indeed, Plaintiffs concede that the City does not control, dictate, monitor or otherwise intervene with the message and/or content of tours, including their own tours.<sup>88</sup> The licensing regime permits tour guides to speak on whatever topics they wish. It is illogical to suggest the licensing regime is intended to control tour guides’ content when it enacted no enforcement mechanisms to do so. The ordinance has no effect on the content of speech at all, much less have an “inevitable effect” on the content of tour

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<sup>84</sup> See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 at 646-47.

<sup>85</sup> Mayor Riley Dep. p.136 (stating the purpose of the written exam is to make sure that licensed tour guides have the minimum information that they should have in order to be qualified to accept money from consumers for their services of providing a tour); Mayor Riley Dep. pp.122–23 (testifying that the purpose for the exam, in pertinent part, is to protect the quality and integrity of this special, unique American City and to ensure that those who paid money to a tour guide have someone that is knowledgeable of the City and that can answer questions about the City). See *People v. Bowen*, 175 N.Y.S. 2d 128, 128 (N.Y. Sp. Sess. 1958) (“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.”).

<sup>86</sup> *Kagan*, 957 F. Supp. 3d 744, 779–80 (E.D. La. 2013), *aff’d* 753 F.3d 560 (5<sup>th</sup> Cir. 2014), *cert denied*, 135 S. Ct. 1403 (2015).

<sup>87</sup> Mayor Riley Dep. p.29 (“Tour guides are free to say whatever they want to say[.]”); Mayor Riley Dep. p.117 (tour guides have freedom to develop their own content of their tours).

<sup>88</sup> Pltf Billups Dep. pp.95–96 (admitting the City does not control what she can say on tours); Pltf Nolan Dep. p.61 (admitting that the City does not attempt to control what people say); Pltf Warfield Dep. pp.83–84 (admitting he has no evidence that the City controls what tour guides say and that no one from the City has told him what to say on a tour); *see also*, Mayor Riley Dep. pp. 29, 42, 55.

guide speech.<sup>89</sup> As the City’s licensing regime has a content neutral purpose, intermediate scrutiny applies.<sup>90</sup>

Plaintiffs’ argue that the written exam is intended to influence the content of tours based on the exam’s alleged focus on certain topics.<sup>91</sup> Plaintiffs are wrong. First, the Historic Charleston Foundation – not the City – prepared the exam and decided what questions would be included.<sup>92</sup> Moreover, the questions on the exam reflect the topics visitors likely expect guides in Charleston to address, not the topics it wants guides to address.<sup>93</sup> The questions on the exam and the continuing education classes offered takes the desires of the tourism industry participants as its starting point, and does not evidence a content-based desire to influence the type of speech being traded in the tourism market here in Charleston.<sup>94</sup> Indeed, as noted above, the difference between what is promised and what is delivered in the tour guide occupation and tourism industry is the core of the City’s interest, not the content of the information itself provided by

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<sup>89</sup> The “‘inevitable effect’ of the statute” is one of the three categories the Court may consider when determining whether a regulation was enacted with a “content-based” purpose. Order p. 7 (citing *Sorrell*, 131 S.Ct. at 2664).

<sup>90</sup> *Kagan*, 957 F.Supp.2d 744 (E.D.La. 2013), *aff’d*, 753 F.3d 560 (5<sup>th</sup> Cir. 2014), *cert denied*, 135 S.Ct. 1403 (2015); *Turner Broad. Sys.* at 647 (finding design and operation of a challenged provision confirms the purpose underlying its enactment is unrelated to the content of speech where the statute (1) do not require or prohibit particular ideas or view points and (2) does not penalize because of the content being conveyed/communicated).

<sup>91</sup> Pltfs’ Memo. for Prelim. Inj., Dkt. No. 5-1, p.13; Plaintiffs’ Complaint ¶ 74, Dkt. No.1.

<sup>92</sup> Maybank Dep. pp. 45-46; 74-75.

<sup>93</sup> Maybank Dep. pp.35–36, 83, 85 (testifying that the topics on the test, which were developed by the Historic Charleston Foundation, are relevant to the topics visitors to Charleston are interested in); Charleston Visitor Survey Report at City of Charleston Prod. 003527 (The Charleston Area Convention and Visitors Bureau’s 2015 Survey Report concludes “the Charleston area’s history and historic attractions have remained and will presumably continue to be the most important factor in visitors’ decision to visit Charleston.”); Hill Dep. p. 40. (“Visitors to Charleston are most likely to be interested in history”).

<sup>94</sup> Order at p.\*8.



tour guides.<sup>95</sup>

Plaintiffs also base their “content based” argument on the ordinance’s former provisions concerning the oral exam and temporary license script.<sup>96</sup> These provisions, however, have been repealed and are therefore no longer a part of the licensing requirements.<sup>97</sup> Therefore, Plaintiffs’ challenges to the oral exam and temporary license script provisions are moot.<sup>98</sup>

The City repealed the oral exam and temporary tour guide script provision because it determined the provisions were unnecessary to its legitimate purpose.<sup>99</sup> Plaintiffs have no evidence the City repealed the provisions to hide some content-based purpose for the tour guide licensing regime. Accordingly, these repealed provisions are irrelevant to whether the City’s current ordinance violates the First Amendment.

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<sup>95</sup> Plaintiff Billups’ marketing material is an example of the representations often made to customers in the Charleston tourism market regarding the “accuracy” of information provided on paid tours. Pltf. Billups’ Website and Marketing Material, attached as Ex. \_\_; Pltf. Billups Dep. p.78–79. Plaintiff Billups’ marketing materials sell her ability to “show people around town” and to tell them about the town’s “rich history”. Pltf. Billups’ Website and Marketing Material, attached as Ex. \_\_; Pltf. Billups Dep. pp.76–79. Billups markets herself as a “local historian” and sells her services to potential customers, stating her “vision is to inform people of the facts about historic Charleston and its notable residents past and present”. *Id.*

<sup>96</sup> Plaintiffs’ Complaint ¶¶17–18, 74 (oral exam); ¶¶27–30, 80 (temporary tour guide license).

<sup>97</sup> Mayor Tecklenburg Dep. pp.21–22; *see also* Charleston City Ordinance Ch. 29, Art. III (indicating repeal of §29-60 and other certain amendments); Charleston City Ordinance Ratification 2016-054).

<sup>98</sup> *See e.g., Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601 (4<sup>th</sup> Cir. 2001)(holding the plaintiffs challenge to the repealed provisions were moot because there was no evidence that the City intended to re-enact repealed provisions); *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App’x 566 (4<sup>th</sup> Cir. 2007) (holding the challenge to the repealed statute at issue was moot because there was no evidence the statute was likely to be re-enacted and the provisions were not applied to the plaintiffs before repeal); *Naturist Soc’y v. Fillyaw*, 958 F.2d 1515 (11<sup>th</sup> Cir. 1992) (citing several U.S. Supreme Court cases finding where a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot as to those features). Here, the City determined the repealed provisions were unnecessary. Mayor Tecklenburg Dep. pp.21–22. Thus, there is no evidence the City is likely to re-enact the repealed provisions given its determination. Accordingly, Plaintiffs’ arguments based on these provisions are moot.

<sup>99</sup> Mayor Tecklenburg Dep. pp.21–22.

Moreover, all three Plaintiffs concede the repealed provisions had no effect on them.<sup>100</sup>

Plaintiff Billups:

“Q. So you are currently licensed as a tour guide in the City of Charleston? A. Correct. Q. Now, you never took the oral exam, correct? A. Correct. Q. Do you understand that that provision was removed from the ordinance? A. Yes. Q. And you received your license without having to take the oral exam, correct? A. Correct. Q. So that old provision never really affected you, correct? A. Correct. Q. And you said that beyond exploring potential sponsors, you did not take the tour, the temporary tour guide exam, correct? A. That's correct. Q. All right. And you were never asked to submit a script when you applied for your license, correct? A. Correct. Q. All right. So that provision doesn't really apply to you either, right? A. I never did it. No. Q. So it doesn't apply to you? A. No.”<sup>101</sup>

Plaintiff Warfield:

Q. So you weren't required to take an oral exam? A. No. Q. You understand that had been removed from the ordinance, right? A. Well, I figured that out when they gave me the license and didn't make me do it. Q. So you understand that, right? A. Yes. Q. And since the oral exam, you weren't required to take it, that doesn't have any effect on you, right? A. No. Q. Did you apply to take a temporary exam? A. No. Q. Did you want a temporary license? A. No. Q. So you never applied to be a temporary tour guide? A. No. Q. And you were never asked to submit a script to the City, correct? A. No. Q. So that provision doesn't apply to you either? A. No.<sup>102</sup>

Plaintiff Nolan:

Q. When you took the exam, you didn't take an oral exam, right? A. No. Q. And you understand that that has been removed from the ordinance? A. I agree. Q. So you agree that that is not relevant to your case? A. Right. Q. And you didn't apply for the

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<sup>100</sup> See e.g., *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601 (4<sup>th</sup> Cir. 2001); *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566 (4<sup>th</sup> Cir. 2007) (unpublished); *Naturist Soc'y v. Fillyaw*, 958 F.2d 1515 (1992) (citing several U.S. Supreme Court cases finding where a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot as to those features).

<sup>101</sup> Pltf. Billups Dep. p.54–55.

<sup>102</sup> Pltf. Warfield Dep. pp.59–60.

temporary exam, right? A. No. Q. You didn't seek to be a temporary tour guide? A. No. Q. So that's not relevant to your case either, right? A. No. Q. And you didn't have to submit a script? You weren't asked to submit a script? A. No.<sup>103</sup>

The repealed provisions are irrelevant to Plaintiffs' claims and any arguments or evidence regarding these provisions should not be considered by the Court in evaluating the constitutionality of the current ordinance.

Even if the Court considers the repealed provisions, which it should not, the repealed provisions do not show a content based purpose. The evidence in the record as to the oral exam shows it was conducted to help tour guides build confidence and develop their skills.<sup>104</sup> The evidence in the record as to the purpose of the the temporary tour guide license is undisputed. Mayor Riley testified that the temporary license's purpose was to support the carriage tour operators during times of staff turnover because of the prior infrequency of the written exam (i.e., two times per year).<sup>105</sup> Further, the script provision at issue called for submission of the script prepared by the employing company, not by the City. The tour companies were free to include the information they wanted in their script and the City never rejected a script.<sup>106</sup> These repealed provisions were in place as a training mechanism to assist prospective tour guides and to build their confidence in becoming a tour guide so as to help ensure they could provide quality tour services to visitors paying for such services.<sup>107</sup>

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

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<sup>103</sup> Pltf. Nolan Dep. 51.

<sup>104</sup> Riley Dep. pp.84–86, 89–90; Maybank Dep. pp.92–105.

<sup>105</sup> Riley Dep. p.91; Maybank Dep. pp.109–115, 117 (further noting that tour guide companies had freedom to develop their own script for purposes of sponsoring a temporary tour guide and scripts were not required to contain any certain information).

<sup>106</sup> Riley Dep. p.163–64; Maybank Dep. p.115.

<sup>107</sup> Riley Dep. pp.84–86, 89–90, 93–96; Maybank Dep. pp.92–105

The City did not require a prospective tour guide to purchase the manual. Moreover, the manual was not prepared by the City. The Historic Charleston Foundation prepared the manual and selected its contents.<sup>108</sup> The manual is a resource that provides information about Charleston, in particular the City's history and culture.<sup>109</sup> Plaintiffs have no evidence the City's purpose in hiring the Historic Charleston Foundation to prepare the manual was to dictate or influence the content of tour guide speech.<sup>110</sup>

In sum, the tour guide ordinance does not control what tour guides say on their tours. It is a qualifications based ordinance. Therefore, the ordinance is content neutral.

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

"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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<sup>108</sup> Maybank Dep. pp.30–31, 35–36, 44, 47, 59 (stating that the Historic Charleston Foundation prepared the manual and highlighted points of interest based on them being things that most people ask about as a result of the organizations heavy interaction with visitors to Charleston; further providing that the Manual was an option, not a requirement). "[B]y providing the tour guide manual, the City provides an opportunity to those people who want to become qualified guides to have a mechanism of studying to get a feel for the overall history of the City so that when they become licensed the City is confident that they understand what the City is all about. They can say whatever they want to say." Maybank Dep. pp.131–32.

<sup>109</sup> Maybank Dep. pp.32–34. Others besides prospective tour guides have purchased the Manual. Maybank Dep. p.32.

<sup>110</sup> The same is true for the continuing education courses offered for re-certification of licensed tour guides. The undisputed purpose for the continuing education courses is to deepen, expand and enhance the knowledge of the tour guide so as to help assure that tour guides would continue to give the tourists paying for their services what they paid for. Riley Dep. pp.44, 96–100; Maybank Dep. pp.130 (stating that when putting together lists of available continuing education courses, the City tries to include some of the topics that people, including tour guides, have asked about or wanted more information on). The City's intent behind the continuing education courses is therefore not to dictate the content of a tour guide's speech and, thus, provides no significant support for the argument that the City's ordinance is content based rather than content neutral.

alternative channels of communication.”<sup>111</sup> Ultimately, for a content-neutral regulation “to be narrowly tailored, it must not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”<sup>112</sup> While this does not require that a subject regulation “‘be the least restrictive or least intrusive means of’ serving the government’s interests, . . . the government still ‘may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.’”<sup>113</sup>

**A. The City has a substantial government interest in regulating tour guide licensure and the City’s licensing regime advances that interest.**

As this Court previously held, the City has a substantial interest in preventing unqualified individuals from charging fees and falsely purporting to conduct knowledgeable tours from swindling trusting tourists out of money.<sup>114</sup> Courts have long recognized that governments have a legitimate and substantial interest in preventing fraudulent or misleading commercial operations and protecting their industries.<sup>115</sup> 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.<sup>116</sup>

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.”<sup>117</sup> At

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<sup>111</sup> *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).

<sup>112</sup> *McCullen*, 134 S. Ct. at 2535 (quoting *Ward*, 491 U.S. at 799).

<sup>113</sup> *Id.* (quoting *Ward*, 491 U.S. at 798–799).

<sup>114</sup> *Order*, p. \*10.

<sup>115</sup> *Riley*, 487 U.S. at 782 (“[A] State’s interest in protecting [ ] the public from fraud is a sufficiently substantial interest to justify a narrowly tailored regulation.”); *Kagan*, 753 F.3d at 561–62 (finding governments have a substantial interest in protecting tourism industry and visitors).

<sup>116</sup> *See Bowen*, 175 N.Y.S. 2d at 128; *see also Kagan*, 957 F. Supp. 2d at 781.

<sup>117</sup> *Ross v. Early*, 746 f.3D 546 (4<sup>th</sup> Cir. 2014).

most, if at all, the licensing regime burdens a rather small range of speech—that in connection with hired tour guide services.<sup>118</sup> 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, and the tour guide licensing requirements advance that interest.<sup>119</sup> Charleston’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. These guides have direct contact with visitors to the City and thereby have direct impact on the tourism industry and the City’s reputation and economy.<sup>120</sup>

The ordinance’s requirement that tour guides pass an exam about Charleston is a common sense way to ensure that tour guides are qualified to charge the public fees for their services.<sup>121</sup> People unwilling or unable to learn about the City and its history are unlikely to pass

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<sup>118</sup> Charleston City Code § 29–58; Order, p.\*16.

<sup>119</sup> 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”).

<sup>120</sup> Riley Dep. 31-33; Hellen Hill, the Executive Director of the CACVB, testified that the organization’s studies found that the number one reason people visit Charleston is positive recommendations from friends and family, and that the City’s reputation is “critical” to visitors’ decision to select Charleston as a tourist destination. Hill Dep. p.46-48. Mrs. Hill further testified that negative tour guide experiences can damage the City’s reputation as a top tourist destination. Hill Dep. p. 64. Mrs. Hill also testified that visitors chose Charleston as a tourist destination because they believe they will have an authentic experience rather than a “fabricated” one. Hill Dep. p.55. See also, Pltf. Nolan Dep. pp.54–56 (stating that tourism is a big part of Charleston’s economy and that poor quality tours could affect peoples’ perception of the City).

<sup>121</sup> Riley Aff., ¶ 11.

the test.<sup>122</sup> By forcing prospective tour guides to commit time and effort into studying for the written exam, the license requirement effectively raises the costs of entry into the tour market. “This would tend to dissuade fly-by-night tour operations by making their scheme less profitable.”<sup>123</sup> Passing the written exam “also demonstrates that candidates have some general ability to learn and associate information with various Charleston locations.”<sup>124</sup> Under the City’s licensing regime, prospective tour guides who can obtain a license are more likely to be knowledgeable and qualified, and less likely to take advantage of trusting tourists.<sup>125</sup> Therefore, the City’s tour guide requirements lessen the likelihood that unqualified individuals will scam potential customers, thereby advancing the government’s substantial interest.

**B. Charleston’s tour guide licensing requirement is not an excessive burden on speech.**

Charleston’s tour guide license ordinance imposes only a minor burden on speech, if at all, and does not “burden substantially more speech than is necessary to further the [City’s] legitimate interests”.<sup>126</sup> As the Court has previously held, the City’s ordinance burdens only a “rather small range of speech – namely, speech given in connection with hired tour guide services.”<sup>127</sup>

The testing requirement and the re-certification process are related to the Charleston tour guide market. The Court has previously held “the content of the Charleston tourism market [is] relevant in determining whether the licensing regime burdens more speech than necessary.”<sup>128</sup> There is no evidence that tours completely unrelated to Charleston’s history and culture are

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<sup>122</sup> Riley Aff., ¶ 11.

<sup>123</sup> Order, p.\*12.

<sup>124</sup> Order p.\*12. *See also* Riley Dep. pp. 22, 76.

<sup>125</sup> *See* Order \*12. *See also* Riley Dep. pp. 117–18.

<sup>126</sup> *McCullen*, 134 S. Ct. at 2535 (quoting *Ward*, 491 U.S. at 799).

<sup>127</sup> Order, p.\*16.

<sup>128</sup> Order, p.\*16.

prevalent in the Charleston tourism market.<sup>129</sup> To the contrary, Plaintiffs admit that large portion of tours, including pub and ghost tours as well as other “themed” tours, either discuss or draw upon the City’s history as part of the tours.<sup>130</sup> Indeed, Plaintiffs Billups and Warfield currently provide tours based in large part on the City’s history.<sup>131</sup> The Charleston Area Convention and Visitors Bureau’s 2015 Survey Report concludes “the Charleston area’s *history and historic attractions* have remained and will presumably continue to be *the most important factor* in visitors’ decision to visit Charleston.”<sup>132</sup> The topics included in Charleston’s licensing exam

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<sup>129</sup> Cf. Order, p.\*16.

<sup>130</sup> Pltf. Billups Dep. pp.77–79, 87–89 (admitting, in pertinent part, that history influences the content of her tour and Charleston’s history is a large part of why people visit the City); Pltf. Warfield Dep. pp.30–33, 62 (agreeing that a lot of tourists who come here are interested in Charleston’s history and, further, that both pub and ghost tours draw and/or touch on the City’s history); Pltf. Nolan Dep.19–20, 24. See also Plaintiffs’ witness Paula Reynolds Dep. p.207 (admitting that most ghost tours are based on historical information, as well as knowledge of the area and culture), attached as Ex. Q. See also, Riley Dep. p.49 (testifying that such tours inherently and inevitably touch on topics by the tour guide exam and manual—history, locations, landscape, culture, etc.; if one takes such a tour and the tour guide cannot answer basic questions about Charleston, then the customer is likely going to feel ripped off and unhappy about their tour, which in turn damages the City’s reputation and thereby its tourism industry and economy). Cf. Order, \*16 n.22; Banike Dep. pp.176–77 (testifying that most tourists are interested in learning about the history and culture of a subject area from a tour guide).

<sup>131</sup> Pltf. Billups Dep. pp.77–79, 87–89; Pltf. Warfield Dep. p.62 (testifying that he plans to do history tours since they are such a big part of the tourism/tour market here in Charleston); see also Pltf. Billups’ Website and Marketing Material, attached as Ex. R.

<sup>132</sup> Charleston Visitor Survey Report at “City of Charleston Prod. 03527” (emphasis added).



closely follow the topics most tourists want to learn about when visiting Charleston.<sup>133</sup> Accordingly, the record establishes that the City’s licensing exam is properly calibrated to ensure paying customers get what they pay for.<sup>134</sup> Thus, the City’s tour guide ordinance does not burden substantially more speech than is necessary.

Under the narrowly tailored prong of intermediate scrutiny analysis, “the City must provide some evidence that: (i) unqualified tour guides pose[ ] a threat to its interests in protecting its tourism industry from fraud and deceit; and (ii) it did not forego readily available, less intrusive means of protecting those interests.”<sup>135</sup>

In establishing that unqualified tour guides pose a threat to Charleston’s interests in protecting its tourism industry, “the government need not prove that its interests have actually

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<sup>133</sup> Maybank Dep. pp.21–22, 35–36, 83, 85 (testifying that the topics on the test, which were developed by the Historic Charleston Foundation, are relevant to what visitors to Charleston are interested in); *see also* 2015 Charleston Visitor Survey Report, at pp.03522–523. Tourists generally are interested in learning from a tour guide—in large part about the history and culture of the subject area. Banike Dep. pp.176–77; Deposition of Rhetta Mendelsohn (hereinafter “Mendelsohn Dep.”) pp. 75–76, attached as Ex. S. Mendelsohn, p.61 (“All the test does is ensure that people have basic knowledge that they need to conduct [tour] business in the City, trying to ensure that people get their money’s worth [with regard to tours] and that the guides are following the laws of the City.”). To the extent Plaintiffs attempt to argue that the continuing education requirements do not serve to further the City’s interests, Plaintiffs are wrong. The continuing education courses are in place to ensure tour guides remain qualified throughout their tour guide career, thereby ensuring consumers remain protected. Indeed, these courses help assure that tour guides continue to have the basic knowledge and understanding to be able to give the tourists who are paying for these services what they’ve paid for. Riley Dep. pp.40, 96–100 (testifying that the purpose of the continuing education courses is to deepen and enhance tour guides’ knowledge on a wide variety of topics concerning Charleston, and relates back to the quality of the City’s tourism industry and the expectation of visitors to Charleston). Moreover, Plaintiffs agree that continuing education and staying abreast of relevant information is important and helps perform the job of a tour guide. Pltf. Billups Dep. p.130.

<sup>134</sup> *See* Order at p.\*13, quoting *McCullen*, 134 S.Ct. at 2535 (holding that the “element of calibration goes to the very heart of the constitutional requirement that the regulation ‘not burden substantially more speech than is necessary to further the government’s legitimate interests.’”).

<sup>135</sup> Order at p. \*13 (citing *McCullen*).

been harmed before implementing a content neutral regulation.”<sup>136</sup> “[E]vidence showing that the government’s interests are likely to be harmed is sufficient.”<sup>137</sup>

As a top rated destination, the City’s reputation for quality plays an important role in its reputation as a top tourist destination as well as its economy.<sup>138</sup> Tour guides have a significant impact on the tourism industry, thereby impacting the City’s reputation and likelihood visitors will return to Charleston.<sup>139</sup>

Misinformation or unqualified tour guides would erode the quality experience that is the foundation of the City’s reputation as a top destination.<sup>140</sup> A visitor who pays for a tour to learn information about Charleston and receives misinformation and/or is misguided would be unsatisfied with their experience.<sup>141</sup> Consequently, tours given by unqualified tour guides result in a bad experience which can adversely affect visitors’ opinions of Charleston, thereby harming its reputation.<sup>142</sup>

The City has “some non-speculative reasons for believing its interests are at risk”.<sup>143</sup>

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<sup>136</sup> Order at p.\*14 (citing *Reynolds*, 779 F.3d at 224–25, 231).

<sup>137</sup> Order at p.\*14 (citing *Reynolds*, 779 F.3d at 224–25, 231).

<sup>138</sup> Riley Dep. pp.14, 18, 29, 31–33; Banike Dep. pp.120–21.

<sup>139</sup> Deposition of Tommy Dew, p.47, attached as Ex. T.

<sup>140</sup> Banike Dep. pp. 152–55; Riley Dep. 31–33. Hellen Hill, the Executive Director of the CACVB, testified that the organization’s studies found that the number one reason people visit Charleston is positive recommendations from friends and family, and that the City’s reputation is “critical” to visitors decision to select Charleston as a tourist destination. Hill Dep. p. 46-48. Mrs. Hill further testified that negative tour guide experiences can damage the City’s reputation as a top tourist destination. Hill Dep. p. 64. Mrs. Hill also testified that visitors’ chose Charleston because they believe they will have an authentic experience rather than a “fabricated” one. Hill Dep. p. 55

<sup>141</sup> Banike Dep. pp.157, 176–77 (noting that when people do not get what they paid for due to unqualified tour guides, “[t]hat’s harm. That’s stealing.”); Mendehlson Dep. pp. 75–77, 80. Riley Dep. 31-33; Hill Dep. p. 46-48, 55, 64.

<sup>142</sup> See Mendelsohn Dep. p.77.

<sup>143</sup> Order at p.\*17.

Charleston is compared to other top tour destinations around the world.<sup>144</sup> It is well reported that in other top tourism areas, unscrupulous tour guides pose a threat to consumers. Numerous news reports show a substantial problem with fake or unscrupulous tour guides taking advantage of vulnerable tourists.<sup>145</sup> For example there are reports of individuals posing as tour guides to obtain information from unsuspecting potential tourists.<sup>146</sup> Given the issues experienced by other top tourist destinations around the world with unscrupulous tour guides, it is beyond “speculation” for Charleston, with five million visitors per year visiting a defined historic area with historic sites, to consider its tour industry an attractive target for similar problems.

The license requirement, like other common occupational licenses, is in place to ensure only that individuals charging for services are qualified to perform them.<sup>147</sup> 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.<sup>148</sup> Without the license requirement ensuring qualified tour guides, there exists no other sufficient mechanism for the City to prevent unscrupulous, unqualified tour

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<sup>144</sup> Riley Aff., ¶ 3. 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.

<sup>145</sup> See, sample of numerous news reports regarding problems with unscrupulous tour guides in tourist destinations, at Exhibit F. *See* Banike Dep. pp.149–51 (testifying of instance where a person claimed to be a certified tour guide in Chicago, but was not and had fake badge pictured on the individual’s website). Further, as Secretary of the World Federation, Esther Banike has received reports of incidents involving harm to tourists in other countries as a result of the unqualified tour guide’s actions. Specifically, she received a report of an unsanctioned guide overseas in a country/location where one was required to have a license, who approached a couple on street, but unfamiliar with terrain where this couple wanted to go and one of them slipped off a cliff and was seriously injured (still in the hospital). *See* Banike Depo. pp. 161, 164, 166.

<sup>146</sup> Banike Dep. pp. 147–49.

<sup>147</sup> Riley Aff., ¶ 11.

<sup>148</sup> Riley Aff., ¶ 11. 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 created an ordinance that prohibited tours that deviated from a certain message, but it did not do so. Riley Aff., ¶ 10.

guides from targeting visitors in Charleston. Any purported “less-restrictive alternatives” proposed by Plaintiffs do not adequately protect the City’s interests in ensuring that tourists paying for tours are led by guides with a base level of knowledge about the City.

Plaintiffs ask the City to rely on “free market forces” as a sufficient less-restrictive alternative. However, this proposed alternative is insufficient because “market forces” cannot reveal unqualified or unscrupulous tour guides until after a tourist has suffered a negative experience and felt scammed and thereafter published it to the market. The Court has held that governments are not required to “wait until damage has been done before implementing any content neutral regulations.”<sup>149</sup> Further, not all tourists refer to market forces to select a tour guide. Moreover, the unscrupulous tour guide is not likely to be deterred by an unfavorable review given their deceitful motives. Consequently, such “market forces” do not adequately protect the City’s interests and are not a viable less-restrictive alternative.<sup>150</sup>

A “voluntary certification” program would also be less effective in achieving the City’s legitimate purpose.<sup>151</sup> The less restrictive alternative analysis is guided by whether the alternative regulation would even cover the problematic activity, and whether enforcement of such alternatives is likely to be practicable.<sup>152</sup> The Secretary for the World Federation of Tourist

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<sup>149</sup> Order at p.\*14.

<sup>150</sup> As the Nobel Prize-winning economist Joseph E. Stiglitz famously stated “the reason that the invisible hand often seems invisible is that it is often not there.” Altman, Daniel. *Managing Globalization*. In: Q&Answers with Joseph E. Stiglitz, Columbia University and *The International Herald Tribune*, October 11, 2006.

<sup>151</sup> Moreover, 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).

<sup>152</sup> *McCullen*, 134 S. Ct. at 2538.

Guide Associations testified that voluntary certification is not as effective as a mandatory exam requirement because under a voluntary scheme not all tour guides are held to the same standard.<sup>153</sup> Indeed, the unscrupulous are the most likely to forgo the voluntary program and thereby dodge this means of testing their qualifications. Thus, these programs are indistinguishable from reliance on “market forces.”<sup>154</sup> To the extent Plaintiffs may suggest the City run a voluntary certification program, Plaintiffs have provided no evidence that other jurisdictions have adopted such an approach, much less jurisdictions with similar tourism markets.

Prosecution under consumer protection laws would also be insufficient. Indeed, as this Court has previously found, general consumer protection laws are insufficient because the entire basis for a “fake tour guide” scam is that unqualified tour guides are indistinguishable from other tour guides, and therefore difficult to detect.<sup>155</sup>

Even if these proposed attempted alternatives would be effective, which the City contends they would not, the fact that the tour guide licensing regime “imposes only a modest burden on speech makes it highly unlikely that the alternatives would burden ‘substantially less speech.’”<sup>156</sup>

There exists no evidence in the record that any purported less-restrictive alternative is

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<sup>153</sup> Banike Dep. p.177. Moreover, a licensing requirement such as Charleston’s creates a standard among tours and tour guides, and develops as well as constitutes a threshold of knowledge regarding the City. Dew Dep. p.44.

<sup>154</sup> Order at p.\*17.

<sup>155</sup> Order at p. \*20. See also, Riley Dep. p 116 (explaining that a visitor subjected to a bad experience will likely be traveling home soon thereafter and is unlikely to be able to follow up on a scam artist, or an incompetent or unknowledgeable tour guide to report it).

<sup>156</sup> Order at p.\*18 (emphasis in original) (citing *McCullen*, 134 S. Ct. at 2540).

actually as effective as the City’s current licensing regime.<sup>157</sup> Courts require that a less-restrictive alternative be at least as effective in achieving the legitimate purpose that the challenged ordinance was enacted to serve.<sup>158</sup> “If Plaintiffs could prevail by simply identifying some speculative less restrictive alternative, regardless of whether that alternative would actually work, the First Amendment would hardly allow for any regulation at all.”<sup>159</sup> In sum, Charleston’s tour guide licensing regime is *not* an excessive burden on speech. The tour guide ordinance is therefore narrowly tailored to meet the City’s substantial interests.

The City’s tour guide ordinance is similar to the New Orleans ordinance the *Kagan* Court held 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.<sup>160</sup>

Plaintiffs can show no reason for a different result here.

**C. The tour guide licensing ordinance leaves open ample alternative channels of communication.**

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<sup>157</sup> *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 190 (holding that a less-restrictive alternative must be at least as effective in achieving the legitimate purpose that the challenged ordinance was enacted to serve and to the extent the alternative fails this test, the government is under no obligation to present evidence that it actually examined or attempted to implement that alternative).

<sup>158</sup> Order at p.\*14 (citing, *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d at 190).

<sup>159</sup> Order at p.\*14.

<sup>160</sup> *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 cannot show that the City’s ordinance leaves open ample alternative channels of communication and, thus, restricts more speech than necessary.<sup>161</sup> The City’s ordinance only regulates the sale of tour guide services, allowing individuals, including Plaintiffs, communicate whatever message they desire about Charleston with or without a tour guide license. The only limitation is that the tour guide cannot **charge money** for their services without a license.<sup>162</sup>

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.<sup>163</sup> The *One World* court held Honolulu’s ordinance left ample alternative channels of communication, in pertinent part, because it only forbid the **selling** of the T-shirts.<sup>164</sup> Rejecting the plaintiffs arguments, the court noted “[v]arious 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.”<sup>165</sup>

The *Kagan* Court applied the same reasoning to the New Orleans license requirement for tour guides. “The City’s licensing scheme satisfies the last requirement, as [p]laintiffs do not need a license to speak and lead tours whenever, wherever, and containing whatever they please, just so long as they do not charge for them.”<sup>166</sup>

Here, no license is required to speak about Charleston or to engage in free tour guide

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<sup>161</sup> See *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1014-15 (9<sup>th</sup> Cir. 1996); *Kagan v. City of New Orleans*, 957 F.Supp.2d 744 (E.D. La. 2013), *aff’d*, 753 F.3d 560 (5<sup>th</sup> Cir. 2014), *cert denied*, 135 S. Ct. 1403 (2015).

<sup>162</sup> *Riley Aff.*, ¶ 6.

<sup>163</sup> *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1014–15 (9<sup>th</sup> Cir. 1996).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Kagan v. City of New Orleans*, 957 F.Supp.2d 744 (E.D. La. 2013), *aff’d*, 753 F.3d 560 (5<sup>th</sup> Cir. 2014), *cert denied*, 135 S. Ct. 1403 (2015).

services.<sup>167</sup> Even for individuals with a license, the ordinance does not regulate the message that is conveyed on tours.<sup>168</sup> Indeed the ordinance does not regulate speech whatsoever.<sup>169</sup> The ordinance has no device to control what licensed tour guides say.<sup>170</sup> Tour guides are free to present whatever message they wish on their tours. The ordinance provides no restraints on opinion and no topic is off limits.<sup>171</sup> Therefore, Plaintiffs have ample alternative channels for communicating their speech.

### CONCLUSION

The City's tour guide ordinance is content-neutral and survives intermediate scrutiny. The ordinance is therefore constitutional under the First Amendment. Based on the foregoing reasoning and citation of authority, Defendant City of Charleston respectfully requests that this Court grant its Motion for Summary Judgment, dismiss Plaintiffs' First Amendment claims, and grant Defendant such further relief as the Court finds just and proper.

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<sup>167</sup> Charleston City Code § 29-2, -58; Riley Aff., ¶ 6.

<sup>168</sup> Riley Dep. p.53; Maybank Dep. p.104.

<sup>169</sup> Riley Dep. p.53; Maybank Dep. pp.104, 134-35; *see also* Riley Aff., ¶ 9-10.

<sup>170</sup> Riley Dep. p.53; Maybank Dep. pp. 104, 134-35; *see also* Riley Aff., ¶ 9.

<sup>171</sup> Riley Dep. p.53; Maybank Dep. p.104; *see also* Riley Aff., ¶ 9.



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