

JURY CHARGES

SAMPLE SET FOR JUDGE PATRICK MICHAEL DUFFY

Note:

If multiple defendants object to a plaintiff's charge, all objections must be on the same page as plaintiff's charge. Defendants should identify themselves next to their objection.

NOV 9 1993

JOINT INSTRUCTION NO. 1

(Section 1983)

ANN A BIRCH, CLERK
CHARLESTON

"Every person, who under color of any statute, regulation, custom or usage of any state . . . subjects or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges or immunity secured by the constitution and the law shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

42 U.S.C. § 1983 (1986).

Under Section 1983, Mr. Fletcher must show that (1) the Defendants deprived him of a right secured by the Constitution and the laws of the United States and (2) that the Defendants acted under color of state law.

Monell v. Dept. of Social Services, 436 U.S. 658 (1978).



JOINT INSTRUCTION NO. 2

(Punitive Damages Under § 1983)

You may award punitive damages under § 1983 only if you find that the Defendant's conduct was "motivated by evil motive or intent" or that it involved "reckless or callous indifference to the federally protected rights of others."

Moody v. Ferguson, 732 F.Supp. 627 (D.S.C. 1989).

JOINT INSTRUCTION NO. 3

(Section 1988)

The Court in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. In awarding an attorney's fee . . . the court, in its discretion, may include expert fees as part of the attorney's fee.

42 U.S.C. § 1988 (Supp. 1993).

JOINT INSTRUCTION NO. 4

(Damages)

Damages, other than nominal damages, are not presumed to flow from every deprivation of procedural due process; in order for a Plaintiff who has suffered a deprivation of procedural due process to recover more than nominal damages, he must also prove that procedural deprivation caused some independent compensable harm.

Burt v. Abel, 585 F.2d 613 (4th Cir. 1978).

JOINT INSTRUCTION NO. 5

(South Carolina Constitution, Art. 1 §§ 2 & 3)

§ 2: Religious freedom; freedom of speech; right of assembly and petition

The general Assembly shall make no law respecting an establishment of religion or prohibiting free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances.

S.C. Const., art. 1 § 2.

§ 3: Privileges and immunities; due process; equal protection of laws.

The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

S.C. Const., art. 1 § 3.

JOINT INSTRUCTION NO. 6

(First Amendment)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. 1.

(Content-neutral)

The principal inquiry in determining content neutrality in speech cases is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.

Ward v. Rock Against Racism, 491 U.S. 781 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

The government's purpose for adopting the regulation is the controlling consideration. 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.

Ward v. Rock Against Racism, 491 U.S. 781 (1989); see Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

Government regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech.

Ward v. Rock Against Racism, 491 U.S. 781 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

JOINT INSTRUCTION NO. 8

(Regulations Restricting Speech)

While the standards in the statute restricting expressive activity may be flexible and the officials implementing them may exercise considerable discretion, perfect clarity and precise guidelines are not required in order for it to survive constitutional scrutiny.

Ward v. Rock Against Racism, 491 U.S. 781 (1989); see Grayned v. City of Rockford, 408 U.S. 104 (1972).

(Captive Audience)

The government has a significant interest in protecting citizens from being held as a captive audience to even protected speech.

Captive audiences include those unable to escape the complained about speech. A captive audience that is entitled to protection may exist outside of the home. The principle is grounded on the concept of privacy and thus although the protection is most often extended to those within their homes, it may be extended to any situation in which privacy interests are substantially threatened because individuals cannot escape bombardment of their sensibilities.

Beaufort v. Baker, ___ S.C. ___, 432 S.E.2d 470 (1993); Eanes v. Maryland, 569 A.2d 604 (1990), cert. denied, 496 U.S. 938 (1991).

JOINT INSTRUCTION NO. 10

(Duty of Municipal Authorities)

The City of Charleston has a duty of maintaining the safety and order upon its streets for the comfort and convenience of the community.

City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961).

(Disturbing Schools)

"It shall be unlawful:

(1) For any person wilfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon;

(2) For any person to (a) enter upon any such school or college premises or (b) loiter around the premises, except on business, without the permission of the principal or president in charge.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and, on conviction, thereof, shall pay a fine of not less than one hundred dollars nor more than one thousand dollars or be imprisoned in the county jail for not less than thirty days nor more than ninety days."

S.C. Code Ann. § 16-17-420 (Law. Co-op. 1976).

JOINT INSTRUCTION NO. 12

(Charleston Municipal Code -- § 21-16)

§ 21-16: Loud and Unnecessary Noises Restricted:

All clamorous crying of wares, singing, whooping or other obstreperous, wanton and unnecessary noises, either in the day time or at night, calculated to disturb the peace and quiet of the city, whether in the public streets or within enclosures, public or private, are prohibited.

Charleston Code § 21-16 (1985).

JOINT INSTRUCTION NO. 13

(Charleston Municipal Code -- § 21-107)

§ 21-107

No person shall enter upon school or college premises, or loiter around the premises, except on business, without the permission of the principal or person in charge.

Charleston Code § 21-107 (1985).

(Charleston Municipal Code -- § 21-108)

§ 21-108: Loitering; police order to disperse:

(a) No person shall loiter, loaf, wander, stand or remain idle either alone and/or in consort with others in a public place in such manner so as to:

(1) Obstruct any public street, public highway, public sidewalk or any other public place or building by hindering or impeding or tend to hinder or impeded the free and uninterrupted passage of vehicles, traffic or pedestrians.

(2) Commit in or upon any public street, public highway, public sidewalk or any other public place or building any act or thing which is an obstruction or interference to the free and uninterrupted use of property or with any business lawfully conducted by anyone in or upon or facing or fronting any such public street, public highway, public sidewalk or any other public place or building, all of which prevents the free and uninterrupted ingress, egress, and regress, therein, thereon, and thereto.

(b) When any person causes any of the conditions or commits any acts enumerated in paragraph (a) of this section, a police officer or any law enforcement officer shall order that person to stop causing or committing such conditions and to move on or disperse. Any person who fails or refuses to obey such orders shall be guilty of a violation of this section.

Charleston Code § 21-108 (1985).

(City of Charleston Municipal Code -- § 21-109)

§ 21-109 Disorderly Conduct Prohibited.

(b) A person shall be guilty of disorderly conduct if, with the purpose of causing public danger, alarm, nuisance, or if his conduct is likely to cause public danger, alarm, disorder or nuisance, he wilfully does any of the following acts in a public place:

. . .

(5) Obstructs, either singly or together with other persons, the flow of vehicular or pedestrian traffic and refuses to clear such public way when ordered to do so by city police or other lawful authority known to be such;

. . .

(8) Makes or causes to be made any loud, boisterous and unreasonable noise or disturbance to the annoyance of other persons nearby, or near to any public highway, road, street, lane, alley, park, square, or common, whereby the public peace is broken or disturbed, or the public annoyed.

(c) This section shall not be construed to suppress the right to lawful assembly picketing, public speaking, or other lawful mode of expressing public opinion not in contravention of other laws.

JOINT INSTRUCTION NO. 16

(Assault)

Assault occurs if a person has been placed in the reasonable apprehension of bodily harm by the conduct of another.

Moody v. Ferguson, 732 F.Supp. 627 (D.S.C. 1989).

A law enforcement officer is privileged to use lawful force in making an arrest. The officer is only liable for assault if he uses force greater than is reasonably necessary under the circumstances.

Id.

The reasonableness or excessiveness of the force necessary is a matter to be determined in the light of the circumstances as they appeared to the officer at the time of the arrest.

Kennedy v. United States, 585 F.Supp. 1119, 1124 (D.S.C. 1984).

JOINT INSTRUCTION NO. 17

(Punitive Damages for Assault)

A Plaintiff may only recover punitive damages for assault when the Defendant's actions are willful, wanton or in reckless disregard of the Plaintiff's rights.

Moody v. Ferguson, 732 F.Supp. 627 (D.S.C. 1989).

The standard used in determining whether punitive damages should be awarded is whether a person of ordinary prudence would conclude the act was done in reckless disregard of another's rights.

Id.

JOINT INSTRUCTION NO. 18

(Probable Cause)

An officer has probable cause to arrest if the facts and circumstances are sufficient to warrant a prudent person in believing the suspect has committed the crime with which he is charged.

Moody v. Ferguson, 732 F.Supp. 627 (D.S.C. 1989).

JOINT INSTRUCTION NO. 19

(Unlawful Arrest)

An Unlawful Arrest is one made without probable cause.

United States v. Watson, 423 U.S. 411 (1976`); Pritchard v. Perry, 508 F.2d 423 (4th Cir. 1975); Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974); Kennedy v. United States, 585 F.Supp. 1119 (1984).

Police Action with respect to an arrest is not actionable where there is probable cause for the arrest and where the arresting officer acts in good faith.

Pierson v. Ray, 386 U.S. 547, 549 (1967); Eslinger v. Thomas, 476 F.2d 225, 229 (4th Cir. 1973); Kennedy v. United States, 585 F.Supp. 1119, 1124 (D.S.C. 1984).

(Intentional Infliction of Emotional Distress)

In order to recover for Intentional Infliction of Emotional Distress the Plaintiff must show that:

(1) the Defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;

(2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community;

(3) the actions of Defendant caused the Plaintiff's emotional distress; and

(4) the emotional distress suffered by the Plaintiff was severe so that no reasonable man could be expected to endure it.

McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991); Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

(Injunctive Relief)

Courts generally will not interfere by injunction in cases of nuisances, trespasses and like injuries to property when the parties can have complete redress in a court of law unless it appears that irreparable mischief will be done by withholding the process, or where damages that will result to the complainants are incapable of being inadequately measured, or where the mischief is such, from its continuous and permanent character, that it must occasion constantly recurring grievances, which cannot be otherwise prevented.

Charleston Joint Venture v. McPherson, ___ S.C. ___, 417 S.E.2d 544 (1992).

(Test for Regulating Speech in a Public Forum)

While the Constitutional guarantee to freedom of speech is a valuable right critical to every citizen, the right is not absolute. The State may regulate such protected speech through enforcement of content-neutral, time, place and manner restrictions which are narrowly tailored to serve a significant governmental interest and leave open ample alternative avenues of communication.

Ward v. Rock Against Racism, 491 U.S. 781 (1989); GROW v. Campbell, 704 F.Supp. 644 (D.C. S.C. 1989); City of Beaufort v. Baker, ___ S.C. ___, 432 S.E.2d 470 (1993).

Restrictions on the time, place or manner of protected speech are not invalid simply because there is some imaginable alternative that might be less burdensome on speech.

Ward v. Rock Against Racism, 491 U.S. 781 (1989); United States v. Albertini, 472 U.S. 675 (1985).

JOINT INSTRUCTION NO. 23

(Governmental Interest)

Although public sidewalks, city streets and parks are traditional public fora, the government has a significant governmental interest in protecting its citizens from excessive and unwelcome noise in these areas.

Ward v. Rock Against Racism, 491 U.S. 781 (1989); Beaufort v. Baker, ___ S.C. ___, 432 S.E.2d 470 (1993).

JOINT INSTRUCTION NO. 24

(Narrowly-tailored)

The requirement of narrowly tailored is satisfied as long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Ward v. Rock Against Racism, 491 U.S. 781 (1989); United States v. Albertini, 472 U.S. 675 (1985).

JOINT INSTRUCTION NO. 25

(Eleventh Amendment)

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. 11.

JOINT INSTRUCTION NO. 26

(Eleventh Amendment Bar)

Absent the consent of the state, the Eleventh Amendment bars any retroactive compensatory relief which would be paid out of a state treasury.

Quern v. Jordan, 440 U.S. 332 (1979); McAdoo v. Toll, 591 F.Supp. 1399 (D.Md. 1984).

JOINT INSTRUCTION NO. 27

(Fourteenth Amendment)

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend 14.

JOINT INSTRUCTION NO. 28

(Fourteenth Amendment Protection)

The Fourteenth Amendment does not protect against all deprivations of life, liberty and property but only against those deprivations "without due process of law."

Baker v. McCollan, 443 U.S. 137, 145 (1979).

JOINT INSTRUCTION NO. 29

(Injury to Reputation)

Injury to reputation in itself is not a deprivation of liberty. However, if governmental acts so injure a person's reputation that he will have lost significant associational or employment opportunities, there is a loss of liberty.

Paul v. Davis, 424 U.S. 693 (1976) .

JOINT INSTRUCTION NO. 30

(Free Exercise Clause)

"Overt acts prompted by religious beliefs or principles are not protected by the First Amendment when they are in conflict with governmental regulations which have been enacted for the general welfare and health of people and in the public interest."

McLaughlin v. McGee Bros. Co., Inc., 658 F. Supp. 117 (W.D.N.C. 1988).

(Forum)

In distinguishing between the different tests used to determine whether prohibition of speech violates the Constitution, you must first determine whether the forum the speech is being delivered in is public or private.

In order to qualify as a public forum, a facility must present an open-ended invitation to the public to use its premises for any and all purposes. City sidewalks, streets, and public parks are all examples of public fora. Traditional public fora are those places which by long tradition or by government fiat have been devoted to assembly and debate.

Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985); Charleston Joint Venture v. McPherson, ___ S.C. ___, 417 S.E.2d 544 (1992).

If the facility or area, is not a public forum, then it is a private forum. The type of forum determines which test you should use to determine whether the restriction on speech is Constitutional.

Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985)

JOINT INSTRUCTION NO. 32

(University Campus)

A university or college campus may be a traditional public forum as to its students but not necessarily as to the public at large.

Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788 (1985); Widmar v. Vincent, 454 U.S. 263 (1981).

School campuses may be deemed public fora for the purpose of the First Amendment only if school authorities have, by policy or practice, opened the facility for indiscriminate use by the general public.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

(Public Property as a Private Forum)

Public property which is not by tradition or designation a forum for public communication may be reserved by the state for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788 (1985); City Council of Los Angeles v. Taxpayers for Vincent, 446 U.S. 789 (1984).

JOINT INSTRUCTION NO. 34

(Punitive Damages)

Punitive damages will not be awarded against a municipality unless expressly authorized by statute.

City of Newport v. Fact Concerts, Inc., 435 U.S. 245 (1981).

JOINT INSTRUCTION NO. 35

(Construing a Statute)

When construing a statute you must apply the normal meaning of words of common understanding.

Beaufort v. Baker, ___ S.C. ___, 432 S.E.2d 470 (1993); Eanes v. Maryland, 569 A.2d 604 (1990), cert. denied, 496 U.S. 938 (1991).

(ACTUAL DAMAGES)

In general, damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages.

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986).

Thus, for deprivation of most constitutional rights, compensatory damages must be proved and may not be presumed; without proof of substantial injury only nominal damages may be recovered.

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986).
Carey v. Piphus, 435 U.S. 247 (1978).

PLAINTIFF'S OBJECTION: This is not the complete rule of law as enunciated by the United States Supreme Court in the above case. The jury, under the Memphis Community School District analysis, can award actual damages for the plaintiff's injuries, including mental and emotional distress and injury to reputation, without putting an "abstract value" on the constitutional rights violated by the defendant.

(No Violation of Civil Rights)

An arrest by a police officer does not violate the arrestee's civil rights under the color of state law if the officer had probable cause to believe that the arrestee committed a criminal offense.

Fisher v. Washington Metropolitan Area Transit Authority, 690 F.2d 1133 (4th Cir. 1982).

If the Defendant did not violate the Plaintiff's federal constitutional rights by the arrest, the Plaintiff will not have a § 1983 claim against the Defendants.

Id.

DEFENDANT'S SUPPLEMENTAL INSTRUCTION NO. 38

(RIGHT TO FREE SPEECH)

In South Carolina, the right to freedom of speech and assembly is not absolute and must be exercised in subordination to the general public's comfort and convenience and in consonance with peace and good order.

City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961).

PLAINTIFF'S OBJECTION: This case relates to regulation for prior restraint and this language takes the form of judicial dicta rather than a rule of law applicable in the case at bar.

DEFENDANT'S SUPPLEMENTAL INSTRUCTION NO. 39

(RELIEF UNDER SECTION 1983)

A Plaintiff is not entitled to relief under Section 1983 where the state court provides redress for common law actions of false arrest and false imprisonment absent allegations that the arresting officers acted pursuant to established state procedure.

Davis v. Robbs, 794 F.2d 1129 (6th Cir.) cert. denied, 479 U.S. 992 (1986).

PLAINTIFF'S OBJECTION: Allegations that the arresting officers acted pursuant to procedure have been set forth in the complaint and this instruction is therefore irrelevant and repetitive.

(FALSE IMPRISONMENT AND FALSE ARREST UNDER SECTION 1983)

In order for an action for false imprisonment or false arrest to be actionable under Section 1983, Mr. Fletcher must show that a constitutional right was violated. The tort of false imprisonment does not become a violation of the Fourteenth Amendment merely because a Defendant is a state official.

Baker v. McCollan, 443 U.S. 137 (1979); Weber v. Village of Hanover Park, 768 F.Supp. 630 (N.D.Ill. 1991).

The fact that the arrested person is innocent of the charge contained in the arrest warrant is largely irrelevant to his claim of deprivation of liberty without due process of law. The arrest itself must be constitutionally deficient in order for Section 1983 to apply.

Baker v. McCollan, 443 U.S. 137 (1979).

An arrest does not give rise to a cause of action for deprivation of Civil Rights if it was made with a valid warrant or under probable cause.

Pritz v. Hackett, 440 F.Supp. 592 (W.D.Wis. 1977).

An officer has a probable cause to arrest if facts and circumstances are sufficient to warrant belief by a prudent person that a suspect has committed a crime for which he is charged.

Moody v. Ferguson, 732 F.Supp. 627 (D.S.C. 1989).

PLAINTIFF'S OBJECTION: This instruction is not neutrally written and constitutes legal argument rather than instruction of legal principle.

(DAMAGES UNDER SECTION 1983)

"Local governmental bodies . . . can be sued directly under Section 1983 for monetary, declaratory or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. . . ."

Monell v. Dept. of Social Services, 436 U.S. 658 (1978); see also, Baxley v. City of N. Charleston, 533 F.Supp. 1248, 1255 (D.S.C. 1982).

In order to show a violation by a municipality, Mr. Fletcher must show that the employees were acting according to some official policy or regulation or custom of the City when his rights were violated.

Monell v. Dept. of Social Services, 436 U.S. 658 (1978); see also, Baxley v. City of N. Charleston, 533 F.Supp. 1248, 1255 (D.S.C. 1982).

To establish this policy or custom, Mr. Fletcher must show a "persistent and wide spread practice. Moreover, actual or constructive knowledge in such customs must be attributed to a governing body or the municipality. Normal random acts or isolated incidents are insufficient to establish a custom or policy."

DePew v. City of St. Marys, Ga., 787 F.2d 1496 (11th Cir. 1986); see also Bennett v. City of Slidell, 728 F.2d 762 (5th Cir.) cert. denied, 472 U.S. 1016 (1984); Dominguez v. Beame, 603 F.2d 337 (2d Cir.) cert. denied, 446 U.S. 917 (1979); Hathaway v. Stone, 687 F.Supp. 708 (D. Mass. 1988); Shelby v. City of Atlanta, 578 F.Supp. 1368 (N.D.Ga. 1984).

PLAINTIFF'S OBJECTION: This instruction is not neutrally written and constitutes legal argument rather than instruction of legal principle.

(FALSE IMPRISONMENT)

False Imprisonment is defined as a deprivation of a person's liberty without lawful justification. To establish a cause of action for false imprisonment, Mr. Fletcher must demonstrate that 1) the Defendants restrained him, 2) the restraint was intentional, and 3) the restraint was unlawful.

Caldwell v. K-Mart Corp., 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991) cert. denied, (1992).

An action for false imprisonment cannot be maintained where one is arrested by lawful authority.

Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (1990).

In order for an arrest to be lawful, probable cause must exist to arrest Mr. Fletcher on the charges brought against him. Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. It is your job as members of the jury to determine whether probable cause existed in this case.

Id. at 663.

PLAINTIFF'S OBJECTION: This instruction is not neutrally written and constitutes legal argument rather than instruction of legal principle.

DEFENDANT'S SUPPLEMENTAL INSTRUCTION NO. 43

(NARROWLY TAILORED)

Although an ordinance or law restricting speech must be narrowly tailored, it need not be the least intrusive means of serving the government's interest.

Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746 (1989);
Beaufort v. Baker, _____ S.C. _____, 432 S.E.2d 470 (1993).

PLAINTIFF'S OBJECTION: The case at bar does not involve any written ordinance, law, statute or regulation passed by any legislative body and therefore this instruction is not relevant.

(VAGUENESS)

A statute prohibiting speech must not be unconstitutionally vague. The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to appraise judge and jury of standards for the determination of guilt. If the statute is so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

Beaufort v. Baker, _____ S.C. _____, 432 S.E.2d 470 (1993); State v. Albert, 257 S.C. 131, 184 S.E.2d 605 (1971) cert. denied, 409 U.S. 966 (1972).

PLAINTIFF'S OBJECTION: The case at bar does not involve any written ordinance, law, statute or regulation passed by any legislative body and therefore this instruction is not relevant.

DEFENDANT'S SUPPLEMENTAL INSTRUCTION NO. 45

(OVERBREADTH)

A statute is unconstitutionally overbroad if its enactment reaches a substantial amount of constitutionally protected conduct so as to be inconsistent with the First Amendment or has a chilling effect on protected expression.

Massachusetts v. Oakes, 109 S.Ct. 2633 (1989); Boos v. Barry, 485 U.S. 312 (1987).

PLAINTIFF'S OBJECTION: The case at bar does not involve any written ordinance, law, statute or regulation passed by any legislative body and therefore this instruction is not relevant.

DEFENDANT'S SUPPLEMENTAL INSTRUCTION NO. 46

(BURDEN OF PROOF)

A duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt.

Beaufort v. Baker, _____ S.C. _____, 432 S.E.2d 470 (1993); Rothschild v. Richland Cty. Bd. of Adjustment, _____ S.C. _____, 420 S.E.2d 853 (1992).

This is so even where the ordinance allegedly violates First Amendment rights.

Beaufort v. Baker, _____ S.C. _____, 432 S.E.2d 470 (1993); Thomson Newspapers, Inc. v. City of Florence, 287 S.C. 305, 338 S.E.2d 324 (1985).

PLAINTIFF'S OBJECTION: The case at bar does not involve any written ordinance, law, statute or regulation passed by any legislative body and therefore this instruction is not relevant.

(TEST FOR RESTRICTING SPEECH IN A PRIVATE FORUM)

In order for an ordinance which restricts speech to survive constitutional scrutiny the ordinance must 1) be reasonably related to a legitimate government interest, 2) be viewpoint neutral, and 3) leave open alternative channels of communication.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988); Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788 (1985); City Council of Los Angeles v. Taxpayers for Vincent, 446 U.S. 789 (1984); Perry Educations Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983).

PLAINTIFF'S OBJECTION: The case at bar does not involve any written ordinance, law, statute or regulation passed by any legislative body and therefore this instruction is not relevant.

(Protection of Free Speech)

"A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . That is why freedom of speech is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

Edwards v. South Carolina, 372 U.S. 229, ___ S.Ct. ___, ___
L.Ed.2d ___, (1963)

The Defendants object to this charge because it is not a statement of law but merely dicta. Furthermore, the quotation is incomplete and, if charged at all, should include the concluding sentence: "The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views." Edwards v. South Carolina, 372 U.S. 229 (1963).

(Public Forum)

"Streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."

Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); Hudgens v. NLRB, 424 U.S. 507, 515, _____ S.Ct. _____, _____ L.Ed.2d _____; Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 315, _____ S.Ct. _____, _____ L.Ed.2d _____ (1968).

The Defendants object to this charge because it is not a statement of law in the cited cases but merely dicta as in, for example, the Plaintiff's cited case Hudgens in which the Court's holding was that a privately-owned shopping center is not a public forum. Furthermore, the final case cited by the Plaintiff, Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), was overruled by the Court's decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). See Hudgens v. NLRB, 424 U.S. 507 (1976).

(Color of State Law)

The protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights."

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961).

Liability under Section 1983 can attach to a municipality if the employees or officers of the municipality were acting under the color of state law.

42 U.S.C. Section 1983.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law."

United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); National Collegiate Athletic Association v. Tarkanian, ___ U.S. ___, ___, 109 S.Ct. 454, 460, ___ L.Ed.2d ___, ___ (1988).

The Defendants object to the first paragraph in this Proposed Instruction because the case cited in support is not a 42 U.S.C. § 1983 case. Furthermore, the Plaintiff has couched the quoted language in a misleading manner by taking the language out of context. The appropriate quoted language would be as follows: "Private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to be involved in it."

The assertion in the second paragraph in this Supplemental Instruction is not a correct statement of the language in 42 U.S.C. § 1983. See Joint Instruction No. 1.

The third paragraph of this Supplemental Instruction attempts to define "color of State law" under § 1983. However, one of the cases cited in support of the statement of law is not a § 1983 case. United States v. Classic, 313 U.S. 299 (1941) is a voting rights case under 18 U.S.C. §52. Although the second case cited in support of the statement is a § 1983 case, the quoted language is dicta in that case and not a statement of law. See National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988).