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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Diane Schafer Goodstein, Circuit Court Judge

Case No. 2016-000999

The City of Columbia..... Respondent,

v.

Johnnie L. Clark and Harriet Clark. Appellants.

RECORD ON APPEAL

Jessica R. Magnum
Office of the City Attorney
P.O. Box 667
Columbia, South Carolina 29202
(803) 737-4242
Attorney for Respondent

Henry P. Wall
Bruner, Powell, Wall
& Mullins, LLC
1735 St. Julian Place,
Suite 200 (29204)
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorney for Appellants

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STATE OF SOUTH CAROLINA	)	COLUMBIA CITY COURT
	)	
COUNTY OF RICHLAND	)	
The City of Columbia,	)	MOTION TO DISMISS
v.	)	CHARGES OF LOUD NOISE
.	)	
Johnnie L. Clark, H.J. Terry-Clark,	)	Various City Tickets
Defendants.	)	
_____	)	

The Defendants move that all "noise" charges be dismissed, that the Court grant them a continuance of at least three weeks, and that their counsel be given access to the property of the complaining witnesses, along with the City Police and Counsel for the complaining witnesses so as to take independent "noise" readings on and in the property of said witnesses during the scheduled church services of Defendants.

The defendant, through counsel, argues for the dismissal of all the charges based upon speech alone which is protected by the First and Fourteenth Amendments to the U. S. Constitution. Both federal and state constitutional law prohibits the punishment of nothing more than loud speech with or without application.

All free speech activity is protected from criminal prosecution, except by reasonable regulation as to time, place, and manner under a narrow, objective, and definitive law which prevents arbitrary discretion in decision-making by the law enforcement officer.

The City of Columbia ordinance being enforced in the instant case is Sect. 8-67

(a) and (c):

(a) Disturbing the public generally. It shall be unlawful for any person to maintain and operate in any building or on any premises in the city any radio device or mechanical musical instrument of device of any kind whereby the

sound therefrom is cast directly on the public streets and places in such a manner as to create unreasonably loud, excessive or disturbing noises and where such device is maintained and operated for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street, park, public place or of persons on neighboring premises.

(c) Creating public nuisance. It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

Defendants argue that the language in this ordinance is both overbroad and vague according to established federal law.

DEFINITIONS OF OVERBREADTH AND VAGUENESS

Recently, U.S. District Court Judge Joseph F. Anderson, Jr., in *McCoy v. City of Columbia*, March 11, 2013, reviewed a City of Columbia ordinance which ordered a person to not "interfere with or molest a police officer in the lawful discharge of his duties." Sect. 10-34(b). (Emphasis added).

The Court described the constitutional issues as follows:

The Plaintiff, Defendant in a criminal charge, challenged the ordinance on two grounds -- that it was overly broad and vague.

The legal standards for analyzing whether the Ordinance is unconstitutionally overbroad or vague are set forth in detail in the Report and Recommendation, and this court only briefly summarized them here. First, regarding overbreadth, "only a statute which is substantially overbroad may be invalidated on its face." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987).

...

Thus, the Supreme Court has "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application." The requirement that the overbreadth be substantial 'stems from the underlying justification for the overbreadth exception itself -- the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the court.' *City Council of Los Angeles v. Vincent*, 466 U.S. 789 (1981).

...

Thus criminal statutes which "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*. (Emphasis added).

...

Then Judge Anderson considered the fact that there was probable cause for the arrest and reviewed the offensive conduct that caused the arrest of McCoy:

As is clearly shown in the video, at approximately 3:45 a.m. on a busy sidewalk in front of several bars, McCoy positioned himself in between the officers and their patrol car, where the officers were attempting to move the arrestee. McCoy verbally contested the arrest of the arrestee. The officers pushed McCoy backwards and indicated that he should step away from the arrest scene, but McCoy failed to heed these clear commands. Importantly, the video shows that McCoy's actions forced the officers to divide their attention between securing the arrestee and engaging McCoy. Indeed, because McCoy did not step back from the arrest scene as instructed, two of the officers were eventually required to let go of the arrestee and focus solely on McCoy. The third officer was left to secure the arrestee alone. In the words of the Ordinance, this conduct surely "interfere[d] with or molest[ed]" the officers "in the lawful discharge of [their] duties." Therefore, it was reasonable for the Officer Defendants to believe that McCoy had violated the Ordinance [probable cause]. (Emphasis added).

Then Judge Anderson turned to the law defining a vague ordinance.

Next, a statute is impermissibly vague if it either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement."

At the outset, it is important to understand that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (Emphasis added).

...

Freedom of speech is protected against censorship and punishment precisely because "speech is often provocative and challenging," and "it may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1 at 4 (1949).

The instant court noted that the City Council could have solved the overbreadth problem by limiting the "interfere with or molest" language with the adverb "physically." Hence, whether the Ordinance is unconstitutional as substantially overbroad is a close question.

Importantly, however, whether the Ordinance is unconstitutionally vague is not. Applying the stricter test for vagueness that is required when a statute implicates protected speech, *Village of Hoffman Estates*, 455 U.S. at 499, the court finds that the Ordinance both "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and "authorizes or even encourages arbitrary and discriminatory enforcement." *City of Houston v. Hill*, 530 U.S. at 732. (Emphasis added).

...

Moreover, because the Columbia City Council chose to leave the terms of the Ordinance undefined, it is not clear whether the Columbia City Council intended the Ordinance to apply to physical conduct alone, and the court cannot say that the Ordinance is valid "in the vast majority of its intended applications." (Emphasis added).

Based on the above, the Ordinance is facially unconstitutional as unduly vague. (Emphasis added).

...

The Court concluded that the law was settled on the overbreadth question but, it was not settled on the issue of vagueness:

III. Conclusion

The court has considered in detail the briefs and arguments of the parties, the Report and Recommendation, and all objections thereto. Based on the foregoing, the court finds that the Ordinance is facially unconstitutional as unduly vague, but the court finds that genuine issues of material fact preclude granting summary judgment to either the City or to McCoy on the issue of whether the Ordinance was unconstitutionally applied to McCoy in this case. Thus, the court hereby grants, in part, and denies, in part, McCoy's motion for summary judgment and denies the City's motion for summary judgment regarding the constitutionality of the Ordinance.

...

This case will proceed to trial on the constitutionality of the Ordinance as applied to McCoy during his arrest and on the City's liability, if any, under Sect. 1983.

IT IS SO ORDERED.

The key language in *McCoy* could and should be applied to the "noise" ordinance in the church case. That important principle reads:

Importantly, however, whether the Ordinance is unconstitutionally vague is not. Applying the stricter test for vagueness that is required when a statute implicates protected speech, *Village of Hoffman Estates*, 455 U.S. at 499, the court finds that the Ordinance both "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and "authorizes or even encourages arbitrary and discriminatory enforcement." *City of Houston v. Hill*, 530 U.S. at 732. (Emphasis added).

In *City of Houston, Texas v. Hill*, 107 S.Ct. 2502 (1987), the U. S. Supreme Court, in a 9-0 ruling clearly established the constitutional prohibition against the punishment of pure speech, even in the context of that case where there was a verbal interference with a police officer making an arrest. The Houston ordinance was similar to the instant statute in that it attempted to punish words alone. On this issue, the Supreme Court, at 2509, noted: "Accordingly, the enforceable portion of the ordinance makes it 'unlawful for any person to . . . in any manner oppose, molest, abuse, or interrupt any policeman in the execution of his duty,' and thereby prohibits verbal interruptions of police officers."

In explaining its ruling, the Supreme Court noted, "This Houston ordinance, however, is not narrowly tailored to prohibit only disorderly conduct or fighting words ." The same can be said of Sect. 8-47 as it was attempted to be used in the instant case. There is no allegation of any kind of disruptive conduct or the use of fighting words that would reasonably provoke the hearer into offensive conduct.

RELATED CASES ON PURE SPEECH

Our state law reaches the same result in several cases that are relevant to the factual situation in the instant case. In *State v. Perkins*, 412 S.E.2d 385 (S.C. 1991), the S.C. Supreme Court was called upon to interpret the portion of Section 16-17-530 which prohibits one from "otherwise conducting himself in a disorderly or boisterous manner."

The facts in *Perkins* where that several persons came into the Anderson County Sheriff's Department to obtain a copy of an incident report. When they discovered that the report was not ready, they became upset and raised their voices in a threatening manner. They was arrested under the language in Sect. 16-17-530:

Any person who shall . . . (b) use obscene or profane language on any highway or at any public place or gathering . . . shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

The State Supreme Court reversed their convictions in a ruling that cited and followed the logic of *City of Houston, Texas v. Hill*. In *Perkins*, the S. C. Supreme Court ruled:

"[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Huston, Texas v. Hill*, 107 S.Ct. 2502 (1987). The State may not punish a person for voicing an objection to a police officer where no "fighting words" are used. To punish only spoken words addressed to a police officer, a statute must be limited in scope to fighting words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Hill* at 2509-10.

The same law has been applied in other contexts even more relevant to the instant case in the state interpretation of the rights of free speech. In the case of *In Re Jeremiah W.*, 576 S.E.2d 185 (S.C. App. 2003), the S. C. Court of Appeals held that a juvenile could not be convicted of a breach of the peace on the simple testimony of "yelling a profanity" at a police officer, and where he then held his hands up and questioned "what" the officer wanted with him. The court explained, "At that point Officer Cooke placed Jeremiah under arrest for being loud, boisterous, and using profanity in public, in violation of S.C. Code Ann. Section 16-17-530 (1976)." (emphasis added).

In ruling that the trial court should have granted a directed verdict on the charge of breach of the peace, the *Jeremiah* Court of Appeals held:

In *State v. Perkins*, our supreme court determined that probable cause to arrest an individual “required more than profanity or loud and boisterous behavior directed at the officers.” *Pittman*, 537 S.E.2d at 566 (discussing *Perkins*, 412 S.E.2d385 (1991)). Therefore, we find Jeremiah was entitled to a directed verdict on the breach of peace charge.

The court noted that there were ten or fifteen people approximately 30 or 40 feet away from Jeremiah and the officer, but also noted that the officer “admitted that Jeremiah never addressed the crowd or asked them to do anything.” There was no evidence of crowd reaction to “fighting words.”

It is obvious from this review, that “disorderly conduct” or “breach of the peace” based on a verbal confrontation are crimes that require proof of more than loud or obscene speech. There must be a showing of the use of “fighting words” which would incite disruptive behavior by the “victim” or proof of some conduct accompanying the offensive speech that converts the verbal actions of the defendant into criminally offensive conduct as opposed to just offensive speech.

See *State v. Lacoste*, 553 S.E.2d 464 (S.C. App. 2001), and *State v. Pittman*, 537 S.E.2d 563 (S.C. App. 2000) as examples where disorderly conduct charges were upheld because the obnoxious speech was coupled with an assault or other conduct in addition to the offensive speech. (emphasis added).

There is one other U. S. Supreme Court case that clearly supports the position taken in this case by the defendant. In *Cohen v. California*, 91 S.Ct. 1780 (1971), a Vietnam war protestor was arrested for wearing a jacket into a county courthouse which

had the words "F--k the Draft" which were plainly visible to women and children as well as other visitors to the court. The U. S. Supreme Court reversed the defendant's conviction for a breach of the peace. The Supreme Court first stated the issue to be decided:

It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

Then the U. S. Supreme court clearly established the law under the federal constitution with the standard that survives to this day:

For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style to the individual.

Maybe one more final note is appropriate to make the application of the constitutional law to the instant fact situation, thereby mandating dismissal. It must be remembered that all of this case law has its foundation with the quintessential free speech case that gave us the famous statement that there are only a few narrowly defined limits on free speech such as a person cannot yell "fire" in a crowded theater. In *Houston v. Hill*, the U. S. Supreme Court quoted the other famous quote from *Terminiello v. Chicago*, 394 U.S. 894 (1974):

Speech is often provocative and challenging . . . [But it] is nevertheless 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.

Counsel, submits that the law is clear on the issues in the instant case, and argues that this law affirmatively mandates the dismissal of the public disorderly conduct charge

based solely on a verbal confrontation, which is protected first amendment activity.

ANOTHER IMPORTANT CASE ON NOISE

The most important case is *Edwards v. South Carolina*, 372 U.S. 229 (1963):

MR. JUSTICE STEWART delivered the opinion of the Court.
The petitioners, 187 in number, were convicted in a magistrate's court in Columbia, South Carolina, of the common law crime of breach of the peace. Their convictions were ultimately affirmed by the South Carolina Supreme Court, 239 S.C. 339, 123 S.E.2d 247. We granted certiorari, 369 U. S. 870, to consider the claim that these convictions cannot be squared with the Fourteenth Amendment of the United States Constitution. There was no substantial conflict in the trial evidence. Late in the morning of March 2, 1961, the petitioners, high school and college students of the Negro race, met at the Zion Baptist Church in Columbia. From there, at about noon, they walked in separate groups of about 15 to the South Carolina State House grounds, an area of two city blocks open to the general public. Their purpose was "to submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and our dissatisfaction with the present condition of discriminatory actions against Negroes in general, and to let them know that we were dissatisfied, and that we would like for the laws which prohibited Negro privileges in this State to be removed."

Then the Court noted:

Already on the State House grounds when the petitioners arrived were 30 or more law enforcement officers, who had advance knowledge that the petitioners were coming. Each group of petitioners entered the grounds through a driveway and parking area known in the record as the "horseshoe." As they entered, they were told by the law enforcement officials that "they had a right, as a citizen, to go through the State House grounds, as any other citizen has, as long as they were peaceful." During the next half hour or 45 minutes, the petitioners, in the same small groups, walked single file or two abreast in an orderly way, through the grounds, each group carrying placards bearing such messages as "I am proud to be a Negro" and "Down with segregation."

During this time, a crowd of some 200 to 300 onlookers had collected in the horseshoe area and on the adjacent sidewalks. There was no evidence to suggest that these onlookers were anything but curious, and no evidence at all of any threatening remarks, hostile gestures, or offensive language on the part of any member of the crowd. The City Manager testified that he recognized some of the onlookers, whom he did not identify, as "possible troublemakers," but his

subsequent testimony made clear that nobody among the crowd actually caused or threatened any trouble. There was no obstruction of pedestrian or vehicular traffic within the State House grounds. No vehicle was prevented from entering or leaving the horseshoe area. Although vehicular traffic at a nearby street intersection was slowed down somewhat, an officer was dispatched to keep traffic moving. There were a number of bystanders on the public sidewalks adjacent to the State House grounds, but they all moved on when asked to do so, and there was no impediment of pedestrian traffic.

...

In the situation and under the circumstances thus described, the police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which, as his later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail.

Upon this evidence, the state trial court convicted the petitioners of breach of the peace, and imposed sentences ranging from a \$10 fine or five days in jail to a \$100 fine or 30 days in jail. In affirming the judgments, the Supreme Court of South Carolina said that, under the law of that State, the offense of breach of the peace "is not susceptible of exact definition," but that the "general definition of the offense" is as follows: "In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence . . . , it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense. . . ."

"By 'peace,' as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society."
239 S.C. at 343-344, 123 S.E.2d at 249.

...

And it is clear to us that, in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and

freedom to petition for redress of their grievances. It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *Gitlow v. New York*, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357; *Stromberg v. California*, 283 U. S. 359; *De Jonge v. Oregon*, 299 U. S. 353; *Cantwell v. Connecticut*, 310 U. S. 296.

...

Not until they were told by police officials that they must disperse on pain of arrest did they do more. Even then, they but sang patriotic and religious songs after one of their leaders had delivered a "religious harangue." There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was "ample."

This, therefore, was a far cry from the situation in *Feiner v. New York*, 340 U. S. 315, where two policemen were faced with a crowd which was "pushing, shoving and milling around," *id.* at 340 U. S. 317, where at least one member of the crowd "threatened violence if the police did not act," *id.* at 340 U. S. 317, where "the crowd was pressing closer around petitioner and the officer," *id.* at 340 U. S. 318, and where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot." *Id.* at 340 U. S. 321. And the record is barren of any evidence of "fighting words." See *Chaplinsky v. New Hampshire*, 315 U. S. 568.

...

These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection. The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.

"[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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions, and have profound unsettling effects as it presses for acceptance of an idea. 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. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v.*

Chicago, 337 U. S. 1, 337 U. S. 5. As in the *Terminiello* case, the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."

The area of application of the Constitution to the exercise of free speech is one of the most difficult areas of legal jurisprudence and a close review of the facts must be made in every free speech case. There can be no cookie cutter application of these legal principles to free speech cases.

FURR, ET AL. V. TOWN OF SWANSEA
(FUNDAMENTAL FREE SPEECH LAW)

Although *Furr, et al., v. Town of Swansea*, 594 F.Supp. 1543 (1984), is a permit case, it still contains a large amount of fundamental free speech law. It illustrates the requirements on laws restricting free speech in public places. Much of this law has direct application to the enforcement of the City of Columbia ordinance on noise in the case against the church for normal, loud noise.

The Federal District Court described the allegations of the complaint:

The plaintiffs allege in their complaint that each of them have on one or more occasions been arrested for preaching on the streets of Swansea, South Carolina without having previously obtained a permit from the Chief of Police or the Town Council as required by an Ordinance of the Town of Swansea. The Ordinance provides as follows:

Section 13.401. PERMIT REQUIRED FOR PREACHING, LECTURING, PUBLIC SPEAKING, EXHIBITING, AND ENTERTAINING ON STREETS. No gatherings for the purpose of preaching, lecturing, public speaking, exhibition, or entertainment of any nature will be permitted on the streets, sidewalks or publicways, except in accordance with a permit issued by the Mayor, upon written application made not less than twenty-four (24) hours prior to the time of such preaching, lecturing, public speaking, exhibition, or entertainment. *Section 13.401.1.*

Then the District Court explained the fact situation and began its discussion of the fundamental free speech law:

The plaintiffs testified during the hearing on the motion that they have periodically, each Saturday at about 10:00 o'clock A.M., proceeded to Swansea for the purpose of preaching the Gospel. They generally proceeded as follows: Only one plaintiff speaks at any given time, usually for a period of ten to fifteen minutes. While speaking, the minister stands near the edge of a sidewalk on Monmouth Street, where most of the commercial establishments are located. The other plaintiffs, while not preaching, generally stand on the other side of the same sidewalk, next to a building. When the minister speaking completes his remarks, another minister comes forward and speaks, usually for the same time period. Plaintiffs acknowledge that they speak loudly in order to be heard, but state that they are orderly in every respect; and that no inconvenience is occasioned to members of the public. The entire process usually concludes at about noon. The largest gathering which has assembled was no more than twelve persons. The preachers do not block the sidewalk or the street. They do, however, hold forth in a fervent, evangelical fashion which many townspeople find offensive. (Emphasis added).

The explanation of basic free speech law follows:

II

The ordinance, read in its entirety, prohibits preaching and public speaking on the streets of Swansea, South Carolina without a permit. Moreover, it is understood by the Mayor, Chief of Police and Town Council as having that effect. Persons desiring to preach or otherwise speak must, within "not less than twenty-four (24) hours" prior to such preaching, lecturing or public speaking, apply in writing for permission and state the "time and date of the proposed gathering, the estimated number of persons attending said gathering and the purpose of such gathering." Ordinance, Sections 13.401 and 13.401.1. Otherwise, preaching, lecturing and public speaking, exhibition and entertainment on the streets of Swansea is prohibited. *Id.* Application for the permit, up until ten days before the preliminary injunction hearing on January 16, 1984, had to be made on a form approved by the Town Council which, in addition to requiring the applicant to list his (her) name, telephone number, address, social security number and driver license number, provided that the "Location desired subject to approval by merchants in area in order to maintain good relations in area and also location desired may be changed to an area agreeable to both parties." The application form also stated that "this permit may be revoked by the Chief of Police or Mayor and Council at any time permit is violated and that [the applicant] will be subject to said charges violated."

Then the Court continued:

The Ordinance provides that the Mayor and Council shall issue the permit subject

to certain conditions including "the manner in which the proposed gathering is to take place" and "the surrounding businesses and the likely effect of the proposed gathering thereon." Ordinance, Section 13.401.2. And the Ordinance provides that after considering those factors the Town Council "shall have the authority to impose such time, place, and manner, restrictions, conditions, and safeguards upon preaching, lecturing, public speaking, exhibition or entertainment, *as it shall deem fit, proper, and necessary* to maintain public order." Ordinance, Section 13.401.3. It may not be gainsaid that the Town Council's authority under Section 13.401.3 extends to the imposition of any and all limitations deemed by the Town Council to be fit, proper and necessary to maintain public order, including ultimately the denial of a permit.

Then the Court applied the fundamental law to the Swansea ordinance:

III

The Ordinance, as written, confers upon the Town Council the absolute power to prohibit preaching and other public speaking on the streets of Swansea. For in deciding whether to impose restrictions upon preaching, lecturing, public speaking or entertainment, the Town Council is to be guided only by its own ideas of the likely effect of the proposed gathering on surrounding businesses, the traffic and the likely effect thereon and the "public convenience, safety, and welfare and the likely effect of the proposed gathering thereon." Thereupon, the Town Council may impose such restrictions "as it shall deem fit, proper, and necessary to maintain the public order." As such, the Ordinance is a prior restraint upon the plaintiffs' rights of freedom of speech and freedom of assembly, guaranteed by the First Amendment and protected from state interference by the Fourteenth Amendment to the Constitution of the United States. While the exercise of First Amendment freedoms may, under appropriate circumstances be limited, the Supreme Court has consistently held that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional."

An ordinance which makes the peaceful enjoyment of the freedoms of speech and assembly dependent upon the uncontrolled will of an official, as by requiring a permit or license which may be granted or withheld in the discretion of that official, is an unconstitutional prior restraint upon the enjoyment of those freedoms. *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958). And the Supreme Court has confirmed that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Lovell v. Griffin*, 303 U.S. at 452-453, 58 S.Ct. at 669 (1938); *Schneider v. State*, 308 U.S. at 159, 165, 60 S.Ct. at 149, 152 (1939); *Staub v. Baxley*, 355 U.S. at 319, 78 S.Ct. at 280 (1969); *Freedman v. Maryland*, 380 U.S. 51, 56-57, 85 S.Ct. 734, 737-738, 13 L.Ed.2d 649 (1965). Indeed, "the

Constitution can hardly be thought to deny to one subjected to the restraint of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1969).

The District Court made further application of the fundamental free speech law to the Swansea Ordinance:

The Supreme Court has condemned a variety of statutes and ordinances which contain no standards for the exercise of discretion by the officials having the right to grant or deny permits as violative of the First and Fourteenth Amendments. *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (an ordinance prohibiting the use of sound amplification devices except with permission of the chief of police was declared a violation of the First and Fourteenth Amendments); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (an ordinance prohibiting distribution of religious literature without a license was declared to be a prior restraint on freedom of speech in violation of the First and Fourteenth Amendment); *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (an ordinance which required a license from a local official for a public assembly on the city streets, highways or parks was declared void because it could be made the instrument of arbitrary suppression of free expression of views on national affairs); *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951) (no ordinance regulated the use of the park; however, by custom and on the advice of the Mayor of Havre de Grace, Maryland, Niemotko and colleagues, all Jehovah's Witnesses, applied for a permit to use the park on four consecutive Sundays. The request was denied. Thereafter, Niemotko and colleagues proceeded to hold their meeting. They were arrested and convicted of disorderly conduct. The Court reversed the convictions as violative of the First and Fourteenth Amendments); *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958) (an ordinance prohibiting solicitation of membership in an organization requiring membership dues or assessments without a permit issued by the Mayor and Council was held a violation of the First and Fourteenth Amendments by making the enjoyment of speech contingent upon the uncontrolled will of municipal authorities); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (a Birmingham ordinance prohibiting participation in parades processions or other public demonstrations without first obtaining a permit from the City Commission was held to be a "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority" and therefore unconstitutional); and *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) (Petitioners' convictions in a South Carolina Magistrate's Court of the common law crime of breach of peace were reversed as an infringement of constitutionally protected rights of free speech, free assembly and freedom to petition for redress of grievances, their convictions

having not resulted from the "even-handed application of a precise and narrowly drawn regulatory statute evidencing a legislative judgment that certain specific conduct be limited or prescribed").

Then the Court gave its holding that the Swansea Ordinance resulted in an unconstitutional restriction on the rights of the citizens to exercise their free speech rights on the Town sidewalks, within interference under a broad, non-definitive ordinance:

While the ordinance contains language which seeks to guide the licensing officials in their determination of the question whether to grant or withhold permission to preach or otherwise speak while upon the streets of Swansea, it reserves to the Town Council the authority to impose such restrictions and conditions upon the right to publicly speak as it deems fit and proper. No limitation upon the exercise of that authority is contained in the ordinance. No standards are set forth for the formulation of restrictions, conditions or safeguards which the Town Council may impose upon the right to speak. The Ordinance thus does not contain "narrow, objective and definite standards to guide the licensing authority" and is a prior restraint upon the plaintiffs' freedoms of speech and assembly, in violation of the First and Fourteenth Amendments to the United States Constitution. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

The fundamental definitions in *Furr, et al. v. Town of Swansea*, have direct application to any free speech constitutional challenge, and certainly should be applied to the operation of the City of Columbia noise ordinance under review in this instant case.

The District Court concluded:

Accordingly, the defendants are preliminarily enjoined from enforcing the ordinances and from interfering with the exercise by plaintiffs of the right to preach, speak or assemble upon the streets of Swansea, South Carolina.

IT IS SO ORDERED.

SUMMARY

Our state law reaches the same result in several cases that are relevant to the factual situation in earlier cases. In *State v. Perkins*, 412 S.E.2d 385 (S.C. 1991), the S.C. Supreme Court was called upon to interpret the portion of Section 16-17-530 which

prohibits one from "otherwise conducting himself in a disorderly or boisterous manner."

The facts in *Perkins* where that several persons came into the Anderson County Sheriff's Department to obtain a copy of an incident report. When they discovered that the report was not ready, they became upset and raised their voices in a threatening manner. They ~~was~~ arrested under the language quoted above.

The State Supreme Court reversed their convictions in a ruling that cited and followed the logic of *City of Houston, Texas v. Hill*. In *Perkins*, the S. C. Supreme Court ruled:

[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. *City of Huston, Texas v. Hill*, 107 S.Ct. 2502 (1987). The State may not punish a person for voicing an objection to a police officer where no "fighting words" are used. To punish only spoken words addressed to a police officer, a statute must be limited in scope to fighting words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Hill* at 2509-10.

The same law has been applied in other contexts even more similar to the 2010 case in the state interpretation of the rights of free speech. In the case of *In Re Jeremiah W.*, 576 S.E.2d 185 (S.C. App. 2003), the S. C. Court of Appeals held that a juvenile could not be convicted of a breach of the peace on the simple testimony of "yelling a profanity" at a police officer, and where he then held his hands up and questioned "what" the officer wanted with him. The court explained, "At that point Officer Cooke placed Jeremiah under arrest for being loud, boisterous, and using profanity in public, in violation of S.C. Code Ann. Section 16-17-530 (1976)." (Emphasis added).

In ruling, the Court of Appeals held that the trial court should have granted a directed verdict on the charge of breach of the peace:

In *State v. Perkins*, our supreme court determined that probable cause to

Exhibit "B"

arrest an individual “required more than profanity or loud and boisterous behavior directed at the officers.” *Pittman*, 537 S.E.2d at 566 (discussing *Perkins*, 412 S.E.2d385 (1991)). Therefore, we find Jeremiah was entitled to a directed verdict on the breach of peace charge.

Other language in *Jeremiah* affirms the position taken by the Defendant in the 2010 case. That court reviewed the definition of “fighting words,” and ruled that “there must be some evidence that Jeremiah’s actions/speech caused at least a minimal level of ‘nervousness, frustration, anxiety.’ or anger, or other evidence that the peacefulness of the neighborhood had been breached.” (referencing *State v. Poinsett*, 157 S.E.2d 570 (1967)).

The court noted that there were ten or fifteen people approximately 30 or 40 feet away from Jeremiah and the officer, but also noted that the officer “admitted that Jeremiah never addressed the crowd or asked them to do anything.” There was no evidence of crowd reaction to alleged “fighting words.”

The point here is that while the 2010 case is not a breach of the peace charge, the same test for proof of “fighting words” would be the State’s burden, and there is just no evidence, or even an allegation of the use of “fighting words” by Defendant. Finally, the *Jeremiah* court made is absolutely clear that simple profanity can not constitute “fighting words.” On this point, the court held: “It is well settled that the use of profanity alone does not constitute fighting words. See *Pittman*, 537 S.E.2d at 566.”

It is obvious from this review, that “disorderly conduct” and “breach of the peace” and trespass based on a verbal confrontation are crimes that require proof of more than loud or obscene speech. There must be a showing of the use of “fighting words” which would incite disruptive behavior by the “victim” or proof of some conduct accompanying the offensive speech that converts the verbal actions of the defendant into criminally

offensive conduct as opposed to just offensive speech.

In fact, in *Pittman*, the Court of Appeals was called on to compare the rulings in *Pittman* and *State v. Galloway*, 407 S.E.2d 662 (S.C. App. 1991), and gave this succinct distinction between constitutionally protected words alone and words and conduct that cross the line of protection: "*Perkins* requires more than profanity or loud and boisterous behavior directed at the officers. The decision in *Galloway* makes clear it was based on the fact that Galloway was boisterous, using obscenities, **and grossly intoxicated.**" (Emphasis in the original).

In the instant case against a church for "loud noise," the same result should follow because there is no clear standard of offensive speech; the ordinance is both overbroad and vague because the City ordinance is not narrow, objective, and definitive and leaves too much discretion in the enforcer, who has to rely on the subjective definition of "disturbing noises" from the complaining witness.

The serious medical conditions of the Defendants is documented by letters from their treating physicians which are attached to this memo.

There is further need for a continuance for counsel for defendants to be able to get independent "noise" readings on and in the property of the complaining witnesses. Timothy Ellis lived next door for 4 years with not complaint; the complaints started after Sheri Callahan started living with Timothy.

Respectfully Submitted,

/signed/

Orin G. Briggs SC Bar # 883

Attorney for Defendants
240 Heritage Trail
Lexington, SC 29072
803/957-4383
e-m: ogb-atty@sc.rr.com

September 6, 2014

BARRY D. OLIVER, MD, PA

PRACTICE LIMITED TO SPORTS MEDICINE
AND GENERAL ORTHOPAEDIC SURGERY

1911 HAMPTON STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE (803) 252-5791
FAX (803) 254-7215

September 4, 2014

Re: JOHNNIE CLARK, DOB: 12/09/1958, SS#: 266-51-5126

To Whom It May Concern:

Mr. Clark is currently under my care for his right hip arthritis. At this time, he is experiencing significant discomfort in his hip and back. This may be aggravated by prolonged standing or sitting. So, I recommend that per the patient's discretion he take intermittent breaks between the two.

I appreciate your accommodating my patient with this request. If you have any further questions or concerns, please do not hesitate to contact the office.

Sincerely,


Barry D. Oliver, M.D.



BURNETT W. GALLMAN, M.D.
RONALD L JOHNSON, M.D.
D. TAUNDOLYN SUBER, M.D.
4100 NORTH MAIN STREET
SUITE 201
COLUMBIA, SC 29203
(803) 786-0980
(803) 786-6452 Fax

B.W. GALLMAN, M.D.
Internal Medicine and
Gastroenterology
R. L. JOHNSON, M.D.
Internal Medicine and
Endocrinology
D. TAUNDOLYN SUBER, M.D.
Internal Medicine and
Gastroenterology

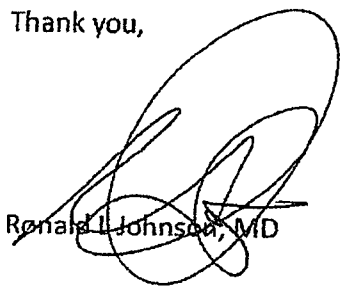
September 03, 2014

Re: Harriett J Clark

To Whom It May Concern:

Mrs. Harriett J Clark is unable to attend court or any court session due to her Bladder Incontinence problem which she is undergoing treatment for at this time. If you have any question or concern feel free to contact me at the number listed above.

Thank you,


Ronald L Johnson, MD

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

COLUMBIA CITY COURT

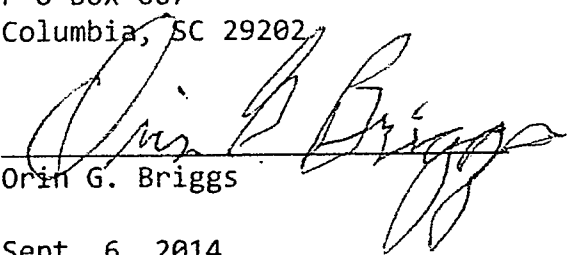
City of Columbia)
)
V.)
)
Johnnie L. Clark, H. J.)
Terry-Clark,)
Defendants.)
_____)

CERTIFICATE OF SERVICE

The undersigned certifies that he served this day a copy of Defendants' Motion to Dismiss Charges of Loud Noise on the Attorney for the City and the Trial Judge at the below listed addresses:

The Honorable Steven D. Dennis
Holler, Garner, Corbett, Ormond, Plante & Dunn
P O Box 11006
Columbia, SC 29211

Jess R. Mangum
Office of the City Attorney
P O Box 667
Columbia, SC 29202



Orin G. Briggs

Sept. 6, 2014

FILE COPY

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

City of Columbia,)

v.)

Johnnie L. Clark and Harriet Terry-Clark,)

Defendants.)

IN THE MUNICIPAL COURT
FOR THE CITY OF COLUMBIA

MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO
DISMISS

Ticket No. 75634GH, et. al.

On September 8, 2014, the Defendants moved for this Court to dismiss all charges against them, arguing the City's noise ordinance is both vague and overbroad, and thereby unconstitutional. Because the ordinance is constitutionally sound, the City respectfully requests that Defendants' motion be denied.

I. CITY ORDINANCE 8-67 PUT THE DEFENDANT ON REASONABLE NOTICE AS TO WHAT CONDUCT WAS PROHIBITED, AND THE DEFENDANTS' LATER WILLFUL VIOLATION OF THE ORDINANCE PRECLUDES THEIR CURRENT CLAIM OF VAGUENESS.

The City has the "power to regulate any pursuit that might affect the public health, morals, safety or comfort" of its citizens. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 93, 596 S.E.2d 917, 921 (2004). Exercise of the police power is subject to judicial intervention only when the action is arbitrary and it has no reasonable relation to a lawful purpose. *Id.* Here, the City enacted the Ordinance in order to maintain the peace, tranquility, safety, and order of its citizens. *Id.* Adoption and enforcement of the Ordinance is well within the City's police power, and the defendants' right to worship must be balanced against the City's duty to protect the health, safety, and welfare of its residents.

In *City of Beaufort v. Baker*, the South Carolina Supreme Court analyzed a noise ordinance that made it unlawful for “any person to willfully disturb any neighborhood or business in the City by making or continuing loud and unseemly noises.” *City of Beaufort v. Baker*, 315 S.C. 146, 149, 432 S.E.2d 470, 472 (1993). (emphasis added). The City of Beaufort claimed loud preaching on the streets of downtown interfered with the local merchants’ abilities to conduct business. Several sidewalk preachers were cited for violating the city’s noise ordinance. In analyzing whether the ordinance was unconstitutionally vague, the Court held:

The concept of vagueness...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 apprise judge and jury of standards for the determination of guilt.

Id. (emphasis added). The Court then looked to the plain language of the ordinance and found the ordinary meaning of the words “loud” and “unseemly” provided the defendants with sufficient notice of unlawful conduct. Using the objective “reasonable person” standard, the ordinance gave adequate notice of conduct necessary to establish a violation. *Id.* Moreover, the Beaufort defendants were warned their conduct violated the city’s noise ordinance before any citations were issued, and the defendants still refused to lower the volume of their preaching. *Id.* The defendants’ continued conduct coupled with their knowledge that their conduct was in contravention to the ordinance created a willful violation. That willful violation precluded the defendants from later making a vagueness claim because they were given fair notice that the exact conduct currently before the Court was in violation of the ordinance. *Id.* Based on the

plain meaning of the language of the ordinance and the defendants' willful violation, the Court held the city's noise ordinance was not unconstitutionally vague.

In this case, the Ordinance makes it unlawful to own a device which "cast(s) sound...in such a manner as to create unreasonably loud, excessive or disturbing noises...which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of...persons on neighboring premises." *City Code Sec. 8-67(a)*. Additionally, it is "unlawful for any person to operate...any instrument or sound-producing or sound-amplifying device so loudly as to unreasonable disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance." *City Code 8-67(c)*. (emphasis added)

Applying the *Baker* analysis to the ordinance at issue, the ordinary meanings of the words "loud," "loudly," "excessive," and "disturbing" provide reasonable notice as to unlawful conduct. Furthermore, Section 8-67 requires the use of radios, phonographs, musical instruments, or other sound-amplifying devices. This limiting language further clarifies the Ordinance and provides the Defendants with greater notice than the *Baker* ordinance.

Additionally, before issuing a citation, the City notified the Defendants that their conduct was in direct violation of the city's noise ordinance. The Defendants were asked to lower the noise being produced by their sound amplification devices or risk being penalized under the Ordinance. The Defendants refused to lower the noise and were subsequently cited. They were fully aware that their conduct was prohibited and cannot now claim ignorance as to what constituted a violation.

**II. CITY ORDINANCE 8-67 DOES NOT AUTHORIZE
OR ENCOURAGE ARBITRARY OR
DISCRIMINATORY ENFORCEMENT.**

To prove a statute has been discriminately enforced, "more must be shown than the fact that a benefit was denied to one person while conferred on another." *Christian Methodist Episcopal Church v. Rizzo*, 2010 U.S. Dist. LEXIS 15246, 2010 WL 619061 (D.S.C. 2010). The defendant establishes a violation only when he proves "that the state intended to discriminate." *Id.* (emphasis in original). "General, non-specific evidence is not sufficient to show that [another] establishment was allowed to operate in violation of the noise ordinance." *Id.*

In this case, the Defendants offered no evidence to show intentional discrimination by the City generally or the Columbia Police Department specifically. They failed to establish any pattern of discrimination by the City or any significant departures from normal police procedures that would indicate selective enforcement in this case. They offered no statements made by City Council or the police department that would indicate any intent to discriminate. The Defendants' suppositions about possible noise ordinance violations at William Brice Stadium lacked specificity and certainty. Their overly-broad generalizations failed to meet the standards established in *Rizzo*.

Additionally, it is axiomatic that if the Court finds the ordinance provides proper notice to citizens, as discussed in Section I of this memo, the Court must also find the ordinance provides a standard by which police officers can determine unlawful conduct. See generally *McCoy v. City of Columbia*, 929 F. Supp. 2d 541, 554 (D.S.C. 2013) (explaining ordinance which lacks objective standard for citizens and officers to determine unlawful conduct authorizes discriminatory enforcement).

**III. CITY ORDINANCE 8-67 IS CONTENT NEUTRAL,
JUSTIFIED BY A COMPELLING GOVERNMENT
INTEREST AND NARROWLY TAILORED TO
MEET THAT INTEREST.**

"The right to practice religion is a fundamental right. However, numerous courts have noted that the Free Exercise Clause . . . 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Christian Methodist Episcopal Church v. Rizzo*, 2010 U.S. Dist. LEXIS 15246, 2010 WL 619061 (D.S.C. 2010). The City may regulate protected speech "through enforcement of content-neutral...restrictions which are narrowly tailored to serve a significant governmental interest and leave open ample alternative avenues of communication. *City of Columbia v. Beaufort*, 315 S.C at 150, 432 S.E.2d at 472. Additionally, an ordinance that is neutral and generally applicable does not need to be justified by a compelling government interest "even if the law has the incidental effect of burdening a particular religious practice." *Id.*

On its face and as applied, the Ordinance does not attempt to regulate speech; a violation of the ordinance is not based on what was said, only the level at which it was said. The ordinance regulates "speech solely upon the noise generated, rather than the message conveyed." *Id.* Additionally, the City has a "substantial interest in protecting its citizens from unwelcome noise," and the ordinance is directly related to the health, safety, and welfare of the general population. *Id.* The ordinance is narrowly tailored to assist the City in alleviating problems caused by excessive noise within the city limits. The Ordinance's language further limits its application by requiring the use of a radio, phonograph, musical instrument, or other sound amplifying device. The Ordinance makes it clear that the City is not targeting speech. It is only

targeting amplified noise at such a level that disturbs the quiet enjoyment guaranteed to residents of the city.

The Defendants rely on *McCoy* in support of their position that the ordinance is unconstitutional. At issue in *McCoy* was City Ordinance 10-34(b), which stated, “It shall be unlawful for any person to interfere with or molest a police officer in the lawful discharge of his duties.” In analyzing whether the ordinance was overbroad, the Court held the ordinary meanings of “interfere” and “molest” were not limited to physical conduct, included speech, and therefore implicated the First Amendment’s protections. City Council “could have diminished the breadth of the Ordinance by including the adverb ‘physically’ before the phrase ‘interfere with or molest,’ but chose not to do so. *McCoy* at 551. Had the ordinance specified physical conduct alone, it is highly unlikely the City of Columbia’s police interference ordinance would have been held unconstitutional.

Unlike the police interference ordinance in *McCoy*, the ordinance at issue here implicates only physical conduct. A violation of the noise ordinance requires that the defendant maintain and operate a sound device in an unreasonably loud manner. The act that triggers the violation is the operation of the device – the physical act of turning the device on and turning the volume up. Because the ordinance targets the physical acts and effects of noise played at an unreasonable volume, the First Amendment concerns triggered in *McCoy* are not applicable.

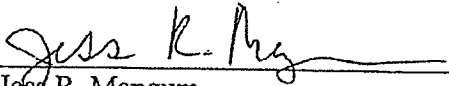
CONCLUSION

As noted by this Court during the Motions hearing, the victims in this case – and the entire neighborhood surrounding the defendant’s church – are a “captive audience” to the Defendants’ continued use of amplified sound devices in contravention of the City’s noise

ordinance. *Baker*, 315 S.C. at 151, 432 S.E.2d at 473. They are constantly exposed to excessive noise emanating from sound amplification devices used by the Defendants and their agents. They are subjected to loud and excessive noise while in the privacy of their own home, at all hours of the day and night, and on various days throughout the week. The City has an obligation to protect its citizens. The Ordinance, as currently written and applied, provides the City with an essential tool to regulate the health, safety, and welfare of its residents.

For the latter reasons, the City respectfully urges this Court to uphold the constitutionality of Section 18-67 and deny the Defendants' motion to dismiss.

Respectfully submitted,



Jess R. Mangum
Office of the City Attorney
P.O. Box 667
Columbia, South Carolina 29202
(803) 737.4242
Attorney for the City of Columbia

September 8, 2014
Columbia, South Carolina

THE SOUTH OF SOUTH CAROLINA

In the Circuit Court

2014CP400 5599



APPEAL FROM COLUMBIA CITY COURT

Steven D. Dennis, City Court Judge

Citations: 68898GJ, 68853GJ, 51422GQ,
46768GQ, 75634GH, 75637GH

The City of Columbia, ... Respondent

v.

Johnnie L. Clark and Harriet Terry-Clark Appellant

NOTICE OF APPEAL

JEANNETTE M. MORRIS
C.P. & C.S.

2014 SEP 12 PM 3:58

RICHLAND COUNTY
FILED

Defendants Johnnie L. Clark and Harriet Terry-Clark appeals the jury conviction on the six citations alleging excessive noise from the church into the home of the next-door neighbor. The sentence was issued by the Court on September 11, 2014 and Appellants received written notice of the sentences on September 12, 2014.

Counsel argues that the lower court made a number of errors of law which were prejudicial to the Appellants. The first error was the lower court failed to give any instructions to the jury about the First Amendment rights of the Appellants regarding free speech rights and freedom of religion rights. In fact, after the court gave the jury instructions, Counsel specifically asked the court to give the jury instructions on the law as set forth in *Edwards v. South Carolina*, 372 U.S. 229 (1963).

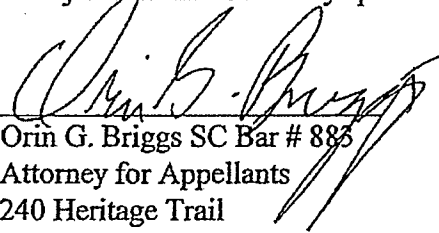
Second, Counsel also asked the lower court to explain to the jury the new Beaufort noise ordinance which include specific decibel readings for noise on the City's "main" business street. This is important because the City Attorney relied on a 1993 decision favorable to the general regulation of noise in the business district, *City of Beaufort v. Baker*, 432 S.E.2d 470 (1993).

The third error of law was to choice a jury from a pool of less that 40 available members of the jury pool.

The fourth major error of law was the court's sole reliance on the Circuit Court decision in *City of Columbia v. Eugene L. Ransdale*, CA# 92-CP-40-356 (which was not

a freedom of religion case) over the major Federal constitutional cases cited by Counsel for Appellants: *City of Houston v. Hill*, 482 U.S. 451 (1981); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Furr v. Town of Swansea*, 594 F.Supp. 1543 (1984), in which Judge Matthew Perry cited more than 20 classic federal constitutional cases on free speech; and *McCoy v. City of Columbia*, March 11, 2013, by order of U.S. District Court Judge Joseph F. Anderson, Jr., which gave an excellent discussion of vagueness and overbreadth.

Counsel respectfully asks this court to grant an early appeal, and to consider counsel's motion for a stay in the execution of his jail sentence of 14 days pending the appeal in the Circuit Court.



Orin G. Briggs SC Bar # 883

Attorney for Appellants

240 Heritage Trail

Lexington, SC 29072

803/957-4383

e-m: ogb-atty@sc.rr.com

September 12, 2014

Attachments:

Six sentencing sheets

City of Columbia v. Eugene L. Ransdale

Latest City of Beaufort noise Ordinance

Other Counsel of Record:

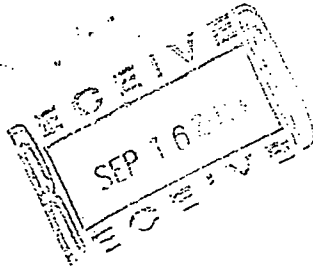
Jessica R. Mangum

Assistant City Attorney

City Attorney's Office

Post Office Box 667

Columbia, South Carolina 29202



THE SOUTH OF SOUTH CAROLINA
In the Circuit Court

APPEAL FROM COLUMBIA CITY COURT

Steven D. Dennis, City Court Judge

CA: 2014-CP-40-5599
Citations: 68898GJ, 68853GJ, 51422GQ,
46768GQ, 75634GH, 75637GH

2014 SEP 17 PM 3:39
JEANNETTE W. HOBBS
C.C.P. & D.S.
RICHLAND COUNTY
FILED

The City of Columbia, ... Respondent,
v.
Johnnie L. Clark and Harriet Terry-Clark Appellant.

AMENDED NOTICE OF APPEAL

Defendants Johnnie L. Clark and Harriet Terry-Clark appeals the jury conviction on the six citations alleging excessive noise from the church into the home of the next-door neighbor -- 5 under 8-67(c), 1 8-67(a). The sentence was issued by the Court on September 11, 2014 and Appellants received written notice of the sentences on September 12, 2014.

Counsel argues that the lower court made a number of errors of law which were prejudicial to the Appellants. The first error was the lower court failed to give any instructions to the jury about the First Amendment rights of the Appellants regarding free speech rights and freedom of religion rights. In fact, after the court gave the jury instructions, Counsel specifically asked the court to give the jury instructions on the law as set forth in *Edwards v. South Carolina*, 372 U.S. 229 (1963).

Second, Counsel also asked the lower court to explain to the jury the new Beaufort noise ordinance which includes specific decibel readings for noise on the City's "main" business street. This is important because the City Attorney relied on a 1993 decision favorable to the general regulation of noise in the business district, *City of Beaufort v. Baker*, 432 S.E.2d 470 (1993). The City of Columbia ordinance is attached to this Amended Notice of Appeal.

The third error of law was to choose a jury from a pool of less than 40 available members of the jury pool.

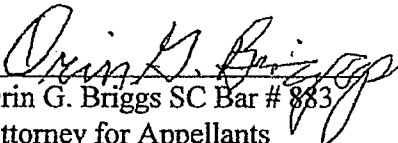
The fourth major error of law was the court's sole reliance on a Circuit Court decision for its decision to deny First Amendment protections for the trial Defendants.

The first amendment to the Notice of Appeal is that while the trial judge cited *City of Columbia v. Eugene L. Ransdale*, CA# 92-CP-40-356 (which was not a freedom of religion case) as authority of defining vagueness and overbreadth, his primary reliance was on *City of Columbia v. Johnny Gardner*, CA# 92-CP-40-0950 (Attached to the Amended Notice of Appeal) over the major Federal constitutional cases cited by Counsel for Appellants: *City of Houston v. Hill*, 482 U.S. 451 (1981); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Furr v. Town of Swansea*, 594 F.Supp. 1543 (1984), in which Judge Matthew Perry cited more than 20 classic federal constitutional cases on free speech; and *McCoy v. City of Columbia*, March 11, 2013, by order of U.S. District Court Judge Joseph F. Anderson, Jr., which gave an excellent discussion of vagueness and overbreadth.

Four federal decisions were cited by the trial judge as defining the usual words found in noise ordinances, with the Circuit Court giving its interpretation of these cases. The three major cases were *Jim Crockett Promotions, Inc. v. City of Charlotte*, 706 F.2d 486 (1983); *Kovacs v. Cooper*, 336 U.S. 77 (1949); and *Grayned v. City of Rockford*, 408 U.S. 104 (1972); none which involved a church and its freedom of religion.

The fifth major error of law and the second amendment to the Notice of Appeal is the error of the trial judge in granting a broad definition of admissible evidence on behalf of the City of Columbia, while enforcing a narrow definition of admissible evidence for the trial Defendants. One example of the latter is the Court's ruling on Counsel's attempt to show religious bias against the African-American church by inquiring about the main complaining witness' affiliation with a church or other religious organization. The trial judge denied this inquiry as being not relevant to the case.

Counsel respectfully asks this court to grant an early appeal, and to consider counsel's motion for a stay in the execution of Defendant Johnnie Clark's jail sentence of 14 days pending the appeal in the Circuit Court.


Orin G. Briggs SC Bar # 883
Attorney for Appellants
240 Heritage Trail
Lexington, SC 29072
803/957-4383

September 16, 2014

Attachments:

City of Columbia Noise Ordinance
City of Columbia v. Johnny Gardner
Attachments to Original Notice of Appeal

Other Counsel of Record:

Jessica R. Mangum
Assistant City Attorney
City Attorney's Office
Post Office Box 667
Columbia, South Carolina 29202

RICHLAND COUNTY
FILED
2014 SEP 17 PM 3:38
JEANETTE W. McBRIDE
C.C.P. & G.S.

THE SOUTH OF SOUTH CAROLINA
In the Circuit Court

APPEAL FROM COLUMBIA CITY COURT

Steven D. Dennis, City Court Judge

Citations: 68898GJ, 68853GJ, 51422GQ,
46768GQ, 75634GH, 75637GH

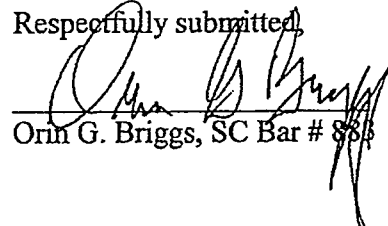
The City of Columbia, ... Respondent,
v.
Johnnie L. Clark and Harriet Terry-Clark Appellant.

MOTION TO STAY EXECUTION OF SENTENCE
PENDING APPEAL TO CIRCUIT COURT

Counsel for Appellants respectfully asks the Chief Judge of the City of Columbia Court to grant a stay of the 14 day jail sentence to the Pastor of the Rehoboth United Assemblies of the Apostolic Faith, Inc. pending the appeal to the Circuit Court.

IT IS SO MOVED.

Respectfully submitted,


Orin G. Briggs, SC Bar # 888

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
The City of Columbia,)
Respondent,)
vs.)
Johnnie L. Clark, H.J. Terry-Clark, et. al.,)
Appellants.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2014-CP-40-05599

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APPELLANTS' MEMORANDUM OF AUTHORITIES

This appeal arises from the prosecution and conviction of two ministers of the gospel by the City of Columbia for six municipal code citations¹ alleging excessive "noise" issued during the worship services of Rehoboth United Assemblies of the Apostolic Faith ("Church"). After a jury trial in which Appellants were not able to raise the First Amendment as a defense, or argue their rights to the reasonable free exercise of religion to the jury, both Appellants were convicted and fined. Pastor Johnnie L. Clark also served two weeks in jail. The trial court refused to stay the fines or sentence and they have been fully paid and served. A timely notice of appeal to this court ensued.

Appellants claim they have a constitutional, common law, and statutorily protected right to worship God without interference from the City, and that any such restrictions by the noise ordinance are constrained or limited by these protections. Specifically, Appellants

¹ which cite specifically to City of Columbia Municipal Noise Ordinance Sec. 8-67 – Radios, phonographs, musical instruments and other sound-amplifying devices.

....
(c) *Creating public nuisance.* It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

contend they should have been able to raise and assert their constitutional rights and arguments as a defense to the prosecution, and the burden was upon the City to establish that the ordinance in issue served a compelling state interest, and, as drafted, was narrowly tailored to achieve its purpose. Appellants maintain the trial court erred in its failure to recognize these fundamental protections provided by the South Carolina Religious Freedom Act ("SCRFA"), and both the U.S. and South Carolina Constitutions.

STANDARD OF REVIEW

The standard of review for appeals from municipal court convictions is limited to errors of law. *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011).

ERRORS OF LAW

The trial court failed to properly comprehend and apply the First Amendment to this case. In making this error, the court erroneously concluded that because the City of Columbia noise ordinance was "content neutral", the Appellants could neither raise nor argue religious freedom as a defense to the enforcement of such an ordinance, even though the alleged ordinance violations all occurred in conjunction with Appellant's worship services. The record is clear that the trial court made this determination from the inception of the case during pretrial motions and discussion (Tr. P2-4). Having made this determination, the court thereafter refused to allow the Appellants to raise the issue of religious freedom or constitutional vagueness of the statute before the jury or the court. The court viewed the case as merely about noise, devoid of content because it determined the ordinance was "content neutral" and therefore immune from religious freedom attack or attack on the basis of constitutional vagueness (Tr. P. 11, 12, 16, 36-37, 95, 156).²

² Christian preaching and teaching has historically been the subject of municipal persecution on the basis of "noise" and public disturbance: "....Paul and Silas have caused trouble all over the world," they shouted, "and now they are here disturbing our city, too." And Jason has welcomed them into his home. They are all guilty of treason

When the religious freedom argument was raised by counsel during closing argument, the court issued a legally erroneous curative charge to the jury indicating that the Defense counsel was attempting to make a legally impermissible argument characterized as "jury nullification", effectively allowing Appellants "lip service." The Court then advised the jury to disregard the argument and do their duty, in effect directing a verdict as to the religious freedom defense (Tr. Pp. 143-144). The court refused to give any kind of constitutional law charge, despite the request or consider the question of constitutional vagueness Free Speech, and Free Exercise. (Tr. P. 152).

The South Carolina Religious Freedom Act ("SCRFA"), S.C. Code Ann., Section 1-31-10 through —60, codifies the restrictions on the government from placing limitations on the free exercise of religion even when an ordinance or law is "content neutral." This chapter defines the "exercise of religion" as: "the exercise of religion under the First Amendment to the United States Constitution or Article I, Section 2 of the State Constitution." S.C. Code Ann., § 1-32-20. Section 1-32-20 goes on to define "state" as:

the State of South Carolina and any political subdivision of the State and includes a branch, department, agency, board, commission, instrumentality, entity, or officer, employee, official of the State or a political subdivision of the State or any other person acting under color of law.

This Title follows the same definition that has been the law in Federal Courts for more than 75 years since Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) and is set forth as follows:

against Caesar, for they profess allegiance to another king, named Jesus."⁸ The people of the city, as well as the city council, were thrown into turmoil by these reports.⁹ So the officials forced Jason and the other believers to post bond, and then they released them." Acts 17 V. 6-9

For an excellent and succinct discussion of how the "content neutral" theory has effected these rights see the attached article, "Free-Exercise Clause Overview" by Claire Mullally.

SECTION 1-32-40. Restriction on state's ability to burden exercise of religion.

The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:

- (1) in furtherance of a compelling state interest; and
- (2) the least restrictive means of furthering that compelling state interest.

Under the SCRFA, the standard applies even to an ordinance which is of "general applicability" (i.e. "content neutral"). Under SCRFA, the Appellants in this action were entitled to raise the statute and the Free Exercise Clause as a defense:

The purposes of this chapter are to: (1) restore the compelling interest test as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of compelling state interest will be imposed on all state and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened; and (2) provide a claim or defense to persons whose exercise of religion is substantially burdened by the State.

The trial court not only overlooked this statute and committed an obvious error of law, but also ignored the prevailing federal law on the subject which clearly governs this case and was repeatedly argued during the trial.

The authority of governments to place restrictions on or prohibit the Exercise of Religion and the Exercise of Free Speech in the public square is limited by the First Amendment and federal common law. Edwards v. South Carolina, 372 U.S. 229 (1963); Furr v. Town of Swansea, 594 F.Supp. 1543 (1984). Notwithstanding this clear, mandatory, and long-standing federal law, the trial judge pronounced his simplistic explanation of what he believed was the First Amendment "law" in the instant case. TT p. 156.

I'm going to tell you my interpretation, Mr. Briggs. First of all, I respect the First Amendment; I respect the Right to Speech and Religion. But if I'm in my own home with my doors and windows shut and there's any level of volume that interferes with my normal life, it is too much. I have a right to have privacy and peace in my own home.

This is a subjective, legally erroneous, and obviously wrong litmus test; the judge's ear is neither

the specification nor a permissible constitutional standard.

One of the most recent decisions of the U.S. Supreme Court on First Amendment Freedoms is Burwell v. Hobby Lobby Stores, Inc., No. 13-354; argued March 23, 2014; decided June 30, 2014, in which the Supreme Court declared a provision of an act of Congress to be a violation of the law on Freedom of Religion. While this decision was not a true constitutional case, it was based on the same standard in that the Supreme Court held that any law that infringes on the Freedom of Religion must meet the two part test of "is there a compelling state interest" that justifies the infringement and "was the means of restriction the least offensive method" of restricting the exercise of sincerely held religious beliefs which were infringed upon.

City of Columbia Ordinance 8-67 is unconstitutional as applied in this case because the trial court did not give any consideration to the federal mandate for testing the validity of a law that infringes on the First Amendment Freedom of Religion and Free Speech. This two part test has been the law of the land for reviewing First Amendment cases even before the famous Wisconsin v. Yoder, 406 U.S. 205 (1972); the case in which the Amish Religion had a constitutional right, based on sincerely held religious belief, to exempt boys at the age of 14 from school to work on the farm and 14 year old girls to leave school to devote their time to learning all the duties of a future wife in the home.

One of the classic free speech cases that shows that an actor does not have to be nice or respectful to authority in the exercise of his or her free speech rights is Terminiello v. Chicago, 369 U.S. 911 (1962), where the U. S. Supreme Court held:

Speech is often provocative and challenging . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a

substantive evil that rises far above public inconvenience, annoyance, or unrest. (Emphasis mine).

There is no evidence in the *Clark* case that the religious fervor in praising God ever exceeded the *Terminiello* requirement of "a substantive evil that rises far above public inconvenience, annoyance, or unrest." Without a clear review of any law that infringes these freedom rights under the federal tests for constitutionality, no court decision can be upheld that rules such a law to be a valid regulation.

Another important Free Speech case which addressed a South Carolina ordinance is *Furr v. Town of Swansea*, 594 F Supp. 1543 (1984). At this point, Appellants only quote a portion of the *Furr* decision:

The Supreme Court has condemned a variety of statutes and ordinances which contain no standards for the exercise of discretion by the officials having the right to grant or deny permits as violative of the First and Fourteenth Amendments. *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (an ordinance prohibiting the use of sound amplification devices except with permission of the chief of police was declared a violation of the First and Fourteenth Amendments); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (an ordinance prohibiting distribution of religious literature without a license was declared to be a prior restraint on freedom of speech in violation of the First and Fourteenth Amendment); *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (an ordinance which required a license from a local official for a public assembly on the city streets, highways or parks was declared void because it could be made the instrument of arbitrary suppression of free expression of views on national affairs); *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951) (no ordinance regulated the use of the park; however, by custom and on the advice of the Mayor of Havre de Grace, Maryland, Niemotko and colleagues, all Jehovah's Witnesses, applied for a permit to use the park on four consecutive Sundays. The request was denied. Thereafter, Niemotko and colleagues proceeded to hold their meeting. They were arrested and convicted of disorderly conduct. The Court reversed the convictions as violative of the First and Fourteenth Amendments); *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958) (an ordinance prohibiting solicitation of membership in an organization requiring membership dues or assessments without a permit issued by the Mayor and Council was held a violation of the First and Fourteenth Amendments by making the enjoyment of speech contingent upon the uncontrolled will of municipal authorities); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (a Birmingham ordinance prohibiting participation in parades, processions or other public demonstrations without first obtaining a permit from the City Commission was held to be a "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority" and therefore unconstitutional); and *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) (Petitioners' convictions in a South Carolina Magistrate's Court of the common law crime of breach of peace were reversed as an infringement of constitutionally protected rights of free speech, free assembly and freedom to petition for redress of grievances, their convictions having not resulted from the "even-handed application of a precise and narrowly drawn regulatory statute

evidencing a legislative judgment that certain specific conduct be limited or prescribed”).

While the ordinance contains language which seeks to guide the licensing officials in their determination of the question whether to grant or withhold permission to preach or otherwise speak while upon the streets of Swansea, it reserves to the Town Council the authority to impose such restrictions and conditions upon the right to publicly speak as it deems fit and proper. No limitation upon the exercise of that authority is contained in the ordinance. No standards are set forth for the formulation of restrictions, conditions or safeguards which the Town Council may impose upon the right to speak. The Ordinance thus does not contain “narrow, objective and definite standards to guide the licensing authority” and is a prior restraint upon the plaintiffs’ freedoms of speech and assembly, in violation of the First and Fourteenth Amendments to the United States Constitution. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

Accordingly, the Appellants are preliminarily enjoined from enforcing the ordinance and from interfering with the exercise by plaintiffs of the right to preach, speak or assemble upon the streets of Swansea, South Carolina.

The Appellants argued at trial and argue now for the dismissal of all the instant charges based upon Free Speech and the Free Exercise of Religion which are protected by the First and Fourteenth Amendments to the U. S. Constitution. Both federal and state constitutional law prohibits the punishment of nothing more than loud speech with or without amplification.

All free speech activity is protected from criminal prosecution, except by regulation as to time, place, and manner under a narrow, objective, and definitive law which prevents arbitrary discretion in decision-making by the law enforcement officer. Here, the City’s ordinance merely applies the standard of “unreasonable” which is necessarily subjective. Indeed according to the trial court, “any level of volume is too much”. Since the U. S. Supreme Court ruling in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) until the *Burwell v. Hobby Lobby*, Nos. 13-354 and 13-356, dated June 30, 2014, the law interpreting the First Amendment Rights of Freedom of Religion and Free Speech have been controlled by federal cases applying the First Amendment through the Fourteenth Amendment, yet the court did not apply these standards to the ordinance.

The City of Columbia ordinance grants too much discretion to the police enforcing the ordinance. The City of Columbia ordinance being enforced in the instant case is Sect. 8-67

(a) and (c):

(a) *Disturbing the public generally.* It shall be unlawful for any person to maintain and operate in any building or on any premises in the city any radio device or mechanical musical instrument or device of any kind whereby the sound therefrom is cast directly on the public streets and places in such a manner as to create unreasonably loud, excessive or disturbing noises and where such device is maintained and operated for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street, park, public place or of persons on neighboring premises.

(c) *Creating public nuisance.* It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

Recently, U.S. District Court Judge Joseph F. Anderson, Jr., in McCoy v. City of Columbia, March 11, 2013, reviewed a City of Columbia ordinance for vagueness and held:

A statute is impermissibly vague if it either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement."

This language is exactly what is wrong with the ordinance in this instant case; it fails to notify the speaker just how much "noise" is too much noise! The instant ordinance does not contain a "narrow, objective, and definite" standard to guide the police in the enforcement of the ordinance.

Since the U.S. Supreme Court ruling in *Cantrell v. Connecticut*, followed by Wisconsin v. Yoder, until the Bunvell v. Hobby Lobby case, the federal law interpreting the First Amendment Right of Freedom of Religion and Free Speech has been controlled by federal cases applying the First Amendment through the Fourteenth Amendment. During trial, counsel for Appellants cited four relevant Free Speech federal cases which should have directed the

court to the proper standard of review for the restriction of the First Amendment Rights of Speech and Religion Freedom. Those cases are: City of Houston v. Hill, 482 U.S. 451 (1981); Edwards v. South Carolina, 372 U.S. 229 (1963); Furr v. Town of Swansea, 594 F.Supp. 1543 (1984), in which Judge Matthew Perry cited more than 20 classic federal constitutional cases on free speech; and McCoy v. City of Columbia, March 11, 2013.

CONCLUSION

The trial court erred in failing to allow the Appellants to raise or assert their First Amendment Rights as a defense to this action. The court further erred in failing to apply the legal standard of a compelling state interest narrowly tailored to achieve its purpose before finding Appellants guilty. The court erred in failing to determine that the City's ordinance, as written and enforced, was unconstitutionally vague and subjective in violation of the Free Speech and Free Exercise of Religious Freedom. The only just decision in this appeal is a reversal of convictions and instructions to dismiss them and any other alleged violations of the City of Columbia ordinance 8-67, a refund of all court costs and fines, and an award of fees and costs pursuant to the Statute. Any decision short of a total reversal of these "convictions" would be a gross miscarriage of justice.



Orin G. Briggs SC Bar# 883

Attorney for Appellants

240 Heritage Trail

Lexington, SC 29072

803/957-4383

Email: obg-atty@sc.rr.com

Ponk



Henry Pickett Wall SC Bar # 5797

Bruner Powell Wall & Mullins, LLC

PO Box 61110

Columbia, SC 29260

803/252-7693

Email: hwall@brunerpowell.com

May 14, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
The City of Columbia,)
)
Respondent,)
)
Vs.)
)
Johnnie L. Clark; H.J. Terry-Clark, et al.)
)
Appellants.)
_____)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-40-05599

CERTIFICATE OF SERVICE

2015 MAY 14 PM 2:13
JESSICA R. MANGUM
CITY ATTORNEY'S OFFICE
COLUMBIA, SC

I, Bridget S. Steele a Legal Assistant with the law firm of Bruner, Powell, Wall & Mullins, LLC, attorneys for Appellants, do hereby certify that on this 14th day of May, 2015, I served the **Defendants Memorandum of Authorities** upon the following party via by Hand Delivery to the address as follows:

Jessica R. Mangum, Esq.
City Attorney's Office
1401 Main Street, 10th Floor
Columbia, SC 29201
Attorneys for Respondent

Bridget S. Steele
Bridget S. Steele

Columbia, South Carolina

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Free-exercise clause overview

[Claire Mullally](#)

Contributing Writer

Friday, September 16, 2011

“Congress shall make no law ... prohibiting the free exercise (of religion)” is called the free-exercise clause of the First Amendment. The free-exercise clause pertains to the right to freely exercise one’s religion. It states that the government shall make no law prohibiting the free exercise of religion.

Although the text is absolute, the courts place some limits on the exercise of religion. For example, courts would not hold that the First Amendment protects human sacrifice even if some religion required it. The Supreme Court has interpreted this clause so that the freedom to believe is absolute, but the ability to act on those beliefs is not.

Questions of free exercise usually arise when a citizen's civic obligation to comply with a law conflicts with that citizen's religious beliefs or practices. If a law specifically singled out a specific religion or particular religious practice, under current Supreme Court rulings it would violate the First Amendment. Controversy arises when a law is generally applicable and religiously neutral but nevertheless has the "accidental" or "unintentional" effect of interfering with a particular religious practice or belief.

Recent interpretation

The Supreme Court has been closely divided on this issue. In its 1990 decision Employment Division v. Smith, the Court greatly narrowed a 35-year-old constitutional doctrine that had required a government entity to prove that it had a "compelling interest" whenever a generally applicable law was found to infringe on a claimant's religious beliefs or practices. Under current constitutional law as explained in Smith, a government burden on a religious belief or practice requires little justification as long as the law in question is determined to be generally applicable and does not target a specific religion or religious practice. The Court in 1993 clarified how these principles were to apply in Church of the Lukumi Babalu Aye v. City of Hialeah. There, the Court closely analyzed a facially neutral and generally applicable law and determined that it was neither neutral nor generally applicable. Since the law burdened a religious practice (here the animal sacrifice ritual of the Santeria religion), the government would have to demonstrate that it had a compelling interest in passing the law. The Court would then "strictly scrutinize" the government's claims. In Hialeah, the government could not meet this burden and the law was stuck down.

Pre-Smith understanding

The first Supreme Court case that addressed the issue of free exercise was Reynolds v. U.S. (1878), in which the Court upheld a federal law banning polygamy over objections by Mormons who claimed that the practice was their religious duty. The Court in Reynolds distinguished between religious belief and religious conduct or action, stating that Congress was "deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive to good order." Recognizing the religious defense, the Court said, would "permit every citizen to become a law unto himself." While the government could not punish citizens because of their religious beliefs, it could regulate religiously motivated conduct, provided that it had a rational basis for doing so. This "rational basis test" became the standard for determining whether a law that impinged on a religious practice violated the free-exercise clause. As that standard was easy for the government to satisfy, for almost a century the courts generally rejected religious-freedom claims against generally applicable laws.

It is important to note also that until the decision of Cantwell v. Connecticut (1940), opened the door to federal litigation against the states for religion-clause claims (by ruling that the 14th Amendment's protections against state action "incorporates" or absorbs, the free-exercise clause of the First Amendment) there was no cause of action against the state for laws that may have impinged on religious practices. In effect, the Supreme Court did not have opportunity to review this issue until the mid-20th century, when various free-exercise clause cases made their way through the state courts to the Supreme Court.

In its 1963 decision Sherbert v. Verner, the Supreme Court found that the Constitution afforded at least some degree of government accommodation of religious practices. Adele Sherbert, a Seventh-day Adventist, was discharged by her South Carolina employer because she would not work on Saturday, her faith's Sabbath. When she could not find other employment that would not require her to work on Saturday, she filed a claim for unemployment benefits. South Carolina law provided that a person was ineligible for benefits if he or she failed, without good cause, to accept available suitable employment when offered. The state denied Sherbert benefits, saying she had not accepted suitable employment when offered, even though she was required to work on her Sabbath. The decision was upheld by the South Carolina Supreme Court.

The U.S. Supreme Court reversed the state court decision. Justice William Brennan wrote that although the Court had theretofore “rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs and principles,” the conduct or actions so regulated had “invariably posed some substantial threat to public safety, peace or order.” Since Sherbert’s “conscientious objection to Saturday work” was not “conduct within the reach of state legislation,” any law that resulted in an incidental burden to the free exercise of her religion must be justified by a “compelling state interest in the regulation of a subject within the State’s power to regulate.”

Thus, in *Sherbert*, the Court adopted a “compelling interest” standard that government must meet when a generally applicable law unintentionally burdened a claimant’s religious practices and beliefs. The state in *Sherbert* could not demonstrate such compelling interest: the mere possibility that allowing exemptions to the unemployment compensation laws for Saturday worshipers might result in fraudulent or spurious claims was not sufficiently compelling, the Court reasoned. Even if an increase in fraudulent claims could be proved, the state would nevertheless have to show that no alternative regulations could “combat such abuses without infringing First Amendment rights,” thus also introducing a doctrine requiring the government to demonstrate that it used the “least restrictive” means when enacting legislation that burdened a religious belief or practice.

It is interesting and important to note the legal and social context in which Justice Brennan articulated this “compelling state interest” standard for free-exercise clause claims. The civil rights litigation of the 1950s and 1960s had greatly informed the Court’s perspective. It had become clear to Brennan that the Court must give a “heightened scrutiny” to cases in which fundamental rights were at stake and require the state to demonstrate that the law in question served only interests that were of paramount importance. A law having a merely “rational,” “important,” “valid” or “legitimate” purpose could not withstand a claim that it infringed on a fundamental right.

In 1972, the Court reaffirmed that a generally applicable law, “neutral on its face” may nonetheless violate the First Amendment if such law “unduly burdens the practice of religion.” In *Wisconsin v. Yoder*, the Court held that the state’s interest in requiring a child’s compulsory attendance at school through age 16, though important, could not withstand a free-exercise claim by members of the Amish religious sect. An Amish family claimed that requiring their children to attend public schools after age 14 would expose them to “worldly influences” against their traditionalist beliefs and undermine the insular Amish community. The Court in *Yoder* noted that the purpose of mandatory education was to develop a productive, self-reliant citizenry, but that the state’s purpose must be examined in light of the particular circumstances of the case. Since the Amish had a 200-year tradition of training their adolescents to be productive members of their “separated agrarian” community, the government’s interests could still be achieved by requiring education only through age 14. This would obviate the burden to the Amish community’s right to freely exercise its religion, while the state’s overriding interest would still be served. In a clear statement of its doctrine, the Court in *Yoder* held that “[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”

After *Sherbert* and *Yoder*, the Court applied the religious-exemption doctrine by examining two questions: Has the government significantly burdened a sincerely motivated religious practice? If so, is the burden justified by a compelling state interest? Increasingly, however, the Court narrowed the concept of a “significant burden” to religion and in a series of decisions throughout the 1980s, the Court rejected many free-exercise claims on this basis. The Court also became more willing to label state interests as “compelling” in cases where religious practice was significantly burdened by a general law.

The *Smith* revolution

It was clear that the Supreme Court was struggling with the issue of requiring accommodations based on

the compelling-interest standard. In its 1990 decision *Employment Division v. Smith*, still a highly controversial opinion, the Court ruled that it would no longer give heightened scrutiny to the government's refusal to grant exemptions to generally applicable laws that unintentionally burden religious beliefs or practices.

In *Smith*, two counselors were fired from their jobs with a private drug rehabilitation organization because they ingested peyote at a ceremony of the Native American Church. The two men, members of the Native American Church, were determined to be ineligible for unemployment benefits because they had been fired for work-related "misconduct." The Oregon Supreme Court held that the prohibition against sacramental peyote use was invalid under the free-exercise clause and thus the men could not be denied unemployment benefits for such use. The U.S. Supreme Court held that the free-exercise clause permits the state to prohibit sacramental peyote use and the state can thus deny unemployment benefits to persons discharged for such use.

Justice Antonin Scalia, writing for the majority, declined to apply the balancing test of *Sherbert v. Verner*, greatly limiting the scope of that precedent. Instead Scalia reached back to the early opinion in *Reynolds v. U.S.* (the polygamy case), claiming that to require the government to show a "compelling interest" in enforcing a generally applicable law when such a law impedes on religiously motivated conduct permits the individual "to become a law unto himself," "invites anarchy" and would produce a "constitutional anomaly." It would, Scalia claimed, make a citizen's obligation to obey the law contingent on his religious beliefs. Scalia found that the Court had never in fact invalidated any government action on the basis of the *Sherbert* compelling-interest test except the denial of unemployment compensation (that *Smith* was itself an unemployment compensation case is not addressed in the decision). Scalia further stated that the only decisions in which the Court had held that the First Amendment barred the application of a generally applicable law to religiously motivated conduct involved not just free-exercise clause claims, but those claims *in conjunction with* other constitutional protections, such as freedom of speech and the press or the right of parents to direct the education of their children (*Yoder*). The *Smith* case, the Court said, did not involve such a "hybrid situation."

Justice Sandra Day O'Connor, although concurring in the outcome, vigorously disagreed with the Court's abandonment of the "compelling interest" standard, as did Justice Harry Blackmun in the dissent. O'Connor reasoned that the free-exercise clause provides relief from a burden imposed by government whether the burden is imposed directly through laws that prohibit specific religious practices, which would be clearly unconstitutional, or indirectly through laws that "in effect make abandonment of one's own religion ... the price of an equal place in society."

Post-*Smith* implications

In the three years following *Smith*, more than 50 reported free-exercise cases were decided against religious groups and individuals. As a result, more than 60 religious and civil liberties groups, including the American Civil Liberties Union, Concerned Women for America, People for the American Way and the National Association of Evangelicals, joined to draft and support the passage of the Religious Freedom Restoration Act — or RFRA. The act, which was signed by President Clinton on Nov. 17, 1993, restored the compelling-interest test and ensured its application in all cases where religious exercise is substantially burdened.

Also in 1993, the Supreme Court re-visited the religious exemption issue in *City of Hialeah*. After a Santeria church announced plans to establish a house of worship in Hialeah, the city enacted an ordinance prohibiting the ritual slaughter or sacrifice of animals, which is one of the religion's principal forms of devotion. The Supreme Court found that the history of the ordinance showed that it specifically targeted the Santeria practice of animal sacrifice while providing numerous exemptions for other

instances of animal slaughter, including Kosher slaughter. Since the ordinance both burdened religious practice and was neither neutral nor generally applicable, the Court would apply “strict scrutiny” and the “compelling interest” standard to the city’s actions. The ordinances could not withstand such scrutiny, the Court stated, holding them invalid under the free-exercise clause.

After *City of Hialeah*, the inquiry into whether a law is in fact “neutral” and “generally applicable” has provided claimants with ammunition in free-exercise clause claims (see *Fraternal Order of Police v. City of Newark*, and *Keeler v. Mayor of Cumberland*). Many “general” laws provide categorical exceptions of one kind or another. Arguably, once a legislature has carved out an exemption for a secular group or person, the law is no longer “generally applicable,” and thus subject to the *City of Hialeah* standard of strict scrutiny. Similarly, a claimant may prevail if he can prove that a law of general applicability that burdens religion is unevenly enforced (see *Rader v. Johnston*). However, some lower courts have interpreted *City of Hialeah* to mean that religious claimants must demonstrate an anti-religious motive when challenging a law that on its face is generally applicable, a difficult standard to prove.

While widely supported, RFRA was short-lived. On June 25, 1997, the Supreme Court, by a vote of 6-3, struck down the act as applied to state and local governments. The Court in *City of Boerne v. Flores* held that Congress overstepped its bounds by forcing states to provide more protection for religious liberty than the First Amendment, as interpreted by the Supreme Court in *Employment Division v. Smith*, required. While RFRA no longer applies to the states, it is still applicable to the federal government, as seen recently in several district court decisions.

In 2000, President Clinton signed the Religious Land Use and Institutionalized Persons Act, or RLUIPA, which mandates the use of the compelling-interest and least-restrictive means standards for free-exercise cases that involve infringements on religion from land-use laws and to persons institutionalized in prisons, hospitals and retirement or nursing homes. Cases challenging the constitutionality of RLUIPA are also making their way through the federal appellate courts.

Currently, 11 states have passed their own RFRAs, all of which reinstate the compelling-interest test to varying degrees.¹ In other states — such as Minnesota, Massachusetts and Wisconsin — the courts have held that the compelling-interest test is applicable to religion claims by virtue of their own state constitutions. In many states, however, the level of protection that applies to free-exercise claims is uncertain.

The jurisprudence regarding religious exemptions to generally applicable laws is clearly still in flux, providing an uneven and uncertain patchwork of protections to religious adherents.

Notes

¹ The following states had RFRAs as of Aug. 25, 2002: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina and Texas.

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STATE OF SOUTH CAROLINA	)	5TH CIRCUIT COURT
	)	OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Sheri Callahan and Tim Ellis,	)	CA No.: 2013-CP-40-3122
	)	
Plaintiffs,	)	
v.	)	MEMORANDUM IN SUPPORT
	)	OF APPEAL OF CRIMINAL
Johnnie L. Clark, H.J. Terry-Clark,	)	CONVICTIONS IN CITY OF
et. al	)	COLUMBIA COURT
	)	
Defendants.	)	
_____	)	

Defendants, through counsel, would show this court that numerous reversible errors were committed by the lower court trial judge.

SUMMARY OF REVERSIBLE ERRORS

The trial judge refused to instruct the jury on the fundamental constitutional rights of the defendants for their First Amendment Rights for Free Speech and Freedom of Religion. TT, p. 144, 152, 156, 168. This argument is set out on page 152 of the trial transcript:

Q. The Court: Mr. Briggs, are you okay with my charge?

A. Mr. Briggs: No objection and no complaint [with what you instructed], your Honor. But I feel like they need some constitutional law and I would suggest a summary of the *Edwards* case, your Honor. That's all I've got to say.

The trial court denied this requested charge.

Although the trial judge allowed the prosecution to challenge the motive of Defendant Apostle Clark, he did not allow the Defendants' attorney to introduce evidence of the female complaining witness's bias against the religious rights of Defendants.

TT p. 77, 78, 79 Attached as Exhibit "A".

The trial judge refused to allow Defense counsel to ask a series of questions about Ms. Callahan's views or bias about religion. The most important part of that issue would have been the question posed on TT p. 77 -- "Ms. Callahan do you have any affiliation with a church or other religious organization?" Of course this would have been followed up with questions about how often she attended church and what her opinion was about conservative religious views.

This opportunity to go into her motive for all the complaints about religious noise was denied by the trial judge although he allowed the City Attorney to quiz Apostle Clark about his motive in not obeying the subjective ordinance. See TT p. 77, 78, 79, 80 attached as Exhibit "A".

Except for a fair number of leading questions objected to by Defense counsel, the trial judge ruled in favor of most of the prosecution's objections and against most of the objections to evidence offered by Defense Counsel.

The trial judge allowed the City Attorney to interrupt Defense Counsel's closing argument, while accusing counsel of arguing "jury nullification," and then the judge expressed his support of that objection by explaining what jury nullification is. The truth is that in 47 years of the practice of law, I have never made the jury nullification argument and did not make that point when I was interrupted. My intent is made quite clear at page 144 of the trial transcript:

Mr. Briggs: Since you raise the point, I hadn't even thought about that subject, okay. The point I'm making, ladies and gentlemen, is the judge will tell you what the law is so what you have to do is take the facts you heard, what testimony you believe, what you don't believe and apply the law that he says about it. But I just wanted to remind you that we are talking about the First Amendment, not the tenth or anything like that. But what the City wants you to do is for you to say that two citizens can trump thirty church members, the church

itself and these constitutional protections. They want you to forget about all those and quote, protect the two citizens.

There was one more critical discussion in my closing argument which, because of the distortion and misrepresentation by the City attorney, shows the very subjective aspect of the police enforcement of ordinance 8-67 (TT p. 144, 145):

Mr. Briggs Apparently all the citations [55] came from complaints in a single room of the house, namely the living room [closest room to the church window]. They have six rooms in the house. Why didn't the police take readings in those other five rooms? There had to be a room where you couldn't hear noise that at one time was for thirty-five minutes. At other times it might have been more, other times at may have been less. My question is why didn't the police test those other rooms?

In fact, Captain Marsh said on a telling point that the decision of whether or not to give a citation was -- the police were influenced by the citizens' definition of too much. I'm sorry, you can't delegate that decision to a citizen. Now how many times did they do that and how many times did the police make their own mind up; we don't know.

There is one more very relevant comment I made to the jury, which they apparently ignored because of the lack of instructions on the constitutional issues by the judge: "Your job is to decide whether a church through their leaders can be punished for praising God in a dramatic manner just to satisfy the bias of two neighbors." (Emphasis added).

This discussion shows the critical importance of the failure of the trial judge to instruct the jury on the extremely relevant standard for testing laws which infringe on the First Amendment Rights of Free Speech and Freedom of Religion.

It would be important for this court to fully review the legal memo filed before the trial as part of the Defendants' argument on the critical First Amendment issues.

Attached as Exhibit "B".

The next error was the trial court refusing to follow the mandate about piercing the corporate veil before holding church members, instead of the corporation, responsible for the alleged criminal conduct. He failed to acknowledge the need for the prosecution to present evidence to justify “piercing of the corporate veil” before individuals in the church leadership could be criminally charged and tried. See TT p. 151 - 153.

Although corporations initially served only limited purposes, the Industrial Revolution spurred their development. The corporation became the ideal way to run a large enterprise, combining centralized control and direction with moderate investments by a potentially unlimited number of people.

The corporation today remains the most common form of business organization because, theoretically, a corporation can exist forever and because a corporation, not its owners or investors, is liable for its contracts. But these benefits do not come free. A corporation must follow many formalities, is subject to publicity, and is governed by state and federal regulations. See *Drury Development Corp. v. Foundation Insurance Co.*, 668 S.E.2d 798 (SC 2008); *Mid-South Management Co., Inc.*, 649 S.E.2d 135 (Ct.App. 2007); and *Sturkie v. Sifly and Walter, et al.*, 313 S.E.2d 316 (Ct.App. 1984).

There is one more important legal error made by the trial judge which should be discussed up front. In his instructions to the jury, he discussed in detail a number of Apostle Clark crimes, all of which except a few bad checks were more than 15 years in the past. See Criminal Rule of Evidence 404 which shows that evidence of old crimes cannot be used to impeach the character of the accused, and when character is attacked, it must be by the use of opinion testimony, not direct evidence of old crimes. TT p. 164, 165.

TRIAL JUDGE IGNORED FUNDAMENTAL STATE LAW ON THE DEFINITION OF FIRST AMENDMENTS RIGHTS

The South Carolina codified law on the restrictions on government placing limitations of the Exercise of Religious Freedom is the same definition that has been the law in Federal Courts for more than 75 years since *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) and is as follows:

SECTION 1-32-40. Restriction on state's ability to burden exercise of religion.

The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:

- (1) in furtherance of a compelling state interest; and
- (2) the least restrictive means of furthering that compelling state interest.

HISTORY: 1999 Act No. 38, Section 1.

The entire Religious Freedom Act is attached to this memorandum as Exhibit "C", quoted here for easy reference. Please note the reference to *Sherbert v. Verner*, 374 U.S. 398 (1963), in the Act, which of course was a South Carolina case denying the state from punishing an employee for insisting that she not work on her Sabbath.

MANDATORY FEDERAL LAW

There are probably more than 70 federal cases that clearly establish the law on the very limited authority of governments to place restrictions on or prohibit the Exercise of Religion and the Exercise of Free Speech in the public square, including as many as several dozen U. S. Supreme Court decisions that place the identical limitations on government restrictions of these First Amendment Rights pronounced years ago and codified in SC Code 1-32-10 thru 1-32-60. These cases includes *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Furr v. Town of Swansea*, 594 F.Supp. 1543 (1984).

Notwithstanding this clear, mandatory, and long-standing federal law, the trial judge pronounced his simplistic explanation of what he believed was the First Amendment "law" in the instant case. TT p. 156.

I'm going to tell you my interpretation, Mr. Briggs. First of all, I respect the First Amendment; I respect the Right to Speech and Religion. But if I'm in my own home with my doors and windows shut and there's any level of volume that interferes with my normal life, it is too much. I have a right to have privacy and peace in my own home.

This of course is not the binding definition of the Rights under the First Amendment to the U. s. Constitution. See the case which involved demonstrations in front of the home of an abortion doctor: *Frisby v. Schultz*, 487 U.S. 474 (1988).

THE CORRECT FIRST AMENDMENT FEDERAL LAW

One of the most recent decisions of the U. S. Supreme Court on First Amendment Freedoms is *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354; argued March 23, 2014; decided June 31, 2014, in which the Supreme Court declared a provision of an Act of Congress to be a violation of the law on Freedom of Religion. While this decision was not a true constitutional case, it was based on the same standard in that the Supreme Court held that any law that infringes on the Freedom of Religion must meet the two part test of "is there a compelling state interest" that justifies the infringement and "was the means of restriction the least offensive method" of restricting the exercise of sincerely held religious beliefs which were infringed.

The *Hobby Lobby* Supreme Court first stated the key issue in the case, and then in the concluding paragraphs of the decision explained the application of the two part test to judge whether the Act of Congress on contraceptives paid for by the employer was contrary to the sincerely held religious beliefs of the closed corporation owners:

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*, permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the *BURWELL v. HOBBY LOBBY STORES, INC.* [to freely exercise its religious beliefs] prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

...

Then the Supreme Court stated the key issue:

V Since the HHS contraceptive mandate imposes substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. 1(b)(2). (Emphasis added)

...

B. The least-restrictive means standard is exceptionally demanding, See *City of Boerne*, 521 U. S., at 532, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§2000bb-1(a), (b)(requiring the Government to "demonstrat[e] that application of [a substantial] burden to *the person* . . . is the least restrictive means of furthering [a] compelling governmental interest" Cite as: 573 U. S. ____ (2014).

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see §2000bb-1(b)(2), that 'this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. See "Birth Control: Medicines to Help You" online <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm>. Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all

FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office's most recent forecasts, ACA's insurance coverage provisions will cost the Federal Government more than \$1.3 trillion through the next decade. See CBO, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014, p. 2.36 If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.

HHS contends that RFRA does not permit us to take this option into account because "RFRA cannot be used to require creation of entirely new programs." Brief for HHS in 13-354, at 15. But we see nothing in RFRA that supports this argument, and drawing the line between the "creation of an entirely new program" and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA (Religious Land Use and Institutionalized Persons Act of 2000), may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. Cf. §2000cc-3(c) (RLUIPA: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. See *supra*, at 9-10, and nn. 8-9. Under that accommodation, the organization can self certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§147.131(b)(4), (c)(1); 26 CFR §§54.9815-2713A(a)(4), (b). If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries." 45 CFR §147.131(c)(2); 26 CFR §54.9815-2713A(c)(2).

...

C HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction. HHS points to no evidence that insurance plans in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate. It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome. In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *Post*, at 32–33. Our decision today provides no such shield.

The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

...

Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries

about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. See *Post*, at 32–35. In making this plea, the dissent reiterates a point made forcefully by the Court in *Smith*. 494 U. S., at 888– 889 (applying the *Sherbert* test to all free-exercise claims “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”).

But Congress, in enacting RFRA, took the position that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 U. S. C. §2000bb(a)(5). The wisdom of Congress’s judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns. (Emphasis added).

The judgment of the Tenth circuit in No. 13-354 is affirmed, the judgment of the Third Circuit in No. 13-356 is reversed, and that case is remanded for further proceedings consist with this opinion.

It is so ordered

Of course the federal law has direct application to the constitutional question about the Columbia ordinance in the *Clark* case. The obvious point here is that if the Federal Constitutional mandate is clear enough to hold that an Act of Congress violates the U. S. Constitution, it is certainly capable of declaring a lowly City ordinance to be a violation of that same Constitutional Right.

City of Columbia Ordinance 8-67 is clearly unconstitutional because the trial court did not give any consideration to the federal mandate for testing the validity of a law that infringes on the First Amendment Freedom of Religion and Free Speech.

In fact, the issues in the criminal and civil cases have been before three state trial courts and not one of these courts gave any attention to the First Amendment law and

obviously failed to address the two-part threshold standard for testing such laws!

This two part test has been the law of the land for reviewing First Amendment cases even before the famous *Wisconsin v. Yoder*, 406 U.S. 205 (1972); the case in which the Amish Religion had a constitutional right, based on sincerely held religious belief, to exempt boys at the age of 14 from school to work on the farm and 14 year old girls to leave school to devote their time to learning all the duties of a future wife in the home.

One of the classic free speech cases that shows that an actor does not have to be nice or respectful to authority in the exercise of his or her free speech rights is

Terminiello v. Chicago, 69 S.Ct. 894 (1974, where the U. S. Supreme Court held:

Speech is often provocative and challenging . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a substantive evil that rises far above public inconvenience, annoyance, or unrest. (Emphasis added).

There is no evidence in the *Clark* case that the church's religious fervor in praising God every exceeded the *Terminiello* requirement of "a substantive evil that rises far above public inconvenience, annoyance, or unrest." Without a clear constitutional review of any law that infringes these First Amendment rights under the federal tests for constitutionality, **no court decision can be upheld that rules such a law to be a valid regulation.** (Emphasis added).

Another Supreme Court case that supports this legitimate hostility to government suppression of dramatic free speech, even vociferous, derogatory speech to the police, as a valid part of the Exercise of free Speech is explained in *City of Houston v. Hill*, 107 S.Ct. 2502 (1987). In this case a citizen loudly and vociferously objected to the arrest of a friend, even calling the police officer a Nazi.

In *City of Houston, Texas v. Hill*, the U. S. Supreme Court, in a 9-0 ruling, clearly established the constitutional prohibition against the punishment of pure speech, even in the context of that case where there was a verbal interference with a police officer making an arrest. The *Houston* ordinance was similar to the instant ordinance in that it attempted to punish words alone.

On this issue, the Supreme Court, at 2509, noted: "Accordingly, the enforceable portion of the ordinance makes it 'unlawful for any person to . . . in any manner oppose, molest, abuse, or interrupt any policeman in the execution of his duty,' and thereby prohibits verbal interruptions of police officers." (Emphasis added).

In explaining its ruling, the Supreme Court noted, "This Houston ordinance, however, is not narrowly tailored to prohibit only disorderly conduct or fighting words." (Emphasis added).

The same can be said about restrictions on private religious speech as was done by the City ordinance in the instant case. There is no allegation of any kind of disruptive conduct in *Clark*, the use of "fighting words", or some other criminal conduct along with the speech that would reasonably provoke the hearer into defensive conduct. The City of Columbia ordinance is just as vague and overbroad as the *City of Houston* ordinance held to be unconstitutional in *City of Houston v. Hill*. Counsel argues that the point here is that unless such an ordinance limits criminal conduct and truly illegal speech, such legislation is unconstitutional.

Another important Free Speech case which addressed a South Carolina ordinance is *Furr v. Town of Swansea*, 594 F. Supp. 1543 (1984). At this point, counsel would only quote a portion of the *Furr* decision:

The Supreme Court has condemned a variety of statutes and ordinances which contain no standards for the exercise of discretion by the officials having the right to grant or deny permits as violative of the First and Fourteenth Amendments. *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (an ordinance prohibiting the use of sound amplification devices except with permission of the chief of police was declared a violation of the First and Fourteenth Amendments); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (an ordinance prohibiting distribution of religious literature without a license was declared to be a prior restraint on freedom of speech in violation of the First and Fourteenth Amendment); *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (an ordinance which required a license from a local official for a public assembly on the city streets, highways or parks was declared void because it could be made the instrument of arbitrary suppression of free expression of views on national affairs); *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951) (no ordinance regulated the use of the park; however, by custom and on the advice of the Mayor of Havre de Grace, Maryland, Niemotko and colleagues, all Jehovah's Witnesses, applied for a permit to use the park on four consecutive Sundays. The request was denied. Thereafter, Niemotko and colleagues proceeded to hold their meeting. They were arrested and convicted of disorderly conduct. The Court reversed the convictions as violative of the First and Fourteenth Amendments); *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958) (an ordinance prohibiting solicitation of membership in an organization requiring membership dues or assessments without a permit issued by the Mayor and Council was held a violation of the First and Fourteenth Amendments by making the enjoyment of speech contingent upon the uncontrolled will of municipal authorities); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (a Birmingham ordinance prohibiting participation in parades, processions or other public demonstrations without first obtaining a permit from the City Commission was held to be a "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority" and therefore unconstitutional); and *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) (Petitioners' convictions in a South Carolina Magistrate's Court of the common law crime of breach of peace were reversed as an infringement of constitutionally protected rights of free speech, free assembly and freedom to petition for redress of grievances, their convictions having not resulted from the "even-handed application of a precise and narrowly drawn regulatory statute evidencing a legislative judgment that certain specific conduct be limited or prescribed").

...

While the ordinance contains language which seeks to guide the licensing officials in their determination of the question whether to grant or withhold permission to preach or otherwise speak while upon the streets of Swansea, it reserves to the

Town Council the authority to impose such restrictions and conditions upon the right to publicly speak as it deems fit and proper. No limitation upon the exercise of that authority is contained in the ordinance. No standards are set forth for the formulation of restrictions, conditions or safeguards which the Town Council may impose upon the right to speak. The Ordinance thus does not contain "narrow, objective and definite standards to guide the licensing authority" and is a prior restraint upon the plaintiffs' freedoms of speech and assembly, in violation of the First and Fourteenth Amendments to the United States Constitution. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

Accordingly, the defendants are preliminarily enjoined from enforcing the ordinance and from interfering with the exercise by plaintiffs of the right to preach, speak or assemble upon the streets of Swansea, South Carolina.

IT IS SO ORDERED.

The defendants, through counsel, argue for the dismissal of all the instant charges based upon Free Speech and the Free Exercise of Religion which are protected by the First and Fourteenth Amendments of the U. S. Constitution. Both federal and state constitutional law prohibits the punishment of nothing more than loud speech with or without amplification.

All free speech activity is protected from criminal prosecution, except by reasonable regulation as to time, place, and manner under a narrow, objective, and definitive law which prevents arbitrary discretion in decision-making by the law enforcement officer.

Since the U. S. Supreme Court ruling in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) until the *Burwell v. Hobby Lobby*, Nos. 13-354 and 13-356, dated June 30, 2014, the law interpreting the First Amendment Rights of Freedom of Religion and Free Speech have been controlled by Federal cases applying the First Amendment through the Fourteenth Amendment.

No state court case has any authority to make a final ruling on a Freedom of Religion or Free Speech case. See the short list of relevant cases cited in the *Clark*

Notice of Appeal:

The fourth major error of law was the court's sole reliance on the Circuit Court decision in *City of Columbia v. Eugene L. Ransdale*, CA# 92-CP-40-356 [which was not a freedom of religion case] over the major Federal constitutional cases cited by Counsel for Appellants: *City of Houston v. Hill*, 482 U.S. 451 (1981); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Furr v. Town of Swansea*, 594 F.Supp. 1543 (1984), in which Judge Matthew Perry cited more than 20 classic federal constitutional cases on free speech; and *McCoy v. City of Columbia*, March 11, 2013, by order of U.S. District Court Judge Joseph F. Anderson, Jr., which gave an excellent discussion of vagueness and overbreadth.

ANOTHER IMPORTANT CASE ON NOISE

One of the most important state cases about Free Speech is *Edwards v. South Carolina*, 372 U.S. 229 (1963), which reviewed the affirmation of the criminal conviction of the defendants by the South Carolina Supreme Court:

The petitioners, 187 in number, were convicted in a magistrate's court in Columbia, South Carolina, of the common law crime of breach of the peace. Their convictions were ultimately affirmed by the South Carolina Supreme Court, 239 S.C. 339, 123 S.E.2d 247. We granted certiorari, 369 U. S. 870, to consider the claim that these convictions cannot be squared with the Fourteenth Amendment of the United States Constitution. There was no substantial conflict in the trial evidence. Late in the morning of March 2, 1961, the petitioners, high school and college students of the Negro race, met at the Zion Baptist Church in Columbia. From there, at about noon, they walked in separate groups of about 15 to the South Carolina State House grounds, an area of two city blocks open to the general public. Their purpose was "to submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and our dissatisfaction with the present condition of discriminatory actions against Negroes in general, and to let them know that we were dissatisfied, and that we would like for the laws which prohibited Negro privileges in this State to be removed."

...

Then the *Edwards* U.S. Supreme Court explained why the law and convictions were unconstitutional:

In the situation and under the circumstances thus described, the police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which, as his later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail. (Emphasis added)

Upon this evidence, the state trial court convicted the petitioners of breach of the peace, and imposed sentences ranging from a \$10 fine or five days in jail to a \$100 fine or 30 days in jail. In affirming the judgments, the Supreme Court of South Carolina said that, under the law of that State, the offense of breach of the peace "is not susceptible of exact definition," but that the "general definition of the offense" is as follows: "In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence . . . , it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense. . . ."

"By 'peace,' as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society."
239 S.C. at 343-344, 123 S.E.2d at 249.

[It is clear that the State Supreme Court opinion about the need for public peace in the last two paragraphs is wrong as the opinion of the *Clark* trial court is wrong.]

...

And it is clear to us that, in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances. It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *Gitlow v. New York*, 268 U. S. 652; *Whitney v.*

California, 274 U. S. 357; *Stromberg v. California*, 283 U. S. 359; *De Jonge v. Oregon*, 299 U. S. 353; *Cantwell v. Connecticut*, 310 U. S. 296. (Emphasis added).

...

Not until they were told by police officials that they must disperse on pain of arrest did they do more. Even then, they but sang patriotic and religious songs after one of their leaders had delivered a "religious harangue." There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was "ample."

This, therefore, was a far cry from the situation in *Feiner v. New York*, 340 U. S. 315, where two policemen were faced with a crowd which was "pushing, shoving and milling around," *id.* at 340 U. S. 317, where at least one member of the crowd "threatened violence if the police did not act," *id.* at 340 U. S. 317, where "the crowd was pressing closer around petitioner and the officer," *id.* at 340 U. S. 318, and where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot." *Id.* at 340 U. S. 321. And the record is barren of any evidence of "fighting words." See *Chaplinsky v. New Hampshire*, 315 U. S. 568.

...

In the situation and under the circumstances thus described, the police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which, as his later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail. (Emphasis added).

These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection. The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.

"[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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions, and have profound unsettling effects as it presses for acceptance

of an idea. 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. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. Chicago*, 337 U. S. 1, 337 U. S. 5. As in the *Terminiello* case, the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand." (Emphasis added for the fuller quote from *Terminiello*.)

It is imperative to point out that any of the key language in *Edwards v. South Carolina* can and should be applied in the test of whether the City of Columbia ordinance is unconstitutional.

The City of Columbia ordinance being enforced in the instant case is Sect. 8-67

(a) and (c):

(a) Disturbing the public generally. It shall be unlawful for any person to maintain and operate in any building or on any premises in the city any radio device or mechanical musical instrument or device of any kind whereby the sound therefrom is cast directly on the public streets and places in such a manner as to create unreasonably loud, excessive or disturbing noises and where such device is maintained and operated for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street, park, public place or of persons on neighboring premises.

(c) Creating public nuisance. It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

The City of Columbia ordinance grants too much discretion to the police enforcing the ordinance and is clearly unconstitutional as applied to the Defendants.

Defendants argue that the language in this ordinance is both overbroad and vague according to established federal law. Also, it is enforcing a private "nuisance" not a public nuisance, so criminal prosecution is illegal. (cite cases)

DEFINITIONS OF OVERBREADTH AND VAGUENESS

Recently, U.S. District Court Judge Joseph F. Anderson, Jr., in *McCoy v. City of Columbia*, March 11, 2013, reviewed a City of Columbia ordinance which ordered a person to not "interfere with or molest a police officer in the lawful discharge of his duties." Sect. 10-34(b). (Emphasis added).

The Court described the constitutional issues as follows:

The Plaintiff, Defendant in a criminal charge, challenged the ordinance on two grounds -- that it was overly broad and vague.

The legal standards for analyzing whether the Ordinance is unconstitutionally overbroad or vague are set forth in detail in the Report and Recommendation, and this court only briefly summarized them here. First, regarding overbreadth, "only a statute which is substantially overbroad may be invalidated on its face." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987).

...

Thus, the Supreme Court has "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application." The requirement that the overbreadth be substantial 'stems from the underlying justification for the overbreadth exception itself -- the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the court." *City Council of Los Angeles v. Vincent*, 466 U.S. 789 (1981).

...

Thus criminal statutes which "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*. (Emphasis added).

...

Then Judge Anderson considered the fact that there was probable cause for the arrest and reviewed the offensive conduct that caused the arrest of McCoy:

As is clearly shown in the video, at approximately 3:45 a.m. on a busy sidewalk in front of several bars, McCoy positioned himself in between the officers and their patrol car, where the officers were attempting to move the arrestee. McCoy verbally contested the arrest of the arrestee. The officers pushed McCoy backwards and indicated that he should step away from the arrest scene, but McCoy failed to heed these clear commands. Importantly, the video shows that McCoy's actions forced the officers to divide their attention between securing the arrestee and engaging McCoy. Indeed, because McCoy did not step back from the arrest scene as instructed, two of the officers were eventually required to let go of the arrestee and focus solely on McCoy. The third officer was left to secure the arrestee alone. In the words of the Ordinance, this conduct surely "interfere[d] with or molest[ed]" the officers "in the lawful discharge of [their] duties." Therefore, it was reasonable for the Officer Defendants to believe that McCoy had violated the Ordinance [probable cause]. (Emphasis added).

Then Judge Anderson turned to the law defining a vague ordinance:

Next, a statute is impermissibly vague if it either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement."

[This language is exactly what is wrong with the ordinance in this instant case; it fails to notify the speaker just how much "noise" is too much noise! The instant ordinance does not contain a "narrow, objective, and definite" standard to guide the police in the enforcement of the ordinance. In fact, counsel would argue that the *McCoy* ordinance is actually more objective than Ordinance 8-67 in the *Clark* case.]

Then Judge Anderson continued his explanation of why the prohibition was unconstitutional.

At the outset, it is important to understand that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (Emphasis added).

...

Freedom of speech is protected against censorship and punishment precisely because "speech is often provocative and challenging," and "it may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1 at 4 (1949).

The instant court noted that the City Council could have solved the overbreadth problem by limiting the "interfere with or molest" language with the adverb "physically." Hence, whether the Ordinance is unconstitutional as substantially overbroad is a close question.

Importantly, however, whether the Ordinance is unconstitutionally vague is not. Applying the stricter test for vagueness that is required when a statute implicates protected speech, *Village of Hoffman Estates*, 455 U.S. at 499, the court finds that the Ordinance both "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and "authorizes or even encourages arbitrary and discriminatory enforcement." *City of Houston v. Hill*, 530 U.S. at 732. (Emphasis added). [The Clark ordinance fails to pass both of these mandatory tests].

...

Moreover, because the Columbia City Council chose to leave the terms of the Ordinance undefined, it is not clear whether the Columbia City Council intended the Ordinance to apply to physical conduct alone, and the court cannot say that the Ordinance is valid "in the vast majority of its intended applications." (Emphasis added).

Based on the above, the Ordinance is facially unconstitutional as unduly vague. (Emphasis added).

...

The *McCoy* Court concluded that the federal law was settled on the overbreadth question but, it was not settled on the issue of vagueness:

III. Conclusion

The court has considered in detail the briefs and arguments of the parties, the Report and Recommendation, and all objections thereto. Based on the foregoing, the court finds that the Ordinance is facially unconstitutional as unduly vague, but the court finds that genuine issues of material fact preclude granting summary judgment to either the City or to McCoy on the issue of whether the Ordinance was unconstitutionally applied to McCoy in this case. Thus, the court hereby grants, in part, and denies, in part, McCoy's motion for summary judgment and denies the City's motion for summary judgment regarding the constitutionality of the Ordinance.

...

This case will proceed to trial on the constitutionality of the Ordinance as applied to McCoy during his arrest and on the City's liability, if any, under Sect. 1983.

IT IS SO ORDERED.

The key language in *McCoy*, quoted on page 21, should be applied to the "noise" ordinance in this instant appeal -- resulting in a decision that 8-67 "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and "authorizes or even encourages arbitrary and discriminatory enforcement."

In *City of Houston, Texas v. Hill*, 107 S.Ct. 2502 (1987), the U. S. Supreme Court, in a 9-0 ruling, clearly established the constitutional prohibition against the punishment of pure speech, even in the context of that case where there was a verbal interference with a police officer making an arrest. The Houston ordinance is similar to the instant ordinance in that it attempted to punish words alone. On this issue, the Supreme Court, at 2509, noted: "Accordingly, the enforceable portion of the ordinance makes it unlawful for any person to . . . in any manner oppose, molest, abuse, or interrupt any policeman in the execution of his duty, and thereby prohibits verbal interruptions of police officers." (Emphasis added).

In explaining its ruling, the Supreme Court noted, "This Houston ordinance, however, is not narrowly tailored to prohibit only disorderly conduct or fighting words ." The same can be said of Sect. 8-67 as it was used in the instant case. There is no allegation of any kind of disruptive conduct or the use of fighting words that would reasonably provoke the hearer into reactionary offensive conduct. The Columbia ordinance is attached as Exhibit "D".

OTHER IMPORTANT FREE SPEECH CASES

Our state law reaches the same result in several cases that are relevant to the factual situation in the instant case. In *State v. Perkins*, 412 S.E.2d 385 (S.C. 1991), the S.C. Supreme Court was called upon to interpret the portion of Section 16-17-530 which

prohibits one from "otherwise conducting himself in a disorderly or boisterous manner."

The facts in *Perkins* where that several persons came into the Anderson County Sheriff's Department to obtain a copy of an incident report. When they discovered that the report was not ready, they became upset and raised their voices in a threatening manner. They was arrested under the language in Sect. 16-17-530:

Any person who shall . . . (b) use obscene or profane language on any highway or at any public place or gathering . . . shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

The State Supreme Court reversed their convictions in a ruling that cited and followed the logic of *City of Houston, Texas v. Hill*. In *Perkins*, the Supreme Court ruled:

"[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Huston, Texas v. Hill*, 107 S.Ct. 2502 (1987). The State may not punish a person for voicing an objection to a police officer where no "fighting words" are used. To punish only spoken words addressed to a police officer, a statute must be limited in scope to fighting words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Hill* at 2509-10.

The same law has been applied in other contexts even more relevant to the instant case in the state interpretation of the rights of free speech. In the case of *In Re Jeremiah W.*, 576 S.E.2d 185 (S.C. App. 2003), the S. C. Court of Appeals held that a juvenile could not be convicted of a breach of the peace on the simple testimony of "yelling a profanity" at a police officer, and where he then held his hands up and questioned "what" the officer wanted with him. The court explained, "At that point Officer Cooke placed Jeremiah under arrest for being loud, boisterous, and using profanity in public, in violation of S.C. Code Ann. Section 16-17-530 (1976)." (Emphasis added).

In ruling that the trial court should have granted a directed verdict on the charge of breach of the peace, the *Jeremiah* Court of Appeals held:

In *State v. Perkins*, our Supreme Court determined that probable cause to arrest an individual "required more than profanity or loud and boisterous behavior directed at the officers." *Pittman*, 537 S.E.2d at 566 (discussing *Perkins*, 412 S.E.2d385 (1991)). Therefore, we find Jeremiah was entitled to a directed verdict on the breach of peace charge.

The court noted that there were ten or fifteen people approximately 30 or 40 feet away from Jeremiah and the officer, but also noted that the officer "admitted that Jeremiah never addressed the crowd or asked them to do anything." There was no evidence of crowd reaction to "fighting words."

It is obvious from this review, that "disorderly conduct" or "breach of the peace" based on a verbal confrontation are "crimes" that require proof of more than loud or obscene speech. There must be a showing of the use of "fighting words" which would incite disruptive behavior by the "victim" or proof of some conduct accompanying the offensive speech that converts the verbal actions of the defendant into criminally offensive conduct as opposed to just offensive speech.

Counsel would be remiss is he did not point out that the *Jeremiah* quote clearly states that "a conviction for pure speech must involve more than loud speech; this decision states: "probable cause to arrest an individual required more than profanity or loud and boisterous behavior directed at the officers."

There is one other U. S. Supreme Court case that clearly supports the position taken in this case by the defendants. In *Cohen v. California*, 91 S.Ct. 1780 (1971), a Vietnam war protestor was arrested for wearing a jacket into a county courthouse which

had the words "F--k the Draft" which were plainly visible to women and children as well as other visitors to the court.

The U. S. Supreme Court reversed the defendant's conviction for a breach of the peace. The Supreme Court first stated the issue to be decided:

It is whether California can punish, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

Then the U. S. Supreme court clearly established the law under the federal constitution with the standard that survives to this day:

For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style to the individual.

Maybe one more final note is appropriate to make the application of the constitutional law to the *Clark* fact situation, thereby mandating reversal. It must be remembered that all of the case law cited in the pre-trial memorandum has its foundation with the quintessential free speech case that gave us the famous statement that there are only a few narrowly defined limits on free speech such as a person cannot yell "fire" in a crowded theater. In *Houston v. Hill*, the U. S. Supreme Court quoted the famous quote from *Terminiello v. Chicago*, 69 S.Ct. 894 (1974):

Speech is often provocative and challenging . . . [But it] is nevertheless 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.

Counsel, submits that the law is clear on the issues in the *Clark* case, and argues that this federal law affirmatively mandates the dismissal of a private "nuisance" based solely on a dislike for loud religious speech which is protected First Amendment activity.

Again, when key federal First Amendment cases are reviewed and analyzed, there is only one conclusion in the instant appeal -- the convictions for "violating" a vague and overbroad city ordinance prohibiting loud religious speech must be reversed. The two part federal standard (has been used to determine whether the regulation of free speech activity passes muster for more than 75 years since *Cantwell v. Connecticut*, 310 U.S. 296 (1948).

A REVIEW OF APPLICABLE STATE CASES

The area of application of the Constitution to the exercise of free speech is one of the most difficult areas of legal jurisprudence and a close review of the facts must be made in every free speech case. There can be no cookie cutter application of these legal principles about Free Speech and Freedom of Religion cases.

FURR, ET AL. V. TOWN OF SWANSEA (FUNDAMENTAL FREE SPEECH LAW)

Although *Furr, et al., v. Town of Swansea*, 594 F.Supp. 1543 (1984), is a permit case, it still contains a large amount of fundamental free speech law. It illustrates the requirements on laws restricting free speech in public places. Much of this law has direct application to the enforcement of the City of Columbia ordinance on noise in the case against the church for normal, loud noise.

The *Furr v. Town of Swansea* Federal District Court described the allegations of the complaint:

The plaintiffs allege in their complaint that each of them have on one or more occasions been arrested for preaching on the streets of Swansea, South Carolina without having previously obtained a permit from the Chief of Police or the Town Council as required by an Ordinance of the Town of Swansea. The Ordinance provides as follows:

Section 13.401. PERMIT REQUIRED FOR PREACHING, LECTURING, PUBLIC SPEAKING, EXHIBITING, AND ENTERTAINING ON STREETS.
No gatherings for the purpose of preaching, lecturing, public speaking, exhibition, or entertainment of any nature will be permitted on the streets, sidewalks or public ways, except in accordance with a permit issued by the Mayor, upon written application made not less than twenty-four (24) hours prior to the time of such preaching, lecturing, public speaking, exhibition, or entertainment. *Section 13.401.1.*

Then the District Court explained the fact situation and began its discussion of the fundamental free speech law:

The plaintiffs testified during the hearing on the motion that they have periodically, each Saturday at about 10:00 o'clock A.M., proceeded to Swansea for the purpose of preaching the Gospel. They generally proceeded as follows: Only one plaintiff speaks at any given time, usually for a period of ten to fifteen minutes. While speaking, the minister stands near the edge of a sidewalk on Monmouth Street, where most of the commercial establishments are located. The other plaintiffs, while not preaching, generally stand on the other side of the same sidewalk, next to a building. When the minister speaking completes his remarks, another minister comes forward and speaks, usually for the same time period. Plaintiffs acknowledge that they speak loudly in order to be heard, but state that they are orderly in every respect; and that no inconvenience is occasioned to members of the public. The entire process usually concludes at about noon. The largest gathering which has assembled was no more than twelve persons. The preachers do not block the sidewalk or the street. They do, however, hold forth in a fervent, evangelical fashion which many townspeople find offensive. (Emphasis added).

The explanation of basic free speech law follows:

II

The ordinance, read in its entirety, prohibits preaching and public speaking on the streets of Swansea, South Carolina without a permit. Moreover, it is understood by the Mayor, Chief of Police and Town Council as having that effect. Persons desiring to preach or otherwise speak must, within "not less than twenty-four (24) hours" prior to such preaching, lecturing or public speaking, apply in writing for permission and state the "time and date of the proposed gathering, the estimated number of persons attending said gathering and the purpose of such gathering."

Ordinance, Sections 13.401 and 13.401.1. Otherwise, preaching, lecturing and public speaking, exhibition and entertainment on the streets of Swansea is prohibited. *Id.* Application for the permit, up until ten days before the preliminary injunction hearing on January 16, 1984, had to be made on a form approved by the Town Council which, in addition to requiring the applicant to list his (her) name, telephone number, address, social security number and driver license number, provided that the "Location desired subject to approval by merchants in area in order to maintain good relations in area and also location desired may be changed to an area agreeable to both parties." The application form also stated that "this permit may be revoked by the Chief of Police or Mayor and Council at any time permit is violated and that [the applicant] will be subject to said charges violated."

Then the Court continued:

The Ordinance provides that the Mayor and Council shall issue the permit subject to certain conditions including "the manner in which the proposed gathering is to take place" and "the surrounding businesses and the likely effect of the proposed gathering thereon." Ordinance, Section 13.401.2. And the Ordinance provides that after considering those factors the Town Council "shall have the authority to impose such time, place, and manner, restrictions, conditions, and safeguards upon preaching, lecturing, public speaking, exhibition or entertainment, *as it shall deem fit, proper, and necessary* to maintain public order." Ordinance, Section 13.401.3. It may not be gainsaid that the Town Council's authority under Section 13.401.3 extends to the imposition of any and all limitations deemed by the Town Council to be fit, proper and necessary to maintain public order, including ultimately the denial of a permit.

Then the Court applied the fundamental law to the Swansea ordinance:

III

The Ordinance, as written, confers upon the Town Council the absolute power to prohibit preaching and other public speaking on the streets of Swansea. For in deciding whether to impose restrictions upon preaching, lecturing, public speaking or entertainment, the Town Council is to be guided only by its own ideas of the likely effect of the proposed gathering on surrounding businesses, the traffic and the likely effect thereon and the "public convenience, safety, and welfare and the likely effect of the proposed gathering thereon." Thereupon, the Town Council may impose such restrictions "as it shall deem fit, proper, and necessary to maintain the public order." As such, the Ordinance is a prior restraint upon the plaintiffs' rights of freedom of speech and freedom of assembly, guaranteed by the First Amendment and protected from state interference by the Fourteenth Amendment to the Constitution of the United States. While the exercise of First Amendment freedoms may, under appropriate circumstances be limited, the Supreme Court has consistently held that "a law subjecting the exercise of First

Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional."

An ordinance which makes the peaceful enjoyment of the freedoms of speech and assembly dependent upon the uncontrolled will of an official, as by requiring a permit or license which may be granted or withheld in the discretion of that official, is an unconstitutional prior restraint upon the enjoyment of those freedoms. *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958). And the Supreme Court has confirmed that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Lovell v. Griffin*, 303 U.S. at 452-453, 58 S.Ct. at 669 (1938); *Schneider v. State*, 308 U.S. at 159, 165, 60 S.Ct. at 149, 152 (1939); *Staub v. Baxley*, 355 U.S. at 319, 78 S.Ct. at 280 (1958); *Freedman v. Maryland*, 380 U.S. 51, 56-57, 85 S.Ct. 734, 737-738, 13 L.Ed.2d 649 (1965). Indeed, "the Constitution can hardly be thought to deny to one subjected to the restraint of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958).

The District Court made further application of the fundamental religious free speech law to the Swansea Ordinance:

The Supreme Court has condemned a variety of statutes and ordinances which contain no standards for the exercise of discretion by the officials having the right to grant or deny permits as violative of the First and Fourteenth Amendments. *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (an ordinance prohibiting the use of sound amplification devices except with permission of the chief of police was declared a violation of the First and Fourteenth Amendments); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (an ordinance prohibiting distribution of religious literature without a license was declared to be a prior restraint on freedom of speech in violation of the First and Fourteenth Amendment); *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (an ordinance which required a license from a local official for a public assembly on the city streets, highways or parks was declared void because it could be made the instrument of arbitrary suppression of free expression of views on national affairs); *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951) (no ordinance regulated the use of the park; however, by custom and on the advice of the Mayor of Havre de Grace, Maryland, Niemotko and colleagues, all Jehovah's Witnesses, applied for a permit to use the park on four consecutive Sundays. The request was denied. Thereafter, Niemotko and colleagues proceeded to hold their meeting. They were arrested and convicted of disorderly conduct. The Court reversed the convictions as violative of the First and Fourteenth Amendments); *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct.

277, 2 L.Ed.2d 302 (1958) (an ordinance prohibiting solicitation of membership in an organization requiring membership dues or assessments without a permit issued by the Mayor and Council was held a violation of the First and Fourteenth Amendments by making the enjoyment of speech contingent upon the uncontrolled will of municipal authorities); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (a Birmingham ordinance prohibiting participation in parades processions or other public demonstrations without first obtaining a permit from the City Commission was held to be a "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority" and therefore unconstitutional); and *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) (Petitioners' convictions in a South Carolina Magistrate's Court of the common law crime of breach of peace were reversed as an infringement of constitutionally protected rights of free speech, free assembly and freedom to petition for redress of grievances, their convictions having not resulted from the "even-handed application of a precise and narrowly drawn regulatory statute evidencing a legislative judgment that certain specific conduct be limited or prescribed").

Then the Court gave its holding that the Swansea Ordinance resulted in an unconstitutional restriction on the rights of the citizens to exercise their Free Speech rights on the Town sidewalks by police interference under a broad, non-definitive ordinance:

While the ordinance contains language which seeks to guide the licensing officials in their determination of the question whether to grant or withhold permission to preach or otherwise speak while upon the streets of Swansea, it reserves to the Town Council the authority to impose such restrictions and conditions upon the right to publicly speak as it deems fit and proper. No limitation upon the exercise of that authority is contained in the ordinance. No standards are set forth for the formulation of restrictions, conditions or safeguards which the Town Council may impose upon the right to speak. The Ordinance thus does not contain "narrow, objective and definite standards to guide the licensing authority" and is a prior restraint upon the plaintiffs' freedoms of speech and assembly, in violation of the First and Fourteenth Amendments to the United States Constitution. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). ((WEmpphasis added).

The District Court concluded:

Accordingly, the defendants are preliminarily enjoined from enforcing the ordinances and from interfering with the exercise by plaintiffs of the right to preach, speak or assemble upon the streets of Swansea, South Carolina.

IT IS SO ORDERED.

This detailed explanation of the Federal Free Speech law in *Furr v. Town of Swansea* has direct application to the City of Columbia ordinance which is being reviewed in this appeal of Ordinance 8-67 show it is even less objective than the ordinance held unconstitutional in *Furr v. Town of Swansea*. **There can be no short cut application of state decisions when reviewing First Amendment Free Speech or Freedom Religion cases. The only applicable law is all the federal cases cited and discussed in this memorandum.**

The fundamental definitions in *Furr, et al. v. Town of Swansea*, and the 28 federal precedents cited in the *Furr* opinion have direct application to any free speech constitutional challenge, and certainly should be applied to the enforcement of the City of Columbia noise ordinance under review in this instant case.

This single case is abundant proof that City ordinance 8-67 is unconstitutional because it is not narrowly drawn, it fails to put citizens on notice of how much noise is too much, and it gives the police too much subjective discretion in the enforcement of the ordinance.

A review of *Frisby v. Schultz*, shows that citizens have the right to demonstrate in the neighborhood provided they did not limit their demonstration to just the home of the doctor. Portions of the Court's Opinion by Justice O'Connor, explains this applicable law:

Brookfield, Wisconsin, has adopted an ordinance that completely bans picketing "before or about" any residence. This case presents a facial First Amendment challenge to that ordinance.

I.

Brookfield, Wisconsin, is a residential suburb of Milwaukee with a population of approximately 4,300. The appellees, Sandra C. Schultz and Robert C. Braun, are individuals strongly opposed to abortion, and wish to express their views on the subject by picketing on a public street outside the Brookfield residence of a doctor who apparently performs abortions at two clinics in neighboring towns. Appellees and others engaged in precisely that activity, assembling outside the doctor's home on at least six occasions between April 20, 1985, and May 20, 1985, for periods ranging from one to one and a half hours. The size of the group varied from 11 to more than 40. The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct. Nonetheless, the picketing generated substantial controversy and numerous complaints.

...

After the Court established that streets do not lose their status as public fora because they are located in a residential neighborhood. Then the Court explained why this particular ordinance was interpreted as a ban in front of a single residence:

The precise scope of the ban is not further described within the text of the ordinance, but, in our view, the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties. Specifically, the use of the singular form of the words "residence" and "dwelling" suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence.

...

The picket need not be carrying a sign, *id.* at 14, but, in order to fall within the scope of the ordinance, the picketing must be directed at a single residence, *id.* at 9. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. *Id.* at 15. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

Then the *Frisby* Court explained their perception of the difference between complete bans on speech in neighborhoods and those, like the instant ordinance that limited its ban to a prohibition of picketing solely in front of a single home.

...

The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. *See, e.g., Schneider, supra*, at 380 U. S. 162-163 (handbilling); *Martin, supra*, (solicitation); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943) (solicitation). *See also Gregory v. Chicago, supra*, (marching). *Cf. Perry*, 460 U.S. at 460 U. S. 45 (in traditional public forum, "the government may not prohibit all communicative activity"). In such cases "the flow of information [is not] into . . . household[s], but to the public." *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 402 U. S. 420 (1971). Here, in contrast, the picketing is narrowly directed at the household, not the public.

Then the Court stated its narrow holding on the ordinance which prohibited picketing solely in front of a single residence:

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content-neutral. Thus, largely because of its narrow scope, the facial challenge to the ordinance must fail. The contrary judgment of the Court of Appeals is
Reversed.

There is one more U.S. Supreme Court case that is even stronger in favor of broad rights of citizens to exercise their Free Speech Rights in a demonstrative and offensive manner. In *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), the Supreme Court, in a 8 - 1 decision ruled that a group of citizens could express their protest against nationwide sins at the funeral of an Iraq veteran.

The history of the case was that the Federal District Court held a jury trial on three tort claims, which resulted in the award of \$2.9 million in compensatory damages and \$2.1 million in punitive damages. The U. S Court of Appeals affirmed the judgment of the District Court. Then the case was reviewed by the U.S. Supreme Court.

Justice Roberts, writing for the Court, began his explanation of the fundamental

Free Speech law:

Phelps became aware of Matthew Snyder's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. they stated, of instance: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDS," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." (Emphasis added).

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10 by 25 foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no evidence associated with the picketing. (Emphasis added).

Whether the First Amendment prohibits holding Westboro liable for its speech turns largely on whether that speech is of public or private concern, as determined by the circumstances of the case. "[S]peech on 'matters of public concern' is 'at the heart of the First Amendment's protection'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (Emphasis added).

...

Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community, " or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." The arguably "in appropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." (Emphasis added).

[Any court reviewing an ordinance or law which restricts free speech must always keep this last underlined sentence in mind. Of course, this means that when speech is harmful to the hearer, such harm does not effect the constitutional status of the speech.]

Deciding whether speech is of public or private concern requires us to examine the "content, form, and context" of that speech, "as revealed by the whole record." As in other First Amendment cases, the court is obligated "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." The placards read . . . (as described in the first court quote above). While these messages may fall short of refined social or political commentary, the issues they highlight -- the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy -- are matters of public import. The signs certainly convey Westboro's position on those issue, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs were viewed as containing messages related to the Snyders specifically, that would not change the fact that the dominant theme of Westboro's demonstration spoke to broader public issues.

Apart from the content of Westboro's signs, Snyder contends that the "context" of the speech -- its connection with his son's funeral -- makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself street, reflect the fact that the church finds much to condemn in modern

society. Its speech is "fairly characterized as constituting speech on a matter of public concern," and the funeral setting does not alter that conclusion.

Snyder argues that the church members in fact mounted a personal attack on Snyder and his family, and then attempted to "immunize their conduct by claiming that they were actually protesting the United States' of homosexuality or the supposed evils of the Catholic Church." We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent its "honestly believed" views on public issues. There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter.

Snyder goes on to argue that Westboro's speech should be afforded less than full First Amendment protection "not only because of the words" but also because the church members exploited the funeral "as a platform to bring their message to a broader audience." There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views and because of the relation between those sites and its views. (Emphasis added).

Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term -- "emotional distress" -- fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a "special position in terms of First Amendment protection." "[W]e have repeatedly referred to public streets as the archetype of traditional public forum." (Emphasis added).

...

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the

church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages. (Emphasis added).

[The attack was on what the speakers were saying, which was also true in the *Clark* case. It must be remembered that for three years the owner of the home next to the church did not file any complaints, but the complaints started after his significant other moved in, knowing that the black church used demonstrative praise as part of their services.]

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or aroused contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). [the case protecting burning the American flag.] Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." (Emphasis added.)

The Snyder Court makes it very clear that offensive, hurtful or even loud speech does not present a valid reason for government to restrict legal Free Speech that is protected under the First Amendment to the U. S. Constitution. A free society does not allow an offended citizen to get government to protect them from offensive speech.

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly

malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or view, or perhaps on the basis of their dislike of a particular expression." In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasan[t]'" expression. Such a risk is unacceptable; "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous. (Emphasis added).

[The understanding of this last paragraph as explained by the *Snyder*

Supreme Court clearly proves that the effect on the hearer of valid free speech has not consideration in the decision of whether the speech is constitutional.]

For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.

Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. As we have noted, "the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."

Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and -- as it did here -- inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course -- to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case. (Emphasis added).

This last paragraph, by itself, is justification for reversing the convictions below. In a free society a America where the First Amendment to the U. S. Constitution places strict limits on legislation that infringes on Free Speech. And a finding that legitimate free speech is found to be offensive to some citizens is totally irrelevant to the question about the constitutionality of the free speech of the speaker.

In the Clark case the complaining witnesses has several choices for self-help. They included the use of five other rooms in their home; the scheduling of activities which would have minimized the effect of the music and preaching on their own activities, scheduling shopping or visiting with friends outside of their home, and building a "sound proof" fence between their home and the church. They chose no self-help, but chose to harass their church neighbors with 55 citations and more complaints were the police could not confirm that when they arrived the "noise" was too loud. Their position was "It is our way, and the heck with you and your constitutional rights."

This one decision, *Snyder v. Phelps*, is extremely compelling on the Free Speech law, and is more than enough justification to warrant the reversal of the *Clark* convictions and to mandate instructions that all other similar citations for alleged violations of the instant Columbia ordinance should be dismissed.

The single dissent of Justice Alito illustrates the extreme hurtfulness of the Westboro speech, but also contrasts the weakness of the complaints in *Clark* counsel has chosen to attach that dissent opinion to this memorandum as Exhibit "H", attached hereto.

ONE NEGATIVE CASE

There is one state noise case that illustrates the difference between true illegal noise and the kind of "noise" that was present in the instant *Clark* case. The old state case law, including (*Beaufort v. Baker*, 432 S.E.2d 470 (1993)), is not controlling because it absolutely fails to meet the mandatory federal standard cited in *Hobby Lobby* and all the other federal cases cited herein. Not only does it fail to meet the federal test for the review of First Amendment cases, but since the ruling in *Beaufort v. Baker*, the City has passed a new ordinance that contains a specific decibel limit which makes that ordinance more in line with the federal two-part test. See this ordinance attached as Exhibit "F".

A review of *Morrison v. Rawlinson*, 7 S.E.2d 635 (1940), will show that the disruption by a public nuisance was so different from the *Clark* case as to prove how non-objective City ordinance is.

The pertinent portion of *Morrison v. Rawlinson*, reads:

Thereafter, in March, 1938, numerous white residents living in the vicinity of the church building presented a petition to the City Council setting forth, in substance, that the services or worship as conducted at The House of Prayer constituted a public nuisance, and prayed that the City Council take steps to abate it. It was upon consideration of this petition that the City Council, on March 29, 1938, adopted the resolution to which we have referred. The plaintiffs had no notice of the filing of the petition, and as already stated had no opportunity to be heard before this resolution was passed.

Many witnesses living in the neighborhood of the church were sworn, both by the plaintiffs and the defendants, who gave in repetitious detail the procedure and practice of worship followed by the church members. They do not disagree thereabout in any essential particular. Among these witnesses were five police officers, one of whom resided in the community where the church is located. The evidence shows that the plaintiffs dance in the church, and, in the course of the meeting, give forth weird and unearthly outcries. There is loud shouting, clapping of hands in unison, and stamping of feet. The incessant use of drums, timbrels, trombones, horns, scrubbing boards and wash tubs add to the general clamor. Some of the votaries are moved to testify; others enter an hypnotic trance.

The central pillars of the church are padded to protect them from injury during their transports. The tumult can be heard for many city blocks. Meetings are carried on daily from early hours in the evening until the early hours of the morning. Boisterous and disorderly throngs, unable to enter the crowded building, congregate in the adjoining streets. Fights often occur. White residents who live in the vicinity testified that life is made unbearable by the continual din, which deprives them of all peace and tranquility, and makes sleep impossible.

On more than one occasion police officers have been summoned not only by officers of The House of Prayer, but by local residents, to quell disorders among those present in the church as well as those congregated outside. On one occasion a police officer arrested fifteen persons, taken from within and from without the church, for disturbing the peace. Upon another occasion the police attempted to arrest the head usher of the church who was engaged in a fight. He resisted arrest with a blackjack and a knife. Police officers and others testified that there is attached to and adjoining the church building a stand operated by The House of Prayer, in which beer, soft drinks and food are sold. Witnesses for the plaintiffs denied the sale of beer. Plaintiffs' witnesses assert that the members of the church do not participate in the prevalent disorder, but that it is carried on by visitors attending the services. The section of the City where The House of Prayer is located is a thickly populated residential area.

The evidence leaves no room for doubt that this constant noise, with its unending repetition, accompanied by frequent breaches of the peace, tends to shatter the nervous system and impair the health of those subjected to it, or coming within its influence, except perhaps those actively participating therein. From a very careful consideration of the testimony and the law, and despite a deep and sympathetic understanding of this type of worship carried on by the members of this negro church, it is impossible for us to escape the conclusion that the services as conducted on this location constitute a public nuisance which is detrimental to the peace, health, and good order of the community in which it is practiced. Nor can there be any doubt of the fact that if the municipal authorities were authorized and empowered to abate nuisances, it was their duty to act in the premises.

A nuisance to be a public nuisance must be in a public place or where the public frequently congregate, or where members of the public are likely to come within the range of its influence, for if the act of use of property be in a remote and infrequented locality, it will not be, unless *malum in se*, a public nuisance. Black's Law Dictionary, 2d Ed., page 835.

The issue in this case was stated by the South Carolina Supreme Court, and then the Court affirmed the decision of the City Council to close the church:

This suit was instituted and a temporary injunction obtained by the appellants for the purpose of restraining the enforcement by the respondents, the Chief of Police and the Police Department of the City of Columbia, 7 S.E.2d 637 of a resolution passed by the City Council, alleged to be invalid. By the terms of this resolution the religious worship conducted by the appellants and the other members of The House of Prayer, was declared to be a public nuisance, and the Police Department of the City of Columbia was ordered to forthwith abate the nuisance, and to close

and keep closed The House of Prayer. This order was immediately carried into effect by the Police Department.

...

Judgment affirmed.

The facts in this case are more than 20 times more offensive and disruptive than the "loud noise" in the *Clark* case. The *Clark* trial testimony indicates a number of different words used to describe the level of religious speech in the *Clark* case.

SUMMARY OF ALL THE APPLICABLE FIRST AMENDMENT LAW AS APPLIED TO THE COLUMBIA ORDINANCE

It is imperative that we note the statutory law set forth in Sect. 1-32-10 through Sect. 1-32-40. See the "South Carolina Religious Freedom Act" attached as Exhibit "C". The South Carolina codified law on the restrictions on government placing limitations of the Free Exercise of Religious Freedom is the same definition that has been the law in Federal Courts for more than 75 years since *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) and is as follows:

SECTION 1-32-40. Restriction on state's ability to burden exercise of religion.

The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:

- (1) in furtherance of a compelling state interest; and
- (2) the least restrictive means of furthering that compelling state interest.

This standard for reviewing Freedom of Religion cases such as *Burwell v. Hobby Lobby Stores, Inc.* is identical to the two part test that has been the federal law for almost a century. That standard was clearly stated in the *Hobby Lobby* case:

Since the HHS contraceptive mandate imposes substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U. S. 1(b)(2). (Emphasis added)

The point of this explanation is that no state court can enforce a law or ordinance without fully complying with the two part *Hobby Lobby*/Sect. 1-32-40 law. In the trial below, the trial judge did not even consider this statement of the law or any of the many state and federal cases counsel cited for the court’s consideration in the pre-trial brief. The trial court refused to instruct the jury on this law explained in *Edwards v. South Carolina* fully discussed at page 15 herein.

A complete review of all the key test words used in all the fundamental cases contained in this memorandum prove beyond any doubt that the wording in City of Columbia Ordinance 8-67 is grossly deficient.

The next key quote would be the now-famous language in *Terminiello v. Chicago*, 69 S.Ct. 894 (1974, where the U. S. Supreme Court held:

Speech is often provocative and challenging . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a substantive evil that rises far above public inconvenience, annoyance, or unrest. (Emphasis added).

Anyone who concludes that the infrequent praise "noise" in *Clark* could be labeled within a mile of the definition of too much noise in *Terminiello* would have to be

intellectually dishonest. or lacking a proper knowledge of the federal law for testing language and conduct which is protected under the First Amendment to the United States Constitution. The words in *Clark* that were heard as "noise," but were not loud enough to be understood, simply do not reach the level of disruption so as to meet any of the tests discussed in this section of Defendants' memorandum.

The next important point is the statement by the trial judge on his definition of the Right of Free Speech which is stated on TT p. 156:

The Court: I'm going to tell you my interpretation, Mr. Briggs. First of all, I respect the First Amendment; I respect the Right to Speech and Religion. But if I'm sitting in my own home with my doors and windows shut and there's any level or volume that interferes with my normal life, it is to much. I have a right to have privacy and peace in my own home. (Emphasis added).

If that were the law, Judge Dennis would have more rights than the abortion doctor who sued picketers demonstrating in front of his home. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the U. S. Supreme Court held that the picketers where not protected under the Free Speech Right under the First Amendment simply because they concentrated their demonstration to only in front of the doctor's home. The Court made it clear that if the demonstrations of the picketers with placards had demonstrated around the entire block where the doctor lived, their demonstration would have been protected Free Speech.

The next important test is the one that has become the standard constitutional test for free speech and freedom of religion cases under the federal test. In *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354; argued March 23, 2014; decided June 31, 2014, the U. S. Supreme Court declared a provision of an Act of Congress to be a violation of the law of Freedom of Religion. First, the Court stated the issue to be decided:

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*, permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the *BURWELL v. HOBBY LOBBY STORES, INC.* [to freely exercise its religious beliefs] prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

...

Then the *Hobby Lobby* Court stated its holding:

But Congress, in enacting RFRA, took the position that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 U. S. C. §2000bb(a)(5). The wisdom of Congress’s judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns. (Emphasis added).

One of the most important state cases about Free Speech is *Edwards v. South Carolina*, 372 U.S. 229 (1963), which reviewed the affirmation of the criminal conviction of the defendants by the South Carolina Supreme Court:

The petitioners, 187 in number, were convicted in a magistrate's court in Columbia, South Carolina, of the common law crime of breach of the peace. Their convictions were ultimately affirmed by the South Carolina Supreme Court, 239 S.C. 339, 123 S.E.2d 247. We granted certiorari, 369 U. S. 870, to consider the claim that these convictions cannot be squared with the Fourteenth Amendment of the United States Constitution. There was no substantial conflict in the trial evidence. Late in the morning of March 2, 1961, the petitioners, high school and college students of the Negro race, met at the Zion Baptist Church in Columbia. From there, at about noon, they walked in separate groups of about 15 to the South Carolina State House grounds, an area

of two city blocks open to the general public. Their purpose was "to submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and our dissatisfaction with the present condition of discriminatory actions against Negroes in general, and to let them know that we were dissatisfied, and that we would like for the laws which prohibited Negro privileges in this State to be removed."

...

Then the *Edwards* U.S. Supreme Court explained why the law and convictions were unconstitutional:

In the situation and under the circumstances thus described, the police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which, as his later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail. (Emphasis added)

And it is clear to us that, in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances. (Emphasis added).

...

Not until they were told by police officials that they must disperse on pain of arrest did they do more. Even then, but they sang patriotic and religious songs after one of their leaders had delivered a "religious harangue." There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was "ample."

...

This, therefore, was a far cry from the situation in *Feiner v. New York*, 340 U. S. 315, where two policemen were faced with a crowd which was "pushing, shoving and milling around," *id.* at 340 U. S. 317, where at least one member of the crowd "threatened violence if the police did not act," *id.* at 340 U. S. 317, where "the crowd was pressing closer around petitioner and the officer," *id.* at 340 U. S. 318, and where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot." *Id.* at 340 U. S. 321. And the record is barren of any evidence of "fighting words." See *Chaplinsky v. New Hampshire*, 315 U. S. 568.

...

In the situation and under the circumstances thus described, the police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which, as his later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail. (Emphasis added).

These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection. The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.

This appeals court would be remiss if it failed to take particular note of the underlined portion of the paragraph above where the U. S. Supreme Court clearly stated that the description of the words and conduct of the 187 demonstrators as "'boisterous,' 'loud,' and 'flamboyant' conduct which, as his [city Manager] later testimony made clear, consisted of listening to a 'religious harangue' by one of their leaders . . ." were not unreasonable or illegal.

The next case which supports the total reversal of the *Clark* lower court is another South Carolina case. This important Free Speech case addressed a South Carolina ordinance is *Furr v. Town of Swansea*, 594 F. Supp. 1543 (1984):

While the ordinance contains language which seeks to guide the licensing officials in their determination of the question whether to grant or withhold permission to preach or otherwise speak while upon the streets of Swansea, it reserves to the Town Council the authority to impose such restrictions and conditions upon the right to publicly speak as it deems fit and proper. No limitation upon the exercise of that authority is contained in the ordinance. No standards are set forth for the formulation of restrictions, conditions or safeguards which the Town Council may impose upon the right to speak. The Ordinance thus does not contain "narrow,

objective and definite standards to guide the licensing authority" and is a prior restraint upon plaintiffs' freedoms of speech and assembly, in violation of the First and Fourteenth Amendments to the United States Constitution. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). (Emphasis added).

Accordingly, the defendants are preliminarily enjoined from enforcing the ordinance and from interfering with the exercise by plaintiffs of the right to preach, speak or assemble upon the streets of Swansea, South Carolina.

IT IS SO ORDERED.

The *Furr* case alone is enough clear law to mandate the reversal of the convictions in the *Clark* case. The underlined language in *Furr* proves the invalidity of the weak language in City of Columbia Ordinance 8-67 (a) and (c).

Counsel for Defendants could review every federal case cited in *Furr, et al. v. Town of Swansea*, but that would just be repetitious and overkill. Certainly, this court has read enough federal constitutional law to conclude that the Free Speech definition stated by the trial judge fails miserably to pass the two part test used in almost all of the federal cases cited in this memorandum.

SUMMARY OF FEDERAL TEST

Since the U.S. Supreme Court ruling in *Cantrell v. Connecticut*, followed by *Wisconsin v. Yoder*, until the *Burwell v. Hobby Lobby* case, the federal law interpreting the First Amendment Right of Freedom of Religion and Free Speech has been controlled by federal cases applying the First Amendment through the Fourteenth Amendment.

Technically, the *Hobby Lobby* case was not a Constitutional First Amendment case, but was the Court's interpretation of the Religious Freedom Restoration Act of 1993 (RFRA), based on constitutional principles. The issue was whether an act of Congress which "permits the United States Department of Health and Human Services to demand

that closely-held corporations provide health insurance coverage for methods of contraception violates the sincerely held religious beliefs of the companies' owners.

We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling governmental interest." In reality, the RFRA was based on First Amendment law. (Emphasis added).

The underlined portion of the *Hobby Lobby* decision is light years more binding than the soft soap (and false) test used in the *Clark* decision. **The point here is that No state law can govern the Free Exercise of Speech and Religious Freedom unless such regulations meet the test which is controlled exclusively by Federal Law.**

Even the state case cited by the lower court and the civil court in the injunction against the church's praise speech is no longer good law because since that decision (*Beaufort v. Baker*, 432 S.E.2d 470 (1993), the Beaufort City Council amended its ordinance and now regulates noise in the business district with a reasonable decibel reading at a reasonable distance from the business entrance. See that ordinance attached as Exhibit "F".

In both the trial and the appeal of the criminal case, Counsel for Defendants cited four relevant Free Speech federal cases which should have directed the criminal and the civil courts about the proper standard of review for restrictions on First Amendment Rights of Speech and Religion Freedom. Those cases are: *City of Houston v. Hill*, 482 U.S. 451 (1981); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Furr v. Town of Swansea*, 594 F.Supp. 1543 (1984), in which Judge Matthew Perry cited 28 classic federal constitutional cases on free speech; and *McCoy v. City of Columbia*, March 11,

2013, by order of U.S. District Court Judge Joseph F. Anderson, Jr., which gave an excellent discussion of vagueness and overbreadth.

To complete this review of the most important federal cases which define the proper test for determining the constitutionality of a statute or ordinance it would be most appropriate to again review *Frisby v. Schultz*, and *Snyder v. Phelps*.

A FEW MORE ERRORS BY THE TRIAL JUDGE AND THE CITY ATTORNEY

One of the most egregious errors of the ordinance and the police enforcement of it is the absence of any narrow, objective and definite definition of how much noise is too much noise. The defendants were never told by the police what level of noise was too much. Counsel's discussion of this important issue is found at TT p. 86 and 87:

Mr. Briggs:

Q. Officer Griggs, in looking at the incident reports, I didn't see any decibel meter readings except for 4-19-13. Do you have any notes that suggest that you took some meter readings any of those other days that you talked about?

A. No, sir. If I took meter readings they would be documented in the report.

Q. Would be documented in there. Okay. When you discuss with the complaining witnesses about a citation, do you make that decision alone or do you consult with them or they tell you they think there should be a citation issued? How does that process work?

A. The decision lies solely with me.

Q. So you are the one that interprets the language in this statute?

A. Yes.

Q. Do you have any guidance other than what's in this statute to guide you as to what is too much noise?

A. No sir, only my interpretation of the statute.

Q. Have you told either Apostle or Dr. Clark, his wife, how much noise is too much?

A. I believe I've I asked them to turn it down.

Where is the objective test? Where is the definitive notice of what is too loud?

Where is the limit on the discretion of the police enforcement of the ordinance? Where is

any reference to the two part constitutional test? Counsel points out again that every definition contained in *Furr v. Town of Swansea* is applicable here and proves how grossly subjective Ordinance 8-67 is!

Counsel would prefer to not have to make this argument (but I have a professional obligation to my clients), and the trial judge just does not fully understand the mandatory federal law for interpreting First Amendment cases. (review again his “definition” at TT p. 70. Exhibit “E”).

One of the gross exaggerations by the City Attorney is found on TT p. 40 and 41:

On some days they can’t even watch TV. They can’t read stories to their son. They can’t sit down and have dinners as a family. And sometimes even when they are exhausted they can’t go to sleep. Why? Because of these Defendants. Because these Defendants have refused to follow the law. Because these Defendants have placed themselves above the law [ordinance, not the Free Speech Law]. Over and over and over again these defendants have blared loud and disturbing music directly into these victims’ home. They do it on all days of the week. They do it at all times of the day and the night. (Emphasis added).

Anybody who believes this gross, gross, gross underlined exaggeration still believes in Santa Claus, the tooth fairy, and the Easter bunny. The underlined sentences above, which are untrue, are clearly in violation of the Ethics Rule which forbids lawyers to make false statements to anyone while representing a client. See Standard of Professionalism 4 and 4.1:

Honesty and Candor

4. Principle: A lawyer should not knowingly misstate or improperly distort any fact or opinion.

Standards:

4.1 A lawyer should not knowingly misstate, distort or improperly exaggerate any fact or opinion in a deceitful or deceptive manner for an improper purpose.

The church never has services before the Sunday School hour which begins at 9 AM, and it never has services after 10 PM or 10:30 PM, and it only has week-long services 2 times a year.

If you add all these services up for the year, it means that the church has a total of less than 500 hours of church time out of a total of 8700 hours in a year. The prosecution fails to acknowledge that the complaining witnesses have five other rooms to occupy at times they believe the "praise" is too loud for them. They purposely put themselves in the only room that is the closest to the church window which allows the most noise to escape the church. Remember that there were 55 citations, plus other complaints where the officers did not hear enough noise to issue a citation. Unless you had an anti-religion bias, wouldn't it have been easier to move to a distant room upstairs rather than spending all that time and money just to harass your neighbors?

When all the errors, exaggerations, and failures of the complaining witnesses to find "shelter" in other rooms of their house are considered along with the fact that not one witness testified that they could actually understand any words being spoken, an objective person would have to conclude that the witnesses were wanting to find "too much noise." The complaining witnesses, who moved to the "nuisance" did everything they could to harass and punish their neighbors because of a specific religious bias on the part of Ms. Callahan. It should also be remembered that Mr. Ellis owned the house for three years before the co-habitation without filing a single noise complaint.

In addition to the woefully inadequate "definition" of the Right of Free Speech set forth by the trial judge, none of the prosecution's witnesses used constitutional words for describing the "offensive" noise by the praise of the church members.

The following are examples of the words used by the witnesses to describe the volume of the alleged "illegal" noise:

Page 41: The City Attorney described the "noise" a "loud and disturbing."

Page 54: Mr. Ellis said [his home] "was built to code so we just have to endure the church's noise."

The only testimony about actually understanding any of the words in the "noise" is at TT p. 65.

Q. Briggs When the preacher is preaching [can you hear words or just noise]?
First answer that. I mean is it clear noise or is it just noise?

A. Ellis It's both.

Q. Okay.

A. Sometimes it's clear. We might make out a word or two.

Page 69: Ms Callahan testified: The police officer came in the house, closed the door, windows were down. We just said can you listen to this; does this sound reasonable and the Answer was "absolutely not."

Page 81: Officer Griggs testified about his response to the complaint of noise by Ms. Callahan.

Q. Briggs In terms of the volume that you heard that night on Wednesday, February 27th; how would you characterize that volume?

A. Unreasonable.

Page 84: Officer Griggs gave his account of the complaint on March 10th.

Q. Ms. Mangum: What sort of instruments did you hear that day?

A. This day I heard organs, drum set, and shouting from a P.A. system which I documented myself as uncomfortably loud noise level.

Page 91 - 92: Ms. Mangum questioned Officer Griggs about October 4th, 2013.

Q. So did you enter the residence?

A. Yes, ma'am.

Q. And when you entered the residence, what did you hear?

A. I could hear the noise from the church. It echoed throughout their back porch and when we stepped inside you could still hear it.

Q. When you say the noise, could you be more specific?

A. You could hear music that they were playing inside of the church and you could hear talking like preaching.

Q. And how would you describe that noise?

A. Very loud.

Page 99: Mangum questioned Captain Marsh.

Q. And based on that conversation did you meet with the Defendant?

A. I did. I reached out to Apostle Clark. I met with him at his church right at the beginning of this whole [situation]. I don't have the date or time, but right when I first got contacted by Ms. Callahan and Mr. Ellis. I arranged a meeting. Myself and Lieutenant, Chris Roberts, went to the church and met with Apostle Clark.

Q. And what did you talk about when you met with the defendant?

A. When I met with Apostle Clark, he invited us into the church and we actually went back to his office and we discussed -- I explained to him the noise issues that Mr. Ellis and Ms. Callahan were having with the church being noisy enough that it was, you know, affecting their quality of life so to say next door.

On page 100 and 101, Captain Marsh testifies that the initial determination of whether the praise from the church is too loud and in violation of Ordinance 8-67. See this discussion attached as Exhibit "G".

Page 110: Mr. Briggs questioned Apostle Clark

Q. Have you had any policeman explain to you, Quote, how much noise is too much?

A. No Sir.

False nullification argument by City Attorney. TT p 143 - 144

Part of Mr. Briggs' closing argument read:

"Apparently all the citations came from complaints in a single room of the house [the back room closest to the closest church window]. Why didn't the police take readings in those other five rooms? There had to be a room where you couldn't hear noise that at one time was thirty-five minutes. At other times it may have been more, other times it may have been less. My question [to the jury] is why didn't the police test those other rooms."

Page 150: The judge gave the following explanation of City code 8-67 subsection (c);

Let me read you the ordinance again. And it comes from City code 8-67, subsection (c). "It shall be unlawful for any person to operate or cause or permit to be operated any instrument or sound producing or sound amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance." (Emphasis added).

Note again the requirement in 8-67 (c) that there be proof of a "public nuisance" or the vague language of "so loudly to unreasonably disturb persons in the vicinity . . . as the

test for illegal noise." The South Carolina law prohibits the criminal prosecution of a "private nuisance." In this case the City and complaining witnesses were required to decide whether the ordinance required the proof of a "public nuisance" and prosecute or choose a "private nuisance" and bring a civil suit.

CONCLUSION

It is almost overkill to state Counsel's recommendation on the decision mandated by all the federal First Amendment cases cited herein, but obviously he has an obligation to be an advocate for his clients.

Finally, counsel for Defendants argues that the decision in this appeal should be a reversal of all convictions and instructions to dismiss any other alleged violations of the City of Columbia Ordinance 8-67. Any decision short of a reversal of these "convictions" would be a gross miscarriage of justice.

Orin G. Briggs SC Bar # 883
Attorney for Defendants
240 Heritage Trail
Lexington, SC 29072
803/957-4383
e-m: ogb-atty@sc.rr.com

Henry Pickett Wall
Bruner Powell Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260
803/252-7693
em: hwall@brunerpowell.com

March _____, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL DISTRICT
COUNTY OF RICHLAND	)	
	)	Civil Action No.: 2014-CP-40-05599
The City of Columbia,	)	
	)	
Respondent,	)	
	)	
vs.	)	
	)	
Johnnie L. Clark, H.J. Terry-Clark,	)	
et. al.,	)	
	)	
Appellants.	)	
	)	
	)	

ORDER

This matter came before me on May 15, 2015, for oral argument and a hearing on Appellants Johnnie L. Clark and H.J Terry-Clark ("Appellants") appeal from Municipal Court.

This appeal arises from the prosecution and conviction of two ministers of the gospel by the City of Columbia for six municipal code citations¹ alleging excessive noise issued during the worship services of Rehoboth United Assemblies of the Apostolic Faith ("Church"). After a jury trial in which Appellants were not able to raise or argue the First Amendment as a defense, both Appellants were convicted and fined. Pastor Johnnie L. Clark also served two weeks in jail. The trial court refused to stay the fines or sentence and they have been fully paid and served. A timely notice of appeal to this court ensued.

¹ City of Columbia Municipal Noise Ordinance Sec. 8-67 – Radios, phonographs, musical instruments and other sound-amplifying devices.

....
(c) *Creating public nuisance.* It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

Appellants argue they have a constitutional, common law, and statutorily protected right to worship God without interference from the City, and that any such restrictions by the noise ordinance are constrained or limited by these protections. Specifically, Appellants contend they should have been able to raise and assert their constitutional rights and arguments as a defense to the prosecution, and the burden was upon the City to establish that the ordinance in issue served a compelling state interest, and, as drafted, was narrowly tailored to achieve its purpose. Appellants do not argue these rights are absolute, but that they at least give rise to a defense which they should have been able to raise, argue and charge to the jury. Even though the City's noise ordinance does not facially discriminate against religion and appears neutral on its face, Appellants maintain the manner in which the ordinance has been enforced impairs their free exercise, and the trial court erred in its failure to recognize these fundamental protections provided by the South Carolina Religious Freedom Act ("SCRFA"), and both the U.S. and South Carolina Constitutions.

The standard of review for appeals from municipal court convictions is limited to errors of law. *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011). In cases where an appeal does not involve disputed facts, an appellate court "is free to review whether the trial court properly applied the law to those facts." *Gov't Employees Ins. Co. v. Draine*, 389 S.C. 586, 591, 698 S.E.2d 866, 868 (2010). Furthermore, the "appellate court owes no particular deference to the trial court's legal conclusions." *Id.* 389 S.C. at 591, 698 S.E.2d at 698-99. Having considered the record, and the arguments of counsel, I find it is appropriate to reverse and remand the decision of the municipal court for the following reasons.

The trial court erroneously concluded that because the City of Columbia noise ordinance was “content neutral”, the Appellants could neither raise nor argue religious freedom as a defense to the enforcement of such an ordinance, even though the alleged ordinance violations all occurred during the Appellant’s worship services. The record is clear that the trial court made this determination from the inception of the case during pretrial motions and discussion (Tr. P2-4). Having made this determination, the court thereafter refused to allow the Appellants to raise the issue of religious freedom or constitutional vagueness of the statute before the jury or the court. The court viewed the case as merely about loud noise, devoid of speech content because it determined the noise ordinance was “content neutral” and therefore absolutely immune from religious freedom challenge or any challenge whatsoever the basis of constitutional vagueness and free speech. (Tr. P. 11, 12, 16, 36-37, 95, 156.). The clearest example on the record is found in the closing argument. When the religious freedom and free speech argument was raised by counsel during closing argument, the court characterized the argument as legally impermissible “jury nullification”. The Court then advised the jury to disregard the argument and do their duty, in effect directing a verdict as to the constitutional challenges. (Tr. Pp. 143-144.) The court refused to charge the jury on the constitutional challenge, despite the request, nor would the court consider the question of constitutional vagueness Free Speech, and Free Exercise whether based upon strict scrutiny, or otherwise (Tr. P. 152.).²

The trial judge presumably relied upon *Employment Division v. Smith*, given its repeated references in the record to the “content neutral” nature of the ordinance. In *Smith*, the United

² I’m going to tell you my interpretation, Mr. Briggs. First of all, I respect the First Amendment; I respect the Right to Speech and Religion. But if I’m in my own home with my doors and windows shut and there’s any level of volume that interferes with my normal life, it is too much. I have a right to have privacy and peace in my own home. (Tr. p. 156, emphasis added).

States Supreme Court ruled it would no longer give apply heightened scrutiny to the government's refusal to grant exemptions to generally applicable laws that unintentionally and tangentially burdened religious beliefs or practices. *Employment Division v. Smith*, 494 U.S. 892 (1988). In *Smith*, the Court addressed the question of whether or not the ingestion of peyote, a religious practice of certain Native Americans, would, in and of itself, render an otherwise content-neutral law unenforceable, and void on the grounds of religious freedom, standing alone. The Court was obviously concerned with individuals raising religious objections, in isolation, to avoid lawful requirements based upon content-neutral law such as paying taxes or registering for the selective service. The Court determined that Free Exercise, standing alone, cannot be stretched so far.

However, even under the *Smith* standard, the court recognized that there are hybrid circumstances involving both Free Exercise and Free Speech or expression:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, 310 U. S., at 304-307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U. S. 573 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U. S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).^[1] 882*882 Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U. S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U. S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U. S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for

the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Gillette v. United States*, *supra*, at 461.

Appellants correctly assert that the operative effect of the noise ordinance in the case at hand regulates both their free exercise, and their right to communicate those beliefs (free speech and association), as the proscribed conduct clearly occurred the gathering of the congregation during worship services, singing, preaching and praying. The constitutional defenses are indeed applicable here as a matter of law here, even under the *Smith* standard. This case presents the very hybrid situation (speech and religion) contemplated in *Smith*.³

³ All free speech activity is protected from criminal prosecution, except by regulation as to time, place, and manner under a narrow, objective, and definitive law which prevents arbitrary discretion in decision-making by the law enforcement officer. Here, the City's ordinance merely applies the standard of "unreasonable" which is necessarily subjective. Indeed according to the trial court, "any level of volume is too much".

In *Furr v. Town of Swansea*, 594 F. Supp. 1543 (1984), the court addressed a South Carolina ordinance which prohibited preaching and public speaking on the streets without a permit. The court ultimately found the ordinance too subjective and thus unconstitutional as it did not contain "narrow, objective and definite standards to guide the licensing authority" and further that it was a "restraint upon the plaintiffs' freedoms of speech and assembly, in violations of the First and Fourteenth Amendments to the United States Constitution." *Id.* at 1552 (citing *Suttlesworth v. Birmingham*, 394 U.S. 147, 89 S. Ct. 935, 22 L.E.2d 162 (1969)).

The City of Columbia ordinance arguably grants too much discretion to the police enforcing the ordinance, providing no objective standard for what constitutes a noise violation. The City of Columbia ordinance being enforced in the instant case is Sect. 8-67 (a) and (c):

The authority of governments to place restrictions on or prohibit the Exercise of Religion and the Exercise of Free Speech in the public square is limited by the First Amendment and federal common law. Edwards v. South Carolina, 372 U.S. 229 (1963); Furr v. Town of Swansea, 594 F. Supp. 1543 (1984). see also Burwell v. Hobby Lobby Stores, Inc., No. 13-354; argued March 23, 2014;

In *City of Beaufort v. Baker*, a post-Smith decision, the Appellants appealed their convictions for the violation of a noise ordinance to the Municipal Court. *City of Beaufort v. Baker*, 315 S.C. 146, 148, 432 S.E.2d 470, 471 (1993). The Appellants contended that the ordinance was unconstitutional as applied because it infringed upon their Freedom of Speech in violation of both the U.S. and South Carolina Constitutions. *Id.* 315 S.C. at 150, 432 S.E.2d at 472. While the Supreme Court ultimately held the ordinance survived the Appellants'

(a) *Disturbing the public generally.* It shall be unlawful for any person to maintain and operate in any building or on any premises in the city any radio device or mechanical musical instrument or device of any kind whereby the sound therefrom is cast directly on the public streets and places in such a manner as to create unreasonably loud, excessive or disturbing noises and where such device is maintained and operated for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street, park, public place or of persons on neighboring premises.

(c) *Creating public nuisance.* It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

Recently, U.S. District Court Judge Joseph F. Anderson, Jr., in McCoy v. City of Columbia, March 11, 2013, reviewed a City of Columbia ordinance for vagueness and held:

A statute is impermissibly vague if it either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement."

The instant ordinance does not contain a "narrow, objective, and definite" standard to guide the police in the enforcement of the ordinance, yet the Appellants were not allowed to make these arguments at trial.

constitutional challenges, the court applied the proper heightened standard to the “content-neutral” ordinance to make its final court order. *Id.* 315 S.C. at 150, 432 S.E.2d at 472. The court’s standard of review for the “content neutral” ordinance, where “the complaints were based solely on the noise level of the preaching” was that it must be narrowly tailored to serve a significant governmental interest. *Id.* 315 S.C. at 150, 432 S.E.2d at 472-73. *Baker*, just as in this case, presented a hybrid situation involving both free speech and free exercise; therefore strict scrutiny was appropriate and the defendant was able to argue constitutional defenses.

Appellants should have been able to argue that City of Columbia Ordinance 8-67 is unconstitutionally vague as applied in this case because enforcement of the law clearly infringes on the First Amendment Freedom of Religion and Free Speech. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Moreover, although neither trial counsel nor the trial court was apparently aware of it when the case was tried, *Yoder* is in fact the correct legal standard in this case. The South Carolina Religious Freedom Act (“SCRFA”), S.C. Code Ann., Section 1-31-10 through —60, codifies the restrictions on the government from placing limitations on the free exercise of religion even when an ordinance or law is “content neutral.” This chapter defines the “exercise of religion” as: “the exercise of religion under the First Amendment to the United States Constitution or Article I., Section 2 of the State Constitution.” S.C. Code Ann., § 1-32-20. Section 1-32-20 goes on to define “state” as:

the State of South Carolina and any political subdivision of the State and includes a branch, department, agency, board, commission, instrumentality, entity, or officer, employee, official of the State or a political subdivision of the State or any other person acting under color of law.

This Title follows the same definition that has been the law in Federal Courts for more than 75 years since *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) and is set forth as follows:

SECTION 1-32-40. Restriction on state's ability to burden exercise of religion.

The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:

- (1) in furtherance of a compelling state interest; and
- (2) the least restrictive means of furthering that compelling state interest.

Under the SCRFA, the standard applies even to an ordinance which is of "general applicability" (i.e. "content neutral"). Under SCRFA, the Appellants in this action were entitled to raise the statute and the Free Exercise Clause as a defense:

The purposes of this chapter are to: (1) restore the compelling interest test as set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), and to guarantee that a test of compelling state interest will be imposed on all state and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened; and (2) provide a claim or defense to persons whose exercise of religion is substantially burdened by the State.

The trial court and prosecutor not only ignored the prevailing federal law on the subject which clearly governs this case and was repeatedly argued during trial, but also overlooked this statute and committed an obvious error of law. The Appellants were tried, convicted, fined, and imprisoned under the wrong legal standard. The case must therefore be reversed.

Furthermore, while the specific statute (SCRFA) was not directly raised by the Appellants at trial, the issue of the proper standard of review, which is stated in SCRFA, was made "sufficiently clear" by the Appellants as demonstrated by their attempted First Amendment defenses to the alleged violation of the ordinance. *Malloy*, 409 S.C. at 561, 762 S.E.2d at 692. The court admitted its understanding of the importance of the First Amendment throughout the trial (Tr. P. 144, 156), The trial judge's repeated recognition of the importance of the fundamental rights protected by the First Amendment showing that the error of law was "reasonably understood by the judge," and thus is reviewable by the appellate court. *Malloy*, 409 S.C. at 561, 762 S.E.2d at 692.

Further, courts in South Carolina have historically allowed the appeal of general First Amendment and constitutional issues where the principle, rather than specific statutes were raised in the trial court as a defense to ordinance violations. *See City of Beaufort v. Baker*, 315 S.C. 146, 432 S.E.2d 470 (1993); *City Of Chester v. Addison*, 277 S.C. 179, 284 S.E.2d 579 (1981). While the Appellants were precluded by the trial judge from raising their constitutional arguments any further to the point of specifically addressing the SCRFA, the issue was effectively raised and ruled on. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it be reasonably understood by the judge." *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014). The court ruled on the issue of the proper standard of review to be applied to the case when the court read the City of Columbia Noise Ordinance § 8-67 several times, stating that this ordinance was the standard the jury was to apply to the facts of the case. (Tr. P. 36, 150.) The municipal court's final holding that the Appellants violated the ordinance was based on an obvious error of law resulting from the court's failure to apply the proper standard of review under either legal standard applicable to this case and these facts: the *Smith* hybrid situation or SCRFA. .

The only just and rational decision on this appeal is a reversal of convictions and instructions to remand the case to municipal court for a new trial or dismissal in accordance with this decision, a refund of all court costs and fines.

AND IT IS SO ORDERED.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
City of Columbia,)
)
Respondent,)
)
v.)
)
Johnnie L. Clark and Harriet Clark,)
)
Appellants.)
_____)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-40-05599

ORDER

This matter came before the Court on May 15, 2015, on an appeal from Johnnie L. Clark and Harriet Clark. Orin Briggs represented the Appellants and the City of Columbia ("City") was represented by Jessica R. Mangum.

BACKGROUND

Johnnie L. Clark and Harriet Clark ("Appellants") were cited for excessive noise in violation of Columbia, South Carolina Municipal Code § 8-67(c), stemming from incidents that took place on February 27, 2013; February 28, 2013; March 10, 2013; April 19, 2013; October 4, 2013; November 21, 2013; and April 4, 2014. Appellants were convicted of these violations following a jury trial on September 11, 2014. Appellant Johnnie L. Clark was sentenced to Two Thousand One Hundred Eighty-five dollars in fines and fourteen days jail, while Appellant Harriet Clark was sentenced to a fine of One Thousand ninety-two dollars and fifty cents or fifteen days. Appellants timely filed their appeal on September 12, 2014 and filed an amended appeal on September 17, 2014. On December 8, 2014, the municipal court filed a transcript of the proceeding below.

STANDARD OF REVIEW

"In a criminal appeal from the municipal court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception."

City of Greer v. Humble, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013). Furthermore, “the circuit court, sitting in its appellate capacity, may not engage in fact finding.” Rogers v. State, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004). On appeal from municipal court, “[t]he appeal must be heard by the Court of Common Pleas upon grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. . . . [T]he [circuit] court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial.” S.C. Code Ann. § 18-3-70 (Supp. 2008).

GROUND FOR APPEAL

Appellants assert five grounds for appeal. First, the Clarks argue the lower court erred in failing to give a jury instruction about their First Amendment rights of free speech and freedom of religion. Second, they argue the lower court should have instructed the jury about the City of Beaufort’s noise ordinance. Third, the Clarks claim the trial court erred in allowing a jury to be pulled when less than 40 available members of the jury pool were present. Fourth, the Clarks argue the trial court erred in relying on a circuit court order to deny the Appellants protection under the First Amendment. Finally, the Clarks claim the trial judge granted a broad definition of admissible evidence on behalf of the City, while enforcing a narrow definition of admissible evidence for the Appellants, and these evidentiary decisions amounted to an error of law.

DISCUSSION

1. First Amendment charge

Appellants first argue the lower court erred in failing to give a First Amendment jury instruction. During the charge conference, the trial judge asked counsel for the City and counsel for the Appellants if there were any objections to the charges read or any additional charges requested. The Clarks responded, “No, no objection and no complaint, Your Honor.” See Tr. p. 152, lines 15-

16. Additionally, the Clarks said, "But I feel like they need some constitutional law and I would suggest a summary of the Edwards case, Your Honor." See Tr. p. 5, lines 16-17.

"Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection."

South Carolina Rules for Criminal Procedure: Rule 20, SCRCrimP.

"A proper objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial court". *State v. Wigington*, 375 S.C. 25, 35-36, 649 S.E.2d 185, 190 (Ct. App. 2007). Appellants' failure to object to the charge as given constitutes a waiver of their right to complain on appeal. *State v. Whipple*, 324 S.C. 43, 52, 476 S.E.2d 683, 688, (S.C. 1996). By Appellants' plain language during the jury trial conference, there was no objection to the trial court's charge. Any subsequent statements or suggestions made by the Clarks did not rise to the level of a proper objection as required by Rule 20. Therefore, this issue is not preserved, and this Court declines to address it.

2. City of Beaufort Noise Ordinance charge

During the charge conference, the Clarks requested a jury charge instruction that included the City of Beaufort noise ordinance. The court did not give the requested instruction, and the Appellants now assert reversible error.

An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion. *State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26, (S.C. Ct. App. 2006) (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *State v. Williams*, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005)). If there is any evidence to support a jury charge, the trial judge should grant the requested charge. *Id.* The refusal to grant a requested jury charge that

states a sound principle of law applicable to the case at hand is an error of law. *Id.* A charge is not required unless the evidence supports it. *Id.*

Here, the record does not support a jury charge on the City of Beaufort noise ordinance. At issue in this trial was whether the Clarks violated the City of Columbia noise ordinance. That ordinance makes it "unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance." *Columbia, South Carolina Municipal Code* § 8-67(c). The City of Beaufort noise ordinance relies on decibel readings from a decibel meter and specific distance measurements related to where the noise was heard in relation to the original source of the noise. *See e.g., Beaufort, South Carolina Municipal Code* § 9-1008 (requiring decibel level of seventy decibels measured by sound level decimeter located fifty feet from the source). The two ordinances each have separate and distinct elements and require substantially different methods of proof.

During the charge to the jury, the trial court read the City of Columbia ordinance and therefore provided an instruction consistent with the evidence presented by both the City and the Appellants. There was no evidence presented that made the Beaufort noise ordinance applicable to the case at hand. The transcript includes no mention of decibel readings taken by the City of Columbia Police Department, nor was there any evidence in the record related to distance measurements taken. The City of Beaufort's noise ordinance does not properly state the law of this case and likely would have served only to confuse the jury. Because the City of Beaufort noise ordinance has no applicability to the case at hand, the trial judge did not err in refusing to charge the jury on that ordinance.

3. Jury pool

In their Amended Notice of Appeal, the Clarks assert the trial court erred in allowing a jury to be pulled when less than 40 available members of the jury pool were present. However, there is nothing in the record to show this issue was raised at the lower court level. An issue not raised at trial is waived on appeal. *State v. Bailey*, 298 C.C. 1, 377 S.E.2d 581 (1989). During arguments before this Court, the Clarks' conceded they did not preserve this issue by objecting to the jury pool at the time of trial and thus the issue was waived. Therefore, this Court declines to address this issue.

4. First Amendment protections

The Clarks argue the lower court erred in relying on a circuit court order when deciding to deny them protection under the First Amendment. The record shows the trial court did a careful and thorough review of the law in this area and spent a great deal of time entertaining the Clarks' varied arguments related to this issue. After thoughtful consideration and review, the lower court found the ordinance was not unconstitutionally vague. For the following reasons, this Court agrees.

At issue in this case was whether the City's ordinance failed to give notice of prohibited conduct and was thus unconstitutionally vague. The traditional standard of unconstitutional vagueness is whether the terms of a statute are so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Reeves v. McConn*, 631 F.2d 377, 383 (5th Cir. Tex. 1980). "This standard is applied even more strictly to statutes that inhibit free speech because of the value our society places on the free dissemination of ideas." *Id.*

The City relied on *City of Columbia v. Johnny Gardner*, a circuit court order from Judge L. Henry McKeller, presiding judge of the Court of Common Pleas in the Fifth Judicial Circuit. In *Gardner*, the City appealed a ruling from the Columbia Municipal Court holding City Ordinance § 2-2082 was unconstitutionally vague. That ordinance provided, "It shall be unlawful for any person to create, assist in creating, permit, continue or permit the continuance of any *unreasonably loud*, disturbing or unnecessary noise in the City." (emphasis added). In ruling for the City, Judge McKeller held "unreasonably loud" was not an unconstitutionally vague term. See, eg., *Kovacs v. Cooper*, 336 U.S. 77 at 89 (1949) (holding *loud*, while an abstract word, "has through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden"); *Reeves v. McConn*, 631 F.2d 377, 382 (5th Cir. 1980) (holding "flexibility and reasonable breadth, rather than meticulous specificity," is acceptable in this area"). Moreover, the Fourth Circuit Court of Appeals held "unreasonably loud" was "invulnerable from [constitutional] attack[s] for vagueness. *Jim Crockett Promotion, Inc. v. Charlotte*, 706 F.2d 486, 489, 1983 U.S. (4th Cir. N.C. 1983).

The circuit court case and subsequent federal cases cited within it make it clear: "unreasonably loud" is not unconstitutionally vague. The Clarks had fair notice about prohibited conduct, and they cannot, therefore, claim protection under the First Amendment. The lower court correctly held the Clarks' First Amendment rights do not supersede the citizenry's rights to peace and general well-being. "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. *Kovacs v. Cooper*, 336 U.S. 77 (U.S. 1949).

5. Evidentiary issues

Lastly, the Clarks claim the trial judge granted a broad definition of admissible evidence on behalf of the City, while enforcing a narrow definition of admissible evidence for the Appellants, and these evidentiary decisions amounted to an error of law. Specifically, the Clarks claim the trial judge erred in not allowed them to inquire into a victim/witness's affiliation with a church or other religious organization.

Generally, all relevant evidence is admissible. *State v. Pittman*, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (S.C. 2007). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* (citing *South Carolina Rules of Evidence*: Rule 401, SCRE). However, relevant evidence may be excluded when its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" *Id.* "Evidence is unfairly prejudicial in the context of Rule 403, if the evidence has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Spears*, 393 S.C. 466, 479, 713 S.E.2d 324, 331(S.C. Ct. App. 2011). The trial court has wide discretion in ruling on the admissibility of evidence in a criminal case. *State v. Cheatham*, 349 S.C. 101, 106, 561 S.E.2d 618, 621 (S.C. Ct. App. 2002). The lower court will not be disturbed on appeal absent a clear abuse of discretion, amounting to an error of law. *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (S.C. 1990). Rule 403, SCRE.

The trial court did not allow the Clarks to question victim/witness Shari Callahan about her personal affiliation with a church or other religious organization. The court did permit the Clarks to proffer testimony in an attempt to show relevance, and the court also allowed the Clarks to question the victim/witness about any religious bias or prejudice she might have. Based on the proffered testimony, and the Clarks' inability to show how the testimony was relevant, the court properly

excluded such testimony. The record shows a conscientious decision on the part of the trial court to exclude evidence that was not relevant. Additionally, the trial court correctly found that the prejudicial effects outweighed the probative value of any such evidence. See, *South Carolina Rules of Evidence*: Rule 403, SCRE. Therefore, the trial court did not err in excluding any testimony related to the victim's personal religious affiliation.

ORDER

For the foregoing reasons, the Court finds that the conviction of the lower court is affirmed, and that the Appellant's appeal **IS DENIED**.

AND IT IS SO ORDERED.

April 14, 2016
~~June 2015~~
Columbia, South Carolina
JL Greg


DIANE SCHAFER GOODSTEIN
Presiding Judge

STATE OF SOUTH CAROLINA	)	IN THE COLUMBIA MUNICIPAL COURT
	)	
COUNTY OF RICHLAND	)	
	)	
CITY OF COLUMBIA,	)	
	)	
VS.	)	TRANSCRIPT OF RECORD
	)	68898GJ, 68853GJ, 51422GQ,
JOHNNIE L. CLARK and HARRIET TERRY	)	46768GQ, 75634GH, 75637GH
CLARK,	)	
	)	
DEFENDANTS	)	

JURY HELD BEFORE THE HONORABLE STEVEN D. DENNIS, PRESIDING
JUDGE, IN THE COLUMBIA MUNICIPAL COURT, COLUMBIA, SOUTH CAROLINA, ON
SEPTEMBER 8, 2014.

APPEARANCES:

JESSICA MANGUM, ESQUIRE
APPEARING FOR THE CITY

ORIN G. BRIGGS, ESQ.
ATTORNEY FOR THE DEFENDANTS

TRANSCRIBED BY:
NANCY S. AHRENS

1 **THE COURT:** GIVE ME A MOMENT TO READ PART OF THIS, PLEASE.

2 **MR. BRIGGS:** YOUR HONOR, ARE YOU GOING TO READ PART OF

3 MINE?

4 **THE COURT:** YES, SIR.

5 **MR. BRIGGS:** LET ME HELP YOU.

6 **THE COURT:** OKAY.

7 **MR. BRIGGS:** IF YOU'LL JUST READ THE FIRST PARAGRAPH AND

8 THEN THE LAST PAGE. THAT HAS TO DO WITH THE CONTINUANCE AND ALSO

9 THE REQUEST FOR ACCESS TO THE SUBJECT PROPERTY AND THEN, YOUR HONOR,

10 I DON'T THINK IT'S TOO COMPLICATED. IF YOU'LL START ON PAGE TWO, THE

11 FIRST PARAGRAPH; PAGE THREE, ESSENTIALLY ALL OF THAT AND THEN THE

12 FIRST PARAGRAPH ON PAGE FOUR YOU'LL GET THE ESSENCE OF THE MOTION TO

13 DISMISS, YOUR HONOR, AND THAT WILL GIVE YOU A GOOD FEEL AND I

14 WOULDN'T WANT TO READ OR EXPLAIN ANY MORE OF THAT PRIOR TO, YOU

15 KNOW, MAKING THE ARGUMENT BECAUSE YOU MIGHT HAVE TIME TO READ IT

16 ON OUR DAY OFF. BUT I KNOW YOU'VE GOT OTHER WORK TO DO, TOO, BUT

17 ANYWAY IT'S NO NEED OF US GOING OVER THE WHOLE THING, BUT IF YOU HAD

18 ANY QUESTIONS. SOME OF THE OTHER IS WHAT'S IN THERE, YOUR HONOR, JUST

19 TO BRIEFLY -- I HAVE THE SWANSEA CASE IN THERE. I HAVE THE EDWARDS

20 CASE IN THERE AND I HAVE WHAT IS PART OF A BRIEF ON DISORDERLY CONDUCT

21 AND BREACH OF THE PEACE WHICH I'VE BEEN SUCCESSFUL IN USING, ABOUT A

22 TWELVE PAGE MEMO, AND I'VE GOTTEN SIX DISMISSALS BASED ON THAT.

23 THAT'S THE AREA WHERE -- I ALWAYS FORGET THE NAME OF THE CASE, I DON'T

24 KNOW WHY, BUT SOME YOUNG FOLKS WENT INTO A SHERIFF'S OFFICE AND

25 WANTED TO GET A REPORT AND IT WASN'T READY AND THEY JUST CARRIED ON

1 AND MADE NOISE AND CURSED.

2 THE COURT: STATE VS. PERKINS?

3 MR. BRIGGS: YES, THAT ONE, YOUR HONOR. SO I CITE THOSE
4 KIND OF CASES, TOO, WHICH ARE SIMILAR AND PROVE AS YOU KNOW THAT
5 WORDS ALONE WON'T PUT YOU IN JAIL IN THIS STATE UNLESS THEY ARE
6 FIGHTING WORDS OR THE OLD HOLLERING FIRE IN A CROWDED THEATER, YOUR
7 HONOR.

8 THE COURT: WHO IS HARRIET CLARK?

9 MR. CLARK: THAT'S MY WIFE.

10 THE COURT: OKAY.

11 MR. BRIGGS: SHE'S HERE, YOUR HONOR.

12 THE COURT: OKAY. ALL RIGHT. I HAVEN'T SEEN THE CHARGING
13 PAPERS. ARE THE CHARGES UNDER CITY CODE 8-67?

14 MS. MANGUM: THEY ARE, YOUR HONOR.

15 THE COURT: AND THE "A" OR "C" OR BOTH?

16 MS. MANGUM: WE HAVE ONE THAT'S UNDER "A" AND THE
17 REMAINING SIX ARE UNDER "C"

18 THE COURT: "C." OKAY. FIRST, LET'S JUST GO AHEAD AND DEAL
19 WITH THE REQUEST THAT THE PREMISES BE OPENED UP TO THE DEFENDANT FOR
20 INDEPENDENT TESTING. IF I DECIDE THAT THEY CAN THEN THAT WOULD BE
21 DISPOSITIVE OF WHETHER WE TRY THIS CASE THIS WEEK OR NOT. WHAT
22 EXACTLY IS YOUR MOTION THERE, MR. BRIGGS? WHAT DO YOU WANT TO DO
23 AND WHY DO YOU THINK YOU ARE ALLOWED TO DO IT, SIR?

24 MR. BRIGGS: YOUR HONOR, I HAD ASKED MR. SHEFTMAN SOME
25 WEEKS AGO TO ARRANGE SOMETHING TO WHERE HE AND I COULD GO OVER

1 THERE DURING A CHURCH SERVICE AND I COULD GET SOME READINGS AT THE
2 WINDOWS OF THE CHURCH. THAT'S WHERE THE NOISE COMES FROM. AND THEN
3 AT THE WINDOWS OF THE RESIDENCE OF THE COMPLAINING WITNESSES. I
4 NEVER GOT ANY RESPONSE FROM HIM AND ON WEDNESDAY OF LAST WEEK --

5 THE COURT: NOW WHO DID YOU REQUEST THAT OF?

6 MR. BRIGGS: HOWARD SHEFTMAN.

7 THE COURT: ALL RIGHT. WELL, HE'S NOT INVOLVED IN THE
8 CRIMINAL SIDE SO IT SEEMS LIKE TO ME YOU SHOULD HAVE BEEN ASKING MS.
9 MANGUM OVER HERE. WOULD YOU AGREE?

10 MS. MANGUM: I WOULD, YOUR HONOR.

11 MR. BRIGGS: I NEVER HEARD MR. MANGUM'S NAME AND I DON'T
12 HAVE ANYTHING IN MY FILE.

13 THE COURT: WELL, SHE'S THE PROSECUTOR.

14 MS. MANGUM: YOUR HONOR, MR. BRIGGS AND I HAVE SPOKEN
15 MANY TIMES ABOUT THIS CASE.

16 THE COURT: YOU KNOW, WHETHER OR NOT IN A CIVIL CASE THEY
17 WILL ALLOW IT, I HAVE NOTHING TO DO WITH THAT. NOT ANYTHING AT ALL.
18 I'M JUST CONCERNED WHETHER THERE ARE ANY RULES UNDER RULE 5 OR ANY
19 OTHER BRADY TYPE CONSIDERATIONS THAT YOU MIGHT HAVE A RIGHT TO DO
20 THIS BUT IF YOU HAVEN'T ASKED MS. MANGUM THEN I DON'T KNOW THAT --

21 MR. BRIGGS: WELL, I WOULD ASK HIM NOW, YOUR HONOR, IF WE
22 COULD TALK ABOUT IT THIS AFTERNOON AND I GUESS YOU ARE LEAVING IT UP
23 TO HIM.

24 THE COURT: WELL --

25 MR. BRIGGS: YOUR HONOR, THE PROBLEM IS I WENT THERE

1 WEDNESDAY NOT KNOWING THAT THIS WAS THE COMPLAINING WITNESS'S
2 HOUSE. I ALWAYS THOUGHT IT WAS THE ONE BEHIND THE CHURCH. YET I GET
3 PLEADINGS FROM A CARL (INAUDIBLE) CLAIMING THAT I'VE MADE MYSELF A
4 WITNESS BECAUSE I IGNORED A NO TRESPASSING SIGN, YOUR HONOR. AND I
5 DON'T WANT TO GET INTO THAT CASE.

6 THE COURT: I'M NOT GOING TO.

7 MR. BRIGGS: BUT, YOUR HONOR, LET ME MAKE ONE OTHER POINT.
8 THE GENTLEMAN IN THIS CASE LIVED HERE FOR FOUR YEARS AND NO
9 COMPLAINTS.

10 THE COURT: YEAH, BUT THAT'S A JURY ARGUMENT. THAT'S NOT
11 WHAT I NEED TO BE HEARING HERE TODAY. UNDER WHAT RULE DO YOU THINK
12 YOU'VE GOT A RIGHT TO GO INTO SOMEBODY ELSE'S HOUSE OR EVEN ON THEIR
13 PROPERTY BECAUSE IT IS PRIVATE PROPERTY TO TAKE SOUND READINGS OR
14 ANY OTHER TESTS?

15 MR. BRIGGS: HOW AM I GOING TO KNOW WHETHER SOMEBODY IS
16 LYING, YOUR HONOR, UNLESS I SEE THE EVIDENCE?

17 THE COURT: WELL, HAVE YOU TAKEN ANY SOUND READINGS ON
18 THE CHURCH PROPERTY?

19 MR. BRIGGS: YES, I HAVE.

20 THE COURT: OKAY.

21 MR. BRIGGS: AND I BROUGHT MY METER. I CAN TAKE ONE RIGHT
22 NOW. I THINK THE COURT KNOWS THAT NORMAL CONVERSATION, YOUR
23 HONOR, IS SIXTY-FIVE DECIMALS. NOW WHEN I TOOK MINE AT THE CHURCH,
24 MINE IS SIXTY-SIX AND IT GETS UP HIGHER THAN THAT SOMETIMES. THE COURT
25 KNOWS ME AND I DO GET LET'S SAY DRAMATIC SOMETIMES. BUT THE READING

1 AT THE CHURCH AT THAT TIME WAS TWENTY-FIVE DECIMALS. YOUR HONOR,
2 YOU CAN'T HEAR TWENTY-FIVE DECIMALS FIVE FEET AWAY. SO WHERE ARE
3 THEY GETTING THEIR DECIMALS READINGS FROM?

4 THE COURT: WHAT DO YOU THINK ABOUT THE MOTION?

5 MS. MANGUM: YOUR HONOR, FIRST OF ALL, IN TERMS OF THE
6 DECIMALS READINGS THAT THE POLICE OFFICERS TOOK ON THE SPECIFIC
7 INCIDENT DATES, MR. BRIGGS CERTAINLY CAN CROSS EXAMINE THEM WHEN
8 THEY ARE ON THE STAND. ASK THEM HOW THEY GOT THOSE READINGS. HE
9 CAN QUESTION THE CERTIFICATION OF THE DECIMAL READING MACHINE. BUT
10 TO GO NOW AND TAKE A DECIMAL READING AT THE HOUSE FOR INCIDENTS
11 THAT TOOK PLACE A YEAR AND A HALF AGO AREN'T RELEVANT TO THE ISSUE
12 BEFORE YOU. I'M ALSO NOT SURE UNDER WHAT JURISDICTION YOU COULD
13 ORDER THAT THE VICTIMS ALLOW –

14 THE COURT: WELL, THAT'S WHAT I'M CONCERNED ABOUT,
15 WHETHER I EVEN HAVE THE AUTHORITY IF I WANTED TO DO IT, TO ORDER
16 PRIVATE PROPERTY TO BE UTILIZED BY SOMEONE THEY DON'T WANT USING IT.
17 YOU KNOW, A CIRCUIT JUDGE MIGHT OR MIGHT NOT HAVE THAT AUTHORITY
18 BUT I'M PRETTY SURE I DON'T.

19 MS. MANGUM: YES, YOUR HONOR.

20 MR. BRIGGS: ALL I NEED, YOUR HONOR, IS A READING FROM OUR
21 WINDOW AND A READING FROM THEIR WINDOW. THAT'S ALL I NEED.

22 MS. MANGUM: AND HE CAN CERTAINLY GET A READING FROM
23 THEIR WINDOW.

24 THE COURT: I DON'T EVEN THINK YOU NEED THAT. I THINK YOU
25 HAVE A READING FROM YOUR WINDOW AND YOU KNOW THE DISTANCE TO THE

1 OTHER ONE. YOU CAN HAVE AN EXPERT THAT WILL TELL YOU HOW SOUND
2 DISPERSES AND WHAT THE RATE OF DIMINISHMENT IS OVER SPACE AND TIME.

3 MR. BRIGGS: I'VE GOT ONE MORE PROBLEM THEN, YOUR HONOR.
4 MY CLIENTS' PROPERTY LINE IS ONLY ONE FOOT AWAY FROM THEIR CHURCH. I
5 WOULD HAVE TO GET SOMEBODY ELSE OTHER THAN ME TO TAKE THE
6 READINGS BECAUSE I CAN'T SQUEEZE INTO ONE FOOT.

7 THE COURT: WELL, I AGREE. YOU NEED SOMEBODY TO DO IT.
8 YOU DON'T WANT TO BE A WITNESS ANYHOW I DON'T THINK SO YOU NEED
9 SOMEBODY ELSE TO DO IT.

10 MR. BRIGGS: WE DID TAKE ONE READING THAT NIGHT. THAT WAS
11 WEDNESDAY. AND THEY CLAIM THEY HEARD MORE NOISE ON TUESDAY AND IT
12 WAS THE SAME -

13 THE COURT: SEE, THAT'S ALWAYS GOING TO BE THE QUESTION.
14 THE DAY YOU READ IT IT WASN'T BEING PLAYED AT THE SAME LOUDNESS AS IT
15 WAS THE DAY THEY CLAIM IT WAS LOUD. SO NO MATTER WHAT YOUR
16 READINGS ARE YOU'RE STILL NOT GOING TO NECESSARILY HAVE PROOF. IT
17 MIGHT BE SOME EVIDENCE BUT IT'S NOT PROOF OF WHAT THEY HEARD.

18 MR. BRIGGS: BUT, YOUR HONOR, IF THE POLICE, MR. BRIGGS, THE
19 COMPLAINING WITNESSES AND THEIR LAWYER WERE THERE WE WOULD KNOW
20 THAT WE HAD THE SAME READING.

21 THE COURT: I'M ASSUMING YOU WERE NOT THERE ON ANY NIGHT
22 THAT A CHARGE HAS BEEN FILED AS HAVING OCCURRED.

23 MR. BRIGGS: NO, I WAS THERE WEDNESDAY INSTEAD OF
24 TUESDAY.

25 THE COURT: WELL, I MEAN WHAT YOU WOULD GET WOULD ALSO

1 BE EVIDENCE BUT HOW PERSUASIVE IT IS, THAT'S UP TO THE JURY TO DECIDE.
2 ALL RIGHT. I'M GOING TO RULE I DON'T HAVE THE AUTHORITY TO ORDER
3 PRIVATE PROPERTY OWNERS TO LET STRANGERS IN THEIR HOUSE OR THEIR
4 YARD. IF THEY WANT TO VOLUNTARILY LET YOU, THAT'S UP TO THEM BUT I
5 DON'T THINK I'VE GOT THE AUTHORITY TO MAKE PEOPLE DO THAT.

6 MR. BRIGGS: I WANT TO OBJECT TO THAT RULING, YOUR HONOR.
7 AND I'LL DO IT A COUPLE OF MORE TIMES IF IT'S NECESSARY.

8 THE COURT: ALL RIGHT. LET'S MOVE ON THE ISSUE OF OVERLY
9 BROAD WHICH I ASSUME IS WHAT WE ARE GETTING AT HERE.

10 MR. BRIGGS: I THINK YOU ESSENTIALLY RULED ON THE
11 CONTINUANCE, YOUR HONOR, UNLESS YOU ARE STILL HOLDING THAT. LET ME
12 MENTION ONE OTHER THING ON A CONTINUANCE, YOUR HONOR.

13 THE COURT: YES, SIR.

14 MR. BRIGGS: THERE WAS SOME DISCUSSION AND I DO NOT
15 REMEMBER WHETHER I TALKED TO JESS ABOUT THIS OR HER LAW CLERK BUT
16 SOME TIME AGO WHEN MR. CLARK HAD HAD MAJOR SURGERY AND HE STILL
17 HAS AN OPEN WOUND, YOUR HONOR, AND HE STILL IS NOT PREACHING. DID
18 YOU PREACH ANY THIS WEEK?

19 (INAUDIBLE)

20 MR. BRIGGS: HE'S STILL NOT PREACHING, YOUR HONOR. HE HAD
21 AN OUTSIDE PREACHER. THEY HAD A COUPLE OF SERVICES THIS WEEK SO HE'S
22 STILL UNDER THE WEATHER. THE POINT I'M MAKING IS WHILE WE HAD BEEN
23 TALKING ABOUT OCTOBER I DIDN'T GET NOTICE OF THESE TRIALS UNTIL
24 AUGUST THE 22ND. DON'T EXPECT YOU TO DO ANYTHING WITH THAT NOW, I
25 JUST WANT IT ON THE RECORD, YOUR HONOR.

1 THE COURT: YES, SIR.

2 MS. MANGUM: YOUR HONOR, MAY I RESPOND?

3 THE COURT: SURE. YES, MA'AM.

4 MS. MANGUM: IT TAKES A LOT FOR MY OFFICE TO COORDINATE
5 ALL OF THESE OFFICERS AND WITNESSES AND DEFENDANTS AND DEFENSE
6 COUNSEL AND SO BEFORE WE EVEN BEGAN AIMING FOR THIS WEEK MY
7 PARALEGAL FIRST MADE CONTACT WITH MR. BRIGGS TO MAKE SURE THAT THIS
8 WEEK WOULD WORK FOR HIM AND HIS CLIENT AND THAT WAS MANY WEEKS
9 AGO. AND SO THIS IS A DATE THAT THEY INITIALLY APPROVED AND THEN WE
10 STARTED WORKING –

11 MR. BRIGGS: THAT IS NOT TRUE, YOUR HONOR. NOBODY HAS
12 TALKED TO ME ABOUT AUGUST THE 22ND. AND I'VE GOT A REAL GOOD
13 ELEPHANT'S TYPE MEMORY.

14 THE COURT: OKAY. ALL RIGHT.

15 MS. MANGUM: I'LL BE GLAD TO PROFFER TESTIMONY.

16 THE COURT: NO, THAT'S ALL RIGHT. THAT'S ALL RIGHT. I GET
17 THE IMPRESSION IT'S DIFFICULT TO PUT THIS TOGETHER BECAUSE THE CHIEF
18 JUDGE TALKED TO ME, I DON'T REMEMBER WHEN, MAYBE NINE MONTHS AGO,
19 AND ASK ME COULD SHE PUT ALL THESE CASES ON MY DOCKET AND WOULD I
20 TRY TO RESOLVE ALL OF THEM. AND SO I THINK IT'S BEEN ON MY DOCKET FOR
21 AT LEAST NINE MONTHS WITHOUT ANY TRIALS. I KNOW IT'S BEEN EFFORTS TO
22 MAKE TRIALS BUT IT'S DIFFICULT TO PUT TOGETHER.

23 MS. MANGUM: WE PREVIOUSLY WERE SCHEDULED FOR A DATE IN
24 JULY. MR. BRIGGS SUBMITTED A LETTER FROM THE DEFENDANT'S DOCTOR
25 THAT HE HAD HAD SOME BACK SURGERY. WE DID NOT CONTEST THAT

1 CONTINUANCE. WE WERE GLAD TO GIVE HIM THE BENEFIT OF THE DOUBT AT
2 THAT POINT BUT WE DID UNDERSTAND THAT WE WOULD BE GOING FORWARD
3 SOONER RATHER THAN LATER, AND THAT'S WHY THIS DATE WAS SELECTED.

4 THE COURT: OKAY.

5 MR. BRIGGS: I HAVE NOTHING FURTHER, YOUR HONOR.

6 THE COURT: OKAY. AT THIS POINT I HAVEN'T HEARD ANYTHING
7 THAT MAKES ME WANT TO GRANT A CONTINUANCE. IF OTHER MATTERS COME
8 UP OR IT'S OTHER FACTS YOU CAN PRESENT I WILL CERTAINLY LISTEN TO THEM
9 AND CONSIDER THEM.

10 MR. BRIGGS: AND, YOUR HONOR, HAVE YOU READ ALL YOU NEED
11 TO KNOW ON THE QUESTION OF DISMISSAL OF CHARGES? ARE YOU GOING TO
12 HOLD THAT IN ABEYANCE? I THINK THAT COVERS MY MOTIONS, YOUR HONOR.

13 THE COURT: OKAY. BUT LET ME DO ASK YOU ONE THING, MR.
14 BRIGGS. ARE YOU MAKING THE ALLEGATION THAT CITY CODE 8-67, SUBSECTION
15 "C" IS OVERLY BROAD? IS THAT YOUR MAIN ARGUMENT?

16 MR. BRIGGS: I WOULD SAY THE MAIN ARGUMENT IS VAGUE
17 BECAUSE IN McCOY THE COURT FELT THAT WAS A BETTER ARGUMENT. I THINK
18 IT VIOLATES BOTH OF THEM.

19 THE COURT: IT COULD BE VAGUE OR --

20 MS. MANGUM: AND IF YOU WERE TO READ, YOUR HONOR, ON
21 YOUR OWN FURR VS. SWANSEA AND THE EDWARDS CASE WHICH WAS ON THE
22 STATEHOUSE GROUNDS, YOU WOULD REMEMBER THE CONTEXT OF THAT. BOTH
23 OF THOSE CASES WOULD SUPPORT AS WOULD CITY OF HOUSTON VS. HILL, YOUR
24 HONOR. THE ONLY DISTINCTION IN HOUSTON VS. HILL IS IT WAS JUST LIKE
25 McCOY. IT WAS SOMEBODY INTERFERING WITH A POLICE OFFICER BUT IT'S

1 STILL FREE SPEECH, YOUR HONOR, AND IT STILL CAN'T BE PROSECUTED WILLY
2 NILLY. AND IT'S GOT TO BE - PROBABY THE KEY WORDING, YOUR HONOR - LET
3 ME GO ON AND PUT IT ON THE RECORD. THERE ARE REALLY THREE TESTS BUT
4 THEY ALL AMOUNT TO THE SAME. ONE IS WHETHER IT'S VAGUE OR
5 OVERBROAD. THAT'S ESSENTIALLY NUMBER ONE. THE OTHER ONE IS - AND
6 YOU FIND THIS IN SOME OF THE CASES - AND IT'S ON THE NEXT TO THE LAST
7 PARAGRAPH ON PAGE NINETEEN, YOUR HONOR. THE ORDINANCE MUST BE
8 NARROW, OBJECTIVE AND DEFINITIVE, AND THEN THE THIRD PART OF ALL THAT
9 TEST IS IT MUST NOT GIVE THE DECISIONMAKER TOO MUCH LATITUDE IN
10 MAKING A DECISION OF WHAT IS DISTURBING NOISES, YOUR HONOR. SEE, NONE
11 OF THOSE TERMS ARE DEFINED IN THE ORDINANCE. NOW LET ME BE HONEST
12 AND LET ME TRY TO HELP THE COURT. I BELIEVE THIS COURT COULD READ AN
13 ORDINANCE LIKE THIS TO BE NARROW IF THE COURT CONCLUDED THAT - LET'S
14 SAY SEVENTY-FIVE DECIMALS AT THE CHURCH WINDOW IS GOOD AND
15 SEVENTY-SIX ISN'T. OKAY. LET ME GIVE YOU A COUPLE OF EXAMPLES. IF THIS
16 ORDINANCE IS CONSTITUTIONAL, YOUR HONOR, EVERY PUBLIC ADDRESS
17 SYSTEM IN EVERY FOOTBALL AND BASEBALL STADIUM IN THIS CITY IS ILLEGAL.
18 I KNOW FOR A FACT WHEN I GO TO THE BASEBALL GAMES AT CAROLINA THAT I
19 SIT IN THE WAY OF A SPEAKER AND IT'S AT LEAST EIGHTY-FIVE DECIMALS. YOU
20 KNOW WHAT THE DECIMAL LEVEL IS AT CAROLINA STADIUM, YOUR HONOR.
21 AND THERE ARE BUSINESSES A BLOCK AWAY. AND I MEANT TO GO OVER THERE
22 AND CHECK IT MYSELF SATURDAY AND I DIDN'T DO IT. BUT THAT WAS THE
23 REASON I WANTED TO HAVE A LITTLE TIME TO TAKE SOME MEASUREMENTS. IT
24 JUST CAME UPON ME RECENTLY THAT WE NEED SOME OTHER MEASUREMENTS.
25 SO I'M SAYING, YES, THIS COURT COULD PROBABLY PUT A RESTRICTIVE

1 READING ON THE LANGUAGE BUT THE LANGUAGE BY ITSELF, NAMELY, THE
2 WORDINGS THAT I HAVE UNDERLINED, YOUR HONOR, IN THE SECTION JUST
3 DON'T TELL THE DEFENDANT HOW MUCH IS TOO MUCH NOISE. AND I THINK THE
4 TESTIMONY WILL SHOW THAT HE'S NEVER SAID IF YOU GO OVER SO AND SO
5 YOU ARE GOING TO VIOLATE THE STATUTE.

6 THE COURT: OBVIOUSLY I KNEW THIS CASE WAS COMING UP SO
7 I'VE DONE SOME THINKING ABOUT IT IN ADVANCE. HERE'S WHAT I'VE BEEN
8 THINKING SO CORRECT ME, HELP ME OUT HERE. NUMBER ONE, NOW MY FIRST
9 QUESTION WAS A THRESHOLD QUESTION, DOES THE POLICE POWER OF THE
10 STATE INCLUDE THE POWER TO REGULATE NOISE. MY GUESS IS IT DOES BUT I
11 WOULD LIKE TO BE REINFORCED AND REASSURED ON THAT.

12 MS. MANGUM: YES, YOUR HONOR.

13 THE COURT: AND IF IT DOES HOW DO YOU DRAFT A STATUTE -
14 AND I THINK MR. BRIGGS MAYBE JUST SUGGESTED AN ANSWER TO THIS
15 QUESTION - THAT IT IS NOT DISCRETIONARY AND IS NOT VAGUE AND IS NOT
16 OVERBROAD. I MEAN HOW CAN YOU POSSIBLY EVEN DEFINE TERMS AND COVER
17 EVERY SITUATION THAT SHOULD BE COVERED AND LEAVE OUT THOSE THAT
18 SHOULDN'T BE. IS IT POSSIBLE TO DO THAT?

19 MS. MANGUM: LET ME START WITH YOUR POLICE POWER
20 QUESTION. AND I'M GOING TO PASS FORWARD A CASE FOR YOU. IT'S DENEEN
21 VS. THE CITY OF CHARLESTON WHICH ADDRESSES THIS VERY ISSUE. THIS IS A
22 SOUTH CAROLINA SUPREME COURT CASE. IT HAS TO DO WITH A NOISE
23 ORDINANCE VIOLATION, AN EQUAL PROTECTION RIGHTS ARGUMENT. AND IN
24 THERE THE COURT FINDS THAT PRESERVING THE HEALTH, SAFETY AND
25 WELFARE AND COMFORT OF DWELLERS IN URBAN AREAS IS A REGULATION OF

1 THE POLICE POWER. AND THE EXERCISE OF THE POLICE POWER IS ONLY
2 SUBJECT TO JUDICIAL INTERVENTION WHEN THE ACTION IS ARBITRARY AND
3 HAS NO REASONABLE RELATION TO A LAWFUL PURPOSE. LET ME FIND THAT
4 EXACT QUOTE FOR YOU. THAT STARTS AT THE BOTTOM OF PAGE TWO, YOUR
5 HONOR.

6 THE COURT: OKAY.

7 MS. MANGUM: AND GOES ON TO PAGE THREE.

8 THE COURT: YES.

9 MS. MANGUM: AND, I'M SORRY. THIS IS AN ALCOHOL ORDINANCE.
10 THIS IS NOT THE NOISE ORDINANCE BUT THIS IS A CLUB WHERE THEY CONTROL
11 – THEY SET A CITY STATUTE TO LIMIT THE TIME THAT YOU CAN CONSUME
12 ALCOHOL.

13 THE COURT: I HAVE PREVIOUSLY DONE A LITTLE BIT OF
14 RESEARCH ON POLICE POWERS BECAUSE IT COMES UP IN THIS COURT. I'VE
15 NEVER RESEARCHED SPECIFICALLY AS IT RELATES TO NOISE ORDINANCES BUT
16 GIVEN THE GENERAL TONE THAT THE APPELATE COURTS TAKE MY GUESS WAS
17 THAT THIS WAS A LEGITIMATE POLICE POWER. BUT IF THERE'S A CASE OUT
18 THERE THAT SAYS IT'S NOT I'D SURE LIKE TO KNOW ABOUT IT.

19 MS. MANGUM: THERE'S NOT, YOUR HONOR, THAT I'M AWARE OF.
20 I'VE DONE EXTENSIVE RESEARCH AS WELL.

21 THE COURT: OKAY. ALL RIGHT. I'M GOING TO READ THIS CASE
22 AND HOPEFULLY IT WILL MAKE ME FEEL BETTER ABOUT MY DECISION.

23 MR. BRIGGS: YOUR HONOR, COULD I CALL ONE OTHER THING TO
24 YOUR ATTENTION ON THIS SUBJECT?

25 THE COURT: YES, SIR.

1 **MR. BRIGGS:** FIRST OF ALL, WHEN WE ARE TALKING ABOUT FREE
2 SPEECH THERE'S NOT A SINGLE STATE CASE THAT HAS ANY AUTHORITY IN THIS
3 MATTER BECAUSE IT'S ALL CONSTITUTIONAL LAW. FEDERAL LAW UNDER THE
4 FIRST AND FOURTEENTH AMENDMENT. BUT THE POINT I WANTED TO MAKE TO
5 YOU IS AS TO SOLUTIONS. IF YOU LOOK ON MY MEMO, PAGE THREE, JUDGE
6 ANDERSON CLEARLY SAID THAT CITY COUNCIL COULD HAVE SOLVED THE
7 OVERBREADTH PROBLEM AND I'LL JUST READ IT. THE INSTANT COURT NOTED
8 THAT CITY COUNCIL COULD HAVE SOLVED THE OVERBREADTH PROBLEM BY
9 LIMITING THE INTERFERE WITH OR (INAUDIBLE) LANGUAGE WITH THE ADVERB
10 OF PHYSICALLY. AND, YOUR HONOR, YOU KNOW THAT LAW AS WELL AS I DO. I
11 CANNOT PHYSICALLY INTERFERE WITH A POLICE OFFICER DOING HIS JOB BUT I
12 CAN MOUTH OFF AS MUCH AS I WANT TO. I CAN CURSE THAT POLICE OFFICER, I
13 CAN TELL HIM AS THEY DID IN CITY OF HOUSTON THAT HE'S A NAZI AND ALL
14 KINDS OF THINGS BUT WHEN YOU PHYSICALLY INTERFERE WITH A POLICE
15 OFFICER YOU HAVE VIOLATED THE LAW AND IT'S NOT PROTECTED SPEECH.

16 **THE COURT:** OKAY.

17 **MS. MANGUM:** YOUR HONOR, I FEEL LIKE WE ARE BIT OFF TRACK
18 HERE BECAUSE THE CITY IS NOT TRYING TO ELIMINATE WHAT MR. CLARK OR
19 WHAT HIS CHURCH SAYS. THAT'S NOT THE ISSUE. THE ISSUE IS NOT WHAT THE
20 SPEECH IS. THE ISSUE IS PURELY THE NOISE LEVEL AND SO I DON'T SEE HOW
21 ANY OF THAT IS APPLICABLE AT THE CASE IN POINT.

22 **THE COURT:** WELL, I THINK YOU FIND A LOT OF SPEECH CASES
23 THAT ARE ATTACKED ON THE OVERBROAD AND VAGUE ISSUE AND SO THEY ARE
24 EXAMPLES OF VAGUENESS AND OVERBREADTH. TELL ME WHAT YOU THINK
25 ABOUT VAGUENESS AND OVERBREADTH AND COULD THEY HAVE CORRECTED

1 THIS? IS THERE A DIFFERENT WORDING THAT WOULD BE MORE APPROPRIATE?

2 MS. MANGUM: WELL, I THINK THAT IN TERMS OF VAGUENESS AND
3 OVERBREADTH AND OUR STATUTE TO (INAUBIDLE) THE WILLIAM BRICE SORT
4 OF ARGUMENT AND I DON'T PRETEND TO KNOW HOW ANY OF THAT WORKS
5 WITH THE FOOTBALL STADIUM BUT IN GENERAL OUR STATUTE UNDER "D" DOES
6 GIVE AN ALTERNATIVE FOR SITUATIONS WHERE THERE MAY BE EXCESSIVE
7 NOISE AND THAT IS THE APPLICATION OF A PERMIT FOR SPECIAL OCCASIONS.
8 AND SO WE ARE NOT SAYING THAT ANY NOISE AT ANY TIME IS ABSOLUTELY
9 UNACCEPTABLE. THERE'S JUST A PROCEDURE TO FOLLOW FOR THAT NOISE.
10 ALSO, OUR STATUTE USES THE TERM UNREASONABLY LOUD SO IT'S THE
11 STANDARD REASONABLE PERSON. AND I THINK THAT ELIMINATES ANY
12 QUESTIONS IN TERMS OF -

13 THE COURT: YES, BUT THE OTHER CAN OF WORMS ABOUT
14 DISCRETION OF THE OFFICER WHO SHOWS UP. ONE OFFICER MIGHT THINK THIS
15 IS UNREASONABLY LOUD AND OTHER OHER OFFICER MIGHT NOT THINK SO. SO
16 YOU GET DIFFERENT ENFORCEMENT BASED ON JUST THE OFFICER'S SUBJECTIVE
17 BELIEFS, WOULDN'T YOU?

18 MS. MANGUM: WELL, YOUR HONOR, I THINK - I MEAM PERHAPS
19 THAT'S A WEIGHT OF THE ARGUMENT KIND OF QUESTION BUT I DON'T THINK
20 THAT TAKES ANYTHING AWAY FROM THE ACTUAL CHARGE

21 THE COURT: AS I UNDERSTAND IT, MR. BRIGGS DOESN'T HAVE TO
22 PROVE THAT ANOTHER OFFICER WOULD HAVE HAD A DIFFERENT OPINION ON
23 ANY OF THESE OCCASIONS. LET'S ASSUME FOR THE SAKE OF ARGUMENT THAT
24 ON EACH OF THESE OCCASIONS THE NOISE WAS SO LOUD THAT NOT ONE IN A
25 MILLION PEOPLE WOULD HAVE THOUGHT IT WAS REASONABLE. HE JUST HAS TO

1 PROVE THAT IT'S POSSIBLE THAT THE NOISE COULD BE AT A LEVEL SOMEWHERE
2 HALFWAY IN BETWEEN OR HALF THE PEOPLE WOULD GO ONE WAY, HALF THE
3 PEOPLE WOULD GO THE OTHER AND THEN THAT WOULD MAKE IT VAGUE AND
4 WOULD MAKE THE ENFORCEMENT SUBJECTIVE. I MEAN THAT'S ALL HE'S GOT
5 TO SHOW, NOT THAT IT DIDN'T HAPPEN BUT THAT IT COULD HAPPEN UNDER
6 THIS ORDINANCE.

7 MS. MANGUM: WELL, YOUR HONOR, IF I COULD, I HAVE TWO
8 CASES THAT I THINK ARE ALMOST DIRECTLY ON POINT.

9 THE COURT: SURE.

10 MS. MANGUM: THEY BOTH INVOLVE NOISE ORDINANCES. ONE IS A
11 CITY OF BEAUFORT CASE AND ONE IS A FEDERAL CASE WITH JUDGE WOOTEN.

12 THE COURT: OKAY.

13 MS. MANGUM: I'LL GIVE YOU THE FEDERAL CASE FIRST. IT'S
14 CHRISTIAN METHODIST EPISCOPAL VS. RUZZIO. AND THEN THIS IS THE STATE
15 CASE, THE CITY OF BEAUFORT. JUST LET ME KNOW WHEN YOU ARE READY TO
16 HEAR FROM ME.

17 (PAUSE)

18 THE COURT: ALL RIGHT. AS RELATES TO THE FEDERAL CASE, ONE
19 OF THE THINGS I FOUND INTERESTING ABOUT IT WAS THAT THE BEAUFORT
20 NOISE ORDINANCE IS NOT DISCRETIONARY. I MEAN IT SAYS IF IT CAN BE HEARD
21 FIFTY FEET AWAY. IT GIVES AN OBJECTIVE STANDARD FOR THE OFFICER TO
22 ENFORCE. AND THAT IS THE WHOLE ISSUE WITH THE CITY'S ORDINANCE IS
23 WHETHER OR NOT IT'S OBJECTIVE, SUBJECTIVE. BEAUFORT FOUND A WAY TO
24 HAVE AN OBJECTIVE NOISE ORDINANCE.

25 MS. MANGUM: YOUR HONOR, IF YOU LOOK AT THE CITY OF

1 BEAUFORT VS. BAKER CASE?

2 THE COURT: OKAY. I'VE GOT IT HERE.

3 MS. MANGUM: THEIR ORDINANCE IS ON PAGE TWO OF THAT CASE.
4 AND THEY RELY ON THE REASONABLE TEST AND THE COURT FINDS THAT THAT
5 TEST IS –

6 THE COURT: WELL, IN THE FEDERAL CASE THEY QUOTE THE
7 ORDINANCE AND -- ALL RIGHT. THE BEAUFORT VS. BAKER IS A 1993 CASE. THE
8 U.S. DISTRICT COURT CASE IS A 2010. I WOULD SUGGEST TO YOU THAT THE CITY
9 OF BEAUFORT HAS AMENDED THEIR NOISE ORDINANCE SOMETIME IN BETWEEN
10 THOSE TWO.

11 MS. MANGUM: THEY MAY HAVE, YOUR HONOR, BUT AT THE TIME
12 OF THE 1993 CITY OF BEAUFORT VS. BAKER THAT ORDINANCE WAS FOUND
13 CONSTITUTIONAL. IT HAS NOT BEEN SINCE FOUND UNCONSTITUTIONAL. I'M
14 NOT SURE WHAT MAY HAVE CAUSED THEM TO CHANGE THAT ORDINANCE.

15 THE COURT: I WILL READ THE BAKER CASE.

16 (PAUSE)

17 THE COURT: WELL, JUST LIKE THE SOUTH CAROLINA SUPREME
18 COURT IN THE BAKER CASE I FIND MYSELF ABOUT THREE TO TWO OR TWO TO
19 THREE.

20 MS. MANGUM: WELL, YOUR HONOR, I THINK PERSONALLY WHILE
21 YOU MIGHT AGREE WITH CHIEF JUSTICE TOAL, I THINK THE CASE LAW –

22 THE COURT: I THINK BOTH ARE INSTRUCTIVE. I THINK THERE'S A
23 LOT TO BE LEARNED FROM THE MAJORITY AND THE MINORITY.

24 MS. MANGUM: YES, YOUR HONOR, AND I AGREE. AND IT IS
25 CERTAINLY IS NOT AN EASY ISSUE BUT I THINK CITY OF BEAUFORT IS PRETTY

1 ON POINT WITH WHAT'S BEFORE YOU TODAY. I WOULD JUST POINT OUT THAT
2 THE FIFTY FEET ORDINANCE WAS ACTUALLY THE ATLANTIC BEACH ORDINANCE
3 AND SO THAT'S DIFFERENT.

4 THE COURT: OH, OKAY. THANK YOU.

5 MS. MANGUM: BUT THE CITY OF BEAUFORT'S ORDINANCE IS NOT
6 AS SPECIFIC BUT YET STILL FOUND TO BE CONSTITUTIONAL AND SOUND. I
7 THINK THE IMPORTANT THING FROM THAT CASE IS THE IDEA THAT THERE'S NOT
8 A DUE PROCESS VIOLATION, THERE IS NOT VAGUENESS BECAUSE THE
9 LANGUAGE IS GIVEN ITS PLAIN AND ORDINARY MEANING. AND LIKE THE CITY
10 OF BEAUFORT CASE IN THIS CASE, YOUR HONOR, BEFORE ANY CITATIONS WERE
11 EVER ISSUED C.P.D. MET WITH THE DEFENDANT - THIS IS ALL TRIAL
12 INFORMATION BUT THE CITY WAS NOT INTERESTED IN ISSUING ANY NOISE
13 VIOLATIONS TO THIS CHURCH. THEY ATTEMPTED TO SPEAK TO THE CHURCH.
14 THEY ATTEMPTED TO WORK SOMETHING OUT AND THEY WERE MET WITH JUST
15 A FLAT OUT REFUSAL. AND SO AT THAT POINT THE DEFENDANT WAS AWARE OF
16 THE ORDINANCE, WAS AWARE THAT THE CITY FELT IT WAS IN VIOLATION OF
17 THAT ORDINANCE AND HE WAS FULLY INFORMED BEFORE ANY CITATION WAS
18 ISSUED.

19 THE COURT: CERTAINLY I HAVE NOT MADE UP MY MIND. JUST A
20 FEW THOUGHTS SO WE MAY HAVE TO HAVE A LITTLE BIT MORE ORAL
21 ARGUMENT WEDNESDAY MORNING AFTER I'VE READ EVERYTHING. I THINK
22 THAT MIGHT BE FAIR TO BOTH SIDES TO LET YOU FURTHER ADDRESS.

23 MR. BRIGGS: I'VE GOT A COUPLE OF COMMENTS, YOUR HONOR,
24 BUT I'M WILLING TO GO AFTER YOU UNLESS YOU WANT TO HEAR WHAT LITTLE
25 BIT I'VE GOT IN RESPONSE.

1 **THE COURT:** LET ME TELL YOU WHAT MY THOUGHTS ARE OUT OF
2 THE BAKER CASE AND FRANKLY I HAVE SOME GOING BOTH WAYS. CHIEF
3 JUSTICE CHANDLER WITH THE CONCURRENCE OF JUSTICE – WELL, CHANDLER
4 ENDED UP BEING CHIEF JUSTICE I THINK. CHIEF JUSTICE HARWELL. I DON'T
5 KNOW WHETHER JUSTICE MOORE GOT TO BE CHIEF JUSTICE OR NOT. PAUL
6 MOORE WAS A FINE JUDGE, I'LL TELL YOU THAT AND A FINE PERSON, TOO.
7 AND, FRANKLY, I MEAN I SPENT SOME TIME WITH JUSTICE HARWELL AND
8 JUSTICE MOORE AND I FIND BOTH OF THEM TO BE FAIRLY LIBERAL GUYS FOR
9 SOUTH CAROLINIANS. I MEAN THEY ARE NOT (INAUDIBLE). I DON'T KNOW
10 JUSTICE CHANDLER REALLY BUT THOSE GUYS WHO WERE PRETTY LIBERAL
11 DECIDED TO FOLLOW THAT THE RIGHT TO SPEAK IS NOT ABSOLUTE, THE STATE
12 CAN REGULATE IT IF IT'S CONTENT NEUTRAL, IF IT'S TAILORED TO SERVE A
13 SPECIFIC INTEREST AND IF THERE ARE OTHER ALTERNATIVE AVENUES OF
14 COMMUNICATION, WHICH I THINK THERE ARE. THEY NOTE SEVERAL TIMES
15 THAT THE MERCHANTS DOWNTOWN WERE A CAPTIVE AUDIENCE AND I THINK
16 THE NEIGHBORS IN THIS CASE FIT IN THAT SAME CATEGORY. THEY ARE A
17 CAPTIVE AUDIENCE. THEY ARE NOT JUST PASSING BY. THEY CAN'T GET UP AND
18 GO SOMEWHERE ELSE. THEY ARE THERE. AND THEY PUT A GOOD BIT OF STOCK
19 IN THAT CAPTIVE AUDIENCE TYPE THING I THINK. THE SPECIFIC ARGUMENT
20 WAS MADE THAT IT DOES NOT PROVIDE FOR A DECIMAL LEVEL AND THEY SAID
21 IN FACT THE DECIMAL IS TOO RIGID AND USING A REASONABLE STANDARD
22 ALLOWS YOU TO APPLY IT IN VARIOUS PARTICULAR CIRCUMSTANCES BETTER
23 THAN YOU COULD IF IT WERE AN ABSOLUTE DECIMAL LEVEL. SO THEY FOUND
24 THE REASONABLENESS TO BE A POSITIVE INSTEAD OF A NEGATIVE. I'M NOT
25 SURE WHETHER THAT'S RIGHT OR NOT BUT THAT'S WHAT THEY FOUND. THEY

1 FIND THAT IT DOES NOT HAVE TO BE THE LEAST INTRUSIVE MEANS AND THAT'S
2 AN INTERESTING NOTE. THEY SAY THAT IT'S NOT VAGUE AS LONG AS IT
3 PROVIDES FAIR NOTICE AND PROPER STANDARDS. HOWEVER, IT IS VAGUE IF
4 THE CITIZEN HAS TO GUESS AT THE MEANING. YOU KNOW, WHETHER OR NOT
5 THIS GENTLEMAN HAD TO GUESS AT THE MEANING I HAVEN'T MADE UP MY
6 MIND OR NOT BUT THAT'S ONE OF THE STANDARDS I NEED TO DECIDE. AND
7 THEY INTERPRET UNSEEMLY LOUD AS MEANING UNREASONABLY LOUD WHICH
8 WOULD BE THE EXACT WORDING OF OUR ORDINANCE SO THAT'S AN IMPORTANT
9 POINT. AND THEN THEY HOLD IT NOT TO BE UNCONSTITUTIONALLY VAGUE.
10 THEN WE GET TO JUSTICE TOAL'S DISSENT WHERE SHE WAS JOINED BY JUSTICE
11 FINNEY WHO ALSO BECAME CHIEF JUSTICE. AND SHE SAYS SHE CAN'T BELIEVE
12 THEY ARE ENFORCING AN ORDINANCE WHICH PLACES A TEST FOR
13 ENFORCEMENT ON THE EAR OF THE COMPLAINANT. IN OTHER WORDS, IT'S
14 SUBJECTIVE TO HER. SHE FINDS THE UNREASONABLE TO BE A NEGATIVE, NOT A
15 POSITIVE. BUT I DO THINK SHE MAKES SOME OTHER POINTS IN HERE WHICH
16 MIGHT DISTINGUISH THE TWO CASES. I HAVEN'T MADE UP MY MIND BUT IT
17 MIGHT. SHE STRESSES THREE OR FOUR TIMES IT IS THE UNAMPLIFIED VOICE.
18 SHE STRESSES THAT SEVERAL TIMES. SHE ALSO STRESSES THAT THE
19 PREACHING DID NOT GO ON FOR AN EXTENDED PERIOD OF TIME. IT WAS A HALF
20 HOUR TO AN HOUR AT THE MOST. SHE FINDS IT TO BE A COMMERCIAL
21 ORDINANCE BECAUSE IT WAS MEANT TO SUPPORT THE COMMERCIAL TRADE.
22 AND, FRANKLY, I THINK THE COMMERCIAL PEOPLE OUGHT TO BE ABLE TO PUT
23 UP WITH MORE THAN A PRIVATE CITIZEN IN THEIR OWN HOME. I'VE GOT A LOT
24 OF RESPECT FOR A PRIVATE CITIZEN IN THEIR OWN HOME. BUT SHE DOES SAY
25 THAT THE POLICE DEPARTMENT, AND I'M NOT SURE THIS IS A FACT IN THIS

1 CASE, COULDN'T EVEN DESCRIBE TO THE PREACHER EXACTLY WHAT WAS AND
2 WASN'T COVERED. THEY JUST SAID THE COURT WILL DECIDE BUT IF WE GET A
3 COMPLAINT THEN IT MIGHT BE A VIOLATION. AGAIN, IT HAPPENED AT NOON, IT
4 DID NOT HAPPEN LATER AT NIGHT. SOME OF THIS ALLEGEDLY HAPPENED
5 LATER AT NIGHT WHICH I THINK WORKS AGAINST THE DEFENDANT. AND THEN
6 SHE SAYS IT MERELY OFFENDS THE SENSIBILITIES OF A FEW LISTENERS. I DON'T
7 CARE IF IT MERELY OFFENDS ONE PERSON IF THEY ARE IN THEIR OWN PRIVATE
8 HOME AND IT'S CONSTITUTIONAL THEN IT'S AN OFFENSE. IT DOESN'T MATTER
9 HOW MANY PEOPLE IT OFFENDS TO ME IN A RESIDENTIAL NEIGHBORHOOD. IN A
10 COMMERCIAL NEIGHBORHOOD IT MIGHT MAKE A DIFFERENCE WHETHER YOU
11 ARE OFFENDING THREE CUSTOMERS OR THREE HUNDRED CUSTOMERS, BUT IN
12 YOUR OWN PRIVATE HOME ONE PERSON IS JUST AS IMPORTANT AS A THOUSAND
13 PEOPLE ARE. SO SHE HAS SOME THINGS IN THERE THAT SHE STRESSES BUT I
14 THINK ARE DISTINGUISHABLE BUT I'VE STILL GOT A LOT TO DO AND I'VE
15 DEFINITELY GOT TO READ THE McCOY BY MY CLASSMATE, JOE ANDERSON.
16 THAT'S HOW I KNOW HE WAS SMARTER THAN ME BECAUSE I WAS A CLASSMATE.
17 HE'S A LOT SMARTER THAN I AM. WHY DON'T Y'ALL JUST LET ME READ THESE.
18 WOULD Y'ALL BE WILLING TO MEET HERE ABOUT EIGHT O'CLOCK WEDNESDAY.

19 MS. MANGUM: YES, YOUR HONOR.

20 THE COURT: MR. BRIGGS, GET A LITTLE ORAL ARGUMENT IN
21 BEFORE -

22 MR. BRIGGS: YES, YOUR HONOR, BUT I USUALLY GET UP AT TEN
23 BUT FOR THE COURT I'LL BE HERE AT EIGHT.

24 THE COURT: THANK YOU. I TOLD THE JURY TO CALL IN ABOUT
25 EIGHT SO THEY ARE GOING TO BE DISAPPOINTED WHEN THEY CALL IN AT EIGHT

1 AND IT'S NOT ON THERE. BUT I THINK I NEED TO READ ALL THIS BEFORE - I
2 THINK Y'ALL CAN MORE EFFECTIVELY ARGUE IF I HAVE READ EVERYTHING.
3 AND I THINK IT WOULD BE FAIRER TO BOTH SIDES IF I READ EVERYTHING.

4 MR. BRIGGS: YOUR HONOR, JUST TWO LITTLE POINTS.

5 THE COURT: YES, SIR. YES, SIR.

6 MR. BRIGGS: I THINK IF YOU READ THE FURR VS. SWANSEA CASE
7 YOU'LL FIND THAT JUDGE PERRY CONSIDERS THE LEVAL OF NOISE AS PART OF
8 THE CONTENT OF THE SPEECH. EVERYBODY WOULDN'T SAY THAT BUT I THINK
9 YOU'LL FIND THAT IN HIS DECISION.

10 THE COURT: THAT'S INTERESTING.

11 MR. BRIGGS: I'D REMIND THE COURT, TOO, THAT THIS DECISION
12 HERE IS A STATE DECISION, DOES'T OVERRULE EDWARDS. NOW THEY REFER TO
13 EDWARDS HERE AND THEY CLAIM THAT IT WAS AN ASSEMBLY CASE. I DON'T
14 BELIEVE THAT BUT THAT'S BESIDE THE POINT. AND I HAD SOME FURTHER
15 DEALINGS WITH BEAUFORT. I BELIEVE IT WAS AFTER THIS DECISION AND WE
16 ARBITRATED A CASE IN FEDERAL COURT AND THEY AGREED TO A SIXTY-FIVE
17 DECIMAL AT THE FRONT DOOR OF THE BUSINESS. THE PROBLEM IS THAT DIDN'T
18 GO BACK TO THE COURT AND I DON'T KNOW WHETHER BEAUFORT EVER
19 CHANGED THEIR ORDINANCE OR NOT BUT I CAN FIND THAT OUT, YOUR HONOR.
20 WE HAD TWO LAWYERS INVOLVED AND I THINK THE OTHER GUY MESSED IT UP
21 BUT THAT'S BESIDE THE POINT. BUT I DID GO TO THE ARBITRATION AND SO
22 THERE MAY BE A LATER WORD ON THE BEAUFORT ORDINANCE WITH REGARD
23 TO THE SITAUTION WITH THE BUSINESSES, YOUR HONOR, AND I'LL FIND THAT
24 OUT.

25 THE COURT: OKAY.

1 **MR. BRIGGS:** I'LL GET THE SON OF THE FAMOUS SENATOR TO
2 SEND US A LETTER.

3 **THE COURT:** OKAY. NOT CUTTING YOU OFF, I HATE TO SAY ONE
4 LAST THING. ONE MORE THING. WHY HASN'T THE CITY JUST PASSED A
5 DECIMAL READING AT SOME CERTAIN DISTANCE? WHAT'S DIFFICULT ABOUT
6 THAT?

7 **MS. MANGUM:** WELL, YOUR HONOR, I DON'T -

8 **THE COURT:** YOU ARE NOT ON CITY COUNCIL I KNOW.

9 **MS. MANGUM:** NO, SIR, I'M NOT. I DON'T THINK THE DECIMAL
10 READING CLEARLY COVERS WHAT CITY COUNCIL WANTS THIS ORDINANCE TO
11 COVER BECAUSE I KNOW JUST FROM THIS CASE AND MY EXPERIENCE IN THIS
12 CASE I HAVE SEEN VIDEO INSIDE OF MY VICTIM'S HOMES WHICH A DECIMAL
13 METER MEASURES AT MAYBE SIXTY. THAT CLEARLY MAKES IT DIFFICULT TO
14 LIVE IN THAT HOME AND SO I THINK - AS YOU SAID EARLIER, I THINK THE
15 DECIMAL GIVES YOU A VERY NARROW APPLICATION OF THE ORDINANCE AND
16 DOESN'T NECESSARILY COVER ALL THE THINGS THAT CITY COUNCIL WOULD
17 WANT IT TO COVER.

18 **THE COURT:** ONE MORE THING. COULDN'T THEY HAVE A
19 DECIMAL READING AT THE DOOR OR AT THE WINDOW AT THE EMINATING
20 PLACE WHICH COULD BE ABOVE SOMETHING THAT IS A VIOLATION AT SO MANY
21 FEET OR WITHIN ANOTHER STRUCTURE BECAUSE IT'S -- OBVIOUSLY IF YOU ARE
22 IN A STRUCTURE THAT'S MORE DISTURBING THAN IT BEING OUT ON THE STREET
23 I THINK BECAUSE IT'S YOUR HOUSE. IF YOU ARE ON THE STREET, YOU CAN GO
24 IN THE HOUSE. IF YOU ARE IN THE HOUSE, YOU'VE GOT NOWHERE ELSE TO GO.
25 THEY COULD PUT IT DIFFERENT LEVELS FOR DIFFERENT PLACES. IT DOESN'T

1 HAVE TO BE ONE LEVEL FITS ALL. THEY COULD MAKE ONE FOR RESIDENCES, ON
2 FOR BUSINESSES, ONE FOR TIMES OF DAY. YOU CAN BE LOUDER YOU KNOW,
3 BEFORE A CERTAIN HOUR AND THEN NOT AS LOUD AFTER. YOU KNOW, THEY
4 COULD – YOU KNOW, IT'S NOT ONE SIZE FITS ALL. IT CAN BE TAILORED.

5 MS. MANGUM: I DON'T KNOW ENOUGH ABOUT THE DECIMAL
6 METER TO SPEAK VERY FLUENTLY ABOUT IT BUT I'M NOT SURE THAT IT TRULY
7 CAPTURES THE NOISE. WHAT I HEARD, IT DOES NOT SHOW UP ON THE DECIMAL
8 METER. AND THAT SOUNDS CRAZY BUT IT IS THE TRUTH.

9 THE COURT: WELL, I'M NOT EXPERT. I'VE (INAUDIBLE) EVER
10 SINCE I WAS A TEENAGER SO I MEAN I KNOW A LITTLE BIT ABOUT SOUND
11 LEVELS AND DECIMALS AND, YOU KNOW, I'VE HAD TEST RECORDS AND
12 (INAUDIBLE) SO I'M NO EXPERT BUT I DO HAVE SOME GENERAL IDEA ABOUT IT.
13 AND SCIENTIFICALLY WHAT YOU ARE SAYING (INAUDIBLE) BUT IF IT'S A
14 SUBJECTIVE FEELING THEN IT'S YOUR FEELING.

15 MS. MANGUM: I'VE WATCHED THE VIDEOS AND THEN SEEN A
16 DECIMAL READING ACCORDING TO I GUESS THE STANDARD CHART, YOU KNOW,
17 SIXTY WOULD BE NORMAL CONVERSATION – AND I DON'T KNOW ENOUGH TO
18 KNOW THAT PERHAPS IF IT'S COMING FROM DRUM BEATS VERSUS NORMAL
19 CONVERSATION ALTHOUGH THE DECIMAL READING MAY BE THE SAME THAT'S
20 JUST IN GENERAL A MORE DIFFICULT SOUND FOR THE HUMAN EAR.

21 THE COURT: I DON'T MIND TELLING YOU IF I AM SITTING AT MY
22 HOUSE AND I'VE HAD THE NOISE COME IN AT THE SAME LEVEL AS MY NORMAL
23 CONVERSATION IT'S GOING TO DISTURB ME. I MEAN I DON'T WANT THAT. IT'S
24 LIKE ME TRYING TO WATCH T.V. OR HAVE A CONVERSATION WITH OTHER
25 PEOPLE AND THERE'S SOMEBODY OVER THERE TALKING. JUST BECAUSE IT'S AT

1 A NORMAL LEVEL IF IT'S IN MY HOUSE AND SOMEBODY ELSE IS PUTTING IT IN
2 THERE IT WOULD DISTURB ME. IF SOMEBODY OPENS UP A LEAF BLOWER
3 OUTSIDE IT DISTURBS ME EVEN IF THEY ARE THREE DOORS UP.

4 MS. MANGUM: YES, YOUR HONOR.

5 THE COURT: I WISH THEY WOULD DO AWAY WITH THOSE THINGS.
6 THEY OUGHT TO MAKE THEM ILLEGAL. RAKE YOUR YARD LIKE YOU USED TO.

7 MS. MANGUM: YOUR HONOR, I THINK, TOO, IN TERMS OF THE
8 DECIMAL METER, I KNOW THAT THE CITY DID NOT HAVE ONE UNTIL RECENTLY
9 AND WE HAVE ONE. THEY ARE EXPENSIVE. THEY REQUIRE SOME OUTSIDE
10 CALIBRATION AND SO IN TERMS OF JUST A GENERAL ORDINANCE I DON'T KNOW
11 IF THERE'S A PROBLEM WITH IT.

12 THE COURT: AND I REALIZE RESOURCES ARE LIMITED
13 EVERYWHERE BUT WE HAVE DATAMASTER MACHINES AND WE HAVE ALL
14 KINDS OF RADAR MACHINES FOR SPEEDING. WE USED TO HAVE A CHEMISTRY
15 LAB. SO, YOU KNOW, WHEN YOU HAVE THOSE THINGS, YOU KNOW, I DON'T
16 KNOW THAT YOU NEED TO TREAT ONE OFFENSE DIFFERENT FROM ANOTHER. IF
17 YOU ARE GOING TO INVEST IN SOLVING ONE, MAYBE YOU OUGHT TO INVEST
18 INSOLVING THEM ALL. THAT'S JUST A THOUGHT. BUT I APPRECIATE Y'ALL.
19 YES, SIR. YES, SIR.

20 MR. BRIGGS: JUST TWO COMMENTS, YOUR HONOR. ONE THAT
21 MIGHT HELP US IF SOMETHING COMES UP LIKE I FIND OUT THE BEAUFORT
22 ORDINANCE HAS BEEN MODIFIED AGAIN BUT THE OTHER TWO THINGS I'D LIKE
23 TO POINT OUT AND ONE OF THEM HAS TO DO WITH THE CIVIL CASE. I'M QUITE
24 AWARE OF THE DISTINCTION. BUT, YOUR HONOR, A JUDGE TELLING A CHURCH
25 THAT THEY CAN'T HAVE CHURCH LONGER THAN EIGHT O'CLOCK AT NIGHT IS

1 CLEARLY –

2 THE COURT: THAT'S NOT WHAT THE JUDGE SAID. YOU CAN HAVE
3 ALL THE CHURCH YOU WANT BUT YOU HAVE TO KEEP THE DECIMAL LEVELS
4 DOWN. I MEAN THAT'S THE ISSUE HERE.

5 MR. BRIGGS: WELL, THEY WERE THREATENED TO BE ARRESTED IF
6 THEY WERE THERE LONGER THAN EIGHT O'CLOCK.

7 THE COURT: IF THEY WANT TO HAVE CHURCH TWENTY-FOUR
8 HOURS A DAY THEY CAN AS LONG AS THEY DON'T DISTURB THE NEIGHBORS.

9 MR. BRIGGS: ALL RIGHT. THAT BRINGS ME TO THE NEXT POINT,
10 YOUR HONOR. AND THIS IS IN THE INFANCY STAGE. I DON'T WANT TO PROMISE
11 ANYTHING AND I THINK THIS COURT KNOWS THAT I'M NOT ONE TO MAKE
12 PROMISES THAT I DON'T INTEND TO KEEP BUT I AM A PROBLEM SOLVER. I'M
13 NOT ASKING FOR ANY DELAY BASED UPON THIS BUT I BELIEVE
14 NOTWITHSTANDING SOME OF THE THINGS THAT WAS CONSIDERED BEFORE, I
15 BELIEVE THIS PROBLEM COULD BE SOLVED IF I DO GO TO A RECORDING STUDIO
16 OR I GO TO THE STATE MOVIE DEPARTMENT THAT WORKS WITH MOVIES WHEN
17 THEY COME IN HERE AND I FIND OUT HOW I CAN INSULATE AND MAKE
18 SOUNDPROOF THE THREE WINDOWS ON THE SIDE OF THE CHURCH NEXT TO THE
19 COMPLAINING WITNESS'S HOUSE.

20 THE COURT: WELL, IN MY MIND THAT'S A GOOD IDEA, MR.
21 BRIGGS. I DON'T KNOW WHETHER THAT'S BRIGHT OR NOT BUT –

22 MR. BRIGGS: NOW THAT WOULD NOT PREVENT THE
23 PROSECUTION, IT WOULD NOT STOP THE CIVIL ACTION BUT IT WOULD PREVENT
24 US GETTING FUTURE CITATIONS IF THE PROBLEM CAN BE SOLVED.

25 THE COURT: I UNDERSTAND THERE WAS MEDIATION IN THIS

1 CASE. IT WAS AN ATTEMPT TO RESOLVE THIS. I DON'T KNOW WHAT WENT ON
2 THERE, I WASN'T THERE.

3 MR. BRIGGS: I WASN'T HERE THEN AND –

4 THE COURT: IT SOUNDS LIKE A SOLVABLE PROBLEM.

5 MR. BRIGGS: I'M GOING TO SAY IT IN FRONT OF MY WITNESS,
6 YOUR HONOR. FOLKS LIKE (INAUDIBLE) AND I THINK YOU KNOW WHERE I
7 WENT TO COLLEGE, JUDGE. THE FOLKS WHO ARE DIED IN THE WOOL NEW
8 TESTAMENT CHRISTIANS TEND TO WANT TO BELIEVE IN GOD MORE THAN THEY
9 WANT TO BELIEVE IN GOVERNMENT. AND SOMETIMES THEY TAKE A HARD
10 STAND WHICH IS NOT NECESSARY. NOW I'VE SAID THAT IN FRONT OF MY
11 CLIENT AND SO I DON'T KNOW WHAT WENT ON BUT I KNOW WHAT I'M TALKING
12 ABOUT WOULD SOLVE THE PROBLEM.

13 THE COURT: WELL, I'M NO BIBLICAL SCHOLAR AND I'M NOT
14 GOING TO GET IN AN ARGUMENT WITH A MINISTER WHO KNOWS A LOT MORE
15 THAN I DO, BUT RENDER UNTO CEASAR THAT WHICH IS CEASAR'S.

16 MR. BRIGGS: YOUR HONOR, I AGREE WITH YOU THAT YOU NEED
17 SOME MORE TIME AND IF WE NEED SOME MORE ARGUMENT FROM EITHER
18 COUNSEL I THINK IT'S APPROPRIATE WHEN WE GET BACK HERE WEDNESDAY.

19 THE COURT: IF YOU ARE WILLING TO DO IT, IT SOUNDS LIKE TO
20 ME YOU COULD INSULATE THOSE WINDOWS. THERE ARE SOUNDPROOFING
21 CURTAINS. YOU COULD MAKE SHUTTERS THAT WOULD FIT OVER IT IF YOU
22 WANTED TO.

23 MR. BRIGGS: YOUR HONOR, I'M TALKING ABOUT DOING
24 SOMETHING LIKE YOU WOULD IN A RECORDING STUDIO. I'M TALKING ABOUT
25 REAL INSULATION.

1 **THE COURT:** YES.

2 **MR. BRIGGS:** AND THEN PROBABLY A PLEXIGLASS THING ON THE
3 OUTSIDE. THE REASON I'M INCLINED TO GO THAT WAY IS THEN THOSE
4 WINDOWS COULD BE OPENED UP IN THE WINTERTIME WHEN YOU'VE GOT SOME
5 GOOD FRESH AIR WHEN YOU WERE JUST HAVING A SOCIAL. THAT IS, YOU ARE
6 JUST HAVING SUPPER ON THE GROUNDS, YOUR HONOR. NO MUSIC. IT
7 WOULDN'T BE A CONFLICT OR ANYTHING LIKE THAT. AND IF IT DID WE'D HAVE
8 ANOTHER PROBLEM. AND I'M NOT ASKING FOR A DELAY TO DO THAT BECAUSE
9 I'M GOING TO GO BY -

10 **THE COURT:** IF YOU CAN TALK HER INTO A DELAY THEN YOU GET
11 ONE. OTHERWISE, YOU DON'T HAVE ONE.

12 **MR. BRIGGS:** I'M NOT EVEN GOING TO TALK ABOUT IT. I WANT TO
13 KNOW WHAT THE POSSIBILITIES ARE. IN OTHER WORDS, I'M GOING TO GO TO A
14 RECORDING STUDIO THAT I KNOW IS HERE AND ASK THEM. THE QUESTION IS
15 WHAT CONSTRUCTION COMPANY IS CAPABLE OF DOING THIS. THAT'S WHAT I
16 NEED TO KNOW. AND I WILL CALL THE -

17 **THE COURT:** YOU MIGHT WANT TO TALK TO HER BETWEEN NOW
18 AND THEN. LIKE I SAID, I'VE HEARD NOTHING TO MAKE ME GRANT A
19 CONTINUANCE BUT SHE CONTROLS THE DOCKET.

20 **MS. MANGUM:** WE ARE PREPARED TO GO FORWARD WEDNESDAY.

21 **THE COURT:** SHE'S GOT THE DOCKET. THAT'S HER DISCRETION.

22 **MS. MANGUM:** I MEAN THE CITY AND CERTAINLY THE VICTIMS
23 WOULD CERTAINLY WELCOME SOME CHANGES TO THE CHURCH FOR THE
24 FUTURE BUT WE ARE PREPARED TO GO FORWARD ON WEDNESDAY ON THESE
25 CHARGES.

1 MR. BRIGGS: AND WHY IS THIS CASE SO MUCH MORE IMPORTANT
2 THAN SOME OF THE OTHERS YOU HAVE, COUNSEL?

3 MS. MANGUM: IT'S AS IMPORTANT AS EVERY CASE THAT I HAVE.

4 THE COURT: WELL, I APPREIATE ALL Y'ALL'S HELP. I HOPE I
5 DIDN'T BORE YOU TOO BAD. I HATE TO DISAPPOINT MY JURY BY HOLDING THEM
6 OFF A LITTLE WHILE WEDNESDAY MORNING. I'D BE HERE AT SEVEN THIRTY.

7

8 (ADJORNED)

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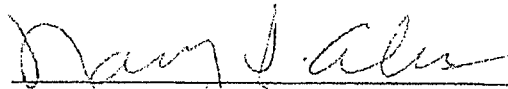
25

STATE OF SOUTH CAROLINA	)	IN THE MUNICIPAL COURT FOR
	)	THE CITY OF COLUMBIA
COUNTY OF RICHLAND	)	
CITY OF COLUMBIA,	)	
	)	
VS.	)	CERTIFICATE
	)	
JOHNNIE L. CLARK AND	)	
HARRIET TERRY-CLARK,	)	
	)	
DEFENDANTS.	)	
	)	
_____	)	

THIS IS TO CERTIFY THAT THE WITHIN MOTIONS, CONSISTING OF TWENTY-EIGHT (28) PAGES, IS A TRUE AND CORRECT TRANSCRIPT OF RECORD FOR THE TRIAL ON SEPTEMBER 8, 2014, SAID TRANSCRIPT BEING PREPARED TO THE BEST OF MY ABILITY FROM A RECORDED DISC PROVIDED TO ME WITHOUT THE BENEFIT OF MY BEING PRESENT AT THE PROCEEDING.

I FURTHER CERTIFY THAT I AM NOT RELATED TO ANY OF THE PARTIES IN THIS MATTER OR THEIR COUNSEL, NOR DO I HAVE ANY INTEREST, FINANCIAL OR OTHERWISE, IN THE OUTCOME OF THE SAME.

IN WITNESS WHEREOF I HAVE HEREUNTO SET MY HAND AND SEAL ON THE 14TH DAY OF MAY, 2015.



 NANCY S. AHRENS
 NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES: 03-29-19

1 THE COURT: THE GARDNER WHICH AROSE OUT OF THIS COURT,
2 JUDGE POPOWSKI, AND APPEALED TO THE CIRCUIT COURT AND CIRCUIT COURT
3 JUDGE HENRY McKELLAR OVERRULED HER WHEN SHE FOUND, NOT THIS
4 PARTICULAR NOISE ORDINANCE WE ARE DEALING WITH IN THIS CASE BUT A
5 VERY SIMILAR CITY NOISE ORDINANCE WITH SIMILAR LANGUAGE AND THE
6 SAME STANDARD WHICH IS IMPORTANT THAT THE STANDARD BE THE SAME,
7 AND IT'S UNREASONABLY LOUD. SO THE QUESTION THAT I'VE BEEN WRESTLING
8 WITH SINCE MONDAY WAS IS THE TERM UNREASONABLY JUST TOO VAGUE.
9 DOES IT PUT, AS JUSTICE TOAL SAID IN HER DISSENT, DOES IT PUT TOO MUCH
10 AUTHORITY IN THE EAR OF THE OFFICER AND NOT ENOUGH GUIDANCE TO THE
11 AVERAGE CITIZEN AS TO WHAT'S PROHIBITED AND WHAT ISN'T. SO I'VE BEEN
12 WRESTLING WITH THAT. I DON'T HAVE TO WRESTLE WITH IT BECAUSE JUDGE
13 McKELLAR HAS ALREADY TOLD ME THAT IT'S NOT VAGUE OR OVERBROAD AND
14 HE CITES BOTH 4TH CIRCUIT AND UNITED STATES SUPREME COURT CASES. I
15 ACTUALLY FOUND THE ROCKFORD CASE MYSELF IN DOING SOME RESEARCH
16 BUT IT'S DIFFICULT. THIS IS A DISTURBING SCHOOL CASE AND IT DEALS WITH
17 JUST ADJACENT PROPERTY WHILE SCHOOL WAS IN SESSION SO I THINK THAT'S A
18 SPECIAL CASE. YOU PROBABLY HAVE MORE POLICE POWER THERE THAN YOU
19 DO JUST IN THE AVERAGE SITUATION. BUT THE KOVACS VS. COOPER CASE
20 UNREASONABLY LOUD IS NOT UNCONSTITUTIONALLY VAGUE. SO WHILE I'VE
21 BEEN WRESTLING WITH IT SOMEBODY ELSE ALREADY KNEW THE ANSWER AND I
22 JUST DIDN'T KNOW WHERE TO FIND IT BUT I THINK WE'VE FOUND IT NOW. MR.
23 BRIGGS, I'LL GIVE YOU A MINUTE TO ARGUE AGAINST ME IF YOU WANT TO BUT I
24 THINK THE CONTENTS OF THE GARDNER ORDER - WELL, FOR ONE THING, I
25 THINK JUDGE McKELLAR'S RULING IS BINDING ON ME. HE'S A CIRCUIT JUDGE IN

1 THIS COUNTY AND HE'S ABOVE ME. I HAVE TO DO WHAT HE TELLS ME TO DO
2 AND, SECOND, WHEN HE STARTS CITING SUPREME COURT AND 4TH CIRCUIT CASES
3 I KNOW THEY ARE BINDING ON ME SO I THINK THE DECISION WAS ALREADY
4 MADE BEFORE I STARTED TRYING TO FIND THE ANSWER. I'LL SHUT UP AND
5 LISTEN. IF YOU WANT TO ARGUE AGAINST ME YOU CAN.

6 MR. BRIGGS: I DO WANT TO ARGUE JUST BRIEFLY, YOUR HONOR,
7 AND THEN IF I COULD AT THE APPROPRIATE TIME I WOULD LIKE TO JUST
8 REVIEW MY MEMO AGAIN AND I THINK I'VE GOT ABOUT FIFTEEN POINTS
9 MARKED. IT WOULDN'T TAKE ME BUT THREE OR FOUR MINUTES TO DO THAT.
10 ON THIS POINT I STILL MAKE THE ARGUMENT I'VE MADE ALL ALONG, YOUR
11 HONOR. AND YOU'RE PROBABLY A BETTER HISTORY PERSON THAN I AM BUT I
12 HAVE TO REMEMBER THAT THE FIRST AMENDMENT TO THE CONSTITUTION
13 SHOWS THE INTENT AND DESIRE AND COMMITMENT OF MOST OF THE PEOPLE
14 WHO CAME FROM EUROPE TO FOUND THIS COUNTRY, YOUR HONOR. THEY WERE
15 OPPRESSED IN THEIR RELIGIOUS BELIEFS OVER THERE. AND IT'S NOT -- IT
16 SHOULDN'T BE MISSED THAT THE AMENDMENT WE ARE TALKING ABOUT IS THE
17 FIRST AMENDMENT TO THE CONSTITUTION. I HAVE READ GRAYNE BEFORE
18 BUT THE PROBLEM IS YOU CAN'T JUST PULL PART OF SOMETHING OUT OF ANY
19 OF THESE CASES. YOU'VE GOT TO KNOW THE SETTING AND I DON'T EVEN
20 REMEMBER NOW CITY OF ROCKFORD AS FAR AS THE FACTUAL CONTEXT, YOUR
21 HONOR, BUT MY POINT IS IN MAKING WHAT I'VE SAID IS WHILE I RESPECT HIM
22 AND CONSIDER JUDGE McKELLAR A FRIEND OF MINE HIS OPINION IS NOT WORTH
23 TWO CENTS COMPARED TO THE FEDERAL CASES THAT I'VE CITED IN MY MEMO,
24 YOUR HONOR. THE LAW ON FREE SPEECH AND FREEDOM OF RELIGION IS
25 SOLELY GOVERNED BY FEDERAL CASES, I.E., U.S. SUPREME COURT CASES. AND I

1 HAVEN'T HEARD ANYBODY SAY THAT SOUTH CAROLINA VS. EDWARDS IS NOT
2 GOOD LAW OR THAT FURR VS. SWANSEA IS NOT GOOD LAW OR THAT EVEN
3 THOSE STATE CASES THAT I CITE AREN'T GOOD LAW, BUT THEY ARE
4 SECONDARY. THIS LAW IS GOVERNED BY FEDERAL CASES AND I NOTICE THAT
5 COUNSEL FOR THE CITY ARGUES AGAIN THE BAKER CASE. AND I BELIEVE YOU
6 HAVE PROBABLY READ BY NOW THE NEW ORDINANCE WHICH WOULD
7 COMPLETELY NULLIFY THAT CASE BECAUSE NOW THEY'VE GOT DECIMALS IN IT
8 AND THEY'VE GOT DISTANCE IN IT. AND I GOT THAT STRAIGHT FROM BILL
9 HARVEY, JR. - WELL, HARVEY III HE IS - LAW CLERK AND THAT'S THE LATEST
10 VERSION OF THAT ORDINANCE. SO I BELIEVE THAT OUR SUPREME COURT - AND
11 THIS CASE IS GOING TO GO THERE IF MY CLIENT DOESN'T WIN - WOULD COME
12 TO THE CONCLUSION THIS LATE IN THE GAME YOU'VE GOT TO HAVE SOME
13 NUMBERS IN THE ORDINANCE TO PASS MUSTER BECAUSE, YOUR HONOR, WHAT
14 YOU'VE REALLY GOT - YOU SAID YOU'VE GOT THE OPINION OF POLICE OFFICER
15 - WHAT YOU'VE REALLY GOT IS THE OPINION BUYING THE ARGUMENT OF THE
16 COMPLAINANT AND YOU ARE LETTING A CITIZEN SET THE STANDARD. AND
17 WHAT YOU'VE GOT - AND I'M GOING TO END WITH THIS, YOUR HONOR - YOU'VE
18 GOT TWO CITIZENS TRUMPING THIRTY MEMBERS OF THE CHURCH, A CHURCH
19 AND BOTH PROVISIONS - BOTH SPEECH AND BOTH PROVISIONS OF THE FREEDOM
20 OF RELIGION CLAUSE, YOU'VE GOT TWO PEOPLE TRUMPING ALL OF THAT.
21 THAT'S NOT GOOD LAW.

22 THE COURT: AND I DON'T HAVE TO RESPOND. I MADE THIS RULE
23 BUT I WANT TO RESPOND. I AM GOING TO AGREE WITH YOU, MR. BRIGGS, THAT
24 WHERE THE FIRST AMENDMENT IS INVOLVED, WHETHER IT'S SPEECH OR
25 RELIGION, THAT IN ORDER FOR THE STATE TO IMPOSE ANY RESTRICTIONS THE

1 SCRUTINY IS THE HIGHEST LEVEL POSSIBLE. AND ALL THE CASES I HAVE READ,
2 INCLUDING ONES QUOTED IN THE GARDNER CASE USED THE HIGHEST SCRUTINY
3 POSSIBLE TO FIND THOSE ORDINANCES CONSTITUTIONAL. YOU ARE RIGHT,
4 THAT IS THE STANDARD, IT WOULDN'T BE A HIGHER STANDARD. THE
5 ORDINANCE I BELIEVE IS CONTENT NEUTRAL. OBVIOUSLY IF IT WEREN'T
6 CONTENT NEUTRAL IT WOULD BE AUTOMATICALLY UNCONSTITUTIONAL BUT I
7 DON'T THINK THE ORDINANCE PROHIBITS YOUR CLIENTS AND OTHER
8 PARISHIONERS FROM ANY CONTENT THAT THEY WANT TO HAVE. IT'S MERELY
9 THE NOISE LEVEL. THERE'S TWO WAYS OF LOOKING AT PUTTING DECIMALS IN
10 THE ORDINANCE AND HONEST MEN MAY DISAGREE. BY HAVING DECIMALS IN
11 THERE YOU DO HAVE AN ABSOLUTE STANDARD BUT THEN YOU HAVE THE
12 INFLEXIBILITY THAT COMES WITH NOT BEING ABLE TO VARY IT DEPENDING ON
13 THE CIRCUMSTANCES AND THE SITUATION. AND THAT'S SORT OF THE WHOLE
14 CRUX OF THE THREE TO TWO DECISION BY THE STATE SUPREME COURT. THE
15 THREE WHO THOUGHT THE ORDINANCE WAS CONSTITUTIONAL, WHO THOUGHT
16 THE WORD REASONABLY GAVE FLEXIBILITY AND THAT WAS A GOOD THING TO
17 THEM BECAUSE YOU COULD APPLY IT TO VARIOUS CIRCUMSTANCES. AND THEN
18 THE PEOPLE - JUSTICE TOAL AND THE OTHER JUSTICE WHO DECIDED THEY
19 DIDN'T THINK IT WAS CONSTITUTIONAL. THEY THOUGHT IT GAVE TOO MUCH
20 FLEXIBILITY AND THEY WANTED REGIDITY. SO YOU CAN LOOK AT THE
21 FLEXIBILITY AS A PLUS OR MINUS, DEPENDING ON HOW YOU LOOK AT IT. AND
22 YOU MENTIONED THE COMPLAINANTS GET TO BRING THE CHARGE. MY
23 UNDERSTANDING IS THAT THESE CASES HAVE BEEN BROUGHT ON TICKETS BY
24 OFFICERS, NOT COURTESY SUMMONSES. AND THAT MEANS TO ME THAT THE
25 OFFICERS WENT OUT AND INVESTIGATED PRIOR TO BRINGING THE CASES. SO

1 THE COMPLAINANT MAY HAVE CALLED THE OFFICER'S ATTENTION TO THE
2 SITUATION BUT THE ACTUAL CHARGE WAS NOT BROUGHT BY THE
3 COMPLAINANT. THE ACTUAL CHARGE WAS BROUGHT BY AN INVESTIGATING
4 OFFICER SO YOU ACTUALLY HAD TWO FILTERS HERE. YOU HAD THE FILTER OF
5 THE RESIDENTS, THE NEIGHBORS, WHETHER THEY FELT IT WAS BAD ENOUGH TO
6 CALL AND REPORT IT AND THEN SECONDLY THE INVESTIGATING OFFICER. SO IN
7 MANY OF THOSE CASES WHERE THE COURTS FOUND THINGS
8 UNCONSTITUTIONAL THEY WERE CONCERNED ABOUT A SINGLE OFFICER
9 RUNNING RAMPANT AND WRITING PEOPLE TICKETS OR ARRESTING PEOPLE ON
10 HIS OWN JUDGMENT. IN THIS CASE YOU ACTUALLY HAVE TWO FILTERS, THE
11 COMPLAINING CITIZEN IS NOT INTERESTED IN LOCKING PEOPLE OR MESSING
12 WITH PEOPLE ON AN AVERAGE DAY. THEY WANT TO MIND THEIR OWN
13 BUSINESS. AND THEN THE OFFICER WHO COMES AND FURTHER INVESTIGATES.
14 SO I THINK THAT'S ACTUALLY A PLUS HAVING TWO FILTERS INSTEAD OF ONE.
15 YES, MA'AM?

16 MS. MANGUM: YOUR HONOR, IF I COULD JUST ADD THERE WERE
17 TIMES THE OFFICERS WENT OUT TO THE RESIDENCE AND TO THE CHURCH AND
18 DID NOT WITNESS ANYTHING AND SO, THEREFORE, DID NOT WRITE A TICKET
19 AND THE VICTIMS DO HAVE SOME PENDING COURTESY SUMMONSES ON THOSE
20 CASES.

21 THE COURT: OKAY. WE ARE NOT TRYING ANY OF THOSE TODAY?

22 MS. MANGUM: NO. EVERYTHING BEFORE YOU TODAY IS BASED
23 ON A TICKET THAT WAS ISSUED BY AN OFFICER WHO OBSERVED THE BEHAVIOR.

24 THE COURT: MR. BRIGGS, I DON'T WANT TO CUT YOU OFF.
25 ANYTHING ELSE YOU WANT TO GO OVER I'LL BE GLAD TO LET YOU SAY, SIR.

1 **MR. BRIGGS:** YES, I WANT TO DO TWO THINGS, YOUR HONOR. I
2 WANT TO NOTE IN THE - I DON'T THINK I HAVE ALL THE INCIDENT REPORTS AND
3 I'M NOT COMPLAINING ABOUT THAT. IF ONE COMES UP THAT AN OFFICER IS
4 GOING TO TALK ABOUT I'LL JUST ASK FOR A COPY, YOUR HONOR. I'VE GOT ALL
5 THOSE THAT WERE ATTACHED TO THE AFFIDAVIT OF MS. CALLAHAN WHEN
6 THEY FILED THE COMPLAINT, YOUR HONOR, SO I'VE GOT A GOOD MANY OF
7 THEM. IN REVIEWING THAT, THERE'S ONLY ONE SITUATION WHERE THE
8 OFFICER CLAIMS HE HAD SIXTY DECIMALS. AND, YOUR HONOR, YOU HAVE
9 READ THE NEW BEAUFORT ORDINANCE, HAVEN'T YOU?

10 **THE COURT:** I GLANCED AT IT. I DID NOT GO INTO DETAIL.

11 **MR. BRIGGS:** IT HAS SEVENTY-FIVE IN IT, YOUR HONOR, AT A
12 DISTANCE OF FIFTY FEET.

13 **THE COURT:** YES, BUT OUR STANDARD IS UNREASONABLY.
14 THAT'S THE STANDARD WE'LL BE TRYING TODAY.

15 **MR. BRIGGS:** OKAY. NOW, YOUR HONOR, THERE ARE A COUPLE OF
16 THINGS THAT I DID NOT POINT OUT AND I'M SURE IT WON'T TAKE ME MORE
17 THAN FIVE MINUTES SO LET ME JUST CONTINUE. IF YOU WANT TO LOOK AT MY
18 MEMO THERE'S SOMETHING THAT I HAD THOUGHT ABOUT BUT DIDN'T POINT
19 OUT. I AM ON PAGE TWO. THE FIRST POINT IS I AM CONVINCED AND I'M
20 ARGUING THAT THE LANGUAGE AT THE TOP OF PAGE TWO OF MY MEMO CASTS
21 DIRECTLY ON THE PUBLIC STREETS AND PLACES IN SUCH A MANNER MODIFIES,
22 YOUR HONOR, EVERY OR CLAUSE IN SECTION "A." OR IS IT "B"? SECTION "A." I
23 WILL LEAVE THAT FOR YOU TO THINK ABOUT BUT I BELIEVE THAT THAT - IN
24 ORDER WORDS, THIS IS ONE SIMILAR TO THE CASE THAT COUNSEL OF THE CITY
25 CITED WHERE THEY ACTUALLY HAD SPEAKERS OUTSIDE THE CHURCH OR

1 BUILDING AND THEY WERE BROADCASTING ON THE STREET. THEY INTENDED
2 TO BROADCAST ON THE STREET. SO THIS ONE IS SIMILAR TO THAT IN THAT
3 WORDING. NOW THAT DOESN'T NECESSARILY ADDRESS THE "C" BECAUSE SOME
4 OF THEM WERE ADDRESSED IN "C" AND I THINK IT'S EVEN VAGUER THAN THE
5 OTHER ALTHOUGH IT DOES HAVE UNREASONABLY DISTURB PERSONS IN THE
6 VICINITY OR IN SUCH A MATTER OR REPOSE ON NEIGHBORS' PREMISES. I DON'T
7 EVEN KNOW WHAT THAT MEANS. I GUESS I SHOULD STUDY MY ENGLISH
8 BETTER. BUT ANYWAY IT'S STILL TALKING ABOUT SOUND AMPLIFICATION. SO I
9 POINT OUT THAT MAJOR FLAW, IF YOU WILL, OR PROBLEM WITH "A." I DON'T
10 EXPECT THE COURT TO RULE ON IT RIGHT NOW UNLESS YOU WANT TO. SO
11 THAT'S MY FIRST POINT.

12 THE COURT: WELL, I DON'T KNOW AT THIS POINT HOW MANY OF
13 THEM ARE BROUGHT UNDER SUBSECTION "A" AND SUBSECTION
14 "C." I DON'T KNOW THE FACTS AND I HAVEN'T EVEN SEEN THE --

15 MR. BRIGGS: WELL, I CAN RETURN TO THAT, YOUR HONOR.

16 MS. MANGUM: I CAN SOLVE THE PROBLEM RIGHT NOW BECAUSE
17 EVERYTHING BEFORE YOU TODAY IS UNDER "C."

18 THE COURT: "C" SEEMS TO BE MORE APPROPRIATE WHEN JUST
19 GIVEN WHAT LITTLE TINY BIT I KNOW ABOUT IT.

20 MR. BRIGGS: THE PROBLEM I HAVE WITH THAT IS IT'S TITLED
21 CREATING PUBLIC NUISANCE, YOUR HONOR. I DIDN'T STOP TO GO AND SEARCH
22 A NUMBER OF LAWS BUT I KNOW THERE ARE A NUMBER OF CASES THAT SAY IN
23 THIS STATE THAT A PERSON WHO MOVES TO A NUISANCE CANNOT LATER
24 COMPLAIN ABOUT IT. THIS GUY LIVED THERE FOR FOUR YEARS BEFORE THERE
25 WERE ANY COMPLAINTS, YOUR HONOR, AND I JUST REFER THAT --

1 THE COURT: THAT WOULD BE GOOD CIVIL LAW BUT IT DOESN'T
2 APPLY IN THE CRIMINAL COURTROOM.

3 MR. BRIGGS: OKAY. I JUST PUT THAT ON THE RECORD, YOUR
4 HONOR. I AM NOW ON PAGE THREE, YOUR HONOR, AND JUST WANT TO TOUCH
5 BASE ON A COUPLE OF POINTS IN THE McCOY DECISION.

6 THE COURT: YES, SIR. I'VE READ IT.

7 MR. BRIGGS: AND IT WAS A GOOD WRITTEN DECISION. ANDERSON
8 DOES A GOOD JOB.

9 THE COURT: HE'S ONE OF THE BEST JUDGES AROUND.

10 MR. BRIGGS: THE POINT I WOULD MAKE IS THIS. I BELIEVE THAT
11 EVERY CASE WE HAVE TALKED ABOUT - FURR, EDWARDS, THE McCOY CASE,
12 CITY VS. HOUSTON - EVERY ONE OF THEM THE OFFENSE THAT PEOPLE WERE
13 GUILTY OF - AND AGAIN ANDERSON CLEARLY SAYS IN THAT LONG PARAGRAPH,
14 AFTER I SAY THEN ANDERSON SAYS, HE CLEARLY SAYS IN THE WORDS OF THE
15 ORDINANCE THIS CONDUCT SURELY INTERFERED WITH OR MOLESTED THE
16 POLICE OFFICERS IN THE LAWFUL DISCHARGE OF THEIR DUTIES. SO McCOY WAS
17 GUILTY OF VIOLATING THE ORDINANCE AND I THINK ALL OF THESE VIOLATIONS
18 IN THESE OTHER CASES IS MORE SERIOUS THAN A LITTLE BIT OF NOISE.

19 THE COURT: BUT IT'S JUST NOT A NOISE CASE. IT IS A VAGUENESS
20 AND BREADTH CASE -

21 MR. BRIGGS: I UNDERSTAND, YOUR HONOR, BUT IT'S STILL A
22 FIRST AMENDMENT CASE.

23 THE COURT: AND IT OFFERED ME SOME GUIDANCE ON
24 VAGUENESS AND BREADTH.

25 MR. BRIGGS: AND HE RULED IT WAS VAGUE.

1 THE COURT: AND BREADTH.

2 MS. MANGUM: HE RULED IT WAS VAGUE.

3 THE COURT: WHEN I'VE GOT AGAIN THE ORDER IN THE GARDNER
4 CASE WHICH DIRECTLY QUOTES 4TH CIRCUIT AND U.S. SUPREME COURT CASES
5 SAYING UNREASONABLY IS REASONABLE. I DON'T NEED TO GO PICKING IN THE
6 WEEDS OF McCOY TO TRY TO FIND SOMETHING THAT'S ALREADY BEEN
7 DISCOVERED. AND THEY BROUGHT IT (INAUDIBLE) PARKED IT AND IT'S SITTING
8 THERE, I DON'T HAVE TO GO LOOKING FOR IT. IT'S RIGHT THERE IN FRONT OF
9 ME.

10 MR. BRIGGS: BUT EDWARDS WOULD NULLIFY THAT, YOUR
11 HONOR.

12 THE COURT: EDWARDS IS ACTUALLY QUOTED IN THE SCHOOL
13 CASE, THE NOISE NEXT TO THE SCHOOL WHICH I DON'T HAVE A COPY OF RIGHT
14 HERE.

15 MR. BRIGGS: YOUR HONOR, I--

16 THE COURT: SO EDWARDS IS USED IN A CASE WHERE THEY END
17 UP FINDING THE ORDINANCE TO BE CONSTITUTIONAL. AND THAT CASE WAS
18 EVEN WORSE IN A WAY. IT WAS A BUNCH OF PEOPLE HAVING A CIVIL RIGHTS
19 PROTEST.

20 MR. BRIGGS: ABOUT A HUNDRED AND EIGHTY-SEVEN, YOUR
21 HONOR, DEMONSTRATING.

22 THE COURT: IF THAT'S NOT POLITICAL SPEECH AT ITS HIGHEST, I
23 DON'T KNOW WHAT IS AND YET THEY DID DETERMINE THAT THAT ORDINANCE
24 WAS CONSTITUTIONAL.

25 MR. BRIGGS: THAT IS U.S. SUPREME COURT.

1 THE COURT: YES, SIR, U.S. SUPREME COURT.

2 MR. BRIGGS: YOUR HONOR, I'M NOT EVEN GOING TO READ IT BUT
3 ON PAGE FOUR I CALL THE COURT'S ATTENTION AGAIN AND FOR THE RECORD
4 TO SHOW THAT PARAGRAPH AT THE TOP OF THE PAGE IS QUOTED TWICE IN MY
5 MEMO. I THINK IT'S VERY PERTINENT, VERY GOOD LAW AND IT'S A BRIEF
6 DESCRIPTION OF, IF YOU WILL, THE TEST FOR VAGUENESS. SO I WON'T READ IT,
7 I'LL JUST NOTE IT AGAIN.

8 THE COURT: THERE'S NO DOUBT, MR. BRIGGS, CITY OF HOUSTON
9 IS A PREEMINENT CASE IN THE VAGUENESS FIELD. AGAIN, IT DOESN'T DEAL
10 WITH A NOISE ORDINANCE. IT'S GUIDANCE IN WHAT THE TEST FOR VAGUENESS
11 IS BUT IT'S NOT DETERMINATE.

12 MR. BRIGGS: AND, OF COURSE, YOU KNOW THIS. I'VE GOT IT AS
13 MY NUMBER FIVE POINT, THE SENTENCE IN THE BOLD -- AND I THINK IT'S
14 WORTH READING AGAIN FOR THE RECORD SO THE RECORD SHOWS WHAT I
15 ARGUED -- BASED ON THE ABOVE THE ORDINANCE IS FACIALLY
16 UNCONSTITUTIONAL AND AS UNDULY VAGUE. THAT'S WHAT ANDERSON SAID
17 OF THE CITY ORDINANCE IN THE McCOY CASE.

18 THE COURT: AND, OF COURSE, WE ARE DEALING WITH A
19 DIFFERENT ORDINANCE.

20 MR. BRIGGS: AND AGAIN BUT I ARGUED DOWN OF THE BOTTOM
21 OF PAGE THAT IT'S APPLICABLE TO A NOISE ORDINANCE BECAUSE YOU ARE
22 TALKING ABOUT THE SAME KIND OF STANDARD, I.E., DOES IT MEET MUSTER,
23 YOUR HONOR. AND I QUOTED THAT NUMBER FOUR AGAIN ON THE TOP OF THAT
24 PAGE SO I, OF COURSE, WON'T READ IT AGAIN. I AM GOING TO READ, YOUR
25 HONOR, IN THE MIDDLE OF PAGE FIVE AND I'VE GOT BESIDE IT THE POINT I

1 MADE BEFORE. THE CONDUCT HERE I BELIEVE IS WORSE THAN THE CONDUCT IN
2 THE INSTANT CASE. THE COURT SAYS -- WELL, I'M WRITING HERE -- BUT THE
3 HOUSTON ORDINANCE WAS SIMILAR TO THE INSTANT STATUTE IN THAT IT
4 ATTEMPTED TO PUNISH WORDS ALONE. THAT'S WHY THE HOUSTON CASE IS
5 APPOSITE, YOUR HONOR. ON THIS ISSUE THE SUPREME COURT AT A CERTAIN
6 PAGE NOTED, QUOTE, ACCORDINGLY, THE ENFORCEABLE PORTION OF THE
7 ORDINANCE MAKES IT UNLAWFUL FOR ANY PERSON TO IN ANY MANNER --
8 HERE'S THE WORDING NOW -- OPPOSE, MOLEST, ABUSE OR INTERRUPT ANY
9 POLICEMAN IN THE EXECUTION OF HIS DUTY AND THEREBY PROHIBITS VERBAL
10 INTERRUPTIONS OF POLICE OFFICERS. NOW THOSE FOUR WORDS ARE PRETTY
11 CLEAR, YOUR HONOR. BUT WHAT WAS THE RESULT OF THEM? THE RESULT OF
12 THEM WAS TO DENY FREE SPEECH AND THAT'S WHAT YOU'VE GOT HERE. YOU
13 ARE DENYING FREE SPEECH WITH, QUOTE, SOME GOOD WORDS.

14 THE COURT: ONCE AGAIN THOUGH, THE ORDINANCE HAS TO BE
15 CONTENT NEUTRAL WHICH IT APPEARS TO BE. IT'S MERELY THE VOLUME
16 THAT'S THE ISSUE, NOT THE CONTENT. THEY CAN SAY ANYTHING THEY WANT,
17 THEY CAN SAY IT ANY TIME THEY WANT AS FREQUENTLY AS THEY WANT. THEY
18 JUST CAN'T SAY IT AS LOUD AS THEY WANT.

19 MR. BRIGGS: THERE ARE CASES THAT SAY LOUD IS PART OF THE
20 CONTENT, YOUR HONOR.

21 THE COURT: I HAVE NOT SEEN THAT CASE.

22 MR. BRIGGS: FURR SAID THAT.

23 THE COURT: THAT ARGUMENT COULD BE MADE.

24 MR. BRIGGS: AND, YOUR HONOR -- AND I'M GOING TO QUIT WITH
25 THIS. I'M NOT EVEN GOING TO GO THROUGH THE REST OF IT, BUT I CAN'T TALK

1 ABOUT FREE SPEECH WITHOUT REMINDING A COURT OF THE VERY
2 FOUNDATIONAL CASE IN ALL OF THIS LAW AND IT'S THE BOTTOM OF PAGE
3 EIGHT AND, OF COURSE, HOUSTON V. HILL QUOTES FROM IT. IT'S TURMANELO
4 (ph) VS. CHICAGO, A 1974 CASE WHICH IS STILL GOOD LAW. SPEECH IS OFTEN
5 PROVOCATIVE AND CHALLENGING BUT IT IS NEVERTHELESS PROTECTED
6 AGAINST CENSORSHIP OR PUNISHMENT UNLESS SHOWN LIKELY TO REDUCE -
7 NOW THIS IS KEY LANGUAGE HERE - A CLEAR AND PRESENT DANGER OF A
8 SERIOUS SUBSTANTIVE EVIL THAT RISES FAR ABOVE INCONVENIENCE,
9 ANNOYANCE AND UNREST. WE'VE GOT ANNOYANCE IN THIS CASE, PERIOD.
10 AND IT AIN'T ENOUGH TO TAKE AWAY A FIRST AMENDMENT RIGHT.

11 THE COURT: AGAIN, FIRST AMENDMENT RIGHT AS I READ THOSE
12 CASES REFERS TO CONTENT AND AS LONG AS THIS ORDINANCE IS CONTENT
13 NEUTRAL THEN IT'S NOT REGULATING SPEECH. REGULATING THE MANNER OF
14 SPEECH.

15 MR. BRIGGS: YOUR HONOR, I DISAGREE WITH YOU. I'VE BEEN
16 DOING THIS KIND OF STUFF NOW FOR TWENTY YEARS.

17 THE COURT: YOU HAVE, YES, SIR.

18 MR. BRIGGS: AND THAT'S NOT THE DEFINITION BECAUSE THEY
19 ARE NOT MEETING THAT STANDARD. IT'S NOT CLEAR, OBJECTIVE AND THERE IS
20 TOO MUCH DISCRETION ON THE PART OF THE POLICE OFFICER IN THIS
21 ORDINANCE. SO ..

22 THE COURT: I THINK THAT'S THE ARGUMENT, THE BEST
23 ARGUMENT MADE FOR YOUR SIDE, AND IT'S ONE THAT WORRIES ME AND
24 THAT'S WHY I SPENT MOST OF MONDAY AFTERNOON AND PART OF LAST NIGHT
25 LOOKING THIS OVER AGAIN AND DOING MY OWN RESEARCH ALSO. BUT ONCE I

1 GOT THE JOHNNY GARDNER ORDER AND JUDGE McKELLAR WAS QUOTING STATE
2 VS. HARDEE, CITY OF COLUMBIA VS. MOSER, JIM CROCKETT VS. CITY OF
3 CHARLOTTE, AND THEN KOVACS VS. COOPER AND GRAYNED VS. ROCKFORD,
4 THOSE CASES JUST SEALED IT UP FOR ME WHEN THEY DECIDED THAT THE
5 FLEXIBILITY IN THE WORD UNREASONABLE WAS A PLUS AND NOT A MINUS
6 BECAUSE AGAIN I THINK YOU CAN SEE IT TWO WAYS. ONE PERSON CAN SEE IT
7 ONE WAY AND ONE ANOTHER BUT THESE COURTS HAVE ALL SEEN IT AS A PLUS,
8 NOT A MINUS. I THINK HONEST PEOPLE WOULD DISAGREE BUT WHEN THE
9 COURT TELLS ME THAT'S WHAT IT MEANS OR THAT'S THE IMPORT OF IT, THAT IT
10 IS FLEXIBLE AND A PLUS, NOT A MINUS, THEN I DON'T HAVE TO MAKE THE
11 DECISION ANY MORE. I JUST HAVE TO DO WHAT THE COURT TOLD ME TO DO. SO
12 I'M NOT LOOKING AT THIS AS A CASE OF FIRST IMPRESSION WHERE I'M MAKING
13 THE DECISION. I'M LOOKING AT THIS CASE WHERE I HAVE PREVIOUS CASES FOR
14 ME TO RELY UPON.

15 MR. BRIGGS: YOUR HONOR, I WANT TO MAKE SURE THAT THE
16 COPY OF MY MOTION TO DISMISS THAT I GAVE YOU WOULD BE ENTERED INTO
17 THE RECORD.

18 THE COURT: I CAN DO THAT.

19 MR. BRIGGS: OKAY.

20 THE COURT: WOULD YOU PLEASE MAKE THAT A PART OF THE
21 RECORD. NOW I HOPE I'VE RULED ON ALL THE MOTIONS. I'VE NOT TRIED TO
22 LEAVE ANY OUT THERE HANGING. IF THERE'S ANY HANGING, SOMEBODY TELL
23 ME WHERE THEY ARE SO I CAN MAKE SURE THERE IS A RULING IN THE RECORD.
24 I DON'T WANT TO MAKE A MISTAKE BY NOT RULING ON SOMETHING. ALL
25 RIGHT. WE ARE SATISFIED ON THAT?

1 MS. MANGUM: I HAVE CHECKED EVERYTHING OFF MY LIST, YOUR
2 HONOR.
3 THE COURT: OKAY.
4 MR. BRIGGS: YOUR HONOR, I NEED TO TELL THE COURT
5 SOMETHING. I AM GOING TO MAKE TWO OTHER MOTIONS BUT ONE OF THEM
6 NEEDS TO BE DONE WHEN SOMETHING COMES INTO EVIDENCE, BUT THE
7 SECOND ONE IS I'M GOING TO OBJECT PROFUSELY IF THE OFFICER WHO WAS AT
8 THE HARRASSMENT HEARING THAT YOU HELD TRIES TO BRING IN OLD,
9 UNRELATED CRIMINAL MATTERS.
10 THE COURT: WELL, I THINK THOSE NEED TO BE TAKEN UP ON A
11 ONE-BY-ONE BASIS.
12 MR. BRIGGS: I WILL CITE THE RULE.
13 THE COURT: SOME MAY BE RELEVANT AND SOME MAY NOT.
14 MR. BRIGGS: WHEN WE GET TO THAT POINT, YEAH.
15 THE COURT: THAT'S WHY THERE'S A RULE THAT TELLS US WHICH
16 ONE IS AND WHICH ONE ISN'T.
17 MR. BRIGGS: I THINK WE PROBABLY OUGHT TO EXCUSE THE JURY
18 FOR THAT ONE, YOUR HONOR.
19 THE COURT: YES, WE CAN DO THAT.
20 MS. MANGUM: YOUR HONOR, JUST FOR CLARIFICATION, WHAT
21 HARRASSMENT CHARGES?
22 THE COURT: I SET BOND BACK IN -
23 MR. BRIGGS: IT WAS SOMETHING WE DID.
24 THE COURT: (INAUDIBLE)
25 MS. MANGUM: NO, I UNDERSTAND. I WAS NOT CLEAR IF THAT'S

1 WHAT YOU WERE REFERRING TO OR SOMETHING FARTHER IN THE PAST. I
2 UNDERSTAND.

3 MR. BRIGGS: A NEW CHARGE WHICH WE GO TO BIG COURT WE
4 DECIDED.

5 THE COURT: AND OBVIOUSLY THE OFFICER READ PREVIOUS
6 ARRESTS AND CONVICTIONS.

7 MR. BRIGGS: AND DIDN'T EVEN KNOW WHETHER THEY WERE
8 CONVICTIONS OR ARRESTS. YOUR HONOR, COULD I ASK A QUESTION THAT I
9 ASKED COUNSEL LAST NIGHT. SHE WAS KIND ENOUGH TO ANSWER MY
10 TELEPHONE CALL. WHAT WAS IT, ABOUT SEVEN O'CLOCK, MS. MANGUM?

11 MS. MANGUM: I'M NOT SURE WHAT TIME IT WAS.

12 MR. BRIGGS: BUT ANYWAY I STILL BELIEVE THAT THE BEAUFORT
13 ORDINANCE AS IT IS WRITTEN NOW HAS SOME VALIDITY AND SOME
14 INSTRUCTIONAL VALUE (INAUDIBLE) IF WE WERE TO, QUOTE, BIFURCATE THE
15 CASE. GO ON AND TRY THESE CASES. I MEAN THEY ARE VALID CITATIONS
16 EXCEPT THEY ARE PRESUMED TO BE CONSTITUTIONAL AND ALL THAT BIT BUT,
17 YOU KNOW, WE HAD A DISCUSSION OF WHETHER OR NOT YOU COULD EVEN SAY
18 THE ORDINANCE EVEN MORE BY PUTTING SOME KIND OF DECIMAL READING IN
19 IT. I'M JUST SUGGESTING THAT WE'VE GOT SOME BRAINS AND INTELLIGENCE
20 AND EXPERIENCE HERE. WE MIGHT TAKE SOME OF THE TIME TO TRY TO DECIDE
21 WHETHER THE CITY WANTS TO GO ON -

22 THE COURT: THAT'S PURELY FOR CITY COUNCIL AND THEIR
23 (INAUDIBLE). THAT HAS NOTHING TO DO WITH ME.

24 MR. BRIGGS: ORDINANCE POST THIS TRIAL, YOUR HONOR.

25 THE COURT: THAT'S UP TO CITY COUNCIL AND IF THEY WANT MY

1 OPINION THEY'LL ASK FOR IT AND THEY NEVER HAVE SO ...

2 MS. MANGUM: YOUR HONOR, I DO HAVE A POTENTIAL WITNESS
3 LIST AND SOME VOIR DIRE IF YOU WANT TO -

4 THE COURT: WHY DON'T Y'ALL SHARE AND - GIVE ME A COPY OF
5 TH VOIR DIRE SO I CAN LOOK AT IT. BUT ALONG THOSE LINES, MR. BRIGGS, NOT
6 TO KEEP THE THING GOING BECAUSE WE NEED TO MOVE ALONG, YOUR
7 ARGUMENT I THINK IS THAT YOU COULD WRITE A BETTER ORDINANCE. I THINK
8 IT WAS THE ROCKFORD CASE OR - I READ SO MANY CASES YESTERDAY I DON'T
9 REMEMBER WHICH ONE - SAID AS LONG AS IT'S CONSTITUTIONAL IT DOESN'T
10 HAVE TO BE THE LEAST INTRUSIVE WAY OF DOING IT. JUST BECAUSE YOU COME
11 UP WITH A BETTER WAY DOESN'T MEAN THIS WAY IS NOT LEGAL. SO THE GOAL
12 IS NOT NECESSARILY TO HAVE THE PERFECT WAY, JUST TO HAVE ONE THAT IS
13 LEGAL.

14 MR. BRIGGS: YOUR HONOR, WHILE WE HAVE GOT JUST A MINUTE I
15 WOULD RESPECTFULLY ASK THE COURT THAT BOTH THE APOSTLE CLARK AND
16 HIS WIFE WHO WE REFER TO AS DR. CLARK COULD DISCREETLY REMOVE
17 THEMSELVES FROM THE COURTROOM OR HE CAN STAND UP, WHATEVER HE
18 NEEDS TO DO ABOUT THE MEDICAL SITUATION BUT THAT THEY BE CAREFUL
19 AND NOT DO IT IN THE MIDDLE OF THE QUESTIONING OR SOMETHING LIKE THAT,
20 YOUR HONOR.

21 THE COURT: I'M NOT SURE I UNDERSTAND YOU.

22 MR. BRIGGS: REMEMBER HIS DOCTOR SAID HE NEEDED TO SIT
23 DOWN AND STAND UP.

24 THE COURT: HE CAN DO THAT AND I TOLD HIM HE COULD.

25 MR. BRIGGS: OKAY. AND THEN DR. CLARK, SHE HAS - IS IT

1 MR. BRIGGS: THAT'S FINE.

2 THE COURT: OKAY.

3 MR. BRIGGS: I WASN'T GOING TO SUGGEST A CHANGE.

4 THE COURT: OKAY. I AM GOING TO ASK MR. TERRY TO SERVE AS
5 THE FOREPERSON AND YOU WILL ALWAYS OCCUPY THAT FRONT SEAT THERE.
6 THE REST OF YOU CAN MOVE AROUND IF YOU WISH. I'D ASK YOU TO SIT HERE,
7 PLEASE. NOW WE ARE GOING TO GET TO THE CASE IN A MINUTE AND WE ARE
8 GOING TO HEAR THE TESTIMONY BUT I KIND OF WANT TO SET YOU UP A LITTLE
9 BIT. THIS IS A CRIMINAL CASE. IT INVOLVES THE CITY OF COLUMBIA'S NOISE
10 ORDINANCE AND IT INVOLVES TWO DEFENDANTS BEING CHARGED WITH
11 VIOLATION OF THAT ORDINANCE. I WILL READ YOU THAT ORDINANCE AT THE
12 END OF THE CASE. IN FACT, DOES ANYBODY OBJECT TO MY READING THE
13 ORDINANCE NOW AND AGAIN AT THE END OF THE CASE?

14 MR. BRIGGS: I WOULD PREFER IT, YOUR HONOR.

15 MS. MANGUM: I DO NOT.

16 THE COURT: I THOUGHT ABOUT THIS YESTERDAY WHEN I WAS
17 SITTING AT HOME GETTING READY FOR THIS. I SAID I WOULD LIKE TO KNOW
18 WHAT STANDARD I'M LOOKING FOR WHILE I'M LOOKING SO I'M GOING TO READ
19 IT NOW AND I'LL READ AGAIN ONCE OR TWICE AT THE END OF THE CASE. IT
20 SHALL BE UNLAWFUL FOR ANY PERSON TO OPERATE, OR CAUSE OR PERMIT TO
21 BE OPERATED, ANY INSTRUMENT OR SOUND-PRODUCING OR SOUND-
22 AMPLIFYING DEVICE SO LOUDLY AS TO UNREASONABLY DISTURB PERONS IN
23 THE VICINITY THEREOF OR IN SUCH A MANNER AS RENDERS THE INSTRUMENT
24 OR DEVICE A PUBLIC NUISANCE. SO THAT'S THE ORDINANCE YOU'LL BE
25 APPLYING TO THE FACTS IN THIS CASE.

1 A COUPLE OF QUICK THINGS. AS A CRIMINAL CASE, AS THE TWO
2 DEFENDANTS, MR. AND MRS. CLARK, SIT HERE TODAY THEY ARE PRESUMED TO
3 BE INNOCENT. AND THE ONLY TIME THAT PRESUMPTION OF INNOCENCE CAN
4 EVER BE TAKEN AWAY FROM THEM IS IF THE PROSECUTION PROVES TO YOU
5 BEYOND A REASONABLE DOUBT THAT THEY ARE GUILTY. OTHER THAN THAT
6 THEY STAY PRESUMED INNOCENT. THE BURDEN OF PROOF IS ALWAYS ON THE
7 PROSECUTION. THE PROSECUTION HAS TO PROVE GUILT BEYOND A
8 REASONABLE DOUBT. THERE ARE MULTIPLE COUNTS AND I'LL TELL YOU THIS
9 AT THE END. YOU COULD FIND THEM GUILTY ON SOME AND NOT GUILTY ON
10 SOME, GUILTY ON ALL, NOT GUILTY ON ALL BECAUSE THEY ARE EACH A COUNT
11 INDIVIDUALLY AND THAT'S WHY I TOLD YOU IT MIGHT BE A GOOD IDEA FOR
12 NOTETAKING BECAUSE YOU'LL HAVE TO BE ABLE TO KEEP THESE INCIDENTS
13 STRAIGHT BECAUSE THERE'S MORE THAN ONE INCIDENT INVOLVED HERE
14 TODAY.

15 I'LL GIVE YOU A DEFINITION OF REASONABLE DOUBT AT THE END
16 OF THE CASE. YOU DON'T NEED TO KNOW THAT NOW BUT I WILL HELP YOU A
17 LITTLE BIT ON THE DEFINITION OF THAT AT THE END. YOU AND I HAVE
18 COMPLETELY DIFFERENT ROLES IN THIS CASE. MY ROLE IS TO RULE ON THE
19 LAW, ON MOTIONS AND OBJECTIONS, TO LET IN THE GOOD EVIDENCE, TO KEEP
20 OUT THE BAD EVIDENCE. YOUR ROLE IS TO TAKE THAT EVIDENCE AND
21 DETERMINE WHAT REALLY HAPPENED, WHAT THE REAL FACTS ARE, WHAT THE
22 IMPORT OF THOSE FACTS ARE. SO YOU ARE FACTUALLY ORIENTED AND I'M
23 LEGALLY ORIENTED. I'M GOING TO ASK YOU FOR A FAVOR. IF I TELL YOU THIS
24 IS THE LAW, PLEASE ACCEPT IT. IF I TELL YOU THAT A PIECE OF EVIDENCE IS
25 NOT ADMISSIBLE AFTER YOU HAVE HEARD IT IF SOMEONE OBJECTS AND I SAY

- 1 Q. MR. ELLIS, COULD YOU STATE YOUR FULL NAME, PLEASE?
- 2 A. TIMOTHY DOUGLAS ELLIS.
- 3 Q. AND WHERE DO YOU CURRENTLY LIVE?
- 4 A. 615 LAUREL STREET, COLUMBIA, SOUTH CAROLINA.
- 5 Q. IS THAT WITHIN THE CITY LIMITS OF COLUMBIA?
- 6 A. YES, MA'AM.
- 7 Q. WHAT NEIGHBORHOOD IS THAT?
- 8 A. IT'S THE BATTERY, ARSENAL HILL.
- 9 Q. AND IS THAT A FAIRLY NEW NEIGHBORHOOD?
- 10 A. IT IS.
- 11 Q. DO YOU KNOW WHEN IT WAS BUILT?
- 12 A. I THINK MY HOME WAS ONE OF THE FIRST STRUCTURES BUILT IN THERE,
- 13 PROBABLY STARTED ABOUT 2006, 2007.
- 14 Q. AND WHAT YEAR DID YOU PURCHASE YOUR HOME?
- 15 A. SPRING OF 2009.
- 16 Q. WHAT WAS YOUR UNDERSTANDING WHEN YOU ORIGINALLY PURCHASED
- 17 THE HOME ABOUT THE NEIGHBORHOOD?
- 18 A. IT WAS A BEAUTIFUL NEIGHBORHOOD. I WANTED TO LIVE DOWNTOWN
- 19 CLOSE TO THE VISTA AND IT WAS JUST A BEAUTIFUL AREA AND A BEAUTIFUL
- 20 HOME. I MEAN I KNEW WHEN I SAW IT, I SAID THIS – AND MY REAL ESTATE
- 21 AGENT HAD SHOWED ME HOMES ALL OVER DOWNTOWN AND WHEN I SAW THAT
- 22 ONE I JUST KNEW WHEN I WALKED IN, I SAID THIS IS IT, THIS IS WHAT I WANT.
- 23 Q. DID THE REALTOR PROVIDE YOU –
- 24 MR. BRIGGS: YOUR HONOR, I DON'T WANT TO CAUSE A PROBLEM
- 25 BUT COULD HE – I DON'T WANT HIM TO MISS THE JURY OR HER BUT COULD HE

1 TURN JUST LIKE A QUARTER SO I CAN HEAR HIM A LITTLE BIT BETTER.

2 THE COURT: SPEAK UP JUST A LITTLE FOR US. WE APPRECIATE IT.

3 A. YES, SIR.

4 Q. (BY MS. MANGUM) DID THE REALTOR GIVE YOU ANY INFORMATION

5 ABOUT THE NEIGHBORHOOD?

6 MR. BRIGGS: HEARSAY, YOUR HONOR.

7 MS. MANGUM: I DIDN'T ASK WHAT THE REALTOR SAID, YOUR

8 HONOR.

9 THE COURT: YOU KNOW, I KNOW AT THE BEGINNING OF ANY

10 WITNESS WE HAVE A LITTLE BACKGROUND BUT IT'S REALLY NOT

11 PARTICULARLY RELEVANT I DON'T THINK TO THE EVENTS THAT EITHER DID OR

12 DIDN'T OCCUR ON THESE OCCASIONS SO LET'S TRY TO KEEP THE BACKGROUND

13 TO A MINIMUM PLEASE. WE HAVE LOTS TO GET TO ON THE MEAT OF THE

14 MATTER.

15 MS. MANGUM: YES, YOUR HONOR.

16 Q. (BY MS. MANGUM) BEFORE YOU BOUGHT YOUR HOME, WERE YOU AWARE

17 THAT THERE WAS A CHURCH NEXT DOOR?

18 A. I WAS.

19 Q. DID THAT IMPACT YOUR DECISION TO BUY THE HOME?

20 A. NO, I FRANKLY CONSIDERED IT KIND OF A BONUS I'M THINKING. I'M

21 GONNA BE LIVING NEXT TO A CHURCH, IT'S GOING TO BE RELATIVELY QUIET,

22 GOOD NEIGHBORS. I SAW NOTHING NEGATIVE ABOUT THAT WHATSOEVER BUT I

23 OBVIOUSLY WAS VERY WRONG.

24 Q. WHEN YOU ORIGINALLY PURCHASED YOUR HOME, WAS THAT YOUR

25 PRIMARY RESIDENCE?

1 A. YES, IT WAS. OR IT IS.

2 Q. AND DID ANYONE ELSE LIVE WITH YOU IN THAT HOME AT THE TIME YOU

3 PURCHASED IT?

4 A. NO.

5 Q. FOR THE FIRST SEVERAL YEARS WHEN YOU WEREN'T WORKING, WHERE

6 DID YOU SPEND MOST OF YOUR TIME?

7 A. WHEN I WASN'T WORKING. OH, I WAS AT SHERRY'S HOUSE AND OVER AT

8 HER HOME.

9 Q. AND SO WHEN DID YOU START LIVING IN THAT HOUSE FULL TIME?

10 A. IT WOULD HAVE BEEN LIKE 2011, EARLY '12 IS WHEN I STARTED SPENDING

11 THE MAJORITY OF MY TIME AT THE HOME.

12 Q. AT THE HOUSE ON LAUREL STREET?

13 A. LAUREL STREET, YES.

14 Q. DO YOU RECOGNIZE THIS PICTURE?

15 A. I DO.

16 Q. WHAT IS THAT A PICTURE OF?

17 A. THAT'S THE CHURCH ON THE LEFT, IT'S MY HOME ON THE RIGHT.

18 MR. BRIGGS: NO OBJECTION, YOUR HONOR.

19 MS. MANGUM: YOUR HONOR, AT THIS TIME WE WOULD MOVE TO

20 PUT THIS IN EVIDENCE AND PUBLISH IT TO THE JURY.

21 THE COURT: ENTERED WITHOUT OBJECTION.

22 (PHOTOGRAPH RECEIVED INTO EVIDENCE AS CITY'S EXHIBIT #1)

23 Q. (BY MS. MANGUM) THIS PICTURE YOU WOULD SAY FAIRLY AND

24 ACCURATELY REPRESENTS YOUR HOME AND THE CHURCH AT THIS MOMENT?

25 A. ABSOLUTELY.

1 THE COURT: SUSTAINED.

2 Q. (BY MS. MANGUM) HAVE YOU BEEN ABLE TO USE THAT PORCH?

3 A. NOT AS OFTEN AS I WOULD LIKE.

4 Q. AND WHY ARE YOU NOT ABLE TO USE THAT PORCH?

5 A. YOU CAN'T HEAR YOURSELF THINK OUT THERE THE NOISE IS SO LOUD

6 AND INCREDIBLY DISTURBING.

7 Q. WE ARE HERE TODAY BASED ON SEVEN SEPARATE NOISE VIOLATIONS

8 AND I'D LIKE TO JUST GO THROUGH THEM ONE BY ONE.

9 A. SURE.

10 Q. THE FIRST VIOLATION THAT WE ARE HERE FOR TODAY TOOK PLACE ON

11 FEBRUARY 27TH, 2013. DO YOU RECALL THAT VIOLATION THAT DAY?

12 A. I DO.

13 Q. CAN YOU TELL US A LITTLE BIT WHAT HAPPENED PRIOR TO YOUR

14 CONTACTING THE POLICE DEPARTMENT?

15 A. THAT EVENING?

16 Q. YES.

17 A. I JUST – THE SERVICES START AT – USUALLY DON'T EVEN BEGIN 'TIL 8:00

18 P.M. AND THE NOISE IS JUST TO THE POINT IT WAS UNBEARABLE AND WE WERE

19 FORCED TO CALL THE COLUMBIA POLICE DEPARTMENT TO COME OUT AND TRY

20 TO RESOLVE THE MATTER.

21 Q. WHAT DAY OF THE WEEK WAS THAT, THE 27TH? DO YOU RECALL?

22 A. I DON'T RECALL.

23 Q. IF I TOLD YOU IT WAS A WEDNESDAY, WOULD THAT SOUND RIGHT?

24 A. YES.

25 Q. AND AT WHAT TIME DID THIS TAKE PLACE?

1 A. THAT IT BEGAN? AROUND 8:00 P.M. THAT'S TYPICALLY WHEN THEY'LL
2 START ON WEEKNIGHTS.

3 Q. HOW LONG DID THE NOISE LAST UNTIL?

4 A. CERTAINLY AT LEAST 'TIL 10:00 P.M.

5 Q. WAS IT CONTINUAL NOISE? CAN YOU DESCRIBE WHAT YOU HEARD?

6 A. NO. THERE'S TIMES WHEN IT'S QUIETER. IT'S JUST UP AND DOWN. IT CAN
7 BE LOUD PREACHING, IT CAN BE ENDLESS DRUMMING. THE DRUMMING IS JUST
8 DRIVING ME INSANE. ORGANS. THE AMPLICATION AND DRUMS, I HEAR IT IN MY
9 SLEEP.

10 Q. WHAT ACTIVITIES ARE DIFFICULT FOR YOU TO DO AT YOUR HOUSE
11 BECAUSE OF THE NOISE?

12 A. BASICALLY JUST LIVE MY LIFE BECAUSE WE NEVER KNOW WHEN THEY
13 ARE GOING TO SHOW UP. THEY HAVE BEEN THERE ON EVERY SINGLE
14 WEEKNIGHT AND WEEKEND (INAUDIBLE). THEY GO FOR WEEKS STRAIGHT
15 MONDAY THROUGH SUNDAY AT TIMES SEVERAL WEEKS A YEAR. YOU KNOW,
16 BASICALLY OUR LIFE HAS TURNED INTO AROUND 7:30 IN THE EVENING ON A
17 WEEKDAY WE START LOOKING OUT THE BLINDS TO SEE IF ANYBODY IS GOING
18 TO SHOW UP. AND IT'S SAD THAT OUR LIVES HAVE COME TO THAT TO KNOW IF
19 WE ARE GOING TO BE ASSAULTED THAT NIGHT.

20 Q. ARE YOU AWARE OF ANY SCHDULE THAT THE CHURCH KEEPS IN TERMS
21 OF SERVICES?

22 A. NO. THEY HAVE ONE POSTED BUT IT'S -- THEY DO NOT GO BY THAT
23 SCHEDULE AT ALL. IT'S ALL OVER THE BOARD. THEY CAN BE THERE MONDAY
24 THROUGH SUNDAY.

25 Q. IS THIS THE SCHEDULE THAT YOU JUST REFERENCED?

1 A. IT IS. AND INTERESTING ENOUGH IT SAYS THAT THEIR SUNDAY MORNING
2 WORSHIP BEGINS AT 11:00 A.M. MR. CLARK DOESN'T EVEN PULL UP SOMETIMES
3 'TIL 11:30 AND SERVICE BEGINS AROUND NOON.

4 MR. BRIGGS: YOUR HONOR, I THINK THAT'S IRRELEVANT.

5 THE COURT: OVERRULED.

6 MS. MANGUM: DO YOU HAVE ANY OBJECTION TO THIS?

7 MR. BRIGGS: YES.

8 THE COURT: WHAT WOULD BE YOUR OBJECTION, SIR?

9 MR. BRIGGS: YOUR HONOR, IT'S OUTDATED. IT IS NOT A TRUE
10 STATEMENT OF THE SERVICES THEY HAVE AND MR. ELLIS HAS GOT TO KNOW
11 IT'S NOT A TRUE STATEMENT OF THE STANDARD SERVICES.

12 THE COURT: I'LL LET IT BE ENTERED JUST TO SHOW THEY HAVE A
13 SCHEDULE, NOT THAT THEY FOLLOW IT, JUST THAT THEY HAVE ONE, THAT ONE
14 EXISTS.

15 MS. MANGUM: THANK YOU, YOUR HONOR.

16 (SCHEDULE RECEIVED INTO EVIDENCE AS CITY'S EXHIBIT #3)

17 MS. MANGUM: YOUR HONOR, PERMISSION TO PUBLISH TO THE
18 JURY.

19 THE COURT: YES, MA'AM.

20 Q. (BY MS. MANGUM) LET'S BACKTRACK FOR A MINUTE. IN TERMS OF THE
21 SCHEDULE THAT IS OUT IN FRONT OF THE CHURCH, WAS IT YOUR TESTIMONY
22 THAT THEY DO NOT FOLLOW THAT?

23 A. NO. THEIR SCHEDULE IS COMPLETELY INCONSISTENT WEEK TO WEEK
24 EXCEPT ON SUNDAYS THEY TYPICALLY DO BEGIN AROUND NOON. WHAT THEY
25 DO BEFORE THAT I DON'T KNOW AND DON'T CARE BECAUSE IT'S QUIET BUT AS

1 FAR AS THE NOISE GOES, WHICH I ASSUME IS THEIR SERVICE, BEGINS TYPICALLY
2 AT TWELVE. OUTSIDE OF THAT THERE IS NO CONSISTENCY WHATSOEVER. THEY
3 MAY BE THERE TUESDAY, WEDNESDAY, THEY MAY BE THERE NONE DURING THE
4 WEEK, THEY MAY BE THERE WEDNESDAY NIGHT. WE HAVE NO IDEA.

5 Q. WAS THIS THE SAME SIGN THAT WAS POSTED WHEN YOU PURCHASED
6 YOUR HOME?

7 A. I THINK SO. I DON'T THINK THERE'S BEEN ANY CHANGES TO IT THAT I'M
8 AWARE OF.

9 Q. WHAT CHANGES HAVE YOU MADE TO YOUR HOME BASED ON THE NOISE
10 THAT COMES FROM THAT CHURCH? WHAT PROBLEMS THAT YOU'VE HAD
11 ASSOCIATED WITH THE NOISE FROM THAT CHURCH.

12 MR. BRIGGS: THAT'S LEADING, YOUR HONOR.

13 THE COURT: OVERRULED.

14 A. JUST OUR INABILITY TO ENJOY OUR HOME. I MEAN I DON'T THINK I
15 SHOULD BE FORCED TO PUT SOUNDPROOFING PRODUCTS IN MY HOME. MY
16 HOME WAS BUILT - IT'S FAIRLY NEW. IT WAS BUILT TO CODE SO WE JUST HAVE
17 TO ENDURE THE CHURCH'S NOISE.

18 Q. HAVE YOU PLANTED SOME SHRUBBERY TO SEPARATE YOUR PROPERTY
19 FROM THE DEFENDANT'S?

20 A. THE DEVELOPER DID PUT SOME SHRUBBERY IN, YES. THAT WAS TO
21 FINISH - I ASSUME YOU ARE TALKING ABOUT THE HOLLY BUSHES.

22 Q. LET ME SHOW YOU THIS PICTURE. DO YOU KNOW WHAT THIS IS?

23 A. YES. THAT WAS PUT IN TO FINISH THE NEIGHBORHOOD AS THE
24 DEVELOPER IS FINALLY CLOSING OUT AND SOON TO TURN OVER THE PROPERTY
25 TO THE HOMEOWNERS ASSOCIATION.

1 Q. AND DOES THIS PICTURE REFLECT THE WAY THE PROPERTY HAS LOOKED
2 FOR THE LAST YEAR AND A HALF?
3 A. OH, YES.
4 MR. BRIGGS: YOUR HONOR, I AM GOING TO OBJECT BECAUSE
5 THESE PEACH TREES ARE NOT ON HIS PROPERTY. THEY ARE ON STATE
6 PROPERTY BUT THAT'S MY OBJECTION.
7 THE COURT: OKAY. OVERRULED.
8 MS. MANGUM: YOUR HONOR, WE WOULD MOVE TO PUT THIS INTO
9 EVIDENCE AND PUBLISH TO THE JURY.
10 THE COURT: IT'S ADMITTED.
11 (PHOTOGRAPH RECEIVED INTO EVIDENCE AS CITY'S EXHIBIT #4)
12 Q. (BY MS. MANGUM) HOW DO THOSE BUSHES OFFER YOU SOME
13 PROTECTION FROM THE CHURCH?
14 A. WELL, EARLY BEFORE THOSE WERE INSTALLED THE CHURCH
15 PARRISHONERS, SOME OF THEM WOULD PARK IN MY FRONT YARD. LITERALLY
16 THREE FEET FROM MY FRONT PORCH WHICH IS MY PROPERTY BY THE WAY.
17 Q. YES, SIR. DOES THIS ASSIST AT ALL IN BLOCKING NOISE FOR YOU?
18 A. NO, IT DOESN'T.
19 Q. THE SECOND VIOLATION -- WE TALKED ABOUT THE FEBRUARY 27TH
20 VIOLATION WHICH WE DISCUSSED ALREADY. THE FOLLOWING DAY, FEBRUARY
21 28TH, 2013, DID YOU CALL THE POLICE THAT EVENING?
22 A. WE DID.
23 Q. AND CAN YOU EXPLAIN WHY YOU DID THAT?
24 A. ONCE AGAIN IT WAS JUST NON-STOP LOUD AMPLIFICATION AND
25 POUNDING OF DRUMS AND IT COMING INTO MY HOME AND I CAN HEAR IT ON MY

1 COUCH. IT'S JUST - I DON'T KNOW. I CAN'T EXPLAIN THE DIFFICULTY IT BRINGS
2 TO OUR LIFE.

3 Q. DO YOU REMEMBER APPROXIMATELY WHAT TIME IT WAS THAT THAT
4 INCIDENT TOOK PLACE?

5 A. IT WOULD HAVE BEEN PROBABLY IN THE SEVEN TO EIGHT O'CLOCK
6 RANGE.

7 Q. HOW LONG DID THAT INCIDENT LAST?

8 A. ONCE AGAIN THEIR SERVICES EARLY ON WOULD GO AS LATE AS 11:00 P.M.
9 THAT NIGHT I DON'T RECALL EXACTLY WHAT TIME IT MAY HAVE ENDED. I'M
10 SURE IT'S RECORDED IN THE CITATION.

11 Q. ON MARCH 10TH, 2013, DID YOU AGAIN CALL THE POLICE?

12 A. WE DID.

13 Q. AND CAN YOU EXPLAIN WHAT THAT CALL WAS IN REFERENCE TO?

14 A. SAME THING. LOUD SCREAMING THROUGH A MICROPHONE, DRUMMING
15 AND JUST BASICALLY ANOTHER NIGHT OF NO REST AND NO SLEEP AND HIGH
16 STRESS.

17 Q. DID YOU HAVE - WERE YOU AWARE OF ANY MEMBERS OF THE CHURCH
18 ON THAT PARTICULAR DAY THAT MADE THEIR PRESENCE KNOWN TO YOU
19 SPECIFICALLY?

20 MS. MANGUM: LEADING, YOUR HONOR.

21 THE COURT: OVERRULED.

22 A. I THINK THAT MAY HAVE BEEN THE NIGHT THAT THOMAS WAS ON THE
23 FRONT PORCH OF THE CHURCH AND HAD TOLD US THEY WERE GOING TO TEAR
24 UP OUR SHRUBBERY, OUR LANDSCAPING.

25 Q. (BY MS. MANGUM) AND THEN ON APRIL 19TH, 2013, DID YOU CALL THE

1 POLICE AGAIN THAT NIGHT?

2 A. WE DID.

3 Q. AND WHY DID YOU CALL THE POLICE?

4 A. ONCE AGAIN, SAME THING. IT'S ALWAYS THE SAME THING. IT'S LOUD,
5 AMPLIFIED VOICE SCREAMING, PREACHING, DRUMS, ORGAN.

6 Q. WAS IT DISTURBING THE QUIET ENJOYMENT OF THE HOME THAT NIGHT?

7 A. ABSOLUTELY. IT'S BEEN THE CASE FOR MANY, MANY NIGHTS.

8 Q. MOVING FORWARD TO OCTOBER 4TH, 2013, DID YOU CALL THE POLICE
9 THAT NIGHT AS WELL?

10 A. WE DID.

11 Q. AND WHY DID YOU DO THAT?

12 A. ANOTHER NIGHT OF WHAT I CONSIDER PERSONALLY AN ASSAULT ON OUR
13 PRIVACY AND OUR SANCTITY OF OUR HOME. MAYBE NOT PRIVACY BUT
14 CERTAINLY THE PEACE AND QUIET AND ENJOYMENT OF OUR HOME. IT'S JUST
15 THE SAME THING OVER AND OVER.

16 Q. AND WITHOUT BELABORING THE POINT, DID YOU ALSO CALL THE POLICE
17 ON NOVEMBER 21ST, 2013?

18 A. WE DID.

19 Q. FOR SIMILAR REASONS?

20 A. ABSOLUTELY.

21 Q. AND AGAIN ON APRIL 4TH, 2014, FOR SIMILAR REASONS?

22 A. YES.

23 Q. IN TERMS OF THE LOCATION OF THE CHURCH, DO YOU HAVE ANY
24 PROBLEM WITH THE MESSAGE THAT THE CHURCH HAS?

25 A. ABSOLUTELY NOT.

1 STAND AND TESTIFY THEY NEVER MADE LOUD NOISES EVER OVER THERE WE
2 MAY HAVE AN OPEN DOOR.

3 MS. MANGUM: YES, YOUR HONOR. JUST TO CLARIFY BEFORE THE
4 JURY COMES OUT, THIS DISC 507, THIS TAKES PLACE ON APRIL 19TH WHICH IS ONE
5 OF THE DATES IN QUESTION.

6 THE COURT: OKAY.

7 MS. MANGUM: DO YOU HAVE ANY OBJECTION TO ME ENTERING
8 THAT?

9 MR. BRIGGS: NO.

10 THE COURT: WITHOUT OBJECTION. AND CAN WE BRING THE
11 JURY BACK?

12 MS. MANGUM: YES, YOUR HONOR.

13 THE COURT: GO AHEAD AND SET IT UP.

14 MS. MANGUM: YOU WANT TO MARK THIS.

15 (DISC RECEIVED INTO EVIDENCE AS CITY'S EXHIBIT #5)

16 (JURY RETURNS TO THE JURY BOX)

17 THE COURT: THANK YOU AGAIN, LADIES AND GENTLEMEN.
18 APPRECIATE IT. WE ARE GOING TO SET UP THESE VIDEOS. IT WILL TAKE A
19 MINUTE OR TWO. MS. MANGUM, YOU CAN PLAY YOUR VIDEO NOW. WHILE WE
20 HAVE GOT A LITTLE BREAK LET'S DO THIS. I'M GOING TO EXCUSE Y'ALL. DON'T
21 LEAVE YET. Y'ALL HAVE GOT TWO DECISIONS TO MAKE BEFORE YOU REACH A
22 VERDICT. WHAT DO YOU WANT TO DO FOR LUNCH? I'M GOING TO SUGGEST TO
23 YOU THAT WE TAKE A FULL HOUR, HOUR AND FIFTEEN MINUTES AND GO
24 SOMEWHERE, WE CAN JUST KEEPING WORKING WHICH MEANS WE MIGHT WORK
25 TO FIVE O'CLOCK WITHOUT EATING ANYTHING OR WE CAN TAKE TEN OR

1 ME. NEXT THING I KNOW I'VE LITERALLY GOT EIGHTEEN WITNESSES IN EACH
2 FACTION LINED UP TO TALK ABOUT THE FACTIONS RATHER THAN THE TWO
3 SECOND INCIDENT THAT HAPPENED IN THE HALLWAY. SO I REMEMBERED THAT.
4 I WOULD NEVER GO DOWN THAT ROAD AGAIN.

5 MS. MANGUM: AND, YOUR HONOR, WE DON'T WANT TO DO
6 ANYTHING THAT'S GOING TO MESS WITH THE ISSUES BUT I DO THINK THAT HIS
7 VERY LIMITED TESTIMONY AS TO WHAT THE POLICE DEPARTMENT DID BEFORE
8 ISSUING THE FIRST CITATION DOES CLEARLY SHOW THAT THE DEFENDANT
9 FROM THE GETGO, FROM THE FIRST CITATION THAT WAS ISSUED THAT'S BEFORE
10 THE JURY TODAY, THE DEFENDANT KNEW HE WAS IN VIOLATION, INTENDED TO
11 BE IN VIOLATION OF THAT STATUTE.

12 MR. BRIGGS: YOUR HONOR, IF WE GET INTO THAT THEN I'VE GOT
13 TO HAVE THE DEFENSE OF WHAT MY CLIENT'S RELIGIOUS CONVICTIONS ARE.

14 MS. MANGUM: THAT HAS NOTHING TO DO WITH IT, YOUR HONOR.

15 MR. BRIGGS: AND WHY THEY THINK -- THEY BELIEVE IN THE FIRST
16 AMENDMENT, LADY.

17 THE COURT: YEAH, LET'S BE CALM. I THINK IT IS RELEVANT. I
18 THINK MORE THAN LIKELY IT'S RELEVANT. IT'S JUST WHETHER IT TAKES TOO
19 MUCH TIME AND CONFUSING GETTING OFF ON ANOTHER ISSUE. ASK YOURSELF
20 THIS. DO YOU THINK THE JURY (INAUDIBLE) WAS A MISTAKE ANYHOW? I MEAN
21 DON'T YOU THINK THEY ALREADY THINK THAT THEY INTENTIONALLY CREATED
22 THE NOISE. THEY DON'T HAVE TO INTEND -- THE INTENT IS TO CREATE THE
23 NOISE. IT'S NOT INTENT TO BOTHER THE NEIGHBORS (INAUDIBLE) I DON'T
24 THINK. AND CERTAINLY THIS NOISE IS NOT BEING CREATED BY AN ACCIDENT.

25 MS. MANGUM: I THINK BASED ON THE INTENT CHARGE THAT YOU

1 MR. BRIGGS: I KNOW BUT IT'S JUST ONE WAY OF DOING IT, YOUR
2 HONOR. I WANT IT TO BE ON THE RECORD.

3 THE COURT: YES, SIR, AND I'LL DECLINE THAT REQUEST.

4 MR. BRIGGS: I KNEW YOU WOULD.

5 THE COURT: OKAY. ARE WE READY NOW FOR THE JURY?
6 (JURY RETURNS TO THE JURY BOX)

7 THE COURT: THANK YOU VERY MUCH FOR YOUR PATIENCE,
8 LADIES AND GENTLEMEN. WE REALLY APPRECIATE IT. WE ARE GOING TO
9 WHAT'S CALLED ARGUE AND CHARGE. EACH SIDE GETS A CHANCE TO ADDRESS
10 YOU AND THEN I'LL READ THE LAW TO YOU. MR. BRIGGS, YOU GET TO GO FIRST,
11 SIR.

12 MR. BRIGGS: LADIES AND GENTLEMEN, WE WANT TO THANK YOU
13 FOR YOUR SERVICE AND I KNOW THE CITY ATTORNEY FEELS THAT WAY AND I
14 KNOW THE JUDGE FEELS THAT WAY. IT'S A PRIVILEGE BUT IT'S A DUTY, TOO,
15 AND WE APPRECIATE YOU ALL BEING HERE. WHAT I WANT TO REMIND YOU
16 ABOUT ON BEHALF OF THE DEFENDANTS IS REMEMBER THAT THIS IS NOT JUST A
17 QUESTION OF NOISE, IT'S A QUESTION OF WHAT THE FIRST AMENDMENT SAYS
18 AND WHAT FREE SPEECH SAYS.

19 MS. MANGUM: YOUR HONOR, I HATE TO OBJECT ON CLOSING BUT I
20 HAVE TO.

21 MR. BRIGGS: YOU CAN'T. NO BASIS FOR IT.

22 THE COURT: I THINK TO A CERTAIN DEGREE I'M GOING TO LET
23 HIM TALK. THAT DOESN'T MEAN THAT IT'S SO. I WILL SAY THIS, LADIES AND
24 GENTLEMEN, AND THIS IS THE LAW. IN SOME STATES IT IS OKAY TO ARGUE
25 JURY NULLIFICATION, THAT IS, EVEN THOUGH WE BELIEVE THE PERSON DID IT

1 WE ARE GOING TO FIND HIM NOT GUILTY BECAUSE WE DON'T LIKE IT. IN SOUTH
2 CAROLINA THAT IS NOT THE LAW. YOU TOOK AN OATH TO FOLLOW THE LAW SO
3 WHETHER YOU LIKE THE LAW OR NOT YOU ENFORCE IT, NOT GUILTY OR
4 GUILTY, WHICHEVER WAY IT GOES BUT YOUR OWN PERSONAL FEELINGS ABOUT
5 THE LAW ARE NOT ALLOWED. YOU'RE A SOLDIER HERE TODAY, YOU DO
6 WHATEVER YOUR DUTY NEEDS YOU TO DO. BUT WE ALL RECOGNIZE THE
7 IMPORTANCE OF THE FIRST AMENDMENT SO I'M GOING TO LET HIM HAVE A
8 LITTLE SHORT SEGMENT. YOU STILL HAVE TO DO YOUR JOB.

9 MR. BRIGGS: SINCE YOU RAISE THE POINT, I HADN'T EVEN
10 THOUGHT ABOUT THAT SUBJECT, OKAY? THE POINT I'M MAKING, LADIES AND
11 GENTLEMEN, IS THE JUDGE WILL TELL YOU WHAT THE LAW IS SO WHAT YOU
12 HAVE TO DO IS TAKE THE FACTS YOU HEARD, WHAT TESTIMONY YOU BELIEVE,
13 WHAT YOU DON'T BELIEVE AND APPLY THE LAW THAT HE SAYS ABOUT IT. BUT
14 I JUST WANTED TO REMIND YOU THAT WE ARE TALKING ABOUT THE FIRST
15 AMENDMENT, NOT THE TENTH OR ANYTHING LIKE THAT. BUT WHAT THE CITY
16 WANTS YOU TO DO IS FOR YOU TO SAY THAT TWO CITIZENS CAN TRUMP THIRTY
17 CHURCH MEMBERS, THE CHURCH ITSELF AND THESE CONSTITUTIONAL
18 PROTECTIONS. THEY WANT YOU TO FORGET ABOUT ALL THOSE AND, QUOTE,
19 PROTECT THE TWO CITIZENS. APPARENTLY ALL THE CITATIONS CAME FROM
20 COMPLAINTS IN A SINGLE ROOM OF THE HOUSE, NAMELY, THE LIVING ROOM.
21 THEY HAVE SIX ROOMS IN THAT HOUSE. WHY DIDN'T THE POLICE TAKE
22 READINGS IN THOSE OTHER FIVE ROOMS? THERE HAD TO BE A ROOM WHERE
23 YOU COULDN'T HEAR NOISE THAT AT ONE TIME WAS THIRTY-FIVE MINUTES. AT
24 OTHER TIMES IT MAY HAVE BEEN MORE, OTHER TIMES IT MAY HAVE BEEN LESS.
25 MY QUESTION IS WHY DIDN'T THE POLICE TEST THOSE OTHER ROOMS. IN FACT,

1 CAPTAIN MARSH SAID ON A TELLING POINT THAT THE DECISION OF WHETHER
2 OR NOT TO GIVE A CITATION WAS -- THE POLICE WERE INFLUENCED BY THE
3 CITIZENS' DEFINITION OF TOO MUCH. I'M SORRY, YOU CAN'T DELEGATE THAT
4 DECISION TO A CITIZEN. NOW HOW MANY TIMES THEY DID THAT AND HOW
5 MANY TIMES THE POLICE MADE THEIR OWN MIND UP WE DON'T KNOW. MAYBE
6 THE MOST MISLEADING STATEMENT WAS THE ONE THE CITY ATTORNEY SAID
7 THAT, QUOTE, THERE WAS NOISE FROM THE CHURCH AT ALL TIMES OF THE DAY
8 AND NIGHT. WE HEARD NO TESTIMONY OF EARLY MORNING NOISE. WE HEARD
9 NO TESTIMONY OF ALL DURING THE NIGHT. NOW THERE'S GOING TO BE AN
10 ARGUMENT LATER ABOUT WHETHER IT WAS NINE-THIRTY OR TEN-THIRTY OR
11 WHENEVER IT WAS BUT YOU CAN DECIDE ABOUT THAT YOURSELF BUT THAT
12 STATEMENT INFLUENCED THE EXAGGERATED TESTIMONY OF THE
13 COMPLAINING WITNESSES.

14 YOUR JOB IS TO DECIDE WHETHER A CHURCH THROUGH THEIR
15 LEADERS CAN BE PUNISHED FOR PRAISING GOD IN A DRAMATIC MANNER JUST
16 TO SATISFY THE BIAS OF TWO NEIGHBORS. REMEMBER NOW THE FINAL WORD IS
17 YOU HAVE TO BE SATISFIED THERE WAS A VIOLATION OF LAW WITHOUT ANY
18 REASONABLE DOUBT IN YOUR MIND THAT THE DEFENDANTS ARE GUILTY AND
19 SHOULD BE PUNISHED. THANK YOU.

20 MS. MANGUM: WE ARE HERE TODAY BECAUSE THE CITY OF
21 COLUMBIA HAS ENACTED A NOISE ORDINANCE AND IT IS THE LAW IN THE CITY
22 AND THE JUDGE WILL TELL YOU EXACTLY WHAT THAT ORDINANCE SAYS
23 AGAIN. BUT IT IS THE LAW AND EVERY CITIZEN IN THIS CITY MUST OBEY IT.
24 THE LAW IN TERMS OF THE NOISE, VIOLATION OF THE NOISE ORDINANCE IS
25 CLEAR THAT NOISE THAT IS UNREASONABLY LOUD THAT INTERFERES WITH

1 OTHERS RIGHT TO QUIET ENJOYMENT IS AGAINST THE LAW. YOU'VE HEARD A
2 LOT OF TESTIMONY TODAY IN A VERY SHORT TIME AND I JUST WANT TO
3 BRIEFLY GO THROUGH SOME OF THAT WITH YOU. YOU HEARD FROM TIM ELLIS
4 AND SHERRY CALLAHAN AND THEY ARE A GREAT STUDY IN THE DIFFERENCES
5 BETWEEN MEN AND WOMEN JUST IN THE WAY THAT THEY TOOK THE STAND.
6 TIM ELLIS VERY MATTER OF FACTLY TOLD YOU THE NOISE IS UNREASONABLE,
7 IT DISTURBS ME, I AM UNABLE TO DO THE THINGS THAT I LIKE TO DO IN MY
8 HOME. YOU ALSO HEARD FROM SHERRY CALLAHAN WHO WAS VERY
9 EMOTIONAL AND SHE TOLD YOU THAT THE NOISE IN EFFECT HAD CHANGED HER
10 WHOLE LIFE. THOSE ARE SERIOUS ISSUES FOR THESE VICTIMS. AFTER THEY
11 WORKED ALL DAY AND THEY BOTH DO, THEY COME HOME TO A HOUSE WHERE
12 THEY CANNOT WATCH T.V, WHERE THEY CANNOT WORK OUT OF THEIR LIVING
13 ROOM, DINING ROOM, BEDROOM, SECOND EATING AREA, ALTHOUGH THE
14 OFFICER TESTIFIED THAT HE LISTENED IN THE LIVING ROOM, AND THAT WAS
15 ENOUGH FOR HIM. YOU ALSO HEARD TESTIMONY THAT IT AFFECTED THEIR
16 ENTIRE HOUSE AND THEIR ENTIRE LIFE. YOU HEARD FROM OFFICER GRIGGS
17 WHO TOLD YOU THAT THE DECISION TO CITE THESE DEFENDANTS WAS HIS AND
18 HIS ALONE BASED ON THE STATUTE BEFORE HIM AND HIS DUTY AS AN OFFICER.
19 AND HE FOUND NOT ONCE, NOT TWICE, BUT SIX TIMES THAT THESE
20 DEFENDANTS WERE NOT FOLLOWING THE LAW IN OUR CITY. IT'S IMPORTANT
21 TO REMEMBER THE DATES OF THOSE CITATIONS BECAUSE THE OFFICER CAME IN
22 FEBRUARY -- I BELIEVE IT WAS THE 27TH. I MAY HAVE THAT WRONG, MAYBE THE
23 21ST. BUT HE CAME, HE ISSUED THE CITATION AND HE HAD TO COME BACK THE
24 VERY NEXT DAY. THE DEFENDANTS WERE ON NOTICE THAT THEY WERE IN
25 VIOLATION AND THEY CONTINUED TO VIOLATE THE ORDINANCE. THEY HAD NO

1 CONCERN FOR THEIR NEIGHBORS, THEY HAD NO CONCERN FOR THEIR
2 COMMUNITY.

3 YOU ALSO HEARD FROM CAPTAIN MARSH TODAY WHO TOLD YOU
4 THAT THE CITY DIDN'T WANT TO ISSUE THE CITATIONS. HE ACTED AS A
5 MEDIARY. HE TRIED TO MEET WITH THE DEFENDANTS TO MAKE SOME CHANGES
6 SO THAT EVERYBODY COULD LIVE IN HARMONY WHICH WAS REALLY THE POINT
7 OF THIS NEIGHBORHOOD TO BEGIN WITH. BUT THE DEFENDANTS REFUSED TO
8 MAKE ANY CHANGES.

9 YOU ALSO HEARD FROM THE DEFENDANT HIMSELF WHO
10 ORIGINALLY TOLD YOU THAT HE DIDN'T EVEN KNOW THERE WAS A CHILD
11 LIVING THERE. WELL, WE KNOW THROUGH TIM ELLIS THAT HE ABSOLUTELY
12 DID KNOW. HE WAS IN COURT A YEAR PRIOR, MAYBE A YEAR AND A HALF AND
13 HE WAS NOTIFIED AT THAT POINT THAT THERE WAS A CHILD IN THE HOME. HE
14 KNEW THERE WAS A CHILD, HE SAW THE VIDEO WHERE THE CHILD COULD NOT
15 SLEEP AND YET HE CONTINUED TO PLAY MUSIC AT SUCH A LEVEL THAT HE WAS
16 CITED SEVEN ADDITIONAL TIMES THAT ARE BEFORE YOU TODAY.

17 I WANT TO GO BACK TO WHERE WE STARTED AT THE VERY
18 BEGINNING OF THIS. TIM ELLIS AND SHERRY CALLAHAN HAD A DREAM AND
19 THEY BOUGHT THAT HOUSE IN THAT COMMUNITY. IT WAS A BRAND NEW
20 NEIGHBORHOOD IN DOWNTOWN COLUMBIA. THEY PLANNED TO RAISE THEIR
21 FAMILY THERE. THEY KNEW THE CHURCH WAS THERE AND THEY TESTIFIED
22 THEY WERE EXCITED, THEY WERE GLAD. THEY THOUGHT THEY WOULD BE
23 GOOD NEIGHBORS. BUT THAT DREAM HAS GONE HORRIBLY WRONG AND ALL
24 THEY ARE ASKING TODAY IS FOR SOME RELIEF. THEY ARE NOT ASKING THAT
25 THE CHURCH LEAVE THE PROPERTY. THEY ARE NOT ASKING THAT THE CHURCH

1 NOT BE ALLOWED TO HAVE SERVICES. THEY ARE SIMPLY ASKING THAT THE
2 CHURCH FOLLOW THE LAWS IN THIS CITY, AND WE ARE ASKING THE SAME
3 FROM YOU TODAY. THANK YOU VERY MUCH.

4 THE COURT: OKAY. LADIES AND GENTLEMEN OF THE JURY, YOU
5 NOW HAVE HEARD ALL THE EVIDENCE IN THE CASE AND THE FINAL
6 ARGUMENTS BY THE LAWYERS. MY DUTY AS THIS POINT IS TO INSTRUCT YOU
7 AS TO THE LAW. IT IS YOUR DUTY TO ACCEPT THESE INSTRUCTIONS OF LAW
8 AND APPLY THEM TO THE FACTS AS YOU DETERMINE THE FACTS TO BE. IF
9 ANYONE HAS STATED A LEGAL PRINCIPLE DIFFERENT FROM ANY THAT I STATE
10 TO YOU IN MY INSTRUCTIONS, IT IS MY INSTRUCTIONS THAT YOU MUST
11 FOLLOW. YOU SHOULD NOT SINGLE OUT ANY INSTRUCTION ALONE AS STATING
12 THE LAW, BUT YOU SHOULD CONSIDER MY INSTRUCTION AS A WHOLE WHEN
13 YOU RETIRE TO DELIBERATE. IT IS THE DUTY OF THE JUDGE TO RULE ON THE
14 ADMISSION OF THE EVIDENCE, BUT THE WEIGHT OF THE EVIDENCE IS ENTIRELY
15 FOR THE JURY AND IT IS THE JURY'S DUTY TO WEIGH THE EVIDENCE AND TO
16 DETERMINE WHAT THE FACTS ARE FROM THE TESTIMONY AS IT IS HEARD FROM
17 THE WITNESSES. HENCE, THE JURY MUST NECESSARILY PASS UPON THE
18 CREDIBILITY OF THE WITNESSES. IN DOING THIS YOU MAY TAKE INTO
19 CONSIDERATION THE WITNESS'S OPPORTUNITY FOR OBSERVATION, THE
20 WITNESS'S KNOWLEDGE OF THE MATTERS TESTIFIED ABOUT, THE WITNESS'S
21 BIAS OR PREJUDICE, THE WITNESS'S DEemeanor. IN FACT, ANYTHING WHICH
22 YOU, THE JURY, BELIEVES WILL HELP YOU DETERMINE WHETHER A WITNESS IS
23 TELLING THE TRUTH, THE OBJECT BEING TO FIND THE TRUTH WHETHER IT
24 COMES FROM A WITNESS FOR THE PROSECUTION OR A WITNESS FOR THE
25 DEFENSE. YOU MAY BELIEVE ONE WITNESS AND DISBELIEVE ANOTHER. YOU

1 MAY BELIEVE ONE PORTION OF A WITNESS'S TESTIMONY AND DISREGARD
2 ANOTHER PORTION OF THAT SAME WITNESS'S TESTIMONY. HAVING
3 DETERMINED THE CREDIBILITY OF THE WITNESSES AND HAVING CONCLUDED
4 WHAT THE FACTS ARE IN THE CASE, IT IS YOUR DUTY TO APPLY THE LAW AS I
5 CHARGE IT TO YOU TO THOSE FACTS AND THUS ARRIVE AT YOUR VERDICT.

6 YOU ARE TO PERFORM THIS DUTY WITHOUT BIAS OR PREJUDICE TO
7 ANY PARTY. THE LAW DOES NOT PERMIT JURORS TO BE GOVERNED BY
8 SYMPATHY, PREJUDICE OR PUBLIC OPINION. BOTH THE ACCUSED AND THE
9 PUBLIC EXPECT THAT YOU WILL CAREFULLY AND IMPARTIALLY CONSIDER ALL
10 THE EVIDENCE IN THE CASE, THAT YOU WILL FOLLOW THE LAW STATED BY THE
11 COURT AND THAT YOU WILL REACH A JUST VERDICT REGARDLESS OF THE
12 CONSEQUENCES.

13 TO CONSTITUTE THE CRIME CHARGED, AND I'LL READ YOU THE
14 ORDINANCE AGAIN SHORTLY, THERE MUST BE THE JOINT OPERATION OF TWO
15 ELEMENTS. ONE, AN ACT FORBIDDEN BY LAW AND, TWO, AN INTENT TO DO THE
16 ACT. BEFORE A DEFENDANT MAY BE FOUND GUILTY OF A CRIME, THE
17 PROSECUTION MUST ESTABLISH BEYOND A REASONABLE DOUBT THAT UNDER
18 THE ORDINANCE DESCRIBED IN THESE INSTRUCTIONS THE DEFENDANTS IN THIS
19 CASE WERE FORBIDDEN TO DO THE ACT CHARGED AND THAT THEY
20 INTENTIONALLY COMMITTED THE ACT.

21 THE LAW PRESUMES A DEFENDANT TO BE INNOCENT OF A CRIME
22 AND THE LAW PERMITS NOTHING BUT LEGAL EVIDENCE PRESENTED BEFORE
23 THE JURY TO BE CONSIDERED IN SUPPORT OF ANY CHARGE AGAINST AN
24 ACCUSED. SO THE PRESUMPTION OF INNOCENCE ALONE IS SUFFICIENT TO
25 ACQUIT A DEFENDANT UNLESS THE JURORS ARE SATISFIED BEYOND A

1 REASONABLE DOUBT OF THE DEFENDANT'S GUILT. IT IS NOT REQUIRED THAT
2 THE PROSECUTION PROVE GUILT BEYOND ALL POSSIBLE DOUBT. THE TEST IS
3 ONE OF REASONABLE DOUBT. A REASONABLE DOUBT IS A DOUBT THAT WOULD
4 MAKE A REASONABLE PERSON HESITATE TO ACT. YOU ARE TO REMEMBER THAT
5 A DEFENDANT IS NOT TO BE CONVICTED ON MERE SUSPICION OR CONJECTURE.
6 THE BURDEN IS ALWAYS UPON THE PROSECUTION TO PROVE GUILT BEYOND A
7 REASONABLE DOUBT. THIS BURDEN NEVER SHIFTS TO A DEFENDANT. SO IF
8 YOU, THE JURY, AFTER CAREFUL AND IMPARTIAL CONSIDERATION OF ALL THE
9 EVIDENCE IN THE CASE HAS A REASONABLE DOUBT THAT EITHER OF THESE
10 DEFENDANTS IS GUILTY THEN YOU MUST ACQUIT ONE OR BOTH, THE ONES YOU
11 CAN SAY YOU HAVE A DOUBT ABOUT. IF THE EVIDENCE IS ON THAT RAZOR'S
12 EDGE AND YOU CAN'T DECIDE WHETHER YOU HAVE A REASONABLE DOUBT OR
13 NOT, THEN YOU DO HAVE A REASONABLE DOUBT AND YOU WOULD STILL FIND
14 THE DEFENDANT NOT GUILTY. BUT, OF COURSE, IF THE PROSECUTION PROVES
15 GUILT BEYOND A REASONABLE DOUBT THEY ARE ENTITLED TO A VERDICT OF
16 GUILTY.

17 LET ME READ YOU THE ORDINANCE AGAIN. AND IT COMES FROM
18 CITY CODE 8-67, SUBSECTION "C." IT SHALL BE UNLAWFUL FOR ANY PERSON TO
19 OPERATE OR CAUSE OR PERMIT TO BE OPERATED ANY INSTRUMENT OR SOUND
20 PRODUCING OR SOUND AMPLIFYING DEVICE SO LOUDLY AS TO UNREASONABLY
21 DISTURB PERSONS IN THE VICINITY THEREOF OR IN SUCH A MANNER AS
22 RENDERS THE INSTRUMENT OR DEVICE A PUBLIC NUISANCE.

23 NOW THE VERDICT YOU REACH MUST REPRESENT THE
24 CONSIDERED JUDGMENT OF EACH JUROR. IN ORDER TO RETURN A VERDICT IT IS
25 NECESSARY THAT ALL OF YOU AGREE. YOUR VERDICT MUST BE UNANIMOUS. IT

1 IS YOUR DUTY AS JURORS TO CONSULT WITH ONE ANOTHER AND TO
2 DELIBERATE WITH A VIEW TO REACHING AN AGREEMENT IF YOU CAN DO SO
3 WITHOUT VIOLENCE TO YOUR OWN INDIVIDUAL JUDGMENT. YOU MUST EACH
4 DECIDE THE CASE FOR YOURSELF BUT ONLY AFTER AN IMPARTIAL
5 CONSIDERATION OF THE EVIDENCE IN THE CASE WITH YOUR FELLOW JURORS.
6 IN THE COURSE OF YOUR DELIBERATIONS DO NOT HESITATE TO RE-EXAMINE
7 OUR OWN VIEWS AND EVEN CHANGE YOUR OWN OPINION IF YOU BECOME
8 CONVINCED IT WAS ERRONEOUS. DO NOT SURRENDER YOUR HONEST
9 CONVICTION AS TO THE WEIGHT OR EFFECT OF EVIDENCE SOLELY BECAUSE OF
10 THE OPINION OF ANOTHER JUROR OR FOR THE MERE PURPOSE OF RETURNING A
11 VERDICT. REMEMBER AT ALL TIMES THAT YOU ARE NOT PARTISANS, YOU ARE
12 JUDGES. YOU ARE THE JUDGES OF THE FACTS. YOUR SOLE INTENT HERE IS TO
13 FIND THE TRUTH FROM THE EVIDENCE IN THE CASE.

14 NOW I'M GOING TO SEND YOU BACK IN JUST A MINUTE. WHEN I
15 DO, DO NOT DELIBERATE. SHORTLY THEREAFTER I HOPE MY COURT OFFICER
16 WILL DELIVER THE VERDICT FORMS AND THE EXHIBITS. WHEN YOU GET THESE,
17 DO DELIBERATE. NOW YOU'VE GOT SEVEN CHARGES, SIX AGAINST THE
18 DEFENDANT, JOHNNIE CLARK, ONE AGAINST MS. HARRIETT CLARK. YOU ARE TO
19 CONSIDER THEM INDIVIDUALLY. YOU MAY FIND SOME GUILTY, SOME NOT
20 GUILTY, ALL GUILTY, ALL NOT GUILTY. IT'S UP TO YOU BUT YOU DO CONSIDER
21 EACH INDIVIDUAL CHARGE ON EACH INDIVIDUAL DATE SEPARATELY. I DON'T
22 KNOW WHO MADE THIS FORM UP BUT LET'S IGNORE HALF THE FORM. IT SAYS
23 WE FIND THE DEFENDANT NOT GUILTY OF -- FORGET THE "OF" -- WE EITHER FIND
24 HIM NOT GUILTY -- OR HER -- OR WE FIND HIM GUILTY. SO, MR. FOREMAN, YOU
25 WOULD CHECK THE APPROPRIATE BOX, YOU WOULD SIGN IT AND DATE IT.

1 ONCE YOU HAVE REACHED A VERDICT ON ALL SEVEN CASES, THEN YOU CAN
2 KNOCK ON THE DOOR AND WE WILL BRING YOU BACK OUT. OKAY. SO I AM
3 GOING TO EXCUSE YOU AT THIS TIME. DO NOT DELIBERATE UNTIL YOU GET THE
4 VERDICT FORMS AND THE EXHIBITS.

5 (JURY LEAVES THE JURY BOX)

6 THE COURT: ANY OBJECTION TO EXCUSING THE ALTERNATE? HE
7 SHOULDN'T BE DELIBERATING WITH THEM ANYHOW.

8 MS. MANGUM: NO, YOUR HONOR. THANK YOU FOR YOUR
9 SERVICE.

10 (ALTRNATE JUROR IS DISMISSED)

11 THE COURT: ALL RIGHT. ANY OBJECTIONS OR ADDITIONAL
12 CHARGES?

13 MS. MANGUM: NOT FROM THE CITY, YOUR HONOR.

14 THE COURT: MR. BRIGGS, ARE YOU OKAY WITH MY CHARGE?

15 MR. BRIGGS: NO, NO, OBJECTION AND NO COMPLAINT, YOUR
16 HONOR. BUT I FEEL LIKE THEY NEED SOME CONSTITUTIONAL LAW AND I
17 WOULD SUGGEST A SUMMARY OF THE EDWARDS CASE, YOUR HONOR. THAT'S
18 ALL I'VE GOT TO SAY.

19 THE COURT: WELL, THAT CASE IS CERTAINLY RELEVANT TO
20 YOUR MOTION, IT WAS CERTAINLY RELEVANT TO MY PREVIOUS DECISIONS ON
21 THOSE MOTIONS BUT IT'S NOT FOR THE JURY. THAT WOULD BE FOR ME. HAND
22 THEM THESE AND MAKE SURE THEY GET THE EXHIBITS OVER HERE, TOO,
23 PLEASE.

24 (JURY DELIBERATING)

25 MR. BRIGGS: YOUR HONOR, I STILL THINK I NEED TO PUT THE

1 INCORPORATION ON THE RECORD.

2 THE COURT: I'M NOT GOING TO CUT YOU OFF. I DON'T THINK IT'S
3 RELEVANT BUT YOU CAN CERTAINLY PUT IT IN THE RECORD IF YOU WANT.

4 MR. BRIGGS: I JUST WANT TO PUT IT ON THE RECORD.

5 THE COURT: YES, SIR.

6 MR. BRIGGS: AND I'VE GOT ONE SENTENCE ABOUT YOU NOT
7 LETTING ME PUT THE DECIMALS IN THERE.

8 THE COURT: GO AHEAD.

9 MR. BRIGGS: MY FIRST ON INCORPORATION, YOUR HONOR, IT IS
10 VERY CLEAR THAT THIS IS A CORPORATION. I DIDN'T BRING THE PAPERS BUT I
11 COULD SUBMIT THEM TO THE COURT. APOSTLE CLARK TESTIFIED THAT IT WAS
12 A CORPORATION. AN INC. THEREFORE, UNLESS THEY SHOWED SOME EVIDENCE
13 OF THE JUSTIFICATION FOR PIERCING THE CORPORATE VEIL YOU CAN'T PUNISH
14 CORPORATE OFFICERS FOR ACTS OF THE CORPORATION, PERIOD. THAT'S ALL
15 I'M GOING TO SAY.

16 THE COURT: ALL RIGHT.

17 MR. BRIGGS: ON THE OTHER ISSUE, YOUR HONOR, I STILL BELIEVE
18 THAT THE FACT THAT I WAS ABLE TO TAKE DECIMAL READINGS AND SHOW
19 SOME RELEVANCE TO THE FACT THAT A NORMAL CONVERSATION - IN FACT,
20 I'LL QUOTE COUNSEL FOR THE CITY. SIXTY TO SIXTY-FIVE BUT FOR BEING ORIN
21 BRIGGS MINE RATED AT SIXTY-SIX WHICH IT PROBABLY GETS HIGHER THAN
22 THAT SOMETIME. BUT I JUST FEEL LIKE IT WAS RELEVANT IN THE SENSE THAT IF
23 THE DEFENDANTS COULD DO IT, THE POLICE COULD HAVE BEEN ABLE TO DO IT
24 AND THEY SHOULD HAVE BEEN ABLE TO DO IT IN EVERY ROOM IN THAT HOUSE.
25 PERIOD.

1 THE COURT: WELL, OBVIOUSLY THE POLICE CHOSE NOT TO DO IT
2 AND THAT'S THEIR CHOICE. THEY CAN PRESENT AND GATHER WHATEVER
3 EVIDENCE. IT IS IN THEIR DISCRETION. THEY DIDN'T GATHER IT.
4 MR. BRIGGS: JUST WANTED THAT ON THE RECORD. YOUR HONOR,
5 JUST FOR THE RECORD, I MAKE MY MOTION THAT -- WELL, WE DON'T HAVE A
6 VERDICT YET. I'LL WAIT UNTIL WE GET A VERDICT.
7 (PAUSE)
8 THE COURT: ALL RIGHT. LET'S BRING THE JURY OUT, PLEASE.
9 (JURY RETURNS TO THE JURY BOX)
10 THE COURT: MR. FOREMAN, HAVE YOU REACHED A VERDICT?
11 FOREMAN: YES, SIR.
12 THE COURT: WOULD YOU PLEASE PASS IT TO THE COURT
13 OFFICER? ALL RIGHT. WE HAVE SEVEN INDIVIDUAL CHARGES. ON NOISE
14 ORDINANCE VIOLATION TICKET NUMBER 75637GH, DEFENDANT, MR. JOHNNIE
15 CLARK, WE FIND THE DEFENDANT GUILTY. ON NOISE ORDINANCE TICKET
16 NUMBER 75634GH, DEFENDANT, JOHNNIE CLARK, WE FIND THE DEFENDANT
17 GUILTY. ON NOISE ORDINANCE TICKET NUMBER 68898GJ, DEFENDANT, MS.
18 HARRIETT CLARK, WE FIND THE DEFENDANT GUILTY. ON NOISE ORDINANCE
19 51422GQ WE FIND THE DEFENDANT, JOHNNIE CLARK, GUILTY. ON NOISE
20 ORDINANCE TICKET NUMBER 46768GQ, WE FIND THE DEFENDANT, JOHNNIE
21 CLARK, GUILTY. ON TICKET NUMBER 12503GT FOR NOISE ORDINANCE, WE FIND
22 THE DEFENDANT, JOHNNIE CLARK, GUILTY. ON TICKET NUMBER 68853GJ, NOISE
23 ORDINANCE, DEFENDANT, JOHNNIE CLARK, WE FIND THE DEFENDANT GUILTY.
24 OKAY.
25 (JURY IS DISMISSED)

1 THE COURT: MS. MANGUM, HAVE YOU GIVEN ANY THOUGHT TO
2 WHAT TO DO NEXT?

3 MS. MANGUM: I SUPPOSE WE SHOULD DO SOME SENTENCING,
4 JUDGE.

5 THE COURT: WHAT KIND OF SENTENCING?

6 MS. MANGUM: YOUR HONOR, THIS IS A DIFFICULT CASE.

7 THE COURT: YES.

8 MS. MANGUM: AND IT'S A DIFFICULT QUESTION. I WOULD LIKE TO
9 BELIEVE THAT FINES WOULD SOLVE THIS PROBLEM. THERE HAVE BEEN NOISE
10 VIOLATIONS RIGHT UP UNTIL COURT TODAY AND THEY CONTINUE. AND SO THE
11 CITY HAS SOME REAL CONCERNS ABOUT WHAT WILL MAKE THE DEFENDANTS
12 UNDERSTAND THAT THEY HAVE GOT TO FOLLOW THE ORDINANCE.

13 THE COURT: I HAVE BEEN LUCKY ENOUGH EARLIER WHEN THE
14 CITY HAD MORE MONEY AND WOULD PAY ME TO GO TO A NATIONAL JUDICIAL
15 SEMINAR. I COULD MEET JUDGES FROM ALL OVER THE COUNTRY. THEY DON'T
16 DO THAT ANY MORE UNFORTUNATELY BECAUSE IT'S VERY EDUCATIONAL. YOU
17 LEARN MORE BY TALKING TO THE JUDGES THAN YOU DO SITTING IN CLASS.
18 AND THERE'S TWO WAYS OF LOOKING AT YOUR JOB. ONE IS YOU ARE JUST
19 HERE TO RUBBER STAMP THE SENTENCE BECAUSE THE LEGISLATURE OR CITY
20 COUNCIL HAS ALREADY PASSED IT. THE OTHER IS TO BE SOMEWHAT OF A
21 SOCIALWORKER IN TRYING TO CRAFT A SENTENCE SO AS TO PROVIDE BETTER
22 GOOD IN THE FUTURE FOR THE COMMUNITY. I'M TORN BETWEEN THE TWO,
23 ESPECIALLY WHEN IT'S AN ONGOING SITUATION BETWEEN TWO PEOPLE WHO
24 ARE GOING TO HAVE CONTACT. I CAN'T ORDER ONE TO STAY AWAY FROM THE
25 OTHER. IT'S JUST NOT POSSIBLE. SO I'M MORE IN TRYING TO SOLVE PROBLEMS

1 THAN IMPOSE PUNISHMENT BUT I'M NOT SURE HOW TO SOLVE THE PROBLEM.

2 MR. BRIGGS: YOUR HONOR?

3 THE COURT: YES, SIR.

4 MR. BRIGGS: COULD I MAKE A SUGGESTION?

5 THE COURT: YES, SIR.

6 MR. BRIGGS: I JUST ASKED APOSTLE CLARK AND HE HAS
7 PROMISED ME AND I'LL LET HIM PUT IT ON THE RECORD SO THE JUDGE WOULD
8 KNOW THAT HE WAS PROMISED, THERE IS AN ADJUSTMENT OF VOLUME ON
9 THEIR P.A. SYSTEM. IT COULD BE TURNED DOWN TO HALF OF WHAT THE
10 VOLUME IS.

11 THE COURT: I'M GOING TO TELL YOU MY INTERPRETATION, MR.
12 BRIGGS. FIRST OF ALL, I RESPECT THE FIRST AMENDMENT, I RESPECT THE RIGHT
13 TO SPEECH AND RELIGION. BUT IF I'M SITTING IN MY OWN HOME WITH MY
14 DOORS AND WINDOWS SHUT AND THERE'S ANY LEVEL OF VOLUME THAT
15 INTERFERES WITH MY NORMAL LIFE IT IS TOO MUCH. I HAVE A RIGHT TO HAVE
16 PRIVACY AND PEACE IN MY OWN HOME.

17 MR. BRIGGS: BUT NOBODY QUOTED A SINGLE WORD. THEY ARE
18 IMAGINING THAT NOISE.

19 THE COURT: I HEARD THE VIDEO.

20 MR. BRIGGS: THEY'VE EXAGGERATED IT.

21 MS. MANGUM: AND, YOUR HONOR, IT'S JUST INSULTING TO EVEN
22 HAVE THIS CONVERSATION RIGHT NOW. THE DEFENDANT WAS FOUND GUILTY,
23 HE'S BEEN FOUND GUILTY BEFORE. THEY ARE UNDER A TEMPORARY
24 INJUNCTION FROM THE CIVIL COURT. THERE ARE GENERAL SESSIONS CHARGES
25 PENDING ON THIS. I MEAN IT JUST WON'T - AND THIS IS WHY BECAUSE EVEN

1 AFTER THIS THERE'S NO UNDERSTANDING THAT THE BEHAVIOR IS NOT
2 ACCEPTABLE, IT IS A VIOLATION OF THE LAW AND IT HAS TO STOP. THE VICTIMS
3 AND THE CITY CERTAINLY - I'M NOT ASKING AND HAVE NEVER ASKED THAT
4 THEY STOP HAVING SERVICES, THAT THEY STOP DOING ANY OF THE THINGS
5 THAT THEIR RELIGION CALLS FOR THEM TO DO. THEY ARE SIMPLY ASKED THAT
6 THEY FOLLOW THE NOISE ORDINANCE AND THEY REFUSE TO DO IT.

7 MR. BRIGGS: YOUR HONOR -

8 THE COURT: I'M GOING TO HEAR FROM YOU, MR. BRIGGS. LET ME
9 ASK HER ONE QUICK QUESTION. DO YOU HAVE OTHER CASES ON THE DOCKET
10 FOR TOMORROW?

11 MS. MANGUM: I DO HAVE SOME THINGS.

12 THE COURT: SO WE WILL BE HERE TOMORROW?

13 MS. MANGUM: I WILL BE HERE.

14 THE COURT: DOES ANYBODY OBJECT PUTTING OFF THE
15 SENTENCING UNTIL TOMORROW MORNING AND EVERYBODY SPEND SOME TIME
16 THINKING ABOUT THIS AND SEE WHAT WE CAN COME UP WITH? WE ONLY GET
17 ONE CHANCE TO GO IT RIGHT AND IT WOULD BE NICE TO TRY TO DO IT THE BEST
18 YOU COULD. IS THAT OKAY WITH YOU, MR. BRIGGS?

19 MR. BRIGGS: IT IS, YOUR HONOR. BUT I WOULD ONLY MAKE ONE
20 OTHER SUGGESTION. I WOULD LIKE TO SEE IT POSTPONED FOR SAY TEN DAYS
21 AND I'M NOT EVEN GOING TO TALK ABOUT WHAT THE SENTENCE OUGHT TO BE
22 BECAUSE THAT'S YOUR PROVINCE AND IF THE CITY ATTORNEY AND THE
23 COMPLAINANTS WILL GET SOME JOLLY OUT OF PUNISHING SOMEBODY THAT'S
24 FINE WITH ME. BUT I KNOW THAT WE ARE GOING TO SOLVE THE PROBLEM IN
25 PUTTING SOUNDPROOF IN THOSE THREE WINDOWS SO THERE AIN'T GONNA BE

1 NO NOISE IN ABOUT THIRTY DAYS. BUT I DON'T EXPECT THE COURT TO WAIT
2 THAT LONG BUT I'D LIKE FOR THE COURT TO WAIT LONG ENOUGH TO WHERE I
3 CAN PROVE THAT THAT COMMITMENT HAS BEEN MADE AND THEY ARE TRYING
4 -I STARTED TO SAY BEG, BORROW AND STEAL. THEY WOULDN'T STEAL. START
5 TRYING TO ROUND UP THE MONEY NEEDED TO DO THAT. IT IS MY OPINION, AND
6 I HAVE NOT TALKED TO THE CONTRACTOR, BUT IT'S MY OPINION THAT THE
7 LABOR IS PROBABLY WORTH A HUNDRED TO A HUNDRED AND FIFTY DOLLARS
8 PER WINDOW AND I'VE TALKED TO ONE OF THE OUTFITS THAT RECORDS - IS IT
9 RECORDING STUDIO? THE MATERIAL IS AVAILABLE. IT'S JUST A MATTER OF
10 FINDING THE RIGHT PLACE AND THE RIGHT MATERIAL AND ENOUGH TIME TO DO
11 THE JOB.

12 THE COURT: LET ME GIVE YOU ANOTHER SIDE OF THAT COIN.
13 THEY'VE BEEN CONVICTED BEFORE, IT DIDN'T STOP THEM. THEY HAD A
14 CHANCE TO GO TO MEDIATION AND GOT UP AND WALKED OUT. I KNOW WHAT A
15 GREAT NEIGHBORHOOD YOU GREW UP IN BECAUSE YOU KNOW THE
16 NEIGHBORHOOD I GREW UP IN AND THAT NEIGHBORHOOD IF YOU HIT
17 SOMEBODY WITH A LITTLE STICK AND IT DIDN'T WORK, YOU GOT A BIGGER
18 STICK. THAT'S HOW YOU GOT PEOPLE'S ATTENTION. YOU DIDN'T LET THEM
19 JUST KEEP ON GOING. YOU GOT THEIR ATTENTION. THAT'S HOW WE GREW UP.
20 AND I'M NOT SURE THAT MR. CLARK IS AFFECTED BY GETTING HIT WITH A
21 LITTLE STICK.

22 MR. BRIGGS: WELL, JUDGE, THEY DIDN'T HAVE ME AS THEIR
23 LAWYER BACK IN THOSE DAYS

24 THE COURT: THAT'S TRUE.

25 MR. BRIGGS: AND I DON'T PUT UP WITH ANY BOLONEY FROM MY

1 CLIENTS. THEY EITHER DO WHAT I TELL THEM TO AND IT'S REASONABLE OR
2 THEY GET THEM ANOTHER LAWYER. AND I MIGHT AS WELL TAKE CREDIT FOR
3 WHAT I'VE DONE. I AM NOT GETTING PAID ONE PENNY TO DO THIS
4 REPRESENTATION BECAUSE I AM HELPING A NATIONAL PUBLIC INTEREST LAW
5 FIRM AND I'M NOT GOING TO GET ANY MONEY. BUT THIS IS GOING TO BE
6 APPEALED ALL THE WAY TO THE SOUTH CAROLINA SUPREME COURT.

7 THE COURT: AND TO A CERTAIN DEGREE MR. CLARK SOUNDS
8 LIKE PEOPLE WHO COME BEFORE ME WHO GET CAUGHT SHOPLIFTING AND
9 OFTEN GIVE THE ITEM BACK AND SAY, YOU KNOW, OR I'LL PAY FOR IT NOW.
10 YEAH. THAT'S NOT A REAL HELPFUL ATTITUDE TO HAVE. I'M SORRY BECAUSE I
11 GOT CAUGHT, NOT BECAUSE I DID IT. I'VE GOT TO ADMIT TO Y'ALL. I MEAN I'VE
12 BEEN PREPARING FOR THIS FOR ABOUT A WEEK AND PART OF MY THOUGHT
13 PROCESS WAS IF HE GETS CONVICTED WHAT TO DO ABOUT IT. AND I HAVEN'T
14 COME UP WITH A GOOD SOLUTION. I NEED SOMEBODY SMARTER THAN MYSELF
15 TO LOOK AT THIS THING.

16 MR. BRIGGS: HOW ABOUT FIVE DAYS, JUDGE?

17 THE COURT: I'M AFRAID I'M INCONVENIENCING PEOPLE NOW BY
18 ASKING THEM TO COME BACK ANOTHER DAY.

19 MR. BRIGGS: IN FEDERAL COURT THEY WAIT THIRTY DAYS,
20 JUDGE.

21 THE COURT: YEAH.

22 MS. MANGUM: YOUR HONOR, WE ARE FINE TO WAIT UNTIL
23 TOMORROW. I THINK THAT GIVES EVERYBODY AMPLE TIME TO THINK ABOUT
24 IT, COME UP WITH SOME SUGGESTIONS BUT I THINK IT'S TIME FOR A SENTENCE
25 AND IT'S TIME FOR EVERYONE TO MOVE FORWARD. I DON'T SEE A BENEFIT IN

1 THE FIVE DAYS VERSUS -

2 THE COURT: YEAH, I'M NOT SURE I DO EITHER. ALL RIGHT. MY
3 CLERK IS ABOUT TO STARVE TO DEATH OVER HERE. FOR HER SAKE I NEED TO
4 MOVE ON. Y'ALL WANT TO SHOOT FOR NINE O'CLOCK TOMORROW MORNING?
5 WOULD THAT INCONVENIENCE Y'ALL TOO MUCH?

6 MR. BRIGGS: WHY COULDN'T WE GO IT IN THE AFTERNOON TO
7 LET HER GET HER WORK DONE IN THE MORNING.

8 THE COURT: WELL, BECAUSE I'M NOT GOING TO BE HERE IN THE
9 AFTERNOON.

10 MR. BRIGGS: I GOT FOUR HOURS SLEEP LAST NIGHT. Y'ALL ARE
11 KILLING ME.

12 THE COURT: LET ME ASK. IS NINE O'CLOCK - WOULD THAT
13 INCONVENIENCE YA'LL TERRIBLY?

14 (INAUDIBLE)

15 THE COURT: Y'ALL WOULD BE OKAY WITH THAT? I APPRECIATE
16 IT. THANK YOU. ALL RIGHT. LET'S ALL GIVE THIS SOME THOUGHT. MAYBE
17 EVEN YOU TWO COULD TALK, I DON'T KNOW. JUST A SUGGESTION. THE TWO OF
18 YOU TOGETHER WOULD BE SMARTER THAN I AM SO COME UP WITH SOMETHING.
19 AND I DON'T MEAN THIS AS A THREAT IN ANY WAY, MR. BRIGGS, BUT IF WE
20 DON'T COME UP WITH SOMETHING CREATIVE I'M LEFT WITH FEW OPTIONS.
21 LET'S PUT IT THAT WAY. THANK Y'ALL VERY MUCH. HOPE Y'ALL HAVE A
22 WONDERFUL DAY. SEE YOU TOMORROW.

23 (RECESS)

24 (SEPTEMBER 11, 2014)

25 THE COURT: ALL RIGHT MR. AND MRS. CLARK, I GUESS I'M

1 State of South Carolina)
2 County of Richland)
3 Johnnie L. Clark,)
4 Plaintiff,)
5 vs.) Transcript of Record
6 City of Columbia,)
7 Defendant.)
_____)

8
9 May 15, 2015

10 Columbia, South Carolina

11
12 BEFORE:

13 The Honorable Diane Goodstein, Judge
14

15 APPEARANCES:

16 Orin G. Briggs, Esquire
17 Attorney for the Plaintiff
18

19 Jessica Mangum, Esquire
20 Attorney for the Defendant
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22
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1 Thereupon, the following proceedings were had,

2 THE COURT: Our next matter is Johnnie Clark versus
3 City of Columbia. Mr. Briggs and Ms. Mangum.

4 MR. BRIGGS: Thank you, Your Honor.

5 MS. MANGUM: Yes, Your Honor.

6 MR. BRIGGS: Your Honor, you do have a copy of this
7 transcript; is that correct?

8 THE COURT: I do.

9 MR. BRIGGS: Okay. I just brought an extra one if
10 you needed it.

11 THE COURT: All right.

12 MR. BRIGGS: My name is George Briggs. Orin G. if
13 you want to be correct. I'm the attorney for the
14 appellant. Your Honor, you were served electronically
15 with what we call the appellant's memorandum of
16 authority. I have another copy, if you don't have that.
17 It was electronically filed, signed by both me and
18 Mr. Wall.

19 THE COURT: What do you mean it was electronically
20 served? Sent to my office by email? Tell me how.

21 MR. BRIGGS: I believe he sent it here, Your Honor,
22 but I have another copy.

23 THE COURT: I think you probably want to give me
24 another copy of it.

25 MR. BRIGGS: Okay. Judge, I'm going to let the

1 bailiff give you copies of all of them.

2 THE COURT: Thank you.

3 MR. BRIGGS: And Ms. Mangum has seen that, the
4 transcript of the trial. I brought another copy of it in
5 case we need it.

6 THE COURT: Okay. Thank you.

7 MR. BRIGGS: Your Honor, may I sit down? I had --

8 THE COURT: Sure.

9 MR. BRIGGS: -- a hip replacement surgery and I have
10 got a good case of arthritis in both hips.

11 THE COURT: Not a problem, sir, at all.

12 MR. BRIGGS: And I just bought me a stationary
13 bicycle so I could at least regain some flexibility --

14 THE COURT: Great.

15 MR. BRIGGS: -- in this thing. I'm not going to
16 take but about 30 minutes, Your Honor. All of these
17 memoranda speak for themselves and so I will do that.

18 THE COURT: Yes, sir. You do have your electronic
19 copy of authority in your memoranda?

20 MS. MANGUM: I do.

21 MR. BRIGGS: You want a hard copy?

22 MS. MANGUM: That's okay.

23 MR. BRIGGS: All right. Your Honor, I have to
24 mention one pleasantry. I have been here since 10:00. I
25 thought we were still in 2B. I don't apologize but for

1 the young folks in the audience I'll tell them one little
2 story. When I was in the Navy back in 1957 the executive
3 officer of my Navy flying squadron told me one day, he
4 says, Briggs, don't use excuses. Said your friends don't
5 need them and your enemies don't want to hear them.
6 That's been a good lesson for me. So for you young folks
7 who haven't learned that lesson yet, I recommend it to
8 you.

9 THE COURT: All right. Okay. I have read the
10 amended notice of appeal. All right. Yes, sir. I'm
11 listening to you, Mr. Briggs.

12 MR. BRIGGS: I will begin. I'm going to refer to
13 the memo that was filed by my colleague Mr. Wall who had
14 a conflict and we won't worry about that. I am going to
15 also briefly refer to the motion to dismiss that was
16 filed in trial court --

17 THE COURT: Okay.

18 MR. BRIGGS: -- so that this court knows that the
19 First Amendment argument was made very clearly in that
20 court and then the main memorandum would be the one that
21 Mr. Wall filed electronically and you have indicated you
22 had a page to it. There are just a couple other facts
23 out of the transcript that I will refer to. I was in
24 Toastmasters for ten years. I could give a two minute
25 speech or I can give a ten minute speech because I found

1 out speeches are like slabs of baloney. You can cut them
2 off anywhere you want to. So I think I can stay within
3 the time that I wish to do and I would only ask that I be
4 able to reserve two minutes if it's anything really very
5 unusual that came out of the city's argument, Your
6 Honor.

7 THE COURT: Okay.

8 MR. BRIGGS: Okay. I'm going to start with the memo
9 handed up which was the one that I prepared which is a
10 short memoranda in support of appeal of criminal
11 convictions in Columbia City Court. This has not been
12 filed with the Court, but as soon as I leave here I will
13 make sure that it is clocked in and it will be official.

14 But, Your Honor, I have been reviewing and studying
15 and enjoying the study of free speech and freedom of
16 religion cases since 1972 which is the year we had the
17 famous Wisconsin v. Yoder case. I won't get into that
18 case right now, but that's how long I have been doing
19 these kind of things, Your Honor. And don't mind saying
20 that I'm 77 now and don't quite have the vigor I used to,
21 but that's probably to my advantage because I have been
22 known to be, if you will, a little, I guess a nice word
23 would be aggravating. Not to judges, Your Honor, but to
24 parties in the courtroom.

25 So I will begin with the very first paragraph in

1 that memorandum that's entitled "Short Memorandum in
2 Support of Appeal of Criminal Convictions in the City of
3 Columbia." Your Honor, when I started in this case, I
4 didn't know this section of our code existed, but I found
5 it out and I think it's important for us to begin there.
6 It's paragraph 1 and I'm just going to read the first
7 section and read that part of it and I will not read too
8 much but I need to make a point so this Court understands
9 one of the difficulties I think the trial court had in
10 this case, Your Honor.

11 The South Carolina code codified law on the
12 restrictions of government placing limitations on
13 exercise of religious freedom. And, of course, Your
14 Honor, this is a religious freedom and a free speech
15 case. Both were involved, Your Honor. It is the same
16 definition that has been the law in the federal courts
17 for more than 75 years since *Cantwell versus Connecticut*.
18 That was the first case where they said the Federal
19 Government could review cases that came from the state
20 Supreme Court. It doesn't deal with the subject matter
21 we're talking about, but it was the start of all this.

22 And I have attached that whole section to the other
23 memorandum which is our main memorandum, appellant's
24 memorandum of authority. If the Court wanted to double
25 check my reading of it, you're welcome to. It is Exhibit

1 A attached to the - we didn't even put a name on it
2 except appellant's memorandum of authority, Your Honor.
3 We are talking about what is referred to as the South
4 Carolina Religious Freedom Act. It is sections 1-32-20
5 through 1-32-30, if the Court wants to look at that
6 attachment as Exhibit A, Your Honor.

7 THE COURT: Okay.

8 MR. BRIGGS: I'm going to read from my brief and
9 after noting the Cantwell case, this code says, Section
10 1-32-40 reads "Restriction on state's ability to burden
11 exercise of religion." This is very important, Your
12 Honor. "The state may not substantially burden a
13 person's exercise of religion", highlighted, bold,
14 whatever you want to do, "even if the burden results from
15 a rule of general applicability."

16 Apparently the trial judge didn't know that law.
17 And I have been doing this, as I said, since '72 and
18 there are a lot of lawyers that don't know the fact that
19 a law has a general applicability has absolutely nothing
20 to do whether it is constitutional in the area of freedom
21 of speech and freedom of religion, Your Honor. So I
22 highlight that. "Unless the state", this is when the
23 state can put a burden on these freedoms. "Unless the
24 state demonstrates that application of the burden to the
25 person is", I'm quoting again, "in the furtherance of a

1 compelling state interest." I'm going to give you an
2 illustration of that in a minute. "And is also the least
3 restrictive means of furthering the compelling state
4 interest."

5 Your Honor, after studying this law all this time,
6 I'm not so sure in today's world the U.S. Supreme Court
7 would outlaw bigamy. It is outlawed now. But we have
8 changed our ideas about these things like we're changing
9 our ideas about same sex marriages. So I'm not so sure
10 even that case would stand scrutiny and the Supreme Court
11 would say bigamy is unconstitutional, but that's a
12 personal opinion, Your Honor.

13 THE COURT: Well, Mr. Briggs, in that I would ask
14 you to move on from that --

15 MR. BRIGGS: Got it.

16 THE COURT: -- because I don't appreciate the
17 implication --

18 MR. BRIGGS: Okay.

19 THE COURT: -- and I would appreciate it if you
20 would move on.

21 MR. BRIGGS: Well, Your Honor, I think this Court
22 knows that I would never try to offend this Court --

23 THE COURT: Well, I would ask you to move on from
24 that topic.

25 MR. BRIGGS: -- or any other court. Okay.. I'm

1 going to go on and read my bold headed portion of the
2 page and then move on to another section. At the city
3 trial the prosecutor did not even attempt to prove this
4 two part constitutional test for a valid state and local
5 restriction on freedom of religion and free speech. Your
6 Honor, my co-counsel and I in reading the transcript, I
7 just believe this particular trial judge was convinced
8 that if it was a neutral generally applicable statute,
9 that there wasn't a First Amendment issue and he's wrong
10 on that and I'll cite a number of cases.

11 THE COURT: Your position is, isn't it, Mr. Briggs,
12 that in order for the sound ordinance to have an effect
13 on, if you will, the decibels of music coming from the
14 church there must be a compelling state interest. Is
15 that your position at the end of the day?

16 MR. BRIGGS: Not only there must be a compelling
17 state interest but that the method used to restrict that
18 must be the least restrictive.

19 THE COURT: Yes.

20 MR. BRIGGS: You're going to find out, I'm not going
21 to do it every time, but you gonna find out that every
22 case that is cited in there is a federal case, says the
23 same thing.

24 THE COURT: Says both.

25 MR. BRIGGS: Including the last one, the Hobby Lobby

1 case --

2 THE COURT: Yes. I get it.

3 MR. BRIGGS: -- says the same test, Your Honor.

4 THE COURT: I get it, Mr. Briggs.

5 MR. BRIGGS: That is the test and, of course, that
6 means that no state law, no state case has anything to do
7 with free speech anymore. It's governed by federal
8 law.

9 THE COURT: All right. I got it. Let me hear from
10 -- Yes, ma'am.

11 MR. BRIGGS: Well.

12 THE COURT: Hold on, Mr. Briggs. I would like to
13 hear on those two issues. First of all, on behalf of the
14 city do you contest that that is the test?

15 MS. MANGUM: Well, Your Honor, this argument was not
16 argued. This specific argument was not argued in the
17 municipal court. So our position is that this is not
18 even preserved for appeal. Second of all, this position
19 is not argued in the amended notice of appeal and so it
20 is not properly before you to argue today.

21 THE COURT: Okay. All right. So your concern is
22 that we're talking about a preservation issue?

23 MS. MANGUM: We are, Your Honor.

24 THE COURT: Very well. Let me hear about that,
25 Mr. Briggs.

1 MR. BRIGGS: I'm not going to argue that point. I
2 think it's clearly reserved. I would cite for the Court
3 to look at at a later time the amended notice of appeal,
4 Your Honor. One of the things it does is cite four very
5 significant Supreme Court cases. We're talking about at
6 the trial level now it was in a memorandum, the
7 memorandum that I'm going to refer to later on, these
8 four cases that are on page 2 of the appeal, it's
9 actually the amended notice of appeal, by themselves,
10 Your Honor, are enough for a court to conclude that the
11 convictions in this case were illegal.

12 Namely I cite the City of Houston versus Hill. We
13 talked about it a little bit before. The Edwards versus
14 South Carolina case. I'm sure the Court has read that.
15 That's the one where the 187 blacks demonstrated on the
16 state house and the South Carolina Supreme Court upheld
17 those convictions, but the U.S. Supreme Court said no.
18 That's protected speech. And it was pretty rowdy, Your
19 Honor. And then a case that I was privileged to work
20 with Judge Perry on, Fur versus the Town of Swansea which
21 is a licensing statute for preaching on the streets of
22 Swansea, South Carolina. But reading that one case, Your
23 Honor, reading that one case is enough for a court to
24 understand this law and decide that the protections of
25 this quote, "two part test", were not - not only --

1 THE COURT: Mr. Briggs --

2 MR. BRIGGS: -- were not addressed, Your Honor.

3 THE COURT: Mr. Briggs - Mr. Briggs, cite for me in
4 your amended notice of appeal where you raised the issues
5 of the need for the city to show compelling state
6 interest as well as the least restrictive manner to
7 enforce that compelling state interest, tell me where
8 that is raised in your amended notice of appeal or within
9 the transcript itself.

10 MR. BRIGGS: I understand that question, Your
11 Honor.

12 THE COURT: Thank you.

13 MR. BRIGGS: And these four questions on the appeal
14 which were cited to the trial court are themselves a
15 pronouncement, if you will, of that standard. It is
16 clear in the Fur, it's clear in City of Houston versus
17 Hill and it's clear in Edwards versus South Carolina and
18 that's my argument, Your Honor.

19 THE COURT: No, sir. Those cases are cited for the,
20 according to your notice of appeal, for the purpose of
21 showing vagueness and overbreadth. As I read your first
22 position, your first position was that the ordinance was
23 or is unconstitutional on the basis of its vagueness and
24 overbreadth. It appears to me that from your notice of
25 appeal that is the reason that they are cited. Would you

1 say so?

2 MR. BRIGGS: Okay. Your Honor, let me skip ahead,
3 okay, and respond to your question. And one of the
4 things I learned after a long time is make sure you
5 listen to the question, Your Honor, and I appreciate that
6 question.

7 The problem in these kinds of cases is that the
8 burden is on the state to prove those. For instance,
9 this ordinance says the noise either had to be
10 unreasonable which I think is not a valid standard or
11 that it had to be a public nuisance. Public nuisance is
12 not mentioned one time in this transcript. Not one time.
13 Now, let me answer your question. This is only a draft
14 memorandum but I'm going to quote some stuff out of the
15 transcript when I get to it. But in this one it talks
16 about all those cases and I would suggest that if the
17 Court read just the Fur case --

18 THE COURT: No, sir. You're not answering my
19 question. Let me try again. Where in your amended
20 notice of appeal do you maintain as an appellate ground
21 that what you just mentioned to the Court? Is it in
22 there or not based on your view of your own amended
23 notice of appeal?

24 MR. BRIGGS: Of course, Your Honor, an amended
25 appeal doesn't even have to talk about a substance, but I

1 decided to do it in this case. All of those cases talk
2 about this so-called two part test. If the Court reads
3 those cases, they are going to find out that each one of
4 them addresses that issue of the compelling state
5 interest and the least restrictive means. Every case
6 since - every case that's been favorable to the churches
7 or protestors since 1972 has cited that two part test.
8 It is gospel, and that's my answer. It may be incomplete
9 but it's my answer, Your Honor.

10 THE COURT: So it's not raised. It isn't raised.
11 It's not raised.

12 MR. BRIGGS: Okay.

13 MS. MANGUM: No, Your Honor, and that's our
14 position.

15 THE COURT: Okay. All right. Yes, sir. Your other
16 grounds.

17 MR. BRIGGS: Okay. Your Honor, I'm now going to
18 turn over to page 3 of this memorandum I started with and
19 discuss it.

20 THE COURT: Okay.

21 MR. BRIGGS: There is an important U.S. Supreme
22 Court case that is even stronger in favor of the broad
23 rights of citizens to exercise their free speech rights
24 in a demonstrative and offensive manner. Your Honor,
25 we're talking about Snyder versus Phelps. I'm sure the

1 Court has read this one. This is the one where the
2 church demonstrated at the funeral of a veteran and not
3 so much direct criticism of the veteran but they were
4 protesting what they referred to as nationwide sins, Your
5 Honor. The District Court awarded like four million
6 dollars damages in that case, Your Honor, and when it got
7 to the U.S. Supreme Court in an eight to one decision the
8 Supreme Court said you can't regulate this kind of stuff.
9 You have no authority to regulate it. And the point
10 being is that the attack in the Snyder case was about the
11 content of what the speakers were saying, their signs and
12 all and I have got it here and I'll just read just a very
13 brief part, but if the Court wants to know how bad it
14 was, the decent is very interesting to read, Your Honor.

15 Let me read, let me start reading it at the top of
16 page 4. Snyder. No. Bottom of 3. In Snyder, the U.S.
17 Supreme Court explained the limitations on government
18 restrictions of free speech. And the quote is, "Given
19 that Westberry", that's the church, "speech was at a
20 public place on a matter of public concern the speech is
21 entitled to special protection." The quote is in the
22 original, Your Honor. "Under the First Amendment such
23 speech cannot be restricted simply because it is
24 upsetting or arouse contempt."

25 That's the issue in this case, Your Honor. And I

1 have underlined the next part. "If there is a bedrock
2 principle under the First Amendment it is that government
3 may not prohibit the expression of an idea simply because
4 society finds the idea itself offensive or disagreeable."
5 Again, that's the issue in this case, Your Honor. A
6 neighbor didn't like religious music. And then the last
7 sentence here, of course, they cite Texas versus Johnson
8 and the Court knows that's a flag burning case. "Indeed,
9 the point of all speech protection is to shield just
10 those choices of content that in someone's eyes was
11 misguided or even hurtful."

12 Now, if you read, and I'm not going to read the
13 whole thing, but if you read the second part of the next
14 quote, Your Honor, starting with the Westberry picketers
15 carried signs that were largely the same at all three
16 locations. They had even been to the Naval Academy, Your
17 Honor. They stated, for instance, God hates the U.S.
18 Thank God for 911. America is doomed. Don't pray for
19 the U.S.A. Thank God for IED's. And, of course, we know
20 those are the things that kill so many of our men over in
21 the middle east.

22 THE COURT: Mr. Briggs, let me stop you a moment.

23 MR. BRIGGS: Yes, ma'am.

24 THE COURT: As I understand this particular case and
25 what I have been able to ascertain at this point, it is

1 the noise ordinance as it relates to the music coming
2 from the church that is at issue here; is that correct?

3 MR. BRIGGS: That's correct.

4 THE COURT: All right. And so the question gets to
5 be whether or not free speech under the constitution
6 forbids the City of Columbia from restricting in any
7 manner the decibels at which the church music emanates
8 from the church, correct?

9 MR. BRIGGS: Your Honor, if I could correct - if I
10 could just clarify that question in one respect.

11 THE COURT: Yes.

12 MR. BRIGGS: The standard in this subsection C is
13 what we're talking about --

14 THE COURT: Yes.

15 MR. BRIGGS: -- is whether or not it was reasonable
16 or it was a public nuisance.

17 THE COURT: Yes.

18 MR. BRIGGS: Public nuisance is not even mentioned
19 in the transcript so they didn't even try to prove public
20 nuisance, Your Honor. If it was a nuisance, it was a
21 private nuisance, all right?

22 THE COURT: Okay.

23 MR. BRIGGS: So the ultimate question is just the
24 word reasonable in the context of that ordinance and in
25 the context of these cases we're discussing is that

1 sufficient notice, and I'll get to that in a minute, but
2 if the Court wants to read again Fur versus Swansea,
3 there has to be notice to the people and I'm going to
4 quote from the transcript and show you the preachers were
5 never told how much noise was too much. I'll get back to
6 that, Your Honor, okay? So we finish with Snyder versus
7 Phelps. Did the Judge have a follow up question on that?

8 THE COURT: I got it. I would like to hear from the
9 city --

10 MR. BRIGGS: That's fine.

11 THE COURT: -- on that issue. And Mr. Briggs'
12 position is simply this: That it's reasonable to say it
13 must be noise that is reasonable noise is insufficient
14 notice to anyone. Reasonable, I guess, could be in the
15 eyes of the beholder. So first of all, is that a
16 standard that stands constitutional scrutiny number 1
17 with regards to free speech, and secondly, public
18 nuisance he says was not raised, was not a ground, it was
19 not mentioned in the transcript. Obviously the
20 transcript is voluminous which I have not been through.
21 Can you address these issues for me please?

22 MS. MANGUM: Yes, Your Honor. In terms of the
23 reasonableness standard, the city relied on City of
24 Columbia versus Johnnie Gardner. I believe Mr. Briggs
25 presented that to the Court in his amended notice of

1 appeal. I also have a copy if you need that. But this
2 exact ordinance was before the Circuit Court on the
3 municipal court appeal and that court relying on some
4 Fourth Circuit law and some United States Supreme Court
5 law found that the unreasonably loud language did pass
6 constitutional muster. So the judge having that order
7 from the Circuit Court found that order to be binding on
8 him. The conversation in terms of the transcript was
9 relatively brief but it's in there and the judge did rely
10 on that case which says although our current statute has
11 been modified based on the Gardner case, part of that
12 language was found to be unconstitutional. They took
13 that language out, otherwise it is the exact same statute
14 that's already been before this court and found to be
15 constitutional.

16 THE COURT: And before the Fourth Circuit?

17 MS. MANGUM: And before the Fourth Circuit, Your
18 Honor. And just to cite the case for the record, Judge
19 McKellar in the Circuit Court case relied on Jim Crockett
20 Promotions versus The City of Charlotte which was a
21 Fourth Circuit case and then he also relied on United
22 States versus Jackson which was the United States Supreme
23 Court case.

24 THE COURT: And is it the position of the city that
25 the decision is based exclusively on the reasonableness

1 or was the public nuisance made a part of the argument
2 and a basis for the conviction if you will?

3 MS. MANGUM: I'm not very clear on what Mr. Briggs'
4 argument is in terms of the public nuisance.

5 THE COURT: As I understand it, as I understand, the
6 noise ordinance says it must be noise that is reasonable
7 and not a public nuisance. I haven't read it, but that's
8 my understanding.

9 MS. MANGUM: Okay. And, Your Honor, If I may quote
10 the ordinance.

11 THE COURT: All right.

12 MS. MANGUM: It says it shall be unlawful --

13 MR. BRIGGS: It's in the footnote on the bottom of
14 the page of appellant's memorandum of authorities, if
15 that helps.

16 THE COURT: You may proceed. Thank you.

17 MS. MANGUM: It says, "It shall be unlawful for any
18 person to operate or cause or permit to be operated any
19 instrument or sound producing or sound amplifying device
20 so loud as to unreasonably disturb persons in the
21 vicinity or in such a manner as to render the instrument
22 or device a public nuisance." So the case that was
23 before the city court and the municipal court relied on
24 the first part of that. We did not rely on the public
25 nuisance.

1 THE COURT: Got it. Let me see the Fourth Circuit
2 case, please.

3 MS. MANGUM: Your Honor, all I have with me is the
4 order from the Circuit Court.

5 THE COURT: Okay. That's attached. I saw that.
6 You're talking about Judge McKellar's order?

7 MS. MANGUM: Yes. I will be glad to supplement the
8 other case for you.

9 THE COURT: Do you have the cite --

10 MS. MANGUM: Yes, Your Honor.

11 THE COURT: -- for the Fourth Circuit so I can pull
12 it up?

13 MS. MANGUM: It is 706 F2D 486 from 1983.

14 THE COURT: All right.

15 MR. BRIGGS: Yes, Your Honor.

16 THE COURT: I have heard what I need to hear on the
17 constitutional issues. Mr. Briggs, let me hear from you
18 on your other grounds in your amended notice of appeal.

19 MR. BRIGGS: Okay. And I will be brief. There are
20 a couple other things, three or four more other things
21 I want to point out, Your Honor.

22 THE COURT: Okay.

23 MR. BRIGGS: Let's start with this idea of -- Let me
24 read from page 5 of the memo we have been talking about,
25 the famous case of Terminiello versus Chicago, Your

1 Honor. The point being here, the question is not the
2 effect on the hero.

3 THE COURT: I'm sorry. I'm done with that. I'm
4 done with constitutionality. I wanted you to address
5 your other grounds.

6 MR. BRIGGS: Okay.

7 THE COURT: Yes, sir.

8 MR. BRIGGS: Okay. Then I want to start with page 2
9 of the memo we have been on, Your Honor. One of the most
10 critical errors made was that the cause of this quote
11 "apparent belief" by the trial judge about content
12 neutral and general applicability and all that bit, he
13 refused to allow me any charge to the jury on the First
14 Amendment issues and I'll just read part of this.

15 THE COURT: I don't want you to read your memo. I
16 can read it, Mr. Briggs. Let me ask you this question:
17 Were there charges which you submitted to the court that
18 were not charged?

19 MR. BRIGGS: Yes.

20 THE COURT: All right. Where in the transcript can
21 you point me so that I may review those?

22 MR. BRIGGS: Okay. When after the judge gave --

23 THE COURT: No, sir. Where in the transcript?
24 Direct me to pages in the transcript so that I may
25 follow.

1 MR. BRIGGS: Pages 143 and 144.

2 THE COURT: Okay. Hold on one second.

3 MR. BRIGGS: And I'll wait.

4 THE COURT: Thank you.

5 MR. BRIGGS: And then page 152, your Honor.

6 THE COURT: All right. So it's 143. Hold on. All
7 right. Are you talking about a request to the lower
8 court to charge the Beaufort ordinance?

9 MR. BRIGGS: Yes, Your Honor. I asked him to charge
10 the Beaufort ordinance and I would ask this court to take
11 the time now --

12 THE COURT: Okay. What else?

13 MR. BRIGGS: -- to read that.

14 THE COURT: What other charge?

15 MR. BRIGGS: I also specifically asked him after the
16 charges, my wordings were, Judge, I have no problem with
17 what you said, but I want to add something to it. My
18 request is that you instruct them on the Edwards case.
19 Of course, he knew exactly what I was talking about.
20 South Carolina versus Edwards. That's all I asked him to
21 do and he refused to do that.

22 THE COURT: And that's at page 152?

23 MR. BRIGGS: I believe it is, Your Honor. Let me
24 just check that.

25 THE COURT: All right. Let me take a look.

1 MR. BRIGGS: And he, in fact, if I can find it --

2 THE COURT: Here we go. "Any objections or
3 additional charges?"

4 MR. BRIGGS: "No additional charges." But he also
5 gave me, quote, "his definition" of what he thought the
6 constitutional law was and, of course, I objected to that
7 and that's in here, too, and we'll get to that in a
8 minute. Your Honor --

9 THE COURT: Okay. So you asked for two things as I
10 see. You asked the lower court to charge the Beaufort
11 ordinance and a summary of the Edwards case.

12 MR. BRIGGS: And, Your Honor, you've got to remember
13 that in a pretrial brief I argued the four cases we have
14 already talked about.

15 THE COURT: Yes, sir. But as you know, when one is
16 objecting to a charge that the court has just given, in
17 order to preserve the issue for appeal you must at the
18 conclusion of the charge raise to the court those charges
19 that you wanted the court to include and I'm looking at
20 where you say "I would suggest a summary of the Edwards
21 case" and that's all. You've got to say what you mean.

22 MR. BRIGGS: Yes. That was my specific request.

23 THE COURT: Yes. Okay. All right, sir. So I have
24 got that issue. What is your next issue?

25 MR. BRIGGS: Okay. My next issue is, and I don't

1 remember exactly where I cited this but I can find it.
2 The judge gave his definition of what he thought the
3 constitutional test was and he said at the bottom of page
4 4 of the memorandum that we have been talking about, Your
5 Honor, and it won't take but a minute to do this.

6 THE COURT: Hold on now. Hold on one second for me.

7 MR. BRIGGS: And it cites the transcript page 156.
8 That's where I talk about it.

9 THE COURT: Okay. Yes. In fact --

10 MR. BRIGGS: I will let the Court read that if the
11 Court wants to.

12 THE COURT: Hold on one second. All right. Now,
13 tell me which of your issues raised on appeal are you now
14 addressing?

15 MR. BRIGGS: Am I what, Your Honor?

16 THE COURT: Are you now addressing?

17 MR. BRIGGS: I'm addressing the errors of the trial
18 judge.

19 THE COURT: Which one mentioned in your amended
20 notice of appeal so I can follow along? I have got
21 Beaufort ordinance. We've talked about that. Failure to
22 charge Edwards versus South Carolina. Then it says the
23 third error of law was to choose a jury from a pool of
24 less than 40 available members of the jury pool. The
25 fourth major error of law was the court's sole reliance

1 on a Circuit Court decision for its decision to deny
2 First Amendment protections for the trial defendants.

3 MR. BRIGGS: Your Honor, I don't think that's worth
4 us discussing. It was an issue but I did not raise it at
5 the time so I would say that it's probably not preserved,
6 Your Honor.

7 THE COURT: All right, sir. Very well.

8 MR. BRIGGS: So what we're talking about is the
9 bottom paragraph on page 1 of the amended notice of
10 appeal where I talk about the court not giving any
11 instructions about the Beaufort ordinance.

12 THE COURT: Got it. I got that argument. I'm good
13 to go on that one. Yes, sir. Do you want to talk about,
14 it says --

15 MR. BRIGGS: Your Honor, I'm going to wait because I
16 heard clearly what the Court said about you understand
17 the constitutional issues --

18 THE COURT: Yes.

19 MR. BRIGGS: -- but at the end I want to read just
20 one quote from the Hobby Lobby case. But I'm going to
21 wait on that.

22 THE COURT: Here's what I want you to do. I have
23 got the constitutional issues. I think I have got that
24 one. Let me ask you this question: Where it talks about
25 the third error of law was to choose a jury from a pool

1 of less than 40 available members of the jury pool. Talk
2 to me about that.

3 MR. BRIGGS: Your Honor, I did not raise that in
4 trial.

5 THE COURT: Okay.

6 MR. BRIGGS: I think it's clear that we didn't have
7 that many, but I'm prepared at this time to waive that
8 argument.

9 THE COURT: All right. Then you say the fourth
10 major error of law was the court's sole reliance on a
11 Circuit Court decision for its decision to deny First
12 Amendment protections for the trial defendants.

13 MR. BRIGGS: Your Honor, my argument is this: That
14 South Carolina Circuit Court decision ain't worth the
15 paper it's written on. There is no state law for freedom
16 of speech and freedom of religion anymore. It has been,
17 I like the word, consumed by all the federal cases,
18 particularly the Supreme Court decisions and I won't
19 quote from it now because we have finished that part of
20 it.

21 THE COURT: Yes, sir. I have got that.

22 MR. BRIGGS: But the latest is the Hobby Lobby case,
23 Your Honor.

24 THE COURT: Okay. Now you want to talk about Hobby
25 Lobby. Okay.

1 MR. BRIGGS: We won't talk about it right now but I
2 would like to end with that.

3 THE COURT: You want to end with that. All right.
4 And then you have the fifth major error of law and the
5 second amendment to the notice of appeal is the error of
6 the trial judge in granting a broad definition of
7 admissible evidence on behalf of the City of Columbia by
8 enforcing a narrow definition of admissible evidence for
9 the trial defendants.

10 MR. BRIGGS: Your Honor, let me do this, if the
11 Court will.

12 THE COURT: All right.

13 MR. BRIGGS: In an earlier version of the memorandum
14 that I wrote which was 55 pages long which I knew this
15 court wasn't in a hurry to read that many pages, I always
16 tell people I'm smarter than I look and so I understand
17 that and we decided to change it and so this document is
18 not even in the record.

19 THE COURT: Okay.

20 MR. BRIGGS: But it's some of my notes. I refer to
21 it as a few more errors by the trial judge and the city
22 attorney. There is one of them I will leave out because
23 it has to do with a quote. Let me make sure my words are
24 used. Possible ethics question which is none of my
25 business. I'm not going to discuss, et cetera, et

1 cetera.

2 THE COURT: I don't know what you're saying. Tell
3 me.

4 MR. BRIGGS: Well, what it involves is during my
5 closing argument I was accused of making the
6 constitutional argument for the purpose of the jury
7 nullification, Your Honor. I have been practicing law
8 since 1967. I have never made a jury nullification
9 argument and I wasn't making it then and I think the
10 judge, in fact, made a wrong instruction about that and
11 so to help the prosecutor. But we don't need to discuss
12 that any further. It's in the brief that I'm going to
13 refer to next when we finish the one we're doing now.
14 Your Honor, I'm talking about some things that happened
15 with regard to, this is the subject we're talking about,
16 how much noise is too much?

17 THE COURT: No. Here's what we're talking about.
18 The fifth major error of law in the second amendment to
19 the notice of appeal is the error of the trial judge in
20 granting a broad definition of admissible evidence on
21 behalf of the City of Columbia while enforcing a narrow
22 definition of admissible evidence as to the trial
23 defendants. I want you to direct me, please, to the
24 record so that I can review your objections of the trial
25 court below as it related to I gather objections made by

1 the state with regards to evidence offered by the defense
2 and let me rule on that.

3 MR. BRIGGS: Your Honor, let me give you just one
4 illustration of that. I didn't even give any thought to
5 listing every one of them.

6 THE COURT: Well, I need every one of them because
7 if you want me to review them, I need to know where they
8 are.

9 MR. BRIGGS: But the others with regard to questions
10 of how much noise is too much fits into that category, I
11 believe. But let me just read you one.

12 THE COURT: Okay.

13 MR. BRIGGS: And you don't need the page number
14 because you don't have this document, Your Honor.

15 THE COURT: Well, I need the page number if it's in
16 the transcript.

17 MR. BRIGGS: Okay. Well, I can submit it, if the
18 Court wants me to.

19 THE COURT: I do.

20 MR. BRIGGS: The first completed draft of a
21 memorandum in favor of the appeal was done by me and it
22 is labeled, it's captioned "Memorandum in Support of
23 Appeal of Criminal Convictions in the City of Columbia
24 Court." It is 55 pages long. It is in good enough shape
25 to submit if the Court thinks it may or may not clear up

1 something and I'll be glad to submit it, Your Honor.

2 THE COURT: Mr. Briggs, here is what I want. It's
3 pretty simple. If you wish for me to review decisions
4 made by the summary court, by the lower court with
5 regards to the admissibility of evidence based upon
6 objections made by the state and the lower court's
7 sustaining those objections where you believe they were
8 properly sustained, I would like you to direct me to
9 those places in the record so that I might review those.

10 MR. BRIGGS: All right. Your Honor, I'm reading
11 from page 51 of that memo that I mentioned.

12 THE COURT: And does that memo at page 51 refer to a
13 part of the transcript?

14 MR. BRIGGS: It does refer to part of the
15 transcript.

16 THE COURT: Wonderful. Tell me where to go in the
17 transcript and I will do that.

18 MR. BRIGGS: Transcript at page 70.

19 THE COURT: Hold on. Let me get there.

20 MR. BRIGGS: I want to be very careful about my
21 words because --

22 THE COURT: I'm at page 70 of the transcript. What
23 line?

24 MR. BRIGGS: Uh, you know, I'm not good on lines,
25 Your Honor, but we're reading -- I'm sorry. No. That

1 was about his definition. The next sentence says "One of
2 the gross exaggerations by the city attorney is found at
3 transcript page 40 and 41", Your Honor. So that's where
4 we need to be.

5 THE COURT: All right. I'll go to page 40. Hold
6 on. All right. I'm on page 40. What line? This
7 appears to be opening statements.

8 MR. BRIGGS: It is. Actually it's closing, Your
9 Honor.

10 THE COURT: Oh, this is closing argument?

11 MR. BRIGGS: Yes, I believe.

12 MS. MANGUM: Your Honor, it's opening.

13 THE COURT: Thank you.

14 MR. BRIGGS: Is the Court ready for me to read or do
15 you want to read that to yourself?

16 THE COURT: Well, let me see because y'all are -
17 there's a question whether it's opening statements or
18 closing arguments. Let me take a quick look. These are
19 the opening statements. All right. Yes, sir. Page 40.

20 MR. BRIGGS: I stand corrected. I have made three
21 mistakes already today so that's four.

22 THE COURT: Tell me what -- All right. So --

23 MR. BRIGGS: Let me read it and then tell you why I
24 objected to it. But I'm going to -- In fact, if I submit
25 this, I will delete --

1 THE COURT: There is no objection made to the
2 opening statement, Mr. Briggs. Please look at page 40 at
3 line 14 through page 41 at line 16. That is the opening
4 statement of Ms. Mangum and there is no objection.

5 MR. BRIGGS: I understand that, Your Honor. And as
6 a general rule we don't object and we don't interrupt
7 opening and closing statements although she did on me and
8 it didn't affect --

9 THE COURT: Yes, sir. But you're telling me that
10 you want me to look at the admissibility of evidence.
11 This is an opening statement. This has nothing to do
12 with the admissibility of evidence and there was no
13 objection.

14 MR. BRIGGS: But it shows - it shows the liberal
15 approach of the judge in allowing her to say things that
16 were just not true, Your Honor.

17 THE COURT: But there is no objection, Mr. Briggs.
18 See what I'm saying? You have to object. There is no
19 objection.

20 MR. BRIGGS: Well, I can't ever remember in 43 years
21 objecting to what somebody said during an opening
22 statement.

23 THE COURT: Well, I'm real sorry. But, Mr. Briggs,
24 if you're going to appeal it, you must preserve your
25 objection and you have to object to preserve so it's not

1 preserved because there is no objection. Tell me what's
2 next so we can proceed.

3 MR. BRIGGS: Your Honor, the other is the argument
4 that we made throughout the brief that my client was
5 never told how much noise is too much, Your Honor.

6 THE COURT: All right.

7 MR. BRIGGS: And that is one of the critical
8 elements in Fur and it's a critical element in every
9 other case including the Hobby Lobby case. Did the
10 protestors know where the line was drawn, Your Honor.

11 THE COURT: I understand that argument, Mr. Briggs.
12 I get that. Now, can you go back to the transcript and
13 tell me where --

14 MR. BRIGGS: I do and I only have two pages of this,
15 Your Honor, and it won't take us long to go through it.
16 I'm at page 53 of this memorandum.

17 THE COURT: Hold on. Let me get there. How about
18 transcript? Where should I go in the transcript?

19 MR. BRIGGS: Page 41, your Honor.

20 THE COURT: All right. 41 is the opening
21 statements.

22 MR. BRIGGS: That's correct.

23 THE COURT: All right. Now, there is no objection
24 on page 41.

25 MR. BRIGGS: That's true.

1 THE COURT: Okay. So remember, this particular
2 ground has to do with the admissibility of evidence. I
3 need to know where there was an objection by the state
4 and the lower court allowed in evidence so that I can, or
5 didn't, failed to allow in your evidence to make a
6 determination whether that was in error. Tell me about
7 that.

8 MR. BRIGGS: Your Honor, again I would ask then that
9 at this time the Court let me tender these descriptions.
10 What they do is address the fact that there are at least
11 seven to eight, quote, "descriptions" of the level of
12 noise involved in this case. It is very critical. It is
13 a part of the total argument that this noise was not
14 unreasonable, Your Honor, and so I ask let me tender it
15 and let the next court, if we go to the next court,
16 decide whether or not this is still a valid submission to
17 the Appellate Court.

18 THE COURT: I'm just trying to follow your notice of
19 appeal. See what I'm saying? And do you not want me to
20 look at the places where the state objected to your
21 offering evidence and the lower court sustaining those
22 objections when you think they should not have been
23 sustained?

24 MR. BRIGGS: Your Honor, I didn't get into that
25 because I think there are probably - I would think there

1 are probably at least 25 situations but I generally
2 describe it in the brief, in this brief that the trial
3 court except for my objections to hearsay which he agreed
4 with quite often because I practically have memorized
5 that rule and dream about it sometimes, but the others
6 were, he just objected and, Your Honor, I reserved the
7 objection but didn't make any argument. I didn't make
8 any argument. So I did not go back and read the
9 transcript and cite those 22 or 23 errors that I think he
10 made in being lenient with her and not lenient with me.
11 But let me give you one example, okay?

12 THE COURT: Tell me where to go in the transcript
13 and I'll take a look at that.

14 MR. BRIGGS: Okay. I can find that one, Your
15 Honor.

16 THE COURT: Okay:

17 MR. BRIGGS: Your Honor, I don't see it in this part
18 of my memo, but let me describe to you the situation.

19 THE COURT: Doesn't help me, Mr. Briggs. I have got
20 to do this on the record. I don't mind being patient
21 while you go through your memo at all, but I must be
22 guided by the transcript which I'm pretty excited to
23 have. I often don't have it from the lower court so I
24 will wait if you need a moment or two to go through it.

25 MR. BRIGGS: Your Honor, I don't think I listed that

1 particular one in this because these have to do with the
2 various words that were used to describe the level of
3 noise. That's all - that is all that's on these two
4 pages.

5 THE COURT: Okay.

6 MR. BRIGGS: Now, I'm sure that it's in my memo
7 somewhere and if we take a break, I will find it, but I
8 wouldn't want the Court to wait on me to do that.

9 THE COURT: I don't mind, Mr. Briggs. I don't mind.
10 If you need a moment to go through to find your cite in
11 the transcript, that's fine. I don't mind. Take your
12 time.

13 MR. BRIGGS: Could we do this about the level of
14 noise first?

15 THE COURT: No. I need --

16 MR. BRIGGS: Can I have five minutes, Your Honor?

17 THE COURT: Absolutely. We'll take five minutes and
18 we'll reconvene in five minutes. Everybody take a little
19 comfort break while Mr. Briggs finds that cite.

20 (Short recess.)

21 BAILIFF: All rise.

22 THE COURT: Thank you so much. Please be seated.
23 Do we have a cite? Mr. Briggs, do we have a cite?

24 MR. BRIGGS: Yes, Your Honor.

25 THE COURT: Okay. Where?

1 MR. BRIGGS: I found the discussion of it. I'm
2 going to give you the - the, uh --

3 THE COURT: Page,

4 MR. BRIGGS: -- the transcript page also.

5 THE COURT: Okay.

6 MR. BRIGGS: The discussion of this subject is on
7 page 1 of this memorandum that has not been filed but I
8 am more than willing to file it with the --

9 THE COURT: Mr. Briggs, I'm going to try once more.
10 What is the page in the transcript?

11 MR. BRIGGS: Pages 77, 78 and 79.

12 THE COURT: All right.

13 MR. BRIGGS: And then on the next page I also cite
14 page 80. Here's the argument, Your Honor. On the bottom
15 of page 1 all other trial judges allowed prosecutions to
16 challenge the motive of the defendant across the board as
17 to why he did not follow the citations, Your Honor. And
18 the Court probably knows this but just to show that the
19 record shows there were 55 different citations that were
20 issued. Now, there were other complaints and I am never
21 facetious --

22 THE COURT: Mr. Briggs, I'm trying to review these
23 pages and the objections that were made and the rulings
24 by the lower court. So the first one, "Question. That's
25 okay. Were there times that the church did not use sound

1 amplification that you are aware of? Mr. Briggs: Your
2 Honor, I object. Unless she's been in the church she has
3 no personal knowledge whether there is amplification or
4 not and it's hearsay to her. The Court: Well, I think
5 it's irrelevant unless you know of something on one of
6 these incident dates that they are charged with. Those
7 are the dates I'm concerned with, the dates of the
8 charges. Ms. Mangum: Okay, Your Honor. I don't have
9 any further questions from Ms. Callahan."

10 Apparently that objection was sustained. Now, where
11 is the next -- All right. Here we go. Okay. Where is
12 the next objection that you made?

13 MR. BRIGGS: Your Honor, we really need to read
14 what's on page 2 of that memorandum.

15 THE COURT: No, we don't. We need to go to the
16 transcript, Mr. Briggs. I don't need to read, have you
17 read to me out of a memorandum that you haven't filed
18 with the court. Please try to control your emotions if
19 you would be so kind.

20 MR. BRIGGS: Your Honor?

21 THE COURT: Yes, sir? Mr. Briggs, as you understand
22 an appeal must be decided upon the record and I need to
23 know from you, I need your assistance because you have
24 not cited to anyplace in the transcript that I can find.
25 That's why I'm asking you. I'm asking you to be so kind

1 as to supplement that which you have submitted to the
2 Court so that I can make a determination. Now, if you
3 wish to abandon that ground, so be it.

4 MR. BRIGGS: Okay. I understand your statement but,
5 Your Honor, I would like to argue my case the way I
6 believe is in the best interest of my client.

7 THE COURT: Mr. Briggs, you will answer the Court's
8 instruction. You will answer the Court's direction.

9 MR. BRIGGS: Okay. All right. But let me - let me
10 just ask --

11 THE COURT: Mr. Briggs.

12 MR. BRIGGS: Let me ask a question then. On page 2
13 it shows exactly what kind of questions I was trying to
14 ask Ms. Callahan after -- I'm going to repeat -- after
15 the court had allowed the prosecution to question the
16 motives of my client. I wanted to question her motives
17 and the judge refused to let me do that. There was, in
18 fact, a conference. I think it was at the bar not
19 outside the courtroom, but there was a conference at the
20 bar and he still ruled against me on that. I really
21 think the Court needs to have as part of this record all
22 the words that appear on page 2 of this memorandum which
23 has not been filed but which I am more than willing to
24 file with a complete redaction of a negative comment
25 about the prosecutor because it was not necessary. It is

1 not relevant to what we're talking about. But I did put
2 it in the draft and it's in this draft, but we're not
3 gonna even talk about it, Your Honor. So my request to
4 the Court is either let me read what's on page 2 or let
5 me tender that as an argument that the Court of Appeals,
6 if we go there, can decide whether or not there was an
7 obvious implied objection to what the judge did. And
8 there are pages of the transcript cited.

9 THE COURT: Mr. Briggs, as I understand what you are
10 saying, you have submitted a memorandum. You now want to
11 submit a page 2 from another memorandum that you don't
12 intend to file with the Court.

13 MR. BRIGGS: No. I will file it.

14 THE COURT: Well, you know, it's sort of now kind of
15 time, Mr. Briggs. You know what I mean? Now is when
16 you're having your hearing so if you want to submit like
17 page 2, I don't have a problem with you submitting page 2
18 if you want to do that. Can you please show it to
19 opposing counsel and then Mr. Hollis will bring me page
20 2. Let me see if that has transcript pages that I can
21 refer to with regards to your ground for appeal in your
22 amended notice of appeal.

23 MR. BRIGGS: I need to find one more page, Your
24 Honor. I'm sorry. Because I didn't anticipate that
25 question. Your Honor, any quote on offensive comments is

1 not in this. I will hand this over to the city attorney
2 and that's what I would tender for the purpose of showing
3 that the trial judge did not allow me to go into the
4 motives of the female witness and I will have to explain
5 to you why her conduct was different from the male
6 complaining witness but I'll do that in a sentence or
7 two, Your Honor.

8 MS. MANGUM: Your Honor, I have no objection.

9 THE COURT: Very well. All right. Thank you.

10 MR. BRIGGS: Well, it's her comment. She had no
11 objection to it being admitted, Your Honor? I didn't
12 hear.

13 THE COURT: It's not an exhibit. It's just two
14 pages from the memorandum. She read them. I'm looking
15 at them.

16 MR. BRIGGS: Okay. I'm sorry.

17 THE COURT: Okay. I have read them and thank you
18 because it does refer me to pages 77, 78, 79 and 80 of
19 the transcript as well as page 144 and 145 of the
20 transcript. So I have reviewed 77, 78, 79, 80 and I now
21 I will go to 144. Okay. I have reviewed the objections
22 that you asked me to or pointed me to in page 2 and page
23 3 of your unfiled memorandum and I find that you have
24 referred me to transcript pages where there was an
25 objection raised. The court ruled on it.

1 MR. BRIGGS: And unfortunately, Your Honor, the
2 discussion outside the courtroom was not put on the
3 record. That's one of my little problems. I don't
4 insist on that what we talked about but he did again rule
5 that I couldn't go into that area and as you can see I
6 tried one more time to ask the initial question I wanted
7 to ask.

8 THE COURT: Okay. I got that. Now, I will just ask
9 this. Are there any other places in the transcript that
10 you wish to direct me to to review objections that were
11 interposed by the state and rulings that were made by the
12 lower court?

13 MR. BRIGGS: No, Your Honor. Again I didn't go by
14 and list all of those.

15 THE COURT: All right.

16 MR. BRIGGS: I would make this request and again you
17 may say no again and however I'll reserve my objection.

18 THE COURT: I don't know what -- That doesn't make
19 any sense, Mr. Briggs. I'm asking you to share with me
20 those places in the transcript that you want me to
21 review. That is an invitation for you to share those
22 with me. You are choosing not to share those with me.

23 MR. BRIGGS: And I - and I - and my response to the
24 Court was that I did not go back and review the
25 transcript for the specific purpose of noting how many

1 favorable rulings the judge made for the prosecution and
2 how many unfavorable and how many favorable he made for
3 me and how many unfavorable he made for me. I did not go
4 back to do that, Your Honor.

5 THE COURT: Okay. That's not the issue that you
6 raised in your notice of appeal is any sort of -- I don't
7 believe that what you raised in your notice of appeal is
8 that there is some relevance to the numbers of objections
9 which are sustained as opposed to overruled. I think
10 what you are concerned about in your notice of appeal is
11 that you were not allowed to present what you perceive to
12 be admissible evidence and that's what I'm asking you
13 for. You have given me some. My simple question to you,
14 are there others for which you can direct me to the
15 transcript of record? I think you have indicated that
16 there are no more. I just want to be clear.

17 MR. BRIGGS: There are no more --

18 THE COURT: Okay.

19 MR. BRIGGS: -- of those kinds of issues --

20 THE COURT: Okay.

21 MR. BRIGGS: -- that I could cite in the record
22 where I specifically objected to not being allowed to
23 question or on the ruling of the judge --

24 THE COURT: Okay.

25 MR. BRIGGS: -- Your Honor.

1 THE COURT: Yes, sir. Then I believe we have
2 addressed all of the issues raised in your appeal.

3 MR. BRIGGS: Okay. May I ask one question? As you
4 know normally we don't have any substance in a notice of
5 appeal but I felt this was so important I put it in there
6 so I don't think I should be bound by not listing 12
7 exceptions when, in fact, my rule is if you can't win on
8 five, you can't win on 12, your Honor.

9 THE COURT: No, sir. That's not --

10 MR. BRIGGS: I just say that for the record. That's
11 all.

12 THE COURT: No, sir. That's not - that is not the
13 governing precept for filing notices of appeal. You
14 must, you must raise whatever grounds you intend to argue
15 in your notice of appeal or as you have here your amended
16 notice of appeal. This is not like the amendment of a
17 complaint or the amendment of an answer. You must raise
18 your grounds for an appeal. That's why I have tried to
19 move through your amended notice of appeal. I'm
20 interested in going through each and every one of them
21 and hearing argument with regards to each and every one
22 of them which is why I tried to follow your amended
23 notice of appeal. I believe we have been through all of
24 the grounds raised in your amended notice of appeal but
25 if we have missed one, please let me know that and I want

1 to hear from you on that.

2 MR. BRIGGS: Okay. Your Honor, there's only two
3 other matters that I would like to address the Court
4 with.

5 THE COURT: All right. Tell me which ground which
6 is enumerated in your notice of appeal that you are
7 speaking to.

8 MR. BRIGGS: I believe that the description, there's
9 two pages of it of the level of noise by the police, by
10 the complaining witness, et cetera, fits into that
11 category of a wrong decision by the trial judge in
12 allowing that kind of discussion in the record so I would
13 just like to address those two pages. I would again be
14 glad to tender them.

15 THE COURT: Mr. Briggs, tell me which of the grounds
16 which you have set forth in your amended notice of appeal
17 are you referring to.

18 MR. BRIGGS: Your Honor, number 5.

19 THE COURT: All right. Let me get there. The fifth
20 major error of law and the second amendment to the notice
21 of appeal is the error of the trial judge in granting a
22 broad definition of admissible evidence on behalf of the
23 City of Columbia while enforcing a narrow definition of
24 admissible evidence for the trial defendants. Is this
25 the one you are referring to?

1 MR. BRIGGS: Yes, Your Honor.

2 THE COURT: All right. Where in the transcript
3 would you direct me?

4 MR. BRIGGS: I would have to - I would want to read
5 those definitions of the -- Remember, we're talking about
6 subsection C of the ordinance and I think we, both
7 lawyers have agreed that you either have to prove the
8 unreasonableness of the noise or you have to prove a
9 public nuisance. I mean, that's clear. It's in the
10 ordinance exception. I think that discussion of the fact
11 that in one of the quotes the police officer was asked
12 did you tell the preacher how much noise was too much and
13 he said no. I think this Court needs to hear those
14 discussions about level of noise and whether or not they
15 were, if you will, synonyms of unreasonable.

16 THE COURT: And where in the transcript is that
17 discussion, Mr. Briggs?

18 MR. BRIGGS: I will cite that for you right now
19 because I have got it here. Your Honor, the discussion
20 on this is on only two pages in this brief that has not
21 been filed. It's in my notes. It's in what I have
22 prepared to discuss and at the top of page 53 of that
23 draft memo it starts with the transcript on page 41.

24 THE COURT: All right.

25 MR. BRIGGS: With the city attorney described the

1 noise as quote "loud and disturbing."

2 THE COURT: Mr. Briggs, we have talked about page
3 41. Those are the opening statements of the attorneys,
4 of you, of Ms. Mangum. There is no objection interposed,
5 Mr. Briggs.

6 MR. BRIGGS: That's not the only thing on this page,
7 Your Honor. I'm quoting the police investigators. I'm
8 quoting Ms. Callahan. I'm quoting Officer Griggs. I'm
9 quoting a place where Ms. Mangum questioned the officer
10 whether he entered the residence and all of that has to
11 do -- Your Honor, let me stop for a minute and make sure
12 the Court knows an essential fact in this case. All 55
13 citations were issued from what is referred to as a
14 living room which is the back room of the house and is
15 the closest room to the window in the church where the
16 musical instruments and the lectern is, okay? It's a six
17 room house and people are trying to tell me that I can't
18 go to the other five rooms in that house and find a place
19 where I can't hear the music. I don't believe that.
20 Because I still don't believe in Santa Claus. This
21 information is critical as to what the definition of
22 unreasonable is.

23 THE COURT: Mr. Briggs, you referred me to page 41
24 of the transcript.

25 MR. BRIGGS: That's just one citation. I got two

1 pages.

2 THE COURT: This one is opening statement with no
3 objection. Is there somewhere else you would like me to
4 go in the transcript?

5 MR. BRIGGS: Your Honor, I'm sorry. Your Honor, I
6 understand exactly what you're saying but I don't think
7 the Court understands that my concern is that if you --
8 The whole Fur case --

9 THE COURT: Mr. Briggs.

10 MR. BRIGGS: Let me -- Please let me finish.

11 THE COURT: Mr. Briggs, no, sir. Mr. Briggs, there
12 are many people who are here waiting for their matters to
13 be heard. I want to hear you fully but as you know the
14 Court must make a determination from the record on
15 appeal. We are fortunate in this case to have a
16 transcript. I need your help, Mr. Briggs, in directing
17 me to the places in the transcript that you would like me
18 to review. I'm simply asking for your assistance. I'm
19 not trying to agitate you and I'm certainly not trying to
20 not hear you, but at the same time, Mr. Briggs, as you
21 are aware on appeal I must deal with the record in those
22 matters which are in the record. Now, if you do not have
23 any other pages in the transcript that you wish to refer
24 me to, I would like to hear from counsel on behalf of the
25 respondents.

1 MR. BRIGGS: I do, Your Honor.

2 THE COURT: Okay.

3 MR. BRIGGS: And would it be permissible to go off
4 the record just so I could --

5 THE COURT: No, sir. I cannot go off the record.

6 MR. BRIGGS: Okay. Well, then I'm going to try to
7 cite one more then.

8 THE COURT: Okay.

9 MR. BRIGGS: Page 84 of the transcript.

10 THE COURT: Okay. Give me just a moment to get
11 there.

12 MR. BRIGGS: Okay.

13 THE COURT: What line, sir?

14 MR. BRIGGS: I didn't -- I don't -- I don't use line
15 numbers. I should and I don't. We're talking about
16 where it says, Ms. Mangum is asking Officer Griggs
17 questions. The first thing says Officer Griggs gave his
18 account of the complaint of March 10. That's the one I'm
19 referring to, Your Honor, and I will wait patiently.

20 THE COURT: All right. I see one objection and it
21 says - there's a question at line 7. There is an
22 objection interposed by you. The Court sustains your
23 objection. There is a comment by Ms. Mangum to attempt
24 to have the Court, if you will, consider that it's non
25 hearsay. The Court continues with its determination that

1 it is, in fact, hearsay and therefore inadmissible. Then
2 that is page 84, lines 13 through 16. This objection,
3 Mr. Briggs, you are sustained and there are no other
4 objections on this page.

5 MR. BRIGGS: Okay. I'm still not communicating my
6 concern, Your Honor, and this will be the last time I
7 will do it. The police -- One of the key elements in any
8 of these cases is what the police used as a definition of
9 a violation of the law and, two, was there any
10 restriction on the police as to the latitude they had in
11 interpreting the statute and in enforcing the statute.
12 That is in Fur nine times, Your Honor, and this
13 information is absolutely critical as showing the
14 elements of the two part Hobby Lobby case and all the
15 others that I have cited that shows that the police
16 did not have any restraint on them in interpreting this
17 ordinance.

18 THE COURT: That's not contained in your fifth
19 ground for appeal that I thought you were addressing.
20 You're going now to another --

21 MR. BRIGGS: I believe it is but I'm not going to
22 argue anymore, Your Honor. I respect this Court. You
23 and I go way back. I know the senator and I'm not going
24 to say anymore except that I don't have any desire to
25 argue with this Court.

1 THE COURT: Okay. On behalf of the city then.

2 MR. BRIGGS: Now, Your Honor, may I do one other
3 thing? As a concluding comment or unless I can do it
4 later on I still believe the record should show what the
5 critical holding was in the Hobby Lobby case and to show
6 that it is the same test that is in the South Carolina
7 statute and in three other cases we have cited already
8 and it is a third of a page. That's all I would like to
9 read in my concluding comments and I don't really think
10 of anything I would need to do after, uh --

11 THE COURT: Tell me what page of the Hobby Lobby
12 decision are you referring to, Mr. Briggs, and I'll make
13 a note of it and I'll review it.

14 MR. BRIGGS: Okay. I'm talking about the -- I'm
15 talking about the memorandum that was filed
16 electronically. I'm sorry. No, Your Honor. This is the
17 one that I told you that I was going to file today. It
18 is ready to be filed. I just didn't get here quite in
19 time to do it and anything I told you would be an
20 excuse.

21 THE COURT: Yes, sir. Tell me what page of the
22 Hobby Lobby decision you're referring to and I will
23 review it.

24 MR. BRIGGS: Okay. What I refer to, Your Honor, as
25 the concluding paragraphs of the decision explain the

1 application of the two part test to judge whether -- and
2 you've got to remember now in Hobby Lobby we're talking
3 about reviewing an act of congress, not an ordinance from
4 some little town or city -- on contraceptives paid for by
5 the employer was contrary to the sincerely held religious
6 belief of the corporation codice. It is just a one quote
7 case that again emphasizes the two part test that has
8 been the law since Wisconsin v. Yoder.

9 THE COURT: Got it. I will review it. Thank you,
10 sir. All right. Yes, ma'am.

11 MS. MANGUM: Thank you, Your Honor.

12 THE COURT: Yes.

13 MS. MANGUM: Just quickly, as you know we are guided
14 by the South Carolina code here and so we are only here
15 to discuss issues that have been noticed in the appeal so
16 that's what I'm going to focus on today, the five issues.
17 I will be brief. I know we have been here a long time.
18 Certainly if you don't need clarification from me, I will
19 not go into much detail.

20 THE COURT: The only clarification that I need from
21 you would be the following. I don't need it with regards
22 to number 5. I think I have got that one. With regards
23 to the requested charge I don't need any additional
24 information with regards to that. Number 3 has been
25 abandoned. Then we're onto number 4. The issue raised

1 in number 4 has to do with vagueness and overbreadth.
2 The cases cited that I have reviewed while the term of
3 unnecessary has been deemed to be unconstitutionally
4 broad and that decision of the Supreme Court and it is --
5 Now I have forgotten the name of the case. Not the City
6 of Cleveland. It was one that had been cited. The
7 Charlotte case. It's the Jim Crockett Promotion, Inc.
8 versus The City of Charlotte.

9 MR. BRIGGS: Yes, ma'am.

10 THE COURT: In that case the court finds that the
11 language unnecessary is unconstitutionally vague. It did
12 not, however, find the standard of unreasonable to be
13 unconstitutionally vague and it's been cited by the City
14 of Charlotte case and continues apparently to be good
15 law. With regards to the other issue which is of some
16 concern, that issue has to do with the geographical
17 limitation and this ordinance contains a geographical
18 limitation. However, the case law talks in terms of,
19 even in terms of the geographical limitations, it cannot,
20 it cannot be used to satisfy an individual. That
21 unreasonableness must be, if you will, the reasonable
22 person damaged and it must be reasonable in terms of
23 geography.

24 Now, Mr. Briggs makes out an argument that he is
25 concerned that this determination was made individually

1 and not generally. He goes on to argue that in making
2 that individualized determination that there was only one
3 room to consider and that was the one closest to the
4 church. I'm interested in having you address that issue.

5 In this case was there evidence to support the
6 determination that the unreasonableness which is limited
7 on a geographical basis because it talks about in the
8 vicinity was not done on an individualized basis but done
9 on a general basis if that makes sense because the case
10 law expresses some concern about that. I would like you
11 to address that and that would be the sole issue.

12 MS. MANGUM: Okay. Yes, Your Honor. And I can't
13 truly address the Court's argument without including some
14 little bit of additional information which is Mr. Briggs
15 is right. There are over 55 citations from this church.
16 The citations are issued by CPD based on complaints by a
17 neighboring house. CPD arrives on scene and makes that
18 determination about whether or not the noise is
19 unreasonable. There is nothing in the record before you
20 that indicates that every one of those citations was made
21 from a living room to my knowledge. The fact that
22 Mr. Briggs said it today doesn't make it true. I can't
23 tell you today that that is or is not true. It simply
24 wasn't brought up in the lower court and so first of all
25 I would say it's not properly before you today, but even

1 if you were to consider it, there is just nothing
2 there.

3 THE COURT: Well, I'm not going to consider it if
4 it's not in the record.

5 MS. MANGUM: Okay. And I don't believe it is.
6 There was video that was introduced. The jury saw the
7 video. It is part of the court file. It's available for
8 you to view. If you have any concern about
9 reasonableness, I would certainly suggest that you review
10 the video as well.

11 THE COURT: Is it video or is it audio and video?

12 MS. MANGUM: It's both.

13 THE COURT: Okay.

14 MS. MANGUM: It's both. And to be fair that video
15 was set up in, I believe, in the living room. But this
16 house is an open concept house and so essentially when
17 you walk in it's straight front to straight back. The
18 living room goes into the dining area and goes into the
19 kitchen. So I don't know that the assertion about the
20 living room is even a valid argument. I do know that
21 there was video from upstairs bedrooms. I can't recall
22 if it was before the court in this particular matter.

23 THE COURT: So it is your position that the
24 determination of whether or not the noise, the sound was
25 unreasonable ultimately was a jury issue.

1 MS. MANGUM: I think it was, Your Honor. It was a
2 question of fact for the jury to determine and there was
3 plenty of evidence that indicated, plenty of evidence in
4 the record that indicated that the noise was unreasonable
5 including testimony from the officers. And we did have
6 more than one officer who went out there on six different
7 occasions, six different officers with six different
8 instances and so we have that testimony and testimony
9 from witnesses that were present and we also had video.
10 All of that was a jury determination whether or not it
11 was unreasonable.

12 THE COURT: Got it. So it was the jury, at the end
13 of the day it was the jury that made the determination
14 that it was unreasonable?

15 MS. MANGUM: Yes, Your Honor.

16 THE COURT: Very well. Got it. Got it. Thank you
17 very much. Anything further from --

18 MS. MANGUM: Would you like me to address any of the
19 other issues?

20 THE COURT: No, ma'am. Thank you.

21 MS. MANGUM: Thank you.

22 THE COURT: All right. Got it. I'm going to ask
23 for proposed orders and would like them in 30 days
24 please. Thank you.

25 MR. BRIGGS: In how many days, Your Honor?

1 THE COURT: 30.

2 MR. BRIGGS: That's more than adequate.

3 THE COURT: Thank you all so much.

4 MS. MANGUM: Your Honor, one other point of
5 clarification. If you are considering allowing
6 Mr. Briggs to make his 55 page memo part of this record
7 that's not previously been submitted to the Court, we
8 would just like time to receive that memo, review it and
9 also reply to it.

10 MR. BRIGGS: I have no objection but right now I
11 have not made up my mind whether I would file that or
12 not, Your Honor.

13 THE COURT: Okay.

14 MR. BRIGGS: But that is quite appropriate and you
15 can give her whatever many days you want.

16 THE COURT: Very well.

17 MS. MANGUM: Thank you, Your Honor.

18 MR. BRIGGS: Your Honor, if I could have one other
19 thing just to reiterate one point. I would request that
20 since the - make sure the Court knows the background.
21 Beaufort was one Circuit Court case, and I forget who the
22 plaintiff was now or the defendant, some years ago on
23 what we refer to as a captive audience, but since that
24 time the ordinance that you have a copy of was passed by
25 the city counsel so when you compare this ordinance with

1 the City of Columbia's ordinance, you're talking about
2 night and day, period. That's the end of my argument,
3 Your Honor.

4 THE COURT: Thank you very much. I look forward to
5 receiving your proposed orders. All right.

6 WHEREUPON THE HEARING WAS CONCLUDED.
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1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

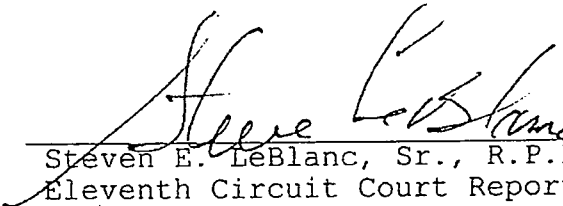
3 (COUNTY OF LEXINGTON)

4
5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Circuit Court Reporter for the Eleventh Judicial
7 Circuit in and for the State of South Carolina, do hereby
8 certify that I reported the proceedings in the before
9 captioned case in the Court of Common Pleas in and for the
10 State of South Carolina on the 15th day of May, 2015.

11 I FURTHER CERTIFY that the forgoing 60 pages
12 constitute a true and accurate record of said proceedings.

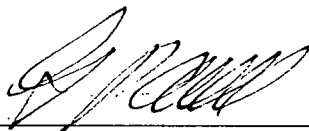
13 I FURTHER CERTIFY that I am neither related, counsel
14 to, nor of interest to any party hereto.

15 IN WITNESS WHEREOF, I have hereunto set my hand at
16 Lexington County, this 16th day of June, 2016.

17
18
19 
20 Steven E. LeBlanc, Sr., R.P.R.
21 Eleventh Circuit Court Reporter
22 State of South Carolina.
23
24
25

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Henry P. Wall
Bruner, Powell Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorney for Appellants

November 21, 2016
Columbia, South Carolina