

IN THE

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**SUPREME COURT OF GEORGIA**

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**Robert Manlove and William Hoffman**

Appellants

versus

**Unified Government of Athens-Clarke County, Georgia**

Appellee

Docket Number

**S09A0118**

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**BRIEF FOR APPELLANTS**

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**Table of Contents**

Table of Authorities Cited.....ii

Jurisdictional Statement and Enumeration of Errors..... 1

Summary of the Case and the Argument.....2

Statement of Facts.....3

Points and Authorities.....6

    I:    Manlove and Hoffman established Constitutionally cognizable harm because they presented evidence that the Noise Ordinance excessively regulates their playing of music .....6

        A.    Music is inherently expressive pure speech, always affected with a free speech interest with or without a particularized message ..... 7

        B.    A particularized message is not required here because this case does not involve expressive conduct..... 10

        C.    The hurdles that the Government seeks to place in the way of free speech claimants would require judges to assume the burdensome role of music critics..... 14

    II:    The trial court should not have barred the deposition of The Honorable David Lynn, because the Government failed to even allege, much less show, bad faith or harassment ..... 16

        A.    The trial court improperly shifted the burden to Manlove and Hoffman to justify the discovery they sought ..... 18

        B.    Manlove and Hoffman had no notice nor opportunity to be heard in opposition to the motion ..... 20

Conclusion ..... 21

Certificate of Service ..... 23

## Table of Authorities Cited

### UNITED STATES SUPREME COURT CASES

<u>Hurley v. Irish-American Gay, Lesbian, &amp; Bisexual Group of Boston</u> 515 U.S. 557 (1995).....	10
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972).....	20
<u>Schad v. Borough of Mt. Ephraim</u> , 452 U.S. 61 (1981).....	6
<u>Spence v. Washington</u> , 418 U.S. 403 (1974).....	11
<u>Texas v. Johnson</u> , 491 U.S. 397 (1989).....	11
<u>Ward v. Rock Against Racism</u> , 491 U.S. 781 (1989).....	8
<u>Winters v. New York</u> , 333 U.S. 507 (1948).....	16

### GEORGIA CASES

<u>Apple Inv. Props. v. Watts</u> , 220 Ga. App. 226 (1996).....	20
<u>Bridges v. 20th Century Travel, Inc.</u> , 149 Ga. App. 837 (1979).....	19, 20
<u>Bullard v. Ewing</u> , 158 Ga. App. 287 (1981).....	19
<u>Clarkston Indus. Inc. v. Price</u> , 135 Ga. App. 787 (1975).....	18
<u>Coffey v. Fayette County</u> , 279 Ga. 111 (2005).....	14
<u>Coffey v. Fayette County</u> , 280 Ga. 656 (2006).....	14
<u>General Motors Corp. v. Conkle</u> , 226 Ga. App. 34 (1997).....	20
<u>McGinn v. McGinn</u> , 273 Ga. 292 (2001).....	19
<u>Milholland v. Oglesby</u> , 115 Ga. App. 715 (1967).....	19
<u>Statesboro Publ'g Co. v. City of Sylvania</u> , 271 Ga. 92 (1999).....	14
<u>Young v. Jones</u> , 149 Ga. App. 819 (1979).....	19

### OTHER FEDERAL AND STATE CASES

<u>Bery v. City of New York</u> , 97 F.3d 689 (2d Cir. 1996).....	6
<u>DA Mortg. v. City of Miami Beach</u> , 486 F.3d 1254 (11th Cir. 2007).....	8, 9

<u>Holloman v. Harland</u> , 370 F.3d 1252 (11th Cir. 2004).....	10
<u>Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University</u> 993 F.2d 386 (1993).....	13
<u>Kelleys Island v. Joyce</u> , 146 Ohio App. 3d 92 (2001).....	12
<u>Madison v. Baumann</u> , 470 N.W.2d 296 (Wisc. 1991).....	9, 13
<u>Zipperer v. Fort Myers</u> , 41 F.3d 619 (11th Cir. 1995).....	20
SECONDARY SOURCES	
Alexandru Pascanu, <u>Chindia</u> . <i>Musica Romanica</i> , 1996.....	16
Robert Donington, <u>Baroque Music: Style and Performance A</u> <u>Handbook</u> (1982).....	12
Funk & Wagnalls, <u>New Standard Dictionary of the English</u> <u>Language</u> (1635).....	7
Henry Wadsworth Longfellow, <u>Outre-Mer: A Pilgrimage Beyond</u> <u>The Sea</u> (1835).....	7
<u>Webster’s Revised Unabridged Dictionary</u> .....	7

## **Jurisdictional Statement and Enumeration of Errors**

This is an action for declaratory and injunctive relief, drawing into question the Constitutionality of Section 3-5-24 of the Athens-Clarke County Code of Ordinances (hereafter, “Noise Ordinance”) under the free speech clause of the Georgia Constitution. Therefore, this Court, and not the Court of Appeals, has jurisdiction over this appeal. The appellants respectfully submit that the trial court committed the following reversible errors:

- I: The trial court erred in dismissing Manlove and Hoffman’s free speech claims.
- II: The trial court erred in barring Manlove and Hoffman from taking the deposition of The Honorable David Lynn.

## **Summary of the Case and the Argument**

Robert Manlove and William Hoffman challenge Athens-Clarke County's noise control ordinance as unnecessarily restrictive and therefore a violation of the expanded free speech guarantees of the Georgia Constitution. They claim that the ordinance excessively restricts the volume at which they may play their music. The trial court dismissed the Constitutional Complaint, ruling that Manlove and Hoffman showed no injury to their free speech rights because they did not articulate a particularized message they sought to convey. Manlove and Hoffman appeal, arguing that music is by its very definition expressive and therefore free speech is always implicated whenever music is regulated.

Manlove and Hoffman also appeal the trial court's order prohibiting them from taking a deposition. The trial court ruled that Manlove and Hoffman had shown no legitimate reason for taking the deposition. On appeal, Manlove and Hoffman argue that the burden of persuasion is on the party seeking to avoid discovery, and that the trial court abused its discretion by shifting that burden. They also argue that due process was violated because they were given no notice nor opportunity to respond.

Manlove and Hoffman ask this Court to respectfully reverse the judgment of dismissal, vacate the order barring the deposition, and remand the case to the trial court with instructions to put the noise ordinance to the appropriate Constitutional test.

## Statement of Facts and Procedural Posture

The communities that coexist side-by-side in Athens-Clarke County share the smallest land area in the State, but in every other respect they could not be more dissimilar. The County is home to Georgia’s flagship research university, off-campus student housing developments, single-family neighborhoods, and a pulsing downtown area serving as the heart of Athens’ famous music and entertainment scene.<sup>1</sup> Notwithstanding the sheer diversity of the varied regions in Athens, and their natures and patterns of normal activities, the Unified Government of Athens-Clarke County (hereafter, “Government”) has established one uniform Noise Ordinance over all the County, mandating the same level of quiet in downtown Athens and ‘fraternity row’ that is expected in a serene single-family subdivision.<sup>2</sup>

The Ordinance prohibits an exhaustive range of sounds, including shouting, singing, hooting, and operation of musical instruments, if those sounds are “plainly audible” at certain arbitrary distances.<sup>3</sup> Sounds are prohibited if they are plainly audible from 300 feet at any time, but after 11 pm on weeknights and midnight on weekends, the distance becomes 100 feet.<sup>4</sup> Moreover, sounds coming from inside an apartment, townhome, or other such dwelling are prohibited if

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<sup>1</sup> R-183-84 (verified by at R-122 ¶ 19 and R-126 ¶ 19)

<sup>2</sup> R-6 ¶ 12

<sup>3</sup> R-9-11

<sup>4</sup> Id.

they are audible a mere 5 feet from the boundaries of that dwelling.<sup>5</sup> In a comprehensive list of exceptions, no allowances is made for sounds occurring in areas where noise is part of the character of the area or pattern of its normal activities.<sup>6</sup> The maximum penalty for making unauthorized sound is a \$1000 fine and six months incarceration.<sup>7</sup>

While students at the University of Georgia, Robert Manlove and William Hoffman filed this Constitutional challenge, arguing that the Noise Ordinance violates the Georgia Constitution because it excessively restricts the volume at which they may play their music.<sup>8</sup> Specifically, they object that the Ordinance applies a uniform regulation in all areas of Athens-Clarke County, and is not even slightly tailored to the characters and patterns of normal activities of the various distinct regions in Athens, such as the vibrant downtown district.<sup>9</sup> Contrary to the Government's representation, Manlove and Hoffman have *never* asserted that they have the right to "play their sound equipment as loudly as they want whenever they want."<sup>10</sup> They assert the right to play loud music only in those

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<sup>5</sup> R-11; R-6-7 ¶¶ 12, 14

<sup>6</sup> R-11-12

<sup>7</sup> R-12, referencing Code of Athens-Clarke County, Georgia § 1-1-5.

<sup>8</sup> R-5 ¶¶ 1-2; R-237-238 ¶¶ 6-7 (Hoffman); R-239-240 ¶¶ 9-10 (Manlove)

<sup>9</sup> R-6-7 ¶¶ 9, 11-14

<sup>10</sup> R-224, 226

areas where loud music is “consistent with the character of the area and would not disrupt the peace of the community.”<sup>11</sup>

The Government has never given any indication that the Ordinance is moribund. To the contrary, it is alive and well, and strictly enforced through a vigorous policy of compliance through deterrence.<sup>12</sup> Hoffman lived in the pulsing downtown district, yet censored the volume of his music because he was aware that the Noise Ordinance is enforced just as vigorously there as it is in a family subdivision.<sup>13</sup> In responding to a noise complaint, an Athens-Clarke County police officer directly threatened to issue Manlove a citation if he observed evidence corroborating the complaint.<sup>14</sup> Manlove and Hoffman have both sought to play their music in areas where loud music would be perfectly at home and would not disrupt the community or invade the rights of others, yet both have self-censored the volume of their music for fear of receiving a Noise Ordinance citation.<sup>15</sup>

Despite these facts, the Government moved to dismiss the Constitutional Complaint, arguing that Manlove and Hoffman failed to show harm.<sup>16</sup> The trial court granted the motion, holding that Manlove and Hoffman did not show that

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<sup>11</sup> R-7 ¶ 18

<sup>12</sup> R-238 ¶ 8 (Hoffman); R-240 ¶ 11 (Manlove); R-7 ¶¶ 15-16

<sup>13</sup> R-237 ¶¶ 3-4

<sup>14</sup> R-239-240 ¶¶ 1-6

<sup>15</sup> R-126 ¶¶ 17-18 (Hoffman); R-122 ¶¶ 17-18 (Manlove)

<sup>16</sup> R-108, 111

their music enjoyed protection as free speech because they failed to articulate any particularized message they intended to convey to others.<sup>17</sup> Manlove and Hoffman timely directly appealed to this Court.<sup>18</sup>

### **Points and Authorities**

**I: Manlove and Hoffman established Constitutionally cognizable harm because they presented evidence that the Noise Ordinance excessively regulates their playing of music.**

For nearly three decades, the United States Supreme Court has recognized that art and entertainment are forms of expression, protected by the Constitution the same as a speech on a campaign trail or a debate on the war in Iraq.<sup>19</sup> One need not be standing on a soap box pontificating about weighty social issues in order to enjoy free speech protection. The fullness of such protection has been awarded, for example, to the visual arts, such as painting and sculpture, because of their inherently expressive artistic nature.<sup>20</sup> Musical art, similarly, is inherently expressive, and is thus always endowed with free speech protection. By asserting that the Government excessively regulates their ability to play – and listen to – music,<sup>21</sup> Manlove and Hoffman allege serious and irreparable injury to their Constitutional free speech rights.

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<sup>17</sup> R-244-245

<sup>18</sup> R-3

<sup>19</sup> See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981)

<sup>20</sup> Bery v. City of New York, 97 F.3d 689, 696 (2d Cir. 1996)

<sup>21</sup> R-240 ¶¶ 9-10 (Manlove); R-237-238 ¶¶ 6-7 (Hoffman)

**A. Music is inherently expressive pure speech, always affected with a free speech interest with or without a particularized message.**

Music is the “universal language of mankind.”<sup>22</sup> This Court need look no further than the very dictionary definition of “music” to understand its inherently expressive character. Clinically speaking, music is “[t]he science and art of rhythmic combinations of tones, vocal or instrumental, embracing melody and harmony, *for the expression* of anything possible by this means, but chiefly anything emotional...”<sup>23</sup> *Webster’s Revised Unabridged Dictionary* agrees, defining music as “...the art of combining tones *in a manner to please the ear.*”<sup>24</sup> Victor Hugo is famously quoted as putting it less clinically but perhaps more powerfully: “Music expresses that which cannot be said and upon which it is impossible to remain silent.”

Instead of using words, music speaks in rhythms and cadences and progressions. C-sharps and A-flats and diminished seventh chords are the literary devices of music, rendering an artistic expression as surely as paint and clay render visual artistic expression and alliteration and irony render poetic expression. This inherently expressive artistic language – the “universal language of mankind” - is deserving in its own right of Constitutional protection.

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<sup>22</sup> Henry Wadsworth Longfellow, *Outre-Mer: A Pilgrimage Beyond the Sea*, (1835)

<sup>23</sup> Funk & Wagnalls, *New Standard Dictionary of the English Language* 1635 (1946) (emphasis added)

<sup>24</sup> *Webster’s Revised Unabridged Dictionary* 956 (1913) (emphasis added)

The Supreme Court first declared music a Constitutionally protected form of expression nearly 10 years ago, in a case involving municipal sound amplification guidelines designed to manage events sponsored by Rock Against Racism.<sup>25</sup> Even though the events consisted of both speakers and rock music, the challenge there involved only the musical aspects of the events, which had been the subject of previous difficulties, including volume complaints. The Court, observing the cultural significance of music as “one of the oldest forms of human expression,” ruled directly that “[m]usic, as a form of expression and communication, is protected under the First Amendment.”

Relying on that decision, courts make short work of the Government’s argument that music must be accompanied by a particularized message to enjoy Constitutional protection. Our Eleventh Circuit, for example, recently considered a Constitutional challenge raised by a nightclub owner, who was cited under a noise ordinance for the music emanating from inside his nightclub.<sup>26</sup> Even without inquiring as to whether the owner intended to convey any particularized message with the complained-of music, the Court had no difficulty whatsoever in applying free speech analysis, holding: “As a threshold matter, we must ask whether the First Amendment protects... playing or broadcasting recorded

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<sup>25</sup> Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989)

<sup>26</sup> DA Mortgage v. City of Miami Beach, 486 F.3d 1254 (11th Cir. 2007)

music. It does.”<sup>27</sup>

The Wisconsin Supreme Court treated this issue in some depth when faced with facts and arguments very similar to this case. Before that Court were musicians who had been cited for playing loud music – specifically a violin and guitar – in violation of a local noise ordinance.<sup>28</sup> The government there argued – as the Government here is arguing – that free speech did not apply because “there was no particularized message that the defendants sought to communicate.”<sup>29</sup> In rejecting that argument, the Court relied upon the dictionary definitions of music, and referenced several examples of musical works highlighting “the expressive and persuasive power of music” – including *The Battle Hymn of the Republic* and *The Star Spangled Banner* – unanimously concluding that “merely the unchallenged assertion that the conduct is the making of music places the activity under the protecting arms of the First Amendment.”<sup>30</sup>

These courts are well supported by higher precedent in rejecting the argument that a particularized message is a prerequisite for free speech protection. The United States Supreme Court itself unanimously rejected that argument in a 1995 case involving the expressive nature of a parade. According to the Court, “...a narrow, succinctly articulable message is not a condition of

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<sup>27</sup> *Id.* at 1265

<sup>28</sup> *Madison v. Baumann*, 470 N.W.2d 296 (Wisc. 1991)

<sup>29</sup> *Id.* at 299

<sup>30</sup> *Id.* at 299-300

constitutional protection, which if confined to expressions involving a ‘particularized message’ would never reach the unquestionably shielded painting of Jackson Pollack, *music of Arnold Schoenberg*, or Jabberwocky verse of Lewis Carroll.”<sup>31</sup> Thus, the Supreme Court for the second time confirmed the Constitutionally protected nature of music, with or without a particularized message.

**B. A particularized message is not required here because this case does not involve expressive conduct.**

The Government argues that Manlove and Hoffman must show a particularized message they intend to convey by playing music, under the Spence-Johnson federal test. However, that test is appropriate only when determining the communicative value of expressive *conduct*, not of pure speech. The Eleventh Circuit explained the distinction: “Expressive conduct is an act with significant non-speech elements that is being used in a particular situation to convey a message.”<sup>32</sup> There is no non-speech element involved in this case – the speech of music is pure. Where the matter under consideration is pure speech, a particularized message has never been required.

Spence and Johnson were “as applied” challenges based on expressive conduct – as opposed to the facial challenge to the ordinance that this case

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<sup>31</sup> Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557 (1995) (9-0 opinion) (emphasis added)

<sup>32</sup> Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004)

presents. Spence asserted that the general law that banned taping things to the American flag could not be Constitutionally applied to him, because he taped something – a peace symbol – to the American flag as an expression.<sup>33</sup> Taping is not inherently expressive – people tape things all the time without intending an expression. His conduct had both speech and non-speech elements. The Johnson case, involving flag burning, was similar. Burning something is not ordinarily expressive – people burn things all the time without intending to express something thereby. The issue became a free speech issue when the challenger sought to use this not-inherently-expressive conduct to express a particular view.<sup>34</sup>

Where someone seeks to do something not inherently expressive, but seeks to endow that conduct with Constitutional protection by claiming that in a particular context it is being used to communicate, courts of course require evidence of that communicative intent before invoking the free speech shield. Otherwise, one could cloak “an apparently limitless variety” of conduct simply by the bare allegation that it is intended to be expressive.<sup>35</sup> But here, the subject matter under regulation does not involve both speech and non-speech elements; it involves something that is expressive by its very nature. There is simply nothing about music that is non-expressive.

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<sup>33</sup> Spence v. Washington, 418 U.S. 405 (1974)

<sup>34</sup> Texas v. Johnson, 491 U.S. 397, 406 (1989)

<sup>35</sup> Spence, 418 U.S. 405 at 408-409.

Although it could be argued that the volume of the music is a non-speech element,<sup>36</sup> that argument fails because volume is an essential element of music itself, critical to its artistic value. Musical compositions are replete with instructions from the composer that a certain section is to be played softly (*p* - *piano*), loudly (*f* - *forte*), increasing or decreasing in volume (*crescendo* / *diminuendo*), and many others. One would think it very strange indeed to hear *Brahms' Lullaby* belted out at earsplitting intensity, or to hear Queen's *We Will Rock You* / *We Are The Champions* softly whispered. Volume is no more separable from the artistic quality of music than light or shade is from the artistic quality of a painting.<sup>37</sup>

Even so, the underlying subject matter being regulated in this case is still music – the regulation concerns the time, place, and manner of that music. The Government argued to the trial court that “loud is not constitutionally protected,”<sup>38</sup> but “loud” is not the subject matter being regulated here. The Ordinance does not say “Loud is prohibited.” The ordinance prohibits loud *music*, along with loud shouting, singing, hooting, et cetera. A regulation on the volume of music is a regulation of the time, place, and manner *of that music*.

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<sup>36</sup> See *Kelley's Island v. Joyce*, 146 Ohio App. 3d 92 (2001)

<sup>37</sup> See Robert Donington, *Baroque Music: Style and Performance A Handbook* (1982), quoting German composer Johann Joachim Quantz (“Light and shade must be constantly introduced... by the incessant interchange of loud and soft.”)

<sup>38</sup> T-12

Spence and Johnson should be interpreted in light of Hurley, which held, using music and other art forms as examples, that speech need not have a particularized message in order to be Constitutionally protected. A case involving a fraternity’s “ugly woman contest” skit is particularly instructive on this point. There, the Fourth Circuit unanimously concluded that the skit, albeit a crude production, was nevertheless an inherently expressive form of entertainment.<sup>39</sup> While the court, in dicta, went on to find that the skit indeed conveyed a message, the law upon which it based its ruling was clear: Entertainment is Constitutionally protected, simply for entertainment’s sake with or without a particularized message.<sup>40</sup> Music is a form of entertainment *at least* as expressive as this fraternity’s caricature.

“The courts of this country uniformly recognize the protected [free speech] aspects of music – all music.”<sup>41</sup> The Government may indeed regulate loud music, but courts must balance the need for the regulation with the free speech rights that it burdens. This Court affords speech the greater weight in that balance, holding such regulations to the unforgiving least-restrictive-means

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<sup>39</sup> Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (1993)

<sup>40</sup> Id.

<sup>41</sup> Madison v. Baumann, 470 N.W.2d 296, 299-300 (Wisc. 1991)

test.<sup>42</sup> The judgment of the trial court, dismissing the complaint without holding the Ordinance to that test, should be respectfully reversed.

**C. The hurdles that the Government seeks to place in the way of free speech claimants would require judges to assume the burdensome role of music critics.**

In the balance between speech and government regulation, the public policy of this State decidedly favors speech, granting even broader protection than does the federal First Amendment.<sup>43</sup> This Court has twice unanimously reaffirmed and strengthened this policy, particularly in the realm of time, place, and manner restrictions on speech.<sup>44</sup> A ruling in the Government's favor would sharply constrict Georgia's free speech jurisprudence, erecting an additional obstacle not found in even the narrower federal law. Nothing in this case warrants such a dramatic departure.

If the Government's position were to become law, the courthouse door would be completely closed to artists, poets, and musicians, unless a judge understood a "particularized message" behind their art. A museum seeking to display a Jackson Pollack painting, or a symphony orchestra seeking to perform a Schonberg piece, would be unable to assert their rights to do so unless they could

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<sup>42</sup> Coffey v. Fayette County, 279 Ga. 111 (2005) (7-0 opinion) (hereafter, "Coffey I")

<sup>43</sup> Statesboro Publ'g Co. v. City of Sylvania, 271 Ga. 92 (1999); see also Coffey v. Fayette County, 280 Ga. 625 (2006) (hereafter, "Coffey II") (rejecting a lower court ruling that would 'render Georgia's additional free speech protections meaningless')

<sup>44</sup> Coffey I, 271 Ga. 111; Coffey II, 280 Ga. 625

articulate a message behind the painting or the composition. This is exactly the obstacle that the United States Supreme Court found unacceptable in Hurley and which this Court should similarly reject.

Not only would this obstacle close the courthouse door to many artists, it would, in essence, conscript Georgia judges into the role of art and music critics. One of the reasons that courts do not require a particularized message in order for art to warrant free speech protection is that it is often impossibly difficult to discern what the message behind a piece of art actually *is*. If the Court were to adopt the Government's view, in all future free speech cases involving music our State's already overburdened courts would be forced to examine the musical elements of each composition, attempting to discern a "particularized message."

From David Bowie's *Space Oddity*<sup>45</sup> to Donna Summer's *MacArthur Park*<sup>46</sup>, music is notoriously difficult to distill into a particularized message. Music is a type of expression which is often particularly difficult to distill into a direct and particularized message. Many pieces of music do not include lyrics, but speak merely through the use of the tools of music theory such as chord progressions and cadences. Even where lyrics are included, they may not often lend themselves to easy interpretation. The lyrics of *Chindia*, for example, consist

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<sup>45</sup> "This is Major Tom to ground control / I'm stepping through the door / and I'm floating in a most peculiar way / And the stars look very different today / For here am I sitting in a tin can / far above the world / Planet Earth is blue and there's nothing I can do..."

<sup>46</sup> "MacArthur Park is melting in the dark / all the sweet green icing flowing down / Someone left the cake out in the rain / I don't think that I can take it / 'cause it took so long to bake it / and I'll never have that recipe again."

solely of nonsense syllables, arranged in strings such as “ta ka ta ka ta, pa ra pa.”<sup>47</sup> Under the law as the Government would have it, Georgia’s judges would be put in the unenviable position of attempting to glean a particularized message behind such compositions.

The Government’s position would also open the door wide to subconscious content-based discrimination. Judges may be more likely to subconsciously see a “particularized message” behind art that they find aesthetically pleasing as opposed to art that they simply do not like. As the United States Supreme Court itself observed, “the line between the informing and the entertaining is too elusive” to warrant forcing courts to distinguish between simple entertainment and ideology.<sup>48</sup> Adherence to the bright line rule – that music is pure speech always affected with a Constitutional interest – is not only in keeping with the applicable case law, it is also the wisest approach from a public policy standpoint.

**II: The trial court should not have barred the deposition of The Honorable David Lynn because the Government failed to even allege, much less show, harassment or bad faith.**

During the discovery phase of this proceeding, Manlove and Hoffman subpoenaed The Honorable David Lynn to give testimony in a deposition by oral examination.<sup>49</sup> Lynn, incidentally, happens to be a member of the Athens-Clarke

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<sup>47</sup> Alexandru Pascanu, Chindia. For SATB Choir. Pub., Musica Romanica, 1996.

<sup>48</sup> Winters v. New York, 333 U.S. 507, 510 (1948)

<sup>49</sup> R-174

County Commission. The Government objected, arguing that Lynn was not subject to deposition regarding his legislative intent behind the Noise Ordinance.<sup>50</sup> In response, Counsel for Manlove and Hoffman agreed to postpone the deposition,<sup>51</sup> but stated affirmatively that he had no intention of inquiring about Lynn’s legislative intent.<sup>52</sup>

In e-mail discussions between the attorneys, counsel for Manlove and Hoffman stated that he was “concerned about some ways that [Lynn] has personally used the Noise Ordinance in ways that I see as inappropriate.”<sup>53</sup> Counsel never stated that this was the only reason, or even *a* reason, that he sought the deposition. Counsel’s only statement regarding the substance of Lynn’s proposed deposition was that “I don’t want to ask him about his legislative intent or his reasons for adopting the Noise Ordinance.”<sup>54</sup>

Nevertheless, the Government moved for a protective order barring the deposition, arguing only that the deposition “[is] improper because [it goes] to legislative intent and [is] not calculated to lead to admissible evidence.”<sup>55</sup> The

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<sup>50</sup> R-165

<sup>51</sup> R-168

<sup>52</sup> R-167

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> R-132-133

trial court granted the motion a mere two business days later.<sup>56</sup> In its Order, the trial court found solely that Counsel’s offhand statement regarding Lynn’s improper usage of the Noise Ordinance “provides no legitimate basis for deposing Lynn and would not lead to the discovery of admissible evidence.”<sup>57</sup>

**A. The trial court improperly shifted the burden to Manlove and Hoffman to justify the discovery they sought.**

By granting a protective order when it found one of Counsel’s statements insufficient reason for taking the deposition, the trial court placed the burden on the party *seeking* discovery to show why it *should* take place. But the party seeking to *limit* discovery has the burden of showing why it should *not* take place, not the other way around.<sup>58</sup> The trial court made no finding of bad faith, harassment, or any other factor justifying a protective order. Thus the trial court abused its discretion in excusing the Government from its burden of persuasion and shifting that burden to Manlove and Hoffman.

Had the trial court held the Government to this burden, it should have denied the motion because the Government failed to even allege, much less establish, any basis for a protective order. A protective order is inappropriate

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<sup>56</sup> R-179

<sup>57</sup> R-179-180

<sup>58</sup> See Clarkston Indus. Inc., v. Price, 135 Ga. App. 787 (1975) (interrogatories), overruled on other grounds, Tobacco Rd., Inc. v. Callaghan, 174 Ga. App. 539 (1985)

unless the discovery is sought in bad faith or for the purpose of harassment<sup>59</sup>, or would unduly invade privacy<sup>60</sup>. The order must be based on evidence clearly and specifically demonstrated – mere conclusory allegations do not suffice.<sup>61</sup>

Here, the Government’s motion for protective order alleged the conclusion that the deposition “[is] improper because [it goes] to legislative intent”<sup>62</sup> – while the only evidence in the record shows that Counsel did *not* intend to inquire about legislative intent.<sup>63</sup> The Government did not even allege, much less show, any bad faith or harassment, nor was any found by the trial court. The Government even had a second opportunity at the April 14 hearing – but despite its counsel’s assurance that “I’m going to present the argument on the ... motion for protective order,”<sup>64</sup> no allegation of bad faith or harassment ever materialized at that hearing either.

The Government’s motion for fees is the very first time that the words “bad faith” or “harassment” appear in the record – nearly four months later.<sup>65</sup> Even in that motion, it continued to place the burden on Manlove and Hoffman to justify discovery, arguing that “Plaintiffs could not show...” and “Plaintiffs failed to

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<sup>59</sup> Bridges v. 20th Century Travel, Inc., 149 Ga. App. 837, 838 (1979); see also Bullard v. Ewing, 158 Ga. App. 287, 291 (1981).

<sup>60</sup> See McGinn v. McGinn, 273 Ga. 292 (2001) (financial records).

<sup>61</sup> Young v. Jones, 149 Ga. App. 819, 824 (1979), Milholland v. Oglesby, 115 Ga. App. 715 (1967)

<sup>62</sup> R-132-133

<sup>63</sup> R-167

<sup>64</sup> T-4

<sup>65</sup> R-254

show....”<sup>66</sup> Backpedal as it might, the Government simply cannot point to any judicial finding of bad faith, harassment, annoyance, or any other factor that could legally justify denying a party the right of discovery.

Where a protective order barred a deposition on the sole ground that the witness possessed no relevant information, the Court of Appeals reversed because there was no “substantial evidence that bad faith or harassment motivates the (discoveror’s) action.”<sup>67</sup> Here, as there, the trial court abused its discretion in issuing the order where bad faith or harassment were not even *alleged*, much less proven.

**B. Manlove and Hoffman had no notice nor any opportunity to be heard in opposition to the motion.**

Discovery under the Civil Practice Act is a statutory right of each party to a civil action.<sup>68</sup> Before that right is limited or taken away, procedural due process requires, at minimum, notice and an opportunity to respond.<sup>69</sup> The trial court abused its discretion by denying Manlove and Hoffman both of these due process minimums.

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<sup>66</sup> Id.

<sup>67</sup> Bridges, 149 Ga. App. at 838

<sup>68</sup> See Apple Inv. Properties, Inc. v. Watts, 220 Ga. App. 226 (1996) (“the court must balance the plaintiff’s right of discovery against the defendant’s right to privacy”); General Motors Corp. v. Conkle, 226 Ga. App. 34 (1997)

<sup>69</sup> See Zipperer v. City of Fort Myers, 41 F.3d 619 (11th Cir. 1995) (Due process requires notice and an opportunity to be heard); Morrissey v. Brewer, 408 U.S. 471 (1972) (Meaningful access to the courts is a property right of Constitutional significance)

Two days is insufficient time for the party opposing a motion to prepare any sort of response or legal objections. There was no emergency requiring immediate action by the Court; the date scheduled for Lynn’s deposition had been voluntarily continued, indefinitely, by Plaintiffs’ Counsel.<sup>70</sup> Manlove and Hoffman did not even have the chance to raise the above arguments, much less the chance to explain why they sought the discovery.

### **Conclusion**

Music is inherently expressive as a fine art – in other words, *everything* about music is expressive. Thus, as a matter of law as well as sound public policy, it is always affected with a free speech interest with or without a particularized message. The trial court’s ruling to the contrary stands in brazen contrast to the unanimous precedent of the United States Supreme Court, as well as the overwhelming majority of case law. Because the ruling below is inconsistent with even federal guidelines, it has absolutely no place in Georgia’s jurisprudence, which more jealously guards the rights of free speech.

Furthermore, the trial court’s protective order was issued with no legal basis, without allowing Manlove and Hoffman the opportunity to even respond to it. The Government showed no bad faith or harassment motivating the discovery requested by Manlove and Hoffman, and none was found by the trial court.

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<sup>70</sup> R-168

The judgment of dismissal should be respectfully reversed, and the protective order barring the deposition of The Honorable David Lynn should be respectfully vacated. The case should then remanded to the trial court with instructions to hold the Noise Ordinance in this case to the Constitutionally mandated least-restrictive-means test.

It is respectfully submitted on the Fifteenth day of October, 2008, by:

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Attorney for Manlove and Hoffman

## Certificate of Service

I, Charles A. Jones Jr., hereby certify that I have served this Brief For Appellants upon The Honorable Bill Berryman, County Attorney, counsel of record for the Appellee, certified mail to the Office of the County Attorney, P.O. Box 427, Athens, GA 30603 , on the Fifteenth day of October, 2008.

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