Analysis of the "plainly audible" standard for noise ordinances

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Noise ordinances which apply a standard of "plainly audible" have advantages which may outweigh the disadvantages under certain circumstances. Drafting considerations should include: nature of the noise source; composition of the enforcement agency; legal precedents or constraints within the jurisdiction; whether the standard can be easily understood by those it regulates; and, whether the standard provides meaningful guidance to facility operators and engineers to achieve compliance. A comparative analysis is provided for the following standards: performance (decibel denominated); nuisance (subjectively worded); and, "plainly audible". Performance standards require the use of sound level meters and trained personnel, and are not easily applied to sources that are transient or mobile. Nuisance standards can be overturned as vague and overbroad. Courts across the United States have upheld the validity of "plainly audible" standards for amplified sound sources, although not uniformly. Case law is discussed. If the "plainly audible" standard is incorporated into a content-neutral code provision, and is impartially applied, it has significant utility and addresses noise sources not easily addressed otherwise.

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1 INTRODUCTION

The goal of a community noise ordinance is to protect quality of life, and to do so in a manner that is predictable, fair and legally defensible. While the goals appear simple, the drafting of such an ordinance is not, and its final form should consider a myriad of variables both internal and external to any given jurisdiction. Critical factors include: the nature of the noise source; composition of the enforcement agency; legal precedents or constraints within the jurisdiction; whether the standard can be easily understood by those it regulates; and, whether the standard provides meaningful guidance for facility operators and engineers to achieve compliance.

Local government[5] noise ordinances contain provisions that fall into essentially two categories: performance and nuisance. Performance provisions establish permissible sound level limits which must be measured with a sound level meter, while nuisance provisions include prohibitions against the emission of sound deemed to be disturbing noise by a complainant at the point of reception. In either case, verification of a violation requires investigation by an enforcement agent (unless the witness/victim swears out a complaint, in which case they are the plaintiff and have the burden of proof).

There are inherent benefits and drawbacks to both performance and nuisance standards; many of the drawbacks are obviated with the use of a "plainly audible" standard. Performance provision investigations are precise and content-neutral, but require equipment, trained personnel and time. Challenges are less likely and adjudication is more certain. Performance provisions are inflexible in their application, which can be particularly problematic when the sound level of an amplified source does not exceed a permissible limit, and the sound is not masked by the intensity and/or frequency of ambient sounds. Nuisance codes are more flexible, but adjudication is unpredictable due to the subjective nature of nuisance determination.

A "plainly audible" investigation can be conducted relatively quickly, without equipment or extensive training, and is based upon an objective standard which has been repeatedly upheld in court as meeting the requirements set forth by the United States Supreme Court that: "To withstand constitutional scrutiny, government restrictions must be (1) content neutral, in that they target some quality other than substantive expression; (2) narrowly tailored to serve a significant governmental interest; and (3) permit alternative channels for expression[6]."

2 THE PLAINLY AUDIBLE STANDARD

Plainly audible standards are exactly what they sound like—standards that prohibit plainly audible sounds at or beyond a distance certain. Sample "plainly audible" provisions follow:

> DEFINITIONS
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> "Plainly audible" means any sound that can be detected by a person using his or her unaided hearing faculties. As an example, if the sound source under investigation is a portable or personal vehicular sound amplification or reproduction device, the enforcement officer need not determine the title of a song, specific words, or the artist performing the song. The detection of the

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[5] As used herein, the term "local government" shall mean a city, town, county, or state, or other political subdivision governed by an administrative body authorized to protect the general health, safety and welfare of its citizens.

[6] *Ward v. Rock Against Racism,* 109 S.Ct. 2746 (1989).

rhythmic base component of the music is sufficient to constitute a plainly audible sound.

"Real property line" means either (a) the vertical boundary that separates one parcel of property (i.e., lot and block) from another residential or commercial property; (b) the vertical and horizontal boundaries of a dwelling unit that is part of a multi-dwelling unit building; or (c) on a multi-use property, the vertical or horizontal boundaries between the two portions of the property on which different categories of activity are being performed.

"Sound production device" means any device whose primary function is the production of sound, including, but not limited to any, musical instrument, loudspeaker, radio, television, digital or analog music player, public address system or sound-amplifying equipment.

SAMPLE PROVISIONS

(1) Personal or commercial music amplification or reproduction equipment shall not be operated in such a manner that it is plainly audible at a distance of 50 feet in any direction from the operator between the hours of 8:00 a.m. and 10:00 p.m. Between the hours of 10:00 p.m. and 8:00 a.m., sound from such equipment shall not be plainly audible at a distance of 25 feet in any direction from the operator.[7]

(2) Self-contained, portable, hand-held music or sound amplification or reproduction equipment shall not be operated on a public space or public right-of-way in such a manner as to be plainly audible at a distance of 50 feet in any direction from the operator between the hours of 8:00 a.m. and 10:00 p.m. Between the hours of 10:00 p.m. and 8:00 a.m., sound from such equipment shall not be plainly audible by any person other than the operator.

(3) Sound production devices may not be operated in such a manner that they are plainly audible at a distance of one hundred (100') feet from the building, structure or vehicle in which they are located.

(4) Sound production devices may not be operated in such a manner that they cross a real property line and are plainly audible within a residence between the hours of 10:00 PM and 8:00 AM.

(5) No person shall operate or use or cause to be operated any sound production device, for commercial or business advertising purposes or for the purpose of attracting attention to any performance, show, sale or display of merchandise, in connection with any commercial business enterprise: (i) outside or in front of any such building, place or premises, abutting on or adjacent to any street, park or public space; (ii) in or upon any vehicle operated, standing or being in or on any public street, park or place; (iii) from any stand, platform or other; (iv) from any airplane or other device used for flying, over the city; (v) from any boat on the waters within the jurisdiction of the city; or (vi) anywhere on the public streets,

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[7] Distances are included as examples only. The basis for choosing an appropriate distance is discussed below. It should be noted that vehicles engaged in overt broadcasting are audible at distances significantly exceeding 100 feet. In all enforcement actions it is recommended that compliance determination is made at a distance exceeding the permissible limit. There is also significant value to testimony of impact beyond simple audibility, such as the inspector stating whether there were prior complaints or whether passers-by noted or exhibited discomfort to or avoidance of the noise.

public sidewalks, parks or places where sound from such reproduction device may be heard on any public street, sidewalk, park or place.

(6) Motorcycles. No person shall cause or permit any motorcycle to operate on a public right-of-way where the muffler or exhaust generates a sound that is plainly audible to another individual at a distance of 200 feet or more from the motorcycle. (This provision may be used as probable cause to curb the vehicle for further inspection, if such is desired).

The permissible distance for "plainly audible" sound should reflect jurisdictional character and will. Consideration should be given to: time of day; location of potentially sensitive receptors (the average setback of residences from roadways, the proximity of nightclubs to residences, etc.); population density; and, whether it is the jurisdictional will to protect "the commons," or public spaces.

3 PRACTICAL CONSIDERATIONS

3.1 Equipment and Training

Enforcement of a decibel-denominated performance provision requires the use of a sound level meter. At a minimum, the meter should conform with ANSI S-1.4-1983, and along with its calibrator be certified annually at an accredited laboratory. The investigator should have received training in the use of the meter, and the protocols for compliance determination measurements in complex acoustical environments. These requirements alone limit the number of practitioners in even the largest enforcement agency, unless that agency is very highly motivated. However, if all these requirements are met, and the measurements are properly conducted, legal challenges to the enforcement action are unlikely to be successful. In fact, a well-documented performance provision investigation is often deterrent to challenge.

Enforcement of both nuisance and "plainly audible" provisions require no equipment or extensive training, thus investigations can be undertaken by virtually all field investigators in an agency. Complaint response time is greatly influenced by the number of qualified meter operators on any given shift, and whether the investigator always carries the meter. These may not be issues for a noise source that is relatively static, but they are when the source is either transient, mobile or both. Enforcement delayed may well be enforcement denied, which has implications both for immediate relief and long term deterrence. This point is particularly relevant to sound production devices, whether amplified or not, and whether fixed or mobile.

3.2 Self-Policing

Some of these same considerations, equipment and training, determine whether a sound source can easily self-police compliance. One of the keys to effectively quieting a jurisdiction is when sound sources are motivated to action by a credible enforcement program and are capable of self-policing. A performance provision may well inform them of the permissible limits in language that is precise, meeting that legal requirement, but they may still not have the capacity to make such a determination for themselves even if they want to comply in good faith. Performance provisions establish permissible limits not only in dB(A), which all meters can measure, but sometimes also dB(C) and octave bands. While some provisions specify the use of the Lmax metric, others require Leq or even cumulative duration above a threshold. These

provisions may be very precise, but they require relatively sophisticated meters that only an enforcement agency or acoustical consultant may have.

Nuisance provisions have language that is inherently subjective, even while there are ongoing efforts to define these provisions more precisely, thus more objectively. As such, self-policing of nuisance provisions may be unreliable, especially if the observer has just been inside the facility under investigation.

A provision prohibiting "plainly audible" noise at a specific distance from the source or its property line is an unambiguous bright line for all observers, whether from enforcement or management, against which they can determine compliance, with virtually no preparation required. There is nothing about the standard which is vague, another legal requirement to be adjudged valid.

3.3 Subjectivity and Objectivity

Objectivity is in many ways a corollary to content-neutrality, and this is one of the underpinnings to a legally defensible provision regulating speech of any nature or type. Certainly, sound level measurements are influenced only by the intensity of sound, not by its content, and are thus inherently objective. Nuisance provision enforcement ideally considers only the intensity, but nuisance provisions often employ subjective adjectives to describe prohibited acts (e.g., 'disturbing:, "loud" "raucous", "reasonable', etc). Enforcement actions based on such a provision may well be challenged as lacking objectivity, or the provision itself challenged as vague or overbroad. That said, through common use and judicial familiarity many nuisance cases are successful; however, it is also true that many enforcement actions are not undertaken by agencies that are uncomfortable enforcing such subjective language.

The determination of whether a sound is "plainly audible" is objective and content-neutral, and this finding has been the upheld in many court decisions. However, challenges to "plainly audible" provisions have been successful where the provision itself is not content neutral through unequal application, such as exempting a specific source category within a greater whole (e.g., permitting amplified music only from commercial vehicles). Thus, the drafter of any such provision must be mindful of this point in the construction of the provision and exemptions there from. As well, people should not draw incorrect and overbroad conclusions from provisions stricken for lacking content neutrality, understanding the limited basis of this rejection.

3.4 Applicability and Design For Compliance

"Plainly audible" provisions are most appropriately applied to volitional sources such as sound production devices, whether amplified or not. The operator chooses the time, place and manner of the emissions, and the operation of the device has only one purpose - to emit sound. The emissions can be modified quickly and simply to achieve compliance, and also for the purpose of avoiding enforcement through evasive behavior.

In those cases where physical plant modifications must be undertaken to achieve compliance with a "plainly audible" provision (e.g., a loud bar), there are numerous remediation and monitoring strategies that can be employed, much as is the case with facilities seeking compliance with a performance provision.

In all cases, a conservative approach is required to designing a remediation strategy, regardless of the regulatory standard. If the jurisdiction enforces a performance provision with an absolute limit (e.g., 50 dB(A) at or within the property line of an affected person between the hours of 10:00 PM and 7:00 AM), the endpoint is clear, although the design should be

conservative. If, however, the jurisdiction has a performance standard set relative to the ambient sound level (e.g., 3 dB(A) (or dB(C)) above ambient), even the assumption of the permissible limit must be conservative, possibly using L90 or Lmin ambient measurements. Much is the same with designing for "plainly audible" compliance.

Once physical plant modifications are completed (e.g., a double-door system, vibration isolation mounting of speakers, installation of a compressor/limiter, etc.), sound system settings can be tuned for intensity and frequency distribution, and once set, physically or electronically locked down. If the use of a pre-tuned "house sound system" is impractical, a real-time monitoring program can help insure compliance. Simply, simultaneous measurements/observations are conducted both in a fixed location inside the bar and at the point of compliance determination. A "not to exceed" sound level is determined (preferably dB(C)) at a location inside the bar at which a monitoring microphone can be mounted, remotely wired to a sound level meter set to threshold trigger at the "not to exceed" level. A light can be wired to alert the operator of the sound system for real-time feedback when the threshold level is exceeded.

The New York City Department of Environmental Protection maintains a document on their web page to assist facilities in achieving compliance: Noise Control Guidance for Nightlife Industry[8],

4 LEGAL ANALYSIS

Governments are charged with the general authority to enact regulations that will protect the general health, safety and welfare of those in their community, though the regulation of noise is also expressly authorized. The Noise Control Act of 1972 specifically finds that "primary responsibility for control of noise rests with State and local governments,"[9] and state legislation often expressly enunciates this specific authority to enact regulations protecting citizens from excessive and unnecessary noise.[10] Though the charge is finite enough, the exercise of this authority has manifested itself in infinite variations of sound control regulations which rely largely on the use of nuisance, performance and plainly audible based standards, or a combination of them.

While the United States Supreme Court has recognized that the use of sound amplification equipment within reasonable limits is an aspect of free speech protected under the First Amendment,[11] there is no constitutionally protected right to amplify sound, nor is there a constitutional right to force unwilling people to listen to your speech or expression. As noted by one Oregon court, "freedom of speech is not intended to protect, and indeed is incompatible with, a cacophony."[12] Therefore, a local government can constitutionally restrict such expression, even in a public place, if the limitations on the time, place and manner of the protected speech are reasonable and content-neutral. Certainly, the plainly audible standard is one way to do just that.

The appeal of the plainly audible standard to local governments should be apparent from its practical attributes, as discussed above, but it also provides a measurable amount of comfort for

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[8] http://www.nyc.gov/html/dep/pdf/noise_control_guide_comm.pdf

[9] 42 USC Chapter 65 § 4901(a)(3)

[10] By way of illustration and example, the Constitution for the State of Florida provides in Article II, Section 7(a) that "Adequate provision shall be made by law for the abatement of …excessive and unnecessary noise."

[11] See *Ward,* 491 U.S. 781 (1989); *Saia,* 334 U.S. 558 (1948).

[12] *Portland v. Aziz,* 47 Or.App 937 (1980).

the general strength of its legal attributes, as will be discussed below. When properly drafted,[13] it is a content neutral regulation that imposes reasonable time, place and manner restrictions on amplified sound sources; it is not overly broad; it is not vague because it puts both sound regulators and sound producers on fair notice of what is permissible and what is prohibited; and it is inherently easily and consistently enforceable. This conclusion is drawn from a review of the standard's resiliency upon its examination by courts across the United States which have not found the standard legally wanting. Even so, the plainly audible standard has been vulnerable to constitutional challenges long familiar to nuisance and performance based standards--and has failed, as those do, when it is not content neutral, is not narrowly tailored to achieve the government's interest motivating the regulation, does not permit alternative channels for expression, or when it makes unlawful constitutionally protected conduct or permits arbitrary or discriminatory enforcement.

4.1 Plainly Audible Standards are not (and need not be) Overbroad

The overbreadth doctrine appears to be the most popular form of constitutional attack of noise regulations, presumably because the plaintiff need not establish that the regulation is unlawful as applied to him, but may make the challenge on behalf of any and all parties who may be adversely affected by its reach and therefore render the regulation wholly and immediately invalid. Further, overbreadth challenges may be sustained either from the text of the regulation or by demonstration of particular facts unique to the plaintiff or the community. For obvious reasons, this analysis will be limited to examinations based on the text of the plainly audible regulations.

An overbroad regulation is one that restricts protected speech or conduct along with unprotected speech or conduct. When a regulation primarily regulates conduct rather than speech, the "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[14]

Plainly audible standards are not directed at the content of broadcasted speech but rather at the intensity of sound coming from amplified sound sources, be they fixed or mobile. Courts have examined provisions with the same or similar language to that set forth in Section 2 above, and have found that these prescriptions against loud noises are an attempt to control conduct, i .e., the use of the volume control on a sound production device, rather than an attempt to control the type of speech being broadcast.[15] More importantly for our purposes here, courts have rejected overbreadth challenges to regulations that prohibit broadcasts of sound from mobile sources that are plainly audible at distances of ten feet or more,[16] and from fixed sources that are plainly audible at distances of as little as five feet or more.[17]

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[13] While it is the intent of this paper to recommend the plainly audible standard for its many merits, this paper does not and cannot assert the legal infallibility of a standard that relies on the use of the term "plainly audible" to save or justify it against language in or motives for the same regulation that does not meet constitutional muster.

[14] *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[15] See *State v. Dorso*, 4 Ohio St.3d 60 (1983).

[16] *See, e.g. Davis v. State,* 710 So.2d 635 (Fla.Dist.Ct.App.1998) (100 feet); *People v. Arguello,* 327 Ill.App.3d 984, 262 Ill.Dec. 272, 765 N.E.2d 98 (Ill.App.Ct.2002) (75 feet); *State v. Adams,* No. 02CA171, 2004 WL 1380494, (Ohio Ct. App., June 14, 2004) (50 feet); *State v. Medel,* 139 Idaho 498, 80 P.3d 1099 (Idaho Ct.App.2003) (50 feet); *Holland v. City of Tacoma,* 90 Wash.App. 533, 954 P.2d 290 (Wash.Ct.App.1998) (50 feet); *United States v. Black,* 2009 WL 2960468 (US Dst. Ct Mich. 2009).

[17] *See, e.g. Kelleys Island v. Joyce* (2001), 146 Ohio App.3d 92, 765 N.E.2d 387 (6th Dist.) (150 feet);*Schrader v. State,* No. 03-99-00780-CR, 2000 WL 1227866 (Tex.Ct.App. Aug. 31, 2000) (30 feet); *Commonwealth v. Scott,* 878

4.2 Plainly Audible Standards are not Vague

Noise regulations challenged for vagueness often overlap with overbreadth and due process challenges, though the "void for vagueness" challenge itself is independent from either of those. Fundamentally, a regulation can be vague if it fails to provide person of ordinary intelligence a reasonable opportunity to understand what it prohibits, or if it authorizes arbitrary or discriminatory enforcement. Case law has repeatedly and firmly decided that plainly audible standards are not vague, leaving the courts to focus on other constitutional issues a noise regulation might present in any given case.

In a series of cases examining a plainly audible standard contained in a Florida statute regulating the operation of amplified sound devices from motor vehicles[18], all decided within the last year to six months of this writing, the most recent Florida Court to have weighed in on the issue has held that the statute, though unconstitutional on other grounds, provides both "fair notice of the prohibited conduct" to those who would be regulated by it and "an explicit guideline to those charged with enforcing" it.[19] This Florida court goes on to conclude that the plainly audible standard itself "is no less precise than the 'loud and raucous' standard approved by the United States Supreme Court in *City of Cincinnati v. Discovery Network, Inc*.[20]

Notably, in these and other cases where the court made quick work of the "vagueness" challenge set forth, a definition of "plainly audible" was provided within the regulation or in other policy documents controlling the enforcement of such a regulation, thus preventing elastic interpretations or ad hoc prosecutions. While helpful for parties regulated and regulating, however, the lack of a definition of "plainly audible" is not necessarily fatal to such a regulation, where other language in the regulation will enable a court to imply a reasonable person standard. The reasonable person standard, though not mathematically precise like a performance standard, has nevertheless been identified by courts as an objective standard which gives fair notice of prohibited conduct, thus providing an interpretation courts may rely upon to sustain such regulation in a way that is not impermissibly vague.

Going forward, it bears noting that this challenge is unlikely to prove a successful means for striking down plainly audible noise regulations, for two reasons. As a general rule, local government ordinances are liberally construed in favor of the local government and are presumed valid. Thus, where a definition of plainly audible is provided in the regulation itself or supplemental regulations, courts will defer to that definition, and make every effort to find that the definition is reasonably clear and workable within the greater context and intent of the

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A.2d 874 (Pa.Super.Ct.2005) (25 feet); *Moore v. City of Montgomery,* 720 So.2d 1030 (Ala.Crim.App.1998) (5 feet).

[18] Section 316.3045, Florida Statutes reads:

316.3045 Operation of radios or other mechanical soundmaking devices or instruments in vehicles; exemptions.—

(1) It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify the sound produced by a radio, tape player, or other mechanical soundmaking device or instrument from within the motor vehicle so that the sound is:

(a) Plainly audible at a distance of 25 feet or more from the motor vehicle; or

(b) Louder than necessary for the convenient hearing by persons inside the vehicle in areas adjoining churches, schools, or hospitals.

(3) The provisions of this section do not apply to motor vehicles used for business or political purposes, which in the normal course of conducting such business use soundmaking devices. The provisions of this subsection shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from regulating the time and manner in which such business may be operated.

[19] See *Montgomery v. State of Florida,* 69 So.3d 1023 at 1029 (Fla. 5th DCA 2011).

[20] *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993).

ordinance. Because of the court's tradition of deference in the presence of a definition, drafters may shield a regulation from vulnerability on this point by assuring that a definition is provided in a regulation. Second, the more often a plainly audible standard is examined by courts in the same jurisdiction or persuasive geographical area, the less discretion the court has to deviate from its previous conclusions and controlling precedent. Thus, if upon an early examination of the plainly audible standard a court finds it to be reasonably clear or unlikely to allow arbitrary or discriminatory enforcement, and upon a subsequent examination finds that either or both of those findings was upheld in a previous case, it will often defer to the prior decision. Because there are only two elements of the vagueness test, the arguments that can be raised in this context are limited. Once a court finds that the standard puts reasonable people on fair notice of the prohibited conduct, and also finds that the regulation does not lend itself to arbitrary or discriminatory enforcement, the analysis is over. That appears to be the case for "void for vagueness" challenges of the plainly audible standard. While as-applied challenges could still arise, the outcomes of facial challenges, have, on this point, been firmly established.

4.3 Plainly Audible Standards which are Content Neutral may reasonably impose time, place and manner restrictions on amplified sounds

The United States Supreme Court has provided pivotal guidance in terms of drafting noise regulations and the shaping of jurisprudence on the constitutional validity of such regulations. In ruling on a New York City case the Supreme Court declared that: "To withstand constitutional scrutiny, government restrictions must be (1) content neutral, in that they target some quality other than substantive expression; (2) narrowly tailored to serve a significant governmental interest; and (3) permit alternative channels for expression."[21]

4.3.1 Plainly Audible Standards are Content Neutral

Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulation speech."[22] Reviewed in isolation from other standards contained in noise regulations, "plainly audible" standards nearly always pass the content neutrality test, as the central feature of a "plainly audible" standard is its obvious focus on sound intensity rather than the message or type of sound heard. "Plainly audible" regulations become vulnerable, however, when they carve out specific exceptions for particular messages or sources of sound. This is not to say that exemptions are fatal—only that the drafter must consider them with caution.

If the exemptions are content-based, the entire regulation is presumed invalid unless the government can demonstrate the regulation is necessary to serve a compelling (not merely significant) state interest and is precisely drawn to achieve that end.[23] The courts do not appear to have established a clear test for determining whether or when the government interest is compelling, though it appears the concept is meant to apply to something necessary or crucial rather than something desired or preferred. Courts have upheld plainly audible standards that create exemptions for sources emanating from traditional public fora such as schools and public property. Public forums are those places "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly,

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[21] *Ward v. Rock Against Racism,* 109 S.Ct. 2746 (1989).
[22] *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984).
[23] *People v. Jones,* 188 Ill.2d 352 (1999).

communicating thoughts between citizens, and discussing public questions.'"[24] Courts upholding standards containing such exemptions generally find that exempting public fora from an ordinance's application clearly serves a significant governmental interest and is consistent with long-standing First Amendment jurisprudence.[25]

That said, courts have struck "plainly audible" standards exempting political and business vehicles,[26] and "plainly audible" standards exempting vehicles engaged in advertising.[27] These cases generally rely on an instruction found in a Supreme Court case regarding free speech which states that "[a] prohibition against the use of sound trucks emitting 'loud and raucous' noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising."[28]

Examining those cases where exemptions proved fatal *in toto,* it is noteworthy that the fatal flaw in those ordinances is not the presence of a regulatory exemption, but rather the governments' apparent interest in using those regulations to protect commercial speech to a greater degree than noncommercial speech—an action which is contrary traditional jurisprudence that has typically assigned commercial speech a "subordinate position" in the scale of First Amendment values.[29]

4.3.2 Plainly Audible Standards are Narrowly Tailored to Serve a Significant Government Interest

Turning to the significant government interest element of this test, there appears to be little or no question that government has a significant interest in protecting citizens from unwelcome or excessive noise. A speech-restrictive regulation will satisfy this requirement so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation."[30] Great deference is traditionally given to the governing body on this point in most First Amendment law, though it seems that the Supreme Court's endorsement in *Ward* has made this a point that often appears to be judicially assumed by most courts rather than one that needs to be demonstratively established in every case by the governing body. Despite the apparent ease with which this point can be met, drafters are nonetheless wise to include a statement of that government's intent for the regulation(e.g., Basis and Background, Declaration of Findings and Policy, Preamble, etc.), as such text also serves to reinforce the point in the event of a regulatory challenge.

Importantly for the "narrowly tailored" part of this test, the regulation need not be the least restrictive means of achieving the government's interest. "When a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."[31] While a local government has the burden of proof to show that alternative avenues exist, the burden is met upon the submission of any alternative avenues.

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[24] *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), citing *Hague v. CIO,* 460 U.S. 37 *(1939)*.
[25] *Niles v. Leonard*, 2010 WL 5550234 (Ohio 2010); *See also People v. Arguello*, 327 Ill.App.3d 984 (2002).
[26] *Daley v. City of Sarasota,* 752 So.2d 124 (Fla. 2nd DCA 2000); *State of Florida v. Catalano,* 60 So.2d 1139 (Fla.2nd DCA 2011); *Montgomery v. State of Florida,* 69 So.3d 1023 (Fla. 5th DCA 2011).
[27] *People v. Jones,* 188 Ill.2d 352 (1999).
[28] *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).
[29] *U.S. v. Edge Broad. Co.,* 509 U.S. 418, 430, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).
[30] *Ward v. Rock Against Racism,* 109 S.Ct. 2746 (1989).
[31] *Costello v. Burlington,* citing *Hill v. Colorado,* 530 U.S. 703, 726 (2000).

4.3.3 Plainly Audible Standards Permit Amply Alternative Channels of Communication

Again, plainly audible standards nearly always pass this test, as they generally do not impose a total ban on the use of amplified sound devices—they only restrict the intensity at which these devices may operate. According to the Supreme Court in *Ward,* the fact "that the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate."[32] As courts also tend to observe, those remaining avenues often involve the speech or expression which does not require amplified sound. Summed up in the words of a fairly recent New York City case, "the requirement that ample alternative channels exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand; indeed, were we to interpret the requirement in this way, no alternative channels could ever be deemed ample."[33]

5 PLAINLY AUDIBLE PROVISION AS A SUBSTITUTE FOR A PERFORMANCE PROVISION IN NEW JERSEY

In the case where a jurisdiction is precluded from employing a performance standard, a "plainly audible" standard may be substituted. In January 2012, S-2850 was signed into New Jersey law as P.L. 2011 c. 198. The law states that "It shall not be a violation of the "Noise Control Act of 1971." P.L. 1971, c.418 (C.13:1G-1 et seq.), or any rule or regulation established pursuant thereto, for a person to operate (1) a beach bar, existing and operating as of August 31, 2011, during normal business hours, as defined by the department [New Jersey Department of Environmental Protection (NJDEP)], between May 15 and October 15...".

The state noise code (N.J.A.C. 7:29) was drafted and adopted pursuant to NJSA13:1G-4 *Codes, rules and regulations; contents; promulgation; enforcement.* Authority to enforce the state code has been delegated to county Departments of Health. Local jurisdictions may adopt a performance code, containing specific decibel-denominated sound level limits, pursuant to 13:1G-21. *Validity of existing civil or criminal remedies; validity of ordinances or resolutions stricter than this act:*

> No existing civil or criminal remedy now or hereafter available to any person shall be superseded by this act or any code, rules, regulations or orders promulgated pursuant thereto. No ordinances or resolutions of any governing body of a municipality or county or board of health which establish *specific standards for the level or duration of community noise* more stringent than this act or any code, rules, regulations or orders promulgated pursuant thereto shall be superseded. Nothing in this act or in any code, rules, regulations or orders promulgated pursuant thereto shall preclude the right of any governing body of a municipality or county board of health, subject to the approval of the department, to adopt ordinances, resolutions or regulations which establish specific standards for the level or duration of community noise more stringent than this act or any code, rules or regulations promulgated pursuant thereto.

The NJDEP has consistently maintained the position that their authority to review and approve local ordinances does not extend to nuisance codes, which are not adopted pursuant to

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[32] *Ward v. Rock Against Racism,* 109 S.Ct. 2746 (1989).
[33] *Masatrovincenzo v. City of New York,* 435 F.3d 78, 101 (2d. Cir. 2006).

N.J.S.A.13:1G-1 et seq., as they do not establish "specific standards for the level or duration of community noise" (i.e., are not decibel-denominated). This has extended to "plainly audible" standards as well.

In *State of New Jersey v. Clarksburg Inn*[34], the Superior Court of New Jersey upheld a challenge to a "plainly audible" provision noting that: "The governing body of every municipality may make, amend, repeal and enforce ordinances to preserve the public peace and order and to prevent disturbing noise, N.J.S.A. 40:48-1. In addition, any municipality may make, amend, repeal and enforce ordinances it deems necessary and proper for the good government, order and protection of persons and property and the preservation of the public health, safety and welfare of the municipality and its inhabitants, N.J.S.A. 40:48-2. " Thus, the court found that the authority to adopt a local nuisance code, specifically one containing a "plainly audible" provision, was found in N.J.S.A. 40:48, not N.J.S.A. 13:1G.

The Court specifically rejected as unpersuasive the argument that "the vague language in the Ordinance should be replaced with objective criteria for enforcement based upon sound decibel levels," and the fact that "the New Jersey Noise Control Act regulate(s) noise based upon decibel levels." "It is not this court's role to require the choice of one method over another when as here the present language in the Ordinance is neither vague nor ambiguous and reasonably notifies the public of the conduct it proscribes."

Local municipalities still desiring to protect citizens' health, welfare, and peaceable enjoyment of their private property may adopt a "plainly audible" provision, while the courts decide on the inevitable challenges to the P.L. 2011 c. 198 for the favored-class competitive advantages it confers on (as yet undefined) beach bars, and the unequal protection challenges from private residents still subject to noise codes from which bars are exempt.

6 CONCLUSION

As stated by the United States Supreme Court: "Condemned to the use of words, we can never expect mathematical certainty from our language."[35] And in some jurisdictions too, it may seem that no amount of language precision can predict with certainty the constitutional muster of a noise regulation. However, not unlike the nuisance ordinance which was the subject of the Supreme Court's statement referenced above, the plainly audible standard is marked both by flexibility and reasonable breadth and the reasonable precision that is the hallmark of performance based standard as well.

The plainly audible standard has been held to be valid in courts at every level in the United States. It is a reasonable, common sense, objective standard with which to regulate disturbing noise. Local governments across the country recognize the ease of enforcement of a plainly audible provision, and the fact that it is an efficient and effective tool in a noise control program.

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[34] *State of New Jersey v. Clarksburg Inn.,* 375 N.J. Super. 624 (2005).

[35] *Grayned v. City of Rockford,* 408 U.S. 104 (1972).