IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC11-1166

THE STATE OF FLORIDA,

Appellant,

vs.

RICHARD CATALANO and
ALEXANDER SCHERMERHORN,

Appellees,

On Review from the Second District Court of Appeal,
Consolidated Case Nos. 2D10-973 & 2D10-974

INITIAL BRIEF OF THE STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Noise is an increasingly serious problem in modern society, so much so that federal, state and local authorities nationwide have adopted general noise control laws as well as specific ones directed at particular contexts that pose unique public safety issues. This case falls in the latter category. It involves a 1990 state traffic control law that addresses the specific problem of loud and distracting noise generated by stereos and other sound-making devices located *inside* motor vehicles that are operated on Florida's streets and highways. Ch. 90-256, Laws of Fla. Noise produced within a vehicle that is so loud *outside* the vehicle that it is "plainly audible at a distance of 25 feet or more from the motor vehicle" is prohibited, and subject to a noncriminal traffic infraction punishable as a nonmoving violation. *See* § 316.0345, Fla. Stat. (2010) [Ex. 1].[1] As the 1990 law required, specific standards were adopted in the rules of the Department of Highway Safety and Motor Vehicles for defining "plainly audible" and "how sound should be measured by law enforcement personnel who enforce" the law. § 316.0345(4), Fla. Stat.

Twenty years of enforcement have occurred under the statute; two Florida appellate courts have upheld it in the face of constitutional challenges. Indeed, state

[1] Because the record index is not yet available, citations are made to exhibits in the attached Appendix that provide record excerpts. For the Court's convenience, the Appendix indicates the record location of these exhibits.

and federal courts addressing the constitutionality of "plainly audible" and similarly worded noise standards have upheld them. The Second District, however, has held that the "plainly audible" standard in section 316.3045(1) – one that is buttressed by additional guidelines in a statutorily required rule – is unconstitutionally vague, invites arbitrary enforcement, and is overbroad. [Ex. 2] It also concluded that the law's exemption in section 316.3045(3), which relates to motor vehicles "used for business or political purposes" (an exemption that does not apply to the private motor vehicles in this case), transforms the entire law into an unconstitutional content-based restriction that fails strict scrutiny thereby justifying the invalidation of section 316.3045(1) (versus striking only the challenged business/political exemption in section 316.3045(3)). Id. Review is sought to establish that (a) the statutory "plainly audible" standard in section 316.3045(1) is facially constitutional; and (b) the "business/political" exception in section 316.3045(3) is permissible, but even if not, it should be invalidated – not the entire motor vehicle noise law.

Factual and Procedural Background

Richard Catalano and Alexander Schermerhorn were cited by law enforcement officers in separate incidents in Pinellas County, Florida, for violating the noise standards of section 316.3045(1), Florida Statutes. [Ex. 3] Both filed not guilty pleas and moved to dismiss their citations, arguing that section 316.3045 is unconstitutional. [Exs. 4 & 5 at 2] The county court denied their respective motions

based on the Fifth District's decision in Davis v. State, 710 So. 2d 635 (Fla. 5th DCA 1998), which "specifically found § 316.3045 Fla. Stat., to be constitutional" in response to virtually identical arguments. [Exs. 6 & 7] Thereafter, Catalano and Schermerhorn changed their pleas to nolo contendere, reserving the right to appeal the constitutionality of section 316.3045. [Exs. 4 & 5 at 2] The county court accepted their pleas and withheld adjudication. Id. Each then appealed to the circuit court, arguing that section 316.3045 is unconstitutionally vague, invites arbitrary enforcement, and impinges on their free speech rights. Id.

Entering virtually identical opinions in both cases, a three-judge panel of the circuit court invalidated section 316.3045 on its face. [Exs. 4 & 5 at 5] The circuit court declined to follow Davis (in which the Fifth District specifically upheld section 316.3045); instead, it relied on the Second District's decision in Easy Way of Lee County, Inc. v. Lee County, 674 So. 2d 863 (Fla. 2d DCA 1996), which involved a nightclub's challenge to a county's general noise ordinance (one whose "plainly audible" standard materially differs from that in section 316.3045(1)). [Exs. 4 & 5 at 5] It held that section 316.3045(1) failed to "provide adequate notice to persons of common understanding concerning the behavior prohibited and the specific intent required; it must provide citizens, police officers, and the courts alike with sufficient guidelines to prevent arbitrary enforcement." Id. (quoting Easy Way). The circuit court found that Easy Way's different context – involving a

general county noise ordinance arbitrarily applied to a nightclub versus the traffic safety context in this case – made no difference to its analysis. Id. at 4.

The State filed a petition for certiorari in the Second District, arguing that the circuit court departed from the essential requirements of law because (1) section 316.3045(1) and its administrative rule establish a "plainly audible" standard is not vague, overbroad, inviting of arbitrary enforcement, or content-based; and (2) the circuit court failed to follow district opinions that upheld the constitutionality of section 316.3045(1) against similar challenges. Davis v. State, 710 So. 2d 635 (Fla. 5th DCA 1998); *see also* Heard v. State, 949 So. 2d 308 (Fla. 1st DCA 2007); Rogers v. State, 753 So. 2d 773 (Fla. 5th DCA 2000).

The State noted that federal and state courts had upheld "plainly audible" and distance standards similar to those in section 316.3045(1) against vagueness and Free Speech challenges, including the Eleventh Circuit Court of Appeals, the Georgia Supreme Court, and other state courts. [Pet. 10-18] The uniformity of these precedents, the state pointed out, is consistent with the United States Supreme Court's allowance for "flexibility and reasonable breadth, rather than meticulous specificity" in this area of law. Id. at 15 (citing Grayned v. Rockford, 408 U.S. 104, 110 (1972)). It also noted that section 316.3045(1) is not a content-based restriction because, as the Fifth District noted in Davis, 710 So. 2d at 636, "[the law] permits one to listen to anything he or she wishes so long as it cannot be heard

at the prohibited distance." Id. at 15. Further, the overbreadth doctrine is inapplicable because section 316.3045 does not reach a *substantial* number of impermissible applications (the exceptions) relative to the magnitude of the law's plainly legitimate applications (such as those at issue). Id. at 17.

A panel of the Second District rejected all of the State's arguments relying in large measure upon its decision in Easy Way. [Ex. 2 at 7 ("because both [cases] dealt with the issue of whether the term 'plainly audible' is constitutional, we hold that the circuit court did not depart from the essential requirements of law in applying … Easy Way")] Contrary to other courts, the Second District viewed "plainly audible" to be a "subjective term on its face" and "vague"; it did not evaluate section 316.3045(1)'s unique "plainly audible" standard on its own terms or apply the legal tests of vagueness, overbreadth, or arbitrary enforcement directly to the state statute itself. Id.

In addition, two panel judges held that section 316.3045 is an unconstitutional content-based restriction. Id. at 8-13 (Judge Kelly did not join this part of the opinion). They viewed section 316.3045 to be constitutionally deficient because it contains an exemption in subsection 3 that leaves noise regulation to local authorities for vehicles used for business (e.g., ice-cream trucks) and political purposes that use sound-making devices in the "normal course of conducting such businesses." Id. The court did not discuss whether section 316.3045(3) could be

severed to preserve section 316.3045(1)'s more general applications to the vast majority of motor vehicles on Florida's roadways. Id.

Though it struck down the statute as unconstitutional and created conflict with other district courts, it also certified the following question of great public importance for this Court's consideration:

> IS THE "PLAINLY AUDIBLE" LANGUAGE IN SECTION 316.3045(1)(a), FLORIDA STATUTES, UNCONSTITUTIONALLY VAGUE, OVERBROAD, ARBITRARILY ENFORCEABLE, OR IMPINGING ON FREE SPEECH RIGHTS?

Id. at 7-8. It did not certify a question as to the constitutionality of the commercial/political use exemption in 316.3045(3). Id. On June 10, 2011, the State timely filed a notice of appeal, or, in the alternative, notice to invoke this Court's discretionary jurisdiction based on the certified question.

SUMMARY OF THE ARGUMENT

In 1990, the State faced a problem: excessive and distracting noise levels from stereos and other sound-making devices inside of motor vehicles that were so loud they posed safety concerns to motorists. In response, it enacted section 316.3045(1), Florida Statutes, which set forth a uniform, content-neutral standard for curtailing the growing "blaring stereo" problem: sound that is "clearly audible" at a specific distance from the motor vehicle is prohibited (currently 25 feet). The law required the adoption of an administrative rule to provide additional guidance on the "plainly audible" standard including "how sound should be measured" by the law enforcement officers charged with enforcing the law.

Over the past two decades, section 316.3045(1) has proven to be a workable standard that survived challenges to its constitutionality in two district courts of appeal. The Second District, however, has concluded erroneously that section 316.3045(1) and its statutorily-required administrative rule are unconstitutionally vague and overbroad, and invite arbitrary enforcement. Its decision is seriously flawed and overly rigid. The United States Supreme Court has held that, in the context of noise regulations, "flexibility and reasonable breadth, rather than meticulous specificity" is permitted. Grayned v. Rockford, 408 U.S. 104, 110 (1972). Indeed, it has upheld vagueness and arbitrariness challenges to a "loud and raucous" standard, Kovacs v. Cooper, 336 U.S. 77 (1949), and a "disturbs or tends

to disturb the peace or good order" standard, Grayned, 408 U.S. at 109, both having more flexible and potentially indeterminate language than the "plainly audible" at 25 feet standard in section 316.3045(1) and its administrative rule. Based on Kovacs and Grayned alone, the Second District's analysis cannot stand.

Buttressing this conclusion is that courts around the country, including the Eleventh Circuit and other Florida appellate courts, have upheld "plainly audible" and similar standards under identical challenges. Indeed, the Second District's decision below, and its Easy Way decision upon which it relies, both place conclusive weight on the analysis of Reeves v. McConn, 631 F.2d 377, 386 (5th Cir. 1980), which *upheld* an ordinance that prohibited noise that was "unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility." The Second District's conclusion that the more definitive "plainly audible" at 25 feet standard of section 316.3045(1), as bolstered by guidance from its statutorily-required administrative rule, is vaguer and creates more potential for arbitrary enforcement than the "loud and raucous," "disturbs or tends to disturb the peace or good order," and "unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility" standards repeatedly approved by courts is plainly wrong as a matter of logical and constitutional analysis. Section 316.3045(1) should be facially upheld – it is neither unconstitutionally vague, overbroad, or subject to the type of arbitrary enforcement that courts condemn.

Finally, the Second District erred in concluding that the exception in section 316.3045(3) for vehicles outfitted to project sound in the normal course of business for commercial or political purposes is a content-based restriction that demands strict scrutiny analysis. Nothing in section 316.3045(3) controls the sound content from these vehicles and the state law does not exempt these vehicles (and leave them to local regulation) because it prefers their message. Instead, because this class of vehicles does not pose the same state-level intrusion and safety problem, their regulation has been left to city and county officials, who have long regulated them and are familiar with these vehicles' unique noise issues. Courts have upheld exceptions where they are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. Section 316.3045(3) meets these standards. But, even if subsection 3 were to fail this test and be deemed unconstitutional, it is the exemption itself that must fail. Dep't of Revenue v. Magazine Publishers of Am., Inc., 604 So. 2d 459, 464 (Fla. 1992).

For all these reasons, the Second District's holding that section 316.3045(1) is unconstitutional should be reversed. Its holding that the exemption in section 316.3045(3) is unconstitutional should likewise be reversed; alternatively, if the exemption in section 316.3045(3) is deemed unconstitutional, it should be severed and stricken, leaving section 316.3045(1) intact.

ARGUMENT[2]

Section 316.3045(1) addresses a serious nationwide problem that afflicts essentially every state and every local community: noise pollution. Its scope, however, is limited to a specific context where excessive noise is problematic and poses public safety problems: noise from sound-making devices, such as stereos, located *inside* motor vehicles that can be heard at a distance *outside* the motor vehicles. Virtually every Floridian has experienced the jolting noise and vibration from a nearby motorist's stereo. Indeed, disruptive noise on Florida's roadways – and its effect on others – is commonly understood as a serious hazard. This Court's own precedents recognize this fact. *See, e.g.,* State ex rel. Nicholas v. Headley, 48 So. 2d 80, 82 (Fla. 1950) ("loud noises emanating from the amplifier constituted a traffic hazard endangering the safety of motorists operating upon the streets. Moreover, these noises were such as to distract the attention of motorists upon such thoroughfare.") (citing Kovacs; upholding city ordinance prohibiting loud speakers on city streets).

To address this "blaring stereo" problem, states and local governments enacted statutes and ordinances over the past few decades that focus upon either a

[2] **Standard of Review**. Whether a statute is constitutional is a question of law subject to *de novo* review. Fla. Dep't of Rev. v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005). Courts must presume the constitutionality of a statute and preserve its validity, if possible. Id.

reasonableness standard (e.g., noise is "plainly audible" at a specified distance) or a technical decibel standard (e.g., decibel level specified for certain activities, time of day, etc.). In 1990, Florida, like most jurisdictions, chose to set a statewide reasonableness standard that had sufficient guidance to ensure that enforcement would be uniform in application. Like other jurisdictions, Florida chose the "plainly audible" standard, a phrase that links a commonly-understood concept ("plainly audible") to an objective distance such as 25 feet.

Florida's motor vehicle sound law goes beyond simply announcing a "plainly audible" standard, which by itself would be constitutionally supportable (as discussed below). Instead, the legislature in 1990 required that the Department of Highway Safety and Motor Vehicle adopt rules that provide further guidance in defining the "plainly audible" standard including "how sound should be measured" by the police officers themselves, who are charged with enforcing the law. § 316.0345(4), Fla. Stat. A rule was adopted in December 1990 that remains virtually identical today.[3] The rule does two things. First, it defines "plainly audible" by adding the requirement, among others, that the sound from a motor vehicle must be "clearly heard outside the vehicle by a person using his normal hearing faculties, at a distance of 25 feet or more from the motor vehicle." Fla.

[3] The rule was amended to account for Chapter 2005-164, Laws of Florida, which changed the applicable distance in section 316.3045(1) from 100 to 25 feet.

Admin. Code R. 15B-13.001(2) [Ex. 8]. Plainly audible would not include, for example, the use of hypersensitive detection devices; instead, only the normal human auditory system is permitted.

Second, because it is *law enforcement personnel*, rather than ordinary citizens, who enforce its provisions, the rule sets operational standards to guide the officers in making determinations of what is plainly audible under particular circumstances. For example, each of the following is a standard that officers apply:

> (a) The primary means of detection shall be by means of *the officer's* ordinary auditory senses, so long as *the officer's* hearing is not enhanced by any mechanical device, such as a microphone or hearing aid.
>
> (b) *The officer* must have a direct line of sight and hearing, to the motor vehicle producing the sound so that he can readily identify the offending motor vehicle and the distance involved.
>
> (c) *The officer* need not determine the particular words or phrases being produced or the name of any song or artist producing the sound. The detection of a rhythmic bass reverberating type sound is sufficient to constitute a plainly audible sound.
>
> (d) The motor vehicle from which the sound is produced must be located upon (stopped, standing or moving) any street or highway as defined by Section 316.002(53), F.S. Parking lots and driveways are included when any part thereof is open to the public for purposes of vehicular traffic.

Fla. Admin. Code R. 15B-13.001(3)(a)-(d) (emphasis added). Each of these standards either limits the officer's discretion or eliminates an ambiguity that could exist in particular situations. For instance, the rule prohibits devices that could accentuate an officer's ability to hear (e.g., a hearing aid) and disallows

measurements where the officer either lacks a direct line of sight/hearing or cannot readily determine the distance to the motor vehicle. In addition, the rule addresses situations where motorists might claim their music was not overly loud simply because the officer could not detect the song or its lyrics.

Given its history and purpose, along with the guidance provided via the Department's administrative rule, the general prohibitions of section 316.3045(1) have been used for two decades and survived judicial scrutiny in Florida and elsewhere. As the next two sections explain, (I) section 316.3045(1)'s "plainly audible" standard is neither vague nor susceptible to the type of unmoored arbitrary enforcement that has concerned courts, nor is it overbroad; and (II) the challenged commercial/political vehicle use exception, section 316.3045(3) (which does not apply to Defendants' vehicles here) is a permissible means of deferring to the authority of local governments to regulate such uses; to the extent section 316.3045(3) is deemed unconstitutional, it should be stricken from the statute rather than invalidating the general provisions of section 316.3045(1) at issue.

I. Section 316.3045(1)'s "Plainly Audible" Standard Meets Well-Established Constitutional Standards: It is Not Vague, Susceptible to the Type of Arbitrary Enforcement the Constitution Prohibits, or Overbroad.

Courts have uniformly upheld "plainly audible" and other similarly-worded noise standards in the face of claims that they are vague and susceptible to arbitrary enforcement under free speech and due process standards. The Second District,

relying upon one of its prior cases involving a general local noise ordinance, erred in straying from these well-established precedents. The "plainly audible" standard in section 316.3045(1) has proven to be a workable, constitutional standard for two decades in Florida and elsewhere; the notion that it falls below constitutional standards is insupportable, particularly given the United States Supreme Court has upheld more flexible and adaptable standards under the First Amendment.

A. Section 316.3045(1) is neither unconstitutionally vague nor susceptible to arbitrary enforcement.

The conclusion that the "plainly audible" standard in section 316.3045(1) is facially[4] unconstitutional because it is vague and invites arbitrary enforcement cannot be squared with either the United States Supreme Court's noise-control precedents or those of other courts. Over sixty years ago, the Supreme Court upheld the constitutionality of a noise ordinance that prohibited the use of a sound generating instrument on vehicles that "emits therefrom *loud and raucous* noises" while upon streets or in public places. Kovacs v. Cooper, 336 U.S. 77, 78 (1949) (emphasis added). Kovacs, who was convicted for operating a sound truck in violation of the ordinance, claimed the "loud and raucous" standard was "so vague,

[4] Appellees' facial claim must show that the law "is impermissibly vague in all of its applications [and] in the sense that no standard of conduct is specified at all." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-95 & n.7 (1982).

obscure and indefinite as to be unenforceable," id. at 79, but the Supreme Court found the question so straightforward that it "merits only a passing reference." Id.

First, the Court noted that the words "loud and raucous" – though "abstract words" – had enough content to convey "a sufficiently accurate concept of what is forbidden." Id. The Court held the standard complied "with the requirements of definiteness and clarity" to defeat vagueness concerns. Id. at 80. This central holding of Kovacs remains unchanged over the past sixty-two years.

Second, the Court noted that local governments, which were seeking solutions to the problem of unconstrained noise at that time, were entitled to regulate noise that is objectionable or interferes with business and other activities. Id. at 81 ("Unrestrained use throughout a municipality of all sound amplifying devices would be intolerable."). It noted that although city streets "are recognized as a normal place for the exchange of ideas by speech and paper" that "does not mean the freedom [of speech] is beyond all control." Id. at 87. Instead, it was constitutionally permissible to bar the use of sound "amplified to a loud and raucous volume." Id. To do otherwise would, among other things, allow "distractions" that could be "dangerous to traffic" from such noise and place neighborhoods "at the mercy" of those who used amplified devices. Id. The Court could not "believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets." Id. Indeed, the Court viewed it "an extravagant

extension of due process" under free speech principles to say that a city could not forbid amplified sound that is "loud and raucous." Id.

Finally, the Court noted that the "loud and raucous" standard placed "no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers [a small leaflet]." Kovacs, 336 U.S. at 89. It concluded that "the need for reasonable protection in the homes and business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance." Id.

Likewise, the more definitive "plainly audible" standard in section 316.3045(1) is justified as part of a governmental effort to deal with amplified sound on streets and highways. The "plainly audible" standard (either alone or in conjunction with the guidelines in its administrative rule) provides far more clarity than the bare "loud and raucous" standard in Kovacs. On the basis of Kovacs alone, the "plainly audible" standard in section 316.3045(1) is facially constitutional.

In in its next major decision on the topic, the Supreme Court noted that every law has some degree of imprecision, but this fact does not make the law unconstitutionally vague, indefinite, or uniquely susceptible to arbitrary enforcement. At issue was the arrest and conviction of Richard Grayned for violating a city's anti-picketing and anti-noise ordinances through disruptive and noisy conduct outside a school. In its 1972 decision, the Court rejected a facial

vagueness and overbreadth challenge to the anti-noise ordinance, which made it a criminal offense for any person adjacent to a school building to make "any noise or diversion which *disturbs or tends to disturb the peace or good order*" of the school or class therein. Grayned v. Rockford, 408 U.S. 104, 107-08 (1972) (emphasis added). In upholding the highlighted language of the anti-noise ordinance as constitutionally permissible, the Court noted that, although it was a close question, the language was neither vague nor impermissibly delegated basic policy matters to "policemen, judges or juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 109.

In upholding the language against Grayned's vagueness challenge, Justice Marshall recognized the limitations of language in defining clear constitutional standards, noting that "we can never expect mathematical certainty from our language." Id. at 110 (footnotes and citations omitted). He held, for the Court, that although the "words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' … we think it is clear what the ordinance as a whole prohibits." Id. (citations omitted).

Similarly, the "plainly audible" standard of section 316.3045(1) – while having some room for flexibility and reasonable breadth – does not require guesswork given its objective standard (plainly audible at 25 feet). It is confined to the limited and legitimate purpose of curtailing excessive sound from motor

vehicles that poses the types of public harm the Court in Kovacs and Grayned both deemed wholly legitimate. Like the more broadly-worded anti-noise language in Grayned, section 316.3045(1) is not susceptible to punishing "the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement." 408 U.S. at 113. As the Supreme Court noted, as with any law "enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible." Id. at 114. Given that the "disturbs or tends to disturb the peace or good order" standard in Grayned is neither constitutionally vague nor susceptible to uniquely arbitrary enforcement, it is abundantly clear that the objective and more precisely defined "plainly audible" standard in section 316.3045(1) meets constitutional norms.

The combination of Kovacs and Grayned makes section 316.3045(1)'s facial validity apparent without further elaboration. These two commanding precedents compel the conclusion that section 316.3045(1), which applies to the run-of-the-mill blaring car stereos at issue in this case, poses no vagueness or subjective arbitrariness that concern courts.

The Second District, however, concluded as a facial matter that a person of common intelligence cannot comprehend what it means for sound to be "plainly

audible" or "clearly heard"[5] at the specified distance. In its view, section 316.3045(1)'s "plainly audible" standard is an unconstitutionally "subjective term on its face." But its conclusion is wrong for many reasons.

First, the term "plainly audible" is more definitive than other standards (discussed above) that have passed scrutiny. In addition, for decades the phrase "clearly audible" has been easily understandable by ordinary persons; courts have said so. The Eleventh Circuit considered a "plainly audible" noise standard in DA Mortgage, Inc. v. City of Miami Beach, 486 F.3d 1254 (11th Cir. 2007), holding it is "an objective standard ... [that] does not carry an inherent risk of arbitrary enforcement." Id. at 1272 (upholding Miami Beach's ordinance that prohibits sound reproduction devices that are "plainly audible at a distance of one hundred (100) feet from the … vehicle in which it is located").

The Fifth and First Districts reached the same conclusion in upholding section 316.3045(1)'s constitutionality. As the Fifth District held in 1998: "This noise code is not vague. One may not play his or her car radio so loudly that it is plainly audible to another standing 100 feet or further away." Davis, 710 So. 2d at 636. *See also* Heard v. State, 949 So. 2d 308 (Fla. 1st DCA 2007).

[5] Section 316.3045(1)'s companion administrative rule defines "plainly audible" to mean sound "that can be *clearly heard* outside the vehicle by a person using his normal hearing faculties, at a distance of 25 feet or more from the motor vehicle." Fla. Admin. Code R. 15B-13.001(2) (emphasis added) [Ex. 8].

Likewise, other state courts addressing vagueness arguments involving a "plainly audible" vehicle noise standard have rejected them. For example, the Georgia Supreme Court concluded that:

> [the argument] that a person of ordinary intelligence does not know what it means for sound to be "plainly audible" at a distance of 100 feet, … belies credibility…. We have no hesitation in declaring that a statute's use of a standard that sound is "plainly audible" at a set distance is not unconstitutionally vague.

Davis v. State, 537 S.E.2d 327, 329 (Ga. 2000); *see also* Moore v. City of Montgomery, 720 So. 2d 1030, 1032 (Ala. Crim. App. 1998); State v. Boggs, No. C-980640, 1999 WL 420108, at *3 (Ohio App. June 25, 1999); *cf.* Holland v. City of Tacoma, 954 P.2d 290, 295 (Wash. Ct. App. 1998) ("A person of ordinary intelligence knows what it means for sound to be 'audible' at more than 50 feet away.").

Ironically, a case upon which the Second District heavily relies, Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980), *upheld* a Houston noise ordinance that contains language far more flexible and potentially indeterminate than the "clearly audible" standard against vagueness and arbitrary enforcement challenges.[6] At issue was a city noise ordinance that required amplified sound to not be "*unreasonably loud, raucous, jarring, disturbing, or a nuisance* to persons within

[6] The panel below, like the panel in Easy Way, placed substantial reliance on Reeves.

the area of audibility." Id. at 386. The Fifth Circuit reversed the district court's conclusion that the ordinance was vague and allowed for arbitrary and discriminatory enforcement by officials. Id. It specifically upheld the use of the terms "unreasonably," "loud," and "raucous" (because the Supreme Court had approved them) as well as the terms "jarring" and "disturbing" "even though they fall short of providing 'mathematical certainty.'" Id. (citing Grayned). Compared to "jarring" and "disturbing" (which were upheld), the greater objectivity and enforceability of section 316.3045(1)'s "plainly audible" standard is clear. The Second District's anomalous conclusion, that section 316.3045(1) is vague and susceptible to arbitrary enforcement compared to language approved in Reeves and other cases, is both illogical and unfounded. It ignores the long-standing admonition that anti-noise laws are permitted to have "[f]lexibility and reasonable breadth, rather than meticulous specificity" in this area. Grayned, 408 U.S. at 110.[7]

[7] Also, section 316.3045(1)'s 25-foot distance standard comports with restrictions approved elsewhere. *See*, *e.g.*, United States v. Black, No. 09-20093, 2009 WL 2960468 (E.D. Mich. Sept. 11, 2009) ("plainly audible" at 10 feet); Commonwealth v. Scott, 878 A.2d 874, 878-81 (Pa. Super. Ct. 2005) (25 feet); State v. Adams, No. 02CA171, 2004 WL 1380494 (Ohio Ct. App. June 14, 2004) (50 feet); State v. Medel, 80 P.3d 1099, 1102-03 (Idaho Ct. App. 2003) (50 feet); People v. Arguello, 765 N.E.2d 98, 101-03 (Ill. App. Ct. 2002) (75 feet); Schrader v. State, No. 03-99-00780-CR, 2000 WL 1227866, at *2-*4 (Tex. Ct. App. Aug. 31, 2000) (30 feet); Holland v. City of Tacoma, 954 P.2d 290, 293-95 (Wash. Ct. App. 1998) (50 feet); Moore v. City of Montgomery, 720 So. 2d 1030, 1032-33 (Ala. Crim. App. 1998) (5 feet).

Second, section 316.3045(1)'s "plainly audible" standard is strengthened by a statutorily-required administrative rule that provides objective terms and guidelines for measuring a violation, which undermines a vagueness argument and the potential for arbitrary enforcement. Together, section 316.3045(1) and Rule 15B-13.001 provide objective standards for measuring whether sound is clearly heard at the applicable distance, allowing an alleged violator to be vindicated if the standard is not met[8] and minimizing the potential for the type of arbitrary enforcement that standard-less laws allow.

Third, the Second District placed wholesale reliance on its opinion in Easy Way to invalidate section 316.3045(1). Easy Way, whose actual holding is somewhat muddled, is easily distinguishable because it involved materially different facts and a materially different "plainly audible" noise law, one that was actually being enforced arbitrarily against a nightclub.

In Easy Way, Lee County officials repeatedly cited a nightclub for noise infractions under the "plainly audible"/50-feet standard in the county ordinance code. The ordinance, however, did not limit its enforcement to law enforcement officers (as section 316.3045(1) and its companion rule require); instead, its

[8] For instance, in one case that Appellees attached to their district court brief (State of Fla. v. Middlebrooks, Case No. 2008CT043699AXX, Order Granting Def's. Mot. to Suppress, August 6, 2009 (Fla. Palm Beach Cnty. Ct.)), the State failed to prove that music could be heard 25 feet from the vehicle. *See* Ex. 9.

"plainly audible" standard was subject to enforcement based on "any law enforcement personnel *or citizen*" who hears the potentially offending sound. 674 So. 2d at 864. The subjectivity of allowing a "citizen" (rather than a law enforcement officer) to determine what is "plainly audible" animated the conclusion that the county ordinance failed to meet constitutional standards. Id. at 866-67.

Ironically, Easy Way relied exclusively on (and block-quoted extensively from) the Fifth Circuit's decision in Reeves, a decision (as noted above) that *upheld* a city noise ordinance challenged as vague and overbroad. Contrary to the Second District's conclusion below, the point that troubled the Reeves (and Easy Way) court was *not* a "clearly audible" standard in general; instead, the concern was that the specific language in Houston's anti-noise ordinance allowing enforcement to be based on noise that was "disturbing … to persons within the area of audibility" created a "closer question" because it could amount in application to a subjective standard. 631 F.2d at 386.

Nonetheless, the court in Reeves *facially upheld* the "disturbing … to persons within the area of audibility" language of the ordinance, reversing the district court's finding that it was unconstitutionally vague. Id. at 386. It noted, however, that the ordinance, as actually applied, might become a subjective standard that allows enforcement simply when any individual finds the level of noise personally disturbing. It stated its concern as follows:

> If **actual experience** with the ordinance were to demonstrate that it represents a **subjective standard**, prohibiting a volume that *any individual* person "within the area of audibility" happens to find *personally* "disturbing," we would not hesitate to change our judgment accordingly.

Id. at 386 (italics in original; bold added). As the bolded and italicized words reflect, the specific concern animating the court in Reeves (and Easy Way) was the possibility that *in actual operation* the ordinances at issue in each of those cases potentially could allow subjective enforcement based on sound volumes that *individuals personally found disturbing* (versus sound volumes in violation of the ordinance based on more objective standards).

This same potential for actual subjective enforcement existed in the Lee County ordinance because, as written, it said that "[*a*]*ny law enforcement personnel* ***or citizen*** *who hears a sound that is plainly audible*" is to measure sound based on "*the* ***complainant's*** *ordinary auditory senses*" without a mechanical aid. Easy Way, 674 So. 2d at 864 (italics in original; bold added). As to actual subjective enforcement, the court noted that the nightclub at issue was "fifty-eight feet" from a residential community whose members had lodged numerous complaints based on their subjective characterizations of what they heard and when they heard it. Id. at 865. It also noted the nightclub was cited repeatedly even when its music could not be heard 50 feet from the club; even after the club soundproofed its walls; and even

though the club made periodic sound checks from a 50-foot radius to ensure compliance. Id. at 864-65.

This strong pattern of arbitrary enforcement against the club, grounded in large measure on the ordinance's potential for subjective enforcement based on individual complainants, underlies the ultimate holding of Easy Way. After block-quoting the "actual experience" quote from Reeves, the court concluded:

> We hold that the "plainly audible" standard in the Lee County ordinance represents exactly such a "subjective standard, prohibiting a volume that *any individual* person 'within the area of audibility' happens to find *personally* disturbing," that would have caused the *Reeves* court to strike down the remaining portion of the Houston ordinance.

Easy Way, 674 So. 2d at 867 (emphasis in original). As the court emphasized, the "any individual/personally disturbing" aspect of the language in the Lee County ordinance was the driving force behind its holding. It had nothing to do with a "plainly audible" standard generally; it had everything to do with Lee County's specific version of the standard.

In sharp contrast, section 316.3045(1) and its administrative rule together limit the "plainly audible" standard to measurement *by a law enforcement officer.* Because it lacks the language that troubled the courts in Reeves and Easy Way, no potential for subjective/arbitrary enforcement exists under section 316.3045(1).[9] In

[9] Other courts have noted this distinction. *See, e.g.*, Holland v. City of Tacoma, 954 P.2d 290, 295 (Wash. Ct. App. 1998) (noting that the "Tacoma ordinance differs (Continued …)

Easy Way, the holding and analysis hinged on actual arbitrariness resulting from language that simply does not exist in section 316.3045(1). The record here has no evidence, let alone evidence of arbitrary enforcement akin to the situation in Easy Way. Only a facial challenge has been litigated. Because the standard in section 316.3045(1) is significantly different from the subjective "any individual person … happens to find personally disturbing" standards addressed by Easy Way and the language of Reeves, and no evidence of arbitrary enforcement exists in this case, the Second District erred by applying Easy Way to strike down section 316.3045(1) on its face.

Finally, even if some theoretical circumstance existed where the "plainly audible" at 25-feet standard posed some legitimate question, the test for overbreadth is not met. Absent substantial overbreadth (addressed below), a facial challenge "must demonstrate that the law is impermissibly vague in *all* of its applications [and] in the sense that no standard of conduct is specified at all." Vill. of Hoffman Estates, 455 U.S. at 494-95 & n.7. The factual record in this facial challenge is barren, presenting no evidence of confusion about section 316.3045(1)'s applicability to the commonplace problem of blaring noise from motor vehicles

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from [the Lee County] sound ordinance in that this ordinance has a clear standard-audible more than 50 feet away from the source-and there is no subjective element such as 'unreasonably' or 'disturbing.'").

such as those in this appeal. Courts can deal separately with claims that a statute as-applied is unconstitutional; here, however, as a *facial* matter, section 316.3045(1) must be upheld even if some theoretical application might raise a constitutional issue sometime in the future.

B. Section 316.3045(1) is not overbroad.

The Second District concluded that section 316.3045(1) is unconstitutionally overbroad without saying why. It merely concluded that Easy Way applies without attempting any overbreadth analysis of its own. Section 316.3045(1) is not unconstitutionally overbroad, however, because it does not infringe upon a substantial amount of protected speech and is not impermissibly vague in all its applications. Vill. of Hoffman Estates, 455 U.S. at 494-95, 497.

Indeed, section 316.3045(1), on its face, does not infringe on any protected speech. Motorists have no established constitutional right to use excessively loud sound-making devices in their motor vehicles on state roadways that create the specific type of noise problems that section 316.3045(1) seeks to curtail. For this reason, the Supreme Court has noted that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." Vill. of Hoffman

Estates, 455 U.S. at 495. Neither Catalano nor Schermerhorn can make an overbreadth argument given that their conduct is clearly proscribed.

Additionally, as the Supreme Court has said, the invalidation of a state statute on overbreadth grounds is "strong medicine." Virginia v. Hicks, 539 U.S. 113, 120 (2003). A challenged law's application to protected speech must "be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." Id. The "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). A person claiming overbreadth bears the burden of demonstrating "from the text of the law *and from actual fact*," not hypotheticals, that substantial overbreadth exists. Virginia v. Hicks, 539 U.S. at 122 (emphasis added) (citation omitted).

Here, no showing whatsoever has been made of a "real" or substantial danger that section 316.3045(1) "will significantly compromise recognized First Amendment protections of individuals not before the Court." Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 802 (1984). The general prohibition in section 316.3045(1) is content-neutral[10] and suppresses no

[10] On its face, section 316.3045(1) neither suppresses any specific messages nor makes any content-based distinctions. As the Fifth District held, "it permits one to listen to anything he or she wishes so long as it cannot be heard at the prohibited (Continued …)

particular message; it merely curtails the level of sound blaring from motor vehicles on public streets, conduct in which no one has a protected right.

Even if some theoretical application of section 316.3045(1) arguably might infringe on free speech rights, whatever unlawful application that is conjured up is overwhelmingly outweighed by the vast legitimate scope of its restriction on the millions of motor vehicles operating on Florida's roadways. Section 316.3045(1)'s legitimate aims to reduce distractions and promote safety on the streets far outweigh whatever theoretical speech-infringing applications may exist at the margins of the statute. *See* State ex rel. Nicholas v. Headley, 48 So. 2d 80, 82 (Fla. 1950) (concluding that "loud noises emanating from the amplifier constituted a traffic hazard endangering the safety of motorists operating upon the streets") (quoting Kovacs); *cf.* Frazier v. Winn, 535 F.3d 1279, 1285 (11th Cir. 2008) (rejecting an overbreadth challenge where "Plaintiff has not persuaded us that the balance favors [potential speakers] in a *substantial* number of instances").

Given its vast legitimate scope, section 316.3045(1) is not unconstitutionally overbroad. It does not curtail free speech rights at all, much less substantially so in relation to its legitimate goal of enhancing public safety on Florida's roadways. Nor is it impermissibly vague in every possible application. No overbreadth is shown.

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distance. In other words, the statute permits one to listen to anything he or she pleases, although not as loudly as one pleases." Davis, 710 So. 2d at 636.

II. Section 316.3045(3)'s Exemption for Vehicles Used for Business/ Political Purposes, Allowing for Local Regulation of Such Uses, Is Permissible.

Section 316.3045(3),[11] which exempts vehicles used for commercial/political purposes that typically utilize sound-making devices, is designed to allow uses that historically have been permissible and generally non-intrusive subject to local regulation. Most importantly, the exemption is not intended to displace local government regulation of the time, place and manner of these uses, which have historically been the focus of city and county officials who are better positioned to balance the interests involved in regulating uses of sound-making devices on local streets and public places.

A. The section 316.3045(3) exemption is content-neutral and should be analyzed with intermediate, not strict, scrutiny.

Section 316.3045(3) is not a classic content-based law; it has nothing to do with suppressing any specific viewpoint or message. The content of sound generated by these two classes of vehicles is unrestricted. The operator of a motor

[11] Section 316.3045(3) provides that:

> 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.

vehicle may choose whatever content desired without censorship of the message. For this reason, the intermediate scrutiny standard applies. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994) ("regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, … because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.").

This test provides that content-neutral restrictions are valid if "they are narrowly tailored to serve a significant governmental interest, and … leave open ample alternative channels for communication of the information." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Here, the exception applies to two specific classes of vehicles used for defined purposes that local governments have historically regulated (including their use of sound devices).[12] The exemption is not based on an evaluation of the content of sound from the vehicles; instead, it exempts from state noise regulation two uses that are subject to local regulation. Turner Broad., 512 U.S. at 643 ("laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances

[12] *See* Kovacs, 336 U.S. at 78 (noting municipalities were "seeking actively a solution" to the local problem of excessive sound from commercial vehicles); Headley, 48 So. 2d 80 (challenge to a Miami vehicle noise ordinance by a candidate for public office).

content neutral."). The fact that commercial or political uses may in some sense benefit from section 316.3045(3), does not make it content-based.

The exemption is narrowly tailored to serve a significant governmental interest because it recognizes the importance historically of local regulation of the oftentimes unique and highly variable situations that commercial and political speech entail. A one-size-fits-all state standard for these categories of uses simply would not work at the local level; instead, courts have allowed local governments to craft noise ordinances to their unique needs and challenges (subject to constitutional standards). Section 316.3045(3) allows local regulation of these uses to develop without a potentially inflexible state standard preempting those efforts.[13]

Indeed, a number of courts have permitted noise exemptions that fall within this framework of state-local regulation. In Service Employees International Union, Local 5 v. City of Houston, 595 F.3d 588, 600 (5th Cir. 2010), for instance, the court upheld a noise ordinance's exceptions for church bells and historical

[13] *See, e.g.*, City of Jacksonville, Fla., Code, Title VI, § 250.602 (setting noise level standards and prohibiting amplified noise at certain times and when a vehicle is stopped); Miami, Fla. Code, Part II, § 39-38(10) (prohibiting soundmaking devices at specific times (except for special events) and at specific noise levels upon penalty of removal of the device or criminal sanction); Pinellas Cnty., Fla., Code, Part II, § 58-445(2) (prohibiting "unreasonably loud and raucous" amplified sound from vehicles); Riviera Beach, Fla., Code, Part II, § 10-266(h) (prohibiting amplified music "except when used in the operation of an ice-cream truck"); St. Petersburg, Fla., Code, Part II, § 11-53 (1) (limiting the hours in which sounds may be emitted from business vehicles).

reenactments as being "reasonable distinctions among categories in the level of disruption caused by noise." Similarly, in Stokes v. City of Madison, 930 F.2d 1163, 1171-72 (7th Cir. 1991), the court upheld an ordinance that required most noisemakers to seek permission from the city, but exempted churches and others. Like the Fifth Circuit, the Seventh Circuit rejected the argument that these were content-based exemptions, but instead recognized that the exempted categories did not present the same degree of noise intrusiveness or require screening of the message itself. *See also* Turley v. Guiliani, 86 F. Supp. 2d 291, 299 n.7 (S.D.N.Y. 2000) (concluding that New York had drawn a lawful, non content-based distinction in permitting performers at corporate-sponsored events to play at higher volumes); Int'l Action Ctr. v. City of New York, 587 F.3d 521, 526 (2d Cir. 2009) (upholding a rule despite its effect on some messages because no evidence suggested an attempt by the city to restrict speech).

Similar to these federal cases, section 316.3045(3) exempts only a limited class of vehicles, allowing section 316.3045(1) to apply to the vast majority of vehicles statewide, giving Florida's 14 million licensed drivers a single statewide standard (versus subjecting them to a patchwork of different local noise ordinances). Conversely, the sound from small numbers of businesses and political sound trucks that tend to operate (and be regulated) locally as to their limited audience/customers poses nowhere near the same statewide noise and public safety

issue.[14] Instead, regulation of these unique vehicle uses is left to local officials who are better acquainted with the dynamics of local noise concerns and dangers.

The Legislature's decision not to impose a statewide prophylactic noise law in favor of one that more effectively advances a workable system of state-local noise regulations as to these uses is permissible. Neither the Constitution nor common sense demand that if a state law exempts *some* noise (leaving it to local regulation) that it must exempt *all* noise; government is not obligated to use simplistic, binary regulations in regulating all loud noise. *See* Ward, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of speech is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."). States are entitled to tailor their noise laws to the specific problems they face subject to balancing of constitutional interests.

The Illinois decision in People v. Jones, 721 N.E.2d 546 (Ill. 1999), cited in the Second District's opinion, does not control. In that case, the court struck down a statute because it discriminated in favor of amplified advertising, a single category

[14] Consider, for instance, that political sound trucks would tend to operate during discrete times or seasons of public debate (legislative sessions), during daylight hours, and in places where legislators and politically involved persons congregate (e.g., capital cities, public buildings, or town squares). Likewise, businesses, like ice-cream trucks, tend to limit operations within a narrow season of the year (hot months); within a narrow band of time each day (afternoons when schoolchildren play at home); within a limited context (residential streets where children can more
(Continued …)

of speech. Id. at 550. Section 316.3045(3) does not intend to wholly exempt commercial or political uses; instead, it leaves these categories of vehicles to the regulation of local authorities. *See also, e.g.*, Fla. H.R. Comm. on Highway Safety & Construction, HB 1383 (1990) Staff Analysis 2 (June 6, 1990) (noting that local restrictions "usually require arresting the offender for violations"). Thus, unlike People v. Jones, section 316.3045(3) is not intended to favor commercial speech, but simply leaves it to local regulation.

Also, section 316.3045(3) is different from Illinois' law because section 316.3045 operates not against speech itself, but as to an identified class of vehicles: "vehicles used for business or political purposes, which in the normal course … use soundmaking devices." § 316.3045(3), Fla. Stat. These categories of uses are not exempted at the state level on account of their message. Conversely, Illinois' law operated against vehicles "engaged in advertising" such that an officer could not simply evaluate the vehicle, but had to evaluate the content of speech to determine a violation. Glendale Assocs., Ltd. v. N.L.R.B., 347 F.3d 1145, 1155-56 (9th Cir. 2003) (finding a content-based restriction where the speech itself had to be examined to determine its lawfulness).

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safely buy ice cream); and go silent in congested traffic/busy highways where sales are not possible.

In addition, the Second District's reference to City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993), does not show Florida's law to be content-based. The Court in Discovery Network said merely that noise restrictions must apply equally regardless of content – whether music, political speech, or advertising. Here, Florida's statute makes no content-based distinctions. Section 316.3045(1) prohibits noise regardless of content; and, in subsection (3), two classes of vehicles are left to local regulation for reasons other than content.

Finally, as with the other facial arguments made in this case, no evidence exists that the narrow class of exempted vehicles poses the same widespread intrusion and safety issues as allowing all vehicles on Florida's roadways generally to blast noise at unrestricted volumes. As a bare facial matter, for all the reasons described above, section 316.3045(3) should be upheld because it is not a content-based restriction on speech.

B. Even if the exemption in section 316.3045(3) is deemed facially unconstitutional, it – rather than section 316.3045(1) – should be invalidated.

Even if the commercial/political use exemption in section 316.3045(3) is deemed facially unconstitutional, it should be invalidated, not section 316.3045(1). Florida law favors severance of the invalid portions of a law versus wholesale invalidation. As this Court has noted, "[s]everability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of

legislative enactments where it is possible to strike only the unconstitutional portions." Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999) (citing State v. Calhoun County, 170 So. 883, 886 (Fla. 1936)). The doctrine of severability is "derived from the respect of the judiciary for the separation of powers, and is 'designed to show great deference to the legislative prerogative to enact laws.'" Id. (quoting Schmitt v. State, 590 So. 2d 404, 415 (Fla. 1991)).

In this case, the Court need not invalidate the general noise prohibition in section 316.3045(1), which is a content-neutral restriction that is neither vague, overbroad, nor susceptible to arbitrary enforcement. Instead, the more limited remedy of striking the exception in section 316.3045(3) would sufficiently resolve the content-neutrality issue. This Court employed such a remedy, for instance, in a free speech challenge to the constitutionality of a tax on sales of magazines. The challenged law taxed magazines, but exempted newspapers, which this Court found to be a content-based exemption. In that case, this Court chose to strike the exemption for newspapers rather than to wholly strike down Florida's magazine tax regime. Dep't of Revenue v. Magazine Publishers of Am., Inc., 604 So. 2d 459, 464 (Fla. 1992). A similar limited remedy is warranted here if this Court finds section 316.3045(3) to be unconstitutional on its face. Indeed, even the Second District in Easy Way severed only that portion of the Lee County ordinance it found offensive, stating "the remainder of the ordinance is determined to be severable and valid

exercise of police power by Lee County." 674 So. 2d at 863. Because section 316.3045(1) is a valid exercise of the state's police powers to regulate noise on state roadways, it should be preserved if section 316.3045(3) is deemed unsalveagable.

CONCLUSION

For the foregoing reasons, the State of Florida respectfully requests that this Court uphold section 316.3045, Florida Statutes, in its entirety, and remand to the trial court for further proceedings consistent with its decision; alternatively, if the Court determines that the commercial/political exemption in section 316.3045(3) is facially unconstitutional, it should sever section 316.3045(3) leaving section 316.3045(1) operational.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE/SERVICE

I certify that this brief is prepared in Times New Roman 14-point font consistent with Florida Rule of Appellate Procedure 9.210, and that a true copy of the foregoing has been furnished this 22nd day of July, 2011, by U.S. Mail to:

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