SUPREME COURT OF FLORIDA

CASE NO. SC11-1166

STATE OF FLORIDA

Appellant,

v.

RICHARD T. CATALANO, et al.,

Appellees.

Lower Tribunal No. 2D10-973

BRIEF *AMICUS CURIE* OF AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF APPELLEES

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Florida is the Florida affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with nearly 400,000 members, approximately 18,000 in the State of Florida, dedicated to defending the Bill of Rights embodied in the United States Constitution and the declaration of rights embodied in the Florida Constitution. It has litigated hundreds of cases in Florida's state and federal courts, both as a plaintiff, or on behalf of a plaintiff, and as *amicus curiae*. The ACLU is frequently involved in litigation involving issues of constitutional protections and has regularly been permitted to file *amicus* briefs in Florida appellate courts. The ACLU assisted in litigating a similar constitutional challenge to a noise ordinance in *Cannon v. City of Sarasota*, No. 8:09-cv-739, 2010 WL 962934 (M.D. Fla. Mar. 16, 2010), and in this case at the Second District Court of Appeal. It is respectfully submitted that the proposed *Amicus*' analysis of the important constitutional questions raised by this appeal may assist this Court in resolving the issues presented.

ARGUMENT

I. SECTION 316.3045, FLORIDA STATUTES IS UNCONSITUTIONAL BECAUSE ITS "PLAINLY AUDIBLE" STANDARD IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Section 316.3045 makes it 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 sound making device or instrument from within the motor vehicle so that the sound is plainly audible at a distance of 25 feet or more from the motor vehicle." Fla. Stat. 316.3045(1)(a).[1] Two lower courts analyzed the statute and found it constitutionally deficient. For the reasons set forth below, *Amicus* believes that the statute fails to satisfy the minimal fair notice requirements embodied in the Due Process Clause.

A. Vagueness

The legislature delegated authority to the Department of Highway Safety and Motor Vehicles (DHSMV) to promulgate rules defining "plainly audible" and to establish standards "regarding how sound should be measured by law enforcement personnel who enforce the provisions of this section." Section 316.3045(4), Fla. Stat. In response, DHSMV crafted Rule 15B-13.001, Florida

[1] This was not always the case. The 2005 amendment wrought by s. 9, ch. 2005-164, Laws of Florida, substituted "25 feet" for the previously legislated "100 feet" in subsection (1)(a), catching many more music-loving citizens, but not commercial or political noisemakers, in its net.

Administrative Code.[2] Rather than selecting objective criteria, such as sound decibel readers, DHSMV has defined "plainly audible" to mean any sound

[2] Rule 15B-13.001, F.A.C., provides that:

(1) The purpose of this rule is to set forth the definition of the term "plainly audible" and establish standards regarding how sound should be measured by law enforcement personnel who enforce Section 316.3045, F.S.

(2) "Plainly Audible" shall mean any sound produced by a radio, tape player, or other mechanical or electronic soundmaking device, or instrument, from within the interior or exterior of a motor vehicle, including sound produced by a portable soundmaking device, 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.

(3) Any law enforcement personnel who hears a sound that is plainly audible, as defined herein, shall be entitled to measure the sound according to the following standards:

(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

produced by a mechanical or electronic sound-making device, emitting from a vehicle, that can be "clearly heard outside the vehicle" by an "officer's ordinary auditory senses" at a distance of 25 feet or more from the motor vehicle.

Notwithstanding the State's arguments, the "plainly audible" definition lacks any objective standards. The legislative command to the DHSMV to establish standards has not been observed. Rather, sound that can be "*clearly* heard outside the vehicle by a person using his *normal* hearing faculties" or an "officer's *ordinary* auditory senses" at a distance of 25 feet or more is the *de facto* standard. *Amicus* suggests that this is a standardless standard. How is a person put on fair notice as to what a "normal" person's hearing faculties or an officer's "ordinary" auditory senses are at a distance of 25 feet? What is the distinction, if any, between sound that can be "clearly" heard outside a vehicle at such a distance as compared

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> 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.
>
> (4) The standards set forth in subsection (3) above shall also apply to the detection of sound that is louder than necessary for the convenient hearing of persons inside the motor vehicle in areas adjoining churches, schools, or hospitals.

to sound that cannot be "clearly" heard? These adjectives do nothing more than unconstitutionally vest an officer with inordinate discretion to subjectively determine what is plainly audible.[3] Furthermore, that standard can be met merely by an officer's "detection of a rhythmic bass reverberating type sound," a musical feature more characteristic of Lil Wayne than Pavarotti, inviting law enforcement to target certain individuals rather than others playing loud music. Rule 15B-13.001, F.A.C (3)(c).

Is political rap exempt? Who decides? For example, a law enforcement officer could easily determine that a van covered with "Pink Slip Rick" signs, broadcasting anti-Gov. Scott slogans, is exempt from the statute as broadcasting political speech. However, if the driver of a private, noncommercial, unadorned vehicle in the same neighborhood as the van were to play a hypothetical rap song, composed with a rhythmic reverberating bass, with the lyrics "Pink Slip Rick" at the same volume as the van, how would that same officer make the call whether the rap is exempt, or if the driver should be cited?

[3] The concurring opinion below of Judge Kelly makes it clear that subsection (b) of the statute suffers constitutional infirmity because it "permits citations, at least 'in areas adjoining churches, schools, or hospitals,' for sound that is 'louder than necessary for the convenient hearing by persons inside the vehicle.'" *State v. Catalano*, 60 So. 3d 1139, 1147 (Fla. 2d DCA 2011) (Kelly, J, concurring specially).

These deficiencies render the statute so vague that it invites arbitrary and potentially discriminatory application in an unconstitutional manner.

B. Overbroad

To be clear, the distance limitation is the *only* objective measurement found in the "plainly audible" definition. The lower court was obviously troubled by the legislature's 2005 amendment reducing the distance limitation from 100 to 25 feet. *Amicus* suggests that the four-fold reduction in the only objective measurement of the plainly audible definition essentially obliterated any standard the statute may have had, rendering it vague as well as overbroad because it sweeps up within its ambit constitutionally protected activity.[4]

An ordinance is overbroad "if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). As succinctly stated by the Fifth District Court of Appeal in *State v. Montas*, 993 So. 2d 1127 (Fla. 5th DCA 2008):

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[4] In this vein, a factual findings by the trial court in *State v. Middlebrooks*, Case No. 2008CT043699AXX (Palm Beach County Aug. 6, 2009), attached as Exhibit 5 to Appellee's Appendix ("*Middlebrooks*"), is instructive. In explaining the inverse square law of physics, Judge Moyle stated:

> If you travel from one distance twice as far away from the sound source, you lose six decibels. As you keep doubling the distance six decibels is lost. [Dr. Hamill] further testified that the difference in intensity of sound heard at 25 feet and sound heard at 100 feet is 12 decibels. The perceived difference is four times louder.

Middlebrooks at 3-4.

> In the context of the First Amendment, an overbroad statute is one that restricts protected speech or conduct. Even if speech or conduct is unprotected by the First Amendment, "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

Id. at 1130 (internal citations omitted).

Amicus does not dispute that the legislature may enact laws to protect against excessive noise, but such regulation must be narrowly tailored to serve a significant government interest. *Ward v. Rock Against Racism,* 491 U.S. 781, 800 (1989). Where the object of a statute is achieved by means which sweep unnecessarily broadly and invades areas of protected freedoms, it is void for overbreadth. Further, when a court balances First Amendment rights with legitimate community interests protected by a noise ordinance, First Amendment freedoms are to be given a "preferred position." *Saia v. New York,* 334 U.S. 558, 562 (1948).

Here, the sweeping restriction of sound beyond the range of 25 feet is not narrowly drawn, and restricts constitutionally protected speech far beyond the point necessary to accomplish any legitimate objective for which the statute was created. One need not resort to hypotheticals to appreciate the overbroad application of the statute. The *Middlebrooks* decision is replete with specific examples that the State fails to recognize. The statute prescribes no time, place or

manner restrictions. Rather, it bans *any* sound emanating from a vehicle beyond 25 feet, regardless of whether anyone's sensibilities are offended, the time of day, a busy intersection, or an interstate highway.[5] The statute sweeps in a substantial amount of protected activity relative to any legitimate ban on unwelcome noise. Applying the inverse square law, the 2005 legislative amendment effectively broadened the net by a factor of four. Stated differently, constitutional freedoms were reduced by a factor of four. Thus, § 316.3045 is unconstitutionally overbroad because it regulates constitutionally protected speech more broadly than necessary to achieve the legitimate governmental interest in regulating noise.

II. THE EXEMPTIONS FOR SOUND FROM POLITICAL AND COMMERCIAL VEHICLES RENDER THE STATUTE CONTENT-BASED AND FACIALLY UNCONSITUTIONAL.

Because "'[m]usic, as a form of expression and communication, is protected under the First Amendment[,]'" *Daley v. City of Sarasota*, 752 So. 2d 124, 125 (Fla. 2d DCA 2000) (quoting *Ward*, 491 U.S. at 790), *Amicus* contends that any restriction on that form of expression must be content-neutral. As demonstrated below, and as the Second District correctly determined, section 316.3045(3) is not content-neutral because it favors vehicles used for political and commercial purposes by excepting them from the statute.

[5] Again, the forensic tests conducted in *Middlebrooks* are enlightening. In that case, the ambient noise of the vehicle was louder than the maximum volume of the stereo from a distance of 25 feet. *Middlebrooks* at 7.

The starting point in any analysis of the regulation of speech is whether the regulation is content-based or content-neutral. An intermediate level of judicial scrutiny is used where the regulation is unrelated to content. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 642-43 (1994). Where a regulation suppresses, disadvantages, or imposes differential burdens upon speech because of its content, "the most exacting scrutiny" must be applied. *Id.* Such content-based discrimination is "presumptively impermissible" and will be upheld only if it is narrowly tailored to serve a compelling state interest with the least possible burden on expression. *See City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

A regulation of speech which distinguishes favored speech from disfavored speech on the basis of ideas or viewpoints is generally content-based. In contrast, a regulation which imposes a burden on speech without reference to the ideas or viewpoints expressed in the speech is, in a majority of instances, content-neutral. *Animal Rights Found. of Florida, Inc. v. Siegel*, 867 So. 2d 451, 455 (Fla. 5th DCA 2004). The 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. The restrictions must be "justified *without reference to the content of the regulated speech*, . . . [be] narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for

communication of the information." *Daley*, 752 So. 2d at 126 (emphasis added) (internal citations and quotation marks omitted).

Under section 316.3045(3), sound produced by a vehicle for "business or political purposes" is exempt from the statutory restrictions.[6] Amicus finds it difficult to understand why the legislature would elevate sound produced by a commercial endeavor above that of the individual given that commercial speech is generally entitled to less constitutional protection. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (the United States Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). *See also KH Outdoor*, 458 F. 3d 1261, 1269 (11th Cir. 2006) (noting that the Eleventh Circuit follows the rationale from the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and does not permit a city to impermissibly favor commercial over noncommercial speech).

"[A] content-neutral conduct regulation applies equally to all, and not just to those with a particular message or subject matter in mind." *Burk v. Augusta-Richmond County*, 365 F. 3d 1247, 1254 (11th Cir. 2004). *See also Solantic, LLC*

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[6] The full text of the exemption provides that "[t]he 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." Fla. Stat. § 316.3045(3).

v. City of Neptune Beach, 410 F. 3d 1250, 1266 (11th Cir. 2005) ("The sign code exemptions that pick and choose the speakers entitled to preferential treatment are no less content based than those that select among subjects or messages."). Here, the statute clearly favors commercial and political speech over other forms of constitutionally protected speech.

The decision of the Illinois Supreme Court in *People v. Jones*, 721 N.E. 2d 546 (Ill. 1999), construing a similar statute, is instructive. The Illinois statute prohibited the volume of a car stereo system to be heard more than 75 feet from its source, but contained an exception for commercial vehicles engaged in advertising. Jones was cited and convicted for excessive noise emitting from his car radio under the Illinois sound amplification statute, which made it unlawful for any sound amplification system to be audible from a distance of 75 feet or more when a motor vehicle was being operated upon a highway. The Illinois statute contained an exception for authorized emergency vehicles or vehicles engaged in advertising. Jones appealed his conviction under the statute and the intermediate appellate court reversed, holding the statute unconstitutional as a content-based restriction. The State subsequently appealed that decision to the Illinois Supreme Court.

The Illinois high court had no difficulty concluding that the statute was subject to First Amendment scrutiny, citing *Ward* and stating:

> There is no dispute that the sound amplification statute places restrictions on expression protected by the first amendment. The

> statute restricts an individual's right to audible expression in a public forum by limiting the volume of that expression.

721 N.E 2d at 549. The court then engaged in an extensive analysis of United States Supreme Court precedent before reaching the conclusion that the statute was not content-neutral because of the exemption carved out for commercial speech. The court relied on an illustration of content-neutrality from the Supreme Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993): "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." *Id.* at 428. *See also Dimmitt v. City of Clearwater*, 985 F. 2d 1565, 1569-70 (11th Cir. 1993) (permit ordinance regulating display of flags was content-based because it contained an exemption for flags displayed by a governmental unit or body).

Because the Illinois statute contained an exemption for commercial advertising, the Illinois high court ultimately concluded that it was a content-based restriction, stating:

> [w]e conclude that the Illinois sound amplification statute is a content-based regulation of expression. While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles. The sound amplification statute, by its plain terms, premises the permissibility of protected speech on its content. The statute's restriction does not apply equally to all types of amplified sound. Rather, a certain type of speech, advertising, is exempted from the volume restriction. The statute thus allows the amplification of an

> advertising message, but prohibits the same amplification of all other messages, including religious speech, political speech and music. The permissible degree of amplification is dependent on the nature of the message being conveyed. Thus, by any commonsense understanding of the term, the statute's restriction is content-based.

721 N.E. 2d at 551-52 (internal citations, italics, and quotation marks omitted). The court expressly rejected the contention that the statute regulated volume, not content, stating:

> the statute favors advertising messages over other messages by allowing only the former to be broadcast at a particular volume. . . . [T]he sound amplification statute, on its face, discriminates based on content. Advertising messages broadcast at a particular volume are permitted while all other messages at that same volume are prohibited.

Id. at 552.

No compelling state interest is served by the viewpoint exemptions contained in section 316.3045(3). Reviewed under strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest. Strict scrutiny requires the State to demonstrate that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. *State v. J.P.*, 907 So. 2d 1101, 1110 (Fla. 2004). *See also Cannon v. City of Sarasota*, No. 8:09-cv-739, 2010 WL 962934, *3 (M.D. Fla. Mar. 16, 2010).

There can be no compelling state interest served by allowing the content-based discrimination on the face of the statute. Simply put, the ice cream truck can crank out the carnival music audible for blocks to attract customers, but an individual cannot turn up their rock and roll to a lesser level, if audible at 25 feet, for their own enjoyment. Similarly, the statute is inapplicable to politicians who want to use amplified sound to broadcast their message from a vehicle at any distance, but not to the individuals listening to the very same message on the radio if it is audible from greater than 25 feet.

The State argues that the statutory exemptions are "designed to allow uses that historically have been permissible and generally non-intrusive subject to local regulation." Initial Brief at 30. *Amicus* simply does not understand what is meant by this reference to non-intrusive historical uses that are subject to local regulation and how that rescues the statute from a strict scrutiny analysis. The State's suggestion that the statutory exemptions are not content-based ignores these questions: How is an officer able to distinguish between what is considered political speech from non-political speech unless he or she evaluates its *content*? Similarly, how would an officer perceive the difference between commercial and non-commercial speech without assessing the *actual content* of the message? More important, if unwelcome noise is truly the legitimate governmental objective of the legislation, sound blaring from a political or commercial vehicle is no less

offensive regardless of its content—indeed, one might argue such content is more unpleasant.

For these reasons, *Amicus* believes the content-based exemptions are fatal to the constitutionality of the statute.

III. SECTION 316.3045(3) IS NOT SEVERABLE.

Twenty-one years after the Legislature enacted the statute, the State argues that the appropriate remedy is to sever the offending content-based exemptions for political and business speech from the statute. Judicial severance of the exemptions for political speech would be contrary to legislative intent and against public policy. Although the statute fails because of the exemptions for political *and* commercial speech, which make the statute impermissibly content-based, this section of the Amicus Brief focuses only on the exemption for political speech. If the statute cannot be salvaged by severing the exemption for political speech, it does not matter whether the business exemption could be severed.

As noted above, section 316.3045 is a noise regulation that bans noise from radios, tape players, or other "mechanical soundmaking device[s] or instrument[s] from within motor vehicles if the sound is "plainly audible at a distance of 25 feet or more from the motor vehicle; or is "louder than necessary for the convenient hearing by persons inside the vehicle in areas adjoining churches, schools, or hospitals." Fla. Stat. § 316.3045. However, not all types of noise streaming from

vehicles are subject to the restriction. Subsection (3) exempts "motor vehicles used for . . . . political purposes, which in the normal course of conducting such business use soundmaking devices." [7]

In 1990, the same year that HB 1383 was filed (now codified as Fla. Stat. § 316.3045), SB 2274 was filed, and also sought to restrict "sound amplification from within motor vehicles." *See* App. 1, Staff Analysis of HB 1383 and its companion bill SB 2274. The Florida State Archives were unable to locate the bills themselves, but the Staff Analyses make clear that SB 2274 exempted "a vehicle used for advertising" and "a vehicle used in a parade or other special event." Notable in its absence from SB 2274 was any exemption for political speech. HB 1383 became law and the exemptions, absent from SB 2274, have remained an integral part of the statute until the State's suggestion - - for the very first time in this Court[8] - - that the exemptions are severable.

Having favored political speech by enacting the House bill that exempted that category of speech from the noise prohibition, not the Senate bill that only favored "vehicle[s] used in a parade or other special event," the Legislature created

[7] The statute of course regulates speech, not vehicles: it doesn't address other types of mechanical noises that emanate from motor vehicles. *Compare* Fla. Stat. § 403.415(4) (2011) *and* Fla. Stat. § 316.293 (2011), *with* Fla. Stat. § 316.3045.

[8] At no time in the County Court, the Circuit Court Appellate Division, or the Second District Court of Appeal did the State suggest that severability was an option or allow those courts the opportunity to consider that argument.

a content-based statute that cannot pass muster under the First Amendment. The Legislature's grant of special protection for political speech has been embedded in the statute since its inception, and the statue cannot be judicially salvaged by severing the exemption that renders it content-based.

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Lawnwood Med. Ctr., Inc. v. Seeger, 990 So. 2d 503, 518 (Fla. 2008) (quoting *Cramp v. Bd. of Pub. Educ.*, 137 So. 2d 828, 830 (Fla. 1962)). See also *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991) ("The *Cramp* test is a well established component of Florida law.").

In *Lawnwood*, this Court rejected severability of unconstitutional provisions as a means to salvage an otherwise constitutional act, holding that the Legislature had "so clearly intended" to include the invalid provisions that severing them would be violate the Legislature's intent. Here, part (3) of the *Cramp* test cannot be met, as severing the exemption for political speech to save the statute would be contrary to the Legislature's intent to afford special protection to speech that

enjoys the highest degree of protection under the First Amendment.[9] *See, e.g.*, *Ballen v. City of Redmond*, 466 F.3d 736, 745 (9th Cir. 2006) ("The City argues that if the ban is unconstitutional because of the numerous exemptions, then the exemptions should be severed from the general ban on portable signs. But severing the Ordinance would subject activity that is currently authorized by the legislature to civil and criminal sanctions, would impermissibly restrict speech that is protected by a strict level of scrutiny, i.e., political speech . . .").

Political speech is the essence of what the First Amendment seeks to protect. Regardless of the medium or the context of that political speech, the Supreme Court has proclaimed this fundamental principle time and again. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 904 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values."); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such

[9] Moreover, here, as in *Lawnwood*, no lower court had addressed the issue of severability. 990 So. 2d at 518.

political expression . . . .”); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *Bridges v. California*, 314 U.S. 252, 270 (1941) (“[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”).

Political speech is central to our democratic system, which is premised on individuals’ ability to speak loudly, freely and without restraint about issues of public importance. As Judge Learned Hand explained, the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” *United States*

v. Associated Press, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943) (quoted in *New York Times Co.*, 376 U.S. at 270).

Justice Brandeis similarly articulated the importance to our founders of safeguarding political speech:

> Those who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 275-76 (1927) (quoted in *New York Times Co.*, 376 U.S. at 270), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Given the importance of the political speech in the First Amendment hierarchy, and the Legislature's recognition of its importance, the political speech exemption of section 316.3045(3) may not be severed from the rest of the statute.

CONCLUSION

Section 316.3045(3) is not content-neutral because it favors commercial and political speech without any rational basis for the distinction and, therefore, is a content-based discrimination that cannot be severed. The statute is also void for vagueness because it lacks adequate guidance to those whose expressive activity is subject to potential sanctions. The statute is also overbroad because it sweeps up far greater conduct than is legitimate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing have been furnished by Regular U.S. Mail this 15th day of September, 2011, to: Richard Catalano, Corporate Counsel, TSE Industries, Inc., 4370 112th Terrace North, Clearwater, FL 33762-4902; and Timothy D. Osterhaus, Office of Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050.

/s Andrea Flynn Mogensen
Andrea Flynn Mogensen, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with Rule 9.210(a)(2), Fla. R. App. P., and that the type size and style used throughout this brief is Times New Roman 14-point font.

/s Andrea Flynn Mogensen
Andrea Flynn Mogensen, Esq.