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

THE STATE OF FLORIDA
Appellant,

v.

RICHARD T. CATALANO and
ALEXANDER SCHERMERHORN,
Appellees

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

ANSWER BRIEF OF APPELLEES

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SUMMARY OF ARGUMENT

The “plainly audible” standard contained in Florida Statute Section 316.3045(1) is unconstitutionally vague, overbroad, virtually guarantees arbitrary enforcement and infringes on the First Amendment. It contains no time, place or manner limitations whatsoever. Under the statute, sound need not disturb the listener. It need only be “plainly audible” at a distance of 25 feet from its source.

F.S. §316.3045 does not contain the traditional standards contained in such statutes and noise ordinances previously approved in a line of decisions from the U.S. Supreme Court, such as “unreasonable,” “loud and raucous,” or “disturbs or tends to disturb the peace, quiet, and comfort of the neighboring inhabitants.”

F.S. §316.3045(3) is not content-neutral. The statute carves out an exception in its coverage, excluding vehicles used for business or commercial purposes. Therefore, coverage under the statute depends upon the content of the message. Blaring ice cream trucks and sound trucks broadcasting political messages are not covered by the statute. They can crank out “Pop Goes the Weasel” to lure children or broadcast empty political promises that can be heard 500 feet away. However, a citizen parked next to the ice cream or sound truck gets a citation if the “rhythmic bass” from his car stereo can even be “detected” just 25 feet away.

Since it is a content-based restriction on the freedom of speech, it is subject to “strict scrutiny.” It is presumptively invalid and may be upheld only if it is

necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

The opinion of the Second District Court of Appeal was entirely correct. The Judges of that court unanimously ruled F.S. §316.3045 unconstitutional. Their well-reasoned opinion should be affirmed by this Honorable Court.

ARGUMENT

A. The "Plainly Audible" Language in Section 316.3045(1) is Unconstitutionally Vague, Overbroad, Arbitrarily Enforceable and Impinges on Free Speech Rights.

This case is about freedom of speech and how vague statutes endanger that right. It's about a vague, overbroad statute that lacks time, place and manner limitations that virtually guarantees arbitrary enforcement. The U.S. Supreme Court explained the dangers of such vague laws in Grayned v. City of Rockford, 408 U.S. 104, 108 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone…than if the boundaries of the forbidden areas were clearly marked.'

The above explanation by the High Court crystallizes Appellees' problems with the statute now before this Court. F.S. §316.3045(1)(a), a copy of which is attached to this Answer Brief as Exhibit 1, provides in pertinent part that:

> (1) It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify the sound produced by a radio, tape player, or other mechanical soundmaking device or instrument from within the motor vehicle so that the sound is:
>
> (b) ***Plainly audible*** at a distance of 25 feet or more from the motor vehicle. (*Emphasis added).*

The above-quoted language of F.S. §316.3045(1)(a), in particular, its subjective standard of sound being "*plainly audible* at a distance of 25 feet or more from the motor vehicle," is overly broad and vague, rendering it an unconstitutional restriction against the right of free speech provided for and protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States and sections 4 and 9 of article I of the Florida Constitution, both facially and in its application.

The "plainly audible" standard used in F.S. §316.3045(1)(a) was held unconstitutional by the Second District Court of Appeal in 1996 in Easy Way of Lee County, Inc. v. Lee County, 674 So. 2d 863 (Fla. 2d DCA 1996), a case interpreting a local noise ordinance. A copy is attached as Exhibit 2.

In Easy Way, the owners of a nightclub known as Club Nouveau After Dark were issued citations by the Sheriff of Lee County for alleged violations of a Lee County noise ordinance. The ordinance prohibited, in relevant part:

> …operating any such device (*radio receiving set, musical instrument, television, phonograph, drum, exterior loudspeaker, or other device for the production or reproduction of sound*) between the hours of 12:01 a.m. and the following 10:00 a.m. in such a manner as to be ***plainly audible*** across property boundaries or through partitions common to two (2) parties within a building or ***plainly audible*** at fifty (50) feet from such device when operated within a public space or within a motorboat."

At no time did the officer who issued the citations to the club owners display a decibel meter or tell the owners that the music exceeded any specific sound pressure level as measured by a decibel meter. Id. At 864. Nonetheless, the club owners were issued citations for repeated violations of the ordinance.

The club owners challenged the constitutional validity of the portion of the Lee County ordinance quoted above as an overly broad restriction against the right of free speech provided for and protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States and sections 4 and 9 of article I of the Florida Constitution. Id. The trial court ruled that the statutory language at issue was facially constitutional. The club owners appealed.

The Second District Court of Appeal held that the "plainly audible" standard in the ordinance was unconstitutional since it represented a "subjective standard,

prohibiting a volume that *any individual* person within the area of audibility happens to find *personally* disturbing," and accordingly declared that portion of the Lee County ordinance unconstitutional. Id. at 867.

This is ***exactly*** the problem with F.S. §316.3045(1)(a). The "plainly audible" standard contained within F.S. §316.3045(1)(a) *is an entirely subjective standard*, prohibiting a volume that *any individual* person within the area of audibility happens to find *personally* disturbing. Like the Lee County ordinance in Easy Way, the use of the "plainly audible" standard in F.S. §316.3045(1)(a) renders it unconstitutional.

The Second District reasoned that, "to withstand a challenge for vagueness, an ordinance must provide adequate notice to persons of common understanding concerning the behavior prohibited and the specific intent required: it must provide citizens, police officers and courts alike with sufficient guidelines to prevent arbitrary enforcement." Id. at 865, 866.

The "plainly audible" standard in F.S. §316.3045(1)(a) fails to provide adequate notice concerning the behavior prohibited. It fails to provide citizens, police officers or the courts with any objective guidelines whatsoever to prevent arbitrary enforcement. The statute's vagueness virtually guarantees arbitrary enforcement.

Florida Statute §316.3045(4) directs the Department of Highway Safety and Motor Vehicles (hereinafter "HSMV") 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." HSMV Rule 15B-13.001, titled *Operation of Soundmaking Devices in Motor Vehicles* (hereinafter the "Rule"), was promulgated by HSMV in response to this directive from the Florida legislature. A copy of the Rule appears in Exhibit 3 of this Answer Brief. The Rule defines "Plainly Audible" as follows:

> "*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." (Emphasis added).

The Rule substitutes one overly broad, vague, subjective standard with another by defining "*plainly audible*" as a sound that can be "*clearly heard*." It is a distinction without a difference. To paraphrase the Second District in Easy Way, a standard such as "clearly heard" is "*an entirely subjective standard*, prohibiting a volume that *any individual* person within the area of audibility happens to find *personally* disturbing." Id. at 867.

Section (3) of the Rule states:

> (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 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.

The definition of "plainly audible" contained in the Rule is incorporated in Florida Statute §316.3045(1)(a) and is *substantially identical* to the definition of "plainly audible" found to be unconstitutionally vague and overbroad in the Easy Way case cited above. One need only compare the above quoted language from the Rule with Paragraphs 4(a)-(c) of the Lee County noise ordinance quoted in Easy Way at page 864 to verify that they are substantially word-for-word copies:

4. For purposes of subsection 3 above, the term "plainly audible" shall mean any sound produced, including sound produced by a portable soundmaking device that can be clearly heard by a person using his or her normal hearing faculties, at a distance of fifty (50) feet or more from the source. *Any law enforcement personnel or citizen 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 complainant's ordinary auditory senses, so long as their hearing is not enhanced by any mechanical device, such as a microphone or hearing aid.*
   b. *The complainant must have a direct line of sight and hearing to the source producing the sound so that he or she can readily identify the offending source and the distance involved.*
   c. *The complainant 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.* (Emphasis added.)

As one can see, Section 3 of the Rule and paragraphs 4(a)-(c) of the Lee County ordinance are almost word-for-word copies. Since the definition of "plainly audible" contained in both the Lee County noise ordinance and Florida Statute §316.3045(1)(a) are *substantially identical*, and since the Second District Court of Appeal previously held in <u>Easy Way</u> that the definition of "plainly audible" contained in the Lee County noise ordinance is unconstitutionally vague

and overbroad, it necessarily follows that Florida Statute §316.3045(1)(a) *must* also be unconstitutionally vague and overbroad under the authority of Easy Way.

As Judge Black stated in his opinion in the instant case below, a copy of which is attached to this Answer Brief as Exhibit 4, "whether the "plainly audible" standard is applied in a noise ordinance or in a traffic statute, the test for constitutionality is the same." (R 299). If the challenged language was unconstitutionally vague and overly broad as a local noise control ordinance, it is still unconstitutionally vague and overly broad as a state statute. The fact that this vague and overly broad language is being used in a statewide statute is all the more egregious since it now affects millions of Floridians rather than just thousands in Lee County.

In its Initial Brief to this Court, the State misinterprets, mischaracterizes, and insults the Second District's clear and well-reasoned analysis and decision in Easy Way, calling its holding "somewhat muddled" (Initial Brief at 22), "illogical and unfounded." (Initial Brief at 21). The State argues that the "strong pattern of arbitrary enforcement against the club, grounded in large measure on the ordinance's potential for subjective enforcement based on individual complaints, underlies the ultimate holding of Easy Way." (Initial Brief at 25). However, as explained by the Second District on page 7 (R 299) of its decision below, the State is, quite simply, wrong:

> We do not agree with the State's position. The challenge in Easy Way was a facial challenge. 674 So.2d at 863. Although the court did quote the Reeves language cited above, it also stated that "the ordinance does not define its crucial terms 'plainly audible' so as to secure against arbitrary enforcement." Id. at 866. **The court reasoned that the "plainly audible" standard represented the subjective standard that was discussed in the Reeves decision---"any individual person 'within the area of audibility' happens to find personally 'disturbing,' " ---not because the term "plainly audible" was being applied subjectively, but because the term "plainly audible" was a subjective term on its face; thus, the court found it vague. Id. at 867.** (Bold added).

Despite this clear and unambiguous statement by Judge Black of the Second District Court of Appeal, the State continues to incorrectly assert that the holding and analysis in Easy Way "hinged on actual arbitrariness" and that "evidence of arbitrary enforcement" was the basis for the Easy Way decision. (Initial Brief at 26). Appellees are baffled as to how the State can continue to make these erroneous assertions in light of the Second District's statement above.

The State goes on to argue that, since F.S. §316.3045(1) and its administrative rule limit the "plainly audible" standard to measurement *by a law enforcement officer*, as opposed to the noise ordinance in Easy Way which also included a citizen, "no potential for subjective/arbitrary enforcement exists under section 316.3045(1)." (Initial Brief at 25). Is the State seriously arguing that a law enforcement officer is somehow incapable of engaging in arbitrary enforcement when interpreting a statute based on an entirely subjective standard? In the Easy

Way case, law enforcement officers, *not* citizens, enforced the county noise ordinance at issue.

The Rule, and by extension, F.S. §316.2045(1)(a), contains insufficient guidelines to protect against arbitrary enforcement. The State contends that the Rule "provides objective terms and guidelines for measuring a violation, which undermines a vagueness argument and the potential for arbitrary enforcement." (Initial Brief at 22). However, the "standards regarding how sound should be measured by law enforcement personnel" contained in the Rule are entirely subjective, namely that particular officer's "ordinary auditory senses" rather than independently verifiable, measurable, objective criteria, such as a decibel reading on a sound pressure meter for some pre-determined period of time. Having such a subjective standard of measurement virtually guarantees arbitrary enforcement.

The standard of measurement used to judge whether an infraction has occurred varies in each and every case. It is not a "static" or "fixed" standard, known and understood by all, applied equally to everyone, giving fair warning to all, but rather, a constantly changing, fluid standard, subject to the hearing, personal opinion and whim of whichever law enforcement officer happens to be present at the time. This subjective standard does not treat all citizens similarly, does not afford equal protection under the law, places too much discretion and power in the hands of the police, and is, quite simply, not fair. It is the essence of

arbitrary and discriminatory enforcement, rendering F.S. §316.3045(1)(a) unconstitutional, both facially and as applied.

B. F.S. 316.3045 Does Not Contain, Nor Does It Meet, the Established Constitutional Standards for Noise Ordinances Approved by the U.S. Supreme Court.

In its Initial Brief, the State cites to various standards for noise ordinances and laws deemed constitutional by the U.S. Supreme Court in a number of opinions. Unfortunately for the State, F.S. §316.3045 does not contain any of these previously approved standards.

The State discusses the "loud and raucous" standard approved by the U.S. Supreme Court in Kovacs v. Cooper, 336 U.S. 77 (1949) starting at page 14 of its Initial Brief. Kovacs dealt with the noise ordinance of the City of Trenton, New Jersey, that prohibited the use of any "sound truck, loud speaker or sound amplifier … which emits therefrom loud and raucous noises" while upon the streets or public places. The High Court approved the "loud and raucous" standard, reasoning that, "While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." Id. at 79.

Unlike the Trenton noise ordinance in the Kovacs case, F.S. §316.3045(1) does not require that a sound be "loud" or "raucous" to violate the statute, only that it be "plainly audible" at 25 feet from its source. Under the Rule which specifies

the applicable "standards" by which sound is to be measured, the mere *detection* of a rhythmic bass reverberating type sound at 25 feet is sufficient to constitute a "plainly audible" sound that violates the statute. (Exhibit 3). The sound need not be "loud" or "raucous" or even "disturbing" to anyone to violate the statute, merely *detectable*. At the expense of the First Amendment, it reaches far more broadly than is reasonably necessary to protect legitimate state interests. Easy Way at 866. This is the critical distinction between the "loud and raucous" standard approved by the U.S. Supreme Court and the "plainly audible" standard ruled unconstitutional by the Second District Court of Appeal.

On page 16 of its Initial Brief, the State next cites to Grayned v. City of Rockford, 408 U.S. 104 (1972) in which the High Court rejected a facial vagueness and overbreadth challenge to an anti-noise ordinance, which read in pertinent part:

> (No) person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof…

Unlike F.S. 316.3045, the anti-noise ordinance in Grayned contains time, place and manner limitations which led the High Court to conclude that the ordinance was not unconstitutionally vague. As the U.S. Supreme Court states in its opinion:

> Rockford does not claim the broad power to punish all 'noises' and 'diversions.' The vagueness of these terms, by themselves, is dispelled by the ordinance's

> requirements that (1) the 'noise or diversion' be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the 'noise or diversion'; and (3) the acts be 'willfully' done. Id. at 113.

On page 18 of its Initial Brief, the State concludes its analysis of the Kovacs and Grayned decisions with a bold assertion: "These two commanding precedents compel the conclusion that section 316.3045(1), which applies to run-of-the-mill blaring car stereos at issue in this case, poses no vagueness or subjective arbitrariness that concern courts." The vagueness and subjective arbitrariness of section 316.3045(1) concerned the three-judge Appellate Panel of the Circuit Court in and for Pinellas County, as well as the Second District Court of Appeal, to the point that they both unanimously ruled this statute unconstitutional.

The State next cites to the case of DA Mortgage, Inc. v. City of Miami Beach, 486 F.3d 1254 (11th Cir. 2007) as authority for upholding the "plainly audible" standard. By doing so, the State is comparing "apples and oranges." The State's Initial Brief fails to mention that the County Code upheld in DA Mortgage contains several standards not found in F.S. §316.3045.

On page 1263 of DA Mortgage, the Eleventh Circuit describes MIAMI-DADE COUNTY Code, Section 21-28(b), as follows:

> On November 19, 2001, the City issued L.C. a citation for violating section 21-28(b) of the County Code, which addresses "unnecessary and excessive" noises. The

> ordinance prohibits persons from operating "[r]adios, televisions, phonographs" and like-manner of sound reproducing devices and musical instruments in such a manner "as to disturb the peace, quiet and comfort of the neighboring inhabitants." MIAMI-DADE COUNTY, FL., CODE § 21-28(B) (1958, as amended 1996). Alternatively, the ordinance prohibits persons from operating sound devices at a "louder volume than is necessary for convenient hearing" of voluntary listeners within the room, vehicle or chamber where the sound device is located. *Id.* The ordinance adopts a presumptive standard for determining whether a noise is unnecessary or excessive: if a sound device is plainly audible between the hours of 11:00p.m. and 7:00a.m. 100 feet away from its source (the building or vehicle where the device is being operated). *Id.*

First, the Miami-Dade Code is based on the reasonable person standard. As the Eleventh Circuit notes in its opinion on page 1272:

> Nevertheless, the overarching standard at play in this ordinance is the reasonable person standard since the statute begins by prohibiting "unreasonably loud, excessive, unnecessary or unusual noises." The Supreme Court has approved the use of the word "unreasonably" in statutes that are otherwise precise and narrowly drawn. *Reeves*, 631 F.2d. at 383 (citing *Cameron v. Johnson*, 390 U.S. 611, 615-16, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968)).

F.S. §316.3045 is not based on the reasonable person standard, as argued by the State. Neither the statute itself nor the Rule that defines "plainly audible" uses the word "reasonable." In order to violate F.S. §316.3045, sound need not be "unreasonably loud, excessive, unnecessary or unusual" as in the County Code in <u>DA Mortgage</u>. It need only be "plainly audible" 25 feet from the motor vehicle.

Second, F.S. §316.3045 does not require that the sound "disturb the peace, quiet and comfort of the neighboring inhabitants" as does the County Code in DA Mortgage. As paragraph 3(c) of the HSMV Rule states, the mere *detection* of a rhythmic bass reverberating type sound 25 feet from the motor vehicle is sufficient to violate F.S. §316.3045, regardless of the time of day, the volume, the duration of the sound, and whether it "disturbs the peace, quiet and comfort of the neighboring inhabitants." (Exhibit 3).

Third, F.S. §316.3045 contains no time limitations whatsoever, unlike the County Code in DA Mortgage where, in addition to the other standards contained in the County Code, the sound must also be "plainly audible between the hours of 11:00p.m. and 7:00a.m" to violate the ordinance.

Lastly, in order to violate the County Code in DA Mortgage, the sound must be plainly audible "100 feet away from its source (the building or vehicle where the device is being operated)." To violate F.S. §316.3045, sound need be "plainly audible" just 25 feet from the motor vehicle, one-quarter the distance required in DA Mortgage.

On page 20 of its Initial Brief, the State cites to the case of Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980) in which the Fifth Circuit upheld Houston's sound amplification ordinance which required that amplified sound be controlled so that it was not "unreasonably loud, raucous, jarring, disturbing, or a nuisance to

persons within the area of audibility." F.S. §316.3045 contains none of these standards, instead opting for the "plainly audible" standard.

The ordinances at issue in Kovacs, Grayned, DA Mortgage and Reeves survived constitutional scrutiny whereas F.S. §316.3045 perishes *precisely* because they included the above-cited standards that are woefully lacking in F.S. §316.3045 (i.e. "unreasonable," "loud and raucous," "disturbs or tends to disturb the peace, quiet, and comfort of the neighboring inhabitants," "between the hours of 11:00p.m. and 7:00a.m."). F.S. §316.3045 fails to require that the "plainly audible" sound result in a disruption or disturbance in order to violate the statute, let alone a demonstrated causality between the disruption that occurs and the 'noise or diversion' as in Grayned. Id. at 113.

The case of Daley v. City of Sarasota, 752 So. 2d 124 (Fla. 2d DCA 2000), also from the Second District Court of Appeal, is highly instructive. In Daley, the City of Sarasota enacted a noise ordinance prohibiting all amplified sound in non-enclosed structures in the area zoned Commercial Business Newtown (CBN) during certain hours of each day, *regardless* of the decibel level of the sound being produced and *regardless* of whether the sound was audible outside the structure. Id. at 125.

Daley owned a business within the CBN in which he entertained his customers with both live and recorded music. After receiving two citations for

violating the noise ordinance, Daley filed a motion in county court to declare the City's noise ordinance unconstitutional. After a hearing, the judge granted the motion, declaring the ordinance unconstitutional as overly broad and dismissing the citations against Daley. The City appealed to the circuit court which found the ordinance "narrowly tailored to achieve the legitimate interest in regulating unreasonable sound" and reversed the county court's order.

The Second District reversed and held the City's ordinance unconstitutional, finding that it curbed First Amendment rights in a manner more intrusive than necessary. Id. at 126. The Second District held that the City could not absolutely ban all amplified sound in non-enclosed structures for certain hours each day regardless of its volume. The court explained that the City's ordinance was flawed, not simply because it sanctioned some constitutionally-protected conduct, but because it was founded upon the mistaken premise that all amplified sound in non-enclosed structures is unreasonable during certain hours of the day and can be prohibited regardless of the First Amendment rights it suppresses. Therefore, the court held, the ordinance was subject to facial attack. Id. at 126, 127.

Just as with Sarasota's ordinance in the Daley case, F.S. §316.3045 is likewise unconstitutional because it is founded upon the mistaken premise that *all* amplified music emanating from a motor vehicle is unreasonable, *regardless* of the time of day, *regardless* of the volume, *regardless* of the duration of the sound,

regardless of whether it disturbs the peace, quiet and comfort of the neighboring inhabitants, and *regardless* of the First Amendment rights it suppresses.

As the Second District pointed out in the Daley case, unamplified sound greater in volume than amplified sound is permissible under F.S. §316.3045(1)(a). 752 So. 2d *at 126*. For example, the unamplified sound generated by a Harley Davidson motorcycle will, in most cases, far exceed the sound pressure level generated by even the most powerful car stereo systems, yet under F.S. §316.3045(1)(a), the noise generated by the motorcycle is legal while the music coming from the car is illegal, subjecting its driver to being pulled over and ticketed. This is the very essence of arbitrary and discriminatory law enforcement which renders F.S. §316.3045(1)(a) unconstitutional, both facially and as applied.

Citing the decision of the United States Supreme Court in Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S. Ct. 2746 (1989), the Daley court reasoned that "Music, as a form of expression and communication, is protected under the First Amendment. This protection extends to amplified music." The court further noted that the use of sound amplification equipment within reasonable limits is an aspect of free speech protected by the First Amendment. Saia v. New York, 334 U.S. 558, 68 S. Ct. 1148 (1948).

In Daley, a case decided back in 2000, the Second District held that the City may regulate amplified sound subject to *"strict guidelines and definite standards*

closely related to permissible governmental interests." Id. at 127. (Emphasis added). It is now 2011. F.S. §316.3045(1)(a) contains no "strict guidelines" or "definite standards" whatsoever. Despite having had eleven (11) years to correct this glaring problem, the Florida legislature has failed to act. No objectively verifiable time, place or manner limitations, strict guidelines, or definite standards have been added to the statute. Just as in 2000 when Daley was decided, all that is required to violate the statute today is the entirely subjective opinion of the particular law enforcement officer at the scene.

F.S. §316.3045(1)(a) is unconstitutionally vague. The traditional standard of unconstitutional vagueness is whether the terms of a statute are so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Easy Way at 866; Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926). This standard is applied even more strictly to statutes that inhibit free speech because of the value our society places on the free dissemination of ideas. Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760 (1976). The "plainly audible" standard contained in F.S. §316.3045(1)(a) is so indefinite and so subjective that men of common intelligence must necessarily guess at its meaning and differ as to its application.

If the same type of subjective standards used in F.S. §316.3045 were applied to speed limits on our roads and highways, those limits would be "Slow, Medium and Fast." Any motorist could be pulled over and ticketed at any time because, in the sole and absolute opinion of the officer on duty, they were "plainly speeding."

Exactly what does "*plainly audible*" mean? Appellees submit that it means one hundred different things to one hundred different people. The volume required to violate this statute is whatever the officer on duty says it is, on any given day, at any given time, and that's *exactly* the problem. It's far too subjective. It places far too much discretion and power in the hands of the police. There is no independent means of measurement, just the personal opinion of the particular officer on the scene. It fails to provide citizens, police officers and courts alike with sufficient guidelines to prevent arbitrary enforcement. It invites, and virtually guarantees, arbitrary enforcement.

It is virtually impossible to defend against a citation issued under this statute. A defendant issued a citation is guilty because the officer who wrote it says so. The officer doesn't need any independently verifiable, objective evidence. The officer need not take any volume measurement with a sound pressure meter or even time the duration of the sound on a wristwatch. The only thing the officer need do is appear in court and testify that he "plainly heard" the sound. F.S.

§316.3045 flies in the face of basic tenets of justice and fairness and cannot pass constitutional muster.

F.S. §316.3045 has a chilling effect on free speech rights since amplified music is protected under the First Amendment to the United States Constitution. Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S. Ct. 2746 (1989); Saia v. New York, 334 U.S. 558, 68 S. Ct. 1148 (1948). While this unconstitutional statute is enforced, all Florida motorists with their radio on must ask themselves questions such as: Will this *particular* officer think that my car stereo is too loud as I pass by him at 40 miles per hour for a second or two? Is my radio too loud even though I have my windows closed? Will this *particular* officer be able to detect the bass beat from this *particular* song 25 feet away as I pass by at 30 miles per hour?

F.S. §316.3045 is subject to "intense scrutiny" since it attempts to restrict speech on the "public ways," a traditional public forum. Ledford v. State, 652 So. 2d 1254 (Fla. 2d DCA 1995). Such regulations survive only if: (1) they are narrowly drawn to achieve a compelling governmental interest; (2) the regulations are reasonable; and (3) the viewpoint is neutral. Id. F.S. §316.3045 cannot withstand intense scrutiny since, at the expense of the First Amendment, it reaches more broadly than is reasonably necessary to protect legitimate state interests,

exactly as found by the Second District Court of Appeal in Easy Way. Id. *at 866, 867.*

In Ledford, the Second District considered a "begging" ordinance of the City of St. Petersburg as it related to free speech rights. In holding the begging ordinance unconstitutionally overbroad and vague, the court applied a "strict scrutiny" standard, reasoning that the aim of protecting citizens from annoyance is not a "compelling" reason to restrict speech in a traditionally public forum. Id. Likewise, in the instant case, the apparent aim of protecting citizens from the annoyance of loud music emanating from passing vehicles for a second or two is not a "compelling" reason to restrict protected speech on a public forum such as a road or highway.

The State argues that "section 316.3045(1), on its face, does not infringe on any protected speech" and that, "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." (Initial Brief at 27). The State is wrong. "Music, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746 (1989) as cited in Daley, 752 So.2d at 125. This protection extends to amplified music. The use of sound amplification

equipment within reasonable limits is an aspect of free speech protected by the First Amendment. Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148 (1948).

The State then argues that, "Neither Catalano nor Schermerhorn can make an overbreadth argument given that their conduct is clearly proscribed." (Initial Brief at 28). The State's conclusory assertion entirely misses the point of this case, that F.S. §316.3045 is so vague and overbroad that it does not give the citizens of Florida, including Catalano and Schermerhorn, reasonable notice of the conduct that is proscribed.

The State cites to the decision of the Fifth District Court of Appeal in Davis v. State, 710 So.2d 635 (Fla. 5th DCA 1998). In Davis, an Orange County Sheriff's Department Officer was working off-duty for the Embassy Nightclub, patrolling its parking lot. He observed Davis' vehicle approaching the nightclub and noticed the loudness of the vehicle's stereo. He stopped Davis for violating F.S. §316.3045 which, at that time, made it a violation to play a vehicle's radio so that it is "plainly audible at a distance of *100 feet* or more from the motor vehicle." (Note that F.S. §316.3045(1)(a) now makes it a violation to play a vehicle's radio so that it is "plainly audible" at a distance of *just 25 feet* or more from the motor vehicle.)

Once stopped, Davis consented to a search of his vehicle and cocaine was found. Davis' contention was that, even though the search was consensual, the cocaine was the fruit of an illegal stop because the noise statute was

unconstitutional since it was void for vagueness, violated Florida citizen's right to "free expression through music" and, in addition, the stopping of a vehicle which has committed no traffic violation was a wrongful seizure. Id.

The trial court ruled against Davis. He appealed. The Fifth District affirmed the trial court. The court noted that it could find *no Florida cases directly on point*, so it looked to cases from other jurisdictions for its holding. (This fact is critically important in deciding what weight to give the decision in Davis.)

While the Easy Way case cited above did not deal with F.S. §316.3045, it directly addressed and analyzed the "plainly audible" standard used in F.S. §316.3045(1)(a). Contrary to the Fifth District's statement in Davis that it could find no Florida cases directly on point, the Easy Way decision was published in 1996, pre-dating the Davis decision by two (2) years. Despite this fact, the Fifth District's decision in Davis does not mention, analyze or attempt to distinguish the well-reasoned constitutional analysis of the Second District Court of Appeal in Easy Way which ruled upon the constitutionality of exactly the same "plainly audible" standard at issue in Davis. It appears that the Fifth District was not even aware of the Second District's decision in Easy Way when it issued its decision in Davis.

The Fifth District's decision in Davis fails to address the "plainly audible" standard used in F.S. §316.3045. Its holding can best be summarized as "it's not

vague because we say so." The Fifth District held that, "Davis' free speech argument is also unavailing. The ordinance addresses noise not speech." Id. at 636. Music is *not* noise. The dismissive attitude demonstrated by the Fifth District in Davis ignores the law of the land, that "music, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746 (1989) as cited in Daley, 752 So.2d at 125. This protection extends to amplified music. The use of sound amplification equipment within reasonable limits is an aspect of free speech protected by the First Amendment. Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148 (1948).

Review of the Second District's decision in Daley was denied by this Court in 2000. *See* 776 So.2d 275 (Fla. 2000). This Court chose not to disturb Daley, a decision which cited Easy Way with approval. Daley at 127. Easy Way and Daley were correctly decided and remain so to this day. The Second District's opinion below follows the holdings in Easy Way and Daley. It is a learned opinion and a model of clarity. It is well-reasoned and its holding fully supported. Their decision is correct in all respects and should be affirmed.

C. Florida Statute Section 316.3045 is Not Content Neutral and Violates Free Speech Rights.

The State asserts that the statute at issue is content-neutral. The State is not correct. F.S. §316.3045(3) states:

> 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 police power, from regulating the time and manner in which such business may be operated.

How can this statute be content-neutral when it does not apply equally to all sound coming from all types of motor vehicles? How can it be content-neutral when it specifically exempts from coverage vehicles used for business or political purposes which normally use soundmaking devices?

The State argues that "Section 316.3045(3) does not intend to wholly exempt commercial or political uses; instead it leave these categories of vehicles to the regulation of local authorities." (Initial Brief at 35). That is *not* what the statute says. It says that its provisions "do not apply to motor vehicles used for business or political purposes which, in the normal course of conducting such business use soundmaking devices." By its own, plain terms, this statute does not apply to, and specifically exempts from its coverage, "motor vehicles used for business or political purposes which, in the normal course of conducting such business use soundmaking devices." These vehicles remain entirely exempt from the statute's coverage based solely on the content of their message, be it business or political. That is a content-based restriction, "no matter how you slice it." The

fact that local authorities ***may*** regulate "the time and manner in which such business may be operated," if they so desire, does not rescue this unconstitutional, content-based restriction.

In People v. Jones, 721 N.E.2d 546 (Ill. 1999), the Illinois Supreme Court construed a similar statute that prohibited the operation of any sound amplification system which could be heard outside the vehicle from 75 or more feet. Like Florida Statute §316.3045(3), the statute contained an exception for vehicles engaged in advertising (business). Because of this exception, the Court subjected the statute to strict scrutiny and held that it was a content-based restriction on speech that violated the First Amendment.

The Illinois Supreme Court noted that, "The first amendment does not generally countenance governmental control over the content of messages expressed by private individuals. Regulations that restrict speech because of its content are therefore subjected to the most exacting scrutiny." Id. at 550.

The Illinois high court held that:

> "Content-based regulations are presumptively invalid and will be upheld only if necessary to serve a compelling governmental interest and narrowly drawn to achieve that end." Id. "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." Id. at 551-552.

To paraphrase the Illinois Supreme Court, Florida Statute §316.3045(3), 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, certain types of speech, business and political, are exempted from the volume restriction. The statute thus allows the amplification of both business and political messages, but prohibits the same amplification of all other messages, including religious 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.

The Second District's decision below cites to City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), which deals directly with the issue of content-neutrality. On pages 11-12 of his opinion (R303-304), Judge Black states:

> 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 428-29 (emphasis added)(citing Kovacs v. Cooper, 336 U.S. 77 (1949)).

Turning our attention to the Florida statute at issue, on its face it is not content neutral. The statute excepts from its provisions "motor vehicles used for business or political purposes, which in the normal course of conducting such business use soundmaking devices." §316.3045(3). In other words, an individual using a vehicle for business purposes could, for example, listen to political talk radio at a volume clearly audible from a quarter mile; however, an individual sitting in a personal vehicle that is parked next to the business vehicle is subject to a citation if the individual is listening to music or religious programming that is clearly audible at twenty-five feet. Clearly, different forms of speech receive different treatment under the Florida statute. That is, the statute in question does not "apply equally to music, political speech and advertising," which is what the Supreme Court requires in order for the statute to be deemed, "content-neutral." See City of Cincinnati, 507 U.S. at 428.

Given that the statute is a content-based restriction of protected expression, it is presumptively invalid and may be upheld only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Jones, 721 N.E.2d at 550. We fail to see how the interests asserted by the State are better served by the statute's exemption for commercial and political speech. As in Jones, the State provides no explanation as to why a noncommercial message broadcast at a particular volume poses a danger to the public, while a commercial or political message does not. Further, as with the statute in Jones, the Florida statute is peculiar in protecting commercial speech to a greater degree than noncommercial speech. Commercial speech is typically in a "subordinate position" in the scale of First Amendment values. U.S. v. Edge Broad. Co., 509 U.S. 418, 430 (1993).

Appellee cannot improve upon the Second District's analysis and eloquent explanation quoted above. On its face, F.S. §316.3045 discriminates based on content. It violates the First Amendment and is unconstitutional.

D. Severance of Sub-Section (3) of F.S. 316.3045 Would Not Save this Statute.

On page 36 of its Initial Brief, the State argues that, even if the commercial/political use exemption in section 316.3045(3) is deemed facially unconstitutional, it should be severed from the statute and invalidated, not section 316.3045(1). As demonstrated above, and as the Second District found below, Section 316.3045(3) is facially unconstitutional as a content-based restriction. However, even if this Court ultimately rules Section 3 of the statute to be constitutional, for all of the reasons above, Section 316.3045(1), and Section (4) which incorporates the definition of "plainly audible" contained in Rule 15B-13.001, should still be found unconstitutional.

E. Another Florida Circuit Court Has Held F.S. §316.3045 Unconstitutional.

In *State v. Middlebrooks*, Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case No. 2008CT043699AXX, the Honorable Paul O. Moyle issued an "Order Granting Defendant's Motion to Suppress" dated August 6, 2009 (the "Order") and declared Fla. Stat. §316.3045(1) to be unconstitutionally vague. A copy of the Order is attached to this Answer Brief as Exhibit 5.

Judge Moyle found Section 316.3045(1) to be unconstitutional because:

1. "It is not narrowly crafted. It fails to provide objective standards." ("statutes" is a typographical error). (Order at 13).
2. "This sweeping restriction of sound is not narrowly drawn, and restricts constitutionally protected speech beyond the point necessary to accomplish the objective for which the ordinance was created." (Order at 11).
3. "The law has ceased to operate with a legitimate governmental interest and now allows arbitrary enforcement. A vague statute is one that fails to give adequate notice of what conduct is prohibited and which because of its imprecision, may also invite arbitrary and discriminatory enforcement." (Order at 13).
4. "The Florida Statute prohibits any noise that is audible from a distance of 25 feet. It does not provide an objective reasonableness test, it simply makes it unlawful for an officer to hear music or a sound at a distance of 25 feet or more." (Order at 10).
5. "The music or sound does not have to be unnecessarily loud or unreasonable, it only has to be audible." (Order at 10).
6. "The Florida statute is unique in that it has no time, place or manner restrictions in any section of the statute and as such, it can be enforced at any time throughout the day or night and can be enforced under any context." (Order at 12).
7. "Most normal conversations, absent ambient noise, can be heard from a distance of 25 feet." (Order at 10).

Judge Moyle's analysis is "spot-on."

Conclusion.

F.S. §316.3045(1) is vague and overbroad. The "*plainly audible*" standard upon which it is based varies in every case. It is not a "static" or "fixed" standard, known and understood by all. Instead, it is a subjective, fluid standard, varying with the personal opinion and whim of whichever law enforcement officer happens to be present at the time. It does *not* treat all citizens similarly, does *not* afford equal protection and justice under the law and is, quite simply, *not* fair. It is the very essence of arbitrary and discriminatory law enforcement, rendering F.S. §316.3045 overly broad, vague and unconstitutional.

F.S. §316.3045 is not content-neutral. It carves out an exception for vehicles used for business and political purposes. It is a content-based restriction on free speech in violation of the First Amendment.

This Court should uphold the decision of the Second District Court of Appeal below and strike down this unconstitutional statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Timothy D. Osterhaus, Esq., Deputy Solicitor General, Office of the Attorney General, The Capitol, Pl-01, Tallahassee, Florida 32399-1050, on this 9th day of September, 2011.

____
Richard T. Catalano, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Richard T. Catalano, Esq.