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

REPLY BRIEF OF THE STATE OF FLORIDA

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The merits and amicus briefs make categorical arguments that section 316.3045(1) is "entirely subjective," lacks "any objective guidelines whatsoever," and "virtually guarantees arbitrary enforcement." [AB 1, 6] The briefs also claim that section 316.3045(3) is not content neutral, but contradictorily claim that section 316.3045(1) cannot be salvaged by severing the offending exceptions in 316.3045(3). [AB 6, 28, 32] Each of these points merits rebuttal.

1. Section 316.3045(1)'s "plainly audible" at 25 feet standard is a judicially-accepted and administratively-workable standard that is neither vague nor subject to constitutionally impermissible discriminatory application.

Appellees and their amicus anchor their vagueness/arbitrary enforcement arguments on categorical statements that section 316.3045(1)'s "plainly audible" standard "is an entirely subjective standard" that "means one hundred different things to one hundred different people."[1] Yet they have no coherent response to the fact that the United States Supreme Court decades ago approved as constitutional far more subjective and flexible standards than section 316.3045(1)'s "plainly audible" at 25 feet standard and its related administrative rule. *See* Kovacs v. Cooper, 336 U.S. 77, 79 (1949) ("loud and raucous" standard); Grayned v.

[1] [AB 6, 22; Amicus Br. 3 ("the 'plainly audible' definition lacks any objective standards…. An 'officer's *ordinary* auditory senses' at a distance of 25 feet or more (Continued …)

Rockford, 408 U.S. 104, 108 (1972) ("disturbs or tends to disturb the peace or good order" standard).

Indeed, their criticism of the "plainly audible" standard—that "sound need not be 'loud' or 'raucous' or even 'disturbing' to anyone to violate" section 316.3045(1)—is difficult to understand. [AB 13-14] They fail to explain how section 316.3045(1) could be made *more* objective by adding the adjectives at issue in Kovacs and Grayned: "loud", "raucous" and "disturbing." According to their argument, sound that meets section 316.3045(1)'s "plainly audible" standard is unconstitutional, but it somehow becomes constitutional if the sound is deemed sufficiently "loud", "raucous" or "disturbing" to the enforcing officer or another. If anything, the addition of these adjectives moves section 316.3045(1) towards a more subjective standard, one that nonetheless the United Supreme Court has approved. How this distinction assists their argument is illusive.

Similarly, their statement that section 316.3045(1) lacks any "time, place and manner limitations whatsoever" is unfounded. [AB 1] Overlooked is that section 316.3045(1) is limited to sound originating from specified sound-making/amplifying devices "from within" a "motor vehicle on a street or highway" that is plainly audible at 25 feet from the vehicle—which is obviously a place and

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is the de facto standard [that] is a standardless standard").

manner restriction. They argue that section 316.3045(1) lacks the type of restrictions upheld as constitutional in Grayned [AB 14-15] wherein the anti-noise ordinance applied to "any noise or diversion" that "disturbs or tends to disturb the peace and good order" of a school or class while in session. 408 U.S. at 108. Here, section 316.3045(1) addresses excessively loud noise from within motor vehicles on public roadways, presenting the need for time, place, and manner limitations that differ from those involving schools in Grayned.

Above all, Appellees and their amicus fail to explain how the more subjective, but nonetheless constitutional, standards in Grayned, Kovacs, DA Mortgage, and Reeves render the more specific standard in section 316.3045(1) deficient. [AB 1, 13-14, 17-18] Their argument is at war with itself. They extol the virtues of the more subjective standards upheld in these four cases, yet denigrate section 316.3045(1) because it does not contain any of these "traditional standards" and instead operates more objectively by requiring the detection of "plainly audible" sound at 25 feet from a motor vehicle (subject to the administrative rule's added requirements).[2]

[2] Appellees incorrectly state that section 316.3045(1) requires that plainly audible sound also be "personally disturbing" to those who can hear it. [AB 6] No such requirement exists in the statute or the caselaw.

Conspicuously absent is any explanation of why section 316.3045(1)'s "plainly audible" standard "virtually guarantees arbitrary enforcement" compared to the constitutionally permissible "loud and raucous" and "disturbs or tends to disturb the peace or good order" standards. How the latter are constitutional, but not the former, is mysteriously unexplained in their briefs. Also unaddressed is that factual disagreement in the application of a standard does not render the standard unconstitutional. The application of noise standards at trial, whether it be a "plainly audible," "loud and raucous," or other constitutionally permissible one, is subject to the fact-finding process with cross examination and rebuttal evidence to test the veracity of the claims and defenses.[3] Some degree of uncertainty exists in every standard's application; yet a "plainly audible" one is no more susceptible to arbitrary or subjective application than any of the so-called "traditional" ones such as "loud and raucous" or "disturbs or tends to disturb the peace and good order."

Notably, Appellees and their amicus entirely ignore that section 316.3045(1) applies to sound originating "from within" a motor vehicle. The statute is written to

[3] *See, e.g.*, State of Fla. v. Middlebrooks, Case No. 2008CT043699AXX, Order Granting Def's. Mot. to Suppress, August 6, 2009 (Fla. Palm Beach Cnty. Ct.) [IB Ex. 9] (ruling that officer could not have heard defendant's music 25 feet from vehicle). That officers or other witnesses may have differing hearing capabilities or recollections of events is what trials and evidentiary hearings resolve; it is not a basis for facially invalidating laws on constitutional grounds.

address sound generated "from within" a motor vehicle for a reason: amplified sound "from within" a vehicle that is "clearly audible" at 25 feet on a public street or highway is sufficiently loud to distract the vehicle's driver and drown out sirens and horns. This degree of sound emanating "from within" a motor vehicle poses obvious public safety issues. As courts recognize, the "interest in eradicating excessive noise is bolstered by the serious public safety concerns posed by the noise to both the riders and employees" of a transportation system. *See, e.g.*, Carew-Reid v. Metro. Transp. Auth., 903 F.2d 914, 917 (2d Cir. 1990) (subway system; noting that "[e]xcessively loud noise … can drown out train whistles, putting track workers at risk, and can prevent passengers from hearing routine and emergency announcements."). Wholly absent from the answer and amicus briefs is any recognition that section 316.3045(1) addresses this serious public safety concern, even though this statute makes specific reference to sound "from within" or "inside" a vehicle. Indeed, Appellees wrongfully suggest that noise must actually "disturb the listener" to be subject to state regulation [AB 1], which no court has said is a precondition to noise abatement laws.

Notably, Appellees contradictorily claim that section 316.3045(1) is undecipherably subjective ("it means one hundred different things to one hundred different people" [AB 22]), yet they fully understand that it objectively is triggered

by sound being plainly audible at 25 feet.[4] [AB 14] "Plainly audible" at 25 feet is simply not a mysterious or amorphous standard. *See* Davis v. State, 537 S.E.2d 327, 329 (Ga. 2000) ("that a person of ordinary intelligence does not know what it means for sound to be "plainly audible" at a distance … belies credibility").

Indeed, only the Second District has departed from the near unanimous approval of a "plainly audible" standard in Florida and elsewhere. For over two decades, it has been a workable standard that survived constitutional in two district courts. Davis v. State, 710 So. 2d 635 (Fla. 5th DCA 1998); Heard v. State, 949 So. 2d 308 (Fla. 1st DCA 2007). Of note, the Fifth District recently upheld section 316.3045(1) against a vagueness challenge, stating:

> The distance standard provides an explicit guideline to those charged with enforcing the statute. If a law enforcement officer can hear sounds at or beyond the specified distance using his normal sense of hearing, the statute has been violated. *See Davis,* 710 So.2d at 636. And, we believe that the "plainly audible" standard is no less precise than the "loud and raucous" standard approved by the United States Supreme Court in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428–29, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), which stated that "a prohibition against the use of sound trucks emitting 'loud and raucous' noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising."

[4] Appellees wrongly suggest that section 316.3045(1) is triggered by the "mere detection" of sound, [AB 14], when the standard is "plainly audible."

Montgomery v. State, __ So. 3d __, 2011 WL 4102292, at *3 (Fla. 5th DCA, Sept. 16, 2011) (footnote omitted). Other courts around the country, including the Eleventh Circuit, have upheld "plainly audible" noise standards.[5]

Appellees suggest a decibel meter or similar device is necessary to satisfy constitutional standards [AB 12], but cite no relevant authority. Courts around the country have routinely rejected similar decibel meter arguments.[6] A primary reason is that enforcement of decibel-based regulation can be "a 'very, very complex issue' due to the infinite number of points of measurement" as well as other factors. *See* Reeves v. McConn, 631 F.2d 377, 386 (5th Cir. 1980) (quoting testimony of

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[5] [IB 19-21] Contrary to Appellees' claim [AB 15-17], the operative standard the Eleventh Circuit addressed in DA Mortgage Inc. v. City of Miami Beach, was a "plainly audible" one. 486 F.3d 1254, 1268, 1272 (11th Cir. 2007). Miami Beach's noise ordinance made it "prima facie evidence" of a violation for sound to be "plainly audible at a distance of 100 feet" from the building, structure or vehicle", which it found to be "an objective standard." Id. at 1272.

[6] *See, e.g.*, City of Belfield v. Kilkenny, 729 N.W.2d 120, 126 (N.D. 2007) ("[W]e do not require police officers to carry decibel meters to judge excessively loud car mufflers; therefore, we certainly will not require them to scientifically test the loudness of a yip, yowl or bark. The reasonable police officer will know it when he hears it.") (quotation omitted); People v. Lord, 796 N.Y.S.2d 511, 512 (N.Y. Sup. App. 2005) ("There is no constitutional requirement that a decibel meter or other such device be used to determine whether a noise level will be considered illegal."); Eanes v. State, 569 A.2d 604, 614 (Md. App. 1990) (setting specific decibel targets on the street "would be likely both underinclusive and overbroad" because noise varies with "time of day, air temperature, air currents, and background noise present"); Mann v. Mack, 155 Cal. App.3d 666, 674 (Cal. App. 1984) (enforcement "requires common sense, not a decibel meter").

"plaintiff's own expert"). For instance, the Second Circuit in Carew-Reid rejected a decibel meter challenge to New York City's ban on amplified sound on subway platforms. 903 F.2d at 917. In rejecting the claim that decibel meters must be used, the court cited their practical difficulties as the sole means of enforcement in the transportation context, providing the example of measuring sound "on a crowded subway platform with riders rushing on and off trains." Id. at 918-19. Similar difficulties exist on public streets where the confluence of sound from motor engines, tires on roadways, and other noise commonly present on roadways exist. More fundamentally, the court concluded that the "validity of [time, place or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." Id. at 918 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985) (noting "[*Ward v.*] *Rock Against Racism* makes clear that the less-restrictive alternative analysis has no part in the review of a time, place or manner regulation"); *see also* Reeves, 631 F.2d at 386 ("Administrative convenience is certainly a proper factor … to weigh in choosing one standard of regulation over another.").

2. Section 316.3045(1) is not substantially overbroad.

Appellees' overbreadth challenge must be viewed from the perspective of whether section 316.3045(1) infringes on rights that "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). Persons claiming overbreadth bear the burden of demonstrating "from the text of the law *and from actual fact*" that substantial overbreadth exists. Virginia v. Hicks, 539 U.S. 113, 122 (2003) (emphasis added) (citation omitted).

Under this standard, the overbreadth challenge fails. Appellees contend that section 316.3045(1) "reaches far more broadly than is reasonably necessary to protect state interests" [AB 14], but neither they nor their amicus rebut, much less challenge, the serious safety interests advanced by an excessive noise standard for stereos and other amplifications within motor vehicles used on public roadways.[7] They simply do not have (and cannot cite any case establishing) an unqualified constitutional right to generate amplified sound so loud from within their motor vehicles on public roadways that it poses the types of traffic safety issues that section 316.3045(1) addresses. Any effect on allegedly constitutionally protected

[7] Appellees' amicus admits that "the legislature may enact laws to protect against excessive noise." [Amicus Br. 6] Moreover, its discussion of the circuit court order in Middlebrooks [Id. at 5 n.4 & 6] fails to undermine the traffic safety interests at stake. In that case, Defendant's expert testimony—that music could not be heard at 25 feet under the specific prevailing conditions (defendant's car travelling at speed limit, windows up, air conditioner on, etc.) even if stereo was on its maximum volume—prevailed because the State presented no contrary evidence. *See* IB Ex. 9 at 4-7. Middlebrooks is simply an example of the "plainly audible" standard not (Continued …)

speech is minimal given that section 316.3045(1) allows sound (regardless of content) to be played at safe, unobtrusive levels. As the Fifth District stated in Davis v. State, section 316.3045(1) "permits one to listen to anything he or she wishes so long as it cannot be heard at the prohibited distance. In other words, *the statute permits one to listen to anything he or she pleases, although not as loudly as one pleases*." 710 So. 2d at 636 (emphasis added); *see also* People v. Arguello, 765 N.E.2d 98, 102 (Ill. App. 2002) ("persons can express themselves with music at any time below a certain volume.").

In sum, section 316.3045(1) places lawful restrictions on amplified sound from within motor vehicles in a manner that does not impact any real or substantial amount of protected speech. Having failed to address the applicable test, or otherwise explain how section 316.3045 is substantially overbroad given its legitimate public safety rationale, Appellees' overbreadth claims must fail.

3. Section 316.3045(3) is not impermissibly content-based and meets the intermediate strict scrutiny standard.

On its face, section 316.3045(3) is not content-based in the traditional sense because it does not prohibit or place any limitations on the type of sound originating from the commercial or political vehicles exempted; instead, it draws a real-world

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being met in a specific case (versus the standard being constitutionally impermissible).

distinction between classification of vehicles that commonly use (and historically have been allowed to use) sound-making devices on public roadways that impact state-level noise and traffic safety goals differently. Indeed, absent a carve-out for traditional commercial or political uses, the potential exists for lawsuits claiming violations of the free speech rights of ice-cream trucks[8] and political parties.[9]

Because it does not draw content-based restrictions on speech, the intermediate scrutiny standard applies. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 662-63 (1994) (content-neutral law upheld if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest") (quotation omitted). An incidental effect on some messages or speakers is permissible. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A

[8] *See, e.g.*, Anabell's Ice Cream Corp. v. Town of Glocester, 925 F. Supp. 920, 929 (D.R.I. 1996) (successful challenge by company using ice cream trucks with electronic jingles to town's ordinance that forbade merchants from using amplification to attract attention).

[9] *See, e.g.*, U. S. Labor Party v. Pomerleau, 557 F.2d 410 (4th Cir. 1977) (city antinoise ordinance unconstitutional as applied to amplification of political speech on public street).

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.").

Although section 316.3045(3) limits the exempted uses to commercial and political ones, it is not based on an attempt to suppress either content or protected speech. Instead, section 316.3045(1) and section 316.3045(3) work together to accommodate competing interests. Section 316.3045(1) focuses on excessively loud sound originating from within the millions of non-exempt motor vehicles on Florida roadways that present noise and safety problems on a dramatically larger scale; in contrast, section 316.3045(3) exempts a small subset of vehicles that have been shown to pose few, if any, noise and safety concerns statewide. [IB 33-34] *See, e.g.*, Serv. Employees Int'l Union, Local 5 v. City of Houston, 595 F.3d 588, 600 (5th Cir. 2010) (upholding noise ordinance exceptions that were "reasonable distinctions among categories in the level of disruption"); Stokes v. City of Madison, 930 F.2d 1163, 1171-72 (7th Cir. 1991) (upholding exempted categories because they were not as intrusive and did not require screening of the message itself); Turley v. Guiliani, 86 F.Supp. 2d 291, 299 n.7 (S.D.N.Y. 2000) (permitting performers at corporate-sponsored events to play at higher volumes). Localities typically regulate the exempted class of specialized vehicles and can more deftly respond to local noise concerns they may create (e.g., ice-cream trucks in residential neighborhoods

or political presentations in public parks). By contrast, excessively loud car stereo noise is a ubiquitous problem that creates real-world safety issues statewide.

Unlike People v. Jones, 721 N.E.2d 546 (Ill. 1999), which drew a content-based exemption for one category of speech ("advertising"), section 316.3045(3) is more narrowly drawn by exempting only "motor vehicles used for business or political purposes, which in the normal course of conducting such business use soundmaking devices." In contrast to the broad exemption for advertising in Jones, the definition of exempted vehicles in section 316.3045(3) is far more limited. Moreover, an officer enforcing section 316.3045(3) does not have to evaluate the content of speech coming from the exempted vehicle, a problem that existed in Jones. *See also* 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). Here, Florida's law exempts only a narrow class of specialized vehicles accustomed to amplifying sound: ice-cream and political sound truck-type vehicles.[10]

[10] Notably, the Fifth District, which recently upheld section 316.3045(1) on vagueness grounds, ruled that it was nonetheless impermissibly content-based because it "excepts from its reach all amplified business or political speech." Montgomery v. State, 2011 WL 4102292 at *5 (Fla. 5th DCA 2011). It is section 316.3045(3) that creates the two excepted uses for specified motor vehicles, but it in no way excepts "*all* amplified business or political speech."

4. Even if section 316.3045(3) is unconstitutional, it is severable.

Appellees do not argue that section 316.3045(3) is non-severable; they merely claim that even if this Court upholds section 316.3045(3), section 316.3045(1) should nonetheless be deemed unconstitutional as vague/arbitrary thereby making severability a non-issue. [AB 32]

If, however, this Court upholds section 316.3045(1) but finds section 316.3045(3) is content-based and facially invalid, the appropriate remedy is to sever the latter subsection. *See*, *e.g.*, Dep't of Revenue v. Magazine Publishers of Am., Inc., 604 So. 2d 459, 464 (Fla. 1992); Easy Way of Lee County, Inc. v. Lee County, 674 So. 2d 863 (Fla. 2d DCA 1996). Florida law favors severance versus wholesale invalidation, *see* Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999), and, contrary to the amicus's suggestion [Amicus Br. 15], must be considered out of respect for the legislature irrespective of whether parties raise the issue. *See*, *e.g.*, Bush v. Holmes, 886 So. 2d 340, 374 (Fla. 1st DCA 2004) (Wolf, J., concurring & dissenting in part) ("While the issue of severability was not raised by the parties … the judiciary has an inherent power *and duty* to uphold the constitutionality of legislation whenever possible") (citing Ray, 742 So.2d at 1280) (emphasis added).

Finally, amicus argue that because political speech "is the essence of what the First Amendment seeks to protect" it cannot be severed from the statute. [Amicus Br. 17] But just a few pages earlier [Amicus Br. 11-12], it argues that including the

exemption for political uses in section 316.3045(3) dooms the statute, noting that "a prohibition against the use of sound trucks emitting "loud and raucous" noise in residential neighborhoods is permissible *if it applies equally to music, political speech, and advertising.*" City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428-429 (1993) (emphasis added). It would seem more consistent with Discovery Network and principles of constitutional avoidance to sever section 316.3045(3)—thereby preserving the general prohibition of section 316.3045(1)—versus condemning the entirety of section 316.3045. 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 invalid.

CONCLUSION

The State of Florida respectfully requests that this Court uphold section 316.3045 in its entirety; alternatively, if the commercial/political use exemption in section 316.3045(3) is deemed facially unconstitutional, it should be severed 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 4th day of October, 2011, by U.S. Mail to:

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