COLUMBIA COUNTY BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM REQUEST FORM

The Board of County Commissioners meets the 1st and 3rd Thursday of each month at 5:30 p.m. in the Columbia County School Board Administrative Complex Auditorium, 372 West Duval Street, Lake City, Florida 32055. All agenda items are due in the Board's office one week prior to the meeting date.

Today's Date: **September 27, 2019** **Meeting Date:** **October 3, 2019**

Name: **Joel Foreman** **Department:** **County Attorney**

Division Manager's Signature: 

1. Nature and purpose of agenda item:

Noise Regulation – Introduction and Overview of Issues

2. Recommended Motion/Action:

To set workshops or town hall meetings with citizens and staff as is the pleasure of the Board for further discussion and fact-finding.

3. Fiscal impact on current budget.

This item has no effect on the current budget.

COLUMBIA COUNTY, FLORIDA
Office of the County Attorney

Joel F. Foreman
County Attorney

MEMORANDUM

To: Board Agenda, October 3, 2019

From: Joel F. Foreman

Re: Noise Regulation – Introduction and Overview of Issues

Date: September 27, 2019

Introduction

Commissioner Nash requested that I investigate the County's authority to regulate noise within the unincorporated areas of the County. Noise regulations in the forms of statutes and ordinances exist throughout the state, but the area is highly complex and involves Constitutional questions that need to be examined and understood before the Board takes action.

Summary

The County, through the Board of County Commissioner, may regulate noise so long as the regulations are content-neutral, are not unduly restrictive to Constitutionally protected forms of expression, are not overly broad, and are not vague. Drafting legislation that meets these requirements is a continuing challenge for the Florida legislature and local governments alike.

Noise as Pollution

Article II, Section 7 of the Constitution of the State of Florida provides as follows:

> SECTION 7. Natural resources and scenic beauty.—
> (a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

Noise is a part of our environment. Excessive or unnatural noise can therefore pollute an environment. People play music in their homes to enhance their personal environments. Naturalists seek out escapes to nature to get away from the bustling noise of daily life. First responders use loud and urgent noises to alert bystanders of danger or emergencies. Importantly, individuals adjust the volume of the sound in their lives to their own levels of comfort and, with some exceptions, those sound levels are theirs to control. It is hardly surprising then that constituents are inclined to complain when they lose control over their ability to enjoy peace and quiet in their homes or offices due to excessive noise created by others. This excessive noise that travels across property lines and rights of way has the capacity to pollute the in-home and in-

office environments of anyone within earshot, and it is usually outside the citizen's individual power to do much of anything about it. Regulation of excessive sound by federal, state, and local governments is often the only meaningful solution available to limit this type of pollution.[1]

Unlike most other forms of pollution, however, what some call noise can qualify as a form of speech or expression protected by the First Amendment to the Constitution of the United States[2].

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Because of this important Constitutional dynamic, regulation of "noise", even when viewed as a pollutant, becomes problematic. Regulation or legislation that potentially criminalizes the exercise of a Constitutionally protected right must be done precisely and in a way that tightly limits or eliminates the potential for infringement upon those rights[3]. I have attached a brief law review article, *With the Best of Intentions: First Amendment Pitfalls for Government Regulation of Signage and Noise*, 46 Stetson L. Rev. 533, 535–36 (2017), that includes discussion of this subject on page 6. I encourage you to review this carefully so we can discuss any questions you may have.

The most significant recent case in this field is *State v. Catalano*, in which the Florida Supreme Court ruled that a state statute containing a restriction upon sound "[p]lainly audible at a distance of [twenty-five] feet or more from the motor vehicle." Because the statute exempted political speech and commercial speech, the statute was not content-neutral. Any regulation that is not content-neutral must be narrowly tailored and must meet a "compelling" governmental (state) interest. I've attached a copy of *Catalano* as well as a copy of the underlying statute, F.S. 316.3045 for your reference.

Drafting Considerations

There are multiple considerations to account for when preparing a noise ordinance. In addition to the Constitutional considerations discussed in the attached article, there are practical issues raised for law enforcement and code enforcement. Since objective measurements are preferred by courts to subjective ones, officers will need to be equipped with appropriate decibel meters. Officers will need to be trained for proper use of those meters. The manner in which incidents are reported and recorded will need to be standardized as determined in collaboration with law enforcement and code enforcement agencies.

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[1] See e.g. *Kovacs v. Cooper*, 336 U.S. 77, 86–87, 89 (1949) (noise ordinance was justified by the need to protect citizens from distracting noises because "[t]he unwilling listener . . . is practically helpless to escape this interference with his privacy . . . except through the protection of the municipality")

[2] Florida's Constitution, Article I, Section 4, also guarantees rights of expression, but includes a clause that provides no one shall abuse his or her rights guaranteed by that section.

[3] "The overbreadth doctrine applies when legislation criminalizes constitutionally protected activities along with unprotected activities, by sweeping too broadly and infringing upon fundamental rights" *State v. Catalano*, 104 So. 3d 1069, 1077 (Fla. 2012)

I've attached a research paper obtained from the Florida Department of Law Enforcement's "Senior Leadership Program" by Patrick Dooley titled "Enforcing Noise Ordinances in Florida"[4]. The article is instructive not only in practical considerations but also to illustrate one perspective on the importance of noise regulation in the broader scope of law enforcement and criminal justice. The Board should determine whether and how the Sheriff's Office or code enforcement will respond to noise complaints. Given the time and place elements that will have to be drafted into the ordinance to guard the ordinance against Constitutional challenges, most complaints will occur during nighttime hours when the County's code officers are generally not on duty.

Finally, the Board should be attentive to the high level of public interest in this area. Recent activity on social media and in the news media suggests a wide array of complaints the public wishes to see addressed. Workshops or town hall meetings can serve to solicit public input and determine which issues are the most pressing for regulation. These sessions could also serve to educate the public on the limitations placed on the government to regulate certain conduct.

Recommended Motion: To set workshops or town hall meetings with citizens and staff as is the pleasure of the Board for further discussion and fact-finding.

[4] http://www.fdle.state.fl.us/FCJEI/Programs/SLP/Documents/Full-Text/Dooley-pat-paper.aspx

46 Stetson L. Rev. 533

Stetson Law Review
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Local Government Law Symposium

Article
Karen Zagrodny Consalo [a1]

WITH THE BEST OF INTENTIONS: FIRST AMENDMENT PITFALLS FOR GOVERNMENT REGULATION OF SIGNAGE AND NOISE

I. INTRODUCTION

A basic tenant of American jurisprudence is the protection of speech under the First, Fifth, and Fourteenth Amendments to the United States Constitution, as well as sections 4 and 9 of Article I of the Florida Constitution. [1] While the extent of free speech is not limitless, this Article demonstrates that government attempts to regulate speech through regulation of signage and noise has been significantly curtailed by both federal and state courts in recent years. Further, a constitutional challenge to a government regulation will often be reviewed de novo as a pure question of law ***534** and is therefore subject to a stricter standard of review than general regulations. [2] This dictates that governments cannot rely upon the judicial deference typically afforded to local governments exercising their police powers. [3] Therefore, many sign and noise ordinances will need to be significantly amended to ensure constitutional compliance. [4] In addition to explaining the current climate of First Amendment regulation with regard to signage and noise, this Article provides concrete advice and best drafting guidelines for governments to utilize when drafting or revising signage and noise regulations.

II. GOVERNMENT SIGN REGULATION

One common area of government regulation which holds numerous potential constitutional pitfalls is signage. As the seventies ballad decries: "Sign, sign, everywhere a sign!" [5] Today, it is difficult to avoid signs in any place of human habitation. [6] From ***535** fifty-foot steel billboards along highways, to massive LED moving displays on sports arenas, to inflatable balloons and streamers waving outside car dealerships, to prolific political yard signs, and government-issued directional signage, signs for commercial, political, ideological, and government purposes are everywhere. To address this myriad of different types of signage, governments (primarily cities and counties) have developed highly complex hierarchies and categories of regulation based upon the size, design, location, and duration of sign usage within their jurisdiction. [7]

Yet, this Article highlights the irony that high levels of specificity in categorization and rules actually render sign regulations less constitutionally sound. [8] Categorization of signs based upon the type of use or the type of user, accompanied by regulation based upon such categories, has recently led federal and state courts to find such ordinances are content-based and therefore subject to the exacting strict scrutiny standard. [9] Strict scrutiny requires proof of a compelling government purpose in enacting the regulation and narrowly tailoring that regulation to meet such purpose. [10] Few sign regulations have survived such strict scrutiny review. [11]

In 2005, the Eleventh Circuit Court of Appeals issued a ruling on sign regulation in the case of *Solantic, LLC v. City of Neptune Beach*, [12] which, at that time, shocked governments in Florida, Georgia, and Alabama by greatly restricting their ability to differentiate between sign restrictions based upon the nature of ***536** the sign user. [13] Prior to *Solantic*, it had been accepted practice for governments to exempt governmental or public service signs from regulation and to apply less strenuous regulation to political, charitable, and religious signs. [14] Yet, the *Solantic* court found any such distinction between the type of sign or type of sign user to be a content-based regulation. [15]

Based upon its finding that the regulation was a content-based regulation, the Eleventh Circuit applied strict scrutiny review to determine if such regulation passed constitutional muster. [16] Applying the two prongs of strict scrutiny review, the court examined whether the ordinance had been enacted to meet a compelling government purpose and whether it was narrowly tailored to meet that interest [17] --the court found the sign regulation failed both prongs. [18] The court asserted that the stated government interests, namely protection of aesthetics and traffic safety, have not been found to be compelling government interests. [19] Further, even if community aesthetics and traffic safety were considered compelling interests, the court found the ordinance did little to achieve such interests and only addressed the aesthetics or traffic safety "at the highest order of abstraction," providing no concrete link between the stated government purpose and the method of sign regulation. [20] Consequently, the Neptune Beach sign regulation was invalidated. [21]

The *Solantic* ruling curtailed the then-common government practice of regulating government-issued signage, as well as the signage of favored users, such as political, religious, and charitable organizations, more leniently than other users' signs. [22] The pre-*Solantic* understanding of governments was that only regulations upon the words expressed on the sign would be considered a content-based regulation, and therefore subject to the exacting ***537** strict scrutiny standard. [23] The *Solantic* ruling required many governments within the Eleventh Circuit to significantly redraft, and in many situations loosen, their sign regulations. [24] This ruling, however, was only a forbearer to the expansion of First Amendment sign protections, which would be issued by the U.S. Supreme Court ten years later. [25]

A. *Reed v. Town of Gilbert*

In 2015, the U.S. Supreme Court issued a ruling in *Reed v. Town of Gilbert*, [26] which has had a dramatic and far-reaching effect on government sign regulations across the country. [27] In an opinion delivered by Justice Thomas, the Court rebuked the Town of Gilbert for exceeding the constitutional parameters of government regulation of speech through its signage regulations. [28] As the basic tenants of the Town's sign regulation scheme was once shared by many state governments, this ruling had a dramatic and immediate impact upon the validity of sign ordinances across the country. [29]

The Town of Gilbert's sign code was based upon the principle that no signs were allowed within the Town unless permitted by the Town. [30] The code then established standards and requirements for obtaining such a permit, as well as restrictions upon the various types of signs. [31] In total, the ordinance established twenty-three different categories of signs. [32] Each category of sign was assigned ***538** a list of permitting parameters, including maximum sizes, allowable locations, and maximum time periods for display. [33]

In *Reed*, the Court focused on three specific sign categories established by the regulation: (1) *Ideological Signs*, meaning "sign[s] communicating a message or ideas for noncommercial purposes"; (2) *Political Signs*, defined as "any temporary sign designed to influence the outcome of an election called by a public body"; and (3) *Temporary Directional Signs Relating to A Qualifying Event*, which encompassed directional signage regarding the meeting of a non-profit organization. [34] Of these three

sign categories, the temporary directional signage was most strictly regulated, followed by political signage, and finally, the least regulated, ideological signs. [35]

The regulations placed upon *Temporary Directional Signs Relating to A Qualifying Event* restricted signs for meetings of religious, charitable, community service, and similar non-profit groups by: (1) limiting the size of such signs to six feet; (2) allowing only four signs per property; and (3) limiting display to no more than twelve hours before and one hour after the event. [36] In comparison, *Political Signs* could be thirty-two feet in size and displayed for up to seventy-five consecutive days; *Ideological Signs* could be twenty feet in size and had no limitation on the number of consecutive days for display. [37]

A religious organization, Good News Community Church, challenged the sign regulations on First and Fourteenth Amendment grounds claiming that the regulations were an abridgment of its freedom of speech. [38] Of particular concern to the Church was the restriction upon its ability to use temporary signage to notify members of the location of its weekly services (which were held at various locations). [39]

Both the U.S. District Court for the District of Arizona and the U.S. Ninth Circuit Court of Appeals ruled against the Church. [40] Upon initial appeal of the District Court's denial of the Church's ***539** request for a preliminary injunction, the Ninth Circuit found the sign regulations to be content-neutral because the "cursory examination" necessary for an enforcement officer to determine a particular sign's compliance with town regulations was "not akin to an officer synthesizing the expressive content of the sign." [41] Upon secondary appeal of the District Court's grant of summary judgment in favor of the Town, the Ninth Circuit again found the regulations to be content-neutral because they were based upon objective factors rather than the substance of the sign. [42] In support of its rulings, the Ninth Circuit explained that the Town's rationale in adopting the regulations was not because the Town "disagreed with the message conveyed" or demonstrated any intent to discriminate between the content of various signs. [43]

Upon finding the regulations to be content-neutral, the Ninth Circuit did not apply strict scrutiny. [44] Rather, the court applied a lower level of review to determine if the sign regulation: (1) was narrowly tailored, (2) served a significant government interest, and (3) was a valid time, place, and manner restriction. [45] In application of this standard of review, the court held the sign ordinance to be valid. [46]

However, upon certiorari review of the denial of summary judgment, the U.S. Supreme Court reversed and remanded. [47] Noting that the First Amendment, as applied to the states (and thereby municipal governments through the Fourteenth Amendment), prohibits government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content," the Court found the Town's sign code to be an unconstitutional content-based regulation on speech. [48] In so ruling, the Court corrected the assertions made by the Town and by both lower courts that the sign code was content-neutral because it was not ***540** enacted for the purpose of restricting a message with which the Town disagreed. [49]

Rather, the Court explained that both lower courts had "skip[ped] the crucial first step in the content-neutrality analysis: determining whether the law is content-neutral on its face." [50] The Court reminded lower courts that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." [51] Therefore, neither government animus, improper censorial motive, nor content-based purpose is necessary for a regulation to be deemed content-based. [52] Stated alternatively, there is no need to examine the government purpose in enacting a sign code, whether benign or malicious, if the law is content-based on its face. [53] It is the operation, not the motive, of the law which imputes First Amendment concerns. [54]

In a similar vein, the Court summarily rejected the circuit court's conclusion that the sign code could not be content-based because it did not differentiate regulations, nor did it censor content, based upon any particular viewpoints. [55] Noting well-established law, the Court explained that a government regulation designed to restrict a specific viewpoint was a blatant and egregious form of content-based regulation--but not the only method by which a government might create a content-based regulation. [56] Rather, a broad restriction upon discussion of an entire topic, like those imposed by the categories of sign code at issue, was a content-based regulation. [57] As another example of such sign-category based regulation, the Court cited a hypothetical example of a regulation which allowed the use of sound trucks for some types of speech, but not for political speech. [58] Even though such hypothetical regulation did not differentiate between ***541** different types of political views, it would still be a content-based regulation because it discriminated against the entire field of political speech while allowing other types of speech. [59] The Court concluded that the Town's strict restriction upon signage, which announced the time and place of certain types of events, but not upon other types of events nor other types of speech, was a content-based regulation. [60]

Upon finding that the sign code was content-based, the Court applied the strict scrutiny standard of review be applied to determine if the sign code was constitutional. [61] The Court found that, even assuming *in arguendo* that the regulation furthered a compelling government interest, the methods of sign regulation used to accomplish this goal were "hopelessly underinclusive" and were therefore not sufficiently narrowly tailored to satisfy strict scrutiny. [62]

Focusing again on the regulations upon directional signage, the Court determined that directional signs had no greater adverse effect on aesthetics, nor on traffic than ideological or political signs. [63] Finding that the Town failed to demonstrate how directional signs adversely affected aesthetics and traffic safety and that the Town allowed similar signs without the strict regulations paced upon directional signage, the Court held that the sign code was not narrowly tailored, and therefore failed strict scrutiny review. [64]

Apparently anticipating an outcry from governments across the country that this ruling would leave them with no avenue by ***542** which to regulate the proliferation of signs in modern America, the Court reiterated that not all sign regulations would be found to be content-based and therefore subject to strict scrutiny. [65] In opening a content-neutral door (albeit a small one) the Court cited various content-neutral methods by which governments could regulate signage, including non-message and non-use related regulations on "size, building materials, lighting, moving parts, and portability." [66] Such a content-neutral sign code would need to be drafted to apply the same regulations to all signs, whether commercial, political, governmental, or other. [67] However, such sign regulations could likely vary by zoning district, such that all signs within a residential neighborhood would be limited in size, duration, lighting, etc., while signs in a commercial district may be allowed to be larger, have greater permanency, and extensive lighting. [68]

The Court also reiterated that even if the regulation was drafted in a content-based manner, it is not automatically constitutionally flawed. [69] Rather, it must meet the strict scrutiny requirements of a compelling government purpose and have narrowly tailored means to achieve that purpose. [70] Posing a specific example, the Court noted that unique standards for ***543** directional signage could pass constitutional muster if there is a clear showing of a compelling government purpose and narrowly tailored means to achieve that purpose. [71] Even with this tepid encouragement, it is clear that in the current judicial climate, any attempt to apply unique sign standards to certain uses or users must include express and objective justifications and methodology to pass constitutional muster. [72]

B. Effect of *Reed v. Gilbert* on Government Sign Regulation and Best Drafting Practices

Despite the Supreme Court's reassurances, there is no doubt that its ruling in *Reed* requires many governments to significantly amend their sign codes. [73] While the ruling in *Reed* has clarified fluctuating and convoluted rules of sign regulation, it does so with a sweeping brush which expands the commonly understood extent of content-based regulation. Whereas regulation of signage based upon the category of the message (i.e., political, commercial, directional, etc.) was previously considered by many governments and courts to be a content-neutral, and therefore a more readily defensible, regulation, the U.S. Supreme Court has made it clear that such categories are in fact content-based regulations subject ***544** to the much higher standard of strict scrutiny. [74] This ruling requires governments to eliminate all portions of their codes that categorize by sign type or sign user and innovate alternative methods to control signage. [75]

The City of Atlanta, Georgia amended its sign code in November 2015, shortly after the *Reed* decision was released. [76] The City's sign code may serve as a model code, or at least as a foundation, for other governments seeking to achieve compliance with *Reed*, while still exerting control over signage. Atlanta's extensive sign code regulates the size, lighting, materials, proliferation, and aspects of signage based primarily upon the type of sign and geographical locations, rather than the type of speech advanced by the sign. [77] Regulating signage by zoning district allows Atlanta to exert influence over certain types of signs in a content-neutral manner. For example, billboards are permitted but only in certain industrial districts. [78] By regulating signage based upon zoning district, the sign code can target the certain types of signage without basing the regulations upon the sign content.

Incorporating further content-neutral regulation, Atlanta's code includes detailed definitions of each type of sign that might be requested and includes definitions for animated signs, banners, beacons, billboards, canopy, flags, and marquees, among others. [79] ***545** This categorization of signage is based upon the sign design and materials, rather than by subject matter or anticipated users. [80]

This drafting allows the City to maintain a content-neutral sign code and avoid potential strict scrutiny review, while still enabling substantial government oversight on signage within Atlanta. Yet the drafters still included legislative findings and purpose, presumably as defensive ammunition in the event that the regulation were found to be content-based. [81] Such stated government purpose includes the general desire to protect public ***546** health, safety, and welfare. [82] In addition to such general terms however, the code also describes the excessive proliferation of signs, the distracting and dangerous nature of signs to motorists and pedestrians, the confusion caused by improperly located signs, and the adverse effects of signs on the aesthetics of the city. [83] The stated legislative purpose also specifically identifies an intent to comply with constitutional mandates and not regulate "dependent entirely on the communicative content of the sign." [84] While the stated government purpose of a regulation does not govern a court's analysis of the same, expressly asserting an intent to remain content neutral at least establishes a presumption of good faith efforts to regulate in a content-neutral manner. [85]

Best drafting practices require a government seeking compliance with the *Reed* decision to ensure the vast majority of sign regulations are content neutral. [86] Government sign codes should describe the intended use or purpose of the sign in establishing categories for signage. In so doing, the words "commercial," "political," "advertising," and "governmental" may well be stricken from the sign code. In their place should be definitions of signage based upon the materials, size, and location of the sign. [87]

***547** Further, regulations associated with each type of so-defined sign must be uniform to all users, without any special benefits or exceptions. This may prove to be more challenging than simply developing new sign definitions since the ordinance drafters must consider how a one-size-fits-all allowance for a certain type of sign may have unintended consequences. For example, if LED signage will be permitted, it will likely be sought by movie theaters, sports facilities, bars and restaurants (even those in a predominantly residential areas), adult entertainment facilities, and even some churches (also often located in residential areas). While time consumptive, it would be wise for ordinance drafters to conduct a thorough survey of the community to identify which types of signs are currently in use and where loosened sign regulations may have adverse effects. It is vitally important to identify these adverse effects and address them, in a content-neutral manner, before enacting the regulation. Attempting to

prevent the "wrong" user from obtaining an allowed sign by retro-fitting a sign ordinance could lead to inverse condemnation or similar claims, while denial of a permit will likely lead to a constitutional challenge. [88]

To avoid over proliferation of signs or to prevent inappropriate signs within the community, drafters should rely upon restrictions applied throughout a zoning district or zoning district-wide, or upon consistent time and manner restrictions. The former would entail a carte-blanche restriction upon certain types of defined signs within a zoning district. For example, a government could prohibit all billboards or flag signs within specified residential zoning districts. This zone-based sign regulation may even require creation and adoption of new zoning districts. For instance, a ***548** community may wish to allow large, well-lit, modern signage in modern commercial areas, but not in a historical commercial district. In such case, the community should adopt a historic, commercial zoning district to limit signage. [89]

The government may also employ time and manner restrictions in order to limit adverse signage affects. These restrictions may also be applied throughout a zoning district or zoning district-wide, or may apply throughout the community. For example, a content-neutral time restriction would be to require all sign illumination be darkened or dimmed during certain hours. [90] Another example of a content-neutral time restriction would be to limit the number of consecutive or cumulative days a yard sign may be erected. [91] Manner restrictions will often relate to the size, materials, lighting, and similar physical characteristics of a type of sign. [92] For example, a manner restriction upon billboard may be limited to twenty-four feet by twelve feet, while a flag sign may be limited to a height of fifty feet, and a yard sign would be restricted to two feet by two feet. Other examples of allowable manner restrictions would be to prohibit mechanized or air-filled signage, to limit the amount of light which may emanate from a sign, or describe required construction materials for certain categories of ***549** signs. As with all other regulations though, these must be applied uniformly to all similarly situated signs. [93]

Lastly, the drafters must take care to ensure there is no room for subjective enforcement or favorable treatment within the sign code. [94] Certainly, governments cannot and should not afford their own signs exemption from regulation. Where necessary, the government may engage in content-based regulations, but must be prepared with evidence to show a compelling need for such regulation and draft it in the most narrowly tailored means to achieve such goal, ensuring the regulation is neither over, nor under, inclusive. [95] Should a government choose to do so, supporting research and studies demonstrating the compelling need should be included in the legislation and legislative discussion should include any considered alternative means of regulation. [96] With these precautions in place, governments can continue to regulate signage, albeit through different methods than those commonly used prior to *Reed*.

***550** *III. NOISE REGULATION*

Noise is another area of speech regulation in which government regulation often runs afoul of the First Amendment. [97] It is a tricky area for governments to tread due to the nebulous nature of noise. [98] Nor is it always in a government's own interest to regulate noise since many government-sanctioned activities--parades, firework displays, and public concerts--often result in extensive noise. [99] Yet, rarely can governments avoid treading into noise regulation when citizens demand action against loud, rancorous, and offensive sounds. [100]

Like sign regulations, noise regulations will be reviewed based upon whether they are content neutral or content based, and if found to be content based, the highly exacting strict scrutiny judicial standard will be applied. [101] Additional constitutional challenges of vagueness and overbreadth are also common to noise regulations. [102]

Significant federal noise regulation cases, including the U.S. Supreme Court case, *Grayned v. City of Rockford*, [103] and more ***551** recently the Eleventh Circuit decision in *Pine v. City of West Palm Beach*, [104] established the current parameters to ensure

government regulations are sufficiently clear and objective to avoid constitutional invalidity. [105] Quite recently, the Florida Supreme Court added to this body of caselaw on noise regulation in *State v. Catalano*. [106]

A. Federal Standards Upon Government Noise Regulation

In *Grayned v. City of Rockford*, the U.S. Supreme Court established minimum standards for government noise regulations. [107] At issue was a government ordinance, which established a 150 foot anti-noise perimeter around schools. [108] Challengers to this prohibition argued that the regulation was unconstitutionally vague. [109] While the Court found that the ordinance was not void for vagueness, its review of the minimum requirements for a noise ordinance are a necessary starting point for examination of any noise regulation. [110]

Reiterating the "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," the Court placed significant emphasis on whether the subject noise regulation: (1) provided fair warning to potentially regulated parties, (2) provided "the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and (3) avoided the risk of "arbitrary and discriminatory" application by enforcing authorities. [111] In the subject noise ordinance, the Court looked with favor upon the City's self-imposed conditions precedent to finding a noise violation. [112] Among these conditions was a finding that the noise at issue was incompatible with normal school activity; that the noise actually disrupted school activity; ***552** and that the noise was willfully conducted. [113] These conditions precedent led the Court to find sufficient protection against arbitrary or subjective government enforcement, and therefore that the code was not unconstitutionally vague. [114]

The Eleventh Circuit more recently expanded upon the drafting precision required to survive vagueness or overbreadth challenges in the 2014 case, *Pine v. City of West Palm Beach*. [115] At issue in *Pine* was a noise ordinance drafted to limit the noise created by protesters outside of medical facilities. [116] The City had enacted a prohibition on amplified sound on any public street or sidewalk within one hundred feet of the property line of a health care facility. [117] The City's stated legislative purpose included a finding that loud noise had an adverse effect on medical patients and it would be in the public interest to alleviate such source of potential harm. [118] Legislative history further indicated that the City had previously amended the noise ordinance to restrict its scope from the broad term of "any unnecessary noise" to a more limited term of "amplified sound." [119]

In addition to this legislative purpose and history indicating that the ordinance had been designed to meet a compelling and documented legislative purpose and had been restricted to a narrowly tailored scope, the court viewed it favorably that the City had placed some burden and responsibility upon the health care facilities which wished to reap the benefits of this noise restriction. [120] A health care facility seeking to limit noise within its vicinity was obligated to post signage throughout the property indicating that it was a "Quiet Zone." [121] The court found such signage provided due process to potentially affected parties via ***553** highly visible notice that noise restrictions might be enforced against them in designated areas. [122]

The City of West Palm Beach had carefully drafted its noise ordinance to incorporate findings to demonstrate a compelling government need to help recovering patients and had taken care, even to the point of amending its ordinance, to ensure it was a narrowly tailored method to achieve this goal. [123] Further, the code included the easily understood and quantifiable standard of one hundred feet to put the public on notice of which areas were quiet zones. [124] The City then placed some burden on the benefited party and, in so doing, ensured public notice that noise restrictions were in place in certain geographical locations. [125] This well-developed noise ordinance was found by the Eleventh Circuit to be constitutionally sound and can serve, in part, as a model for other jurisdictions. [126]

B. Recent Developments in Florida Regarding Government Noise Regulation

With its abundance of theme parks, entertainment venues, beaches, and bike-weeks, the State of Florida has a greater need to enact noise regulations than most states. [127] The Florida Supreme Court recently addressed constitutional issues of vagueness, overbreadth, and infringement upon protected speech vis-à-vis ***554** government noise regulation. [128] In *State v. Catalano*, [129] the Court reviewed a statewide statute which, in part, regulated the emission of sound from vehicles. [130] At issue was a restriction upon sound "[p]lainly audible at a distance of [twenty-five] feet or more from the motor vehicle." [131] Violation of this Statute constituted a ***555** "noncriminal traffic infraction, punishable as a nonmoving violation." [132] The legislature had delegated authority to define the term "plainly audible" to the Florida Department of Highway Safety and Motor Vehicles. [133] The Statute also included a list of exemptions from the statutory restrictions, including vehicles and noise used for "business or political purposes." [134]

In *Catalano*, the Court reiterated the well-established principal that noise created by music, including amplified music, is speech entitled to protection under the First Amendment. [135] As such, the Court first examined whether the regulation was content based or content neutral to determine which constitutional standard of review to apply, while reiterating that both types of regulation must meet the applicable First Amendment requirements. [136]

Content-neutral noise regulations may impose time, place, or manner restrictions on the speech, so long as such regulations are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information. [137] However, even in creating a content-neutral noise ***556** regulation, a government must be wary not to over-regulate "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." [138]

The Court then reiterated that a content-based regulation upon noise is presumptively invalid and must overcome strict scrutiny. [139] In addition, the Court explained that noise regulation, even if for a compelling interest and narrowly tailored, must "leave open ample alternative channels for communication of the information." [140]

In *Catalano*, the Court found that the regulation was not content neutral because, by its express terms, it treated business and political speech more favorably than other forms of speech and was therefore subject to strict scrutiny review. [141] The State alleged that it had a compelling reason to enact this Statute, namely to ***557** protect its citizens and ensure traffic safety. [142] The Court found that, even assuming such reason was compelling, the State had not narrowly tailored this ordinance to actually achieve such interests because it still allowed amplified business and political speech. [143] As such, the regulation failed strict scrutiny review. [144]

The Court also reviewed the challenger's claims that the statute was unconstitutionally overbroad and vague. [145] In explaining the doctrine of overbreadth, the Court stated, "The overbreadth doctrine applies when legislation criminalizes constitutionally protected activities along with unprotected activities, by sweeping too broadly and infringing upon fundamental rights." [146] Alternatively stated, a regulation is overbroad if it causes "a substantial amount of protected speech [to be] prohibited or chilled in the process.'" [147] Due to the scope of the subject regulation, which restricted many types of noise in a more intrusive manner than necessary to accomplish the stated goals, the Court found it to be unconstitutionally overbroad. [148]

Interestingly, the Statute did survive a vagueness challenge. [149] Vagueness is a slightly different constitutional concern from overbreadth. [150] An overly vague regulation is one ***558** which "fails to give a person of common intelligence fair and

adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement." [151]

Due to the Statute's inclusion of certain quantitative standards, such as a twenty-five foot geographical limitation, as well as clearly articulated definitions such as "plainly audible," the Court found that this noise regulation could indeed survive a vagueness challenge. [152] The Court warned however, that objective, measurable standards were necessary for constitutionality and less defined terms, such as "excessive, raucous, disturbing, or offensive" would expose the noise regulation to a finding of unconstitutional vagueness. [153]

C. Best Drafting Practices for Government Noise Regulations

Recent caselaw demonstrates that courts strongly encourage well-defined, narrowly tailored, objective, and quantitative standards from governments that wade into the amorphous field of noise regulation. [154] Fortunately, content-neutral time, place, and manner noise regulations (which will not lead to strict scrutiny review) tend to be easier to draft than content-neutral sign regulations. The legislators must simply take care to enact the restrictions without regard to the type of noise, whether music, protest chants, or commercial advertisements. Rather, across-the-board noise regulations should be based upon reasonable decibel levels, specified times of day or night, and geographical areas. [155] ***559** As long as not overly-restrictive and alternative avenues for noise making are left open, such time, place, and manner restrictions should meet constitutional muster. [156]

Clearly defined terms are also necessary to prevent discretionary or arbitrary enforcement by city officials, such as police and code enforcement officers. While discretion may be more convenient to the government, perhaps even desired by the government, it is the antithesis of the free speech principles established by our court system. [157] To avoid such constitutional hazards, it is important to incorporate objective and defined terms for enforcement. A good starting point for such objective enforcement is the use of decibel levels in the ordinance and well-calibrated decibel meters in practice. Similarly, a clearly stated location of the noise ordinance, whether specific distance from the source of the noise or whether measured at a property line, is necessary to a well-drafted noise ordinance. When the ordinance incorporates terms open to interpretation, such as "loud" or "disturbing," these terms must be expressly defined to avoid subjective enforcement.

Lastly, the government must take care not to exempt or allow special treatment of "preferred" types of speech, such as government-sponsored fireworks displays or civic parades. Nor may the government treat certain types of speech, such as music or protests, in a more restrictive fashion than similarly emitted noise. While governments will inevitably want to encourage some noises while eliminating others, even-handed application of reasonable time, place, and manner regulations upon noise is vital ***560** to avoid strict scrutiny review and ensure the likelihood the noise ordinance will withstand judicial review.

IV. PROCEDURAL SAFEGUARDS

In addition to substantive constitutional protections, it is important that both sign and noise regulations include procedural due process safeguards. [158] As discussed above, part of this procedural due process requires reasonable notice to potential violators that they risk violating the law through their action. [159] Similarly, due process requires that the regulation include clearly defined terms for regulated activity ensuring that reasonable minds understand what activities would constitute a violation. [160]

Once a violation of the sign or noise regulation is determined by an enforcement officer, basic procedural due process requires that the alleged violator be given notice of the charges against them and a meaningful opportunity to be heard in their defense. [161] As such, the procedures for notice to an alleged violator, as well as the notice of the time and place of the violation hearing, should be provided in writing and in a manner by which actual receipt of the notice may be ensured. [162] This notice should be followed by a hearing before an unbiased enforcement body, during which the alleged violator may be heard in their own

defense, with the ***561** assistance of legal counsel, if desired. [163] Oftentimes, governments use general enforcement bodies, such as code enforcement boards or a special magistrate, to enforce sign and noise regulations. [164] However, the procedural safeguards of these enforcement bodies should be reviewed to ensure they afford all constitutional protections required when engaging in an enforcement action upon a fundamental right, such as the freedom of speech. [165]

V. CONCLUSION

Government regulation of both signage and noise implicate fundamental rights and are therefore highly scrutinized by the courts. For better or worse, recent caselaw from the U.S. Supreme Court and other courts of appeal have finally determined the boundaries of such government regulations. These cases indicate that regulations in both arenas will be highly scrutinized for constitutional overstep. With such firm direction from our high courts, governments at the state, local, and even federal level would do well to thoroughly review, and if necessary, overhaul their existing regulations upon signage and noise.

Footnotes

a1 © 2017, Karen Zagrodny Consalo. All rights reserved. Lecturer in the Department of Legal Studies, University of Central Florida. J.D., University of Florida, 2000; B.A., Rollins College, 1997. The Author is certified by the Florida Bar as an expert in City, County & Local Government Law and maintains a private law practice specializing in government matters.

1 The First Amendment of the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Section 4 of the Declaration of Rights of the Florida Constitution, entitled "Freedom of Speech and Press," states:
Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.
FLA. CONST. art. I, § 4. Article I, section 9 of the Florida Constitution, entitled "Due Process" further ensures each person due process of law prior to deprivation of their liberty. FLA. CONST. art. I, § 9. *See also* Montgomery v. State, 69 So. 3d 1023, 1025 (Fla. 5th Dist. Ct. App. 2011) (recognizing music as a protected form of expression under the First Amendment); Easy Way of Lee Cnty. v. Lee Cnty., 674 So. 2d 863, 864 (Fla. 2d Dist. Ct. App. 1996) (recognizing free speech protection under the United States Constitution as well as the Florida Constitution).

2 *See* State v. Catalano, 104 So. 3d 1069, 1075 (Fla. 2012) (noting that there is also a strong presumption of validity in favor of the government regulation shadowing such review); *see also* State v. J.P., 907 So. 2d 1101, 1107 (Fla. 2004) (applying de novo standard of review). It is interesting to note that the U.S. Supreme Court has expressed hesitation to apply the de novo standard of review to consideration of congressional intent in establishing speech regulations that impute First Amendment concerns. The Court explained:
This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.
Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994).

3 The majority of government regulations are subject to deferential judicial standards such as the "fairly debatable" standard or certiorari review. In Martin County v. Yusem, the Florida Supreme Court noted, "The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." 690 So. 2d 1288, 1295 (Fla. 1997) (citing B & H Travel Corp. v. State Dep't of Cmty. Affs., 602 So. 2d 1362 (Fla. 1st Dist. Ct. App. 1992)); *see also* Bd. of Cnty. Comm'rs of Brevard v. Snyder, 627 So. 2d 469, 474 (Fla. 1993) (using the fairly debatable standard of review).

4 *See, e.g.*, Lisa Harms Hartzler, *Sign Regulation after* Reed v. Town of Gilbert, Arizona*: Greater Clarity or More Confusion?*, ILLINOIS REALTORS, http://www.illinoisrealtor.org/node/3961 (last visited Apr. 13, 2017) (predicting Illinois' redrafting of sign ordinances in the wake of the *Reed* decision).

5 FIVE MAN ELECTRICAL BAND, *Signs*, on GOOD-BYES AND BUTTERFLIES (Lionel Records 1970).

6 There is such a proliferation of signage across America that the U.S. Supreme Court agreed it could be considered "visual assault" on citizens. Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 561 (1981) (describing billboards as "visual pollution").

7 *See infra* Part II(A) (discussing a Gilbert, Arizona regulation limiting sign usage).

8 *See, e.g.*, Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2231 (2015) (holding a regulation with twenty-three signage categories failed to pass constitutional muster); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1264 (11th Cir. 2005) (broadening the definition of content-based regulation).

9 *See Reed*, 135 S. Ct. at 2231 (applying strict scrutiny standard for content-based restrictions); *Solantic, LLC*, 410 F.3d at 1264 (also applying strict scrutiny for content-based restrictions); *see generally* State v. J.P., 907 So. 2d 1101, 1107 (Fla. 2004) (applying strict scrutiny to a Tampa curfew ordinance).

10 *See Reed*, 135 S. Ct. at 2231 (defining the strict scrutiny standard).

11 Strict scrutiny review is the highest scrutiny upon government regulation and often leads courts to rule a government regulation is unconstitutional. *See* Republican Party of Minn. v. White, 416 F.3d 738, 749 (8th Cir. 2005) (reasoning strict scrutiny review is the highest scrutiny upon government regulation and often leads courts to rule a government regulation is unconstitutional). "Strict scrutiny is an exacting inquiry, such that 'it is the rare case in which ... a law survives strict scrutiny.'" *Id.* (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992)).

12 410 F.3d 1250 (11th Cir. 2005).

13 *Id.* at 1274.

14 *See* Caren Burmeister, *Sign Ruling of Interest Nationwide*, FLORIDA TIME-UNION (June 11, 2005), http://jacksonville.com/tu-online/stories/061105/nes_18958272.shtml#.V8I7x2W7GFI (explaining that the *Solantic* decision was "contrary to prior precedent").

15 *Solantic, LLC*, 410 F.3d at 1274.

16 *Id.* at 1267.

17 *Id.* at 1267-68.

18 *Id.* at 1268.

19 *Id.* at 1267.

20 *Id.*

21 *Id.* at 1268-69.

22 *See, e.g., id.* at 1256-57 (illustrating political, religious, and charitable organization exemptions provided in Neptune Beach regulations).

23 *Id.* at 1259.

24 Brandon L. Bowen, *A New Challenge to Effective Sign Regulation*, JENKINS & OLSON, P.C., http://www.ga-lawyers.pro/Sign-Ordinances/A-NEW-CHALLENGE-TO-EFFECTIVE-SIGN-REGULATION.shtml (last visited Apr. 13, 2017).

25 Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015).

26 *Id.*

27 *Id.*; *see also* David Cortman, *An Important Blow for Free Speech*, NAT'L REV. (June 23, 2015, 10:00 AM), http://www.nationalreview.com/article/420176/important-blow-free-speech-david-cortman (speculating that "[*Reed*'s] wide-ranging effects will result in less government meddling in speech and greater individual freedom for us all").

28 *Reed*, 135 S. Ct. at 2224.

29 *See, e.g.*, Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, NY TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html?_r=0 (explaining the unintended effects that *Reed* could have on other regulatory schemes); Cortman, *supra* note 27 (arguing that *Reed* will have widespread effects, which will result in less governmental meddling in speech); Hartzler, *supra* note 4 (explaining the widespread effects *Reed* will have on real-estate brokers).

30 *Reed*, 135 S. Ct. at 2224.

31 *Id.* at 2224-25.

32 *Id.* at 2224.

33 *Id.* at 2224-25.

34 *Id.*

35 *Id.*

36 *Id.* at 2225.

37 *Id.* at 2224-25.

38 *Id.* at 2226.

39 *See id.* at 2225 (stating that this was a cost-effective and efficient way for the church to inform community members where the service would be held each week).

40 *Id.* at 2226.

41 *Id.* (citation omitted). In fact, the Ninth Circuit ridiculed the Church's arguments as an "absurdity of construing the 'officer must read it' test as a bellwether of content." Reed v. Town of Gilbert, 707 F.3d 1057, 1062-63 (9th Cir. 2013).

42 *Reed*, 135 S. Ct. at 2226.

43 *Id.* (quoting *Reed*, 707 F.3d at 1071).

44 *See id.* (explaining that the lower court applied a "lower level of scrutiny to the Sign Code").

45 *Reed*, 707 F.3d at 1063.

46 *See Reed*, 135 S. Ct. at 2226 (describing how the Sign Code did not violate the First Amendment).

47 *Id.* at 2233.

48 *Id.* at 2226 (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

49 *See id.* at 2227-28 (explaining that the Sign Code is a content-based regulation on its face).

50 *Id.* at 2228.

51 *Id.* (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

52 *Id.* at 2228-29.

53 *See id.* (explaining that only content-neutral statutes need to be looked at for an improper government purpose).

54 *Id.* at 2229.

55 *Id.* at 2229-30.

56 *Id.* at 2230.

57 *Id.*

58 *Id.*

59 *See id.* (explaining that even banning sound trucks for all political speech would be a content-based regulation).

60 *Id.* at 2231.

61 *Id.*; *see generally* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011) (stating, "'[L]aws that burden political speech are' accordingly 'subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest"') (quoting Citizens United v. Fed. Elec. Comm'n, 130 S. Ct. 876, 898 (2010)); *see also* N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 625 n.16 (Fla. 2003) (explaining what strict scrutiny review entails and when it is used).

62 *Reed*, 135 S. Ct. at 2231-32. Interestingly, the stated compelling purpose for the sign regulation was the same as that cited by the local government (and rejected by the Eleventh Circuit) in *Solantic*: aesthetics and traffic safety. However, the U.S. Supreme Court did not weigh in on the merits of these interests in *Reed*. As such, in Florida, Georgia, and Alabama, these interests are seemingly not compelling reasons for content-based sign restrictions. *See Solantic, LLC*, 410 F.3d at 1267-68 (explaining that caselaw does not recognize aesthetics and traffic safety as compelling government interests).

63 *Reed*, 135 S. Ct. at 2231-32.

64 *Id.* at 2232.

65 *See id.* (explaining parts of the Sign Code that do not relate to a sign's message would not be subject to strict scrutiny).

66 *Id.*

67 *See id.* at 2231 (noting one of the problems with the Sign Code was that it did not apply equally to ideological signs and directional signs).

68 Due to the recent nature of Reed v. Gilbert, many government sign regulation rewrites will necessarily be trial and error. However, as a starting point, drafting content-neutral regulations will likely require a basis in zoning districts rather than sign usage. To understand the community needs and pressures related to signage, the ordinance drafter should tour the different zoning districts to see what signs currently exist and identify potential pitfalls if certain signs are allowed or prohibited. For example, should a local government prohibit lighting on any sign in a residential district, the may create a problem of over-restrictiveness considering the common practice of lighting entrance signs at subdivisions, schools, churches, and libraries--all of which are found in residential districts. The other side of that coin may be a concern with overly lenient regulations in a commercial zone where permanent, lighted signs may be permitted at large dimensions. Where such signage is allowed, the drafters must keep in mind that political signs, bars signs, and adult entertainment signs in those zoning districts will also be allowed such permanency, lighting, and size.

69 *See Reed*, 135 S. Ct. at 2232 (giving the example of a narrowly tailored sign ordinance protecting the safety of citizens--i.e., warning signs--as having the potential to survive strict scrutiny).

70 The Court also reiterated the ongoing right of a government to forbid all signage on public property so long as the regulation is content neutral. *Id.* Presumably, this approach would not even require a ban *per se* since the local government would have a proprietary right as the land owner or land trustee to prohibit signs, other than its own, on the property.

71 *Id.* In such hypothetical regulation, the compelling government need for directional signage could be established by inclusion of statistics regarding the most dangerous vehicular areas within the jurisdiction and an explanation of how more extensive directional signage would reduce such traffic hazards.

72 *See id.* (noting that constitutional regulations are even-handed and solve legitimate government problems). Although the Town of Gilbert's website indicates that its Land Development Code was revised on July 5, 2015 (shortly after the U.S. Supreme Court struck the Town's sign code), as of June 28, 2016, the online link from the Town of Gilbert's website to Article 4.4, Sign Regulations, still includes the content-based regulations. GILBERT, AZ., SIGN REGULATIONS art. 4.4 (Mar. 3, 2016), *available at* http://www.gilbertaz.gov/home/showdocument?id=8475. Nor is any information on the Town's current Sign Regulations available at the Town of Gilbert's Code of Ordinances codified by Municode. GILBERT, AZ., CODIFIED ORDINANCES (Municode through Ordinance No. 2601, enacted Dec. 15, 2016), *available at* https://www.municode.com/library/az/gilbert/codes/code_of_ordinances.

73 For example, at the time of publication, the City of Miami, Florida has a codified sign code that incorporates numerous content-based types of sign categorizes including symbolic flags, construction signs, outdoor advertising, home occupation, real estate, and many others. The Miami code even excludes government signs and legal notices, and national flags from any regulation. MIAMI, FL., MUN. ZONING CODE art. 6 (Nov. 23, 2016). Similarly, the City of Austin, Texas has a sign code which provides extensive and specific regulations for advertising signage, yet exempts other types of signage such as governmental signs and memorial signs, from any regulation. AUSTIN, TX.,MUN. CODE § 25-10-151 (Feb. 7, 2017). In Boston, Massachusetts the sign code creates a multitude of category based regulations, such as signs for sale or rent, government signs, public notices, and advertising signs. BOSTON,MA.,MUN. CODE art. 11 (Feb. 3, 2017).

74 A pre-*Reed* scholarly analysis of government authority to regulate signage, in the context of First Amendment compliance, can be found in Daniel R. Mandelker, *Sign Regulation and Free Speech: Spooking the Doppelganger*, in TRENDS IN LANDUSE LAW FROM A TO Z 67, 70-71 (Dean Patricia E. Salkin ed., 2001).

75 *See Reed*, 135 S. Ct. at 2231-32 (emphasizing the categorization of the signs and the distinction between the treatment the various categories when discussing the Town's failure to satisfy strict scrutiny).

76 ATLANTA, GA., MUN. LAND DEV. CODE § 16-28A (Jan. 27, 2017) (highlighting the ordinance's amendment on Nov. 11, 2015).

77 For example, Atlanta allows "portable signs" in the C-1 through C-5, I-1, I-2, SPI-1 and SPI-9 zoning districts. *Id.* § 16-28A.007. Section 16-28A.007 also states all areas in which "billboard signs" will be prohibited, such as "within [three-hundred] feet of any residential district boundary." *Id.* The permitted location of each type of defined sign is regulated by zoning and geographical boundaries. So too is each type of defined sign regulated for size, duration, materials, etc. *Id.* §§ 16-28A.007(a)-(c), (j), (o), (r), (t)-(u).

78 *"Billboard Signs*: Billboard signs are permitted only in the I-1 and I-2 industrial districts and are subject to all of the following requirements," and further the ordinance expressly prohibits billboards in a variety of other zoning districts. *Id.* § 16-28A.007(b).

79 Georgia defines a wide variety of signage, including: animated sign, banner, beacon, billboard sign, building marker, building sign, building signature sign, canopy sign, changing sign, flag, flashing sign, freestanding sign, institutional sign, large screen video display sign, marquee, marquee sign, neighborhood entrance sign, parapet wall sign, pennant, portable sign, projecting sign, roof sign, rotating sign, subdivision entrance sign, suspended sign, temporary sign, and wall sign. *Id.* § 16-28A.004.

80 *See id.* (defining signs by their physical characteristics as opposed to their potential usage).

81 Georgia also includes an extensive explanation of the legislative findings, reasoning, and conclusions for enacting the sign code. *See id.* § 16-28A.003 (explaining the purpose and intent of enacting the code). While it is too lengthy to quote verbatim herein, certain provisions require mention:

The City of Atlanta finds that the number, size, design characteristics, and locations of signs in the city directly affect the public health, safety, and welfare. The city finds that signs have become excessive, and that many signs are distracting and dangerous to motorists and pedestrians, are confusing to the public and do not relate to the premises on which they are located, and substantially detract from the beauty and appearance of the city. The city finds that there is a substantial need directly related to the public health, safety and welfare to comprehensively address these concerns through the adoption of the following regulations. The purpose and intent of the governing authority of the City of Atlanta in enacting this chapter are as follows:

(1) To protect the health, safety and general welfare of the citizens of the City of Atlanta, and to implement the policies and objectives of the comprehensive development plan of the City of Atlanta through the enactment of a comprehensive set of regulations governing signs in the City of Atlanta.
(2) To regulate the erection and placement of signs within the City of Atlanta in order to provide safe operating conditions for pedestrian and vehicular traffic without unnecessary and unsafe distractions to drivers or pedestrians.
(3) To preserve the value of property on which signs are located and from which signs may be viewed.
(4) To maintain an aesthetically attractive city in which signs are compatible with the use patterns of established zoning districts ....
(6) To maintain and maximize tree coverage within the city.
(7) To establish comprehensive sign regulations which effectively balance legitimate business and development needs with a safe and aesthetically attractive environment for residents, workers, and visitors to the city ....
(9) To ensure the protection of free speech rights under the State and United States Constitutions within the City of Atlanta and in no event place restrictions that apply to any given sign dependent entirely on the communicative content of the sign ....
(13) To place reasonable controls on nonconforming signs that are by definition contrary to the public health, safety and welfare while protecting the constitutional rights of the owners of said nonconforming signs ....
Id. §§ 16-28A.003(1)-(9), (13).

82 *Id.* § 16-28A.003(1).

83 *Id.* § 16-28A.003.

84 *Id.* § 16-28A.003(9).

85 *See* Pine v. City of West Palm Beach, 762 F.3d 1262, 1269 (11th Cir. 2014) (explaining the government had good reason to regulate and applied the content-neutral standard for analyzing whether the regulation was narrowly tailored).

86 *See* Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2232 (2015) (finding that content-neutral signs are subject to lessor scrutiny, while content-based signs will only be upheld in few instances if they are narrowly tailored, like warning signs).

87 For a simplistic example, below are three common types of regulated signs with examples of simple content-based definitions and content-neutral definitions:
Content-Based Definitions (based upon the purpose of use of the sign):
(1) "Billboard Sign" an off-site sign used for commercial or political purposes.
(2) "Flag Sign" a sign which donates the country or state of origin of its user or advances patriotic pride within the community.
(3) "Yard Sign" a sign designed to convey support or opposition for a political party, candidate or issue, or to advertise a commercial goods or sales, and is located in a residential yard.
Content-Neutral Definitions (based upon physical attributes of the sign):
(1) "Billboard Sign" a sign in excess of fifty square feet, lit or unlit, erected upon a pole or poles in excess of ten feet in height which is designed for and contains readily-changeable copy.
(2) "Flag Sign" an unlit banner, pennant, or other cloth style signage designed to hang from a pole or hook but not be permanently affixed on all sides.
(3) "Yard Sign" an unlit sign of less than five square feet, constructed of wood, cardboard, or plastic, which are designed to be temporary, portable, and reusable.

88 *See* Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1516-17 (11th Cir. 1987) (giving a thorough examination of potential judicial remedies which might be sought against a government which alters land use entitlements on private property, including the potential for inverse condemnation in some states, as well as nullification of the law in its entirety); *see also* First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., Cal., 482 U.S. 304, 315 (1987) (recognizing that when the government takes a person's property rights, that person can bring an action in inverse condemnation). Florida governments must also be cautious of the Bert J. Harris, Jr., Private Property Rights Protection Act, which creates a unique cause of action for a property owner who has been "inordinately burdened" by a government zoning action. *See* FLA. STAT. § 70.001 et seq. (2016) (providing relief for people whose property use has been inordinately burdened by the government).

89 Although, as referenced above, the government should be careful to also consider potential lawsuits when existing zoning entitlements are altered. *See supra* text accompanying note 88 (regarding the Private Property Rights Protection Act).

90 *See, e.g.*, GILBERT, AZ., SIGN REGULATIONS art. 4.403(G)(1)(d) (Mar. 3, 2016), *available at* http://www.gilbertaz.gov/home/showdocument?id=8475 (requiring all electronic changeable message signs to have dimming features that appropriately adjust to the conditions).

91 Yard signs (typically small, temporary signs stuck in the ground upon thin metal supports) may prove to be the most tricky to regulate since they are used in such a wide variety of speech: political, commercial, directional, informational, etc., and by such a variety of users: small and large commercial ventures, private individuals, churches, schools, campaigns, etc. Any length-of-time restriction on these types of signs must take into account the common practice of leaving political signs in yards for months prior to election cycles, as well as the common practice of schools and churches to erect certain signs on a regular basis but not necessarily day-to-day basis for notification of services and meetings, as well as irregular use by private citizens to advertise the occasional yard sale or birthday party. Since *Reed* does not allow variant timing for these variant uses, governments will have to strike a compromise with regard to the number of consecutive and/or cumulative days yard signs will be allowed in order to allow the speech, yet not have a community constantly overrun by tiny yard signs.

92 *See* Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2223 (2015) (listing content-neutral restrictions that include size, material, lighting, parts, and portability).

93 A regulation must be applied uniformly to all like-situated signs to truly be content-neutral. *See id.* at 2233 (explaining the different physical criteria that are used to determine which signs fall within the regulation, which is the essence of a content-neutral regulation).

94 *See id.* at 2224-25, 2230 (commenting and holding unconstitutional that the Town gave certain sign messages favorable treatment).

95 *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 765 (1994) (noting that a content-neutral regulation may "burden no more speech than necessary to serve a significant government interest"); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stressing the importance of the government need to be unrelated to the content of the regulated speech); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (giving municipalities the power to regulate without unfair discrimination); Pine v. City of West Palm Beach, 762 F.3d 1262, 1269 (11th Cir. 2014) (noting the lenity of content-neutral regulation, as it does not need to be the least restrictive); *see, e.g.*, Animal Rights v. Siegel & Westgate Resorts, Ltd., 867 So. 2d 451, 455 (Fla. 5th Dist. Ct. App. 2004) (giving the example of public safety as recognized significant government interest in the content-neutral analysis); Daley v. City of Sarasota, 752 So. 2d 124, 126 (Fla. 2d Dist. Ct. App. 2000) (finding a significant government interest in regulating unreasonable sound).

96 In the context of another type of highly litigated government regulation upon speech, adult entertainment, proving the compelling government purpose is often achieved by supporting studies incorporated into the adopting ordinance. *See* City of Renton v. Playtime Theatres, 475 U.S. 41, 50-51 (1986) (noting the City of Renton's reliance on the effects of adult films in Seattle when drafting their ordinance). Further, reading *Reed* in conjunction with *Solantic*, it appears any government justification of sign regulation based upon the grounds of community aesthetics or traffic safety must have supporting evidence rather than vague assertions. *See* Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015) (the town simply made assertions justifying its preservation of aesthetic appeal and traffic safety); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005) (explaining that even if traffic and aesthetic concerns were adequate justifications, the Town only recited those interests in the abstract so the ordinance cannot pass strict scrutiny). As such, the best practice would be to, like in adult entertainment ordinances, incorporate expert studies to support the legislative finding and purpose.

97 Historically, amplified sound has been of particular concern. *See generally* Saia v. New York, 334 U.S. 558, 562 (1948) (holding a noise regulation which criminalized amplified speech to be an unconstitutional restraint on the right to free speech due to the unfettered description it afforded the police and lack of narrowly drawn standards).

98 *See* Jolene Creighton, *How Sound Works: The World's Loudest Noises*, FUTURISM (October 10, 2015), http://futurism.com/how-sound-works-the-worlds-loudest-noises-interactive-infographic/ (explaining how sounds are physical vibrations).

99 *See generally* Loyola University Health System, *Fireworks, Construction, Marching Bands Can Cause Permanent Hearing Loss*, SCIENCEDAILY.COM (June 17, 2014), https://www.sciencedaily.com/releases/2014/06/140617164244.htm (finding that the registered level for fireworks is 150 decibels and concerts is 115 decibels, compared to normal conversation at 60 decibels).

100 Although what is loud, rancorous, or obnoxious noise is often in the ear of the beholder, leading to even more trouble with regulation. *See generally* City of Miami Beach v. Seacoast Towers-Miami Beach, Inc., 156 So. 2d 528, 531 (Fla. 3d Dist. Ct. App. 1963) (finding

an anti-noise ordinance that served to effectively prohibit a land owner from engaging in construction activities on his property simply to avoid annoyance to his neighbors unconstitutional).

101 While the constitutional requirements of strict scrutiny (namely a compelling government purpose and narrowly tailored means) have already been discussed in this Article and will not be belabored here, two Florida cases provide analysis of strict scrutiny application to government noise regulation. *See* State v. Catalano, 104 So. 3d 1069, 1079 (Fla. 2012) (noting that where time, place, and manner restrictions upon noise are content based, strict scrutiny must be applied); Montgomery v. State, 69 So. 3d 1023, 1030 (Fla. 5th Dist. Ct. App. 2011) (noting that a noise regulation which discriminates between various types of speech is not content neutral, and therefore, strict scrutiny judicial review applies).

102 *E.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Pine v. City of West Palm Beach, 762 F.3d 1262, 1275 (11th Cir. 2014).

103 408 U.S. 104 (1972).

104 762 F.3d 1262 (11th Cir. 2014).

105 *See Grayned*, 408 U.S. at 112 (stating that a statute need not have a specific quantum of disturbance, but there needs to be some measure); *Pine*, 762 F.3d at 1275 (noting the necessity that the law can provide notice to those who could be affected).

106 104 So. 3d at 1072.

107 408 U.S. at 108.

108 *Id.* at 107.

109 *Id.* at 108.

110 *Id.* at 114.

111 *Id.* at 108-09; *see also* Pine v. City of West Palm Beach, 762 F.3d 1262, 1275 (11th Cir. 2014) (reiterating the factors noted in *Grayned*).

112 *Grayned*, 408 U.S. at 113-14.

113 *Id.*

114 *Id.* at 114.

115 762 F.3d at 1262.

116 *Id.* at 1265.

117 *Id.*

118 *Id.* at 1265-66.

119 *Id.* at 1265-67. The term "amplified sound" was then further restricted through a definition of "a sound augmented by any electronic or other means that increases the sound level or volume." *Id.* at 1267.

120 *See id.* at 1226-67 (noting that the City tailored the sound ordinance to be clearly defined and narrowly tailored).

121 *Id.* at 1267.

122 *See id.* at 1275 (stating, "The Sound Ordinance is not unconstitutionally vague because it squarely gives fair notice to those who may be affected").

123 *See id.* at 1266 (explaining that West Palm Beach amended its sound ordinance in 2008 to improve clarity).

124 *Id.* at 1265.

125 *See id.* at 1266 (noting that the prohibition extends one-hundred feet from the property line of the benefitting health care facility).

126 *See id.* at 1276 (holding that the "City's noise control regulations give a person of ordinary intelligence fair notice of what type of amplified sound is restricted"); *e.g.*, WEST PALM BEACH, FLA., MUN. CODE ch. 34, art. II.

127 *See* Mary Beth Griggs, *A Map of America's Noise Levels: Looking for a Little Peace and Quiet?*, POPULAR SCIENCE (February 18, 2015), http://www.popsci.com/map-quietest-places-america (showing the loudness in decibels across the United States). The City of Orlando, Florida in particular has been ranked one of the noisiest cities in America. Lila Battis, *The Loudest Cities in America*, MEN'S HEALTH (August 6, 2013), http://www.menshealth.com/guy-wisdom/loudest-cities.

128 State v. Catalano, 104 So. 3d 1069, 1072 (Fla. 2012). Additional analysis is provided by the Second District in Easy Way of Lee Cnty. v. Lee Cnty., 674 So. 2d 863, 864 (Fla. 2d Dist. Ct. App. 1996), in which the court reversed a local government's noise restrictions against a late-night business. The regulations at issue prohibited the use of musical instruments, devises for the reproduction of sound, and loudspeakers between certain regulated nighttime hours. *Easy Way of Lee Cnty.*, 674 So. 2d at 864. The regulations did include First Amendment protections against vagueness in the form of specific decibel measurements, geographical parameters, and expressly defined terminology. *Id.* Yet, the court found that the government lacked a sufficiently compelling interest, and cited C.C.B. v. State for its finding "that the aim of protecting citizens from annoyance is not a 'compelling' reason to restrict speech in a traditionally public forum." *Id.* at 865 (citing C.C.B. v. State, 458 So. 2d 47, 50 (Fla. 1st Dist. Ct. App. 1984)). Further, the court held the ordinance to be unconstitutionally overbroad stating, "If, at the expense of First Amendment freedoms, a statute reaches more broadly than is reasonably necessary to protect legitimate state interests, a court may forbid its enforcement." *Id.* at 866. The court explained that a combination of undefined terms for enforcement, as well as various subjective standards, failed to alert a potential violator as to exactly what conduct was proscribed, and therefore rendered it both unconstitutionally vague and overbroad. *Id.* at 865-67; *see also* Daley v. City of Sarasota, 752 So. 2d 124, 126-27 (Fla. 2d Dist. Ct. App. 2000) (noting, "[T]he City's ordinance can be used to suppress First Amendment rights far more severely than can be justified by the City's interest in regulating unreasonable sound .... The City may [only] regulate amplified sound subject to strict guidelines and definite standards closely related to permissible governmental interests"). Explaining that "[t]he 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 of Lee Cnty.*, 674 So. 2d at 866 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). The court also explained that to avoid a vagueness problem, the regulation "must provide adequate notice to persons of common understanding concerning the behavior prohibited and the specific intent requirement: it must provide 'citizens, police officers and courts alike with sufficient guidelines to prevent arbitrary enforcement.'" *Id.* at 865-66 (citation omitted). Applying these standards to the county ordinance at issue, the Second District found the drafters had failed to "define its crucial terms ... so as to secure against arbitrary enforcement" rendering the ordinance unconstitutionally vague. *Id.* at 866.

129 104 So. 3d 1069 (Fla. 2012).

130 *Id.* at 1072. *See also* FLA. STAT. §§ 316.3045(1)(a)-(b) (2007). Specifically, the statute established the following standards:
(1) It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify the sound produced by a radio, tape player, or other mechanical soundmaking device or instrument from within the motor vehicle so that the sound is:
(a) Plainly audible at a distance of [twenty-five] feet or more from the motor vehicle; or
(b) Louder than necessary for the convenient hearing by persons inside the vehicle in areas adjoining churches, schools, or hospitals.
Id.

131 *Catalano*, 104 So. 3d at 1072.

132 *Id.* at 1073.

133 The DMV defined "plainly audible" as:
[A]ny 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 twenty-five feet [] or more from the motor vehicle.
Id. (citation omitted). The DMV also required any enforcing officer to "have a direct line of sight and hearing" to the source of the alleged violating vehicle. *Id.* (citation omitted).

134 *Id.*

135 "[T]he right to play music, including amplified music, in public fora is protected under the First Amendment." *Id.* at 1078; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 788-90 (1989) (noting that regulation of amplified music in public park was protected by the First Amendment); Saia v. New York, 334 U.S. 558, 562 (1948) (finding that "[t]he police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights"); Montgomery v. State, 69 So. 3d 1023, 1028 (Fla. 5th Dist. Ct. App. 2011) (holding that "[m]usic, as a form of expression and communication, is protected under the First Amendment .... This protection extends to amplified music"); Daley v. City of Sarasota, 752 So. 2d 124, 125 (Fla. 2d Dist. Ct. App. 2000) (internal citations omitted).

136 *Catalano*, 104 So. 3d at 1078; *see also* Animal Rights Found. of Fla. v. Siegel, 867 So. 2d 451, 455 (Fla. 5th Dist. Ct. App. 2004) (explaining the analysis is dependent upon the content-neutrality).

137 *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (explaining that governments may place restrictions upon the time, place, and manner of protected speech subject to content-neutrality, a narrowly tailored scope of regulation, and allowance for alternative means of speech); *see also* Madsen v. Women's Health Ctr., 512 U.S. 753, 765 (1994) (noting that a content-neutral regulation may "burden no more speech than necessary to serve a significant government interest"); *Ward*, 491 U.S. at 791 (noting that content-neutrality hinges on whether the regulation is the result of the government's disagreement with its message); Pine v. City of West Palm Beach, 762 F.3d 1262, 1269 (11th Cir. 2014) (explaining that content-neutral regulations have lower standards); *Montgomery*, 69 So. 3d at 1029 (noting that regulations requires specificity); *Animal Rights*, 867 So. 2d at 455 (stating that regulations cannot unnecessarily burden speech); *Daley*, 752 So. 2d at 126 (noting that "the mere existence of an alternative means of expression, such as unamplified speech, will not by itself justify a restraint on the particular means that the speaker finds more effective").

138 *Ward*, 491 U.S. at 799; *see also Pine*, 762 F.3d at 1269-70 (quoting the same language).

139 *Catalano*, 104 So. 3d at 1079; *see also Animal Rights*, 867 So. 2d at 456-57 (finding that an injunction upon the use of megaphones, bull horns, and shouting to "burden more speech than is necessary to protect any valid public interest because they enjoin all shouting and all uses of bullhorns or megaphones, rather than tailoring a prohibition against impermissible conduct ... [a]s such, the injunction is impermissibly broad"); Simmons v. State, 944 So. 2d 317, 323 (Fla. 2006) (stating that strict scrutiny applies to the law because it is content-based); Firestone v. News-Press Publ'g Co., 538 So. 2d 457, 459 (Fla. 1989) (requiring restrictions on First Amendment rights to be met with strict scrutiny); State v. Gray, 435 So. 2d 816, 819 (Fla. 1983) (noting how infringing on a constitutionally protected freedom affects the court's analysis); s*ee generally* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (denying application of strict scrutiny to content-neutral must-carry rules); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding ordinance invalid under the First Amendment).

140 *Catalano*, 104 So. 3d at 1078; *see also* N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 625 n.16 (Fla. 2003) (stating that "[u]nder 'strict' scrutiny, which applies *inter alia* to certain classifications and fundamental rights, a court must review the [regulation] to ensure that it furthers a compelling [s]tate interest through the least intrusive means").

141 104 So. 3d at 1078-79; *see also Daley*, 752 So. 2d at 127 (finding a ban on amplified sound from a non-enclosed structure during certain hours to be constitutionally overbroad and explaining that any anti-noise "regulation must be sufficiently definitive as to secure against arbitrary enforcement").

142 *Catalano*, 104 So. 3d at 1080.

143 *Id.*

144 *Id.*

145 *Id.* at 1075-77

146 *Id.* at 1077 (quoting Firestone v. News-Press Publ'g Co., 538 So. 2d 457, 459 (Fla. 1989) (citing State v. Gray, 435 So. 2d 816, 819 (Fla. 1983))).

147 *Id.* (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002); City of Daytona Beach v. Del Percio, 476 So. 2d 197, 202 (Fla. 1985)).

148 *Id.* at 1077-79.

149 *Id.* at 1077.

150 The difference between overbreadth and over-vagueness was succinctly described by the Florida Supreme Court in Simmons v. State: "[T]he doctrines of overbreadth and vagueness are separate and distinct." Southeastern Fisheries Ass'n v. Dep't of Natural Res., 453 So. 2d 1351, 1353 (Fla. 1984). The overbreadth doctrine applies only if the legislation is susceptible of application to conduct protected by the First Amendment. *Id.* The overbreadth doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected expression. *See* City of Daytona Beach v. Del Percio, 476 So. 2d 197, 202 (Fla. 1985). The vagueness doctrine has a broader application because it was developed to ensure compliance with the Due Process Clause in the Fifth Amendment of the United States Constitution. Florida's Constitution includes a similar due process guarantee in article I, section 9 .... Because of its imprecision, a vague statute may also invite arbitrary or discriminatory enforcement. *See Southeastern Fisheries*, 453 So. 2d at 1353.
944 So. 2d 317, 323-24 (Fla. 2006).

151 Montgomery v. State, 69 So. 3d 1023, 1028 (Fla. 5th Dist. Ct. App. 2011) (citing Brown v. State, 629 So. 2d 841, 842 (Fla. 1994)).

152 *Catalano*, 104 So. 3d at 1075-76. The court cited several other cases in support of its finding that geographical restrictions, even as little as five feet or as extensive as one-hundred feet, could insulate a noise regulation from a vagueness challenge. *Id.* at 1076-77.

153 *Id.* at 1076.

154 *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (allowing the City to regulate noise that disturbs the peace); Pine v. City of West Palm Beach, 762 F.3d 1262, 1275 (11th Cir. 2014) (noting that mathematical certainty, while desirable, is not attainable from the English language); *Catalano*, 104 So. 3d at 1072 (striking down a regulation because the language used was too broad).

155 For example, a restriction against a noise in excess of twenty decibels after ten o' clock post meridiem (10:00 p.m.) would likely be considered a valid time, place, and manner restriction upon noise. A government might also tailor the times and allowable decibel limits within different zoning districts. For example, downtown urban zones may have a noise "curfew" of two o'clock ante meridiem (2:00 a.m.), while residential zones may have a noise curfew of 10:00 p.m. However, when enacting anti-noise regulations to specific geographical areas, such as near churches, schools, and medical facilities, the government should clearly articulate why the noise restriction is necessary in those particular areas as opposed to others so as to avoid claims of discriminatory treatment of certain kinds of speakers over others. An example of such potential pitfalls would be to limit speech of protestors around medical facilities that perform abortions while allowing protestors outside of a political office. To resolve this type of conundrum, best drafting practices would limit all assemblies adjacent to private property to a certain decibel level. *E.g., Grayned*, 408 U.S. 104; *Pine*, 762 F.3d 1262.

156 However, leaving such an alternative does not necessarily ensure strict scrutiny success. As noted by the Second District Court of Appeal in *Daley*, "[T]he mere existence of an alternative means of expression, such as unamplified speech, will not by itself justify a restraint on the particular means that the speaker finds more effective." 752 So. 2d at 126 (citing Reeves v. McConn, 631 F.2d 377, 382 (5th Cir. 1980)).

157 *See Daley*, 752 So. 2d at 127 (describing the government regulation as prohibiting amplified sounds).

158 When fundamental substantive rights are at issue, procedural due process "serves as a vehicle to insure fair treatment through the proper administration of justice." Massey v. Charlotte Cnty., 842 So. 2d 142, 146 (Fla. 2d Dist. Ct. App. 2003) (citing Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001)).

159 A basic component of such due process is providing the alleged violator with notice of the charges against them and an opportunity to be heard in regard to such charges. *See* Little v. D'Aloia, 759 So. 2d 17, 19-20 (Fla. 2d Dist. Ct. App. 2000) (requiring that notice be reasonably calculable); Michael D. Jones, P.A. v. Seminole Co., 670 So. 2d 95, 96 (Fla. 5th Dist. Ct. App. 1996) (giving the example of notice prior and after a proceeding); Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship, 619 So. 2d 996, 1002 (Fla. 2d Dist. Ct. App. 1993) (quoting Jennings v. Dade Cnty., 589 So. 2d 1337, 1340 (Fla. 3d Dist. Ct. App. 1991)) (explaining the difference between notice required in a judicial and quasi-judicial hearing); *see generally* Dawson v. Saada, 608 So. 2d 806, 808 (Fla. 1992) (discussing the notice requirements in connection to property ownership).

160 *See generally Dawson*, 608 So. 2d at 808 (noting that the legislature has the ability to define to what extent a person can be heard under notice requirements); *Little*, 759 So. 2d at 18 (describing actions taken by the City to give property owners notice before seizing the property); Verizon Bus. Network Serv. v. Dep't of Corrections, 988 So. 2d 1148, 1151 (Fla. 1st Dist. Ct. App. 2008) (noting the importance of the constitutional guarantee to being heard before an impartial tribunal).

161 *See Little*, 759 So. 2d at 19-20; *Michael D. Jones, P.A.*, 670 So. 2d at 96; *Lee Cnty.*, 619 So. 2d at 1002 (quoting *Jennings*, 589 So. 2d at 1340).

162 FLA. STAT. ch. 162 (2016).

163 *See Little*, 759 So. 2d at 18 (noting a "notice of hearing on the alleged violations"); *Michael D. Jones, P.A.*, 670 So. 2d at 96 (noting use of "notice of a hearing before the Code Enforcement Board"); *Lee Cnty.*, 619 So. 2d at 1002 (noting the use of a quasi-judicial hearing and notice of that hearing); *Jennings*, 589 So. 2d at 1340 (noting the use of a quasi-judicial hearing and notice of that hearing).

164 *See generally*, Dep't of Law Enforcement v. Real Property, 588 So. 2d 957, 964 (Fla. 1991) (noting the use of an adversarial preliminary hearing in a forfeiture proceeding).

165 *Id.*

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104 So.3d 1069
Supreme Court of Florida.

STATE of Florida, Appellant,
v.
Richard T. CATALANO, et al., Appellees.

No. SC11–1166.
|
Dec. 13, 2012.

Synopsis

Background: Drivers were convicted in county court of violation of noise control statute. Drivers appealed. The Circuit Court, Sixth Judicial Circuit, Pinellas County, found the statute unconstitutional. The State petitioned for certiorari review, and cases were consolidated. The District Court of Appeal, 60 So.3d 1139, denied certiorari. State appealed.

[Holding:] The Supreme Court, Labarga, J., held that noise statute that restricted volume at which car stereo system could be played on public street, but which exempted business and political vehicles, was unconstitutionally overbroad.

Affirmed.

Polston, C.J., and Canady, J., concurred in result.

Quince, J., concurred in result only.

West Headnotes (23)

[1] **Constitutional Law**
Vagueness in General

Litigants may not successfully challenge the constitutionality of a statute for vagueness or complain of its vagueness as applied to the hypothetical conduct of others if the record demonstrates that a defendant has engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute.

1 Cases that cite this headnote

[2] **Criminal Law**
Review De Novo

A court's decision regarding the constitutionality of a statute is reviewed de novo as it presents a pure question of law.

4 Cases that cite this headnote

[3] **Constitutional Law**
Presumptions and Construction as to Constitutionality

Constitutional Law
Proof beyond a reasonable doubt

There is a strong presumption that a statute is constitutionally valid, and all reasonable doubts about the statute's validity must be resolved in favor of constitutionality.

3 Cases that cite this headnote

[4] **Constitutional Law**
Statutes

In order to withstand a vagueness challenge, a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct.

2 Cases that cite this headnote

[5] **Constitutional Law**
Constitutionality of Statutory Provisions

When considering the constitutionality of a statute, court first look at the language of the statute itself.

1 Cases that cite this headnote

[6] **Constitutional Law**
Statutes in general

To withstand constitutional scrutiny in a vagueness challenge, statutes do not have to set determinate standards or provide mathematical certainty.

1 Cases that cite this headnote

[7] **Constitutional Law**
Motor vehicles

Disorderly Conduct
Constitutional and statutory provisions

Disorderly Conduct
Modes of transportation and related facilities

The "plainly audible" standard in noise control statute that prohibited operation of a radio so that the sound was plainly audible at a distance of 25 feet or more from the vehicle provided persons of common intelligence and understanding adequate notice of the proscribed conduct, so it was not void for vagueness; although it was true that each police officer might have different auditory sensitivities, the "plainly audible" beyond 25 feet standard provided fair warning of the prohibited conduct and provided an objective guideline, distance, to prevent arbitrary and discriminatory enforcement so that basic policy matters were not delegated to policemen, judges, and juries for resolution on an ad hoc and subjective basis. U.S.C.A. Const.Amend. 1; West's F.S.A. § 316.3045.

2 Cases that cite this headnote

[8] **Constitutional Law**
Overbreadth in General

Litigants need not meet the traditional requirement of standing when challenging the constitutionality of a statute on the grounds of overbreadth.

1 Cases that cite this headnote

[9] **Constitutional Law**
Freedom of Speech, Expression, and Press

A litigant whose own speech or conduct is clearly proscribed is permitted to challenge a statute on its face on the ground that the rights of nonparties may be unconstitutionally inhibited; this is so because the existence of the statute may cause others not before the court to refrain from constitutionally-protected speech or expression rather than undertake to have the law declared partially invalid. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Statutes in general

The overbreadth doctrine applies when legislation criminalizes constitutionally protected activities along with unprotected activities, by sweeping too broadly and infringing upon fundamental rights.

1 Cases that cite this headnote

[11] **Constitutional Law**
Prohibition of substantial amount of speech

In the context of the First Amendment, the overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[12] **Constitutional Law**
Narrow tailoring

The government may regulate expression only with narrow specificity. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Overbreadth in General

The first step in an overbreadth analysis is determining whether the statute restricts First Amendment rights, and whether the restrictions are substantial. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
Noise and Sound Amplification

Constitutional Law
Music

The right to play music, including amplified music, in public fora is protected under the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[15] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest
Constitutional Law
Existence of other channels of expression

Limitations on speech are reasonable if they are justified without reference to the content of the regulated speech, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

If the time, place, and manner of the limitations on speech are content based, a strict standard of scrutiny is applied. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[17] **Constitutional Law**
Governmental disagreement with message conveyed

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys; if the government's purpose has no relation to the content of the speech, the statute will be deemed neutral even if the restriction affects some speakers or messages and not others. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[18] **Constitutional Law**
Motor vehicles

Noise statute that restricted volume at which car stereo system could be played on public street, but which exempted business and political vehicles, was subject to strict scrutiny. U.S.C.A. Const.Amend. 1; West's F.S.A. § 316.3045.

Cases that cite this headnote

[19] **Constitutional Law**
Motor vehicles
Disorderly Conduct
Constitutional and statutory provisions
Disorderly Conduct
Noise in general

Noise statute that restricted volume at which car stereo system could be played on public street, but which exempted business and political vehicles, was unconstitutionally overbroad because it restricted the freedom of expression in a manner that was more intrusive than necessary; the statute was not narrowly tailored to achieve the government's interests in improving traffic safety and protecting citizenry from excessive noise and protected commercial speech to a greater degree than noncommercial speech. U.S.C.A. Const.Amend. 1; West's F.S.A. § 316.3045.

1 Cases that cite this headnote

[20] **Constitutional Law**
Streets and highways

Traffic safety is generally not considered a compelling state interest for allowing content based restrictions on speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[21] **Statutes**
Effect of Partial Invalidity; Severability

"Severability" is a judicially created doctrine which recognizes a court's obligation to uphold the constitutionality of legislative enactments where it is possible to remove the unconstitutional portions.

2 Cases that cite this headnote

[22] **Statutes**

Effect of Partial Invalidity; Severability

The portion of a statute that is declared unconstitutional will be severed if: (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.

3 Cases that cite this headnote

[23] Statutes

Motor vehicles

Unconstitutional provision of noise statute that restricted volume at which car stereo system could be played on public street could not be severed from remainder of statute, where severance would have expanded the statute's reach beyond what the legislature contemplated. U.S.C.A. Const.Amend. 1; West's F.S.A. § 316.3045.

Cases that cite this headnote

West Codenotes

Held Unconstitutional
West's F.S.A. § 316.3045

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Opinion

LABARGA, J.

This case is before the Court on appeal from a decision of the Second District Court of Appeal, *State v. Catalano,* 60 So.3d 1139 (Fla. 2d DCA 2011), which declared section 316.3045, Florida Statutes (2007), to be invalid. We have jurisdiction. [1] For the reasons set forth below, we affirm the Second District's declaration that the statute is invalid because it is an unreasonable restriction on the freedom of expression. We also find that the statute is unconstitutionally overbroad, but not unconstitutionally vague. Finally, we find that section 316.3045(3) is not severable from the remainder of the statute.

FACTS AND PROCEDURAL HISTORY

Richard Catalano (Catalano) and Alexander Schermerhorn (Schermerhorn) were cited by law enforcement officers in separate incidents in Pinellas County, Florida, for violating the sound standards of section 316.3045(1)(a), Florida Statutes (2007). *Catalano,* 60 So.3d at 1141. [2] Specifically, section 316.3045 provides as follows:

> Operation of radios or other mechanical soundmaking devices or instruments in vehicles; exemptions.—
>
> (1) It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify the sound produced by a radio, tape player, or other mechanical soundmaking device or instrument from within the motor vehicle so that the sound is:
>
> (a) Plainly audible at a distance of 25 feet or more from the motor vehicle; or
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> (b) Louder than necessary for the convenient hearing by persons inside the vehicle in areas adjoining churches, schools, or hospitals.
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> ***1073** (2) The provisions of this section shall not apply to any law enforcement motor vehicle equipped with any communication device necessary in the performance of law enforcement duties or to any emergency vehicle equipped with any communication device necessary in the performance of any emergency procedures.

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

(4) The provisions of this section do not apply to the noise made by a horn or other warning device required or permitted by s. 316.271. The Department of Highway Safety and Motor Vehicles shall promulgate rules defining "plainly audible" and establish standards regarding how sound should be measured by law enforcement personnel who enforce the provisions of this section.

(5) A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

§ 316.3045, Fla. Stat. (2007).

As required by subsection (4), the Department of Highway Safety and Motor Vehicles (DMV) promulgated the following rule:

15B–13.001 Operation of Soundmaking Devices in Motor Vehicles.

(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 twenty-five feet (25') 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 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.

***1074** (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.

Fla. Admin. Code R. 15B–13.001 (2011). Both Catalano and Schermerhorn entered not guilty pleas and moved to dismiss their citations in county court, arguing that section 316.3045 is facially unconstitutional. The county court denied their respective motions based on the Fifth District's decision in *Davis v. State,* 710 So.2d 635 (Fla. 5th DCA 1998), which found section 316.3045, as originally written prior to the 2005 amendment, constitutional. *Catalano,* 60 So.3d at 1142.

Thereafter, Catalano and Schermerhorn changed their pleas to nolo contendere, reserving the right to appeal the constitutionality of section 316.3045. The county court accepted their pleas and withheld adjudication. Each then appealed to the circuit court of Pinellas County, arguing that section 316.3045 is facially unconstitutional because the "plainly audible" standard is vague, overbroad, invites arbitrary enforcement, and impinges on their free speech rights. The circuit court issued virtually identical opinions holding that the decision in *Davis* conflicts with the Second District's decision in *Easy Way of Lee County, Inc. v. Lee County,* 674 So.2d 863, 867 (Fla. 2d DCA 1996), which held that a county's general sound ordinance's "plainly audible" standard was unconstitutionally vague and overbroad. *Catalano,* 60 So.3d at 1143–44. Accordingly,

bound by the decision in *Easy Way,* the circuit court reversed the trial court's orders denying the motions to dismiss the citations.

Subsequently, the State filed a petition for writ of certiorari in the Second District Court of Appeal, arguing that the circuit court departed from the essential requirements of law because section 316.3045 comports with free speech rights, does not invite arbitrary enforcement, is not vague, overbroad, or content based, and the circuit court failed to follow *Davis,* which upheld the constitutionality of section 316.3045. The Second District denied the State's petition for certiorari relief, holding that the circuit court did not depart from the essential requirements of the law in applying the binding Second District precedent of *Easy Way,* which held that the "plainly audible" standard of a noise ordinance was unconstitutional.[3] *See Catalano,* 60 So.3d at 1144–46. In addition, the majority in *Catalano* held that section 316.3045(3) is an unconstitutional content-based restriction because it contains an exemption for vehicles used for business and political purposes that use sound-making devices in the normal course of operations. *Id.* at 1146.

ANALYSIS

[1] The State appealed the declaration of invalidity of section 316.3045 and asks this Court to determine whether: (a) the statutory "plainly audible" standard in ***1075** section 316.3045(1)(a) is unconstitutionally vague and overbroad; and (b) whether the "business/political" exception in section 316.3045(3) is permissible, but even if not, whether the exception should be severed. For the reasons that follow, we find that the statute is not unconstitutionally vague, but is unconstitutionally overbroad and an impermissible content-based restriction. Additionally, we find that severance of section 316.3045(3) is not an appropriate remedy to preserve the constitutionality of this statute. We first examine whether section 316.3045(1)(a) is unconstitutionally vague.[4]

Vagueness

[2] **[3]** **[4]** A court's decision regarding the constitutionality of a statute is reviewed de novo as it presents a pure question of law. *See Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n,* 838 So.2d 492, 500 (Fla.2003). There is a strong presumption that a statute is constitutionally valid, and all reasonable doubts about the statute's validity must be resolved in favor of constitutionality. *See DuFresne v. State,* 826 So.2d 272, 274 (Fla.2002). "This Court has noted, however, that in a vagueness challenge, any doubt as to a statute's validity should be resolved in favor of the citizen and against the State." *Id.* (citing *State v. Brake,* 796 So.2d 522, 527 (Fla.2001)). Accordingly, in order to withstand such a challenge, a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct. *Id.* at 527. As we explain below, we find that section 316.3045(1)(a), which prohibits the amplification of sound from within a vehicle so that it is "plainly audible" beyond twenty-five feet, is not unconstitutionally vague.

[5] When considering the constitutionality of a statute, we first look at the language of the statute itself. *See State v. Dugan,* 685 So.2d 1210, 1212 (Fla.1996); *Miele v. Prudential–Bache Sec., Inc.,* 656 So.2d 470, 472 (Fla.1995). Specifically, section 316.3045(1)(a) states as follows:

> Operation of radios or other mechanical soundmaking devices or instruments in vehicles; exemptions.—
>
> (1) It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify the sound produced by a radio, tape player, or other mechanical soundmaking device or instrument from within the motor vehicle so that the sound is:
>
> (a) Plainly audible at a distance of 25 feet or more from the motor vehicle.

§ 316.3045, Fla. Stat. (2007). Catalano and Schermerhorn argue that the "plainly audible" language is unconstitutionally vague on its face because whether a police officer can hear amplified sound beyond twenty-five feet is necessarily subject to each particular police officer's auditory faculties, leading to arbitrary enforcement based on whether a police officer personally ***1076** finds the amplified sound disturbing. In short, Catalano and Schermerhorn argue that citizens cannot conform their behavior to the law because of uncertainty over whether the music in their vehicles would be plainly audible beyond twenty-five feet to a particular police officer.

[6] **[7]** To withstand constitutional scrutiny, however, statutes do not have to set determinate standards or provide mathematical certainty. *See Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)

(observing that we cannot expect mathematical certainty from the use of words); *Broadrick v. Oklahoma,* 413 U.S. 601, 608, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (explaining that the English language has limitations with respect to being both specific and brief, but noting that statutes must set out standards in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest). Applying the rationale from *Grayned* and *Broadrick,* the "plainly audible" standard provides persons of common intelligence and understanding adequate notice of the proscribed conduct: individuals operating or occupying a motor vehicle on a street or highway in Florida cannot amplify sound so that it is heard beyond twenty-five feet from the vehicle. Although it is true that each police officer may have different auditory sensitivities, the "plainly audible" beyond twenty-five feet standard provides fair warning of the prohibited conduct and provides an objective guideline—distance—to prevent arbitrary and discriminatory enforcement so that basic policy matters are not delegated to policemen, judges, and juries for resolution on an ad hoc and subjective basis. *See Grayned,* 408 U.S. at 108–09, 92 S.Ct. 2294. This is not a standard that calls for police officers to judge whether sound is excessive, raucous, disturbing, or offensive; if the officer can hear the amplified sound more than twenty-five feet from its source, the individual has violated the statute.

[8] **[9]** Indeed, several jurisdictions both in Florida and around the country have upheld similar statutes in the face of vagueness challenges. *See, e.g., Montgomery v. State,* 69 So.3d 1023, 1032 (Fla. 5th DCA 2011) (holding section 316.3045(1)(a) is not unconstitutionally vague, but finding the statute unconstitutionally overbroad as an impermissible content-based restriction); *Davis v. State,* 710 So.2d 635, 636 (Fla. 5th DCA 1998) (upholding pre–2005 amendment version of section 316.3045(1)(a), which required that amplified sound be plainly audible more than one-hundred feet from the vehicle, as not unconstitutionally vague); *State v. Medel,* 139 Idaho 498, 80 P.3d 1099, 1103 (Ct.App.2003) (upholding ordinance as not unconstitutionally vague where it prohibited operating a vehicle's sound system so that it is audible at a distance of fifty feet); *Davis v. State,* 272 Ga. 818, 537 S.E.2d 327, 328–29 (2000) (finding that a statute which prohibits amplified sound from a vehicle which is "plainly audible" at 100 feet is not vague and stating that it would belie credibility to find that persons of ordinary intelligence do not know what it means for amplified sound to be "plainly audible" at a distance greater than one-hundred feet); *People v. Hodges,* 70 Cal.App.4th 1348, 83 Cal.Rptr.2d 619, 622 (1999) (ordinance prohibiting a vehicle's sound system from operating where it could be heard twenty-five feet away not unconstitutionally vague); *Moore v. City of Montgomery,* 720 So.2d 1030, 1032 (Ala.Crim.App.1998) (holding ordinance that prohibited sound audible five feet from vehicle not unconstitutionally vague and stating that finding otherwise belies credibility); *Holland v. City of Tacoma,* 90 Wash.App. 533, 954 P.2d 290, 295 (1998), *review denied,* ***1077** 136 Wash.2d 1015, 966 P.2d 1278 (1998) (finding ordinance not unconstitutionally vague as the court noted that a person of ordinary intelligence knows what is meant by prohibition of sound that is audible more than fifty feet away); *Com. v. Scott,* 878 A.2d 874, 878–79 (Pa.Super.Ct.2005). Additionally, the United States Supreme Court has rejected vagueness challenges to arguably more subjective terms. *See Kovacs v. Cooper,* 336 U.S. 77, 78, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (upholding constitutionality of a sound ordinance that prohibited the use of a sound-generating instrument that produces loud and raucous sound on vehicles); *Grayned,* 408 U.S. at 107–08, 92 S.Ct. 2294 (upholding constitutionality of a sound ordinance that prohibited sound that disturbed or tended to disturb the peace). Thus, we find that the "plainly audible" standard is not unconstitutionally vague. [5] We now discuss whether the statute is unconstitutionally overbroad or an unreasonable restriction on the freedom of expression. [6]

Overbreadth and the First Amendment

[10] **[11]** **[12]** **[13]** The overbreadth doctrine applies when legislation criminalizes constitution-ally protected activities along with unprotected activities, by sweeping too broadly and infringing upon fundamental rights. *See Firestone v. News–Press Publ'g Co.,* 538 So.2d 457, 459 (Fla.1989) (citing *State v. Gray,* 435 So.2d 816, 819 (Fla.1983)). In the context of 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, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); *see City of Daytona Beach v. Del Percio,* 476 So.2d 197, 202 (Fla.1985). The government may regulate expression only with narrow specificity. *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *see also Firestone,* 538 So.2d at 459 ("Restrictions on first amendment rights must ***1078** be supported by a compelling governmental interest and must be narrowly drawn to insure that there is no more infringement than

is necessary.") (citing *Winn–Dixie Stores, Inc. v. State,* 408 So.2d 211 (Fla.1981)). The overbreadth doctrine, applied facially, however, is "strong medicine" that must be used sparingly. *Del Percio,* 476 So.2d at 202 (citing *Broadrick,* 413 U.S. at 613, 615, 93 S.Ct. 2908). Accordingly, the first step in an overbreadth analysis is determining whether the statute restricts First Amendment rights, and whether the restrictions are substantial. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

[14] **[15]** **[16]** Here, the State argues that Catalano and Schermerhorn do not have a constitutionally recognized right to play loud music, thus the statute is not subject to an overbreadth analysis. However, the right to play music, including amplified music, in public fora is protected under the First Amendment. *See Ward v. Rock Against Racism,* 491 U.S. 781, 788–90, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (noting that regulation of amplified music in public park was protected by the First Amendment); *Saia v. New York,* 334 U.S. 558, 562, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) ("The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights."). This right, nevertheless, is subject to reasonable limitations on the time, place, and manner of the protected speech. Limitations are reasonable if they are "justified without reference to the content of the regulated speech, ... narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. If the time, place, and manner of the limitations are content based, a strict standard of scrutiny is applied. *See, e.g., Simmons v. State,* 944 So.2d 317, 323 (Fla.2006).

[17] "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. If the government's purpose has no relation to the content of the speech, the statute will be deemed neutral even if the restriction affects some speakers or messages and not others. *See id.* Initially, it would appear that section 316.3045(1)(a) does not regulate expression based on the content of the message as it bans all amplified sound coming from within the interior of a motor vehicle that is "plainly audible" beyond twenty-five feet from the source. In short, the statute proscribes excessive sound emanating from vehicles on public thoroughfares. Subsection (3), however, excepts "motor vehicles used for business or political purposes, which in the normal course of conducting such business use [sound-making] devices" from this broad proscription.

[18] The State argues that this exception is based on the type of vehicle, and not the content of the message, because these vehicles do not present the same safety and noise pollution concerns as other vehicles. Thus, according to the State, the justification for the differential treatment, and the statute as a whole, is content neutral. The regulation, however, treats commercial and political speech more favorably than noncommercial speech. Additionally, the statute does not have to intentionally suppress certain ideas to be constitutionally suspect as a content-based restriction. *See City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) ***1079** (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 117, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991)). Regardless of the intent of the Legislature, section 316.3045 is a sweeping ban on amplified sound that can be heard beyond twenty-five feet of a motor vehicle, unless that sound comes from a business or political vehicle, which presumably uses sound-making devices for the purpose of expressing commercial and political viewpoints. For instance, business and political vehicles may amplify commercial or political speech at any volume, whereas an individual traversing the highways for pleasure would be issued a citation for listening to any type of sound, whether it is religious advocacy or music, too loudly. Thus, this statute is content based because it does not apply equally to music, political speech, and advertising. *See Discovery Network,* 507 U.S. at 428–29, 113 S.Ct. 1505 (stating that a sound ordinance is permissible if it applies equally to music, political speech, and advertising). Accordingly, this statute is subject to the strict scrutiny analysis to determine whether it is a reasonable restriction or unconstitutionally overbroad.

[19] **[20]** The State argues that this statute serves the State's interest in traffic safety and protecting the public from excessively loud noise on public streets. Protecting the public from excessively loud noise is a compelling state interest. *See Grayned,* 408 U.S. at 116, 92 S.Ct. 2294 ("If overamplified loudspeakers assault the citizenry, government may turn them down.") (citing *Kovacs,* 336 U.S. at 80, 69 S.Ct. 448, and *Saia,* 334 U.S. at 562, 68 S.Ct. 1148). Traffic safety, however, which the State argues is the overarching purpose of the statute, is generally not considered a compelling state interest.[7] *See, e.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507–08, 101 S.Ct. 2882, 69 L.Ed.2d

800 (1981) (plurality opinion) (aesthetics and traffic safety were substantial government interests); *Beaulieu v. City of Alabaster,* 454 F.3d 1219, 1234 (11th Cir.2006) ("The [c]ity's interests in aesthetics and traffic safety are substantial but they are not compelling for present purposes."); *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250, 1267 (11th Cir.2005) (noting that traffic safety has not been recognized as a compelling state interest); *Dimmitt v. City of Clearwater,* 985 F.2d 1565, 1570 (11th Cir.1993) (stating that aesthetics and traffic safety were not compelling state interests); *Cafe Erotica v. Florida Dept. of Transp.,* 830 So.2d 181, 187 (Fla. 1st DCA 2002) (stating that traffic safety has been traditionally recognized as a substantial government goal, citing *Metromedia* and *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)).

Even assuming the asserted interests are compelling, it is unclear how the statute advances those interests by allowing commercial and political speech at a volume "plainly audible" beyond twenty-five feet, but not allowing noncommercial speech to be heard at the same distance. *See Montgomery,* 69 So.3d at 1032 ("We fail to see how the interests asserted by the State are better served by the statute's exemption for commercial and political speech."). The State simply argues that noncommercial vehicles are more dangerous to the public because they are ubiquitous. This argument, however, fails to explain how a commercial or political vehicle amplifying commercial or political messages audible a mile away is less dangerous or more tolerable than a noncommercial vehicle amplifying a religious message audible just over twenty-five feet away from the vehicle. Further, the statute protects commercial speech to a greater degree than noncommercial speech; commercial speech, however, is generally afforded less protection. *See U.S. v. Edge Broad. Co.,* 509 U.S. 418, 430, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) (noting that commercial speech is afforded less protection than other forms of speech); *see also Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 477–78, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) ("Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' " quoting *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)). Accordingly, we find that the statute is an unreasonable restriction on First Amendment rights. Likewise, the restriction of the constitutionally protected right to amplify sound, despite the State's acknowledgement that this level of noise is tolerable and safe if the source is a commercial or political vehicle, is not narrowly tailored to achieve the government's interests in improving traffic safety and protecting the citizenry from excessive noise. Thus, we also find that the statute is unconstitutionally overbroad because it restricts the freedom of expression in a manner more intrusive than necessary. We now proceed with a discussion of whether severance of the offending provisions is an appropriate remedy in this situation.

Severability

[21] **[22]** "Severability is a judicially created doctrine which recognizes a court's obligation to uphold the constitutionality of legislative enactments where it is possible to remove the unconstitutional portions." *Florida Dept. of State v. Mangat,* 43 So.3d 642, 649 (Fla.2010) (citing *Ray v. Mortham,* 742 So.2d 1276, 1280 (Fla.1999)). It is "derived from the respect of the judiciary for the separation of powers, and is 'designed to show great deference to the legislative prerogative to enact laws.' " *Ray,* 742 So.2d at 1280 (quoting *Schmitt v. State,* 590 So.2d 404, 415 (Fla.1991)). The portion of a statute that is declared unconstitutional will be severed if: " '(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. Instruction,* 137 So.2d 828, 830 (Fla.1962)); *see also Schmitt,* 590 So.2d at 415. Here, the key determination is whether the overall ***1081** legislative intent is still accomplished without the invalid provisions. *See Martinez v. Scanlan,* 582 So.2d 1167, 1173 (Fla.1991) (citing *Eastern Air Lines, Inc. v. Dep't of Revenue,* 455 So.2d 311, 317 (Fla.1984)).

[23] Section 316.3045(1)(a) prohibits individuals from amplifying sound inside their motor vehicles that is "plainly audible" more than twenty-five feet away from the vehicle. At first glance, the broad purpose of the statute could be accomplished absent the invalid provisions. The statute, however, was not intended to apply uniformly to all classes of vehicles or content; subsection (3) of the statute and legislative history clearly indicate that the Legislature intended to exempt commercial and political vehicles from

the statute's proscription. Severing the provision from the statute would expand the statute's reach beyond what the Legislature contemplated. Accordingly, in striving to show great deference to the Legislature, this Court will not legislate and sever provisions that would effectively expand the scope of the statute's intended breadth.[8] *Cf. Holly v. Auld,* 450 So.2d 217, 219 (Fla.1984) (noting that courts lack the power to construe an unambiguous statute to extend, modify, or limit its express terms or its reasonable implications).

CONCLUSION

Accordingly, for the reasons set forth above, we affirm the Second District's declaration that the statute is invalid. Section 316.3045(1)(a) is an unreasonable restriction on the freedom of expression and is unconstitutionally overbroad, but is not unconstitutionally vague. Additionally, we find that severance of the constitutionally infirm provisions is not an appropriate remedy.

It is so ordered.

PARIENTE, LEWIS, and PERRY, JJ., concur.

POLSTON, C.J. and CANADY, J., concur in result.

QUINCE, J., concurs in result only.

All Citations

104 So.3d 1069, 37 Fla. L. Weekly S763

Footnotes

1 *See* art. V, § 3(b)(1), Fla. Const. (providing for mandatory review by this Court of decisions of district courts of appeal declaring invalid a state statute or provision of the state constitution). The Second District also certified a question of great public importance: "Is the 'plainly audible' language in section 316.3045(1)(a), Florida Statutes, unconstitutionally vague, overbroad, arbitrarily enforceable, or impinging on free speech rights?" *Catalano,* 60 So.3d at 1144. Thus, we also have jurisdiction based on the certified question of great public importance. *See* art. V, § 3(b)(4), Fla. Const.

2 The Second District consolidated *State v. Catalano,* Case No. 2D10–973, with *State v. Schermerhorn,* Case No. 2D10–974, on appeal and issued one opinion. *Catalano,* 60 So.3d at 1141. The only distinguishing feature between the two cases is that Catalano was issued a citation on November 13, 2007, and Schermerhorn's citation was issued on April 11, 2008. Catalano and Schermerhorn are now joined as appellees here.

3 Judge Kelly only concurred with this portion of the opinion that discusses whether the circuit court departed from the essential requirements of the law by relying on *Easy Way,* 674 So.2d at 867, to conclude section 316.3045(1)(a) was unconstitutionally vague and overbroad. *Catalano,* 60 So.3d at 1147 (Kelly, J., concurring specially). Associate Judge Raiden concurred with the opinion, but also wrote separately that, although he was not positive section 316.3045(1)(a) was impermissibly vague, he joined the majority opinion because subsection (b) of the statute suffers constitutional infirmity as 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.' " *Catalano,* 60 So.3d at 1147 (Raiden, J., concurring).

4 The State suggests that Catalano and Schermerhorn do not have the requisite standing to facially challenge the constitutionality of the statute for vagueness. Litigants may not successfully challenge the constitutionality of a statute for vagueness or complain of its vagueness as applied to the hypothetical conduct of others "[i]f the record demonstrates that a defendant has engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute." *See State v. Brake,* 796 So.2d 522, 526–27 (Fla.2001) (citing *McKenney v. State,* 388 So.2d 1232, 1233 (Fla.1980) ("A person whose conduct clearly falls within the statute's prohibition cannot reasonably be said to have been denied adequate notice.")). Here, due to the procedural posture of the case, the record does not clearly demonstrate whether Catalano and Schermerhorn engaged in clearly proscribed conduct. Nevertheless, their standing is not determinative as we find the statute is not unconstitutionally vague.

5 Although we find that the statutory language sufficiently notifies citizens of the proscribed conduct, the United States Supreme Court has also noted that an administrative regulation can save a vague statute. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 504, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Here, as required by subsection (4), the Department of Highway Safety and Motor Vehicles (DMV) promulgated Florida Administrative Code Rule 15B–13.001. Pursuant to the rule, a violation of section 316.3045(1)(a) occurs when an individual's vehicle produces sound that can be "clearly heard" more than twenty-five feet away by a law enforcement officer who has a direct line of sight and hearing to the motor vehicle producing the sound, using his or her normal auditory senses, without any

enhancements or hearing aid. Additionally, the administrative regulation notes that an officer need not determine particular words or phrases, or the name of any song or artist; the detection of a rhythmic bass reverberating sound is sufficient. Thus, any lingering doubt as to what constitutes a violation of the statute is clarified by the administrative regulation.

6 Litigants need not meet the traditional requirement of standing when challenging the constitutionality of a statute on the grounds of overbreadth. *See* *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A litigant whose own speech or conduct is clearly proscribed is permitted to challenge a statute on its face on the ground that the rights of nonparties may be unconstitutionally inhibited. *See* *Montgomery,* 69 So.3d at 1029 (quoting *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.,* 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987)). This is so because the existence of the statute may cause others not before the court to refrain from constitutionally-protected speech or expression rather than undertake to have the law declared partially invalid. *See* *Montgomery,* 69 So.3d at 1029 (citing *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), and *Broadrick,* 413 U.S. at 612, 93 S.Ct. 2908).

7 We have previously recognized that there is a compelling state interest in highway safety. *See* *State v. Bender,* 382 So.2d 697, 699 (Fla.1980) ("[T]here is a compelling state interest in highway safety that justifies the state legislature to allow suspension of a driver's license for failure to take a breathalyzer or blood alcohol test.") (citing *Mackey v. Montrym,* 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979)); *see also* *Sambrine v. State,* 386 So.2d 546, 548 (Fla.1980). *Bender* and cases from the district courts of appeal that acknowledge this compelling interest, however, involve a defendant's failure to take a breathalyzer or blood alcohol test in situations where the driver may have been under the influence of alcohol. *See* *Kurecka v. State,* 67 So.3d 1052, 1060 n. 3 (Fla. 4th DCA 2010); *Conahan v. Dep't of Highway Safety and Motor Vehicles,* 619 So.2d 988, 990 (Fla. 5th DCA 1993); *State v. Demarzo,* 453 So.2d 850, 853 (Fla. 4th DCA 1984). Here, much like the cases cited above which do not find traffic safety to be a compelling state interest, the proscribed conduct involves an individual's freedom of expression as it relates to safety on public thoroughfares. Nevertheless, the level of import of the State's interest here does not change our conclusion on the constitutionality of the statute.

8 Additionally, in 1990, the same year that House Bill 1383, now codified as section 316.3045, was filed, Senate Bill 2274 was filed and also sought to restrict "sound amplification from within motor vehicles." Fla. S.B. 2274 (1990). Senate Bill 2274 exempted "a vehicle used for advertising" and "a vehicle used in a parade or other special event." Senate Bill 2274 did not propose an exemption for political speech. House Bill 1383 contained the exemptions which eventually became the law. Fla. H.B. 1383 (1990). Thus, it is likely that the invalid provisions were crucial to the enactment of section 316.3045.

End of Document

West's Florida Statutes Annotated
Title XXIII. Motor Vehicles (Chapters 316-325)
Chapter 316. State Uniform Traffic Control (Refs & Annos)

West's F.S.A. § 316.3045

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

Effective: July 1, 2005
Currentness

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

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

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

(2) The provisions of this section shall not apply to any law enforcement motor vehicle equipped with any communication device necessary in the performance of law enforcement duties or to any emergency vehicle equipped with any communication device necessary in the performance of any emergency procedures.

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

(4) The provisions of this section do not apply to the noise made by a horn or other warning device required or permitted by s. 316.271. The Department of Highway Safety and Motor Vehicles shall promulgate rules defining "plainly audible" and establish standards regarding how sound should be measured by law enforcement personnel who enforce the provisions of this section.

(5) A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

Credits
Added by Laws 1990, c. 90-256, § 1, eff. Oct. 1, 1990. Amended by Laws 1999, c. 99-248, § 220, eff. June 8, 1999; Laws 2005, c. 2005-164, § 9, eff. July 1, 2005.

West's F. S. A. § 316.3045, FL ST § 316.3045
Current through the 2019 First Regular Session of the 26th Legislature.

End of Document

Enforcing Noise Ordinances in Florida

Patrick K. Dooley

Abstract

Florida is changing and growing and as change takes place, law enforcement will be confronted with many issues. Noise ordinance enforcement is an area that traditionally law enforcement has not looked at as a high priority. Quality of life issues are one area that law enforcement may be given the responsibility of enforcing. Something initially viewed as a minor complaint can have serious effects on the residents of a community. Most communities in Florida have a noise ordinance in one form or another. Enforcement of noise ordinances is a science that administrators should look at from a training prospective as well as realistic prosecution. This paper will explore the different types of ordinances as well as the proper equipment to be used.

Introduction

As Florida moves into the new millennium, many problems will continue to emerge. Communities are growing as never before, fueled by the large tourism industry. Our woodlands and wetlands are giving way to new developments. New entertainment theme parks open on a regular basis. Beautiful beaches all over Florida have seen dramatic changes. The sand dunes and sea oats are giving way to homes and condominiums. As these changes take place, new problems arise. Bars, restaurants and hotels line the roadways. As these areas expand, they move closer to our residential neighborhoods, exposing sounds of loud music, traffic and machinery to adjacent homes. If gone unchecked by the local governments, the quality of life of the residents will decline.

When an agency begins receiving noise complaints, often from a single complainant, it is very easy to classify that individual as overly sensitive, or even a chronic complainer. But the problem goes much deeper than that. We must look at several issues to fully understand the magnitude of the problem of noise. We must first understand the difference between sound, and noise.

There are physical and psychological effects of noise on individuals. Sleep deprivation can have devastating effects on people. People have been driven to drastic measures as a result of stress brought on by a noise complaint. Do the rights of individuals to not have their lives interfered with by noise, take precedence over other individuals rights to conduct business for profit?

The goal of this research paper is to bring about a better understanding to law enforcement the need to properly train officers who are given the responsibility of enforcing noise ordinances in Florida. Literature reviews are used to provide a basic understanding of noise, and its effects on communities. Previously documented research will assist in exposing the detrimental effects of noise from a psychological, as well as a physical stand point. Studies of noise conducted by various sources will be used to demonstrate the need for proper enforcement. The director of Rutgers University, College of Environmental Science was very helpful with technical assistance.

Research Problem

Noise ordinance enforcement in most communities is not a high priority. Most communities in Florida have a noise ordinance or code in one form or another. However, enforcement is something we do not practice on a regular basis unless a complaint is received. Once the complaints begin, we are charged with a task of enforcement. In many agencies the officers may not be properly prepared to take an enforcement action that will result in a strong case for the prosecution.

Currently there are many very different noise ordinances throughout the state. These ordinances or codes have broad differences. Some are based simply on a nuisance statement, while others are performance based. Performance based ordinances have specific sound level guidelines which after taking a sound level reading, clearly state what is, and what is not a violation.

When a local government chooses to use a performance-based type ordinance, the personnel assigned to the enforcement of the ordinance have very little, or no training in the use of sophisticated measurement equipment. In these situations the measurement equipment can vary greatly. There are sound level measurement devices that are of a high quality, affordable, and with some instruction on the operation, are relatively easy to use. The instruments used for measuring sound vary a great deal in cost, as well as quality. This research will examine instruments that are available, and which ones have proven to be dependable and accurate. Many ordinances are written in a manner that a very specific type of decibel meter would be required for proper enforcement. Yet, these same jurisdictions do not posses the equipment required to enforce their own ordinances. In many cases they find that equipment this specific, is just not affordable. In other cases a city will purchase a decibel meter which is so difficult to use, and they later find it to be money wasted.

As Florida continues to grow, so will litigation of cases involving noise ordinance enforcement. It is for this reason that law enforcement administrators must ensure that enforcement is taken seriously. This research will attempt to answer the following questions concerning noise ordinance enforcement.

1) At what point does sound become noise?
2) Is there a need for proper noise ordinance enforcement?
3) Do current noise ordinances have a realistic impact on our communities?
4) Do agencies provide proper training to personnel assigned to noise ordinance enforcement?
5) Would mandated guidelines for noise ordinance enforcement be beneficial to communities?

Background

With the addition of loudspeakers, music more readily crosses from one property line to another. This can interfere with peace and tranquility of a community. The United States Supreme Court recognized the rights of residents to maintain their privacy. As early as 1949 it recognized local government's duty to regulate, and enforce laws protecting individuals from the invasion of amplified music. The court stated, "in his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality." (Kovac v.Cooper, 336 U.S. 77, 87 (1949))

The Florida Constitution, states that "it shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provisions shall be made

by law for the abatement of air and water pollution and excessive and unnecessary noise."(Florida Constitution, Article II, Section 7)

Sound Wave Measurement

Sound waves are a series of compressions and refractions within a medium. There are two components of sound waves, intensity and frequency. Intensity is determined by the amount of energy in a sound wave. This contributes to the loudness as perceived by the human ear. The intensity, or sound pressure is reported and measured in decibels (db.) (Zwerling, 1996). The decibel scale is similar to the Richter scale in the respect that they are both logarithmic. (When there is an increase of three decibels of sound pressure, humans perceive a 10-decibel increase as a doubling of the loudness.) Frequency is measured by how fast the sound waves are moving. This determines the pitch of the sound. The term Hertz (Hz) is used to report the measurement of frequency. Frequency is measured in cycles per second. (Zwerling, 1996)

Most ordinances have it written into them that require measurement with a decibel meter be taken on the A-scale. The reason for this is that the A-scale is designed to mimic that of human hearing. When a measurement is taken with a decibel meter on the A-scale, the result is a single number for measurement that would be closest to the way the human ear would perceive that particular source. A single number of measurements are then reported, such as 65db.

There is a recent interest in areas of Florida to allow enforcement officers to take sound measurements with meters using the "C" scale. The "C" scale weighting system allows the sound meter to pick up low frequencies. These are the intrusive sub-woofer type of bass sounds that can penetrate structures and result in physical sensation. This type of base is not readable using the "A" scale. (Zwerling, 2000)Most quality sound meters are already equipped with "C" scale weighting, and can be changed from "A" to "C" with a simple switch. When properly applied the "C" scale is a valuable tool in sound enforcement.

Methods

Mail surveys were conducted with State Attorney's throughout the state, to determine their opinions of what is proper to present a clear and convincing case in the courts. The survey consisted of six questions. (Appendix A) It was sent to all of the State Attorney's Offices representing each judicial circuit.

The paper also examines the two most common types of noise enforcement codes. The first being the nuisance codes. The second are performance codes. Nuisance codes have in some cases been found to be unconstitutional. This is due to their lack of specific wording, and not clearly stating what in fact is a violation. The performance based codes are codes which have more often been upheld by the courts. They are based on a very clear and specific statement of what is a violation. Performance codes contain very specific guidelines for enforcement. They usually also contain a table which will state the allowable decibel levels. (Appendix B)

The proper preparation and presentation of a case is a major basis of this research paper. There are many factors to consider when investigating a noise complaint. One of the questions asked most often, is how do you determine what noise is coming from the source of the complaint, and what noise is coming from an additional outside source, such as traffic. These questions will be answered, in a very simple and clear manner. Much of the sound measurement instruction was found in previous research conducted

by Department of Environmental Sciences at Rutgers University as well as literature reviews.

Results

Survey Results from State Attorney's

The response to the mail survey was positive with a 68% response to the survey. The responses will be broken down by question.

1) What points do you look for to prosecute a noise violation? Note: Respondents to question one in some cases provided multiple answers.

a. 54% agreed that previous warnings, or past problems were important for prosecution.
b. 38% stated the level of noise was important. (db level)
c. 38% stated that the elements of the ordinance must be met.
d. 38% required the number of victims / witnesses present.
e. 23% stated that the area of the complaint was important, residential or business.
f. 15% said that the time of day of the violation was important.

2) Do you believe that it is better from a prosecution stand point to enforce an ordinance or code that sets forth specific decibel levels or one that is nuisance based?

a. 62% preferred an ordinance that is performance based.
b. 31% preferred a nuisance based ordinance.
c. 8% had no preference.

3) Have you found officer training to be adequate in cases that you have prosecuted?

a. 38% had no experience or were not aware of any cases for prosecution.
b. 30% said that officer training was adequate.
c. 15% said that officer training was not adequate for prosecution.
d. 8% believe that it depends on the type of case.

4) Are noise measurement devices used by officers noted by the court to be adequate?

a. 54% are not aware of any noise measurement device owned by their city or county.
b. 31% said that law enforcement does not use noise measurement devices.
c. 15% have been found to be adequate.

5) Do Assistant State Attorney's receive any training to assist them in understanding sound measurement?

a.100% stated that they received no training in sound measurement.

6) Would any officer training assist you in prosecuting a noise violation case?

a. 69% stated documented training would be beneficial for prosecution.
b. 31% responded that training would be of no help.

Physical Effects of Noise

Noise can affect people in different ways. It has been found that sleep interference occurs at an average night time sound level of 35db. It has also been determined that younger people are found to be less sensitive to sleep interruption by about 10db. (Suter, 1991) When measuring sound, and the effect of sound passing through barriers or walls, sound reduces by approximately 15db. Meaning that if sound were to be measured at 50db outside of a home, the db reading on the inside of the home would be approximately 35db. Thus allowing uninterrupted sleep. Unregulated noise has been proven to have serious adverse effects on people far beyond simple annoyance. Exposure to loud noise has resulted in uncontrollable stress which can result in mood swings as well as hormonal and nervous system changes in otherwise healthy subjects. (E.P.A. 1974) The stress, tension, and fatigue associated with long term exposure to noise has destroyed marriages, caused others to loose their jobs, and forced other to sell their homes at considerable losses. (Zwerling, 1996)

The Ordinance or Code

Very often it is found that police rely on nuisance ordinances for enforcement of a noise complaint. The reason is that in many cases the field enforcement of a performance based ordinance does not meet the need of the field officer. The equipment it not readily available or the officer does not have proper training to operate the equipment. This lack of training may also cause the officer to be uncomfortable defending the case in court.

There is wording that can be used in a nuisance based code that has been upheld by the courts. A standard of “plainly audible” has been held to be neither broad or vague. (State v Ewing, 914 P. 2d 549, Haw (1996)) This wording is clear and easily understood by anyone. The subjectivity has been removed. The following standard can be used in an ordinance to address a sound system: “plainly audible” means any sound that can be detected by a person using his or her unaided hearing faculties. When considering a workable ordinance for a residential or commercial area, simply apply the “plainly audible” wording using specific times and distances.

In many instances performance based codes or ordinances are written without input from experts in the field of noise or acoustics. Law enforcement is also not solicited for input. With a desire for continuity, ordinances are often copies from another jurisdiction. The result in many cases is the perpetuation of a vague or ineffective ordinance.

Several ordinances in Florida currently are based upon statistical averaging. (e.g., L10- the sound level which is exceeded ten percent of the time.) This type of ordinance requires very sophisticated equipment which is very expensive. There are still other ordinances which do not allow noise to exceed a specific level for a given period of time. An example of this would be an ordinance which states for example, the noise level shall not exceed X db, for a three minute commutative period in any sixty minute period. When an officer wants to enforce an ordinance of this nature it very difficult to prove that the source was above the limit for a specific period of time without measurement

equipment with a recorder built in. This type of equipment is also expensive and requires a full sixty minutes of sound measurement.

There are alternatives which are effective. An ordinance which states a specific db level that should not be exceeded when measuring a single incident that exhibits the everyday operation of the location in question. (Zwerling, 1996) Wording an ordinance in this manner would include noises such as a truck loading or unloading, or an annoying piece of machinery. This type noise may be relatively short in duration but they are included in an ordinance worded in this manner. (Zwerling, 1996)

There are several other considerations to look at when deriving at a workable and enforceable noise ordinance. Agencies should develop a noise violation report form. This form needs to include relevant information such as date, time, calibration times, location, and person taking the reading. Another piece of helpful information is a diagram of the scene. This will give the prosecutor a much better understanding of the location when presenting the case to the courts. Weather conditions should always be stated in the report. Wind and temperature can all have effects on the readings the sound measurement equipment provide. Sound measurements should not be taken when precipitation is falling or on the ground, because the moisture can damage the sound meter. (Cowan, 1994) The report form should also include the type, and model of the equipment used for the sound measurement. (Appendix C)

Sound Measurement Equipment

Sound measurement equipment is manufactured in accordance with the American National Standards Institute (ANSI). (Cowan, 1994) In a case where a private party had continuously loud stereo, chances are they would not challenge a db meter purchased at en electronic outlet. A case made against a bar, with several prior complaints will probably challenge the sound measurement device. So it is important to use equipment that meets the industry standards. A good quality measurement device can be purchased with a calibrating device for about $1000.00. This type of a device is relatively easy to operate with some instruction, and is reliable enough to withstand a challenge in the courts.

Typical sound level calibrators are small and can be handled with relative ease. Most come with an adapter to fit the meter to be calibrated. With most sound meters, the calibrator fits over the end of the meter. Then the calibrator is turned on. The sound meter must read within two db of the calibrators sound pressure given. Meaning if the calibrator is displayed at 114db, the meter must be within two db to continue the measurements. If the meter is out of the two db range, then the meter may be manually adjusted to come into compliance. All sound meters should be calibrated by the factory at least once per year.

Taking the Sound Measurement

The first step to taking a sound measurement is to determine the actual source of the noise. Walking around the source of the noise will be helpful when completing the diagram portion of the sound measurement report from. It will also provide you with better testimony should the case go to court. The report form should be filled out completely. The noise source should be described, and if the measurement taken represents a normal cycle of operation for the facility. (Zwerling, 1999) The instrument used for the sound measurement should be properly calibrated, and the results recorded. Noting the results of the field calibration is absolutely required for a valid sound measurement report form. (Zwerling, 1999)

There are several ways to measure residual sound levels in a residential neighborhood. The investigator can walk in the opposite direction of the source, away from the residual noise, or measurement may taken in a similar neighborhood with away from the source of the complaint. The person taking the measurement may use a barrier to block the source of outside noise. (Zwerling, 1999)

When taking the sound level reading, it is best to take a reading with the source off. This will give a reading of the background sound level. A reading of the ambient sound level should be taken with the source of the complaint on as well. To determine the difference between the ambient and background sound levels the table below can be used. (Cowan, 1994)

Table 1

Correction for Background Sound Levels.

Difference between Ambient and Background Sound Levels	Corrections Factor to be subtracted from Ambient Level for Source Level
3	3
4, 6	2
6- 9	1
10 or more	0

Measured in dbA

If the ambient noise level is less than 3 dbA higher than the background sound level, than the source level cannot be determined. In this case no violation can be substantiated. (Cowan, 1994)

When taking sound measurements the time of the measurement should last at least five minutes in duration. This will insure the measurements are accurate for the particular source in question.

Discussion

The subject of noise enforcement is a quality of life issue. An issue which some do not even believe to be a law enforcement issue. In some jurisdictions law enforcement is not given the responsibility of enforcement. In locations where law enforcement is charged with noise enforcement, we must go beyond the surface and examine the facts. The facts are that we have a responsibility to maintain the quality of life with the tools our communities give us. The ordinances or codes whether they are performance based or nuisance based must be enforced. If a community does not choose to restrict sound, then the ordinance should not exist.

If law enforcement administrators are charged with responsibility of enforcement of noise ordinances, then there is a responsibility that we provide the proper tools, and training to the officers expected to investigate these types of complaints. All too often officers expect officers to be able to complete a task, however difficult, without adequate training, or no training at all. The measurement of sound, is based in scientific fact. This is a science that without some training very few people understand. Yet, how many times do officers respond to a noise complaint and not have any real understanding of what they are measuring.

There are those who would argue that this is such a minor offense that it does not warrant too much of an investment in training. When a police officer becomes certified in this state to operate a traffic radar unit, the officer receives forty hours of mandatory training. Yet there is no requirement for officers who use sound measurement devices to make a case. I am not suggesting a forty hour state mandated course, however I do believe the research shows that some training should be required.

Sergeant Patrick Dooley has been with the Jacksonville Beach Police Department since 1991. He has worked in several areas to include patrol, detectives division, evidence technician, gang intelligence, field training officer and juvenile specialist. Pat is pursuing his Bachelor's degree in Criminal Justice from St. Leo University. He is also a graduate of the FBI National Academy, 228 Session.

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Appendix A

SURVEY QUESTIONS

State Attorneys

1) What points do you look for to prosecute a noise violation?

2) Do you believe that it is better from a prosecution stand point to enforce an ordinance or code that is sets forth specific decibel levels or one that is nuisance based?

3) Have you found officer training to be adequate in cases that you have prosecuted?

4) Are the noise measurement devices used by officers noted by the courts to be adequate?

5) Do Assistant State Attorneys receive any training to assist them in understanding sound measurement?

6) Would any documented officer training assist you in prosecuting a noise violation case?

Appendix B

Maximum Permissible Sound Levels

	RECEIVING PROPERTY		
	RESIDENTIAL		COMMERCIAL
Source Property	7:00am - 10:00pm	10:00pm - 7:00am	All Times
Residential	55	50	65
Commercial	65	50	65
Industrial	65	50	65

Appendix C

SOUND MEASUREMENT REPORT FORM

NAME/ADDRESS OF NOISE SOURCE:

_____

_____

_____

DATE_____DAY OF WEEK_____TIME_____am /pm.

Investigating Agency_____

Investigating Officer_____

Name of responsible party notified_____

Description of noise source to be measured:_____

_____

_____

Description of property receiving noise_____

_____

Description of Residual Noises, (fairly constant in nature)_____

_____

Description of Extraneous Noises, (intermittent in nature, and not from source)_____

_____

DESCRIPTION OF INSTRUMENT:_____

SOUND LEVEL METER_____MODEL #_____ANSI TYPE_____
SERIAL #_____ DATE OF LAST CERTIFICATION_____
SOUND LEVEL CALIBRATOR_____WIND SCREEN USED (YES/NO)_____
WIND METER USED (YES/ NO)_____TIME OF CALIBRATION_____

WEATHER CONDITIONS:_____

PRECIPITATION_____GROUND WET_____TEMPERATURE:_____
WIND VELOCITY_____TIME TAKEN_____

NEIGHBORHOOD RESIDUAL NOISE MEASUREMENT:_____

TIME : START / FINISH READING RANGE (dbA) TYPE RESIDUAL LOCATION OF MEASUREMENT/ COMMENTS

_____

_____

_____

_____

MEASUREMENT OF TOTAL NOISE:_____

TIME : START / FINISH READING RANGE (dbA) CORRECTED (SOURCE) LEVEL LOCATION / COMMENTS

_____

_____

_____

_____

_____

_____

_____

_____

Noise Measurement Taken By: Reviewed By:

_____ _____

INCLUDE SITE SKETCH ON REVERSE (Include source, walk around, and exact measurement location)