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

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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

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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).

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

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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").

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

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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).

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

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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).

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

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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.

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

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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.

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

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)).

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

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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.*

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

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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.

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

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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.

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

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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).

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]

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 LAND USE 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,

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

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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).

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]

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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.

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

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(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).

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

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).

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*.

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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.

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

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).

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;

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.

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

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.

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

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.

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

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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.

"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

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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

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

(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").

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

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).

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]

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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

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

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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).

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

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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).

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.

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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.*