IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Michael Moshoures, Plaintiff, v. City of North Myrtle Beach; Marilyn Hatley, *in her official capacity as Mayor of the City of North Myrtle Beach*, Dana Crowell, *in her official capacity as Chief of the North Myrtle Beach Department of Public Safety*, Defendants.	Case No.: 4:22-cv-02123-JD **ORDER AND OPINION**

Before the Court are cross-motions for Summary Judgment by Plaintiff Michael Moshoures ("Plaintiff" or "Moshoures") (DE 30), and Defendants City of North Myrtle Beach ("City"), Marilyn Hatley, in her official capacity as Mayor of the City of North Myrtle Beach ("Hatley") and Dana Crowell, in her official capacity as Chief of the North Myrtle Beach Department of Public Safety ("Crowell") (DE 29). Moshoures, the owner of the Sky Bar, a nightlife establishment in North Myrtle Beach, seeks declaratory and injunctive relief against the City and Crowell (collectively "Defendants" or "North Myrtle Beach"). Moshoures contends City Ordinance 21-33 ("Ordinance 21-33" or "Ordinance"), which prohibits broadcasts of obscene, profane, or vulgar language at certain sound levels during specific times of day, is unconstitutionally vague, unconstitutionally overbroad, and an unreasonable content-based restriction on speech, and he seeks to enjoin its enforcement. (DE 1.) On the other hand, Defendants contend among other things, that Ordinance 21-33 does not prohibit or restrict protected speech, the Ordinance is content neutral, the Ordinance is not facially overbroad or

vague, and that Marilyn Hatley, in her official capacity as Mayor of the City of North Myrtle Beach, should be dismissed.[1]

The parties have fully briefed their motions, and so they are ripe for review and decision. After reviewing the motions and memoranda submitted, the Court grants in part and denies in part their motions as provided below.

BACKGROUND

Plaintiff Moshoures owns the Sky Bar located at 214 Main Street, North Myrtle Beach, South Carolina. (DE 1, p. 1 ¶ 3.) Moshoures contends, "to attract and retain patrons, Sky Bar frequently features rap, hip hop, and top-40 music, which often includes profane and sexually explicit lyrics." (DE 30, p .4.) At a North Myrtle Beach City Council meeting on July 19, 2021, several citizens voiced concerns over "the obscene[,] vulgar language coming from the music there [Sky Bar]" and that "it should not be allowed[,] and it degraded the downtown area." (DE 13-2, 13-3.) North Myrtle Beach's Mayor, Police Department, and other officials also received several emails from citizens and tourists with similar complaints. (See DE 13-4, 13-5, 13-6, 13-7, 13-8, 13-9, 13-10.) On September 19, 2021, in response to these public complaints, and after discussion with staff, police, and other City employees, the Mayor and City Council adopted an amendment to the North Myrtle Beach Code of Ordinances, Ch. 12, Art V § 12-70, *et seq.* ("Ordinance 21-33" or "Ordinance"). Ordinance 21-33, § 12-70 declares:

> It is hereby declared to be the public policy of the city to reduce the ambient sound level in the city, as so to preserve, protect and promote the public health, safety and welfare, and the peace and quiet of the residents and visitors of the city, prevent injury to human, plant and animal life and property, foster the convenience and comfort of its inhabitants and visitors, and facilitate the

[1] Defendants move for summary judgment as to Mayor Hatley because the "Mayor's duties do not include enforcing the challenged ordinance." (DE 29-1, p. 21.) Plaintiff does not oppose summary judgment on this ground. (DE 33, p. 16 n. 6.) Thus, summary judgment is granted for Defendants as to Mayor Hatley.

> enjoyment of the natural attractions of the city. *It is hereby declared to be the public policy of the city to protect children from being exposed to broadcast obscene, profane or vulgar words and lyrics while accompanying their caretakers on the streets, in public places, in homes or in businesses.* The provisions and prohibitions hereinafter contained and enacted are for the above-mentioned purpose.

(DE 13-12, p. 2 (emphasis added).) To effectuate North Myrtle Beach's policy declaration, Ordinance 21-33 provides in Section 12-75(h) the following:

> The use of sound equipment to broadcast obscene, profane or vulgar language from any commercial property, private property, public right-of-way or city property in excess of thirty (30) dB(A) from 7:01 a.m. to 10:59 p.m. and fifty (50) dB(A) from 11:00 p.m. to 7:00 a.m. as measured from the boundary with the adjacent neighboring commercial property, private property, public right-of-way or city property is prohibited.

(DE 13-12, p. 5.) In addition, Ordinance 21-33, § 12-71, adds three definitions to define "obscene," "profane," and "vulgar" as follows:

> *Obscene* means description of sexual conduct that is objectionable or offensive to accepted standards of decency which the average person, applying North Myrtle Beach community standards would find, taken as a whole, appeals to prurient interests or material which depicts or describes, in a patently offensive way, sexual conduct or genitalia specifically defined by S.C. Code Ann. § 16-15-305, which, taken as a whole, lacks serious literary, artistic, political, or scientific value.
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> *Profane* means to treat with irreverence or contempt, crude, filthy, dirty, smutty, or indecent.
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> *Vulgar* means making explicit and offensive reference to sex, male genitalia, female genitalia or bodily functions.

(DE 13-12, pp. 2-3.) Lastly, Section 12-77 of Ordinance 21-33 provides that a violation of the ordinance is a misdemeanor and is punishable as provided in Section 1-6 of the City of North Myrtle Beach Code of Ordinances. (DE 13-12, p. 6.) Moshoures contends he was "ticketed multiple times under the previous version of the ordinance and has received several warnings under the new, more aggressive ordinance." (DE 30, p. 4.)

LEGAL STANDARD

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Celotex Corp., 477 U.S. at 322. "A fact is 'material' if proof of its existence or non-existence would affect disposition of the case under applicable law. An issue of material fact is 'genuine' if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." Wai Man Tom v. Hosp. Ventures LLC, 980 F.3d 1027, 1037 (4th Cir. 2020) (citation omitted). If the burden of persuasion at trial would be on the nonmoving party "a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Celotex Corp., 477 U.S. at 324. "[T]he burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. at 325. "If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied . . . ." Id. at 332 (Brennan, J., dissenting).

Accordingly, once the movant has made this threshold demonstration, to survive the motion for summary judgment, under Rule 56(e), the nonmoving party must "go beyond the

pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324 (citation omitted). Under this standard, "the mere existence of a scintilla of evidence" in favor of the non-movant's position is insufficient to withstand the summary judgment motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). "Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion." Wai Man Tom, 980 F.3d at 1037.

"Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits." Jacobs v. N.C. Admin. Off. of the Courts, 780 F.3d 562, 568 (4th Cir. 2015) (quoting 10A Charles A. Wright et al., Federal Practice & Procedure § 2728 (3d ed. 1998)). "The court may grant summary judgment only if it concludes that the evidence could not permit a reasonable jury to return a favorable verdict. Therefore, courts must view the evidence in the light most favorable to the nonmoving party and refrain from weighing the evidence or making credibility determinations." Variety Stores, Inc. v. Wal-Mart Stores, Inc., 888 F.3d 651, 659 (4th Cir. 2018) (internal quotation marks omitted and alterations adopted). A court improperly weighs the evidence if it fails to credit evidence that contradicts its factual conclusions or fails to draw reasonable inferences in the light most favorable to the nonmoving party. See id. at 659-60.

DISCUSSION

Moshoures seeks declaratory and injunctive relief on three causes of actions, claiming Ordinance 21-33 (1) is overbroad in violation of the First Amendment; (2) is an unreasonable content-based restriction on speech and expression and thus violates the First Amendment; and (3) is unconstitutionally vague in violation of the Fourteenth Amendment. (DE 1.) Both parties

concede, and the Court agrees that there are no material facts in dispute, and thus, each cause of action can be resolved here. (DE 29-1, p. 2; DE 30, p. 4.) As a threshold matter, Defendants contend, "Plaintiff's claims fail because obscene, vulgar, or profane speech is not protected by the First Amendment. Accordingly, the issues before the Court do not even cross the Constitutional threshold, and may be resolved as matters of law."[2] (DE 29-1, p. 8.) That said, the Court will first determine whether "obscene," "vulgar," or "profane" language falls within the protections of the First Amendment as it will guide the Court's analysis in resolving Plaintiff's challenges to the constitutionality of Ordinance 21-33.[3]

Under the First Amendment, "[a] government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015)

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[2] As an additional threshold matter, Defendants erroneously contend "[w]ithout proof of a license to broadcast the music at issue, plaintiff cannot bring this action, as he has no legal right to broadcast the music to the public." (DE 29-1, p. 21.) First, Defendants rely on Eldred v. Ashcroft, for their contention that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches." 537 U.S. 186, 221 (2003). But Eldred concerned a First Amendment challenge regarding a federal statute that extended copyright terms for copyrighted works – an issue absent and distinct from the issues Moshoures raises in this case. Further, "music, as a form of expression and communication, is protected under the First Amendment," even when the party asserting their First Amendment protections are merely playing or broadcasting the music. Ward v. Rock Against Racism, 491 U.S. 781, 784-95, 790 (1989) (protecting plaintiff's ability to amplify the music of "the various performing groups at [its] annual events"); see also DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1266 (11th Cir. 2007) (relying on Ward in holding: "whether the First Amendment protects the conduct at issue in the challenged ordinance—playing or broadcasting recorded music. It does."). Thus, Defendants' motion for summary judgment on this ground is denied.

[3] The Court is mindful that Section 12-78 of Ordinance 21-33 includes a severability clause that states, "[i]f any provision or any section of this article shall be held to be invalid by a court of competent jurisdiction, such holding shall not affect the remainder of this article . . . ." (DE 13-12, p. 6.) "Severability is of course a matter of state law." Leavitt v. Jane L., 518 U.S. 137, 139 (1996). In South Carolina, "[t]he test for severability is whether the constitutional portion of the statute remains 'complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution . . . .'" Thayer v. S.C. Tax Comm'n, 307 S.C. 6, 13, 413 S.E.2d 810, 814-15 (1992). Accordingly, since section 12-75(h) may be complete with either "obscene," "vulgar," or "profane," on its own, the Court will resolve Plaintiff's challenges to each individually.

(quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Id. "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Id. (citation omitted).

The Supreme Court has "categorically settled . . . that obscene material is unprotected by the First Amendment." Miller v. California, 413 U.S. 15, 23 (1973) (citing Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Reidel, 402 U.S. 351, 354 (1971); Roth v. United States, 354 U.S. 476, 485 (1957)). The permissible scope of regulation of obscene material is confined to "works which depict or describe sexual conduct." Id.

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (internal citations omitted).

First, as to Ordinance 21-33's definition of "obscene," that definition directly mirrors the Supreme Court's definition of obscene material, and it refers to South Carolina's statute defining obscenity. (See DE 13-12, p. 3; see also S.C. Code Ann. § 16-15-305(B)). Thus the Plaintiff is not entitled to First Amendment protection for "obscene" language as defined by Ordinance 21-33.

Next, Ordinance 21-33 defines "vulgar" as "making explicit and offensive reference to sex, male genitalia, female genitalia or bodily functions." (See DE 13-12, p. 3.) The definition

of "vulgar" falls within the Ordinance's definition of obscene.[4] That said, Moshoures restates his argument from his Motion to Reconsider that "'vulgar' cannot mean the same thing as 'obscene' because an ordinance must be read 'so that no word . . . shall be rendered surplusage, or superfluous[.]'" (DE 21 (citation omitted)). At any rate, this Court has ruled in response to Plaintiff's Motion to Reconsider that "the ordinance defines 'vulgar' clearly and unambiguously, and [] that definition clearly and unambiguously falls within the constitutional definition of 'obscene.'"[5] (DE 37, pp. 2-3.) Thus, Plaintiff is not entitled to First Amendment protection for "vulgar" speech as defined by Ordinance 21-33.

Ordinance 21-33 defines "profane" as "to treat with irreverence or contempt, crude, filthy, dirty, smutty, or indecent." (DE 13-12, p. 3.) This definition falls outside the definition of "obscene" articulated by the Supreme Court in Miller, 413 U.S. at 23. Further, Defendants offer no authority suggesting that "profane" speech as defined in the Ordinance is protected speech under the First Amendment. And so, this Court declines to do the same. In addition, Plaintiff contends that "profane" speech is content-based because "[t]he Ordinance imposes relaxed volume limits on socially acceptable speech and harsh volume limits on other, socially disfavored speech." (DE 30, p. 7.) The Court agrees. Determining whether any given language is restricted by Ordinance 21-33's definition of "profane" "depends entirely on the

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[4] South Carolina law provides that any material is obscene if "to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section . . . . " S.C. Code Ann. § 16-15-305(B)(1).

[5] See DE 37, Order ("Although Plaintiff cites to a sound rule of *statutory construction*,[] 'when a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.' Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); see also Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Furthermore, '[i]f a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning.' Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).")

communicative content" of that language. Reed, 576 U.S. at 164. Thus, "profane" speech, as defined by Ordinance 21-33, is constitutionally protected, content-based speech.[6]

Accordingly, the Court will only address Plaintiff's challenges to the constitutionality of Ordinance 21-33 with respect to "profane" speech but otherwise grants summary judgment for Defendants on Plaintiff's claims about obscenity[7] and vulgarity[8]. See supra note 3.

Restrictions on "Profane" Speech as Defined by Ordinance 21-33

1. Overbreadth

Plaintiff argues he is entitled to summary judgment "because the 'profane' provision of Ordinance 21-33 regulates *only* protected speech and no unprotected speech, [and therefore], it is unconstitutionally overbroad." (DE 30, p. 5.) This Court agrees. "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount

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[6] Defendants' contention that Ordinance 21-33's restrictions are content-neutral because the "justification" for the ordinance is not content-based, even if it makes a distinction on the basis of content, is misguided. (See DE 29-1, p. 10.) Rather, "[a]lthough 'a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary.' In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral." Reed, 576 U.S. at 165–66.

[7] Plaintiff does not move for summary judgment on the ordinance's obscenity regulations; rather, Plaintiff contends "as a whole, Ordinance 21-33 is facially overbroad in violation of the First Amendment" because "from its inception, [it has] aimed to regulate music." (DE 30, p. 6.) Defendants contend "there is no categorical exemption for music from the general rule that obscene material is not protected under the First Amendment." The Court agrees with Defendants. The Court has found no binding authority that categorically shields musical works or sound recordings from the obscenity analysis the Supreme Court articulated in Miller, 413 U.S. at 2. Rather, in the seminal case Luke Recs., Inc. v. Navarro, the 11th Circuit applied the Miller test to the lyrics and the music of the specific musical album in question. 960 F.2d 134, 136 (11th Cir. 1992). Thus, the Court reiterates its holding on Plaintiff's Motion for Reconsideration that "[t]he Court's Order does not make any determination on whether any one piece of music or music in general, taken as a whole, has literary merit such that it falls out of the constitutional definition of obscene. " (DE 37, p. 4.)

[8] Plaintiff's contention that he is entitled to summary judgment on the Ordinance's regulation of "vulgar" language because it is unconstitutionally overbroad and vague is denied. "[I]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." Houston v. Hill, 482 U.S. 451, 458 (1987) (citation omitted). But as previously found, "vulgar" under Ordinance 21-33 clearly and unambiguously falls within the definition of "obscene" and therefore does not restrict constitutionally protected conduct.

of protected speech. The doctrine seeks to strike a balance between competing social costs." United States v. Williams, 553 U.S. 285, 292 (2008). "Invalidation for overbreadth is . . . 'strong medicine' . . . that is not to be 'casually employed.'" Id. at 293.

> Only a statute that is substantially overbroad may be invalidated on its face. 'We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . .' Instead, 'in a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.'

Houston v. Hill, 482 U.S. 451, 458 (1987) (internal citations omitted). Ordinance 21-33 defines "profane" as "to treat with irreverence or contempt, crude, filthy, dirty, smutty, or indecent." Furthermore, Ordinance 21-33, Section 12-75(h) provides that:

> The use of sound equipment to broadcast obscene, profane or vulgar language from any commercial property, private property, public right-of-way or city property in excess of thirty (30) dB(A) from 7:01 a.m. to 10:59 p.m. and fifty (50) dB(A) from 11:00 p.m. to 7:00 a.m. as measured from the boundary with the adjacent neighboring commercial property, private property, public right-of-way or city property is prohibited.

(DE 13-12, p. 5.) A violation of the Ordinance is a misdemeanor. Although the Ordinance deals with sound equipment and decibel levels, it regulates speech at its core, making it unlawful to broadcast profane language at certain times.

The Ordinance also criminalizes any broadcast that "treats with irreverence or contempt, or that is filthy, dirty, smutty, or indecent" with no constraints or limits. But the First Amendment protects offensive and indecent speech. See Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Sable Comm. of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment . . . ."). Enforcement of the Ordinance would criminalize a substantial amount of constitutionally

protected speech. Thus, summary judgment is granted in favor of Plaintiff and denied as to Defendants regarding whether Ordinance 21-33's restrictions on "profane" language is facially invalid under the First Amendment overbreadth doctrine.

2. Content-Based Restrictions

Notwithstanding the Court's invalidation of the profane regulations on overbreadth grounds, Plaintiff contends "the Ordinance's limitation on 'profane' expression is an unconstitutional content-based restriction" because "Defendants offer no compelling government interest to justify the Ordinance, and even assuming the proffered interest is compelling, the Ordinance is not narrowly tailored to serve that interest." (DE 30, p. 7.) The Court agrees. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed, 576 at 163 (defining "strict scrutiny") (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991).[9] "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000). "The State must specifically identify an 'actual problem' in need of solving and the curtailment of free speech must be

[9] Defendants contend intermediate scrutiny jurisprudence – that Ordinance 21-33 must be "narrowly tailored to serve a significant governmental interest, " Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) – should be applied here. But Defendants' application of intermediate scrutiny based on its contention that Ordinance 21-33 is content-neutral is erroneous (see DE 29-1, pp. 9-12), considering this Court's previous finding that Ordinance 21-33's restrictions are content-based regardless of North Myrtle Beach's justification for enacting the ordinance. See supra note 7; Reed, 576 U.S. 155, 165 ("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." (citation omitted)). Further, Defendants' application of intermediate scrutiny based on its assertion that Ordinance 21-33 governs commercial speech (see DE 29-1, p. 33) is also erroneous, considering the Ordinance contains no such limitation on its face but governs *any* broadcast that includes restricted language. Thus, Defendants' analysis under intermediate scrutiny jurisprudence is erroneous and will not be discussed further.

actually necessary to the solution. [This] is a demanding standard." Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 799 (2011) (internal citations omitted). "It is rare that a regulation restricting speech because of its content will ever be permissible." Playboy Entm't Grp., 529 U.S. at 818. North Myrtle Beach has not met this standard.

While North Myrtle Beach cites various governmental interests in Ordinance 21-33, the only interest that might justify the content-based differential treatment is its interest in "protect[ing] children from being exposed to broadcast [] profane [] words and lyrics while accompanying their caretakers on the streets, in public places, in homes or in businesses."[10] (DE 13-12, p. 2.) But a compelling interest is one "of the highest order." Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. 522, 541 (2021) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)). Although the Supreme Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors," Sable Commc'ns of California, Inc., 492 U.S. at 126, North Myrtle Beach fails to claim or cite any evidence that "being subjected to [profane] lyrics . . . on public streets" (DE 29-1, p. 14) hurts the physical or psychological well-being of minors. See, e.g., Brown v.

[10] Defendants also contend the government has a compelling interest in "preserving the character of its neighborhoods." But Defendants cite no precedent that this is a *compelling* government interest; rather, "the First Amendment demands a more precise analysis" than merely stating the purported compelling governmental interest "at a high level of generality." Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. 522, 541 (2021). Next, Defendants contend the government has a compelling interest in protecting adult "captive audiences [and] unwilling listeners . . . from being exposed to [] profane lyrics." But "a bedrock principle underlying the First Amendment, [] is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. at 414. Further, although the Supreme Court has "recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,'" Hill v. Colorado, 530 U.S. 703, 718 (2000), Defendants cite no authority to extend this interest to public sidewalks. Rather, "[i]n the traditional public forum, which includes the streets, sidewalks, parks, and general meeting halls, speakers' rights are at their apex." Steinburg v. Chesterfield Cnty. Plan. Comm'n, 527 F.3d 377, 384 (4th Cir. 2008). Thus, the Court finds Defendants have failed to meet their burden that these objectives are compelling government interests, and Defendants' arguments based on these interests will not be discussed further.

Ent. Merchants Ass'n, 564 U.S. at 799–800 (finding a state statute did not pass strict scrutiny because, among other things, "ambiguous proof" was insufficient to show a causal link between violent video games and harm to minors).

But assuming arguendo that it did, Ordinance 21-33 is not narrowly tailored to serve this interest. North Myrtle Beach contends "Sky Bar may still play all of the [] profane lyrics it wants and is still permitted to broadcast such lyrics as long as they are not audible above the specified levels outside of the Sky Bar, on neighboring properties, and public streets." (DE 29-1, p. 17.) Thus, it contends, Ordinance 21-33 is narrowly tailored "to circumstances where children, and their caretakers, are [] . . . assaulted by [] profane broadcasts while going about their business on public thoroughfares and in neighboring businesses." (DE 32, p. 4.) North Myrtle Beach contends "these restrictions are reasonable and necessary to effectuate the City's legitimate governmental interests." (Id.)

This contention is problematic. To begin with, North Myrtle Beach applies an erroneous standard to content-based restrictions. Such restrictions must be more than just reasonable – under strict scrutiny, a measure must be "narrowly tailored" (or "narrowly drawn"), that is, no "lawful alternative and less restrictive means could have been used" to achieve the governmental interest. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986). In the context of the First Amendment, "the Government may serve [a compelling] interest, but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." Sable Comm. of Cal., Inc., 492 U.S. at 126 (internal quotation marks and citations omitted). Thus, when a regulation "affect[s] First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." Brown, 564 U.S. at 805.

That said, Ordinance 21-33's restrictions on "profane" speech are overinclusive considering they necessarily interfere with Moshoures' First Amendment freedom to broadcast "profane" language which may be heard by adults, regardless of whether they object or consent, outside of Sky Bar. See Texas v. Johnson, 491 U.S. at 414 ("The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Furthermore, Ordinance 21-33's restrictions on "profane" speech may be overinclusive even in respect to minors. "Minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." Brown, 564 U.S. at 794–95 (citing Erznoznik v. Jacksonville, 422 U.S. 205, 212–213 (1975)). "No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed." Id. (internal citations omitted). "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Id. (citing Erznoznik, 422 U.S. at 213–214).

Moreover, Plaintiff proffers "a less restrictive alternative to uphold the City's allegedly compelling interest: deference to parental decision-making." (DE 30, p. 10.) North Myrtle Beach has the burden "to prove that the proposed alternatives will not be as effective as the challenged statute." Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 665 (2004). To that end, North Myrtle Beach contends caretakers, often tourists, could not possibly have "full information" that profane broadcasts would be audible in a main downtown thoroughfare, and therefore "disapproving adults" are unable to act, i.e., "outrun earshot" of the broadcast. (DE 32, p. 4.) Although restricting the volume of "profane" broadcasts so that they cannot be heard on

public thoroughfares would be more effective than deference to parental-decision-making, "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists." Playboy Entm't Grp., 529 U.S. at 813. Here, the right of expression prevails. For these reasons, Ordinance 21-33's restrictions on "profane" language fail the "narrowly tailored" requirement under strict scrutiny.

In sum, Ordinance 21-33's restrictions on broadcasting "profane" language does not pass constitutional muster under strict scrutiny. North Myrtle Beach has not met its burden to establish a compelling government interest or, even if it had, that Ordinance 21-33 is narrowly tailored to its purported government objective. Thus, summary judgment is granted in favor of Plaintiff and denied as to Defendants regarding whether Ordinance 21-33's "profane" language restrictions are unconstitutional content-based restrictions.

3. Void for Vagueness

Finally, Plaintiff contends that Ordinance 21-33's definition of "profane" is unconstitutionally vague. (DE 30, p. 11.) The Court agrees. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000). "The vagueness of [content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech." Reno v. Am. C.L. Union, 521 U.S. 844, 871–72 (1997).

Although Ordinance 21-33 provides people of ordinary intelligence a reasonable opportunity to understand the "level of loudness" that "profane" language may be broadcasted,[11] it fails to provide fair notice of what specific language falls under its definition of "profane." Although some terms Ordinance 21-33 uses to define "profane" *may* have plain-meaning definitions that could be reasonably understood by an ordinary person (i.e., "crude", "filthy", "dirty", or "smutty"), Ordinance 21-33 also defines "profane" as "to treat with irreverence or contempt" or "indecent." (DE 13-12, p. 3.) Determining whether specific language falls within these terms requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." United States v. Williams, 553 U.S. 285, 306 (2008); see also Coates v. City of Cincinnati, 402 U.S. 611, 614, (1971) (finding an ordinance regulating "annoying conduct" vague because "[c]onduct that annoys some people does not annoy others"); Reno, 521 U.S. at 870–871, and n. 35 (striking down a statute partly because its inclusion of "indecent" was found to be vague). For these same reasons, Ordinance 21-33's definition of "profane" encourages arbitrary and discriminatory enforcement, as law enforcement would equally be making "wholly subjective judgments" as to whether a specific broadcast would fall within Ordinance 21-33's reach. Thus, summary judgment is granted in favor of Plaintiff and denied as to Defendants regarding whether Ordinance 21-33's definition of "profane" language is unconstitutionally vague.

[11] See Ordinance 21-33, § 12-75(h) ("The use of sound equipment to broadcast obscene profane, or vulgar language from any commercial property, private property, public right-of-way or city property in excess of thirty (30) db(A) from 7:01 a.m. to 10:59 p.m. and fifty (50) dB(A) from 11:00 p.m. to 7:00 a.m. as measured from the boundary with the adjacent neighboring commercial property, private property, public right-of-way or city property is prohibited.")

CONCLUSION

For these reasons, Plaintiff's Motion for Summary Judgment (DE 30) is granted, and Defendants' Motion for Summary Judgment (DE 29) is denied, with respect to Ordinance 21-33's restrictions on "profane" language. But Plaintiff's Motion for Summary Judgment (DE 30) is denied, and Defendants' Motion for Summary Judgment (DE 29) is granted, with respect to Ordinance 21-33's restrictions on "obscene" and "vulgar" language. Accordingly, "profane" is severed from Ordinance 21-33, and the Court declares the following:

1. Ordinance 21-33's restrictions on "profane" language is unconstitutionally overbroad.
2. Ordinance 21-33's restrictions on "profane" language is an unconstitutional content-based restriction on speech.
3. Ordinance 21-33's restrictions on "profane" language is unconstitutionally vague.

Further, Defendants are enjoined from all enforcement of Ordinance 21-33's "profane" language restrictions.

IT IS SO ORDERED.

Joseph Dawson, III
United States District Judge

Florence, South Carolina
March 13, 2024