AMERICAN CIVIL LIBERTIES UNION
South Carolina

October 7, 2021

VIA ELECTRONIC MAIL AND POSTAL MAIL

Mayor Marilyn Hatley
City of North Myrtle Beach
1018 2nd Avenue S
North Myrtle Beach, SC 29582
mayorhatley@nmb.us

RE: *City Ordinance Criminalizing Obscene, Profane and/or Vulgar Lyrics Played Within the City*

Mayor Hatley and North Myrtle Beach City Council:

I am writing to urge you to immediately **repeal** the recent amendments to Sections 12-70 through 12-78 of Article V of the North Myrtle Beach Noise Ordinance. As drafted, these amendments plainly violate the First Amendment to the United States Constitution.

1. **The Ordinance is an Unconstitutional Content-Based Law.**

It is well-established that City of North Myrtle Beach (NMB) "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[1] Content-based laws like the Ordinance at issue here "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[2] The NMB Ordinance immediately fails this test because the City does not have a "compelling interest" in enforcing prudish sensibilities or in maintaining its reputation as a "family beach."[3]

2. **The Ordinance Criminalizes Vast Swaths of Protected Speech.**

As drafted, the Ordinance is also both vague and overbroad. A statute is unconstitutionally overbroad when it criminalizes a substantial amount of protected speech or conduct, and NMB's new Ordinance does just that. The Supreme Court

[1] *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[2] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("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.").
[3] *See Central Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 633-34 (4th Cir. 2016) (noting that a city may have a "substantial" interest in its "physical appearance" and "traffic safety," but "neither we nor the Supreme Court have ever held that they constitute compelling government interests.").

has long held that simple profanity or vulgarity—not rising to the level of "fighting words" or obscenity—is constitutionally protected speech.[4] Any argument to the contrary is "meritless."[5] By defining "vulgar," "profane," and "obscene," without regard for Supreme Court precedent, NMB has illegally criminalized vast categories of protected speech.

The Ordinance defines "profane," for example, as "to treat with irreverence or contempt, crude, filthy, dirty, smutty, or indecent." To start, these words are vague and subjective, fail to provide notice of what speech is illegal, and thereby create a serious threat of discriminatory enforcement.[6] Beyond that, the First Amendment protects a tremendous amount of speech that is "irrevere[nt]" "crude" or "indecent." This is especially true of music, which is a traditional mode of artistic expression.[7] The Eleventh Circuit, for example, has discussed the "serious artistic value" in 2 Live Crew's album "As Nasty As They Wanna Be," an album that undoubtedly qualifies under North Myrtle Beach's definitions of vulgar, profane, and obscene.[8] In reversing a district court's ruling that the album was "obscene," the Eleventh Circuit expressed its belief that "no work of music alone may be declared obscene [under *Miller v. California*]."[9]

Given the robust protections afforded to musical expression, North Myrtle Beach's proposed Ordinance would almost assuredly be struck down as overbroad under the First Amendment.[10]

3. Even If the City Could Impose Limits on Profanity, the Ordinance's Decibel Limits Are Unreasonable.

Even if North Myrtle Beach could lawfully restrict the playing of "smutty" music, the decibel limits set by your Ordinance are untethered to the advancement of a

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[4] *See, e.g.*, *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971).
[5] *United States v. Hicks*, 980 F.2d 963, 970 (5th Cir. 1992) ("As an initial matter, we must address the Government's threshold contention that profanity is not constitutionally protected speech. This argument is meritless.").
[6] *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) ("It is axiomatic that a law fails to meet the dictates of the Due Process Clause 'if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.'") (quoting *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999)).
[7] *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.")
[8] *See, e.g.*, https://www.songlyrics.com/2-live-crew/me-so-horny-lyrics/
[9] *Luke Recs., Inc. v. Navarro*, 960 F.2d 134, 135 (11th Cir. 1992) ("[W]e tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene[.]"); *also see Torries v. Hebert*, 111 F. Supp. 2d 806, 809–10 (W.D. La. 2000) (recognizing that "music, as a form of expression and communication, is protected under the First Amendment; that the First Amendment protection extends to rap music; and that the First Amendment protection is not weakened because the music takes on an unpopular or even dangerous viewpoint.").
[10] *See* https://spinditty.com/playlists/Popular-Songs-That-Absolutely-Wouldnt-Fly-Today (discussing popular songs that contain "indecent" lyrics).

legitimate City interest. Thirty (30) decibels, which is the daytime sound limit imposed by this Ordinance, is roughly equivalent to a "quiet rural area,"[11] "leaves rustling" or a *whisper*.[12] Thirty (30) decibels is considered "very quiet," and is approximately one eighth as loud as "background music" or a "normal conversation." Given these facts, I find it difficult to imagine how any judge would find this Ordinance to be even rationally related to a legitimate interest.

4. Abandoning this Ordinance Is In the City's Best Interest.

Beyond North Myrtle Beach's interest in honoring its citizens' constitutional rights, passing an unconstitutional ordinance is also ill-advised because it exposes the City to the imminent threat of litigation. A lawsuit challenging Sections 12-70, *et seq.*, would be costly to North Myrtle Beach, even in the absence of damages.[13]

I am aware of your desire to retain North Myrtle Beach's reputation as a "family beach," but you cannot use unconstitutional means to achieve that end. Please consider rejecting this new law.

Most sincerely,

D. Allen Chaney Jr.

Allen Chaney
Director of Legal Advocacy
ACLU of South Carolina
P.O. Box 20998
Charleston, SC 29413
(843) 282-7953
achaney@aclusc.org

[11] https://www.iacacoustics.com/blog-full/comparative-examples-of-noise-levels.html
[12] https://www.uofmhealth.org/health-library/tf4173
[13] *See*, *e.g.*, *Dowd v. City of Los Angeles*, 28 F. Supp. 3d 1019, 1068 (C.D. Cal. 2014) (granting **$601,902.50** in attorney's fees and **$2,835.76** in additional costs following First Amendment challenge that only resulted in nominal damages of $10).