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

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| Moshoures,<br>*Plaintiff*,<br><br>v.<br><br>North Myrtle Beach, et al.,<br>*Defendants*. | Civil Action No.:<br><br>**Plaintiff's Motion for Preliminary Injunction** |

## PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Michael Moshoures hereby respectfully move for a preliminary injunction. Plaintiff is likely to succeed on the merits of his First and Fourteenth Amendment claims; Plaintiff and other North Myrtle Beach residents and visitors will continue to suffer irreparable harm unless the Court grants preliminary injunctive relief; and the balance of hardships and public interest favor preliminary injunctive relief.

This motion is supported by a memorandum which will be filed contemporaneously.

Dated: July 6, 2022

Respectfully Submitted,

**AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA**

/s/ *Meredith McPhail*

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| Moshoures,<br>*Plaintiff*,<br><br>v.<br><br>North Myrtle Beach, et al.,<br>*Defendants*. | Civil Action No.:<br><br>**Memorandum of Law In Support of Plaintiff's Motion for Preliminary Injunction** |

## INTRODUCTION

"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." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Yet that is exactly what the City of North Myrtle Beach has done by enacting Ordinance 21-33, which criminalizes "obscene, profane or vulgar words and lyrics." Ordinance 21-33 violates the United States Constitution for three independent reasons—it is overbroad in violation of the First Amendment; it fails as a content-based restriction on speech in violation of the First Amendment, and it is vague in violation of the Fourteenth Amendment's guarantee of due process.

Plaintiff now seeks a preliminary injunction halting enforcement of Ordinance 21-33. Preliminary relief is especially warranted in this case because the noise ordinance so egregiously contravenes the First and Fourteenth Amendments, causing per se irreparable harm and detriments the public interest.

## RELEVANT FACTS

Ordinance 21-33

On October 4, 2021, the City of North Myrtle Beach passed Ordinance 21-33 to protect the "City's governmental interest in protecting children and non-consenting adults from being subjected to obscene, vulgar and/or profane lyrics." The ordinance declares "the public policy of the city":

> [1] 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 enjoyment of the natural attractions of the city. . . . [2] that every person is entitled to ambient sound levels that are not detrimental to life, health and enjoyment of his or her property. . . . [3] that the making, creation or maintenance of excessive or unreasonable sound within the city affects and is a menace to public health, comfort, convenience, safety, welfare and the prosperity of the people of the city. . . . [and 4] 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.

Under Ordinance 21-33, it is a misdemeanor to play "obscene, vulgar and/or profane" lyrics above a certain volume. The ordinance offers the following definitions:

> **Obscene** – 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
>
> **Profane** – to treat with irreverence or contempt, crude, filthy, dirty, smutty, or indecent
>
> **Vulgar** – making explicit and offensive reference to sex, male genitalia, female genitalia or bodily functions

During the day (from 7:01 a.m. to 10:59 p.m.), such music may not exceed 30 decibels (dB(A)) "as measured from the boundary with the adjacent neighboring" property. Thirty

decibels is the volume of a soft whisper and quieter than a refrigerator humming.[1] From 11 p.m. to 7 a.m., such music may not exceed 50 dB(A), which is quieter than an air conditioner.[2]

Notably, however, Ordinance 21-33 sets different volume thresholds for sounds other than "obscene, vulgar and/or profane words and lyrics." Such sounds may reach 60 dB(A) at night (between 11 p.m. and 7 a.m.) and may be as loud as 80 dB(A) during the day. Eighty dB(A) is roughly equivalent to the volume of a gas-powered lawnmower,[3] and because decibels are a logarithmic unit for measuring sound, 80 dB(A) is *thirty-two times* louder than the 30 dB(A) limit for "obscene, vulgar and/or profane" noise.[4] Moreover, certain noise is exempt entirely from the decibel restrictions, including "[a]ny other noise resulting from activities of a temporary duration permitted by law and for which a license or permit has been granted by the city, or activities sponsored or cosponsored by the city."

Violation of Ordinance 21-33 is a misdemeanor offense punishable by a fine of up to $500 and up to 30 days in jail.

Before filing this action, the American Civil Liberties Union Foundation of South Carolina notified Defendant Hatley by letter that North Myrtle Beach's newly amended noise ordinance violates the First and Fourteenth Amendments. Defendant Hatley did not answer the letter directly but, when pressed by reporters, replied that "everyone is entitled to their opinion."[5]

Plaintiff's Injuries

Plaintiff Michael Moshoures owns Sky Bar, a nightlife establishment located at 214 Main Street in North Myrtle Beach. To attract and retain patrons, Sky Bar frequently features rap, hip hop, and top-40 music, which often includes profane and sexually explicit lyrics. Plaintiff was

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[1] *What Noises Cause Hearing Loss?*, CENTERS FOR DISEASE CONTROL & PREVENTION (Oct. 7, 2019), https://www.cdc.gov/nceh/hearing_loss/what_noises_ cause_hearing_loss.html.

[2] *Id.*

[3] *Id.*

[4] Neil Bauman, *Converting Decibels Into Sound Intensities*, CENTER FOR HEARING LOSS HELP (Oct. 29, 2016), https://hearinglosshelp.com/blog/converting-decibels-to-sound-intensities/.

[5] Kevin Accettulla, *ACLU sends letter to North Myrtle Beach over new 'vulgar' music ordinance*, WBTW (Oct. 8, 2021), https://www.wbtw.com/news/grand-strand/aclu-sends-letter-to-north-myrtle-beach-over-new-vulgar-music-ordinance/.

ticketed multiple times under the previous version of the ordinance and has received several warnings under the new, more aggressive ordinance. He reasonably expects that the new ordinance will be enforced against him. Plaintiff seeks a preliminary injunction against the City's enforcement of its unconstitutional mandate.

## LEGAL STANDARD

To obtain a temporary restraining order or a preliminary injunction, Plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

## ARGUMENT

Plaintiff Moshoures is likely to prevail on the merits of his claims and will suffer irreparable harm without preliminary relief. Because the balance of equities also tips in Plaintiff's favor and because an injunction is also in the public interest, this Court should grant Plaintiff's request for a preliminary injunction.

### I. Plaintiff is likely to prevail on the merits of each of his three claims.

There is no doubt that Ordinance 21-33 violates the law. First, the ordinance is unconstitutionally overbroad because it criminalizes substantial amount of protected speech by punishing the playing of offensive music louder than a whisper. Second, the ordinance is an unconstitutional content-based restriction on speech because it imposes relaxed volume limits on socially acceptable speech and harsh volume limits on socially disfavored speech. Third and finally, the ordinance is unconstitutionally vague because it does not provide adequate notice of what constitutes "obscene," "profane," or "vulgar" music.

#### A. Ordinance 21-33 is overbroad in violation of the First Amendment.

The First Amendment cannot tolerate "the possibility that protected speech of others may

be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). To guard against such an outcome, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted).

A law's application is unconstitutional if it impermissibly restricts speech protected by the First Amendment. As a preliminary matter, then, a court looks to First Amendment principles to determine what is, and what is not, protected. The First Amendment is a broad shield, but there are certain categories of speech to which that protection does not extend, including defamation, fraud, incitement, speech integral to criminal conduct, and—most relevant here—obscenity. *Stevens*, 559 U.S. at 468; *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011) ("[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."). Speech falls into the category of obscenity if (1) "the average person, applying contemporary community standards would find that the work, taken as a whole, appears to the prurient interest"; (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; *and* (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). With regard to the third factor, the inquiry is "whether a reasonable person would find such value in the material, taken as a whole," and "the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met." *Pope v. Illinois*, 481 U.S. 497, 501, 501 n.3 (1987).

There can be no real dispute that Ordinance 21-33 criminalizes a substantial amount of protected speech. The ordinance explicitly targets two protected modes of expression: music and amplified speech. *See 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."); *Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 493 (1985)

("[A]llowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."); *Stokes v. City of Madison*, 930 F.2d 1163, 1168-69 (7th Cir. 2011) ("The First Amendment protects . . . musical speech, loud speech, financial speech[.]"); *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1265–66 (11th Cir. 2007) ("[T]he First Amendment protects music, as a form of speech and expression, from government censorship and control. . . . [T]he First Amendment protects the right to broadcast recorded music[.]"); *Torries v. Hebert*, 111 F. Supp. 2d 806, 809 (W.D. La. 2000) ("[T]he First Amendment protection is not weakened because the music takes on an unpopular or even dangerous viewpoint[.]").

It also explicitly targets certain messages[6]—specifically, any sound louder than a whisper (30db) that contains profane, vulgar, or obscene language—defined so broadly as to functionally criminalize any speech a passerby might find offensive. But the First Amendment plainly protects offensive speech, *Johnson*, 491 U.S. at 414 ("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."); indecent expression, *Sable Comm. of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("expression which is indecent but not obscene is protected by the First Amendment"); and crude behavior, *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 390 (4th Cir. 1993) ("Even crude street skits come within the First Amendment's reach.")—much of which is criminal under Ordinance 21-33 if uttered above a whisper in the daytime.

Worse still, the ordinance targets protected speech in a traditional public forum (literally, in this case, Main Street), where "speakers' rights are at their apex." *Steinburg v. Chesterfield Cnty., Planning Comm'n*, 527 F.3d 377, 384 (4th Cir. 2008); *see also Frisby v. Schultz*, 487 U.S.

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[6] The ordinance is also unconstitutional for this reason. *See infra,* Part II.B.

474, 480 (1988) (describing public streets, sidewalks, and parks as the "archetype of a traditional public forum").

Although Ordinance 21-33's definition of 'obscene' does mirror the legal definition of obscenity under *Miller v. California*, two significant problems remain. First, the ordinance refers to obscene "lyrics." But under *Miller*, speech can only be designated obscene after being evaluated *as a whole*. 413 U.S. at 24. In the context of a musical piece, that includes both the lyrics and the musical accompaniment. *See, e.g.*, *Torries*, 111 F. Supp. 2d at 821. By limiting the obscenity inquiry to lyrics, rather than the entire piece, the ordinance disregards the potential literary, artistic, political, or scientific value of the music itself. In fact, the Eleventh Circuit posited that "because music possesses inherent artistic value, no work of music alone may be declared obscene[.]" *Luke Recs., Inc. v. Navarro*, 960 F.2d 134, 135 (11th Cir. 1992) (reversing the district court's holding that 2 Live Crew's album "As Nasty As They Wanna Be" [7] is obscene). In that way, Ordinance 21-33 misses the mark and applies to significant amounts of protected speech.

Second, even if the ordinance's definition of 'obscene' does mirror exactly the constitutional test under the First Amendment, Ordinance 21-33 goes further, restricting two other entire categories of speech: lyrics that are "profane" or "vulgar," neither of which falls within unprotected speech. Most problematic is the ordinance's definition of 'profane' as "to treat with irreverence or contempt, crude, filthy, dirty, smutty, or indecent." That definition is massively broad and undoubtedly covers copious amounts of protected speech. Even just one of the words used to define 'profane' could contain an entire universe of protected speech.

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[7] This is one of—if not *the*—most sexually explicit albums of all time. *See* Billy Johnson, Jr., *7 Ways the World Went Crazy With 'As Nasty As They Wanna Be*,' ROLLING STONE (Feb. 7, 2014), https://www.rollingstone.com/music/music-news/7-ways-the-world-went-crazy-with-as-nasty-as-they-wanna-be-87013/ (arguing that "[p]rops for pioneering southern rap group 2 Live Crew are long overdue").

Ordinance 21-33 will silence an enormous amount of protected speech. This is not a possibility, but an inevitability. Because of that "inhibitory effect," *Broadrick*, 413 U.S. at 612, the ordinance is overbroad in violation of the First Amendment.

**B. Ordinance 21-33 is an unconstitutional content-based speech restriction.**

"[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik v. City of* Jacksonville, 422 U.S. 205, 209 (1975). In such cases, "the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004). Municipal noise ordinances generally do not violate the First Amendment if they are content-neutral and do not single out any specific type of speech, subject-matter, or message. *Harbourside Place, LLC v. Town of Jupiter, Fla.*, 958 F.3d 1308, 1316 (11th Cir. 2020). But when they "target [specific] speech based on its communicative content," they are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "It is rare that a regulation restricting speech because of its content will ever be permissible," *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). This is not one of those rare cases.

**1. Ordinance 21-33 is a content-based speech restriction.**

"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." *Reed*, 576 U.S. at 163. Ordinance 21-33 singles out "particular speech," *id.*, that City Council disfavors—profanity, vulgarity, and obscenity—and subjects it to far harsher limitations[8] than other speech deemed more "socially acceptable." Like the content-based statute at issue in *United States v. Playboy*

[8] "It is of no moment that [Ordinance 21-33] does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *Playboy Entm't Grp.*, 529 U.S. at 812.

*Entertainment Grp., Inc.*, the provision "focuses *only* on the content of the speech and the direct impact that speech has on its listeners. This is the essence of content-based regulation." 529 U.S. 803, 811–12 (2000) (citations and quotation marks omitted); *see also DA Mortg.*, 486 F.3d at 1266 (holding that the ordinance is content-neutral because "[i]t does not distinguish, for example, between excessively loud singing, thunderous classical music recordings, reverberating bass beats, or television broadcasts of raucous World Cup soccer finals. It simply prohibits excessively loud noise from recorded sources[.]"); *Torries*, 111 F. Supp. 2d at 818. As a result, Plaintiff will prevail on his First Amendment claim unless Defendants can show that Ordinance 21-33 is "narrowly tailored to serve compelling state interests." *Id*.

**2. Ordinance 21-33 is not justified by a compelling governmental interest.**

Ordinance 21-33 cites various governmental interests, but the only interest that could plausibly justify the content-based differential treatment is the City's interest in "protect[ing] 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." NORTH MYRTLE BEACH, S.C., Ch. 12, Art. V, § 12-70 (2021).

A compelling interest is one "of the highest order." *Fulton v. City of Phila., Penn.*, 141 S. Ct. 1868, 1881 (2021) (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 546 (1993)). "[T]he First Amendment demands a more precise analysis" than merely stating the purported compelling governmental interest "at a high level of generality." *Id.* Not every objective articulated by a government actor is necessarily a compelling interest. In fact, the following have been rejected as compelling interests: "an effort to alleviate the effects of societal discrimination," *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996); a state's "policy preference for skating as far as possible from religious establishment concerns," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017); and even "general and abstract aesthetic, business, and traffic safety interests." *Bee's Auto Inc. v. City of Clermont*, 8 F. Supp. 3d 1369, 1382 (M.D. Fla. 2014) (summarizing Eleventh Circuit precedent). This inquiry, then, is

necessarily a rigorous one.

In this case, the City's stated governmental interest does not rise to the level of "compelling" because it is not "of the highest order." While it is well-established that the government has a compelling interest in "protecting the physical and psychological well-being of minors . . . [that] extends to shielding minors from the influence of [material] that is not obscene by adult standards," *see, e.g.*, *Sable*, 492 U.S. at 126, the interest cited by North Myrtle Beach differs in two crucial ways.

First, the City's general interest in "protecting" children from "obscene, profane, or vulgar" words while "on the streets, in public places, in homes or in businesses" does not approach the level of specificity required by the First Amendment. *Fulton*, 141 S. Ct. at 1881. As discussed in Part I.A, *supra*, it appears that the city attempted to align its definition of 'obscene' with the constitutional standard, but the other descriptors—profane and vulgar—are extraordinarily overinclusive. The ordinance gives no reason why the protection of children from such a broad category of speech constitutes a compelling interest. *Cf. Brown*, 564 U.S. at 799-800 (holding that California was unable to show compelling government interest for regulating video games where "it acknowledges that it cannot show a direct causal link between violent video games and harm to minors.").

Second, the City aims to intervene while children are "accompan[ied by] their caretakers;" *i.e.*, when children are already supervised by a decisionmaker competent to make parental choices regarding whether to shield their child from the wide array of language prohibited by Ordinance 21-33. NORTH MYRTLE BEACH, S.C., Ch. 12, Art. V, § 12-70 (2021). Other cases, including several decided by the Supreme Court, emphasize the government's role as a *supplement* to parental authority, not as a means to *supplant* that authority. *See, e.g.*, *Brown*, 564 U.S. at 802–04 ("[W]e note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority."); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 865, 878 (1977). Ordinance 21-33 diverges from that principle.

Although North Myrtle Beach may have some authority to protect children from accessing obscene material, Ordinance 21-33 is not crafted with the specificity demanded by the First Amendment. For those reasons, it cannot constitute a sufficiently compelling interest to justify content-based speech restrictions.

**3. Even assuming that a compelling governmental interest exists, Ordinance 21-33 is not narrowly tailored to accomplish that goal.**

"[T]he 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*, 492 U.S. at 126 (internal quotation marks and citations omitted). Here, even assuming that the City's cited interest is a compelling one, Ordinance 21-33 is not narrowly tailored to achieve that interest.

A measure is "narrowly tailored" if 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). The measure "must 'fit' with greater precision than any alternative means," *id.*, and "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive," *Brown v.*, 564 U.S. at 805.

"Even where," as here, "the protection of children is the object, the constitutional limits on governmental action apply." *Id.* at 804–05. Notably, on several occasions, the Supreme Court has rejected attempts to protect children from exposure to sexual content as violative of the First Amendment. *Playboy Entertainment Grp.*, 529 U.S. at 827; *Reno*, 521 U.S. at 882; *Sable*, 492 U.S. at 126; *Erznoznik*, 422 U.S. at 212; *see also Ashcroft*, 542 U.S. at 659–61 (upholding grant of preliminary injunction). Even when faced with the need to protect society's children, "the Government may not reduce the adult population to only what is fit for children." *Reno*, 521 U.S. at 875 (quoting *Denver*, 518 U.S. at 759) (internal quotation marks and alterations omitted).

Similarly, even when the government's interest is in protecting children, the degree of intrusiveness of the allegedly harmful speech is an important piece of a court's analysis. *Reno*, 521 U.S. at 869. Typically, the government has greater latitude to curtail speech to protect

children when the allegedly harmful speech "intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik*, 422 U.S. at 209 (citations omitted); *see also Reno*, 521 U.S. at 869*; Hassay v. Mayor*, 955 F. Supp. 2d 505, 521–22 (D. Md. 2013) ("With respect to a public forum 'bustling' with the sounds of activity and expression, an ordinance that prohibits no louder than most normal human activity is not narrowly tailored to restricting 'excessive noise.'") (granting the requested preliminary injunction). This is not such a case. The allegedly harmful lyrics are not channeled into the home via the internet, telephone, or television; rather, they are, in Plaintiff's case, played in a nightlife establishment setting. Such exposure cannot be said to "intrude[] on the privacy of the home" or capture a captive audience.

*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), is particularly instructive on this point. In *Erznoznik*, the City of Jacksonville passed an ordinance prohibiting "showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place." 422 U.S. at 206. The city first defended the ordinance as an attempt to "protect its citizens against unwilling exposure to materials that may be offensive." *Id.* at 208. In response, the Court explained,

> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes.

*Id.* at 210–11 (internal quotation marks, alterations, and citations omitted).

The city also attempted to justify the ordinance "as an exercise of the city's undoubted police power to protect children," *id.* at 212, but even still, the Supreme Court noted that "only in

relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]," *id.* at 213. Ultimately, the Court explained that the ordinance was not sufficiently tailored to the city's interest and that "[s]peech 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. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Id.* at 214.

Ordinance 21-33 is analogous to the ordinance invalidated by the Supreme Court in *Erznoznik*. It, too, involves allegedly harmful messages played by a private establishment but audible or visible to passersby. It, too, is allegedly justified by the need to protect children, and it, too, casts a wide net that restricts significant amounts of protected speech. The Supreme Court's reasoning that determined the outcome in *Erznoznik* is similarly applicable here: the government may not outlaw protected speech simply because it has determined for itself that the content is unsuitable for children.

*Torries v. Hebert*, 111 F. Supp. 2d 806 (W.D. La. 2000), is yet another analogous case. In *Torries*, the owner and an employee of a skating rink were arrested for playing "gangster rap" music during dance parties for minors, and their CDs were confiscated. *Id.* at 810–13. After determining that the plaintiffs' arrest was a content-based restriction on their speech, the court, in evaluating plaintiffs' request for a preliminary injunction, applied strict scrutiny to determine the likelihood that plaintiffs would succeed on the merits of their claim. *Id.* at 818. Regarding the government's claim that it was protecting children, the district court looked to the Supreme Court's guidance from *Reno v. Am. Civil Liberties Union*: "the Government may not reduce the adult population to what is fit for children." *Id*. at 821 (quoting *Reno*, 521 at 875). The district court emphasized that "[p]arental control of their children's attendance at the Skate Zone is an adequate protection from unexpected program content, a level of control which is patently different compared to a broadcast communication." *Id.* at 822. Ultimately, the court held that "[e]ven if the Court found the music at issue to be obscene as to minors, the Court could not

condone the defendants' continued censorship of the [skating rink] at the expense of an adult audience who wishes to listen to the contested music." *Id.*

Here, like in *Torries*, a commercial establishment seeks to play popular music for its customers. And, like in *Torries*, the government is restricting a specific type of music deemed inappropriate in an attempt to protect children, even though the allegedly harmful speech is protected and legitimately enjoyed by adults. The district court's reasoning is equally applicable here: especially when parental control exists, a government may not ban certain music to "protect children" just because there was a determination that the music was inappropriate. Rather, where protected speech is concerned, parents may make judgments for their children, and adults may enjoy at their leisure.

Ordinance 21-33 is not narrowly tailored to the government's alleged compelling interest. As a preliminary matter, Plaintiff need not show a less restrictive alternative to prevail in this case. *Playboy Entertainment Grp.*, 529 U.S. at 813, 815 ("Where 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. We are expected to protect our own sensibilities simply by averting our eyes.") (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)) (quotation marks and alteration omitted).[9]

Nevertheless, one exists. The alternative is to defer to parental decision-making when, as envisioned by the ordinance, a parent is accompanying a child and hears music. At that moment, the parent can take the child out of earshot (averting the ears, so to speak), or the parent can make a determination that the content is not objectionable. *See Ashcroft*, 542 U.S. at 669 ("The need for parental cooperation," or the fact that the alternative is not mandatory, "does not automatically disqualify a proposed less restrictive alternative."). "It is no response that [the proposed less restrictive alternative] requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive

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[9] Notably, the court in *Torries* did not even address the availability of a less restrictive alternative prior to ruling against the government. 111 F. Supp. 2d at 818.

alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy Entertainment Grp.*, 529 U.S. at 824.

In sum: "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). Applying this principle, the Fourth Circuit has explained, in an analogous context, that "protected speech may not be criminalized (a surefire form of suppression) merely because such speech might be accessible to . . . inadequately-supervised minors." *PSINet, Inc. v. Chapman*, 362 F.3d 227, 241 (4th Cir. 2004) (Davis, D.J., concurring). Those principles hold true here. Because Ordinance 21-33 is not narrowly tailored to the government's alleged compelling interest, it violates the First Amendment.

### C. Ordinance 21-33 is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.

"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). Ordinance 21-33 fails on both accounts.

#### 1. Ordinance 21-33 fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.

Notably, vagueness is particularly dangerous in "the sensitive First Amendment area." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165–66 (1972). A law is unconstitutionally vague if "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill*, 530 U.S. at 732. For example, if a law has "prohibitions [that] are not clearly defined" *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), or an "unascertainable standard," *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), it does not "give adequate warning of what activities it proscribes," *Broadrick*, 413 U.S. at 607. Similarly, a law with "no standard of conduct [] specified at all" would be impermissibly vague.

*Coates*, 402 U.S. at 614 (analyzing a prohibition on "annoying" behavior, reasoning, "[c]onduct that annoys some people does not annoy others").

The dangers of Ordinance 21-33's vague prohibitions are not "hypertechnical theories" or "conjure[d] up hypothetical cases." *Hill*, 530 U.S. at 733. Rather, "people of ordinary intelligence" will struggle to discern what exactly is prohibited as 'irreveren[t],' 'smutty,' 'offensive,' and 'indecent.' Functionally, citizens of and visitors to North Myrtle Beach must speculate about the meaning of Ordinance 21-33 and cross their fingers in the hopes that they do not run afoul of it.

**2. Ordinance 21-33 enables arbitrary and discriminatory enforcement.**

An ordinance is unconstitutionally vague when it enables arbitrary and discriminatory enforcement by providing insufficient guidance for law enforcement in the form of "unfettered" discretion, imprecise terms, "inherently subjective" standards, or a complete absence of "explicit standards." *Papachristou*, 405 U.S. at 168, 170; *City of Chicago v. Morales*, 527 U.S. 41, 60, 62 (1999); *Broadrick*, 413 U.S. at 607 (quoting *Grayned*, 408 U.S. at 108). Ordinance 21-33 contains a "list of [prohibited language that] is so all-inclusive and generalized," allowing "those convicted [to] be punished for no more than vindicating affronts to police authority." *Papachristou*, 405 U.S. at 163, 166–67. As a result, it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis" and "permit[s] punishment for the expression of an unpopular point of view," *Grayned*, 408 U.S. at 108–09, 113—exactly the evil guarded against by the First Amendment. Just as a private citizen will struggle to interpret the strictures of Ordinance 21-33, so will a law enforcement officer. Even a good faith effort will fall short simply because enforcement of the ordinance demands subjective judgment.

Ultimately, Ordinance 21-33 is unconstitutionally vague for two reasons: it fails to adequately warn the public about the nature of prohibited conduct, and it fails to provide sufficient guidance to law enforcement, enabling arbitrary and discriminatory enforcement.

## II. Plaintiff will suffer irreparable injury in the absence of an injunction.

"The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). That is undoubtedly true in the Fourth Circuit, where First Amendment violations are treated as "*per se* irreparable injur[ies]." *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978); *see also In re Murphy-Brown, LLC*, 907 F.3d 788, 796 (4th Cir. 2018). Therefore, Plaintiff's likelihood of success on his first and second claims for relief is sufficient to demonstrate irreparable harm under *Winter*.

## III. The balance of equities tips heavily in favor of a preliminary injunction, and an injunction serves the public interest.

The third and fourth *Winter* factors—balance of equities and public interest—are jointly "established when there is a likely First Amendment violation." *Centro Tepeyac v. Montgomery Cty*, 722 F.3d 184, 191 (4th Cir. 2013) (affirming the district court's ruling to that effect). Under Fourth Circuit precedent, "a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction. . . . It also teaches that upholding constitutional rights surely serves the public interest." *Id.* (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)) (internal quotation marks and citations omitted); *see also Newsom ex rel. Newsom v. Albemarle Cty Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). As outlined above, Plaintiff is likely to succeed on each of his claims raising First and Fourteenth Amendment violations. Therefore, the balance of the equities and the public interest weigh in favor of a preliminary injunction.

## RELIEF REQUESTED

1. Preliminarily enjoin the enforcement of Section 12-75(h) of the North Myrtle Beach Municipal Code;

Dated: July 6, 2022

Respectfully Submitted,

**AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA**

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*Attorneys for the Plaintiff*

# DECLARATION OF MICHAEL MOSHOURES

I, Michael Moshoures, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows under penalty of perjury:

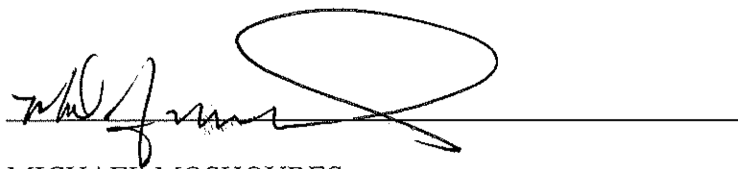
1. I own Sky Bar, a nightlife establishment located at 214 Main Street in the City of North Myrtle Beach, South Carolina. Sky Bar plays rap, hip hop, and top-40 music, which often include profane and sexually explicit lyrics. Patrons expect to hear music from those genres.

2. Sky Bar was ticketed multiple times under North Myrtle Beach's prior noise ordinance. Sky Bar has received multiple warnings under the new ordinance, Ordinance 21–33. On multiple occasions, law enforcement has entered Sky Bar like a SWAT team, turned on the lights, and forced the DJs to stop the music. When that happens, customers leave, and I lose revenue.

3. Because I fear receiving additional disruptive warrants and tickets under Ordinance 21-33, I feel that my DJs must play the "clean" versions of popular songs. My clients do not like the "clean" versions of popular songs. It is also difficult for DJs to get those "clean" versions.

4. Because the DJs experience difficulty getting the "clean" versions of songs and because they fear being ticketed, I have had more difficulty hiring and retaining qualified DJs. One of my DJs, who used to work six nights per week, will now only work two nights per week.

5. Because of Ordinance 21-33, I feel that I cannot play the music that I want to play for my patrons.



MICHAEL MOSHOURES

Date: 7-1-22