

**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;

TOMMY DENNIS, in his official capacity as
Chief of the North Myrtle Beach
Department of Public Safety;

Defendants.

Case No. _____

**Complaint for Declaratory and
Injunctive Relief**

PRELIMINARY STATEMENT

1. The City of North Myrtle Beach has made it a crime to play “crude,” “smutty,” or “indecent” music at a volume barely perceptible to the human ear. In so doing, the City has trampled on the firmly rooted freedoms of speech and expression preserved by our federal constitution.

2. Because this ordinance is a presumptively unconstitutional content-based abridgment of free speech, criminalizes vast swaths of protected speech, and is so vague that it promotes discriminatory enforcement, it must be struck down.

PARTIES

Plaintiffs

3. MICHAEL MOSHOURES is an individual and is the owner of Sky Bar, a night life venue located at 214 Main Street in the City of North Myrtle Beach.

Defendants

4. The City of NORTH MYRTLE BEACH is a municipality in Horry County, South Carolina. It is governed by City Council, which consists of the Mayor and six Council members.

5. MARILYN HATLEY is the Mayor of North Myrtle Beach and the head of the North Myrtle Beach City Council. Defendant Hatley—in concert with North Myrtle Beach City Council—proposes, votes upon, and passes laws in the city of North Myrtle Beach.

6. TOMMY DENNIS is the Chief of the North Myrtle Beach Public Safety Department. In that capacity, Defendant Dennis is responsible for enforcement of the North Myrtle Beach municipal code, including the ordinance challenged herein.

JURISDICTION AND VENUE

7. This civil rights action is authorized and instituted under 42 U.S.C. § 1983, which permits citizens to seek relief from unconstitutional state action.

8. This Court has jurisdiction over Plaintiff's federal constitutional claims under 28 U.S.C. § 1331.

9. Defendant's acts or omissions giving rise to the claims alleged herein occurred in the District of South Carolina. Venue is therefore proper under 28 U.S.C. § 1391(b).

10. Venue is proper in the Florence division under Local Rule 3.01 because the plaintiff and defendants reside in this division and a substantial portion of the events or omissions giving rise to the claim occurred in this division.

FACTS

The Noise Ordinance

11. On October 4, 2021, the City of North Myrtle Beach passed Ordinance 21-33, which amended the City's Noise Ordinance to prohibit new conduct, including the playing of profane, vulgar, or obscene music at a volume louder than 30 decibels.

12. The new ordinance was enacted in response to complaints by citizens that certain

commercial establishments (bars) were playing loud and profanity-laced music in a way that was clearly audible from the street and sidewalk.

13. Under the newly amended noise ordinance, amplified sounds that contain “obscene, profane or vulgar language” are subject to far stricter noise limits than other sounds.

14. Specifically, “obscene, profane or vulgar” sounds can be played no louder than thirty (30) decibels between the hours of 7 a.m. and 11 p.m.. EX A.

15. Thirty decibels is roughly equivalent to a “quiet rural area,” “leaves rustling,” or a whisper.

16. Under the same ordinance, non-profane sounds can be broadcast during the same time of day at up to eighty (80) decibels, which corresponds to the sound of heavy traffic or a lawn mower.

17. Because decibels are a logarithmic unit for measuring sound, 80 decibels is actually *thirty-two times* louder than 30 decibels.¹

18. Under Ordinance 21-33, the following definitions are provided for “obscene, profane or vulgar” sounds:

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.

PROFANE means to treat with irreverence or contempt, crude, filthy, dirty, smutty, or indecent.

VULGAR means making explicit and offensive reference to sex, male genitalia, female genitalia or bodily functions.

¹ <https://hearinglosshelp.com/blog/converting-decibels-to-sound-intensities/>

19. Violation of Ordinance 21-33 is a misdemeanor offense, punishable by up to a five-hundred-dollar (\$500) fine and up to thirty (30) days in jail.

Overbreadth

34. The new Noise Ordinance was designed to cover musical expression. According to City Council documents, the Ordinance was passed in response to citizen complaints about “obscene and vulgar lyrics that were being broadcast from a business located on Main Steet.” EX B.

35. By prohibiting offensive music, even played at a very low volume, North Myrtle Beach necessarily criminalized substantial amounts of protected speech. The Supreme Court has explained that “music is one of the oldest forms of human expression” and has held that “the Constitution prohibits *any* . . . attempts” to “censor musical compositions to serve the needs of the state.” *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (emphasis added).

36. Although “obscene” speech has been upheld as a category unprotected by the First Amendment, music cannot meet the legal definition for obscenity. *See 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[.]”).

Vagueness

37. Many of the words and phrases contained in Ordinance 21-33 are inescapably vague and lack sufficient definiteness to provide fair notice of proscribed conduct.

38. “Profane,” for example, is defined by reference to a set of other words—“crude, filthy, dirty, smutty, or indecent”—that do little to clarify the type of conduct or expression prohibited by the Ordinance.

39. These vagueness concerns are particularly problematic because they place the task of determining whether conduct is criminal—versus merely unpopular—entirely within the discretion of law enforcement.

40. The concern of discriminatory enforcement is heightened here because data show that law enforcement in North Myrtle Beach is already prone to discriminatory policing.

41. Public contact reports collected by the South Carolina Department of Public Safety show that Black individuals comprise over 22% of the uncited law enforcement stops executed by the North Myrtle Beach Department of Public Safety, despite African Americans representing only 1.5% of the city's population.²

42. Similar disparities exist in data reported by the Horry County Sheriff's Office, where Black individuals represent 46.53% of the uncited traffic stops and only 12.9% of the population.³

Plaintiff's Injuries

43. Plaintiff Michael Moshoures owns Sky Bar, a night club in North Myrtle Beach that plays rap, hip hop, and top-40 music.

44. Patrons of the Sky Bar show up each night expecting to hear music from these genres, which often include profane and sexually explicit lyrics.

45. Citizen complaints about the type of music emanating from Sky Bar provoked City Council to amend the Noise Ordinance to create stricter rules for profanity, vulgarity, and obscenity.

46. Sky Bar was ticketed multiple times under North Myrtle Beach's prior noise ordinance.

47. Under the new ordinance, Plaintiff has received several warnings from law enforcement. On more than one of those occasions, the police entered Sky Bar "like a SWAT team," force the DJ to stop the music, and turn the lights on. Each time this occurs, Sky Bar loses customers and revenue.

² Data is collected by law under S.C. Code § 55-5-6560 and published at <https://apps.scdps.sc.gov/publiccontactreports/PublicContact-012.aspx>; *also see* <https://www.census.gov/quickfacts/fact/table/northmyrtlebeachcitysouthcarolina,horrycountysouthcarolina/PST045219>

³ *Id.*; <https://www.census.gov/quickfacts/horrycountysouthcarolina>

48. Sky Bar has also lost customers and revenue because the bar's clientele does not like the "clean" versions of popular songs, which Plaintiff feels he must play to avoid liability under the ordinance.

49. It is also difficult for DJs to acquire the "clean" versions of songs. That difficulty, along with the frequent warnings, has put a strain on the DJs who work at Sky Bar. In at least one case, a DJ has decreased the frequency he is willing to work at Sky Bar as a result.

50. At present, Mr. Moshoures's First Amendment right to play music for his patrons is under attack. He must either acquiesce to an unconstitutional city ordinance or risk criminal prosecution under the North Myrtle Beach City Code.

CLAIMS FOR RELIEF

First Cause of Action

42 U.S.C. § 1983

Overbroad in Violation of the First Amendment

51. Plaintiff repeats and realleges the allegations in previous paragraphs of this Complaint as if fully alleged herein.

52. A statute is facially 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 marks omitted).

53. Here, Ordinance 21-33 criminalizes any sound louder than a whisper (30db) that contains profane, vulgar, or obscene language.

54. In doing so, the Ordinance broadly and vaguely defines the terms 'profane,' 'vulgar,' and 'obscene' and thereby criminalizes any speech that a passerby might find offensive. But the First Amendment plainly protects offensive speech, *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."), and indecent expression, *Sable Commc'ns of California, 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.”).

55. Finally, the plain intent of Ordinance 21-33 is to prohibit individuals and businesses from playing unappealing music at a volume that is (barely) audible from Main Street North Myrtle Beach.

56. This is doubly problematic. First, music is a form of protected expression that cannot meet any of the exceptions to free speech recognized by the Supreme Court. *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.”). And second, the streets and sidewalks of Main Street are a traditional public forum where First Amendment rights are “at their apex.” *Steinburg v. Chesterfield Cnty., Planning Comm’n*, 527 F.3d 377, 384 (4th Cir. 2008).

57. In short, it is difficult to imagine a *lawful* application of Ordinance 21-33. That being true, the law criminalizes a substantial amount of protected speech and expression and must therefore be struck down as overbroad.

58. On his first cause of action, Plaintiff seeks declaratory and injunctive relief under 42 U.S.C. § 1983.

59. Plaintiff also seeks all reasonable costs, expenses, and attorneys’ fees available under 42 U.S.C. § 1988.

Second Cause of Action

42 U.S.C. § 1983

Content-Based Speech Restriction Under the First Amendment

34. Plaintiff repeats and realleges the allegations in previous paragraphs of this Complaint as if fully alleged herein.

35. Defendants are state actors responsible for the enforcement of the challenged Ordinance, which violates Plaintiffs’ rights secured by the First Amendment.

36. Ordinance 21-33 is a presumptively unconstitutional content-based law because it applies different noise restrictions based on the content of the speech involved.

37. Specifically, the ordinance permits playing “decent” music at up to 80 decibels but restricts “indecent” music to a volume of only 30 decibels.

38. To justify treating certain speech differently on the basis of its content, the City must show that the restriction is narrowly tailored to a compelling governmental interest.

39. Ordinance 21-33 fails both prongs. First, North Myrtle Beach cannot articulate a compelling interest in reducing socially disfavored speech on Main Street. And second, even if there were a compelling interest at stake, the Ordinance’s unreasonable decibel limits transgress the “narrowly tailored” requirement under the First Amendment.

40. On his second cause of action, Plaintiff seeks declaratory and injunctive relief under 42 U.S.C. § 1983.

41. Plaintiff also seeks all reasonable costs, expenses, and attorneys’ fees available under 42 U.S.C. § 1988.

Third Cause of Action
42 U.S.C. § 1983
Void for Vagueness Under the Fourteenth Amendment

42. Plaintiff repeats and realleges the allegations in previous paragraphs of this Complaint as if fully alleged herein.

43. It is a basic principle of due process that laws must give a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

44. Where speech and expression are implicated, “[t]he general test of vagueness applies with particular force.” *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

45. Here, Ordinance 21-33 is squarely directed at speech and expression, and its definitions of ‘obscene,’ ‘profane,’ and ‘vulgar,’ do not provide sufficient notice of what type of

speech falls under the law's harsh noise limits.

46. Because these terms are poorly and vaguely defined, the Ordinance improperly equips law enforcement with wide discretion to determine what speech is criminal.

47. On his third cause of action, Plaintiff seeks declaratory and injunctive relief under 42 U.S.C. § 1983.

48. Plaintiff also seeks all reasonable costs, expenses, and attorneys' fees available under 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, the PLAINTIFFS respectfully request this Court to:

1. Declare that Ordinance 21-33 is overbroad in violation of the First Amendment because it criminalizes a substantial amount of protected speech and expression;
2. Declare that Ordinance 21-33 is an unreasonable content-based restriction on speech and expression and thus violates the First Amendment;
3. Declare that Ordinance 21-33 is unconstitutionally vague in violation of the Fourteenth Amendment;
4. Enjoin any and all enforcement of Ordinance 21-33 by Defendants and their agents;
5. Award Plaintiffs' attorneys' fees, costs and expenses incurred in this matter under 42 U.S.C. § 1988; and
6. Provide any other such further relief as the Court deems just and equitable.

Date: July 5, 2022

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