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.: 4:22-cv-02123-JD **ORDER AND OPINION**

This matter is before the Court on Michael Moshoures' ("Plaintiff" or "Moshoures") Motion for a Preliminary Injunction. Moshoures, the owner of the Sky Bar, a nightlife establishment in North Myrtle Beach, seeks to enjoin Defendants City of North Myrtle Beach, Marilyn Hatley, in her official capacity as Mayor of the City of North Myrtle Beach, and Tommy Dennis, in his official capacity as Chief of the North Myrtle Beach Department of Public Safety (collectively "Defendants" or "North Myrtle Beach") from enforcing Section 12-75(h) of the North Myrtle Beach Municipal Code.[1] (DE 5-1, pp. 1, 17.) Moshoures contends that Section 12-75(h) violates the First and Fourteenth Amendments of the United States Constitution. (Id. at p. 1.) The parties have fully briefed the motion; therefore, it is ripe for review and decision. After reviewing the motion and memoranda submitted, the Court grants, in part, and denies, in part, Plaintiff's Motion for a Preliminary Injunction for the reasons stated herein.

[1] Section 12-75(h) of North Myrtle Beach Municipal Code codified at Ordinance Number 21-33 prohibits "[t]he 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. . . . ."

BACKGROUND

Plaintiff Moshoures owns the Sky Bar located at 214 Main Street, North Myrtle Beach, South Carolina. (DE 5-1, p. 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." (Id.) At a North Myrtle Beach City Council meeting on July 19, 2021, numerous citizens voiced concerns regarding "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 numerous 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 North Myrtle Beach Code of Ordinances, Ch. 12, Art V § 12-70, *et. seq.* ("Ordinance 21-33"). 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 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 form 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.
>
> *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.

(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 Code of Ordinances of the City of North Myrtle Beach. (DE 13-12, p. 6.)

Moshoures contends Section 12-75(h) of 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." (DE 5-1, p. 1.) Moshoures also contends he was "ticketed multiple times under the previous version of the ordinance and has received several warnings under the new, more aggressive ordinance." (Id. at p. 3-4.) Moshoures claims a preliminary injunction is warranted to enjoin the enforcement of Ordinance 21-33, § 12-75(h), because "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." (DE 5, p. 1.)

LEGAL STANDARD

Under Rule 65(a), Fed. R. Civ. P., a court may issue a preliminary injunction. A preliminary injunction is "an extraordinary remedy . . . which is to be applied only in [the] limited circumstances which clearly demand it." Direx Israel, Ltd. v. Breakthrough Med Corp., 952 F.2d 802, 811 (4th Cir. 1991) (internal quotation marks omitted) (citation omitted). The primary purpose behind the issuance of a preliminary injunction is to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003). A party seeking a preliminary injunction must establish all four of the following elements: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L.Ed.2d 249 (2008). If a preliminary injunction motion is granted, the order granting it must "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail-and not by referring to the complaint or any other document-the act or acts restrained or required." Fed. R. Civ. P. 65(d).

DISCUSSION

As a preliminary matter, Moshoures contends and North Myrtle Beach concedes that the second *Winter* factor – irreparable injury – is met because the loss of a First Amendment freedom constitutes irreparable harm. (DE 5-1, p. 17, DE 13, p. 21, citing Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.). Accordingly, this Court's inquiry will focus on Moshoures' likelihood of success on the merits of his claims because,

if this factor is met, the third and fourth factors are deemed established. See Centro Tepeyac v. Montgomery Cty, 722 F.3d 184, 191 (4th Cir. 2013) (deeming "the [balance of equities] and [public interest] Winter factors . . . established when there is a likely First Amendment violation."); see also Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotation marks and citation omitted) ("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.").

With these parameters in mind, Moshoures contends he is likely to succeed on the merits of his constitutional challenges because Ordinance 21-33, § 12-75(h), violates the First and Fourteenth Amendments in three ways. Moshoures argues:

> *First*, the ordinance is unconstitutionally overbroad because it criminalizes [a] 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.

(DE 5-1, p. 4 (emphasis added).) It is important to note that Ordinance 21-33, § 12-75(h), regulates speech both protected and unprotected by the First Amendment. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." United States v. Stevens, 559 U.S. 460, 468, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010) (quoting Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002)). However, the Supreme Court has "categorically settled . . . that obscene material is unprotected by the First Amendment." Miller v. California, 413 U.S. 15, 23, 93 S. Ct. 2607, 2614, 37 L.Ed.2d 419 (1973) (citing Kois v. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972); United States v. Reidel, 402 U.S. 351, 354, 91 S.Ct. 1410, 1411-12; Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309.) 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, Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, quoting Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (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, 93 S. Ct. 2615. Ordinance 21-33, § 12-71's definition of "obscene" 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)). Accordingly, speech that falls within Ordinance 21-33, § 12-71's definition of obscene is not protected speech under the First Amendment, and Moshoures is not likely to succeed in striking down such restrictions.

However, Ordinance 21-33, § 12-75(h)'s reach goes beyond obscene speech because it also seeks to regulate "profane" and "vulgar" speech. To that end, Moshoures asserts that "the ordinance is unconstitutionally overbroad because it criminalizes [a] substantial amount of protected speech by punishing the playing of offensive music louder than a whisper." (DE 5-1, p. 4.) Ordinance 21-33, § 12-71, defines profane as "to treat with irreverence or contempt, crude, filthy, dirty, smutty, or indecent." (DE 13-12, p. 3.) In addition, the ordinance defines vulgar as "making explicit and offensive reference to sex, male genitalia, female genitalia or bodily functions."[2] (Id.) "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs." United States v. Williams, 553 U.S. 285, 292, 128 S.

[2] 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).

Ct. 1830, 1838, 170 L. Ed. 2d 650 (2008). "Invalidation for overbreadth is . . . 'strong medicine' . . . that is not to be 'casually employed.'" Id. at 293, 128 S.Ct. 1838. While the ordinance's definition of profane is broad, its definition of vulgar (i.e., "explicit and offensive reference to sex, male genitalia, female genitalia") is not; instead, it is facially consistent with and can be harmonized with the definition of obscene.

> *Obscene* means description of sexual conduct that is objectionable or offensive . . . taken as a whole, appeals to prurient interests or material which depicts or describes, . . . sexual conduct or genitalia specifically defined by S.C. Code Ann. § 16-15-305, which, . . . lacks serious literary, artistic, political, or scientific value.

(DE 13-12, p. 3.) "In the First Amendment context, . . . 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, 130 S. Ct. 1577, 1587 (2010) (emphasis added). Although this Court finds that Ordinance 21-33's regulation of *profane* speech is overbroad, that fact alone is insufficient to enjoin Ordinance 21-33, § 12-75(h), in its entirety given the definitions of obscene and vulgar are facially consistent with Miller and South Carolina law. See Miller, 413 U.S. at 23, 93 S. Ct. 2614.

Further, 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, 116 S. Ct. 2068, 2069, 135 L. Ed. 2d 443 (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) is complete in itself without the application of "profane" words or lyrics, the term "profane" can be severed from Section 12-75(h). Therefore, this Court finds Moshoures is not likely to succeed in his challenge to Ordinance 21-33, § 12-75(h), in its entirety, but rather he is only likely to succeed as to his challenge regarding "profane" words or lyrics.

Next, notwithstanding the Court's ruling on Moshoures' First Amendment rights to obscene and vulgar speech, he contends "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." (DE 5-1, p. 5.) "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, 163 135 S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015) (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (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). "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." Id. at 163, 135 S. Ct. 2226 (citing R.A.V. v. St. Paul, 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

While Ordinance 21-33 cites various governmental interests, 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." (DE 13-12, p. 2.) A compelling interest is one "of the highest order." Fulton v. City of Phila., Penn., 141 S. Ct. 1868, 1881, 210 L.Ed.2d 137 (2021) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546, 113 S.Ct. 2217 (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.

Here, North Myrtle Beach argues that the ordinance restrictions are necessary to protect legitimate government interests outside of the Sky Bar because the obscene, vulgar, and profane lyrics are broadcast from the Sky Bar out to the general public. Assuming *arguendo* that shielding the public and children from profane speech is a compelling government interest, North Myrtle Beach does not articulate how its ordinance is narrowly drawn to serve its compelling interest. However, Moshoures has proffered less restrictive alternatives to which North Myrtle Beach has offered no rebuttal. Nevertheless, a measure is "narrowly tailored" (or "narrowly drawn") 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, 106 S. Ct. 1842, 1850, 90 L. Ed. 260. "[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 Comm. of Cal., Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2836, 106 L.Ed.2d 93 (1989) (internal quotation marks and citations omitted). A regulation of speech is only narrowly tailored when it does not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock

Against Racism, 491 U.S. 781, 799 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). "The Government may not suppress lawful speech as the means to suppress unlawful speech." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255, 122 S.Ct. 1389, 1404, 152 L.Ed.2d 403 (2002).

Applying these principles, 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). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." FCC v. Pacifica Found., 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978); see also Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 1366, 22 L.Ed.2d 572 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). Accordingly, Moshoures is likely to succeed on the merits that Ordinance 21-33, § 12-75(h)'s restriction on "profane" words or lyrics is not narrowly tailored, and therefore, infringes on his constitutional rights.

Lastly, Moshoures contends he is likely to succeed on the merits of his Fourteenth Amendment Due Process claims because "the ordinance is unconstitutionally vague [as] it does not provide adequate notice of what constitutes 'obscene,' 'profane,' or 'vulgar' music." (DE 5-1, p. 2.) "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, 120 S.Ct. 2480, 2498, 147 L.Ed.2d 597 (2000). A potentially vague law that interferes with First Amendment rights deserves greater scrutiny

"because of its obvious chilling effect on free speech." Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871-72, 117 S.Ct. 2329, 2332, 138 L.Ed.2d 874 (1997). As stated previously, Ordinance 21-33, § 12-71's definitions of "obscene" and "vulgar" pass constitutional muster. Moshoures concedes that the definition of "obscene" mirrors the legal definition of obscenity in Miller. (DE 5-1, p. 7; see Miller, 413 U.S. at 23, 93 S. Ct. 2614.) In addition, this Court has determined that the definition of "vulgar" is facially consistent with the definition of obscene, and therefore, it provides people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited. Although this Court agrees, in the context of South Carolina's obscenity laws, that the ordinance's definition of "profane" is unconstitutionally broad and Moshoures is entitled to First Amendment protections, Moshoures has not demonstrated that Ordinance 21-33's definition of "profane" does not afford people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited. Moreover, the ordinance does not lack clarity regarding the loudness of the music to be played. Without more, the Court declines to speculate as to the legal basis for Moshoures' claim here.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for a Preliminary Injunction, enjoining Defendants from enforcing Section 12-75(h) of Ordinance 21-33 (DE 5), is granted as to the use of sound equipment to broadcast "profane" words or lyrics. However, Plaintiff's motion is denied as to the use of sound equipment to broadcast "obscene" or "vulgar" words or lyrics as defined in Ordinance 21-33, § 12-70, *et seq*.

IT IS SO ORDERED.

Florence, South Carolina
February 23, 2022

Joseph Dawson, III
United States District Judge