UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 07-21088-CIV-ALTONAGA/Brown

MIAMI FOR PEACE, INC.; **SOUTH FLORIDA PEACE AND JUSTICE NETWORK**; and **HAITI SOLIDARITY, INC.**,

Plaintiffs,

vs.

MIAMI-DADE COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Plaintiffs' Motion for Final Partial Summary Judgment Against Defendant Miami-Dade County ("Motion") [D.E. 60]. Plaintiffs request partial summary judgment in their favor regarding Defendant, Miami-Dade County's liability for all three counts of Plaintiffs' Second Amended Complaint [D.E. 43]. The undersigned has considered the parties' written submissions, the record, and applicable law.

I. BACKGROUND [1]

Plaintiffs, Miami for Peace ("MFP"), South Florida Peace & Justice Network ("SFPJ"), and Haiti Solidarity ("HS") (collectively, the "Plaintiffs") are not-for-profit corporations operating in Miami, Florida. In April 2007, Plaintiffs planned and organized an anti-war demonstration to coincide with a commencement address given by President George W. Bush at the Miami-Dade College ("MDC") campus in Kendall, Florida, on April 28, 2007 (the "April Protest"). As part of the April

[1] Unless otherwise specified, all facts contained in this section are undisputed.

Protest, Plaintiffs sought to have their members march on S.W. 107th Avenue and S.W. 104th Street to the entrance of the MDC campus. Miami-Dade County (the "County") has a parade permit requirement ("Permit Ordinance") for any parades or processions in the unincorporated areas of the County, which includes the area surrounding the MDC campus. The County's Permit Ordinance provides as follows:

> In the unincorporated areas, no procession or parade, excepting the forces of the United States Armed Services, the military forces of the state, and the forces of the police and fire departments, and funeral processions, shall occupy, march, or proceed along the street or roadway except in accordance with a permit issued by the sheriff and such other regulations as are set forth herein which may apply. No sound truck or other vehicle equipped with amplifier or loudspeaker shall be driven upon any street except in accordance with a permit issued by the sheriff.

Miami Dade Code § 30-274 [D.E. 62-2].

Although Plaintiffs were informed by the County that they could hold their planned demonstration, they were denied a permit to march or process along any of the roadways surrounding the MDC campus. The County submits that on April 18, 2007, it informed one of the attorneys for the Plaintiffs that a permit would not be issued for the planned demonstration because shutting down the streets surrounding the MDC campus would cause "congestion and not allow ingress and egress for emergency vehicles, creating serious security and public safety problems, especially considering the presence of the President of the United States." (*Declaration of Robert L. Diers* ("*Diers Decl.*") [D.E. 72-2] at ¶ 5).[2] The County also submits that a permit is only required for parades or

[2] Plaintiffs contend that the original version of the Diers Declaration lacked an executed signature page and therefore cannot be properly considered on summary judgment. The County, however, provided the executed signature page along with a Notice [D.E. 77] on May 27, 2008, notifying the Court that the page was inadvertently omitted from the initial filing. The undersigned, therefore, considers the Diers Declaration for purposes of this Motion.

processions, and that the Permit Ordinance is inapplicable to First Amendment demonstrations. (*See id.* at ¶ 8).

Unable to secure a permit for the April Protest, Plaintiffs claim their members were fearful of arrest or prosecution under Miami-Dade County Code § 21-31.1, the County's anti-loitering ordinance (the "Loitering Ordinance"). The Loitering Ordinance provides, in relevant part, as follows:

> (b) *Loitering* For the purposes of this Section "loitering" means the act of standing, remaining or sleeping on, in or about any public street, public sidewalk, public overpass, public bridge, public library, or other place specifically enumerated herein. A person commits the offense of loitering when he knowingly:
>
> (1) Loiters on any public street, public sidewalk, public overpass, public bridge or public place so as to hinder or impede the passage of pedestrians or vehicles.
>
> . . .
>
> (4) Loiters in or about a school, college or university campus so as to hinder or impede the orderly conduct of instructional, recreational, or other school activities.
>
> . . .
>
> (c) Penalties for violation . . . Any person convicted of a violation of any subsection of this section shall be punished by a fine of five hundred dollars ($500.00) or by imprisonment in the County Jail for a term not to exceed sixty (60) days, or by both such fine and imprisonment, in the discretion of the court. This section is applicable in both the incorporated and unincorporated areas of Miami-Dade County and all violations thereof shall be prosecuted in the County Court.

Miami-Dade County Code § 21-31.1.

The County has offered testimony from one of its representatives, Robert Diers, that the County "has rarely, if ever, enforced" the Loitering Ordinance, and that the "Miami-Dade Police Department does not have any recent history of enforcing [it] against First Amendment demonstrators

or protestors." (*Diers Decl.* at ¶ 13). Diers also testified that the Loitering Ordinance is not included in the handbook of criminal statutes provided to Miami-Dade Police officers. (*See id.* at ¶ 14).

In light of Plaintiffs' conclusion that the Permit Ordinance and the Loitering Ordinance would impair their ability to hold the April Protest, Plaintiffs filed their initial Complaint [D.E. 1] on April 24, 2007, accompanied by an Emergency Motion for a Preliminary Injunction [D.E. 3]. Upon the agreement of the parties, the Court entered an Order [D.E. 13] that the County would not enforce either of the two challenged ordinances during the April Protest, and denied Plaintiffs' Emergency Motion as moot. The April Protest was subsequently able to proceed, although with the understanding that no traffic lanes or streets would be closed. The demonstrations, therefore, were limited to the sidewalks and grassy areas surrounding the MDC campus. None of Plaintiffs' members at the April Protest were arrested or threatened with arrest for violation of the County's Loitering Ordinance. (*See Diers. Decl.* at ¶ 12).

Plaintiffs, MFP and SFPJN, intend to hold future demonstrations in Miami-Dade County, including an anticipated demonstration on election day, November 4, 2008. (*See Declaration of Linda Belgrave* ("*Belgrave Decl.*") [D.E. 62-3] at ¶ 3). They anticipate the planned demonstrations will require street closures. (*See id.* at ¶ 5). As a result, Plaintiffs submit the County's Permit Ordinance and Loitering Ordinance will impede their efforts to plan these future demonstrations (*see id.* at ¶ 6), and discourage future participants from exercising their First Amendment rights (*see id.* at ¶ 8).

Plaintiffs filed their Second Amended Complaint on September 14, 2007. The Second Amended Complaint contains three counts pursuant to 42 U.S.C. § 1983. Count I alleges the Permit

Ordinance "is unconstitutional on its face as an impermissible prior restraint, containing terms which provide unfettered discretion to law enforcement officials, lack of deadlines for considering applications, lack of appropriate review for unfavorable decisions, and other deficiencies." (*Second Amended Complaint* at ¶ 26). It further alleges the Permit Ordinance and the County's implementation of that Ordinance, "were the proximate cause of the deprivation of the First Amendment rights of Plaintiffs and other demonstrators [at the April Protest] . . . and are the proximate cause of the 'chilling,'" of Plaintiffs' activities at other demonstrations in the County. (*Id.* at ¶ 28). Plaintiffs also seek compensatory damages for "the expenditure of money . . . for printing, travel and related expenses for portions of [their planned events] negatively impacted by the Defendant's ordinances . . . ." (*Id.*)

Count II of the Second Amended Complaint alleges that the Loitering Ordinance is unconstitutional on its face as an impermissibly broad prohibition, that has had, and will in the future have, a substantial impact on conduct protected by the First Amendment . . . ." (*Id.* at ¶ 32). It further alleges that the County's adoption and implementation of the Loitering Ordinance "were the proximate cause of the deprivation of the First Amendment rights of Plaintiffs, and other demonstrators similarly situated, with respect to the [April Protest] . . . on public streets, sidewalks, and other public property adjacent to [the MDC campus], and are the proximate cause of the 'chilling,'" of Plaintiffs' activities at other demonstrations in the County. (*Id.* at ¶ 34).

Finally, Count III alleges the Loitering Ordinance is "unconstitutional on its face, as an impermissibly *vague* prohibition that has a substantial impact on conduct protected by the Due Process Clause of the Fourteenth Amendment" because "it fails to provide the kind of notice that

enables ordinary citizens to understand what precise conduct it prohibits" and "authorizes arbitrary and discriminatory enforcement through its lack of precision." (*Id.* at ¶ 38) (emphasis in original). It further alleges the adoption and implementation of the Loitering Ordinance "are the proximate cause of the past deprivation of the First Amendment rights of Plaintiffs without due process, and other demonstrators similarly situated [at the April Protest] . . . with respect to the planned activities on public streets, sidewalks and other public property adjacent to [the MDC campus], and the proximate cause of the 'chilling,'" of Plaintiffs' activities at other demonstrations in the County. (*Id.* at ¶ 41). As a result of this deprivation, Plaintiffs also seek compensatory damages. (*See id.*).

Plaintiffs filed the present Motion seeking partial summary judgment on all counts as to the following issues: (1) Plaintiffs' entitlement to a permanent injunction, enjoining Defendant from enforcing the Permit Ordinance and the Loitering Ordinance; (2) Plaintiffs' entitlement to a declaration that the Permit Ordinance and Loitering Ordinance violate Plaintiffs' rights under the First Amendment; and (3) Plaintiffs' entitlement to a declaration that the Loitering Ordinance violates Plaintiffs' due process rights.

II. ANALYSIS

A. Legal Standard

Summary judgment shall be rendered "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." Fed. R. Civ. P. 56(c). In making this assessment, the Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Stewart v.*

Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir. 1997), and "must resolve all reasonable doubts about the facts in favor of the non-movant." *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1558 (11th Cir. 1990).

"By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Likewise, a dispute about a material fact is a "genuine" issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* However, "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252,

"For factual issues to be considered genuine, they must have a real basis in the record . . . mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005) (citations omitted). The moving party "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). Summary

judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. In those cases, there is no genuine issue of material fact "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.

B. Plaintiffs' Standing to Seek Declaratory Relief

Plaintiffs seek declaratory relief on their claims that the Permit Ordinance and the Loitering Ordinance violate their constitutional rights. Generally, federal courts are empowered to issue a declaratory judgment prohibiting the enforcement of an ordinance or statute that is determined to be unconstitutional. *See, e.g., Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 320, 331 (2006); *Bischoff v. Osceola County, Fla.*, 222 F.3d 874, 877 (11th Cir. 2000); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1234 (11th Cir. 2006) (affirming district court's declaratory judgment that sign ordinance violated the First Amendment).

Nevertheless, "Article III of the United States Constitution limits the power of the federal courts to hear 'cases' and 'controversies.'" *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1223 (11th Cir. 2004) (citing U.S. Const. Art. III, § 2). The most significant element of "case or controversy" is the requirement of standing. *See id.* (citation omitted). "[E]very court has an independent duty to review standing as a basis for jurisdiction at any time, for every case it adjudicates." *Florida Ass'n of Medical Equipment Dealers, Med-Health Care v. Apfel*, 194 F.3d 1227, 1230 (11th Cir. 1999) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)). In order to demonstrate it has standing a party must show: "1) an injury in fact or an invasion of a legally

protected interest; 2) a direct causal relationship between the injury and the challenged action; and 3) a likelihood of redressability." *Midrash,* 366 F.3d at 1223 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

"The requirements for standing are somewhat more lenient for facial challenges to statutes on the grounds of overbreadth." *Bischoff*, 222 F.3d at 883; *see also Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997) ("[T]he injury requirement is most loosely applied when a plaintiff asserts a violation of First Amendment rights based on the enforcement of a law, regulation or policy."). "However, even under the more lenient requirements for standing applicable to First Amendment overbreadth challenges, it still remains the law that plaintiffs must establish that they have suffered some injury in fact as a result of the defendant's actions." *Bischoff*, 222 F.3d at 883 (citations omitted).

The County does not question Plaintiffs' standing to challenge the Permit Ordinance on the ground of constitutional overbreadth. Moreover, upon the Court's own review, it is plain that Plaintiffs easily satisfy the permissive standing requirement for such a challenge. *See id.* Plaintiffs are involved in the planning and execution of public demonstrations. Plaintiffs and their members were denied a permit for the April Protest under the Permit Ordinance, and they submit their First Amendment rights were infringed as a result of this denial. They further submit they intend to engage in future demonstrations for which they will require additional permits under the current licensing scheme. (*See Belgrave Decl.* at ¶¶ 3-5).

The County does, however, challenge Plaintiffs' standing to challenge the Loitering Ordinance. Specifically, the County asserts Plaintiffs lack "associational standing" to challenge the

Loitering Ordinance on behalf of their members. "'(W)hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought.'" *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). "'If . . . the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.'" *Id.* (quoting *Warth*, 422 U.S. at 515). Thus, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*; *accord Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

The text of the Loitering Ordinance is exceedingly broad in scope. A person commits the offense of loitering "when he knowingly . . . [l]oiters on any public street, public sidewalk, public overpass, public bridge or public place so as to hinder or impede the passage of pedestrians or vehicles" or "[l]oiters in or about a school, college or university campus so as to hinder or impede the orderly conduct of instructional, recreational, or other school activities." *Miami-Dade County Code* § 21-31. The range of activities that can "impede" the passage of pedestrians or vehicles, or "hinder" the orderly conduct of school activities is limitless. The awkward and sweeping language of the Ordinance results in a legislative pronouncement that defines loitering with use of the term it seeks to define: "knowingly . . . [l]oitering" in selected public areas, "so as to hinder or impede the

passage of pedestrians or vehicles" or "the orderly conduct of instructional, recreational, or other school activities." *Id.* Indeed, even the only arguably "objective" component of this construction – "so as to hinder or impede" – is also relatively subjective. A violation of the Loitering Ordinance is classified in penal terms, resulting in maximum penalties of a $500.00 fine, or sixty days in the County Jail. *See id.*

Plaintiffs contend their members' activities at the April Protest, as well as their likely activities at future demonstrations fall within the reach of the Loitering Ordinance. The undersigned agrees. Since the Loitering Ordinance lacks virtually any objective standards regarding its application, every participant in a public demonstration, or indeed anyone using a public right of way, may be deemed to be in violation of the ordinance and be subjected to its stated penalties. Indeed, in the context of a demonstration like the April Protest, where the streets and sidewalks surrounding the MDC campus were filled with demonstrators, it is a virtual certainty that Plaintiffs' members could be deemed "guilty" of hindering or impeding pedestrians and traffic.

Although none of the Plaintiffs' members have actually been prosecuted under the Loitering Ordinance, "[t]he Supreme Court has accepted imminent harm as satisfying the injury-in-fact requirement of Article III standing." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160-61 (11th Cir. 2008) (citing *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979)). Moreover, "'[i]mminence' as a doctrinal standard is 'somewhat elastic,'" and is intended to ensure that the threatened injury is not too speculative. *Id.* (citing *Lujan*, 504 U.S. at 564 n.2). The undersigned is unpersuaded by the County's assurances that the Loitering Ordinance has been rarely, if ever, enforced against protestors in the past (*see Diers Decl.* ¶ at 13), particularly in

the context of this facial challenge. As discussed, virtually every public demonstration in unincorporated Miami-Dade County will involve a violation of the Loitering Ordinance, and there is nothing preventing the County from enforcing the ordinance at future demonstrations. Moreover, Plaintiffs have identified specific future planned public demonstrations, including one to coincide with the November 2008 election. Plaintiffs' members are subject to imminent harm from any future application of the Loitering Ordinance and they consequently have individual standing to sue.

Citing the Eleventh Circuit's decision in *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1330 (11th Cir. 2000), the County also contends that Plaintiffs lack associational standing to challenge the Loitering Ordinance because the interests they seek to vindicate are not germane to each of the organizations' purposes. In *White's Place*, the court premised its decision upon the fact that the plaintiff, a corporation operating a club offering erotic dancing, did not have a substantial interest in challenging an ordinance that prohibited individuals from opposing a police officer, absent "[t]he participation of an individual employee who has been threatened with arrest." *Id.* The undersigned finds *White's Place* inapposite to the instant matter. In contrast to the plaintiff in *White's Place*, one of Plaintiffs' primary activities is the planning and execution of public demonstrations. Accordingly, the interests of each of these organizations in opposing the Loitering Ordinance are very closely aligned with the interests of their members. *See, e.g.*, *Browning*, 522 F.3d at 1165-66 (holding that NAACP had associational standing to challenge voter registration statute on behalf of its members). Finally, Plaintiffs' members' participation is unnecessary for purposes of this facial challenge. Accordingly, the Court concludes that Plaintiffs have standing to challenge the Loitering Ordinance.

C. Constitutionality of the Permit Ordinance

Plaintiffs assert the Permit Ordinance is unconstitutionally overbroad in that it fails to articulate specific standards for the granting of parade permits, and thereby provides the County official in charge of its administration with unfettered discretion. Generally, a party making a facial challenge to a statute or ordinance on a constitutional basis must demonstrate that there are no circumstances under which the statute or ordinance would be valid. *See U.S. v. Salerno*, 481 U.S. 739, 745 (1987). However, the Supreme Court has "acknowledged an exception to the 'unconstitutional-in-every-conceivable-application' rule in cases involving the overbreadth doctrine in 'the limited context of the First Amendment.'" *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1331 (11th Cir. 2001) (quoting *Salerno*, 481 U.S. at 745).

In the instant case, Plaintiffs contend that the Permit Ordinance is a prior restraint which infringes their First Amendment rights. "A prior restraint on speech prohibits or censors speech before it can take place." *Cooper v. Dillon*, 403 F.3d 1208, 1215 (11th Cir. 2005) (citing *Alexander v. U.S.*, 509 U.S. 544, 553 (1993)). One such type of prior restraint occurs "where the government has unbridled discretion to limit access to a particular public forum." *Id.* (citing *U.S. v. Frandsen*, 212 F.3d 1231, 1236-37 (11th Cir. 2000) (finding prior restraint where a National Park Service licensing scheme gave park official unlimited power to grant or deny permits to protest in the park)). "Although there is a 'heavy presumption' against the validity of a prior restraint . . . [a] government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally . . . ." *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 130 (1992) (internal citations omitted). "Such a scheme, however, must meet certain

constitutional requirements." *Id.* For instance, "[i]t may not delegate overly broad licensing discretion to a government official." *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51, 56 (1965)).

With respect to a licensing scheme, "the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969). An ordinance which "'makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'" *Id.* (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1957)).

The Permit Ordinance provides "no narrow, objective, and definite standards," or indeed any standards at all regarding the issuance of parade permit. *See Shuttlesworth,* 394 U.S. at 151. Instead, it states simply that "no procession or parade, excepting the forces of the United States Armed Services, the military forces of the state, and the forces of the police and fire departments, and funeral processions, shall occupy, march, or proceed along the street or roadway except in accordance with a permit issued by the sheriff." *Miami Dade Code* § 30-274. It does not provide any criteria for the sheriff or other County official to consider in determining whether a license should be granted, nor does it state any reason justifying a denial of a permit request. It does not apprise the applicant of what the criteria are guiding the sheriff's decision to issue or not issue a permit. Moreover, there is no time limit set forth in the Permit Ordinance for the County official to consider a permit request, and no provision is made for any type of review or appeal of an adverse decision.

The County has submitted that Plaintiffs were denied a permit for the April Protest because of "congestion" and "serious security and public safety problems." (*Diers Decl.* at ¶ 5). None of the County's stated criteria for denying Plaintiffs' application, however, appear anywhere in the Permit Ordinance. We are left simply to assume the benevolence and good intentions of the sheriff in denying the application. Interestingly, the Ordinance makes no mention of security or safety concerns at all. Notwithstanding the County's assertions regarding its reasons for denying Plaintiffs' permit application, the Court must "analyze [the ordinance] as written." *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994). This is because it is not reasonable to "depend on the individuals responsible for enforcing [an] Ordinance to do so in a manner that cures it of constitutional infirmities." *Id.* On a facial challenge, therefore, the County's explanations regarding the criteria it applied to Plaintiffs' permit application are irrelevant. The Court must rely on the text of the Ordinance.

In any event, even assuming the County had applied a written standard of "public safety" to deny Plaintiffs' application, that would not be sufficient by itself to cure the constitutional defect. Indeterminate standards like "public safety" are generally insufficient to satisfy the limited discretion requirement. *See Shuttlesworth*, 394 U.S. at 150-51 (holding that an ordinance directing public officials to grant licenses where the proposed expression is consistent with "public welfare, peace, safety, health, decency, good order, morals or convenience" was too amorphous to meaningfully limit public officials' discretion). Similarly, the County's assertion that a permit is not required for First Amendment demonstrations (*see Diers Decl.* at ¶ 8), and that Plaintiffs were not denied a permit on the basis of their message is also unavailing since "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the

administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth,* 505 U.S. at 133 n.10. No such restriction exists in the Permit Ordinance.

Significant to the present analysis, the Permit Ordinance lacks any procedural safeguards. "[A]ny system of censorship that runs the risk of suppressing constitutionally protected expression must contain three procedural safeguards designed to obviate the dangers of censorship: (1) the burden of going to court to suppress the speech and the burden of proof once in court must lie with the censor; (2) any restraint prior to a judicial determination may only be for a specified brief time period in order to preserve the status quo; and (3) an avenue for prompt judicial review of the censor's decision must be available." *Redner*, 29 F.3d at 1500 (citing *Freedman*, 380 U.S. at 58-59). The Permit Ordinance clearly lacks the second and third procedural safeguards set forth by the Supreme Court. It provides no time limit for the County to make a determination regarding the issuance of a permit, and thereby "risks the suppression of protected expression for an indefinite time period prior to any action on the part of the decisionmaker or any judicial determination." *Id.* at 1501. Similarly, there is no provision in the statute for prompt, meaningful judicial review of the County's decision to deny a permit. *See Bourgeois v. Peters*, 387 F.3d 1303, 1319-20 (11th Cir. 2004) ("'[P]rompt judicial review must be available to correct erroneous denials' of access to expression.") (quoting *Cafe Erotica of Fla., Inc. v. St. John's County*, 360 F.3d 1274, 1283 (11th Cir. 2004)). In view of the unrestricted discretion provided to the County official issuing or not issuing the parade permits, and the lack of required procedural safeguards, the undersigned concludes the Permit Ordinance is constitutionally overbroad.

Plaintiffs also contend the Permitting Ordinance is unconstitutional because it is not a content-neutral time, place, and manner regulation. It is well established that, "any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth,* 505 U.S. at 130 (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)). The Permit Ordinance provides exceptions from its permit requirement for "the forces of the United States Armed Services, the military forces of the state, and the forces of the police and fire departments, and funeral processions . . . ." *Miami Dade Code* § 30-274. Although the undersigned is not persuaded by the County's argument that the Permit Ordinance is content-neutral, a further inquiry is unnecessary since "[e]ven a facially content-neutral time, place, and manner regulation may not vest public officials with unbridled discretion over permitting decisions." *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1256 (11th Cir. 2004) (citations omitted). A content-neutral ordinance must still "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (citing *Niemotko v. State of Md.,* 340 U.S. 268, 271 (1951)). As discussed, the Permit Ordinance fails to sufficiently limit the sheriff or County official's discretion in granting permits, and fails to provide the required constitutional safeguards. Accordingly, it is constitutionally overbroad regardless of whether or not it is deemed to be content-neutral.

D. Constitutionality of the Loitering Ordinance

Plaintiffs challenge the Loitering Ordinance on the ground that it is unconstitutionally vague. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with

sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). Thus, "[v]agueness may invalidate a criminal law for either of two independent reasons." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (holding that loitering ordinance which required a police officer, on observing a person whom he reasonably believed to be a street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made failure to obey such an order a violation, was unconstitutionally vague). "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* (citing *Kolender*, 461 U.S. at 357). The Loitering Ordinance is constitutionally vague for both of these reasons.

The plain text of the Loitering Ordinance, specifically its use of the phrase "hinder or impede," criminalizes an extremely broad variety of activities on a public right of way, including simply standing on a sidewalk, and criminalizes virtually all behavior likely to take place at a public demonstration. This broad language makes it exceedingly hard to discern exactly what conduct is prohibited. Indeed, at least one Florida court has long ago held that a loitering statute utilizing a similar "hinder or impede" construction as the County's Loitering Ordinance was unconstitutionally vague. *See Ciccarelli v. City of Key West*, 321 So. 2d 472, 474 (Fla. 3d DCA 1975) (concluding that a valid loitering statute using such language "must contain some restrictive standards which would limit its application to impediments to passage that threaten public safety or a breach of the peace.").

Second, the lack of any objective standards for determining when an individual is in violation of the Ordinance raises the likelihood of its arbitrary or discriminatory enforcement. As discussed, the undersigned is not persuaded by the County's assertion that the Loitering Ordinance is rarely, if ever, enforced (*see Diers Decl.* at ¶ 13), as this does little to mitigate the fact that there is nothing to preclude its enforcement against Plaintiffs' members absent a permanent injunction. For all of these reasons, the Court concludes that the Loitering Ordinance is unconstitutionally vague. Having concluded that the Loitering Ordinance is unconstitutionally vague, the undersigned declines to consider Plaintiffs' other constitutional challenges to the Ordinance.[3]

E. Entitlement to a Permanent Injunction

A district court may grant permanent injunctive relief if the moving party demonstrates: (1) actual success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). As to first prong, Plaintiffs have demonstrated actual success on the merits of their claims that the Permit Ordinance and the Loitering Ordinance are unconstitutional.

As to the second prong, "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *KH Outdoor, LLC,* 458 F.3d at 1271-72 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, having demonstrated that the ordinances

[3] Plaintiffs also challenge the Loitering Ordinance on the grounds that it is constitutionally overbroad and violates Plaintiffs' liberty interest.

have subjected them to a deprivation of their First Amendment rights, Plaintiffs have made a showing of irreparable injury.

Similarly, Plaintiffs have shown the equities are in their favor. *See id.* at 1268. While Plaintiffs have shown that the future application of the Permit Ordinance and the Loitering Ordinance may subject them to the deprivation of their constitutional rights, the County has not articulated any hardship it will suffer as a result of the injunctive relief sought by Plaintiffs.

Finally, "[t]he public has no interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC,* 458 F.3d at 1272 (citations omitted); *see also Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) ("[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute[.]") (internal quotation marks and citations omitted)). In light of the undersigned's determination that the challenged ordinances are unconstitutional, Plaintiffs have also satisfied the final element for a permanent injunction. For all of these reasons, Plaintiffs are entitled to a permanent injunction against enforcement of the Permit and Loitering Ordinances.[4]

III. CONCLUSION

In accordance with the foregoing, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion **[D.E. 60]** is **GRANTED**. A permanent injunction is issued prohibiting the County from future enforcement or application of Miami Dade Code Sections 30-274 (the Permit Ordinance) and

[4] On April 16, 2008, the County filed a Motion to Stay [D.E. 68], notifying the Court it was in the process of revising its Code in the wake of mediation and requesting an abatement of the proceedings in this matter. That Motion was denied in an Order [D.E. 70] dated April 17, 2008. The permanent injunction shall apply only to the current versions of the Permit and Loitering Ordinances.

21-31.1 (the Loitering Ordinance). The parties are further ordered to schedule a mediation by **June 25, 2008**, and submit their report of mediation results within five days thereafter. The mediation is to address the remaining issues of attorney's fees and any compensatory damages.

This case is removed from the Court's trial calendar. The parties' Joint Motion Filed Out of Time for Extension of Time to Submit Proposed Findings of Fact and Conclusions of Law **[D.E. 79]** is **DENIED** as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of June, 2008.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: (1) Magistrate Judge Stephen T. Brown
(2) All counsel of record