# NO. 12-2440

# UNITED STATES COURT OF APPEALS
# FOR THE
# SIXTH CIRCUIT

**LEVON YUILLE**, PASTOR,

*Plaintiff-Appellant,*

**v.**

**BILL SCHUETTE**, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, STATE OF MICHIGAN; AND **BRIAN L. MACKIE**, IN HIS OFFICIAL CAPACITY AS PROSECUTING ATTORNEY, WASHTENAW COUNTY,

*Defendants-Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**
**HONORABLE GERALD E. ROSEN**
**Civil Case No. 2:12-cv-14652-GER-MAR**

## APPELLANT'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVENUE NW
SUITE 201
Washington, D.C. 20006
(646) 262-0500

*Attorneys for Plaintiff-Appellant*

## INTRODUCTION

Plaintiff-Appellant Pastor Levon Yuille (hereinafter "Plaintiff" or "Pastor Yuille"), by and through his undersigned counsel, hereby moves this court for an immediate injunction, enjoining Michigan Compiled Laws ("MCL") § 168.931(1)(e) in advance of the November 6, 2012, presidential election to prevent irreparable injury to Plaintiff's fundamental rights and interests.

MCL § 168.931(1)(e) states: "**A priest, pastor, curate, or other officer of a religious society shall not for the purpose of influencing a voter at an election, impose or threaten to impose upon the voter a penalty of excommunication, dismissal, or expulsion, or command or advise the voter, under pain of religious disapproval**." Mich. Comp. Laws § 168.931(1)(e). Anyone who violates MCL § 168.931(1)(e) "is guilty of a misdemeanor" and subject to a fine and/or imprisonment. Mich. Comp. Laws § 168.931(1).

In light of the upcoming presidential election scheduled for November 6, 2012, Plaintiff, a Christian pastor, seeks to engage in religious speech for the purpose of influencing voters at this election. However, Plaintiff is prohibited from doing so under MCL § 168.931(1)(e).

## STATEMENT OF THE CASE

On October 22, 2012, Plaintiff filed his complaint, challenging the constitutionality of this provision of Michigan's extant election law under the First

and Fourteenth Amendments.[1] (R-1 [Compl.]). On October 23, 2012, Plaintiff filed an emergency motion for a TRO / preliminary injunction, seeking to enjoin this provision of the law prior to the November 6, 2012 election. (R-6 [Pl.'s Mot. for TRO]). The government responded on October 26, 2012, (R-14 [Defs.' Resp.]), and Plaintiff replied on October 29, 2012, (R-17 [Pl.'s Reply]).

On October 30, 2012, the district court held a hearing on Plaintiff's motion. And on October 31, 2012, the district court dismissed the complaint for lack of standing and denied the request for injunctive relief as moot. (R-23 [Op. & Order]). That same day, Plaintiff filed his notice of appeal. (R-24 [Notice of Appeal]). This court has jurisdiction pursuant to 28 U.S.C. § 1291.

It is important to highlight a critical fact to which the parties agree: MCL § 168.931(1)(e) is, on its face, a "*content-based*" restriction on religious speech and thus "*strict scrutiny applies*."[2] (R-14 [Defs.' Resp.] at 14) (emphasis added).

## STATEMENT OF FACTS

Pursuant to MCL § 168.931(1), "A person who violates 1 or more of [its] subdivisions is guilty of a misdemeanor." Mich. Comp. Laws § 168.931(1).

[1] The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

[2] Michigan Attorney General Bill Schuette filed an *amicus* brief in the district court in his personal capacity, urging the court to enjoin MCL § 168.931(1)(e) and stating, "Among other things, § 931(1)(e) is not a neutral law of general applicability but specifically targets religious speakers and religious speech; substantially burdens political and religious speech as well as the free exercise of religion; and cannot be justified by any compelling governmental interest." (R-21-1 [*Amicus* Br. of Att'y Gen.] at 1).

Subdivision (1)(e) states as follows: "A priest, pastor, curate, or other officer of a religious society shall not for the purpose of influencing a voter at an election, impose or threaten to impose upon the voter a penalty of excommunication, dismissal, or expulsion, or command or advise the voter, under pain of religious disapproval." Mich. Comp. Laws § 168.931(1)(e). (R-1-1 [Compl. at Ex. 1]).

Pastor Yuille is a resident of the State of Michigan, a devout Christian, and the pastor of The Bible Church, which is located in Ypsilanti, Michigan. He is the National Director of the National Black Pro-Life Congress, the former Chairman of the Michigan Black Republican Council of Southern Michigan, and the host of *Joshua's Trail*, a Christian radio talk show that airs in Washtenaw County, Michigan and elsewhere. (R-6-2 [Pastor Yuille Decl. at ¶¶ 2, 3 at Ex. 1]).

Pursuant to his sincerely held Christian beliefs, Pastor Yuille believes that when a person knowingly acts contrary to God's Word, the person risks excommunication, which occurs when a person separates himself or herself from the body of Christ. (R-6-2 [Pastor Yuille Decl. at ¶ 5 at Ex. 1]).

Pursuant to his sincerely held Christian beliefs, Pastor Yuille believes, professes, and advises that abortion and gay marriage are gravely immoral and contrary to God's Word. Consequently, pursuant to his sincerely held Christian beliefs, Pastor Yuille believes, professes, and advises that it is a grave sin for a politician to support abortion and gay marriage and that it is a grave sin for a

Christian to knowingly vote for a politician that publicly supports abortion and gay marriage. Pastor Yuille believes, professes, and advises that when a Christian knowingly votes for a politician who publicly supports abortion and gay marriage, the voter becomes a partner in the sin and his or her soul is in danger of eternal damnation. As a result, the voter is separating himself or herself from the body of Christ. (R-6-2 [Pastor Yuille Decl. at ¶¶ 6-10 at Ex. 1]).

Thus, Pastor Yuille believes, professes, and advises that it is a grave sin for a Christian to vote for a candidate such as President Barack Obama, who publicly supports abortion and gay marriage. (R-6-2 [Pastor Yuille Decl. at ¶ 9 at Ex. 1]).

Pastor Yuille expresses these sincerely held religious beliefs publicly and privately, including when he is speaking to potential voters. (R-6-2 [Pastor Yuille Decl. at ¶ 11 at Ex. 1]). As a result of the upcoming presidential election scheduled for November 6, 2012, Pastor Yuille is compelled by his sincerely held religious beliefs to influence voters to vote consistent with their Christian faith. Consequently, pursuant to his sincerely held religious beliefs, Pastor Yuille intends to advises voters that to vote for a candidate that publicly supports abortion and gay marriage, such as President Barack Obama, is to act contrary to God's Word, it is a grave sin, it is looked upon with religious disapproval, and it could endanger their soul and separate them from the body of Christ. (R-6-2 [Pastor Yuille Decl. at ¶¶ 12, 13 at Ex. 1]).

By professing his sincerely held religious beliefs and advising voters pursuant to these beliefs, Pastor Yuille is violating the plain language of MCL § 168.931(1)(e), and thus subjecting himself to criminal prosecution. Consequently, MCL § 168.931(1)(e) has a chilling effect on his speech. (R-6-2 [Pastor Yuille Decl. at ¶ 14 at Ex. 1]).

In light of the upcoming presidential election scheduled for November 6, 2012, Pastor Yuille wants to profess his sincerely held religious beliefs and advise voters, particularly those voters who are members of his church, to vote consistent with God's Word so as to avoid religious disapproval and suffering separation from the body of Christ. However, he is prohibited from doing so under MCL § 168.931(1)(e). (R-6-2 [Pastor Yuille Decl. at ¶ 15 at Ex. 1]).

## ARGUMENT

### I. Plaintiff Has Standing to Challenge MCL 168.931(1)(e).

The district court erroneously concluded that Plaintiff lacks standing to challenge this provision of Michigan's extant election law,[3] which, *on its face*, criminalizes Plaintiff's religious speech, substantially burdens his religious beliefs, and targets religion for disfavored treatment.[4] (R-23 [Op. & Order]).

[3] There is no dispute that MCL § 168.931, of which § 168.931(1)(e) is a part, is a criminal statute that is currently enforced in Michigan. *See, e.g., Mich. v. Pinkney*, No. 286992, 2009 Mich. App. LEXIS 1526, at *1 (Mich. Ct. App. July, 14, 2009) (affirming conviction under MCL § 168.931(1)(a)).

[4] Indeed, when counsel informed Pastor Yuille of the court's ruling, Pastor Yuille

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In order to invoke the jurisdiction of this court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

A party's standing to make a pre-enforcement challenge to a criminal statute that chills the exercise of First Amendment liberties is well established. Quite appropriately, the standing requirement is relaxed in the First Amendment context. *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (stating that the injury-in-fact requirement for standing is properly relaxed for First Amendment challenges "because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application'") (quotations in original, citations omitted); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) ("When the First Amendment is in play . . . the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections.").

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said it was like "leaving a loaded gun on the table." And the chilling effect of this statute is perhaps more pronounced today as religious leaders are feeling increased animosity and hostility from the government.

Indeed, it is well established that when a statute chills speech, that chilling effect constitutes an injury-in-fact sufficient to confer standing.[5] *See G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact"); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[A]n actual injury can exist when the plaintiff is chilled from exercising her right to free expression or foregoes expression in order to avoid enforcement consequences."); *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997) ("Sufficient hardship is usually found if the regulation . . . chills protected First Amendment activity."); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). And when the government chills a citizen's First Amendment rights, the citizen need not wait for some adverse consequence before challenging the action. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.");

[5] Contrary to the district court's conclusion (*see* R-23 [Op. & Order] at 7-8), it is not a "subjective" chill when a criminal statute prohibits a party's speech on its face. *See Thornhill v. Ala.*, 310 U.S. 88, 98 (1940) ("Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.").

*Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.").

The district court's heavy reliance on *Poe v. Ullman*, 367 U.S. 497 (1961), a case not involving the fundamental right to freedom of speech, was misplaced. (*See* R-23 [Op. & Order at 6] [stating that "[i]t is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality" (quoting *Poe*, 367 U.S. at 507-08)]). Indeed, the Supreme Court has warned the lower courts to be cognizant of "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application," because "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society."[6] *NAACP v. Button*, 371 U.S. 415, 433 (1963). Moreover, in *Epperson v. Ark.*, 393 U.S. 97 (1968), a case decided after *Poe v. Ullman*, the plaintiff had not been charged under the challenged statute, "*no record of any prosecutions in*

[6] (*See also* R-23 [Op. & Order] at 9, n.3 ["The Court declines Plaintiff's invitation to wade into the speculative thicket of whether the statute is unconstitutional if applied to his or anyone else's speech at an actual election site (as Defendants would construe *and, perhaps, enforce the statute*), as such a circumstance is not before the court." (emphasis added)]); *but see Broadrick v. Okla.*, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

*Arkansas*" under the challenged statute existed, and the statute was no more than a "*curiosity*." *Id.* at 101-02 (emphasis added). Yet, the Supreme Court stated, "Nevertheless, the present case was brought, the appeal as of right is properly here, and *it is our duty to decide the issues presented*. *Id.* at 102. Similarly, in a case following, and distinguishing, *Poe v. Ullman*, the Supreme Court held that abortion providers had standing to challenge a state's abortion statutes even though "the record [did] not disclose that any one of them [had] been prosecuted, or threatened with prosecution." *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *see also Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987) (holding that where a plaintiff "would be subject to application of the [challenged] statute," that alone is sufficient to provide the "fear of prosecution . . . reasonably founded in fact" to confer standing).

In sum, MCL § 168.931(1)(e) is the law today in Michigan; it is a provision that currently exists as part of Michigan's extant election law. And it is a law that criminalizes Plaintiff's speech on its face. Indeed, no court should "tolerat[e], in the area of First Amendment freedoms, the existence of [such] a penal statute." Consequently, Plaintiff has standing to challenge this patently unconstitutional criminal law.

Moreover, a close reading of Defendants' brief filed in opposition to Plaintiff's request for a temporary restraining order and their counsel's arguments

before the district court during the hearing on Plaintiff's motion, demonstrate that the government has *not* disavowed enforcement of MCL § 168.931(1)(e).[7] Indeed, in their opposition, Defendants strenuously defended this criminal statute, claiming that the government had a compelling interest for enacting it. (R-14 [Defs.' Resp.] at 14-19). Defendants also urged the court to uphold the constitutionality of this criminal law against Plaintiff's challenge by adopting an untenable reading of the statute. Defendants requested that the court limit the phrase "at an election" to mean "at the polls on election day or at a site where a voter was filling out an absent voter ballot application." (R-14 [Defs.' Resp.] at 16). While Defendants' interpretation of the statute does not save it from constitutional challenge, a court is nonetheless without authority to rewrite this statute as Defendants suggest. It is true that a court has an obligation to save a legislative enactment from facial unconstitutionality wherever possible; however, it may not impose a narrowing construction on a statute unless it is "readily susceptible" to such a construction. *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). Thus, a court may not

[7] (*See* R-23 [Op. & Order] [declining to read the statute as broadly drafted by the Michigan legislature and noting that the "more limited reading of the statute is the one which apparently has been given, and is currently being given, by the relevant law enforcement authorities"); *but see Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 857 (E.D. Pa. 1996) (Sloviter, J.) (rejecting the "troubl[ing]" argument that "the First Amendment should [] be interpreted to require [the court] to entrust the protection it affords to the judgment of prosecutors" when "[p]rosecutors come and go" but "[t]he First Amendment remains to give protection to future generations")

"rewrite a . . . law to conform it to constitutional requirements." *Id.* And although a court may prefer an interpretation of a statute that will preserve its constitutionality, it does not have license to rewrite a statute to "create distinctions where none were intended." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 72 n.6 (1982). Moreover, when reviewing the statute, every word is presumed to have meaning, and the court must give effect to all the words to avoid an interpretation which would render words (or entire sections) superfluous or redundant. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998). And the interpretation of one subsection must be supported by reading it in conjunction with the rest of the statute. In fact, the court is required to give effect, if possible, to every word, sentence and section and, to that end, to read the entire statute as a harmonious and consistent enactment as a whole. *See Dussia v Monroe Co Emps. Ret. Sys.*, 386 Mich. 244, 248 (1971).

In light of these fundamental principles of statutory construction, Defendants' suggested interpretation of Michigan's election law is untenable. Indeed, if the Michigan legislature intended to limit the location of the prohibited conduct as Defendants suggest it certainly knew how to do so. *See* Mich. Comp. Laws § 168.931(1)(k) (prohibiting certain conduct "*in a polling place* or within 100 feet from an entrance to the building *in which a polling place is located*")

(emphasis added); Mich. Comp. Laws § 168.932(h) (prohibiting certain conduct of "[a] person *present* while an absent voter is voting an absent voter ballot") (emphasis added). The fact is, the Michigan legislature did not limit the restrictions on religious speech to only when it is expressed "at the polls on election day" or "at a site where a voter was filling out an absent voter ballot application"—such limitations are found elsewhere in the statute, *but not in the challenged provision*. Moreover, it is evident that the "at an election" language modifies the voter and not the location of the unlawful "influence." Thus, the statute would not prohibit someone from influencing a voter who was not voting *at an election*, such as a voter voting for a party platform *at a convention*, for example.[8] Nonetheless, in the First Amendment context, the government must regulate *with greater precision*, not less. *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). This lack of precision is further highlighted by Defendants' arguments, which serve to demonstrate the vagueness, overbreadth, and thus unlawfulness, of this statute. (*See* R-14 [Defs.' Resp.] at 17 [stating that "the geographic scope of the challenged provision—'at an election'—is necessarily broader than just the 100-foot area around the polling place for purposes of its prohibited conduct"]).

[8] Moreover, while the preposition "at" can refer to location (*i.e.*, "at a polling place"), it can also refer to time (*i.e.*, "at noon").

During oral argument on Plaintiff's motion for a TRO,[9] Defendants retreated from the broad and sweeping application of this statute *that is required by its plain language*, but they plainly defended—and did not disavow the enforcement of—a narrower construction that is nonetheless unconstitutional:

> THE COURT: This statute does not reach -- is the Attorney General's Office interpretation of this statute that it is not -- that it does not reach proselytization from a pulpit, on a street corner, not at the time of an -- at the time when the votes are being cast?
> MS. SHERMAN: It does not reach or prohibit proselytization *other than at an election*, yes, that would be the Attorney General's position.

(Tr. of Hr'g at 26:17-24)[10] (emphasis added).

> THE COURT: Does the Attorney General's Office have any intent under this statute to prohibit him from being –
> MS. SHERMAN: No, Your Honor. And I would point the Court to I believe it's Affidavit Seven which is the affidavit of Tom Cameron, he's the [head] of our criminal division. He has under oath before a notary public said we have no -- *I can't say there's no intent*. *I have to back up on that*. What I would say is there are no -- they don't know of any threats of prosecution, there are no pending prosecutions and there's no investigation pending.

(Tr. of Hr'g at 28:5-15) (emphasis added).

> THE COURT: Well, he said in his affidavit that he's been doing all of these activities. He's proselytized against abortion --
> MR. HILLER: Correct.
> THE COURT: -- proselytizing against gay marriage.
> MR. HILLER: Correct.

[9] A copy of the transcript has been filed along with this motion.
[10] Ms. Sherman was representing the Michigan Attorney General at the hearing, and Mr. Hiller was representing the Wayne County Prosecutor.

> THE COURT: Whether he's threatened excommunication or dismissal or some other religious disapproval, I'm not sure. But, but what if he did?
> MR. HILLER: *As long as he didn't do it at an election*, he does not violate the statute.
> THE COURT: By "at an election" Prosecutor – Washtenaw County Prosecutor means either at a polling site or some other situs where a voter is voting?
> MR. HILLER: Correct.

(Tr. of Hr'g at 35:5-19) (emphasis added).

> THE COURT: -- *at what point will the Attorney General enforce this statute*?
> MS. SHERMAN: *At an election*.

(Tr. of Hr'g at 45: 22-24) (emphasis added).

> THE COURT: Let me ask you this. Suppose his client goes to the polls on Tuesday and stands in front of the polling places and says don't vote for President Obama because he's a sinner. And if you do, you will be viewed with religious disfavor and you'll go directly to where ever people who are disfavored go. You going to enforce the statute?
> MS. SHERMAN: I can't speak for what -- I can't speak for our criminal division and The Attorney General's Office. *I can't promise they aren't going to enforce something*. I can tell you there are no threats or impending plans to enforce that. We do enforce state law, but it's never been enforced since 1877.

(Tr. of Hr'g at 50:24-51:11) (emphasis added).

> THE COURT: If he stays outside the hundred feet and in subsection (k) he's okay?
> MS. SHERMAN: If, if the Court reads Subsection (1)(e) *in pari materia* with (1)(k) and said it's clear from the statute as a whole as to what the legislature meant was a hundred feet then he's fine beyond the hundred feet. But even if –
> THE COURT: I don't think I have to say it's absolutely pristinely clear, I think I can say that as I'm duty-bound to do, that the statute

> fairly and reasonably can be read that way and that is harmonious with the Constitution.
> MS. SHERMAN: *But I would argue even if it was broader and it was just at an election not the 100 feet, the statute is still narrowly tailored for the kind of potential intimidation that's present here*. But certainly the most clean and plausible way to apply it would be to say if you read the statute as a whole, it's clear that the 100-foot mark from (k) when read as a whole as a reasonable restriction on (1)(e) at an election. But either way the Court -- *the state has not only a compelling interest in protecting against voter fraud, but it also has the narrow tailoring because it only prohibits those particular activities; the commanding, the advising, the imposing the threats upon; and it only does so at the polling location and not at the pulpit or on the sidewalk*. And it only does so during the time, you know at the election, not before the election, not after, not the day before, not the week before and, again, not on the sidewalk. *So I think it's narrowly tailored under either of those potential interpretations*.

(Tr. of Hr'g at 52:4-53:7) (emphasis added).

In sum, despite Defendants' claim that this criminal statute is harmless, their strenuous defense of this provision of Michigan's election law as necessary and narrowly tailored to prevent a "minister's influence and power" over a voter (*see* R-14 [Defs.' Resp.] at 15-16),[11] and their unwillingness to disavow enforcement of a narrower construction plainly demonstrate that the chilling effect on Plaintiff's speech is real and palpable, thus conferring standing.

[11] During oral argument, counsel for the Attorney General stated the following: "I think it's also important that the kind of power and influence that a religious official can wield is for some voters very different in kind then the kind of power that a leaflet wheels. The Supreme Court has said voter intimidation is very hard to detect. I submit that this is a particularly difficult kind of potential intimidation to detect." (Tr. of Hr'g at 31:10-16).

## II. Granting an Immediate Injunction Is Warranted in this Case.

The issuance of an injunction pending appeal is within this court's authority. *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Id.* The relevant factors are: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573; *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (setting forth the standard for issuing a preliminary injunction); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (same).

Typically, the reviewing court will balance these factors, and no single factor will necessarily be determinative of whether or not to grant the injunction. *Connection Distributing Co.*, 154 F.3d at 288. However, because this case deals with a violation of Plaintiff's fundamental constitutional rights, the crucial and often dispositive factor is whether Plaintiff is likely to prevail on the merits. *Id.*

### A. Plaintiff's Strong Likelihood of Success on the Merits.

Plaintiff's First Amendment rights to freedom of speech and the free exercise of religion are protected from infringement by Defendants by operation of the Fourteenth Amendment. *See Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

#### 1. Right to Freedom of Speech.

The freedom of speech is a fundamental right that is essential for the preservation of our republican form of government. As the Supreme Court has long recognized, "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted). Moreover, Supreme Court precedent "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Consequently, there can be no dispute that Pastor Yuille's speech, which expresses his sincerely held religious beliefs, is fully protected under the First Amendment. *See, e.g., Murdock v. Pa.*, 319 U.S. 105, 110 (1943) (holding that "spreading one's religious beliefs" and "preaching the Gospel" are constitutionally protected activities); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J.) (observing that "*private* speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses").

Consequently, MCL § 168.931(1)(e), which imposes criminal penalties on speech, "is a stark example of speech suppression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (noting that "even minor punishments can chill protected speech" and acknowledging that "a law imposing criminal penalties on protected speech is a stark example of speech suppression").

And while the government may enact reasonable, *content-neutral* time, place, and manner regulations of speech if the regulations are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication, *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 45 (1983), *content-based* restrictions on speech, such as MCL § 168.931(1)(e), are subject to *strict scrutiny*. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). That is, the government may restrict speech based on its content when the restriction "is *necessary* to serve a *compelling* state interest and the [restriction] is *narrowly drawn* to achieve that interest." *Id.* (emphasis added). For "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992) (noting that one of the primary evils of content discrimination is that it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"). Thus, content-based restrictions "are

presumptively unconstitutional." *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998).

To determine whether a restriction is content-based, the courts look at whether it "restrict(s) expression because of its message, its ideas, its subject matter, or its content." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). Here, MCL § 168.931(1)(e) specifically targets the "religious" speech of a "priest, pastor, curate or other officer of a religious society" that is made "for the purpose of influencing a voter at an election."[12] Consequently, there is no dispute that this criminal law operates as a content-based restriction on speech. Therefore, the government must justify the restriction with a compelling interest that is narrowly tailored to achieve that interest. As demonstrated in section 2.d. below, the government cannot meet its burden.

[12] In fact, MCL § 168.931(1)(e) is a viewpoint-based restriction on speech, which is the most egregious form of content discrimination. *See Rosenberger*, 515 U.S. at 829. Here, MCL § 168.931(1)(e) does not generally proscribe "secular" speech that is made "for the purpose of influencing a voter at an election," similar to how it generally proscribes "religious" speech made for that purpose. Therefore, under this criminal statute, a person could "advise" a voter "under pain of . . . disapproval" for the "purpose of influencing [the]voter at an election" for any number of nonreligious reasons without fear of prosecution. Consequently, this statute expressly targets a religious viewpoint on similar speech, which is impermissible under the First Amendment. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (prohibiting speech from a religious standpoint was a viewpoint-based restriction).

**2. Right to Free Exercise of Religion.**

Under the First Amendment, the government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626. Indeed, "[t]he principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). In short, when the government burdens religious beliefs, the Free Exercise Clause is implicated.

**a. Plaintiff's Sincerely Held Religious Beliefs.**

It cannot be gainsaid that the judiciary is ill-equipped to sit in judgment on the truthfulness of an adherent's religious beliefs. Consequently, the court's limited competence in this area extends to determining "whether the beliefs professed by [Plaintiff] are sincerely held and whether they are, in his own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965).

Here, there can be no question that Plaintiff's beliefs are sincerely held, rooted in religion, and thus protected by the First Amendment. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (finding that Santeria is a "religion" under the First Amendment and that the practice of animal sacrifice is protected by the Free Exercise Clause).

In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981), the Supreme Court stated that "beliefs rooted in religion are protected by the Free Exercise Clause. . . ." The Court further confirmed that "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. Thus, what matters for a free exercise claim is whether the record is clear that the person asserting the claim acted "for religious reasons." *Id.*

As in *Thomas*, the record in this case is undisputed: Plaintiff is subject to criminal sanctions under MCL § 168.931(1)(e) for engaging in expressive activity "for religious reasons."

**b. The Substantial Burden on Plaintiff's Religious Beliefs.**

In *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), the Court held that the State's denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), the Court held that the State's denial of unemployment compensation benefits because the employee voluntarily terminated his employment with a roll foundry that produced armaments, claiming that the production of armaments was contrary to

his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion. By denying employment benefits because the employee refused, on religious grounds, to work in a plant that produced armaments, the State imposed a substantial burden on the employee's exercise of religion by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); *see also Wis. v. Yoder*, 406 U.S. 205 (1972) (holding that a Wisconsin law compelling school attendance beyond eighth grade impermissibly burdened the religious practices of the Amish).

Indeed, in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), the Court stated, "It is true that this Court has repeatedly held that *indirect coercion or penalties* on the free exercise of religion, *not just outright prohibitions*, are subject to scrutiny under the First Amendment." (emphasis added).

Here, MCL § 168.931(1)(e) imposes criminal sanctions for engaging in religious speech—a burden that is clearly more substantial than the denial of unemployment benefits at issue in *Sherbert* and *Thomas*. Thus, there can be no question that the burden in the form of a criminal penalty for engaging in speech compelled by sincerely held religious beliefs is a burden prohibited by the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520

(striking down law that punished a religious practice); *see generally Free Speech Coal*., 535 U.S. at 244 (acknowledging that "a law imposing criminal penalties on protected speech is a stark example of speech suppression").

**c. *Smith* Does Not Preclude Finding a Constitutional Violation.**

In 1990, the Supreme Court decided *Emp't Div. v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court was faced with the issue of whether the Free Exercise Clause could prohibit the application of Oregon drug laws to the ceremonial ingestion of peyote and thus permit the State to deny unemployment compensation for work-related misconduct based on the use of this drug. The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and *neutral law* of *general applicability* on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879 (quotations and citation omitted) (emphasis added). This was considered by Congress and others to be a departure from the Court's prior precedent. *See, e.g.,* 42 U.S.C. § 2000bb (enacting the Religious Freedom Restoration Act "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened"). "The *Smith* Court, however, did not overrule its prior free exercise decisions, but rather distinguished them." *Fraternal Order of Police Newark Lodge No. 12 v.*

*City of Newark*, 170 F.3d 359, 363 (3rd Cir. 1999) (Alito, J.) (citing *Smith*, 494 U.S. at 881-84).

In 1993, the Court again addressed a free exercise claim in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Court preliminarily found that Santeria is a "religion" under the First Amendment and that the practice of animal sacrifice is protected by the Free Exercise Clause. The Court ultimately held that the law at issue burdened this religious practice in violation of the First Amendment.

In *Lukumi*, the Court stated that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." *Id.* at 546. The Court reviewed several municipal ordinances regulating the slaughter of animals, one of which prescribed punishment for "whoever . . . unnecessarily . . . kills any animal"—a facially neutral ordinance. *Id.* at 537. The Court explained that this ordinance could not be applied to punish the ritual slaughter of animals when the ordinance was not applied to secular killings. The Court stated, "Respondent's application of the ordinance's test of necessity *devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons*. Thus, *religious practice is being singled out for discriminatory treatment*." *Id.* at 537-38 (emphasis added) (quotations and citations omitted).

In short, a law that targets religious conduct or beliefs, even if facially neutral, "is not neutral or not of general application [and] must undergo the most rigorous scrutiny."

As stated by the Supreme Court:

> To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] down' but really means what it says. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.

*Id.* at 546 (internal quotations, punctuation, and citations omitted) (emphasis added).

Here, the plain language of MCL § 168.931(1)(e) targets "priest[s], pastor[s], curate[s], or other officers of a religious society," it places certain restrictions and prohibitions on "excommunication, dismissal or expulsion" from a religious organization, and it places certain restrictions and prohibitions on "religious disapproval." *See Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 367 (Alito, J.) (holding that the police department's policy regarding the prohibition on the wearing of beards was unconstitutional under the Free Exercise Clause because the department made exceptions from its policy for secular reasons, such as medical reasons, but refused to exempt officers whose religious beliefs prohibited them from shaving their beards). Consequently, because MCL §

168.931(1)(e) is not a neutral law of general applicability, it must survive strict scrutiny, which it cannot. As noted above, a regulation that burdens religious beliefs and practices "will survive strict scrutiny only in rare cases"—and this is not one of them.

**d. MCL § 168.931(1)(e) Does Not Survive Strict Scrutiny.**

Having made the threshold showing that MCL § 168.931(1)(e) substantially burdens Plaintiff's religious beliefs and expression, the government must demonstrate that the application of the burden to Plaintiff furthers a compelling state interest and is the least restrictive means of furthering that interest. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546.

As an initial matter, what is the governmental interest "of the highest order" that is advanced by criminalizing Plaintiff's religious speech during an election? Indeed, in this presidential election cycle, there is no shortage of individuals and groups seeking to influence voters.[13] The government, however, makes it a crime to influence Christian voters to vote consistent with God's Word. Nonetheless, Plaintiff, a Christian pastor, cannot, as a matter of conscience, stay silent when a

[13] For example, if you were a member of local gun club, the club's president could dismiss you from the club if you did not vote for the presidential candidate that supported gun owners' rights under the Second Amendment without violating MCL § 168.931. At a minimum, the club president could subject the voter to "pain of . . . disapproval." And the list of similar "secular" examples is practically endless.

member of his congregation is intending to engage in conduct that threatens his soul and threatens to separate him or her from the body of Christ.

Because strict scrutiny applies, Defendants have the heavy burden of justifying the challenged restriction with a *compelling* governmental interest that is *narrowly tailored* to achieve that interest. Here, Defendants cannot carry that burden. Defendants claim that the compelling governmental interest is to prevent coercion and intimidation of voters. More precisely, Defendants claim a compelling interest to prevent "a minister's influence and power" over a voter. (R-14 [Defs.' Resp.] at 15-16). This "influence and power," however, does not come in the form of threats of violence or the offer of a bribe or even the loss of employment. The "influence and power" the government seeks to criminalize is "disapproval" in the form of *religious* speech. That is, the government claims a compelling interest to criminalize *religious* speech that might influence a voter. This is not a compelling interest.[14] Nonetheless, criminalizing the speech of only certain "religious" persons is not narrowly tailored to serve this interest. Indeed, if the person engaging in the very same speech was not a "pastor, priest, curate or other officer of a religious society" the speech would be permissible *even if it had*

[14] *See Burson v. Freeman*, 504 U.S. 191, 219 (1992) (stating that "States must come forward with more specific findings to support regulations directed at intangible 'influence'") (citing *Mills v. Ala.*, 384 U.S. 214, 219 (1966) (striking down a state law that made it a crime to publish an editorial on election day that urged readers to vote a particular way and denouncing the statute as an "obvious and flagrant abridgment" of the First Amendment).

*the effect* (not just the purpose) of influencing a voter. Or, if a person engaged in *secular* speech "at an election" for the purpose of influencing a voter to vote for a certain candidate because the candidate was black, pro-union, or supported gay rights, for example, "under pain of [social] disapproval" (*i.e.*, the voter would be labeled a racists, a scab, or a homophobe if he did not vote for the candidate), that would not violate the statute even though the speech is coercive and intimidating. In short, when the government restricts First Amendment conduct "and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546-47. Moreover, as noted, Michigan law already protects voters from undue influence at the polls without invidiously discriminating against religion. *See* Mich. Comp. Laws § 168.931(1)(k) (prohibiting any person from "solicit[ing] votes in a polling place or within 100 feet from an entrance to the building in which a polling place is located"). Thus, broadly targeting the speech of "religious officials" is not *necessary* to serve the stated governmental interest. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992) (finding that the content-based restriction did not survive strict scrutiny and noting that "[t]he existence of adequate content-neutral alternatives" "'undercuts significantly' any defense of such a statute").

In sum, as the Court concluded in *Lukumi*:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

*Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 547.

Similarly here, MCL § 168.931(1)(e) was "enacted contrary to these constitutional principles" and is thus "void." Therefore, Plaintiff is entitled to an immediate injunction.[15]

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[15] For many similar reasons, MCL § 168.931(1)(e) also violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause "protects against invidious discrimination among similarly situated individuals or implicating fundamental rights." *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (quoting *Scarbrough v. Morgan Cnty. Bd. of Ed.*, 470 F.3d 250, 260 (6th Cir. 2006)). "The threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Scarbrough*, 470 F.3d at 260. "Strict scrutiny is appropriate . . . if a classification 'infringes on a class of people's fundamental rights [or] targets a member of a suspect class.'" *Miller*, 622 F.3d at 538 (quoting *Scarbrough*, 470 F.3d at 260). Here, MCL § 168.931(1)(e) infringes upon fundamental rights and targets individuals based on religion. Consequently, MCL § 168.931(1)(e) must survive strict scrutiny, *see Barr v. Lafon*, 538 F.3d 5554, 576 (6th Cir. 2008) ("[W]e apply strict scrutiny under the Equal Protection Clause to a statute infringing on speech protected by the First Amendment . . . ."), which, as discussed above, it cannot.

**B. Irreparable Harm to Plaintiff without the Injunction.**

Plaintiff will be irreparably harmed without the injunction. The criminal sanctions imposed by MCL § 168.931(1)(e) on Plaintiff's religious speech deprives him of his fundamental First Amendment rights. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." (citing *Elrod*)). Consequently, absent immediate injunctive relief, Plaintiff will be irreparably harmed.

**C. Whether Granting the Injunction Will Harm Others.**

In this case, the likelihood of harm to Plaintiff is substantial because Plaintiff intends only to peacefully exercise his First Amendment rights, and the deprivation of these rights, even for minimal periods, constitutes irreparable injury. *See* sec. B, *supra*.

On the other hand, if Defendants are restrained from enforcing MCL § 168.931(1)(e) against Plaintiff, Defendants will suffer no harm because the exercise of constitutionally protected expression can never harm any of

Defendants' or others' legitimate interests. *See Connection Distributing Co.*, 154 F. 3d at 288.

Moreover, this is not a case in which the injunction will change a ballot, add a candidate, or alter the mechanics of the election. Consequently, there will be no disruption to the election by enjoining Defendants from enforcing this criminal restraint on Plaintiff's speech.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiff shows that his First Amendment rights have been violated, then the harm to others is inconsequential.

**D. The Impact of the Injunction on the Public Interest.**

The impact of the injunction on the public interest turns in large part on whether Plaintiff's constitutional rights are violated by MCL § 168.931(1)(e). As this Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

As noted previously, MCL § 168.931(1)(e), facially and as applied to Plaintiff's religious activity, directly violates Plaintiff's fundamental rights protected by the First and Fourteenth Amendments. Therefore, it is in the public interest to issue the injunction.

## CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this court grant this motion and immediately enter an injunction, enjoining the enforcement of MCL § 168.931(e) prior to the upcoming election on November 6, 2012.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)

/s/ David Yerushalmi
David Yerushalmi, Esq.

*Counsel for Plaintiff-Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by email upon all parties for whom counsel has not yet entered an appearance electronically:

OFFICE OF THE MICHIGAN ATTORNEY GENERAL
Denise C. Barton (P41535)
Assistant Attorneys General
P.O. Box 30736
Lansing, Michigan 48909
(517) 373-6434
bartond@michigan.gov

*Counsel for Defendant-Appellee Schuette*

WASHTENAW COUNTY PROSECUTOR'S OFFICE
Steven Hiller (P36233)
Chief Assistant Prosecutor
200 N. Main Street
P.O. Box 8645
Ann Arbor, Michigan 48107-8645
(734) 222-6620
hillers@ewashtenaw.org

*Counsel for Defendant-Appellee Mackie*

AMERICAN FREEDOM LAW CENTER

s/Robert J. Muise
Robert J. Muise (P62849)