IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PASTOR LEVON YUILLE,

Plaintiff,

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, Michigan,

Defendants.

Case No. 2:12-cv-14652

PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER (TRO) / PRELIMINARY INJUNCTION

Hon. Gerald E. Rosen

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Plaintiff Levon Yuille (hereinafter "Pastor Yuille" or "Plaintiff"), by and through his undersigned counsel, hereby moves this court for an immediate Temporary Restraining Order (TRO) and/or preliminary injunction pursuant to Fed. R. Civ. P. 65 and E.D. Mich. LR 65.1, seeking to enjoin 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.

In support of this motion, Plaintiff relies upon the pleadings and papers of record, as well as his brief filed with this motion and the declaration attached thereto.

For the reasons set forth more fully in Plaintiff's brief, Plaintiff hereby requests that this court temporarily/preliminarily enjoin the enforcement of MCL § 168.931(1)(e), which provides: "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." Anyone who violates MCL § 168.931(1)(e) "is guilty of a misdemeanor" and subject to a fine and/or imprisonment.

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. Consequently, Pastor Yuille seeks to engage in religious speech for the purpose of influencing voters at this upcoming election. However, Pastor Yuille is prohibited from doing so under MCL § 168.931(1)(e).

This Michigan criminal law, facially and as applied to Plaintiff's religious speech activity, violates Plaintiff's rights to freedom of speech and the free exercise of religion protected by the First Amendment, and it deprives Plaintiff and other similarly situated persons of the equal protection of the law guaranteed by the Fourteenth Amendment.

As stated in the attached certificate of service, on October 23, 2012, Plaintiff's counsel caused to be served a copy of this motion and accompanying brief and exhibit on each Defendant, along with the service of the summonses and Complaint. Additionally, a courtesy copy of this motion and accompanying brief and exhibit was sent via email to Ms. Denise Barton, Assistant Attorney General, Office of the Michigan Attorney General, at

bartond.@michgan.gov and Mr. Steven Hiller, Chief Deputy Assistant Prosecutor, Washtenaw County Prosecutor's Office, at hillers@ewashtenaw.org on October 23, 2012.

Moreover, pursuant to E.D. Mich. LR 7.1, on October 23, 2012, Plaintiff's counsel sought but did not receive concurrence from Defendants' counsel in the relief sought by this motion.

RULE 65(b) NOTICE

As set forth in the declaration of Plaintiff Yuille, which is filed as Exhibit 1 in support of Plaintiff's motion, and as argued further in the accompanying brief, MCL § 168.931(1)(e) criminalizes Plaintiff's religious speech and thus causes irreparable harm as a matter of law. *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."). Consequently, Plaintiff will suffer "immediate and irreparable injury . . . before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). Therefore, it would be entirely appropriate for the court to immediately issue the requested TRO prior to the November 6, 2012, presidential election and then hold a hearing on the motion for a preliminary injunction within 14 days. *See* Fed. R. Civ. P. 65(b)(2)(3).

Moreover, Plaintiff's counsel contacted Ms. Denise Barton, Assistant Attorney General, Office of the Michigan Attorney General, on October 22, 2012, and again on October 23, 2012, and Mr. Steven Hiller, Chief Deputy Assistant Prosecutor, Washtenaw County Prosecutor's Office, on October 23, 2012, to inform them of this motion and to seek concurrence in the relief sought, which, as noted previously, was denied.

WHEREFORE, Plaintiff hereby requests that this court immediately grant this motion for a TRO/preliminary injunction.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

/s/ David Yerushalmi
David Yerushalmi, Esq.

Counsel for Plaintiff

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PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER (TRO) / PRELIMINARY INJUNCTION

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ISSUE PRESENTED

Whether MCL § 168.931(1)(e), which criminalizes Plaintiff's religious speech activity based on its content and targets religion and religious practices for disfavored and discriminatory treatment, causes irreparable harm to Plaintiff sufficient to warrant immediate temporary/preliminary injunctive relief.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)

Elrod v. Burns, 427 U.S. 347 (1976)

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995)

R.A.V. v. St. Paul, 505 U.S. 377 (1992)

BRIEF IN SUPPORT OF MOTION

This case challenges the constitutionality of MCL § 168.931(1)(e), facially and as applied to Plaintiff's religious speech activity, which is protected by the First Amendment. Plaintiff seeks an immediate TRO/preliminary injunction, enjoining this criminal law prior to the November 6, 2012 election.

RELEVANT FACTS

Pursuant to MCL § 168.931, "A person who violates 1 or more of [its] subdivisions is guilty of a misdemeanor." MCL § 168.931. 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." MCL § 168.931(1)(e). Anyone who violates this law "is guilty of a misdemeanor" and subject to a fine and/or imprisonment. *See* MCL § 168.931(2). (Compl. at Ex. 1 [Doc. No. 1-1]).

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. (Pastor Yuille Decl. at ¶¶ 2, 3 at Ex. 1).

Pastor Yuille is a Christian minister with a strong desire to bring people back to the Bible by teaching God's pure and unadulterated Word. (Pastor Yuille Decl. at ¶ 4 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. (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. (Pastor Yuille Decl. at ¶¶ 6-10 at Ex. 1).

Thus, pursuant to his sincerely held Christian beliefs, 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. (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, including potential voters who are members of his church. (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, Plaintiff Yuille intends to advises voters, including those voters who are members of his church, 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. (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. (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). (Pastor Yuille Decl. at ¶ 15 at Ex. 1).

ARGUMENT

The factors to be weighed before issuing a TRO or a preliminary injunction are the same. *See, e.g., Workman v. Bredesen*, 486 F.3d 896, 904-05 (6th Cir. 2007); *Southerland v. Fritz*, 955 F. Supp. 760, 761 (E.D. Mich. 1996).

The standard for issuing a preliminary injunction is well established. In *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), the court stated:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Id.; see also Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he

is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). 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*.

I. Plaintiff's Likelihood of Success on the Merits.

The First Amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. Plaintiff's First Amendment rights to freedom of speech and the free exercise of religion are protected from infringement by States and their political subdivisions by operation of the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

A. 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.* 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."[1] 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 B.4. below, the government cannot meet its burden.

B. 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."

[1] In fact, MCL § 168.931(1)(e) is arguably 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 Cornelius*, 473 U.S. at 806 (stating that viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) ("[If speech] fall[s] within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker.").

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.

1. 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."

2. 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 Wisconsin 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").

3. *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.

4. 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, 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.[2] 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 member of his congregation is intending to engage in conduct that

[2] 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.

threatens his soul and threatens to separate him or her from the body of Christ. In short, as the Supreme Court stated, "Where government restricts only conduct protected by the First Amendment 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." *Id*. at 546-47.

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.[3]

[3] 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.

II. Irreparable Harm to Plaintiff without the TRO/Preliminary Injunction.

Plaintiff will be irreparably harmed without the TRO/preliminary 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.

III. Whether Granting the TRO/Preliminary Injunction Will Cause Substantial Harm to 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. II, *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.

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.

IV. The Impact of the TRO/Preliminary Injunction on the Public Interest.

The impact of the TRO/preliminary injunction on the public interest turns in large part on whether Plaintiff's constitutional rights are violated by MCL § 168.931(1)(e). As the Sixth 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 TRO/preliminary injunction.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this court grant this motion.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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/s/ David Yerushalmi
David Yerushalmi, Esq.

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2012, a copy of the foregoing was filed electronically. I further certify that on October 23, 2012, a copy of the foregoing was personally served on Defendants, along with copies of the summonses and the Complaint.

Additionally, I hereby certify that on October 23, 2012, a courtesy copy of the foregoing was sent via email to Ms. Denise Barton, Assistant Attorney General, Office of the Michigan Attorney General, at bartond.@michgan.gov and Mr. Steven Hiller, Chief Deputy Assistant Prosecutor, Washtenaw County Prosecutor's Office, at hillers@ewashtenaw.org.

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