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 REPLY IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER (TRO) / PRELIMINARY INJUNCTION

Hon. Gerald E. Rosen

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Plaintiff Yuille hereby replies to Defendants' response (Doc. No. 14) to his motion for a TRO / preliminary injunction (Doc. No. 6). In sum, Defendants' arguments are wrong on all counts. Indeed, Defendants do not dispute, nor could they, that § 931(1)(e) "is content-based" and thus "*strict scrutiny applies*." (Defs.' Resp. at 14) (emphasis added). Consequently, the court should grant the TRO because this criminal sanction is **not** *necessary* to serve a compelling state interest nor is it narrowly drawn, as discussed further below.

Defendants' claim that the doctrine of laches applies in this case is incorrect. This case does not involve a late attempt to change a ballot or to add a candidate or to alter the mechanics of an election. (*See* Defs.' Resp. at 4-9 [citing cases]). It is a challenge to a law that criminalizes speech. "The Supreme Court has unequivocally admonished that *even minimal infringement* upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (emphasis added). The Court has also acknowledged that "[t]he timeliness of political speech is particularly important." *Elrod v. Burns*, 427 U.S. 347, 374, n.29 (1976) (emphasis added). Thus, Plaintiff will be harmed as a matter of law without the injunction. In comparison, Defendants can point to no real harm if this criminal law is immediately enjoined prior to the upcoming election. On one hand they claim that there are "[n]o known prosecutions under the statute." (Defs.' Resp. at 3). And on the other, they make the absurd claim that enjoining this unconstitutional speech restriction will "create an atmosphere of voter confusion over election advocacy and support." (Defs.' Resp. at 9). As noted, there will be no material change to this election in any way if the TRO is granted. And there will be no need to "train clerks and election inspectors" if the prosecutor, the person responsible for enforcing § 931(1)(e), is enjoined from enforcing this provision. Also, Defendants already have in place laws to protect voters and the integrity of an election that do

not invidiously discriminate against religion. *See* M.C.L. § 168.932(a) (prohibiting "bribery, menace, or other corrupt means or device" that have the purpose of adversely affecting a voter "*at any election* held in this state") (emphasis added); M.C.L. § 168.931(1)(k) (imposing a 100-foot buffer zone around "polling place[s]"); M.C.L. § 168.931(1)(d) (restricting employers from adversely affecting the vote of their employees "*at an election*") (emphasis added).

Defendants' standing and ripeness arguments are similarly misplaced. Standing and ripeness are, quite appropriately, 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 standing is 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."); *King Enters. v. Thomas Twp.,* 215 F. Supp. 2d 891, 906 (E.D. Mich. 2002) (noting that the standing rules are relaxed in the First Amendment context). Moreover, the chilling effect of § 931(1)(e) is sufficient to confer standing in this case. *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,* 427 U.S. at 373 (holding that even minimal infringement

upon First Amendment values constitutes irreparable injury sufficient to justify review). And contrary to Defendants' claim,[1] when a criminal statute such as § 931(1)(e) chills a citizen's First Amendment rights, the citizen need not wait for some adverse consequence before challenging it. *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."); *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."). Indeed, the fact that Plaintiff's speech subjects him to punishment under § 931(1)(e) is alone sufficient to confer standing. *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).

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. (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*

[1] (*See* Defs.' Resp. at 13 [incorrectly asserting that "[u]ntil he is threatened with prosecution for engaging in prohibited behavior at the polls, Pastor Yuille's claim is not ripe"]).

speech that might influence a voter. This is not a compelling interest.[2] 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 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. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). Moreover, as noted, Michigan law already protects voters from undue influence at the polls without invidiously discriminating against religion. *See* M.C.L. § 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'

[2] *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).

any defense of such a statute"). And this is particularly true in light of the apparent lack of convictions under this criminal provision.

Finally, Defendants invite this court to adopt a tortured reading of the statute so as to find it constitutional. This invitation must be rejected. As an initial matter, how does limiting 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" (Defs.' Resp. at 16) save this criminal statute from constitutional challenge? It doesn't. And why should this court rewrite the statute for the Michigan legislature when the legislature could have clearly defined the geographical limitations for such prohibited conduct if it wanted to? Indeed, the court shouldn't. If the legislature intended to limit the location of the prohibited conduct as Defendants suggest it certainly knew how to do so. *See* M.C.L. § 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); M.C.L. § 168.932(h) (prohibiting certain conduct of "[a] person *present* while an absent voter is voting an absent voter ballot") (emphasis added). 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* 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"]).

In sum, Defendants cannot defend the indefensible. The court should grant the TRO and immediately enjoin this patently unconstitutional provision of Michigan's election law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 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 ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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