STATE OF MICHIGAN
IN THE 19TH DISTRICT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs,

Case No. _____

vs.

Hon. Mark W. Somers

TERRY JONES a/k/a "PASTOR JONES," STEPHANIE SAPP, WAYNE SAPP and ALL ASSOCIATES AND CONFEDERATES, INCLUDING ALL MEMBERS OF THE DOVE OUTREACH CENTER,

Defendants.
_____/

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_____/

***AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN**

The American Civil Liberties Union of Michigan (ACLU) vehemently disagrees with the content of Pastor Jones' and Mr. Sapp's speech. However, if the First Amendment has any meaning, it is that the government cannot suppress the free speech because it – or anyone else – disagrees with the speech. As the Supreme Court recently held, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even

hurtful." *Snyder v Phelps*, 131 S Ct 1207, 1219 (2011) (citations and quotations omitted). Because these important constitutional concerns have not been adequately raised during the process of these proceedings, we feel it is crucial to provide the court with analysis.

STATEMENT OF FACTS

In the months leading up to the 10th anniversary of the September 11th attacks, Pastor Terry Jones ("Pastor Jones"), the leader of a small congregation in Gainesville, Florida called the Dove World Outreach Center, announced that he would hold an event to commemorate the attacks and invited people to join him in burning copies of the Qur'an, the holy book of Muslims.[1] Although Pastor Jones did not ultimately burn the Qur'an, his actions and the actions of individuals inspired by him led to protests around the world, some with fatal consequences.[2] In March 2011 Pastor Jones held an "International Judge the Koran Day." The event concluded with Wayne Sapp, a compatriot of Pastor Jones, burning a copy of the Qur'an. Pet Comp, *People v Terry Jones*, et al, Case Nos 11S0229, 11S0231 (19th Dist Ct, Apr 15, 2011).

On April 9, 2011, a group associated with Pastor Jones submitted a permit request to the City of Dearborn to hold a demonstration "[p]rotest[ing] Sharia and Jihad" in front of the Islamic Center of America, located at 19500 Ford Road in Dearborn, Michigan. *Id*. at 5. The application stated that only two people were anticipated to attend the demonstration and Mr. Jones and Mr. Sapp have said that the demonstration would be peaceful. On April 15, 2011, Wayne County Prosecutor Kym L. Worthy filed a

[1] Damein Cave, *Far From Ground Zero, Pastor Is Ignored No Longer*, NY TIMES, Aug 25, 2010, *available at* http://www.nytimes.com/2010/08/26/us/26gainesville.html.
[2] Enayat Najafizada and Rod Nordland, *Afghans Avenge Florida Koran Burning, Killing 12*, NY TIMES, Apr 1, 2011, *available at* http://www.nytimes.com/2011/04/02/world/asia/02afghanistan.html.

complaint in the 19th District Court of the State of Michigan "To Institute Proceedings To Prevent Crime" under MCL 772.1 *et. seq.*, commonly known as the "peace bond" statute, to compel Pastor Jones and Wayne Sapp ("Mr. Sapp"), the defendants in the case, to appear before the court. Pet Comp, *People v Terry Jones*, et al, Case Nos 11S0229, 11S0231 (19th Dist Ct, Apr 15, 2011).

The peace bond statute may only be invoked when "a person has threatened to commit an offense against the person or property of another." MCL 772.2. Ms. Worthy claims that Mr. Jones and Mr. Sapp are planning to incite a riot and therefore the court should set a bond in the amount necessary to cover the amount of money it will cost the City of Dearborn to police the event. A trial is being held today to determine whether defendants are likely "breach the peace." MCL 772.4(2). If Mr. Jones and Mr. Sapp are found likely to breach the peace, the government will likely ask the court to require them to either pay the peace bond or be placed in the county jail. MCL 772.6.

ARGUMENT

I. THE GOVERNMENT CANNOT SUPPRESS SPEECH BY MAKING A PERSON PAY A BOND BASED ON THE COST OF POLICE SERVICES NECESSARY TO ADDRESS THE ANTICIPATED ACTIONS OF OTHERS.

It is a basic principle of First Amendment jurisprudence that one may not be charged a price to engage in expressive activity because others may react negatively to that expressive activity.

A. Charging a Demonstration Fee Based on the Anticipated Negative Reaction to the Message Conveyed in the Demonstration Constitutes an Unconstitutional Prior Restraint of Free Speech.

In *Forsyth County v Nationalist Party*, the Supreme Court held that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." 505 US 123, 34-135 (1992). In *Forsyth*, the Court considered the constitutionality of an ordinance that allowed a local administrator to assess a fee for demonstrations or parades depending on how much the administrator estimated it would cost to maintain public order during the event.

Following a series of racially charged demonstrations, where racial slurs were freely shouted and projectiles were thrown, *id*. 124-126, Forsyth County passed an ordinance authorizing administrators to charge individuals who wished to demonstrate a fee based on such considerations as costs to the county in policing the event. *Id*. at 131. After being assessed a $100 fee for a permit to demonstrate in opposition to Martin Luther King, Jr.'s birthday, the Nationalist Movement, sued to enjoin Forsyth County from "interfering with the Movement's plans." *Id.*

Striking down the ordinance, the Supreme Court explained that any requirement that a person pay a fee as a condition of expressing themselves is a "prior restraint" on speech, which contains a "heavy presumption" of invalidity. *Id.* at 130. The Court noted that in determining how much to charge protestors under the ordinance, officials must measure the amount of hostility likely to be caused by the speech based on whether the message was unpopular. *Id.* at 134. Accordingly, the scheme was struck down as an improper content-based regulation: "This Court has held time and again: 'Regulations

which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" *Id.* at 135 (citing cases).

B. Requiring Pastor Jones to Pay a Peace Bond for Estimated Police Costs Based on the Anticipated Reaction to His Unpopular Message is an Unconstitutional Prior Restraint of his Free Speech.

In the present case, the Wayne County Prosecutor's Office is attempting to require protesters to pay a bond for anticipated police costs based on the reaction to the protesters' unpopular message. However, as made clear in *Forsyth*, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." 505 US at 134. In a free country, a person cannot be penalized because of their controversial message. As stated in *Forsyth*, "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-135. To the contrary, "the fact that an opinion gives offense may be precisely a reason for giving it constitutional protection." See *Fed Commc'n Comm'n v. Pacifica Found.,* 438 US 726, 745 (1978).

II. A PEACE BOND MAY NOT BE USED TO PREVENT THE PEACEFUL EXPRESSION OF ONE'S POLITICAL OR RELIGIOUS VIEWS, EVEN IF THE VIEWS ARE CONTROVERSIAL AND UNPOPULAR.

Mr. Jones and Mr. Sapp are planning a small demonstration on public land across the street from a Dearborn mosque to protest Islam. While their views may be offensive and vile to the ACLU and most Americans, there is no doubt that they are engaged in core political speech. Furthermore, as established in *American-Arab Anti-Discrimination Committee v Dearborn,* 418 F3d 600, 608 (CA 6, 2005), small groups of individuals peacefully protesting on sidewalks or the public right of way adjacent to public streets do not need a permit to express their views. While the city may prefer that the protest be held miles away from the mosque, Mr. Jones and Mr. Sapp have decided that the most effective venue for their message is the largest mosque in the United States. Generally,

"one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v State of New Jersey*, 308 US 147, 163 (1939). Additionally, the Supreme Court has held that the place a message is communicated can be important to message and therefore may have constitutional significance. See *City of Ladue v Gilleo*, 512 US 43, 56 (1994).

It appears from the government's motion that the main concern with the protest across the street from the mosque is not that the Mr. Jones and Mr. Sapp are planning to initiate violence or incite their cohorts to engage in immediate violence. Rather, the government seeks to suppress their speech based on the reaction of others. Use of the "Peace Bond" statute, MCL 772.1 *et seq.* for this purpose is inappropriate for at least two reasons. First, the statute, by its own terms, does not apply to the facts of this case. Second, even if the statute was intended for situations such as these, it would be unconstitutional as applied.

A. The Peace Bond Statute Cannot Be Used to Suppress Speech in this Case Because Mr. Jones and Mr. Sapp Have Not "Threatened To Commit an Offense Against the Person or Property of Another."

To invoke the peace bond process under MCL 772.2, the complaint must show that "a person has threatened to commit an offense against the person or property of another." However, there is nothing in the petition to suggest that Mr. Jones or Mr. Sapp has threatened to commit any offence against anyone's person or property. To the contrary, the attachment to the petition suggests that they wish to engage in a 2-person peaceful protest on the public property. Such protests are clearly protected by the First Amendment, even if the message conveyed in controversial. *Snyder*, 131 S Ct at 1219.

In its verified complaint, the government suggests that the Mr. Jones and Mr. Sapp are "embarked on a threatened course of action" to commit the crime of incitement to riot. Yet, the United States Supreme Court has made it clear that the government cannot punish inflammatory speech under an incitement-to-riot statute unless it is directed to inciting and likely to incite imminent violence; even speech that broadly advocates violence at some unspecified time in the future is protected. *Brandenburg v Ohio*, 395 US 444, 449 (1969). There is no evidence that Mr. Jones and Mr. Sapp are planning to physically attack anyone, vandalize the mosque or commit any act that remotely constitutes incitement to riot.

If the government is suggesting that Mr. Jones and Mr. Sapp could be somehow be inciting a riot or breaching the peace because of the reaction of others, the U.S. Supreme Court has explicitly rejected such reasoning. "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence." *Brown v State of Louisiana*, 383 US 131, 133 n1 (1966). Otherwise the counter protestors would have a "heckler's veto" over constitutionally protected speech. *Id*.

Amicus is unaware of any case where the peace bond statute has been used to suppress a peaceful demonstration. The only case relied upon by the prosecutor's office, *Dearborn Heights v Bellock*, 17 Mich App 163 (1969), involves a case of loud parties and does not even address MCL 772.1 *et seq*. There is good reason for this dearth of authority supporting the prosecutor's attempted use of the peace bond statute: it was never intended to serve as a prior restraint on free speech.

B. Even If the Peace Bond Statute Was Intended To Be Used To Restrain Political Speech, Application of the Statute To the Facts of this Case Would Be Unconstitutional.

For many of the reasons set forth above, even if there were certain circumstances that would justify using the peace bond statute to suppress speech, it would be unconstitutional to apply it in this circumstance. First, under Forsyth, supra, the government cannot set a fee as a condition of speaking based on the reaction of others; such action would constitute a content-based prior restraint on speech. Second, the speech at issue in this case is protected by the First Amendment and therefore cannot be punished in any way under state law as "an offense against person or property" or a "breach of the peace." *Brandenburg*, 395 US at 449. Finally, the state cannot impose a "heckler's veto" on the speech based on the speculation on how others might react to the message. *Brown*, 131 US at 133 n1 .

CONCLUSION

Amicus Curiae ACLU Fund of Michigan urges this court to deny the Wayne County's Prosecutor's unconstitutional attempt to use the peace bond statute as a prior restraint on constitutionally protected, albeit offensive, speech.

Respectfully submitted,

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With assistance from ACLU of Michigan
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