UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR LAVIN, *et al.*, Plaintiffs v. **JENNIFER BRUNNER,** In Her Official Capacity as Ohio Secretary of State Defendant	CASE NO. 1:10-cv-01986 JUDGE: MAGISTRATE JUDGE:

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Arthur Lavin, M.D., *et al.* respectfully move this Court for a preliminary injunction that enjoins Defendant, pending disposition of this action on its merits, from enforcing Ohio Revised Code Section 3599.45. A memorandum in support and other supporting materials are attached.

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. ISSUE PRESENTED

Plaintiffs are entitled to a preliminary injunction that enjoins Defendant from enforcing Ohio Revised Code § 3599.45. That statute flatly bans candidates for Ohio Attorney General or county prosecuting attorney from accepting any campaign contributions whatsoever from Ohio Medicaid providers. Because it advances no sufficiently important governmental interest and is not closely drawn, the ban violates Plaintiffs' rights to free speech and free association under the First and Fourteenth Amendments of the United States Constitution.

II. INTRODUCTION

At issue in this case is a remarkable statute that makes it a crime for thousands of law abiding citizens to contribute to candidates for certain public offices. Plaintiffs are physicians, and number among the more than 64,000 healthcare providers who treat indigent Ohioans under the federal Medicaid program.[1]

Each Plaintiff is knowledgeable about, and deeply vested in, the public-policy debate surrounding the delivery of healthcare, in Ohio and nationwide. Each has strong opinions about providing services to the most disadvantaged of citizens. And in keeping with their beliefs, each has chosen to support a particular candidate for Ohio Attorney General, Richard Cordray, because his views reflect their own regarding healthcare reform.

But not one of the Plaintiffs can contribute to the campaign of their chosen candidate for attorney general—nor, for that matter, to the campaign of any candidate for county prosecuting attorney—because under Ohio Revised Code § 3599.45, it is a first-degree misdemeanor for candidates to accept Plaintiffs' contributions.

It is beyond question that the act of contributing to a political candidate is a form of political speech, and a form of political association, protected by the First Amendment. The state is not free

[1] *See* Health Policy Institute of Ohio, *Ohio Medicaid Basics 2009,* at 2, *available at* http://www.healthpolicyohio.org/pdf/MedicaidBasics_2009.pdf, last accessed Sept. 3, 2010 (figure includes not only physicians, but wide array of healthcare providers including corporations, which themselves have a First Amendment right to engage in political activity).

to prohibit such contributions at will. Rather, it must demonstrate that restrictions on campaign spending are closely drawn to advance a sufficiently important state interest that justifies such restrictions. The outright ban at issue cannot meet that test: it is neither closely drawn to advance, nor does it in fact advance, any important governmental interest, and as such, cannot survive its encounter with the First Amendment.

Ohioans will go to the polls to elect an attorney general in eleven weeks. For Plaintiffs to have the benefit of knowing that their campaign contributions helped their candidate at the polls, the contested statute must be enjoined at once. To permit the restrictions at bar to persist even a little longer will be to rob these Plaintiffs, and many concerned and politically engaged physicians like them, of the fundamental right to have a say in their democracy.

III. THE PARTIES

Each Plaintiff is a physician licensed to practice medicine in and by the State of Ohio. Each contracts with the Ohio Department of Job and Family Services to provide goods and services to eligible patients under the Medicaid Program. And each, by virtue of his or her own experience in the practice of medicine, has come to form strong opinions regarding the provision of care for the indigent and the urgent need for healthcare reform in America.

Plaintiffs have experienced first-hand the frustrations that a broken health-insurance system have visited on patients who require access to quality medical care without interference from insurers. They object to the efforts of various politicians to undermine and derail the healthcare reforms that Congress and the Obama administration enacted, and particularly object to the efforts of some politicians, including a handful of state attorneys general, to challenge those reforms in the courts.[2]

[2] As of this writing, 21 states have filed suit, contesting the implementation of various aspects of the administration's healthcare reforms—enacted by Congress as the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)—Virginia, in an action pending in the Eastern District of Virginia,

Mike DeWine, who is a candidate for Ohio Attorney General, has promised to add Ohio to the list of states contesting healthcare reform in the courts if he is elected.[3] For this reason, the Plaintiffs oppose his candidacy.

Plaintiffs, by contrast, were impressed with the refusal of the incumbent attorney general, Richard Cordray, to join in these suits, and support his position that the recently enacted federal healthcare reforms are not only constitutional, but also represent sound public policy that is vital to our national welfare, and will benefit millions of Ohioans.

For these reasons, Plaintiffs hoped to contribute to the reelection campaign of General Cordray, but they have been thwarted in doing so by the provisions of Section 3599.45, which we will discuss in detail shortly.

The enforcement of that statute—and the state's election laws generally—falls to the Defendant, Ohio Secretary of State Jennifer Brunner ("the Secretary").

The Secretary is the chief elections officer of the state under Revised Code § 3501.04, and in that capacity is both authorized to enforce, and charged with enforcing, the state's election laws. Ohio law requires her to investigate violations of election laws and to refer those violations for prosecution. She is sued here in her official capacity only for purposes of obtaining declaratory and injunctive relief, in particular to bar enforcement of the contested statute.

IV. STATEMENT OF FACTS

In July 2010, lead Plaintiff, Arthur Lavin, M.D., contacted the campaign office of General

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and twenty other states in an action pending in the Northern District of Florida. *See* Warren Richey, *Attorneys general in 14 states sue to block healthcare reform law*, CHRISTIAN SCI. MONITOR, Mar. 23, 2010, *available at* http://www.csmonitor.com/USA/Justice/2010/0323/Attorneys-general-in-14-states-sue-to-block-healthcare-reform-law; John Schwartz, *Virginia Suit Against Health Care Law Moves Forward*, N.Y. TIMES, Aug. 2, 2010, *available at* http://www.nytimes.com/2010/08/03/us/03virginia.html.

[3] Mike DeWine, *Should Ohio join attempt to overturn health-care law? Yes.,* COLUMBUS DISPATCH, Apr. 1, 2010.

Cordray, to inquire as to how Plaintiffs might donate to support the campaign.[4] Plaintiffs were dismayed to learn that their contributions would not be accepted, because they were serve patients insured by the Medicaid program.[5] In fact, the Cordray campaign's website explicitly warns that the campaign will not accept donations from Medicaid providers.[6]

The reason for the refusal, the website explains, is found in the contested statute:

> The Cordray Committee is not permitted to accept campaign contributions from a provider of services or goods under contract with the department of job and family services pursuant to the Medicaid program of Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, or from any person having an ownership interest in the provider.[7]

To understand the contribution ban—and why it is improper under the First Amendment—it is necessary to understand a bit about the Medicaid program, its administration in Ohio, and the history surrounding Section 3599.45's adoption.

A. The Medicaid program

In July 1965, Congress amended the Social Security Act of 1935 to add Title XIX, which allows federal appropriations to be made to fund lump-sum disbursements to the states for the purpose of providing medical assistance and rehabilitation to indigent, blind, disabled and aged individuals, their dependent children and their families. This is known as the Medicaid program.[8]

Section 1902 of the Medicaid Act requires states that participate in the program to have in

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[4] *See* Declaration of Arthur Lavin, M.D. at ¶ 7 (attached as Ex. 1).

[5] *Id.* at ¶ 8.

[6] *See* https://donate.cordrayforohio.com/page/contribute/contribute, last accessed Aug. 19, 2010. A printed copy of the page displayed at that URL is attached as Ex. 2.

[7] *Id.*

[8] *See* Social Security Amendments of 1965, Pub. L. No. 89-97, sec. 121(a), Title XIX, 79 Stat. 343, 343-52 (1965) (codified as amended at 42 U.SC. § 1396-1, §§1396a-d) (2010)).

place fiscal procedures designed to ensure that the program is administered efficiently, and that contractors who provide services funded by the program are subject to certain standards of accountability and oversight.[9]

In Ohio, the Medicaid program generally is administered by the Ohio Department of Job and Family Services ("ODJFS").[10] Providers become part of the Medicaid program by entering into agreements with ODJFS, subject to certain eligibility requirements.[11] ODJFS has authority to set out rules, consistent with state and federal law, establishing the conditions, method, and amount of reimbursement to providers, as well as procedures for enforcing those rules, including procedures for corrective-action plans, or sanctions, for those who violate the rules. [12] It is to ODJFS—not the attorney general or the county prosecuting attorneys—that Medicaid providers submit their claims for reimbursement,[13] their cost reports,[14] and, where required, their requests for prior authorization.[15]

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[9] *See id.* § 1902, 79 Stat. at 344-48 (codified at 42 U.S.C. § 1396a(a)(4)(2010)).

[10] Ohio Rev. Code Ann. § 5111.01 (West 2010).

[11] *See, e.g.,* Ohio Admin. Code § 5101:3-1-17; § 5101:3-1-17.2; Ohio Rev. Code Ann. §§ 5111.22; 5111.21 (West 2010).

[12] Ohio Rev. Code Ann. § 5111.02; Ohio Admin. Code § 5103:3-1-60 (specifying reimbursement requirements) & Appx. DD (fee schedule for fee-for-service providers); *see also* Ohio Rev. Code Ann. §§ 5111.021; 5111.221 (providing that ODJFS shall make best efforts to calculate payment rates by set date every year). *See generally* Ohio Admin. Code § 5101:3 *et seq.* (setting out rules, including for billing, reimbursement, and eligibility, for various provider services).

[13] *See, e.g., id.* § 5111.021; Ohio Admin. Code §§ 5101:3-1-19 *et seq.* (claims submissions); 5101:3-3-39.1 (claim submissions for nursing facilities); 5101:3-26-09 (managed-care-plan reimbursements); 5101: 3-9-05 (pharmacy reimbursements); 5101:3-2-04 (certain hospital-provided services).

[14] *See, e.g.,* Ohio Admin. Code §§ 5101:3-2-23 (cost reports); 5101:3-3-20 (cost reports of nursing facilities); 5101:3-26-09(6)(a) (cost reports of managed-care plans).

[15] *See id.* § 5101:3-1-31.

ODJFS has broad authority to recover Medicaid overpayments.[16] That includes deducting from payments any amount that the provider owes the state, and conducting final fiscal audits under federal law.[17] ODJFS also conducts reviews of the Medicaid program, including site inspections and interviews with providers, to determine any program violations.[18] Upon adjudication, ODJFS can refuse to enter into, suspend, or terminate a provider agreement.[19] Where judgment entry or fraud conviction based on Ohio Rev. Code § 109.85 has been made, ODJFS may terminate without adjudication.[20]

Finally, ODJFS is required to have in place its own program to prevent and detect fraud, waste, and abuse.[21] When it detects fraud, the Department may subject the provider to audit and review, [22] including putting a provider's claim payments on "hold and review."[23] ODJFS is also required to prepare an annual report detailing the Department's efforts to minimize fraud, abuse, and waste in the Medicaid program, to be submitted to the Governor and General Assembly and made available to the public.[24]

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[16] *See, e.g.,* Ohio Rev. Code § 5111.061; *see also id.* § 5111.914 (providing that state agencies contracting with ODJFS may commence action to recover overpayment on the department's behalf).

[17] *Id.* § 5111.021(C) and (D).

[18] *See, e.g., id.* § 5111.10; *see also id.* § 5101.37 (general-investigative authority).

[19] *Id.* § 5111.06(B) (citing Chapter 119 on administrative procedures); *see also* § 5111.52 (rules for terminating agreement with nursing facilities).

[20] *Id.* § 5111.06(D)(4) (citing 5111.03(C) and (F)).

[21] Ohio Admin. Code § 5101:3-1-29.

[22] *Id.*

[23] Ohio Admin. Code § 5101:3-1-27.1.

[24] Ohio Rev. Code Ann. § 5111.092.

B. The Contested Statute: Ohio Rev. Code § 3599.45

Ohio has a comprehensive scheme for regulating campaign finances, the full breadth of which it is not necessary to consider here. For our purposes, it is sufficient to note that the contested statute imposes a unique outright ban on political contributions:

> 3599.45 Contribution from Medicaid provider
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> (A) No candidate for the office of attorney general or county prosecutor or such a candidate's campaign committee shall knowingly accept any contribution from a provider of services or goods under contract with the department of job and family services pursuant to the medicaid program of Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, or from any person having an ownership interest in the provider.
>
> As used in this section "candidate," "campaign committee," and "contribution" have the same meaning as in section 3517.01 of the Revised Code.
>
> (B) Whoever violates this section is guilty of a misdemeanor of the first degree.[25]

Like many states, Ohio imposes general restrictions on the amount that can be contributed to a given political candidate. Individuals over the age of seven may contribute no more than $10,000 to a candidate for a particular statewide office.[26] Adjusted for inflation, that limit, as of this writing, is $11,395.56.[27] Ohio also bans political contributions from a small number of discrete groups, including children under the age of seven, foreign nationals, and certain state employees

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[25] *Id.* § 3599.45 (West 2010).

[26] *Id.* § 3517.102.

[27] Ohio Rev. Code Ann. § 3517.104(A); http://www.sos.state.oh.us/sos/upload/candidates/2009limitadjustment.pdf, last accessed on Aug. 13, 2010; *see also* http://www.sos.state.oh.us/SOS/Campaign%20Finance/CFGuide/Resources/limchart.aspx, last accessed on Aug. 13, 2010.

who would be employed by, or in the same state agency or office as, the candidate.[28] In addition, as described in further detail below, Ohio has rules regarding the award of contracts to those who have contributed to public officials with responsibility to award such contracts.

But what Ohio does not do—other than in the contested statute—is otherwise prohibit virtually an entire class of professionals (in this case, physicians) from contributing to candidates for an elected office.[29] And while every state regulates the conduct of its own elections, and every state participates in the Medicaid program,[30] no state—besides Ohio—limits or bans the political contributions that Medicaid providers may make based solely upon their status as Medicaid providers.[31]

In this light, one might expect the contested statute to have been enacted in response to a pattern of corruption or abuse involving attorneys general and county prosecuting attorneys that caused the General Assembly to create a specific, harsh remedy for a local and significant problem.

It was not.

The Ohio General Assembly enacted Section 3599.45 in 1978, as part of a bill that enacted

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[28] *See* Ohio Rev. Code Ann. §§ 3517.13(W)(1) (foreign nationals), 3517.102(B)(1)(c) and (C)(1)(a)(I) (children under seven), and 3517.092(B)(2) (state employees). Contributions by foreign nationals to candidates for state office are also prohibited under 2 U.S.C.A. § 441e(b).

[29] In 2008, there were about 38,000 physicians practicing in Ohio. *See Kaiser State Health Facts*, http://www.statehealthfacts.org/profileind.jsp?cmprgn=1&cat=8&rgn=37&ind=429&sub=100, last accessed Sept. 3, 2010. While we have been unable to ascertain with precision what fraction provide services under Medicaid, in 2008, there were more than 64,000 Medicaid providers of all sorts in Ohio. *See* www.healthpolicyohio.org/pdf/MedicaidBasics_2009.pdf, last accessed August 24, 2010.

[30] *See* National Conference of State Legislatures, *Medicaid Update*, http://www.ncsl.org/default.aspx?tabid=14518, last accessed Aug. 20, 2010 (all states participate in Medicaid).

[31] *See generally* Edward D. Feigenbaum and James A. Palmer, *Campaign Finance Law 2002* (Federal Election Commission 2002), *available at* http://www.fec.gov/pubrec/cfl/cfl02/cfl02.shtml ("Feigenbaum and Palmer, *Campaign Finance Law 2002*").

certain statutes—Ohio Revised Code Sections 5111.03 and 109.85—prohibiting Medicaid fraud. The three statutes together constituted a single act, Amended Senate Bill 159.[32]

The primary purpose of that bill was to "provide for the recovery of . . . excess payments under the medicaid program."[33] The bill followed on the heels of legislation passed by Congress in October 1977, entitled the Medicare-Medicaid Anti-Fraud and Abuse Amendments (P.L. 95-142) to the Social Security Act ("Amendments").[34]

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[32] 1978 Laws of Ohio 434, enacting Am. S. B. 159, 112th Gen. Assemb, 2d. Sess. (Oh 1978), (codified as amended at Ohio Rev. Code Ann. §§ 5111.03, 109.85, 3599.45) (attached as Ex. 3). Section 5111.03 was originally codified as Revised Code Section 5101.511.

[33] Ohio Senate Journal, 112th Gen. Assemb., 1st Sess., at 187, 192, 1278 (1977) (all journal minutes attached as Ex. 4); Ohio House Journal, 112th Gen. Assemb., 2d Sess., at 2418, 2556 (1978), Ex. 4.

[34] *See* Legislative Service Commission, Bill Analysis for Am. S.B. 159, 112th Gen. Assemb., at 1 (1978) ("S.B. 159 Bill Analysis") (attached as Ex. 5). These Amendments and subsequent federal regulations set forth standards for the establishment and operation of State Medicaid Fraud Control Units and provided 90% federal funding for the activities of qualifying state units in combating Medicaid provider fraud. *Id.*

Toward that end, Senate Bill 159 proposed to add two new sections to the Revised Code. The first of these, now codified at Section 5111.03, prohibited Medicaid fraud itself, and provided sanctions—civil penalties and the termination of provider contracts—for those convicted of such fraud.[35] The substantive restrictions provide as follows:

> No provider of services or goods contracting with the department of job and family services pursuant to the medicaid program shall, by deception, obtain or attempt to obtain payments under this chapter to which the provider is not entitled pursuant to the provider agreement, or the rules of the federal government or the department of job and family services relating to the program. No provider shall willfully receive payments to which the provider is not entitled, or willfully receive payments in a greater amount than that to which the provider is entitled; nor shall any provider falsify any report or document required by state or federal law, rule, or provider agreement relating to medicaid payments.[36]

Senate Bill 159 also enacted Section 109.85, which authorizes the Attorney General to investigate and prosecute cases involving Medicaid fraud, or to refer them for prosecution to prosecutors in the county where the alleged violations took place:

> (A) Upon the written request of the governor, the general assembly, the auditor of state, the director of job and family services, the director of health, or the director of budget and management, or upon the attorney general's becoming aware of criminal or improper activity related to Chapter 3721. and the medical assistance program established under section 5111.01 of the Revised Code, the attorney general shall investigate any criminal or civil violation of law related to Chapter 3721 of the Revised Code or the medical assistance program.
>
> (B) When it appears to the attorney general, as a result of an investigation under division (A) of this section, that there is cause to prosecute for the commission of a crime or to pursue a civil remedy, the attorney general may refer the

[35] *See* Ohio Rev. Code Ann. § 5111.03(B) and (C) (originally 5101.511(B) and (C)).

[36] Ohio Rev. Code Ann. § 5111.03(A) (West 2010).

> evidence to the prosecuting attorney having jurisdiction of the matter, or to a regular grand jury drawn and impaneled pursuant to sections 2939.01 to 2939.24 of the Revised Code, or to a special grand jury drawn and impaneled pursuant to section 2939.17 of the Revised Code, or the attorney general may initiate and prosecute any necessary criminal or civil actions in any court or tribunal of competent jurisdiction in this state. When proceeding under this section, the attorney general, and any assistant or special counsel designated by the attorney general for that purpose, have all rights, privileges, and powers of prosecuting attorneys. The attorney general shall have exclusive supervision and control of all investigations and prosecutions initiated by the attorney general under this section. The forfeiture provisions of Chapter 2981 of the Revised Code apply in relation to any such criminal action initiated and prosecuted by the attorney general.
>
> (C) Nothing in this section shall prevent a county prosecuting attorney from investigating and prosecuting criminal activity related to Chapter 3721 of the Revised Code and the medical assistance program established under section 5111.01 of the Revised Code. The forfeiture provisions of Chapter 2981 of the Revised Code apply in relation to any prosecution of criminal activity related to the medical assistance program undertaken by the prosecuting attorney.[37]

Together, these provisions create the state-law offense of Medicaid fraud, and give the Attorney General and county prosecuting attorneys the power to investigate and prosecute those offenses, just as they have the power to investigate and prosecute a plethora of other crimes under Ohio law.

These provisions together made up the whole of Senate Bill 159 when it passed the Ohio Senate.[38] The campaign-contributions ban at issue here was added in the Ohio House, where it was

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[37] Ohio Rev. Code Ann. § 109.85 (West 2010).

[38] Am. S.B. 159, 112th Gen. Assemb., 1st Sess. (Oh 1977) (bill as passed by Senate), Ex. 6; *see* Ohio Senate Journal at 187, 192, 1229-30, 1278-80 (1977), Ex. 4.

ultimately adopted by a margin of just one vote.[39] Nothing in the contested statute's history suggests that it was adopted in the face of a pattern of corruption in which the attorney general, or prosecuting attorneys, were found or even alleged to have turned blind eyes to campaign contributors' Medicaid fraud. Quite the opposite.

Ohio Senator Harry Meshel was the principal Senate sponsor of Am. S. B. 159, and recalls no underlying scandal or crisis involving Medicaid fraud going uninvestigated or unpunished by public officials due to corrupt relationships.[40]

Rather, he recalls the provision being added in its larger context: a game of "one-upsmanship" by both Democrats and Republicans in which they would attempt to "outdo one another" to enact ever-stricter ethics requirements involving public officials.[41] According to Meshel, the restrictions adopted in Section 3599.45 were not enacted in response to any particular episode of actual corruption or the appearance of corruption involving attorneys general or county prosecutors and Medicaid providers.[42]

While the statute's legislative history does not alter its plain-language contribution ban, it does bear directly—as we shall soon see—upon the question of whether it is closely tailored to the need for which it was ostensibly adopted.

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[39] Ohio House Journal, 112th Gen. Assemb., 2d Sess., 2558-60 (1978) (attached as Ex. 4); *see also Hearing on Am. S.B. 159 Before the H. Comm. on Fin. and Approp.*, 112th Gen. Assemb., 2d Sess. 4-5 (Oh 1978) (Minutes—Mar. 8, 1978, 9:30am) (attached as Ex. 7).

[40] *See* Declaration of Harry Meshel at ¶¶ 1-10 (attached as Ex. 8).

[41] *Id.* at ¶ 10.

[42] *See id.*

C. Other Campaign Contribution Limits in Ohio

In addition to the general limitations discussed above, Ohio imposes a set of focused limitations on the award of state contracts—but not campaign contributions—to prevent kickbacks and pay-to-play schemes by state contractors. State agencies may not award unbid contracts in excess of $500 to any individual or entity that, during the previous twenty-four months, has contributed over $1,000 to the campaign of any public official responsible for awarding contracts on behalf of that agency.[43] In addition, the Ohio General Assembly adopted provisions (not currently in force) limiting certain state contractors' contributions to such public officials to $1,000 for a year after the award of a contract.[44] Violation of any of the above provisions can lead to civil penalties, and to the rescission of state contracts awarded in derogation of these restrictions.[45]

D. Duties of the Ohio Attorney General and County Prosecuting Attorneys

Both the attorney general and the several county prosecutors are empowered to investigate and prosecute Medicaid fraud. That is unremarkable, of course, and in no way distinguishes Medicaid fraud from literally hundreds of other crimes, the investigation and prosecution of which is

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[43] Ohio Rev. Code Ann. § 3517.13(I) and (J) (Lexis 2006) (as enrolled by 1990 Laws of Ohio 4928, 4946-4950, and in effect before H.B. 694 was passed in 2006) (attached as Ex. 9).

[44] Am. Sub. H.B. 694, 126th Gen. Assemb., 2d. Sess. (Oh. 2006), *invalidated on grounds of procedural infirmity by UAW, Local Union 1112 v. Brunner*, 911 N.E.2d 327, 333, 335 (Ohio Ct. App. 2009) (holding that bill was improperly enacted when clerical error caused wrong version to be signed by Governor, and General Assembly's reenactment of the bill violated Ohio's single-subject rule).

[45] Ohio Rev. Code Ann. § 3517.992(R) (West 2010). Penalties for the bans mentioned above in n. 28 and accompanying text are as follows: Ohio Rev. Code Ann. § 3517.992(AA1), (AA2) (West 2010) (foreign nationals) (three times the amount contributed or $10,000, whichever is more); § 3517.992(I)(1), (J)(1), (I)(6), (J)(5) (minors under age seven) (three times the amount contributed, but no violation occurs if fully refunded within 5 days of receiving or by the tenth business day after receiving notification); § 3517.992(R) (certain state contractors)($1,000 and potential contract rescission); *see also* Am. Sub. H.B. 694 (three times amount contributed in excess of amount permitted, plus contract-rescission at discretion of elections commission, for violations of $1,000 limitation on contributions made within one year after contract awarded).

a part—but only a small part—of the vast responsibilities with which these officials are charged.

The Ohio Attorney General is the state's chief law-enforcement officer, and may, upon the request of the Governor, prosecute any person indicted for a crime.[46] And while the office of the Ohio Attorney General maintains a Health Care Fraud Section to discharge its duty to combat Medicaid fraud, it also maintains over two dozen other sections, which focus on the prosecution of innumerable laws and the oversight of a wide variety of official functions. These functions include the following: antitrust; appellate litigation; charitable law; civil rights; collections enforcement and revenue recovery; consumer protection; defense of the State of Ohio in the Court of Claims; criminal justice; education law; employment law; environmental enforcement; labor relations; public-utilities law; taxation; tobacco enforcement; transportation; and workers' compensation.[47]

Ohio's prosecuting attorneys "may inquire into the commission of crimes within the county" and "shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party," except for those requiring a special prosecutor or the state attorney general.[48]

In addition, county prosecuting attorneys have a range of additional powers and responsibilities beyond their prosecutorial duties. Each acts as the chief legal advisor to the elected commissioners of his or her county, as well as to the county board of elections, the public libraries, and all other county boards, be they elected or appointed.[49] By default, each is also the chief legal advisor to the various townships within each county, and may serve as counsel to a variety of other

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[46] *Id.* § 109.02.

[47] Attorney General Cordray lists the various departments and sections he oversees on his official website: www.ohioattorneygeneral.gov/about, last accessed Aug. 13, 2010.

[48] Ohio Rev. Code Ann. § 309.08(A) (West 2010).

[49] *Id.* at § 309.09(A).

agencies and special purpose districts as well.[50]

In short, both the attorney general and the prosecuting attorneys in the various counties perform a host of duties in addition to the potential prosecution of Medicaid fraud. They are vested with tremendous power, and great responsibility, the proper exercise and discharge of which are of obvious importance to the citizens and electors of this state.

V. LAW & ARGUMENT

Like thousands of other Ohioans, Plaintiffs hope to be heard in the race for Attorney General by donating to the campaign of the candidate of their choice. Unlike their fellow citizens, however, they are prohibited from doing so. Unless and until this Court enjoins the enforcement of Section 3599.45, these Plaintiffs—physicians with an informed passion about the need for healthcare reform—will be excluded from participating in the democratic process in a most basic way.

A preliminary injunction is appropriate when the moving party can establish: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) the issuance of an injunction would not cause substantial harm to others; and (4) a preliminary injunction is in the public interest.[51]

These four considerations are factors to be weighed, and not independent elements to be met, before an injunction may be granted.[52] The existence of a strong showing on one or more of

[50] *Id.* at § 309.09(B), (D), (E), (F), (G), (H).

[51] *Tenn. Scrap Recyclers Ass'n v. Bredesen,* 556 F.3d 442, 447 (6th Cir. 2009).

[52] *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

the four factors lessens the requisite showing as to the others.[53] In cases involving the abridgment of First Amendment freedoms, a likelihood of success on the merits *per se* demonstrates the threat of irreparable harm absent an injunction, and thus ordinarily merits injunctive relief.[54]

A. Plaintiffs are Likely to Succeed on the Merits of their First Amendment claims.

Plaintiffs are likely to succeed on the merits of their First Amendment claims. The contested statute cannot survive the sort of intermediate scrutiny reserved for limits on campaign contributions because: (1) it is neither crafted to advance a sufficiently important state interest, nor (2) closely drawn to advance such an interest.

1. The contested statute encroaches upon Plaintiffs' First-Amendment rights to speech and association, and as a contribution restriction, is subject to intermediate scrutiny.

Laws that limit the ability to make political campaign contributions unquestionably implicate the First Amendment guarantees of free speech and free association.[55] In the seminal campaign-finance case *Buckley v. Valeo*, the U.S. Supreme Court addressed federal limits on contributions and expenditures, stating that both types of restrictions imposed "direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties."[56]

While the Court found contribution limits to impose less of a restraint on speech than do

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[53] *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.*, 119 F.3d 393, 399 (6th Cir. 1997) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

[54] *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky,* 354 F.3d 438, 445 (6th Cir. 2003), *reh'g en banc denied*, 361 F.3d 928 (2004), *and aff'd*, 545 U.S. 844 (2005); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), *cert denied*, 526 U.S. 1087 (1999) (probable success on merits is often the "determinative factor" in preliminary-injunction cases involving the First Amendment rights of the movant).

[55] *Citizens United v. FEC*, 130 S. Ct. 876, 900-01 (2010); *Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976).

[56] *Buckley*, 424 U.S. at 17 (citation omitted).

expenditure limits, it nonetheless held that a "contribution serves as a general expression of support for the candidate and his views," a "symbolic expression of support."[57]

Even more, such limits restrict the First Amendment's right to associate, since "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals.[58] The freedom to associate "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally effective."[59] The prohibition on campaign contributions at issue here accordingly implicates Plaintiffs' First-Amendment rights in two important ways.

Because contribution restrictions encroach on fundamental rights, the Supreme Court has consistently subjected such limitations to intermediate scrutiny. The state must demonstrate that it has a "sufficiently important interest and [has] employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms."[60]

2. Evidence is required to show a sufficiently important state interest.

In meeting its burden under intermediate scrutiny, the government is not free to posit an interest into being: it must demonstrate that there exists a malady to be cured, and it must do so through the introduction of evidence.[61] To understand why Ohio can show no sufficiently

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[57] *Id.* at 21.

[58] *Id.* at 20.

[59] *Id.* at 65-66.

[60] *Id.* at 25; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387 (2000); *FEC v. Beaumont*, 539 U.S. 146, 162 (2003).

[61] *See, e.g., McConnell v. FEC*, 540 U.S. 93, 232 (2003) (invalidating, because evidence was too "scant," a prohibition on contributions by minors), *overruled in part on other grounds*, *Citizens United v. FEC,* 130 S. Ct. 876, 913 (2010).

important interest in the contested statute, it is instructive to review the justifications that the Supreme Court deems sufficient and insufficient.

In *Buckley*, the Supreme Court first considered the constitutionality of limits on direct campaign contributions. It did so in the context of a challenge to the Federal Election Campaign Act of 1971, which, among other things, capped individual campaign contributions to candidates for federal office at $1,000 per election, and imposed an annual aggregate limit of $25,000 on individual campaign contributions.[62]

The Court found that Congress had a legitimate interest in preventing both the reality and the appearance of a political process in which large donors were able to secure favorable treatment from incumbent and potential office holders through their donations, and found that interest to be a a "constitutionally sufficient justification" for the limitations that the act imposed.[63]

In so holding, the Court was careful to note that—in the post-Watergate era in which *Buckley* was decided—Congress had well documented both the reality and the public perception of widespread political corruption.[64] The need to ameliorate the specific harms, the Court noted, justified limiting the amount a given donor could contribute to a given candidate.

> The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions the narrow aspect of political association where the actuality and potential for corruption have been identified while leaving persons free to engage in independent political expression, to associate actively through

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[62] *Buckley*, 424 U.S. at 13 (citing 18 U.S.C. § 608(b)(1) and (3) (1970 ed., Supp. IV)).

[63] *Id.* at 26.

[64] *Id.* at 26-27 & n. 28 (citing *Buckley v. Valeo,* 519 F.2d 821, 839-40, & nn. 36-38 (D.C. Cir. 1975)). The Court of Appeals noted that the congressional record contained numerous specific examples of the favorable treatment given to donors both by the Nixon administration and by Congress, including the award of ambassadorial positions to campaign contributors, as well as lax regulatory oversight of, and favorable legislative treatment for, industries and trade groups with which donors were affiliated.

> volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.[65]

It was in this light that the Court first sustained what was a quantitative limitation on—rather than (as in this case) a flat prohibition against—the "undifferentiated, symbolic act of giving" to a chosen campaign.[66]

The Court clarified the permissible scope of limits on campaign contributions in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388-90 (2000). Missouri law imposed limits of between $275 and $1,050 on individual contributions to candidate for state office. The plaintiff, a political-action committee, contested the limitations on various First-Amendment grounds.[67] In sustaining the limits, the Court noted that the dangers addressed by the Missouri statute were parallel to those addressed by the statute in *Buckley*, and thus were not "novel" or "implausible."[68]

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.[69]

While the Court rejected the notion that a heightened evidentiary standard had been applied by cases after *Buckley*, it stated unequivocally: "We have never accepted mere conjecture to carry a First Amendment burden."[70]

The Supreme Court has twice invalidated restrictions on political contributions as

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[65] [*sic*]. *Id.* at 28.

[66] *Id.* at 21.

[67] *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 381 (2000).

[68] *Id.* at 390.

[69] *Id.*

[70] *Id.* at 392.

unjustified, at least in part, by the evidentiary record on which they were adopted: in *McConnell v. FEC*, in which the Court struck down a ban on contributions by minors,[71] and in *Randall v. Sorrell*, in which the Court struck down a Vermont statute severely limiting the amount that citizens and corporations could donate to campaigns for various state offices.[72]

In *McConnell*, the Court held that the government failed to make a "convincing case of the claimed evil," namely, circumvention of contribution limits imposed on parents.[73] In *Sorrell*, the Court found the restrictions, which limited contributions to some statewide races to just $200, unjustified by any specific history of corruption.

> [W]e have found nowhere in the record any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described. Rather, the basic justifications the State has advanced in support of such limits are those present in *Buckley*. The record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere. Indeed, other things being equal, one might reasonably believe that a contribution of, say, $250 (or $450) to a candidate's campaign was less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases we have considered. [74]

While it was a collection of infirmities that, taken together, doomed the Vermont statute to constitutional perdition as not "closely drawn," the Court characterized the flaw just described as the failure by the state to "point to a legitimate statutory objective that might justify these special

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[71] *McConnell v. FEC*, 540 U.S. 93, 232 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

[72] *Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (plurality).

[73] *McConnell*, 540 U.S. at 232.

[74] *Sorrell,* 548 U.S. at 261.

burdens . . . ."[75] In striking down the statute, the Court also found that the restrictions at issue were severe enough to prevent candidates from mounting successful campaigns, and that they would stifle state political parties to an extent that would render them ineffective.[76]

As we shall see next, the failure of a legitimate objective is a problem the legislation at issue here shares. Assessed under the intermediate scrutiny reserved for limitations on campaign contributions, the contested statute fails First Amendment review, both because it was enacted without the sort of evidentiary support needed to sustain restrictions on campaign contributions, and because it is not closely drawn to achieve any legitimate governmental purpose.

3. Section 3599.45 was not enacted to advance a governmental interest sufficiently important to justify its ban on campaign contributions by Medicaid providers.

The contested statute's campaign-contribution ban cannot be justified by a generic attempt to prevent either the appearance or the reality of political corruption.

As made the cases cited above show, the state may not reflexively invoke *Buckley* for the proposition that such evil exists, or that limiting campaign contributions will necessarily promote public integrity, or create the appearance of having done so. Rather, the state must be able to substantiate—with evidence—the existence of malady it proposes to cure, if the medicine it prescribed is to pass constitutional muster.

The nature and "quantum" of that evidence varies "with the novelty and plausibility of the justification raised" in support of a contested restriction.[77] By this standard, the contested statute

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[75] *Id.* at 262.

[76] *Sorrell*, 548 U.S. at 256-60.

[77] *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 391 (2000).

comes to Court facing a comparatively heavy burden: it is altogether novel, and bans contributions in a manner that can be supported only by the most implausible of justifications.

No other state prohibits Medicaid providers, by dint of that status, from contributing to political campaigns. Ohio is unique *among* states in this regard, and that alone makes the contested statute novel.[78] The prohibition is also novel *within* the context of Ohio campaign-finance law. No other Ohio statute permanently and categorically bars an entire class of service providers from contributing to the electoral campaigns of officials who have nothing to do with awarding them contracts or determining the rate at which they are compensated.[79]

This distinguishes Section 3599.45 from its nearest statutory kin, Section 3517.13(I), which imposes restrictions on state contractors who contribute to political candidates for state office. The latter provision prohibits state contractors who have contributed more than a fixed amount to certain political campaigns from receiving contracts awarded by the incumbents of the offices contested in those races—or by their subordinates—for 24 months thereafter.[80] Other provisions, not currently in force though passed by the General Assembly, would limit contributions from such state contractors to $1,000 for one-year after a contract is awarded.[81]

The justification for these statutes is obvious. They prevent campaign contributions from

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[78] *See generally* Feigenbaum and Palmer, *Campaign Finance Law 2002*, above n. 31.

[79] As mentioned, the only provisions imposing bans are as follows: Ohio Rev. Code Ann. §§ 3517.13(W)(1) (foreign nationals), 3517.102(B)(1)(c) and (C)(1)(a)(I) (children under seven), and 3517.092(B)(2) (state employees—only as to candidates employed by the same office).

[80] Ohio Rev. Code Ann. § 3517.13(I) (West 2010), EX. 9. Similar time bars and monetary caps apply to contractors who provide services to the Workers Compensation Bureau who wish to donate to candidates for Governor or Lieutenant Governor. Ohio Rev. Code Ann. § 3517.13(Y) and (Z) (West 2010), EX. 9.

[81] Am. Sub. H.B. 694, 126th Gen. Assemb., 2d. Sess. (Oh. 2006), *invalidated on grounds of procedural infirmity by UAW, Local Union 1112 v. Brunner*, 911 N.E.2d 327, 333, 335 (Ohio Ct. App. 2009) (holding that bill was improperly enacted when clerical error caused wrong version to be signed by Governor, and General Assembly's reenactment of the bill violated Ohio's single-subject rule).

being given in a *quid-pro-quo* exchange for public contracts. In significant contrast with Section 3599.45, they do so (a) without imposing a total ban on contributions, (b) for limited periods only, and (c) without the threat of criminal sanctions.

Perhaps the most significant contrast, however, is the potential relationships into which these other laws intercede: between campaign contributors, and the public officials with the authority to reward those contributions directly, albeit unlawfully, in the form of government contracts. That such abuses occur is not a novel idea. Imposing restrictions to prohibit them from occurring squares easily with the rationale that the Supreme Court articulated in both *Buckley* and *Nixon*, and seeks to prevent an ancient form of political corruption in a plausible way—by preventing, for a fixed period, contributory *quid* from being rewarded by state-contract *quo*.

But however plausible those rationales may be in the context of pay-to-play restrictions, they do not support a statute prohibiting Medicaid providers from contributing to candidates running for either attorney general or county prosecuting attorney:

- Neither the attorney general nor the county prosecuting attorney plays any role in approving providers to contract with the state to provide Medicaid services.
- Neither determines how often a provider may be compensated for services under the program (which turns on the number of patients seen).
- Neither determines the rate at which a provider may be compensated (which is set by a fee-for-service schedule over which attorneys general and prosecuting attorneys have no say).

The only connection between the elected officials whose campaigns are affected by the contested statute and the providers of Medicaid services is that the former—theoretically, some day, and in the case of the most egregious conduct by a handful of certain providers—may be called

upon to investigate and prosecute those particular providers for fraud.

Yet this distinguishes Medicaid providers from no one else in the state. The attorney general and/or county prosecuting attorneys have the authority to investigate and prosecute anyone in the state for various crimes. Their relationship to Medicaid providers—and their susceptibility to the perceived (and perhaps imagined) corrupting influence of campaign contributions by Medicaid providers—is no different from what it is to any other citizen. Saying that the state has a sufficiently important government interest in banning Medicaid-provider contributions because particular Medicaid providers might one day commit fraud is like saying that *all* individual contributions from *everyone* should be banned because all contributions could one day be murderers subject to criminal prosecution.

All of which brings us back to the plausibility of the restriction now at bar, and the degree to which the need for that restriction is or is not supported by the evidence.

The only conceivable rationale for the restriction at issue is a contention that prosecutorial authorities who have received contributions from Medicaid providers might look the other way when the evidence suggests that those providers might be engaged in program-related fraud. So implausible a rationale for such a novel restriction faces a high evidentiary bar.[82]

And yet, as shown below, there is no evidence to suggest that candidates for attorney general, or for county prosecuting attorney—or incumbents in either of those offices—have ever been embroiled in a scandal involving Medicaid fraud or the failure to investigate and prosecute it.

Here it bears emphasis that the state is not free to fall back upon general concerns about the corrupting role of money in politics in justifying the contribution ban at issue: it must, rather, point

[82] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("[T]he quantum of empirical evidence needed . . . will vary up or down with the novelty and plausibility of the justification raised.").

to evidence that supports the existence of the problem that the contested law, closely drawn, endeavors to cure.

Nowhere is this better illustrated than in a very recent Second Circuit decision that upheld certain campaign-finance restrictions based upon a record of public corruption, while invalidating others that imposed the same limitation without a firm evidentiary foundation.

Green Party of Connecticut v. Garfield, __ F.3d ___, Nos. 09-0599 & 09-0609, 2010 WL 2737134 (2d Cir. July 13, 2010), considered the Connecticut Campaign Finance Reform Act, which banned both contractors who had done business with the state, and prospective contractors who sought to do so, from contributing to the campaigns of candidates for state office.[83] The ban was "branch specific" and prohibited contributions to the executive branch or legislative branch only if the contractor had done business with that branch of government.[84]

In addition, the act banned campaign contributions by "communications lobbyists," which it defined as persons who received $2,000 or more in annual compensation "'to communicate with an official or his staff in the legislative or executive branch of government or in a quasi-public agency for the purpose of influencing legislative or administrative action.'" [85]

Imposing the "closely drawn" analysis announced in *Buckley*, and approved by the Supreme Court as recently as *Randall v. Sorrell,* 548 U.S. 230, 261 (2006) (plurality), the Second Circuit sustained the contractor ban based on a widespread, entrenched, and pervasive pattern of political

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[83] *Green Party of Conn. v. Garfield*, __ F.3d __, Nos. 09-0599 & 09-0609, 2010 WL 2737134, *2 (2d Cir. July 13, 2010) (citing Conn. Gen. Stat. § 9-612(G) *et seq.*) (attached as Ex. 10).

[84] *Id.* at *2-3.

[85] *Id.* at *3 (quoting Conn. Gen. Stat. § 1-91(V)).

kickbacks that for years had undermined honest government in Connecticut.

In doing so, the appeals court stressed that the inquiry into whether a statute meets that test begins with a probe into precisely the sort of contributions it proscribes, and the underlying reason advanced to justify the proscription:

> We will, therefore, evaluate the contribution bans imposed by the CFRA under the closely drawn standard. We will uphold the statutory bans against plaintiffs' First Amendment challenge only if they are closely drawn to achieve a "sufficiently important" government interest.
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> * * *
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> [W]e are required to examine how the CFRA applies to the different groups of individuals it regulates and determine, in each case, whether the law is closely drawn to the state's interest in combating corruption and the appearance of corruption. [86]

The court found ample justification for the ban on contractors' contributions by contractors, their principals, and their relatives, based on Connecticut's pervasive and sordid history of graft:

> The most widely publicized of the scandals involved Connecticut's former governor, John Rowland. In 2004, Rowland was accused of accepting over $100,000 worth of gifts and services from state contractors, including vacations, flights on a private jet, and renovations to his lake cottage. Rowland accepted the gifts, it was alleged, in exchange for assisting the contractors in securing lucrative state contracts. Rowland resigned amidst the allegations, and in 2005 pleaded guilty – along with two aides and several contractors – to federal charges in connection with the scandal. Rowland was fined and sentenced to a year and a day in federal prison.
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> Sadly, the ignominy of public corruption was not limited to Rowland. As the District Court discussed in detail, the "Rowland scandal was but one of the many corruption scandals involving elected officials in state and local government that helped earn the state the nickname 'Corrupticut.'"

[86] *Id.* at *5, *8.

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> The record before us, moreover, shows that the General Assembly had good reason to be concerned about both the "actuality" and the "appearance" of corruption involving contractors. Connecticut's recent corruption scandals showed that contributions by contractors could lead to corruption. And it took no great leap of reasoning to infer that those scandals created a strong appearance of impropriety in the transfer of any money between contractors and state officials-whether or not the transfer involved an illegal quid pro quo. The scandals reached the highest state offices, leading to the resignation and eventual criminal conviction and imprisonment of the state's governor. They were, as a result, covered extensively by local media and garnered the attention of national media outlets as well.[87]

The court found a significant state interest in banning contributions from the relatives and corporate principals of state contractors as well, based on fears that—in a climate of pervasive corruption—those intent on giving bribes would find a way to do so despite restrictions on their own political giving.[88]

Turning its attention to the ban on political contributions by lobbyists, the court found a "markedly different" situation, compelling a different result:

> The CFRA's ban on contributions by lobbyists presents markedly different considerations than the CFRA's ban on contributions by contractors. The distinction centers on the fact that the recent corruption scandals in Connecticut in no way involved lobbyists.
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> * * *
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> The situation is different with lobbyists. The recent corruption scandals had nothing to do with lobbyists . . . and thus there is insufficient evidence to infer that all contributions made by state lobbyists give rise to an appearance of corruption. Plaintiffs have submitted some evidence suggesting that many members of the public generally distrust lobbyists and the "special attention" they are

[87] *Id.* at *1, *7 (citing *Green Party of Conn. v. Garfield*, 648 F. Supp.2d 298, 307-09 & n. 9 (D. Conn. 2009)).

[88] *Id.* at *10-11.

> believed to receive from elected officials.
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> But as the Supreme Court has recently clarified, the anticorruption interest recognized by *Buckley* and other cases is "limited to quid pro quo corruption" and does not encompass efforts to limit "[f]avoritism and influence" or the "appearance of influence or access." [89]

Absent such evidence, the Second Circuit found that Connecticut had failed to justify its ban on lobbyist contributions: "[T]here is insufficient evidence to demonstrate that all lobbyist contributions give rise to an appearance of corruption . . . ."[90]

Similarly, here, there is insufficient evidence of any reality or appearance of corruption. As already noted, the structure of the Medicaid program makes quid pro quo corruption—of the sort that motivated the statutes upheld in *Buckley*, *Nixon*, and in part in *Green Party*—simply impossible. Attorneys general and county prosecuting attorneys do not award Medicaid contracts, do not set the rate of compensation for the services provided, and do not decide who may be a service provider. There will be no *quid*, because there can be no *quo*.

Moreover, there is absolutely nothing in the history of the contested act to support the claim that Ohio banned contributions from Medicaid providers in response to a history or pattern of pervasive corruption, or a public perception that such corruption plagued the Medicaid program. The legislative history, for example, documents no instances of improper dealings between Medicaid providers like Plaintiffs and attorneys general or county prosecuting attorneys, or anything else that would raise the inference of impropriety. Although Ohio lacks an official legislative history, and its

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[89] *Id.*, at *13-14 (citing *Green Party of Conn. v. Garfield,* 590 F. Supp.2d 288, 321 (D.Conn. 2008), and quoting *Citizens United v. FEC*, 130 S. Ct. 876, 909-10 (2010) (some quotation marks omitted by the Second Circuit, and record citations omitted by counsel here)).

[90] *Id.*, at * 13.

courts afford limited value to a legislative sponsor's testimony supporting a bill, about what the bill means,[91] courts have given weight to the state house and senate journals.[92] Bill analyses, likewise, have been referred to when deemed helpful for a better understanding, even if they are not controlling.[93] By statute, Ohio law authorizes courts to consider the "circumstances under which [a] statute was enacted," as well as the legislative history, when the statute is ambiguous.[94]

As the attached Declaration of Harry Meshel, former state senator, shows, nothing in the history of the contested legislation suggests that it was enacted in response to a pattern or perception of pervasive corruption involving attorneys general or county prosecutors.

Over the course of his career, Senator Meshel served as President of the Ohio Senate, and as Minority Leader. He served as a senator during the 112th General Assembly, during which Section 3599.45 was adopted.[95] He was also the chief Senate sponsor of Am. S.B. 159, the legislative vehicle through which the contested statute was enacted.[96]

While the contested statute's ostensible purpose was combatting Medicaid fraud, there was no perception at the time that the attorney general was subject to undue influence by Medicaid

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[91] *Glick v. Sokol*, 149 Ohio App.3d 344, 346, 77 N.E.2d 215, 317 (Ohio Ct. App. 2002).

[92] *See, e.g., Shafer v. Ohio Turnpike Comm'n*, 113 N.E.2d 14, 18 (Ohio 1953); *see also Ohio Legislative History* (Supreme Court of Ohio Law Library Information Series), *available at* http://www.supremecourt.ohio.gov/Publications/lib_series/Brochure_4.pdf.; David M. Gold, "A Guide to Legislative History in Ohio," *Members Only Brief* (prepared for members of the Ohio General Assembly), Vol. 128, Issue 10 (Jan. 26, 2010), at 7 & n.21 (citing cases), *available at* http://www.lsc.state.oh.us/membersonly/128legislativehistory.pdf.

[93] *Meeks v. Papadopulos*, 404 N.E.2d 159, 162 (Ohio 1980); *see also Ohio Legislative History*, above n. 92, at 2.

[94] Ohio Rev. Code Ann. § 1.49 (B) and (C).

[95] *See* Meshel Decl. at ¶¶ 2-3, above n. 40, Ex. 8.

[96] *Id.* at ¶ 4.

providers. Indeed, there could not have been, because in 1978, prosecutions for Medicaid fraud were the sole province of county prosecuting attorneys—not the Ohio attorney general.[97] Senator Meshel specifically recalls that the ban was *not* motivated by a pattern of corruption involving Medicaid providers and either the attorney general, or prosecutors:

> It was unclear at the time what the motivation behind the provision was. There were not, to my recollection, any circumstances of actual corruption or appearance of corruption caused by any campaign contributions by Medicaid providers. I do recall that that was an era of one-upmanship in which Democrats and Republicans were trying to outdo one another regarding ethics-related proposals. [98]

However laudable such internecine, partisan, competitive, ethical instincts may have been, they fall short of advancing the sort of significant governmental interest that the First Amendment requires before the rights of free expression and free association inherent in making a campaign contribution may be trammeled.

Indeed, the evidence instead shows that Section 3599.45's prohibition on contributions by providers was marginal in the scheme of the General Assembly's legislation. The statute was passed in 1978 as part of Senate Bill 159 ("S.B. 159"), which was a package of statutes following on the heels of congressional legislation that enabled states to set up anti-fraud Medicaid control units.[99] The overarching purpose of S.B. 159 was not to combat political corruption, but rather to authorize the Attorney General to combat Medicaid fraud.[100]

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[97] *Id.* at ¶¶ 4-5.

[98] *Id.* at ¶ 10.

[99] *See generally* S.B. 159 Bill Analysis, above n. 34, Ex. 5.

[100] *See* S.B. 159 Bill Analysis, above n. 34, at 1, Ex. 5; *see also* Ohio Senate Journal, 112th Gen. Assemb., 1st Sess. At 187, 192, 1278 (1977), Ex. 4 (describing the purpose of the bill as "provid[ing] for the recovery of . . . excess payments under the medicaid program"); *House Panel Approves Medicaid Fraud Bill*, COLUMBUS

From the legislative history that is available, it is clear that the campaign-finance portion of the bill was not a central concern of the sponsors. The provision was not a part of the bill as originally drafted and passed by the Senate.[101] It was, instead, introduced as an amendment on the last day of House committee hearings.[102] Compared to other aspects of the bill, particularly the role of the attorney general versus the county prosecutor in combating fraud, section 3599.45 was barely discussed.[103] When it was put to a vote, the House rejected the provision before passing it with only a 1-vote margin.[104] A bill analysis compiled by the Legislative Service Commission, a nonpartisan agency that serves the House and Senate, makes no mention of section 3599.45.[105]

As shown by the legislative history, then, the ban on providers' campaign contributions was ancillary to the main concerns of S.B. 159—a tag-along based on nothing more than speculation that a Medicaid provider might at some point engage in fraud and, having done so, might attempt to unduly influence a prosecutor, or that a prosecutor might allow a campaign contribution to influence his judgment in prosecuting such fraud. Mere conjecture such as this is not and never has been

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DISPATCH, Mar. 9, 1978, at B-7, (attached as Ex. 11); *New Law Empowers State to Probe Medicaid Fraud,* THE PLAIN DEALER*,* Apr. 25, 1978, at A-5, (attached as Ex. 12).

[101] S.B. 159, 112th Gen. Assemb., 1st Sess. (Oh 1977) (bill as it passed Senate), above n. 38, Ex. 6); Ohio Senate Journal, 112th Gen. Assemb., 1st Sess., 187, 192, 1229-30, 1278-80 (1977), Ex. 4 (minutes documenting amendments in Senate).

[102] *See* House Comm. Hearing Minutes (Mar. 8, 1978, 9:30am), above n. 39, Ex. 7.

[103] *See id.* C*ompare* House Comm. Hearing Minutes (Feb. 15, 1978, 1:30pm) (attached as Ex. 13); House Comm. Hearing Minutes (Feb. 15, 1978, 9:30am), (attached as Ex. 14); House Comm. Hearing Minutes (Jan. 11, 1978) (attached as Ex. 15). *See also 2 Youngstown Democrats clash on bill to halt Medicaid fraud*, THE PLAIN DEALER, Feb. 16, 1978, at 4-E (attached as Ex. 16) (describing the controversy over attorney general versus county prosecutor role).

[104] *See* House Comm. Hearing Minutes (Mar. 8, 1978, 9:30am), above n. 39, Ex. 7; Ohio House Journal, 112th Gen. Ass., 2d Sess., 2558-2560 (1978), Ex. 4 (showing that the House first rejected the amendment, then adopted it by a 1-vote margin).

[105] *See generally* S.B. 159 Bill Analysis, above n. 34, Ex. 5.

sufficient to justify a First Amendment burden, especially an outright ban of the kind at issue here.[106] In the absence of evidence of undue influence, there simply is no justification for treating contributions by Medicaid providers as suspect, much less ban-worthy.

4. The Outright Ban on Contributions that the Contested Statute Imposes Is Not Closely Drawn to Further Any Governmental Interest, Substantial or Otherwise.

Contribution limits pass First Amendment muster only if they are "closely drawn" to prevent actual or perceived corruption.[107] The government must demonstrate that its restrictions are proportional to the harm they ostensibly seek to remedy.[108] Restrictions that unreasonably stifle speech or association, or that are disproportionate to their stated ends, are unconstitutional, even when enacted to advance an otherwise sufficiently important governmental interest.[109] Courts have a duty to "review the record independently and carefully" where there are "danger signs" that a statute is doing more harm to electoral fairness than good.[110]

As described below, Section 3599.45 is overbroad, arbitrary, and disproportionately severe, and for these reasons, too, cannot survive its encounter with the First Amendment.

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[106] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden."); *McConnell v. FEC*, 540 U.S. 93, 232 (2003) (finding evidence of the "claimed evil" too "scant" to support a ban on contributions from minors); *see also Green Party of Conn. v. Garfield*, __ F.3d __, Nos. 09-0599 & 09-0609, 2010 WL 2737134, at *14 (2d Cir. July 13, 2010) (finding insufficient evidence to sustain a ban on lobbyist contributions).

[107] *Nixon*, 528 U.S. at 387-88.

[108] *Randall v. Sorrell*, 548 U.S. 230, 249 (2006); *McConnell,* 540 U.S. at 232.

[109] *See Sorrell*, 548 U.S. at 237; *McConnell*, 540 U.S. at 231-32; *Dallman v. Ritter*, 225 P.3d 610, 624, 625-26 (Colo. 2010) (citing *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003)).

[110] *Sorrell*, 548 U.S. at 249.

a. The Section unnecessarily imposes an outright ban on contributions by Medicaid providers.

The fact that Section 3599.45 imposes an outright ban, and not merely a limitation, on campaign contributions, is perhaps the most important consideration in determining whether it is "closely drawn" to advance an important governmental interest.

The proper analytical stage at which to consider the propriety of a ban is in deciding whether a given proscription is closely drawn:[111]

> [A]n outright ban on contributions is a drastic measure that substantially infringes "one aspect of the contributor's freedom of political association." As opposed to a contribution limit, which merely restricts those First Amendment freedoms . . . a contribution ban utterly eliminates an individual's right to express his or her support for a candidate by contributing money to the candidate's cause. Indeed, a contribution ban cuts off even the "symbolic expression of support evidenced by" a small contribution. Thus, if the state's interests in this case can be achieved by means of a limit on lobbyist contributions, rather than a ban, the ban should be struck down for failing "to avoid unnecessary abridgment of associational freedoms . . . ."[112]

In this light, it is not surprising that the courts have not hesitated to invalidate contribution bans where less onerous proscriptions might remedy the ills those bans ostensibly addressed.

In *McConnell,* for example, the plurality invalidated a ban on contributions by minor children, noting that many state election laws had found less restrictive ways to prevent adults from circumventing campaign-finance laws by channeling their contributions through their children:

> Even assuming, arguendo, the Government advances an important interest, the provision is overinclusive. The States have adopted a variety of more tailored approaches—e.g., counting contributions by

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[111] *FEC v. Beaumont*, 539 U.S. 146, 162 (2003).

[112] *Green Party of Conn. v. Garfield*, __ F.3d __, Nos. 09-0599 & 09-0609, 2010 WL 2737134, at *13 (2d Cir. July 13, 2010) (quoting *Sorrell*, 548 U.S. at 246, 247 (in turn quoting *Buckley*, 424 U.S. at 21, 24-25)). *See also Dallman*, 225 P.3d at 623 ("An absolute ban is a serious impairment of protected First Amendment rights.").

> minors against the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children. Without deciding whether any of these alternatives is sufficiently tailored, we hold that the provision here sweeps too broadly. We therefore affirm the District Court's decision striking down § 318 as unconstitutional.[113]

The Second Circuit, in *Green Party*, invalidated the ban on contributions by lobbyists discussed earlier, while noting that the state could have justified a limitation on contributions, but not an outright ban.[114]

At least two state supreme courts have come to similar conclusions in invalidating bans on political contributions under the First Amendment.

The California Supreme Court invoked *Buckley* three decades ago to invalidate a portion of a state campaign finance law that barred lobbyists from contributing more than $10 per month to any candidate for state office.[115]

> The claimed state interest is to rid the political system of both apparent and actual corruption and improper influence. Under *Buckley* such a purpose justifies closely drawn restrictions. However, it does not appear that total prohibition of all contributions by any lobbyist is a closely drawn restriction.
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> * * *
>
> While either apparent or actual political corruption might warrant some restriction of lobbyist associational freedom, it does not warrant total prohibition of all contributions by all lobbyists to all candidates.[116]

Much more recently, in *Dallman*, the Colorado Supreme Court reached a similar conclusion, striking down an amendment to the state constitution that banned contributions from holders of

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[113] *McConnell*, 540 U.S. at 232.

[114] *Green Party*, 2010 WL 2737134, at *13.

[115] *Fair Political Practices Comm'n v. Super. Ct*, 599 P.2d 46, 51-52 (Cal. 1979).

[116] *Id.* at 52-53.

sole-source government contracts, because its prohibitions were not closely drawn.[117]

In that case, as in ours, the law prohibited contributions from contractors to politicians with absolutely no control over the contracts in question: "state legislators, school board members, county commissioners, and board members for water districts are prohibited from accepting contributions from sole source government contractors regardless of their ability to influence contract awards or their relation to the contractor…." Nothing that "the government's interest in eliminating the appearance of impropriety is not without bounds," the court held that "we cannot sacrifice First Amendment freedoms to an implausible perception of impropriety that links every contribution to an illicit arrangement extending to all levels of state government." For this reason, the statute was held to be "over-inclusive in light of its plainly legitimate sweep. The Amendment fails to tailor its prohibitions towards those who have some control over awarding no-bid contracts, which would be directly correlated to its purpose of preventing the appearance of impropriety.[118]

The court went on to find the law overbroad in several other respects as well, including in its expansive definition of the contractors to whom it applied, the harsh nature of sanctions imposed for violations, and its prohibition on contributions by family members and labor unions.[119]

These cases highlight what ought to otherwise be obvious: a ban on political contributions is a blunt instrument, and the blanket bludgeoning with that instrument where contributions are only notionally or abstractly linked to actual or perceived public corruption is not closely drawing a remedy to advance an important governmental interest.

As shown above, Ohio cannot demonstrate any nexus between donations to candidates for attorney general and county prosecuting attorney, and Medicaid fraud, in any event. But even if it

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[117] *Dallman v. Ritter*, 225 P.3d 610, 616-18 (Colo. 2010).

[118] *Id.* at 627.

[119] *Id.* at 627-32.

could, there plainly exist regulatory alternatives to a wholesale ban on contributions that could address such a problem without resorting to so draconian and free-speech-and-association squelching an option. Contribution limits of the sort the Second Circuit signaled it was willing to accept in *Green Party* are an obvious alternative.[120] In addition, Ohio perhaps might impose lesser penalties for the violation of Section 3599.45, bringing it in line with other laws limiting political contributions in the state.[121]

In the end, the state bears the burden of demonstrating that its sufficiently important interests cannot be served other than by an outright ban. Because a ban prohibits even the symbolic act of making *de minimus* contributions, this is a burden the state cannot carry.

Far from being "closely drawn" to serve an important governmental interest, Section 3599.45 unnecessarily imposes a disproportionately severe restriction (a ban) and penalties (criminal sanctions), and arbitrarily singles out Medicaid providers for its prohibitions, despite there being no conceivable link between them and their candidates-of-choice on the one hand, and political patronage corruption on the other. The statute is not closely drawn for these reasons alone.

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[120] *See Green Party of Conn. v. Garfield*, __ F.3d __, Nos. 09-0599 & 09-0609, 2010 WL 2737134, at *13 (2d Cir. July 13, 2010).

[121] *See, e.g.,* Ohio Rev. Code Ann. § 3517.992(AA1), (AA2) (West 2010) (foreign nationals) (three times the amount contributed or $10,000, whichever is more); Ohio Rev. Code Ann. § 3517.992(I)(1), (J)(1), (I)(6), (J)(5) (minors under age seven) (three times the amount contributed but no violation occurs if fully refunded within 5 days of receiving or by the tenth business day after receiving notification); R.C. 3517.992(R) (certain state contractors)($1,000 and potential contract rescission); *see also* Am. Sub. H.B. 694, 126th Gen. Assemb., 2d Sess. (Oh 2006) (three times amount contributed in excess of amount permitted, plus contract-rescission at discretion of elections commission, for violations of $1,000 limitation on contributions made within one year after contract awarded)., *invalidated on procedural grounds by UAW v. Brunner*, 911 N.E.2d 327 (Ohio Ct. App. 2009).

b. Section 3599.45 is Overbroad, and Not Closely Drawn, In That It Prohibits Contributions from Those With Even a *De Minimus* Ownership Interest in a Medicaid Provider.

Section 3599.45 prohibits accepting contributions from any provider of goods and services under the Medicaid program, or any person having "an ownership interest" in such a provider. That expansive term is nowhere defined in the contested statute, or even in Title XXXV of the Ohio Revised Code, despite the fact that several terms of art are defined in Section 3599.45 itself, and numerous terms used in regulating Ohio elections are defined in Revised Code § 3517.01.

While the law is in flux, and the Supreme Court in *Citizens United* recently affirmed the rights of corporations to make independent expenditures on behalf of candidates for public office, the right of business entities to make direct contributions to candidates has not been established.[122] To the extent that the contested statute prohibits corporate contributions, then, it does not offend the First Amendment.

But plainly, and on its face, the contested statute prohibits much more than corporate donations:

- Candidates must refuse not only donations from *business entities* that provide Medicaid services, but from *anyone* with any, even infinitesimal, "ownership interest" in those corporations.
- No limitation is imposed on the sorts of interest that might serve to disqualify a potential donor. General partners, limited partners, and common-stock shareholders are treated equally.
- No reasonable threshold below which that interest might be too diluted is offered. A one-percent partner, or the owner of a single share of common stock in a

[122] *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010).

corporation, a branch of which provides durable medical equipment under Medicaid, are, on the face of the statute, forbidden contributors.

- Persons with absolutely no control over the policy or business practices of a corporate Medicaid provider are banned all-the-same from contributing to certain political campaigns.

This is more onerous a law even than the Colorado law recently invalidated in *Dallman*, for example, which put the threshold beyond which corporate owners were barred from making contributions at ten percent.[123] It is more onerous than the contractor provisions sustained in *Green Party*, which imposed a 5% ownership threshold on prohibited donors. And it contrasts with a number of provisions in the Ohio Revised Code that set pay-to-play limits on individuals with a 20% ownership interest in certain contracting entities.[124]

This sweeping restriction provides an independent reason to invalidate the contested statute: in addition to not being closely drawn to advance a significant state interest, it is overbroad and proscribes far more speech than is necessary to achieve any significant governmental purpose.[125] Of course, prohibiting contributions from those with no authority to shape the conduct of a corporate provider serves no purpose whatsoever. For this reason too, the law is overbroad, and thus, by definition, is not closely drawn to serve a significant governmental interest.

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[123] *Dallman*, *v. Ritter*, 225 P.3d 610, 617-18 (Colo. 2010).

[124] *See, e.g.*, Ohio Rev. Code Ann. § 3517.13(J), EX. 9 (20% threshold for prohibition applied to shareholders in corporations with contracts with public agencies the heads of which are putative recipients of campaign contributions); § 3517.13(Z), Ex. 9 (similar threshold in workers' compensation-contribution prohibition).

[125] *See Green Party of Conn. v. Garfield*, __ F.3d __, Nos. 09-0599 & 09-0609, 2010 WL 2737134, at *10 (2d Cir. July 13, 2010).

B. Plaintiffs Will Suffer Immediate and Irreparable Harm Absent a Preliminary Injunction—being Deprived of their Right to Free Speech and Association in this Election.

Plaintiffs seek to exercise an expressive and associational freedom vouchsafed to them under the First Amendment: the right to contribute to the campaign of a candidate for public office. The contested statute makes it a crime for the candidate of their choice to accept such a contribution, and thus frustrates their desire to do so. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[126]

The next Ohio Attorney General will be elected on November 2, 2010. Unless the Court enjoins enforcement of the contested statute, Plaintiffs will forever and irrevocably lose the opportunity to support the candidate of their choice in that election through the protected expressive and associational act of making a contribution to his campaign. There is and can be no adequate remedy at law for such a loss. Injunctive relief is the only option.

C. Others Will Suffer No Harm if an Injunction Is Granted.

Where there is a substantial likelihood that the law is unconstitutional, no substantial harm to others can be said to inhere in its injunction.[127] Moreover, given the impossibility of a *quid pro quo* exchange between Medicaid providers and the Attorney General, or between Medicaid providers and a county prosecuting attorney, there is no reason to fear that allowing Plaintiffs to express themselves by contributing to the Cordray campaign will result in some form of constitutionally cognizable harm to the state.

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[126] *Elrod v. Burns*, 427 U.S. 347 (1976); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 1496 (1999); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989); *Dia v City of Toledo*, 937 F. Supp. 673 (N.D. Ohio 1996); *Morscott, Inc. v. City of Cleveland*, 781 F. Supp. 500, 506 (N.D. Ohio 1990).

[127] *Déjà vu of Nashville v. Metro. Gov't of Nashville,* 274 F.3d 377, 400 (6th Cir. 2001).

D. An Injunction Will Serve the Public Interest Because Preventing Constitutional Violations is Always in the Public Interest.

As the Sixth Circuit has stated in granting a preliminary injunction: " [I]t is always in the public interest to prevent violation of a party's constitutional rights."[128] And as the Supreme Court observed in *Buckley*: "The First Amendment affords the broadest protection to . . . political expression [such as debate on the qualifications of candidates] in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[129] It is precisely because Plaintiffs feel so strongly about "political and social changes desired by the people," such as was recently achieved with the arrival of health-insurance reform, that they want to show their support for Attorney General candidate Richard Cordray. The public can only benefit from the "unfettered interchange" of ideas that will result from including Plaintiffs' voices among the many others that will be heard this fall and beyond.

E. The Court Should Set Minimal Bond, Or Dispense with Bond In This Case Altogether Because No State Money Is At Stake—Just Constitutional Rights.

Bond is inappropriate in this case. This is not a commercial dispute in which one party is being enjoined from engaging in profitable or revenue-generating activity. Rather, the government, if enjoined, will simply be required to forebear enforcing a campaign-finance law until the constitutionality of that law be finally determined. In such a case, bond is not appropriate.

The U.S. District Court for the Northern District of Iowa came to precisely that conclusion in another First Amendment case, in which plaintiffs sought to enjoin the enforcement of a local

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[128] *Id.* (citation omitted). *See also Morscott, Inc.*, 781 F. Supp. at 507 ("It is beyond cavil that it is in the public interest to uphold a constitutionally protected right.").

[129] *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

adult-use ordinance.[130] The district court considered the propriety of setting bond under Fed. R. Civ. P. 65(c). Applying Eighth Circuit precedent, it concluded bond should be waived. It was "not clear to the court what, if any, monetary damages would be incurred by the City as the result of an improvident injunction. . . ." The court further noted that "requiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because the rights potentially impinged by the governmental entity's actions are of such gravity that protection of those rights should not be contingent upon an ability to pay." Thus, the court waived the bond requirement.[131]

The same is true in this case, and the Court should waive bond. Should the Court determine that bond cannot be waived, the Court should set it at a minimal amount since, again, nothing monetary is at stake, only priceless constitutional rights.

[130] *Doctor John's, Inc. v. City of Sioux City, Iowa*, 305 F. Supp.2d 1022 (N.D. Iowa 2004).

[131] *Dr. John's*, 305 F. Supp.2d at 1043-44.

VI. CONCLUSION

For the foregoing reasons, as well as those set forth in the Complaint, the Court should enjoin enforcement of Section 3599.45 pending the final resolution of this case on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 4, 2010 my office served, via ordinary U.S. mail, the foregoing **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** on the following:

Defendant Jennifer Brunner, in her official capacity
Secretary of State of the State of Ohio
180 E. Broad Street, 16th Floor
Columbus, OH 43215

and by certified U.S. mail to the following:

Richard Cordray
Ohio Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215

/s/ Subodh Chandra
One of the attorneys for Plaintiff Class Members