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: DONALD C. NUGENT MAGISTRATE JUDGE: NANCY A. VECCHIARELLI

PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Under 28 U.S.C. § 636(b)(1)(C) and Rule 72.3(b) of the Rules of this Court, Plaintiffs respectfully submit the following objections to certain of the Magistrate Judge's Report and Recommendation, issued on October 12, 2010. Plaintiffs do not object to the Report and Recommendation overall or its conclusion that Plaintiffs' Motion for a Preliminary Injunction prohibiting the Secretary from enforcing Ohio Rev. Code § 3599.45 should be granted.

Objections to Magistrate Judge's Report and Recommendation ("R&R") of October 12, 2010

Under 28 U.S.C. § 636(b)(1)(C), as well as Rule 72.3(b) of the Rules of this Court, any party may serve and file objections to the proposed findings and recommendations of the Magistrate Judge.[1] Local Rule 72.3(b) in particular states that failure to file timely objections "shall constitute a waiver of subsequent review," absent a showing of good cause.[2] The Rule further states that the objecting party "shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objections."[3] Under both § 636(b)(1)(C) and the Local Rule, this Court must make a *de novo* determination of those portions of the report to which objection is made.[4] Plaintiffs thus submit these detailed objections to preserve matters for this Court's review as well and for subsequent review.

As explained below, Plaintiffs' respectfully object to the following:

(1) certain factual findings and omissions,

(2) the R&R's conclusion and reasoning that the Ohio Revised Code § 3599.45 is not overbroad, and

(3) the R&R's conclusion that Defendant has demonstrated a sufficiently important government interest in a statute prohibiting contributions from Medicaid providers to the Attorney General and prosecutor candidates.

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[1] 28 U.S.C. § 636(b)(1)(C); Local Rule 72.3(b) (N.D. Ohio).

[2] Local Rule 72.3(b).

[3] *Id.*

[4] § 636(b)(1)(C); Local Rule 72.3(b) (N.D. Ohio).

Plaintiffs certainly do not object to the R&R overall, its rigorous engagement with the issues, or its conclusion that a preliminary injunction should issue.

I. The Plaintiffs object to certain factual findings and omissions in the R&R as follows:

1. There were over 64,000 total Medicaid providers in Ohio in state fiscal year 2008 (July 1, 2007-June 30, 2008).[5] This figure is undisputed, and in fact is included in Defendant's own exhibit.[6] In response to the Magistrate Judge's concern, expressed at the hearing, that the source for this figure—the Health Policy Institute of Ohio—is not a state source, Plaintiffs respectfully direct the Court's attention to the Ohio Department of Job and Family Services' ("ODJFS"'s) 2009 Annual Report, which reports that the total number of providers between July 1, 2008 and June 30, 2009, was 99,000.[7] Defendant's Exhibit E, also issued by ODJFS, states that over 93,000 active providers were enrolled in the system in July 2009.[8]

2. Defendant has produced no evidence of the portion of work or resources the Attorney General or county prosecutors devote to Medicaid fraud

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[5] *See* Health Policy Institute of Ohio, *Medicaid Basics 2009*, at 2, *available at* http://a5e8c023c8899218225edfa4b02e4d9734e01a28.gripelements.com/pdf/publications/medicaidbasics_2009.pdf, last accessed October 15, 2010 (the Health Policy Institute of Ohio is a nonpartisan, nonprofit organization that communicates current research to policymakers, state agencies, and other decision-makers).

[6] *See id.* (submitted as Def.'s Ex. B. at Prelim. Injunc. Hrng).

[7] Ohio Department of Job and Family Services, *2009 Annual Report*, at 13, *available at* http://www.odjfs.state.oh.us/forms/results1.asp?stype=FORM_NUM&searchPar=JFS%2008017, Pls.' Supp. Ex. 1.

[8] Ohio Department of Job and Family Services, *Medicaid Program Integrity Report for 2009*, at 3, *available at* http://jfs.ohio.gov/ohp/reports/documents/Medicaid%20Program%20Integrity%20Report%20CY%202009.pdf (submitted by Defendant at Prelim. Injunc. Hrng. as Ex. E).

compared to other areas of prosecution.[9] This is a relevant fact and should be included in the findings of Medicaid fraud facts, at R&R page 2.

3. Defendant has produced no evidence that the AG or county prosecutors have more discretion to prosecute Medicaid fraud than they do any other offense occurring within their respective jurisdictions. This is a relevant fact and should be included at R&R page 3.

4. Neither the Attorney General nor the county prosecuting attorney plays any role in approving providers to contract with the state to provide Medicaid services, or determining the rate or method of compensation—that function being fulfilled by the ODJFS.[10] This is a relevant fact and simply augments the R&R at page 2.

5. As indicated in Plaintiffs' Proposed Finding of Fact No. 35,[11] the ODJFS contracts with managed-care organizations, including health-insuring corporations.[12] Such organizations enter into provider agreements with ODJFS,[13] under which they are "authorized to provide, or arrange for the provision of health care services to medical assistance recipients."[14] The

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[9] *See* Pls.' Prop. Findings of Fact and Concl. of Law (Doc. 13), at pp. 8, 17 (Prop. Findings of Facts Nos. 31, 69).

[10] Pls.' Prop. Findings of Fact and Concl. of Law (Doc. 13), at pp. 4-5, 18-19 (Prop. Findings of Fact Nos. 14-17, 76-78).

[11] *Id.* at p. 9 (Prop. Finding of Fact No. 35).

[12] Ohio Rev. Code § 5111.17(A).

[13] Ohio Admin. Code § 5101:3-26-01.

[14] Ohio Rev. Code § 5111.17(A).

ODJFS lists "health maintenance organizations" in a spreadsheet of Medicaid providers.[15]

6. In addition to the declaration of State Senator Harry Meshel, the chief Senate sponsor of the bill enacting the statute at issue here, R&R page 3-4 & n.1, Plaintiffs adduced historical evidence, including state senate and house journal minutes, committee-hearing minutes, a Legislative Service Commission bill analysis, and newspaper articles.[16] This evidence, which has not been refuted by Defendant, shows that the General Assembly lacked any evidence before it of corruption or the appearance of corruption. The evidence is probative and should be included at R&R pages 3-4.

7. Plaintiffs also object to the following statement, R&R, page 4 n.1: "[A]s more than thirty years have passed between the legislation enacting Ohio's campaign limits and Senator Meshel's declaration, the court assigns little or no probative value to that declaration." Defendant presented no evidence that would call into question Senator Meshel's memory, as chief sponsor of the bill. Defendant did not even attempt to contest Senator Meshel's memory. Plaintiffs therefore respectfully suggest that the R&R should not discount Senator Meshel's recollection that there was no basis for the law when it was adopted.

8. Plaintiffs also object to the R&R's statement, at page 29: "The Secretary's duties with regard to enforcing [Ohio Rev. Code § 3599.45] . . . or any

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[15] ODJFS, Medicaid Management Information System, Provider Update Control Report, at 4, Pls.' Supp. Ex. 2.

[16] *See* Pls.' Prop. Findings of Fact and Concl. of Law (Doc. 13), at pp. 13-16 (Prop. Findings of Fact Nos. 53-66).

election statute have not been clarified by either party." In their Proposed Finding of Fact No. 11, Plaintiffs specifically quote from the statute under which the Secretary must "investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of election laws to the attorney general or prosecuting attorney, or both, for prosecution."[17]

9. The R&R states: "State agencies may not award unbid contracts in excess of $500 to any entity that, during the previous two years, has contributed over $1,000 to the campaign of any agency official responsible for awarding contracts."[18] This finding is based on Plaintiffs' Proposed Finding of Fact No. 46, which states: "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." Plaintiffs have discovered an error in this statement in their Proposed Findings, however, that is also reflected in their opening brief. Instead of applying to "any entity," as to corporations and business trusts, the restriction applies only where an owner with greater than 20% ownership interest has made a contribution.[19] Accordingly, the Proposed Finding should read: "State agencies may not award unbid contracts in excess of

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[17] Ohio Rev. Code 3501.05(N)(1), quoted in Pls.' Prop. Findings of Fact and Concl. of Law (Doc. 13), at pp. 3-4 (Prop. Finding of Fact No. 11).

[18] R&R, at 5.

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

> $500 to certain individuals and entities that, during the previous twenty-four months, have contributed over $1,000 to the campaign of any public official responsible for awarding contracts on behalf of that agency. Corporations and business trusts are subject to the restriction only where an owner with over 20% interest, or the owner's spouse, has made such a contribution." This should be stated correctly as a part of the Court's findings of fact and conclusions of law.

II. Plaintiffs, at this stage of the proceedings, have demonstrated that Ohio Rev. Code § 3599.45 is unconstitutionally overbroad (page 27).

In articulating the "overbreadth" standard—that the overbreadth must be "substantial" "judged in relation to the statute's plainly legitimate sweep"[20]—the R&R correctly notes that the Defendant has not met her burden to show that the statute has any "legitimate application to the plaintiffs before the court."[21] Nonetheless, applying the standard, the R&R concludes that Plaintiffs have not shown that Ohio Rev. Code § 3599.45 precludes a "substantial" amount of protected speech, because Plaintiffs have not yet shown how many providers are publicly held corporations or limited partnerships. The R&R states as follows: "This much, at least is essential before the court can even begin to estimate whether the number of *de minimis* owners of Medicaid providers is 'substantial.'"[22]

Plaintiffs object to the R&R's conclusion that overbreadth has not yet been shown, because

(1) they have provided facts and inferences sufficient to show that the statute covers

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[20] *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *New York v. Ferber*, 458 U.S. 747, 770 (1982).

[21] R&R, at 24.

[22] R&R, at 27.

owners with such small, non-controlling interests that they would not be subject to prosecution or penalties for Medicaid fraud; in addition, Plaintiffs here respectfully submit documentation supporting such inferences to address the Magistrate Judge's concerns raised at oral argument about specific evidence of publicly held providers; and

(2) the statute precludes a substantial amount of protected speech even apart from owners who may have minimal interests.

1. It is beyond reasonable dispute that there are Medicaid providers that are either publicly held or that have owners with limited interests such that they would not be prosecuted for fraud.

Under Ohio Revised Code § 3599.45, an attorney-general or county-prosecutor candidate is prohibited from accepting 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.[23]

As indicated by Plaintiffs' Proposed Finding of Fact No. 36, providers of pharmacy services and providers of durable-medical equipment are included within the ambit of the statute.[24] This proposed finding was intended to answer the Magistrate Judge's question, raised at oral argument in this matter, whether an entity such as CVS was considered a provider. Plaintiffs submit that it is beyond reasonable dispute that CVS is a pharmacy, and that CVS is publicly held, and therefore that the Court may take judicial notice of these facts

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[23] Ohio Rev. Code § 3599.45(A) (West 2010).

[24] Pls.' Prop. Findings of Fact and Concl. of Law, dated Oct. 8, 2010 (Doc. 13), at p. 10 (Prop. Finding No. 36).

in determining that there are Medicaid providers with small, non-controlling interests.[25] Nonetheless, Plaintiffs also here submit supplemental documentation to show the existence of such providers.

According to the ODJFS, Ohio has 1,643 providers of durable-medical equipment, and 3,188 providers of pharmacy services.[26] While Plaintiffs have not yet obtained a comprehensive list of all such providers, an online Medicaid Managed Care provider directory provided in partnership with ODJFS shows that one provider of durable-medical equipment is CVS.[27] As mentioned, it is beyond reasonable dispute, and Plaintiffs also here submit documentation to show, that CVS (officially, "CVS Caremark") is a publicly held corporation.[28] The directory does not separately list providers of pharmacy services—instead indicating that a consumer under the Managed Care program can use "any pharmacy that accepts Ohio Medicaid."[29] A $36.7 million Medicaid-fraud settlement agreement between CVS Caremark and the United States and other states, including Ohio, however

[25] *See* Fed. R. Civ. P. 201 ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

[26] ODJFS, Medicaid Management Information System, Provider Update Control Report, at 3, 4, Pls.' Supp. Ex. 2.

[27] *See, e.g.*, Ohio Medicaid Managed Care Enrollment Center, Online Provider Directory, Search Results for "CVS," Pls.' Supp. Ex. 3.

[28] *See, e.g.,* CVS Caremark Corporation, Form 10-K (filed for the FY ending Dec. 31, 2009), *available at* http://www.sec.gov/Archives/edgar/data/64803/000119312510043086/d10k.htm (indicating par value of common stock) (indicating listing on New York Stock Exchange), Pls.' Supp. Ex. 4.

[29] *See* Ohio Medicaid Managed Care Enrollment Center, Online Provider Directory, search results for "pharmacy," Pls.' Supp. Ex. 5.

shows that the company has sought Medicaid reimbursements through its pharmacies located in Ohio.[30] Thus, CVS falls under the category of Medicaid pharmacy-providers.

In addition to providers of pharmacy service and durable-equipment suppliers, managed-care organizations are also included within the ambit of Ohio Revised Code § 3599.45. Such organizations enter into provider agreements with ODJFS,[31] under which they are "authorized to provide, or arrange for the provision of health care services to medical assistance recipients."[32] There are seven managed-healthcare plans,[33] included within the 56 health-maintenance organizations that ODJFS lists as providers.[34]

Two examples of managed-care organizations contracting with Ohio to provide Medicaid services are Molina Health Care of Ohio, Inc., and WellCare.[35] Molina Health Care of Ohio, Inc. operates as a wholly owned subsidiary of Molina Health Care, Inc.[36] Molina

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30 *See United States ex. Rel. Bernard Lisitza v. CVS Caremark Corp.*, No. 03 C. 742 (N.D. Ill. 2008) (settlement agreement), at 2, *available at* http://www.justice.gov/usao/iln/pr/chicago/2008/pr0318_01b.pdf, last accessed October 19, 2010, Pls.' Supp. Ex. 6; *see also* United States Dept. of Justice Press Release Regarding Settlement Agreement, Mar. 18, 2008, *available at* http://www.justice.gov/usao/iln/pr/chicago/2008/pr0318_01.pdf, last accessed October 19, 2010, Pls.' Supp. Ex. 7.

31 Ohio Admin. Code § 5101:3-26-01.

32 Ohio Rev. Code § 5111.17(A).

33 *See, e.g.,* Medicaid Managed Care Enrollment Center, "Contact Us" Page, *available at* https://www.ohiomcec.com/ContactUs.aspx, last visited October 18, 2010, Pls.' Supp. Ex. 8.

34 ODJFS, Medicaid Management Information System, Provider Update Control Report, at 4, Pls.' Supp. Ex. 2.

35 *See, e.g.,* Medicaid MCEC, "Contact Us" Page, Pls.' Supp. Ex. 8.

36 *See* Molina Health Care, Inc. 2009 Annual Report, at 1, 35, 66, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Mzc3MjN8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1, last accessed October 18, 2010, Pls.' Supp. Ex. 9. *See also* http://www.molinahealthcare.com/medicaid/members/oh/Pages/home.aspx (Molina Healthcare of Ohio members page), last accessed October 18, 2010, Pls. Supp. Ex. 10.

Health Care, Inc., is a publicly held corporation.[37] WellCare Health Plans, Inc., also a publicly held corporation,[38] operates in Ohio through its wholly owned subsidiary, WellCare of Ohio, Inc.[39]

As the statute plainly prohibits *anyone* with an "ownership interest" in a Medicaid provider from donating, shareholders with very small ownership interests in CVS or Molina Health Care, or WellCare, on the statute's face would be prohibited, even though those shareholders have no control over the company's decisions and would never be involved in prosecution for Medicaid fraud based on their ownership status.[40]

Indeed, the civil Medicaid fraud statute, Ohio Rev. Code § 5111.03, only penalizes providers with termination of the agreement upon the conviction of or judgment against an owner, where the owner has at least a 5% ownership interest in the provider.[41] Thus, whether or not an entity is publicly held, Section 3599.45 would prohibit contributions from individuals with small interests even when the fraud statute itself does not contemplate any penalty of agreement-termination against such an individual. In addition, as Plaintiffs point out in their opening brief, Section 3599.45's restriction of anyone with an ownership interest—however small—is more

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[37] *See, e.g.,* Molina Health Care, Inc. 2009 Annual Report at pp. 1, 25, Pls.' Supp. Ex. 9.

[38] WellCare Annual Report 2009, at 21, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzY5NzA1fENoaWxkSUQ9Mzc5OTEyfFR5cGU9MQ==&t=1, last accessed October 18, 2010, Pls. Supp. Ex. 11 (cited pages only).

[39] *See, e.g., id.* at 3; *id.* at F-7; *id.* at Ex. 21.1 (listing WellCare of Ohio, Inc., in list of subsidiaries), Pls.' Supp. Ex. 11.

[40] *Cf.* Ohio Rev. Code § 2901.23 (assigning criminal liability to corporation where officer, agent, or employee were involved, or, in certain cases, board of directors, trustees, or partners); *State v. CECOS Int'l, Inc.*, 526 N.E.2d 807, 811 (Ohio 1988) ("[A] business entity may be found guilty of a criminal offense only if the criminal act or omission was approved, recommended, or implemented by high managerial personnel with actual or implied authority to approve, recommend or implement same. High managerial personnel are those who make basic corporate policies.").

[41] Ohio Rev. Code § 5111.03.

onerous than campaign-finance provisions addressed in other cases. It also contrasts with Ohio's own pay-to-pay rules, which set limits on individuals with a 20% ownership interest in certain contracting entities.[42]

2. Ohio Revised Code § 3599.45 prohibits a substantial amount of protected speech even apart from those with an ownership interest in a publicly held provider.

A statute prohibits a "substantial" amount of protected speech in relation to any "plainly legitimate sweep," when, for example, it applies to circumstances or contributions with little or no connection to the harm the statute intends to combat.[43]

The R&R observed, under the second prong of the intermediate-scrutiny analysis, that Ohio Revised Code § 3599.45 prohibits a provider's contributions to each of the 88 county prosecutors even if the provider does not operate or reside in that county.[44] The R&R correctly concluded, in part based on that observation, that the statute is not "closely drawn" to further its purported interest.[45] The R&R, accordingly, concluded that the statute has no "legitimate application" to the Plaintiffs here.[46]

Even if such a legitimate application could be demonstrated, however—and it has not been—the sweep of the statute to prohibit contributions in dozens of races outside a

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[42] Pls.' Mot. for Prelim. Injunc. (Doc. 2), at 38, nn. 123-24 and accompanying text.

[43] *See, e.g., Dallman v. Ritter*, 225 P.3d 610, 626-27 (Colo. 2010) (holding contribution restriction on certain contractors overbroad because, while the law intended to encourage competitive bidding, it applied even to those state contracts where competitive bidding was either not feasible or not appropriate). *See also New York v. Ferber*, 458 U.S. 747, 766 (1982) (characterizing the overbreadth claim in that case as forbidding the distribution of material that did not threaten the harm sought to be combated by the state).

[44] *See* R&R, at 15, 17.

[45] R&R, at 22 ("Ohio's contribution ban imposed on Medicaid providers cannot be considered 'closely drawn.'").

[46] R&R, at 24.

contributor's home county would, by the R&R's own salient reasoning, be overbroad by comparison. As the R&R points out, an individual running for prosecuting attorney in Hamilton County, for example, has "no potential connection to" a provider residing in, for example, Ashtabula County, and providing services in Cuyahoga County.[47] Thus, for the same reasons that the R&R correctly found the ban's reach to each of 88 prosecutors not "closely drawn," the statute also prohibits a substantial amount of protected speech and thus is overbroad.[48]

In addition, as discussed below, the Defendant's own exhibits indicate that Medicaid providers in Ohio number over 64,000, yet there were only 377 fraud-related complaints lodged against providers in 2008, and out of those, only 316 investigations.[49] That figure is less than 1% of the total number of Medicaid providers. The statute is thus overbroad because it reaches a substantial number of providers—99%—who will never have occasion to even appear on the radar of the Attorney General or county prosecutor.

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[47] *Id.*

[48] *See Dallman v. Ritter*, 225 P.3d 610, 627 (Colo. 2010) (holding unconstitutional a provision prohibiting candidates from accepting contributions from sole source contractors regardless of their ability to influence contract awards or their relation to the contractor) ("[W]e cannot sacrifice First Amendment freedoms to an implausible perception of impropriety that links every contribution to an illicit arrangement . . . The [provision] 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.").

[49] *Compare* Health Policy Institute of Ohio, *Medicaid Basics 2009*, at 1, 8, *available at* http://a5e8c023c8899218225edfa4b02e4d9734e01a28.gripelements.com/pdf/publications/medicaidbasics_2009.pdf, last accessed October 15, 2010 (submitted by Defendant at Prelim. Injunc. Hrng. As Ex. B), *with Ohio Medicaid Fraud Control Unit FY 2009 Annual Report*, at 3, *available at*: http://www.ohioattorneygeneral.gov/getattachment/38ff2c4c-fce7-42f3-85c4-d2581907e462/2009-Health-Care-Fraud-Annual-Report.aspx, last accessed on Oct. 7, 2010 (submitted by Defendant at Prelim. Injunc. Hrng. as Ex. C).

III. The Defendant has not met her burden to demonstrate a sufficiently important interest to justify limiting campaign contributions (page 13).

The magistrate judge's report and recommendation provides as follows:

> Given the lack of novelty and high plausibility of the government interest asserted by the Secretary to justify Ohio's campaign limits, the quantum of evidence necessary to satisfy heightened judicial scrutiny in this case is extremely small. Consequently, given the evidence presented by the Secretary regarding Medicaid fraud in Ohio, the court finds that the Secretary has carried her burden of demonstrating a sufficiently important government interest to justify limiting campaign contributions.[50]

The R&R's conclusion on the first prong of the intermediate-scrutiny analysis is contrary to Supreme Court case law. First, the R&R incorrectly concludes that the Defendant's justification for Ohio Rev. Code § 3599.45 is not novel or implausible and therefore that the evidence required is "extremely small." The R&R comes to this conclusion despite repeatedly finding that Ohio is the only state that has such a statute.[51] Second, the R&R incorrectly concludes that the Defendant's evidence regarding Medicaid fraud in Ohio is sufficient to impinge on the First Amendment rights at issue here.

1. The quantum of evidence required in this case is high.

In *Nixon v. Shrink Missouri Gov't PAC*, the Supreme Court stated: "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."[52] While the Court drew no clear lines, its own analysis is instructive as to what might be novel or implausible. *Nixon*, because it addressed the same general contribution limits at issue in *Buckley*, had no need to look at anything more specific than *Buckley*'s own justification:

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[50] R&R, at 13.

[51] R&R, at 5, 14; *see also id.* at 21 (calling the ban "unique and without precedent").

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

"*Buckley* demonstrates that the dangers of large, corrupt, contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."[53]

Here, the proposed justification for Ohio Rev. Code § 3599.45 is not the general "danger of large, corrupt contributions." It is the danger of *any* contribution specifically by a *Medicaid provider to a candidate for Attorney General or county prosecutor*. It is this more group-specific justification that must be considered for its novelty or plausibility,[54] particularly given that the First Amendment disfavors identity-specific restrictions on political speech.[55] In *Green Party of Conn. v. Garfield*, for example, the Second Circuit assessed whether a ban on contractor-contributions furthered a sufficiently important government interest.[56] The Court did not rely, as the R&R does, on a general justification that "corruption and the appearance of corruption are problems endemic in the American political system."[57] Rather, in coming to the conclusion that the restriction was justified, the Court analyzed the record specifically as to contractors, finding 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

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[53] *Id.* at 391.

[54] *See, e.g., Casino Ass'n of Louisiana v. State*, 820 So.2d 494, 508, 2002-0265 (La. 6/21/02) ("Given the history of the gaming industry and its connection to public corruption and the appearance of public corruption, it is completely plausible, and not at all novel, for the Louisiana legislature to have concluded that it was necessary to distance *gaming interests* from the ability to contribute to candidates and political committees which support candidates.") (emphasis added).

[55] *See Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) ("The First Amendment generally prohibits the suppression of political speech based on the speaker's identity."); *id.* at 899 ("We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."); *id.* at 899 ("[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers.").

[56] *Green Party of Conn. v. Garfield*, __ F.3d __, Nos. 09-0599 & 09-0609, 2010 WL 2737134, at *7 (2d Cir. July 13, 2010) (emphasis added).

[57] R&R, at 13.

to corruption."[58] Similarly, in the portion of *McConnell v. FEC* addressing restrictions on soft party contributions to national party committees (separate from the portion of the opinion striking down the ban on minors, discussed below), the Supreme Court analyzed the restriction's justification specifically: "The question for present purposes is whether *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption."[59] This more salient question arises from the statute's actual subject matter, which is *not* corruption generally. Rather, the subject matter specifically targets the relationship between prosecutors and Medicaid providers.

When considered at the appropriate level of specificity, the justification contemplated by Ohio Rev. Code § 3599.45 is utterly novel and implausible. As the R&R points out and as Defendant does not dispute, no other state in the country has seen the need to impose such a restriction on Medicaid providers.[60] The prohibition, in addition, is the only one of its kind in Ohio—no other group in Ohio is prohibited from contributing to candidates for Attorney General or county prosecutor.[61]

What the R&R fails to appreciate is the rationale's implausibility. Although Defendant makes much of the fact that 26% of Ohio's budget goes to Medicaid funding, she has not shown what portion of that is allocated to the Attorney General or county

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[58] *Green Party*, 2010 WL 2737134, at *7 (emphasis added).

[59] *McConnell v. FEC*, 540 U.S. 93, 145 (2003) (emphasis in original); *see also id.* at 144 ("The idea that large contributions *to a national party* can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible.") (emphasis added).

[60] R&R, at 5, 14. *See also* Pls.' Prop. Findings of Fact and Concl. of Law (Doc. 13), at p. 13 (Prop. Finding of Fact No. 51).

[61] *See* R&R, at 5. *See also* Pls.' Prop. Findings of Fact and Conclusions of Law (Doc. 13), at pp. 11-13 (Prop. Findings of Fact Nos. 43-51).

prosecutors to combat Medicaid fraud.[62] Nor has she shown that the Attorney General or county prosecutors spend more resources combating Medicaid fraud than any other type of problem that comes before them.[63] Finally, as the Defendant's own evidence shows, although there were over 64,000 Ohio Medicaid providers in 2008,[64] the Attorney General's Medicaid Fraud Control Unit ("MFCU") received only 377 fraud-related complaints in 2008-09.[65] That figure is less than 1% of all Ohio Medicaid providers. Thus the notion that campaign contributions by Medicaid providers present a particular danger to the Attorney General's or county prosecutors' prosecutorial decision-making is extremely implausible.

The Court should distinguish between Medicaid providers and the targeted groups where courts have upheld contribution bans. For example, bans on contributions by employees of the gambling industry have been upheld because of the history of corruption in the gambling industry.[66] Restrictions on contributions by lobbyists are upheld given the

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[62] *See* Pls.' Prop. Findings of Fact and Conclusions of Law (Doc. 13), at p. 8, 17 (Prop. Findings of Fact Nos. 31, 69).

[63] *Id.* at 8 (Prop. Finding of Fact No. 31).

[64] *See* Health Policy Institute of Ohio, *Medicaid Basics 2009*, at 1, 8, *available at* http://a5e8c023c8899218225edfa4b02e4d9734e01a28.gripelements.com/pdf/publications/medicaidbasics_2009.pdf, last accessed October 15, 2010 (submitted by Defendant at Prelim. Injunc. Hearing as Ex. B) (over 64,000 Medicaid providers).

[65] *Ohio Medicaid Fraud Control Unit FY 2009 Annual Report*, at 3, *available at* http://www.ohioattorneygeneral.gov/getattachment/38ff2c4c-fce7-42f3-85c4-d2581907e462/2009-Health-Care-Fraud-Annual-Report.aspx (reporting attorney general's fraud-investigation-and-prosecution statistics) (submitted by Defendant at Prelim. Injunc. Hearing as Ex. C).

[66] *See, e.g., Casino Ass'n of Louisiana v. State*, 820 So.2d 494, 504, 2002-0265 (La. 6/21/02) ("[G]ambling has been recognized as a vice activity which poses a threat to public health and public morals.") ("Given the history of the gaming industry and its connection to political corruption and the appearance of public corruption, it is completely plausible and not at all novel, for the Louisiana legislature to have concluded that it was necessary to distance gaming interests from the ability to contribute to candidates and political committees which support candidates."); *State v. Soto*, 565 A.2d 1088, 1097, 1098 (N.J. 1989) (upholding ban on contributions by casino employees, citing the "acknowledged vulnerability of the casino industry to organized crime" and the "mischief" wrought by gambling on "public welfare and morality").

close professional contact between lobbyists and legislators who are influenced by them.[67] The Courts in each of these cases focused on the specific industries in a way that the R&R did not in accepting a more sweeping "corruption" rationale. Medicaid providers, as shown above, as a group have very little contact with prosecutors. In addition, providing health services to poor individuals can in no way be compared to the "vice" activity of gambling. Any justification for prohibiting Medicaid provider contributions to prosecutor candidates is novel and implausible. Accordingly, a high "quantum of empirical evidence" is required.

In addition, as the Supreme Court in *Nixon* stated, "more extensive evidentiary documentation" may be required where Plaintiffs have made a "showing of their own to cast doubt on the apparent implications of *Buckley*'s evidence and the record here."[68] Here, Plaintiffs have made such a showing. Plaintiffs presented the following evidence, which the R&R incorrectly disregarded: senate journal minutes and a bill draft showing that fraud was the primary concern of the bill, and that the contribution ban was not even part of the bill as contemplated by and passed by the state senate;[69] house journal minutes and committee hearing minutes documenting no rationale for the ban;[70] a bill analysis by the Legislative

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[67] *See, e.g., State v. Alaska Civ. Lib. Union*, 978 P.2d 597, 619 (Alaska 1999) ("Lobbyists are, by definition, paid to influence administrative or legislative action. Their professional purpose, coupled with their proximity to legislators during the legislative session, makes them particularly susceptible to the perception that that they are *buying* access when they make contributions."); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) ("[L]obbyists are paid to effectuate particular political outcomes. The pressure on them to perform mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange "dollars for political favors" can be powerful.").

[68] *Nixon*, 528 U.S. at 394.

[69] Ohio Senate Journal, 112th Gen. Assemb., 1st Sess., 187, 192, 1229-30, 1278-80 (1977) (Pls.' Mot. Prelim. Injunc., Ex. 4) (minutes documenting amendments in Senate); Am. S.B. 159, 112th Gen. Assemb., 1st Sess. (Oh 1977) (bill as it passed Senate) (Pls.' Mot. Prelim. Injunc., Ex. 6); *see also* Ohio House Journal, 112th Gen. Assemb., 2d Sess., at 2418, 2556 (1978) (Pls.' Mot. Prelim. Injunc., Ex. 4).

[70] *See* House Comm. Hearing Minutes (Mar. 8, 1978, 9:30am) (Pls.' Mot. Prelim. Injunc., Ex. 7); Ohio House Journal, 112th Gen. Ass., 2d Sess., 2558-2560 (1978) (Pls.' Mot. Prelim. Injunc., Ex. 4).

Service Commission making no mention of Ohio Rev. Code § 3599.45;[71] newspaper articles barely mentioning the provision, let alone documenting any instances of corruption to which it was responding;[72] and, finally, a declaration by the principal senate sponsor of the bill enacting the provision, stating: "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."[73]

As Plaintiffs detailed in their Proposed Findings of Fact and Conclusions of Law, the above evidence is probative notwithstanding that Ohio lacks an official legislative history.[74] The R&R itself acknowledges that in *Nixon*, even though Missouri like Ohio did not keep a legislative history, the Supreme Court considered an affidavit from a legislator who was involved in campaign-finance reform at the time the contribution limits at issue were adopted.[75]

Through their evidence, Plaintiffs have called into question the justification proposed to support Ohio Rev. Code § 3599.45—that there is a danger of any, even minimal, campaign contributions made by Medicaid providers corrupting Attorney General and

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[71] *See* Legislative Service Commission, Bill Analysis for Am. S.B. 159, 112th Gen. Assemb., at 1 (1978) (Pls.' Mot. Prelim. Injunc., Ex. 5).

[72] *See, e.g., 2 Youngstown Democrats clash on bill to halt Medicaid fraud*, THE PLAIN DEALER, Feb. 16, 1978, at 4-E (Pls.' Mot. Prelim. Injunc., Ex. 16) (describing the controversy over attorney general versus county prosecutor role); *New Law Empowers State to Probe Medicaid Fraud,* THE PLAIN DEALER*,* Apr. 25, 1978, at A-5, (Pls.' Mot. Prelim. Injunc., Ex. 12); *House Panel Approves Medicaid Fraud Bill*, COLUMBUS DISPATCH, Mar. 9, 1978, at B-7 (Pls.' Mot. Prelim. Injunc., Ex. 11).

[73] Declaration of Harry Meshel, at ¶ 10 (Pls.' Mot. Prelim. Injunc., Ex. 8).

[74] *See* Pls. Prop. Findings of Fact and Concl. of Law (Doc. 13), at pp. 26-27 (Prop. Findings of Fact Nos. 30-34).

[75] *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 393 (2000); R&R, at 4 n.1.

county prosecutors' prosecutorial decisions. Because Plaintiffs have made such a showing, and because of the novelty and implausibility of the justification, the quantum of evidence required for Defendant to satisfy heightened judicial scrutiny is not "extremely small," but, instead, large.

2. Generalized evidence of fraud does not suffice to support a justification for Ohio Rev. Code § 3599.45.

Even if the R&R correctly concluded that the amount of evidence required in this case is small, it incorrectly found that Defendant's evidence of fraud in Ohio suffices to justify restrictions on contributions by Medicaid providers. As shown by *Nixon* and *McConnell v. FEC*, there has to be *some* evidence to substantiate the concern of actual or perceived corruption, in this case, regarding prosecutorial decisions about Medicaid fraud.

Even in *Nixon*, where Missouri had enacted the same type of plain-vanilla general–contribution limits at issue in *Buckley*, the Court analyzed the evidence proffered by the state, finding the following evidence "enough to show that the substantiation of the congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law"[76]: (as here) an affidavit from a state legislator involved in campaign-finance reform at the time contribution limits were enacted, stating the danger of large contributions; newspaper accounts of large contributions supporting inferences of impropriety; reports of scandals; and a statewide initiative showing the public's perception of the need to combat corruption.[77] In other cases that have upheld restrictions on contributions by particular groups, states have submitted comparable evidence.[78]

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[76] *Nixon*, 528 U.S. at 393.

[77] *Id.* at 393-94.

[78] *Casino Ass'n of Louisiana*, *Casino Ass'n of Louisiana v. State*, 820 So.2d 494, 504, 2002-0265 (La. 6/21/02) ("affidavits outlining the public perception that gaming is associated with political

Here, the Defendant has not presented a shred of evidence, let alone anything nearing that in *Nixon* or *Buckley*, to support a justification of corruption or its appearance in the exercise of prosecutorial discretion related to Medicaid providers. The R&R itself notes as much.[79]

Importantly, while the R&R cites to the portion of *McConnell v. FEC*[80] that upheld restrictions on soft–money contributions to national parties,[81] it did not mention the portion of the Supreme Court's opinion that struck down a ban on contributions by minors because of insufficient evidence. In *McConnell*, the Government proposed that the ban protected against "corruption by conduit[,]that is, donations by parents through their minor children to circumvent contribution limits applicable to the parents."[82] The Court found that the Government had offered "scant evidence of this form of evasion," and that "[a]bsent a more convincing case of the claimed evil, this interest is simply too attenuated . . . to withstand heightened scrutiny."[83]

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corruption, information that nine states (including Louisiana) have prosecuted governmental officials in gaming cases, and statistics showing the staggering sum of money collected by those within the gaming industry"); *State v. Soto*, 565 A.2d 1088, 1097, 1098 (N.J. 1989) (state commission of investigation report to the governor and legislature noted that contributions from the gambling industry gave the appearance of buying influence, and therefore recommended the restriction); *State v. Alaska Civ. Lib. Union*, 978 P.2d 597, 619 (Alaska 1999) (state submitted newspaper articles, affidavits, and a survey commissioned by the state senate to show the perception of lobbyists' role in political fundraising). *See also* Pls.' Prop. Findings of Fact and Concl. of Law (Doc. 13), at pp. 23-24 (Prop. Concl. of Law Nos. 21-22 & n. 97).

[79] R&R, at 13 ("Secretary offers no evidence that corruption or the appearance of corruption between Medicaid providers and county prosecutors was a particular problem at any time before, during, or after passage of SB 159.").

[80] *McConnell v. FEC*, 540 U.S. 93, 143-45 (2003).

[81] R&R, at 13.

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

[83] *Id.*

Here, the Defendant does not even have "scant" evidence of the "claimed evil." The claimed evil here is not fraud. Fraud is already addressed by the provisions that outlaw fraud and provide civil and criminal penalties for engaging in such fraud.[84] Rather, the claimed evil is actual or perceived corruption in prosecutorial decisions regarding Medicaid fraud. As mentioned, the R&R acknowledged that the "Secretary offers no evidence that corruption or the appearance of corruption between Medicaid providers and county prosecutors was a particular problem at any time before, during, or after passage of SB 159."[85] Indeed, as mentioned, although there were undisputedly over 64,000 total Medicaid providers in Ohio in 2008,[86] the Attorney General's Medicaid Fraud Control Unit received only 377 fraud-related complaints in 2008-09.[87] That means that in 2008, the Attorney General's office had occasion to come into contact with less than 1% of all Medicaid providers. This figure belies any concern of the kind of real or perceived corruption that might justify restricting providers' campaign contributions. Accordingly, the R&R incorrectly concludes that "given the evidence presented by the Secretary regarding Medicaid fraud in Ohio, . . . the Secretary has carried her burden of demonstrating a sufficiently important government interest to justify limiting campaign contributions."[88]

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[84] *See* Ohio Rev. Code §§ 5111.03; 2913.40.

[85] R&R at 13.

[86] *See* Health Policy Institute of Ohio, *Medicaid Basics 2009*, at 1, 8, *available at* http://a5e8c023c8899218225edfa4b02e4d9734e01a28.gripelements.com/pdf/publications/medicaidbasics_2009.pdf, last accessed October 15, 2010 (submitted by Defendant at Prelim. Injunc. Hrng. as Ex. B).

[87] Ohio Medicaid Fraud Control Unit FY 2009, at p. 3, *available at*: http://www.ohioattorneygeneral.gov/getattachment/38ff2c4c-fce7-42f3-85c4-d2581907e462/2009-Health-Care-Fraud-Annual-Report.aspx, last accessed on Oct. 7, 2010 (submitted by Defendants at Prelim. Injunc. Hrng. as Ex. C).

[88] R&R, at 13.

Indeed, were evidence of fraud sufficient to carry the burden of showing a "sufficiently important government interest" here, Ohio could prohibit the Attorney General and county prosecutors from accepting campaign contributions from *anyone* in Ohio—as anyone can be prosecuted for murder—based on no more than an assertion that violent crime is a problem in Ohio. More is required before First Amendment freedoms can be restricted in the manner that Ohio Rev. Code § 3599.45 does.

The R&R correctly concludes, under the *second* prong of the intermediate-scrutiny analysis, that "Ohio's ban on contributions by Medicaid providers to the campaigns of persons running for Attorney General or county prosecutor is unique and without precedent,"[89] and that "the statute imposes a ban without referencing any serious exigence that would justify such an extreme measure and without evidence that the legislature considered any sanction less than a ban."[90] Plaintiffs agree that these frailties and others compel a conclusion that a ban on contributions is not "closely drawn."

For very similar reasons, however, Plaintiffs respectfully submit that Defendant failed to demonstrate a sufficient justification to burden the rights of Medicaid providers at all. That is the basis for Plaintiffs' objection here.

IV. Conclusion

For reasons outlined above, and as required by 28 U.S.C. § 636(b)(1)(C) and Rule 72.3(b) of the Rules of this Court, Plaintiffs object to certain portions and aspects of the Magistrate Judge's Report & Recommendation. Plaintiffs obviously do not object to the R&R overall, or its recommended conclusion that Plaintiffs' Motion for a Preliminary Injunction should

[89] R&R, at 21.

[90] R&R, at 22.

be granted. Plaintiffs will submit a proposed order along with their response to Defendant's objection to the R&R.

Respectfully submitted,

THE CHANDRA LAW FIRM, LLC

/s/ Subodh Chandra
Subodh Chandra (OH Bar No. 0069233)
Donald Screen (OH Bar No. 0044070)
1265 W. 6th St., Suite 400
Cleveland, OH 44113-1326
Phone: 216.578.1700
Fax: 216.578.1800
Subodh.Chandra@StanfordAlumni.org
Donald.Screen@gmail.com

BERKMAN, GORDON, MURRAY & DEVAN

/s/ Raymond V. Vasvari, Jr.
J. Michael Murray (0019626)
Raymond V. Vasvari, Jr. (0055538)
55 Public Square, Suite 2200
Cleveland, Ohio 44113-1949
PH: 216.781.5245 Fx: 216.781.8207
jmmurray@bgmdlaw.com
rvasvari@bgmdlaw.com

Attorneys for Plaintiffs Arthur Lavin, M.D., et al.

CERTIFICATE OF SERVICE

I certify that on October 19, 2010 my office served, via the Court's ECF system, the foregoing **PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION** on the following:

KARL H. SCHNEIDER
MARK R. METERKO
250 Civic Drive, Ste. 500
Columbus, OH 43215
khschneider@ms-lawfirm.com
mmeterko@ms-lawfirm.com

Attorneys for Defendant

/s/ Subodh Chandra
One of the attorneys for Plaintiffs