UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR LAVIN, M.D., *et al.*, Plaintiffs v. **JON HUSTED,** In his official capacity as Ohio Secretary of State Defendant	CASE NO. 1:10-cv-01986 JUDGE DONALD C. NUGENT MAGISTRATE JUDGE NANCY A. VECCHIARELLI

Plaintiffs' Motion for Summary Judgment and Permanent Injunction

Plaintiffs Arthur Lavin, M.D., *et al.* respectfully move for summary judgment, and seek a permanent injunction that enjoins Defendant from enforcing Ohio Revised Code § 3599.45. A memorandum in support follows. Exhibits and Table of Authorities will be filed separately.

TABLE OF CONTENTS

I. Statement of the Issues

Plaintiffs are entitled to summary judgment and to a permanent injunction that enjoins Defendant from enforcing Ohio Revised Code § 3599.45. That statute flatly bans Ohio attorney-general or county-prosecuting-attorney candidates from accepting campaign contributions from Ohio Medicaid providers and persons with "an ownership interest" (no matter how insignificant) in such providers. Because § 3599.45 advances no sufficiently important governmental interest, is not closely drawn, and is overbroad, the ban violates Plaintiffs' rights to free speech and free association under the First and Fourteenth Amendments.

II. Summary of the Argument

Section 3599.45 makes it a crime for candidates for state attorney general or county prosecuting attorney in any of Ohio's 88 counties to accept campaign contributions from thousands of law-abiding citizens—viz., Medicaid providers and anyone with "an ownership interest in" a Medicaid provider. No other state prohibits Medicaid providers (or those with ownership interests in them, such as shareholders) from making such contributions; and Ohio imposes no such restriction on any other group that could be subject to prosecution.

Contribution restrictions such as the one here impinge on free-speech and free-association rights protected by the First Amendment. As such, they are subject to intermediate scrutiny: the state must demonstrate that the statute furthers a sufficiently important government interest and that it is closely drawn to avoid unnecessary abridgment of individuals' freedoms. The statute at issue here fails on both counts.

The state cannot demonstrate that the statute promotes a sufficiently important governmental interest. Where courts have upheld contribution restrictions, they have done so based on an evidentiary record showing a history of pervasive corruption or the appearance of corruption. No such evidence exists here. The chief Senate sponsor of the bill testifies, and the statute's history demonstrates, that the prohibition was *not* enacted in

response to any actual or perceived corruption, and Defendant is not expected to produce any evidence to the contrary. Nor, as this case pends 30 years later, is there evidence to show a current concern about actual or perceived corruption.

Even if the state could demonstrate a sufficiently important governmental interest in restricting Medicaid-provider and owner contributions, it cannot show that the statute is "closely drawn" to serve that interest. The statute unnecessarily imposes a total *ban*, rather than simply a limit, and thus prohibits even "symbolic expression[s] of support" evidenced by small contributions.[1] Worse, it imposes a criminal penalty while other contribution bans in Ohio impose only civil penalties. And it unnecessarily prohibits contributions to prosecuting-attorney candidates in each of Ohio's 88 counties, even though a county prosecuting attorney lacks jurisdiction to prosecute a non-resident provider or shareholder.

Finally, the contested statute is overbroad in that it bans contributions from anyone with "an ownership interest," however small, in a Medicaid provider. Many publicly held corporations provide Medicaid services in Ohio. These entities' shareholders have an ownership interest in Medicaid providers, and thus are subject to the statute's ban, even though very few have any control over the providers' practices. The statute thus tramples on the constitutional rights, not only of 64,000 Medicaid providers, but also of hundreds of thousands of individuals who have nothing to do with providing Medicaid services and will never conceivably be prosecuted for Medicaid fraud.

Defendant has produced no evidence that creates a genuine issue of material fact. Plaintiffs are therefore entitled to summary judgment, and to a permanent injunction to prevent the ongoing violation of their constitutional rights.

---

[1] *Buckley v. Valeo,* 424 U.S. 1, 21 (1976).

III. STATEMENT OF UNDISPUTED[2] FACTS

Plaintiffs are physicians, and number among the more than 64,000 providers[3] who contract with the Ohio Department of Job and Family Services (ODJFS) to provide services to indigent patients under the Medicaid program established by Congress in 1965.[4] Only Dr. Lavin has a known "ownership interest" in his medical practice.[5] Other Plaintiffs are unsure whether they have ownership interests in publicly traded Medicaid providers through mutual funds or other investments.[6] Because at least most of the Plaintiffs are on fixed salaries, moreover, they lack any conceivable financial incentive to commit Medicaid fraud.[7]

In July 2010, Plaintiff Lavin contacted then Ohio Attorney General Richard Cordray's campaign office, to inquire on Plaintiffs' behalf about donating to the campaign.[8] Plaintiffs were dismayed when the Cordray campaign refused the donations because of Plaintiffs' Medicaid–provider status.[9] Quoting the contested statute, the campaign's website

---

[2] In a (30)(b)(6) deposition, Defendant's designated representative admitted that Defendant can offer no affirmative evidence contradicting the facts set forth here. *See generally* Curt Mayhew Depo. Tr. at 8-64 (Mar. 14, 2011) (attached as Ex. 1).

[3] *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). As of December 2010, the figure was nearly 89,000. *See* ODJFS, Provider Update Control Report, at 4 (Jan. 2011) (attached as Ex. 2).

[4] *See* Declaration of Arthur Lavin, M.D. at ¶¶ 1-2 ("Lavin Decl.") (attached as Ex. 3); 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.S.C. § 1396-1, §§1396a-d) (2010)) (allowing 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).

[5] Lavin Decl. at ¶ 1; Arthur Lavin, M.D.'s Response to Def.'s First Set of Interrog. ¶ 1 ("Lavin Interrog. Resp.") (attached as Ex. 4).

[6] *See* Declaration of Eric Schreiber, M.D., at ¶ 4 ("Schreiber Decl.") (attached as Ex. 5); *see also* Jason Chao, M.D.'s Am. Resp. to Def.'s First Set of Interrog. ¶¶ 1-2; Constance D. Magoulias, M.D.'s Am. Resp. to Def.'s First Set of Interrog. ¶¶ 1-2 (both forthcoming and to be filed with Court when received).

[7] *See* Schreiber Decl. at ¶ 4; *see also* Second Declaration of Arthur Lavin, at ¶¶ 5-6 (Drs. Beachy, Chao, Devereux, Degolia, and Magoulias also have no such incentive) (attached as Ex. 6).

[8] *See*, *e.g.*, Lavin Decl. at ¶ 7; Lavin Interrog. Resp. at ¶¶ 1-2.

[9] Lavin Decl. at ¶ 7-8; *see also* Lavin Interrog. Resp. at ¶ 2.

also warned that the campaign would not accept donations from Medicaid providers:[10]

> 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.[11]

Having been denied their right to free speech and association in the 2010 election, Plaintiffs wish to be able to contribute to candidates of their choice in the future.

A. Section 3599.45

The challenged statute provides in its entirety as follows:

> 3599.45 Contribution from Medicaid provider
>
> (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.[12]

Although § 3599.45 does not define "a provider of services or goods," Ohio Administrative Code §§ 5101:3 *et seq.* provide lengthy lists of provider categories. The lists include, among multifarious other categories, individual physicians like Plaintiffs and their

[10] *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. 7.
[11] *Id.*
[12] Ohio Rev. Code § 3599.45 (West 2010).

practices.[13] Numerous quasi-medical professionals, such as providers of pharmacy goods and services, medical-equipment suppliers, and medical-transportation services, are also included. ODJFS also contracts with managed-care organizations, including health-insurance organizations.[14]

Notably, Medicaid providers include many publicly held corporations, such as those that provide pharmacy services. Corporations such as Wal-Mart Stores, Inc., Target Corporation, and Walgreen Co., for example, are all publicly held entities that directly provide Ohio Medicaid services.[15] A shareholder of any of these public entities thus has an ownership interest in an Ohio Medicaid provider.[16] Wal-mart's individual shareholders alone number approximately 293,000.[17] In addition, other corporations such as CVS/Caremark Corp. and Rite Aid Corp. operate in Ohio through wholly owned subsidiaries that provide Medicaid services.[18] Their shareholders have an indirect ownership interest in Ohio Medicaid providers. Thus, hundreds of thousands of individuals or more who have "an ownership interest" in publicly held corporate providers fall within the ban's broad reach (not to mention the millions of Americans who have indirect ownership interests in such Medicaid providers through mutual funds, exchange-traded funds, or other investments.)

---

[13] Ohio Admin. Code § 5101:3-4. *See generally id.* §§ 5101:3-2 through 5101:3-16; 5101:3-22; 5101:3-29 through 5101:3-30.

[14] Ohio Rev. Code § 5111.17(A).

[15] Declaration of Mary Kendall ¶¶ 2-3 (Wal-Mart Stores, Inc.) (attached as Ex. 8); Declaration of William Thom ¶¶ 2-3 (Target Corporation) (attached as Ex. 9); Declaration of Judy Rohan ¶¶ 2-3 (Walgreen Co.) (attached as Ex. 10); *see also* Wal-Mart Stores, Inc., Form 10-Q; Target Corp., Form 10-Q; Walgreen Co. 10-Q (attached as Exs. 11, 12, 13).

[16] *See, e.g.,* Kendall Decl. at ¶ 4 (Ex. 8).

[17] Kendall Decl. at ¶ 2 (Ex. 8).

[18] Declaration of Thomas Moffat ¶¶ 2-3 (CVS Pharmacy, Inc.) ("Moffat Decl.") (attached as Ex. 14); Declaration of James Comitale ¶¶ 2-4 (Rite Aid Corp.) ("Comitale Decl.") (attached as Ex. 15). For others, *see* Sears Holdings Corp., Form 10-Q, Kroger Co. Form 10-Q and Winn Dixie Stores, Inc., Form 10-Q (attached as Ex.16, 17, 18). *See generally* ODJFS Pharm. & Med. Supplier Provider Listing (sorted excerpts attached as Ex. 19) (complete document available from Plaintiffs' counsel upon request).

B. Ohio's Campaign-Finance Scheme

Section 3599.45's ban on political contributions by Medicaid providers and those with an ownership in them is unique within Ohio's comprehensive campaign-finance scheme. Like many states, Ohio imposes general restrictions on the amount that can be contributed to a political candidate. Individuals over the age of seven may contribute no more than $10,000 to a candidate for a particular statewide office[19]—adjusted for inflation, now $11,543.70.[20] Ohio also bans political contributions from a small number of discrete groups, including children under the age of seven, foreign nationals, corporations, members and employees of the Ohio Elections Commission, and certain state employees who would be employed by, or in the same state agency or office as, the candidate.[21]

In addition, Ohio imposes a set of focused limitations on the award of state contracts to prevent kickbacks and "pay-to-play" schemes by state contractors. State agencies may not award unbid contracts in excess of $500 to certain individuals or entities that, during the previous 24 months, have contributed more than $1,000 to the campaign of any public official responsible for awarding contracts on behalf of that agency.[22] Also, the Ohio General Assembly previously adopted provisions (not currently in force) limiting certain state contractors' contributions to such public officials to $1,000 for a year after the

---

[19] *Id.* § 3517.102.

[20] Ohio Rev. Code Ann. § 3517.104(A); http://www.sos.state.oh.us/SOS/Upload/news/2011/CF2011-2013LimitChartReport.pdf, last accessed on Mar. 11, 2011; *see also* http://www.sos.state.oh.us/SOS/Campaign%20Finance/CFGuide/Resources/limchart.aspx, last accessed on Mar. 11, 2011.

[21] *See* Ohio Rev. Code Ann. §§ 3517.13(W)(1) (foreign nationals), 3517.102(B)(1)(c) and (C)(1)(a)(I) (children under seven), 3599.03(A)(1)(corporations), 3517.152(F)(2) (OEC members), 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).

[22] 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. 20).

award of a contract.[23] 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.[24]

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), and even small-time investors, from contributing to candidates for an elected office.[25] And while every state both regulates the conduct of its own elections and participates in the Medicaid program,[26] no state besides Ohio limits or bans Medicaid providers, let alone persons who own even a single share in one, from expressing themselves through political contributions.[27]

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 prosecuting attorneys. But it was not.

C. History of Section 3599.45

The General Assembly enacted section 3599.45 in 1978, as part of a bill that comprised certain statutes prohibiting Medicaid fraud, Ohio Revised Code §§ 5111.03 and 109.85. The three statutes together constituted a single act, Amended Senate Bill 159 ("S.B.

---

[23] 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).

[24] Ohio Rev. Code Ann. § 3517.992(R) (West 2010). Penalties for the bans mentioned above are set forth at Ohio Rev. Code Ann. § 3517.992(AA1), (AA2) (West 2010) (foreign nationals); § 3517.992(I)(1), (J)(1), (I)(6), (J)(5) (minors under age seven); § 3517.992(R) (certain state contractors); *see also* Am. Sub. H.B. 694 (additional state contractor provisions); § 3599.03 (corporations).

[25] 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.

[26] *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).

[27] *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*").

159").[28] Following on the heels of congressional anti-fraud legislation in October 1977,[29] the bill had as its primary purpose "the recovery of . . . excess payments under the medicaid program."[30]

Toward that end, S.B. 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.[31] 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.[32]

S.B. 159 also enacted section 109.85, the statute's enforcement mechanism. It authorizes the attorney general to investigate any criminal or civil violation of law related to the Medicaid program and, if prosecution or civil remedy is warranted, either refer the evidence to the appropriate county prosecutor or grand jury or initiate and prosecute the action.[33] The provision gives the attorney general exclusive supervision and control over

---

[28] 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. 21). Section 5111.03 was originally codified as Revised Code Section 5101.511.

[29] *See* Legis. Serv. Comm'n, Bill Analysis for Am. S.B. 159, 112th Gen. Assemb., at 1 (1978) ("S.B. 159 Bill Analysis") (attached as Ex. 22).

[30] Ohio Senate Journal, 112th Gen. Assemb., 1st Sess., at 187, 192, 1278 (1977) (all journal minutes attached as Ex. 23); Ohio House Journal, 112th Gen. Assemb., 2d Sess., at 2418, 2556 (1978), Ex. 23.

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

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

[33] R.C. 109.85(A), (B).

investigations and prosecutions initiated by the office.[34] It also authorizes county prosecuting attorneys to investigate and prosecute Medicaid fraud in their respective counties.[35]

These provisions together made up the whole of S.B. 159 when it passed the Ohio Senate.[36] The campaign-contributions ban at issue here was not a part of that bill. It was, instead, introduced as an amendment on the last day of House committee hearings.[37] Compared with other features of the bill, particularly the respective roles of the attorney general and county prosecutor in combating fraud, section 3599.45 was barely discussed.[38] When it was put to a vote, the House initially rejected the provision before passing it by only a one-vote margin.[39] 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.[40] Newspaper articles, similarly, barely mentioned the provision, let alone documented any instances of corruption to which it was responding.[41]

Importantly, nothing in the contested statute's history suggests that it was adopted in response to 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

---

34 R.C. 109.85(B).
35 R.C. 109.85(C).
36 Am. S.B. 159, 112th Gen. Assemb., 1st Sess. (Oh 1977) (bill as passed by Senate), Ex. 24; *see* Ohio Senate Journal at 187, 192, 1229-30, 1278-80 (1977), Ex. 23.
37 *See* House Comm. Hearing Minutes (Mar. 8, 1978, 9:30am), Ex. 25.
38 *See id. Compare* House Comm. Hearing Minutes (Feb. 15, 1978, 1:30pm) (attached as Ex. 39); House Comm. Hearing Minutes (Feb. 15, 1978, 9:30am), (attached as Ex. 40); House Comm. Hearing Minutes (Jan. 11, 1978) (attached as Ex. 41). *See also 2 Youngstown Democrats clash on bill to halt Medicaid fraud*, THE PLAIN DEALER, Feb. 16, 1978, at 4-E (attached as Ex. 26) (describing the controversy over attorney general versus county prosecutor role).
39 Ohio House Journal, 112th Gen. Assemb., 2d Sess., 2558-60 (1978) (attached as Ex. 23); *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. 25).
40 *See generally* S.B. 159 Bill Analysis, Ex. 22.
41 *See, e.g., 2 Youngstown Democrats clash on bill to halt Medicaid fraud*, THE PLAIN DEALER, Feb. 16, 1978, at 4-E (Ex. 26); *New Law Empowers State to Probe Medicaid Fraud,* THE PLAIN DEALER*,* Apr. 25, 1978, at A-5, (Ex. 27); *House Panel Approves Medicaid Fraud Bill*, COLUMBUS DISPATCH, Mar. 9, 1978, at B-7 (Ex. 28).

fraud. Ohio Senator Harry Meshel, the principal Senate sponsor of S.B. 159, recalls no underlying scandal or crisis in which corrupt relationships caused Medicaid fraud to go uninvestigated or unpunished by public officials.[42] Rather, he recalls that the provision was added in the context of a game of "one-upmanship," in which both Democrats and Republicans attempted to "outdo one another" to enact ever-stricter ethics requirements involving public officials:[43]

> 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. [44]

D. ODJFS, Ohio Attorney General, and Prosecuting Attorneys

1. ODJFS

ODJFS administers Ohio's Medicaid program.[45] As such, ODJFS has authority to establish rules setting forth the conditions, method, reimbursement amounts to providers, and the procedures for enforcing rules.[46] It is to ODJFS—not the attorney general or prosecuting attorneys—that Medicaid providers submit their claims for reimbursement, cost reports, and requests for prior authorization.[47] In addition, ODJFS has broad authority to

---

[42] *See* Declaration of Harry Meshel at ¶¶ 1-10 (attached as Ex. 29).
[43] *Id.* at ¶ 10.
[44] *Id.* at ¶ 10.
[45] Ohio Rev. Code Ann. § 5111.01 (West 2010); s*ee also* Ohio Admin. Code § 5101:3-1-17; § 5101:3-1-17.2; Ohio Rev. Code Ann. §§ 5111.22; 5111.21 (West 2010).
[46] 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 generally* Ohio Admin. Code § 5101:3 *et seq.* (setting out rules, including for billing, reimbursement, and eligibility, for various provider services).
[47] *See, e.g.,* Ohio Rev. Code § 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).; 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); 5101:3-1-31 (prior authorization).

determine program violations[48] and recover Medicaid overpayments.[49] It is also required to have in place its own program to prevent and detect fraud, waste, and abuse.[50] Where a Medicaid provider or owner has been convicted of fraud under Ohio Rev. Code § 109.85, ODJFS may terminate a provider agreement without adjudication.[51] For purposes of termination, the civil fraud statute defines "owner" as any individual with a 5% ownership interest in the Medicaid provider.[52]

2. The Ohio attorney general's Medicaid Fraud Control Unit

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.[53] The attorney general's office maintains a Medicaid Fraud Control Unit ("MFCU") 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.

In 2010, MFCU's expenditures constituted approximately 2.25% of the total expenditures in the Attorney General's Office ($4.54 million out of a total of $201 million).[54] Although Defendant has previously pointed to the size of the state's Medicaid budget ($14.7 billiion) as indicating the plausibility of corruption,[55] no part of that budget goes to the attorney

---

[48] *See, e.g.,* Ohio Rev. Code § 5111.10; *see also id.* § 5101.37 (general-investigative authority).
[49] *See, e.g., id.* § 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); *id.* § 5111.021(C) and (D) (deducting amounts provider owes state and conducting fiscal audits).
[50] Ohio Admin. Code § 5101:3-1-29.
[51] Ohio Rev. Code § 5111.06(D)(4) (citing 5111.03(C) and (F)).
[52] *Id.* § 5111.03(C).
[53] *Id.* § 109.02.
[54] *See* OAG Comprehensive Expenditures FY2010 (attached as Ex.30) (subtotals added by Plaintiffs' counsel through Excel function at suggestion of OAG representative). To decipher this exhibit, the Court will need to refer to OAG's Chart of Dep't Accounts FY2010 (attached as Ex. 30) and apply AGO443100, the 2010 code for Medicaid fraud.
[55] Def. Prop. Findings of Fact and Concl. Of Law, at 3 (Doc. 4).

general's efforts to combat Medicaid fraud.[56] Several former state attorneys general have testified that the MFCU's was one small aspect of their work, and that they viewed it as no more or less important than any other aspect.[57] The attorney general, moreover, is not typically involved in most of the decision-making of the Medicaid Fraud section, which tends to operate autonomously.[58]

3. County prosecuting attorneys

Ohio's 88 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.[59] 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.[60] 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 agencies and special purpose districts as well.[61]

In short, both the attorney general and the prosecuting attorneys in the various counties perform a host of duties in addition to prosecuting Medicaid fraud. They are vested with broad powers, the proper exercise and discharge of which are of obvious importance to

---

[56] *See* Declaration of Justin Nahvi ¶ 4 (attached as Ex. 32); 2010 Section Budget Report, MFCU, at 4 (attached as Ex. 33).
[57] Declaration of Jim Petro ¶ 3 (attached as Ex. 34); Declaration of Lee Fisher ¶ 3 (attached as Ex. 35); Declaration of Marc Dann ¶ 4 (attached as Ex. 36).
[58] Petro Decl. ¶ 3; Dann Decl. ¶ 4*; see also* MFCU Handbook—Complaint Review and Case Intake, at 4 (section chief responsible for signing off on fraud investigations) (attached as Ex. 37).
[59] Ohio Rev. Code Ann. § 309.08(A) (West 2010).
[60] *Id.* at § 309.09(A).
[61] *Id.* at § 309.09(B), (D), (E), (F), (G), (H).

the state's citizens and electors.[62]

IV. Law and Argument

A. Summary-Judgment Standard and Elements of Permanent Injunction

A moving party is entitled to summary judgment where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[63] The moving party's burden to show that no genuine issue of material fact exists "may be discharged by 'showing-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case.'"[64]

Once the moving party has satisfied his or her burden, "[t]he respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.'"[65] "[T]he party opposing the motion ... may not 'rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact' but must make an affirmative showing with proper evidence … to defeat the motion."[66] As shown below, Defendant can make no such "affirmative showing with proper evidence."

A party is entitled to a permanent injunction "if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law."[67]

---

[62] *See, e.g.,* Ohio Rev. Code Chapter 309 (prosecuting attorneys); Ohio Rev. Code Title 29 (crimes).
[63] Fed. R. Civ. P. 56(a).
[64] *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 374 (6th Cir. 2009) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986) (internal quotation marks omitted)).
[65] *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1480 (6th Cir.1989) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)).
[66] *Alexander v. CareSource,* 576 F.3d 551, 558 (6th Cir.2009) (quoting *Street,* 886 F.2d at 1479).
[67] *ACLU of Kentucky v. McCreary Co.*, 607 F.3d 439, 445 (6th Cir. 2010) (citations and internal quotations omitted).

B. Section 3599.45 violates Plaintiffs' First-Amendment rights.

In this case, there are no material facts in dispute. While Defendant, in its earlier briefing, has offered a theoretical rationale for the statute, it has produced no *evidence*, and has furnished no other grounds, that would allow this Court to conclude that the statute *either* promotes a sufficiently important governmental interest *or* is closely drawn to accomplish that purpose. The statute's demonstrable First Amendment infringement therefore warrants entry of judgment for Plaintiffs as a matter of law.

1. Campaign-contribution restrictions impinge on First Amendment rights and are subject to intermediate scrutiny.

The First Amendment, which applies to the states through the Fourteenth Amendment, prohibits the government from 'abridging the freedom of speech.'[68] In its seminal campaign-finance case, *Buckley v. Valeo*, the United States Supreme Court held unequivocally that laws restricting campaign contributions and expenditures impinge upon the First Amendment's guarantees of free speech and free association.[69]

While the Court found that contribution limits impose less of a restraint on speech than do 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."[70] More importantly, contribution limits restrict an individual's right to associate: "[T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association."[71] As the Court stated: "Making a contribution, like joining a political party, serves to affiliate a person

---

[68] U.S. Const. amend. I.
[69] *Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976); *see id.* at 17 (contribution limitations impose "direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties."); *Citizens United v. FEC*, 130 S. Ct. 876, 900-01 (2010).
[70] *Buckley,* 424 U.S. at 21.
[71] *Id.* at 24.

with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals."[72] 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."[73] The prohibition on campaign contributions imposed by section 3599.45 thus implicates Plaintiffs' First Amendment rights in at least two important ways.[74]

To justify a contribution restriction, 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."[75] Since *Buckley*, the Supreme Court has referred to this standard as "intermediate scrutiny," and applied it to contribution restrictions.[76] The state cannot satisfy this standard.

2. The state must support any contribution restriction with a justification backed by adequate evidence.

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.[77] While the Supreme Court has provided no clear line, it has articulated the following principle while applying intermediate scrutiny in a campaign-contribution case: "The quantum of empirical evidence needed to satisfy

---

[72] *Id.* at 22.
[73] *Id.* at 65-66.
[74] *Cf. Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (stating that when individuals abstain from protected speech, they "harm[ ] not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas").
[75] *Buckley*, 424 U.S. at 25.
[76] *See, e.g., FEC v. Beaumont*, 539 U.S. 146, 162 (2003); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387 (2000); *Randall v. Sorrell*, 548 U.S. 230, 247 (2006).
[77] *See, e.g., McConnell v. FEC*, 540 U.S. 93, 232 (2003) (invalidating a prohibition on contributions by minors, because evidence of the "claimed evil" was too "scant"), *overruled in part on other grounds, Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010); *see also Century Comms. Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987) ("[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures.").

heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[78]

To understand why Ohio can show no important interest served by the contested statute, it is instructive first to review the justifications and evidence that courts, particularly the Supreme Court, have deemed sufficient and insufficient.

In *Buckley*, the Supreme Court considered the constitutionality of $1,000-contribution limits imposed by the Federal Election Campaign Act of 1971. The Supreme Court upheld the contribution limits, finding 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. The Court held that that interest was a "constitutionally sufficient justification" for the Act's limitations.[79]

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.[80] As discussed by the *Buckley* Court of Appeals, "The record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions."[81] In addition, Congress considered public-opinion polls and found that public confidence in the electoral system was badly shaken by reports of corruption in the 1972 election.[82] The need to ameliorate the specific harms, the Court held, justified limiting the amount a given donor

[78] *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 381 (2000).
[79] *Buckley,* 424 U.S. at 26.
[80] *Id.* at 26-27 & n. 28 (citing *Buckley v. Valeo*, 519 F.2d 821, 839-40 & nn.36-38 (D.C. Cir. 1975)).
[81] *Id.* at 840 n.37.
[82] *Id.* at 839-40 & nn. 35-38.

could contribute to a given candidate.[83]

In *Nixon v. Shrink Missouri Gov't PAC*, the Supreme Court again addressed a $1,000 general contribution limit, this time imposed by the state of Missouri on contributions made to statewide campaigns. Clarifying the evidentiary requirement for such limits, the Court noted that the dangers addressed by the Missouri statute were parallel to those the statute in *Buckley* addressed—the "dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."[84]

The Court then adjudged the following evidence sufficient to justify enactment of the general contribution limit: an affidavit from a legislator pointing out the danger of large contributions, newspaper accounts of large contributions supporting inferences of impropriety, reports of scandals discussed in judicial opinions, and a statewide initiative showing the public's perception of the need to combat corruption.[85] And while the Court denied that a new evidentiary standard had been applied by cases after *Buckley*, it stated unequivocally: "We have never accepted mere conjecture to carry a First Amendment burden."[86]

The Supreme Court has on two occasions struck down restrictions on individual campaign contributions, at least in part because they were unsupported by sufficient evidence. In *McConnell v. FEC*, the Court found that evidence of the government's interest in imposing a ban on contributions from minors—namely, circumvention of contributions imposed on parents—was too "scant" to justify the burden on speech.[87]

---

[83] 424 U.S. at 28.
[84] *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378-79 (2000).
[85] *Id.* at 393-94.
[86] *Id.* at 392.
[87] *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).

In *Randall v. Sorrell*, the Court struck down Vermont's general contribution limits as too low ($200 for various state offices),[88] in part because of a lack of any "special justification":

> We 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.

While the Court invalidated the restrictions as not "closely drawn" because of a collection of infirmities, 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 burdens . . ."

A 2010 Second Circuit case, *Green Party of Connecticut v. Garfield*,[89] well illustrates a state's obligation to produce evidence of the problem its statute endeavors to cure. *Green Party* upheld certain campaign-finance restrictions on state contractors based upon a record of entrenched, pervasive public corruption, and invalidated a ban against lobbyist-contributions because it lacked a firm evidentiary foundation. The record before the court

> show[ed] that the General Assembly had good reason to be concerned about both the 'actuality' and the 'appearance' of corruption involving contractors. . . . 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.[90]

The ban on lobbyist contributions, however, was not similarly supported: "The recent corruption scandals had nothing to do with lobbyists . . . and thus there is insufficient

---

[88] *Randall v. Sorrell*, 548 U.S. 230, 261 (2006).
[89] *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010).
[90] *Id.* at 200 (citing *Green Party of Conn. v. Garfield*, 648 F.Supp.2d 298, 307-09 & n.9 (D. Conn. 2009).

evidence to infer that all contributions made by state lobbyists give rise to an appearance of corruption."[91] The court accordingly invalidated the restriction on lobbyist contributions.

3. Ohio can show no sufficiently important interest in section 3599.45's ban on contributions by Medicaid providers.

Summary judgment is warranted here because, as with the bans invalidated in *McConnell* and *Green Party* and the restriction struck down in *Randall*, no evidence has been or can be produced in support of section 3599.45. The only plausible justification for prohibiting contributions from Medicaid providers or their owners is that prosecutors receiving such contributions might "look the other way" in the event a contributor were implicated in program-related fraud. Such a justification, however, lacks substance and is the sort of "mere conjecture" that *Nixon* decried.

To begin with, under *Nixon*, the evidence required to support a contribution prohibition varies "with the novelty and plausibility of the justification raised."[92] By this standard, the justification here faces a comparatively heavy burden: it is altogether novel and implausible.

No other state prohibits Medicaid providers, by dint of that status, from contributing to political campaigns. This alone makes the contested statute novel.[93] 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.[94] Indeed, no other group potentially

---

[91] *Id.* at 206 (citing *Green Party of Conn. v. Garfield*, 590 F. Supp.2d 288, 321 (D. Conn. 2008)).
[92] *Nixon*, 528 U.S. at 391.
[93] *See generally* Feigenbaum and Palmer, *Campaign Finance Law 2002* (Federal Election Commission 2002), *available at* http://www.fec.gov/pubrec/cfl/cfl02/cfl02.shtml.
[94] As mentioned, the only provisions imposing bans are as follows: Ohio Rev. Code §§ 3517.13(W)(1) (foreign nationals), 3517.102(B)(1)(c) and (C)(1)(a)(I) (children under seven), 3599.03 (corporations),

subject to prosecution is banned from contributing to attorney-general or prosecuting-attorney candidates. And no other Ohio statute eliminates the free-speech and free-association rights of *anyone* based merely on his or her ownership interest, however infinitesimal and non-controlling and non-influential, in a specific type of entity. The justification for the prohibition is thus "novel" on any number of levels.

The ban is, in addition, "implausible." Unlike "pay-to-play" restrictions, which seek to prevent the very real prospect that a contractor contributing to a public official (quid) will be rewarded by a state contract (quo),[95] Medicaid providers have no direct connection to the attorney general or prosecuting attorneys: neither the attorney general nor county prosecuting attorney plays any role in approving Medicaid providers or in establishing their rates of compensation.

Nor is the potential widespread effect of Medicaid-provider or owner contributions on prosecutorial decisions a plausible concern. As Defendant's own previously presented evidence shows, although there were over 64,000 Medicaid providers in 2008,[96] the attorney general's Medicaid Fraud Control Unit ("MFCU") received only 377 fraud-related complaints in 2008-09.[97] That figure is well less than 1% of all Ohio Medicaid providers, meaning that more than 99% of Medicaid providers had no contact with the attorney general's office during that time period. This fact alone shows that any perception of pervasive corruption is an illusory one.

3517.152(F)(2) (Ohio Elections Commission members), and 3517.092(B)(2) (state employees—only as to candidates employed by the same office).

[95] *See, e.g.,* 3517.13(I) (prohibiting 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).

[96] *See* Health Policy Institute of Ohio, *Medicaid Basics 2009*, at 1, 8 (over 64,000 Medicaid providers).

[97] *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 (submitted by Def. at Prelim. Injunc. Hearing as Ex. C).

Moreover, the attorney general does not regularly "sign off on" investigation and charging decisions regarding Medicaid fraud.[98] And as former Attorneys General Petro, Fisher, and Dann attest, under their watch the attorney general's office on many occasions took action against individuals who had legally contributed to their campaigns.[99] Petro's office took action against Best Buy Co., Inc., for example, even though Petro himself is a Best Buy shareholder.[100] No *evidence* shows that a prosecutor's actions would be any different toward Medicaid providers.[101]

Defendant has previously relied on the size of Ohio's Medicaid budget to support its contention that corruption between Medicaid providers and prosecuting authorities is plausible. The argument is completely irrelevant. No part of the Medicaid budget goes to the attorney general's efforts to combat Medicaid fraud. (In fact, the MFCU is funded from an allocation within Ohio's budget entirely separate from any funds provided for the administration of Medicaid.[102])

Indeed, the MFCU's modest expenditure ($4.5 million in 2010[103]) is itself immaterial. That expenditure is no greater than that of many, and considerably less than that of some, sections within the attorney general's jurisdiction,[104] including sections presumably at least as susceptible to the allegedly corrupting influence of campaign contributions. For example, the Consumer Protection Section, which investigates and prosecutes consumer fraud, expended $7 million in 2010. Yet no Ohio statute criminalizes an attorney general candidate's

---

98 *See* Petro Decl. ¶ 3; Dann Decl. ¶ 4*; see also* MFCU Handbook—Complaint Review and Case Intake, at 4 (section chief responsible for signing off on fraud investigations) (Ex. 37).
99 Petro Decl.¶ 5 (Ex. 34); Fisher Decl.¶ 5 (Ex. 35); Dann Decl. ¶ 7 (Ex. 36).
100 Petro Decl. ¶ 5.
101 *See id.*
102 *See* Declaration of Justin Nahvi ¶4 (attached as Ex. 32); *see also* Legislative Service Commission Redbook, Attorney General (2010), at 20 (attached as Ex. 38).
103 *See* OAG Comprehensive Expenditures FY2010 and OAG Chart of Accounts, above note 54.
104 OAG Comp. Expend. FY2010.

acceptance of contributions from "sellers" or other persons subject to prosecution by the section. And with good reason: without a demonstrable nexus between the group singled out by a contribution ban and a heightened risk of corruption, no important government interest can be articulated.

In short, there is no plausible justification for prohibiting Medicaid-provider and shareholder contributions on the basis of some theoretical conflict-of-interest. Such a theoretical conflict-of-interest could be ascribed with equal plausibility to *anyone* subject to prosecution for *anything*; yet no comparable prohibition exists for anyone besides Medicaid providers and those who have ownership interests, however small, in them.

Given the statute's novelty and implausibility, then, under *Nixon* the statute's justification warrants a high evidentiary burden. Yet no evidence *at all* has been produced. The history of the contested statute is instructive. Ohio courts have given weight to house and senate journals, as well as bill analyses,[105] and 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.[106] Here, there is no evidence that the Ohio General Assembly was concerned about any untoward relationship between prosecutors and Medicaid providers or their shareholders. Nor are there any documented instances of improper dealings between the two groups, or anything else that would suggest impropriety.

Defendant, moreover, has produced nothing to contradict Plaintiffs' demonstration that the contested statute was *not* passed in response to any evidence of corruption. Standing

---

[105] *See, e.g., Shafer v. Ohio Turnpike Comm'n*, 113 N.E.2d 14, 18 (Ohio 1953); *Meeks v. Papadopulos*, 404 N.E.2d 159, 162 (Ohio 1980); *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.

[106] Ohio Rev. Code Ann. § 1.49 (B) and (C); *cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 393 (2000) (considering an affidavit from a legislator who was involved in campaign-finance reform at the time the contribution limits at issue were adopted, despite the fact that Missouri [like Ohio] did not keep a legislative history).

unrebutted, for example, is the declaration of Senator Harry Meshel, a former President of the Ohio Senate and the chief sponsor of the bill containing the contested statute,[107] who specifically recalls that the ban was prompted not by any concern about corruption but rather by a game of political "one-upmanship."[108]

Indeed, the evidence shows that Section 3599.45's prohibition on contributions by providers was marginal in the scheme of the General Assembly's 1978 legislation, Senate Bill 159 ("S.B. 159").[109] The bill followed on the heels of congressional legislation enabling states to set up anti-fraud Medicaid control units.[110] Its overarching purpose was not to combat political corruption, but rather to authorize the Attorney General to combat Medicaid fraud.[111] Newspaper articles, moreover, barely mentioned the provision, let alone documented any instances of corruption.[112]

As shown by the statute's history, then, the ban on providers' campaign contributions was a mere tag-along, ancillary to the main concerns of S.B. 159. Only now—33 years after its enactment and after being challenged—is the statute receiving its first proffered rationalization. The state's *post hoc* effort to prop up the statute, however, is based on nothing but speculation that a Medicaid provider or owner **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 sufficient to justify a First

---

[107] Declaration of Harry Meshel, at ¶ 4 (attached as Ex. 29).
[108] *Id.* at ¶ 10.
[109] *See* above notes 36-41 and accompanying text.
[110] *See generally* S.B. 159 Bill Analysis, Ex.22.
[111] *See* S.B. 159 Bill Analysis, at 1, Ex. 22; *see also* Ohio Senate Journal, 112th Gen. Assemb., 1st Sess. At 187, 192, 1278 (1977), Ex. 23 (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 DISPATCH, Mar. 9, 1978, at B-7, (attached as Ex. 28); *New Law Empowers State to Probe Medicaid Fraud,* THE PLAIN DEALER, Apr. 25, 1978, at A-5, (attached as Ex. 27).
[112] *See* above note 41 and accompanying text.

Amendment burden, especially an outright ban of the kind at issue here.[113] In the absence of evidence of undue influence, there simply is no justification for treating contributions by Medicaid providers or their owners as suspect, much less ban-worthy.

4. Section 3599.45's ban on contributions by Medicaid providers is not closely drawn to further any governmental interest.

Even where a sufficiently important governmental interest has been demonstrated, contribution limits pass First Amendment muster only if they are "closely drawn" to prevent actual or perceived corruption.[114] By this standard, the government must demonstrate that its restrictions are proportional to the harm they ostensibly seek to remedy.[115] 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.[116] 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.[117] As described below, section 3599.45 is arbitrary and disproportionately severe, and for these reasons too cannot survive intermediate scrutiny.

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. As the Court in *Green Party* explained:

---

[113] *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*, 616 F.3d 189, 207 (2d Cir. 2010) (finding insufficient evidence to sustain a ban on lobbyist contributions).

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

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

[116] *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)).

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

> [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 . . . rather than a ban, the ban should be struck down for failing "to avoid unnecessary abridgment of associational freedoms . . . ."[118]

In this light, it is not surprising that courts have invalidated contribution bans where less onerous proscriptions will suffice.

In *McConnell,* for example, the Supreme Court invalidated a ban on contributions by minor children, finding that the provision was "overinclusive" and "swe[pt] too broadly," especially given that many state-election laws had adopted less restrictive ways to prevent adults from circumventing campaign-finance laws through their children's contributions.[119] And the Second Circuit in *Green Party* invalidated Connecticut's ban on lobbyist contributions discussed earlier while noting that a *limitation* might have passed muster.[120]

State supreme courts have come to similar conclusions in invalidating bans on political contributions. In *Dallman v. Ritter*, for example, the Colorado Supreme Court recently invalidated a constitutional amendment banning contributions from holders of sole-source government contracts.[121] The prohibitions were not closely drawn and lacked a

---

[118] *Green Party of Conn. v. Garfield*, 616 F.3d 189, 206 (2d Cir. 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.").

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

[120] *Green Party*, 616 F.3d at 207; *see also Fair Political Practices Comm'n v. Superior Court*, 599 P.2d 46, 51-52 (Cal. 1979) ("[w]hile 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").

[121] *Dallman* 225 P.3d at 616-18.

plausible connection between contributors and recipients: "[t]he 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."[122] Noting 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."[123]

As in the cases above, section 3599.45's ban—a blunt instrument in any case—"sweeps too broadly,"[124] condemning contributions both "large and small."[125] Even if Ohio could demonstrate a nexus between Medicaid-provider or shareholder donations and prosecution of Medicaid fraud—which, as shown above, it has not—there is nothing to suggest that a ban, as opposed to some less restrictive alternative such as a limit, is necessary to combat any hypothetical corruption. It is particularly telling that, when Ohio enacted campaign-finance rules ("pay-to-play") rules applicable to other state contractors, it enacted only time-restricted *limitations*.

The statute's criminal penalty, finally, is out of all proportion to the purported offense. Even where Ohio has prohibited candidates from accepting contributions from certain state employees, foreign nationals, and minors under the age of seven, it has imposed far less stringent penalties.[126] It is disproportionately severe, and offensive to First-

---

122 *Id.* at 627.
123 *Id.*
124 *McConnell*, 540 U.S. at 232.
125 *Fair Political Practices Comm'n v. Super. Ct*, 599 P.2d 46, 51-52 (Cal. 1979).
126 *See*, *e.g.,* Ohio Rev. Code §§ 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).

Amendment principles, to subject Medicaid providers' and their shareholders' exercise of political speech to a significantly harsher penalty than any of these other groups.

The statute's ban also reaches too broadly in that, as Magistrate Judge Vecchiarelli found compelling,[127] it prohibits candidates for prosecuting attorney in each of Ohio's 88 counties from accepting contributions from *all* Medicaid providers—regardless of which county those providers reside or operate in. Accordingly, a Medicaid provider or shareholder is banned from contributing to a county prosecuting-attorney candidate even when that candidate, if elected, would have no jurisdiction to investigate or prosecute any fraud in which such a Medicaid provider could be implicated. Plaintiffs here, for example, operate in only one county—Cuyahoga County—and yet are prohibited from donating to at least 86 county prosecuting-attorney candidates who would lack jurisdiction to prosecute them.

As in *Dallman*, then, the statute "fails to tailor its prohibitions towards those who have some control over" the allegedly offending activity. And less restrictive alternatives are available: the statute could easily have been tailored to restrict contributions from those Medicaid providers and shareholders residing or operating within the prosecutor's jurisdiction. Or it could have applied temporal limits, restricting contributions for a certain period of time before or after an election. Or it could have restricted contributions from those Medicaid providers and shareholders against whom complaints had been brought or investigations begun. Defendant's own designated representative admitted in deposition admitted that less restrictive alternatives to a ban exist.[128] For this reason, too, the statute is not closely drawn.

[127] Report & Recommendation regarding preliminary injunction (Doc. No. 17), at 22.
[128] Curt Mayhew Depo. Tr. at 58-64, Ex. 1.

5. Section 3599.45 is Overbroad In That It Prohibits Contributions from Those With Even a *De Minimus* Ownership Interest in a Medicaid Provider.

Even were the above reasons insufficient to show that § 3599.45 is not closely drawn to meet any governmental interest, the statute's prohibition on contributions from anyone with "an ownership interest" in a Medicaid provider is constitutionally overbroad. The overbreadth doctrine permits litigants "to challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[129]

By its plain language, "an ownership interest" means any ownership interest, however infinitesimal. As discussed above, many publicly held corporate entities, including Wal-Mart Stores, Inc., Target Corporation, and Walgreen Co,[130] provide Medicaid services in Ohio. Individual shareholders of these corporate Medicaid providers have "an ownership interest" in a Medicaid provider and are, accordingly, banned from making contributions under section 3599.45. Wal-Mart individual shareholders alone number approximately 293,000.[131]

The contested statute thus reaches hundreds of thousands of individual shareholders who have nothing to do with the provision of Medicaid services, who have no control over the policy and business practices of a corporate Medicaid provider, and who would never be prosecuted for Medicaid fraud. It is more onerous a law even than the Colorado law

---

[129] *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

[130] *See* Declaration of Mary Kendall ¶ 3(Wal-mart Stores, Inc.); Declaration of William Thom ¶ 3 (Target Corporation); Declaration of Judy Rohan ¶ 3 (Walgreen Co.); *see also* ODJFS, Pharm. & Med. Supplier Provider Listing (sorted excerpts).

[131] Kendall Decl. at ¶ 2. Other publicly held corporate entities, such as CVS/Caremark Corporation, whose individual common-stock owners number approximately 55,000, and Rite Aid Corporation, which has tens of thousands of registered investors, provide Medicaid services through subsidiaries. *See* Moffat Decl. at ¶ 2; Comitale Decl. at ¶ 2. Their shareholders thus have an indirect ownership interest in a Medicaid provider, but "an ownership interest" nonetheless.

invalidated in *Dallman*, which set at ten percent the threshold beyond which corporate owners were barred from making contributions.[132] And 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.[133] Indeed, the civil Medicaid fraud statute, Ohio Rev. Code § 5111.03, imposes the penalty of contract termination upon conviction of an "owner" having at least a 5% interest in the provider.[134] Thus the General Assembly has shown itself capable of closely drawing ownership interests that trigger restrictions, yet chose not to with the contested statute.

In addition to not being closely drawn to advance a significant state interest, then, the contested statute is overbroad and proscribes far more speech than is necessary to achieve any important governmental purpose. 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, Plaintiffs are entitled to summary judgment.

C. A permanent injunction is warranted.

A party is entitled to a permanent injunction "if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law."[135] As demonstrated above, Plaintiffs have suffered a constitutional violation. Moreover, the Supreme Court has held that "[t]he loss of First Amendment

---

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

133 *See, e.g.*, Ohio Rev. Code Ann. § 3517.13(J), EX. 20 (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) (similar threshold in workers' compensation-contribution prohibition).

134 *Id.* § 5111.03(C).

135 *ACLU of Kentucky v. McCreary Co.*, 607 F.3d 439, 445 (6th Cir. 2010) (citations and internal quotations omitted).

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[136] Plaintiffs have already been irreparably harmed by their inability to contribute in the 2010 attorney-general election. Without injunctive relief, their rights continue to be violated.

V. Conclusion

Although the Court was unpersuaded during the preliminary-injunction phase of this case that Plaintiffs were likely to prevail on the merits, Plaintiffs respectfully request the Court to re-examine the sweeping and devastating breadth of the statute. To uphold this statute, the Court must sanction a ban on contributions from Plaintiff Eric Schreiber, M.D., who has no financial incentive to commit fraud because he is on a fixed salary as a Cleveland Clinic employee. Indeed, the Court must sanction banning a single shareholder in Wal-mart—who has no control over Wal-mart's pharmacies—from contributing to a prosecuting attorney's race in a county where the shareholder does not even reside. In short, the Court must sanction nonsense.

It will not escape the Court's notice that Plaintiff's are asking it to reconsider its previous analysis of these issues. To the extent it concluded that Defendant had articulated a "rational basis" for the contested statute, Plaintiffs urge the Court instead to apply the "intermediate scrutiny" standard the Supreme Court has said must be applied to statutes that abridge individuals' free-speech and free-association rights. As shown above, this ill-drawn statute fails intermediate scrutiny. (Given the above-described absurdities, indeed, its rational basis can be questioned as well.) While Plaintiffs will never recover the free-speech and free-associational rights that were lost in the 2010 election, this Court can still restore Plaintiffs' rights on an injunctive basis and prevent further irreparable harm.

---

[136] *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Respectfully submitted,

THE CHANDRA LAW FIRM, LLC

/s/ Subodh Chandra

Subodh Chandra (OH Bar No. 0069233)
Donald Screen (OH Bar No. 0044070)
Sandhya Gupta (OH Bar No. 0086052)
1265 W. 6th St., Suite 400
Cleveland, OH 44113-1326
Phone: 216.578.1700
Fax: 216.578.1800
Subodh.Chandra@gmail.com
Donald.Screen@gmail.com
Ms.Sandhya.Gupta@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.

COMBINED CERTIFICATIONS

PAGE LENGTH

I certify that this case has been assigned to the standard tract and that the foregoing document complies with the page length limitations contained in this court's order of March 10, 2011 modifying the allowable page length to 30 pages.

SERVICE UPON PARTIES

I certify that on March 16, 2011, my office served, via the Court's ECF system, the foregoing 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/ Sandhya Gupta
One of the attorneys for Plaintiffs Arthur Lavin, M.D., et al.