UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Arthur Lavin, et. al.,	:	Case No.: 1:10-cv-01986
Plaintiff,	:	JUDGE: Nugent
v.	:	MAGISTRATE JUDGE: Vecchiarelli
Jon Husted, in his Official Capacity as Ohio Secretary of State,	:	
Defendant.	:	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant, Jon Husted, in his official capacity as the Ohio Secretary of State, respectfully moves this Court for an Order entering summary judgment in his favor as to all claims within Plaintiffs' Complaint because there is no genuine issue of material fact that R.C. 3599.45 does not violate the United States Constitution as a matter of law.

Respectfully submitted,

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I. STATEMENT OF ISSUES PRESENTED

1. Whether there is no genuine issue of material fact that R.C. 3599.45 advances the sufficiently important state interest of preventing corruption or the appearance of corruption as a matter of law?
2. Whether there is no genuine issue of material fact that R.C. 3599.45 is closely drawn to prevent corruption or the appearance of corruption as a matter of law?

II. SUMMARY OF ARGUMENT

Plaintiffs have filed a Complaint seeking a declaration that R.C. 3599.45, which bans candidates for Ohio Attorney General or County Prosecutor from knowingly accepting any campaign contributions from Medicaid providers or anyone with an ownership interest in Medicaid providers, violates the United States Constitution.

The well established law is that R.C. 3599.45 must be deemed Constitutional so long as it is closely drawn to match a sufficiently important governmental interest. R.C. 3599.45 advances a sufficiently important state interest because it prevents corruption or the appearance of corruption, and it is closely drawn to advance those interests. Accordingly, there is no genuine issue of material fact that R.C. 3599.45 does not violate the United States Constitution as a matter of law.

III. STATEMENT OF FACTS

Plaintiffs Arthur Lavin, M.D., Jason Chao, M.D., Michael Devereaux, M.D., Patricia J. Kellner, M.D., Jerone Liebman, M.D., Eric R. Schreiber, M.D., Constance D. Magoulias, M.D., Peter A. Degolia, M.D. and Nathan R. Beachy, M.D. ("Plaintiffs") claim to be Ohio Medicaid providers who serve Medicaid patients, as authorized by the Ohio Department of Job and Family Services ("ODJFS").[1] Out of the nine Plaintiffs, only Dr. Lavin owns an ownership interest in a

[1] Compl. at ¶¶ 3-11.

Medicaid provider.[2] Dr. Lavin owns Advanced Pediatrics, which is purportedly a Medicaid provider, in which his ownership interest is 100%.[3] Defendant Jon Husted (the "Secretary"), in his official capacity as the Ohio Secretary of State is the chief elections officer of Ohio, and is charged with enforcing the state's election laws.[4]

Plaintiffs have filed a complaint against the Secretary seeking a declaration that R.C. 3599.45 violates the First and Fourteenth Amendments of the United States Constitution. R.C. 3599.45 states, in its entirety:

> (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.[5]

In 1965, the United States Congress created Medicaid as Title XIX of the Social Security Act. Pursuant to Title XIX, the federal government distributes lump-sum payments to the states

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[2] *See* Plaintiffs' responses to interrogatories, Exhibits 1-9. On March 13, 2011, Plaintiffs' counsel notified the Secretary, via e-mail, that the interrogatory responses of Dr. Lavin, Dr. Chao and Dr. Magoulias would need to be supplemented to indicate that they did "not know whether they have indirect ownership interests in Medicaid-providing publicly traded corporations through mutual funds or other investments." As of the date of the filing of this motion for summary judgment, the Secretary has not received supplemental responses. Out of an abundance of caution and respect for this Court, the Secretary has attached a copy of that e-mail to this motion as Exhibit 10.
[3] Dr. Lavin response to Interrogatory No. 1, Exh. 1.
[4] Ohio Rev. Code Ann. § 3501.04.
[5] Ohio Rev. Code Ann. § 3599.45.

for the purpose of providing medical assistance and rehabilitation to indigent, blind, disabled and aged individuals, their dependent children and their families.[6]

In Ohio, the Medicaid program is administered by the ODJFS. Medicaid represents a massive government investment by the State of Ohio.[7] The state budget for the Ohio Medicaid program for fiscal year 2009 was approximately $14.3 Billion.[8] Medicaid constitutes about 26% of Ohio's budget.[9] Medicaid is not only Ohio's largest government program, but it is growing faster than most other state programs.[10] According to the Health Policy Institute of Ohio, the total annual Medicaid spending for all Ohio agencies in 2010 was over $15.3 billion.[11] In July of 2009, there were over 93,000 active Medicaid providers in Ohio. (ODJFS integrity report).

The parties agree that Medicaid fraud is a problem.[12] Indeed, between July 1, 2008 and June 30, 2009, the Office of the Ohio Attorney General alone, through its Medicaid Fraud Control Unit ("MFCU"), received five hundred eighty-nine (589) complaints of Medicaid fraud and patient abuse or neglect, and opened four hundred ninety-four (494) of the complaints for

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[6] 42 U.S.C. 1396a-d.

[7] *See* Ohio Department of Job and Family Services, *Medicaid Program Integrity Report for Calendar Year 2009*, Exh. 11 p. 1.

[8] *Id.*

[9] Report and Recommendation, Doc. No. 17;
See also Medicaid Growth Burning Budget, Columbus Dispatch,August 8, 2010, *available at:* http://www.dispatch.com/live/content/local_news/stories/2010/08/08/medicaid-growth-burning-budget.html?sid=101, Exh. 12.

[10] *See* Health Policy Institute of Ohio, *Ohio Medicaid Basics 2009*, p. 2, Exh. 13, *available at:* http://a5e8c023c8899218225edfa4b02e4d9734e01a28.gripelements.com/pdf/publications/medicaidbasics_2009.pdf

[11] *See* Health Policy Institute of Ohio, *Executive Summary, Ohio Medicaid Basics 2011*, Exh. 14, p. 2.

[12] Plaintiffs conceded this fact at the Preliminary Injunction hearing held October 7, 2010, *See* Exh. 15, transcript p. 20 (Plaintiffs' attorney stated that "Medicaid fraud was a problem in 1978. It's why the statute was adopted. It remains a problem today. We'll stipulate to that…."); p. 22 (…there's no argument there is Medicaid fraud…"); p. 74 ("I'll stipulate to the fact that Medicaid fraud is a problem…").

active investigation, completing four hundred and forty-one investigations (441).[13] During the same period, the MFCU obtained ninety-seven (97) indictments, bills of information, or complaints, and obtained eighty-seven (87) convictions. The MFCU also completed twenty-one (21) civil settlements with restitution orders totaling $68,593,864.73.[14]

In federal fiscal year 2008, MFCU ranked first in the nation, when jointly comparing convictions-per-professional staff and recoveries-per-grant-dollar.[15] In addition, the MFCU ranked fourth in terms of gross numbers of convictions and fifth in terms of gross dollar recoveries.[16] Continuing into 2009, the MFCU achieved eighty-two (82) indictments, one-hundred-fourteen (114) convictions and $87.9 million in recoveries.[17]

During July 1, 2009, to June 30, 2010, the MFCU received seven hundred (700) complaints of Medicaid fraud and patient abuse or neglect, with four hundred ninety-nine (499) related to allegations of Medicaid fraud.[18] During the same period, the MFCU opened three hundred eighty-six (386) complaints for active investigation related to Medicaid fraud and obtained one hundred-twelve indictments, bills of information or complaints related to Medicaid fraud.[19] The MFCU obtained ninety (90) convictions related to Medicaid fraud and completed twenty-six (26) civil settlements.[20] The total value of criminal restitution orders and civil settlements was $58,689,502.45.[21]

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[13] *Ohio Medicaid Fraud Control Unit FY 2009,* Office of Ohio Attorney General, *Annual Report,* Exh. 16, p. 3.
[14] *Id.*
[15] *See* Ohio Department of Job and Family Services, *Medicaid Program Integrity Report for Calendar Year 2009*, Exh. 11, p. 11.
[16] *Id.*
[17] *Id.*
[18] *Ohio Medicaid Fraud Control Unit FY 2010,* Office of Ohio Attorney General, *Annual Report,* Exh. 17, p. 3.
[19] *Id.*
[20] *Id.*
[21] *Id.*

Revised Code section 5111.03 prohibits and defines Medicaid fraud in Ohio. The section provides for civil penalties, the termination of provider agreements, and the exclusion of individuals, providers, or entities for a violation of division (A) of the statute, which states in part:

> 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.[22]

Revised Code section 2913.40 criminalizes Medicaid fraud and prohibits providers from, among other things, making false or misleading statements in order to receive payment for goods or services that were not rendered or provided as claimed, or which were greater than the amount of reimbursement to which they are entitled.

The Attorney General, within his discretion, may enforce the civil penalties and sanctions contained in section 5111.03. "The attorney general on behalf of the state *may* commence proceedings to enforce this section in any court of competent jurisdiction."[23]

The Attorney General is given even broader discretion and exclusive control over Medicaid investigations by Revised Code section 109.85. The Attorney General investigates any criminal or civil violation of the medical assistance program or violation of Chapter 3721 (nursing homes and residential care facilities) upon the written request of the governor, the general assembly, the auditor of the state, the director of job and family services, the director of

[22] Ohio Rev. Code Ann. § 5111.03(A).
[23] Ohio Rev. Code Ann. § 5111.03(F) (emphasis added).

health, or the director of budget and management, or upon the attorney general's becoming aware of criminal or improper activity.[24]

After conducting the initial investigation, the Attorney General has broad and unfettered discretion in determining whether to prosecute the matter, whether to refer the matter to a county prosecuting attorney, and whether to pursue a civil remedy against the Medicaid provider:

> When it appears to the attorney general, as a result of an investigation under division (A) of this section, that there is cause to prosecute for the commission of a crime or to pursue a civil remedy, the attorney general *may* refer the evidence to the prosecuting attorney having jurisdiction of the matter, or to a regular grand jury drawn and impaneled pursuant to sections 2939.01 to 2939.24 of the Revised Code, or to a special grand jury drawn and impaneled pursuant to section 2939.17 of the Revised Code, or the attorney general *may* initiate and prosecute any necessary criminal or civil actions in any court or tribunal of competent jurisdiction in this state. When proceeding under this section, the attorney general, and any assistant or special counsel designated by the attorney general for that purpose, have all rights, privileges, and powers of prosecuting attorneys. *The attorney general shall have exclusive supervision and control of all investigations and prosecutions initiated by the attorney general under this section.*[25]

While the Attorney General has unfettered discretion over investigations and prosecutions initiated by the office of the Attorney General, "nothing in this section shall prevent a county prosecuting attorney from investigating and prosecuting criminal activity related to Chapter 3721 [nursing homes and residential care facilities] of the Revised Code and the medical assistance program established under section 5111.01 of the Revised Code."[26] Therefore, a County Prosecutor is given the same broad prosecutorial discretion as the attorney general for Medicaid fraud cases that are initiated by the county prosecutor's office.

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[24] *See* Ohio Rev. Code Ann. § 109.85(A).
[25] Ohio Rev. Code Ann. § 109.85(B) (emphasis added).
[26] Ohio Rev. Code Ann. § 109.85(C).

Another layer of discretion entrusted to the Attorney General or County Prosecutor is the determination of what constitutes fraud as opposed to waste and abuse within the Medicaid program. The Ohio Administrative Code defines Medicaid "fraud" as: "[A]n intentional deception, false statement or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to oneself or another person. It includes any act that constitutes fraud under applicable federal or state law."[27] On the other hand, Medicaid "waste and abuse," is defined as, practices that are inconsistent with professional standards of care; medical necessity; or sound fiscal, business, or medical practices; and that constitute an overutilization of Medicaid covered services and result in an unnecessary cost to the Medicaid program."[28]

IV. LAW AND ARGUMENT

A. Standard of review

"The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury" when all facts and inferences drawn therefrom are viewed in the light most favorable to the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986), and enter summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). While the moving party bears the initial burden of specifying the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine

[27] Ohio Admin. Code § 5101:3-1-29 (B)(1).
[28] Ohio Admin. Code § 5101:3-1-29 (B)(2).

issue of material fact, once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. *Anderson, supra* at 247-48.

B. R.C. 3599.45 is a constitutional limitation on campaign contributions

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court drew a distinction between campaign contribution limitations and expenditure limitations, stating that, "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." *Buckley,* 424 U.S. at 23. Recognizing this fundamental difference, the *Buckley* Court set forth the following standard for reviewing contribution limitations: "[e]ven a 'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 (citations omitted).

R.C. 3599.45 operates as a campaign contribution limitation. Accordingly, R.C. 3599.45 must be deemed Constitutional so long as it is closely drawn to match a sufficiently important governmental interest. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). R.C. 3599.45 is a constitutional limitation on campaign contributions as set forth by *Buckley v. Valeo*[29] and its progeny. R.C. 3599.45 promotes sufficiently important state interests, and it is closely drawn to advance those interests.

1. R.C. 3599.45 furthers a sufficiently important state interest because it prevents corruption and/or the appearance of corruption

The *Buckley* Court held that limiting the "actuality and appearance of corruption" are sufficiently important state interests for justifying a campaign contribution limitation. *Buckley*,

[29] 424 U.S. 1 (1976).

424 U.S. at 26. The Court was specifically concerned with the danger of actual *quid pro quo* arrangements, as well as the impact of the appearance of corruption stemming from public awareness of opportunities for abuse. *Id.* at 27. The line of cases that arose after *Buckley* have reaffirmed that preventing corruption or the appearance of corruption are sufficiently important government interests. *See McConnell v. Fed. Elections Commission*, 540 U.S. 93, 143 (2003) ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits").

The Supreme Court has never set forth a specific evidentiary burden that is required of a state in order to demonstrate the sufficiently important state interest of preventing corruption or the appearance of corruption, stating only that: "[t]he 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." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). Courts, however, should be careful not to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982). Further, the Supreme Court has noted that corruption and the appearance of corruption are problems endemic in the American political system. *Buckley*, 424 U.S. at 26-29; *Nixon*, 528 U.S. at 388-89.

R.C. 3599.45 prevents the enforcers of the Medicaid fraud statute (i.e. the Attorney General and County Prosecutor) from accepting contributions from those subject to prosecution under the Medicaid fraud statute (i.e. Medicaid providers, such as Plaintiffs). It is certainly plausible that candidates for Attorney General or County Prosecutor could refrain from investigating or prosecuting Medicaid providers in exchange for campaign contributions from those Medicaid providers or the owners of the Medicaid providers. In the alternative, the

Attorney General or County Prosecutor could decide to investigate or even prosecute a Medicaid provider because it, or its owners, did not contribute to his or her campaign. At the very least, R.C. 3599.45 prevents the appearance that the Attorney General or County Prosecutor investigated, prosecuted, or refrained from investigating or prosecuting a Medicaid provider based upon whether the Medicaid provider made a campaign contribution.

This standing alone is enough for this Court to conclude as a matter of law that R.C. 3599.45 promotes a sufficiently important state interest because it prevents the actuality and appearance of corruption that would arise as a result of Medicaid providers contributing to the campaigns of candidates for Attorney General or County Prosecutor.

Moreover, Medicaid represents a massive investment administered by the State of Ohio through ODJFS. In fact, it accounts for over a quarter of Ohio's budget. Medicaid fraud is an on-going problem in the nation, including Ohio, and it has received robust attention from law enforcement. The Ohio General Assembly must be allowed to protect this massive taxpayer investment from corruption or its appearance. Given the taxpayers' large investment in Medicaid and the problem of Medicaid fraud in Ohio, it is completely plausible, and not at all novel, to conclude that contributions from Medicaid providers to the enforcers of the Medicaid fraud statute prevents those enforcers from refraining to investigate or prosecute Medicaid providers, or at the least, prevents the appearance that this is occurring.

This is particularly true in light of the discretion trusted to the Attorney General and the County Prosecutors in investigating and prosecuting Medicaid fraud. Prosecutors in general have broad discretion when making decisions relating to their official duties. "[T]he decision 'whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.'"[30]

In addition to the general grant of prosecutorial discretion, the Attorney General has explicit statutory jurisdiction and broad discretion over civil and criminal prosecutions of Medicaid fraud in Ohio. The Attorney General maintains the discretion to determine who to investigate, whether an act is a criminal violation, or merely civil, and whether to prosecute the matter. County prosecutors, of course, have similar discretion in whether to investigate and prosecute.

Preventing the Attorney General and County Prosecutors from accepting campaign contributions from Medicaid providers avoids the inevitable appearance of corruption over whether a Medicaid provider was investigated, charged civilly or criminally, prosecuted or given a favorable plea deal based on whether it, or its owners, made a campaign contribution to the Attorney General or County Prosecutor when he or she was a candidate.

Despite the above, the Secretary expects Plaintiffs to argue that there is not a sufficiently important government interest because there is no evidence of actually corrupt practices involving Medicaid providers and the Attorney General or county prosecutors. In support of their motion for preliminary injunction, Plaintiffs insisted that without a scandal there could never be a sufficient government interest in preventing corruption or the appearance of corruption. This argument is simply wrong, and has been rejected by the Supreme Court.

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[30] *U.S. v. Oldfield*, 859 F.2d 392, 398 (6th Cir. 1988) (Quoting *U.S. v. Batchelder*, 442 U.S. 114, 124 (1979)); *See also Bordenkircher v. Hayes* (1978), 434 U.S. 357, 364 (holding that, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion").

In *Nixon*, the respondents made a similar argument that Missouri failed to justify the invocation of the state's interests with empirical evidence of actually corrupt practices or of a perception among Missouri voters that contributions had a covertly corrosive influence. *Nixon*, 528 U.S. at 391. The *Nixon* Court explicitly rejected this argument stating that, "respondents [were] wrong in arguing that this Court has 'supplemented' its *Buckley* holding with a new requirement that governments enacting contribution limits must 'demonstrate that the recited harms are real, not merely conjectural.'" *Id.* at 391-92. Invoking *Nixon*, the Supreme Court of Louisiana also rejected the argument that the government failed to show the perceived harms were real in concluding that the government had a sufficient statute banning campaign contributions by riverboat and casino industries to all state candidates. *Casino Ass'n of Louisiana* v. *Louisiana*, 820 So. 2d 494, 506 (La. 2002), *cert. denied*, 537 U.S. 1226 (2003).

R.C. 3599.45 promotes a sufficiently important state interest because it prevents the actuality and appearance of corruption that would arise as a result of Medicaid providers contributing to the campaigns of candidates for Attorney General or County Prosecutor. This is a sufficiently important state interest under *Buckley* and its progeny. Consequently, this Court must conclude as a matter of law that R.C. 3599.45 furthers a sufficiently important state interest.

2. R.C. 3599.45 is closely drawn to advance the sufficiently important state interests of preventing corruption and the appearance of corruption

A contribution restriction need not be perfect to be closely drawn. Rather, a contribution restriction, such as the one at issue here, is closely drawn if it "do[es] not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates or political parties." *Buckley*, 424 U.S. at 29.

In applying this standard, the Supreme Court has admonished that "'there is no scalpel to probe'" each possible contribution level. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006). To that end, courts should not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) citing *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982). Courts should ordinarily defer to the "legislature's determination of such matters" because they "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." *Randall*, 548 U.S. 248. In practice, the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related to the costs and nature of running for office. *Id.* at 247-48. The legislature must be given "room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137.

R.C. 3599.45, only applies to Medicaid providers, and their owners, as contributors, and the enforcers of the Medicaid statute, as the recipients. It only prohibits contributions to candidates for offices that would prosecute Medicaid fraud. It does not prevent Medicaid providers, or their owners, from contributing to any other candidate for any other state or county office. It did not exclude employees of Medicaid providers, family members of owners of Medicaid providers or any other person who may otherwise be affiliated with a Medicaid provider.

R.C. 3599.45 does not infringe upon Medicaid providers' ability to make symbolic expressions of support, and it does not prevent Medicaid providers from participating in any other First Amendment activity in support of a candidate for Attorney General or County Prosecutor. For example, the statute does not prevent Medicaid providers from spending unlimited amounts of their own money, independent of the campaign, on behalf of any candidate for Attorney General or County Prosecutor. Medicaid providers may solicit others to make contributions in support of any candidate for Attorney General or County Prosecutor; they can express support, in any way, for or against any candidate for Attorney General or County Prosecutor; they can volunteer their time in support of any candidate for Attorney General or County Prosecutor; and they can make contributions to a political action committee, which supports any candidate for Attorney General or County Prosecutor.

The direct and symbolic expressions of support available to a Medicaid provider, outside of direct campaign contributions to candidates for Attorney General or County Prosecutor, are limitless. As correctly observed by this Court:

> While Medicaid providers and their owners are limited in making direct financial contributions to a candidate for attorney general or county prosecutor, they may exercise their rights of free association and speech under the First Amendment by volunteering their time to such candidates and may certainly 'enter into robust and effective discussion of candidates and campaign issues.' Thus, the statute does not prohibit Plaintiffs from supporting…[any]…candidate for attorney general or county prosecutor.[31]

The contribution ban of R.C. 3599.45 is merely a "merely marginal speech restriction," which does not materially limit the robust and effective discussion of candidates. *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) ("restrictions on political contributions have been treated as merely 'marginal' speech restrictions…because contributions lie closer to the edges than to the core of political expression").

Where, as here, the First Amendment is not burdened, beyond the marginal speech restrictions related to contribution limits, a court should not second guess the legislature as to the precise restrictions necessary to carry out the state's sufficiently important government interest.

[31] Memorandum Opinion and Order, Doc. No. 24.

Consequently, this Court must conclude that R.C. 3599.45 is closely drawn to advance the sufficiently important state interest of preventing corruption or an appearance of corruption.

Despite the above, Plaintiffs have previously argued that R.C. 3599.45 is not closely drawn because it acts as an outright ban on contributions and because it prohibits candidates from accepting contributions from so called *de minimis* owners of Medicaid providers. Each of these arguments fail.

Plaintiffs are incorrect in claiming R.C. 3599.45 is an "outright ban" because it does not prohibit Medicaid providers from contributing to the campaigns of a candidate for Attorney General or County Prosecutor through a Political Action Committee ("PAC"). In *Beaumont*, the Supreme Court upheld a federal campaign finance statute that banned corporations from contributing to federal elections.[32] In determining that the statute was "closely drawn," the Court emphasized that the statutes challengers were "simply wrong in characterizing § 441b as a complete ban." *Beaumont*, 539 U.S. at 162. The statute did not operate as a complete ban because, "the section 'permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of [PACs] . . . The PAC option allows corporate political participation without the temptation to use corporate funds for political influence'" *Id.* at 162-63 (quoting *FEC v. National Right to Work Comm.*, 459 U.S. 197, 201 (1982)).

Applying this precedent, Plaintiffs are "simply wrong" in stating that the contribution limitation on Medicaid providers contained in R.C. 3599.45 operates as a complete ban.

[32] 2 U.S.C. § 441b(a) ("It is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with [certain federal elections]) (statute held unconstitutional as applied to expenditures by *Citizens United v. FEC* (2010), 130 S. Ct. 876).

Plaintiffs are free to contribute to a candidate for Attorney General or County Prosecutor through a PAC.

Assuming *arguendo* that the contribution limitation contained in R.C. 3599.45 is found to be an outright contribution ban on Plaintiffs, an outright ban does not prevent a contribution limitation from being closely drawn to a sufficiently important state interest. While *Buckley* recognized the existence of "some lower bound" for contribution limitations,[33] *Buckley* dealt with contribution limitations for the entire electorate, not with a finite group of individuals that create a heightened risk of corruption. In addition, the Supreme Court has upheld a federal "ban on direct corporate contributions." *Beaumont*, 539 U.S. at 154. This demonstrates that laws banning contributions by specific groups may be closely drawn to a sufficiently important state interest. Moreover, several courts have held that a complete ban on contributions can be closely drawn to advance a sufficiently important government interest.

Invoking *Buckley*, the Supreme Court of Louisiana upheld a state statute which prohibited campaign contributions by the riverboat and casino industries to all candidates. *Casino Ass'n of Louisiana,* 820 So. 2d at 509. Distinguishing the statute from "the across-the-board restrictions involved in *Buckley* and *Nixon*," the Court held that the contribution limit, although a complete bar as to the casino industry, did not fall below the outer limits of contribution regulation because it would "have a very minimal effect on the candidates' ability to amass the resources necessary for effective advocacy."[34] *Id.* at 503. The Court also emphasized

[33] *See Randall*, 548 U.S. at 248.

[34] Plaintiffs have not alleged or set forth any evidence indicating that candidates for Attorney General or County Prosecutors' offices cannot amass the resources necessary to run for office. Moreover, candidates have successfully run for those offices since R.C. 3599.45 became effective in 1978. As such, R.C. 3599.45 does not prevent candidates from amassing the resources necessary for effective advocacy. *See Nixon*, 528 U.S. at 395-96 (finding contribution limits closely drawn because there was no evidence they "would have any dramatically adverse effect on the funding of campaigns and political associations and

that the persons affected by the statute were free to engage in independent political expression and make independent expenditures, just as the Plaintiffs are in this case.[35]

In another case, the Supreme Court of California upheld a complete ban on contributions from lobbyists to candidates seeking office for which the lobbyist was registered to lobby:

> Section 85702 is not unconstitutional simply because it bans, rather than limits, contributions by certain lobbyists. In other words, contrary to plaintiffs' assertions, a ban on contributions is not per se illegal. First, as set forth by the United States Supreme Court in *Nixon* the test for determining the validity of the amount of a limitation (here a complete ban) is whether the limit is 'so low as to impede the ability of candidates to amass the resources necessary for effective advocacy.' Plaintiffs have not argued here, nor is there any evidence to suggest, that candidates will be unable to seek office without personal contributions by registered lobbyists.[36]

The Supreme Court of Alaska has also upheld a contribution ban on lobbyists making campaign contributions to legislative candidates outside the district in which the lobbyists were eligible to vote. *Alaska Civil Liberties Union*, 978 P.2d at 619. The Court stated that the statute was closely drawn because the restraint did not foreclose lobbyists from engaging in political speech. "For example, [they] may also participate in and contribute to groups – including political parties – which may contribute to any legislative candidate."[37]

The Fourth Circuit Court of Appeals has also rejected the notion that contribution bans are unconstitutional *per se*, stating, "[c]ourts simply are not in the position to second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999).

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that the limitations prevented the candidates…from amassing the resources necessary for effective advocacy.").

[35] *Id.* at 509.

[36] *Institute of Governmental Advocates v. Fair Political Practices Comm.* (Cal. 2001), 164 F. Supp. 2d 1183, 1191 (quoting *Nixon*, 528 U.S. at 397) (citations omitted).

[37] *Alaska Civil Liberties Union*, 978 P.2d. at 619.

Plaintiffs have previously argued that R.C. 3599.45 is not closely drawn because it prohibits candidates from accepting donations from anyone with even a "*de minimis*" ownership interest in a Medicaid provider. This argument not only fails, but Plaintiffs should be barred from making it.

The traditional rule is that, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)); See also *United States v. Raines*, 362 U.S. 17, 21 (1960) (holding that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional").

There is no evidence that any of the Plaintiffs even have an ownership interest in a Medicaid provider, with the exception of Dr. Lavin. Dr. Lavin's ownership interest in Advanced Pediatrics is 100%. Plaintiffs clearly are not the hypothetical *de minimis* owners that they claim may exist. As a result, Plaintiffs cannot argue that R.C. 3599.45 is not closely drawn on the ground that it may apply to *de minimis* owners of Medicaid provider, and this Court should not consider any such arguments in relation to whether the statute is closely drawn.

Even if the Court does consider Plaintiffs' arguments related to so called *de minimis* owners of Medicaid providers, it would not change the conclusion that R.C. 3599.45 is closely drawn. Every owner of a Medicaid provider would have some financial interest in preventing the Medicaid provider from being investigated or prosecuted. If the Attorney General or a county prosecutor was deciding whether to investigate or prosecute an owner of a Medicaid provider, who contributed to their campaigns, an appearance of corruption would arise regardless of the person's ownership level in the Medicaid provider. Further, several minority stakeholders in a Medicaid provider, rather than the majority owner, could contribute to the campaign of an Attorney General or county prosecutor, and the same appearance of corruption would still arise if the Attorney General, or county prosecutor, acted favorably toward the majority owner.

Most importantly, this Court must not second guess the legislature as to the precise restrictions necessary to carry out the state's sufficiently important government interest. As eloquently stated by Magistrate Judge Vecchiarelli:

> The court is ill-suited to determine the amount of an individual's interest in a Medicaid provider that would justify a limitation on the individual's campaign contributions. Such judgments based on independent findings of fact are properly the business of the legislative branch. Thus, the court cannot say that the legislature may properly limit contributions of persons who own a particular percentage of a Medicaid provider who earn a specific amount of income from their ownership interest.[38]

R.C. 3599.45 advances the state interest of avoiding corruption or its appearance arising from Medicaid providers, or their owners, contributing to the campaigns of candidates for Attorney General or County Prosecutor without preventing to any material degree the discussion of candidates and issues. It is limited to those with a financial stake in avoiding the prosecution of the Medicaid provider (the provider itself or its owners) for Medicaid fraud, and the enforcers of the Medicaid Fraud statute. Under the circumstances, this Court must not second guess the legislature as to the precise restrictions necessary to carry out the state's sufficiently important government interest. Consequently, this Court must conclude that R.C. 3599.45 is closely drawn to advance the sufficiently important state interest of preventing corruption or an appearance of corruption.

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[38] Report and Recommendation, Doc. No. 17.

III. CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that this Court grant his motion for summary judgment in his favor as to all claims within Plaintiffs' Complaint because there is no genuine issue of material fact that R.C. 3599.45 does not violate the United States Constitution as a matter of law.

Respectfully submitted,

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CERTIFICATION PURSUANT TO LOCAL RULE 7.1(f)

Pursuant to Local Rule 7.1(f), undersigned counsel certifies that the case has been assigned to the standard track. Undersigned counsel further certifies that the Court has granted an extension of the page limit to thirty pages. This Memorandum adheres to the page limitations set by the Court.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 16, 2011 the foregoing Motion for Summary Judgment was filed with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to the following:

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