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## Cleveland-Area Physicians Win Federal Appeal Seeking To Restore Their Free-Speech Rights

Plaintiffs Succeeded in Overturning Ohio Law That Forced Physicians to Give Up Free Speech In Return For Providing Health Care to Medicaid Patients

CLEVELAND, OHIO – Today, nine Cleveland-area physicians who provide health care to poor patients through the Medicaid program, and were blocked by state law from expressing their support for then-Ohio Attorney General Richard Cordray in his 2010 re-election race, won their appeal to the federal Sixth Circuit Court of Appeals seeking to restore their First-Amendment rights. The physicians were seeking to prevent Ohio's chief elections officer, Secretary of State Jon Husted, from enforcing an Ohio statute that makes it a crime for Ohio attorney-general and county-prosecutor candidates to accept campaign contributions from physicians who serve Medicaid patients.

The Sixth Circuit's decision reverses the decision of the U.S. District Court for the Northern District of Ohio.

The criminal statute at issue, Ohio Revised Code Section 3599.45, was adopted in 1978 and provides that "[n]o candidate for the office of attorney general or county prosecutor or such a candidate's campaign committee shall knowingly accept any contribution from" any Medicaid provider "or from any person having an ownership interest in the provider."

In a unanimous decision, the Sixth Circuit held, "The statute here restricts the First Amendment rights of nearly 100,000 Medicaid providers who do not commit fraud, based on an attenuated concern about a relative handful of providers who do. There is no avoiding the conclusion that the contribution ban set forth in § 3599.45 is not closely drawn."

The Court observed that the State's own statistics for 2009 showed that there were nearly 100,000 Ohio Medicaid providers, and that that same year, "only 0.003% were implicated in Medicaid fraud." "Based on the numbers alone, therefore," the Court held, "the ban restricts 'fundamental First Amendment interests'... much more broadly than necessary. And that is true even without considering the statute's ban on contributions from 'any person having an ownership interest in' a Medicaid provider." (That ban squelches the rights of hundreds of thousands if not millions of shareholders in Wal-Mart, Target, Walgreens, CVS, Rite-Aid, and other publicly traded providers of Medicaid pharmacy services.)

The Court noted that Secretary of State Husted "concedes that he has no evidence at all in support of his theory that § 3599.45 prevents actual or perceived corruption among prosecutors in Ohio" or that prosecutors have "abused their discretion" to prosecute Medicaid fraud. "The Secretary's claim that § 3599.45 prevents corruption, therefore, is dubious at best," the Court observed.

Subodh Chandra, lead counsel for the physicians, said, "Dr. Lavin and his physician colleagues are gratified that the Court affirmed their constitutional rights of free speech and association. While they will never get back the rights they lost in the 2010 election, at least from now on, doctors and others will have their free-speech rights restored."

This case arose because the physicians were all long-time advocates of reforming health insurance to ensure better quality and access to healthcare for all Americans. They were pleased when President Obama signed the Patient Protection and Affordable Care Act into law in March 2010 because the law, among other things, bans insurers from discriminating against patients for pre-existing conditions and permitted people to stay on their parents' policies until the age of 26.

According to lead plaintiff, Arthur Lavin, M.D., the physicians were all "baffled and dismayed" by then-Ohio attorney general candidate Mike Dewine's pledge to challenge health-insurance reform in federal court, but were pleased with Attorney General Cordray's support for the act. The plaintiffs sought to support Cordray by contributing to his campaign. But they were shocked to learn that because they were Medicaid providers, Cordray's acceptance of such contributions would be a criminal act.

"We wanted to contribute to keep Mike DeWine from trying to take us back to allowing insurers to discriminate against patients," said Dr. Lavin, "and here we found we were being discriminated against ourselves, all because some of our patients' bills are paid through the Medicaid program. It didn't make any sense."

The plaintiffs are Arthur Lavin, M.D., a Beachwood-based pediatrician with Advanced Pediatrics; Jason Chao, M.D., attending physician at University Hospitals and a professor of Family Medicine at Case Western Reserve University School of Medicine; Michael Devereaux, M.D., a neurologist at University Hospitals and Professor of Neurology at Case Western Reserve University School of Medicine; Nathan Beachy, M.D., a family physician at MetroHealth and Senior Instructor of Family Medicine at Case Western Reserve University School of Medicine; Patricia Kellner, M.D., a family physician with Eastside Family Practice who is also affiliated with University Hospitals; Jerome Liebman, M.D., a pediatric cardiologist at University Hospitals; Eric Schreiber, M.D., a diagnostic radiologist at the Cleveland Clinic; Constance Magoulas, M.D., a family physician at MetroHealth; and Peter DeGolia, M.D., a family physician with Foley Elder Health Center who is also affiliated with University Hospitals.

The federal suit, captioned Lavin, et al. v. Husted, was originally filed on September 3, 2010 against then-Secretary of State Jennifer Brunner in the U.S. District Court, Northern District of Ohio, Eastern Division. In addition to Subodh Chandra, Donald P. Screen and Sandhya Gupta of The Chandra Law Firm, LLC; and Raymond V. Vasvari, Jr. of Berkman, Gordon, Murray, and DeVan serve as co-counsel for the plaintiffs.

The Ohio State Medical Association, Ohio Osteopathic Association, and Academy of Medicine of Cleveland and Northern Ohio, represented by Maureen P. Tracey and Diane E. Citrino of Thacker Martinsek, LPA filed an amicus ("friend of the Court") brief in support of the plaintiffs before the Sixth Circuit, pointing out that because many of Ohio's physicians are Medicaid providers, their rights were also at stake in the suit.