

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Thomas E. Brinkman, Jr., <i>et al.</i> ,	:	
	:	Case No. 1:09-cv-326
Plaintiffs,	:	
	:	Chief District Judge Susan J. Dlott
v.	:	
	:	ORDER GRANTING MOTION FOR
Armond D. Budish, Speaker of the Ohio	:	PRELIMINARY INJUNCTION
House of Representatives and Chairman of the	:	
Joint Legislative Ethics Committee of the	:	
Ohio General Assembly, <i>et al.</i> ,	:	
	:	
Defendants.	:	

This matter is before the Court on Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (doc. 2) and Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction (doc. 5).¹ Plaintiffs seek the Court to enjoin enforcement of Ohio Revised Code (“O.R.C.”) § 102.03(A)(4), a “revolving door” statute which prohibits certain lobbying activities by former members of the Ohio General Assembly for a period of one year after the former members leave office. Plaintiffs allege that § 102.03(A)(4) violates their First Amendment rights and denies them equal protection under the law. Defendants deny that the statute is unconstitutional. For the reasons that follow, the Court holds that Plaintiffs have established a likelihood of success on the merits. Plaintiffs’ Motion will be **GRANTED** and enforcement of O.R.C. § 102.03(A)(4) will be **PRELIMINARILY ENJOINED**.

¹ Defendants’ Memorandum in Opposition was labeled in the alternative as a Motion for Summary Judgment. Given the procedural posture of this case, the Court declines to consider the merits of Defendants’ alternative motion.

I. BACKGROUND

Plaintiffs Thomas E. Brinkman, Jr., the Coalition Opposed to Additional Spending and Taxes (“COAST”), and Mark W. Miller filed their initial Verified Complaint on May 11, 2009. They filed an Amended Complaint on May 12, 2009.² (Doc. 4.) Brinkman is a citizen of the State of Ohio and a former member of the Ohio General Assembly from January 2001 until December 2008. (*Id.* at 2.) Miller is a citizen of the State of Ohio. (*Id.* at 3.) Both Brinkman and Miller are members and supporters of COAST, an unincorporated association of individuals organized as a political action committee under the laws of the State of Ohio. (*Id.*) Miller is the treasurer of COAST and Brinkman has served as the group’s official spokesman. (*Id.* at 3, 6.)

COAST advocates for the restraint of government taxing and spending in Ohio on the local, state, and national level. (*Id.* at 6.) COAST conducts advocacy activities in numerous ways, including operating a blog, publishing an e-mail newsletter, sending press releases, and direct lobbying. (*Id.*) Presently, COAST seeks to advocate on a number of budgetary issues pending before the Ohio General Assembly, including advocating against a proposed operating subsidy for the Underground Railroad Freedom Center. (*Id.* at 7-8.) Brinkman seeks to represent COAST, as his client, on an uncompensated basis on matters before the Ohio General Assembly. (*Id.* at 9.)

The challenged statutory provision, Ohio Revised Code § 102.03(A)(4), prohibits Brinkman, as a former member of the Ohio General Assembly, from representing COAST on matters before the Ohio General Assembly, or any committee thereof, or any controlling board,

² Plaintiffs filed Notice of Verification of Amended Complaint on May 29, 2009. (Doc. 11.)

for a period of one year beginning in December 2008.³ Violation of the statute is considered a misdemeanor offense of the first degree. O.R.C. § 102.99(B). Plaintiffs seek a declaratory judgment that O.R.C. § 102.03(A)(4) is unconstitutional on its face and as applied and seek a preliminary injunction prohibiting enforcement of O.R.C. § 102.03(A)(4). (*Id.* at 16-19.)

Defendants are the Joint Legislative Ethics Committee (“JLEC”), a twelve-member committee of the Ohio General Assembly with responsibility for governing former members of the Ohio General Assembly with respect to state ethics laws; Armond D. Budish, a member of the Ohio House of Representatives and a member and chairman of JLEC; eleven other members of JLEC;⁴ Tony W. Bledsoe, the executive director of JLEC; Joseph T. Deters, the Hamilton County Prosecuting Attorney; Ron O’Brien, the Franklin County Prosecuting Attorney; Richard C. Pfeiffer, Jr., the City Attorney for the City of Columbus; and John P. Curp, the City Solicitor for the City of Cincinnati. (*Id.* at 3-5, 9.) Defendants Deters, O’Brien, Pfeiffer, and Curp are sued in their official capacities only.

JLEC is responsible for enforcement of O.R.C. § 102.03(A)(4) and would be the body to receive or initiate complaints against Brinkman for violations of the statute. (*Id.* at 11.) JLEC also is empowered to investigate complaints or charges for violations of the statute. (*Id.*) If JLEC determines by a preponderance of the evidence that § 102.03(A)(4) has been violated, it must report the violation to the appropriate prosecuting authority. (*Id.*)

³ Plaintiffs submitted a sworn Declaration of Thomas E. Brinkman on July 11, 2009 in which Brinkman identified three other organizations and causes on whose behalf he would advocate before the Ohio General Assembly if the restriction in Ohio Revised Code § 102.03(A)(4) were rescinded. (Doc. 14-2 ¶¶ 4-6.)

⁴ Bill Harris, William Batchelder, Capri Cafaro, Louis Blessing, John Carey, Jennifer Garrison, Matt Huffman, Dale Miller, Sue Morano, Tom Niehaus, and Matthew Szollosi.

Plaintiffs' desired activities which implicate O.R.C. § 102.03(A)(4) would primarily or exclusively take place in Hamilton or Franklin Counties within the jurisdictions of Deters, O'Brien, Pfeiffer, and/or Curp. (*Id.* at 5.)

II. APPLICABLE STATUTE

Ohio's revolving door statute provides in relevant part:

(4) For a period of one year after the conclusion of employment or service as a member or employee of the general assembly, no former member or employee of the general assembly shall represent, or act in a representative capacity for, any person on any matter before the general assembly, any committee of the general assembly, or the controlling board. . . . As used in division (A)(4) of this section "person" does not include any state agency or political subdivision of the state.

O.R.C. § 102.03(A)(4).

"Matter" is defined in the statute to mean "the proposal, consideration, or enactment of statutes, resolutions, or constitutional amendments." O.R.C. § 102.03(A)(5). To "represent" includes "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." *Id.* Under the Ohio Revised Code generally, a "person" is defined as "an individual, corporation, business trust, estate, trust, partnership, and association," O.R.C. § 1.59(C), but the specific statute clarifies that "person" does not include "any state agency or political subdivision of the state" for purposes of O.R.C. § 102.03(A)(4).

JLEC has issued a memorandum interpreting O.R.C. § 102.03(A)(4) as being applicable to situations where former members of the Ohio General Assembly seek to represent another person or entity regardless of whether the former member is acting for compensation or on an uncompensated (*i.e.*, voluntary) basis. (Doc. 4 at 12 and Ex. A.)

III. STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

Rule 65 of the Federal Rules of Civil Procedure authorizes the Court to grant preliminary injunctive relief. In determining whether to issue or withhold a preliminary injunction, the Court must balance the following factors:

- (1) Whether the party seeking the injunction has shown a strong likelihood of success on the merits;
- (2) Whether the party seeking the injunction will suffer irreparable harm absent the injunction;
- (3) Whether an injunction will cause others to suffer substantial harm; and
- (4) Whether the public interest would be served by the preliminary injunction.

Southern Milk Sales, Inc. v. Martin, 924 F.2d 98, 103 n.3 (6th Cir. 1981); *see also Leary v.*

Daeschner, 228 F.3d 729, 736 (6th Cir. 2000) (same). These factors are to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction.

Leary, 228 F.3d at 736.

A party must show more than a mere possibility of success to obtain a preliminary injunction. *Mich. Coal. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). In general, the extent a party must demonstrate a substantial likelihood of success varies inversely with the degree of harm that party will suffer absent an injunction. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 538 (6th Cir. 1978). Issuance of a preliminary injunction is appropriate “where the [moving party] fails to show a strong or substantial probability of ultimate success on the merits of the claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the [nonmoving party] if an injunction is issued.” *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (citation omitted).

IV. ANALYSIS

Plaintiffs allege that enforcement of O.R.C. § 102.03(A)(4) should be enjoined because the statutory provision violates Plaintiffs' First Amendment rights of speech, petitioning, and freedom of association facially and as applied and because it violates equal protection of the law. Defendants deny that the statute is unconstitutional and argue that its enforcement should not be prohibited.

"When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Connection Distr. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Even a minimal infringement upon First Amendment rights results in irreparable harm. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001); *Connection Distr. Co.*, 154 F.3d at 288. Likewise, when a plaintiff shows a substantial likelihood that his First Amendment rights are violated, "no substantial harm to others can be said to inhere in its enjoinder." *Deja Vu of Nashville, Inc.*, 274 F.3d at 400. Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Connection Distr. Co.*, 154 F.3d at 288 (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Accordingly, the Court will focus on whether Plaintiffs have established a likely violation of their First Amendment rights.

A. First Amendment Rights

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the government for redress of grievances." U.S. Const. amend 1. "The

Fourteenth Amendment extends these prohibitions against the States.” *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 379 (6th Cir. 2008), *cert. denied*, *Ohio v. Citizens for Tax Reform*, 129 S.Ct. 596 (2008). “[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Lobbying the government falls within the gambit of protected First Amendment activity. *See F.T.C. v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426 (1990) (“It is, of course, clear that the association’s efforts . . . to lobby District officials to enact favorable legislation . . . were activities that were fully protected by the First Amendment.”); *Roberts*, 468 U.S. at 627 (characterizing lobbying as being “worthy of constitutional protection under the First Amendment”). However, that right is not unfettered and can be the subject of appropriate regulation. *See, e.g., United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding registration and reporting requirements for Congressional lobbyists); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 n. 20 (1995) (“The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption.”).

O.R.C. § 102.03(A)(4) prohibits former members of the Ohio General Assembly from representing another person or entity (except for a state political subdivision) on matters before the Ohio General Assembly for a period of one year after they leave office.⁵ The parties disagree whether the constitutionality of § 102.03(A)(4) should be examined under a strict scrutiny analysis or under an intermediate level of scrutiny. Defendants contend that the statute is a

⁵ The statute prohibits former members from acting on matters before the Ohio General Assembly, its committees, or a controlling board. O.R.C. § 102.03(A)(4). For simplicity, the Court will refer to all three types of matters before the Ohio General Assembly.

content-neutral regulation of speech and is subject to intermediate scrutiny. “[A] law neutral with respect to content is subject to intermediate scrutiny, which is satisfied where the law furthers an important governmental interest without burdening substantially more speech than necessary.”

Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1250 (6th Cir. 1997). Without deciding whether the statute is a content-neutral regulation, the Court rejects Defendants’ argument because strict scrutiny analysis also is appropriate when a law severely infringes upon core political speech.

As stated above, lobbying “is fully protected by the First Amendment.” *Superior Court Trial Lawyers Ass’n*, 493 U.S. at 426; *see also Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 185 (6th Cir. 2008) (“Speech advocating a campaign to affect government policy is the essence of protected, political speech.”). First Amendment protection is “at its zenith” for “core political speech” which involves “interactive communication concerning political change.”

Buckley v. Amer. Const. Law Found., 525 U.S. 182, 186-87 (1999). “When a State places a severe or significant burden on a core political right . . . the provision must be narrowly tailored and advance a compelling state interest.” *Citizens for Tax Reform*, 518 F.3d at 387 (citing *Meyer*, 486 U.S. at 425; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).⁶

⁶ At oral argument held on July 16, 2009, Defendants argued that O.R.C. § 102.03(A)(4) does not place a severe burden on Plaintiffs’ First Amendment rights, and therefore, strict scrutiny analysis does not apply. Defendants relied on *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), to support this proposition. The Sixth Circuit held in *Libertarian Party* that “voting regulations are not automatically subjected to heightened scrutiny,” but instead that strict scrutiny applies only if the “character and magnitude of the asserted injury” is “severe.” *Id.* at 585 (citations omitted). However, “if the state law imposes only reasonable, nondiscriminatory restrictions upon the protected rights, then the interests of the state in regulating elections is generally sufficient to justify the restrictions.” *Id.* at 586 (internal quotation and citation omitted). The court then provided the following test:

In determining the magnitude of the burden imposed by a state’s election laws, the Supreme Court has looked to the associational rights at issue, including

The parties disagree whether O.R.C. § 102.03(A)(4) places a severe burden on Plaintiffs' First Amendment rights. Defendants point out that the statute does not prohibit (1) Brinkman from lobbying the Ohio General Assembly on his own behalf, (2) COAST from lobbying the Ohio General Assembly through a representative who is not a former General Assembly member less than one year removed from office, and (3) COAST from retaining Brinkman to serve as the organization's spokesperson on matters not before the Ohio General Assembly.

Despite the fact that O.R.C. § 102.03(A)(4) does not restrict all lobbying activities by either Brinkman on his own behalf or by COAST, Plaintiffs' First Amendment rights are severely restricted by O.R.C. § 102.03(A)(4). The statute operates in this instance to prohibit COAST from selecting the person they believe to be the most effective communicator to represent them on matters before the General Assembly. "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *see also Nat'l Ass'n of Social Workers v. Harwood*, 874 F. Supp. 530, 537 n. 8 (D.R.I. 1995) ("[I]ncorporated within the First Amendment

whether alternative means are available to exercise those rights; the effect of the regulations on the voters, the parties and the candidates; evidence of the real impact the restriction has on the process; and the interests of the state relative to the scope of the election.

(*Id.* at 586.)

The preceding language suggests that the standard announced in *Libertarian Party* applies only to voting and election cases. In fact, the cases cited by the Sixth Circuit in support of the standard are all voting or election cases. *Id.* at 585-86 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); and *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Even if the *Libertarian Party* standard were applied to this case, the Court finds above that O.R.C. § 102.03(A)(4) does severely burden Plaintiffs' First Amendment rights.

protection of lobbying are the practical concerns of effectiveness and economic constraints.”), *rev’d on other grounds*, 693 F.3d 622. Likewise, “the right to choose a spokesperson to advocate a group’s collective views lies implicit in the speech and association rights guaranteed by the First Amendment.” *Fraternal Order of Police v. Mayor and City Council of Ocean City, Md.*, 916 F.2d 919, 923 (4th Cir. 1990); *cf. O’Brien v. Leidinger*, 452 F. Supp. 720, 725 (E.D. Va. 1978) (“The right to advocate would be hollow indeed if the state, rather than the association’s members, could select the group’s advocate.”) The law’s prohibition against Brinkman representing COAST on an uncompensated basis, the speaker COAST deems its most effective advocate, severely burdens COAST’s First Amendment rights as applied.

Given that the statute is subject to strict scrutiny, the Court must next determine whether O.R.C. § 102.03(A)(4) furthers a compelling government interest and is narrowly tailored to achieve that end. *Citizens for Tax Relief*, 518 F.3d at 387. Defendants rely on a decision by an Ohio appeals court interpreting the former O.R.C. § 102.03(A), *Ohio v. Nipps*, 66 Ohio App. 2d 17, 23, 419 N.E.2d 1128 (1979), to support their position that the current statute furthers a compelling government interest. The former statute provided as follows:

No public official or employee shall represent a client or act in a representative capacity for any person before the public agency by which he is or within the preceding twelve months was employed or on which he serves or within the preceding twelve months had served on any matter with which the person is or was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion.

Nipps, 66 Ohio App. 2d at 18 (quoting O.R.C. § 102.03(A)). In *Nipps*, a man convicted of violating the former O.R.C. § 102.03(A) challenged that the statute was unconstitutionally vague.

Id. at 18-19.⁷ The appeals court gleaned from the text of the statute its legislative purpose: “to ensure that no public official or employee will engage in a conflict of interest or realize personal gain at public expense from the use of ‘inside’ information.” *Id.* at 21. The appeals court held that Ohio had “a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.” *Id.*

The current version of O.R.C. § 102.03(A)(4) can be analyzed the same way. The purpose of the statute taken as a whole appears to be to promote ethical behavior among public officials and to promote public confidence in government. Federal courts have found that the analogous interests of preventing corruption or the appearance of corruption are compelling governmental interests. *See, e.g., Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 388-89 (2000); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n. 26 (1978); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 715-16 (4th Cir. 1999) (identifying prohibiting corruption as a compelling state interest in lobbying context); *cf. Honorable Mike Turner*, Tenn. Op. Att’y Gen. No. 05-173, slip op. at 2 (Dec. 8, 2005) (stating that “[p]reventing corruption or the appearance of corruption, ensuring the efficient operation of state government, and ensuring that officials and employees are able to exercise their judgment in the public interest are all valid compelling state interests” permitting some form of revolving door statute). Specifically, the Supreme Court in the

⁷ The defendant alleged that the statute was vague and violated the First Amendment. The appeals court did not consider the First Amendment challenge “because defendant has not articulated how a real and substantial discouragement of protected First Amendment activity has occurred.” *Id.* at 20.

Nixon case recognized compelling interests in restricting *quid pro quo* corruption, the appearance of corruption, the appearance of improper influence, and opportunities for abuse. 528 U.S. at 388-89.

Assuming that Defendants have established a compelling government interest, they also must establish that the statute is narrowly tailored to achieve the compelling interest. “The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” *Nixon*, 528 U.S. at 391. Courts do not “accept mere conjecture as adequate to carry a First Amendment burden.” *Id.* at 392; *see also Citizens for Tax Reform*, 518 F.3d at 387 (striking down statute where there was “no evidence in the record” to support a showing that the statute was narrowly drawn to meet the compelling state interest). Defendants’ primary basis for arguing that the statute is narrowly drawn is that the affected former members of the General Assembly are subject to the restriction for only twelve months. They also suggest that the statute is narrowly drawn to the extent that it does not foreclose former members of the General Assembly from joining or participating in the activities of an advocacy organization; rather, it only restricts the former members from representing the organization on matters before the General Assembly.

The Court finds at the preliminary injunction stage that O.R.C. § 102.03(A)(4) is not narrowly tailored. Defendants have not adequately established at this juncture how the restriction furthers the purported compelling interests of promoting the integrity of the administration of government or promoting public confidence in government. Certainly, Defendants have not established that § 102.03(A)(4), at least as applied to the situation of a former member seeking to represent an organization on an uncompensated basis, furthers the interest of curbing *quid pro*

quo corruption. Brinkman is not seeking pecuniary benefit from his representation of COAST or other organizations on matters before the Ohio General Assembly. Therefore, a concern for *quid pro quo* corruption is not implicated. A quick survey of other revolving door statutes suggests that the Ohio statute could be more narrowly tailored in this regard. For example, several states have revolving door statutes that restrict only compensated lobbying activities. *See, e.g.,* Ala. Code § 36-25-13(a); Haw. Rev. Stat. 84-18(b); Md. Code Ann., State Gov’t § 15-504(d)(1).⁸

Additionally, Defendants have not established that § 102.03(A)(4) is narrowly tailored to curbing the inappropriate use of “inside” information, which was the justification upheld for enforcing the prior revolving door statute in *Nipps*. 66 Ohio App. 2d at 20-21. The prior revolving door statute only prohibited advocacy on behalf of a client on matters about which the former public official had personally participated when he was in office. 66 Ohio App. 2d at 20. Its purpose to ensure that “no public official or employee will engage in a conflict of interest or realize personal gain at public expense from the use of ‘inside’ information” was closely tied to its narrow restriction against advocacy on matters on which the official had personally participated. *Id.* at 20-21.⁹ Conversely, former General Assembly members are prohibited from representing clients on any matter before the General Assembly, regardless of whether it is a matter in which they personally participated while in office and on which they had the

⁸ *See also Honorable Mike Turner*, Tenn. Op. Att’y Gen. No. 05-173, slip op. at 2 (Dec. 8, 2005) (opining that a revolving door statute should be limited to banning lobbying for pay or consideration in order to be considered narrowly tailored).

⁹ Additionally, in the current statute, a different subsection similarly prohibits former public officials from representing clients or other persons “on any matter in which the public official . . . personally participated as a public official . . . through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.” O.R.C. § 102.03(A)(1).

opportunity to gain “inside” information.

In sum, Defendants have not adequately articulated, nor proven with evidence, that the restriction in O.R.C. § 102.03(A)(4) is narrowly tailored to achieve its stated interest in maintaining public confidence in good government at least insofar as the statute is applied to Plaintiffs. Plaintiffs have established a likelihood of success on the merits. Plaintiffs have proven for purposes of granting a preliminary injunction that the O.R.C. § 102.03(A)(4), as applied to Brinkman’s representation of COAST on an uncompensated basis, violates Plaintiffs’ First Amendment rights. The Court will preliminarily enjoin O.R.C. § 102.03(A)(4) on this basis pursuant to Rule 65 of the Federal Rules of Civil Procedure. Given this holding, the Court declines to express an opinion as to whether O.R.C. § 102.03(A)(4) violates the First Amendment when examined facially.

B. Equal Protection

The Equal Protection Clause provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. 14. Plaintiffs contend that O.R.C. § 102.03(A)(4) denies them equal protection because it treats former General Assembly members who seek to represent a state agency on a matter before the General Assembly more favorably than it treats former General Assembly members who seek to represent a private client on a matter before the General Assembly. That is, former General Assembly members who seek to represent a state agency are not required to wait twelve months after they leave office to lobby on matters pending before the General Assembly.

The parties again disagree on the level of scrutiny to be applied. “A statute challenged on equal protection grounds will be subject to strict scrutiny when the statute involves a ‘suspect’

classification or has an impact on a ‘fundamental’ right.” *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 410 (6th Cir. 1999); *see also City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (establishing same standard). Defendants contend that only rational basis analysis should be applied because O.R.C. § 102.03(A)(4) does not involve either a suspect classification nor impact a fundamental right. The Court disagrees. The Court concluded above that O.R.C. § 102.03(A)(4) significantly burdened Plaintiffs’ core political speech rights.¹⁰ As such, the statute again is subject to strict scrutiny analysis. “Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666 (1990).

Defendants in their brief applied only a rational basis analysis. The Court understood Defendants to suggest at oral argument that former members who represent state agencies on matters before the General Assembly could be treated more favorably because their activities do not raise the same type of corruption concerns as do former members who seek to represent private organizations. In the absence of an evidentiary basis for this assertion or legal precedent supporting the assertion, the Court holds that Defendants have not at this point established a compelling justification for discriminating against former members of the General Assembly who seek to represent private organizations on matters before the General Assembly. Plaintiffs have

¹⁰ *But see Forti v. New York State Ethics Comm.*, 554 N.E.2d 876, 882-83 (N.Y. 1990) (applying rational basis analysis to New York revolving door statute that restricted the lobbying activities of former executive employees to a greater extent than it restricted the lobbying activities of former legislative employees)

established a likelihood of success on the merits on their equal protection claim and preliminary injunctive relief is appropriate pursuant to Rule 65 of the Federal Rules of Civil Procedure. The Court will preliminarily enjoin O.R.C. § 102.03(A)(4) on the basis that it violates Plaintiffs' rights to equal protection under the laws.

V. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (doc. 2). The Court **PRELIMINARILY ENJOINS** Defendants from enforcing Ohio Revised Code § 102.03(A)(4) and rules promulgated thereto against Plaintiffs and others similarly situated until such time as the Court is able to issue a final judgment on the merits in this matter.

IT IS SO ORDERED.

s/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court