



## INSPECTOR GENERAL REPORT

2012-06-0165

September 17, 2012

### RECOMMENDATIONS FOR 2012-2013 LEGISLATIVE SESSION

*Inspector General David O. Thomas reports as follows:*

This report addresses the jurisdiction and activity of the Office of the Inspector General (OIG) with regard to its duty to make recommendations to the Indiana Legislature with regard to public integrity laws. IC 4-2-7-3(9).

The OIG now makes the following recommendations with regard to the upcoming Legislative Session.

#### I

#### Uniform Government Code (Complete Recodification of Titles 4 and 5)

The first phase of clarifying Titles 4 and 5 has been accomplished by codifying the offenses within those titles. *Public Laws 126-2012 and 114-2012, supra, codifying the offenses within IC 35-44.1 and 44.2.*

The OIG now respectfully submits that a second phase of legislative codification within Titles 4 and 5 would benefit both the definition of the agencies and their operating rules.

We addressed this issue in our previously published Inspector General Report entitled “Uniform Government Code Proposal.”<sup>1</sup>

Beyond merely codifying the offenses within Titles 4 and 5, the OIG now respectfully recommends a complete recodification of all sections within Titles 4 and 5 into two categories, namely (1) agency categorizations, and (2) operating rules, which would further clarify the rules for greater compliance. As addressed in more detail in the Uniform Government Code report, *supra*, currently these two areas are intermixed within both titles.

Our research indicates that such a codification has not occurred since the “Financial Reorganization Act of 1947.” *See*: IC 4-13-2.

Following the same directive of not changing any substantive law when previously codifying the offenses, likewise a codification of the remaining language in Titles 4 and 5 without changing any of the substantive laws might also help ensure the success of the project.

Believing the benefit in clarity would be immense by categorizing the governmental agencies and the operating rules into a systematic codification similar to other states and jurisdictions, we have taken the liberty of doing so in a draft for Legislative consideration. *See Exhibit A, attached.*

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<sup>1</sup> 2008-06-0165, published on-line at <http://www.in.gov/ig/files/2008.06.0165.UGCProposal.pdf>.

## II

### Post-Employment Considerations

Another consideration for the upcoming Legislative Session involves an examination of the Post-Employment Rule (PER) in 42 IAC 1-5-14 and IC 4-2-6-11.<sup>2</sup> The PER restricts in two ways certain employment by state workers who

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<sup>2</sup> IC 4-2-6-11

One year restriction on certain employment or representation; advisory opinion; exceptions

(a) As used in this section, "particular matter" means:

- (1) an application;
- (2) a business transaction;
- (3) a claim;
- (4) a contract;
- (5) a determination;
- (6) an enforcement proceeding;
- (7) an investigation;
- (8) a judicial proceeding;
- (9) a lawsuit;
- (10) a license;
- (11) an economic development project; or
- (12) a public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
  - (2) from an employer if the former state officer, employee, or special state appointee was:
    - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
    - (B) in a position to make a discretionary decision affecting the:
      - (i) outcome of the negotiation; or
      - (ii) nature of the administration; or
  - (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;
- before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or

leave the Executive Branch. First, there is a “365-day cooling off period” for qualifying employees before going to work for certain employers. Second, and even if the cooling-off period does not apply, there may be “particular matter” restrictions which apply for the life-time of the particular matters.

There has been debate as to whether the PER should be amended. Some have advanced that the PER should be more restrictive, and many state workers have expressed concern that the PER is too restrictive.

An example of both contentions occurred in 2010-09-0233,<sup>3</sup> where an administrative law judge (ALJ) at the Indiana Utility Regulatory Commission (IURC) was determined not to be in violation of the PER, but was found by the SEC to be in violation of the related Conflict of Interest Rule in 42 IAC 1-5-6 and IC 4-2-6-9. The application of the PER turned upon whether the IURC ALJ made the actual “decision” within the prohibitions of IC 4-2-6-11(b)(3), which states in

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compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of his or her duties or responsibilities while a state officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) representation by; or
- (3) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to a special state appointee who serves only as a member of an advisory body.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

<sup>3</sup> 2010-09-0233, published on-line at: [http://www.in.gov/ig/files/2010-09-0233\(Storms-Ethics\).pdf](http://www.in.gov/ig/files/2010-09-0233(Storms-Ethics).pdf).

relevant part:

A former . . . employee . . . may not accept employment or receive compensation . . . from an employer if the former state . . . employee . . . made a regulatory or licensing decision that directly applied to the employer . . . . (*emphasis added*).

IC 4-2-6-11(b)(3).

The SEC correctly found that under the PER, the IURC Commission, rather than the IURC ALJ, made the “decision” in that case, and that although the Conflict of Interest Rule had been violated by the ALJ while seeking post-employment, the PER had not been violated.

Even if this interpretation of the PER in this context is considered to be ambiguous, which we believe it is not, the rule of lenity supports the SEC’s strict interpretation of the PER in this manner. *Mask v. State*, 829 N.E.2d 932 (Ind. 2005)(when a penal statute is ambiguous and may be interpreted in more than one way, the interpretation which does not subject the person to the penalty must be followed); *City of Fort Wayne v. Bishop*, 228 Ind. 304, 92 N.E.2d 544 (1950)(penal statutes include civil actions if a penalty may be issued).

For these reasons, the OIG respectfully submits that if an expansion of the PER is desired, a legislative change must occur.

Pursuant to our charge to make recommendations to the Legislature regarding public integrity laws, IC 4-2-7-3(9), the OIG respectfully recommends that the PER not be amended to be either more or less restrictive for the following reasons.

A

The 2005 PER may be the strictest in Indiana history. It increased post-

employment restrictions in at least four ways.

First, prior to its adoption in 2005, there was *nothing* to stop a state employee from going to work for a company that did business with his or her state agency. The only restriction was in communicating back with the agency, not the actual post-employment. *See: IC 4-2-6-11 (2004)<sup>4</sup> and Exhibit B,*

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<sup>4</sup> IC 4-2-6-11 pre-2005 stated:

- (a) This section applies only:
  - (1) to a former state officer or former employee; and
  - (2) during the period that is twelve (12) months after the date the former state officer or former employee had responsibility for the particular matter.
- (b) As used in this section, "legislative matter" has the meaning set forth in IC 2-2.1-3-1.
- (c) As used in this section, "particular matter" means:
  - (1) an application;
  - (2) a business transaction;
  - (3) a claim;
  - (4) a contract;
  - (5) a determination;
  - (6) an enforcement proceeding;
  - (7) an investigation;
  - (8) a judicial proceeding;
  - (9) a lawsuit;
  - (10) a license;
  - (11) an economic development project; or
  - (12) a public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(d) A former state officer or former employee may not represent or assist a person regarding a particular matter involving a specific party or parties:

- (1) that was under consideration by the agency that was served by the state officer or employee; and
- (2) in which the officer or employee participated personally and substantially through:
  - (A) a decision;
  - (B) an approval;
  - (C) a disapproval;
  - (D) a recommendation;
  - (E) giving advice;
  - (F) an investigation; or
  - (G) the substantial exercise of administrative discretion.

(e) An appointing authority or state officer of the agency that was served by the former state officer or former employee may waive application of this section if the appointing authority or state officer determines that representation or assistance of a former state officer or former employee is not adverse to the public interest. A waiver under this subsection must be in writing and must be filed with the commission.

(f) This section does not prohibit an agency from contracting with a former state officer or employee to act on a matter on behalf of the agency.

*attached (Executive Order 04-10).*

In contrast, the 2005 PER restricts for the first time the actual employment for one year if qualifying conduct occurs. *See: PER (42 IAC 1-5-14 and IC 4-2-6-11), footnote 2, supra.*

Second, this earlier and narrower prohibition for particular matters was for only 365 days, not the current life-time ban for particular matters. *Id.*

Third, and perhaps the most impactful difference, the 2005 PER restrictions were made applicable to all state employees, special state appointees, members of the quasi-agencies (bodies corporate and politic), and the elected state officers. This is in contrast to the earlier application which applied not only lesser restrictions, but also to a very limited group of state workers, namely only the Governor's and Lieutenant Governor's immediate staffs and agency leaders. Accordingly, there were no post-employment restrictions of any kind for the majority of the state workforce, including the elected officials. *See: Executive Order 04-10, supra.*

Fourth and finally, in contrast to the Executive Branch lobbying restrictions imposed in 2005 through IC 4-2-8, lobbying restrictions, if any, were minimal prior to 2005. *See Exhibit C, attached (Executive Order 04-11).*

Restriction	Pre-2005	Post-2005
1-year employment restriction	No	Yes
Life-time ban on particular matters	No	Yes
Applicable to all state workers	No	Yes
Lobbying restrictions	No	Yes

## B

Another consideration when determining whether to change the current PER should include the constitutional limits in how strict a PER may be. The federal courts have recently determined that an Ohio post-employment law violated the government workers' constitutional rights and issued a permanent injunction against the statute's enforcement, something we would like to avoid in Indiana. *See: Brinkman v. Budish, 692 F.Supp.2d 855 (2010), attached hereto as Exhibit D.*

## C

A third reason to observe caution in restricting post-employment further may be seen in the Indiana appellate scrutiny of employment restrictions in the civil jurisdictions. Although contractual covenants-not-to-compete may have differences to those in governmental post-employment restrictions, the appellate scrutiny may be instructive. Specifically, the Indiana Supreme Court has said that "it is to the best interest of the public that persons should not be unnecessarily restricted in their freedom of contract..." *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276, 279 (Ind.1983) (quoting *Hodnick v. Fid. Trust Co.*, 96 Ind.App. 342, 350, 183 N.E. 488, 491 (1932)). The court has more recently stated that "noncompetition covenants in employment contracts are in restraint of trade and disfavored by law" and will be construed strictly against the employer. *Central Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 728-29 (Ind.2008).

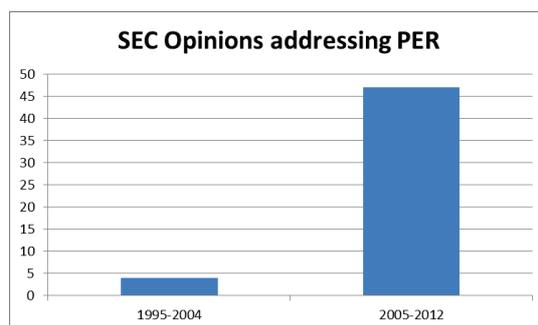
D

A fourth consideration in whether to make the PER more restrictive might include an examination of the results of the SEC in enforcing these newer standards.

1

Since the 2005 PER, the SEC to date has issued 47 Formal Advisory Opinions interpreting and enforcing the PER.<sup>5</sup>

Those forty-seven (47) SEC opinions interpreting the PER within the past eight years are in contrast in volume to the four (4) SEC opinions interpreting the less restrictive post-employment rule in the eight years prior to 2005.

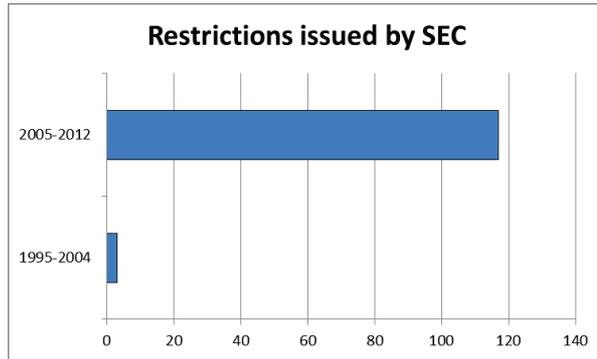


2

In these 47 post-2005 advisory opinions by the SEC on the PER, each of the applicants was restricted in post-employment, for a total of 117 restrictions issued against the applicants. Prior to 2005, three (3) restrictions were issued by the SEC.

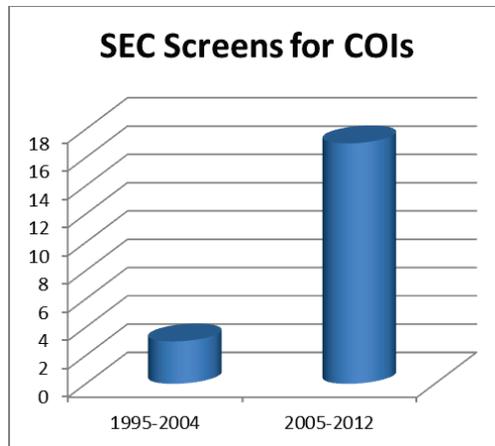
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<sup>5</sup> See opinions published on-line: <http://www.in.gov/ig/2338.htm#postemp>.



3

Since 2005, the SEC has also issued at least seventeen (17) screens to employees to prevent conflicts of interests which are often related to PER issues.<sup>6</sup> In the eight years prior to 2005, three (3) screens were issued by the SEC.



4

In addition to these SEC restrictions and screens, the OIG legal staff has

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<sup>6</sup> See SEC Formal Advisory Opinions interpreting 42 IAC 1-5-6, itemized on-line at: <http://www.in.gov/ig/2338.htm#coidecvote>.

issued to state employees 480 Informal Advisory Opinions interpreting the PER since 2005, showing a further awareness of the PER by state employees.

In summary, we believe that statistics, alone, may not be conclusive in evaluating the effectiveness of a penal statute. Yet we do believe that this information provides relevant evidence that the 2005 PER has had a dramatic effect both on increased SEC activity, effectiveness, and employee awareness.

For all the above reasons, the OIG reports the above information and stands ready to provide more information and research to the Legislature upon request.

Dated this 17<sup>th</sup> day of September, 2012.

/s/ David O. Thomas, Inspector General

# Proposed organization of Title 4: State Government Structure

## Part 1. Elected State Officers

	Current citation	
State Officers Generally	IC 4-2	
Officers' Bonds and Oaths	IC 5-4	<i>Applies also to local govt.</i>
Officers' Deputies	IC 5-6	<i>Applies also to local govt.</i>
Officers' Impeachment, Removal, Resignation, and Disqualification	IC 5-8	<i>Applies also to local govt.</i>
Officers' Leaves of Absence and Appt Preferences for Military Svc.	IC 5-9	
Governor	IC 4-3	
Lieutenant Governor	IC 4-4	
Secretary of State	IC 4-5	
Attorney General	IC 4-6 and IC 5-26.5	
Auditor of State	IC 4-7	
Treasurer of State	IC 4-8.1	

## Part 2. Administration

Office of Management and Budget	IC 4-3-22	<i>In Governor statute</i>
State Budget Agency	IC 4-12	
Department of Administration	IC 4-13	
State Personnel Department	IC 4-15-2.2	<i>Revised in 2011</i>
Office of Technology	IC 4-13.1 and IC 4-34	<i>Technology Fund is INSPIRE \$</i>
Office of the Inspector General	IC 4-2-7	
State Ethics Commission	IC 4-2-6	
Governor's Comm. on Minority and Women's Business Enterprises	IC 4-13-16.5	<i>Staffed by IDOA</i>
State Employees Appeals Commission	IC 4-15-1.5	
Indiana Arts Commission	IC 4-23-2 and 2.5	
Indiana Recycling Market Development Board	IC 4-23-5.5	
Commission on Forensic Sciences	IC 4-23-6	
Coroners Training Board	IC 4-23-6.5	
Indiana Library and Historical Department	IC 4-23-7, 7.2, 7.3, 8, 9 and 10	
State GIS Officer	IC 4-23-7.3	
Indiana Commission for Arts and Humanities in Education	IC 4-23-12	<i>Superintendent is member</i>
Governor's Residence Commission	IC 4-23-15	
Dr. Martin Luther King Jr. Indiana Holiday Commission	IC 4-23-24.1	
Indiana Advisory Commission on Intergovernmental Relations	IC 4-23-24.2	<i>Staffed by IU Center for Urban Policy and the Environment</i>
Indiana Commission for Women	IC 4-23-25	<i>Staffed by DWD</i>
Advisory Committee for Children With Special Health Needs	IC 4-23-26	
Children's Health Policy Board	IC 4-23-27	
Commission on Hispanic/Latino Affairs	IC 4-23-28	
Governor's Council For People with Disabilities	IC 4-23-29	
Mortgage Lending and Fraud Prevention Task Force	IC 4-23-30	
Board for the Coordination of Programs Serving Vulnerable Individuals	IC 4-23-30.2	
Indiana Lottery Commission	IC 4-30	
Indiana Horse Racing Commission	IC 4-31	

EX A-1

Indiana Gaming Commission	IC 4-32.2, 33, 35-36	
Law Enforcement Training Board	IC 5-2-1-3	<i>IC 5-2 ("law enforcement") should be in IC 4 (and grouped with ISP et al in IC 10 "Public Safety")</i>
State Board of Accounts	IC 5-11-1-1	
Interstate Jobs Protection Commission	IC 5-25	<i>All of IC 5-25 should be kept together</i>
Integrated Public Safety Commission	IC 5-26	<i>Should be with law enforcement - IC 5-36 should be all together</i>
Office of Tourism and Indiana Tourism Council	IC 5-29	
<u>Other entities:</u>		
Department of Correction Ombudsman Bureau	IC 4-13-1.2	<i>Within IDOA - Ombd. 1</i>
State Library and Historical Building	IC 4-13-12	<i>Just the building</i>
Indiana Historical Society Building	IC 4-13-12.1	<i>Contract with IDOA</i>
Department of Child Services Ombudsman	IC 4-13-19	<i>Within IDOA - Ombd. 2</i>
Indiana Affirmative Action Office	IC 4-15-12-3	<i>Within SPD</i>
Criminal Justice Institute	IC 5-2-6, 6.1 - 6.9	
Indiana Housing and Community Development Authority	IC 5-20	<i>All of IC 5-20 should go here</i>
<u>Public Corporations:</u>		
Indiana Finance Authority	IC 4-4-10.9 and 11	
State Museum and Historic Sites Corporation	IC 4-37	
Indiana Stadium and Convention Building Authority	IC 5-1-17	<i>Within "Bonds and other obligations"</i>
Indiana Bond Bank	IC 5-1-1.5	
Law Enforcement Academy Building Commission	IC 5-2-2-1	<i>IC 5-2 ("law enforcement") should be in IC 4 (and grouped with ISP et al in IC 10 "Public Safety")</i>
Indiana Economic Development Corporation	IC 5-28	
Indiana Health Informatics Corporation	IC 5-31	<i>All IC 5-31 moved here</i>
<u>Local entities</u>		
Local Public Improvement Bond Banks	IC 5-1-1.4	<i>A local "quasi agency"</i>
Local Coordinating Council	IC 5-2-11-1.6	

Ex A-2

# Proposed organization of Title 5: Uniform Government Code

Part 1. General Employee Rules, Rights, & Benefits	Current citation	
Code of Ethics	IC 4-2-6	
State Employees' Bill of Rights	IC 4-15-10-4	
Public Employee Benefits	IC 5-10	
Social Security Coverage for Public Employees	IC 5-10.1	
Public Retirement and Disability Benefits	IC 5-10.2	
Public Employee's Retirement Fund	IC 5-10.3	
State Teachers' Retirement Fund	IC 5-10.4	
Indiana Public Pension Modernization Act	IC 5-10.5	
<b>Part 2. Purchasing/Finance</b>		
State Purchasing	IC 4-13-1.3	<i>See also IC 4-10 from 1897</i>
Development of Recycled Materials Market	IC 4-13-1.4	
Federal Surplus Property	IC 4-13-1.7	
Financial Reorganization Act of 1947	IC 4-13-2	
Internet Purchasing Sites	IC 4-13-17	
State Lands Acquisition	IC 4-17	<i>Repealed</i>
State Real Property	IC 4-20.5	<i>Acquisition rules</i>
Institutions General Provisions	IC 4-23	<i>Spending in prisons</i>
Bonds And Other Obligations	IC 5-1	
Officers' Fees and Salaries	IC 5-7	<i>Local govt too - 1800's</i>
Accounting for Public Funds	IC 5-11	<i>SBOA here - local govt, too</i>
Investment of Public Funds	IC 5-13	
Public Works	IC 5-16	
Public Purchases	IC 5-17	
Federal Aid	IC 5-19	
Public Purchasing	IC 5-22	
Public-Private Agreements	IC 5-23	
Electronic Digital Signature Act	IC 5-24	
Electronic Payments to Governmental Bodies	IC 5-27	
Loans of State Funds and Mortgages to State	IC 4-11	<i>From 1855, 1919, 2006</i>
<b>Part 3. Contracting</b>		
Contracts > \$10M	IC 4-12-13	
Statewide Price Contracts for Certain School Corporation Purchases of Major Equipment Items	IC 4-13-1.6	
Drug Testing of employees of Public Works Contractors	IC 4-13-18	
Design-Build Public Works Projects	IC 5-30	
<b>Part 4. Meetings and Records</b>		
Publication of Notices	IC 5-3	
Public Records and Public Meetings	IC 5-14	<i>APRA - local govt, too</i>
Preservation of Public Records	IC 5-15	
<b>Part 5. Adjudication</b>		
Administrative Orders and Procedures	IC 4-21.5	
<b>Part 6. Rule Promulgation</b>		
Administrative Rules and Procedures	IC 4-22	
<b>Part 7. Misc.</b>		
Miscellaneous Provisions	IC 4-1	

EX A-3

STATE OF INDIANA  
EXECUTIVE DEPARTMENT  
INDIANAPOLIS

EXECUTIVE ORDER 04-10

FOR: SENIOR-LEVEL EXECUTIVE BRANCH EMPLOYEES LEAVING STATE GOVERNMENT

TO ALL WHOM THESE PRESENTS MAY COME, GREETINGS

WHEREAS, Executive Branch policymakers collaborate closely with other members of their office or agency to fulfill their public responsibilities;

WHEREAS, Executive Branch policymakers sometimes leave state government to work in the private sector for parties who are affected by the policymaking decisions of state government; and

WHEREAS, the public should be confident that adequate protections are in place to ensure Executive Branch policymakers who accept employment with private parties do not have greater access to their counterparts in state government;

NOW, THEREFORE, I, JOSEPH E. KERNAN, by virtue of the authority vested in me as Governor of the State of Indiana, do hereby order that:

1. Within twelve months after retirement or termination of employment, the Governor's and Lieutenant Governor's Chief of Staff; Counsel; Press Secretary; Deputy Chiefs of Staff; and Policy Directors shall not knowingly make, with the intent to influence, any communication to or appearance before any employee of the Governor's Office or Lieutenant Governor's Office, or any agency appointing authority, if that communication or appearance is made on behalf of any other person (other than the state, an agency, a political subdivision, or other public institution), in connection with any matter concerning which he or she seeks official action by that employee.
2. Within twelve months after retirement or termination of employment, agency appointing authorities shall not knowingly make, with the intent to influence, any communication to or appearance before any employee of the Governor's Office or Lieutenant Governor's Office, any other agency appointing authority, or any employee of the agency in which the appointing authority served if that communication or appearance is made on behalf of any other person (other than the state, an agency, a political subdivision, or other public institution), in connection with any matter concerning which he or she seeks official action by that employee.



IN TESTIMONY WHEREOF, I, Joseph E. Kernan, have herewith set my hand and caused to be affixed the Great Seal of the State of Indiana on this 27th day of April, 2004.

*Todd Rokita*

ATTEST: Todd Rokita  
Secretary of State

*Joseph E. Kernan*  
Joseph E. Kernan  
Governor of Indiana

STATE OF INDIANA  
EXECUTIVE DEPARTMENT  
INDIANAPOLIS

EXECUTIVE ORDER 04-11

FOR: REGISTRATION OF EXECUTIVE BRANCH LOBBYISTS

TO ALL WHOM THESE PRESENTS MAY COME, GREETINGS:

WHEREAS, many individuals and businesses seek to influence the decisions of the Executive Branch of government relating to policies, procurement, and other business;

WHEREAS, the Executive Branch decisions that these individuals and businesses seek to influence involve the expenditure of billions of taxpayers' dollars and the operations of all aspects of government;

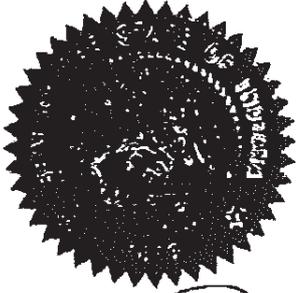
WHEREAS, it is important that Executive Branch business be conducted in the most transparent manner possible, so that citizens have full information about efforts directed at influencing Executive Branch policies and procurement, including funds expended by private individuals and businesses in an effort to influence these matters; and

WHEREAS, the General Assembly already has undertaken a similar process to register persons who lobby the General Assembly by establishing the Lobby Registration Commission and procedures for lobbyists to register and report their activities and expenditures.

NOW, THEREFORE, I, JOSEPH E. KERNAN, by virtue of the authority vested in me as Governor of the State of Indiana, do hereby order that:

1. The Commissioner of the Indiana Department of Administration (the "Commissioner") shall promulgate rules requiring registration for individuals who lobby the Executive Branch in order to influence Executive Branch action (the "Executive Branch Lobbying Rules").
2. For purposes of the Executive Branch Lobbying Rules, "lobby" means contacts made to promote, support, influence, modify, oppose, or delay the outcome of an Executive Branch action by direct communication with designated Executive Branch officials and employees.
3. The Executive Branch Lobbying Rules shall require such lobbyists to report their lobbying activities to the Commissioner on at least a semi-annual basis.
4. The Commissioner shall be authorized to create enforcement mechanisms for the Executive Branch Lobbying Rules to the extent permitted under applicable law.
5. The Commissioner shall submit proposed Executive Branch Lobbying Rules for inclusion in the Indiana Register no later than July 5, 2004.
6. Nothing herein shall restrict the Commissioner's authority, through the rulemaking process, to promulgate the Executive Branch Lobbying Rules with such definitions, standards, and requirements as the Commissioner deems to be in the best interests of public policy.

EX C-1



IN TESTIMONY WHEREOF, I, Joseph E. Kernan,  
have herewith set my hand and caused to be affixed the  
Great Seal of the State of Indiana on this 27th day of April,  
2004.

*Joseph E. Kernan*  
Joseph E. Kernan  
Governor of Indiana

*Todd Rokita*

ATTEST: Todd Rokita  
Secretary of State

EX C-2

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

**C**

United States District Court,  
S.D. Ohio,  
Western Division.

Thomas E. BRINKMAN, Jr., et al., Plaintiffs,

v.

Armond D. BUDISH, Speaker of the Ohio House of  
Representatives and Chairman of the Joint Legislative  
Ethics Committee of the Ohio General Assembly, et  
al., Defendants.

Case No. 1:09-cv-326.

Feb. 17, 2010.

**Background:** Advocacy organization and its members filed action against committee of Ohio General Assembly with responsibility for governing former members of General Assembly with respect to state ethics laws, alleging that "revolving door" statute violated First Amendment and Equal Protection Clause. Plaintiffs moved for summary judgment.

**Holdings:** The District Court, Susan J. Dlott, Chief Judge, held that:

- (1) strict scrutiny applied to analysis of whether Ohio revolving door statute violated First Amendment free speech clause;
- (2) compelling interests existed for State of Ohio to enact revolving door statute, as applied to compensated lobbying, but not as to uncompensated lobbying;
- (3) preventing former general assembly members from having special access to legislative process did not constitute compelling interest for State of Ohio to enact revolving door statute;
- (4) revolving door statute had not been narrowly tailored to achieve objectives of avoiding corruption or appearance of corruption; and
- (5) permanent injunction was warranted to enjoin enforcement of Ohio revolving door statute.

Motion granted.

West Headnotes

111 Constitutional Law 92 ↪ 1440

92 Constitutional Law

92XVI Freedom of Association

92k1440 k. In general. Most Cited Cases

Constitutional Law 92 ↪ 1460

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1460 k. In general. Most Cited Cases

Implicit 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. U.S.C.A. Const. Amend. 1.

121 Constitutional Law 92 ↪ 1481

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1481 k. Lobbying. Most Cited Cases

Lobbying the government falls within the gambit of protected First Amendment activity. U.S.C.A. Const. Amend. 1.

131 Constitutional Law 92 ↪ 1721

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

Press

92XVIII(F) Politics and Elections

92k1721 k. Lobbying. Most Cited Cases

Strict scrutiny applied to analysis of whether Ohio revolving door statute, that prohibited any member or employee of general assembly after leaving such employment or service from representing clients on any matter before general assembly for one year, violated First Amendment free speech clause, since statute severely burdened First Amendment rights of advocacy group by prohibiting it from using former general assembly member as its advocate before general assembly. U.S.C.A. Const. Amend. 1; Ohio R.C. § 102.03(A)(4).

141 Constitutional Law 92 ↪ 1681

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and

EX D-1

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

Press

92XVIII(F) Politics and Elections

92k1681 k. Political speech, beliefs, or activity in general. Most Cited Cases

First Amendment protection is at its zenith for core political speech which involves interactive communication concerning political change. U.S.C.A. Const.Amend. 1.

**[5] Constitutional Law 92 ↪ 1460**

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1460 k. In general. Most Cited Cases

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. U.S.C.A. Const.Amend. 1.

**[6] Constitutional Law 92 ↪ 1440**

92 Constitutional Law

92XVI Freedom of Association

92k1440 k. In general. Most Cited Cases

**Constitutional Law 92 ↪ 1500**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1500 k. Advocacy. Most Cited Cases

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. U.S.C.A. Const.Amend. 1.

**[7] Constitutional Law 92 ↪ 1721**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(F) Politics and Elections

92k1721 k. Lobbying. Most Cited Cases

**Statutes 361 ↪ 24**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k24 k. Lobbying or misconduct. Most Cited Cases

Avoiding corruption, i.e., prevention of unethical practices, and appearance of corruption, i.e., bolstering public's confidence in integrity of government, were compelling interests for State of Ohio to enact revolving door statute, that prohibited any member or employee of general assembly after leaving such employment or service from representing clients on any matter before general assembly for one year, as applied to compensated lobbying, but not as to uncompensated lobbying, on claim that statute violated First Amendment free speech clause, since governmental interest in preventing corruption or appearance of corruption was limited to quid pro quo corruption. U.S.C.A. Const.Amend. 1; Ohio R.C. § 102. 03( A)( 4).

**[8] Constitutional Law 92 ↪ 1721**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(F) Politics and Elections

92k1721 k. Lobbying. Most Cited Cases

**Statutes 361 ↪ 24**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k24 k. Lobbying or misconduct. Most Cited Cases

Preventing former general assembly members from having special access to legislative process did not constitute compelling interest for State of Ohio to enact revolving door statute, that prohibited any member or employee of general assembly after leaving such employment or service from representing clients on any matter before general assembly for one year, on claim that statute violated First Amendment free speech clause, since political corruption did not necessarily follow from special access to elected officials or favoring speaker and appearance of influence or access would not cause electorate to lose faith in democracy. U.S.C.A. Const.Amend. 1; Ohio R.C. § 102. 03( A)( 4).

Ex D-2

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

**[9] Constitutional Law 92** ↪ 1721

92 Constitutional Law  
92XVIII Freedom of Speech, Expression, and Press  
92XVIII(F) Politics and Elections  
92k1721 k. Lobbying. Most Cited Cases

**Statutes 361** ↪ 24

361 Statutes  
361I Enactment, Requisites, and Validity in General  
361k24 k. Lobbying or misconduct. Most Cited Cases  
Ohio revolving door statute, that prohibited any member or employee of general assembly after leaving such employment or service from representing clients on any matter before general assembly for one year, had not been narrowly tailored to achieve objectives of avoiding corruption or appearance of corruption, on claim that statute violated First Amendment free speech clause, since temporally limited restriction did not address concern against quid pro quo corruption, statute restricted both compensated and uncompensated lobbying, and it did not restrict other behaviors or activities that might have given rise to actual or perceived corruption. U.S.C.A. Const.Amend. 1; Ohio R.C. § 102.03(A)(4).

**[10] Constitutional Law 92** ↪ 1506

92 Constitutional Law  
92XVIII Freedom of Speech, Expression, and Press  
92XVIII(A) In General  
92XVIII(A)1 In General  
92k1506 k. Strict or exacting scrutiny; compelling interest test. Most Cited Cases  
On a claim that a statute violates First Amendment free speech rights, 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. U.S.C.A. Const.Amend. 1.

**[11] Constitutional Law 92** ↪ 1505

92 Constitutional Law  
92XVIII Freedom of Speech, Expression, and

Press

92XVIII(A) In General  
92XVIII(A)1 In General  
92k1505 k. Narrow tailoring. Most Cited Cases

**Constitutional Law 92** ↪ 1506

92 Constitutional Law  
92XVIII Freedom of Speech, Expression, and Press  
92XVIII(A) In General  
92XVIII(A)1 In General  
92k1506 k. Strict or exacting scrutiny; compelling interest test. Most Cited Cases  
Courts do not accept mere conjecture as adequate to carry a First Amendment free speech burden, when analyzing whether a statute is narrowly tailored to achieve compelling governmental interests. U.S.C.A. Const.Amend. 1.

**[12] Injunction 212** ↪ 9

212 Injunction  
212I Nature and Grounds in General  
212I(B) Grounds of Relief  
212k9 k. Nature and existence of right requiring protection. Most Cited Cases  
Before granting a permanent injunction, the party seeking relief must demonstrate that: (1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

**[13] Injunction 212** ↪ 9

212 Injunction  
212I Nature and Grounds in General  
212I(B) Grounds of Relief  
212k9 k. Nature and existence of right requiring protection. Most Cited Cases  
The party seeking a permanent injunction must establish success on the merits rather than a probability of success on the merits.

**[14] Civil Rights 78** ↪ 1456

Ex D-3

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

## 78 Civil Rights

### 78III Federal Remedies in General

#### 78k1449 Injunction

78k1456 k. Other particular cases and contexts. Most Cited Cases

Permanent injunction was warranted to enjoin enforcement of Ohio revolving door statute, that prohibited any member or employee of general assembly after leaving such employment or service from representing clients on any matter before general assembly for one year, on claim that statute violated First Amendment free speech clause, since statute violated First Amendment, even minimal infringement upon First Amendment rights resulted in irreparable harm, there were no available remedies at law that were adequate to compensate for loss of First Amendment rights, and it always was in public interest to prevent violation of constitutional rights. U.S.C.A. Const.Amend. 1; Ohio R.C. § 102.03(A)(4).

## [15] Civil Rights 78 ¶1450

## 78 Civil Rights

### 78III Federal Remedies in General

#### 78k1449 Injunction

78k1450 k. In general. Most Cited Cases

Even a minimal infringement upon First Amendment free speech rights results in irreparable harm, as required for a permanent injunction to issue. U.S.C.A. Const.Amend. 1.

## [16] Civil Rights 78 ¶1450

## 78 Civil Rights

### 78III Federal Remedies in General

#### 78k1449 Injunction

78k1450 k. In general. Most Cited Cases

There are no available remedies at law, as required for a permanent injunction to issue, that are adequate to compensate for a loss of First Amendment free speech rights. U.S.C.A. Const.Amend. 1.

## [17] Civil Rights 78 ¶1450

## 78 Civil Rights

### 78III Federal Remedies in General

#### 78k1449 Injunction

78k1450 k. In general. Most Cited Cases

Prevention of the violation of a party's constitutional

rights is always in the public interest, as required for a permanent injunction to issue.

## West Codenotes

Held Unconstitutional Ohio R.C. § 102.03(A)(4) \*858 Christopher R. Finney, Joshua Braden Bolinger, Finney, Stagnaro, Saba & Patterson Co., L.P.A., Cincinnati, OH, Curt Carl Hartman, Amelia, OH, for Plaintiffs.

Kent M. Shineall, Jeannine R. Lesperance, Ohio Attorney General's Office Constitutional Offices Section, Nick A. Soulas, Jr., Columbus, OH, Peter J. Stackpole, City of Cincinnati, David Todd Stevenson, Cincinnati, OH, for Defendants.

## **ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND ISSUANCE OF A PERMANENT INJUNCTION AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

SUSAN J. DLOTT, Chief Judge.

This matter is before the Court on Plaintiffs' Motion For Summary Judgment and the Issuance of a Permanent Injunction (doc. 29) and Defendants' Amended Motion for Summary Judgment (doc. 34). Plaintiffs in this case challenge the constitutionality of Ohio Revised Code ("O.R.C.") § 102.03(A)(4), a statute which prohibits former members of the General Assembly from representing another person or organization before the Ohio General Assembly for a period of one year subsequent to their departure from office. The Court previously issued an Order Granting Motion for Preliminary Injunction ("Injunction Order") temporarily enjoining enforcement of § 102.03(A)(4). For the reasons that follow, the Court **GRANTS** Plaintiffs' motion, **DENIES** Defendants' motion, and **PERMANENTLY ENJOINS** enforcement of § 102.03(A)(4).

## **I. BACKGROUND**

### **A. Factual Background**

Plaintiffs are Thomas E. Brinkman, Jr., the Coalition Opposed to Additional Spending and Taxes ("COAST"), and Mark W. Miller. COAST is an organization which advocates for the restraint of gov-

Ex D-4

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

ernment taxing and spending in Ohio on the local, state, and national level. (Doc. 29-1 ¶¶ 2, 8-9.) <sup>FN1</sup> COAST conducts advocacy activities in numerous ways, including operating a blog, publishing an email newsletter, sending press releases, and direct lobbying. (*Id.* ¶ 3.) COAST has directly lobbied legislators through its leadership and by testimony before legislative bodies. (*Id.* ¶ 4.) Presently, COAST seeks to advocate on a number of budgetary issues before the Ohio General Assembly, including advocating against proposed operating subsidies for the Underground Railroad Freedom Center. (*Id.* at ¶ 5.)

<sup>FN1</sup>. References to Plaintiffs' Proposed Undisputed Facts (doc. 29-1) are limited to those facts Defendants admitted to be true in Defendants' Response (doc. 38).

\*859 Both Brinkman and Miller are members and supporters of COAST, and Miller serves as the treasurer of COAST. (*Id.* ¶¶ 8-10.) Brinkman served in the Ohio General Assembly from January 2001 until December 2008. (Doc. 31-2 ¶ 1.) <sup>FN2</sup> Brinkman has sought to represent COAST before the Ohio General Assembly on an uncompensated basis. <sup>FN3</sup> (Doc. 31-2 ¶¶ 2, 6.) However, O.R.C. § 102.03(A)(4), as written, prohibited Brinkman from representing COAST before the Ohio General Assembly or any of its committees from the date he left the General Assembly through January 1, 2010. (*Id.* ¶¶ 4, 5; Doc. 29-1 ¶ 10.) <sup>FN4</sup>

<sup>FN2</sup>. References to Defendants' Proposed Undisputed Facts (doc. 32-1) are limited to those facts Plaintiffs admitted to be true in Plaintiffs' Response (doc. 37-1).

<sup>FN3</sup>. The parties have stipulated that COAST paid Curry Printing Company—which is owned by Kathy Brinkman, the wife of Plaintiff Brinkman—approximately \$13,195.00 for printing services performed on its behalf between January 1, 2001 and January 1, 2009. (Doc. 31-2 ¶ 7.)

<sup>FN4</sup>. The Court recognizes that Defendants were prohibited from enforcing O.R.C. § 102.03(A)(4) against Brinkman or any former member of the Ohio General Assembly from the August 4, 2009, the date this Court granted a preliminary injunction against

Defendants, through the present date.

Additionally, in his Affidavit, Brinkman states that he declined to join the Ohio League of Conservation Voters and the Right to Life of Greater Cincinnati because O.R.C. § 102.03(A)(4) would have prevented him from representing the groups before the Ohio General Assembly in 2009.

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 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; <sup>FN5</sup> 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. Defendants Deters, O'Brien, Pfeiffer, and Curp are sued in their official capacities only. (Doc. 4 ¶ 20.)

<sup>FN5</sup>. Bill Harris, William Batchelder, Capri Cafaro, Louis Blessing, John Carey, Jennifer Garrison, Matt Huffman, Dale Miller, Sue Morano, Tom Niehaus, and Matthew Szollosi.

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. (Doc. 29-1 ¶ 33.) JLEC also is empowered to investigate complaints or charges for violations of the statute. (*Id.* ¶ 34.) 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.* ¶ 35.)

## B. Procedural Background

Plaintiffs filed their initial Verified Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction on May 11, 2009. They filed an Amended Complaint on May 12, 2009. <sup>FN6</sup> Defendants opposed the issuance of a temporary restraining order and preliminary injunction. On August 4, 2009, the

Ex D-5

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

Court issued the Injunction Order preliminarily enjoining the enforcement of O.R.C. § 102.03(A)(4). The parties thereafter engaged in discovery and filed the pending summary judgment motions. Plaintiffs \*860 now seek and Defendants oppose the issuance of a permanent injunction enjoining the enforcement of O.R.C. § 102.03(A)(4). Plaintiffs contend that the statute violates the First Amendment and the Equal Protection Clause both facially and as applied.

FN6. Plaintiffs filed Notice of Verification of Amended Complaint on May 29, 2009. (Doc. 11.)

## II. THE 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). Violation of the statute is considered a misdemeanor offense of the first degree. *See* O.R.C. § 102.99(B).

JLEC has issued a memorandum interpreting O.R.C. § 102.03(A)(4) to apply to both compensated and uncompensated lobbying by former members of General

Assembly on behalf of another person. (Doc. 29-1 ¶¶ 40-42.)

## III. STANDARDS GOVERNING MOTIONS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 governs motions for summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). On a motion for summary judgment, the movant has the burden of showing that no genuine issues of material fact are in dispute, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The movant may support a motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the non-moving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In responding to a summary judgment motion, the nonmoving party may not rest upon the pleadings but must go beyond the pleadings and "present affirmative evidence in order to defeat a properly supported motion for summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmoving party must "set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(c)(2). The Court's task is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Liberty Lobby, 477 U.S. at 249, 106 S.Ct. 2505. A genuine issue for \*861 trial exists when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252, 106 S.Ct. 2505.

## IV. ANALYSIS

### A. First Amendment

[1][2] 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.

Ex D-6

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

amend I. “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*, --- U.S. ---, 129 S.Ct. 596, 172 L.Ed.2d 455 (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, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). Lobbying the government falls within the ambit of protected First Amendment activity. See *F.T.C. v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426, 110 S.Ct. 768, 107 L.Ed.2d 851 (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, 104 S.Ct. 3244 (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., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 n. 20, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (“The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption.”); *United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (upholding registration and reporting requirements for Congressional lobbyists).

[3][4][5] Plaintiffs contend that O.R.C. § 102.03(A)(4) violates the First Amendment both facially and as applied. The statute 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.<sup>FN7</sup> The Court found in the Injunction Order that the constitutionality of § 102.03(A)(4) should be examined under a strict scrutiny analysis and Defendants now appear to concede this issue. (Doc. 16 at 8-10; Doc. 34 at 6-7.) As stated above, lobbying “is fully protected by the First Amendment.” *Superior Court Trial Lawyers Ass’n*, 493 U.S. at 426, 110 S.Ct. 768. 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, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999); 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.”). “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 \*862 *Meyer v. Grant*, 486 U.S. 414, 425, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997)).

FN7. 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 as matters before the Ohio General Assembly.

[6] The statute operated in this instance to prohibit Brinkman from representing COAST on matters before the Ohio 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*, 486 U.S. at 424, 108 S.Ct. 1886; 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 protection of lobbying are the practical concerns of effectiveness and economic constraints.”), *rev'd on other grounds*, 69 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 statute severely burdened Plaintiffs' First Amendment rights by prohibiting COAST from using Brinkman as its advocate before the General Assembly.

### 1. Compelling Government Interest

[7] Given that the statute is subject to strict scrutiny, the Court next must determine whether O.R.C. § 102.03(A)(4) furthers a compelling government interest and is narrowly tailored to achieve that end. See

Ex D-7

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

*Citizens for Tax Reform*, 518 F.3d at 387. Defendants proffer the Affidavit of Defendant Tony Bledsoe, the executive director of Defendant JLEC, to establish the State of Ohio's compelling interests. Bledsoe states that the General Assembly enacted § 102.03(A)(4) to effectuate three compelling interests: (1) to prevent unethical practices of public employees and public officials; (2) to promote, maintain, and bolster the public's confidence in the integrity of state government; and (3) to prevent unequal access to the General Assembly by outside organizations by virtue of any significant relationships with current and former public officials who may be in a position to influence government policy. (Bledsoe Aff. ¶ 4.)

Plaintiffs attack these purported justifications on multiple grounds. To begin, Plaintiffs assert that the Court need not accept Bledsoe's statements as true because he offers mere post-hoc justifications which are not based on his personal knowledge of the General Assembly's intent in enacting § 102.03(A)(4). However, Plaintiffs' argument discounts Bledsoe's experience as the executive director of JLEC, the body entrusted to enforce § 102.03(A)(4). Moreover, this Court in the Injunction Order implicitly recognized that substantially similar justifications could be gleaned from the text of the statute. (Doc. 16 at 11.)

Plaintiffs also attack the merits of each proposed justification. The Court will examine each of Defendants' purported compelling interests more closely. As to the first justification, Bledsoe states that Ohio "has a compelling interest in preventing legislators from taking official acts in exchange for employment as a lobbyist immediately upon leaving the legislature." (*Id.* ¶ 5.) Similarly, as to the second justification, Bledsoe states that Ohio has an interest in bolstering the public's confidence in the integrity of state government—regardless of any actual corrupt or unethical practices—because of past instances of government corruption. (Bledsoe\*863 Aff. ¶ 6.) 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 Mo. Gov't PAC*, 528 U.S. 377, 388-89, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (recognizing as compelling interests the restricting of *quid pro quo* corruption, the appearance of corruption, the appearance of improper influence, and opportunities for abuse); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 715-16 (4th Cir.1999) (identifying as

compelling state interests in the lobbying context prohibiting corruption and the appearance of corruption); *Ohio v. Nipps*, 66 Ohio App.2d 17, 21, 419 N.E.2d 1128 (1979) (analyzing a more restrictive predecessor statute and holding that Ohio had compelling interest to restrict unethical practices of employees and public officials).

Importantly, the Supreme Court recently has emphasized that the "governmental interest in preventing corruption or the appearance of corruption, [is] limited to *quid pro quo* corruption." *Citizens United v. Federal Election*, --- U.S. ---, 130 S.Ct. 876, 909, --- L.Ed.2d --- (2010). Defendants concede that their first two justifications "depend upon the payment of compensation to the former-legislators." (Bledsoe Aff. ¶ 8.) Accordingly, the Court finds that Defendants' first two purported justifications are compelling interests for restricting compensated lobbying by former members of the General Assembly.

[8] The first two justifications, however, cannot constitute a compelling interest to prohibit uncompensated lobbying by former members of the General Assembly, such as the lobbying Brinkman sought to perform on behalf of COAST. Defendants respond that the third justification constitutes a compelling interest supporting O.R.C. § 102.03(A)(4) regardless of whether the former legislators are lobbying on a compensated or uncompensated basis. Bledsoe states that the third justification "reflects the State of Ohio's interest in preventing former legislators from using their close relationships with former colleagues and special knowledge of the legislative process to gain access as lobbyists in ways that provide them unequal access to public officials [in comparison] to that of others petitioning the government, and thereby allow them to play an undue role in crafting and passage of legislation." (Bledsoe Aff. ¶ 7.) Plaintiffs attack this justification as an unlawful attempt to "level the playing field."

The Supreme Court recently spoke against attempts to favor or disfavor certain speakers or viewpoints:

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are in-

Ex D-8

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

terrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

*Citizens United*, 130 S.Ct. at 898-99. The Supreme Court concluded that “[w]e find \*864 no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.” *Id.* at 899. Moreover, the Supreme Court rejected the suggestion that political corruption necessarily follows from the fact that a speaker may be favored by or have special access to elected officials. *Id.* at 910-11. “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” *Id.* Though the Supreme Court spoke in the specific context of corporate expenditures to advocate for the election or defeat of a candidate, *id.* at 886, the Supreme Court’s reasoning refutes the premise that O.R.C. § 102.03(A)(4) is necessary to prevent former General Assembly members from having special access to the legislative process.

The Court concludes that Plaintiffs’ third purported justification does not constitute a compelling interest. As such, Defendants have failed to establish any compelling governmental interest justifying § 102.03(A)(4) as applied to uncompensated lobbying. The Court holds that § 102.03(A)(4) is unconstitutional as applied to prohibit Brinkman from representing COAST on an uncompensated basis.

## 2. Narrowly Tailored

[this could be the reason why the IC report should seek definitions]

[9] Because Plaintiffs have challenged O.R.C. §

102.03(A)(4) both facially and as applied, and because the Court found above that Defendants have established compelling interests justifying O.R.C. § 102.03(A)(4) as applied to compensated lobbying, the Court next must examine whether the statute is narrowly tailored to achieve those ends. The statute must be narrowly tailored to achieve the objectives of avoiding corruption (*i.e.*, the prevention of unethical practices) or the appearance of corruption (*i.e.*, bolstering the public’s confidence in the integrity of government). Defendants make two arguments that the statute is narrowly tailored: (1) the restriction in § 102.03(A)(4) lasts for only twelve months and (2) an Ohio appellate court in *Nippys* upheld a prior version of § 102.03(A)(4).

[10][11] As to the twelve-month limit, Defendants have not articulated or presented evidence to establish that the temporally limited restriction adequately addresses the concern against *quid pro quo* corruption. “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, 120 S.Ct. 897. Courts do not “accept mere conjecture as adequate to carry a First Amendment burden.” *Id.* at 392, 120 S.Ct. 897; *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 have not established that the danger of *quid pro quo* corruption or the appearance of corruption is significantly lessened if the former legislator is permitted to lobby the General Assembly one year and one day after leaving the legislature.

As to the *Nippys* precedent, the prior statute only prohibited advocacy on behalf of a client on matters about which the former public official had personally participated when he or she was in office. 66 Ohio App.2d at 20, 419 N.E.2d 1128.<sup>FNS</sup> The \*865 statute’s stated 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, 419 N.E.2d 1128.<sup>FN9</sup> Conversely, under the current version of the statute, former General Assembly members are prohibited from representing clients on any matter

Ex D-9

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

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 opportunity to gain “inside” information. The *Nipps* decision, therefore, does not support a finding that the current statute is narrowly tailored. Rather, it provides an example of how the current statute could be narrowed.

FN8. 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 18-19, 419 N.E.2d 1128 (quoting O.R.C. § 102.03(A)).

FN9. 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).

Additionally, the current § 102.03(A)(4) is over-inclusive because it does not restrict only compensated lobbying, but rather restricts both compensated and uncompensated lobbying. Several other states, by way of contrast, have more narrowly tailored 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). Finally, § 102.03.04(A)(4) is under-inclusive because it does not restrict other behaviors or activities of former members of the General Assembly that might give rise to actual or perceived corruption, such as the acceptance of gifts or offers for

employment unrelated to lobbying.

For all these reasons, the Court finds that the statute is not narrowly tailored. Therefore, O.R.C. § 102.03(A)(4) does not withstand strict scrutiny analysis. The statute violates the First Amendment facially and as applied to Plaintiffs.

### 3. Remedy

[12][13] The Court next must determine whether a permanent injunction in the appropriate remedy. The standard for granting permanent injunctions is similar to the familiar standard for the issuance of a preliminary injunction. The party seeking relief must demonstrate the following:

- (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*U.S. v. Matusoff Rental Co.*, 494 F.Supp.2d 740, 756 (S.D. Ohio 2007) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982), and *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)); see also *Beeker v. Olszewski*, 415 F.Supp.2d 734, 754 (E.D. Mich. 2006) (similar statement of law). The party seeking a permanent injunction must establish success on the merits rather than a probability of success on the merits. See \*866 *Beeker*, 415 F.Supp.2d at 754; *State of Ohio E.P.A. v. U.S. Dept. of Labor*, 121 F.Supp.2d 1155, 1168 (S.D. Ohio 2000).

[14][15][16][17] These factors support the issuance of a permanent injunction here. Plaintiffs have established a violation of the First Amendment here. 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). Further, “[t]here are no available remedies at law that are adequate to compensate for a loss of First Amendment rights.” *Am. Booksellers Found. for Free Expression v. Strickland*, 512 F.Supp.2d 1082, 1106 (S.D. Ohio 2007), question certified to the Ohio Supreme Court, 560 F.3d 443

Ex D-10

692 F.Supp.2d 855  
(Cite as: 692 F.Supp.2d 855)

(6th Cir.2009). Finally, “it is always in the public interest to prevent the violation of a party's constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir.1994). The Court will permanently enjoin the enforcement of O.R.C. § 102.03(A)(4).

#### **B. Equal Protection**

The Court need not and will not address the parties' equal protection arguments because the Court has found that O.R.C. § 102.03(A)(4) must be struck down on the basis that it violates the First Amendment.

#### **V. CONCLUSION**

For the foregoing reasons, Plaintiffs' Motion For Summary Judgment and the Issuance of a permanent Injunction (doc. 29) is **GRANTED** and Defendants' Amended Motion for Summary Judgment (doc. 34) is **DENIED**. It is hereby **ORDERED** that Defendants, together with their officers, agents, servants, employees, and attorneys, as well as all other persons who are in active concert or participation with any of the foregoing individuals, are hereby **PERMANENTLY ENJOINED** from enforcing Ohio Revised Code § 102.03(A)(4) and rules promulgated thereto against Plaintiffs and any others similarly situated.

IT IS SO ORDERED.

S.D. Ohio, 2010.  
Brinkman v. Budish  
692 F.Supp.2d 855

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Ex D-11