

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN P. KILROY,

Plaintiff,

v.

Case No. 2:11-cv-145

JUDGE GREGORY L. FROST

Magistrate Judge Terence P. Kemp

JON HUSTED,

Defendant.

OPINION AND ORDER

This matter is before the Court on the Motion of Non-Parties Richard Michael DeWine, Custodian of Records for Mike DeWine for Ohio and J.B. Hadden to Quash Subpoenas (ECF No. 29) and Plaintiff Kilroy's Opposition to Motion to Quash Subpoenas Addressed to Richard Michael DeWine, J.B. Hadden, and Custodian of Records for Mike DeWine for Ohio (ECF No. 30). For the reasons that follow, the Court **GRANTS** the non-parties' motion.

I. Background

Plaintiff John Kilroy is a lawyer and minority shareholder of Target Corporation, a publicly traded corporation that, through a network of in-store pharmacies, provides Medicaid goods and services in Ohio. Plaintiff exercises no control over the operations of Target Corporation or its Medicaid goods and services. Plaintiff is a registered and politically active voter and he wishes to contribute to the election campaigns of candidates for Ohio Attorney General and county prosecuting attorneys, but claims that he has been deterred from doing so by Ohio Revised Code § 3599.45.

Plaintiff filed the instant action, alleging that Ohio Revised Code § 3599.45 violates his

rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiff seeks a declaratory judgment that § 3599.45 is unconstitutional.

Plaintiff has served subpoenas on Ohio Attorney General Richard Michael DeWine, the DeWine Campaign, and the campaign's treasurer, J.B. Hadden. Each subpoena commands these non-parties to appear at depositions and to bring several categories of documents related to the DeWine Campaign's activities, including: policies and procedures relating to compliance with Ohio Revised Code § 3599.45, communications with potential contributors "who are or were suspected to be Ohio Medicaid providers . . . regarding the subject of contributing"; and communications with potential contributors discussing § 3599.45. (ECF Nos. 23, 24, 25.) Additionally, the subpoena directed at General DeWine orders him to produce "all personal brokerage- or investment-account statements" for individual or joint accounts with his wife "that reflect an ownership interest in" any of the following Wal-Mart, Wal-mart Stores, Inc., Walgreen Co., CVS Caremark Corp., Rite Aid Corp., Target Corp., Medco Health Solutions, Inc., and Kroger Co. (ECF No. 23.) The subpoena also commands DeWine to produce all documentation of the dates in 2009 and 2010 on which he individually or jointly with his wife purchased or sold stock in any of the above-mentioned companies. *Id.*

These three non-parties have moved to quash the subpoenas.

II. Standard

Rule 26(b) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" Fed. R. Civ. P. 26(b)(1). "The scope of examination permitted under Rule 26(b) is broader than that permitted at trial. The test is whether the line of interrogation is reasonably calculated

to lead to the discovery of admissible evidence.’ ” *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) (quoting *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 500-01 (6th Cir. 1970)).

Rule 45 of the Federal Rules of Civil Procedure provides that “the issuing court must quash or modify a subpoena that . . . subjects a person to undue burden.” Fed. R. Civ. P. 45(c)(3)(A)(iv). In determining whether a subpoena imposes an undue burden, a court considers “such factors as relevance, the need of the [requesting] party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.” *American Elec. Power Co. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999) (quoting *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 53 (S.D. N.Y. 1996)). “Courts are required to balance the need for discovery against the burden imposed on the person ordered to produce documents, and the status of a person as a non-party is a factor that weighs against disclosure.” *Id.* Finally, the burden is on the party seeking information to “establish a need for the breadth of the information sought in response to [a non-party’s] prima facie showing that the discovery [would be] burdensome.” *Katz v. Batavia Marine & Sporting*, 984 F.2d 422, 423-24 (6th Cir. 1993).

III. Discussion

Defendant argues that Plaintiff’s subpoenas should be quashed under Rule 45(c)(3)(A)(iv) as unduly burdensome because they seek irrelevant information. This Court agrees.

Plaintiff’s Complaint requests a declaration that Ohio Revised Code § 3599.45 “impermissibly violates his right to make campaign contributions [to candidates for attorney

general or county prosecutor], and thus to engage in political expression and association protected by the First and Fourteenth Amendments.” (ECF No. 1.) Plaintiff argues in his Motion for Preliminary Injunction that the statute does not promote “a sufficiently important [governmental] interest” and that, even if it did promote such an interest, the statute is not “closely drawn” to serve that interest. (ECF No. 19 at 1, 2.)

As Defendant correctly argues, however, neither Attorney General DeWine’s nor the DeWine Campaign’s actions have a bearing on any of these legal issues. On the contrary, whether the Ohio Revised Code § 3599.45 violates the United States Constitution raises a question of law, not of fact. What Attorney General DeWine and the DeWine Campaign did or did not do in response to the statute is beside the point. Either the statute is constitutional or it is not, and that question will be decided by this Court as a matter of law.

This Court already determined that “an ownership interest” means *any* ownership interest. (ECF No. 28) (denying Defendant’s motion for judgment on the pleadings). Thus, the statute’s prohibition extends to individuals, like Plaintiff, who own even a *de minimus*, non-controlling share in a publicly held Medicaid provider. Whether Attorney General DeWine, or any other attorney general or county prosecutor, violated the statute does not change its reach. Indeed, Judge Nugent demonstrated the lack of relevance of this type of evidence in his ruling regarding the constitutionality of Ohio Revised Code § 3599.45, looking only at the potential full-reaching effects of the statute. *See Lavin v. Husted*, No. 1: 10 CV 1986, 2011 U.S. Dist. LEXIS 80254 (July 22, 2011).

The Court concludes that the evidence sought by Plaintiff is not relevant nor is his line of interrogation reasonably calculated to lead to the discovery of admissible evidence. Therefore, it

would be an undue burden for Attorney General DeWine, the DeWine Campaign's Custodian of Records, and J.B. Hadden to comply with the subpoenas at issue here.

IV. Conclusion

Based on the foregoing, the Court **GRANTS** the Motion of Non-Parties Richard Michael DeWine, Custodian of Records for Mike DeWine for Ohio and J.B. Hadden to Quash Subpoenas. (ECF No. 29.)

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE