UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

THE BUCKEYE INSTITUTE,

Plaintiff,

vs.

INTERNAL REVENUE SERVICE, *et al.*,

Defendants.

Civil Action No. 2:22-cv-04297

Hon. Michael H. Watson,
United States District Judge

Hon. Elizabeth P. Deavers,
United States Magistrate Judge

PLAINTIFF THE BUCKEYE INSTITUTE'S
REPLY IN SUPPORT OF SUMMARY JUDGMENT

ARGUMENT

I. BUCKEYE HAS STANDING.

The IRS[1] persists in challenging Buckeye's standing with an Article III theory that no court has ever endorsed. But Buckeye's standing is easy: Buckeye has standing because 26 U.S.C. § 6033(b)(5) requires Buckeye to disclose the identity of donors, thus inflicting an injury on Buckeye's First Amendment right to associate privately. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) ("*AFPF*").[2]

"[W]hen the plaintiff is himself an object of the government action at issue, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring that action will redress it." *Phillips v. DeWine*, 841 F.3d 405, 414 (6th Cir. 2016) (cleaned up). Buckeye is a nonprofit corporation exempt from taxation under § 501(c)(3). Alt Decl., ECF No. 36-1 ¶2. Buckeye is thus subject to § 6033(b)(5), which requires that Buckeye identify its substantial donors every year on its Schedule B. That means Buckeye is the "object" of the law and so there is "little question" it has standing to challenge it. *Phillips*, 841 F.3d at 414.

1. Buckeye's injury lies in the fact that requiring disclosure of one's private associations violates the First Amendment unless the government can overcome

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[1] "IRS" refers collectively to all Defendants.
[2] All statutory references are to Title 26 of the United States Code.

exacting scrutiny. *See AFPF*, 141 S. Ct. at 2383–85. Disclosure creates a "deterrent effect on the exercise of First Amendment rights" that is "inevitable." *Id.* at 2383. Thus, Buckeye suffers an Article III injury simply because § 6033(b)(5) requires Buckeye to disclose the identity of its substantial donors in violation of its First Amendment right to privacy.

The IRS makes two mistakes in arguing to the contrary.[3] First, it conflates the merits for standing. And second, it relies on cases analyzing the harm from laws that did not directly regulate the plaintiffs and thus subjected them to only a speculative injury.

Start with the IRS's first mistake. The IRS contends that Buckeye is only injured under Article III if donors reduce their contributions for fear of retaliation. Reply, ECF No. 37 at PageID 439. This argument conflates standing with the merits. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015). Whether Buckeye is harmed under Article III from forced disclosure is not the same question as the *extent* of the burden on Buckeye's First Amendment right to associate. The former is the standing question. And the Supreme Court has held that requiring organizations to disclose their private donors creates an "inevitable" burden on "the exercise of First Amendment rights." *AFPF*, 141 S. Ct. at 2383. "When it comes to a person's beliefs and associations," the Court explained,

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[3] The IRS relies on its briefing in its motion to dismiss to dispute Buckeye's theory of standing. MTD, ECF No. 44 at PageID 680. Buckeye likewise relies on its earlier briefing. *See* ECF No. 35 at PageID 145–49.

"broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *Id.* at 2384 (cleaned up). Thus, Buckeye has a First Amendment right *not* to disclose its donors, and § 6033(b)(5) infringes on that right by requiring Buckeye to do so—harming Buckeye under Article III.

True, the government could save § 6033(b)(5) by showing it survives exacting scrutiny. *Id.* But that's a question about the merits. If Buckeye is right that the IRS does not need § 6033(b)(5) to enforce the tax code and thus the law fails exacting scrutiny (a merits question), it violates Buckeye's associational rights whether or not any specific donors have withheld support for fear of retaliation. *See* 141 S. Ct. at 2384, 2386. Said another way: Compelled disclosure is itself an Article III injury. *See also* ECF No. 35, PageID 149 (explaining that "Buckeye need only allege that it and its supporters face the impending violation of their First Amendment rights through compelled disclosure of their association"). And § 6033(b)(5) compels disclosure.

Were it otherwise, the Supreme Court's decision to facially invalidate California's law in *AFPF* would make no sense. The Court held that California's disclosure rule was facially unconstitutional despite receiving *no evidence* about the First Amendment burden on a "substantial number of its applications" to other organizations. *Id.* at 2387–88. That conclusion followed the Supreme Court's holding that disclosure rules impose a burden on First Amendment rights as a matter of law, *id.* at 2383–84, and the extent of that burden is irrelevant if the

government lacks a good reason for its rule, *id.* at 2386. That is also why, as the Supreme Court explained, the first step in any private-association case is not to consider the burden on the plaintiff's associational rights but rather to determine "the extent to which the burdens are unnecessary." *Id.* at 2385. A law compelling disclosure without good reason violates the First Amendment no matter the extent of the burden on any particular organization.

The IRS's second mistake is to rely on unrelated decisions in which the Supreme Court found that the plaintiffs lacked standing when challenging a law that did not directly regulate their conduct. *See* MTD Response, ECF No. 35, PageID 149. Take *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), as an example. In *Clapper*, the plaintiffs challenged a law that permitted government surveillance of certain communications. *Id.* at 401. The plaintiffs argued they had standing because there was an "objectively reasonable likelihood that their communications [would] be acquired . . . at some point in the future." *Id.* at 401, 416. The Supreme Court rejected this theory of standing because the law did not require the government to engage in surveillance, much less surveillance of the specific plaintiffs. *Id.* at 412 (explaining that the government program only "*authoriz[ed]*--but [did] not *mandate* or *direct*—the surveillance that [the plaintiffs] fear"). In other words, the plaintiffs could not show any harm because it was unclear whether the government would ever engage in surveillance.

The IRS argues that Buckeye's harm here is similarly hypothetical. ECF No. 37 at PageID 441–45. But the difference is that, unlike the law at issue in *Clapper*,

§ 6033(b)(5) mandates the very action that Buckeye is challenging. It *requires* Buckeye to disclose its donors, so there is nothing hypothetical about the invasion of Buckeye's right to associate privately. While the IRS might dispute that doing so violates the First Amendment, that's a merits question. That Buckeye contends disclosure is unconstitutional and the law requires disclosure is enough to satisfy Article III.

The bottom line is this: Section 6033(b)(5) compels Buckeye to disclose its private associations. If Buckeye is right that the disclosure rule is not substantially related to its interest in tax compliance and it is not narrowly tailored to that goal (a merits question), then forcing Buckeye to disclose the identities of its donors violates the First Amendment. That injury alone establishes Buckeye's standing.

2. Buckeye also has standing because it has been subjected to retaliation and harassment in the past, making it reasonable for donors to avoid supporting Buckeye at levels triggering disclosure because those donors too would likely suffer the same.

Buckeye experiences harassment for its public positions that some view as controversial—from multiple profanity laced emails to disgusting voicemails. Recently, for example, Buckeye received numerous harassing communications after leading public campaign informing union members that they are entitled to quit their union and stop paying dues. Alt Harassment Decl., ECF No. 49-1 at PageID 721–22 ¶¶14–16. One individual called Buckeye "a bunch of anti-american, lying thieving, traitor trash, scumbags." *Id.* at PageID 722 ¶16. Other communications

have vilified Buckeye and its members as "henchman for the Koch brothers," well-known political activists who have likewise drawn public opposition. *Id.* at PageID 720 ¶11. Thus, just like in *AFPF*, Buckeye has experienced the kind of harassment that would cause some donors to fear being associated with the organization.

The IRS's history of leaks and intimidation makes Buckeye's associational problems even worse. Buckeye itself experienced a conspicuously timed audit after publicly opposing the federal government on an important issue of public policy, Response, ECF No. 36-1 at PageID 185 ¶¶9–11. While elsewhere the IRS argues that this is irrelevant unless Buckeye proves that the audit was "improper," Reply, ECF No. 43 at PageID 495 n.8, the history of the IRS's treatment of conservative-leaning organizations like Buckeye more than justifies such a reaction. *See id.* at ¶11; *see also* Alt Harassment Decl., ECF No. 49-1 at PageID 722–23 ¶¶20–21. And the IRS continues to reinforce those concerns to this day. Alt Harassment Decl., ECF No. 49-1 at PageID 722 ¶20 (citing *The IRS Makes a Strange House Call on Matt Taibbi*, Wall Street Journal (Mar. 27, 2023)). Buckeye is concerned about the privacy of its donors, and the IRS's inability to prevent political retaliation and unauthorized disclosures prevents Buckeye from doing so when disclosure is required. *Id.* at PageID 723 ¶21.

3. Buckeye also has sustained actual financial damages owing to the disclosure law. The types of threat cited above make Buckeye's donors cautious about even being potentially associated with the organization. One donor who has supported Buckeye for several years has made it clear to Buckeye that it will not donate at a

level that would trigger disclosure under § 6033(b)(5). Alt Donor Decl., ECF No. 49-2 at PageID 733–35 ¶¶5–10. In response to that, Buckeye must monitor its donations and ensure that it does not solicit contributions that would require disclosure under Schedule B, and Buckeye would ask for much higher level of contributions. On top of that, Buckeye has guaranteed to refund any amounts that would meet or exceed the disclosure level. *Id.* at PageID 733-34 ¶5. This contingent liability exists only because of § 6033(b)(5).

The IRS contends that the Court should disregard Alt's statements about donors' fears of retaliation as hearsay. ECF No. 44 at PageID 682–83. For starters, the IRS concedes that these statements reflect Buckeye's donors' state of mind—a well-established exception to hearsay. *Id.* at 682 n.1. Donors' fear retaliation for giving to Buckeye and have lessened their donations, which has impaired Buckeye's ability to speak. ECF No. 36-1 ¶¶11–15.[4]

Setting that aside, Buckeye's response to the donors' fears is decidedly *not* hearsay. Buckeye has had to reduce the amount it solicits to ensure that donors do not contribute over the level that would trigger disclosure on a Schedule B. Alt Donor Decl., ECF No. 49-2 at PageID 733–35 ¶¶5–10. And Buckeye has gone so far

[4] The IRS also argues that Alt's declaration does not trace donors' fears to the Schedule B requirement because some donors have expressed fear of retaliation "if their names appeared on Buckeye's Schedule B *or were otherwise disclosed to the IRS*." ECF No. 44 at PageID 683 n.3. That ignores other statements, such as the fact that "some donors reduced their donations to avoid being listed on Buckeye's Schedule B as a 'substantial contributor.'" ECF No. 36-1 at PageID 187 ¶11.

as to guarantee refunds for excess donations above the substantial-contributor threshold. *Id.* at PageID 733-34 ¶5. Even under the IRS's narrow view of an injury-in-fact, Buckeye has established its standing.

II. SECTION 6033(B)(5) FAILS EXACTING SCRUTINY.

A. Section 6033(b)(5) is facially invalid because the IRS cannot show it is substantially related to a sufficiently important interest and narrowly tailored to achieve that goal.

The IRS argues that § 6033(b)(5) is subject to rationale basis review because it is an "opt in" program rather than a mandatory disclosure. To do so, the IRS incorporates its arguments from its motion to dismiss. Buckeye likewise incorporates its arguments, *see* MTD Response, ECF No. 35 at PageID 151–59, and it additionally incorporates its argument made on this point in response to the IRS's motion for summary judgment, MSJ Response, ECF No. 49 at PageID 700–01.

On whether § 6033(b)(5) survives exacting scrutiny, the IRS relies on its own motion for summary judgment for support. Buckeye likewise incorporates its response to that motion. MSJ Response, ECF No. 49 at PageID 702–18.

The IRS's primary argument is that Buckeye relies on evidence related to whether the IRS needs donor information for § 501(c) organizations other than § 501(c)(3)s. Thus, the IRS submits, Buckeye's evidence has no bearing on whether § 6033(b)(5) meets exacting scrutiny. But as Buckeye explains in its response to the IRS's motion, the IRS cannot show that donor information is uniquely important for § 501(c)(3) groups such that this information transforms from wholly irrelevant (for some nonprofits) to substantially related to an important government interest (for

§ 501(c)(3)s). MSJ Response, ECF No. 49 at PageID 703–11. At best, the IRS has established that donor information is marginally more relevant for § 501(c)(3)s than other organizations like § 501(c)(4)s. *Id.* at PageID 703–10. But exacting scrutiny requires much more than marginal relevance. *Id.* at PageID 703–11. Thus, the fact that Buckeye relies on evidence related to other kinds of § 501(c) organizations does not undermine its request for summary judgment. *Id.*

There are no genuine disputes of material fact as to whether the IRS has met its burden to show that it "need[s]" the "universal production" of Schedule B information "in light of any less intrusive alternatives." *AFPF*, 141 S. Ct. 2386. It has not. Buckeye is entitled to summary judgment.

B. Section 6033(b)(5) is unconstitutional as applied to Buckeye.

For similar reasons as those discussed above, the evidence also establishes a reasonable basis for fearing retaliation from disclosure. Buckeye has experienced repeated hostility and retaliation for taking stances on issues of public concern. *See supra* at 5–6. The fear of retaliation has deterred—and continues to deter—individuals otherwise inclined to support Buckeye from doing so, which in turn harms Buckeye's ability to speak. *Id.* at 5–8. It also deters Buckeye from seeking donations from donors in excess of the amount that would trigger the reporting requirement on Schedule B. Alt Donor Decl. ECF No. 49-2, PageID 733–35, ¶¶5–10. The IRS has not demonstrated its need for § 6033(b)(5) in administering the tax code in light of the "real and pervasive" deterrent on association that it imposes on Buckeye. *AFPF*, 141 S. Ct. at 2388.

CONCLUSION

The Court should grant summary judgment in favor of Buckeye, enter a judgment declaring that 26 U.S.C. § 6033(b)(5) violates the First amendment, and permanently enjoin the defendants from collecting the names and addresses of Buckeye's contributors under 26 U.S.C. § 6033(b)(5).

Dated: September 1, 2023.

Respectfully submitted,

/s/ Jay R. Carson

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