UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

THE BUCKEYE INSTITUTE,

Plaintiff,

v.

INTERNAL REVENUE SERVICE; DANIEL WERFEL, in his official capacity as Commissioner of Internal Revenue; UNITED STATES DEPARTMENT OF THE TREASURY; and JANET YELLEN, in her official capacity as Secretary of the Treasury,

Defendants.

No. 2:22-cv-4297-MHW-EPD

The Hon. Michael H. Watson, U.S.D.J.

The Hon. Elizabeth P. Deavers, U.S.M.J.

UNITED STATES' REPLY IN FURTHER SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The question in this case is not whether Buckeye and its supporters can associate anonymously, but rather whether they are entitled to a subsidy while doing so. They are not. Organizations and individuals are free to associate without becoming subject to the substantial-contributor reporting requirement simply by not seeking a tax subsidy. Buckeye's response demonstrates that there is no dispute as to the key issues that entitle the United States to summary judgment:

1. The § 501(c)(3) regime is an opt-in regime; organizations generally must affirmatively apply to be treated as § 501(c)(3) organizations.
2. An organization that does not seek § 501(c)(3) status is not subject to the substantial-contributor reporting requirement.
3. Substantial-contributor reporting contributes to administering important components of the law relating to § 501(c)(3) organizations.

A requirement or condition for a federal tax subsidy is generally valid if it bears "a rational relation to a legitimate government purpose." *Taxation With Representation v. Regan*, 461 U.S. 540, 547 (1983). Because the substantial-contributor reporting requirement is a rational condition on a tax subsidy for § 501(c)(3) organizations, it comports with the First Amendment. *See Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361 (11th Cir. 2003). Contrary to Buckeye's argument, *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) ("*AFP*") did not change the standard applicable to federal tax subsidies. Thus, should the Court determine that Buckeye has standing to proceed

and that this case survives the United States' motion to dismiss, the United States is entitled to summary judgment.

But the United States has also shown that the substantial-contributor reporting requirement comports with exacting scrutiny. The requirement is narrowly tailored: Congress has required that a small fraction of § 501(c)(3) organizations report a small subset of their donors; and it is substantially related to an important government interest: Substantial-contributor information aids in administering the tax law and promoting voluntary compliance. Accordingly, even if the § 501(c)(3) regime were a compelled disclosure regime, and even if Buckeye had standing, the United States would still be entitled to summary judgment.

ANALYSIS

I. The substantial-contributor reporting requirement is a rational condition on a subsidy for tax-exempt organizations and thus comports with the First Amendment.

As discussed in the United States' opening brief and in its briefing on the motion to dismiss, the substantial-contributor reporting requirement is a condition on a tax subsidy and thus is analyzed under the rational basis standard. *See Taxation With Representation,* 461 U.S. at 547. Buckeye does not (and cannot) dispute that the § 501(c)(3) regime is opt-in, that it provides government subsidies in the form of tax exemptions and deductions, or that organizations can obtain tax-exempt status under § 501(c)(4) instead of § 501(c)(3), thereby avoiding the substantial-contributor reporting requirement.

Instead, Buckeye misreads *AFP* and asserts that AFP silently overturned *Taxation With Representation* and decades of precedent relying on its holding,[1] and that conditions of Congressional subsidies now are treated as compulsory, even though the California law at issue was not a subsidy. Buckeye's argument, though, is inconsistent with the language of the case. The *AFP* opinion in fact explicitly describes the California regulation at issue as compulsory, in contrast to § 6033(b)(5): "revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California's disclosure requirement, ***which can prevent charities from operating in the State altogether***." 141 S. Ct. at 2389 (emphasis added). The Supreme Court thus framed the issue in *AFP* as a rule that compelled disclosure as a condition of operating, and so analyzed the statute under the rubric that applies to compelled disclosure – exacting scrutiny rather than rational basis scrutiny.[2]

In this paragraph, the Supreme Court contrasts disclosure to the IRS "as a condition of federal tax-exempt status" to California's regulation, which "can prevent charities from operating in the State altogether." *Id.* And the Court observes that conferral of tax-exempt status may raise issues not presented by the California regulation. In other words, the Court was specifically observing that

[1] *See, e.g., Agency for Int'l Dev. v. Alliance for Open Soc. Int'l*, 570 U.S. 205, 214 (2013); *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); *The Enterprise, Inc. v. United States*, 833 F.2d 1216, 1224-25 (6th Cir. 1983).

[2] As Buckeye notes, the portion of the opinion that determines that exacting scrutiny rather than strict scrutiny applies to compelled disclosures received only a plurality of votes of the Court. The issue is irrelevant here, where the disclosure is not compelled.

§ 6033(b)(5), which makes disclosure "a condition" on preferential tax treatment, is different from the California regulation, under which disclosure is mandatory. Buckeye makes a strange structural argument to try to argue that this language means its exact opposite. Buckeye somehow reads this to mean that exacting scrutiny must also apply to disclosure to the IRS as a condition of a tax subsidy, but Buckeye's reading is literally the opposite of what the text says.[3]

Contrary to Buckeye's revisionist reading, the Supreme Court observed that the plaintiffs in *AFP* had refused to comply with the disclosure requirement, and California responded by threatening to suspend their registrations, which would have prevented them from operating in the state altogether. *See AFP*, 141 S. Ct. at 2379-80 ("***In order to operate*** and raise funds in California, charities generally must register with the Attorney General and renew their registrations annually.") (citing Cal. Gov't Code §§ 12585(a), 12586(a)) (emphasis added); *id.* at 2380 (stating that "the Attorney General threatened to suspend their registrations").[4] In other words, the plaintiffs in *AFP* were told that they could not operate in California

[3] Buckeye suggests that because this discussion appears in the section of the opinion that applies exacting scrutiny, the Court is implying that exacting scrutiny would also apply to disclosure "as a condition of federal tax-exempt status." The opinion has three parts – part I, a recitation of the facts; part II, a statement of the law; and part III, an analysis applying the law to the facts. As one would expect, the discussion appears toward the end of part III. The only conclusion to be drawn from its location in the opinion is that the discussion is part of the Court's analysis.

[4] The rule at issue in *AFP* was a regulation promulgated by the California Attorney General, which required organizations, when renewing their registrations with the Attorney General, to file copies of their Forms 990 and required schedules. *See AFP*, 141 S. Ct. at 2380. The requirement was not part of California's tax law and was not linked to any California tax benefit.

unless they disclosed their donors. That is compulsory disclosure, not a condition to a tax subsidy, and the Supreme Court analyzed it as such.

By contrast, organizations are free to operate and solicit (nondeductible) contributions (and potentially to be tax-exempt under another subsection of § 501(c)) without applying for § 501(c)(3) status. "Congress has enacted no barrier to the exercise of [organizations'] constitutional rights. Rather, Congress has established certain requirements that must be followed in order to claim the benefit of a public tax subsidy." *Mobile Republican Assembly*, 353 F.3d at 1361. The § 501(c)(3) regime simply offers a tax subsidy that requires compliance with certain activity restrictions and reporting requirements, including the substantial-contributor reporting requirement. Organizations can avoid these restrictions and requirements simply by declining to apply for § 501(c)(3) status. And even if failure to comply with the reporting requirements could result in a loss of § 501(c)(3) status, it would not prevent an organization from continuing to operate.

The plaintiffs in *AFP* were given no choice – disclose your donors or cease operations. The Supreme Court thus analyzed the California regulation as compulsory disclosure. There is nothing in *AFP* that suggests that a tax subsidy would be analyzed similarly. Buckeye's suggestion – that *AFP* silently overruled *Taxation With Representation* and decades of reaffirming precedent and replaced it with a rule that opt-in governmental subsidies are somehow treated as compulsory,

and that neither the Court nor the dissent thought that abolishing those decades of precedent was significant enough even to mention – is fanciful at best.[5]

The analysis here is straightforward: Congress has made a tax subsidy available to organizations that elect into the § 501(c)(3) regime, which entails restrictions on their conduct and complying with reporting requirements, including the substantial-contributor reporting requirement. That requirement is rationally related to the § 501(c)(3) regime and does not seek to regulate conduct outside of the regime; thus, the requirement is constitutional.

II. Even if the substantial-contributor reporting requirement were subject to exacting scrutiny, it would comport with the First Amendment.

A. Donor information is substantially related to an important government interest.

Congress expressly expanded the statutory reporting requirements for § 501(c)(3) organizations, including donor information, to "provide the Internal Revenue Service with the information needed to enforce the tax laws," concluding "that more information is needed." S. Rep. No. 91-552 (1969). Congress specifically added the donor disclosure requirement to "facilitate meaningful enforcement" of

[5] Buckeye also takes issue with the United States' treatment of *Shelton v. Tucker*, 364 U.S. 479 (1960), in the United States' motion to dismiss briefing, but as discussed in that briefing, *Shelton* involved a teacher (who had been employed by the public school system for twenty-five years, *see id.* at 482-83) who was given the choice of abandoning his profession or disclosing his group memberships; for the reasons discussed in the United States' brief, jurisprudence has not treated the option to exit a profession as a free choice. *See* U.S. MTD Reply at 13-14, ECF no. 37, PageID.449-450. In contrast, all Buckeye would be giving up here is a government subsidy. There is no equivalence between expecting an experienced teacher to disclose group memberships or abandon the profession and Congress's proffer of tax subsidies to organizations that comply with certain requirements.

"new self-dealing rules and other provisions" regulating § 501(c)(3) organizations. H.R. Rep. No. 91-413 (1969). Pursuant to Congress's express directive, as discussed in the United States' opening brief, the IRS uses substantial-contributor information to monitor compliance with the internal revenue laws, to detect possible abusive transactions, and to deter wrongdoing. Buckeye's principal argument appears to be that the government has not shown that the IRS makes sufficient use of the substantial-contributor information to justify the reporting requirement, but this ignores both the IRS's use of this information and the role of information reporting in the federal tax system. In the declarations submitted with the United States' opening brief, the government set forth how substantial-contributor information is used in administering the tax laws and in deterring wrongdoing. As shown below, Buckeye's responses – that this information cannot be necessary for § 501(c)(3) organizations because it is not needed for § 501(c)(4) organizations and that deterrence is a "marginal benefit[]" – are insufficient.[6]

1. Buckeye draws a false equivalence between reporting for § 501(c)(3) and § 501(c)(4) organizations.

As discussed in the United States' opening brief, substantial-contributor information contributes significantly to the IRS's tax compliance monitoring. Much

[6] Buckeye suggests that one of the IRS's witnesses, Lynn Brinkley, lacks a foundation for her testimony that Schedule B information can assist examiners in identifying issues and determining whether to proceed with examinations (Pl. Resp. at 11-12 n.6, ECF no. 49, PageID.709-710), but Ms. Brinkley's declaration explains that she is the Director of the Exempt Organizations Examinations unit and her responsibilities include executive oversight of the exempt organization examination program (Brinkley Decl. ¶¶ 1, 2, CEF no. 43-1, PageID.499). The work performed by examiners in evaluating exempt organization returns and the factors relevant to their decisions are plainly matters within her supervisory authority.

of Buckeye's response focuses on a false equivalence: Buckeye asks the Court to conclude that because Treasury regulations no longer require § 501(c)(4) organizations to report substantial-contributor information on Schedule B, the information must be unnecessary for § 501(c)(3) organizations as well.

But Buckeye fails to recognize that § 501(c)(3) organizations raise different considerations. Most significantly, donations to § 501(c)(3) organizations are generally tax-deductible, while contributions to § 501(c)(4) organizations generally are not. Thus, issues such as private inurement with a § 501(c)(3) organization present a risk to the Treasury (and a comparative benefit to dishonest taxpayers) that is not presented by a § 501(c)(4) organization. Buckeye's argument – that substantial-contributor information cannot be needed in detecting wrongdoing in the context of § 501(c)(3) organizations because it is not needed in the context of § 501(c)(4) organizations – is flawed because it ignores this distinction.[7]

2. Buckeye improperly dismisses the deterrent effect of the IRS's possession of Schedule B information.

As discussed in the United States' opening brief, the substantial-contributor reporting requirement also encourages tax compliance through deterrence. Large-dollar donors can have significant influence over § 501(c)(3) organizations. Reporting the identities of those who make the largest donations discourages those donors from engaging in wrongdoing because they know that the chances of

[7] The additional inducement for private inurement provided by the tax deductibility for donors to § 501(c)(3) organizations demonstrates that Congress tried to narrowly tailor the substantial-contributor reporting requirement by requiring it for only certain § 501(c)(3) organizations, rather than all tax-exempt entities.

detection are significantly higher. The reporting requirement thus discourages organizations from engaging in improper transactions in the first place.

In addition, the reporting requirement discourages taxpayers from claiming large charitable deductions on their tax returns that they did not make, hoping not to get audited. As discussed in the declaration of Rogelio Vera, the IRS can check claimed charitable deductions against Schedule B reporting to confirm that the charitable contributions at issue were actually made. Vera Decl. ¶ 6, ECF no. 43-8, PageID.651.[8] In other contexts, the Supreme Court has affirmed the validity of information reporting to counteract fraud over First Amendment objections. *See, e.g., Bowen v. Roy*, 476 U.S. 693, 707-08 (1986) ("Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.").

B. A more narrow reporting system would not achieve Congress's goals.

The substantial-contributor reporting requirement is already significantly more narrow than Buckeye states. It applies only to a small fraction of § 501(c)(3)

[8] Buckeye does not address the uses of Schedule B information to deter wrongdoing except to complain that the United States' academic articles are hearsay and to assert that deterring wrongdoing is a "marginal benefit[]." (Pl. Resp. at 14, ECF no. 49, PageID.712.) To the first point, the United States is not relying on these specific articles, but rather, on the general, commonsense, and widely accepted understanding that people are less likely to engage in wrongdoing if they are more likely to get caught. To the second, the government submits that broad deterrence of high-dollar tax evasion is far more than a "marginal" benefit.

organizations, and it requires reporting of only the identities of a small subset of donors. Further, because Schedule B information is used to select returns for examination, and because the IRS's possession of Schedule B information deters wrongdoing on a widespread scale, targeted collection of Schedule B information from charitable organizations would not be an adequate substitute. Buckeye's suggestion that the IRS could obtain this information by seeking it on a piecemeal basis from every charitable organization the IRS is considering examining is unworkable and would not achieve Congress's goals.

First, and most significantly, only a small fraction of § 501(c)(3) organizations are subject to the substantial-contributor reporting requirement. Buckeye is simply incorrect that § 6033(b)(5) "requires every § 501(c)(3) organization to disclose its substantial donors to the IRS." (Pl. Resp. at 1, ECF no. 49 at PageID.699.) The reporting requirement applies only to certain § 501(c)(3) organizations; Congress has exempted churches, religious activities of religious orders, and certain organizations with gross receipts under a $5,000 threshold. 26 U.S.C. § 6033(a)(3)(A). The Treasury Department has also exercised its statutorily authorized discretion (*id.* § 6033(a)(3)(B)) to waive reporting for certain religious and governmental organizations and to raise the threshold to $50,000. 26 C.F.R. § 1.6033-2(g). The vast majority of § 501(c)(3) organizations fall into these categories and thus are not subject to the substantial-contributor reporting requirement. Most § 501(c)(3) organizations file Form 990-N, which does not

include Schedule B.[9] Buckeye's repeated intonations that Congress requires Schedule B disclosure from all § 501(c)(3) organizations are simply inaccurate; Congress and Treasury have tailored the provision to apply only to a small fraction of § 501(c)(3) organizations – those for which they view the information as most relevant.

In addition, the rule requires reporting not of all donor identities, but only of those who contribute more than two percent of the organization's total contributions (and only if their total contributions exceed $5,000). 26 U.S.C. § 6033(b)(5); 26 C.F.R. § 1.6033-2(a)(2)(iii)(A). The rule is thus narrowly tailored both in that it applies only to a small fraction of § 501(c)(3) organizations, and in that those organizations must report only a small fraction of their donors.

Second, Buckeye's proposed substitute would not achieve the deterrence function that Schedule B currently serves. Buckeye suggests that the IRS could request donor information when it considers whether to examine a return. But this would encourage organizations and taxpayers to play the "audit lottery," assured that, due to the IRS's limited resources and more limited information, the chances of detection are low.

Third, the delays inherent in having to request and receive information even to determine whether to refer a taxpayer for examination would facilitate

[9] Moreover, Buckeye incorrectly claims that the 218,516 Forms 990 filed in 2019 was the number of Forms 990 that included a Schedule B. (Pl. Resp. at 7 n.4, ECF no. 49, PageID.705). That sum in fact reflects the total number of Forms 990-series returns filed. Not all Forms 990 will include a Schedule B because not all filing organizations have substantial contributors.

organizations and taxpayers running out the clock on the statute of limitations for assessment of taxes and penalties resulting from disallowed charitable deductions. In addition, because the IRS would need to expend significant additional resources to send out, and, if necessary, follow-up on, thousands of requests for donor lists each year, it would drain resources away from other tax enforcement functions.

Further, because the IRS can use Schedule B information to cross-check claims of large charitable donations, to achieve the same level of enforcement, the IRS may need to request Schedule B information not only when considering whether to examine the return of a § 501(c)(3) organization, but also when examining the return of a taxpayer who claimed such a deduction. Buckeye's proposed alternative thus has significantly more problems than Buckeye acknowledges.

For these reasons, Buckeye's proposed substitute is no substitute at all. Congress reasonably required a subset of § 501(c)(3) organizations to report the identities of certain of their donors because this information is most relevant to the enforcement of the tax laws. There is no basis to disturb Congress's judgment in this regard.

C. Buckeye's argument is fundamentally inconsistent with Congress's structure and design of the tax system.

Buckeye's argument is inconsistent on a fundamental level with the design of the Internal Revenue Code and the IRS as Congress has structured it. Buckeye argues essentially that if the IRS does not review a significant percentage of Schedule B disclosures, then the collection is by definition overbroad. But Congress

has created a federal tax system that depends on voluntary compliance, not one that requires widespread auditing and significant governmental resources. *See United States v. Bisceglia*, 420 U.S. 141, 145 (1975) ("[T]he Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability."). Accordingly, "there is a duty to report all of the financial information that Congress requires." *Mann Construction, Inc. v. United States*, 27 F.4th 1138, 1141 (6th Cir. 2022). The vast majority of taxpayers will never be audited, yet the vast majority of taxpayers comply with the law. *See* Joint Committee on Taxation, *Overview of the Tax Gap* tbl. 1, at 3 (May 8, 2019), *at* https://perma.cc/S3DL-JWXN.

To encourage compliance, Congress requires significant information reporting. Companies and individuals are required to report significant details on their economic activities, and third parties are required to report details of various economic transactions. Experience has shown that tax compliance is significantly higher where information reporting is present; only a small fraction of non-compliance involves income subject to information reporting. *Id.* fig. 3, at 5 (approx. 11% of non-compliance relates to income for which there is substantial information reporting). Thus, Congress has required a significant range of information reporting, notwithstanding that most of the subjects of that information reporting will never be audited. To protect taxpayer confidentiality, and to encourage compliance, Congress has protected that information with strict confidentiality provisions. *See Rueckert v. IRS*, 775 F.2d 208, 210 (7th Cir. 1985) (observing that

the tax confidentiality statute, 26 U.S.C. § 6103, "encourages voluntary compliance with the tax assessment system by assuring taxpayers of the confidentiality of their returns.") (citing H.R. Rep. No. 94-658). In other words, Congress has designed a system under which a wide range of information is reported to the IRS and the IRS has resources to examine only a small fraction of the information reported. Buckeye's suggestion – that because the IRS examines only a small percentage of Schedule Bs, its collection of information from many § 501(c)(3) organizations is overbroad – ignores the design of the federal tax system.

Nor is Buckeye's argument coherent at its core. Buckeye suggests that because the IRS cannot examine most Schedule Bs, the statute must be unconstitutional. If tomorrow, Congress were to direct the IRS to examine every § 501(c)(3) organization and Congress were to expand the IRS's budget to make that possible, would Buckeye then agree that § 6033(b)(5) is constitutional, notwithstanding that it would increase the focus on its donors? Similarly, if the IRS deployed a computer program to automatically check claims for charitable deductions against Schedule B information, would Buckeye then concede that the law passes constitutional muster? Surely the First Amendment is not so fickle.

The substantial-contributor reporting requirement has been in place for fifty years, a period during which the IRS's resources and enforcement priorities have varied substantially. But one constant is that the information has always been relevant to the administration of the internal revenue laws. The reporting requirement leads to increased taxpayer compliance, and the declarations

submitted with the United States' summary judgment motion demonstrate that the IRS uses this information in administering the laws. This more than demonstrates a substantial relationship to an important government need.

D. The IRS's excellent track record on confidentiality minimizes any burden on associational freedoms.

The IRS's strong track record on keeping Schedule B information confidential reduces any burden on associational freedoms presented by the substantial-contributor reporting requirement. Buckeye does not appear to take issue with this track record but seeks to distract from it by raising two meritless responses.

First, Buckeye provides a false comparison, suggesting that the IRS's policies and track record keeping Schedule B information confidential are irrelevant in light of the improper disclosure of other information (including Form 990 information not related to Schedule B). Pl. Resp. at 16, ECF no. 49, PageID.714. But what matters to the burden on associational rights is the risk of disclosure of the information at issue, not other information. If the risk of inadvertent disclosure of Schedule B information is very low – and it is – then the accompanying burden on associational rights is accordingly reduced. Further, Buckeye's argument compares apples to oranges; if the numerator is the number of inadvertent disclosures of any kind, then the denominator should be the hundreds of millions of tax and information returns filed with the IRS every year. In other words, if the question is whether Schedule B information is likely to be inadvertently disclosed, either the Court should evaluate the number of inadvertent Schedule B disclosures as compared with the number of Schedule Bs filed each year, or the Court should evaluate the number of inadvertent

disclosures of any kind as compared with the number of documents of any kind filed each year. Either way, the risk is extraordinarily low.[10]

Second, Buckeye misstates the Supreme Court's approach to confidentiality in *AFP*. Buckeye asserts that "California could not save its law because the information was not publicly disclosed." (Pl. Resp. at 17, ECF no. 49, PageID.715.) But the Supreme Court noted that the district court had found exactly the opposite: "The District Court also found that California was unable to ensure the confidentiality of donors' information." *AFP*, 141 S. Ct. at 2381. California asserted that it had improved its confidentiality provisions, but the Supreme Court did not credit this assertion in light of California's history of failing to safeguard this information: "Here the State's assurances of confidentiality are not worth much." *Id.* at 2388 n.*. The situation here is exactly the opposite: The undisputed facts show the IRS has a strong history of safeguarding Schedule B information. Accordingly, § 6033(b)(5) imposes a much lower burden on associational rights.

E. Even if *AFP* were the applicable precedent, the facts here are distinguishable.

As discussed above, the analysis in *AFP* does not apply here because, in that case, the Supreme Court considered a regulation that "can prevent charities from operating," 141 S. Ct. at 2389, whereas an organization that does not want to become subject to § 6033(b)(5) need only not apply for § 501(c)(3) status; it would

[10] Buckeye has supplied a declaration asserting that its employees have been targeted for harassment, ECF no. 49-1, but has made no such showing with regard to its donors. Indeed, Buckeye has been in existence for more than thirty years and has not identified any instance in all that time in which one of its donors was harassed as a result of any disclosure to the IRS.

still be free to operate exempt from taxation under another subparagraph of § 501(c), just without a tax deduction for donors.[11] But even if *AFP* were the applicable precedent, Buckeye's attempts to analogize it to this case fail.

First, Buckeye still has not shown and cannot show that its donors face a material risk of retaliation. While Buckeye has introduced a new affidavit claiming that its *employees* have been subjected to harassment (ECF no. 49-1), Buckeye has not demonstrated that there is any significant risk that the IRS would improperly disclose its Schedule B, that third parties would obtain the improperly disclosed schedule, and that those third parties would then retaliate against its *donors*.

Second, as discussed above, Buckeye ignores that, in *AFP*, the Court observed that California had failed to maintain the confidentiality of Schedule B information and did not credit its assurances that it would do so in the future. Here, the IRS's excellent track record of keeping Schedule B information confidential is undisputed.

Third, while California did not use contributor information to initiate investigations, the IRS reviews Schedule B information throughout the process of selecting returns for examination, and in addition, the IRS's possession of that information serves an important deterrence function in encouraging voluntary compliance. Buckeye ignores these distinctions and writes off deterrence as a "marginal benefit[]," Pl. Resp. at 14, ECF no. 49, PageID.712, but deterrence and

[11] Or alternatively, an organization could establish a § 501(c)(4) affiliate to provide support to the § 501(c)(3) organization and could direct potential donors concerned about their confidentiality to donate to the § 501(c)(4) entity. *See Taxation With Representation*, 461 U.S. at 544 (observing that a § 501(c)(3) organization that wishes to engage in substantial lobbying could lobby through an affiliated § 501(c)(4) organization). *See also, e.g., Agency for Int'l Dev.*, 570 U.S. at 215.

the voluntary compliance that it supports are the core of the United States' tax system. *See United States v. Bisceglia*, 420 US 141, 145 (1975).

III. The substantial-contributor reporting requirement and related statutes reflect Congress's view of the correct balance of the needs of revenue raising, encouragement of charitable activities, privacy, freedom of association, and law enforcement.

This lawsuit represents an improper attempt to overrule Congress's careful balancing of privacy interests and law enforcement in the context of a large government subsidy. The § 501(c)(3) regime represents Congress's judgment of the proper balancing of complex competing interests, including the need to raise revenue; the public interest in charitable activity; the appropriate restrictions on recipients of federal benefits; and the proper balance of the privacy interests of organizations and their supporters weighed against the necessity of ensuring that the IRS can adequately monitor compliance with Congress's requirements.

Indeed, while Buckeye focuses on the lack of a substantial-contributor reporting requirement for § 501(c)(4) organizations, it ignores that Congress's imposition of the requirement for certain donors to certain § 501(c)(3) organizations – not all § 501(c)(3) organizations or all donors and not § 501(c)(4) organizations – itself reflects a balance struck by Congress, as well as an effort to narrowly tailor the imposition to organizations whose donors enjoy tax deductibility. And that is a logical balance given that the Treasury estimates that the charitable contribution deduction is the equivalent of an expenditure of more than $77 billion annually, projected to grow to more than $100 billion per year by 2026. *See* Department of the Treasury, *Tax Expenditures* tbl. 1 (lines 104, 117, 129) (2021), *at*

https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2023.pdf (last visited Sept. 27, 2023). For scale, that makes the charitable deduction, standing alone, more expensive than the entire Department of Labor or the Department of Justice and more than twice as expensive as NASA. USASpending.gov, *Agency Profiles*, *at* https://www.usaspending.gov/agency (last visited Sept. 27, 2023).

Given the scope, importance, and cost of the § 501(c)(3) regime, it is no surprise that the requirements have been carefully calibrated by Congress to achieve its policy goals. Buckeye's efforts to upset this calibration by asserting its right to obtain the benefits Congress offered without having to comply with the conditions Congress placed on those benefits should be rejected.

IV. Buckeye's Rule 56(d) request should be denied.

No amount of discovery will change the key facts in this case: The § 501(c)(3) regime is an opt-in tax subsidy regime; an organization that does not elect § 501(c)(3) treatment is not subject to the substantial-contributor reporting requirement; and contributor information is important for administering the law relating to § 501(c)(3) organizations. Accordingly, there is no reason to delay the resolution of this case. The United States is entitled to summary judgment.

CONCLUSION

"As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l*, 570 U.S. 205, 214 (2013) (citations omitted). The substantial-contributor reporting requirement does not

compel any organization to disclose its donors. Organizations operated for charitable purposes are free to operate, to solicit contributions, and to engage in any other legal activity without applying for § 501(c)(3) status. But if they do choose to seek the tax subsidies that accompany that status, then they must comply with the reasonable restrictions and reporting that Congress requires in exchange for that treatment. Those restrictions include limitations on activities (which, in other contexts, might otherwise be unconstitutional, *see Regan v. Taxation With Representation*, 461 U.S. 540 (1983)), and reporting requirements (which might otherwise implicate the First Amendment, *see Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003)), including the substantial-contributor reporting requirement. If organizations do not want to comply with these rules, their remedy is to decline the tax subsidies, not to demand the benefits without accepting the burdens. Should the Court reach the merits of this case, the United States is entitled to summary judgment.

Respectfully submitted,

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