No. 24-_____

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE BUCKEYE INSTITUTE,

Plaintiff-Respondent

v.

INTERNAL REVENUE SERVICE; DANNY 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-Petitioners

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b)

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The Internal Revenue Service, Danny Werfel, Commissioner of Internal Revenue, the United States Department of the Treasury, and Janet Yellen, Secretary of the Treasury (collectively referred to herein as "the Government" or "the United States"), petition this Court, pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5, for permission to appeal the November 9, 2023 opinion and order of the United States

District Court for the Southern District of Ohio (Judge Michael H. Watson) (A1-A13, Doc. 60)[1] denying the parties' motions for summary judgment. At issue is the standard for evaluating the constitutionality of a long-standing federal reporting requirement for organizations that opt to claim tax-exempt status under § 501(c)(3). As explained herein, the District Court's resolution of that legal issue is likely to result in protracted litigation, implicating substantial privacy and privilege concerns, which may be avoided by interlocutory review.

The plaintiff, Buckeye Institute ("Buckeye"), brought this action challenging, on First Amendment grounds, the requirement in § 6033(b)(5) of the Internal Revenue Code (26 U.S.C.) ("I.R.C."),[2] that organizations that have elected to be exempt from tax under § 501(c)(3) generally must furnish annually to the Secretary the names and addresses of their "substantial contributors." The Government moved to dismiss the complaint. (Doc. 21.) Relying on *Regan v. Taxation with*

[1] "A" references are to the pages of the Addendum, *infra*. "Doc." references are to the docket entries below, as numbered by the Clerk of the District Court.

[2] Unless otherwise stated, section references herein are to the I.R.C.

Representation of Washington, 461 U.S. 540 (1983), and *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003), the Government argued that § 6033(b)(5)'s reporting requirement is a condition on a tax subsidy that is constitutional so long as it has a rational basis and does not restrict First Amendment rights outside the contours of the tax-subsidy program itself. (Doc. 21 at 15-25.)

The District Court rejected the Government's argument in its November 9, 2023 order (A9-A10), holding that § 6033(b)(5)'s reporting requirement is a "compelled disclosure" that must survive "exacting scrutiny" review to pass constitutional muster. In so ruling the court relied on *Americans for Prosperity Foundation v. Bonta ("AFP")*, 594 U.S. __, 141 S. Ct. 2373 (2021), which applied "exacting scrutiny" to California's requirement that charitable organizations soliciting funds in the State disclose their donors. The Court in *AFP*, however, distinguished the federal reporting requirement on the ground that "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." *Id*. at 2389.

The exacting scrutiny standard "requires that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,' and that the disclosure requirement be narrowly tailored to the interest it promotes." *AFP*, 141 S. Ct. at 2385 (citations omitted). Although this standard, unlike strict scrutiny, does not require Congress to adopt the "least restrictive means" of achieving its objectives, it is (as its name suggests) far more exacting than the rational basis review applied to conditions on tax subsidies. *Id.* at 2383. The District Court concluded that whether § 6033(b)(5)'s reporting requirement would survive exacting scrutiny raised genuine issues of material fact that were inappropriate to decide on summary judgment. (A12.)

On February 26, 2024, the District Court determined that the requirements for interlocutory appeal in 28 U.S.C. § 1292(b) had been satisfied, and certified for immediate appeal its order deciding the applicable standard for reviewing the constitutionality of § 6033(b)(5)'s reporting requirement. (A16-A17.)

QUESTION PRESENTED

What standard of review governs a First Amendment challenge to the federal donor reporting requirement that generally applies to § 501(c)(3) tax-exempt organizations?

BRIEF STATEMENT OF REASONS WHY INTERLOCUTORY APPEAL IN THIS CASE IS AUTHORIZED BY STATUTE AND SHOULD BE ALLOWED

28 U.S.C. § 1292(b) authorizes a court of appeals to permit an appeal from a non-final order, upon timely application, if the district court certifies "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." In deciding whether to permit appeal, as a prudential matter, the court of appeals is guided by the factors certified by the district court. *In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017).

The Government seeks immediate review of the District Court order denying summary judgment in this case of first impression on an issue of nationwide interest. In the attached order (at A10), the District Court ruled that "exacting scrutiny" is the standard for determining

whether the donor-reporting requirement, in § 6033(b)(5), applicable to tax-exempt organizations is an unconstitutional restraint on Buckeye's freedom of association. By contrast, other courts have held that conditions on tax subsidies that implicate First Amendment rights are subject to the less restrictive rational basis review. In *Regan,* the Supreme Court upheld a requirement that a § 501(c)(3) organization refrain from lobbying, without subjecting the requirement to exacting scrutiny, because the requirement was simply a condition on the tax subsidy afforded by § 501(c)(3) status, and the organization was still free to lobby without the subsidy. 461 U.S. at 549-50. And the Eleventh Circuit, in *Mobile Republican Assembly*, ruled that the donor reporting requirement in § 527(j)[3] was, like the prohibition against lobbying in *Regan*, a condition on the receipt of a voluntary tax subsidy. 353 F.3d at 1361-62.

An immediate appeal of the District Court's order satisfies the criteria of 28 U.S.C. §1292(b). Whether, for First Amendment purposes,

[3] Section 527(j)(3)(A) & (B) requires tax-exempt political organizations to report the name and address of all donors who contribute $200 or more to the organization, or receive at least $500 in expenditures from the organization, in any given year.

§ 6033(b)(5)'s reporting requirement is reviewed under an exacting scrutiny standard (like the compelled disclosure in *AFP*) or a rational basis standard (like the conditions on tax subsidies in *Regan* and *Mobile Republican Assembly*) is a controlling legal question on which there is a substantial ground for difference of opinion, as the foregoing cases illustrate. *See* Discussion, part A, below. Moreover, a decision on the proper standard will materially advance the ultimate termination of this litigation. Under the District Court's ruling as it stands now (applying exacting scrutiny), the parties must proceed to discovery and trial on the role the reporting requirement plays in furthering the Government's interest in tax administration, as well as on what burden the reporting requirement imposes on Buckeye's freedom of association. (*See* A12.) This factfinding is likely to give rise to privacy and privilege concerns, and significant evidentiary disputes, all of which might be obviated by an appellate ruling on the controlling legal standard. Such a ruling would also reduce the risk of a repeat trial if this Court were to determine, in an appeal from a final judgment, that the District Court incorrectly applied an exacting scrutiny standard. (*See* A16.) *See* Discussion, part B, below.

The District Court amended its order, on February 26, 2024, to include a certification that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the litigation. (A15-A17.) This petition is being filed within 10 days of the certified order, as required by 28 U.S.C. § 1292(b). Interlocutory appeal is therefore authorized by statute, and this Court should exercise its discretion to permit the appeal.

STATEMENT OF THE CASE

1. Statutory background

Tax exemptions and deductions "are a form of subsidy that is administered through the tax system." *Regan*, 461 U.S. at 544. Congress has, for policy reasons, chosen to exempt certain organizations from federal taxation, such as non-profits operated for the promotion of social welfare (§ 501(c)(4)) and certain political organizations (§ 527). Organizations which are operated exclusively for religious, charitable, scientific, literary, or educational purposes enjoy special status. They are not only tax-exempt (§ 501(c)(3)), but donations to those

organizations are considered charitable contributions that may be deducted from the taxable income of the donor (§ 170(a)(1) & (c)(2)).

These charitable organizations are generally classified as either a public charity or a private foundation. *See* § 509. Generally speaking, a § 501(c)(3) organization is a public charity if it receives a significant part of its financial support from the public, and not only from a small group of "substantial contributors" who are "disqualified persons" for purposes of the public charity/private foundation test. §§ 509(a)(2)(A), 4946(a). Private foundations are subject to restrictions not applicable to public charities, such as distribution requirements and restrictions on self-dealing (including with substantial contributors). *See* §§ 4940-4948. Typically, a substantial contributor is one who contributes 2% or more (and at least $5,000) of the organization's total contributions in any given year. *See* § 507(d)(2); Treas. Reg. (26 C.F.R.) § 1.6033-2(a)(2)(ii)(F) & (iii)(A).

"[T]o provide the Internal Revenue Service with information needed to enforce the tax laws," including the "new self-dealing rules and other provisions" governing private foundations, H.R. Rep. No. 91-413, at 36, Congress enacted § 6033(b)(5), *see* Tax Reform Act of 1969,

§ 101(d)(2)(C), Pub. L. No. 91-172, 83 Stat. 287, 520, which requires most § 501(c)(3) organizations to report annually the names and addresses of their substantial contributors. Churches and certain smaller charities are exempt from this reporting requirement. § 6033(a)(3).

Although most information reported on the annual returns filed by tax-exempt organizations must be made publicly available (§ 6104(b) & (d)), federal law prohibits public disclosure of the names and addresses of substantial contributors reported on exempt organization returns (except in cases inapplicable here). §§ 6103(a), 6104(b) & (d)(3). Improper disclosure by the IRS of donor information can subject the discloser to criminal penalties and the United States to civil liability. §§ 7213, 7431.

2. Facts and procedural history

Buckeye is a § 501(c)(3) organization headquartered in Columbus, Ohio, and is subject to the donor reporting requirement of § 6033(b)(5). (A1-A2.) Buckeye describes itself as "promot[ing] limited and effective government and individual freedom through policy research and

advocacy, often serving as a government watchdog and litigating to defend constitutional rights." (Doc. 68 at 3.)

Buckeye filed this action against the Government, claiming that § 6033(b)(5)'s reporting requirement "violates the First Amendment rights of association and assembly of Buckeye and its supporters, both on its face and as applied." (Doc. 68 at 3.) Its complaint seeks a declaratory judgment that the statute is unconstitutional and an injunction prohibiting the Government from enforcing § 6033(b)(5). (Doc. 68 at 12.)

The Government moved to dismiss the complaint for failure to state a claim. (Doc. 21.) Relying primarily on *Regan*, *supra*, the Government argued that § 6033(b)(5)'s reporting requirement does not violate the First Amendment because it is a condition on receiving an optional tax subsidy and because the condition is rationally related to that benefit. (Doc. 21 at 14-22.) Buckeye opposed dismissal and moved for summary judgment. It argued that the reporting requirement is subject to, and fails, the exacting scrutiny standard applied in *AFP* to the California requirement that charities disclose their donors as a condition of operating and fundraising in the State. (Doc. 36 at 18-19.)

The Government cross-moved for summary judgment, arguing that because § 501(c)(3) is an opt-in regime, § 6033(b)(5)'s reporting requirement is not a compelled disclosure subject to exacting scrutiny. (Doc. 43 at 2-3.) As the Government had pointed out in its earlier motion to dismiss, the Supreme Court in *AFP* acknowledged the distinction between California's mandatory disclosure regime and the § 6033(b)(5) reporting requirement: "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." (Doc. 21 at 27 (quoting *AFP*, 141 S. Ct. at 2389 (citations omitted).) The Government further argued that § 6033(b)(5)'s reporting requirement would be constitutional even under exacting scrutiny, since (among other reasons) it is an important component of the IRS's activities in monitoring compliance with the Internal Revenue Code. (Doc. 43 at 4-8.)

3. The District Court's opinion and order

On November 9, 2023, the District Court denied both parties' cross-motions for summary judgment. Applying *AFP*, *supra*, the court

agreed with Buckeye that "exacting scrutiny is the correct standard for this case." (A10.) The court explained that *Regan* established that "both 'tax exemptions and tax-deductibility are a form of subsidy,' " and that "Congress may choose to not fund certain activities without offending the First Amendment," although it " 'may not deny a benefit to a person *because* he exercises a constitutional right.' " (A10, *quoting* Regan, 461 U.S. at 544-46 (emphasis added).) But it stated that the cases since *Regan* (including *AFP*) "developed on these rules." (A10.) "From those cases," the District Court "synthesize[d] the following rule" (A10-A11):

> Congress may, without offending the First Amendment, condition benefits for *programs* or *activities* on compliance with restrictions on First Amendment activities, but if Congress denies a benefit because an *organization* will not comply with a restriction on First Amendment activities, that denial may be unconstitutional.

Applying this rule, the District Court determined that this case did not present an example, as in *Regan*, of the Government " 'insisting that public funds be spent for the purposes for which they were authorized.' " (A11, quoting *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).) "Instead," the court reasoned, this is a case " 'in which the Government has placed a condition on the *recipient* of the subsidy rather than on a

particular [federally-funded] program or service[.]' " (A11-A12 (quoting *Rust*, 500 U.S. at 197 (emphasis in original; brackets added by district court)).) The court thus concluded that the fact that the § 6033(b)(5) reporting requirement was a condition of § 501(c)(3) status did not immunize it from the exacting scrutiny standard of *AFP*. However, the court concluded that "[t]he parties' briefing under the exacting scrutiny [standard] raises a genuine issue of material fact," in light of conflicting evidence on the extent to which the donor reporting requirement "is an important part of the IRS's enforcement and compliance procedures." (A12.) The court further concluded that applying the exacting scrutiny standard would require it to resolve factual questions at trial where it could make "credibility" determinations. (A12.) The court thus denied summary judgment to both sides.[4]

In a February 26, 2024 order, upon the unopposed request by the Government, the District Court amended its order denying summary judgment to include a certification, pursuant to 28 U.S.C. § 1292(b), for interlocutory appeal. (A16-A17.) The court concluded that all the

[4] The District Court also terminated the Government's motion to dismiss for failure to state a claim as moot. (A1 n.1.)

factors in 28 U.S.C. § 1292(b) supporting interlocutory appeal were present. (A15-A16.)

First, the District Court determined that "whether 'exacting scrutiny' or some other standard governs the issue" of the constitutionality of § 6033(b)(5)'s donor reporting requirement "is central to—and likely dispositive of—[Buckeye's] claim." (A15.) Second, the court determined that "there is a substantial ground for a difference of opinion about what standard should apply." (*Ibid.*) As the court explained, the Supreme Court decisions in *Regan* and *AFP* both touch upon this issue "and, at least arguably, conflict with one another," allowing "reasonable minds" to reach contradictory conclusions. (A15.) Finally, the court determined that "an immediate appeal will materially advance the end of this action." (A16.) As the court explained, "[k]nowing which standard applies . . . will not only help the parties with discovery and trial but also will reduce the risk of having to repeat trial if, after a traditional appeal," this Court determined that exacting scrutiny is not the correct standard. (*Ibid.*)

DISCUSSION

This Court should exercise its discretion under 28 U.S.C. § 1292(b) to allow this appeal

Under 28 U.S.C. § 1292(b), this Court may, in its discretion, permit an appeal from a non-final order if a district court is of the opinion and so states, in the order, that (1) it "involves a controlling question of law" upon which "there is substantial ground for difference of opinion;" and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." A petition for permission to appeal must be made within 10 days of the district court's certification. *Ibid.* These conditions are met here. Although this Court does not permit an interlocutory appeal in every case certified by a district court, it does so where (as here) "potentially unnecessary 'protracted and expensive litigation' will ensue" absent interlocutory review. *In re Somberg*, 31 F.4th 1006, 1008 (6th Cir. 2022) (quoting *Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695, 699 (6th Cir. 2015)); *see also In re Trump*, 874 F.3d at 952 (granting an interlocutory appeal where the case presented a "novel question" of law and potentially invasive discovery of a government official).

A. The order below turns on a controlling question of law as to which there are substantial grounds for difference of opinion

To qualify for interlocutory appeal under 28 U.S.C. § 1292(b), the issue presented must involve a question of law, not fact. "Interlocutory appeals are limited to questions that present neat abstract issues of law," *Hills v. Kentucky*, 457 F.3d 583, 588 (6th Cir. 2006) (internal quotation marks and citation omitted) that can be decided "quickly and cleanly without having to study the record," *Ahrenholz v. Board of Trustees of Univ. of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000). The question here fits that description.

The appropriate level of scrutiny for analyzing the constitutionality of § 6033(b)(5) is a purely legal question. *See*, *e.g.*, *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 80 (1st Cir. 2004) (reviewing "legal conclusions" including the "level of scrutiny [the district court] applied when evaluating the constitutionality" of government action); *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 540 (3d Cir. 2011) (reviewing level of scrutiny applicable to an equal protection challenge as conclusion of law); *cf. McCoy-Elkhorn Coal Corp. v. U.S. Env't Prot. Agency*, 622 F.2d 260, 264 (6th Cir. 1980)

("facial attack on the constitutionality of the statute . . . presents a purely legal question"). And deciding that purely legal question requires the study of case law not the record.

The question of law to be resolved in an interlocutory appeal must also be "controlling." A "controlling" issue need not be outcome-determinative, but it must be one that "could materially affect the outcome of litigation in the district court." *In re Baker & Getty Fin. Servs., Inc.,* 954 F.2d 1169, 1172 n.8 (6th Cir. 1992) (internal question marks and citation omitted)); *accord In re Trump*, 874 F.3d at 951.

Whether the donor reporting requirement in § 6033(b)(5) is subject to exacting scrutiny, rational basis, or some other standard of constitutional review will undoubtedly affect the outcome of this litigation and is therefore controlling. According to the District Court, evaluating the statute under the exacting scrutiny standard will require discovery and a trial, including "witness credibility" determinations. (A12.) But reversal by this Court could completely alter the trajectory of the litigation, given that, under a less exacting standard of review, the case could be decided without discovery or trial. Under rational basis review, the focus of analysis is on the text, context, and history of

§ 6033(b)(5), and Buckeye would have to negate "every conceivable basis which might support" the reporting requirement. *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012)(internal quotation marks and citation omitted)(applying rational basis test to equal-protection challenge to tax statute); *see Regan*, 461 U.S. at 550 (upholding anti-lobbying condition to § 501(c)(3) exemption because it is "not irrational"). Thus, the standard to be applied is both "central to" and "likely dispositive of" Buckeye's claim, as the District Court concluded. (A15.)

Furthermore, a substantial ground for difference of opinion exists regarding the applicable level of scrutiny. This factor is satisfied where resolution of the question is not already governed by existing precedent, *In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013), and "fair-minded jurists might reach contradictory conclusions" on the proper result, *In re Trump*, 874 F.3d at 952 (quoting *Reese v. BP Exploration, Inc.* 643 F.3d 681, 688 (9th Cir. 2011)). Such is the case here.

In this case, no precedential decision squarely addresses the constitutionality of the § 6033(b)(5) reporting requirement, or the standard of review applicable to that requirement. Although the

Supreme Court in *Regan* held that Congress could rationally require an organization to refrain from lobbying as a condition of § 501(c)(3) tax-exempt status, 461 U.S. at 550-51, it did not address whether Congress could require that organization to identify its substantial contributors as a condition of § 501(c)(3) status. And, while the Court in *AFP* subjected to exacting scrutiny California's requirement that charities disclose their substantial contributors as a condition of operating and fundraising in the State, it expressly stated that, with regard to § 6033(b)(5), the IRS's "revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California's disclosure requirement." 141 S. Ct. at 2389 (citing *Regan*, 461 U.S. at 545).

That the level of scrutiny applicable to § 6033(b)(5) is an open question on which "fair minded jurists might reach contradictory conclusions," *In re Trump*, 874 F.3d at 952, is evidenced by the fact that jurists have reached contradictory conclusions regarding the constitutionality of federal reporting requirements for tax-exempt organizations. In this regard, the District Court applied exacting scrutiny to § 6033(b)(5)'s reporting requirement while the Eleventh Circuit, in *Mobile Republican Assembly*, found that an analogous

reporting requirement in § 527(j) "falls squarely under *Regan*." 353 F.3d at 1361; *see id.* (observing that "Congress has enacted no barrier to the exercise of the appellees' constitutional rights" but has merely "established certain requirements that must be followed in order to claim the benefit of a public tax subsidy"). The District Court was therefore correct to conclude (A15) that "there is a substantial ground for a difference of opinion about what standard should apply" in this case.

B. Immediate appeal from the order may materially advance the ultimate termination of this litigation

The final factor for interlocutory appeal under 28 U.S.C. § 1292(b) is whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Appeals that materially advance litigation are "those where, absent review, potentially unnecessary 'protracted and expensive litigation' will ensue." *In re Somberg*, 31 F.4th at 1008 (quoting *Little*, 805 F.3d at 699). But if "litigation will be conducted in substantially the same manner regardless of the court's decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." *In re*

City of Memphis, 293 F.3d 345, 351 (6th Cir. 2002) (internal quotation marks, brackets, and citation omitted).

Here, this Court's resolution of the standard of review applicable to the constitutionality of the § 6033(b)(5) donor reporting requirement will certainly affect the course of this case, and could, depending on the outcome, avoid a great deal of litigation. The District Court's order observed that "the parties' briefing under the exacting scrutiny [standard] raises a genuine issue of material fact." (A12.) As it stands, under exacting scrutiny the court will have to determine whether the donor reporting requirement bears a substantial relation to a sufficiently important government interest, and whether the requirement is narrowly tailored to the Government's asserted interest. *AFP*, 141 S. Ct. at 2383. In addition, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ibid*. (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

The resolution of these questions will involve (in our estimation) a 6 to 7-month fact discovery period, followed by expert discovery, each of which may involve a significant amount of motion practice, owing to

certain privacy and privilege concerns, discussed below. (*See* Doc. 71 at 12-13.) Following discovery, the parties have estimated a trial lasting up to 8 days, at which they may each call 7 fact witnesses, and one expert witness, if not more. (Doc. 64 at 3.) Most, if not all, of that litigation would be avoided if the applicable standard is rational basis review, under which the donor reporting requirement will be upheld as long as it is "not irrational," *Regan*, 461 U.S. at 550, and does not "reach outside" the § 501(c)(3) tax-subsidy program, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 217 (2013). It is possible that showing can be made from the language and history of the statute itself (without the need for discovery and witness testimony); indeed, the District Court viewed a determination that rational basis review applied as "likely dispositive" of Buckeye's claims. (A15.)

Not only will interlocutory review at this time avoid "unnecessary protracted and expensive litigation," *In re Somberg*, 31 F.4th at 1008 (internal quotation marks and citation omitted), but the alternative raises significant privacy and privilege concerns. Determining under the exacting scrutiny standard whether the donor reporting requirement is narrowly tailored to the Government's interests in tax

administration risks revealing closely-guarded information concerning enforcement of the tax laws—such as the processes for selecting returns for examination. *See, e.g.*, 26 U.S.C. § 6103(b)(2) (flush language) (IRS does not have to disclose information concerning examination selection "if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws").[5] And determining under that standard "the seriousness of the actual burden on First Amendment rights," *AFP*, 141 S. Ct. at 2383, will require Buckeye to substantiate its allegation that potential donors have reduced their contributions, or that its freedom of association is otherwise impaired, as a result of the reporting requirement. Doing so invokes some of the same privacy concerns of which Buckeye complains. (Doc. 68 at 10.) The fact that these thorny privilege and privacy issues could be avoided through interlocutory review (if the Court determines that rational basis, not exacting scrutiny, is the applicable standard) is

[5] *See Gillin v. IRS*, 980 F.2d 819, 822 (1st Cir. 1992) (explaining why the IRS "closely guards" criteria for identifying returns for examination); *Buckner v. IRS*, 25 F. Supp. 2d 893, 898 (N.D. Ind. 2001) (release of information concerning examination selection "could compromise the integrity of the IRS and its regulatory function").

another "prudential factor" in favor of permitting appeal. *In re Trump*, 874 F.3d at 951.

CONCLUSION

For the foregoing reasons, the Government requests that the Court exercise its discretion under 28 U.S.C. § 1292(b) to permit the interlocutory appeal from the District Court's order denying summary judgment.

Respectfully submitted,

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MARCH 6, 2024

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(s) /s/ Ivan C. Dale

Attorney for petitioners

Dated: March 6, 2024

CERTIFICATE OF SERVICE

It is hereby certified that on this 6th day of March, 2024, I mailed copies of this petition for permission to appeal to counsel for the plaintiff-respondent, via First Class Mail, at the following addresses:

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ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Buckeye Institute,

Plaintiff,

v.

Internal Revenue Service, *et al.*,

Defendants.

Case No. 2:22-cv-4297

Judge Michael H. Watson

Magistrate Judge Deavers

OPINION AND ORDER

The Internal Revenue Service ("IRS"), Douglas O'Donnell, United States Department of Treasury, and Janet Yellen (collectively, "Defendants") move to dismiss The Buckeye Institute's ("Plaintiff") Complaint. ECF No. 21. Plaintiff and Defendants also move for summary judgment on Plaintiff's claim.[1] ECF Nos. 36 & 43. For the following reasons, Plaintiff's motion for summary judgment and Defendants' motion for summary judgment are **DENIED.**

I. FACTS

Plaintiff is a nonprofit corporation that enjoys tax-exempt status under 26 U.S.C. § 501(c)(3) ("501(c)(3)"). Alt Decl., ¶¶ 2–3, ECF No. 36-1. In Plaintiff's words, Plaintiff often serves "as a government watchdog" and litigates "against federal, state, and local authorities to defend rights under the Ohio and United

[1] In Defendants' motion for summary judgment, Defendants make (or incorporate by reference) the same arguments they made in the motion to dismiss. Because the Court will address all of Defendants' arguments through the lens of summary judgment, the motion to dismiss, ECF No. 21, is **TERMINATED AS MOOT**.

States Constitutions." *Id.* ¶ 3. Plaintiff relies on financial support from donors. *Id.* ¶ 5.

Like other 501(c)(3) organizations, Plaintiff is subject to certain reporting requirements. Under 26 U.S.C. § 6033(b)(5), many 501(c)(3) organizations must annually disclose to the Secretary of the Treasury "the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors" (the "Disclosure Requirement").[2] A "substantial contributor" is a donor who contributes an aggregate total of $5,000 per tax year, if the contributed amount is more than two percent of the total contributions the organization receives in a tax year. 26 U.S.C. § 507(d)(2)(A). 501(c)(3) organizations comply with the Disclosure Requirement by properly completing and filing Schedule B to Form 990 ("Schedule B"). *See* Schedule B (Form 990), *available at* https://www.irs.gov/pub/irs-pdf/f990ezb.pdf. Although Schedule Bs must "be made available to the public at such times and in such places as the Secretary may prescribe," the Secretary may not "disclose the name or address of any contributor to any organization" (in other words, the Secretary must make redacted Schedule Bs available to the public). 26 U.S.C. § 6104(b).

However, the IRS has a less-than-perfect record for keeping Schedule Bs and Form 990s confidential: the IRS acknowledges at least fourteen

[2] As Defendants point out, not all 501(c)(3) organizations are subject to the Disclosure Requirements. For example, "religious activities of any religious order" are exempted from the Disclosure Requirement. *See* 26 U.S.C. § 6033(a)(3)(A).

unauthorized disclosures of Form 990 information since 2010. *See* IRS Talking Points, ECF No. 36-9.

Plaintiff argues the Disclosure Requirement infringes on Plaintiff's First Amendment rights to freedom of association and assembly. *E.g.*, Mot., ECF No. 36. According to Plaintiff, Plaintiff's (and Plaintiff's donors') "exercise of these rights to associate with each other in pursuing their mutual social, political, and ideological goals is significantly curtailed because they reasonably fear that they cannot associate privately." *Id.* at 8. Plaintiff's donors have "made clear" that they are afraid of "retribution" from Plaintiff's opponents if their Schedule B information becomes public. Alt Decl. ¶¶ 8, ECF No. 36-1. Some of Plaintiff's donors have reduced their contributions to avoid being listed on Plaintiff's Schedule B. *Id.* ¶ 11–15.

Plaintiff sues Defendants, contending that the Disclosure Requirement is unconstitutional under the First Amendment, both facially and as applied to Plaintiff. Compl. ¶¶ 36–42, ECF No. 1.

II. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a): "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The Court must grant summary judgment if the opposing party "fails to make a showing sufficient to establish the existence of an element essential to that party's case" and "on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing there is a genuine dispute of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49, 255 (1986). The Court disregards "all evidence favorable to the moving party that the jury would not be required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000) (citation omitted). Summary judgment will "not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248 (internal citations and quotation marks omitted).

The Court is not "obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). The Court may rely on the parties to call attention to the specific portions of the record that

demonstrate a genuine issue of material fact. *Wells Fargo Bank, N.A. v. LaSalle Bank N.A.*, 643 F. Supp. 2d 1014, 1022 (S.D. Ohio 2009).

III. ANALYSIS

Both sides move for summary judgment on Plaintiff's claim. ECF Nos. 36 & 43. Before addressing the merits of Plaintiff's claim, the Court will consider whether Plaintiff has standing.

A. Standing

Pursuant to Article III of the United States Constitution, federal jurisdiction is limited to "cases" and "controversies," and standing is "an essential and unchanging part of" this requirement. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). If a plaintiff lacks standing, then the federal court lacks jurisdiction. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Thus, standing is a "threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Article III standing has three elements. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (internal alterations omitted). Third, it must be likely that the injury will be "redressed by a favorable decision." *Id.* at 561.

Defendants argue that Plaintiff lacks standing because Plaintiff's asserted injury has an overly attenuated connection to the Disclosure Requirement. Resp. 2–3, ECF No. 44. The Court disagrees.

First, Plaintiff has (at least one) injury-in-fact: it has received fewer donations. Thus, Plaintiff has alleged a monetary harm. When a plaintiff suffers a monetary harm, it "has suffered a concrete injury in fact under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

Next, consider causation. For standing purposes, "causation" means a "causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant[.]" *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). Defendants argue that Plaintiff cannot satisfy causation because it is the actions of third parties (that is, the donors' decision to donate less or not at all) that cause Plaintiff's injury, not any action by Defendants. Mot. 6–12, ECF No. 21.

The Supreme Court of the United States' decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) forecloses Defendants' argument. In *Department of Commerce*, a group of states (the "States") challenged a Census rule that required respondents to mark if they were a citizen or non-citizen. *Id*. at 2563–65. The States argued that many non-citizens would choose to not complete the Census rather than check the "non-citizen" box because of fears of legal consequences. *Id*. at 2565–66. Because the States

received federal funding based on population, this non-response caused the States a financial harm (among other harms). *Id.*

The Federal Government (the "Government") argued that the harm was not "fairly traceable" to the Census rule because the harm depended "on the independent action of third parties choosing to violate their legal duty to respond to the census." *Id.* The Supreme Court rejected this argument as follows:

> [W]e are satisfied that, in these circumstances, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential. The evidence at trial established that noncitizen households have historically responded to the census at lower rates than other groups, and the District Court did not clearly err in crediting the Census Bureau's theory that the discrepancy is likely attributable at least in part to noncitizens' reluctance to answer a citizenship question. Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties . . . Because Article III requires no more than de facto causality[] . . . traceability is satisfied here.

Id. at 2566 (internal quotation marks and citations omitted).

The same reasoning applies here with equal weight. Plaintiff points to evidence that donors will "likely react in predictable ways" to the disclosure requirement: the donors reduce their donations to avoid being part of the disclosure. Alt Decl. ¶¶ 11–15, ECF No. 36-1.[3] Indeed, not only has Plaintiff

[3] Defendants argue that the Court should not consider Alt's statements about why donors have reduced contributions because, according to Defendants, those statements are hearsay. However, because those statements *could* be presented in an admissible form at trial (*e.g.*, by calling the donors to testify), the Court may consider them on summary judgment. *See Bard v. Brown Cnty., Ohio*, 970 F.3d 738, 758, n.12 (6th Cir.

shown that donors are "likely" to react this way, Plaintiff has shown that donors *already have* reacted this way. In sum, Plaintiff's "theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Dep't of Com.*, 139 S. Ct. at 2566 (citations omitted). As a result, causation is satisfied.

Finally, Plaintiff satisfies redressability because the Court could redress Plaintiff's injury by enjoining enforcement of the Disclosure Requirement.

Accordingly, Plaintiff has standing to pursue its claims.[4]

B. Merits

Turning to the merits, the first issue is what standard of review applies to Plaintiff's First Amendment claim. A recent Supreme Court case, *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) ("*AFPF*"), is instructive.

In *AFPF*, certain charitable organizations challenged a California state regulation (the "California Regulation") that required charitable organizations to file a Schedule B with the State of California. 141 S. Ct. at 2379. "Out of concern for their donors' anonymity," the two plaintiff organizations did not

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2020) (instructing that although certain "out-of-court statements may constitute inadmissible hearsay," "it is well-established that the party opposing summary judgment need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment" (quotation marks and citation omitted)).

[4] In arguing against standing, Defendants make many of the same arguments as the dissent in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2392–2405 (2021) (Sotomayor, J., dissenting). *See* Mot. 6–12, ECF No. 21. Unfortunately for Defendants, those arguments did not carry the day and are thus unpersuasive here.

provide those disclosures (or provided redacted versions). *Id.* at 2380. The plaintiffs "alleged that disclosure of their Schedule Bs would make their donors less likely to contribute and would subject them to the risk of reprisals." *Id.* The plaintiffs argued that the California Regulation violated the First Amendment. *Id.*

The Supreme Court began by observing that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Id.* at 2382 (cleaned up). A three-justice plurality of the Court concluded that "exacting scrutiny" was the appropriate level of scrutiny for compelled disclosure cases.[5] *Id.* at 2382–83.

Under the exacting scrutiny standard, "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 2383 (quotation marks and citations omitted). To pass exacting scrutiny, the "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (cleaned up). In addition, although a compelled disclosure requirement need not be "the least restrictive means of achieving [the government's] ends," the requirement must be "narrowly tailored to the government's asserted interest." *Id.*

[5] One justice concurred in the result but would have analyzed the claim under strict scrutiny. *Id.* at 2389–91. Two other justices concurred in the result but would not have decided which level of scrutiny to apply because, in their view, the California Regulation failed under either standard. *Id.* at 2391–92.

Applying *AFPF*, exacting scrutiny is the correct standard for this case. As in *AFPF*, the Disclosure Requirement here requires (or "compels") 501(c)(3) organizations, including Plaintiff, to disclosure their contributors to the federal government. Thus, as in *AFPF*, the Disclosure Requirement is a compelled disclosure and will be reviewed under exacting scrutiny. *AFPF*, 141 S. Ct. at 2383 ("Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.").

Defendants disagree. Defendants argue that *AFPF's* exacting scrutiny framework is inapplicable here because Plaintiff voluntarily chose to take advantage of the 501(c)(3) tax benefit. *E.g.*, Mot. 2–3, ECF No. 43. In support of this argument, Defendants cite *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983). *Id.* Relevant here, *Regan* explains two rules: (1) both "tax exemptions and tax-deductibility are a form of subsidy"; and (2) although "the government may not deny a benefit to a person because he exercises a constitutional right," Congress may choose to not fund certain activities without offending the First Amendment. 461 U.S. at 544–46.

The cases since *Regan* (including *AFPF*) developed on these rules. From those cases, the Court synthesizes the following rule: Congress may, without offending the First Amendment, condition benefits for *programs* or *activities* on compliance with restrictions on First Amendment activities, but if Congress denies a benefit because an *organization* will not comply with a restriction on

First Amendment activities, that denial may be unconstitutional. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218, (2013) (striking down a law that required organizations that received certain federal funding to "adopt—as their own—the Government's view on an issue of public concern"); *Rust v. Sullivan*, 500 U.S. 173, 195–200 (1991) (holding that Congress could prohibit recipients of federal funds for a "family planning" public health project from using those funds for anything related to abortion).

Applied here, the Disclosure Requirement requires any 501(c)(3) to disclose their substantial donors in order to operate as a 501(c)(3). That is, if a charitable organization does not disclose their substantial donors, they may not receive the benefit of 501(c)(3) status. Thus, this is not an example of the Government "simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196. Instead, the Government denies its 501(c)(3) tax benefits entirely to organizations that resist the disclosure requirement. Thus, if the Disclosure Requirement is unconstitutional, it would be an unconstitutional condition on receipt of the tax benefits. *See id.* at 196–97 (explaining that the "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather

than on a particular [federally-funded] program or service[.]" (emphasis in original)).[6]

In sum, the remaining question is whether the Disclosure Requirement is unconstitutional, and the Court will review the constitutionality of the Disclosure Requirement under exacting scrutiny. The parties' briefing under the exacting scrutiny raises a genuine issue of material fact. For example, Defendants argue and point to some evidence that the Disclosure Requirement is an important part of the IRS's enforcement and compliance procedures. Mot. 8–11, ECF No. 43. On the other hand, Plaintiff raises several issues that undercut Defendants' arguments. Resp. 5–13, ECF No. 49. Determining which side is ultimately more persuasive will turn, at least in part, on witness credibility, which is an inappropriate consideration at summary judgment. *Anderson*, 477 U.S. at 255. Accordingly, both motions for summary judgment are **DENIED**.

[6] That Plaintiff could re-organize as a different type of 501(c) organization does not change this conclusion. As the Supreme Court has explained, both tax exempt status and tax deduction status (that is, the status that allows an organization to receive tax-deductible donations) are subsidies. *Regan*, 461 U.S. 544. If Plaintiff reorganizes as a different type of 501(c) organization, it would lose tax deduction status. Thus, the allegedly unconstitutional condition (the disclosure requirement) is on the tax deduction status.

IV. CONCLUSION

For the following reasons, Plaintiff's motion for summary judgment and Defendants' motion for summary judgment are **DENIED**. The motion to dismiss is **TERMINATED AS MOOT.** The parties are **ORDERED** to file a joint notice **WITHIN FOURTEEN DAYS** identifying the anticipated length of trial, number of witnesses, and mutually available trial dates in the next several months.

The Clerk shall terminate ECF Nos. 21, 36, and 43.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Buckeye Institute,

Plaintiff,

v.

Internal Revenue Service, *et al.*,

Defendants.

Case No. 2:22-cv-4297

Judge Michael H. Watson

Magistrate Judge Deavers

OPINION AND ORDER

The Internal Revenue Service, Commissioner Douglas O'Donnell, the United States Department of Treasury, and Secretary Janet Yellen (collectively, "Defendants") move the Court to certify an interlocutory appeal. ECF No. 71. The Buckeye Institute ("Plaintiff") does not oppose. *Id.* at 2. For the following reasons, the motion is **GRANTED**.

This case arises out of a disclosure requirement for 501(c)(3) tax-exempt organizations (the "Requirement"). *See generally*, Am. Compl., ECF No. 68. Plaintiff challenges the Requirement as violating the First Amendment. *Id.* In its recent Opinion and Order denying summary judgment, the Court concluded that it would use the "exacting scrutiny" standard to determine whether the Requirement is unconstitutional (the "Order"). ECF No. 60.

Defendants move pursuant to 28 U.S.C. § 1292(b) for certification of the Order for interlocutory appeal. To prevail on a motion under § 1292(b), the moving party must show: "(1) the order involves a controlling question of law,

(2) a substantial ground for difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002) (citing 28 U.S.C. § 1292(b)); *see also In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017). "[R]eview under § 1292(b) should be the exception, granted only in an extraordinary case." *In re Gen. Motors, LLC*, No. 19-0107, 2019 WL 8403402, at *1 (6th Cir. Sept. 25, 2019) (citation omitted).

This is one of the rare cases in which the factors favor certification. First, whether "exacting scrutiny" or some other standard governs the issue is central to—and likely dispositive of—Plaintiff's claim. *See In re Transdigm Grp., Inc. Sec. Litig.*, No. 1:17 CV 1677, 2018 WL 11227556, at *1 (N.D. Ohio Jan. 30, 2018) ("A controlling question of law exists where a question is potentially dispositive of a case or could result in a reversal of judgment after a final hearing." (quotation marks and citations omitted)). Thus, the first factor weighs in Defendants' favor.

Second, there is a substantial ground for a difference of opinion about what standard should apply to the Requirement. As outlined in the Order, two Supreme Court cases, *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) ("AFPF") and *Regan v. Taxation with Representation of Washington*, 46 U.S. 540 (1983), touch on the issues in this case and, at least arguably, conflict with one another. Order, ECF No. 60. Although this Court concluded that *AFPF* ultimately controlled, reasonable minds could conclude that, instead,

Regan guides the analysis. *See In re Trump*, 874 F.3d at 952 (explaining that interlocutory appeal may be appropriate "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions" (quotation marks and citations omitted)). Accordingly, the second factor favors certifying an interlocutory appeal.

Finally, an immediate appeal will materially advance the end of this action. The parties have represented that they need to conduct substantial discovery before trial and, of course, the case must proceed through trial. Knowing which standard applies to the Requirement will not only help the parties with discovery and trial but also will reduce the risk of having to repeat trial if, after a traditional appeal, the Sixth Circuit determines that "exacting scrutiny" is not the correct standard for this case. *See In re Somberg*, 31 F.4th 1006, 1008 (6th Cir. 2022) (instructing that an interlocutory appeal will materially advance the litigation if, "absent review, potentially unnecessary protracted and expensive litigation will ensue" (quotation marks and citations omitted)). Therefore, the third factor supports an interlocutory appeal.

For these reasons, Defendants' motion is **GRANTED**. The Court **CERTIFIES** the Order, ECF No. 60, for interlocutory appeal.[1] The Court

[1] Defendants also ask the Court to identify a particular issue for interlocutory appeal. Because the Court may certify only *orders*, not *issues*, for interlocutory appeal, that request is **DENIED**. *See In re Zurich Am. Ins. Co.*, No. 21-0302, 2021 WL 4473398, at *1 (6th Cir. Sept. 29, 2021) ("[S]ection 1292(b) authorizes certification of *orders* for interlocutory appeal, not certification of *questions*" (emphasis in original; quotation marks and citations omitted)).

AMENDS the Order to include a certification of interlocutory appeal, as consistent with this Opinion and Order and as required by 28 U.S.C. § 1292(b).

The Clerk shall terminate ECF No. 71.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT