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 A. Preston Deavers, U.S.M.J.

UNITED STATES' MOTION FOR SUMMARY JUDGMENT

The United States hereby moves this Court to award it summary judgment. The substantial-contributor reporting requirement, 26 U.S.C. § 6033(b)(5), is a rational condition on an opt-in tax benefit and thus does not offend the First Amendment. Further, even were the statute evaluated under the standard that applies to compelled disclosures, exacting scrutiny, it would be constitutional. Accordingly, the United States is entitled to summary judgment. A memorandum of law follows this motion; supporting declarations and exhibits are attached.

Respectfully submitted,

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/s/ Arie M. Rubenstein
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INDEX OF ATTACHMENTS

The following documents are attached to this motion:

1. Declaration of Lynn A. Brinkley
    A. Form 5773, EO Workpapers Summary, Exhibit A to Brinkley Decl.
    B. Interim Guidance Memorandum, Exhibit B to Brinkley Decl.
    C. FY 2022 Accomplishments Letter, Exhibit C to Brinkley Decl.
    D. Training materials, Exhibit D to Brinkley Decl.
2. Declaration of Steven Fager
    A. Form 5773, EO Workpapers Summary, Exhibit A to Fager Decl.
3. Declaration of Rogelio Vera
4. Declaration of Adrian F. Gonzalez
    A. FY 2022 Accomplishments Letter, Exhibit A to Gonzalez Decl.
5. Declaration of Jennifer A. Jett

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UNITED STATES' MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The substantial-contributor reporting requirement of 26 U.S.C. § 6033(b)(5) comports with the First Amendment because the requirement is a reasonable condition on an opt-in tax benefit. Congress made preferential tax treatment available to organizations that act in the public interest, and to their donors, if the organizations elect § 501(c)(3) status and if they meet certain conditions. Organizations that elect this status must comply with restrictions on their operations, and must report certain information to the IRS, including the identities of their substantial contributors, to ensure that the IRS has the necessary information to monitor their compliance with those restrictions. This reporting is rationally related to the tax benefit offered and does not affect conduct outside the § 501(c) charitable organization tax benefit program; thus, it is constitutional.

Buckeye wrongly asserts that § 6033(b)(5) should be analyzed as compelled disclosure rather than a reporting requirement that is a condition of an optional tax benefit, but even if it were compelled, it would still be constitutional. Under the standard applicable to compelled disclosures, exacting scrutiny, a statute comports with the First Amendment if the disclosure requirement is substantially related to an important government interest and is narrowly tailored to achieve its purpose. Here, Congress sought to maintain the integrity of the income tax system, an important government purpose, and the disclosure requirement applies specifically and only to those organizations subject to the restrictions on operations specified by § 501(c)(3). The statute is thus constitutional. Should the Court reach the merits, it should grant the United States summary judgment.

ANALYSIS

The substantial-contributor reporting requirement, 26 U.S.C. § 6033(b)(5), is constitutional because it is a rational condition on an opt-in tax benefit. Congress reasonably determined that, as a condition of § 501(c)(3) status, organizations should be required to disclose to the IRS the identities of their substantial contributors. This requirement is constitutional because the condition is rationally related to the offered benefit.

Because § 501(c)(3) is an opt-in regime rather than a compelled disclosure provision, the substantial-contributor reporting requirement is not subject to exacting scrutiny. However, even if it were, it would still be constitutional. Section 6033(b)(5) is substantially related to the maintenance of a sound tax system, a government purpose of the highest order, and is narrowly tailored to achieve that purpose. Accordingly, the Court should award the United States summary judgment.[1]

I. The substantial-contributor reporting requirement is constitutional because it is a rational condition on a tax benefit.

As discussed in the United States' motion to dismiss, the substantial-contributor reporting requirement is constitutional because it is a rational condition on an opt-in benefit. (*See* U.S. MTD at 15-25, ECF no. 21, PageID.71-81; *see id.* at 21, PageID.77 (discussing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983).) There can be no genuine dispute that § 501(c)(3) is an opt-in regime.

[1] The United States' position is that Plaintiff has failed to plead jurisdiction and therefore this case must be dismissed. (*See* U.S. MTD at 6-12, ECF no. 21, PageID.62-68.) However, in the event that the Court disagrees, then the United States is entitled to summary judgment for the reasons stated herein.

Organizations that elect § 501(c)(3) status receive preferential tax treatment, and their donors may receive tax deductions for their contributions. (*See id.* at 13-14, PageID.69-70.) And there can be no genuine dispute that Schedule B reporting is rationally related to the regime. As described below, the undisputed facts show that Schedule B reporting meets exacting scrutiny; therefore, the reporting also meets the less-strict rational basis standard. Accordingly, the United States is entitled to summary judgment.

II. Even if the substantial-contributor reporting requirement were subject to exacting scrutiny, it would be constitutional.

Exacting scrutiny applies to certain compelled disclosure regimes, not conditions on opt-in benefits. But even if § 6033(b)(5) were subject to exacting scrutiny, it would be constitutional because it is substantially related to an important government interest – the proper functioning of the income tax system – and it is narrowly tailored.

A. Section 6033(b)(5) is substantially related to the proper functioning of the income tax system, an important government interest.

1. The government has a compelling interest in protecting tax revenue.

There can be no dispute that maintaining the integrity of the income tax system is an important – even vital – government interest. The Supreme Court has repeatedly emphasized "the broad public interest in maintaining a sound tax system," *United States v. Lee*, 455 U.S. 252, 260 (1982), and that "even a substantial burden" on First Amendment rights would be justified by that public interest, *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989) (citing *Lee*, 455 U.S. at

260). Thus, courts readily conclude that "there is a compelling government interest in maintaining the integrity and effectiveness of the revenue system," *Hummon v. United States*, 83-cv-1607, 1984 WL 295, at *4 (S.D. Ohio May 1, 1984) (citations omitted). The Sixth Circuit has observed that the income tax system is of sufficient importance to justify even burdens on the free exercise of religion: "[T]he government's interest in revenue-raising statutes is sufficiently compelling to outweigh the free exercise rights of those who find the statute offensive to their religion." *Nelson v. United States*, 796 F.2d 164, 168 (6th Cir. 1986) (citing *Lee*, 455 U.S. at 260).

2. Schedule B information is an important component of the IRS's activities in monitoring compliance with the Internal Revenue Code.

The identities of substantial contributors are relevant to several provisions of the Internal Revenue Code. As discussed below, the IRS uses Schedule B information as part of its mission to ensure that § 501(c)(3) organizations are operated in accordance with the restrictions that apply to those organizations.

a. The IRS uses Schedule B information to help monitor compliance with the laws that govern § 501(c)(3) organizations.

Congress has created a number of restrictions and conditions on the § 501(c)(3) tax exemption to ensure that the tax benefits that flow from that status are not misused. Of relevance here, Congress required § 501(c)(3) organizations to report their substantial contributors to the IRS because these contributors are often in a position to exercise significant influence over § 501(c)(3) organizations and the

information reported can be of significant value in identifying potential violations of these restrictions and conditions.

First, the information can be relevant to whether a § 501(c)(3) organization is a private foundation. The Internal Revenue Code provides generally that a § 501(c)(3) organization is either a private foundation or a public charity. 26 U.S.C. § 509. A § 501(c)(3) organization that would otherwise be classified as a private foundation can be classified as a public charity if it receives a significant portion of its support from the general public (instead of just a small group of donors). *Id.* §§ 170(b)(1)(A)(vi); 509(a)(1). Private foundations are subject to restrictions and requirements that do not apply to public charities, such as restrictions on self-dealing (including with substantial contributors) and distribution requirements. *See generally id.* §§ 4940-4948. The identities of the organization's substantial contributors and the amounts that they contribute are relevant to determining whether the organization satisfies the public support test and, thus, whether the organization qualifies as a public charity instead of a private foundation.

Second, the § 501(c)(3) exemption is available to an organization only if "no part of the net earnings . . . inures to the benefit of any private shareholder or individual," 26 U.S.C. § 501(c)(3), and if the organization serves public rather than private interests, 26 C.F.R. § 1.501(c)(3)-1(d)(1)(ii). Because substantial contributors may have significant influence over organizations, inurement is more likely to occur with substantial contributors. Information as to the identities of

substantial contributors can assist the IRS in identifying potential private inurement and private benefit issues involving those substantial contributors.

Third, Congress has imposed an excise tax on any transaction in which a "disqualified person" receives a benefit from certain tax-exempt organizations and does not pay fair market value for that benefit. *Id.* § 4958(a), (b). Both the organization's managers and the disqualified person can be liable for the excise tax. *Id.* The statute defines "disqualified person" to include anyone "in a position to exercise substantial influence over the affairs of the organization." *Id.* § 4958(f)(1)(A). Substantial contributors to an organization may be in a position to exercise substantial influence over its affairs. Indeed, one of the factors that shows a person is in a position to exercise substantial influence over an organization is that the person is a substantial contributor. 26 C.F.R. § 53.4958-3(e)(2)(ii). Thus, the identities of substantial contributors are relevant to determining whether the excise tax applies.

Fourth, the Internal Revenue Code allows for charities to be classified as "supporting organizations" if they have certain specified relationships with one or more public charities. 26 U.S.C. § 509(a)(3). A supporting organization is treated as a public charity even if it would otherwise be a private foundation. *Id.* An organization generally cannot qualify as a supporting organization if it is controlled directly or indirectly by a "disqualified person," which for this purpose includes a substantial contributor. *Id.* §§ 509(a)(3)(C), 4946(a)(1)(A). (Substantial contributors to supporting organizations are also *per se* disqualified persons for

purposes of the excise tax discussed above. *Id.* § 4958(c)(3)(B).) Thus, in the case of a supporting organization, the identities of substantial contributors can assist the IRS in determining whether the organization qualifies for supporting organization treatment.[2]

b. Information reporting itself encourages compliance.

The very fact that substantial donor information is reported to the IRS itself encourages tax compliance. "It is widely known . . . that tax enforcement is excellent whenever such third-party reporting is in place, and that enforcement is weak – even in the most advanced economies – when such third-party reporting is not in place . . . ." Henrik J. Kleven, *Why Can Modern Governments Tax So Much? An Agency Model of Firms as Fiscal Intermediaries*, 83 Economica 219 (2016); *see generally* Jay A. Soled, *Homage to Information Returns*, 27 Va. Tax Rev. 371, 371-72 (2007) (information returns "are pivotal in causing taxpayers to be forthright in their reporting practices").

The substantial-contributor reporting requirement encourages compliance in that those who control § 501(c)(3) organizations are aware that the IRS has immediate access to the identities of the organization's substantial contributors,

[2] The first and fourth issues apply to § 501(c)(3) organizations, but generally not to § 501(c)(4) organizations. The substantial-contributor reporting requirement in § 6033(b)(5) applies only to § 501(c)(3) organizations. Buckeye's summary judgment motion focuses on the Treasury Department's decision to revise the applicable regulations to stop requiring donor information from § 501(c)(4) organizations (*see* Pl. SJ Mem. at 12-15, ECF no. 36, PageID.176-179), but as shown by this discussion, § 501(c)(3) and § 501(c)(4) organizations present very different issues. In addition, contributions to § 501(c)(3) organizations are generally tax deductible, 26 U.S.C. § 170(a), while contributions to § 501(c)(4) organizations are generally not.

discouraging them from engaging in improper private benefit transactions. Further, the reporting requirement discourages taxpayers from inventing substantial false donations to § 501(c)(3) entities and hoping not to get audited.

3. The substantial-contributor reporting requirement is substantially related to the proper functioning of the income tax system.

Section 6033(b)(5) is substantially related to the government's interest in raising revenue because it enhances the IRS's ability to monitor compliance with the Internal Revenue Code. As detailed in the declarations from IRS officials submitted in support of this memorandum, Schedule B information is useful at several stages of the IRS's review of tax returns.

Schedule B information is relevant to the initial evaluation of § 501(c)(3) organization returns in determining whether to recommend that the organization be subject to audit. As explained by Adrian Gonzalez, Director of Compliance, Planning and Classification (CP&C) of the Tax Exempt and Government Entities Division (TEGE) of the IRS, CP&C is the IRS office that initially reviews exempt organization returns to determine whether to recommend audit. (*See* Gonzalez Decl.¶ 3, attached as ex. 4.) As Mr. Gonzalez states, Schedule B information can be used to identify issues that would suggest an audit is appropriate. These include the question of classification as a private foundation, inurement issues, and the possible applicability of excise taxes. (*Id.* ¶¶ 8-15.) Because CP&C reviews Schedule B's as part of its determination whether to recommend that a return be audited, seeking information from the organization at issue as part of an audit is

not an adequate substitute for having this information in advance to help determine which entities to audit in the first place.

Indeed, the IRS regularly uses Schedule B information to evaluate whether a public charity should be reclassified as a private foundation. As detailed in the declaration of Rogelio Vera, group manager for CP&C, IRS specialists are trained to use, and do regularly use, Schedule B information in the course of evaluating whether public charities should be reclassified as private foundations. (*See* Vera Decl. ¶ 14, attached as ex. 3.) Mr. Vera also states that IRS specialists are commonly asked to confirm whether contributions from particular donors appear on Schedule B. (*Id.* ¶ 6.) Mr. Vera supervises specialists who respond to requests from IRS examiners in other divisions (Small Business / Self Employed, or SBSE; and Large Business & International, or LB&I), and thus examiners from these divisions are able to refer to Schedule B information in the course of other exams. (*Id.* ¶¶ 4-5.)

The declaration of Lynn Brinkley, Director of Exempt Organization Examinations of TEGE, also demonstrates that Schedule B information is relevant to determining whether to proceed with an examination of a § 501(c)(3) organization. (*See* Brinkley Decl., attached as ex. 1.) As Ms. Brinkley explains, her office receives tax returns from CP&C and evaluates those returns to determine whether to proceed with an audit and, if so, which issues should be the focus of the audit. (*Id.* ¶¶ 5, 6, 11, 12.) The Internal Revenue Manual instructs examiners to review the return and all schedules, including Schedule B, to identify "large,

unusual or questionable items," including those that can affect tax-exempt status and private foundation status. (*Id.* ¶¶ 6-8.) As discussed above, Schedule B information can bear directly on these issues. Indeed, as Ms. Brinkley explains, exempt organization examiners are specifically trained to review Schedule B as part of their determination whether to commence an examination and in developing the examination plan. (*Id.* ¶¶ 41-47 (citing exhibit 1.D). *See, e.g.,* Training Materials, ex. 1.D to Brinkley Decl., at F5-17, p.91 (providing example in which examiner verifies contribution against Schedule B information); *id.* at F5-30, pp.104-06 (directing examiner to review Schedule B for large, unusual, or questionable items and providing example).)

The United States also submits the declaration of Internal Revenue Agent Steven Fager, an experienced agent with TEGE (attached as ex. 2). In his declaration, Mr. Fager describes how he evaluates returns of § 501(c)(3) organizations to determine whether to recommend that the organizations be subject to audit. (*Id.* ¶¶ 4-12.) Mr. Fager reviews Schedule B information as part of evaluating whether to recommend audit and identifying issues to be the focus of any recommended audit. (*Id.*) Mr. Fager specifically states that he regularly evaluates returns to identify whether excise taxes may apply and whether the organization is being used to serve private interests (which may result in a loss of tax exemption), and that Schedule B information has helped him evaluate returns. (*Id.* ¶¶ 33-34.)[3]

[3] The confidentiality provisions of the Internal Revenue Code generally prohibit Mr. Fager (or any other IRS employee) from disclosing details regarding any specific return he has examined. *See* 26 U.S.C. § 6103(a).

These declarations demonstrate that Schedule B information is used in several stages of the IRS's process for evaluating returns of § 501(c)(3) organizations for compliance with the Internal Revenue Code. Congress was correct in its judgment that this information would be useful in monitoring compliance with the requirements of § 501(c)(3).

B. The substantial-contributor reporting requirement is narrowly tailored because the alternatives are insufficient to accomplish Congress's purpose.

The substantial-contributor reporting requirement is narrowly tailored to achieving Congress's purpose of providing information to the IRS to enable it to detect noncompliance and tax evasion with respect to 501(c)(3) organizations. Narrow tailoring must be viewed in light of the alternatives available to Congress. In this case, the alternatives are insufficient to achieve Congress's purposes.

Congress sought to ensure that the IRS has access to information sufficient to permit the IRS to identify § 501(c)(3) organizations that are being misused for private inurement purposes. Accordingly, Congress required § 501(c)(3) organizations, as a condition of the § 501(c)(3) exemption from the income tax and for tax-deductibility for contributions, to disclose the identities of those individuals who may have the most influence over the organization and who are entitled to the largest tax deductions. Any substitute that relies on the IRS first identifying organizations that may not be operating in accordance with the requirements of § 501(c)(3) and then seeking their specific contributor information is insufficient because the information itself helps to identify those organizations in the first place.

Other information-gathering mechanisms available to the IRS would not serve the same goal. For example, the IRS has the authority to issue a summons seeking information, including substantial-contributor information, if certain requirements are met. 26 U.S.C. § 7602(a). But as discussed above, Schedule B information is useful in identifying which organizations to investigate. Absent that information, the IRS would not necessarily know which organizations to summons. And without knowing the identity of substantial contributors, the IRS would not be able to identify certain transactions as potentially problematic and therefore would not be able to identify which organizations to investigate.

Other substitutes for Schedule B would not resolve Buckeye's concerns. For example, instead of requiring § 501(c)(3) organizations to disclose their substantial contributors, Congress could require taxpayers who claim a deduction for contributions to tax-exempt organizations to disclose the recipients of those contributions on their tax returns.[4] But this would not reduce any possible burden on Buckeye's supporters' right to assemble anonymously.

Exacting scrutiny does not require least restrictive means, just that the disclosure regime be narrowly tailored to achieve its purpose. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Here, Congress determined that reporting substantial-contributor information was a narrowly

[4] Currently, taxpayers are required to report the total amounts of cash and non-cash contributions on Schedule A to Form 1040, but are not required to report the recipient organizations. Taxpayers are required to retain documentation in case of IRS audit. *See* 26 C.F.R. § 1.170A-13 (describing substantiation requirements).

tailored way to ensure that taxpayers and § 501(c)(3) organizations do not abuse the tax benefits that Congress made available.

Further, as discussed above, the substantial-contributor reporting requirement serves a deterrent function by ensuring that taxpayers are aware that the IRS has information that aids in detection of private inurement and false charitable contribution deductions and the assessment of excise taxes. A narrower provision would not accomplish these goals.

Nor is this reporting over-inclusive. Section 501(c)(3) organizations are subject to restrictions on private inurement, and all substantial contributors to these organizations, who receive tax deductions for their contributions, are potential recipients of any private inurement or benefit. Accordingly, Congress required all of these organizations to disclose their substantial contributors.[5] The requirement does not apply to any organizations other than those that are subject to the rules that Congress sought to enforce.

Indeed, Congress instituted the substantial-contributor requirement because it concluded that existing reporting was insufficient. As the Joint Committee on Taxation explained: "The Congress concluded that experience of the past two decades indicated that more information is needed on a more current basis from more organizations . . . ." JCT, General Explanation of the Tax Reform Act of 1969 at 52-53, *available at* https://www.jct.gov/publications/1970/jcs-16-70/; *see id.* at 55

[5] Churches and certain other organizations are excepted from filing exempt organization annual information returns and thus are not subject to the substantial-contributor reporting requirement. 26 U.S.C. § 6033(a)(3).

(observing that Congress made additional changes to exempt organization reporting because "[t]he Congress believed that the Internal Revenue Service was handicapped in evaluating and administering the tax laws by the lack of information with respect to many organizations"). In other words, Congress concluded based on twenty years of experience that the other options available to the IRS were inadequate.

III. The IRS's focus on confidentiality minimizes any burden on Buckeye's contributors' First Amendment rights.

Substantial-contributor information is subject to strict statutory confidentiality provisions, and the IRS has a strong track record of complying with those laws, minimizing any burden on contributors' First Amendment rights. As the Supreme Court explained in *Americans for Prosperity*, confidentiality reduces the burden for purposes of determining whether a disclosure regime infringes on the First Amendment. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021). Congress's decision to protect substantial-contributor information with strict confidentiality laws, and the IRS's excellent record in that respect, support a determination that the substantial-contributor reporting requirement presents a minimal burden on First Amendment rights.[6]

[6] Buckeye's motion for summary judgment tries to avoid facts and statistics, which show a solid track record of the IRS safeguarding Schedule B information. Instead, it sensationalizes and misstates the facts of an outlier example, *National Org. for Marriage v. United States*, 807 F.3d 592 (4th Cir. 2015). In that case, the IRS improperly released Schedule B information for a tax-exempt organization. *Id.* at 595. Buckeye asserts that "the leaker understood and intended for the confidential information to be broadly published," (Pl. SJ Mem. at 7 & n.2, ECF no. 36, PageID.171), but the District Court held that the accusation of willful disclosure

A. Congress has protected substantial-contributor information with strict confidentiality rules, supported by civil and criminal penalties for improper disclosure.

As discussed in the United States' motion to dismiss, Congress has enacted strict laws regulating the disclosure of tax return information, including substantial-contributor information. While Forms 990 filed by public charities are generally required to be made available to the public, the names and addresses of substantial contributors to these organizations are not. 26 U.S.C. § 6104(b), (d). Strict criminal liability and civil penalties and a private right of action against the United States protect the confidentiality of this information. 26 U.S.C. §§ 7213, 7431.

B. The IRS has an excellent track record in maintaining the confidentiality of substantial-contributor information.

The experience of the past years demonstrates that the IRS has been very successful in maintaining the confidentiality of Schedule B information. As discussed in the declaration of Jennifer Jett, Director of Business Systems Planning, Shared Services, of TEGE (ex. 5), the IRS has developed computer systems that automatically identify and redact Schedule B information before the returns are made public. (*Id.* ¶ 8.) Ms. Jett supervises specialists who verify that the computer systems have correctly redacted Schedule B information by manually

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was "unfounded." *Nat'l Org. for Marriage*, 807 F.3d at 597 (quoting No. 13-cv-1225, 2014 WL 5320170, at *6 (E.D. Va. Oct. 16, 2014)); *see also Nat'l Org. for Marriage v. United States*, 24 F. Supp. 3d 518, 524 (E.D. Va. 2014) (observing that numerous sources of evidence "compel the conclusion" that the disclosure was accidental). While even accidental disclosure is unacceptable, the court rejected the charge that the disclosure was willful.

searching a statistically significant sample for Schedule B information. (*Id.* ¶¶ 9-14.) While this process is relatively new, Ms. Jett observes that, to date, her office has not found an instance in which the computers failed to redact Schedule B information. (*Id.* ¶ 17.) Ms. Jett also notes that she has been in her position for five years and, in that entire time, she is not aware of a single instance in which Schedule B information was not properly redacted before the returns were made public in accordance with 26 U.S.C. § 6104. (*Id.* ¶¶ 2, 18-19.)[7]

While no process is perfect, the IRS has a strong track record of maintaining the confidentiality of Schedule B information. Computer systems now automatically redact Schedule B information, specialists check samples to ensure that the redaction was done correctly, and the confidentiality rules are enforced by strict civil and criminal penalties and a private right of action for damages against the United States. In light of the IRS's record and these statutory protections, Buckeye cannot demonstrate that its donors face a reasonable probability of retaliation from third parties. While confidentiality does not eliminate the burden on First Amendment rights, it does lessen that burden, *Americans for Prosperity*, 141 S. Ct. at 2388. Here, the strict confidentiality rules that Congress has

[7] For context, the IRS received 218,516 Form 990 returns from § 501(c)(3) public charities in 2019. *See* Form 990 Returns of 501(c)(3)-(9) Organizations: Balance Sheet and Income Statement Items, by Internal Revenue Code Section, Tax Year 2019 at tbl. 3, *available at* https://www.irs.gov/statistics/soi-tax-stats-charities-and-other-tax-exempt-organizations-statistics. Buckeye asserts that more than one million organizations file Form 990 each year (Pl. SJ Mem. at 16, ECF no. 36, PageID.180), but Buckeye is including the large number of § 501(c)(3) organizations that file Form 990-N (the "e-Postcard"), not Form 990. Form 990-N is a very short form that many § 501(c)(3) organizations below a certain size can file in lieu of Form 990. *See* 26 C.F.R. § 1.6033-6. Form 990-N filers do not file Schedule B.

prescribed and the IRS's success in implementing those rules significantly reduce any First Amendment burden on Buckeye's contributors.

IV. A comparison to the regime at issue in *Americans for Prosperity* demonstrates why § 6033(b)(5) is not unconstitutional.

As discussed in the United States' motion to dismiss, *Americans for Prosperity Foundation v. Bonta* ("*AFP*"), 141 S. Ct. 2373 (2021), is not the controlling precedent because that case involved compelled disclosure of charities whose donors had First Amendment rights of association, which requires a different analysis. (*See* U.S. MTD at 25-27, ECF no. 21, PageID.81-83.) Indeed, the Supreme Court explicitly noted 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." *AFP*, 141 S. Ct. at 2389 (citations omitted). But even if *AFP* were the relevant law, a comparison of the facts in that case to those here demonstrates that § 6033(b)(5) would survive exacting scrutiny.

First, unlike Buckeye, the petitioners in *AFP* had shown past retaliation and a possibility of future retaliation. The Supreme Court observed that, at trial, the petitioners in *AFP* had demonstrated that "petitioners had suffered from threats and harassment in the past, and . . . donors were likely to face similar retaliation in the future if their affiliations became publicly known." *AFP*, 141 S. Ct. at 2381.

Here, by contrast, Buckeye has not alleged **any** prior retaliation and has not alleged that it is likely that its donors face future retaliation.[8]

Second, in contrast to the IRS's excellent track record of maintaining the confidentiality of Schedule B information, in *AFP*, the Supreme Court observed that the District Court had found that "California was unable to ensure the confidentiality of donors' information." *Id.* Accordingly, the District Court determined that donors "would be reasonably justified in a fear of disclosure" given California's record. *Id.* (internal quotation marks omitted). One plaintiff identified nearly 2,000 Schedule Bs posted to the internet, and the District Court observed that "the amount of careless mistakes made by the Attorney General's Registry is shocking." *Id.* (internal quotation marks omitted). By contrast, as discussed above, the IRS has shown its continuing commitment to enhancing safeguards by changing to an automated system, supported by human verification, to ensure that Schedule B information is not disclosed. Buckeye, unlike the petitioners in *AFP*, cannot show that its donors have a reasonable fear of disclosure.

Third, as discussed above, Schedule B information is used in the IRS's evaluation of tax returns, including to determine whether to audit tax returns, while in *AFP*, Schedule B information "will become relevant in only a small number of cases involving filed complaints." *Id.* at 2387 (record citation omitted). Because California used Schedule B information only after it had initiated an investigation,

[8] Buckeye mentions that it was subject to an IRS audit ten years ago but does not allege that its selection for audit was improper, nor would that constitute retaliation against its donors.

it could use other methods to obtain that information. *See id.* Thus, having Schedule B information at hand was simply a matter of "administrative convenience." *Id.* By contrast, the IRS is using Schedule B information to determine whether to begin an examination. The IRS uses this information to ensure the integrity of the tax system, not just for convenience.

AFP is distinguishable from the present case in all pertinent respects. In *AFP*, the Supreme Court held that California's collection of Schedule B information did not survive exacting scrutiny because California's administrative convenience did not justify indiscriminate collection in light of California's failure to keep the information confidential and in light of the availability of other adequate alternatives. Here, by contrast, Congress required reporting of this information to assist the IRS in monitoring compliance with the tax laws, an important government interest; other alternatives are inadequate substitutes because the IRS uses the information prior to initiating examinations; and the IRS has an excellent track record of maintaining confidentiality. Even if § 6033(b)(5) were subject to exacting scrutiny, the analysis in *AFP* demonstrates that it would be consistent with the First Amendment.

CONCLUSION

Congress allowed preferential tax treatment for organizations that meet certain criteria and for donors to those organizations. In exchange, those organizations are subject to certain restrictions on their operations and certain reporting requirements, including the substantial-contributor reporting requirement. This requirement is designed to provide the IRS with information

relevant to ensuring that organizations that opt to take advantage of this preferential tax treatment comply with the restrictions on operations required of the organizations.

Congress's decision to require this information reporting as a condition of these tax benefits is rational because the reporting relates directly to the proffered tax benefits and because it does not regulate conduct outside the program. The requirement thus does not offend the First Amendment.

Even were the requirement analyzed under the regime applicable to compelled disclosure, however, it would still be constitutional. Schedule B information is substantially related to a crucial government interest – maintaining the integrity of the income tax system. The evidence demonstrates that the IRS has procedures to take this information into account when reviewing tax returns for possible examination. And because this information is used before returns are selected for examination, the summons process is not an adequate substitute. Congress has minimized the burden on contributors by protecting Schedule B information with strict confidentiality protections. The substantial-contributor reporting requirement is narrowly tailored to accomplish Congress's purpose – enabling the IRS to monitor compliance with the requirements of § 501(c)(3) – and it is thus consistent with the First Amendment. The United States is entitled to summary judgment.

Respectfully submitted,

DAVID A. HUBBERT
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