UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

THE BUCKEYE INSTITUTE,

Plaintiff,

v.

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

Defendants.

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

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

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

UNITED STATES' RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Buckeye is not entitled to summary judgment because it has not demonstrated that it has standing to pursue its claim. Buckeye's legal theory for why it has standing is flawed, and accordingly, this case should be dismissed. But even assuming that its theory were valid, Buckeye has failed to produce any admissible evidence that supports its standing to sue. Absent such evidence, Buckeye is not entitled to summary judgment. Even if the Court reaches the merits of Buckeye's motion, it should be denied for two reasons: *First*, for reasons stated in detail in the United States' motion for summary judgment (ECF no. 43), § 6033(b)(5) is a rational condition on an opt-in benefit; and even were it subject to exacting scrutiny, it would not offend the First Amendment because the collection of Schedule B information is substantially related to an important government interest and § 6033(b)(5) is narrowly tailored to meet that need. *Second*, Buckeye has failed to produce evidence of a reasonable probability that its donors face retaliation necessary to establish an as-applied First Amendment violation.

ANALYSIS

I. Buckeye's motion should be denied because Buckeye has failed to allege or demonstrate that it has standing.

Buckeye is not entitled to summary judgment because its legal theory supporting its standing to sue is flawed, and because it has failed to introduce evidence sufficient to show that it has standing even under its flawed theory. "Federal courts must determine that they have jurisdiction before proceeding to the merits." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (citing *Steel Co. v. Citizens for*

Better Environment, 523 U.S. 83, 94-95 (1998)). Because Buckeye's legal theory of standing is flawed, the Court should dismiss this case. But even if the Court accepted Buckeye's legal theory, Buckeye's motion for summary judgment should be denied because Buckeye has failed to support that theory with admissible evidence.

A. This case should be dismissed because Buckeye has not alleged facts sufficient to demonstrate standing.

As discussed in the United States' briefing in support of its motion to dismiss, Buckeye's legal theory of standing is fundamentally flawed. Buckeye has not alleged a cognizable injury-in-fact, nor has it alleged facts that would establish causation or redressability. (*See* U.S. MTD at 6, ECF no. 21, PageID.62.) Buckeye has not pleaded Article III standing, and so this case should be dismissed.

B. Buckeye has not produced admissible evidence to support its standing claim.

Even if Buckeye's legal theory of standing were sound, Buckeye would still not be entitled to proceed to the merits because it has failed to introduce admissible evidence to support that theory. "Standing has three elements: injury, causation, and redressability." *WCI, Inc. v. Ohio Dep't of Public Safety*, 18 F.4th 509, 515 (6th Cir. 2021) (citation omitted). Buckeye cites no admissible evidence to support any of these elements.

1. Buckeye has the burden of proof to show an injury-in-fact, causation, and redressability.

Buckeye has the burden to show that the elements of Article III standing are satisfied. Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be

supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To obtain summary judgment, Buckeye must show that there is no genuine dispute that the facts supporting its standing to sue are satisfied. *See* Fed. R. Civ. P. 56(a).

The requirements of Article III standing cannot be relaxed regardless of the substance of the case. Indeed, the Sixth Circuit recently rejected an argument that the standing requirements can be relaxed where the plaintiff asserts that First Amendment rights are being infringed. *See Davis v. Colerain Twp., Oh.*, 51 F.4th 164, 173 (6th Cir. 2022) ("Like many plaintiffs who cannot meet Article III's normal rules, she asks us to 'relax' those rules because her case involves a sensitive free-speech question and a restriction that risks 'chilling' speech. . . [W]e have repeatedly rejected similar claims that concerns about 'chilling' speech allow us to water down Article III's core constitutional components.") (citing *Phillips v. DeWine*, 841 F.3d 405, 417 (6th Cir. 2016); *McKay v. Federspiel*, 823 F.3d 862, 868-69 (6th Cir. 2016)). To obtain summary judgment, Buckeye must demonstrate by affidavit or other evidence that the standing requirements are satisfied.

2. Hearsay is inadmissible at summary judgment.

"It is well established that a court may not consider hearsay when deciding a summary judgment motion." *Tranter v. Orick*, 460 F. App'x 513, 514 (6th Cir. 2012) (*per curiam*) (citations omitted). Accordingly, "at summary judgment, hearsay 'must be disregarded.'" *M.J. v. Akron City Sch. Dist. Bd. of Ed.*, 1 F.4th 436, 446-47 (6th Cir. 2021) (quoting *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1189 (6th Cir. 1997)).

3. Buckeye's standing theory rests entirely on inadmissible hearsay.

Buckeye's only evidence in support of its organizational standing to sue is inadmissible hearsay. Buckeye seeks to demonstrate injury-in-fact, causation, and redressability by showing that it has supporters who donate less than they otherwise would because they fear retaliation if they become subject to the substantial-contributor reporting requirement. The sole evidence that Buckeye has submitted in support of its standing theory is a declaration from Robert Alt, President and CEO of Buckeye (ECF no. 36-1). Mr. Alt asserts that unnamed Buckeye contributors have "expressed concern" that they could be subject to retaliatory audits (*id.* at ¶ 11, PageID.187). Mr. Alt further states that some donors reduced their donations to avoid the substantial-contributor reporting requirement, and he provides a few details as to what these contributors said about their fears of reporting to the IRS and improper disclosure (*id.* ¶¶ 11-13, PageID.187-188).

But Mr. Alt's statements about what he was told by Buckeye contributors are pure hearsay. Mr. Alt is reporting the contents of out-of-court statements, and Buckeye relies on the truth of those statements to support its standing argument.[1] These statements are thus inadmissible hearsay. Mr. Alt also makes generalized assertions about why Buckeye's contributors have reduced their contributions (*id.* ¶ 15, PageID.188), but his only foundation for explaining the motivation behind

[1] Nor can Buckeye avoid the hearsay rule by claiming that the statements merely go to the state of mind of the contributors. It is their state of mind – their fear of reprisal – that is the matter asserted, and the out-of-court statements touted by Mr. Alt go to the truth of that matter.

their decisions is the same inadmissible hearsay. Putting aside the hearsay, Mr. Alt lacks a foundation to testify to the states of mind of unnamed contributors.[2]

Buckeye has thus introduced no admissible evidence to support its alleged injury-in-fact, causation, or redressability. Setting aside what Mr. Alt asserts he was told by contributors, Buckeye has produced no evidence that any Buckeye donor has reduced their contributions because of their fear of retaliation due to the substantial-contributor reporting requirement, nor any non-hearsay evidence that supports its contention that invalidating § 6033(b)(5) would redress its contributors' fears.[3] Nor does Buckeye's evidence – including Mr. Alt's statements – suggest that any fear of retaliation, if it exists, is anything more than subjective chill, which is insufficient to support standing. (*See* U.S. MTD at 9, ECF no. 21, PageID.65.)

Even if Buckeye's legal theory of standing were sound – and it is not – Buckeye has failed to identify admissible evidence supporting the factual predicates of that theory. Buckeye's motion for summary judgment should therefore be denied.

[2] The government appreciates that the unnamed contributors allegedly fear reprisal and that this fear is in tension with the need for their testimony. But the court system has mechanisms for protecting individuals who fear reprisal, including protective orders, submission of material under seal, and the use of pseudonyms. Buckeye has not sought to use any of these, nor has Buckeye shown that any donor faces an actual material risk of reprisal.

[3] Indeed, Mr. Alt claims that Buckeye's contributors stated they fear retaliation "if their names appeared on Buckeye's Schedule B *or were otherwise disclosed to the IRS*" (Alt. Decl. ¶ 11, ECF no. 36-1, PageID.187) (emphasis added), but even absent § 6033(b)(5), the IRS could still obtain donor identities via summons. Buckeye has thus not shown that § 6033(b)(5) specifically is the cause of the alleged harm, rather than a generalized fear of the IRS; nor has Buckeye demonstrated that invalidating § 6033(b)(5) would redress their concerns.

II. Were the Court to reach the merits of Buckeye's motion, it should deny the motion because Buckeye has not shown a reasonable probability of reprisal and because § 6033(b)(5) does not offend the First Amendment.

The Court need not reach the merits of Buckeye's summary judgment motion because Buckeye has not shown that it has standing. However, should the Court reach the merits, the motion should still be denied. For the reasons stated in the United States' motion for summary judgment, the statute is not unconstitutional, regardless of whether the Court applies rational basis or exacting scrutiny review. Moreover, Buckeye has not shown that its donors face retaliation, and thus it cannot show that the statute is unconstitutional as applied to it.

A. Even if Buckeye had standing and had shown the requisite harm, and even if § 6033(b)(5) were subject to exacting scrutiny, it would not violate the First Amendment.

The substantial-contributor reporting requirement is a reasonable condition on opt-in preferential tax status, and for that reason, it is constitutional. (*See* U.S. MTD at 12, ECF no. 21, PageID.68.) Even if it were a compelled disclosure regime subject to exacting scrutiny, however, it would still be constitutional. As discussed in the United States' motion for summary judgment (ECF no. 43), the IRS has an important need for Schedule B information and § 6033(b)(5) is narrowly tailored to achieve Congress's goals.

Buckeye bases its motion largely on quotes from IRS personnel who were discussing a different reporting requirement. As Buckeye details, until recently, the Treasury Department required certain other tax-exempt organizations, not just § 501(c)(3) organizations, to report their substantial contributors. 26 C.F.R.

§ 1.6033-2(a)(2)(ii)(F) (1971). Treasury recently amended the relevant regulations so that reporting is no longer required for entities other than § 501(c)(3) entities, because Treasury determined that, for those entities, the information was not necessary for efficient tax administration. 85 Fed. Reg. 31959, 31963 (May 28, 2020). Buckeye relies on Treasury statements discussing this change for its summary judgment motion. (*See* Pl. Mem. at 12-13, ECF no. 36, PageID.176-177.) For example, Buckeye cites to the preamble for the Treasury Regulations that revoked the substantial-contributor reporting requirement for non-501(c)(3) entities. (*E.g., id.* at 6, PageID.170 (citing 85 Fed. Reg. 31959)). But that guidance is specifically addressing reporting for organizations other than those described in § 501(c)(3). *See* 85 Fed. Reg. at 31963. The same is true of IRS Revenue Procedure 2018-38 (ECF no. 36-4, PageID.199); Buckeye cites the document to suggest that the IRS has no use for Schedule B information, but that document is specific to organizations "other than organizations described in § 501(c)(3)," *id.* at 1.

These statements, made in the context of reporting by other types of organizations, do not bear on the IRS's use of Schedule B information reported by § 501(c)(3) organizations. On the contrary, as detailed in the United States' motion for summary judgment, IRS procedures call for use of, and the IRS uses, Schedule B information. (*See* U.S. SJ Mem. at 8, ECF no. 43, PageID.485.) And contrary to Buckeye's assertions, IRS procedures call for Schedule B information to be used in selecting returns for examination, not just once an audit has commenced. Thus, the IRS cannot simply obtain this information through other means. As discussed in

the United States' motion, Schedule B information can be relevant to whether an organization is properly qualified as a Section 501(c)(3) organization, whether it is a private foundation as opposed to a public charity, whether its managers or substantial contributors are subject to excise taxes, and other issues. (*Id.*) There is simply no basis to conclude that because the IRS recently determined it does not need affirmative reporting of substantial contributor information for other organizations at this time, it therefore does not have an important need for that information from § 501(c)(3) organizations.[4]

Certainly, the evidence Buckeye cites does not demonstrate that there is no genuine dispute of material fact regarding the IRS's use of Schedule B information for § 501(c)(3) organizations. On the contrary, the United States' motion for summary judgment shows that Schedule B information is substantially related to an important government interest and that § 6033(b)(5) is narrowly tailored to achieve that goal. Accordingly, were the Court to reach the merits of this case, Buckeye's motion should be denied and the United States' motion for summary judgment should be granted.

B. Buckeye has not shown a reasonable probability that its donors face retaliation, and thus it has not shown that the statute is unconstitutional as applied to it.

Even if Buckeye had produced admissible evidence that potential donors had reduced their contributions, they still could not establish a First Amendment

[4] In addition, the § 501(c)(3) regime differs from the § 501(c)(4) regime in certain key ways, among them that § 501(c)(3) organizations may be treated as private foundations, *see* 26 U.S.C. § 509(a), and that contributions to § 501(c)(3) organizations can be deducted if the requirements are satisfied, 26 U.S.C. § 170(a).

violation absent evidence showing a "reasonable probability" of reprisal. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court considered challenges to several campaign finance laws, including a provision generally requiring any person who spends more than $10,000 on electioneering communications in a calendar year to file a publicly available disclosure statement with the FEC identifying all donors who contributed $1,000 or more. Applying exacting scrutiny, the Supreme Court held that this requirement as applied was consistent with the First Amendment. *Citizens United*, 558 U.S. at 366-67 (discussing 2 U.S.C. § 434(f), recodified as 52 U.S.C. § 30104(f)).

Just as Buckeye does here, Citizens United argued that disclosure requirements would chill donations by exposing their donors to retaliation. *Id.* at 370. The Supreme Court noted that the statute might be unconstitutional as applied "if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Id.* (citing *McConnell v. Fed. Elec. Comm'n*, 540 U.S. 93, 198 (2003)). But the Court held that Citizens United had not made the required showing: "Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation." *Id.* Thus, Citizens United had failed to show that compelled disclosure of its donors violated the First Amendment. *Cf. Americans for Prosperity v. Bonta*, 141 S. Ct. 2373, 2381 (2021) (noting factual finding that petitioners "had suffered from threats and harassment in the past, and

that donors were likely to face similar retaliation in the future if their affiliations became publicly known").

The same is true here. Buckeye has not even attempted to demonstrate that its donors or potential donors face a "reasonable probability" of retaliation. On the contrary, Buckeye has been filing Schedule B for years and has identified no instance in which a donor was subject to harassment or retaliation as a result. Thus, even if § 6033(b)(5) were a compelled disclosure regime – and it is not – Buckeye's as-applied claim would fail because Buckeye has not demonstrated a reasonable probability of retaliation.

CONCLUSION

"Article III . . . gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990) (citation omitted). Standing is not an afterthought – it is a core element of a plaintiff's claim. But Buckeye's memorandum of law does not even address its standing to sue, and its only evidence supporting its dubious standing theory is inadmissible hearsay. The Court need not reach the merits of Buckeye's summary judgment motion because Buckeye has not demonstrated that there is a Case or Controversy to be resolved.

But even if the Court reaches the merits, Buckeye's motion should be denied. The undisputed facts show that the IRS uses Schedule B information to further the purpose of effective tax administration and that § 6033(b)(5) is narrowly tailored to achieve that purpose. Moreover, there is no record evidence that Buckeye's donors

face a reasonable probability of retaliation. Absent such a showing, Buckeye cannot establish that § 6033(b)(5) is unconstitutional as applied to it. Buckeye is thus not entitled to summary judgment.

Respectfully submitted,

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