UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

THE BUCKEYE INSTITUTE,

Plaintiff,

v.

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

Defendants.

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

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

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

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

INTRODUCTION

Buckeye lacks standing to challenge the § 6033(b)(5) substantial-contributor reporting requirement because its alleged injury-in-fact, a reduction in contributions resulting from the subjective chill of potential contributors, is too speculative to constitute a cognizable harm and too attenuated to be fairly traceable to the statute. Any such reduction in contributions is traceable to the independent decisions by its contributors to reduce their contributions in response to their subjective fears of retaliation, not to the statute; and because Buckeye has not alleged an imminent risk of retaliation, Buckeye has not alleged a causal relationship between the statute and the harm. Absent causation and traceability, Buckeye cannot proceed. Buckeye attempts to remedy these problems by analyzing standing as if the harm is the reporting itself, but this is backward; the reporting is the alleged cause; the harm is the alleged reduction in contributions.

Regardless, Buckeye has failed to state a claim. The substantial-contributor reporting requirement is a reasonable condition on the award of tax benefits to organizations that choose to apply for § 501(c)(3) status (and to their contributors). It does not seek to regulate conduct outside the sphere of tax benefits to which it applies. Buckeye asserts that the requirement should be subject to exacting scrutiny because it is a mandatory reporting provision, but nothing about the statute is mandatory. Buckeye's argument to the contrary is based on a misreading of the applicable case law.

Because Buckeye lacks standing, and because it has failed to state a claim, this case must be dismissed.

ANALYSIS

I. Buckeye lacks standing to challenge § 6033(b)(5) because its alleged injury-in-fact – reduced contributions – is speculative, attenuated, and depends on the independent actions of third parties.

As discussed in the United States' opening memorandum, Buckeye lacks standing to challenge § 6033(b)(5). Its alleged injury-in-fact, the receipt of reduced contributions, lies at the end of a chain of speculative events and decisions of independent third parties. Buckeye's analysis misses the mark because Buckeye focuses on the required reporting, not the harm. There is no dispute that Buckeye would be subject to the reporting requirement (if it has substantial contributors); the issues are whether Buckeye has suffered an injury-in-fact because of that reporting requirement and, if so, whether that injury is fairly traceable to the requirement. Because Buckeye's alleged injury is too speculative to be cognizable, and because the alleged chain of causation is too attenuated for the injury to be fairly traceable to the statute, this case should be dismissed.

A. Buckeye wrongly conflates its alleged injury with the reporting requirement itself.

Buckeye's standing analysis improperly conflates its injury-in-fact with the reporting required by § 6033(b)(5). At times, Buckeye's analysis treats its injury-in-fact as the reporting itself rather than the harm that it alleges results from that reporting – reduced contributions. But reporting to the IRS is not an injury in itself; the injury must be what allegedly results from the reporting.

Buckeye's Complaint, and its memorandum of law, make clear that its alleged injury-in-fact is a reduction in contributions received. (Compl. ¶ 35; *see* Pl.

Mem. at 6, PageID.145 (identifying contributors' decision to stop giving to Buckeye or to give smaller contributions as resulting in an infringement on Buckeye's First Amendment rights)).

But Buckeye improperly analyzes standing as if the injury-in-fact were the reporting rather than the resulting reduction in contributions. For example, Buckeye alleges that the harm at issue is "inevitable." (Pl. Mem. at 7-9, PageID.146-148.) Buckeye appears to mean that the § 6033(b)(5) reporting requirement itself is inevitable and that that provides its standing. But the reporting is not the harm. There is nothing inevitable about Buckeye's supporters' alleged choice to reduce their contributions as a result of this requirement – that is their independent decision. And that independent decision cannot confer standing on Buckeye.

This problem runs throughout Buckeye's analysis of its standing. For example, Buckeye seeks to distinguish *Clapper* v. *Amnesty International*, 568 U.S. 398 (2013), on the ground that there, the "plaintiffs could not allege that their injury . . . was imminent or impending. . . . By contrast, § 6033(b)(5) mandates reporting. That is as imminent as harm can get." (Pl. Mem. at 10, PageID.150.) Buckeye again conflates the harm with the reporting requirement. Reporting of Buckeye's substantial contributors, while perhaps imminent, is not the harm that must be "imminent or impending" – the harm that must be imminent or impending is Buckeye's injury-in-fact, reduced contributions resulting from the threat of retaliation.

There is no dispute that Buckeye is subject to the reporting requirement; to demonstrate standing, Buckeye must show that it will suffer a cognizable injury as a result of that reporting requirement. That injury – in this case, reduced contributions – must be imminent or impending and must be fairly traceable to the statute. As discussed below, Buckeye cannot show that its harm is caused by or fairly traceable to § 6033(b)(5).

B. The alleged harm – reduced contributions resulting from contributors' fear of retaliation – is too attenuated, too speculative, and not fairly traceable to § 6033(b)(5).

A focus on the correct harm demonstrates that Buckeye's standing argument is premised on a highly attenuated chain of causation. Buckeye's argument that it has standing depends on these assertions:

1. Buckeye has supporters who would donate more to Buckeye, except
2. Those supporters fear that if they donate more than a threshold amount, then
3. Buckeye will disclose their identities to the IRS on Schedule B, and
4. The IRS will improperly retaliate against them, or
5. The IRS will fail to keep their information confidential (contrary to law), and
6. Third parties will retaliate against them, and
7. As a result, Buckeye's supporters have decreased their contributions to Buckeye.

There are two problems here. First, steps four, five, and six are highly speculative. Buckeye has alleged that steps one, two, and seven are true, and step three is the § 6033(b)(5) reporting requirement at issue in this case. But Buckeye has not alleged that there is a material risk of retaliation from the IRS or from third

parties, steps four and six; nor has it alleged that there is a material risk that the IRS will improperly disclose its contributors' information, step five.

Buckeye asks this Court to remedy its alleged harm by eliminating step three – striking down the § 6033(b)(5) reporting requirement as unconstitutional. But Buckeye has not alleged that all of the other steps – necessary steps for cognizable harm to occur – are imminent or impending. Because Buckeye has not alleged that steps four, five, or six are imminent, it is simply alleging that Buckeye's contributors are choosing to reduce their contributions due to their subjective fear.

As discussed in the United States' memorandum, harm resulting from subjective chill, without "'specific present objective harm or a threat of specific future harm,'" is not cognizable. (U.S. Mem. at 9-10, PageID.65-66 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).) "[A] general fear of the IRS is insufficient to establish that speech will be chilled." *United States v. Judicial Watch, Inc.*, 371 F.3d 824, 832-33 (D.C. Cir. 2004) (citations omitted). The danger that Buckeye alleges its supporters fear is a "hypothetical future harm that is not certainly impending," *Amnesty Int'l*, 568 U.S. at 416 (citations omitted). And as the Supreme Court held in that case, costs incurred to address hypothetical, non-imminent fears are not cognizable injuries that can support Article III standing. *Id.* Buckeye alleges harm resulting from its supporters' subjective fears of hypothetical, non-imminent future possibilities; this is insufficient to confer standing under *Amnesty International*.

Buckeye's response – that the harm is imminent because the statute requires

reporting – suffers from the conflation discussed above. Buckeye asserts that "no one disputes that the IRS will collect information about Buckeye's substantial contributors" (Pl. Mem. at 10, PageID.149), but this addresses only step three in its standing analysis. It is steps four, five, and six that lack any allegation of imminence; without such an allegation, Buckeye is simply alleging subjective chill.

The second problem with Buckeye's standing argument is that the injury, a reduction in contributions received, is not fairly traceable to § 6033(b)(5) because it depends on the decisionmaking of independent third parties. Specifically, the chain of causation runs through its contributors' independent decisions to reduce their contributions as a result of their subjective fear of retaliation, step two.[1] But as the Sixth Circuit said in *Association of American Physicians and Surgeons*: "Many cases thus hold that a plaintiff failed to establish that an injury was traceable to a defendant when the injury would arise only if some third party decided to take the action triggering the injury." 13 F.4th 531, 546 (6th Cir. 2021) (citations omitted). That is the circumstance here – Buckeye suffers reduced contributions only if its contributors choose to decrease their contributions.

Buckeye attempts to distinguish *Association of American Physicians* and other cases on the ground that the harm here is "inevitable," whereas the harms in

[1] Moreover, Buckeye alleges that its donors reduced their contributions after the IRS initiated an examination in 2013. (Pl. Mem. at 6, PageID.145 (citing Compl. ¶ 33).) In other words, an IRS examination, not the substantial-contributor reporting requirement, prompted the alleged reduction in contributions. Even if Buckeye were relieved of the reporting requirement, the IRS could still access information about Buckeye's contributors in an examination, as Buckeye acknowledges. (*Id.* at 22, PageID.161.) Buckeye thus has not shown that relieving it of the reporting requirement would redress its alleged harm.

that and other cases are more speculative (Pl. Mem. at 8, PageID.147), but again, this argument loses sight of the injury Buckeye has alleged – reduced contributions resulting from its contributors' subjective fear. Absent an allegation that IRS retaliation is imminent or impending, or that the IRS will imminently disclose their material to third parties who are then likely to retaliate against them, there is nothing inevitable about their contributors' subjective fears. The link between the reduced contributions and the statute is highly attenuated.

Buckeye observes that an injury is fairly traceable to a challenged action if the result is the "predictable effect" of the action (Pl. Mem. at 7-8, PageID.146-147 (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 1565-66 (2019))), but that underscores the lack of traceability.[2] Absent an allegation about the likelihood of retaliation, Buckeye's argument appears to be that regardless of how irrational its supporters' fears are, if they act on those fears, the statute is to blame for the consequences. This is not the law of standing. Given the strict confidentiality rules surrounding taxpayer return information (*see* U.S. Mem. at 5, PageID.61), the possibility that some contributors might nonetheless decide that the possibility of improper disclosure or retaliation, however remote, is sufficiently concerning so as to reduce their contributions to Buckeye is not a predictable effect.[3]

[2] Indeed, the fact that § 6033(b)(5) has been in place for fifty years and did not previously deter Buckeye's contributors (or else there would be no reductions at issue) strongly indicates that the cause of any reduction in Buckeye's support is neither a "predictable effect" of, nor fairly traceable to, the statute.

[3] Buckeye spends significant space in its brief discussing various improper IRS disclosures that have occurred over the past few decades but does not suggest that there is any material likelihood of improper disclosure. Buckeye cites a statement

Buckeye cites *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), but the analysis in that case demonstrates that Buckeye lacks standing here. The *Speech First* plaintiff had standing because the injury-in-fact was not merely fear that consequences could materialize later, but rather that the challenged action – investigation by a university "Bias Response Team" – "acts by way of implicit threat of punishment and intimidation to quell speech." *Id.* at 765. The Sixth Circuit held that the plaintiffs had standing because this implicit threat of punishment and intimidation was not merely speculative, but was objectively present. *Id.*

By contrast, Buckeye has not alleged that any consequences naturally flow from the IRS's collection of contributor identity information other than the subjective fear that its contributors allegedly feel. *Speech First* explicitly rejected this type of subjective fear as sufficient to support standing: "there must be something more than 'the individual's knowledge that a governmental agency was engaged in certain activities or . . . the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Id.* at 764 (quoting *Laird*, 408 U.S. at 11) (omission in *Speech First*). But that is all Buckeye has here – the allegation that its supporters are contributing less because of their fear that the

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that there have been at least fourteen unauthorized disclosures of Form 990 information over a ten-year period (Pl. Mem. at 5, PageID.144 (citing Compl. ¶ 25)) but does not contrast these against the millions of Forms 990 filed during this period. While even one improper disclosure is unacceptable, these numbers do not support an inference that improper disclosure is a material risk. Rather, they suggest that the alleged subjective reactions to isolated events are not the predictable effect of the substantial-contributor reporting requirement.

IRS might in the future take some other additional action (retaliation or improper disclosure). This is exactly the subjective chill that *Speech First* affirms does not constitute an injury-in-fact.

Simply put, Buckeye has not alleged that the IRS has taken or will take some specific action that will cause harm. "For purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact." *Morrison v. Board of Educ. of Boyd Cty.*, 521 F.3d 602, 609 (6th Cir. 2008). The IRS has done nothing here. The statute simply requires that Buckeye report information to the IRS. Absent an allegation that some action by the IRS – retaliation, improper disclosure, etc. – is imminent or impending, Buckeye's standing argument relies on pure subjective chill. The case law rejects pure subjective chill as sufficient to support standing. Buckeye thus lacks standing to challenge the substantial-contributor reporting requirement.

II. Buckeye has failed to state a claim because Section 6033(b)(5) has a rational relationship to the opt-in § 501(c)(3) program, and thus is not an unconstitutional condition.

As discussed in the United States' opening brief, the § 501(c)(3) program is an opt-in program, and thus the proper constitutional analysis is the unconstitutional conditions doctrine, not compelled reporting. No entity is compelled to seek § 501(c)(3) status; organizations such as Buckeye are free to engage in any lawful activities without becoming subject to the substantial-contributor reporting requirement simply by not applying for § 501(c)(3) status.

Buckeye's arguments to the contrary are incorrect. Buckeye does not (and cannot) dispute that it elected § 501(c)(3) status, nor does it dispute that § 501(c)(3)

status is opt-in, not a mandatory regime. Instead, Buckeye relies on a misreading of case law to suggest that the Supreme Court evaluates opt-in tax benefits as if they were mandatory. As discussed below, the law does not support this conclusion.

Buckeye predicates its arguments on the false premise that it has a right to the tax benefits at issue. It then argues that because of that right, any condition placed on those tax benefits is compulsory. But there is no constitutional right to preferential tax treatment. The substantial-contributor reporting requirement has a rational relationship to the opt-in § 501(c)(3) tax benefit regime, and thus Buckeye has failed to state a claim.

A. The § 501(c)(3) program is an opt-in tax benefit regime, and conditions on those benefits are analyzed under the unconstitutional conditions doctrine.

Buckeye cannot and does not argue that it is compelled to operate as a § 501(c)(3) organization. Section 501(c)(3) is a pure opt-in regime. Rather, Buckeye appears to argue that Supreme Court discussions of compulsory reporting regimes include opt-in regimes as well. But there is no support for this argument in Buckeye's main case, *Americans for Prosperity*, or other inapposite cases. There is no compelled reporting if there is no compulsion. Exacting scrutiny applies to compulsory reporting regimes, not opt-in government benefit programs.

1. Section 501(c)(3) is not mandatory; organizations such as Buckeye must affirmatively apply for § 501(c)(3) status.

As detailed in the United States' opening brief, § 501(c)(3) status is opt-in. Nothing compels organizations to apply for preferential tax treatment under § 501(c)(3). On the contrary, the law provides that no organization shall be treated

as a § 501(c)(3) organization unless it applies for that status (with limited exceptions inapplicable here). 26 U.S.C. § 508(a).

Simply put, there is nothing mandatory about § 501(c)(3) status. An organization can choose whether or not to receive the tax benefits that come along with that status, in return for becoming subject to the restrictions and requirements that Congress has placed on those benefits. There is no basis to suggest that § 501(c)(3) status is somehow compulsory.

2. *Americans for Prosperity* involved a mandatory reporting regime, not an opt-in tax benefit.

Buckeye's argument that the § 501(c)(3) program should be viewed as compulsory revolves around a misreading of the case law. Contrary to Buckeye's assertion, the Supreme Court treated the California law at issue in *Americans for Prosperity v. Bonta*, 141 S. Ct. 2373 (2021), as a mandatory reporting rule, not an opt-in tax benefit.[4] The Supreme Court in *Americans for Prosperity* described the California regime as compelled disclosure: "*In order to operate and raise funds in California*, charities generally must register with the Attorney General and renew

[4] Buckeye observes that the California rule at issue (11 Cal. Code of Reg. § 301) required charities to provide a copy of their federal Form 990 (Pl. Mem. at 13, PageID.152), but concludes that "if the IRS did not require disclosure, neither did California." (*Id.*) This was incorrect as of when the case was filed. At that time, the regulation provided: "A charitable organization that is not exempt from taxation under federal law shall use Internal Revenue Service Form 990 to comply with the reporting provisions of the Supervision of Trustees and Fundraisers for Charitable Purposes Act." That is, the regulation required all charities, not just tax-exempt charities, to report their substantial contributors. The regulation was amended during the litigation to permit taxable charities that file IRS Form 1120 with the IRS to file that form with California as well; that form does not require reporting of contributors. However, the Supreme Court treated the regulation as compulsory, as it was when the case was filed.

their registrations annually." 141 S. Ct. at 2379-80 (emphasis added). The Court thus described the disclosure requirement as a condition of operation, not of any tax benefit or other subsidy. Indeed, Buckeye even cites language from *Americans for Prosperity* in which the Court observed, "California's disclosure requirement . . . can prevent charities from operating in the State altogether." (Pl. Mem. at 13, PageID.152 (quoting U.S. Mem. at 26, PageID.82 (quoting *Americans for Prosperity* at 2389)).) The Court specifically described the California law as compulsory; the § 501(c)(3) tax benefit regime simply does not operate in that way. There is no support in the opinion for Buckeye's proposed rule that opt-in tax benefits are evaluated under the same standard.

To the contrary, the Supreme Court has rejected the proposition that an opt-in tax benefit can be viewed as compulsory, even if the tax benefits are significant. *See, e.g., Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983) ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'") (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)); *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l*, 570 U.S. 205, 214 (2013) (same) (citing *Regan*).

Buckeye cites two other Supreme Court cases as evidence that the Supreme Court treats optional benefit programs as mandatory compulsion, but neither stands for such a proposition. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*"), the Supreme Court analyzed a Colorado requirement that proponents of a ballot initiative report the names and addresses of

all paid circulators. *Id.* at 186. The case is not analogous. In *ACLF*, the Supreme Court was addressing a law that directly regulates a constitutionally protected activity, pursuing a ballot initiative, and so the Court applied exacting scrutiny. The laws were mandatory – a citizen could not engage in that constitutionally protected activity without becoming subject to the statutory conditions. Here, organizations such as Buckeye are free to engage in the constitutionally protected activity at issue – private association – without becoming subject to the substantial-contributor reporting requirement. It is only if they choose to apply for preferential tax status that they become subject to the reporting requirement.

Buckeye also cites *Shelton v. Tucker*, 364 U.S. 479 (1960), but nothing in *Shelton* suggests that the Court applied a more stringent standard of review because it viewed the plaintiff as having chosen to remain a teacher following passage of the new law at issue.[5] The opinion does not even use the term "exacting scrutiny," let alone discuss why that level of review is appropriate. But cases involving public employees have long held that they cannot be dismissed for political views or membership in associations. *See, e.g., Slochower v. Bd. of Higher*

[5] In *Shelton*, the Court addressed an Arkansas statute that required teachers employed by public schools to file an affidavit listing all organizations to which they belonged or supported. *Id.* at 480. The statute's purpose was to respond to "the decisions of the United States Supreme Court in the school segregation cases," *id.* at 481 n.1 (quoting Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958). The district court in the same proceeding had invalidated another law barring any member of the NAACP from working for the state. *Id.* at 484 n.2; *see Shelton v. McKinley*, 174 F. Supp. 351, 360 (E.D. Ark. 1959). There were no restrictions on the public disclosure of the teachers' information, and segregationists had announced their intention to disseminate the information. (Brief for Petitioners, 1960 WL 98558, at *17.)

Ed. of City of N.Y., 350 U.S. 551, 555-59 (1956) (reversing professor's dismissal due to his refusal to deny being a member of the Communist Party); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (striking down loyalty oath for state employees because it did not differentiate between innocent and knowing membership in subversive organizations). *Cf. Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (discussing balance of First Amendment rights of public employees against state interest in regulating speech). And jurisprudence has recognized that the consequences to an individual of "opting out" of employment can be extraordinarily significant, especially in response to a law intended to root out those with unpopular views. *See, e.g., Wieman*, 344 U.S. at 190-91 ("There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds."). The possibility that a teacher might "opt out" by abandoning their career thus received no consideration in *Shelton*.

By contrast, numerous Supreme Court cases analyze opt-in regimes as optional, not compulsory. *See, e.g., Taxation With Representation*, 461 U.S. at 544; *United States v. Am. Library Ass'n*, 539 U.S. 194, 212 (2003) (plurality opinion) (upholding requirement that libraries install filtering software as a condition of federal funding: "To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance."); *Agency for Int'l Dev.*, 570 U.S. at 214 ("As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds.") (citation omitted). These cases, and those cited by Buckeye, demonstrate that compulsory regimes are analyzed

differently from opt-in benefit programs. There is no basis in the law to support Buckeye's suggestion that opt-in tax benefit programs are treated as compulsory for constitutional purposes.

B. There is no right to receive tax-deductible contributions.

The constitutional right that Buckeye alleges is infringed is its right to free association, not a right to receive contributions that the contributors may deduct on their taxes. "Deductions are a matter of grace and Congress can, of course, disallow them as it chooses." *Commissioner v. Sullivan*, 356 U.S. 27, 28 (1958).

While Buckeye correctly asserts that a § 501(c)(4) affiliate would not help Buckeye receive tax-deductible contributions, Buckeye's receipt of tax-deductible contributions is not the issue. Forming a § 501(c)(4) affiliate would allow Buckeye's supporters to support Buckeye and its mission without becoming subject to the substantial-contributor reporting requirement (albeit their contributions would not be tax-deductible). Buckeye asserts that this would not solve the problem facing it and its § 501(c)(3) donors (Pl. Mem. at 15, PageID.154), but this presumes that the problem is the inability to get a tax deduction while avoiding reporting. There is no such right. The alleged problem is infringement on the right to associate freely, not the right to receive tax deductions while doing so. A § 501(c)(4) affiliate would permit Buckeye supporters concerned about the substantial-contributor reporting requirement to support Buckeye without becoming subject to that requirement.

C. The substantial-contributor reporting requirement is not an unconstitutional condition on § 501(c)(3) tax benefits.

As discussed in the United States' opening brief, the substantial-contributor

reporting requirement is a reasonable condition on the tax benefits that Congress made available to charitable organizations that elect § 501(c)(3) status. (*See* U.S. Mem. at 12, PageID.68.) There is a clear relationship between allowing deductions for contributions and requiring reporting to the IRS of the identities of those who receive the largest deductions and can exert the most influence over the organization. The reporting requirement provides the IRS with information directly relevant to administration of the charitable contribution deduction and to ensuring that § 501(c)(3) organizations operate consistently with the statute; in addition, provision of that information to the IRS itself increases tax compliance.[6]

Buckeye's arguments to the contrary are meritless. Buckeye argues that the reporting rule "operates as a restriction on Buckeye itself" because it "hinders and undermines Buckeye's associational rights" (Pl. Mem. at 18, PageID.157), but this assumes the conclusion. The Sixth Circuit directs courts to ask "whether the condition directly relates to the benefit offered or instead 'reaches beyond' that benefit to regulate unrelated constitutional rights." *Ostergren v. Frick*, 856 F. App'x 562, 571 (6th Cir. 2021). Here, the condition does not "reach beyond" the tax benefit – it simply requires that the identities of those who receive the largest deductions be reported to the IRS, the agency charged with administering those tax deductions and tax-exempt status (and with keeping that information confidential). In no way

[6] Buckeye objects that this argument relies on material outside the Complaint (Pl. Mem. at 19 n.4, PageID.158), but to the extent they are objecting to the citations in the United States' brief to academic work (U.S. Mem. at 20 n.8, PageID.76), the Court can take judicial notice under Rule 201(c)(2) of the Federal Rules of Evidence that information reporting increases tax compliance.

does § 6033(b)(5) regulate Buckeye's activities at all, let alone in a manner unrelated to the tax benefits at issue.[7]

Buckeye also suggests that the United States' legal theory "would allow Congress to leverage its power to provide tax exemptions to wholly undermine the ability of organizations espousing positions or policies unpopular in the halls of Congress to participate equally in the marketplace of ideas" (Pl. Mem. at 19-20, PageID.158-159), but the substantial-contributor reporting requirement applies to all similarly situated organizations without regard to what positions or policies they espouse. This would be a very different case if the law applied only to organizations that advanced certain political or religious positions. Section 6033(b)(5) does not.

Buckeye's argument that the substantial-contributor reporting requirement cannot survive rational basis review misconstrues that standard. In rational basis review, "the 'burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). Buckeye asserts that § 6033(b)(5) "serves no purpose" because "the IRS can obtain

[7] Buckeye contrives a hypothetical in which Congress seeks to make all taxpayer data public as a condition of claiming any tax benefit (Pl. Mem. at 19, PageID.158), but the hypothetical is unhelpful in resolving the current litigation. Buckeye's argument confuses reporting to the IRS with disclosure to the public. The statute at issue here requires only reporting to the IRS, not public disclosure. (Taxpayers are required to report all kinds of information to the IRS to claim deductions, credits, and exemptions. None of that information is disclosed to the public, just as Schedule B information is not disclosed to the public.) Perhaps there are some tax benefits for which Congress might reasonably require that claimant information be publicly disclosed. Perhaps there are others for which public disclosure would serve no purpose, and thus would not survive rational basis review. Suffice to say, this hypothetical is too vague and distant from the facts of this case to shed light here.

any information it needs through other means," and thus cannot survive rational basis review. (Pl. Mem. at 22-23, PageID.161-162.) But this is an argument about tailoring, not rational basis. The substantial-contributor reporting requirement is the approach that Congress deemed appropriate to address its concerns with abuses of the tax benefits provided to § 501(c)(3) organizations and their donors. So long as it is a rational way to approach the problem – and it is – there is no basis for Buckeye to ask this Court to strike down the law because Buckeye believes that Congress could have accomplished its purposes differently.

Finally, Buckeye's cursory attempt to distinguish *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003), is meritless. Buckeye asserts that the case was decided "before *AFPF* held that exacting scrutiny applies to disclosure regimes premised on tax-exempt status." (Pl. Mem. at 24, PageID.163.) But as discussed above, *Americans for Prosperity* held nothing of the sort. The California law at issue in that case had no connection to taxation, and as challenged, it applied to all charitable organizations seeking to operate in the state, whether or not they sought tax-exempt status. The decision explicitly observes 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." *Americans for Prosperity*, 141 S. Ct. at 2389 (citations omitted). There is no foundation for Buckeye to assert that the case decided an issue that was explicitly carved out from the scope of its decision.

Buckeye also seeks to distinguish *Mobile Republican Assembly* on the ground

that the posture in that case was whether the Anti-Injunction Act applied, but this distinction is irrelevant. The facts of the case are closely analogous to those presented here – an organization that receives preferential tax treatment challenged a statute requiring it to report its contributors as a condition of that treatment. *Mobile Repub. Assem.*, 353 F.3d at 1359. The organization advanced arguments similar to those put forth by Buckeye here. And the court rejected those arguments: "Congress has enacted no barrier to the exercise of the appellees' constitutional rights. Rather, Congress has established certain requirements that must be followed in order to claim the benefit of a public tax subsidy. Any political organization uncomfortable with the reporting of expenditures or contributions may simply decline to register under section 527(i) and avoid these requirements altogether." *Id.* at 1361. The same is true of Buckeye – if it had been uncomfortable with the substantial-contributor reporting requirement, it need not have accepted the tax benefits. And as suggested in *Taxation With Representation*, Buckeye can create a § 501(c)(4) affiliate to support its activities and exempt concerned donors from the substantial-contributor reporting requirement. As the Eleventh Circuit observed: "Section 527(j) merely places conditions on private organizations who voluntarily seek a *federal* tax subsidy, something well within the taxing authority conferred upon Congress." *Id.* at 1363 n.7. Similarly, Section 6033(b)(5) merely places a condition on private organizations who voluntarily seek a federal tax subsidy, and this condition is well within Congress's taxing authority. The Eleventh Circuit's reasoning applies equally here.

CONCLUSION

This case must be dismissed because Buckeye lacks standing to challenge the substantial-contributor reporting requirement. It has not alleged that its supporters face imminent retaliation (or even any material risk of retaliation): rather, its theory of harm is that its supporters' fears of that retaliation have caused them to reduce their contributions. Any harm Buckeye has suffered is caused by pure subjective chill of independent actors, not in response to any imminent consequences of government action. Subjective chill, standing alone, does not constitute causation. And any harm to Buckeye results from its supporters' independent decisions to reduce their contributions. Buckeye suggests that these reductions are the predictable result of the statute, but the statute has been in place for many decades with no such challenge, strongly indicating that any such decisions are traceable to subjective perceptions that have changed over time.

Regardless, Buckeye has failed to state a claim. The § 501(c)(3) regime is an opt-in tax benefit program, and so conditions on those benefits are analyzed under the unconstitutional conditions doctrine. Buckeye's arguments to the contrary are inconsistent with the text of the law and with controlling case law, including *Americans for Prosperity*. The substantial-contributor reporting requirement is a rational way for Congress to provide the IRS with information relevant to the § 501(c)(3) program and the § 170 tax deduction, is viewpoint-neutral, and does not regulate conduct outside the program. It is thus constitutional.

Respectfully submitted,

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