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MWeisbuch
DJ# 5-58-12861
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May 12, 2026

Via CM/ECF

Kelly L. Stephens
Clerk of Court
U.S. Court of Appeals for the 6th Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: *Buckeye Institute v. IRS, et al.*, No. 25-3170 (6th Cir.)
Response to Fed. R. App. P. 28(j) letter regarding *First Choice Women's Res. Ctrs., Inc. v. Davenport*, No. 24-871, 2026 WL 1153029 (Apr. 29, 2026)

Dear Ms. Stephens:

The Supreme Court's decision in *First Choice Women's Resource Centers., Inc. v. Davenport*, No. 24-781, 2026 WL 1153029 (Apr. 29, 2026), does not support applying exacting scrutiny here.

First Choice addressed standing to challenge a compelled disclosure (there, via subpoena), not tiers of scrutiny for a condition on a voluntary subsidy. *See* 2026 WL 1153029, at *3. Buckeye nevertheless relies on a statement describing *Americans for Prosperity v. Bonta*, 594 U.S. 595 (2021):

> any demand for donor information, we said, must overcome heightened First Amendment scrutiny.

First Choice, 2026 WL 1153029, at *7. In context, that statement addresses compelled disclosures. *AFP* itself distinguished the "condition of federal tax-exempt status" at issue. 594 U.S. at 618.

By contrast, courts have not subjected content-neutral administrative conditions on voluntary subsidies to heightened scrutiny. Whereas *First Choice* highlighted the burden when the government requires disclosure or "den[ies] benefits to an organization based on its message," 2026 WL 1153029, at *6, the Supreme Court upheld a content-neutral reporting requirement as "incidental" to Congress's mail subsidy policy, *Lewis Pub. Co. v. Morgan*, 229 U.S. 288, 313-316 (1913); *accord The Enterprise, Inc. v. United States*, 833 F.2d 1216, 1223-1226 (6th Cir. 1987) (applying *Lewis Publishing* and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), to uphold another condition on mail subsidies).

Similarly, courts have upheld administrative requirements that "ensure the integrity of the federally funded program," *Rust v. Sullivan*, 500 U.S. 173, 198 (1991), or "help[] to carry out these programs," *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003), without applying heightened scrutiny. There is even less reason for heightened scrutiny when, unlike in *First Choice*, the recipient can use a "dual structure" to remain anonymous when outside the scope of a (double) subsidy program. *Regan*, 461 U.S. at 544.

At oral argument, no judge of this Court suggested the First Amendment applies differently to Congress. The questioning Buckeye cites merely underscored that Congress's longstanding determination with respect to this requirement is consistent with the above-described principles and passes muster as a matter of law under either level of scrutiny.

Sincerely yours,

/s/ Michael Weisbuch
Michael Weisbuch
Senior Counsel
Office of the Associate Attorney General

The body of this letter contains 348 words.

cc: All counsel (via CM/ECF)