UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

THE BUCKEYE INSTITUTE,
Plaintiff,
vs.
INTERNAL REVENUE SERVICE, *et al.*,
Defendants.

Civil Action No. 2:22-cv-04297

Hon. Michael H. Watson,
United States District Judge

Hon. Elizabeth P. Deavers,
United States Magistrate Judge

**THE BUCKEYE INSTITUTE'S BRIEF IN OPPOSITION TO MOTION TO DISMISS**

## INTRODUCTION

Congress requires that tax-exempt organizations like The Buckeye Institute disclose the identities of their substantial contributors. In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) ("*AFPF*"), the Supreme Court held that laws requiring such disclosure must overcome exacting scrutiny. No one seems to believe that the disclosure requirement Buckeye challenges can satisfy that standard. For good reason: The Supreme Court's opinion in *AFPF* invalidating California's law—which mandated disclosure of the same donor information the IRS requires—applies with equal force here. So Defendants (collectively, "the IRS") all but ignore that standard and instead argue that the Court should adopt a more deferential review that applies in other, unrelated spending contexts.

The Court should decline the IRS's invitation to chart its own path. *AFPF* makes clear that disclosure rules like the one at issue must meet exacting scrutiny. The

Court should thus deny the IRS's motion.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

Several types of organizations are exempt from taxation under 26 U.S.C. § 501(c). One exemption, found in § 501(c)(3), applies to [c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." To qualify for 501(c)(3) status, a corporation must meet that definition and comply with other rules and restrictions. A 501(c)(3) organization, for example, cannot devote a "substantial part" of its activities to lobbying. *Id.* But generally speaking, Congress opened 501(c)(3) status to a wide variety of charitable and educational purposes.

The government also requires 501(c)(3) organizations to disclose the identity of donors providing significant financial support. Under 26 U.S.C. § 6033(b), "Every organization described in section 501(c)(3) . . . shall furnish annually information, at such time and in such manner as the [Treasury] Secretary may by forms or regulations prescribe, setting forth . . . the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors." A "substantial contributor" includes "any person who contributed or bequeathed an aggregate amount of more than $5,000 to the private foundation, if such amount is more than 2 percent of the total contributions and bequests received by the foundation." 26 U.S.C. § 507(d)(2)(A).

The IRS implements § 6033(b)(5) by requiring 501(c)(3) organizations to annually file a Form 990, "Return of Organization Exempt From Income Tax." Complaint, ECF No. 1 at PageID 5, ¶ 17. Schedule B of that form requires 501(c)(3) organizations to report the names and addresses of all persons who contribute the greater of $5,000 or 2 percent of the total contributions received by the organization during the tax year. *Id.* at PageID 5, ¶ 18 (citing Internal Revenue Serv., U.S. Dep't of the Treasury, OBN No. 1545-0047, Schedule of Contributors (2021), https://www.irs.gov/pub/irs-pdf/f990ezb.pdf). Organizations that fail to provide complete or accurate information on their Schedule B are subject to civil penalties and revocation of their 501(c)(3) status. 26 U.S.C. §§ 6652(c)(1), 6033(j)(1)(B). Penalties can amount to $10,000 or 5 percent of the organization's gross receipts for the year. *Id.* § 6652(c)(1)(A).

Not all 501(c) organizations must disclose their substantial contributors to the IRS. By statute, the rule only applies to 501(c)(3)s. But for almost 50 years, the IRS compelled the same disclosure from other 501(c) organizations by regulation. That ended in May 2020, when the IRS eliminated its requirement that § 501(c) organizations—other than those governed by § 501(c)(3)—disclose the names and addresses of their substantial contributors. *See* Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959, 31966 (May 28, 2020).

The IRS rescinded its regulation after determining that "the IRS can obtain sufficient information from other elements of the Form 990 or Form 990-EZ" for issues "relating to qualification for exemption." *Id.* at 31963. The IRS explained that collecting this information up front provided no benefit for "evaluating possible private benefit or inurement or other potential issues." *Id.* Rather than require mandatory disclosure for all 501(c) organizations, the IRS determined that it "can obtain the names and addresses of substantial contributors, along with other information, upon examination, as needed." *Id.* The IRS also determined that removing the up-front disclosure requirement reduced the risk of "inadvertent disclosure" and thus protected against "possible reprisals (such as harassment, threats of violence, or economic retribution)." *Id.* at 31963–64.

However, because the disclosure requirement for 501(c)(3) organizations is set by statute, the IRS could not rescind it by regulation. Section 501(c)(3) organizations must continue disclosing the identity of their substantial contributors on penalty of civil fines and forfeiture of their tax-exempt status.

## II. The Buckeye Institute

Buckeye is an Ohio-based nonpartisan, nonprofit organization. Complaint, ECF No. 1 at PageID 3, ¶ 8. Buckeye's mission is to promote limited and effective government and individual freedom through policy research and advocacy. *Id.* Buckeye often serves as a government watchdog and litigates to defend constitutional rights. *Id.* Buckeye is exempt from taxation under § 501(c)(3). *Id.* at PageID 4, ¶ 14.

Buckeye relies on financial and other support from individuals, corporations, and foundations that share its commitment to individual liberty, free enterprise, personal responsibility, and limited government. *Id.* at PageID 8, ¶ 29. These issues often involve controversy. *See id.* ¶ 30. Buckeye and its supporters—like similar groups—depend on their First Amendment freedom to associate and assemble privately. *Id.* Privacy ensures that Buckeye's supporters do not face retribution for Buckeye's advocacy of controversial positions. *Id.* But many Buckeye contributors are reluctant to support it out of fear that the IRS will misuse or mishandle their confidential information, leading to political retaliation. *Id.* at PageID 9, ¶ 31.

Buckeye's supporters have good reason to worry about confidential information from the IRS falling into the wrong hands. The IRS has demonstrated its inability to take care of taxpayer data. In 2019, the IRS confirmed that it knew of at least 14 unauthorized disclosures of Form 990 information since 2010. *Id.* at PageID 7, ¶ 25. Less than two years later, the activist organization ProPublica published private income and tax payment information of several taxpayers on its website, where it remains publicly available. *Id.* ¶ 26. In 2021, the IRS's inspector general released a report concluding that taxpayer data remains vulnerable to inappropriate and undetected use and disclosure. *Id.* at PageID 7–8, ¶ 27. And just last year, the IRS announced that it "accidentally posted [private] data from" 990-T forms affecting more than one hundred thousand taxpayers. *Id.* at PageID 8, ¶ 28. That information remained on a publicly accessible database "for about a year." *Id.*

The fear of what might happen should the IRS misuse or disclose their private information has already led some Buckeye contributors to withdraw or lower their support. *Id.* at PageID 9, ¶ 33. One example stands out: In 2013, shortly after the Ohio General Assembly relied on Buckeye's arguments to reject expansion of the federal Medicaid program, Buckeye learned that it would be audited by the Cincinnati office of the IRS. *Id.* ¶ 32. Some of Buckeye's contributors feared that the IRS initiated this audit as political retaliation. *Id.* ¶ 33. They began making smaller, anonymous donations that would not show up on a Schedule B. *Id.*

The reasonable decisions by some contributors to stop giving to Buckeye or to give Buckeye smaller contributions for fear of having their identities disclosed on Schedule B limit Buckeye's ability to speak, associate, and assemble with like-minded citizens. *Id.* ¶ 35.

## ARGUMENT

### I. BUCKEYE HAS STANDING.

A plaintiff establishes standing by "show[ing] injury in fact, causation, and redressability." *Durham v. Martin*, 905 F.3d 432, 433 (6th Cir. 2018). The IRS mostly challenges causation. It contends that Buckeye's harms are too attenuated and speculative because they arise from the independent actions of third parties responding to a subjective fear of reprisal. That argument stands at odds with the complaint's allegations. It also does not square with any of the relevant precedent.

#### *A. The disclosure rule causes Buckeye harm.*

On a motion to dismiss, the Court must evaluate standing as it does everything else—by "accept[ing] the facts presented in [the] complaint as true and constru[ing] them in [the plaintiff's] favor." *Id.* Those facts easily establish standing.

Section 6033(b)(5) requires Buckeye to disclose the identity of its substantial donors. *See* Complaint, ECF. No 1 at PageID 4–5, ¶¶ 15, 17, 18, & 19. That requirement has already caused some of Buckeye's contributors to reduce their contributions out of fear that they will suffer retaliation if their confidential information falls into the wrong hands. *Id.* at 9, ¶ 33. This chilling effect creates a "real and pervasive" problem for organizations like Buckeye. *AFPF*, 141 S. Ct. at 2388. And this problem is "inevitable." *Id.* at 2383. Disclosing the private associations of groups that advocate on controversial issues necessarily burdens the First Amendment rights of those seeking to associate together. *Id.*

Ignoring all of this, the IRS argues that Buckeye impermissibly relies on the speculative actions of third parties whose decisions turn on their subjective fear, rather than on actual impending retaliation. But Defendants' argument involves a series of missteps.

First, the IRS errs in claiming that standing cannot be based on the independent actions of third parties. The Supreme Court confirmed that basis for standing just four years ago in *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019). There, several states challenged the Department of Commerce's decision to include a citizenship question on the census. *Id.* at 2563. They argued doing so would deter noncitizens from responding, which would cause the states to lose federal funding tied to population. *Id.* at 2565. The government argued, as it does here, that "any harm to [the states] is not fairly traceable to the Secretary's decision [to include the census question], because such harm depends on the independent action of third parties." *Id.* The Supreme Court rejected the claim. It held that the states' injury did "not rest on mere speculation about the third parties; it relie[d] instead on the *predictable effect* of Government action on the decisions of third parties." *Id.* at 2566 (emphasis added).

So too here. That supporters would reduce their contributions to avoid disclosure rules is not only predictable—it has already happened. Complaint, ECF No. 1 at PageID 9, ¶ 33. Buckeye alleged that its donors have made "smaller" donations for fear of reprisal. *Id.* No speculation is necessary.

Yet Buckeye would have standing even if its allegations were only predictive, just as the states had standing in *New York*, where the Supreme Court asked whether the alleged harm arose from the "predictable effect of Government action on the decisions of third parties." *New York*, 139 S. Ct. at 2566. Here, the harm is not just predictable—it is "inevitable." *See AFPF*, 141 S. Ct. at 2383. As explained above, the Supreme Court in *AFPF* held that laws "requiring disclosure" of group association create a "deterrent effect on the exercise of First Amendment rights" that is "inevitable." *Id.* That satisfies *New York*'s "predictable effect" test.

Contrast the inevitability of harm here with the cases upon which the IRS relies. In *Association of American Physicians & Surgeons v. U.S. F.D.A.*, 13 F.4th 531 (6th Cir. 2021), the Sixth Circuit declined to endorse a theory of standing that depended on "conclusory allegations that an *unknown* state medical board might bring disciplinary charges against an *unknown* physician member for conduct violating an *unknown* standard." *Id.* at 545. (emphasis added). That kind of claim depended too much on "guesswork" about the actions of independent third parties. *Id.* at 546. And *Binno v. ABA*, 826 F.3d 338 (6th Cir. 2016)—decided before *New York*—stands for the unremarkable proposition that a plaintiff cannot sue the American Bar Association for compelling law schools to utilize the LSAT if the ABA "does not actually 'mandate'" that schools use the test. *Id.* at 345. Neither case bears on the issues here. The IRS mandates disclosure that "inevitabl[y]" causes Buckeye First Amendment harm. *AFPF*, 141 S. Ct. at 2383. There is nothing unknown or disconnected about this causal chain.

The IRS's argument that Buckeye's supporters experience only a "subjective" chill because they do not face "impending retaliation" fails for similar reasons. MTD, ECF. No. 21 at PageID 65–68. While it is true that a plaintiff cannot establish standing based on the subjective fear that the government *might* do something illegal, that rule does not apply here. "Government activity constitutes an injury-in-fact when 'the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764–65 (6th Cir. 2019) (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). The disclosure rule "presently" and "prospectively" applies to Buckeye and its substantial contributors. Thus, the chill on their First Amendment right to associate exists now—it is objective and, as the Supreme Court held, "inevitable."

Neither *Laird* nor *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), provide otherwise. In both cases, the Supreme Court held that the plaintiffs lacked standing to challenge federal information-gathering programs because the plaintiffs had no basis to believe the government would collect their information anytime soon—if ever. *See Laird*, 408 U.S. at 13–14; *Clapper*, 568 U.S. at 411. But here, no one disputes that the IRS will collect information about Buckeye's substantial contributors. *Laird* and *Clapper* thus do not apply.

One last point on standing. Relying on *Clapper*, the IRS argues that Buckeye must allege that its supporters face "impending retaliation" from disclosure to establish standing. MTD, ECF No. 21 at PageID 67. This argument conflates the harm under the First Amendment (disclosure of private association) with the reason that the First Amendment protects people from this harm (fear of reprisal). Buckeye need not show that its supporters face "impending retaliation." Instead, Buckeye need only allege that it and its supporters face the impending violation of their First Amendment rights through compelled disclosure of their association.

*Clapper* states as much. In *Clapper*, the Supreme Court held that the plaintiffs lacked standing because they could not allege that their injury—government surveillance of their communications—was imminent or impending. 568 U.S. at 411–12. The government program at issue only "*authoriz[ed]*—but [did] not *mandate* or *direct*—the surveillance that [the plaintiffs] fear." *Id.* at 412. By contrast, § 6033(b)(5) mandates disclosure. That is as imminent as harm can get. *Id.* The IRS misunderstands the relevant harm here, and in doing so, invents a new standing rule that runs contrary to the precedent the IRS cites.

## II. Buckeye's Complaint states a claim under the First Amendment.

The First Amendment protects Buckeye and its supporters' right to privacy in association with each other. This "right to expressive association" guarantees organizations and individuals the "right to associate for the purpose of speaking." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 68 (2006) ("*FAIR*"). "[I]implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others." *AFPF*, 141 S. Ct. at 2382. And "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

The freedom to associate includes the right to do so privately. *AFPF*, 141 S. Ct. at 2382. "[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Id.* (quoting *NAACP*, 357 U.S. at 462). Thus, as the Supreme Court recently held, laws compelling groups to disclose the identity of their donors must overcome exacting scrutiny. *AFPF*, 141 S. Ct. at 2383.[1] This standard applies "[r]egardless of the type of association" at issue.

[1] In *AFPF*, six justices agreed that disclosure laws must *at least* meet exacting scrutiny "[r]egardless of the type of association." *Id.* Justice Thomas argued that strict scrutiny—a higher standard—should apply. *Id.* at 2390 (Thomas, J., concurring). And Justices Alito and Gorsuch agreed that because the law at issue in *AFPF* did not meeting exacting scrutiny, the Court need not decide whether strict scrutiny should apply. *Id.* at 2392 (Alito, J., concurring).

*Id.*

The IRS argues that Buckeye's Complaint fails to state a claim because the disclosure rule allegedly does not compel 501(c)(3) organizations to do anything. Accordingly, it need only rationally relate to the government's interest—a standard the IRS contends the rule meets. But the challenged provision indeed mandates the disclosure of private information. And because the IRS does not argue that the disclosure rule can overcome exacting scrutiny, the Court should deny the motion to dismiss.

*A. Congress cannot avoid exacting scrutiny by compelling disclosure as part of a broadly available tax exemption.*

The IRS offers two related theories as to why *AFPF* does not apply. First, it argues that § 6033(b)(5) does not effect a "compelled disclosure" because Buckeye can opt not to organize under § 501(c)(3). Relatedly, the IRS argues that the tax exemption created by § 501(c)(3) amounts to a subsidy, which gives the federal government broader authority to run roughshod over First Amendment rights. The Court should reject both arguments.

1. The disclosure rule is not optional. If the IRS is right that the rule does not compel disclosure, a great swath of Supreme Court precedent would make no sense—*AFPF* included. After all, *AFPF* and its predecessors also analyzed mandatory disclosures that required opting in. Yet those cases still applied exacting scrutiny.

Start with *AFPF*. The IRS argues that the California law in *AFPF* required "all charitable entities that sought to operate in California to register and disclose their contributors." MTD, ECF No. 21 at PageID 82. Not so. California only required charitable organizations to disclose "their Internal Revenue Service Form 990, along with any attachments and schedules." *AFPF*, 141 S. Ct. at 2380. So if the IRS did not require disclosure, neither did California. That means California's law operated on the same "opt-in" basis as § 6033(b)(5). An organization seeking to avoid disclosure could have—as the IRS argues—opted not to elect tax-exempt status and avoid disclosing its donors to California. Yet the Supreme Court applied exacting scrutiny all the same.

The IRS points out that the Supreme Court left open the possibility 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." MTD, ECF No. 21 at PageID 82 (quoting *AFPF*, 141 S. Ct. at 2389). This, the IRS contends, supports its theory that a different standard of review applies to the "opt-in" tax classification for 501(c)(3)s. *Id*. But the IRS misses an important part of the Supreme Court's caveat: It does not appear in the Court's analysis about what standard applies. Rather, the Court made this statement when it *applied* exacting scrutiny. *Compare AFPF*, 141 S. Ct. at 2382–85 (deciding what standard applies to the challenge to California's law), *with id.* at 2389 (discussing potential differences in the IRS reporting requirement as part of its exacting-scrutiny analysis).

And that makes sense. Exacting scrutiny requires the court to consider the government's interest in imposing the burden on the First Amendment. No one doubts that the IRS's interest in administering its tax classifications differs from California's interest in policing charitable fraud. So in applying exacting scrutiny, the Supreme Court correctly noted that the federal interest "may raise issues not presented by California's disclosure requirement." *AFPF*, 141 S. Ct. at 2389. The Court did not suggest what those issues might be, and importantly, it did not suggest that a lower standard would apply.

The Supreme Court has applied exacting scrutiny in other cases in which the plaintiff opted into the compelled disclosure. *See Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 204 (1999) (invalidating a compelled-disclosure rule that applied only to the proponents of a ballot initiative that opted to rely on paid circulators, rather than volunteers); *Shelton v. Tucker*, 364 U.S. 479, 488–89 (1960) (applying exacting scrutiny to a compelled-disclosure rule that applied only to teachers who sought to teach in state-supported schools). And the IRS cites *no* case involving a disclosure rule in which the Supreme Court declined to apply exacting scrutiny based on the illusory notion of "voluntariness."[2]

Nor does *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), require otherwise. The holding in *Regan* was narrow. The Supreme Court held that "Congress has *merely* refused to pay for [] lobbying out of public monies." *Id.* at 545

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[2] Indeed, the only case the IRS cites that involved a compelled disclosure tied to a federal program is *Lewis Pub. Co. v. Morgan*, 288 (1913). That case arose decades before the Supreme Court applied tiered scrutiny to assess constitutional claims.

(emphasis added). In doing so, the Court emphasized that "[t]he Code does not deny [the 501(c)(3) entity] the right to receive deductible contributions to support its non-lobbying activity." *Id.* But that is what is at issue here. Compelling the disclosure of donors interferes with the right to receive deductible contributions for Buckeye's non-lobbying activities. While Congress may have relatively broad authority to choose what kinds of speech and activities it wants to fund, *id.* at 545–46, the Supreme Court has never held that Congress may compel disclosure of group association of those receiving federal funds or tax exemptions. Certainly *Regan* does not suggest that Congress may impact "the right to receive deductible contributions" without passing the exacting scrutiny test.

The IRS twists *Regan* to argue that Buckeye "need not even give up its tax exemption to allow its donors to avoid the substantial-contributor reporting requirement." MTD, ECF No. 21 at PageID 69. Buckeye could instead, the IRS says, solve its problem by retaining its 501(c)(3) status and "establish a § 501(c)(4) affiliate, and direct donors concerned about the substantial-contributor reporting requirement to support the affiliate instead." *Id.* Of course, that does not solve the problem. It simply forces the creation of a new organization and requires donors to give to that different organization instead. The 501(c)(3) entity and its donors still have the same First Amendment problem.

In any event, the Supreme Court rejected the argument that setting up a 501(c)(4) solves the First Amendment problems in other contexts. "[I]t is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Agency for Int'l Dev. v. All. for an Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2087 (2020) ("*AOSI II*"). The Supreme Court thus rejected an expansive reading of *Regan* that would have done away with corporate independence when assessing constitutional rights. *Id.* at 2088. "[*Regan*] simply explained that a speech restriction on a corporate entity did not prevent a separate affiliate from speaking." *Id.* The same principle applies here. Buckeye is a § 501(c)(3) organization, and whether individuals could form a separate corporate entity as a 501(c)(4) to avoid the compelled disclosure has no bearing on whether § 6033(b)(5) violates Buckeye's right to associate.

2. The IRS's second argument for avoiding exacting scrutiny fares no better. Relying again on *Regan*, the IRS argues that the tax-exempt status of 501(c)(3) contributions confers a subsidy, thus only requiring the government to prove that the disclosure rule is directly related to its interest in offering tax-exempt status. If correct, the IRS's theory would transform every tax exemption into a blank check for invading First Amendment rights. Exacting scrutiny exists to stop that kind of government infringement on the right to associate, which is why it applies here—even if 501(c)(3) status qualifies as a "subsidy."[3]

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[3] Although *Regan* treated tax-exempt status under § 501(c)(3) status as a subsidy, that principle does not always apply. For example, the Supreme Court has held that tax-exempt status for religious organizations does not violate the Establishment Clause. "The grant of a tax exemption is not sponsorship since the government does

The general rule is that "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 212 (2013) (*"AOSI I")*. That rule comes with a narrow exception. In *Regan*, the Supreme Court rejected a challenge to the 501(c)(3) ban on lobbying. Taxation With Representation—a 501(c)(3) organization—argued that "Congress' decision not to subsidize its lobbying violates the First Amendment" because it "imposes an 'unconstitutional condition' on the receipt of tax-deductible contributions." 461 U.S. at 545. Although "the government may not deny a benefit to a person because he exercises a constitutional right," the Supreme Court explained, "Congress is not required by the First Amendment to subsidize lobbying." *Id.* at 545–46. "Congress has not infringed any First Amendment rights or regulated any First Amendment activity" because it "has simply chosen not to pay for TWR's lobbying." *Id.* at 546.

*Regan* narrowly held that Congress can refuse to subsidize lobbying without running afoul of the First Amendment. The Supreme Court later expounded on *Regan* and explained that Congress can put restrictions on how organizations use government funds, including what "activities Congress wants to subsidize." *AOSI I*,

not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 675 (1970). "No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'" *Id.*

570 U.S. at 214–15. In *Regan*, Congress did not want to subsidize lobbying, so it could withhold 501(c)(3) status for organizations that lobbied. But "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Id.* (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)).

Here, the disclosure rule does not a limit "the activities Congress wants to subsidize." *Id.* at 214. Buckeye already limits its activities to those that Congress specified for 501(c)(3) organizations. It does not claim, as the *Regan* plaintiff did, that Congress must extend tax-exempt status for activities that Congress does not wish to subsidize. Nor does the IRS argue that Buckeye wants to use its tax-exempt status for activities beyond those that Congress chose to subsidize.

Instead, the disclosure rule operates as a restriction on Buckeye itself, not on what Buckeye says or does with federal funds. More specifically, it hinders and undermines Buckeye's associational rights protected by the First Amendment. It prevents Buckeye from exercising its right to associate privately even if Buckeye does so while limiting its use of tax-exempt status to the kinds of speech and activities that Congress chose to subsidize. Imposing that kind of burden on Buckeye's First Amendment freedom requires treating 501(c)(3) organizations as if the benefit of tax-exempt status "convert[s]" them "into arms of the state." *Walz*, 397 U.S. at 675. It falls outside of Congress's authority to condition how its money is spent.

The IRS's theory would transform ordinary tax exemptions into virtually limitless authority without meaningful First Amendment restraint. Consider just one example from the IRS's brief. The IRS argues that the disclosure rule passes constitutional muster because reporting requirements discourage improper transactions. MTD, ECF 21 at PageID 76 n.8.[4] If that's all it takes, nothing would stop Congress from making all taxpayers' data public whenever someone claims a deduction or exemption. The government could argue that privacy in personal transactions facilitates the concealment of potentially illegal activity and making all taxpayer information public would allow for everyone to monitor each other's financial activities. Under the IRS's theory, the Court need not even consider whether doing so imposes a burden on the First Amendment right to association. All that would be required would be for the government to show that its condition is rationally related to its rule—regardless of tailoring and regardless of the First Amendment problems.

This problem is why exacting scrutiny exists. It requires courts to consider the burden on First Amendment freedom in relation to the government's purported interest justifying the law. *AFPF*, 141 S. Ct. at 2383–85. It is one thing to say that Congress has the power to fund its own message or preferred activities. But the IRS's legal theory would allow Congress to leverage its power to provide tax exemptions to wholly undermine the ability of organizations espousing positions or

[4] The IRS improperly introduces materials outside the complaint to make this argument.

policies unpopular in the halls of Congress to participate equally in the marketplace of ideas. When Congress chooses to make benefits like tax-exempt status and tax-deductible contributions broadly available to "private speakers" with a "diversity of views," it cannot condition those benefits on giving up the right to associate privately. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). Doing so undermines the free speech of those organizations. *See AOSI I*, 570 U.S. at 218–19. Such a condition is thus unconstitutional if it cannot satisfy exacting scrutiny. *See AFPF*, 141 S. Ct. at 2383.

In the alternative, should this Court accept the IRS's construction of *Regan*, Buckeye respectfully preserves its argument that *Regan* was wrongly decided and should be reconsidered. Individuals and organizations do not give up their right to associational privacy by operating as a tax-exempt entity under federal law. The First Amendment does not permit Congress to exercise its power to tax to coerce such a bargain. Thus, if the Court determines that *Regan* requires applying a more deferential standard than that announced in *AFPF*, Buckeye contends that *Regan* must be overruled.

*B. The Complaint alleges that the disclosure rule fails exacting scrutiny.*

The Court should deny the motion to dismiss if it determines that exacting scrutiny applies because the IRS does not argue that the Complaint fails to state a claim under this standard. But even if the Court considered that issue, the Complaint alleges more than enough to plausibly state a claim.

Exacting scrutiny is a rigorous standard. "Under that standard, there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* (cleaned up). And even if the government identifies a substantial relationship between its disclosure regime and an important government interest, "the challenged requirement must be narrowly tailored to the interest it promotes." *Id.* at 2384.

No substantial relation exists between the indiscriminate, up-front collection of Schedule B information and the government's regulation of 501(c)(3) organizations. The complaint alleges that the "compelled disclosure regime" is "disconnected from any identifiable need for the information it gathers." Complaint, ECF No. 1 at PageID 2–3, ¶ 5. And the IRS has acknowledged as much with respect to other 501(c) organizations. *Id.* at PageID 6, ¶¶ 23–24. The IRS abandoned its disclosure requirements for other 501(c) organizations because they were unnecessary for "evaluating possible private benefit or inurement or other potential issues relating to qualification for exemption." *Id.* ¶ 24. The same conclusion applies equally to 501(c)(3) organizations. *Id.* at PageID 2–3 & 10, ¶¶ 5, 39. As Buckeye alleges, the statutory disclosure requirement for 501(c)(3) organizations is "disconnected from any identifiable need for the information it gathers." *Id.* at PageID 2–3, ¶ 5. Thus, "[n]o substantial relation exists between the wholesale disclosure of substantial donors through Schedule B and the government's interest in enforcing compliance with the tax code." *Id.* at PageID 10, ¶ 39.

Even if the IRS could establish a substantial connection between collecting Schedule B information and a sufficiently important interest, that alone would not justify encroachment on the First Amendment rights of Buckeye and its supporters. *See Davis v. FEC*, 554 U.S. 724, 744 (2008) (citing *Buckley v. Valeo*, 424 U.S. 1, 68, 71 (1976) (per curiam)). "While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *AFPF*, 141 S. Ct. at 2383.

The IRS's across-the-board collection and storage of Schedule B donor data far exceeds what might be needed to further an important government interest in enforcing the tax code. Any legitimate interest "relating to qualification for exemption," Complaint, ECF No. 1 at PageID 6–7, ¶ 24, can be served without burdening the First Amendment rights of every 501(c)(3) organization in the United States and their supporters. As the Supreme Court reminded California's Attorney General, *see AFPF*, 141 S. Ct. at 2386–87, the IRS, too, could obtain the same information upon examination as needed rather than collecting up-front the names and addresses of contributors to all 501(c)(3) organizations. And the IRS confirmed as much in its own regulatory filings. Complaint, ECF No. 1 at PageID 6–7, ¶ 24.

The IRS could not have carried its exacting scrutiny burden had it attempted to do so.

*C. The Complaint alleges the disclosure rule fails under less scrutiny as well.*

Even if the Court agrees with the IRS that it need only show that the disclosure rule is rationally related to the tax-exempt status Congress created, the Complaint's allegations show that the disclosure rule fails that test too. Buckeye alleges that the disclosure rule serves no purpose. Complaint, ECF No. 1 at PageID 2–3, ¶ 5. And the IRS agrees that it serves no purpose because the IRS can obtain any information it needs through other means. *Id.* at PageID 6–7, ¶ 24. Thus, the indiscriminate, up-front collection of contributor information is not reasonably related to Buckeye's tax-exempt status.

Rather than focus on the allegations in Buckeye's complaint, the IRS argues that "[t]he Supreme Court and other courts have considered and rejected challenges to tax benefits that are conditioned on disclosure and conduct requirements." MTD, ECF No. 21 at PageID 77. But that overstates the case. The IRS cites only one case that dealt with a disclosure requirement. *Id.* at PageID 79 (citing *Lewis Pub. Co. v. Morgan*, 229 U.S. 288 (1913)). And it's hard to see *Morgan*'s relevance here, given that the decision arose decades before the Supreme Court even recognized tiers of scrutiny as the proper mode of analysis—much less announced exacting scrutiny as the standard for disclosure laws.

The remaining cases upon which the IRS relies dealt with federal restrictions on conduct, not disclosures—that is, government restrictions on what speech or activities a recipient of federal funds may use them for. *Id.* at PageID 77 (citing *Regan*); *id.* at PageID 78 (citing *Grove City College v. Bell*, 465 U.S. 555, 574 (1984), which analyzed a condition on funding that applies "only" to the "program or activity operated" with federal funds); *id.* at PageID 79–80 (citing *Cammarano v. United States*, 358 U.S. 498 (1959), which upheld the 501(c)(3) restriction on lobbying). As explained above, the Supreme Court has made clear that Congress has more leeway when limiting the conduct that federal monies pay for. *See supra* at 16–17. It has never held that the same holds true for laws compelling disclosure of group association. None of these cases support the IRS's argument that the disclosure rule here passes muster because it is reasonably related to the government's interest.

One final point. The IRS argues that "[t]he Eleventh Circuit rejected a claim very similar to Buckeye's in *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003). But the Eleventh Circuit decided *Mobile Republican Assembly* almost two decades before *AFPF* held that exacting scrutiny applies to disclosure regimes premised on tax-exempt status. And it did so in the context of determining whether to apply the Anti-Injunction Act to a constitutional challenge to the tax exemption in 26 U.S.C. § 527(j). *Id.* at 1362. That issue does not apply here. *See CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1586 (2021). *Mobile Republican* is inapposite.

## CONCLUSION

The Court should deny the IRS's motion to dismiss.

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Respectfully submitted,

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