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

PLAINTIFF THE BUCKEYE INSTITUTE'S
RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Section 6033(b)(5) indiscriminately requires every § 501(c)(3) organization to disclose its substantial donors to the IRS.[1] To survive a First Amendment challenge, Defendants (collectively, the "IRS") must therefore demonstrate that the disclosure rule is substantially related to their interest in enforcing the tax code, and that the rule is narrowly tailored for accomplishing that goal. This they cannot do.

The IRS submitted five declarations to meet its burden. But at best, the evidence shows only that the identity of an organization's substantial donors is sometimes relevant to monitoring tax compliance. How often? And for how many organizations does this information prove useful? The IRS never says. Instead, it relies on vague claims that IRS employees routinely review Schedule B information for potential discrepancies in the same way that IRS employees review every other schedule and form submitted. That is not enough to meet the IRS's burden of showing that it needs "universal production" of donor information to properly enforce the tax code. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2386 (2021). The IRS's evidence thus "falls far short of satisfying the means-end fit that exacting scrutiny requires." *Id.* The Court should deny its motion for summary judgment.

FACTUAL BACKGROUND

Buckeye relies upon its previous factual survey. *See* Buckeye MSJ, ECF No. 36 at PageID 166–74.

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[1] All statutory references are to Title 26 of the United States Code.

ARGUMENT

I. SECTION 6033(B)(5) COMPELS DISCLOSURE AND MUST OVERCOME EXACTING SCRUTINY.

The IRS argues that § 6033(b)(5) is constitutional because it is rationally related to the "opt-in benefit" of § 501(c)(3) status. IRS MSJ, ECF No. 43 at PageID 479–80. In doing so, the IRS incorporates its argument from its motion to dismiss. *Id.* (citing MTD, ECF No. 21 at PageID 71–81). Buckeye likewise incorporates its response to this argument, s*ee* Response, ECF No. 35 at PageID 151–59, and offers two additional points.

First, the IRS's argument that exacting scrutiny does not apply because § 501(c)(3) status is optional must be wrong because its reasoning would apply to the law in *AFPF*, to which the Supreme Court applied exacting scrutiny. The *AFPF* law required charities to disclose only the information that they disclosed to the IRS. 141 S. Ct. at 2380.[2] If a charity wanted to avoid disclosure, it could choose not to organize as a § 501(c)(3). Under the IRS's theory, California's law was "voluntary" because it depended on a charity's decision to "opt" for § 501(c)(3) status.

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[2] The IRS concedes this but tries to muddy the water. *See* Reply, ECF No. 37 at PageID 447 n.4. According to the IRS, while it's true that California only required charities to disclose donors if federal law required doing so, the IRS points out that the California law was broader when the case initiated. But it is unclear why that matters. The Supreme Court described the law at issue exactly as Buckeye did. *See AFPF*, 141 S. Ct. at 2380 ("Pursuant to this regulatory authority, the Attorney General requires charities renewing their registrations to file copies of their Internal Revenue Service Form 990, along with any attachments and schedules."). And the Supreme Court specifically cited the 2020 version of the California regulation, not the version that existed when the suit was originally filed.

The IRS responds that *AFPF* involved a mandatory rule because the Supreme Court said so. Reply, ECF No. 37 at PageID 447. Buckeye agrees—but the IRS misses the point. Even though charities had to opt into § 501(c)(3) status in *AFPF*, "[t]he Supreme Court . . . described the California regime as compelled disclosure." Reply, ECF No. 37 at PageID 447. So the same is true here. Buckeye opts into § 501(c)(3) status, but that does not make the disclosure rule any less mandatory.

Second, the IRS makes a related error in attempting to distinguish *Shelton v. Tucker*, 364 U.S. 479 (1960). *Shelton* also involved a statute that would be considered "opt in" under the IRS's theory because it required disclosure only if an individual opted into certain kinds of employment. *See* Response, ECF No. 35 at PageID 153. The IRS contends that *Shelton* is inapposite because "[t]he opinion does not even use the term 'exacting scrutiny,' let alone discuss why that level of review is appropriate." Reply, ECF No. 37 at PageID 449. But in *AFPF*, the Supreme Court relied on *Shelton* as an example of applying exacting scrutiny in past disclosure cases—citing it more than a dozen times. 141 S. Ct. at 2383–86, 88.[3] If *Shelton* involved a mandatory disclosure rule, this case does too.

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[3] The IRS also dismissed *Shelton*'s relevance because public employees cannot be dismissed for their political views or membership in associations. ECF No. 37 at PageID 449. That has no bearing on whether a disclosure rule is opt in or mandatory. Congress, likewise, cannot deny § 501(c)(3) status based on an organization's ideological views. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983)).

II. SECTION 6033(B)(5)'S DONOR-DISCLOSURE REQUIREMENT FAILS EXACTING SCRUTINY.

The IRS contends that § 6033(b)(5) survives exacting scrutiny because it is substantially related to an important government interest ("the proper functioning of the income tax system") and it is narrowly tailored for doing so. IRS MSJ, ECF No. 43 at PageID 480. The IRS is wrong. At most, the IRS has demonstrated that donor information is sometimes relevant to reviewing a taxpayer's Form 990 before initiating an examination. But to prove that, the IRS also shows that donor information is relevant to reviewing tax compliance for other organizations as well—like § 501(c)(4)s—yet it only collects it for §501(c)(3)s. It cannot be that indiscriminate, "universal production" of donor information is wholly unnecessary for one group but vital for another when the relevant issues overlap. *See AFPF*, 141 S. Ct. at 2386. And the IRS's effort to transform exacting scrutiny into a mere relevance standard defies the Supreme Court's instruction in *AFPF*.

Given the paltry explanation for why the IRS "need[s]" to collect donor information from every single § 501(c)(3) organization every single year, the degree of burden on Buckeye's associational rights is irrelevant. *See AFPF*, 141 S. Ct. at 2385, 2387. Any "reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary." *Id.* at 2385. Because the IRS cannot show that universal collection is substantially related to an important government interest or narrowly tailored, "[t]he disclosure requirement creates an unnecessary risk of chilling in violation of the First Amendment,

indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous." *Id.* at 2388. It facially fails exacting scrutiny.

A. Exacting scrutiny requires the IRS to prove that upfront disclosure is more than a convenient tool for reviewing potentially relevant information.

Although the IRS recites the standard for exacting scrutiny, it fails to grapple with it. Instead, the IRS repeatedly argues that § 6033(b)(5) is constitutional because a donor's identity "can be relevant" to certain questions about tax status. IRS MSJ ECF No. 43 at PageID 482; *see also id.* at 482–83 (information "can assist the IRS"); *id.* (substantial contributor information is "relevant"); *id.* at 484 (the information "can assist the IRS"). But in *AFPF*, the Supreme Court held that the government "is not free to enforce *any* disclosure regime that furthers its interest." 141 S. Ct. at 2386. Thus, the IRS must do more than prove a disclosure rule offers some benefit or has some relevance. "It must instead demonstrate its *need* for *universal production* in light of any less intrusive alternatives." *Id.* (citing *Shelton*, 364 U.S. at 488) (emphasis added). Vague claims that donor information *can* be relevant in an unknown number of cases simply will not do.

B. The IRS's witnesses do not establish that indiscriminately collecting donor information is substantially related to monitoring tax compliance.

The IRS gives four justifications for requiring universal upfront donor disclosure to monitor tax compliance. ECF No. 43 at PageID 482–84. First, it claims that donor information "can be relevant to whether a § 501(c)(3) organization is a private foundation." *Id.* at PageID 482. Second, it contends that donor information can help identify "potential private inurement and private benefit issues." *Id.* at PageID 483.

Third, it states that donor information is "relevant to determining whether [an] excise tax applies." *Id.* And fourth, it states that this information "can assist the IRS in determining whether the organization qualifies for supporting organization treatment"—that is, whether an organization should be classified as a private foundation. *Id.* at 483–84. The IRS's reasons do not justify its disclosure demands.

1. The IRS's first problem is that it concedes only two of these four issues are unique to § 501(c)(3) organizations. *Id.* at 484 n.2. A § 501(c)(4) corporation, for example, is also subject to restrictions on private inurement and excise taxes. *See* §§ 501(c)(4)(B) and 4958(a), (b), (e). Yet the IRS has already disclaimed that it needs donor information for § 501(c)(4) entities. Buckeye MSJ, ECF No. 36, PageID 168–71. "For the specific purpose of evaluating possible private benefit or inurement or other potential issues relating to qualification for exemption," the IRS explained, "the IRS can obtain sufficient information from other elements of the Form 990 or Form 990-EZ and can obtain the names and addresses of substantial contributors along with other information, upon examination, as needed." Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959, 31963 (May 28, 2020). Thus, the IRS's reliance on policing against private inurement or monitoring for unpaid excise taxes stands contrary to its prior representations. And it cannot be squared with the fact that the IRS successfully monitors tax compliance for § 501(c)(4) entities without upfront collection of donor information on Schedule Bs.

This problem goes beyond disregarding two of the IRS's four justifications for § 6033(b)(5). The IRS's thesis is simple: Here are four ways, the IRS says, that it sometimes uses donor information for monitoring tax compliance. But half of those issues apply to other organizations, and the IRS doesn't need donor information at all to perform the same tasks for those groups. So what makes the two other issues—those unique to § 501(c)(3) groups—so important that upfront collection transforms from *wholly unnecessary* to *vital* to the IRS's mission? The IRS does not say. It (and its witnesses) treat all four issues exactly the same—donor information is sometimes relevant for each of them. Exacting scrutiny demands more.

2. Turning to the two issues the IRS identifies as unique to § 501(c)(3) groups—its evidence comes up short. The IRS argues that donor information assists in monitoring tax compliance because it relates to whether a § 501(c)(3) organization should be classified as a public charity or private foundation. For this, the IRS submits four declarations, each of which runs into the same general problems. First, the witnesses concede that they (or their employees) review Form 990s after some sort of filtering or referral process. That all but eliminates the IRS's claim that Congress could not have given it a narrower tool. If IRS employees only review a fraction of Form 990s filed each year, it makes no sense for Congress to require universal disclosure for hundreds of thousands of organizations.[4] Second, the

[4] The IRS submits that it received Form 990 returns for 218,516 § 501(c)(3) organizations in 2019 that included a Schedule B. ECF No. 43 at PageID 493 n.7.

witnesses all state that donor information is "relevant" to reviewing classification issues, and so they sometimes review the Schedule Bs to consider whether such issues exist. But no witness indicates how often donor information matters. How many times, for example, does an IRS employee recommend or initiate an examination because of a Schedule B? The IRS doesn't say. And the few statistics it offers only undermine the claim that it "need[s] . . . universal production" of this information. *AFPF*, 141 S. Ct. at 2386; *see* Gonzalez Decl., ECF No. 43-9, PageID 656 ¶21–23 (explaining that in fiscal year 2022 the IRS's CP&C group reviewed referrals for only 2,996 organizations filing a Form 990, or less than 2 percent of the likely number of 501(c)(3) groups that file a Schedule B).

Start first with Adrian Gonzalez, Director of Compliance, Planning and Certification (CP&C) of the Tax Exempt and Government Entities (TEGE) division. The IRS cites Gonzalez for the claim that "Schedule B information can be used to identify issues that would suggest an audit is appropriate," including issues related to classification. IRS MSJ, ECF No. 43 at PageID 485. But Gonzalez also states that CP&C views Form 990s "through referrals," Gonzalez Decl., ECF No. 43-9 at PageID 654 ¶4—a point his declaration repeatedly acknowledges, *id.* ¶¶6–7, 21–23, 25, including identifying the approximate number of "actionable referrals" that CP&C received last year, *id.* ¶25. Thus, by the time CP&C analyzes a Schedule B, the IRS has already winnowed down a group of Form 990s for review. "The upshot is that [the IRS] casts a dragnet for sensitive donor information from [hundreds] of thousands of charities each year, even though that information will become relevant in only a small

number of cases involving [referrals]." *AFPF*, 141 S. Ct. at 2387. And the IRS never explains why Congress could not give CP&C a more targeted tool for obtaining this information when necessary, rather than through upfront collection. *See id.* at 2386.

Even still, Gonzales does not make the case that reviewing Schedule B information is "substantially related" to monitoring tax compliance. He states that "[t]he names and addresses reported on the Schedule B relate to several issues that could arise through a referral." ECF 43-9 at PageID 654 ¶8. Those issues include questions about private inurement and excise taxes—issues that also matter for § 501(c)(4) organizations, but which the IRS manages to monitor without upfront collection. Yet Gonzales treats these issues identically. *Compare id.* ¶9, *with id.* ¶¶14–15. He makes no claim that donor information has heightened relevance for issues unique to § 501(c)(3)s. So how is it that the disclosure rule is "substantially related" to monitoring tax compliance for § 501(c)(3)s and narrowly tailored to achieving that goal, but unnecessary for doing so when it comes to § 501(c)(4) groups? Gonzalez doesn't say.

Gonzalez also states that CP&C received approximately 5,994 "actionable referrals during fiscal year 2022," and of those 2,996 were entities that file a Form 990 that includes a Schedule B. ECF No. 43-9 at PageID 656 ¶¶21–23. Elsewhere the IRS states in fiscal year 2019 approximately 218,516 entities filed a Form 990. ECF No. 43 at PageID 493 n.7. Assuming those numbers stay similar, that means CP&C

receives referrals for *less than 2 percent* of the entities that file Form 990.[5] And how many of that less than 2 percent present issues related to the Schedule B? Again, Gonzales does not say.

The IRS next offers a declaration from Rogelio Vera to support its claim that "the IRS regularly uses Schedule B information to evaluate whether a public charity should be reclassified as a private foundation." ECF No. 43 at PageID 486. Vera's declaration creates many of the same problems for the IRS as Gonzalez's. Most importantly, Vera's entire declaration describes supervising IRS employees who sometimes review Schedule B information *based on referrals*. ECF No. 43-8 at PageID 651 ¶¶ 5–6. That cannot justify a law requiring "universal production." *AFPF*, 141 S. Ct. at 2386. Vera's declaration thus further undermines the IRS's claim that Congress could not give the IRS a narrower tool that allows the government to obtain Schedule B information when necessary, rather than requiring universal upfront disclosure.

Vera's declaration also lacks any detail demonstrating Schedule B information is "substantially related" to tax monitoring. Like Gonzales, Vera does not say how often the identities of substantial donors materially influences the decision to initiate an examination. In fact, to show relevance, Vera states that donor information is useful for confirming that nothing is wrong at all. ECF No. 43-8 at PageID 652 ¶13. But if that's enough for exacting scrutiny, then virtually every piece of information that

[5] This could be an overstatement. Gonzalez does not say if or how often CP&C receives more than one "actionable referral" for the same organization.

could reveal a problem with tax compliance meets the standard. The Supreme Court, however, has rejected relying on such a thin justification for requiring disclosure. 141 S. Ct. at 2386. It matters how often Schedule B information leads to action. *Id.* And on that issue, Vera says nothing.

The IRS next relies on a declaration from Lynn Brinkley, the Director of Exempt Organizations Examinations in the IRS's Tax Exempt and Government Entities Division ("TEGE"). Brinkley oversees the nationwide exempt organization examination program, and her declaration describes the process that TEGE examiners use to decide whether to initiate an examination, as well as the training examiners receive. But it, too, lacks the detail necessary to "satisfy[] the means-end fit that exacting scrutiny requires." *AFPF*, 141 S. Ct. at 2386. Brinkley states that TEGE examiners review Schedule Bs, along with all the other information provided with a Form 990, to spot potential issues for an examination. She likewise states that examiners are trained to do the same.

Yet Brinkley's bottom line is as vague as those of the other witnesses. She states that Schedule B information "can help" examiners rule out or identify issues, decide whether to proceed with an examination, and assist in establishing the steps for an effective exam. ECF 43-1 at PageID 506 ¶¶50–52.[6] Not to belabor the point, but how often does Schedule B information move the needle? Brinkley does not say.

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[6] Brinkley's opinion that the "names and addresses reported on Schedule B can help exempt organization examiners" perform certain tasks lacks a foundation. *Id.* at

On top of that, Brinkley's view of relevance does not justify collecting this information. She identifies issues such as private inurement and excise taxes as reasons that Schedule B information is relevant. *Id.* at PageID 503 ¶¶26–29. Again, the IRS concedes that those issues are not exclusive to § 501(c)(3) organizations, ECF No. 43 at PageID 484 n.2, and the IRS does not collect donor information for other nonprofits because it already determined that doing so is unnecessary.[7]

The last declaration the IRS relies on is from Steve Farger, a TEGE agent. Fager's declaration suffers from all the same problems as the others. First, Fager receives Form 990s from referrals. ECF No. 43-6 at PageID 643 ¶5. Thus, Fager, like the others, could accomplish the same tasks if Congress gave the IRS a narrower tool for collecting this information when necessary. Second, Fager also does not explain how often donor information matters in his review. All he says is that he reviews it—but of course he does. Congress requires the IRS to collect this information, and the information is perhaps marginally relevant to the questions the IRS might have about tax compliance. It is no surprise that if the IRS has the information, it reviews

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PageID 601 ¶¶50–52. She states that her current job "include[s] providing executive oversight of TEGE's nationwide exempt organization examination program." *Id.* at PageID 499 ¶2. Her declaration otherwise lacks any information about her background or experience to support her opinions in Paragraphs 50–52.

[7] The fact that the IRS trains its employees to review Schedule Bs says nothing about whether the information is substantially related to the government's interest in enforcing the tax code. Congress requires the IRS to collect this information, and so one would expect that the IRS has implemented protocols for reviewing it. That donor information might have some marginal relevance to monitoring tax compliance does not bear on whether the IRS needs "universal production." *AFPF*, 141 S. Ct. at 2386.

it. That's a different question than whether the information is substantially relevant to the government's interest. *See* 141 S. Ct. at 2386. And Fager makes no effort to explain how often Schedule Bs really matter.

Consider the problem this way. Suppose that Congress required every § 501(c)(3) to provide monthly bank statements to the IRS. One would expect that the IRS would review this information and train its employees to do so. After all, detailed financial accounts could surely lead to spotting issues related to tax compliance. But does that mean that indiscriminately collecting every financial transactions for every § 501(c)(3) is "substantially related" to the IRS's interest in monitoring tax compliance? Or that doing so is a narrowly tailored solution? Of course not. The government "is not free to enforce *any* disclosure regime that furthers its interests." *AFPF*, 141 S. Ct. at 2386. And vague statements from IRS employees that donor information *can* be useful for spotting tax discrepancies in an unknown number of cases hardly "satisfy[ies] the means-end fit that exacting scrutiny requires." *Id.*

C. Encouraging voluntary compliance cannot justify a disclosure regime.

The IRS also argues that § 6033(b)(5) encourages tax compliance because taxpayers are more likely to follow the law knowing the IRS has access to relevant information. ECF No. 43 at PageID 484–85. The IRS cites two academic articles for support. *Id.* Whatever claims those articles make is hearsay, and the IRS has not disclosed or produced an expert witness to testify to such claims. *See* Fed. R. Evid. 803(18)(A). Thus, the Court should disregard the argument.

Even still, this argument illustrates the broader problem with the IRS's position. Suppose that the IRS is right that disclosure encourages voluntary compliance.[8] The IRS "is not free to enforce *any* disclosure regime that furthers its interest." *AFPF*, 141 S. Ct. at 2386. Presumably, there are all sorts of mechanisms that could encourage voluntary compliance. Consider the example above again: Congress could enact a statute requiring all 501(c)(3) organizations to provide monthly bank statements to the IRS. That might also encourage voluntary compliance. But does it mean the IRS "need[s]" such a tool to adequately monitor tax compliance? *See id.* No. The burden is on the IRS to demonstrate the "need for universal" disclosure. *Id.* Pointing out marginal benefits is not enough.

D. Upfront collection is not narrowly tailored to further the government's interest.

The IRS cannot show that the requirement is narrowly tailored. As discussed above, the IRS does not explain why the government must indiscriminately collect Schedule B information when its own witnesses testify that they primarily review Form 990s after a referral. At the very least, Congress could give the IRS targeted tools for collecting this information only when a Form 990 is selected for review. While this might be more cumbersome, administrative convenience cannot justify requiring indiscriminate upfront disclosure. *See AFPF*, 141 S. Ct. at 2387.

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[8] To be sure, the two articles the IRS cites say nothing about § 6033(b)(5) or Schedule Bs, and the IRS cites them only for general claims about information reporting. The IRS's one-paragraph claim that "[t]he substantial-contributor reporting requirement encourages compliance" cites no data or evidence of any kind. *See* ECF No. 43 at PageID 484–85.

In its motion for summary judgment, Buckeye noted that the "IRS does not systematically use Schedule B" because "the lack of a Taxpayer Identification Number makes the data unsuitable for electronic matching." Buckeye MSJ, ECF No. 36 at PageID 170. The IRS never disputes this. It does not claim it has the tools, for example, to automatically detect tax compliance issues in Schedule Bs prior to review. That means the IRS only reviews Schedule B *after* a particular taxpayer's Form 990 is selected. But if Congress can require every § 501(c)(3) organization to disclose the identities of its substantial donors, a less intrusive solution would be to seek disclosure if—for example—the IRS has received an "actionable referral" for review. ECF No. 43-9 at PageID 656 ¶21.

The IRS leans on the fact that, unlike California in *AFPF*, the IRS uses "Schedule B information to determine whether to begin an examination." ECF No. 43 at PageID 496. This, the IRS argues, is enough to show narrow tailoring. Not so. In *AFPF*, the Supreme Court held that "even if [California] relied on up-front collection *in some cases*, its showing falls far short of satisfying the means-end fit that exacting scrutiny requires." 141 S. Ct. at 2386 (emphasis added). It is not enough that the IRS uses Schedule B information in an unknown number of cases to initiate an examination. The IRS bears the burden of "demonstrat[ing] its *need* for universal production in light of any less intrusive alternatives." *Id.* (emphasis added). None of the IRS's witnesses even hazard a guess as to how often Schedule B information leads the IRS to initiate an examination or otherwise take action.

Finally, the IRS contends that Congress enacted § 6033(b)(5) after concluding "that the other options available to the IRS were inadequate." ECF No. 43 at PageID 491. That grossly overstates any conclusion one might draw from the Congressional report the IRS cites. The IRS is right that the report states "Congress believed that the Internal Revenue Service was handicapped in evaluating and administering the tax laws by the lack of information with respect to many organizations." Report at 55. According to the report, Congress wanted to give the IRS more information, and so it gave the IRS more information. But the report does not discuss Congress considering "the other options available" (or what those options even were). *See AFPF*, 141 S. Ct. at 2386 (faulting California for having "not even considered alternatives to the current disclosure requirement").

E. Confidentiality laws do not eliminate the burden on associational rights.

Like California did in *AFPF*, the IRS relies on its confidentiality rules to argue that any burden on Buckeye's right to associational privacy is minimal. ECF No. 43 at PageID 491–94. For support, the IRS offers the declaration of Jennifer Jett, TEGE's Director of Business Systems Planning, Shared Services. Jett states she is not aware of any example of the IRS publishing unredacted Schedule Bs under § 6104 during the past five years. ECF No. 43-11, ¶¶ 17. But the IRS has acknowledged at least 14 unauthorized disclosures of Form 990 information since 2010, ECF No. 36-9, including releasing unredacted donor information of a highly controversial organization to its ideological opponent, *see Nat'l Org. for Marriage, Inc. v. United States*, 807 F.3d 592, 594–95 (4th Cir. 2015). To this, the IRS shrugs its shoulders

and says that "no process is perfect." ECF No. 43 at PageID 493. But try telling that to those who know it takes just one donation on a controversial issue to cause lasting harm. *See, e.g.*, *Mozilla CEO resignation raises free-speech issues*, USA Today (Apr. 4, 2014), available at https://perma.cc/7HPU-J9AZ.

What's more, the IRS simply ignores the examples of other unauthorized disclosures, ECF No. 36 at PageID 171–72, including a highly politicized leak to the activist group ProPublica, *id.*, as well as a recent leak affecting more than 120,000 taxpayers from just last year, *id.* at 172. Perhaps the IRS views these leaks as immaterial because the leakers disclosed different kinds of confidential information than that listed on a Schedule B. But this information is also subject to "strict confidentiality rules that Congress has prescribed." ECF No. 43 at 493–94; *see* § 6103(a). And the leaks affect organizations like Buckeye that are concerned for their donors' privacy. *See* Alt Decl. ¶21. Any potential donor to an organization that might take a position on controversial public issues has ample reason to distrust the IRS's ability to protect his or her privacy. California could not save its law because the information was not publicly disclosed. Neither can the IRS.

F. Any differences between this case and AFPF *are immaterial.*

The IRS ends its brief trying to distinguish this case from *AFPF*. But on every metric that matters, these cases line up.

First, the IRS notes that in *AFPF*, the Supreme Court stated that "revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California's disclosure requirement." ECF No. 43 at PageID 494 (citing *AFPF*, 141

S. Ct. at 2389). The IRS argues that this sentence means exacting scrutiny should not apply. *Id.* But the Supreme Court made this observation when it *applied* exacting scrutiny, not when discussing what standard might apply. *See* Response, ECF No. 35 at PageID 152. That makes sense. The IRS's interest in enforcing the tax code differs from California's interest in *AFPF*. But as explained above, the law fails exacting scrutiny even when measured against the IRS's different interest.

Second, the IRS points to evidence in *AFPF* that the plaintiffs experienced retaliation, arguing that Buckeye faces no similar problems. ECF No. 43 at PageID 494–95. While the plaintiffs in *AFPF* were subjected to retaliation, the Supreme Court did not rest its conclusion on that basis. In fact, quite the opposite: The Supreme Court held that disclosing donor information creates an "inevitable" chill on First Amendment rights, 141 S. Ct. at 2383, and the majority rejected the dissent's position that the plaintiffs must show more than that, *id.* at 2389 (citing *id.* at 2383). "As we have explained," the Court held, "plaintiffs may be required to bear this evidentiary burden where the challenged regime is narrowly tailored to an important government interest." *Id.* "Such a demanding showing is not required, however, where—as here—the disclosure law fails to satisfy these criteria." *Id.* Just as in *AFPF*, Section 6033(b)(5) lacks the narrow tailoring necessary to justify the "widespread burden on donors' associational rights." *Id.* The "inevitable" chill from disclosure is enough to facially invalidate the law.

Still, Buckeye has experienced significant harassment for its public positions—from multiple profanity-laced emails to disgusting voicemails—only amplifying the

burden on its associational rights from potential public disclosure. *See* Alt Harassment Decl., ¶¶3–17. Recently, Buckeye was harassed verbally and in writing after leading a public campaign to inform union members about their rights to quit their union and stop paying dues. *Id.* ¶14. One individual called Buckeye "a bunch of anti-american, lying thieving, traitor trash, scumbags." *Id.* ¶15. Other individuals have vilified Buckeye and its members as "henchman for the Koch brothers," well-known political activists who have likewise drawn public opposition. *Id.* ¶11.

These types of threats make Buckeye's donors cautious about even being potentially associated with the organization. One donor who has supported Buckeye for many years has made it clear to Buckeye that it will not donate at a level that would trigger disclosure under § 6033(b)(5). Alt Donor Declaration, ¶5. In response, Buckeye monitors its donations to ensure that it does not solicit contributions that would require disclosure under Schedule B, and has even guaranteed this donor it would refund any amount that would otherwise require disclosure. *Id.*

Third, the IRS distinguishes its track record of keeping taxpayer information confidential from California's. Even if the IRS does a better job, it is not enough to minimize the burden on associational rights. *See supra* 16–17. And fourth, the IRS argues that its rule is narrowly tailored to monitor tax compliance because—unlike in *AFPF*—the IRS uses Schedule B information to determine whether to initiate an examination in the first place. But the IRS ignores that the Supreme Court held that the disclosure rule in *AFPF* would fail exacting scrutiny "[e]ven if the State relied on up-front collection in some cases." 141 S. Ct. at 2386; *see supra* at 14–16.

G. Buckeye needs discovery if the IRS's evidence would otherwise meet its burden.

Even if the Court takes the IRS's evidence as a given, it does not satisfy exacting scrutiny. But if the Court disagrees, it should deny summary judgment so that Buckeye can take discovery into the issues discussed above—including but not limited to the extent to which the IRS actually relies on Schedule B information before initiating examinations. *See* Fed. R. Civ. P. 56(d); Carson Decl. at ¶6.

CONCLUSION

The Court should deny the IRS's motion for summary judgment.

Dated: September 1, 2023.

Respectfully submitted,

/s/ Jay R. Carson

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

THE BUCKEYE INSTITUTE,

Plaintiff,

v.

INTERNAL REVENUE SERVICE; CHARLES P. RETTIG, 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.

Civil Action No. 2:22-cv-04297

Hon. Michael H. Watson,
United States District Judge

Hon. Elizabeth P. Deavers,
United States Magistrate Judge

DECLARATION OF ROBERT ALT REGARDING HARASSMENT

I, Robert Alt, hereby declare as follows:

1. I am an adult resident of the State of Ohio and the President & CEO of The Buckeye Institute ("Buckeye"), a position I have held since October 2012. I am competent to make this Declaration and do so in support of Buckeye's Memorandum in Opposition to the Defendants' Motion for Summary Judgment in the above-captioned matter.

2. Buckeye seeks to promote limited and effective government and individual freedom in Ohio and across the country through policy research and advocacy, often serving as a government watchdog and litigating against federal, state, and local authorities to defend rights under the Ohio and United States Constitutions.

3. As Buckeye's President, my duties include meeting with donors, soliciting donations, reviewing all government filings, and otherwise attending to Buckeye's day-to-day affairs.

4. Over the past several years, Buckeye has taken positions on issues involving public policy. Some have viewed these positions as controversial.

5. Buckeye has been harassed and vilified directly and indirectly during this time. Some examples of this are set forth below.

6. In October 2020, a postal patron sent a postcard to Buckeye stating, "Go to Hell Buckeye Institute." See Ex. A.

7. On September 19, 2018, Buckeye received an email stating, "Ya'll can go f*** yourselves." See Ex. B.

8. On September 17, 2018, Buckeye received an email stating, "Hey! F you guys! We're gonna crush you, DeVos, Trump, and the fascist agenda at the ballot here in 2018. Get ready." See Ex. C.

9. On September 17, 2018, Buckeye received an email stating, "Fascist Corporate Whores Never Stop Do They?**!** Dear Fascist Corporate Whores: You never stop do you?! Always attacking Unions and workers and defending corporations. You fit the Fascist mold Hitler loved so much!" See Ex. D.

10. On September 19, 2018, Buckeye received an email stating: "I am sticking with the union F*** you Scabs." See Ex. E.

11. On September 17, 2018, Buckeye received an email stating: "Your recent mailer's disguising your concern for public education teachers is a farce! It's obvious that you are just henchmen for the Koch brothers." See Ex. F.

12. On September 15, 2018, Buckeye received an email stating: "Stop f***in contacting me u bunch of dumb asses. I didn't ask u to and don't appreciate your f***in LIES." See Ex. G.

13. On February 3, 2023, Buckeye received an email stating: "Nothing but a group of right wing republican F***wits and C**womblers." See Ex. H.

14. Buckeye has also received multiple harassing voicemails. While Buckeye does not have the exact date received, Buckeye has the approximate dates.

15. The following voicemails were received in September 2018 in response to Buckeye's public campaign to let union members know that they are entitled to quit their union and stop paying union dues as a result of the Supreme Court case, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). I have listened to these voice mails and the following are accurate transcriptions of the relevant portions of the voicemails:

a. "F*** off."

b. "You should all be ashamed of yourself and you'll all be going to hell."

c. "I dare you to call me back…if you got the balls."

d. "I hope you all get painful rectal disease."

e. "Stop sending me your anti-union, anti-teacher bull*** propaganda…I hope you guys rot in hell…"

16. The following voicemail was received between July 27 and August 7, 2023, in response to Buckeye's support of a supermajority requirement to amend the Ohio Constitution. I have listened to this voicemail, and the following is an accurate transcription of the relevant portion

thereof: "F** you Buckeye Institute. You are just a bunch of anti-american, lying, thieving, traitor trash, scumbags. F***ing waste of life."

17. As President of Buckeye, I am responsible for protecting our donors from harassment such as the foregoing. As a result, Buckeye takes seriously the privacy of our donors. Buckeye does not publish its donors' names or share them with others except when requested by the donor or required by law. Accordingly, Buckeye does not put donor names or information on any government documents unless absolutely required by the law, and even then, we contest those requirements, as Buckeye is doing in this case.

18. As President of Buckeye, I am familiar with leaks of private data by the government and other abuses by the IRS.

19. The IRS claims that it has been successful at keeping donor information private. But only a year ago, the IRS disclosed that it had "inadvertently" released information on as many as 120,000 private organizations' 990 forms to the public. Brian Fung, *IRS says it mistakenly exposed taxpayer data belonging to non-profits*, CNN (Sept. 2, 2022), https://www.cnn.com/2022/09/02/politics/irs-taxpayer-data-nonprofits/index.html.

20. Further, I am aware of the well-publicized cases of IRS retaliation against conservative groups. Lois Lerner, the former IRS Director of Exempt Organizations, was held in contempt of Congress after it was revealed that the agency targeted numerous conservative groups. *IRS targeting: Lois Lerner held in contempt of Congress*, BBC (May 8, 2014), https://www.bbc.com/news/world-us-canada-27319132. It is readily apparent that the IRS's practice of targeting groups on the philosophical right included Buckeye. See Pl. The Buckeye Inst.'s Mot. Summ. J. at 9. I am also aware of other recent apparent intimidation actions of the IRS against a journalist criticizing the IRS, as discussed in the Wall Street Journal. *The IRS Makes a*

Strange House Call on Matt Taibbi, WSJ (Mar. 27, 2023), https://www.wsj.com/articles/irs-matt-taibbi-twitter-files-jim-jordan-daniel-werfel-lina-khan-84ee518.

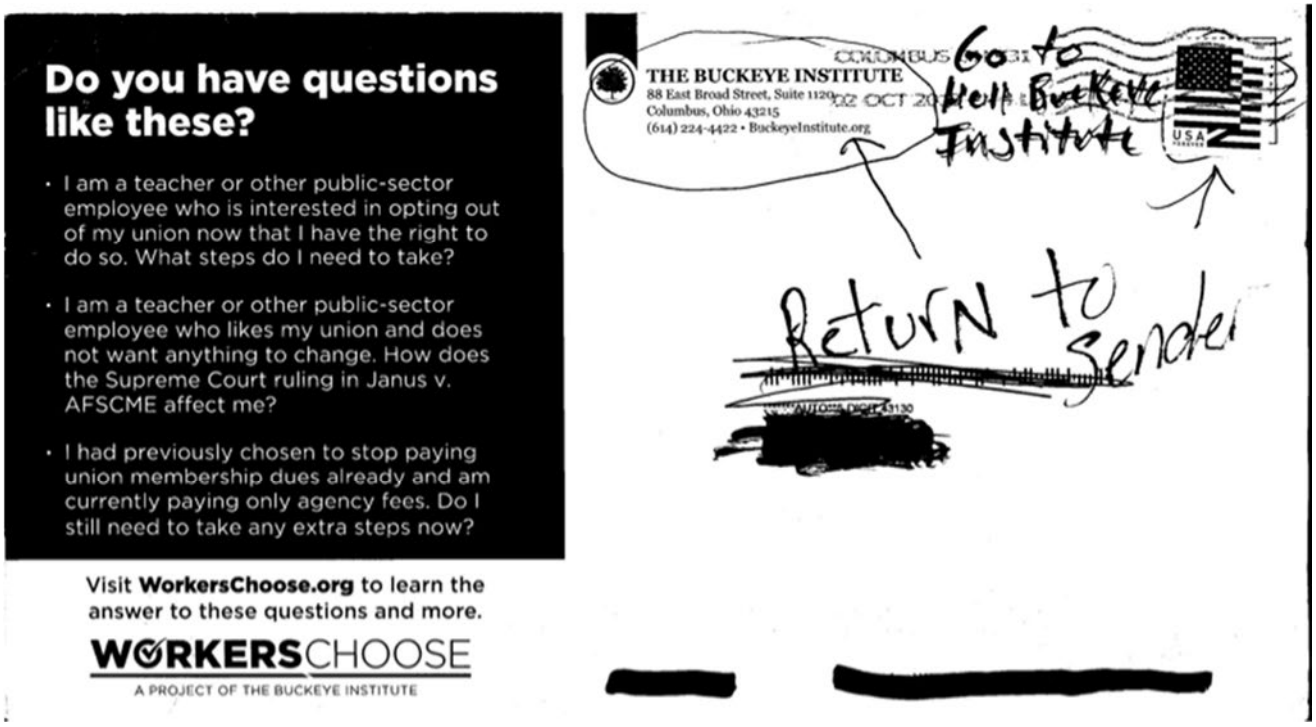
21. While many IRS employees may be meticulously careful with confidential information, the fact that some indisputably are *not* creates the need for organizations that are concerned about the privacy of their donors like Buckeye to not disclose sensitive donor information to the IRS if they wish to keep that information private, particularly if there is a less intrusive method for the IRS to operate without requiring disclosure of and warehousing of information contained on form 990, Schedule B.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on September 1, 2023.

/s/ Robert Alt
ROBERT ALT

Exhibit A



Do you have questions like these?

- I am a teacher or other public-sector employee who is interested in opting out of my union now that I have the right to do so. What steps do I need to take?
- I am a teacher or other public-sector employee who likes my union and does not want anything to change. How does the Supreme Court ruling in Janus v. AFSCME affect me?
- I had previously chosen to stop paying union membership dues already and am currently paying only agency fees. Do I still need to take any extra steps now?

Visit **WorkersChoose.org** to learn the answer to these questions and more.

WORKERSCHOOSE
A PROJECT OF THE BUCKEYE INSTITUTE

THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1120
Columbus, Ohio 43215
(614) 224-4422 • BuckeyeInstitute.org

Go to Hell Buckeye Institute

Return to Sender

Exhibit B

THE BUCKEYE INSTITUTE

Workers Choose <workerschoose@buckeyeinstitute.org>

Re: Ohio's Public Workers Have the Right to Choose!

Jessica Valsi <[redacted]> Wed, Sep 19, 2018 at 10:16 AM
To: Workers Choose <WorkersChoose@buckeyeinstitute.org>

Ya'll can go fuck yourselves.

Exhibit C

THE BUCKEYE INSTITUTE

Workers Choose <workerschoose@buckeyeinstitute.org>

Hey! F you guys!

Jeffrey Elliott <[redacted]> Mon, Sep 17, 2018 at 7:44 PM
To: WorkersChoose@buckeyeinstitute.org

We're gonna crush you, DeVos, Trump, and the fascist agenda at the ballot here in 2018. Get ready.

Exhibit D

THE BUCKEYE INSTITUTE

Workers Choose <workerschoose@buckeyeinstitute.org>

Fascist Corporate Whores Never Stop Do They?!

Gary Peterson <[redacted]> Mon, Sep 17, 2018 at 1:11 PM
To: WorkersChoose@buckeyeinstitute.org
Cc: Gary Peterson <[redacted]>

Dear Fascist Corporate Whores:
You never stop do you?! Always attacking Unions and workers and defending corporations. You fit the Fascist mold Hitler loved so much! Get a real life! Doesn't look like you're winning despite your court "judgments," thus your mailings! Teachers are leading the next revolution against a-holes like you!

Sincerely,

Anyone smart enough to see through corporate whores!

Exhibit E

THE BUCKEYE INSTITUTE

Workers Choose <workerschoose@buckeyeinstitute.org>

Re: Ohio's Public Workers Have the Right to Choose!

Mark Goffinet <[redacted]> Wed, Sep 19, 2018 at 10:33 AM
To: WorkersChoose@buckeyeinstitute.org

I am s icking with the union Fuck you Scabs

Exhibit F

THE BUCKEYE INSTITUTE

The Buckeye Institute <info@buckeyeinstitute.org>

Unwanted Mailers

Peggy Wagner <[redacted]> Mon, Sep 17, 2018 at 6:05 PM
To: info@buckeyeinstitute.org

To whom it may concern,

Your recent mailer's disguising your concern for public education teachers is a farce ! It's obvious that you are just henchmen for the Koch brothers.
As a proud union member for 27 years your propaganda disgusts me. I work with many educators whom come from charter or parochial/religious schools with no union and am appalled at the lack of representation and the poor wages they "earn." Honestly, I do not understand how you can sleep at night knowing that you are panhandling such untruths. Unions help wage earners make a livable income something your institute seems to be afraid of.
If you truly cared for the average worker instead of the money making greed of those who fund your institute the world would be a much better place.
Please stop sending your propaganda to 1503 Faircrest SW Canton Oh 44706.

Peggy Wagner
--

Vision
A Brighter Tomorrow
Where all students acquire a worldview of
life's possibilities and the confidence to pursue their dreams using the
knowledge and skills learned in the Canton City School District.

Mission

To inspire confident, creative and open-minded learners.

Visit us on
our
website <http://www.ccsdistrict.org/>,
on Facebook
<https://www.facebook.com/CantonCitySchoolDistrict> and Twitter
<https://www.twitter.com/CCS_District>

PLEASE NOTE: This message and any
response to it may constitute a public record, and therefore may be
available upon request in accordance with Ohio public records law. (ORC
149.43)

Exhibit G

THE BUCKEYE INSTITUTE

The Buckeye Institute <info@buckeyeinstitute.org>

Contact

M Z <[redacted]> Sat, Sep 15, 2018 at 3:06 PM
To: "info@buckeyeinstitute.org" <info@buckeyeinstitute.org>

Stop fuckin contacting me u bunch of dumb asses. I didn't ask u to and don't appreciate your fuckin LIES.

Sent from my Verizon, Samsung Galaxy smartphone

Exhibit H.

THE BUCKEYE INSTITUTE

The Buckeye Institute <info@buckeyeinstitute.org>

Student loans

Carolynn Hickey <[redacted]> Fri, Feb 3, 2023 at 8:45 PM
To: info@buckeyeinstitute.org

Nothing but a group of right wing republican Fuckwits and Cockwomblers

Carolynn Hickey
Sent from my iPhone

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

THE BUCKEYE INSTITUTE,

Plaintiff,

v.

INTERNAL REVENUE SERVICE; CHARLES P. RETTIG, 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.

Civil Action No. 2:22-cv-04297

Hon. Michael H. Watson,
United States District Judge

Hon. Elizabeth P. Deavers,
United States Magistrate Judge

DECLARATION OF ROBERT ALT REGARDING ANONYOMOUS DONOR JOHN DOE

I, Robert Alt, hereby declare as follow:

1. I am an adult resident of the State of Ohio and the President and CEO of The Buckeye Institute ("Buckeye"), a position I have held since October 2012. I am competent to make this Declaration and do so in support of Buckeye's Memorandum in Opposition to the Defendants' Motion for Summary Judgment in the above-captioned matter.
2. The Buckeye Institute is supported by a diverse group of individual and foundation donors. One of whom I will refer to as John Doe. Mr. Doe began his financial support of Buckeye in 2021.

3. He has verbally emphasized to me on several occasions that he takes his privacy quite seriously.
4. When I met John Doe for the first time, he told me that he agreed with our mission and objectives at Buckeye.
5. He further explained that he would like to financially support Buckeye, but he conditioned that support upon the following:
    a. He agreed to make a significant gift to the organization, but emphasized that he did not wish for his name to be disclosed as a "substantial contributor" on The Buckeye Institute's annually filed IRS Form 990 explicitly because of Mr. Doe's concerns about the prior mishandling of identifying information by the IRS itself among other breaches of confidentiality involving Schedule Bs. This requirement of his created a complication for Buckeye because what constitutes a "substantial contributor" is not a fixed amount, but rather a fluctuating number year to year based upon a percentage of our 501(c)3's gross revenue for a given tax year. Mr. Doe therefore asked at what level he would be considered a "substantial contributor" to Buckeye for the year he was making that gift, so that he could make sure his donation was below the reporting threshold.
    b. I informed Mr. Doe of my rough estimate of the dollar amount that would most likely constitute a "substantial contributor" to

Buckeye for that year based upon the requirements for Schedule B reporting. Mr. Doe agreed to donate just below the amount that would make him a "substantial contributor," with the explicit caveat that if toward the end of the year my estimate proved to be wrong and it would therefore be necessary to report John Doe's name on IRS Form 990, Buckeye would issue him a partial refund in an amount sufficient to make his gift fall below the level of a "substantial contributor" in order to avoid putting his name and identifying information on Buckeye's IRS Form 990 Schedule B.

6. John Doe executed the agreed-upon donation to Buckeye.
7. John Doe subsequently has given additional funds to Buckeye, and has insisted upon the same conditions.
8. Despite his endorsement of and agreement with Buckeye's work, and his significant financial capacity and personal willingness to give to our organization at higher levels, John Doe has made it clear that as long as the Schedule B reporting requirement is in place, he will not be able to give at a level that would result in his being listed as a "substantial contributor" on Buckeye's IRS Form 990 Schedule B.
9. Based upon the foregoing, my repeated requests for donations from John Doe have had to be limited to amounts consistent with these terms and conditions.

10. If the requirement to disclose Buckeye's "substantial contributors" on IRS Form 990 were to be eliminated, Buckeye would be able to significantly increase the amount of Buckeye's requests for donations from John Doe and others like him who share his concern for giving in privacy.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on September 1, 2023.

/s/ Robert Alt
Robert Alt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

THE BUCKEYE INSTITUTE,

Plaintiff,

v.

INTERNAL REVENUE SERVICE; CHARLES P. RETTIG, 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.

Civil Action No. 2:22-cv-04297

Hon. Michael H. Watson,
United States District Judge

Hon. Elizabeth P. Deavers,
United States Magistrate Judge

DECLARATION OF JAY R. CARSON

I, Jay R. Carson, hereby declare as follows:

1. I am an adult resident of the State of Ohio and the Senior Litigator at The Buckeye Institute ("Buckeye"), a position I have held since May of 2020. I represent Buckeye as Trial Attorney in this action, and I am competent to make this Declaration and do so in support of Buckeye's Memorandum in Opposition to the Defendants' Motion for Summary Judgment in the above-captioned matter.

2. Buckeye filed this suit on December 5, 2022. Compl., ECF No. 1. The defendants responded to the complaint by filing a motion to dismiss, MTD, ECF No. 21, and Buckeye moved for early summary judgment, Buckeye MSJ, ECF No. 36.

3. Given the early dispositive motions, the parties jointly moved to stay discovery before exchanging initial disclosures or holding a pre-trial conference. ECF No. 27. The Court granted that motion. ECF No. 28. Thus, to date the parties have conducted no discovery.

4. On July 14, 2023, while their motion to dismiss remained pending, the defendants filed a motion for summary judgment. ECF No. 43. The defendants attached five declarations and several more exhibits for support. In four of these declarations (ECF Nos. 43-1, 43-6, 43-8, and 43-9), the defendants' witnesses make several factual claims about the IRS's internal processes and other issues related to how the government uses the information disclosed by taxpayers pursuant to 26 U.S.C. § 6033(b)(5). In the fifth declaration (ECF No. 43-11), the witness makes several factual claims about the IRS's history of making unauthorized disclosures of confidential taxpayer information.

5. As explained in its Memorandum in Opposition, Buckeye submits that the Court should deny the defendants' motion for summary judgment even if the Court took all of the factual claims made by these witnesses as true because the evidence does not establish that 26 U.S.C. § 6033(b)(5) is substantially related to a sufficiently important government interest or narrowly tailored to achieving that goal.

6. Because of the discovery stay, which the parties agreed to after the defendants filed a motion to dismiss but before they filed a motion for summary judgment, Buckeye has not had the opportunity to engage in any discovery on the issues presented in the defendants' declarations. Buckeye has not been able to depose any of these witnesses or been able to obtain documents from the defendants related to their claims. If the Court determines that the defendants' evidence would otherwise meet the standard for rejecting Buckeye's constitutional challenge, such discovery will allow Buckeye (and the Court) to determine whether the defendants' factual claims are valid.

7. This declaration has been prepared and filed pursuant to Fed. R. Civ. P. 56(d), and is submitted in good faith and not for any improper or dilatory purpose.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on September 1, 2023.

/s/ Jay R. Carson
JAY R. CARSON