

No. 25-3170

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In The  
United States Court of Appeals for the Sixth Circuit

—◆—  
BUCKEYE INSTITUTE,

*Plaintiff-Appellee,*

v.

INTERNAL REVENUE SERVICE;  
WILLIAM LONG, in his official capacity as Commissioner of  
Internal Revenue; U.S. DEPARTMENT OF THE TREASURY;  
SCOTT BESSENT, in his official capacity as Secretary of the Treasury,

*Defendants-Appellants.*

—◆—  
**On Appeal From The United States District Court  
For The Southern District Of Ohio at Columbus,  
Civil Action No. 2:22-cv-4297 (Watson, J.)**

—◆—  
**AMICUS CURIAE BRIEF OF RANDY ELF  
IN SUPPORT OF AFFIRMANCE AND IN SUPPORT OF  
APPELLEE BUCKEYE INSTITUTE**

—◆—  
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November 20, 2025

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<sup>2</sup> “Authorities upon which [this filing] chiefly rel[ies] are marked with asterisks.” D.C.CIR.R. 28(a)(2), *available at* <https://www.cadc.uscourts.gov/circuit-rules-procedures>; *accord* 11TH CIR.R. 28-1(e), *available at* <https://www.ca11.uscourts.gov/rules-procedures>.

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**GLOSSARY<sup>3</sup>**

|                   |                                                                                                                                                            |
|-------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| BUCKEYE-BR.       | PL.-APPELLEE BUCKEYE INST.'S RESP. BR.                                                                                                                     |
| EC                | Executive committee                                                                                                                                        |
| IRS               | Internal Revenue Service                                                                                                                                   |
| IRS-BR.           | DEFS.-APPELLANTS IRS ET AL.'S OPENING BR.                                                                                                                  |
| PIC               | Political-issues committee                                                                                                                                 |
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<sup>3</sup> D.C.CIR.R. 28(a)(3); 10TH CIR.R. 28.2(C)(6), *available at* <https://www.ca10.uscourts.gov/clerk/rules>.

## AMICUS CURIAE STATEMENT<sup>4</sup>

Amicus has presented many briefs and oral arguments on the First Amendment and written a law-review article addressing it. Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits*, 29 REGENT U.L. REV. 35 (2016) (“*Triggering*”), available at <https://ssrn.com/abstract=5283417>.

Amicus has also made many presentations across the country on this topic. *E.g.*, *id.* at 35 n.\*; Randy Elf, *How Political Speech Law Benefits Politicians and the Rich* (Aug. 20, 2020) (one-hour video), available at <https://www.youtube.com/watch?v=h3ebymA7xOo>.

Where this brief quotes *Triggering* text, some cites from corresponding footnotes are inserted into the text, and some cites remain in footnotes. Cites are converted from law-review style to brief style; many are condensed. Emphases are as in *Triggering*.



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<sup>4</sup> All parties consent to this filing. No party’s counsel wholly or partly authored this brief. No such counsel, party, or other person—other than Amicus or Amicus’s counsel—contributed monetarily to preparing or submitting this brief. Amicus has no members. *Cf.* FED.R.APP.P. 29(a)(2), 29(a)(4)(E).

## STATEMENT OF ISSUES

Which scrutiny level applies to Plaintiff-Appellee Buckeye Institute's First Amendment challenge to Internal Revenue Service ("IRS") disclosure law?



## SUMMARY OF ARGUMENT

This action involves a First Amendment challenge to IRS-disclosure law.

The Sixth Circuit should hold that at least substantial-relation-exacting scrutiny, with the narrow tailoring of *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373 (2021), applies here.

Whatever the holding, the Sixth Circuit should distinguish the challenged law from ballot-access-disclosure law, political-speech-disclosure law, and law banning or otherwise limiting speech.

Thus, *Boone County Republican Party Executive Committee v. Wallace*, 132 F.4th 406 (6th Cir. 2025), *reh'g en-banc denied*, 140 F.4th 797 (6th Cir. 2025), *aff'g* No. 3:24-cv-00049, 2024-WL-3912946 (E.D. Ky. Aug. 22, 2024), is distinguishable.





## ARGUMENT

### **I. The Sixth Circuit should hold that at least substantial-relation-exacting scrutiny, with the narrow tailoring of *Americans for Prosperity*, applies here.**

This action involves a First Amendment challenge to IRS-disclosure law. (*Compare* PL.-APPELLEE BUCKEYE INST.’S RESP. BR. at 2 (“BUCKEYE-BR.”) (statement of issues) *with* DEFS.-APPELLANTS IRS ET AL.’S OPENING BR. at 2 (“IRS-BR.”) (same).)

*Americans for Prosperity* does not decide the scrutiny *level* for its claims, yet the Sixth Circuit should hold that at least substantial-relation-exacting scrutiny, *compare* 141 S.Ct. at 2391-92 (Alito, J., concurring) *with id.* at 2383 (op. of Roberts, C.J.), with the narrow tailoring of *Americans for Prosperity*, *compare id.* at 2391-92 (Alito, J., concurring) *with id.* at 2383-85 (majority-op.), applies here.

*Americans for Prosperity, id.*, expands the narrow tailoring of *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (op. of Roberts, C.J.).

### **II. The Sixth Circuit should distinguish the challenged law from particular types of law. *Boone* is distinguishable.**

Whatever the holding, the Sixth Circuit should distinguish the challenged law from particular types of law. *Infra* Parts II.A-II.C (text);

*see, e.g., Ams. for Prosperity, supra* at 3 (both opinions acknowledging political-speech-disclosure law). This will deter others’ conflating the different types of law.

Thus, *Boone* is distinguishable. *Infra* Parts II.B-II.C (text).

**A. No ballot-access-disclosure law is at issue here.**

No ballot-access-disclosure law is at issue here. (*Compare* BUCKEYE-BR. at 2 (statement of issues) *with* IRS-BR. at 2 (same).)

If it were, substantial-relation-exacting scrutiny would apply. *Doe v. Reed*, 561 U.S. 186, 196 (2010) (citations omitted).

**B. No political-speech-disclosure law is at issue here.**

No political-speech-disclosure law is at issue here. (*Compare* BUCKEYE-BR. at 2 (statement of issues) *with* IRS-BR. at 2 (same).)

If it were, the scrutiny level would depend on the type of such law. *Compare Triggering* at 80 n.252 (challenge to Track 2, *non*-political-committee disclosure requirements), *id.* at 77 & nn.236-37 (challenge to *particular* Track 1, political-committee or political-committee-like burdens by challengers for which it *is* constitutional to trigger Track 1 burdens in the first place), *and id.* at 77-79 & nn.238-51 (“challenge to whether government may trigger Track 1 burdens for an organization

itself in the first place”) (each collecting authorities); *but cf. Boone*, 132 F.4th at 428-30 (not acknowledging different types of such law).<sup>5,6</sup>

No such law arises here. *Supra* at 4. This *alone* suffices to distinguish *Boone*, *e.g.*, 132 F.4th at 421-30, on the political-speech-disclosure law; further analysis is unnecessary.<sup>7</sup>

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<sup>5</sup> The Supreme Court, applying constitutional scrutiny, has permitted two-track regulation—i.e., disclosure—of political speech. *See Buckley v. Valeo*, 424 U.S. 1, 63-64 (1976) (per curiam) (distinguishing political-committee(-like) burdens and *non*-political-committee disclosure).

The *terms* “Track 1” and “Track 2” are [Amicus’s], yet the *concepts* have been in the case law since ... *Buckley*, 424 U.S. at 63-64.

*Triggering* at 36 n.7; *but cf. Rio Grande Found. v. Oliver*, 154 F.4th 1213, 1218, 1230 n.12 (10th Cir. 2025) (addressing a Track 2, non-political-committee-disclosure challenge, conflating the two tracks by overlooking circuit precedent, and ironically calling analysis that primarily urges avoiding these mistakes “not useful”), *reh’g-en-banc pet. filed* (10th Cir. Sept. 23, 2025); *id.* at 1231 (Eid, J., dissenting) (same conflation).

<sup>6</sup> Challengers’ *capability* of complying with challenged law does not make it constitutional. *E.g., Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874 (8th Cir. 2012) (en-banc), *quoted in Triggering* at 46 & n.73 (collecting competing authorities); *but see Boone*, 132 F.4th at 424, 426, 429, 430 (“already set up”; “organizational structure and expertise”; “not so onerous ... as to give us pause”; “same reporting requirements except ... in the leadup to the election”).

<sup>7</sup> Alternatively, *see Boone*, 132 F.4th at 421 n.7 (desiring material that others appear to have understandably considered unnecessary):

► First, in *Boone*, the disclosure is Track 1, political-committee-like burdens for political-issues committees (“PICs”). *Compare* 132 F.4th at 410-11, 422, 430 *with Triggering* at 43-44 & nn.60-65, 56 & nn.117-24 (describing Track 1 burdens), 45-46 & nn.71-72 (same), 43-44 & nn.59-60, 50-51 & nn.90-92, 65 n.157 (same); *but cf. Boone*, 132 F.4th at 424, 426, 427, 429 (addressing “onerous” and “seriously limiting”).

Yet *Buckeye Institute* presents no issue analogous to whether Kentucky’s PIC definition, *Boone*, 132 F.4th at 411 (citation omitted), triggers such burdens beyond First Amendment boundaries, *e.g.*, *Buckley*, 424 U.S. at 79; *Sampson v. Buescher*, 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010), *each discussed in Triggering* at 48 & nn.83-84, 62-65 & nn.153-58 (collecting authorities); *see Coal. for Secular Gov’t v. Williams*, 815 F.3d 1267, 1269, 1276-81 (10th Cir. 2016) (extending *Sampson*), *quoted in Boone*, 132 F.4th at 429; *cf. Triggering* at 48 & n.81 (overbreadth, not vagueness), 49-50 & nn.87-89, 64 & nn.155-56 (tailoring), 51 & nn.93-96 (*constitutional* boundary), 59-61 & nn.146-50 (determining the *Buckley*-major purpose), 51-52 & nn.97-103 (*Citizens United* pages 366-71), 67-73 & nn.168-92, 77 (appeal-to-vote test); *but cf. Boone*, 132 F.4th at 428-30 (not fully seeing such boundaries).

► Second, the PIC’s parent executive committee (“EC”) already bears Track 1, political-committee-like *EC* burdens. *Compare Boone*, 132 F.4th at 410-12 *with supra* at 6 n.7 (citing *Triggering* as describing Track 1 burdens). *If* under Kentucky law, *PIC* disclosure, *supra* at 6 n.7, also befalls the parent EC, *Boone*, 132 F.4th at 421-28; *but see id.* at 431-34 (Griffin, J., dissenting) (implicitly disagreeing), then this is *another set* of Track 1 burdens for the parent EC.

Yet *Buckeye Institute* presents no issue analogous to whether Kentucky’s PIC definition, *Boone*, 132 F.4th at 411 (citation omitted), lacks narrow tailoring, *supra* at 3, because it triggers *another set* of Track 1 burdens for the EC, rather than letting it **(a)** use, *e.g.*, separate *ledger* funds/accounts, not just separate bank accounts, to keep particular contributions to the EC, *e.g.*, *Boone*, 132 F.4th at 411 (citation omitted), from becoming *contributions* to *candidates* and **(b)** include ballot-measure speech in *EC* reports.

**C. No speech ban or other speech limit is at issue here.**

No law banning or otherwise limiting speech<sup>8</sup> is at issue here. (*Compare* BUCKEYE-BR. at 2 (statement of issues) *with* IRS-BR. at 2 (same).)

If it were, the scrutiny level for such law would apply. *Compare*, e.g., *McCutcheon*, 572 U.S. at 232 (Thomas, J., concurring in the judgment), *with id.* at 199 (op. of Roberts, C.J.).

No such law arises here. *Supra* at 7. This *alone* suffices to distinguish *Boone*, e.g., 132 F.4th at 412, 423; *id.* at 431-34 (Griffin, J., dissenting), on the speech ban; further analysis is unnecessary.<sup>9,10</sup>

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<sup>8</sup>“A ban is a limit of zero.” *Triggering* at 38 n.25 (citation omitted).

<sup>9</sup> Alternatively, see *Boone*, 132 F.4th at 421 n.7 (desiring material that others appear to have understandably considered unnecessary): Kentucky has either

- an *entire* ban on the EC’s ballot-measure speech, *id.* at 431-34 (Griffin, J., dissenting); *contra id.* at 422 (seeing no ceiling on the EC’s speech, meaning its *entire* ballot-measure speech, and seeing no prevention of anyone’s speech, meaning no *entire* prevention of anyone’s ballot-measure speech (quoting *Citizens United v. FEC*, 558 U.S. 310, 366 (2010))), or
- a *lesser* ban, i.e., on the EC’s using *particular* contributions for ballot-measure speech, see *id.* at 412 (“foreclose” (citation omitted)), 423 (“prohibited” (citation omitted)).

Yet *Buckeye Institute* presents no issue analogous to whether such an *entire* ban violates the First Amendment. Compare *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-300 (1981) (ballot-measure contributions), and *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-95 (1978) (ballot-measure spending), with *FEC v. Ted Cruz for Senate*, 142 S.Ct. 1638, 1652 (2022) (quid-pro-quo corruption or its appearance (citing *McCutcheon*, 572 U.S. at 207 (opinion of Roberts, C.J.))), and *Bluman v. FEC*, 800 F.Supp.2d 281, 283 n.1, 286-89 (D.D.C. 2011) (explaining why aliens lack First Amendment political-speech rights), *aff’d*, 565 U.S. 1104 (2012) (mem.).

Or whether such a *lesser* ban violates the First Amendment. Compare *Cruz*, 142 S.Ct. at 1650 (holding that restricting resources burdens speech), 1652, 1656 (invalidating a ban on using *particular* contributions for non-quid-pro-quo-corruption-or-its-appearance-causing spending), with *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 537-39 (5th Cir. 2013) (invalidating a ban on *particular* contributors for non-quid-pro-quo-corruption-or-its-appearance-causing spending), *cited in Triggering* at 45 n.70, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1117-21 (9th Cir. 2011) (same), and *Ind. Right to Life Victory Fund v. Morales*, 112 F.4th 466, 472 (7th Cir. 2024) (same (following *Texans* and *Thalheimer*)); *contra Boone*, 132 F.4th at 423 (“Nothing in the Constitution requires the [Kentucky] Registry [of Election Finance] to allow” what it “has prohibited”).

<sup>10</sup> *If* distinguishing *Boone* alternatively requires any of what is addressed *supra* at 5-8 nn.7, 9, then asking this may be helpful as background: *Why* do the *Boone* dissent and the *Boone*-majority opinion see the *Boone*-disclosure law, *supra* at 6 n.7 (second point), and the *Boone* ban, *supra* at 7 n.9, so differently? *Cf.* 132 F.4th at 421-28 (asking a different but related question: whether requiring an EC to “register as” a PIC—i.e., *be* a PIC, *infra* at 9 n.10—is disclosure or a ban, meaning *for the EC*); 132 F.4th at 431-34 (Griffin, J., dissenting) (correctly *not* conflating disclosure and bans).

One reason—perhaps the main reason—is largely *implicit* in *Boone*.

In short, the *Boone* dissent contemplates that the parent EC *form/have* a PIC as a *separate* entity from the EC;



the *Boone*-majority opinion contemplates that the parent EC itself *be* a PIC, with the two *combined*, with either

the whole EC as a PIC

or the PIC as “a fund or account that is part of the” EC.



*Compare* 132 F.4th at 431-34 (Griffin, J., dissenting) (explicitly saying *form* and *separate*, implicitly saying *have*, and implicitly rejecting *be* and *combined*) and *id.* at 422-24 (using *form* for both *form* and *be*, implicitly saying *be* and *combined*, implicitly rejecting *form/have*, and explicitly rejecting *distinct*, i.e., *separate*) with *Triggering* at 43 & nn.56-59 (describing the difference between law with an *entire* ban and law with *no* ban; not addressing law with a *lesser* ban) (ADDENDUM.1).

Yet in *Boone*, reaching this issue is unnecessary *if* it affects the constitutionality of *no* part of the challenged law.



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◆

## CONCLUSION

The Court should affirm the district-court order, 2023-WL-7412043, and hold that at least substantial-relation-exacting scrutiny, with the narrow tailoring of *Americans for Prosperity*, applies here, *supra* Part I. Whatever the holding, the Court should distinguish particular types of law and *Boone*. *Supra* Part II (text).

Respectfully submitted,

/s/ Randy Elf

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with

- the type-volume limit, FED.R.APP.P. 29(a)(4), because it has 2025 words excluding what is exempt, *id.* 32(f), and
- the typeface and type-style requirements, *id.* 32(a)(5)-(6), because it is in 14-point Century Schoolbook, a proportionally-spaced font in Microsoft Word 2007.

*See id.* 32(g).

/s/ Randy Elf

RANDY ELF

November 20, 2025

## CERTIFICATE OF SERVICE

I certify that today I filed the **AMICUS CURIAE BRIEF OF RANDY ELF IN SUPPORT OF AFFIRMANCE AND IN SUPPORT OF APPELLEE BUCKEYE INSTITUTE** with the Court's electronic-filing system, *see* FED.R.APP.P. 25(a)(1), 25(a)(2)(B), 25(b), 25(c)(2)(A), 25(d)(3); 6TH CIR.R. 25(a), 25(f), which will serve:

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## II. POLITICAL-COMMITTEE AND POLITICAL-COMMITTEE-LIKE BURDENS

Some laws inherently *ban* political speech. For example, an organization and a political committee that it *forms or has* are separate entities, so law requiring an organization to *form or have* a political committee, and letting *only* the political committee engage in political speech, inherently bans such speech by the organization itself.<sup>56</sup>

By contrast, some other laws do *not* inherently ban such speech by the organization itself. Nevertheless, when the organization itself engages in its speech, the organization itself must *be* a political committee<sup>57</sup> or a political-committee-like organization.<sup>58</sup> Alternatively, such laws require—or *in effect* require—a fund or account that is part of the organization to *be* a political-committee-like fund or account.<sup>59</sup>

Political committees, political-committee-like organizations, and political-committee-like funds or accounts “are expensive to administer

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<sup>56</sup> See *id.* at 337–40 (describing such law).

<sup>57</sup> See *Buckley*, 424 U.S. at 63 (describing such law). This is as opposed to having to *form or have* a separate political committee.

<sup>58</sup> *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 834 (7th Cir. 2014) (describing such an organization).

<sup>59</sup> *E.g., id.* at 825, 839–40, 844–46 (describing such an account); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 868–72 (8th Cir. 2012) (en banc) (describing such a fund/account); see *infra* note 92.

To be clear, such law does not require an organization to *form or have* a political committee. When an organization *forms/has* a political committee, the political committee is *separate* from the organization. *Citizens United*, 558 U.S. at 337; *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 196 (1981). An organization does not speak through a political committee it *forms/has*; such a political committee, not its parent organization, speaks and bears Track 1, political-committee burdens as a separate entity. *Citizens United*, 558 U.S. at 337. This *Citizens United* holding supersedes *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (holding that organizations “speak through” their political committees), *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) (opinion of Brennan, J.) (same), and *FEC v. Beaumont*, 539 U.S. 146, 163 (2003) (asserting an organization’s political committee is an “avenue for” the organization’s own “contributions”). That an organization may wholly control a political committee that it *forms/has*, *Beaumont*, 539 U.S. at 149, does not change the point of law that the organization and such a political committee are separate under *Citizens United*, 558 U.S. at 337.

By contrast, when an organization itself must *be* a political committee or political-committee-like organization to speak, the organization itself speaks and bears Track 1, political-committee or political-committee-like burdens. *Barland*, 751 F.3d at 812–16, 822, 825–26. The same holds when a fund or account that is part of the organization must *be* a political-committee-like fund or account. *E.g., id.* at 825, 839–40, 844–46; *Minn. Citizens Concerned for Life*, 692 F.3d at 868–72.

Some courts conflate *forming/having* and *being* a political committee. See, e.g., *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 601, 604 (Tex. Ct. App. 2012) (incorrectly holding that law banning an organization’s speech and letting the organization “create its own political committee,” which then speaks, does not ban the organization’s speech).