NO. 25-3170

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
Case No. 2:22-cv-04297 (The Hon. Michael Watson)

BRIEF OF AMICUS CURIAE INDEPENDENCE INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29 and 26.1 of the Federal Rules of Appellate Procedure, amicus states that it has no parent corporation and issues no stock, thus, no publicly held corporation owns more than ten percent of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Independence Institute, by and through its undersigned counsel, hereby moves for leave to participate in this case as amicus curiae in support of the Buckeye Institute by filing an amicus curiae brief.

In support of this motion, the Independence Institute hereby states as follows:

1. Undersigned counsel has conferred with counsel for the parties to this case. Counsel for the Buckeye Institute and Counsel for the Internal Revenue Service do not oppose the motion.

2. Founded in 1985 on the eternal truths of the Declaration of Independence, the Independence Institute is a 501(c)(3) public policy research organization based in Colorado.

3. The briefs and scholarship of Research Director David Kopel have been cited in seven Supreme Court opinions, and in 130 opinions of lower courts, including in the Sixth Circuit Court of Appeals.

[1] No counsel for any party has authored this brief in whole or in part. No person other than the amicus has made any monetary contribution to this brief's preparation or submission.

4. The Institute's Senior Fellow in Constitutional Studies, law professor Robert Natelson, has been cited 39 times in 11 opinions by Justices of the Supreme Court, making him one of the most-cited scholars of the modern Court.

5. This case involves the constitutional appropriateness of the requirement to disclose the identities of certain donors who donate to 501(c)(3) non-profit organizations. The Independence Institute is specifically affected by this case as a 501(c)(3) organization, but more importantly, it is the mission of the Independence Institute to uphold and support the U.S. Constitution and its Bill of Rights. First Amendment rights to freedom of speech, freedom of assembly and freedom of the press are impacted by this case.

SUMMARY OF THE ARGUMENTS

The Founders well knew that tax law could be used to abridge the freedom of speech and of the press. The infamous Stamp Act of 1765 had been preceded by decades of use of the tax power to control the press and speech in the United Kingdom. As the British government

had discovered, tax law was a more effective tool of repression than the various censorship and licensing systems that had failed in prior centuries, such as under Henry VIII and Elizabeth I.

Indeed, the statute at issue directly abridges the original meaning of the First Amendment by stripping anonymity from persons who financially support speech. Such information can be particularly dangerous in the hands of an agency, such as the Internal Revenue Service, which has already admitted in court to its own extensive abuse of its tax code powers for partisan purposes.

Accordingly, statutes that might have the effect of "abridging the freedom of speech, or of the press" should be judged under the same standards as other statutes.

ARGUMENT

The I.R.S. opening brief could give the impression that the interactions between the U.S. tax code and First Amendment rights are accidental and trivial and therefore deserving of the virtually no judicial review. However, the First Amendment was drafted and ratified

because of awareness and experience with the use of taxation law against the freedom of speech and the press.

The English government's attempts to control speech and the press through patents, licensing, and censorship will be described in Part I. Beginning in the eighteenth century, the government shifted to a newer, and ultimately more effective system to control speech and the press: the tax code, as will be detailed in Part II.

Part III describes the use of tax powers to suppress speech in the American colonies, via the infamous Stamp Act of 1765. Part IV summarizes acknowledgement of the above history by U.S. courts, particularly the Supreme Court.

Part V briefly summarizes the centrality of anonymity for writers to the original meaning of the First Amendment, and Part VI summarizes the recent history of Defendant having abused the Internal Revenue Code for improper partisan political purposes.

I. Early English attempts to control speech and the press

During the reign of King Henry VIII (1509-47), "policy with respect to the press was carried out through instrumentalities based upon the

authority of the prerogative or, in other words, upon powers inherent in the office of the king." Fredrick Seaton Siebert, Freedom of the Press in England 1476-1776: The Rise and Decline of Government Control 25 (1965) [hereinafter "Freedom"]. "The Magna Carta, together with other feudal limitations on the power of the king, was discarded or at least held in abeyance during the sixteenth century." *Id.* at 28. During Henry VIII's regime,

> freedom of speech and of the press did not exist either in theory or in fact. . . . The natural desire of the English people for a greater right of self-expression had been so long and so completely repressed during the Middle Ages that they were not yet ready to make the supreme sacrifices necessary to gratify it. Their desire was also limited by the fact that only a small portion of the English people could read and write.

Giles Patterson, *Free Speech and a Free Press* 27-28 (1939).

As literacy spread, and "the trade in printed books increased and later extended into the field of religious and political controversy, the Tudor statesmen slowly but effectively concentrated the control of the new craft in the hands of the king and Council." Siebert, Freedom at 30.

A. Patent law

One form of press control was medieval patent law. "[T]he crown regarded itself as the sole patron . . . of new industries," and therefore

issued patents to protect inventors' rights. Siebert, Freedom at 33-34. This concept was applied to the press by "extending the meaning of 'invention' to include any new publication. . . . [N]ever absent from the minds of Tudor sovereigns in allowing the royal protection was the realization that the privilege would either reward a compliant printer or seduce a recalcitrant one." *Id.* at 34.

By the reign of Queen Elizabeth I (1558-1603), "patents of monopoly" placed entire subjects off-limits to everyone except a particular printer favored by the government. The "patents of monopoly" were "primarily prohibitions directed against not only reprints but new works in the specially reserved field." *Id.* at 38. For example, "under a patent of monopoly, such as that of law books to Tottell, another printer could issue no new works on the law." *Id.*

However, the patent monopolies backfired:

> As larger areas of the printing field were awarded to loyal followers, the opportunities for the printer without a patent and the newly-released apprentice to make an honest living decreased. Printers were forced by economic necessity to work on prohibited books in which there was always a large profit. Secret and surreptitious presses multiplied.

Id. at 40.

B. Licensing

A second system of press control was licensing, which was originally introduced to constrain religious speech and thought. As early as 1408, "the Provincial Council of the English church had prohibited the translation of the Bible into the vulgar tongue unless it was first submitted for examination." Siebert, Freedom, at 42 (citing William Lyndewode, Provinciale Seu Constitutiones Anglie Cum Summariis [Provincial, or the Constitutions of England with Summaries], n.ccvi (Josse Badius ed., 1525)).[2] In response to the Lollards, a proto-Protestant group who advocated for church reform and reading the Bible in English, Parliament in 1414 allowed "ecclesiastical officers to proceed in open court against the makers and writers of heretical books." *Id.*; 2 Hen. V ch. 7 (2 Statutes of the Realm, 1377-1509, at 181).

Yet church authorities found it difficult to throttle the circulation of unapproved theological literature. "Censures, warning, and admonitions failed to impress the early printers and booksellers. The Church's ultimate punishment, excommunication, held little terror for the agents circulating Protestant books." Siebert, Freedom, at 46. The

[2] https://collections.britishart.yale.edu/catalog/alma:9934274333408651.

church turned for help to the crown, which was eager to assist. Under King Henry VIII, "Executions were substituted for excommunication, and fine and Imprisonment for warning and censure." *Id.*

By Proclamation in 1538, Henry "set up a licensing system for *all* books printed in English," not only the Bible and religious books. The new system shifted "the administration of the licensing regulations from the clergy to state officers," that is, appointees of the king. *Id.* at 49; 1 Tudor Royal Proclamations 186 (Paul L. Hughes & James F. Larkin eds., 1969)) [hereinafter Tudor Royal Proclamations]. Initially, a few printers were imprisoned and fined; for the next several years "Few violations are recorded in the minutes of the Council." Siebert, Freedom at 50. However, in 1546, three individuals were executed for "erroneous opinions." *Id.*

The licensing system stayed in place with few changes under Henry's successors Edward VI (1547-53) and Mary (1553-58), although the enforcement of the system seemed to suffer from neglect as various other religious and economic problems required the attention of the Crown. *Id.* at 53. King Edward attempted to reinvigorate licensing in

1551 via royal proclamation. *Id.* at 54; 1 Tudor Royal Proclamations 514.

After Queen Mary ascended the throne, she attempted to abate the religious conflicts roiling the country by allowing a certain amount of freedom of religious practice, while forbidding the use of "devilish terms of papist or heretic." 2 Tudor Royal Proclamations 5, 6 (Paul L. Hughes and James F. Larkin eds., 1969). This proved to be difficult to enforce in the current climate. By the late 1550s, "Scurrilous, rowdy, and defamatory pamphlets" abounded. Siebert, Freedom at 55. In order to better control the press, in 1557, Queen Mary issued a royal charter for the establishment of the "Stationers Company, the trade organization of printers." *Id.* at 56. The Stationers Company "was composed of ninety-seven members and possessed the exclusive privilege of keeping presses." Patterson at 28.

C. Queen Elizabeth I introduces universal prior restraint

In 1558, Elizabeth succeeded her older half-sister Mary, and used the licensing system to impose prior restraints. According to the Royal Injunctions of 1559, "no manner of person shall print any manner of book or paper" unless it has been "first licensed by her majesty" or one

of her proxies; "pamphlets, plays and ballads" were similarly licensed. 2 Tudor Royal Proclamations 117, 128. Further, Elizabeth reduced the number of approved printers to twenty, and even those twenty could print only what was "first seen and allowed." Patterson, at 30.

Under Elizabeth, printers found themselves "enclosed in a triangle, one side of which was guarded by the queen, the Council, and the royal officials, the other by the church hierarchy and the ecclesiastical judges, and the third by the Stationers Company and its henchmen." Siebert, Freedom, at 56.

Various arrangements for reviewing and licensing printed materials were attempted over the next few decades. Strict enforcement not only proved to require a great deal of effort, but also apparently resulted in the development of various methods of "hoodwinking the licensers by disguising their real designs in the form of satires or epigrams" and by the straight-out forging of signatures. *Id*. at 63.

D. Licensing intensified

In 1637, the proliferation of unlicensed printers resulted in a decree from King Charles I reiterating "that all printed books must be submitted for license and registered by the Stationers' Company."

Patterson at 35. For the first time, quantitative ownership of presses was restricted; and the government oligopoly of printers was now had law enforcement authority. "No one could have more than three presses," and the Stationers Company "was given power to search for violators." *Id.* Some printers were subjected to "cruel and unusual punishment — in the dungeon, in the pillory, or by mutilation and by branding" for innocuous or implied criticism of the crown. *Id.* at 36. One unfortunate printer published a book which mentioned that "in Rome, women characters were portrayed on the stage by courtesans." *Id.* at 35. This was interpreted to be an indirect criticism of the Queen, and the printer was fined, forced to stand in the pillory, had both ears cut off and his forehead branded. *Id.* at 36. The barbarity of the punishment resulted in a public protest. *Id.*

Vigorous licensing enforcement continued to cause secondary problems. "The licensing system was impractical and inefficient. . . . If news was suppressed, rumor took its place. Only 'official' news could counteract the rumors, but who could be trusted to guide this hydra-headed monster, public opinion?" Siebert, Freedom, at 161.

The obduracy and tyranny of King Charles I resulted in the British Civil Wars that began in 1642, the monarchy eventually being abolished and Charles I executed for treason in 1649. Patterson, at 37. Eventually, a military dictatorship led by Oliver Cromwell took power, and continued to use licensing against the press. "Governments set up by popular opinion sought vainly for a formula by which that same popular opinion might be regimented for the self-perpetuation of the officials in power." Siebert, Freedom, at 165. The licensing system was "abolished . . . re-established . . . expired . . . [and] again renewed." Patterson, at 53.

E. Registration and the Licensing of the Press Act

When the monarchy was restored in 1660, King Charles II took many steps to restrict the free press and free thought. The Licensing of the Press Act, 14 Car. II, c. 33 (1662), reconstituted the Stationers Company and required that "all intended publications be registered" with the Company, thus giving the king his 'royal prerogative' — and by extension, giving the Stationers the ultimate say in what got printed

and what did not." Karen Nipps, *Cum privilegio: Licensing of the Press Act of 1662*, 84 The Library Q. 494, 494 (2014).[3]

The enforcement of the Licensing of the Press Act was not gentle. It gave "The king's representatives 'power and authority . . . to search all Houses and Shops' and confiscate whatever they deemed unlawful. Penalties by fine and imprisonment for offenders were decreed." *Id.* at 495. This Act and its draconian prior restraint, like previous licensing decrees, proved both ineffective and unpopular. "In fact, far more unregistered titles than registered titles made their way into the marketplace." *Id.* at 500. In 1692, after England's 1688 Glorious Revolution, the act was allowed to permanently lapse because "the hue and cry over state censorship and the rights of the stationers and of an ever-increasing number of professional authors (including Defoe and Swift) had reached a critical mass." *Id.*

II. The shift to taxation as the method of control, and the Stamp Act of 1712

As some Members of Parliament had accurately discerned at the dawn of the eighteenth century, "none of the historical methods for the control of the press and public opinion could be depended upon to work

[3] http://nrs.harvard.edu/urn-3:HUL.InstRepos:17219056.

successfully over any extended period of time." Siebert, Freedom, at 165. Beginning in the reign of Queen Anne (1702-14), a less obvious approach was implemented:

> Eighteenth century statesmen saw no reason to revive such obviously unsavory methods of control as state licensing and printing-trade regulation. There were other methods, more subtle and more indirect, and therefore less dangerous. Taxation, subsidization and prosecution under due process of law — these were the methods employed by the state to control and regulate the press.

Fred S. Siebert, *Taxes on Publications in England in the Eighteenth Century*, 21 Journalism & Mass Commc'n Q. 12, 12 (1944).

Because of the Glorious Revolution, the Crown in England undeniably had to share power with Parliament. A new approach was needed, by which the government could control the press while still giving lip service to the freedom of the press. The government discarded the direct methods of control as practiced by the Tudor regimes. Rather than overtly justifying press control, as the governments of the prior two centuries had done, the new approach was indirect.

> The rhetoric of the times called for tactical expression of political belief in the freedom of the press, that is, in freedom from the Tudor and Stuart types of control; but in actual practice, it was universally recognized by political leaders that the stability of government as well as their continuance

> in office demanded some form of control over the media of communication.

Siebert, Freedom, at 305. The new approach would attempt "not to suppress" print, "but to exploit its popularity." J.A. Downie, Robert Harley and the Press: Propaganda and Public Opinion in the Age of Swift and Defoe 148 (1979).

In 1712, Queen Anne addressed Parliament and bemoaned the publications of "false and scandalous Libels such as are a reproach to any government. This Evil seems too strong for the Laws now in force: it is therefore recommended to you find a Remedy equal to the Mischief." Siebert, Freedom, at 309 (quoting J.M. Thomas, *Swift and the Stamp Tax of 1712*, 24 Pubs. of Mod. Lang. Assoc. 247, 258-59 (1916). Parliament acquiesced by passing the Taxation Act, also known as the Stamp Act of 1712. 10 Anne ch. 18 & 19 (1712). The Act applied to publishers, including newspapers, in England. "That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt." *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 246 (1936).

Some of the primary targets of the Stamp Act of 1712 were "those newspapers and pamphlets which depended for their sale on their cheapness and sensationalism." Siebert, Freedom at 310.

> If these sheets [pamphlets] could be taxed their distribution might become difficult, and when any one attempted to evade the tax he could be punished, not as a libeller, but as a smuggler, and the character of what was printed would not come under discussion, as it generally would under a trial for libel.

1 Collet Dobson Collet, History of the Taxes on Knowledge: Their Origin and Repeal 7 (1899).

There were several advantages to the ruling classes of the use of taxation as a means of control. Besides avoiding obviously tyrannical appearances, and providing much needed revenue, the stamp taxes were actually supported by some of the printers and publishers. The proliferation of printed material depressed prices and made it more difficult to make a profit. Printers and publishers petitioned Parliament requesting the revival of some sort of system to "maintain[] existing printing monopolies" without resorting to the licensing system. Siebert, Freedom at 306-07.

Some publishers desiring more official control were accomplices of the Crown. The *London Gazette* was the only newspaper that had been

allowed under the Licensing Act and it was "edited by a clerk in the office of the Secretary of State." Patterson, at 55. After the expiration of the Licensing Act, the *London Gazette* continued to be the official newspaper of the government ministry under Queen Anne. Downie, at 1.

Additionally, there were also many unofficial government propaganda tools. The *Post Boy* "was a most important government organ for the regular dissemination of the ministerial slant on events." *Id.* at 163. Famed writer Jonathan Swift "can be said to have organised government propaganda for the Oxford ministry." *Id.* at 162. For a time Swift's "*Political Slate* counted as almost a fifth ministerial paper . . . (the others were the *Examiner*, the *Review*, the *Post Boy*, and the *Gazette*)." *Id.* at 163.

The creator of the Stamp Act of 1712, Henry St. John, the first Viscount Bolingbroke, "is credited with the discovery that a tax on publications would serve the double purpose of providing revenue and at the same time serve as a substitute for the Regulation of Printing Act." Siebert, Freedom at 308-09. By taxation, the government could drive many of the smaller printers out of business. The larger printers

who could survive the tax were all too aware that they must not excessively displease the government. There was some level of tax that they would not survive, nor could they prosper if all taxation were removed and full competition restored. Thus, even printers and periodicals that were not government propaganda outlets were still dependent on government controls.

III. Control of speech and the press in the American colonies

The Stamp Act of 1765 is the infamous American version of the English Stamp Act of 1712. Before the 1765 Stamp Act, all taxes on intra-American commerce had been imposed only by the colonial legislatures. Other than export and import taxes, the Stamp Act of 1765 was the first tax imposed directly on the colonies by the British Parliament, and it applied to trade that never ventured overseas. The proponents of the Stamp Act considered it necessary to "rein in a colonial society whose disorder and insubordination seemingly threatened the viability of both the British economy and the British Empire as a whole." Justin duRivage & Claire Priest, *The Stamp Act and the Political Origins of American Legal and Economic Institutions,*

88 S. Cal. L. Rev. 875, 890 (2015). The 1765 Stamp Act taxed "the paper on which a variety of legal and commercial documents were printed," and therefore "the Stamp Act effectively taxed transactions and information." *Id.* at 885-86. One of the goals of the Act was to "curb colonial civil society by raising the cost of newspapers that fanned the flames of political opposition." *Id.* at 891.

The proliferation of American newspapers and pamphlets, and the corresponding criticism of the actions of governments, was a great frustration to the royal governors in the colonies.

> By taxing both newspaper and pamphlets, as well as the advertisements that made them profitable, the Stamp Act promised to make mobilizing public opinion against government much more difficult. It would likewise make petitioning, in which groups of citizens presented public officials with community grievances, more expensive and less common. When combined with the army of British troops that the Stamp Act helped pay for, it promised to radically transform the power dynamic between the colonial public and their imperial governors.

Id. at 898.

Seven American colonial legislatures denounced the Stamp Act, as did a convention of the colonies. According to the New Jersey's General Assembly's "Stamp Act Resolves":

> Whereas the late Act of Parliament, called the Stamp-Act, is found to be utterly subversive of Privileges inherent in, and originally secured by Grants and Confirmations from the Crown of Great-Britain, to the Settlers of this Colony . . . That as the Tranquility of this Colony hath been interrupted through Fear of the dreadful Consequences of the Stamp-Act, that therefore the Officers of the Government, . . . be entituled to . . .use what Endeavors lie in their Power . . . for the Repealing the Act abovementioned."

N.J. Gen. Assembl., 12th Sess., 20th Assembl. 7-8 (1765). *See also* Connecticut Resolves, 12 Conn. Colonial Recs. (Oct. 10, 1765); Maryland Resolves, Votes and Procs. of the Lower H. of the Assemb. of the Province of Md.: Sept. Sess. 1765, at 9-10 (Sept. 28, 1765); Resolutions on the Stamp Act, Oct. 29, 1765, 42 J. of H. of Rep. of Mass. 151-53 (Mass. Hist. Soc. 1972); Resolves of the Pa. Assembl., VII Pa. Archives, 8th Series, Sept. 21, 1765 (Charles Hoban ed. 1935); VI Recs. of the Colony of R.I. and Providence Plantations in New Eng. 451-52 (John Russell Bartlett ed. 1861); Virginia Resolves, Journals of the House of Burgesses of Virginia, 1761-1765, at 359-60 (May 30, 1765); The Declaration of Rights of the Stamp Act Congress, Mass. Gazette 3 (Mar. 20, 1766).

IV. United States courts recognize the danger of taxation to the First Amendment

As the U.S. Supreme Court has recognized, for the Stamp Act of 1765 "revenue was of subordinate concern, and . . . the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs." *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 247 (1936). Indeed, the Stamp Act of 1765, and similar laws were considered taxes on knowledge, for, as Dr. Alexander Adam famously wrote, "A tax upon Paper, is a tax upon Knowledge." James Williamson, *On the Diffusion of Knowledge Amongst the Middle Classes*, 62 Edinburgh Rev. J 126, 126 (1836)[4].

The American colonists who later ratified the U.S. Constitution were "familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes." *Grosjean*, 297 U.S. at 247-48.

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[4] https://books.google.com/books?id=bOoEAAAAQAAJ&pg=PA126#v=onepage&q&f=false

Grosjean quoted the leading American constitutional scholar of the latter nineteenth century, Michigan Supreme Court Justice Thomas Cooley:

> Judge Cooley has laid down the test to be applied – The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

Grosjean, 297 U.S. at 249-50 (quoting 2 Thomas Cooley & Walter Carrington, *A Treatise on the Constitutional Limitations* 886 (8th ed. 1927)).

In *Murdock v. Pennsylvania*, when reviewing the taxation of door-to-door solicitation, the U.S. Supreme Court again looked to the origins of the First Amendment. As the Court observed, "The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed. . . . They may indeed operate even more subtly." *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (citing *Grosjean,* 297 U.S. at 244-49).

Although *Murdock* was decided prior to the full development of tiers of scrutiny, the Court did declare that the ordinance was "not narrowly

drawn to safeguard the people of the community in their homes against the evils of solicitations." 319 U.S. at 116. The fact that the law in question was "nondiscriminatory" was insufficient to save it. *Id.* at 115.

A district court in this Circuit has noted the close nexus between the rights enumerated in the First Amendment of the U.S. Constitution and the colonists' objections to the Stamp Act: "After the passage of the Stamp Act in 1764 'American colonists responded . . . with organized protests.'" *Intervarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 827 (E.D. Mich. 2021).

Our Founders well knew that taxation could be used to hinder freedom of speech and the press. The First Amendment's scope is not limited to prior restraints of the types used by the Tudors and by the seventeenth-century Stuarts before their craftier successors of the eighteenth century. Instead, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. As Justice Harlan Fiske Stone explained, "no law" means that laws suppressing speech and the press cannot be immunized by being located in a tax code:

> The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against

> discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.

Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, J., dissenting).

Justice Stone's words that "every form of taxation" is a proper subject for First Amendment review were delivered in a 1942 dissent; however the next year the majority of the Court agreed. In 1943, the Court reheard *Jones v. Opelika* and overturned the 1942 decision. *Jones v. Opelika*, 319 U.S. 103 (1943). The new decision came in parallel with *Murdock v. Pennsylvania*, wherein the Court stated:

> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano Co. v. Hamilton,* 292 U. S. 40, 292 U.S. 44-45, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.

319 U.S. 104, 112 (1943).

V. The Important Role of Anonymous Speech

Once one discards the implausible notion that the First Amendment does not apply to tax codes, the necessity of heightened scrutiny for the

statute at issue in this case becomes apparent. The statute strips the privacy of persons who contribute to the support of policy advocacy speech. Therefore, the statute deserves serious review of its abridgement of the First Amendment, because anonymity when speaking (and *a fortiori*, when aiding another speaker) were at the core of the original First Amendment.

The ubiquity of anonymous speech in pre-colonial and colonial America is known by any reader of the Federalist Papers. The use of pseudonyms such as "Publius" and "an American Citizen" was the rule rather than the exception. Robert G. Natelson, *Does "The Freedom of the Press' Include a Right to Anonymity? The Original Understanding*, 9 N.Y.U. J. L. & Liberty, 160, 178 (2015). Among the advantages, anonymous authorship forced readers to consider ideas on their merits, rather than the prestige or character of the author. *Id.* at 184-5.

Compilations of American and British published political commentary in the 18th century divide the pieces into three categories. *Id*, at 178-9. The first is legislative declarations, which are necessarily attributed. *Id*, at 179. The second is written records of speeches or sermons. The oral, public nature of their original pronouncement makes

such attribution inevitable. *Id*. However, the third class of publications, those made by individuals directly for print, are almost universally unsigned. These include letters to the editor, essays and pamphlets. *Id*, at 178-9.

The rare signed pamphlet is so unusual that the collection editors have noted it "was unique for the period in having the author's name boldly listed on the title page." *Id.* at 179 (quoting 1 American Political Writing During the Founding Era 1760-1805, 67 (Charles S. Hyneman & Donald S. Lutz eds., 1983)).

The Supreme Court has noted that "under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

VI. The Need for Heightened Scrutiny Never Vanishes

Our constitutional system of ordered liberty depends not only on the checks and balances among the various branches of government, but also upon the vigorous debate enabled among private entities in our society by the protections of the First Amendment. James Madison explained that "the freedom of the press, as one of the greatest

bulwarks of liberty, shall be inviolable." Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788, at 449 (2010).

To exempt the Internal Revenue Code from ordinary First Amendment standards of review would give the federal government a subtle power to prefer and promote preferred entities and narratives, with pernicious effects on the freedom of knowledge of all citizens that is necessary to a self-governing people.

Although it appeared in long-age attempts by the English crown and Parliament to control the press, it remains a very current problem. Just as the printing press with moveable type expanded speech and the regulation thereof, the Internet also creates both avenues for increased speech and possibilities for the control of such expression. Recent events have shown various creative attempts by the government to control and curtail information and narratives. Alphabet, Inc., the parent company of both Google and YouTube, has submitted congressional testimony which reveals a recent history of attempts by "governments and law enforcement entities" to "moderate content according to their views." These attempts are given teeth by the fact that there are "significant penalties for non-compliance." Letter from Daniel F. Donovan, counsel

for Alphabet, Inc., to Hon. Jim Jordan, chairman H. Judiciary Comm., 119th Cong. 4 (Sept. 23, 2025)[5]

The Internal Revenue Service, the defendant in the instant case, has admitted that it wrongfully subjected certain non-profit organizations to harsher scrutiny, increased delays and inappropriate information requests based on their conservative policy positions. "Justice Department Settles with Conservative Groups over IRS Scrutiny," Reuters (Oct. 26, 2017).[6] *See In re United States v. NorCal Tea Party Patriots*, 817 F.3d 953 (6th Cir. 2016); *Linchpins of Liberty v. United States*, 71 F.Supp.3d 236 (D.D.C. 2014); *True the Vote v. I.R.S.,* 71 F.Supp.3d 219 (D.D.C. 2014).

In other words, the instant defendant *admits* that it has used the Internal Revenue Code for the political advantage of the then-ruling administration.

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[5] https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2025-09-23-letter-to-hjc.pdf; *See also Murthy v. Missouri*, 603 U.S. 43 (2024) (implied regulatory pressure on social media companies, but no standing because [before the Alphabet admissions] a connection between pressure and censorship could not be proven).

[6] https://www.reuters.com/article/legal/justice-department-settles-with-conservative-groups-over-irs-scrutiny-idUSKBN1CV1TX/.

The admission is fatal to Defendant's claim that its statutes are somehow exempt from the ordinary rules governing judicial review of abridgements of the freedom of speech and of the press. While the nature and means of public discourse are always changing, it is always essential to apply heightened scrutiny to all laws, including tax laws, that facilitate allow government pressure and manipulation of the discourse necessary for a free and self-governing people.

CONCLUSION

This Court should apply First Amendment heightened scrutiny to the statute.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

This undersigned hereby certifies that a copy of the above amicus brief was served on all counsel of record via the Court's electronic filing system this 26th day of November 2025.

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