No. 25-3170

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE BUCKEYE INSTITUTE,

Plaintiff,
v.

INTERNAL REVENUE SERVICE, *et al.*,
Defendant.

Appeal from the United States District Court
for the Southern District of Ohio

BRIEF OF IOWA AND 17 ADDITIONAL STATES SUPPORTING PLAINTIFF-APPELLEE AND AFFIRMANCE OF SUMMARY JUDGMENT AGAINST IRS

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STATEMENT OF AMICUS CURIAE

After *Americans for Prosperity v. Bonta* ("*AFP*"), every State regulates nonprofit organizations without requiring those organizations to report the names of their donors. 594 U.S. 595 (2021). That makes sense. A commitment to ensuring ethical nonprofit operations is vital, but the potential to chill expression lingers over certain disclosure requirements. Indeed, that is why the U.S. Supreme Court held that California's mandated disclosure regime for nonprofits failed the "exacting scrutiny" standard necessary to balance those two vital interests. *Id.* at 607.

One of the key concerns in the Court's exacting scrutiny was California's "less-than-perfect record for keeping Schedule Bs and Form 990s confidential." *The Buckeye Inst. v. Internal Revenue Serv.*, 2023 WL 7412043, at *1 (S.D. Ohio Nov. 9, 2023), *amended*, 2024 WL 770872 (S.D. Ohio Feb. 26, 2024). In that way, California's Department of Revenue is like the federal Internal Revenue Service. Indeed, the Court found that "the IRS acknowledges at least fourteen unauthorized disclosures of Form 990 information since 2010." *Id.*

Amici States submit this brief in support of the Institute because they are committed both to detecting unscrupulous non-profit activity and to protecting citizens' First Amendment right of free association. Any State may investigate a charity—or false charitable organization—without violating the First Amendment. But forty-seven States and the District of Columbia accomplish those twin goals without any state law requiring non-profit organizations to disclose the identities of their donors. And since *AFP*, the remaining States have either rescinded or stopped enforcing their donor disclosure laws. That majority approach prevents the evils of sham charities without jeopardizing the fundamental right of free association.

States play a vital role in regulating nonprofits. But the federal government's requirements here risk infringing First Amendment rights without benefitting its regulatory goals. That is why this coalition of 18 States files this amicus brief respectfully asking this Court to find that the IRS's disclosure requirements fail *AFP*'s exacting scrutiny and thus should be set aside as unconstitutional.

SUMMARY OF ARGUMENT

The Supreme Court has long recognized "the vital relationship between freedom to associate and privacy in one's associations." *AFP*, 594 U.S. at 606 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). Interference with that right is subject to at least "exacting scrutiny"—if not more rigorous scrutiny. *See id.* at 608. That requires the government regulation to be "narrowly tailored to the government's asserted interest." *Id.* And that means that "even a 'legitimate and substantial' governmental interest 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 480 (1960) and citing *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961)).

As Amici States know from experience, the IRS's blanket policy of compelled disclosure is not necessary to police non-profit organizations. It thus cannot survive strict scrutiny under the First Amendment. This Court should apply *AFP* to the IRS to reach the same result.

As applied, the IRS unconstitutionally required The Buckeye Institute to submit a list of its "substantial contributors" to the Secretary

of Treasury without first establishing any particularized suspicion of wrongdoing. *The Buckeye Inst.*, 2023 WL 7412043, at *1 (citing 26 U.S.C. §§ 6033(b)(5), 507(d)(2)(A), 6104(b)). The chilling effect is intuitive—and after *AFP*, should be enough given the undisputed facts to show impermissible chill. As the district court recognized, the IRS "acknowledges at least fourteen unauthorized disclosures of Form 990 information since 2010." *Id.* The district court wishes to proceed to trial to determine whether the "Disclosure Requirement is an important part of the IRS's enforcement and compliance procedures." *Id.* But given *AFP*, this Court should correct the district court and remand with instructions to grant summary judgment to The Buckeye Institute—or, at least, give enough guidance to the district court to rule that way at trial.

This Court should apply *AFP* to reverse for three primary reasons. *First*, the link between the required disclosure of donor information and the IRS's asserted governmental interest is tenuous. Since 2021, every State and the District of Columbia have identical governmental interests in protecting their citizens from charity fraud, yet they do not require the preemptive disclosure of donor information.

Second, not only does every State ably protect their populations from fraud, but they also avoid the risk of unintentional disclosure to the public at large. Presumably even the IRS agrees that avoiding public dissemination of membership rosters is an important state interest. But, as the record here proves, the potential for such disclosure is high. As a result, the common interest is far better served by the IRS declining to collect donor information from organizations that have not given them a reason to suspect misconduct.

Finally, the IRS's departure from this consensus undermines the ability of States to protect their citizens' First Amendment liberties. Requiring a Schedule B each year from every one of the charitable organizations seeking renewal across the country exposes the identity of vast numbers of citizens across the nation. In so doing, the IRS's outlier approach jeopardizes the associational protections in every State.

ARGUMENT

I. Preemptive Disclosure of Donors to the IRS is Not Substantially Related to the IRS's Legitimate Interests.

When disclosure of membership or donor lists would result "in reprisals and violence" to members, state-required disclosure is permitted only if (1) the IRS has a substantial interest for requiring

disclosure, (2) the means are substantially related to that interest, and (3) the means are narrowly tailored. *AFP*, 594 U.S. 608; *see Gremillion*, 366 U.S. at 296; *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). The IRS's interest in regulating charitable organizations does not justify the compelled disclosure of The Buckeye Institute's donor information. This disclosure is unnecessary, exposes donors to retaliation, and jeopardizes the First Amendment rights of citizens across the nation.

A. Post-*AFP* Every State Regulates Charities Without Preemptive Donor Disclosures.

There is no evidence that the IRS actually needs Schedule B forms or Forms 990 to effectively regulate charitable organizations. Indeed, the IRS suggests that one of the primary reasons that the substantial-contributor-reporting requirement is necessary is "its deterrent effect." Appellant Br. at 37 (citing 26 U.S.C. § 6033(b)(5)). Rather than tying the mandated disclosure information to an investigatory purpose, the IRS relies on the same grounds that California did in *AFP*—to preemptively stop bad behavior. But that is precisely the impermissible purpose highlighted by the Supreme Court in *AFP*. Indeed, that Court found a more powerful deterrent effect to be the deterrent from joining an

association. *See AFP*, 594 U.S. at 616. Nor can that purpose satisfy *AFP*'s "exacting scrutiny." *Id.* And since *AFP*, every State successfully regulates its charitable organizations without requiring preemptive disclosures.

The blanket and preemptive disclosure of significant donors is not appropriately correlated to the federal government's valid law enforcement interests. All 50 state attorneys general possess a law enforcement interest in preventing non-profits from defrauding their citizens. No State requires annual submission of unredacted Schedule Bs—and 10 States go one step further by not requiring any registration to raise funds in their jurisdictions. States across the country from Arizona and Delaware to Texas and Iowa have adopted general non-registration standards.

Amici States' lack of preemptive donor disclosure requirements has not stopped them from effective oversight of non-profits that solicit donations within their jurisdictions. Nor has it stopped them from investigating, prosecuting, and deterring fraudulent activities.

All 50 States' prosecution of fraudulent charities is important because it shows that the IRS's donor disclosure requirement does not satisfy the exacting scrutiny required to show narrow tailoring related to

a substantial government interest. That is important because, even assuming an important government interest, there exists narrower means to achieve the goal of regulating charitable organizations. The IRS does not claim that requiring submission of unredacted Schedule Bs increases its investigative efficiency. The burdensome disclosure rule and attendant chill imposes substantial costs with little benefit.

Amici States share the IRS's law enforcement concerns and diligently regulate non-profits. They just pursue their law enforcement interests through traditional methods including compliance audits and subpoenaing donor information after developing a particularized suspicion of wrongdoing. Those methods are available to the IRS as well, and widespread experience proves that they work.

B. Required Nonpublic Disclosure Creates The Potential For Public Disclosure.

The IRS's indiscriminate disclosure requirement risks public disclosure of membership lists, chilling associational rights. By collecting donor information without any law enforcement need, the IRS creates a risk of unintentional disclosure to the public. Ironically, the IRS highlighted that potential difficulty by acknowledging at least fourteen major breaches of this data since 2010. And the district court recognized

that the risk of disclosure harms nonprofits because "donors reduce their donations to avoid being part of the disclosure." *Buckeye Inst.*, 2023 WL 7412043, at *3. And that is not a mere risk—the district court found "Plaintiff has shown that donors *already have* reacted this way." *Id.*

In the wake of the Supreme Court finding California's donor disclosure rule unconstitutional, no State preemptively collects that information. And while the IRS may not be as cavalier with the data as California, the record below already shows substantial security breaches. That risk and *AFP* together help explain why no State pursues its law enforcement interest by demanding every charity surrender this sensitive information. The IRS cannot inadvertently disclose the identity of an anonymous donor if it never had that information in the first place.

C. The IRS Impairs The Ability Of States To Protect Their Citizens.

"In the First Amendment context, fit matters." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (plurality opinion). But, every year, the IRS requires every 501(c)(3) charitable organization to turn over their Schedule Bs and Forms 990 containing highly sensitive donor information. The burdens of that approach are felt across the nation.

As explained above, every State in the United States now respects the associational rights of their citizens by not requiring disclosure of Schedule Bs or Forms 990 without a particularized need. But, if a resident in any State makes a so-called substantial donation to a charitable organization, their identity is put at risk. The IRS thereby undermines the First Amendment protections secured by the States.

That is just one more reason why the IRS's infringement on associational rights is grossly disproportionate to the interest served. *See McCutcheon*, 572 U.S. at 218 (narrow tailoring requires a fit that is "'in proportion to the interest served'"). It also underscores the urgent need for this Court to apply *AFP* to the IRS so that its outlier approach does not undermine the First Amendment protections provided in every State across the United States.

CONCLUSION

The Court should affirm the use of exacting scrutiny on appeal. It should also reverse the denial of summary judgment to The Buckeye Institute and render in the Institute's favor.

In the alternative, it should affirm denial of summary judgment against the IRS and remand for fact-finding while clarifying the burden rests on the IRS to justify its current practice.

November 25, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,314 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: November 25, 2025

/s/ *Eric H. Wessan*
Solicitor General

CERTIFICATE OF SERVICE

The undersigned certifies that on the 25th day of November, 2025, this brief was electronically filed with the Clerk of Court using the CM/ECF system, which will serve all counsel of record.

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