No. 24-781

In the Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,
Petitioner,
v.
MATTHEW J. PLATKIN, Attorney General of New Jersey,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where the subject of a state investigatory demand has established a reasonably objective chill of its First Amendment rights, is a federal court in a first-filed action deprived of jurisdiction because those rights must be adjudicated in state court?

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill its mission.

The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). As such, it relies on support from individuals, corporations, and foundations that share a commitment to individual liberty, free enterprise, personal responsibility, and limited government. The Buckeye Institute vigorously defends the right of donors to associate with Buckeye anonymously if they so choose.

The Buckeye Institute has a substantial interest in the important question presented in this case, namely, whether a state may demand an unredacted list of all significant donors to a nonprofit organization. See

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

Buckeye Inst. v. *Internal Revenue Serv.*, No. 2:22-CV-4297, 2023 WL 7412043 (S.D. Ohio Nov. 9, 2023); Brief of Amicus Curiae The Buckeye Institute, *No on E, San Franciscans* v. *Chiu*, 145 S. Ct. 136 (2024) (No. 23-926); Brief of Amici Curiae The Buckeye Institute and 34 Public Policy Research Organizations and Advocacy Groups, *Americans for* Prosperity *Found.* v. *Bonta*, 594 U.S. 595 (2021) (Nos. 19-251, 19-255); Brief of State Policy Network and 24 State Public Policy Groups as Amici Curiae, *Indep. Inst.* v. *F.E.C.*, 580 U.S. 1157 (2017) (No. 16-743); Brief of Amici Curiae The Buckeye Institute for Public Policy Solutions, et al., *Delaware Strong Fams.* v. *Denn*, 136 S. Ct. 2376 (2016) (No. 15-1234); Brief of Amici Curiae The Buckeye Institute for Public Policy Solutions, et al., *Ctr. for Competitive Pol.* v. *Harris*, 577 U.S. 975 (2015) (No. 15-152). The Buckeye Institute has performed economic and policy analysis on important matters of public interest in states across the country. To potentially subject Buckeye's donors to disclosure in any state where it addresses these important matters would inflict significant and potentially irreparable harm to Buckeye and to its supporters' freedom to associate.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When a man in a suit walks into your business and says, "This is a nice place you have here. Hand over a list of your customers, and no one gets hurt"—it constitutes a threat. You might expect the business owner or manager to call the police or even the Attorney General. But what if the man in the suit is the Attorney General? In that case, your best recourse may be taking action under 42 U.S.C. § 1983, which provides a right to be heard in federal court. The Third Circuit, contrary to both the text and intention of § 1983, would allow such threats to hang ominously over the heads of the threatened parties until fully addressed by state courts. When such threats are made against the lifeblood of nonprofit organizations—donors—the threat is not only menacing but injurious.

This case is crucial to the free speech rights of nonprofit organizations. Before the invention of the printing press around 1440, the elites in society effectively controlled speech. Few people could read and those that could largely controlled the flow of information. From that auspicious beginning, we have become a society deluged with communication. People can communicate with the world via "X" (Twitter), Instagram, Facebook, TikTok, YouTube, WhatsApp, Snapchat, and dozens and dozens of other platforms, websites, and applications. Many of these communications are anonymous, which facilitates the public expression of different thoughts and provocative inquiries that stand in contrast to the conventional wisdom of the day. This ability to voice

unpopular opinions is the essence of free speech. In the same way, anonymous donations to organizations facilitate the promulgation of ideas and speech with which those donors agree but may be otherwise unsupported in society or contrary to current widely accepted opinions.

There are many who would prefer to suppress information with which they disagree. See, *e.g.*, *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 716 (2024). And some of those efforts originate in the government. See, *e.g.*, *Nat'l Rifle Ass'n of Am.* v. *Vullo*, 602 U.S. 175, 180–81 (2024) ("As superintendent of the New York Department of Financial Services, Vullo allegedly pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups."); see also *id.* at 188 (citing *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995) ("explaining that governmental actions seeking to suppress a speaker's particular views are presumptively unconstitutional.").

Fortunately, the Court has long protected the right of individuals to associate without fear of government intervention, reprisal, and harassment. Despite the Court's rebuffing governmental efforts to censure speech, some many government entities have continued to circumvent the Court's holdings and have sought to punish the right to free speech and association by demanding information about private individuals and nonprofit organizations, which is what the New Jersey's Attorney General is attempting

to do here. The Court should not allow the Attorney General—or any other government official—to demand protected donor information. Nor should it force Petitioner to await a decision by the state court before seeking relief from the federal courts.

ARGUMENT

I. The First Amendment protects citizens' rights to speak and associate without fear of government interference or retaliation.

"Free Speech is a human right. It is the free expression of thought that is the essence of being human. . . . It is the natural condition of humans to speak. . . . As such, it is not the creation of the Constitution, but rather embodied in that document." Jonathan Turley, *The Indispensable Right: Free Speech in an Age of Rage* 23 (Simon & Schuster 2024). Americans cherish the right to speak, even anonymously. They protect that right jealously "not to achieve the potential of the democratic system, but the fulfillment of one's own potential. Free speech remains one of humanity's most essential impulses, and the Constitution captured that essentiality in the First Amendment." *Id.* at 49–50.

Although free speech is an inherent human desire and a natural right, the Court has stated that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969) (citations omitted). A direct regulation on speech is not

necessary for an action to be deemed chilling to First Amendment interests as "compelled disclosure of political affiliations and activities" can impose the same burden on protected speech. *AFL-CIO* v. *FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003).

The ability to speak politically and yet remain anonymous is recognized both in this country's tradition and in this Court's jurisprudence. Long before the Federalist and Anti-Federalist Papers were published under pseudonyms, many pamphlets questioning British policies and practices circulated throughout the colonies. See Online Library of Liberty, *The Anonymous Pamphleteer 1775*, OLL, https://tinyurl.com/45t3nkbd (last visited Feb. 17, 2025). Accordingly, this Court has vigorously defended the right to politically associate without the fear of "suppression or impairment through harassment, humiliation, or exposure by government." *Bates* v. *Little Rock*, 361 U.S. 516 (1960) (Black, J, concurring). See also *McIntyre* v. *Ohio Elections Com'n*, 514 U.S. 334 (1995) (holding that Ohio's statutory prohibition against distribution of any anonymous campaign literature violated First Amendment).

Additionally, the "Court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.'" *Americans for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984)). "Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in

shielding dissident expression from suppression by the majority,'" see *id.* (quoting *Roberts*, 468 U.S. at 622). And forced disclosure of a member's identity is akin to restricting one's "'right to associate' with their preferred publisher 'for the purpose of speaking.'" See *TikTok Inc.* v. *Garland*, 145 S. Ct. 57, 73 (2025) (Sotomayor, J., concurring in part and concurring in the judgment) (quoting *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 68 (2006)).

II. Governments have chilled associational speech by targeting the private information of nonprofit organizations.

Targeting an organization based upon its stance on a particular issue leaves every public interest group vulnerable to such attack. Donors to these nonprofit organizations then, understandably, will be concerned about potential retaliation, public exposure, or harassment, and will likely think twice about their charitable giving. Indeed, this chilling effect is not hypothetical; the risk of donor intimidation and the suppression of associational rights is an immediate and foreseeable consequence of the subpoena issued in this case, as evidenced by First Choice Women's Resource Centers, Inc.'s ("First Choice") donors in the record. Pet'r's Br. App. 174a. This Court has recognized that examples of "donors to certain causes [being] blacklisted, threatened, or otherwise targeted for retaliation" "cited by *amici* are cause for concern." *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 370 (2010) (citing amicus briefs of the Institute for Justice and Alliance Defense Fund, which outlined such examples).

Public interest organizations routinely take positions opposing either direct action by a state's attorney general, see, *e.g.*, Brief of Amici Curiae The Buckeye Institute and 34 Public Policy Research Organizations and Advocacy Groups, *Americans for* Prosperity *Found.* v. *Bonta*, 594 U.S. 595 (2021) (Nos. 19-251, 19-255), or state laws that an attorney general's office is bound to uphold and defend, see, *e.g.*, Brief of American Civil Liberties Union, et al., *Lackey* v. *Stinnie* (filed Aug. 12, 2024) (No. 23-621). Public interest organizations also often disagree with state attorney generals' interpretations of the law. Compare, *e.g.*, Brief of 11 States as Amici Curiae, *Florida* v. *Dep't of Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400) (arguing in favor of Medicaid expansion) with Brief of Amici Curiae Center for Constitutional Jurisprudence, et al., *Florida*, 567 U.S. 519 (2012) (No. 11-400) (taking opposite position). The chilling effect of requiring these same organizations to disclose their donors is thus "readily apparent." *In re First Nat'l Bank*, 701 F.2d 115, 118 (10th Cir. 1983) (finding obvious chilling effect where the IRS sought membership records of tax protester group).

One of the most famous examples is Alabama's attempts in the 1950s to deter the activities of the NAACP by demanding its full membership rolls. See *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Because "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs," the demand for donor's private information violates free speech and associational rights. *Id.* at 462.

More recently, this Court has barred states from collecting unredacted copies of forms where nonprofits divulge their top contributors—given the states' limited need for that information. *Bonta*, 594 U.S. 595. The Court noted that "[e]very demand that *might* chill association" is constitutionally suspect. *Id.* at 615 (emphasis added). "Even if there [is] no disclosure to the general public," *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960), the "unnecessary risk of chilling" nonetheless violates the First Amendment, *Sec'y of State of Md.* v. *Joseph H. Munson Co., Inc.*, 467 U.S. 947, 968 (1984).

The Buckeye Institute has experienced the chilling effect described by Petitioner firsthand. *Buckeye Inst.*, 2023 WL 7412043, at *1. In 2013, shortly after the Ohio General Assembly relied upon The Buckeye Institute's arguments in rejecting Medicaid expansion, Buckeye learned that it had been selected for a full field audit by the Cincinnati office of the IRS. This audit notification came on the heels of widespread media reporting and congressional investigations of wrongdoing by that same IRS office. See, *e.g.*, Gregory Korte, *Cincinnati IRS agents first raised Tea Party issues*, USA Today (June 11, 2013), https://tinyurl.com/ybjes4th.

Against that notorious backdrop, The Buckeye Institute's donors feared that this audit was politically motivated retaliation against The Buckeye Institute. These donors expressed concern that if their names appeared on The Buckeye Institute's Form 990 Schedule B or records subject to disclosure in the audit, they too would be subjected to retaliatory audits. Some individuals therefore opted to make

smaller, anonymous, cash donations—foregoing donation receipts—in order to avoid potential retribution based on their contributions to the organization. Concerns about disclosure to a government agency fueling government retaliation had a demonstrable chilling effect on the freedom to associate with The Buckeye Institute.

Wisconsin's "John Doe" investigations provide yet another troubling example of government-sanctioned harassment that individuals have faced based upon the views espoused by organizations they financially support. "Initially a probe into the activities of Governor Walker and his staff, the ['John Doe'] investigation expanded to reach nonprofits nationwide that made independent political expenditures in Wisconsin, including the League of American Voters, Americans for Prosperity, and the Republican Governors Association." Jon Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving* 3 (2015), https://tinyurl.com/4pu8vfvj. The raids targeted individuals associated with those organizations, some of whom were awakened in the middle of the night by "a persistent pounding on the door," floodlights illuminating their homes, and police with guns drawn. David French, *Wisconsin's Shame: 'I Thought It Was a Home Invasion'*, National Review (May 4, 2015), https://tinyurl.com/aktjc63y. These individuals were then forced to watch in silence as investigators rifled through their homes, seeking an astonishingly broad range of documents and information, all because they supported certain political advocacy organizations. *Id*. The Wisconsin Supreme Court eventually put an end to these

unconstitutional investigations, concluding that they were based upon a legal theory "unsupported in either reason or law" and that the citizens investigated "were wholly innocent of any wrongdoing." *State ex rel. Two Unnamed Petitioners* v. *Peterson*, 866 N.W.2d 165, 211–12 (Wisc. 2015).

III. The Government's subpoenas severely chill the exercise of core fundamental rights.

For centuries, private parties via litigation and governments have chilled fundamental speech and association rights by demanding the production of communications and materials by groups holding views that are unpopular or controversial. Accordingly, political speech is the core of the First Amendment. "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Education* v. *Barnette*, 319 U.S. 624, 642 (1943). By issuing subpoenas demanding sensitive information that it is not entitled to, the New Jersey Attorney General has violated the protections guaranteed by the Constitution.[2]

Nonprofits rely upon financial and other support from individuals, corporations, and foundations that

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[2] Because of such abuses, courts regularly quash subpoenas issued to nonparties that have a tendency to chill the free exercise of association protected by the First Amendment. See, *e.g.*, *Pebble Ltd. Partnership* v. *EPA*, 310 F.R.D. 575, 582 (D.Ala. 2015); see also *Perry* v. *Schwarzenegger*, 591 F.3d 1126, 1131 (9th Cir. 2009); *Boe* v. *Marshall*, No. 2:22-CV-184-LCB, 2022 WL 14049505, at *3 (M.D. Ala. Oct. 24, 2022). But that is not the only available remedy.

share their core values to further their missions. When giving money to support a cause, donors exercise their right to associate in fulfilling social, educational, and ideological goals.

Here, the New Jersey Attorney General served a subpoena on a nonprofit organization that, even when viewed in the most favorable light, is justified only by a baseless assertion that some donors may have been confused about First Choice's operations. The government seeks to use its investigatory authority to obtain sensitive donor information that it could not otherwise acquire because of First Amendment protections. The issuance of this subpoena—even if it is ultimately quashed—severely chills First Amendment rights because individuals will now fear that their charitable contributions to organizations engaged in controversial issues will be subjected to government scrutiny and possible, if not likely, retaliation. This fear alone, which ultimately hinders or inhibits the associational rights of citizens, is sufficient to demonstrate a violation of the First Amendment. The New Jersey Attorney General has a strong opinion on a sensitive social topic. He is entitled to that opinion. What he is not entitled to is the private donor information of an organization that disagrees with his viewpoint.

The New Jersey Attorney General's subpoena to First Choice deters the exercise of constitutional rights because it silences, intimidates, and retaliates against those who support a particular viewpoint and charitable association with which the government disagrees. First Choice's donors, volunteers, and supporters will be exposed and vulnerable, potentially

leading them to reduce or discontinue their engagement with the organization. See Declaration of Amiee Huebner, Pet'r's Br. App. 179a. Moreover, donors and volunteers have a well-founded basis for fearing potential harassment or retaliation, given the increasing hostility and threats directed at individuals and organizations engaged in contentious issues of public concern.

IV. This case presents the Court with an ideal opportunity to circumscribe the use of subpoenas, which chill First Amendment activities.

Organizations subjected to unconstitutional demands like in this case have two options, either comply—thereby destroying the trust and privacy of their donors—or file suit. To affirm the Third Circuit's determination that First Choice's claims are unripe because it "can continue to assert [its] constitutional claims in state court as that litigation unfolds," Pet'r's Br. App. 4a, would be both incorrect and potentially devastating to public interest litigation. Exhaustion of remedies at the state level "is *not* a prerequisite to an action under [42 U. S. C.] §1983." *Knick* v. *Twp. of Scott*, 588 U.S. 180, 184–85 (2019) (citations omitted). Accord *Williams* v. *Reed*, majority slip op. (Feb. 21, 2025) (No. 23–191). See also *id.* dissenting slip op. at 2 (Thomas, J., dissenting) ("Plaintiffs who do not exhaust state remedies are always free to bring their claims in a federal forum."). New Jersey's Attorney General is threatening the First Amendment rights of First Choice's donors through its subpoena, which constitutes a cognizable and imminent constitutional

harm and is all that is required for standing under § 1983.

This case is not unlike the catch-22 in *Williams*. Under the Third Circuit's reasoning, First Choice cannot bring suit in federal court under § 1983 unless and until the Attorney General seeks to enforce its already issued subpoena and receive a final decision from the state court. In essence, the Third Circuit has said that to challenge a restriction on your First Amendment rights under § 1983, one first must to wait for the chill to become a freeze. "That catch-22 prevents the claimants here from obtaining a merits resolution of their § 1983 claims in [federal] court and in effect immunizes state officials from those kinds of § 1983 suits for injunctive relief." *Id.* majority slip op. at 7.

In addition to the preclusion trap issues addressed by Petitioner, this issue presents a particular threat to public-interest and nonprofit organizations along with the litigation they pursue to further their causes. Section 1983 was enacted to provide "a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck* v. *Humphrey*, 512 U.S. 477, 480 (1994). These organizations rely upon supporters to fund their missions—including and especially through litigation. To allow the Third Circuit's determination that constitutional claims must be addressed by state courts to stand will endanger such suits.

It is no secret that litigation is expensive. George Khory*, How Much Do Lawyers Get Paid to Argue at SCOTUS*, FindLaw.com (Mar. 21, 2019), https://tinyurl.com/5dxp4dx8; see also Robert Barnes, *A priceless win at the Supreme Court? No, it has a*

price, Washington Post (July 25, 2011), https://tinyurl.com/4944tx9w. When assessing whether to bring a case, nonprofit organizations must be especially mindful of the costs associated with lengthy litigation. By requiring that certain issues first be litigated in state court to receive review in the forum that is guaranteed by 42 U.S.C. § 1983, the Third Circuit has imposed a burden that will likely amount to millions of dollars in additional cost for public interest organizations. This burden is especially apparent in the context of the current case as it creates a difficult and circular cycle for organizations that rely upon donations from supporters. If allowed to stand, the Third Circuit's rule requires organizations to defend unconstitutional attempts to access sensitive donor information in two different forums, while simultaneously chilling the speech of the very individuals who would otherwise fund that same lengthy litigation.

CONCLUSION

The primary purpose of the First Amendment is to protect the ability to speak without the fear of adverse action from the government because of that speech. By issuing a subpoena to obtain sensitive donor information without a legitimate interest, New Jersey is chilling the speech of not only the donors of First Choice but of all Americans who wish to privately support causes of their choice.

Accordingly, this Court should grant the petition and protect the First Amendment rights of private donors.

Respectfully submitted,

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