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 a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* ADVANCING AMERICAN FREEDOM; AMERICAN ASSOCIATION OF SENIOR CITIZENS; AMERICAN VALUES; AMERICANS UNITED FOR LIFE; ANGLICANS FOR LIFE; CENTER FOR A FREE ECONOMY; CENTER FOR URBAN RENEWAL AND EDUCATION (CURE); CHRISTIAN MEDICAL AND DENTAL ASSOCIATION; CHARLIE GEROW; JAY D. HOMNICK, SENIOR FELLOW, PROJECT SENTINEL; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS;
(*Amici continued on inside cover*)

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TIM JONES, FORMER SPEAKER, MISSOURI HOUSE, CHAIRMAN, MISSOURI CENTER-RIGHT COALITION; LUTHERAN CENTER FOR RELIGIOUS LIBERTY; MEN FOR LIFE; MOUNTAIN STATES LEGAL FOUNDATION; NATIONAL APOSTOLIC CHRISTIAN LEADERSHIP CONFERENCE; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; NATIONAL RELIGIOUS BROADCASTERS; NEW JERSEY FAMILY POLICY CENTER; NORTH CAROLINA VALUES COALITION; MELISSA ORTIZ, PRINCIPAL & FOUNDER, CAPABILITY CONSULTING; PRO-LIFE WISCONSIN; RICK SANTORUM; SETTING THINGS RIGHT; 60 PLUS ASSOCIATION; SOUTHEASTERN LEGAL FOUNDATION; STAND FOR GEORGIA VALUES ACTION; STUDENTS FOR LIFE OF AMERICA; THE FAMILY FOUNDATION OF VIRGINIA; THE JUSTICE FOUNDATION; TRADITION, FAMILY, PROPERTY, INC.; YANKEE INSTITUTE; YOUNG AMERICA'S FOUNDATION; AND YOUNG CONSERVATIVES OF TEXAS
IN SUPPORT OF PETITIONER

QUESTION PRESENTED

1. 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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STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the fundamental American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness.[1] AAF has an interest in the continued freedom of organizations to advocate for their beliefs, whether political, social, or otherwise, without fear of government retaliation, and "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation."[2] AAF files this amicus brief on behalf of its 1,965 members in New Jersey and 8,333 members in the Third Circuit.

Amici American Association of Senior Citizens; American Values; Americans United for Life; Anglicans for Life; Center for a Free Economy; Center for Urban Renewal and Education (CURE); Christian Medical and Dental Association; Charlie Gerow; Jay D. Homnick, Senior Fellow, Project Sentinel; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Former Speaker, Missouri

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[1] All parties received timely notice of the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *Amici Curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

House, Chairman, Missouri Center-Right Coalition; Lutheran Center for Religious Liberty; Men for Life; Mountain States Legal Foundation; National Apostolic Christian Leadership Conference; National Center for Public Policy Research; National Religious Broadcasters; New Jersey Family Policy Center; North Carolina Values Coalition; Melissa Ortiz, Principal & Founder, Capability Consulting; Pro-Life Wisconsin; Rick Santorum; Setting Things Right; 60 Plus Association; Southeastern Legal Foundation; Stand for Georgia Values Action; Students for Life of America; The Family Foundation of Virginia; The Justice Foundation; Tradition, Family, Property, Inc.; Yankee Institute; Young America's Foundation; and Young Conservatives of Texas believe in the importance of free speech and free association and are concerned about government overreach that infringes on those rights.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The American Constitution is designed to effectuate the purpose of government: protecting the liberty of the people. That liberty depends on the rule of law which is undermined when a government official uses his power to advance his political agenda at any cost. This case is an instance of such disregard for the rule of law in New Jersey. Rather than enforcing the law, New Jersey Attorney General Matthew Platkin is using his office to advance a pro-abortion agenda. This includes threatening the ability of crisis pregnancy centers specifically, and pro-life

organizations generally, to engage in the exercise of their rights to free speech and free association.

No government or government official should have the power to scour a private organization's records without a clear showing of cause. Further, the government should get access to only that information specifically necessary to determining whether a crime has occurred. Because even the threat of disclosure causes harm, organizations need the opportunity to seek relief in federal courts before having to divulge that information.

In this case, Mr. Platkin has demanded that First Choice Women's Resource Centers (hereinafter "First Choice") disclose "years of sensitive internal information—including donor information about nearly 5,000 contributions." Petition for Writ of Certiorari at 2. Given Mr. Platkin's record of pro-abortion and anti-pro-life pregnancy center advocacy while in office, this intimidation tactic is not surprising.[3]

If the Constitution's protections are to be more than mere "parchment barriers,"[4] governments must not be allowed to accomplish indirectly what they could not accomplish directly. Because even the threat

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[3] For example, after this Court's decision in *Dobbs v. Jackson Women's Health*, 597 U.S. 215 (2022), Mr. Platkin created a Strike Force that, with the help of Planned Parenthood, issued a Consumer Alert "warning" New Jerseyans that pro-life pregnancy centers do not perform abortions. Petition for Writ of Certiorari at 7.

[4] The Federalist No. 48 at 256 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

of donor disclosure can chill the speech and associational rights of both donors and their beneficiaries, Mr. Platkin's actions in this case are inconsistent with the First Amendment's protection of free speech and free association. Federal courts must be able to review State action that is intended to harm constitutionally protected interests even where it does not do so directly. This Court should grant certiorari and rule for Petitioners.

ARGUMENT

I. Government Officials' Efforts to Circumvent the Constitution's Protections are Subject to Judicial Review Just as are Direct Efforts to Violate Them.

Governments are "instituted among Men" to secure their individual rights to "life, liberty, and the pursuit of happiness." *The Declaration of Independence* para. 2 (U.S. 1776). Yet, government itself represents a significant danger to individual rights. According to James Madison, because men are not angels, "the great difficulty" in "framing a government" is that "[y]ou must first enable the government to control the governed; and in the next place, oblige it to control itself."[5] The Constitution, as amended by the Fourteenth Amendment, binds the authority of State officials in order to protect the rights with which individuals were endowed "by their Creator." *The Declaration of Independence* para. 2 (U.S. 1776). As the Founders would be unsurprised to

[5] The Federalist No. 51 at 269 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

learn, government officials today are seeking to remove, go around, or leap over the barriers erected by the Constitution. If such efforts are successful, the guarantees of the Constitution will be reduced to little more than "parchment barriers."[6]

"The Constitution deals with substance, not shadows," and its prohibition on the infringement of First Amendment rights ought to be "levelled at the thing, not the name." *Students for Fair Admissions v. Presidents and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023) (internal quotation marks omitted) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867)). This Court and lower courts have recognized limitations not only on overt and direct violations of the rights protected in the Constitution but also limitations on the government's ability to circumvent constitutional protections of individual rights.

After this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), some school districts attempted to avoid the consequences of that decision without creating an opportunity for judicial review. Virginia, for example, passed a law creating a "Pupil Placement Board" which had authority to determine which schools students would attend. *Adkins v. Sch. Bd. of Newport News*, 148 F. Supp. 430, 441 (E.D. Va. 1957) Relatedly, the law prohibited students' changing schools unless approved by the Board, which approval would be given only for good cause. *Id.* Clearly, then, the law was meant to maintain *de facto* segregation despite the Court's finding that

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[6] The Federalist No. 48 at 256 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

segregation was unconstitutional. Striking down this policy, the Eastern District of Virginia wrote, "Courts cannot be blind to the obvious, and the mere fact that Chapter 70 makes no mention of white or colored school children is immaterial when we consider the clear intent of the legislative body." *Id.* at 442. Because the purpose of the law in question was to continue segregation in contravention of the Court's decision in *Brown*, the district court struck down the law.

Courts recognized this massive resistance for what it was: an attempt to treat black students as second-class citizens despite the requirements of the Fourteenth Amendment's Equal Protection Clause. As this Court explained almost twenty years later:

> Any arrangement, implemented by state officials at any level, which significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. "[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"

Gilmore v. Montgomery, Alabama, 417 U.S. 556, 568 (1974) (alteration in original) (quoting *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)). Nor should government officials be able to stifle the core political activities of association and speech "through evasive schemes."

II. New Jersey Attorney General Platkin's Actions Here Unconstitutionally Harm the First Amendment-Recognized Free Speech and Free Association Rights of First Choice and Other New Jersey Pro-Life Pregnancy Centers.

Mr. Platkin's efforts to undermine the pro-life pregnancy centers' ability to operate violate the freedom to associate, a right that is protected by the First Amendment and is an American tradition. As Alexis de Tocqueville noted, early Americans made a habit of forming associations. Unlike in aristocratic societies where aristocrats hold the power and those beneath them carry out their will, in America, "all citizens are independent and weak; they can hardly do anything by themselves, and no one among them can compel his fellows to lend him their help. So they all fall into impotence if they do not learn to help each other freely."[7] Moreover, "[w]hen you allow [citizens] to associate freely in everything, they end up seeing in association the universal and, so to speak, unique means that men can use to attain the various ends that they propose."[8] In America, "[t]he art of association then becomes . . . the mother science; everyone studies it and applies it."[9]

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[7] 3 Alexis de Tocqueville, *Democracy in America*, 898 (Eduardo Nolla ed., James T. Schleifer trans., Indianapolis: Liberty Fund, Inc. 2010) (1840).

[8] *Id*. at 914.

[9] *Id*.

This American tradition was enshrined in the First Amendment. This Court has "long understood" the rights of free Speech, peaceable assembly, and petition in the First Amendment to imply "a corresponding right to associate with others." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Such 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.'" *Id.* (quoting *United States Jaycees*, 486 U.S. at 622).

This Court has recognized what Tocqueville found Americans knew at the dawn of our Republic: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *Ams. for Prosperity Found.*, 141 S. Ct. at 2382 (internal quotation marks omitted) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)), and that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. at 460 (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925)). Further, "'it is immaterial' to the level of scrutiny 'whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters.'" *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *NAACP v. Alabama*, 357 U.S. at

460-61). In this case, Mr. Platkin sought to undermine political diversity by squeezing organizations that advocate views and provide services with which he disagrees. Such an effort to impose ideological uniformity on the healthcare landscape of New Jersey is antithetical to the First Amendment's protections of association and speech. The bar for constitutional review in freedom association cases is low and was clearly exceeded in this case.

The Court has held that in compelled disclosure cases, exacting scrutiny is triggered "by 'state action which *may* have the effect of curtailing the freedom to associate,' and by the '*possible* deterrent effect,' of disclosure." *Ams. for Prosperity Found.*, 141 S. Ct. at 2388 (emphasis in original) (quoting *NAACP v. Alabama*, 357 U.S. at 460-61).[10] Here, there is no question that the state action "*may* have the effect of curtailing the freedom to associate." *Id.*

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[10] Although the Court has applied exacting scrutiny in the compelled disclosure context, here, strict scrutiny will be the more applicable standard. Justice Alito notes in his *Americans for Prosperity Foundation* concurrence that the Court's compelled disclosure doctrine largely developed before the Court's development of the strict scrutiny standard. *Ams. for Prosperity Found.*, 141 S. Ct. at 2391 (Alito, J., concurring). Justice Thomas argued in his concurrence in the same case, "Laws directly burdening the right to associate anonymously, including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights." *Id.* at 2390 (Thomas, J., concurring). Similarly, here, strict scrutiny would be the most appropriate test given the directly burdensome nature of the government's actions on First Choice and other pro-life pregnancy centers' freedom to associate.

The mere threat of disclosure in this case causes immediate harm. As this Court explained, "When it comes to 'a person's beliefs and associations,' '[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.'" *Ams. for Prosperity Found.*, 549 U.S. at 610 (alteration in original) (omission in original) (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)). Potential donors of First Choice and any other pro-life pregnancy center in New Jersey will reasonably see Mr. Platkin's subpoena as a threat to their anonymity if they move forward with their donation. Mr. Platkin's subpoena of First Choice will naturally chill the association and speech of potential donors who are concerned about privacy and will thus also chill First Choice's speech and association.

Mr. Platkin seems clearly to have targeted First Choice, using his otherwise legitimate subpoena power not to pursue genuine violations of law but to demand a treasure trove of data. Doing so is a win-win for Mr. Platkin. If he succeeds, he and his political allies will have a mass of confidential information about First Choice. Further, as First Choice points out in its petition, disclosing that data will impose a massive burden on First Choice's resources, preventing it from carrying out its mission. In doing so, it succeeds in undermining the work towards which Mr. Platkin has demonstrated antipathy. If the courts reject his bid for data, he will at least have absorbed resources in the form of legal costs and time and can present the battle as part of his pro-abortion bona fides.

The question before this Court is not primarily who will win and who will lose. The question is the degree of harm Mr. Platkin will be able to impose on New Jersey pro-life pregnancy centers in general and on First Choice in particular.

No State official should be able to use his legitimate law enforcement power to pursue those with whom he disagrees politically. This case presents an opportunity for this Court to make clear that such targeting is a direct violation of constitutional rule of law.

CONCLUSION

For these reasons, the Court should grant the Petition for Certiorari.

Respectfully submitted,

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