NO. 24-781

IN THE
Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS INC.,
Petitioner,
v.
MATTHEW PLATKIN, in his official capacity as 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 THE MANHATTAN INSTITUTE, RELIGIOUS FREEDOM INSTITUTE, AND ANIMAL ACTIVIST LEGAL DEFENSE PROJECT AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici are organizations whose ability to effectively pursue their chosen policy goals requires the ability to freely associate with others without fear of reprisal.[1] They seek to provide their perspective on the harm suffered on receipt of a government demand for donor, member, and volunteer information and the importance of a federal forum for reviewing constitutional claims arising out of that demand.

The Manhattan Institute is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. It has historically sponsored scholarship and filed briefs opposing regulations that either chill or compel speech.

The Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. Among its core activities, RFI equips students, parents, policymakers, professionals, faith-based organization members, scholars, and religious leaders through programs and resources that communicate the true meaning and value of religious freedom, and apply that

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[1] No party or counsel for a party wrote any part of this brief. No person other than *amici* and their counsel made any financial contribution to the preparation of this brief. Counsel of record for all parties were notified of the intent to file this brief more than ten days in advance under Supreme Court Rule 37.2.

understanding to contemporary challenges and opportunities. RFI works to secure religious freedom for everyone everywhere because human dignity and human nature demand it, and human flourishing depends on it.

The Animal Activist Legal Defense Project (the Project) is housed at the University of Denver. The Project serves as a law clinic that educates students on criminal defense, particularly for activists. Our clients are persons interested in advancing the status of non-human animals in the legal system, and who are facing legal liability. The Project serves groups and individuals who are generally associated with progressive causes. The Project works with a variety of unpopular activists accused of civil disobedience and direct action, and some of its donors prefer or require anonymity.

As organizations that pursue policy goals that encounter political opposition, *amici* rely on the First Amendment as a bulwark against both direct and indirect attempts by the government to chill or silence their message. The ability to assert First Amendment claims in federal court provides a key protection for *amici*'s activities, serving to prospectively ward off unwarranted investigatory demands and as a means for redress if such demands occur. *Amici* confirm that receipt of a government demand for disclosure of donor, member, and volunteer information immediately chills and impedes their ability to pursue their chosen policy goals. For these reasons, *amici* urge this Court to grant certiorari and resolve the circuit split by clarifying that a government demand

for such information ripens a First Amendment claim for federal adjudication under § 1983.

SUMMARY OF THE ARGUMENT

The First Amendment protects individuals' ability to collectively pursue common goals. The right to associate preserves "political and cultural diversity" and shields "dissident expression from suppression by the majority." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021).

Compelled disclosure of membership lists and donor information chills associational rights. It serves as a type of indirect speech regulation. Groups targeted for unlawful compelled disclosure have viable First Amendment claims that can, and should, be adjudicated in federal court under 42 U.S.C. § 1983. *See id.* at 615–16.

But the Third Circuit here, in a *per curiam* opinion over a dissent by Judge Bibas, determined that the targets of a non-self-executing investigatory subpoena must litigate in state court to ripen their First Amendment claims. App.4a–5a. Even more striking, the panel held that the target's First Amendment claims were not ripe even *after* the state initiated and doggedly pursued enforcement. *See id.*

This cannot be. First, the government's threat to compel disclosure of donor, member, and volunteer information chills the recipient's associational rights as well as those of the donors, members, and volunteers. Enforcement by a state court is unnecessary, because the First Amendment claim is already ripe.

Second, the Civil Rights Act of 1871 guarantees a federal forum for persons who have suffered constitutional violations at the hands of a state actor. *Knick v. Twp. of Scott*, 588 U.S. 180, 184 (2019). Requiring state litigation to ripen a federal claim deprives the claimant of this guarantee.

Third, this Court recently cleaned up the 34-year mess that resulted from *Williamson County*'s imposition of a state-litigation requirement to ripen federal takings claims. *See Knick*, 588 U.S. at 184–85. The Court should not allow this failed experiment to be replicated in the First Amendment context.

This Court should grant the petition for certiorari to resolve these issues.

ARGUMENT

I. The government's mere demand for disclosure, coupled with a credible threat of enforcement, chills First Amendment rights.

"First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (cleaned up). This breathing space includes the ability of individuals to come together to pursue collective goals. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462–63 (1958).

Despite—or perhaps because of—the First Amendment's central role in facilitating democracy, governments have historically attempted to dissuade the exercise of First Amendment rights by impeding the right to associate. Government action is sometimes direct. *See Elrod v. Burns*, 427 U.S. 347

(1976) (patronage dismissals). At other times, it is indirect but impedes First Amendment rights just the same. Among indirect regulations, compelled disclosure of membership and donor information has an unfortunate and sordid history. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. at 453–54 (demanding full membership lists); *Ams. for Prosperity Found.*, 594 U.S. at 600–01 (demanding disclosure of donor information).

Compelled disclosure of associational ties impairs the right to free association, which, like the right to free speech, "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 485–86 (1960). In *Shelton v. Tucker*, an Arkansas statute mandated teachers disclose organizations to which they had belonged or contributed in the previous five years. *Id.* at 480. This included every type of associational tie: social, professional, political, avocational, or religious. *Id.* at 488. The Court recognized that this disclosure requirement "broadly stifle[d] fundamental personal liberties." *Id.* at 488. It was undisputed that the required disclosure harmed the right to free association. *Id.* at 485–86. The Court recognized that the school board's review of a teacher's associational ties resulted in a "constant and heavy" pressure on the teacher. *Id.* at 486–87. And disclosure requirements often apply that pressure to prevent association with politically unpopular groups: one of the teachers was a member of the NAACP. *Id.* at 483.

It is no wonder why compelled disclosure is used frequently: it is intimidating and effective. "Broad and sweeping state inquiries" into "a person's beliefs and associations"—areas protected by the First

Amendment—"discourage citizens from exercising rights protected by the Constitution." *Ams. for Prosperity Found.*, 594 U.S. at 610 (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)). This is particularly true in the 21st century; radical polarization is coupled with an abundance of easily available information. In this setting, disclosure of membership in, or donations to, an organization can (and does) lead to "bomb threats, protests, stalking, and physical violence." *Id.* at 617.

People know this. An organization that is compelled to disclose its donors, members, or volunteers will have serious difficulties garnering donations, members, and volunteers. But the harm to First Amendment rights occurs before disclosure is required by a court. The mere *threat* of disclosure, coupled with a risk of enforcement, chills First Amendment rights and ripens a First Amendment claim. *See id.* at 616.

This dynamic was at play in *Americans for Prosperity Foundation v. Bonta*. There, the Attorney General's regulations required charities to file information about major donors, including names, total contributions, and addresses, as part of annual registration and renewal. *Id.* at 600–01. Two charities filed annual renewal documents for years, but always withheld donor information. *Id.* at 602. Following a policy change, the AG sent deficiency letters to the two charities. *Id.* The charities refused to provide donor information. *Id.* In response, the "Attorney General threatened to suspend their registrations and fine their directors and officers." *Id.* The charities brought § 1983 claims in federal court, alleging the

Attorney General violated both their First Amendment rights and the rights of their donors. *Id.* The charities claimed that compelled disclosure "would make their donors less likely to contribute and would subject them to the risk of reprisals." *Id.* There, the charities alleged sufficient associational harm based on the threat of enforcement by the AG. *See id.*

The chilling effect of threatened disclosure is real. When faced with the threat of compelled disclosure, taking into account the resulting consequences in an age where "anyone with access to a computer can compile a wealth of information about anyone else," *id.* at 617 (cleaned up), new members will be reluctant to join, donors will be reluctant to donate, and the ability of the targeted groups to pursue their goals will be impeded. Just as the disclosure requirement placed a "constant and heavy" pressure on the teachers in *Shelton*, 364 U.S. at 486–87, receipt of a CID demanding donor, member, and volunteer information burdens those considering whether to begin or continue involvement with the recipient organization.

The potential for a state court to scale back the scope of a demand during an enforcement proceeding is cold comfort. The threat of disclosure is in and of itself sufficient to impede the organization's effectiveness. Many donors, members, and volunteers won't take a "donate, join, or volunteer now and wait to see if the organization wins in court" approach. In *Americans for Prosperity Found.*, the § 1983 claims were ripe when the AG threatened to suspend the charities' registrations and levy fines. 594 U.S. at 603.

Plaintiffs need not wait until the actual irreparable injury—compelled disclosure—occurs. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) ("Congress intended [§ 1983] to throw open doors of the United States courts to individuals who *were threatened with*, or who had suffered, the deprivation of constitutional rights, and to provide these individuals immediate access to the federal courts." (emphasis added) (cleaned up)).

The recipient of a demand for disclosure has, and should have, the right to affirmatively assert any federal First Amendment claim that flows from the issuance of the demand, so long as the demand is accompanied by a credible threat of enforcement. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164–65 (2014).

That standard is easily met here. Not only has the state threatened enforcement—it followed through by initiating and doggedly pursuing court-ordered disclosure. Only First Choice's stiff resistance has stymied disclosure to this point. And the state court could compel disclosure through contempt "at any point during the proceedings." App.42a.

Yet the Third Circuit found First Choice's claims unripe because First Choice "[could] continue to assert its constitutional claims in state court as that litigation unfolds," and its "current affidavits [did] not yet show enough of an injury." App.4a. Apparently, the Third Circuit "believe[s] that the state court will adequately adjudicate First Choice's constitutional claims, and . . . expect[s] that any future federal

litigation between these parties would likewise adequately adjudicate them." *Id.* 4a–5a.

It's unclear why the panel "believe[s]" First Choice's constitutional claims will be "adequately adjudicat[ed]" in state court or "future federal litigation." *Id.*4a. Those claims have ping-ponged between state and federal court five times in the past two years. In each instance, the state or federal court managed to avoid the merits of the claims. And all the while, First Choice (and its donors) have suffered the chilling effects of threatened disclosure.

Nor is the panel's blind faith in future adjudication consistent with this Court's precedent. Rights are chilled, and claims ripen, upon demand of disclosure and threat of enforcement. *See Ams. for Prosperity Found.*, 594 U.S. at 603 (adjudicating First Amendment claims after Attorney General "threatened to suspend [the plaintiffs'] registrations and fine their directors and officers."); *Susan B. Anthony List*, 573 U.S. at 164 (holding that plaintiff could pursue First Amendment claims where "the *threat of future enforcement* . . . is substantial" (emphasis added)). First Choice faces much more than that—the state has initiated and pursued *actual* enforcement. First Choice has viable claims that are ripe for adjudication in federal court right now. That a state court might later adjudicate the First Amendment issues does not render them unripe now.

II. Requiring state-court enforcement to ripen federal claims deprives the claimant of the federal forum guaranteed by the Civil Rights Act of 1871.

The Civil Rights Act of 1871 "guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials." *Knick*, 588 U.S. at 185 (cleaned up). Over the years, the Court has protected the availability of the federal forum by rejecting efforts to impose state-law exhaustion requirements on § 1983 claims. *See Patsy*, 457 U.S. at 500–01 ("[T]his Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*.").

Provision of a federal forum does, to some degree, deviate from pre-Civil-Rights-Act principles of federalism. But this is a feature of the Act, not a bug. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)). "[S]ince the Civil Rights Act of 1871, part of 'judicial federalism' has been the availability of a federal cause of action when a local government violates the Constitution. 42 U.S.C. § 1983." *Knick*, 588 U.S. at 201 n.8.

Civil investigative demands that infringe on First Amendment rights—tools wielded frequently and

aggressively on partisan issues—necessitate a federal forum to guard the people's federal rights. Across the ideological spectrum, state Attorneys General increasingly pursue "high-visibility legal challenges" to advance policy preferences and increase a voter base. *See, e.g.*, Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L.J. 2100, 2144–46 (2015) (noting "the rise of politically salient regulatory lawsuits against private interests" by State AGs). But the guarantee of a federal forum "rings hollow" for plaintiffs who are "forced to litigate their claims in state court." *Knick*, 588 U.S. at 185.

That is precisely the effect of the panel's decision here. *See* App.4a–5a (holding that federal claims were not ripe, in part based on the panel's "belie[f] that the state court will adequately adjudicate First Choice's constitutional claims"); *see also* App.82a n.7 (noting that federal-court challenges to investigatory demands would "seldom if ever be ripe" because "res judicata principles will likely bar . . . a claim in federal court" following a state-court adjudication).

In any case, this approach gives short shrift to—or ignores—the importance of the federal forum "guarantee[d]" by the Civil Rights Act of 1871. *Knick*, 588 U.S. at 189. The recipient of a federal non-self-executing subpoena may have to wait, but still eventually receives the guaranteed federal forum. Preclusion won't bar them from presenting their federal claims to a federal court. The opposite is true for recipients of equivalent state subpoenas, who are all but guaranteed to be deprived of a federal forum

and are instead forced to litigate their federal claims in state court. *See* App.13a n.7.

It also fails to recognize that the Civil Rights Act intentionally "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242. Principles of comity are trampled when federal claimants are denied the federal forum guaranteed by the Civil Rights Act of 1871.

This is not to say that every state-law investigation can be challenged in federal court. It is also not to say that every challenge filed in a federal forum will succeed. Many may not succeed; many may not advance past the pleading stage. *See Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1179 (9th Cir. 2022). The point is that a federal forum is available to adjudicate the federal claim—even if it turns out to adjudicate the *inadequacy* of a federal claim—without requiring a federal-claim-extinguishing, state-court litigation to ripen the federal claim.

III. The Court should not allow the failed *Williamson County* ripeness approach to be replicated in the First Amendment context.

The Court is no stranger to the mess created by requiring state litigation to ripen § 1983 claims; it cleaned one up five years ago in *Knick*.

In *Knick*, the Court recognized the initial allure of requiring a state adjudication to ripen the federal claim. The Fifth Amendment is not violated by a taking, per se; it is violated by a taking *without just compensation*. So it would be premature, the

argument runs, for a federal court to intervene until the claimant has pursued, and the state has refused, just compensation through all available means, including a state-law claim for inverse condemnation. *See Knick*, 588 U.S. at 188 (describing the reasoning of *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)).

The "unanticipated consequences" of the *Williamson County* approach "were not clear until 20 years later," when the Court determined that the state litigation required to *ripen* the federal claim would also *bar* the federal claim. *Id.* at 189 (describing *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 331 (2005)).

This procedural "Catch-22" could not stand. *Id.* at 184. § 1983 "guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials." *Id.* at 185 (cleaned up). "Exhaustion of state remedies is *not* a prerequisite to an action under 42 U.S.C. § 1983." *Id.* (cleaned up). Requiring federal-claim-barring state litigation to ripen a federal claim under § 1983 made "the guarantee of a federal forum ring[] hollow" by "forc[ing]" the plaintiffs "to litigate their claims in state court." *Id.*

So it is here. If the Third Circuit's decision stands, plaintiffs with otherwise ripe First Amendment claims will—in some circuits, at least—be forced to assert the substance of those claims in a state enforcement action rather than in federal court. This creates every bit as much a "Catch-22" as the state-litigation requirement imposed in *Williamson County* and rejected in *Knick*. 588 U.S. at 184–85. Just as

under *Williamson County*, under the Third Circuit's decision "[t]he federal claim dies aborning." *Id.* at 185.

It took 34 years to recognize and correct the pernicious real-world effects of the state-litigation requirement imposed by *Williamson County*. The Court should grant certiorari to prevent replication of the failed *Williamson-County*-ripeness approach to First Amendment claims brought under § 1983.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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