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 IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner alleged sufficient facts to support Article III ripeness in its challenge to a non-self-executing state civil subpoena.

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INTRODUCTION

This Petition arises from an unpublished, *per curiam* decision from the Third Circuit that satisfies none of the Court's traditional certiorari criteria. In holding that Petitioner's constitutional challenge to a non-self-executing subpoena was not ripe for federal review, the Third Circuit applied long-established principles of justiciability to find that Petitioner has not met its Article III burden on this record.

Concerned that certain nonprofit entities in New Jersey, including Petitioner, may be misleading donors and potential clients regarding the health services they provide, the New Jersey Attorney General and the Division of Consumer Affairs issued a subpoena requesting information that would bear on whether Petitioner's conduct violated state law. That subpoena is not self-executing; it can only be enforced by a New Jersey state court, and Petitioner faces no penalties for noncompliance with the subpoena unless and until a judicial order mandating the production of documents issues. Although the State issued its subpoena in 2023, the state court has not required production of any documents—and has instead declined the State's requests for such an order. Nonetheless, Petitioner has repeatedly waged a collateral attack on the subpoena in federal court. The federal district court twice dismissed Petitioner's federal action, each time determining that Petitioner's federal claims were unripe. The Third Circuit affirmed, holding in an unpublished order that Petitioner could not establish Article III ripeness on this record.

For three reasons, the Petition does not satisfy this Court's traditional criteria for certiorari. *First*, the decision below does not implicate a circuit split for this

Court to resolve. The instant Petition rests on the premise that there is a split between the Fifth Circuit's "categorical rule" that challenges to non-self-executing subpoenas are never ripe, and the Ninth Circuit's rule that ripeness depends on the facts—and that the Third Circuit, in the decision below, sided with the Fifth Circuit. But Petitioner is simply wrong: the Third Circuit's unpublished decision did not adopt any rule for determining the ripeness of pre-enforcement challenges to a state subpoena at all, let alone adopt the Fifth Circuit's categorical approach. Instead, the panel concluded that Petitioner's claims were unripe based upon fact-specific considerations, including the failure to show a sufficient chill to its speech on this record. The alleged split is thus not implicated in this case, because the panel's factbound ruling precludes a ripeness finding under either the Fifth Circuit's or Ninth Circuit's approach. And in any event, this alleged split is overstated, and has not had any practical effect in real-world cases in either the Fifth or Ninth Circuits—making review doubly premature.

Second, this case presents an especially poor vehicle to address the question of ripeness, not only because of the fact-specific bases for the Third Circuit's ruling, but also because of the unique circumstances surrounding this subpoena. Petitioner frames this as a case that asks whether challenges to non-self-executing subpoenas can ever be ripe in federal court, or whether the mere fact that they require enforcement by a state court precludes Article III jurisdiction. But as the Third Circuit's brief decision identified, there are multiple and highly atypical facts in this case. Far from merely a case in which enforcement has yet to happen, a state court has repeatedly declined to order the production of documents and has instead directed the parties to negotiate over the scope of the subpoena through an

ongoing meet-and-confer process, all while reserving consideration of Petitioner's constitutional objections. Moreover, while Petitioner relied heavily below on declarations allegedly demonstrating the subpoena had a chilling effect on its donors, the State—as the Third Circuit identified—already disclaimed any request in this subpoena for information that would cover the identities of any of Petitioner's declarants, because the State is not seeking the identities of any donors other than those who contributed via two specific websites. These unique facts—which the Third Circuit specifically cited in its decision—all mean that no matter the generalized rule regarding the ripeness of pre-enforcement subpoena challenges, there are case-specific reasons why this challenge fails to satisfy Article III. And that underscores why this case is an ill-suited vehicle for articulating a generalized ripeness rule in the first place.

Third, the decision below is correct and does not have the impacts Petitioner alleges. The Third Circuit specifically considered Petitioner's allegations and record evidence, along with the unique procedural posture, and held that Petitioner had not sufficiently presented any chill to its constitutional rights stemming from the subpoena. Nor does the decision below undermine Section 1983 or create a "preclusion trap" that would bar a party's claims from ever being heard in federal court. It simply requires Petitioner to clear the usual Article III threshold, and leaves open the possibility that parties could do so on different factual records than this one.

STATEMENT OF THE CASE

A. Statutory and Factual Background.

1. The New Jersey Consumer Fraud Act ("CFA"), the Charitable Registration and Investigations Act ("CRIA"), and the Professions and Occupations Act ("P&O Law") empower the New Jersey Attorney General and the Division of Consumer Affairs to investigate a broad range of unlawful practices, including deceptive and fraudulent commercial practices, N.J. Stat. Ann. §§ 56:8-2, -3 (CFA); deceptive and misleading statements or omissions by charitable organizations, N.J. Stat. Ann. §§ 45:17A-32(a), (c)(3), (c)(7), -33(c) (CRIA); and unlicensed practice of medicine, deceptive and misleading practices, and other professional misconduct, N.J. Stat. Ann. §§ 45:1-18, -18.2, -21 (P&O Law). CRIA prevents misleading conduct by charitable organizations relating to "the planning, conduct, or execution of any solicitation" for charitable donations. N.J. Stat. Ann. § 45:17A-32(c)(1), (3), (7). The P&O law, for its part, bars unlicensed practice of medicine, N.J. Stat. Ann. § 45:1-18.2, and licensed medical professionals from engaging in deceptive and misleading practices, see, *e.g.*, N.J. Stat. Ann. § 45:1-21. The Attorney General and the Division are "charged with seeing that" these state laws are "obeyed" and are therefore empowered to "inquire to be assured of compliance." *In re Addonizio*, 248 A.2d 531, 542 (N.J. 1968).

Although these statutes authorize the Attorney General to issue subpoenas to investigate various forms of misconduct, they do not empower the Attorney General to unilaterally enforce subpoenas by compelling recipients to produce the sought-after information. Instead, as the parties agree, subpoenas issued pursuant to the CFA, CRIA, and the P&O law are "non-self-executing." See Pet. 6; Pet. App. 3a, 37a,

75a-76a. In other words, to compel compliance, the Attorney General must seek an order from the New Jersey Superior Court, which has exclusive statutory power to require production and issue sanctions for noncompliance. See N.J. Stat. Ann. § 56:8-6 (CFA) (providing that "the Superior Court" is the entity which issues "an order … [granting] such other relief as may be required" for subpoena enforcement); N.J. Stat. Ann. § 45:17A-33(g) (CRIA); N.J. Stat. Ann. § 45:1-19 (P&O law).

2. This case arose from the Division's investigation into whether Petitioner was violating the CFA, CRIA, and the P&O law—in particular, whether Petitioner misled donors and potential clients, among others, into believing that it was providing certain reproductive health care services. The Division's initial investigative steps included a review of the different websites Petitioner maintains for different audiences. This investigation revealed that the core website Petitioner maintains for donors, https://1stchoicefriends.org, explains that Petitioner has a pro-life mission to "protect the unborn," CA3 Dkt.2 No. 17-2, at JA857–58.[1] The core donor website's donation-solicitation page explains that "pro-life donors like you have saved lives and served women considering abortion in New Jersey." *Id.*, at JA857. And its Volunteer Application confirms Petitioner is "committed to assisting women to carry to term." *Id.*, at JA853. But Petitioner has two other, client-facing websites—https://1stchoice.org and https://firstchoicewomancenter.com—which have donation pages but omit these same references to Petitioner's mission and operations. See *id.*, at JA676-765, 892-

[1] Citations to "CA3 Dkt.1" are to the first appeal in this matter, CA3 No. 24-1111. Citations to "CA3 Dkt.2" are to the proceeding below, CA3 No. 24-3124.

952. Instead, one of these sites simply says that clients should "consult a medical professional" before seeking an abortion, and claims that Petitioner is "a network of clinics providing the best care and most up-to-date information on your pregnancy and pregnancy options." *Id.*, at JA912. Although the other site notes that "First Choice Women's Resource Centers is an abortion clinic alternative that does not perform or refer for termination services," *id.*, at JA681, this fine print only appears on the bottom of the webpage and does not appear on the donation page, *id.*, at JA681, JA698-701.

The State also grew concerned that Petitioner might be violating state law in a number of other respects. Among other things, the State noted medical statements on Petitioner's websites that may be misleading or untrue. Compare *id.*, at JA926 (stating that "a pre-abortion ultrasound is generally required before you take the abortion pill"), and *id.*, at JA760 (stating without citation that "[t]here is an effective process for reversing the abortion pill"), with U.S. Food & Drug Admin., Mifeprex (Mifepristone) Prescribing Information 17 (Mar. 2016), https://tinyurl.com/mr2au9mz (noting that an ultrasound is an option, not that one is generally required), and Am. Coll. of Obstetricians & Gynecologists, *Facts Are Important: Medication Abortion "Reversal" Is Not Supported by Science*, https://tinyurl.com/mrye7fsa (last visited Feb. 23, 2025). The State also identified conflicting evidence regarding the role that licensed professionals were playing in Petitioner's operations—including whether individuals were performing diagnostic sonograms and even purporting to assess gestational age, viability, and ectopic pregnancies without possessing the requisite qualifications and licensure. Compare *id.*, at JA673 (representing services are overseen by a physician), and *id.*, at JA903

(claiming to diagnose ectopic pregnancies and determine viability), with *id.*, at JA731, 734 (acknowledging it is "not an obstetrical medical practice" and "does not use ultrasound to ... diagnose abnormalities"). And the Division's investigation also revealed concerns about Petitioner's patient-privacy practices. Compare *id.*, at JA682, 730, 736, 749 (promising patients that services are confidential), with *id.*, at JA952 (claiming exemption from HIPAA), and *id.*, at JA704 (policy allowing for sharing with affiliates).

These concerns about the lawfulness of Petitioner's practices led the Division to investigate further. On November 15, 2023, the Division served a civil subpoena on Petitioner. Pet. App. 89a-110a. The subpoena's requests were aimed at evaluating whether Petitioner or its staff engaged in misrepresentations and other prohibited conduct, and sought copies of Petitioner's advertisements and donor solicitations, documents substantiating claims therein, and identification of the licensed medical personnel involved in the provision of Petitioner's services. Pet. App. 101a-110a. The subpoena set a response deadline of December 15, 2023. Pet. App. 89a.

B. Procedural History.

Petitioner's challenges to the subpoena have spawned litigation before the New Jersey Superior Court, the New Jersey Appellate Division, the federal district court, the Third Circuit, and this Court. A brief summary of the proceedings follows.

1. *Federal Action: District Court Dismissal and Initial Appeal*.

On December 13, 2023, two days before Petitioner's deadline to respond to the subpoena, Petitioner filed suit in federal district court. The district court dismissed, finding Petitioner's claims unripe. Pet. App. 71a-84a. The district court emphasized that state law grants exclusive authority to enforce or quash a subpoena to the New Jersey Superior Court. See Pet. App. 75a-76a (citing N.J. Stat. Ann. §§ 56:8-6; 45:17A-33(g)). Explaining that it "cannot yet know whether the state court … will, in fact, enforce the subpoena in its current form," and that Petitioner might not suffer the injuries it asserted, the district court concluded that Petitioner's federal claims were "not ripe for resolution because no actual or imminent injury has occurred." Pet. App. 81a (citing *Google, Inc. v. Hood*, 822 F.3d 212, 225-26 (CA5 2016)).

Petitioner appealed to the Third Circuit and filed a petition for mandamus with this Court. The Third Circuit denied an injunction pending appeal on February 15, 2024. CA3 Dkt.1 No. 20. It also denied Petitioner's request for an expedited appeal, noting Petitioner did not "promptly file a motion to expedite" and failed to tell the Court that it was "simultaneously pursuing extraordinary relief from the Supreme Court and representing to that Court that expedited treatment is not necessary." CA3 Dkt.1 No. 29. This Court then denied Petitioner's petition for a writ of mandamus to require the district court to exercise jurisdiction, without noted dissent. See *In re First Choice Women's Res. Centers, Inc*., 144 S. Ct. 2552 (2024). But the underlying appeal before the Third Circuit remained live at that time.

2. *State Action: Superior Court Denial of Petitioner's Motion to Quash And Subsequent State-Court Filings.*

Meanwhile, the State moved to enforce the subpoena in New Jersey Superior Court on January 30, 2024. CA3 Dkt.2 No. 17-2, at JA983. Petitioner cross-moved to stay or quash the subpoena on April 1, 2024, *ibid.*, and the parties contested the same constitutional arguments that Petitioner raised in its federal suit, see *id.*; CA3 Dkt.2 No. 44, at SA45-67, SA500-10. On May 28, the state court issued oral rulings granting the State's application, denying the cross-motion to quash, and denying Petitioner's motion for a stay. Pet. App. 158a-59a, 168a-71a. The court memorialized its rulings in orders dated May 30, June 6, and June 18. CA3 Dkt2. No. 17-1, at JA247-49; CA3 Dkt.2 No. 17-2, at JA989-992. The state court found no basis to quash the subpoena in toto because it found no evidence that the subpoena resulted from "retaliation and bias on the State's part," finding Petitioner's claim to be "speculation." Pet. App. 154a-56a. But it found that other challenges—including Petitioner's claims that certain subpoena requests would violate First Amendment associational rights, or would otherwise be burdensome or unreasonable—were "premature" because they "center[ed] on" the subpoena's "scope" and particular requests. Pet. App. 155a-56a. So although the state court concluded that "the Attorney General has not, at this very preliminary juncture of this matter, violated any statutory or constitutional tenets which would lead to a quashing of the subpoena at issue," Pet. App. 158a, the court added that Petitioner's remaining "constitutional arguments [we]re … premature" at that stage of the case, Pet. App. 156a. The state court's June 18 Order directed Petitioner to

"respond fully" to the subpoena by July 18. CA3 Dkt.2 No. 17-1, at JA248-49.

On July 18, Petitioner filed a motion for a protective order with the state court. *Id.*, at JA986. At the same time, instead of producing all of the documents subject to the subpoena, Petitioner provided a limited document production and identified a list of specific subpoena requests to which it objected. Petitioner emphasized that the state court only required it to "respond" to the subpoena—which it took to mean that *either* the production of documents or specific objections sufficed. See Pet. 11 (confirming both that Petitioner responded with "written responses and objections—including an objection to providing donor identities," and that it has not produced the documents covered by those constitutional objections). Petitioner also appealed to the intermediate appellate court, the New Jersey Appellate Division. On July 26, the State opposed Petitioner's request for a protective order and cross-moved to enforce litigants' rights based on the State's own understanding that Petitioner failed to comply with the trial court's order. CA3 Dkt.2 No. 17-2, at JA463-65. The trial court found that it lacked jurisdiction to hear Petitioner's motion for a protective order given the pending appeal to the Appellate Division. CA3 Dkt.2 No. 44, at SA517-18. The Appellate Division thus granted a limited remand to allow the state trial court to consider these motions. CA3 Dkt.2 No. 17-2, at JA575.

3. *Subsequent Federal Filings and Decisions*.

In light of the multiple subsequent state trial court orders, the State moved to dismiss Petitioner's then-still-pending appeal at the Third Circuit. CA3 Dkt.1 No. 50. On July 9, the Third Circuit dismissed the prior appeal as moot and remanded the case to district

court. CA3 Dkt.1 No. 56-1. Ten days later, Petitioner filed another motion for preliminary relief in the district court—arguing that the federal lawsuit was now ripe given the intervening state-court orders. DNJ Dkt. No. 41.

On November 12, the district court denied Petitioner's motion and dismissed its claims without prejudice. See Pet. App. 57a-58a. The district court concluded that, although the state court had required Petitioner to provide *responses* to the subpoena, including objections, it "remain[ed] an open question" whether Petitioners would be compelled to disclose the materials it believed were constitutionally protected, and emphasized that the state trial court had not actually decided whether to order such production. Pet. App. 31a-32a. Because Petitioner still faced no sanctions from this non-self-executing subpoena until the state court decides that it must comply, the federal district court again held that the matter remained unripe under Article III. *Ibid.*

Petitioner appealed to the Third Circuit, which granted Petitioner's motion to expedite the appeal. CA3 Dkt.2 No. 12.

4. *The State Court's November 19 Hearing and December 2 Ruling.*

Pursuant to the New Jersey Appellate Division's remand order, on November 19, 2024, the state trial court held a hearing on the parties' motions. CA3 Dkt.2 No. 17-2, at JA608-67. The hearing provided significant clarity on two relevant points. First, the State clarified the scope of the information it was requesting through the subpoena. Although Petitioner had expressed a concern that the subpoena requested the identities of a broad array of donors—including at

galas and church fundraisers, or via websites that clearly delineated Petitioner's mission and operations—counsel for the State confirmed that Petitioner only has to provide the identities of the donors who donated via https://1stchoice.org and https://firstchoicewomancenter.com, the particular websites that may be misleading as to Petitioner's mission and operations. See *id.*, at JA632-33.[2] Identifying those donors would allow the State to determine if they were ultimately misled. See *id.* Second, the state court confirmed it had not required Petitioner to produce the subpoenaed documents; instead, when it ordered Petitioner to "fully comply" to the subpoena, its order allowed for responses in the form of objections, rather than in the form of document production. See *id.*, at JA663.

Two weeks later, on December 2, 2024, the state trial court issued an Order and Statement of Reasons denying both motions. Pet. App. 59a-66a. Consistent with the hearing, the trial court again clarified that Petitioner's prior responses to the subpoena—which took "the form of objections without any responsive documents"—were "in keeping with" that court's prior rulings to respond fully to the subpoena. Pet. App. 65a. The court explained that while it previously "found that the service of the subpoena itself" was not unlawful, it "specifically *did not rule* on the constitutionality of the requests made in the subpoena," Pet.

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[2] Petitioner thus errs in representing to this Court that it would be required to "disclose donor information for some 5,000 individual contribut[ors] … includ[ing] everyone who gave at First Choice's benefit dinners and through church baby-bottle campaigns—even though such donors could not possibly be confused about First Choice's pro-life mission." Pet. 8. The State has repeatedly made clear in state and federal court alike that Petitioner need not do so, and the Third Circuit—as laid out below—specifically credited and relied on that factual representation.

App. 63a (emphasis added), and emphasized that Petitioner's various constitutional objections were preserved, see Pet. App. 63a-66a. Moreover, the court concluded that it remained "premature" to decide Petitioner's constitutional objection to the subpoena while the parties were engaging in the very "good faith negotiations" regarding "the scope of the document demands in the subpoena" that the court orders "required." Pet. App. 63a. The court added that if "the parties were unable to reach a consensus on all or some of the demands," the state court would only then adjudicate "the scope of the demands and the propriety of the objections." Pet. App. 65a.

5. *The Third Circuit's Merits Decision.*

Following briefing and argument, the Third Circuit issued an unpublished, *per curiam* opinion holding that Petitioner's constitutional claims were not ripe. Pet. App. 1a-5a. Far from adopting any bright line rule, the panel provided the following basis for concluding that the federal action was not ripe for Article III review:

> Having considered the parties' arguments, we do not think First Choice's claims are ripe. [1] It can continue to assert its constitutional claims in state court as that litigation unfolds; [2] the parties have been ordered by the state court to negotiate to narrow the subpoena's scope; they have agreed to so negotiate; [3] the Attorney General has conceded that he seeks donor information from only two websites; and [4] First Choice's current affidavits do not yet show enough of an injury.

Pet. App. 4a. The court added that the state court can and "will adequately adjudicate [Petitioner's] constitutional claims," as would any future federal litigation.

Pet. App. 4a-5a (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

Judge Bibas noted his dissent in a footnote, stating that he "would find [Petitioner's] constitutional claims ripe" pursuant to *Americans for Prosperity Foundation v. Bonta* ("*AFP*"), 594 U.S. 595 (2021). Pet. App. 3a.

REASONS FOR DENYING THE PETITION

This Petition does not satisfy this Court's criteria for multiple reasons. First, contrary to the Petition's central claim, the decision below does not implicate a circuit split, let alone one that warrants review. Second, the decision below turns on multiple highly idiosyncratic facts that complicate review of any ripeness question. And third, the decision below is correct and will have none of the impacts Petitioner fears.

I. THE PETITION DOES NOT IMPLICATE ANY CIRCUIT SPLIT WARRANTING REVIEW.

The Petition's primary submission is that this Court should grant certiorari to resolve a dispute amongst the circuits as to "whether a recipient of an investigatory demand must first go to state court before challenging the demand in federal court." Pet. 15. According to Petitioner, there is a divide between the Fifth and Ninth Circuits on this question—with the former finding that challenges to non-self-executing state subpoenas are never ripe prior to enforcement by a state court, and the latter finding that they can be. Pet. 17-18. But that theory runs into two fatal problems. First, the Third Circuit's decision below does not implicate this alleged conflict whatsoever. Second, Petitioner dramatically overstates the minor differences in Fifth and Ninth Circuit precedents. As a

result, the Petition amounts to a request that this Court engage in factbound error correction.

1. Initially, the Third Circuit's decision does not even implicate the circuit conflict that the Petition alleges. Even assuming that there is divergence between the two circuits, the Third Circuit's order finding Petitioner's claims unripe would satisfy either approach. It is thus a tremendously poor vehicle for reviewing this issue.

The Petition's principal submission is that there is a circuit conflict regarding Article III ripeness that requires resolution by this Court. As Petitioner frames this case, the split regards whether a challenge to a non-self-executing subpoena can ever be ripe in federal court before the state court with authority to do so actually enforces the subpoena. According to the Petition, the Fifth Circuit adopts a "categorical rule" that challenges to non-self-executing state civil subpoenas are never ripe until they have been enforced by a state court. See Pet. 17 (citing *Google*, 822 F.3d 212); see also Pet. 2-3, 14. By contrast, the Petition claims, the Ninth Circuit finds challenges to non-self-executing state subpoenas will be "ripe where the demand has caused injury"—that is, where the recipient has suffered "objectively reasonable chilling of its speech or another legally cognizable harm." See Pet. 18 (quoting *Twitter, Inc. v. Paxton*, 56 F.4th 1170 (CA9 2022)); see also Pet. 2-3, 14. And in the decision below, the Petition asserts, the Third Circuit sided with the Fifth Circuit, adopting a blanket rule that all challenges to non-self-executing state civil subpoenas are never ripe until they have been enforced by a state court. See Pet. 14-15.

Petitioner's principal problem, however, is that the decision below does not in fact implicate an alleged

split between the Fifth and Ninth Circuits. In sharp contrast to the Petition's portrayal of its ruling, nowhere in its two-page, unpublished decision did the Third Circuit ever adopt a "categorical rule" that pre-enforcement challenges to non-self-executing subpoenas must be unripe unless they have been enforced by a state court first. Pet. 17. Rather, the majority identified certain case-specific reasons that Petitioner's claims could not yet be ripe—including both that Petitioner "can continue to assert its constitutional claims in state court" *and* that the factual record did "not yet show enough of an injury." Pet. App. 4a. Indeed, this ruling precludes a finding of ripeness under either the Fifth Circuit's or the Ninth Circuit's approaches. Because the subpoena has not been enforced by the New Jersey state court—which has neither adjudicated Petitioner's constitutional arguments nor required Petitioner to produce—Petitioner's claims are unripe under *Google*. But like the Ninth Circuit in *Twitter*, the Third Circuit also considered Petitioner's claims of an injury based on chill to speech and determined the record did not adequately substantiate them.

Indeed, Petitioner simply misunderstands the Third Circuit order. In the core paragraph assessing the ripeness of this challenge, the Third Circuit provided a range of factual conclusions that supported its case-specific finding. It emphasized that "[Petitioner's] current affidavits do not yet show enough of an injury"—addressing a debate among the parties regarding whether Petitioner sufficiently supported that its speech was being chilled. Pet. App. 4a. It also held that "the Attorney General has conceded that he seeks donor information from only two websites"—a relevant holding because First Choice had argued that its donors' speech would be chilled based on declarations from donors who contributed only via means *other*

than those websites. Pet. App. 4a. And it emphasized that "the parties have been ordered by the state court to negotiate to narrow the subpoena's scope [and] they have agreed to so negotiate"—meaning it was also contingent on what documents Petitioner would ultimately need to turn over, thus making Article III review highly speculative. Pet. App. 4a. Had the Third Circuit meant to adopt a "categorical rule" that challenges to non-self-executing subpoenas are never ripe under Article III until they have been enforced, there would have been no reason to consider these fact-specific conclusions. Petitioner doubtless disagrees with the Third Circuit's factbound findings, but they do not reflect a categorical legal rule; they represent uncertworthy disputes instead. See *Halbert v. Michigan*, 545 U.S. 605, 611 (2005) (this Court's role is not one of factual "error-correction").

For that reason, the decision below does not even implicate the very circuit split Petitioner presents to this Court. The Third Circuit did not adopt a bright line rule either accepting or rejecting the Fifth Circuit's test in *Google* or the Ninth Circuit's in *Twitter*. Indeed, the opinion does not even mention either case, let alone claim to be adopting either's rule. See Pet. App. 3a-5a. Rather than cite either case or adopt either test, the two-page order just highlighted the record evidence that showed this case was unripe in either event. If this Court agreed with *Google* that challenges to non-self-executing subpoenas are unripe until they are enforced by a state court, the Third Circuit decision would stand. But if this Court agreed instead with *Twitter* that challenges to non-self-executing subpoenas are ripe in the rare cases where they cause objectively reasonable chill, the Third Circuit ruling would be affirmed again—because the Third Circuit specifically relied on those very facts to

find that Petitioner could "not yet show enough of an injury" to move forward. Pet. App. 4a. Because the unpublished decision just concluded that the facts before it did not pass muster under Article III—and thus would not pass muster regardless of how this Court may resolve any tension between *Google* and *Twitter*—there is no basis for the Court to take this case to resolve a purported split with no impact on the actual judgment below.

2. Moreover, the alleged split between the Fifth and Ninth Circuits—even were it implicated—is overstated and does not warrant review at this time. The Fifth Circuit treats the non-self-executing nature of a subpoena as determinative of ripeness, while the Ninth Circuit views the non-self-executing nature of a subpoena as a significant indicator that the plaintiff has failed to establish the injury necessary to show Article III ripeness. As subsequent district court rulings confirm, this subtle distinction has not had any practical effect in real-world cases in either circuit. Any review of this issue is thus premature at best, which means that this Court should allow for further percolation. And at a minimum, it confirms there is no need for this Court to review a case that does not implicate the alleged split and that would require the Court instead to scrutinize and adjudicate record-specific factual issues.

Begin with the Fifth Circuit's approach. In *Google v. Hood*, Google challenged a subpoena issued by the Mississippi Attorney General arising out of concerns that Google was failing to address unlawful activity facilitated by its search engine. 822 F.3d, at 217-19. Google alleged that the subpoena contravened both its statutory immunity under the Communications Decency Act and violated its First and Fourth Amendment

rights. *Id*., at 219. But the Fifth Circuit found that its challenge was not ripe. Relying in part on *Reisman v. Caplin*, 375 U.S. 440 (1964), in which this Court rejected a pre-enforcement challenge to an IRS subpoena, the Fifth Circuit concluded that because Mississippi law provided that the Attorney General could only enforce his subpoena by "'apply[ing]' to certain state courts" for "'an order' granting injunctive or other relief," any challenge to his subpoena remained unripe until such an order issued. *Id.*, at 225 (citation omitted). And because Google could not be "forced to comply" or face sanctions "absent a court order," it "would 'suffer no undue hardship from denial of judicial relief.'" *Id*. (citation omitted). The court further rejected any distinction between state and federal subpoenas, noting that there is "no reason why a state's non-self-executing subpoena should be ripe for review when a federal equivalent would not be. *Id.*, at 225-26. Rather, "comity should make us less willing to intervene when there is no current consequence for resisting the subpoena and the same challenges raised in the federal suit could be litigated in state court." *Id.*, at 226.

Although the Ninth Circuit has taken a slightly different approach, Petitioner overstates the tension. In *Twitter v. Paxton*, Twitter challenged a civil investigative demand ("CID") by the Texas Attorney General pursuant to his investigation of whether Twitter "truthfully represent[ed] its content moderation policies." See 56 F.4th, at 1172-73. Twitter claimed that the CID and underlying investigation were "unlawful retaliation for its protected speech." *Id*., at 1172. The Ninth Circuit explained that a First Amendment retaliation challenge to a state subpoena is ripe under Article III only if the recipient can show that it suffered "an injury in fact." *Id.*, at 1173-74. In assessing whether a recipient of a non-self-executing subpoena suffered

such an injury, the Ninth Circuit rejected Texas's position that *Reisman* controlled, noting in a footnote that it found *Google*'s reliance on *Reisman* not "persuasive" because *Reisman* did not involve a subpoena that inflicted a chill on a recipient's First Amendment speech. *Id*., at 1178, n.3.

But although it declined to adopt a categorical rule, the Ninth Circuit made clear that a high bar remained—and that challenges to non-self-executing subpoenas were highly unlikely to support Article III injuries. In assessing whether the recipient of a non-self-executing subpoena that required state-court enforcement suffered an Article III injury, *Twitter* still found it highly relevant that the subpoena was "not self-enforcing," and therefore that "[p]re-enforcement Twitter never faced any penalties for its refusal to comply" with the subpoena's requests. *Id.*, at 1176. In other words, the Ninth Circuit agreed that "to complain about the [subpoena] in this posture is to speculate about injuries that have not and may never occur." *Id.*; see *id.*, at 1177 (emphasizing, as the Fifth Circuit did, that Twitter could still "raise its First Amendment defense" if the Attorney General "moves to enforce the CID" in the state court). That conclusion was part and parcel of the Ninth Circuit's holding that while a company like Twitter could conceivably satisfy Article III by showing it was "chilled from exercising [its] right to free expression," Twitter "fail[ed] to allege any chilling effect on its speech or any other legally cognizable injury" from this non-self-executing subpoena. *Id*., at 1174-75. And for that reason, along with its record-specific findings that Twitter's claims of chill were "vague," "indefinite," and "highly speculative," the Ninth Circuit ultimately reasoned that Twitter had "not suffered an Article III injury because the CID is not self-enforcing." *Id*., at 1175.

Crucially, there is no need for this Court to resolve the tension—between a case that holds federal challenges to non-self-executing subpoenas are never ripe, and one that holds they almost never will be—because the alleged one-to-one circuit split has had no practical impact. The Petition does not identify a single case within the Ninth Circuit that has held a challenge to a non-self-executing subpoena to be ripe since the *Twitter* decision, and the State is not aware of one. To the contrary, in *Seattle Pacific University v. Ferguson*, the Ninth Circuit again considered a challenge to a document request by a state attorney general. 104 F.4th 50, 57 (CA9 2024). As in *Twitter*—and as in this case—the Ninth Circuit held the challenge to the investigation unripe, *both* because the challenger failed to offer any concrete allegations of chill, *and* because "the Attorney General's request for documents carries no stick" and the challenger "would not face sanctions for ignoring it." *Ibid. Seattle Pacific* reveals how little distance there is between the Fifth and Ninth Circuit's approaches in practice—and confirms the Third Circuit's judgment would stand under either approach.

The same is true for district courts in the Ninth Circuit: following *Twitter*, they have repeatedly found these types of challenges unripe based on a lack of injury. See, *e.g.*, *Obria Grp. Inc. v. Ferguson*, No. 23-06093, 2025 WL 27691, at *7 (W.D. Wash. Jan. 3, 2025) (finding circumstances "nearly identical to those in *Twitter*"); *U.S. News & World Reports v. Chiu*, No. 24-00395, 2024 WL 2031635, at *13 (N.D. Cal. May 7, 2024) (plaintiff failed to offer any evidence of a concrete injury caused by state subpoena); *Second Amendment Found. v. Ferguson*, No. 23-1554, 2024 WL 97349, at *4 (W.D. Wash. Jan. 9, 2024) (plaintiff failed to show speech was chilled by state investigation and document

requests). Indeed, Petitioner characterizes *U.S. News & World Report* as "rel[ying] on *Google*," Pet. 20—which, if true, would be a sign of intra-circuit tension within the Ninth Circuit, rather than a pressing inter-circuit conflict—but *U.S. News & World Report* again simply illustrates the extensive overlap between the two circuits. That district court decision expressly applied *Twitter* in concluding that plaintiff's claims were not "constitutionally ripe," and cited *Google* in support of its separate finding that the claims were not "prudentially ripe," 2024 WL 2031635, at *10-*14—once again confirming the limited practical import of any distinction between the two cases (and no import on the judgment in this case).

A minor difference in analysis that has not produced a difference in outcomes does not warrant this Court's review. Consistent with its certiorari practices, this Court should instead allow the question to percolate amongst the circuits, only two of which have decided the question. Indeed, even though Petitioner characterizes *district* courts as "hopelessly split on this issue," Pet. 19, that runs into two problems. For one, Petitioner does not cite any case in which a court found a pre-enforcement subpoena challenge constitutionally unripe based on *Google*; instead, it simply cites cases that found challenges unripe under *Twitter*'s approach. See Pet. 19-21; see also *supra* at 21 (discussing *Obria Grp., Inc.*, 2025 WL 27691, at *6-8; *U.S. News & World Report*, 2024 WL 2031635, at *12-13; *Second Amendment Found.*, 2024 WL 97349, at *4-5). For another, to the extent there is any split among district courts, that confirms the need for percolation among circuit courts. Indeed, two of the cases Petitioner cites are currently on appeal. See *Media Matters for Am. v. Paxton*, 732 F. Supp. 3d 1 (D.D.C. 2024), *appeal pending*, No. 24-7059 (CADC); *Second Amendment*

Found., 2024 WL 97349 (W.D. Wash. 2024), *appeal pending*, No. 24-760 (CA9). Particularly as the courts of appeals continue to assess the ripeness of pre-enforcement challenges to non-self-executing subpoenas, this Court need not weigh in prematurely.

II. THIS CASE OFFERS AN ESPECIALLY POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Not only does Petitioner seek factbound error correction of an unpublished decision that does not implicate a circuit split, but the case's idiosyncratic facts render it a particularly poor vehicle for deciding any broad questions of ripeness. Although Petitioner frames this case as implicating a pure question of law regarding whether challenges to non-self-executing subpoenas ripen once the recipient has an objectively reasonable chill to its First Amendment speech, see Pet. i, 15-16, a number of facts in this record—which the Third Circuit emphasized in holding that Petitioner's claims were unripe—illustrate the fatal vehicle problems here.

First, this Petition does not cleanly present whether the recipient of a non-self-executing subpoena has a ripe claim based on the "objectively reasonable chilling" of speech, see Pet. 24; see also Pet. i, because there are unique fact-specific reasons (cited by the Third Circuit below) that the alleged chill was not objectively reasonable. Both below and before this Court, Petitioner's primary support for its chill is an anonymous declaration by donors who wish not to have their identities divulged, and who would decline to donate to Petitioner to avoid that risk. The anonymous declarants spell out how they have donated or would donate to Petitioner, including via Petitioner's donor-facing website (that spells out Petitioner's mission and

operations clearly) and at in-person fundraising events. Pet. App. 176a. But as the Third Circuit recognized below, the State has specifically foresworn seeking the identities of any donors who donated on that website or at in-person events via this subpoena. See Pet. 26-27; Pet. App. 4a. Instead, the State expressly limited its requests to donors that contributed using the two websites—https://1stchoice.org and https://firstchoicewomancenter.com—that do not include references to Petitioner's mission and operations. Petitioner did not cite a single donor who expressed concerns, let alone expressed chill for future donations, who contributed via those websites and thus were covered by the subpoena.

That would significantly complicate review of the ripeness question presented. Indeed, as Petitioner frames the question, the premise is that the subpoena recipient has a "reasonably objective chill of its First Amendment rights," Pet. i; see also Pet. 24 (citing *Twitter* for its "objectively reasonable" analysis), and so the question becomes whether that recipient can proceed to challenge a non-self-executing state subpoena, Pet. i. To reach that question, this Court would thus have to decide whether Petitioner actually established objectively reasonable chill based on declarants whose identities are categorically not at risk of disclosure in this subpoena. In other words, this Court would have to engage in a highly idiosyncratic and factbound assessment of whether the Third Circuit was correct to expressly credit the State's "conce[ssion]" that the subpoena "seeks donor information from only two websites," Pet. App. 4a—as well as what impact that would have on the reasonableness of any *other*, unaffected donors' chill. Having to scrutinize the reasonableness of alleged chill from a state investigatory demand on third parties whose information is not even sought by

that demand would therefore significantly complicate review of this Article III question.

Second, even beyond the fact-specific shortcomings of Petitioner's declarations, the procedural history of this case would also muddy this Court's review of the Article III question presented. This is not a case in which state court enforcement of a non-self-executing subpoena has simply yet to happen—as, for example, in *Google* and *Twitter*. The state trial court has affirmatively refused to consider the constitutional dispute unless and until Petitioner and the State meet and confer over the scope of the subpoena; in other words, it has ordered the parties to negotiate over the very subpoena requests that Petitioner challenges, before it will compel any production. See *supra* at 11-13; Pet. App. 63a-64a (state court noting that it "did not rule on the constitutionality of the requests made in the subpoena," that Petitioner's "federal constitutional claims" are "preserved," and that the parties must meet and confer). And the court made quite clear that it would not even entertain any further requests from the State to require production unless and until the parties undertake those negotiations and reach an impasse. *Ibid.* Indeed, the Third Circuit explained that the claims are unripe in part because the parties were "ordered to negotiate to narrow the subpoena's scope" and "have agreed to so negotiate." Pet. App. 4a.

That, too, would significantly complicate this Court's review. In multiple cases cited in the Petition itself—including in both *Google* and *Twitter*—the circuit resolves the federal challenge before the State initiates a state-court enforcement action. That posture would allow this Court to take up whether the fact of a non-self-executing subpoena that produces objectively reasonable chill could support a ripe federal suit—if, of

course, this Court were to find that the narrow tension between the Fifth and Ninth Circuits justifies certiorari. Far from "an ideal vehicle" to address this question, Pet. 34, granting this Petition would require this Court to first consider whether a party has objectively reasonable chill from a non-self-executing subpoena when the state court that could enforce it has repeatedly declined to do so before there are good-faith negotiations regarding the scope of subpoena requests. And because the heart of ripeness doctrine seeks to avoid adjudication of "contingent" questions, *Texas v. United States*, 523 U.S. 296, 300 (1998), this Court would have to assess whether the parties' agreement to meet and confer—on which the Third Circuit explicitly relied—makes it too speculative to assess which subpoena requests remain live. Pet. App. 4a.

In short, this fact pattern may indeed render this case a "unicorn," Pet. 34, but only because it throws the vehicle problems here into stark relief.

III. THE DECISION BELOW IS CORRECT AND WILL NOT HAVE THE IMPACTS PETITIONER ALLEGES.

Beyond the fact that the decision below does not implicate a split and that the Petition suffers from significant vehicle problems, review is not warranted because the decision below was correctly decided on highly fact-specific grounds, and because that factbound holding lacks sufficient impact to merit certiorari.

1. As an initial matter, the decision below correctly held that the record in this case presented insufficient evidence of Article III injury from a non-self-executing subpoena to make the case ripe. The central Article III ripeness inquiry is whether a purported injury is "dependent on 'contingent future events that may not

occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 592 U.S. 125, 131 (2020) (quoting *Texas v. United States*, 523 U.S., at 300). This challenge to a non-self-executing state civil subpoena is highly contingent, because Petitioner will not need to produce documents in response or face any penalties unless the state court decides to enforce the subpoena first. See *supra* at 4-5 (discussing New Jersey law). As *Google* and *Twitter* both confirm, it is generally speculative whether a state court will do so. But it is especially speculative in this case, because the court ordered the parties to "negotiate to narrow the subpoena's scope" before it considers constitutional defenses and any order compelling production. Pet. App. 4a; *supra* at 11-13. It is thus unclear whether Petitioner will have to produce documents—let alone which requests in the subpoena it will ultimately have to satisfy.[3]

Regardless of whether that is a dispositive or highly probative fact, the Third Circuit correctly held that Petitioner has not substantiated the sort of chill necessary to overcome it. As explained above, Petitioner's claims of a chilling effect are largely based on statements from anonymous donors whose information the State is not even seeking. See Pet. 26-27 (arguing it has "substantiated" its harms via this "anonymous sworn declaration" from "multiple First Choice donors");

[3] Petitioner errs in representing to this Court that its speech is chilled because the state court enforced the subpoena and the State has threatened Petitioner with penalties and attorney's fees. See Pet. 25. Petitioner overlooks that the state court specifically and repeatedly clarified that it has not yet required Petitioner to produce any documents, and that unless and until it actually requires the production of documents, Petitioner cannot be subject to any penalties or attorney's fees for failing to do so. See *supra* at 11-13.

see also *id.*, at i, 2-3 (citing alleged chill to donors). But Petitioner cites no precedent for the proposition that a declaration by donors who are *not* covered by the subpoena can substantiate that the subpoena is chilling contributions of donors who are covered—that is, who contributed via a website that made sharply different representations about Petitioner's work and are therefore dissimilarly situated—and the State is aware of none. So contrary to Petitioner's misunderstanding of the Third Circuit opinion, when the Third Circuit previously held that Petitioner had "not yet show[n] enough of an injury" for its claims to be ripe, Pet. App. 4a, the Third Circuit did not do so "without a word of explanation—other than to cite the possibility of relief in state proceedings," Pet. 27. Instead, the Third Circuit emphasized that the "Attorney General has conceded that he seeks donor information from only two websites," Pet. App. 4a—which meant that Petitioner's allegations and substantiation were ultimately inadequate.

AFP, 594 U.S. 595, is easily distinguishable. *AFP* considered a facial challenge to a California regulation requiring every charity in the state to disclose the names and addresses of any donor who contributed more than $5,000, and invalidated that regulation. *Id.*, at 602, 619. Ripeness was uncontested in that case, and for good reason. For one, *AFP* did not concern a non-self-executing subpoena that required enforcement by the state court at all; instead, *AFP* concerned a binding legal requirement with which charities were required to comply to avoid loss of their registration and regulatory fines. *Id*., at 602-03. By contrast, this case involves a particularized request for information that is subject to negotiation and to objections that will be adjudicated by a state court. For another, while *AFP* included requests for information from any donor who

gave a contribution exceeding $5,000, this subpoena only seeks information regarding individuals who donated via two of Petitioner's websites, and not those who contributed via any other means. *AFP* therefore had no occasion to consider whether statements of chill by a donor who is *not* covered by a subpoena supports an objectively reasonable chill on dissimilarly-situated donors who are covered. And nothing in *AFP* suggested that a challenge is necessarily ripe just because the request concerns donor information, without regard to the nature of the request and the allegations or substantiation of chill.[4]

Nor is the decision below contrary to Section 1983 principles. All the panel held is that, on the allegations and record before it, Petitioner's claims were not ripe as a matter of Article III jurisdiction. Pet. App. 4a-5a. Article III jurisdiction is, after all, a "bedrock constitutional requirement that this Court has applied to all manner of important disputes," and whether it exists in a given case is a "threshold question" federal courts must always answer before reaching other issues. *Food*

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[4] Though this Court has no need to consider this question, there are also significant differences between *AFP* and this case on the merits of the constitutional challenges. While California's sweeping and prophylactic regulation was insufficiently tailored, *AFP* confirmed more targeted measures to investigate donor fraud are permissible, citing a reasonably supported "subpoena or audit letter" as the canonical examples of appropriate measures. *Id.*, at 613-14; see *Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003) (finding "critical" distinction "between fraud actions trained on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high"). The subpoena here falls squarely into the latter camp: it is directed to a specific entity and is based on particularized concerns about potential violations of state laws. See *supra* at 5-7.

& Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367, 378 (2024) (citation omitted). A ruling that identifies a lack of Article III injury merely applies the proper limits of federal court jurisdiction; it does not, as Petitioner suggests, evade federal court jurisdiction.

Knick v. Township of Scott, 588 U.S. 180 (2019) is not to the contrary. See Pet. 22-23. *Knick* overruled a precedent that had "established an exhaustion requirement for § 1983 takings claims"—claims for which there was otherwise undisputed federal jurisdiction—"when it held that a property owner must pursue state procedures for obtaining compensation before bringing a federal suit." 588 U.S., at 194. The court reaffirmed its "longstanding position that a property owner has a constitutional claim to compensation at the time the government deprives him of his property," *ibid.*, and need not take additional steps to exhaust state remedies regarding just compensation before vindicating Fifth Amendment rights in federal court, see *id.*, at 192-95, 202. That makes sense: Section 1983 provides a right to a federal forum where the Article III court has federal subject matter jurisdiction. A judicially-created quasi-exhaustion requirement that deprives federal courts of the ability to reach Section 1983 claims for which they have Article III jurisdiction contravenes that rule, as *Knick* held. A judicial determination that an injury is not yet ripe does the opposite: it respects Article III's limits on federal court authority to reach claims, whether under Section 1983 or any other law.

2. Relatedly, the decision below does not have the impacts that Petitioner fears: it does not create a "preclusion trap" that bars this Court or other federal courts from reaching the merits of proper federal claims. See Pet. 22-24.

In claiming the Third Circuit created a preclusion trap that will categorically bar Section 1983 challenges to non-self-executing subpoenas, Petitioner again misreads the panel's opinion. Because the panel's unpublished and brief opinion relied on a factbound analysis rather than any bright-line rule, the decision below left open the possibility that a future party could secure a federal forum with a stronger showing of injury. Indeed, in this very case, although it found that the particular allegations and facts presented insufficient evidence of chill for purposes of Article III ripeness, the panel added that should the facts change, the state court system and "any future federal litigation between these parties" could "adequately adjudicate First Choice's constitutional claims." Pet. App. 4a-5a.

Nor is that the only reason that Petitioner's alleged "preclusion trap" and its concomitant harms are overstated. For one, although parallel litigation in state and federal courts can indeed result in a final judgment in one forum that is preclusive on the other, whether preclusion will actually result is highly dependent both on case-specific facts and on the preclusion law of the first forum. See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."). Moreover, even if the state court in this case (or another) issues a judgment on Petitioner's constitutional claims with preclusive effect on federal district court litigation, this Court's review of course remains available. See, *e.g.*, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975) ("A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451(1958)

(reviewing a state court decision on federal claims after plaintiff held in contempt for refusing to comply with a state court ruling requiring production). So to the degree Petitioner is ultimately unsuccessful in pressing its merits arguments in state court, it is free to seek relief from this Court at that time. That provides no basis to grant certiorari to address ripeness in a case that does not implicate the alleged, overstated circuit split; that is complicated by a procedural history of multiple fact-specific holdings; and where the decision below correctly resolved the case on narrow Article III grounds.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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