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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Attorney General has already acknowledged that the decision below is the subject of a circuit split. It is also contrary to this Court's precedents, which do not relegate First Amendment plaintiffs to state court to litigate their section 1983 claims. And this is an ideal case for this Court to say that the target of an unconstitutional investigative demand is not barred from federal court. The Court should grant the petition and provide clarity to the lower courts on the important question presented.

ARGUMENT

I. This case directly implicates an important and acknowledged circuit split.

The Attorney General now disclaims a circuit split he previously acknowledged. This is wrong twice over.

1. The Attorney General paints the Fifth and Ninth Circuits as adopting only "slightly different approach[es]." BIO.19. But he previously acknowledged the "1-1 split," admitting "that [the Fifth Circuit in] *Twitter* expressly declined to follow [the Ninth Circuit in] *Google*'s reasoning that challenges to a non-self-executing state subpoena are unripe until they are enforced." *In re First Choice*, No. 23-941, BIO.22 (citations omitted). And he conceded below that *Twitter* "expressly diverged from *Google*," COA.Dkt.43.28, and urged the Third Circuit to adopt *Google*'s approach, *id.* at 25. The Attorney General was right about the split the first time.

The *Google/Twitter* split is a categorical divide. *Google* held that a challenge to a state investigatory

demand was not ripe because there was "no current consequence for resisting the [demand] and the same challenges raised in the federal suit could be litigated in state court." *Google, Inc.* v. *Hood*, 822 F.3d 212, 226 (5th Cir. 2016). *Twitter* expressly rejected *Google* as not "persuasive," recognizing that, under ordinary First Amendment principles, a subpoena challenger "could have suffered injury in the form of objectively reasonable chilling of its speech or another legally cognizable harm from the [demand] even prior to [its] enforcement." *Twitter, Inc.* v. *Paxton*, 56 F.4th 1170, 1179 n.3 (9th Cir. 2022). The conflict is direct.

2. The Third Circuit's decision exacerbated this conflict. In holding First Choice's claims unripe, the Third Circuit echoed *Google*, reasoning that First Choice "can continue to assert its constitutional claims in state court as that litigation unfolds." Pet.App.4a. It then listed several aspects of that state-court litigation—that "the parties have been ordered by the state court to negotiate to narrow the subpoena's scope" and that "they have agreed to so negotiate." *Ibid.* And it concluded that "the state court will adequately adjudicate First Choice's constitutional claims." Pet.App.4a–5a. This reasoning uses the *Google* standard to decide First Choice's case, creating a 2-1 split.

To avoid this conclusion, the Attorney General recasts the Third Circuit's decision as eschewing "*any* rule." BIO.2 (emphasis added). Not so. To dispose of First Choice's appeal, the Third Circuit necessarily determined the ripeness of First Choice's challenge to the Attorney General's subpoena. The Third Circuit considered First Choice's ability to litigate its claims in state court a primary reason its claims were not ripe. That was legal error. Rule-of-law principles don't allow an appellate court to decide a case good for one day and one train only.

The Attorney General next suggests that review is unavailable because the Third Circuit issued a "factbound" decision. BIO.17. The Attorney General divines this reading from a single phrase, sandwiched in the middle of the Third Circuit's discussion of the state-litigation requirement. Without elaboration or citation, the panel noted that "First Choice's current affidavits do not yet show enough of an injury." Pet.App.4a. The Attorney General overreads this snippet as a conclusion that the *Twitter* standard was not met. Yet the only "facts" supporting this statement are the Third Circuit's discussion of the state-litigation requirement—that First Choice "can continue to assert its constitutional claims in state court as that litigation unfolds" and "the parties have been ordered by the state court to negotiate to narrow the subpoena's scope." Pet.App.4a. None of those state-court centric factors are part of the "usual Article III threshold." Cf. BIO.3. To the contrary, they encapsulate *Google*'s state-litigation requirement. *Google*, 822 F.3d at 226.

In any event, this Court made clear in *Americans for Prosperity* that for "freedom of association" claims, the "risk of a chilling effect … is enough, because First

Amendment freedoms need breathing space to survive." *Americans for Prosperity* v. *Bonta*, 594 U.S. 595, 618–19 (2021) (cleaned up); Pet.25–26. As the Americans for Prosperity amicus brief explains, "the chilling effect on donors who may be exposed against their will, is the same" here as in that case. AFP.Am.Br.3; see also *id.* at 5–7; *Americans for Prosperity*, 594 U.S. at 618. This case is ripe.

At day's end, the Attorney General cannot dispute the Third Circuit's heavy reliance on the state-litigation requirement. This Court should grant review to reject that requirement and remand to the Third Circuit to consider this case without reference to state-court proceedings.

3. The Third Circuit opted for an unpublished, per curiam decision despite a year of emergency litigation in five courts, a circuit split, amicus briefing, and a Judge Bibas dissent. Some have critiqued such "'one and done' method of decisionmaking" via unpublished per curiam as "a clever way of … trying to avoid" further review. *Sambrano* v. *United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *36 n.95 (5th Cir. Feb. 17, 2022) (Smith, J., dissenting). Yet the fact the "order under challenge … is unpublished carries no weight" in determining whether to grant certiorari. *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987). This Court often reviews unpublished decisions to resolve circuit conflict.[1] Earlier this Term, the Court granted review of an unpublished Second Circuit decision that

[1] *E.g.*, *Eastern Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 61 (2000) (reviewing unpublished decision); *Lynce* v. *Mathis*, 519 U.S. 433, 436 (1997) (same); *Old Chief* v. *United States*, 519 U.S. 172, 177 (1997) (same); *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993) (same).

was part of a circuit split. *BLOM Bank SAL* v. *Honickman*, No. 23-1259.

Lower courts are invoking the state-litigation requirement to duck federal jurisdiction in a wide variety of controversies involving state investigations. *E.g.*, Second.Amend.Found.Am.Br.7–9; Christ. Legal.Soc'y.Am.Br.13–20. The Third Circuit's decision gives them more room to do so. The Court should grant review, lest the lower courts "use the doctrine of Article III standing as a way of avoiding ... contentious constitutional questions." *Parents Protecting Our Child., UA* v. *Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14–15 (2024) (Alito, J., dissenting).

II. The Third Circuit's state-litigation requirement violates this Court's precedents.

1. The Third Circuit's state-litigation requirement deprives First Choice of its guaranteed federal forum.

The Attorney General concedes that "Section 1983 provides a right to a federal forum where the Article III court has federal subject matter jurisdiction." BIO.30 (discussing *Knick* v. *Township of Scott*, 588 U.S. 180 (2019)). But he fails to acknowledge that *Google* and the decision below deprive federal courts of jurisdiction over "non-self-executing" subpoenas regardless of First Amendment chill. That's a recipe for condemning nearly every federal constitutional claim involving an investigatory subpoena to state court because such demands are rarely, if ever, "*self*-executing." Like most state laws, they ordinarily require a court to compel compliance or issue penalties. The decision below conflicts

directly with the "general rule … that plaintiffs may bring constitutional claims under § 1983 without first bringing any sort of state lawsuit, even when state-court actions addressing the underlying behavior are available." *Knick*, 588 U.S. at 194 (quotations omitted).

The Attorney General says *Knick* is inapt. BIO.30. That's wrong. The Third Circuit's state-litigation requirement creates a preclusion trap just as surely as the *Williamson County* exhaustion rule did. Subpoena recipients may not avail themselves of federal court until they litigate in state court and as the Attorney General concedes, that litigation can result in a preclusive final judgment. BIO.30. It's precisely what the Attorney General argued when he urged the district court to dismiss First Choice's constitutional claims when he thought those claims *had* been decided by the state court. COA.JA.432–440.

Preclusion is also how the Attorney General ensured that Smith & Wesson's claims were never adjudicated in federal court. *Smith & Wesson Brands, Inc.* v. *Attorney Gen. of N.J.*, 105 F.4th 67, 70 (3d Cir. 2024). As Judge Matey explained in that case, "in its crusades, New Jersey follows the familiar playbook" of "creating a 'preclusion trap' by initiating an order to show cause in state court to quickly secure enforcement of a subpoena before a federal challenge can be heard, and then arguing that the summary proceeding results in a 'permanent loss of [the] right to federal judicial review.'" *Id.* at 99 (Matey, J., dissenting) (discussing First Choice's travails). Courts should not reward such shenanigans.

2. The Third Circuit's ripeness rule also conflicts with First Amendment precedents.

A section 1983 plaintiff may bring a claim in federal court if its right to associate or speak has been chilled. *Americans for Prosperity*, 594 U.S. at 618–19. This is because "the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals" but also by the "risk of a chilling effect on association." *Ibid*.

The Attorney General tries to avoid review by suggesting that the "non-self-executing nature" of his subpoena makes any injury "highly contingent." BIO.27. That *Google*-centric rationale ignores that the *issuance* of the subpoena objectively chilled First Choice's associational and speech rights. Pet.17.

First Choice has made an uncontroverted showing that "[s]ince the publication of a leaked draft of the *Dobbs* opinion in 2022, pro-life organizations, especially pregnancy resource centers like First Choice, have been subjected to an increased level of criminal acts, intimidation, and harassment." Pet.App.182a. And First Choice's donors have attested to a present chill on their right of association because their identities "*might be disclosed* to an official hostile to pro-life organizations." Pet.App.177a (emphasis added). They consider such disclosure "a highly offensive invasion into a sensitive personal matter," Pet.App.178a, decreasing the likelihood of future donations. Plus, even while state-court enforcement proceedings are stayed, the Attorney General has been calling First Choice's former employees to question them for his investigation. Supp.App.4a–5a. Far from contingent,

these injuries have *already* occurred, and they will continue to occur every day the Attorney General evades federal-court review. Pet.26–28.

The Attorney General's only answer to this past and ongoing chill is to claim that First Choice's donor declaration is irrelevant after his voluntary narrowing because those donors are no longer "covered by the subpoena." BIO.28. But "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). And the Attorney General has not disavowed pursuing those donors.

To be sure, the Attorney General says he has "foresworn" seeking the identities of any donors who donated on First Choice's "donor-facing website" and at in-person fundraising events. BIO.24. But he aggressively pursued the identities behind some 5,000 of First Choice's donations until the Third Circuit granted an expedited appeal. Even then, his statement purporting to pull back was limited: the day before oral argument, he asserted "*at this time* the State is only seeking the identities of individuals who may have donated through links on First Choice's client-facing websites." Supp.App.2a (emphasis added). And he expressly "reserve[d] the right to seek identities of other donors." *Ibid*. That's no disavowal. See *303 Creative* v. *Elenis*, 600 U.S. 570, 583 (2023) (standing to sue where state "decline[d] to disavow future enforcement"). It is partial, conditional, and revocable. Courts are not "compelled to leave the defendant free to return to its old ways." *Friends of the Earth*, 528 U.S. at 170.

The Attorney General's late-breaking narrowing of his subpoena is too little too late. His backtracking does nothing to eliminate the chilling harm imposed on the remaining pool of donors whose identities he still demands. See *Ellis* v. *Railway Clerks*, 466 U.S. 435, 442, 104 (1984). And this Court has an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000).

The Attorney General's struggle to distinguish *Americans for Prosperity* is telling. He doubles down on the argument that a non-self-executing subpoena can never be ripe, arguing that "*AFP* did not concern a non-self-executing subpoena that required enforcement by the state court." BIO.28. That just tees up the question presented: whether a federal challenge to a non-self-executing subpoena can ever be ripe. Next, he suggests that *AFP* "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." BIO.29 (emphasis omitted). But again, the Attorney General *still* demands protected donor identities and has only agreed to a temporary pause in his pursuit of others. Such "maneuvers designed to insulate a decision from review … must be viewed with a critical eye." *Knox* v. *Service Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012).

The Attorney General argues that the Third Circuit left open the possibility that if "the facts change," future federal litigation could "adequately adjudicate First Choice's constitutional claims." BIO.30. The Third Circuit said no such thing. It never referenced "fact[ual] changes" or explained how federal litigation might occur *after* the state court has

adjudicated First Choice's federal claims, when the Attorney General will argue preclusion. Pet.App.4a–5a.

Of course, federal constitutional issues resolved by a state court may ultimately be reviewable in this Court. But that was equally true of *Williamson County*'s exhaustion rule. And critically, the jurisdictional question at issue here will *not* later be reviewable by this Court. This Court should grant review now to correct the Catch–22 imposed by the Third and Fifth Circuits' state-litigation requirement.

III. This case is an ideal vehicle to review this exceptionally important question.

The question whether the target of a state-investigatory demand may avail itself of the federal forum guaranteed by section 1983 is exceptionally important. Confining a section 1983 litigant to state court would defeat the purpose of the law's guarantee to provide "a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck* v. *Humphrey*, 512 U.S. 477, 480 (1994). That can't be right. Manh.Inst.Am.Br.10–12.

The Attorney General calls this case "highly atypical." BIO.2. He's partly right. A case raising this question would typically escape this Court's review as moot or precluded. But the Attorney General has agreed to stay state-court proceedings during the pendency of this petition, and should the Court grant review, until after the Court issues its mandate. Pet.App.87a–88a. Plus, the state court has repeatedly withstood the Attorney General's demand that it order the production of protected donor identities and rule against First Choice on its constitutional claims.

That means this is the rare case where the preclusion trap of *Google*'s state-litigation requirement will *not* deprive this Court of its ability to review this case now. Nor will any mootness issues arise while the state-court proceedings are stayed. This case offers a rare and ideal vehicle to end the division of authority between *Google* and *Twitter*. Review is all the more warranted because *Google* makes it unlikely that any other vehicle—published or not—will arise out of the Fifth Circuit. See Annunciation.House.Am.Br.7 (organizations "*must* go to state court to vindicate federal constitutional rights against a state actor—the federal courthouse doors are closed to them").

That First Choice's constitutional claims remain live in federal court is nothing short of providential. The Attorney General has aggressively pursued First Choice through five courts and nearly 50 briefs, constantly pivoting to avoid federal-court scrutiny. For example, the Attorney General did not initially contest ripeness, Pet.10, then disputed it on appeal from the district court's first dismissal, Pet.11, then conceded it after the state court's order, Pet.12, and then withdrew that concession after the district court's second dismissal, Pet.13–14. On the merits, he first conceded to the state court that it had not decided First Choice's constitutional claims, Pet.App.160a, then insisted that it *had* decided those claims *and* the federal court should find preclusion, COA.JA.432–440.

State officials have jaw-dropping authority to issue investigative demands. They often wield authority to investigate based on mere suspicion of wrongdoing or a subjective invocation of the "public interest." Pet.31–34. Yet the *Google* rule eliminates

one of the most effective checks on unconstitutional state action. Here, for instance, the Attorney General has never offered *any* evidence of aggrieved donors. And his late-breaking theory of donor deception based on two "client" websites suffers fatal flaws.

First, contrary to his assertion (BIO.5), https://firstchoicewomancenter.com does *not* have a donation page. So that page cannot justify his request for donor identities. Second, the donation page for https://1stchoice.org contains only a photo collage of babies and their parents and fields for the donor's name, address, and type of donation. https://bit.ly/43xm3p4; see also COA.JA.698–700. And its drop-down menu for donation designation includes the "baby bottle boomerang." *Ibid.* Nothing on the page could plausibly mislead a donor about First Choice's unmistakable pro-life mission. The Attorney General complains that the following disclaimer (found on the bottom of every other website page, including those necessary to access the donation page) is absent—"First Choice Women's Resource Centers is an abortion clinic alternative that does not perform or refer for termination services," BIO.6—but he fails to explain how its absence is misleading.

Protected association "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Americans for Prosperity*, 594 U.S. at 606. Yet First Choice has never had its day in federal court to adjudicate the serious threats to its associational rights. The Court should take this unique opportunity to grant review and provide clarity to the lower courts.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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MARCH 11, 2025

SUPPLEMENTAL APPENDIX

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State of New Jersey

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December 9, 2024

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Re: *Platkin v. First Choice Women's Resource Center, Inc.*
No. ESX-C-22-24

Dear Lincoln:

In light of last Monday's order from the Superior Court, we write to re-initiate the meet-and-confer process on the scope of the Subpoena.

We understand that you have certain constitutional objections to the Subpoena, including that certain requests violate First Choice's freedom of association,

and we understand that you preserve those objections even as we engage in this meet-and-confer process. Although we have a difference of opinion on the merits of those objections, we are willing to narrow the scope of Request 26 in an effort to make progress on our core concerns. As we have explained in our briefing, at this time the State is only seeking the identities of individuals who may have donated through links on First Choice's client-facing websites, www.1stchoice.org, and www.firstchoicewomancenter.com, and documents sufficient to identify the other methods that First Choice used to solicit donations. We are not looking for identities of individuals who may have donated at galas, church fundraisers, and the like. We do still have questions about the statements First Choice is making in its solicitations in any fora—whether offline at galas or events, through mailings, on other websites, or in any other way—but are not seeking the identities of any donors other than those who contributed through those websites. Of course, we reserve the right to seek identities of other donors as needed based on additional information that the State may receive, but will make any such requests through a separate subpoena.

With respect to your other objections, please advise what productions First Choice is willing to make at this time. We are prepared to revisit the terms of the confidentiality order to facilitate productions.

Finally, based on the clarification from the Court, the State understands that the June 18 Order was not a final, appealable order, but rather an interlocutory one—because it allowed your client to respond with

objections rather than to produce the requested documents, and because the Court has committed to adjudicating those objections before requiring further production. The State thus plans to seek dismissal of the appeal pending before the Appellate Division while we continue the meet-and-confer process. Please let us know by December 12, 2024, if you will consent to dismissal.

Respectfully submitted,
MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: */s/ Lauren Van Driesen*
Lauren Van Driesen
Deputy Attorney General

March 7, 2025

Via Email
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Re: *In re First Choice Women's Resource Centers, Inc.*

Dear David:

We recently learned that during the period of our agreed stay of enforcement proceedings in this matter, an investigator from your office used publicly available information to call several former employees of First Choice Women's Resource Centers, Inc. and ask them questions as part of your ongoing investigation of their former employer. These former employees requested counsel to help them navigate the inevitable challenges and sensitivities of interactions with the Office of the Attorney General regarding this investigation. My firm agreed to represent them.

We therefore write to notify you that Alliance Defending Freedom represents the following former employees of First Choice Women's Resource Centers, Inc. in all matters related to the Attorney General's ongoing investigation of First Choice, including the trial and appellate litigation arising out of *Platkin v. First Choice Women's Resource Centers, Inc.*, No. ESX-C-22- 24 (N.J. Super. Ct, Ch. Div.), and *First Choice Women's Resource Centers, Inc. v. Platkin*, No. 3:23-cv-23076 (D.N.J.):

1. Gail Loehr;
2. Liana Moore;
3. Melissa Mastrolia; and
4. Zoesamaidi Reyes.

As their counsel, I ask that you direct all further communications or inquiries for these former employees to me. Thank you in advance for your cooperation.

Sincerely,

/s/Lincoln Davis Wilson
Lincoln Davis Wilson