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

BRIEF OF MANHATTAN INSTITUTE, RELIGIOUS FREEDOM INSTITUTE, ANIMAL ACTIVIST LEGAL DEFENSE PROJECT, UNPLANNED GOOD, AND COALITION OF VIRTUE 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** (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. MI works to keep America and its great cities prosperous, safe, and free. It sponsors scholarship and files *amicus* briefs opposing regulations and other government actions 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, scholars, policymakers, professionals, faith-based organization members, and religious leaders through programs and resources that communicate the true meaning and value of religious freedom, and apply that understanding to contemporary challenges.

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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.

The **Animal Activist Legal Defense Project** (Project), housed at the University of Denver, serves as a law clinic that educates students on criminal defense, particularly for activists. The Project's 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, working with a variety of unpopular activists accused of civil disobedience and direct action.

Unplanned Good is a nonprofit organization dedicated to promoting adoption as a viable choice for women facing an unplanned pregnancy. The organization's mission includes advocacy to support prospective birthmothers through public policy that educates students on the option of voluntary open adoptions and government funding of critical birthmother needs, both during pregnancy and after placement of an infant with an adoptive family. Unplanned Good directs its advocacy to a variety of pro-choice and pro-life audiences. The sensitive and often divisive nature of these issues demand confidence and confidentiality of Unplanned Good's donor base.

The **Coalition of Virtue** (COV) is a Muslim domestic policy organization that advocates for the Muslim community's traditional family values in furtherance of the common good. It holds that all human beings are created by God with dignity, rights, and duties, and that the virtues are the foundation of civilization. COV promotes virtue in society, grounded in divine guidance as embodied in the Islamic tradition, in cooperation with those who share

its moral vision. It envisions an America where families have a say in their children's education, equal opportunities are available to all, and the highest good is championed. It advocates for policies that safeguard the rights of parents, the integrity of marriage and the family, and the life of the unborn.

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.

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. Pet.App.4a–5a. More striking still, 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, a threat to compel disclosure of donor, member, and volunteer information chills the target organization's associational rights—as well as those of the donors, members, and volunteers. Enforcement by a state court is unnecessary; 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.

Amici urge this Court to reverse the Third Circuit and clarify that a government demand for sensitive information, coupled with a credible threat of enforcement, creates a ripe First Amendment claim that can be brought under § 1983.

ARGUMENT

I. The government's 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.* 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.

Amici can attest to this dynamic, because they support causes that can be controversial. Donors—understandably—expect, and sometimes require, anonymity to protect themselves from the exposure, blowback, and threats that can accompany disclosure. Anonymity protects not only ideas that are *currently* unpopular, but also those that might *become* unpopular as the political and social winds shift, often

suddenly and unexpectedly.

This dynamic was at play in *Americans for Prosperity Foundation v. Bonta*. There, the California 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. And it is particularly acute in an age where "anyone with access to a computer can compile a wealth of information about anyone else," *id.* at 617 (cleaned up). When faced with the threat of compelled disclosure, 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.

Compelled disclosure creates other harms, too. To pursue their policy goals in polarized times, some organizations position themselves in the (ever narrowing) middle of political and social issues, soliciting and obtaining donations from groups on both sides of hot-button topics. Compelled disclosure threatens to paint these organizations with the political or social views of their donors, impeding their ability to effectively craft and convey their message.

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. And it's difficult to create and disseminate a position of neutrality in the "culture wars" when compelled disclosure of donors is imminent.

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. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164–65 (2014).

That standard is easily met here. Not only did the state demand disclosure—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." Pet.App.42a n.22.

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." Pet.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.* Those claims have ping-ponged between state and federal court five times in the past two years—all without resolution of the merits of the claims. And while those constitutional issues remain unaddressed, 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* Pet.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* Pet.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* Pet.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. Section 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. Under the Third Circuit's decision, plaintiffs with otherwise ripe First Amendment claims will 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 reverse the Third Circuit to prevent replication of the failed *Williamson-County*-ripeness approach to First Amendment claims brought under § 1983.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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