No. 24-781

IN THE
Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,
Petitioner,

v.

MATTHEW J. PLATKIN,
ATTORNEY GENERAL OF NEW JERSEY,
Respondent.

On Writ of Certiorari to the
U.S. Court of Appeals for the Third Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Jonathan D. Urick
Audrey Dos Santos
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Caleb P. Burns
Jeremy J. Broggi*
Joel S. Nolette
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7000
JBroggi@wiley.law

*Counsel of Record
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The Chamber has a strong interest in this case. Increasingly, state officials are weaponizing subpoenas, civil investigative demands, and other forms of compulsory process to obtain sensitive internal information from trade and other expressive associations whose views they oppose. When state officials fail to meet the very high First Amendment standard this Court has endorsed for all compelled disclosure requirements, lower federal courts must hold these officials to account lest speech and associational freedoms be impermissibly chilled.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The State of New Jersey is the most recent government to seek the confidential internal materials of a group that it opposes. Soon after taking office, the New Jersey Attorney General began publicly denouncing the services Petitioner provides. More than mere rhetorical opposition, the Attorney General then issued an administrative subpoena demanding information about nearly 5,000 contributions Petitioner had received, as well as sensitive internal communications between Petitioner and its supporters.

New Jersey is not alone and neither is Petitioner. The number of politically motivated investigations is exploding. There are many recent examples of governments ordering disfavored groups to divulge their confidential internal materials, without regard to the severe and obvious chilling effects on speech and association that these demands create. The targets are politically varied, often including the business community and trade associations.

The First Amendment guards against "use of the power to investigate enforced by the contempt power to probe at will and without relation to existing need." *DeGregory v. Att'y Gen. of N.H.*, 383 U.S. 825, 829 (1966). "[C]ompulsory process" intrudes "into the very heart of the constitutional privilege to be secure in associations." *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 558 (1963). Under this Court's precedents, therefore, state investigative demands seeking expressive associations' confidential internal materials must satisfy "strict scrutiny" or, at a mini-

mum, "exacting scrutiny." *See Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 619 (2021) (Thomas, J., concurring in part and concurring in the judgment) ("strict scrutiny [applies] to laws that compel disclosure of protected First Amendment association"); *id.* at 606–08 (plurality opinion) ("exacting scrutiny" applies to "compelled disclosure" requirements); *id.* at 623 (Alito, J., concurring in part and concurring in the judgment) ("I see no need to decide which standard should be applied here.").

As politically motivated investigations multiply, rigorous adherence to high First Amendment standards is all the more important. Ensuring such adherence requires timely access to a neutral and independent decisionmaker with Article III protection from political pressure—exactly the remedy that Congress provided in 42 U.S.C. § 1983 and which this Court again endorsed in *Americans for Prosperity Foundation v. Bonta*. Because the Third Circuit's denial of Petitioner's right to timely access a federal forum contravenes this Court's precedents and the clearly expressed will of Congress, this Court should reverse. Any other result would impermissibly chill fundamental First Amendment freedoms.

ARGUMENT

I. The First Amendment Privilege Protects Associations' Confidential Materials From Compelled Disclosure

The First Amendment prohibits the Government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and

to petition the Government for a redress of grievances." U.S. Const. amend. I. Because effective exercise of these rights "is undeniably enhanced by group association," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), the Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others," *Americans for Prosperity Found.*, 594 U.S. at 606 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

The right to associate entails the right to do so privately. The Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). For example, in *NAACP v. Alabama*, the Court held that the First Amendment prohibited Alabama's Attorney General from compelling the NAACP to provide "the names and addresses of all its Alabama members and agents." 357 U.S. at 451. And in *Americans for Prosperity Foundation*, the Court held that California could not require charities to disclose "the identities of their major donors" to its Attorney General. 594 U.S. at 600–01. In both circumstances, the Court concluded that the government's demands for confidential group information violated the First Amendment based on "the vital relationship between freedom to associate and privacy in one's associations." *Id.* at 606–07 (quoting *NAACP v. Alabama*, 357 U.S. at 462).

These cases and others stand for a straightforward principle: When the Government requires "disclosure of an association's confidential internal materials, it

intrudes on the 'privacy of association and belief guaranteed by the First Amendment,' as well as seriously interferes with internal group operations and effectiveness." *AFL-CIO v. FEC*, 333 F.3d 168, 177–78 (D.C. Cir. 2003) (quoting *Buckley*, 424 U.S. at 64). Courts have found that the First Amendment privilege bars government efforts to obtain, among other things, associations' "internal planning materials," *id.* at 177, their "strategic pre-lobbying communications," *In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 481 (10th Cir. 2011), their "internal campaign communications" and related "internal campaign information," *Perry v. Schwarzenegger*, 591 F.3d 1126, 1141–43 (9th Cir. 2009), information about their structure and organization, *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (plurality opinion), information about the "identities of [their] leaders," *Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981), *vacated as moot*, 458 U.S. 1118 (1982), and information that could expose the identities of their donors or members, *see Americans for Prosperity Found.*, 594 U.S. at 600–01; *NAACP v. Alabama*, 357 U.S. at 451.

These cases recognize the First Amendment "prevents use of the power to investigate enforced by the contempt power to probe at will and without relation to existing need." *DeGregory*, 383 U.S. at 829; *accord Gibson*, 372 U.S. at 557–58 ("we hold simply that groups which themselves are neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities are to be protected in their rights of free and private association"). Unwarranted gov-

ernmental intrusions into a group's confidential internal materials pierce "the very heart of the constitutional privilege to be secure in associations." *Gibson*, 372 U.S. at 558; *see also Washington Post v. McManus*, 944 F.3d 506, 519 (4th Cir. 2019) (per Wilkinson, J.) ("Without clear limits, the specter of a broad inspection authority, coupled with an expanded disclosure obligation, can chill speech and is a form of state power the Supreme Court would not countenance.").

The need for the security the First Amendment guarantees is crucially important where, as in the case below, the association and the Government are on opposite sides of a policy issue. "Freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (cleaned up); *accord Black Panther Party*, 661 F.2d at 1265 ("privacy is important where the government itself is being criticized, for in this circumstance it has a special incentive to suppress opposition"). A state's investigatory processes in general, and "a state attorney general's subpoena power" in particular, "can be abused to target viewpoints, chill speech, and silence and intimidate organizations." *Media Matters for America v. Paxton*, 138 F.4th 563, 580 (D.C. Cir. 2025); *see NRA v. Vullo*, 602 U.S. 175, 180–81 (2024) (state official "allegedly pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions"); *Stanford v. Texas*, 379 U.S. 476, 482 (1965) (noting British Crown's "systematic[ ]" abuse of "general warrants" granting royal

officers "roving commissions to search where they pleased in order to suppress and destroy the literature of dissent" in Tudor England).

At all times, but all the more critically when the Government may be adverse or hostile to an association's expressive activities or its point of view, the First Amendment privilege provides a vital protection against investigative overreach. "First Amendment freedoms need breathing space to survive." *Americans for Prosperity Found.*, 594 U.S. at 609 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

II. States Increasingly Are Chilling Associational Speech Through Compelled Disclosure Of Associations' Confidential Materials

The burden and chill on First Amendment rights in this case is severe. This Court has repeatedly given substantial weight to an association's interest against compelled disclosure of its members' identities. *See, e.g.*, *Americans for Prosperity Found.*, 594 U.S. at 606; *NAACP v. Alabama*, 357 U.S. at 462. New Jersey's demands implicate that interest and then some. Its subpoena seeks not only Petitioner's "donor records and identities," Pet. App. 3a, but also its private communications about strategic planning for public advocacy where Petitioner dissents from New Jersey's views, Pet. App. 100a–110a.

New Jersey's actions illustrate a disturbing trend. Increasingly, state officials are weaponizing subpoenas, civil investigative demands, and other forms of compulsory process to obtain confidential and sensitive information from associations they oppose. There

is "no doubt" that these "investigations" "impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *See Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

The business community is a frequent target of such abusive investigatory tactics. In Massachusetts and in New York, state officials insist that oil and gas companies turn over internal communications about their views on climate change. *See Exxon Mobil Corp. v. Healey*, 28 F.4th 383 (2d Cir. 2022). The same is true in the U.S. Virgin Islands, where the government demanded four decades of internal company documents and private communications with third parties specifically to chill and deter oil and gas companies "from expressing an opinion on climate change that runs counter to the view held by … some state officials." Petition for Declaratory Relief ¶ 66, *Exxon Mobil Corp. v. Walker*, No. 4:16-cv-00364-K (N.D. Tex. May 18, 2016), ECF No. 1-5.

In some parts of the country, officials train their sights on "big tech." *See Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1172 (9th Cir. 2022) ("the [Texas] Attorney General served Twitter with a Civil Investigative Demand asking it to produce various documents relating to its content moderation decisions" (cleaned up)); *Google, Inc. v. Hood*, 822 F.3d 212, 216 (5th Cir. 2016) ("Hood's conflict with Google culminated in his issuance of a broad administrative subpoena"). Other States, meanwhile, have different lists of disfavored industries. *See, e.g.*, *Vullo*, 602 U.S. at 181 (firearms association); *Smith & Wesson Brands, Inc. v. Att'y*

Gen. of N.J., 105 F.4th 67 (3d Cir. 2024) (firearms manufacturer).

Trade associations are a favorite target. In California, for example, the Attorney General demanded that a plastics industry trade association turn over internal communications with its members related to their advocacy in proceedings before a federal administrative agency. *See American Chemistry Council v. Bonta*, No. 1:24-cv-1533-APM (D.D.C. filed May 24, 2024) (ongoing action to enjoin subpoena enforcement); *see also Plastics Industry Ass'n v. Bonta*, No. 1:24-cv-1542-APM, 2025 WL 1025142 (D.D.C. Apr. 7, 2025) (action to enjoin enforcement of subpoena seeking historical member communications on similar topics).

California's investigation highlights the intentional nature of efforts by some States to chill speech and association, and to silence and intimidate opposition. When the Federal Trade Commission solicited comment on a proposed revision to guidance on the definition of "recyclable" in marketing claims, California and the trade association went head-to-head on the merits. But rather than rest on the persuasiveness of its own speech to persuade the agency, California launched an investigation into the association, accusing it of "perpetuating a myth." Press Release, Cal. Dep't of Just., Off. of Att'y Gen., *Attorney General Bonta Petitions Court to Compel Plastics Industry Association and American Chemistry Council to Fully Comply with Outstanding Investigative Subpoenas* (May 28, 2024), perma.cc/B8UL-B76V. But "[u]nder our Constitution there is no such thing as a false idea," *Bose Corp. v. Consumers Union of U.S., Inc.*,

466 U.S. 485, 504 (1984) (cleaned up); we do not "need Oceania's Ministry of Truth," *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion). In reality, California's alleged "myth" was simply a disagreement about a public-policy issue: the trade association believed that FTC guidance should reflect consumer understandings about the evidence on the effectiveness of plastics recycling, while California did not. California's subpoena punished the trade association for sharing its views with a federal agency, demanding its internal communications that would reveal not only individual members' identities but also their views on live public-policy issues that California considers undebatable.

With decades of experience representing hundreds of thousands of members who wish to participate in the political marketplace while remaining secure in their constitutionally protected associational privacy, the Chamber can attest to the burden and chill that inevitably results when state officials seek to expose an association's member identities or strategic planning materials. Trade associations exist to confidentially collect and represent the views of anonymous members. Trade associations generally must canvass members to discern their individual views and resolve differences, and must do all that before taking public positions. Allowing state governments to freely compel disclosure of anonymous speech by dissenting trade associations would definitely chill the speech of trade associations and their members, just as it would for other types of expressive associations that may similarly provide their members with anonymity to protect associational privacy.

Such a result would be contrary to our history. Our Nation has had a "respected tradition of anonymity in the advocacy of political causes" since the Federalist Papers and before. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 343 & n.6 (1995). In this country, anonymous speech is "not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 357. Anonymity is, indeed, "a shield from the tyranny of the majority." *Ibid.* It "exemplifies" the very "purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Ibid.* When it comes to anonymous speech, the government interest in deterring "fraudulent conduct" must yield to the "greater weight" of the "value of [the] speech." *Ibid.* Losing anonymity has the "inevitable result" of "deter[ring] … the exercise of First Amendment rights." *Americans for Prosperity Found.*, 594 U.S. at 607.

Anonymity allows a group's members to engage in the political marketplace without fear of being punished by their government for advancing unpopular ideas. *See Talley v. California*, 362 U.S. 60, 65 (1960) ("anonymity has sometimes been assumed for the most constructive purposes"); *Americans for Prosperity Found.*, 594 U.S. at 617 (contributors have "reason to remain anonymous"); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002) (in "a free society" "there are a significant number of persons who support causes anonymously"). That is as true for businesses as anyone else: "The mere facts of carrying on a commerce … and of being organized as a corporation do not make men's

affairs public." *FTC v. American Tobacco Co.*, 264 U.S. 298, 305 (1924). The First Amendment's protections apply "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *NAACP v. Alabama*, 357 U.S. at 460; *see also Americans for Prosperity Found.*, 594 U.S. at 617 ("these organizations span the ideological spectrum, and indeed the full range of human endeavors"). Organizations of all kinds are guaranteed "the constitutional privilege to be secure in associations." *Gibson*, 372 U.S. at 558.

III. Timely Access To Federal Courts Is Critical For Associations Seeking To Vindicate The First Amendment Privilege

Because investigative demands can in themselves chill associations' First Amendment rights, *see Buckley*, 424 U.S. at 64 ("compelled disclosure, in itself, can seriously infringe on privacy of association"); *Media Matters*, 138 F.4th at 580 ("subpoena power can be abused to target viewpoints, chill speech, and silence and intimidate organizations"), this Court has held that "the power of compulsory process [must] be carefully circumscribed" when "free and private association" is threatened, *Gibson*, 372 U.S. at 558.

The risk of government abusing investigative demands to silence disfavored speech requires close judicial scrutiny. The Court has made clear that requirements compelling disclosure of expressive associations' confidential internal materials must satisfy "strict scrutiny" or, at a minimum, "exacting scrutiny." *See Americans for Prosperity Found.*, 594 U.S. at 619 (Thomas, J., concurring in part and concurring

in the judgment) ("strict scrutiny [applies] to laws that compel disclosure of protected First Amendment association"); *id.* at 606–08 (plurality opinion) ("exacting scrutiny" applies to "compelled disclosure" requirements); *id.* at 623 (Alito, J., concurring in part and concurring in the judgment) ("I see no need to decide which standard should be applied here."). That includes investigative requests.

When a State demands an association's confidential internal materials and is unwilling to tailor those demands to the association's assertion of its First Amendment privilege, the best course for the association may be to bring an action to enjoin the demand under 42 U.S.C. § 1983. Congress enacted § 1983 to provide a federal cause of action "to vindicate rights protected by the Constitution." *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229 (2025). Section 1983 provides plaintiffs "access to a federal forum for claims of unconstitutional treatment at the hands of state officials," *Heck v. Humphrey*, 512 U.S. 477, 480 (1994), including "for the alleged violation of their First Amendment rights," *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205, 207 (2024) (per curiam). "The very purpose of § 1983," this Court has stated, is "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 503 (1982) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

The federal forum Congress guaranteed must be promptly available in cases like this one. The "general rule" under § 1983 is that plaintiffs may bring their constitutional claims "without first bringing any

sort of state lawsuit, even when state court actions addressing the underlying behavior are available." *Knick v. Twp. of Scott*, 588 U.S. 180, 194 (2019). "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Otherwise, the § 1983 plaintiff would continually find "himself in a Catch-22" where "[h]e cannot go to federal court without going to state court first" but "if he goes to state court and loses, his claim will be barred in federal court" by preclusion doctrines. *Knick*, 588 U.S. at 184–85; *cf. Williams v. Reed*, 145 S. Ct. 465, 470 (2025) (even in their own courts States may not apply exhaustion rules that "in effect immuniz[e] state officials from § 1983 claims").

The Third Circuit's ruling illustrates this "preclusion trap." *See Knick*, 588 U.S. at 185. In affirming dismissal, the panel majority expressed its "belie[f] that the state court will adequately adjudicate First Choice's constitutional claims." Pet. App. 4a–5a. But that assurance rings hollow because, as the District Court acknowledged, after any state court litigation concludes, res judicata will "totally prohibit Plaintiff from accessing federal courts." Pet. App. 54a; *see also, e.g.*, *Exxon Mobil Corp.*, 28 F.4th at 388 ("Exxon's claims against the Massachusetts Attorney General are precluded by the doctrine of res judicata"); *Smith & Wesson Brands*, 105 F.4th at 83 ("Smith & Wesson's federal claims are barred by claim preclusion").

Judge Bibas's dissent recognized the harmful chilling effects of the panel majority's ruling. "[T]his case," he said, "is indistinguishable from *Americans for Prosperity Foundation*." Pet. App. 3a. There, this

Court held that the First Amendment prohibited California's Attorney General from compelling certain charities to provide him with the identities of their major donors. 594 U.S. at 600–01. In doing so, the Court repeatedly praised the federal district judge's handling of that pre-enforcement challenge. *See, e.g.*, *id.* at 619 ("The District Court correctly entered judgment in favor of the petitioners and permanently enjoined the Attorney General from collecting their Schedule Bs."), 616 n.* ("After two full bench trials, the court found that the Attorney General's promise of confidentiality 'rings hollow'"), 613 ("the record amply supports the District Court's finding" the collection was unnecessary). This Court never so much as *hinted* that the District Court should have refrained from exercising jurisdiction under § 1983.

Denial of the federal forum Congress authorized to vindicate federal rights is always harmful, and especially so in the First Amendment context. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2364 (2025) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020)). At best, the Third Circuit's approach delays federal adjudication of First Amendment rights; at worst, it denies a federal forum altogether.

No one doubts the obligation of the state courts to faithfully apply federal law. *See* U.S. Const. art. VI, cl. 2; *Testa v. Katt*, 330 U.S. 386, 393 (1947). But state judges lack Article III protection and so are sometimes susceptible to the influence of state politics. *See NAACP v. Alabama*, 357 U.S. at 463 ("the State has

here acted solely through its judicial branch"); The Federalist No. 81, at 421 (Alexander Hamilton) (Liberty Fund ed. 2001) ("State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws"). Congress provided a federal cause of action to guarantee the availability of a neutral and independent decisionmaker when federal rights are at stake. That remedy must remain available so that speech and associational rights are not chilled by unchecked state investigative demands.

CONCLUSION

The Court should reverse.

Respectfully submitted,

Caleb P. Burns
Jeremy J. Broggi*
Joel S. Nolette
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7000
JBroggi@wiley.law

Jonathan D. Urick
Audrey Dos Santos
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

**Counsel of Record*

Counsel for Amicus Curiae

August 28, 2025