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 UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE NETCHOICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus NetChoice is a national trade association of online businesses that share the goal of promoting free enterprise and free expression on the internet.[1] A list of NetChoice's members is available at https://perma.cc/5JKN-98LK. NetChoice fights to ensure the internet remains innovative and free. Toward those ends, NetChoice engages in litigation, amicus curiae work, and political advocacy.

This case allows the Court to consider how improper state investigative demands can chill activities protected by the First Amendment. As with Petitioner, there is a risk that state governments may target online services, including those operated by NetChoice's members, with subpoenas and civil investigative demands. These can, and often are designed to, chill expressive activity. *See, e.g.*, *Twitter, Inc. v. Paxton*, 56 F.4th 1170 (9th Cir. 2022); *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016).

NetChoice litigated this Court's cases on First Amendment protections for online editorial discretion: *Moody v. NetChoice, LLC & NetChoice, LLC v. Paxton*, 603 U.S. 707 (2024). It therefore has a keen interest in ensuring that States do not erode

[1] In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than NetChoice, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

these protections through speech-chilling investigations.

SUMMARY OF ARGUMENT

This Court should hold that 42 U.S.C. § 1983 allows parties to raise in federal court constitutional challenges to state government investigations that can chill—and often are *designed* to chill—their First Amendment rights. Without a federal forum to check state overreach, the targets of those investigations must choose between curtailing disfavored associations and speech or enduring the heavy costs and potential liability associated with noncompliance. The First Amendment does not allow States to put private entities to that unconstitutional choice

When wielded improperly, state subpoenas and civil investigative demands can chill activities protected by the First Amendment. For some of NetChoice's members, activities subject to governmental scrutiny can include the very content-moderation policies that this Court has held to be protected by the First Amendment. *E.g.*, *Moody*, 603 U.S. at 738. And for others, it can include sensitive information such as associational information about political or ideological organizations. *See, e.g.*, *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021). These investigative demands impose costly burdens on their targets. In the face of these invasive and costly demands, organizations may curtail their associations or speech disfavored by the State—in hopes that will stop the burdensome investigations. *See, e.g.*, *Smith & Wesson Brands, Inc. v. Att'y Gen'l of N.J.*, 27 F.4th 886,

896-97 (3d Cir. 2022) (Matey, J., concurring). And the penalties associated with defying investigative demands only heighten these concerns. *See, e.g.*, N.J. Stat. § 56:8-6 (authorizing contempt proceedings for targets that fail to "obey" a subpoena).

The threat that state officials could use their investigative authority to retaliate against unpopular speech and associations is clear. States have previously used their investigative powers to target and retaliate against actors and activities they disfavor. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 453 (1958). Today, the subjects of these state investigations span the ideological spectrum, including political organizations and non-profits of all stripes, as well as a wide array of businesses. *See, e.g.*, *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175 (2024); *MediaMatters for Am. v. Paxton*, 138 F.4th 563 (D.C. Cir. 2025); *WinRed, Inc. v. Ellison*, 59 F.4th 934 (8th Cir. 2023); *Twitter*, 56 F.4th at 1172.

Worse, state law too often allows state officials to target disfavored entities while remaining out of the public eye. Unlike laws enacted through the democratic process and in the daylight, investigations occur largely in the dark. Thus, investigations can drive viewpoint discrimination and retaliation underground, away from public scrutiny. This risk is heightened by the sweeping investigative powers States have conferred on their officials. *See, e.g.*, N.J. Stat. § 56:8-3. These expansive investigative powers frequently stem from substantive laws that in turn also have expansive scope, further broadening state

investigative powers. *See, e.g.*, *id.* (authorizing New Jersey's attorney general to investigate "any practice declared unlawful" by New Jersey's wide-ranging Consumer Fraud Act). These investigative powers often lack meaningful state-court oversight. For example, state courts frequently have refused to place judicial safeguards on these investigative powers. *See, e.g.*, *In re KAHEA*, 497 P.3d 58, 66 (Haw. 2021) (holding that neither the target of an investigation nor the State's courts may "second-guess the Attorney General's discretion" to say which investigations are in the "public interest").

Accordingly, a federal forum is necessary to subject improper state investigations to the scrutiny that those investigations might not otherwise face. If left unchecked, States' investigative powers may pose a significant threat to citizens' First Amendment rights. This Court has recognized that the abridgement of First Amendment rights "may inevitably follow from varied forms of governmental action." *NAACP*, 357 U.S. at 461. Just as States may not retaliate against disfavored viewpoints by enacting laws banning unpopular expression or associations, they also may not use piercing and costly investigations to achieve the same result. *See Vullo*, 602 U.S. at 189-90 ("[A] government official cannot do indirectly what she is barred from doing directly.").

Plaintiffs therefore should have a federal forum under § 1983 to challenge improper state investigative demands that can threaten and chill the exercise of constitutional rights. Although § 1983 ordinarily

provides plaintiffs a federal forum when they challenge violations of federal law by state officials, the court below denied Petitioner its day in federal court. That court held that Petitioner's First Amendment challenge to a state investigation was not yet ripe because that claim could be raised in state court. Pet.18. But that decision contravenes the very purpose of § 1983, which guarantees a federal forum for violations of federal law by state officials. *See Heck v. Humphrey*, 512 U.S. 477, 480 (1994). It also exposes § 1983 plaintiffs to a preclusion trap—that is, the plaintiff cannot go to federal court without first going to state court; but if the plaintiff goes to state court and loses, its claim will be barred in federal court. As this Court recently held, that "preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view." *Knick v. Twp. of Scott*, 588 U.S. 180, 1885 (2019). The Court should therefore reverse the Third Circuit's judgment.

ARGUMENT

I. Improper state investigative demands can chill associational and expressive rights.

When wielded improperly, state subpoenas and civil investigative demands chill activities protected by the First Amendment. There is ample evidence that the risk of retaliatory investigations is no mere hypothetical, but rather all too commonplace.

A. This Court has repeatedly acknowledged that state investigative demands can chill disfavored speech. It is black-letter law that the First Amendment "prohibits government officials from subjecting individuals to 'retaliatory actions'" for "having engaged in protected speech." *Hou. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (citation omitted); *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (explaining that governmental actions seeking to suppress a speaker's particular views are presumptively unconstitutional). And that is no less true when governments seek to impose burdens indirectly, rather than directly, upon activities protected by the First Amendment. *See NAACP*, 357 U.S. at 461 ("The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press.").

As explained in *NAACP*, "[i]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that

abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id.* For instance, *NAACP* reasoned that state subpoenas seeking an organization's membership lists demonstrated how "compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective a restraint on freedom of association." *Id.* at 462.

More recently, *Americans for Prosperity Foundation v. Bonta* reiterated this idea, applying "[e]xacting scrutiny" to such demands due to the "possible deterrent effect" on the freedom of association and the "unnecessary risk of chilling" the exercise of First Amendment rights. 594 U.S. at 616 (citation and emphasis omitted). "When it comes to a person's beliefs and associations," this Court stated, "broad and sweeping state inquiries into these protected areas discourage citizens from exercising rights protected by the Constitution." *Id.* at 610 (cleaned up).

Just last year, *National Rifle Association of America v. Vullo* further clarified that "the First Amendment prohibits governmental officials from relying on the threat of invoking legal sanctions and other means of coercion to achieve the suppression of disfavored speech." 602 U.S. at 189 (cleaned up). This includes situations where officials "directly" or "indirectly" "coerce . . . private part[ies] to punish or suppress disfavored speech," demonstrating how even indirect, coercive investigative tactics can unlawfully chill protected expression. *Id.* at 190.

This risk is not merely theoretical: Governments have historically used their broad investigative powers to retaliate against disfavored viewpoints without directly outlawing that disfavored speech or associations. The Founders, for instance, "reviled 'general warrants' and 'writs of assistance,'" which allowed British officers to carry out "unrestrained search[es]" against colonials they suspected of wrongdoing or opposing the Crown. *Carpenter v. United States*, 585 U.S. 296, 303-04 (2018) (explaining how John Adams recalled that colonial opposition to such investigations "helped spark the Revolution itself" (citations omitted)). At the height of the Cold War, Senator McCarthy's House Un-American Activities Committee used its broad investigative powers to target suspected communists. *See Watkins v. United States*, 354 U.S. 178, 212 (1957). And during the Civil Rights era, southern States targeted organizations such as the NAACP. *See NAACP*, 357 U.S. at 451 (explaining that the State's attorney general sought to compel the NAACP to reveal "the names and addresses of all its Alabama members and agents"); *Ams. for Prosperity Found.*, 594 U.S. at 606 ("As part of an effort to oust [the NAACP] from the State, the Alabama Attorney General sought the group's membership lists.").

B. This Court's recognition that investigative demands can chill First Amendment protected activity makes perfect sense, because impermissible investigations often impose costly burdens on their targets. Improper investigations often require employing legal counsel, conducting costly internal searches to collect responsive records, and otherwise expending

resources to comply with States' broad requests. For instance, Media Matters has spent millions of dollars challenging investigative demands from two States. *See* Kenneth Vogel, Kate Conger, & Ryan Mac, *Under Siege From Trump and Musk, a Top Liberal Group Falls Into Crisis*, N.Y. Times (July 25, 2025), https://perma.cc/6Y6G-BECQ. And for smaller organizations, simply devoting *time* to responding to these requests poses large opportunity costs, diverting attention from the organization's advocacy to responding to the State. So the opportunity cost of responding to investigations can too often be forgoing protected First Amendment activity.

To avoid these costs, organizations and businesses may decide to curtail disfavored associations or speech in hopes that States will cease their investigations. *E.g.*, *Smith & Wesson*, 27 F.4th at 896 (Matey, J., concurring) ("Future firearms instructors, fearing the arrival of subpoenas, might decide it is not worth advertising their services for 'safety' training."); *id.* at 896-97 ("Perhaps publishers will be punished too, with outdoor magazines thinking twice before speaking about the content of a product."); *cf. Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (explaining that records requests are "expensive" and can often "force parties to settle underlying disputes" to avoid them).

The penalties associated with defying improper investigative demands only heighten the concerns about squelching First Amendment protected activity. State investigative powers are often reinforced by

laws and regulations providing severe sanctions when the targets of those investigations purportedly refuse to comply. In New Jersey, for example, the Attorney General may move to hold a target in contempt for failing to "obey" a subpoena, and may request other relief, including the "[v]acating, annulling, or suspending" of a corporate charter, and the "revoking or suspending" of licenses, permits or certificates required to do business. N.J. Stat. § 56:8-6. Other States provide similar penalties. *See, e.g.*, Iowa Code § 714.16(6) ("dissolving a corporation" and "revoking or suspending" licenses, permits, or certificates); N.Y. Gen. Bus. Law § 343 ("contempt"); Tex. Bus. & Com. Code § 17.62 (providing for criminal penalties, fines, and "contempt").

The threat posed by contempt proceedings, criminal prosecutions, and substantial fines make the costs of even appearing to defy state investigations too extreme for most to bear. So improper state investigations risk putting individuals, businesses, and organizations to the unconstitutional choice of either placating the government by complying with its investigative demands or curtailing their disfavored positions. The First Amendment allows no such thing.

C. Consequently, many States can use their investigative power to retaliate against those they disfavor by launching investigations into First Amendment protected activity. The targets of these improper investigations may span the ideological spectrum, including political organizations and non-profits of all stripes, as well as a wide array of businesses.

Investigations into how NetChoice members make protected "editorial judgments" when disseminating "compilation[s]" of speech, for example, burden this constitutionally protected activity. *Moody*, 603 U.S. at 744 (quotation omitted). In *Twitter, Inc. v. Paxton*, a state attorney general launched an investigation into Twitter's "content-moderation decisions" after publicly claiming that the company was acting like "Chinese-style thought police" and "closing conservative accounts." 56 F.4th at 1172. But this Court, in *Moody*, just rejected laws directly infringing members' rights to choose which speech to disseminate, holding that "[t]he government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey." 603 U.S. at 734.

State investigative demands infringing that same exercise of protected editorial discretion should fare no better. After all, burdensome government investigations into First Amendment protected activity could practically force digital services to modify state-disfavored "content-moderation practices" rather than continue submitting to the intrusive government inquiries. *Id.* at 737. In addition, investigative demands seeking user data submitted to NetChoice members' services, "could undermine user confidence and chill online activity and commerce." Br. for Amicus Curiae NetChoice in Support of Petitioner, *Harper v. O'Donnell*, 2025 WL 1005168, at *1 (U.S.) (No. 24-922). Many NetChoice members rely on user trust to foster innovation and economic growth. *See id.*

Online services are not the only disfavored entities that have faced intrusive investigations. This Court recently allowed First Amendment claims to proceed against New York officials who disfavored the firearms industry, allegedly using the threat of investigations and enforcement actions to pressure insurance companies affiliated with the National Rifle Association to break ties with the group in an effort to "stifle the NRA's pro-gun advocacy." *Vullo*, 602 U.S. at 180-81. Noting that the State's "investigation transformed the gun issue into a regulatory, legal, and compliance matter," the insurance companies ceased all business with the NRA rather than incur the costs of dealing with a potential investigation. *Id.* at 193 (cleaned up). So investigative demands can burden and chill an entity's First Amendment freedoms even by indirectly aiming the investigation at others.

Similar concerns about imperiled First Amendment rights apply to demands targeting constitutionally protected activity that are issued to political or ideological organizations. If state officials order such organizations to disclose their membership or donor lists, for instance, those organizations may cease their disfavored advocacy or political positions because they reasonably fear that disclosure could cause their members or donors to face reprisals, such as "economic [harm] and violence." *Ams. for Prosperity*, 594 U.S. at 606.

But state officials of all political persuasions have targeted organizations for their perceived ideological viewpoints. State attorneys general, for example, have

allegedly targeted Media Matters, a progressive "non-profit research and information center" after it published an article criticizing content on X (formerly Twitter). *Media Matters for Am. v. Paxton*, 732 F. Supp. 3d 1, 8 (D.D.C. 2024); *see Media Matters for Am. v. Bailey*, 2024 WL 3924573, at *2 (D.D.C. Aug. 23, 2025). In 2021, attorneys general from Minnesota, Connecticut, Maryland, and New York launched a joint investigation against WinRed, a political action committee that "centralizes donations to Republican-affiliated candidates and committees." *WinRed*, 59 F.4th at 936.

Ample evidence therefore demonstrates that state investigations threatening activities protected by the First Amendment are all too commonplace. And they can target a wide array of organizations and businesses.

II. States can use their investigative powers to covertly retaliate against actors and activities they disfavor, so a federal forum is necessary to subject those investigations to proper constitutional oversight.

As explained above, state officials can wield their broad investigative powers to target disfavored individuals, groups, and businesses for engaging in constitutionally protected activity. The breadth of state laws—and the fact that investigations largely occur out of the public eye—can shield retaliatory and speech-chilling investigations from public scrutiny. So a federal forum for challenging such speech-chilling investigations is necessary to protect First

Amendment rights. And providing a federal forum in the first instance will avoid creating a preclusion trap.

State investigations largely occur outside the public's view, so they lack important democratic checks on their misuse. That can drive viewpoint discrimination and retaliation underground, allowing state officials to do "indirectly" through investigation what they plainly cannot do "directly" through duly enacted legislation. *Vullo*, 602 U.S. at 190.

Officials can target state-disfavored activities and actors in part because States have conferred sweeping investigative powers on their attorneys general and other state officials. Respondent here, for instance, has the power to civilly investigate entities and individuals merely "when he believes" that an investigation would be in the "public interest." N.J. Stat. § 56:8-3; *see id.* § 45:1-18 (similar); *id.* § 45:17A-33(c) (similar). States across the nation grant their attorneys general similarly broad investigative powers. *See, e.g.*, Ga. Code §§ 10-1-397, -404; Haw. Rev. Stat. § 28-2.5(a); Tenn. Code § 47-18-106.

These investigative powers are frequently linked to substantive laws with expansive scope. For instance, Respondent launched his investigation here, in part, under N.J. Stat. § 56:8-3. That statute authorizes the attorney general to investigate "any practice declared to be unlawful" under New Jersey's Consumer Fraud Act. *Id.* § 56:8-1, *et seq.* And that Act broadly defines unlawful practices to include an immense variety of conduct. *See, e.g.*, *id.* § 56:8-2 ("[A]ny commercial practice that is unconscionable or

abusive[.]"); *DeSimone v. Springpoint Senior Living, Inc.*, 306 A.3d 1276, 1282 (N.J. 2024) (explaining how the "Legislature has broadened the definition of an 'unlawful practice' under the CFA" to include many "areas of concern"(citation omitted)). The same is true in many other States. *See, e.g.*, Ga. Code §§ 10-1-397, -404 (providing investigative powers under Georgia's Deceptive or Unfair Practices Act); Tenn. Code § 47-18-106 (supplying investigative authority under Tennessee's Consumer Protection Act); Bob Cohen, *Right to Private Action Under State Consumer Protection Act—Preconditions to Action*, 117 A.L.R. 155 § 2(a) (2004) (explaining that every State has enacted "laws of broad applicability . . . prohibiting unfair or deceptive acts and practices and unfair competition in the marketplace").[2]

State judiciaries have often refused to—or are unable to—check these investigative powers. In Hawaii, for instance, the Attorney General may issue an investigative demand after he "determines that an investigation would be in the public interest." Haw. Rev. Stat. § 28-2.5(a). And the State's highest court has held that determination "rests squarely with the Attorney General," and neither the target of the investigation nor the State's courts may "second-guess the Attorney General's discretion" to say which

[2] As *Vullo* demonstrates, state officials do not need to rely on general grants of authority. They can leverage even narrow regulatory authority—in *Vullo*, over insurance companies—to indirectly target disfavored actors and activities. 602 U.S. at 180, 192.

investigations are in the "public interest." *KAHEA*, 497 P.3d at 66.

In sum, States grant extensive investigative powers over broad laws to their attorneys general and other officials. The breadth of those powers coupled with the lack of state-level recourse for improper or overbroad investigations allows state officials to wield them to chill the exercise of constitutionally protected activities.

Ordinarily, 42 U.S.C. § 1983 provides targets of improper investigations with a federal forum to vindicate their constitutional rights. In this case, however, Petitioner was denied its day in federal court. The court below held that Petitioner's constitutional claims were not yet ripe because they could be asserted in state court. Pet.18. But that decision contradicts § 1983's very purpose of guaranteeing a federal forum for violations of federal law by state officials. *See Heck*, 512 U.S. at 480.

This Court has previously rejected similar requirements for plaintiffs to first challenge unconstitutional conduct by state officials in state court. *See Knick*, 588 U.S. at 194. These kinds of improper state-litigation requirements can subject a plaintiff to a Catch-22—namely, "[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." *Knick*, 588 U.S. at 184-85. As *Knick* explained, this "preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view." *Id.* at 185. The same holds true here.

The Court should therefore rule that § 1983 plaintiffs have a right to a federal forum to challenge state investigations when those investigations chill the exercise of constitutional rights.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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