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 WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

August 28, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation (WLF) is a nonprofit public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as amicus curiae to urge this Court to keep the federal courthouse door open to federal questions. *See, e.g.*, *B.P. v. Mayor of Baltimore*, 593 U.S. 230 (2021); *Dart Cherokee Basin Oper Co. v. Owens*, 574 U.S. 81 (2014).

While this case is directly about donor privacy, it also has serious implications for the Nation's business community. Large enterprises make tempting lawfare targets, and the unfettered use of constitutionally invasive administrative subpoenas have become a favored tool of state attorneys general to make political points by abusing investigative power.

Finally, as a § 501(c)(3) organization itself, WLF has an independent interest in ensuring that its donors' rights "to pursue their lawful private interests privately and to associate with others in so doing" are properly safeguarded from unlawful "state scrutiny." *NAACP v. Ala.*, 357 U.S. 449, 466 (1958).

---

* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"When it comes to a person's beliefs and associations, broad and sweeping state inquiries into these protected areas discourage citizens from exercising rights protected by the Constitution." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 610 (2021) (cleaned up). To secure these rights, 42 U.S.C. § 1983 ensures that targets of such "broad and sweeping state inquiries" have access to a federal forum. *Id.* (same). No one disputes that the New Jersey Attorney General is acting under color of law when demanding First Choice's donor list. Yet the Third Circuit determined that First Choice could challenge that subpoena—a cognate demand to the one struck down by this Court in *NAACP v. Alabama*—only in the New Jersey courts.

That outcome blinks away why we have section 1983. Its predecessor statute, the Civil Rights Act of 1871, was passed precisely because Congress determined that it could not trust the state courts to vindicate federally protected rights. *Mitchum v. Foster*, 407 U.S. 225, 240 (1972). Such home-cooking is not a legacy confined to the time and place of the Reconstruction South. It's a longstanding truth, as Hamilton acknowledged, that "the prevalency of a local spirit," The Federalist, No. 81, can overwhelm the rights of unpopular litigants in state courts.

And the examples of such unpopular targets are legion. In just the last few years, state attorneys general of both parties have used similar, First Amendment-sensitive demands to go after business interests "on the wrong side." *Exxon Mobil Corp. v.*

Healey, 28 F.4th 383 (2d Cir. 2022); *Twitter, Inc v. Paxton*, 56 F.4th 1170 (9th Cir. 2022); *Smith & Wesson Brands, Inc. v. Att'y Gen'l of N.J.*, 105 F.4th 67 (3d Cir. 2024). Beyond chilling constitutional rights, these efforts undercut the federal justice system the Founders provided to create wealth and stabilize markets. *See* Charles J. Cooper & Howard C. Nielson, Jr., *Complete Diversity and the Closing of the Federal Courts*, 37 Harv. J.L. & Pub. Pol'y 295 (2014). The Nation's enterprises should not have to risk paying a lawfare "tax" of years in state court if they are seen as an easy punching bag for a partisan official.

This incentive to lawfare is only amplified by the States' widespread practice of electing state-court judges. True, "[j]udges are not politicians," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015), but neither are they "angels." The Federalist, No. 51. *NAACP v. Alabama*, the very case that established the right First Choice seeks to vindicate in federal court, is instructive. There, an elected judge and elected attorney general conspired to drive the NAACP out of Alabama—and reaped political gain. Helen J. Knowles-Gardner, *The First Amendment to the Constitution, Associational Freedom, and the Future of the Country: Alabama's Direct Attack on the Existence of the NAACP*, 48 Seattle U. L. Rev. 1, 27-41 (2024).

Fortunately, the answer to this thorny problem is straightforward: keep the federal courthouse door open for targets of constitutionally risky state investigations. A federal forum can check these incentives to lawfare. Disinterested and life-tenured judges will serve as weigh stations, separating good-

faith investigations from abusive process. Even better: no judicial innovation is needed to make this happen. The Court simply must instruct the lower courts to apply section 1983 as it is written.

ARGUMENT

I. FEDERAL COURTS MUST BE OPEN TO FOURTEENTH AMENDMENT CLAIMS.

The Attorney General of New Jersey, acting under New Jersey law, is demanding First Choice's donor list. But the Fourteenth Amendment, as it incorporates the First Amendment, protects donor lists from the grasping hands of state officials. *Ams. for Prosperity Found.*, 594 U.S. at 619; *NAACP*, 357 U.S. at 466. That conundrum should end with an open federal courthouse door for First Choice so that an Article III judge may decide whether New Jersey's demand clears the Constitution.

Yet the door has been slammed shut here, leaving First Choice at the sufferance of New Jersey officials in the New Jersey courts—"the proverbial 'home cooking.'" *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004). That's more than just odd—it's at odds with the rationale for federal jurisdiction generally and for 42 U.S.C. § 1983 specifically.

Congress enacted the Civil Rights Act of 1871, section 1983's original form, precisely because of federal concerns that the States' courthouses would be, shall we say, less than considerate of Fourteenth Amendment claims.

"[T]he Ku Klux Klan's campaign of terror propelled Republicans [in Congress] to intervene" by passing "a series of Enforcement Acts to counteract terrorist violence." Eric Foner, *A Short History of Reconstruction* 195 (Kindle Ed.). One of these laws was the 1871 Civil Rights Act, which barred state officials from "subject[ing] . . . any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat. 13 (1871). "Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*, 407 U.S. at 240; *see*, *e.g.*, Foner 182 ("As late as 1872, Kentucky still barred blacks from testifying in [state] court").

The modern version of the 1871 statute, 42 U.S.C. § 1983, still ensures what Alexander Hamilton recognized as essential long before Reconstruction. "[T]he judiciary authority of the Union ought to extend . . . to all those [cases] in which the State tribunals cannot be supposed to be impartial and unbiased." The Federalist, No. 80 (spelling modernized). Section 1983's text is Congress's promise to accomplish the Fourteenth Amendment by providing access to a tribunal on behalf of all the States, not just one. Only this Court can keep that promise for First Choice and others.

The particulars are different now, of course. New Jersey hardly resembles the Reconstruction-era South. But the Constitution is national and perpetual, not regional and confined to a singular

time. Section 1983 still applies in full force, across the country, and for good reason. Indeed, this very case shows why federally protected rights "are proper objects of federal superintendence." The Federalist, No. 80.

When attorneys general issue subpoenas or investigative demands like the one here, they often act under broad grants of authority and in expectation of a home-field advantage in state court. All too often, this is an incentive for lawfare. Punching one's political or ideological opponents with the blunt instrument of state coercion is always tempting to those in power. That incentive architecture "pose[s] the inherent risk" that politically fraught subpoenas or investigative demands will "seek[] not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (Kennedy, J., plurality).

This is problem enough when targeted at nonprofits like First Choice. *See, e.g., Media Matters for Am. v. Paxton*, 138 F.4th 563 (D.C. Cir. 2025). But that's only part of the story. Large chunks of the business community make tempting political targets for state attorneys general of all partisan stripes. In only the past few years, Exxon, Google, Meta, Twitter, and Smith & Wesson have all fought constitutionally invasive demands predicated on state consumer protection laws. *Exxon*, 28 F.4th at 388; *Twitter*, 56 F.4th at 1172-73; *Smith & Wesson*, 105 F.4th at 71; Office of the Mo. Att'y Gen'l, *Attorney General Bailey Issues a Demand Letter to Google and Meta in Investigation over Censorship of Firearm-*

related Content (June 27, 2025), https://perma.cc/8TVC-YE9B. A common thread running through all these cases? A politically motivated attorney general targeting a business interest "on the other side."

Ambitious attorneys general in New York and Massachusetts targeted Exxon, ostensibly to enforce their States' consumer fraud statutes. Later investigative demands sought, among other things, records of private communication between the company and the attorneys general's political opponents. *E.g.*, Amended Complaint at 30, ¶ 73, *Exxon Mobil Corp. v. Healey*, Case No. 17-2301 (S.D.N.Y.) (ECF No. 100) ("The CID's narrower requests . . . appear to target groups simply because they hold views with which Attorney General Healey disagrees"). In the right hands, that kind of information could "directly frustrate th[ose] organizations' ability to pursue their political goals effectively by revealing to their opponents" the "activities, strategies[,] and tactics" they "have pursued . . . and will likely follow in the future." *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 177 (D.C. Cir. 2003) (internal quotation marks and citation omitted). As such, those "communications and activities encompass a vastly wider range of sensitive material protected by the First Amendment than would be true in the normal discovery context." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1138 (9th Cir. 2009) (internal quotation marks and citation omitted).

Exxon spent nearly *six years* (and untold dollars) trying to get its First Amendment and political retaliation defenses heard in an appropriate

federal forum. *Exxon*, 28 F.4th at 388-91 (recounting case history). While this saga unfolded, the New York proceeding fell apart on the facts, *People v. Exxon Mobil Corp.*, 119 N.Y.S.3d 829 (N.Y. Sup. Ct. 2019), but the Massachusetts case persists. *Commonwealth v. Exxon Mobil Corp.*, Case No. 1984CV03333 (Mass. Sup. Ct., Suffolk Cnty.). The validity of the two fishing expeditions, however, never reached the well of an Article III tribunal. *Exxon*, 28 F.4th at 402-03.

A similarly ambitious Texas attorney general chose a different target: Twitter, under its prior ownership. After Twitter banned President Trump from its platform, the attorney general blasted the company as "'the left's Chinese-style thought police'" and served it with an expansive demand for documents about the company's "content moderation decisions." *Twitter*, 56 F.4th at 1172. In response, Twitter invoked the Constitution and sought relief in a federal forum. As it should have: the First Amendment protects content moderation, *Moody v. NetChoice, LLC*, 603 U.S. 707, 732 (2024), the right to associate (and not associate) with others, *Janus v. Am. Fed'n of State, Cnty. and Municipal Emps., Council 31*, 585 U.S. 878, 892 (2018), and "'prohibits government officials from subjecting'" others "'to retaliatory actions' for engaging in protected" conduct. *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). But, just as with Exxon, Twitter was denied the right to have its constitutional objections heard in federal court. *Twitter*, 56 F.4th at 1179.

These sundry State attacks on nationwide enterprises do more than derogate the Fourteenth Amendment and chill protected activity. *See Smith &*

Wesson, 105 F.4th at 98 (Matey, J., dissenting) ("Intimidation, rather than litigation—where law must be offered, facts found, and an impartial decision reached—seems to be [the State Attorney General's] plan"). They also strike against the Constitution's intentional design to protect interstate commerce from being undermined by the friction of state courts. *See* Cooper & Nielson at 296. The Founders did not want the cost of doing business across America to include the "tax" of being on the receiving end of lawfare from state-to-state. *See id*.

That is why the Constitution allocates jurisdiction to the federal courts in diversity cases, to guard against in-state bias toward out-of-state enterprises. U.S. Const., art. III, § 2. "[W]hether" that bias was "real or perceived," the Framers understood "the crippling effect that judicial bias favoring in-state interests . . . would have on interstate commerce" unless preemptively ousted. Cooper & Neilson at 296. Section 1983 provides belts-and-suspenders against such state-court chicanery by ensuring access to an Article III judge in *all* cases where a state official might wield her power and local jurisdiction to frustrate the constitutional rights of the Nation's going concerns.

Federal courts are properly structured to handle that delicate job. Life-tenured judges appointed by a nationally elected president by-and-with the consent of legislators representing the States are well-positioned to separate good-faith investigatory work from pernicious lawfare. *Home Depot U.S.A. v. Jackson*, 587 U.S. 435, 446 (2019) (Alito, J., dissenting) ("The rule of law requires neutral forums for resolving disputes" and the "legal

system takes seriously the risk that for certain cases, some neutral forums might be more neutral than others" or even merely "might appear that way, which is almost as deleterious"). Section 1983 ensures that state investigative targets, from First Choice to Exxon Mobil, have access to that Article III weigh station.

II. STATE COURT JUDGES ARE NOT "ANGELS" IMMUNE TO ELECTORAL PRESSURE.

Abusive investigatory demands are manifestly "not just a Jersey thing." *See* Pet. at 32. But what kind of is "just a Jersey thing," *id*., is a judicial selection process that eschews elections—a check on abusive partisan lawfare that virtually the rest of the States have abandoned. That's no panacea (we wouldn't be here otherwise). But as bad as things are in New Jersey, there's even more trouble around the corner in pretty much every other State.

While "[t]he first 29 States of the Union adopted methods for selecting judges that did not involve popular elections," *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring), "every State entering the Union since 1845 has provided for the election of judges in one way or another." Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 Ohio St. L.J. 43, 52 (2003) (capitalization altered). "Today, ninety percent of state judges face some kind of popular election." Nino C. Monea, *The Political Roots of Judicial Elections*, 55 Creighton L. Rev. 427, 432 (2022).

Yes, "[j]udges are not politicians, even when they come to the bench by way of the ballot."

Williams-Yulee, 575 U.S. at 437. But neither are they "angels" somehow immune to electoral pressure. The Federalist, No. 51. As this Court has itself acknowledged, "elected judges . . . *always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench." *Republican Party of Minn.*, 536 U.S. at 782 (emphasis in original).

And this is particularly troubling when an elected attorney general has made the political calculation that her subpoena demand will reap popular benefits. "A judge may hope that conscience will triumph over retention" or re-election "anxiety, but as [former California Supreme Court Justice] Otto Kaus put it so well, ignoring the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub.'" Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733, 739 (1994).

The kinds of cases discussed here—going after energy companies to conduct opposition research, defending a president of one's own party against a social media company, or opining on cultural fault-lines like abortion—are exactly the types of "visible decisions," *id.*, most likely to pose "special risks to the integrity of the courts and the judicial function." Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. Cal. L. Rev. 1969, 1980-81 (1988).

NAACP v. Alabama, the very case that established the donor privacy right that First Choice

invokes, came about, in part, from just such political posturing by the (elected) Alabama Attorney General and the (elected) presiding circuit court judge. Knowles-Gardner at 27-41.

Alabama Attorney General John Patterson demanded the NAACP's donor list as part of a well-designed "full-frontal attack on the NAACP" to fuel his gubernatorial ambitions "as a champion to Alabama's white voters." *Id*. at 31 (internal quotation marks and citation omitted). Rather than comply with the demand—which would have allowed Patterson (and others given the information) to intimidate, harass, and terrorize those contributors—the NAACP closed up shop in the State. Having coerced that result, the Attorney General made his role in expelling the NAACP from Alabama "a central component of his [successful] 1958 gubernatorial campaign." *Id*.

Judge Walter Burgwyn Jones, who granted the initial injunction against the NAACP on Patterson's request, also reaped electoral benefits by violating the NAACP's constitutional rights. He successfully campaigned for re-election in 1958 on keeping the civil rights organization down-and-out—"'to deal the NAACP . . . a blow from which they shall never recover.'" *Id*. at 41 (quoting Jones campaign speech, ellipses in original). Of course, Judge Jones, who had carefully cultivated a white supremacist voting base, would have faced very different electoral consequences in 1958 had he blocked Patterson's demand and upheld the Constitution. *Id*. at 34-39.

Jones's fight continued even after this Court ruled that the attorney general's demand violated the

First Amendment. *NAACP*, 357 U.S. at 466. Undaunted and backed by public confidence, Judge Jones issued an order in late 1961, "dissolving [his] previously issued temporary injunction, but permanently enjoining and restraining [the NAACP] from conducting intrastate business in Alabama, and ousting [the organization] from this State." *NAACP v. Ala.*, 274 Ala. 544, 545 (Ala. 1963). Only after repeated intransigence caused the case to "reach[] this Court for the fourth time," *NAACP v. Ala.*, 377 U.S. 288, 289 (1964), did the two Alabamians' politically enriching scheme truly disintegrate. *Id.* at 310. By then, Patterson was term-limited as governor and Jones was dead.

Not every case will be as stark as Jim Crow Alabama. Nor is foreclosing judicial elections a cure-all. But the mere existence of judicial elections will certainly amplify the lawfare incentives inherent to investigatory demands for constitutionally sensitive information. If the Court revokes 42 U.S.C. § 1983 for these types of "visible decisions," Eule at 739, elected attorneys general will continue to feed these lawfare-courting cases to elected judges.

This Court has dealt with the "context of judicial elections" before on a judicial forum question. *Caperton v. A.T. Massey Co.*, 556 U.S. 868, 881-82 (2009). In *Caperton*, the Court held that the Fourteenth Amendment's due process guarantee requires stricter recusal standards for elected judges than appointed ones. *Id.* at 887. There is no need here to reach for *lex specialis* to vindicate the Fourteenth Amendment and avoid the downstream pollution judicial elections may have on future controversies.

The Court needs only to apply section 1983 as written, and ensure that the federal courts are open to "any citizen of the United States or other person within the jurisdiction thereof" alleging "deprivation of any rights, privileges, or immunities secured by the Constitution" from a state official acting under color of law. 42 U.S.C. § 1983.

CONCLUSION

Section 1983 throws a doorstopper on the federal courthouse to keep it open for reviewing constitutionally sensitive state subpoenas. The Third Circuit kicked it away. This Court should reverse.

Respectfully submitted,

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

August 28, 2025