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 AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus is the Reporters Committee for Freedom of the Press ("Reporters Committee"), an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

As an organization that defends the rights of journalists and news organizations, amicus has a strong interest in preserving prompt access to a federal forum when state officials misuse investigatory demands to undermine the freedom of the press. The Reporters Committee has often appeared as amicus curiae in the federal courts when the same issue presented here has threatened to chill the speech of news organizations. *See, e.g.*, Br. of Amici Curiae Media Orgs. in Supp. of Pl.'s Mot. for Prelim. Inj. & in Opp'n to Def.'s Mot. to Dismiss & to Strike, *U.S. News & World Rep., L.P. v. Chiu*, No. 3:24-cv-00395 (N.D. Cal. Mar. 20, 2024).

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[1] Pursuant to Supreme Court Rule 37, counsel for amicus curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the amicus curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The First Amendment protects free speech and a free press "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). The Constitution therefore prohibits officials "from subjecting an individual to retaliatory actions" for their speech, *Hartman v. Moore*, 547 U.S. 250, 256 (2006), whether by relying on the "threat of invoking legal sanctions," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963), or by seeking the "compelled disclosure" of sensitive information to achieve the same, intimidating result, *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021); *see also Media Matters for Am. v. Paxton*, 138 F.4th 563, 580 (D.C. Cir. 2025) ("[B]ad faith use of investigative techniques can abridge journalists' First Amendment rights."). In this case, though, the U.S. Court of Appeals for the Third Circuit held that a speaker who receives a retaliatory investigative demand is shut out of seeking relief in federal court until state enforcement proceedings unfold, *see* Pet. App. 4a—a holding that would invite burdensome, bad-faith investigations that "use the power of the State to punish or suppress disfavored speech," *Nat'l Rifle Ass'n v. Vullo*, 602 U.S. 175, 188 (2024).

Amicus writes to highlight the threat such a rule would pose to the First Amendment rights of the press in particular. The Constitution provides virtually absolute protection for "the exercise of editorial control and judgment," *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also*

Moody v. NetChoice, LLC, 603 U.S. 707, 738 (2024), but regulatory agencies and state officials have nevertheless claimed broad investigative power to scrutinize news coverage they find 'unfair.' Demands that media organizations justify their viewpoint to the government not only threaten the confidentiality of reporters' sources and work product, they also inevitably divert time and funds away from the press's core constitutional function. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (emphasizing that the "Constitution specifically selected the press" to fulfill an "important role" in our democracy). Faced with the prospect of a bad-faith investigation that imposes those costs—and absent hope of prompt relief from a federal court—some news organizations may simply avoid reporting on matters that could antagonize the wrong vindictive official.

To avoid just those harms, Congress guaranteed speakers immediate access to a federal forum when their First Amendment rights are violated, *see* 42 U.S.C. § 1983, without first requiring that they exhaust any uncertain remedies that might be available in state court, *see Monroe v. Pape*, 365 U.S. 167, 183 (1961). The Third Circuit's contrary rule—which would allow state officials to leave the threat of costly enforcement proceedings hanging over the head of any news organization they "think[] biased," *NetChoice, LLC*, 603 U.S. at 719—undermines clear congressional intent and creates an obvious risk of "[o]fficial harassment of the press" beyond the facts of this particular case. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). This Court should reverse. Because the harms of a retaliatory investigative demand set in as soon as the inquiry

lands in a news organization's inbox, amicus respectfully urges this Court to make clear that a federal forum is available just as quickly.

ARGUMENT

I. Retaliatory investigative demands impose chilling burdens on the press.

Among the First Amendment's most vital safeguards for a free press is its protection for "editorial control," *Tornillo*, 418 U.S. at 258; choices about what to say and what not to say about "public issues and public officials—whether fair or unfair," *id.*; *see also TikTok, Inc. v. Garland*, 604 U.S. 56, 73 (2025) (Gorsuch, J., concurring) (the First Amendment shields "judgments about what stories to tell and how to tell them"). Whether the particular speaker is a newspaper, a lone pamphleteer, or an advocacy organization like the Petitioner, the state has no legitimate interest in commandeering that process to impose choices it finds better balanced or more "responsible." *Tornillo*, 418 U.S. at 256; *see also NetChoice, LLC*, 603 U.S. at 741–42 ("On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana.").

In an effort to evade those constraints, regulatory officials of all stripes routinely repackage their efforts to enforce editorial fairness as investigations into consumer fairness. *Compare, e.g.*, Pet. App. 111a–47a (alleging that the investigative demand here was issued in retaliation for Petitioner's pro-life advocacy), *with Yelp Inc. v. Paxton*, 137 F.4th

944, 955 (9th Cir. 2025) (challenge to investigative demand allegedly issued "in retaliation for Yelp's support of abortion rights"). And the news media is vulnerable to the same harassment, whatever point of view a critic thinks their coverage stands for. *Compare, e.g.*, Press Release, Fed. Trade Comm'n, Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), https://perma.cc/X6X9-H8VM (rejecting complaint asking the Federal Trade Commission to judge whether Fox News's use of the slogan "Fair and Balanced" is a deceptive trade practice), *with Media Matters for Am.*, 138 F.4th at 569–70 (enjoining a retaliatory investigation of Media Matters for consumer fraud for publishing "an unfavorable article about X.com").

When a bad-faith investigative demand issues to a news organization, harms to the freedom of the press begin accruing immediately. First and most fundamentally, even where a publisher's conduct is unimpeachable, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Even if the demand is never enforced, it hangs like a sword of Damocles over the outlet, discouraging further reporting on the same topic and undermining the free flow of information to the public. *See Media Matters for Am.*, 138 F.4th at 581 (noting that Media Matters "pared back its reporting" on topics related to the story that had attracted the original investigation).

Then come the practical strains. Whether a news organization complies with or challenges an investigative demand, its receipt immediately requires the "diver[sion of] significant time and resources to hire legal counsel and respond to discovery requests." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014). As a 2009 study recounts, "time spent responding to subpoenas[,] whether complying or challenging" can be a significant cost to newsrooms, not only in legal fees and potential court costs, but also in diversion of staff time and resources away from reporting the news. RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 Wash. L. Rev. 317, 354–55 (2009). One respondent remarked, "I hear people in the business say all the time now that they just can't do [investigative journalism] anymore, because they can't afford to have that kind of time spent on subpoenas." *Id.* at 360–61.

On top of those burdens, investigative demands can undermine the confidentiality of journalists' sources and work product—confidentiality essential to their ability to do their jobs. As any number of courts have recognized, "[c]ompelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant." *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *accord Chevron Corp. v. Berlinger*, 629 F.3d 297, 307 (2d Cir. 2011); *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). The disclosure of work product, too, "may substantially

undercut the public policy favoring the free flow of information to the public." *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *see also United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988). And on each front, even the *perception* that a reporter could be recruited as an investigative arm of government can cause journalists to be "shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe, or even physically harassed if, for example, observed taking notes or photographs at a public rally." *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993).

Efforts to compel the press to provide information to state officials about their reporting therefore "exact[] a penalty" on that very coverage—a penalty felt as soon as the demand issues. *Tornillo*, 418 U.S. at 256. And all of those injuries can accrue, too, even if a media organization ultimately has a meritorious objection (under state law or otherwise) to producing the information sought. In the interim, "each passing day" that newsgathering is burdened by a retaliatory investigatory demand will successfully inflict an irreparable First Amendment injury, and the practical and constitutional harms will continue to pile up until the investigation is successfully quashed. *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975).

II. When retaliatory investigations burden the press, the First Amendment requires prompt access to a federal forum.

In light of the immediate First Amendment injuries a retaliatory investigative demand inflicts, refusing to redress "[o]fficial harassment of the press" before a news organization musters through a state-court proceeding would make little sense. *Branzburg*, 408 U.S. at 707. Nevertheless, some courts—following substantially the same course the Third Circuit took here—have made it difficult or impossible for news outlets to obtain prompt relief in federal court from retaliatory investigations.

In June 2023, for instance, San Francisco's City Attorney wrote a letter to U.S. News and World Report expressing his dissatisfaction with its "Best Hospitals" rankings. *See* S.F. City Att'y, *U.S. News & World Report Faces Legal Scrutiny Over Dubious Hospital Rankings*, (June 20, 2023), https://perma.cc/K9CS-38AJ. When U.S. News chose not to alter its rankings, the City Attorney followed up with a subpoena, demanding—now on pain of contempt—that U.S. News disclose in detail its "basis for stating that its Best Hospitals rankings are 'how to find the best medical care in 2023,'" and that the publication detail the basis for its editorial judgments on controversial questions like the decision not to "includ[e] measures of health equity in its rankings." *U.S. News & World Rep., L.P. v. Chiu*, No. 24-CV-00395-WHO, 2024 WL 2031635, at *2 (N.D. Cal. May 7, 2024). But when U.S. News brought suit in federal court seeking relief from the subpoenas on First Amendment grounds, its claim was never heard on

the merits; instead, the district court dismissed the case as unripe, pointing the publication to state court. *Id.* at *12.

That result has no sound constitutional or statutory basis, but Respondent would have it be the rule. Requiring that the recipient of a retaliatory investigative demand first raise the First Amendment as a defense in state court flies in the face of the general rule that "exhaustion of state remedies is *not* a prerequisite to an action under § 1983." *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (internal quotation marks omitted). On the contrary, "Congress intended . . . to throw open the 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 notwithstanding any provision of state law to the contrary." *Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) (internal citation and quotation marks omitted). The statute has no exception for state officials who act under the color of an investigative demand in particular when abridging First Amendment rights.

This Court's ripeness precedent likewise provides no support for the Third Circuit's rule. Whether a suit is ripe for purposes of Article III weighs "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148 (1967). As already canvassed above, the hardship to a news organization forced to await enforcement proceedings is

substantial. In just that vein, this Court has often recognized that deference to state courts is generally inappropriate in First Amendment cases, because "to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *City of Houston v. Hill*, 482 U.S. 451, 467–68 (1987) (internal citation omitted). Here too, because the prospect of defending a lawsuit brought by the state attorney general would itself "deter persons of ordinary firmness from exercising their First Amendment rights," *Media Matters for Am.*, 138 F.4th at 581, the "special burdens on their newsgathering activities" that a retaliatory investigative demand can inflict set in immediately, *id.*

Successfully raising a defense in state court—constitutional or otherwise—will not make good those harms. Even where a recipient prevails, the practical costs of litigating in state court may be unrecoverable if state law makes less generous provision for attorney's fees than a federal action would have. *Compare, e.g.*, N.J. Stat. § 2A:84A-21.8 (under New Jersey's shield law, permitting discretionary recovery of attorneys' fees upon a finding that there was "no reasonable basis for requesting the information"), *with* 42 U.S.C. § 1988 (permitting award of attorneys' fees to a "prevailing party"). But more fundamentally, nothing that might happen at the end of state proceedings will solve for the interim hardship of "current self-censorship in [a news organization's] reporting," *Media Matters for Am.*, 138 F.4th at 585, because "[t]he loss of First Amendment freedoms, for

even minimal periods of time," is "irreparable," *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

In the face of those serious costs, awaiting enforcement proceedings in state court does little or nothing to sharpen the issues for judicial decision. Any interpretation of the attorney general's investigative authority that a state court might offer—even if it meant the recipient "might ultimately prevail in the state courts"—"would not alter the impropriety of [the official] invoking the statute in bad faith to impose continuing harassment in order to discourage" First Amendment activity. *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965); *see also Knick v. Twp. of Scott*, 588 U.S. 180, 193 (2019) (the fact that a state court may later provide a remedy for a state official's unconstitutional conduct does not "mean[] there never was a constitutional violation in the first place"). And symmetrically, a state court's conclusion that a demand is superficially within an official's powers under state law would not license issuing the demand in retaliation for speech or newsgathering. *See Vullo*, 602 U.S. at 183–84 (*prima facie* authority to take enforcement action under state law did "not excuse Vullo from allegedly employing coercive threats to stifle gun-promotion advocacy"). Either way, nothing is gained by requiring that the case first proceed in state court.

The decision under review, then, advances no particular interest and would offer a blueprint for the "bad faith use of investigative techniques [to] abridge journalists' First Amendment rights." *Media Matters for Am.*, 138 F.4th at 580. This Court should reject that result. Common sense, congressional intent, and

the First Amendment all make the same point clear: Because the harms of a retaliatory investigative demand are felt immediately, the federal courthouse doors are open immediately. To ensure prompt redress is available to journalists and others targeted by unconstitutional investigations, amicus respectfully urges the Court to reverse.

CONCLUSION

For the foregoing reasons, amicus respectfully urges the Court to reverse.

Respectfully submitted,

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