No. 24-781

In the Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS INC.,

Petitioner,

v.

MATHEW 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* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

New Jersey's Attorney General served an investigatory subpoena on First Choice Women's Resource Centers, Inc., a faith-based pregnancy center, demanding that it turn over most of its donors' names. First Choice challenged the Subpoena under 42 U.S.C. § 1983 in federal court, and the Attorney General filed a subsequent suit to enforce it in state court. The state court granted the Attorney General's motion to enforce the Subpoena but expressly did not decide First Choice's federal constitutional challenges. The Attorney General then moved in state court to sanction First Choice. Meanwhile, the district court held that First Choice's constitutional claims were not ripe in federal court.

The Third Circuit affirmed in a divided per curiam decision. Judge Bibas would have held the action ripe as indistinguishable from *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 618–19 (2021). But the majority concluded First Choice's claims were not yet ripe because First Choice could litigate its constitutional claims in state court. In doing so, the majority followed the rule of the Fifth Circuit and split from the Ninth Circuit. It did not address the likely loss of a federal forum once the state court rules on the federal constitutional issues.

The question presented is:

Where the subject of a state investigatory demand has established a reasonably objective chill of its First Amendment rights, is a federal court in a first-filed action deprived of jurisdiction because those rights must be adjudicated in state court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Mountain States Legal Foundation (MSLF) is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel). In order to secure these interests, MSLF files this amicus brief urging the Court to grant relief to the petitioner.

SUMMARY OF THE ARGUMENT

The New Jersey Attorney General served a subpoena on First Choice because he wanted to burden it and chill its speech. Now, by challenging an unconstitutionally chilling subpoena seeking information revealing most of First Choice's donors, First Choice alleges a viable constitutional injury. Pet. for Writ of Cert. at 8. The Third Circuit thus erred in finding First Choice's case to be unripe. The Court

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[1] Per Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

should allow First Choice's claims to go forward in federal court, and allow First Choice a chance to protect its interests against an attorney general who has demonstrated hostility toward crisis pregnancy centers.

First Choice's claims satisfy both the constitutional and prudential elements of ripeness. The First Amendment injury is issuing a subpoena demanding the identities of First Choice's donors. Having done this, Attorney General Platkin objectively chilled both First Choice and its donors' associational freedom. Siding with the Third Circuit would recreate the "Catch-22" the Court dispensed with in *Knick*. *Knick v. Twp. of Scott*, 588 U.S. 180, 187 (2019).

In the context of 42 U.S.C. § 1983 claims, a federal remedy is "supplementary to any state remedy, and the latter need not have been first sought and refused before the federal one was invoked." *Monroe v. Pape,* 365 U.S. 167, 168 (1961). The *Knick* Court recognized that forcing Fifth Amendment claims into state court as a prerequisite to ripen a federal claim may create a "Catch-22." The case at bar is analogous. The Third Circuit dismissed First Choice's First Amendment argument, in part because First Choice could make its constitutional arguments in New Jersey court. If First Choice loses its constitutional arguments in New Jersey court, the preclusion trap recognized in *San Remo Hotel* will likely spring, barring First Choice from arguing the merits of its claims in federal court. *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 336 (2005).

ARGUMENT

I. First Choice's Claims are Both Constitutionally and Prudentially Ripe.

Being served with a subpoena is no joke. Apart from the immediate need to retain counsel, consider what information to provide, and set aside the time and energy needed to respond, there is also the matter of being compelled to produce private, non-public information to a complete stranger. That concern is exacerbated when the subpoena is motivated by political considerations. *See Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 180 (2024) ("Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.").

Here, the Court should find that New Jersey Attorney General Platkin's subpoena inflicted a reasonably objective chill, ripening First Choice's claim.

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. DOI,* 538 U.S. 803, 808 (2003) (internal quotation marks omitted). The constitutional component of the ripeness inquiry is usually treated under the rubric of standing, and often can coincide squarely with standing's injury in fact prong. *See Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc); *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc).

In determining whether a case satisfies prudential requirements for ripeness, the Court considers two factors: the fitness of the issues for judicial decision, and "the hardship to the parties of withholding court consideration." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983).

A. First Choice Meets the Test for Injury.

First Choice has suffered an injury in fact. The Court exercises the doctrine of ripeness to avoid entangling itself in "abstract disagreements" *See id.* But First Amendment rights "need breathing space to survive," and the Court has "found in a number of cases that *constitutional violations* may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum,* 408 U.S. 1, 11, (1972) (emphasis added); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963) (finding that because First Amendment freedoms need breathing room to survive, the government may only regulate speech with narrow specificity).

The Court has long frowned on government probes prying into organizational membership. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 465-66 (1958) (holding compelled disclosure of the NAACP's membership lists violated members' associational rights); *Shelton v. Tucker*, 364 U.S. 479, 485, 490 (1960) (striking down a law requiring public school teachers to disclose all organizations to which they belonged in the prior five years). And "it is not necessary that petitioner first expose himself to actual

arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Beyond the possibility of "future misuse," the *Laird* court demanded "objective harm" for a claim to be actionable. 408 U.S. at 10, 13. *Bonta* serves as an illustration of chilling state action resulting in objective harm.

In *Bonta*, the California attorney general sought to force charities to file information about major donors, including names, total contributions, and addresses, as part of annual registration and renewal. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 601-02 (2021). This list was already disclosed to the IRS as a condition of federal tax-exempt status, and the plaintiffs did not allege specific acts of discrimination done by the Attorney General. *Id.* at 617–18. The state government sent deficiency letters to charities who refused to provide donor information. *Id.* at 602. In response, the Attorney General "threatened to suspend their registrations and fine their directors and officers." *Id.* The charities brought 42 U.S.C. § 1983 claims in federal court, alleging that compelled disclosure "would make their donors less likely to contribute and would subject them to the risk of reprisals." *Id.* There, the charities alleged sufficient associational harm based on the threat of enforcement by the Attorney General. *Id.* at 602.

Steffel provides another example:

> In *Steffel* ... police officers threatened to arrest petitioner and his companion for distributing handbills protesting the

> Vietnam War. Petitioner left to avoid arrest... Petitioner sought a declaratory judgment that the trespass statute was unconstitutional as applied to him. [The Court] determined that petitioner had alleged a credible threat of enforcement: He had been warned to stop handbilling and threatened with prosecution if he disobeyed; he stated his desire to continue handbilling (an activity he claimed was constitutionally protected).

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014).

Importantly, the mere threat of state prosecution was enough to ripen the free speech claim in *Steffel*.

Here, First Choice suffered an injury. By attempting to enforce the subpoena, Respondent Platkin has advanced the dispute beyond being an "abstract disagreement" to an injury in fact. *Nat'l Park Hosp. Ass'n v. DOI,* 538 U.S. 803, 808 (2003).

Simply issuing a subpoena is a "credible threat" that the subpoena will be enforced. *Driehaus,* 573 U.S. at 159. But Attorney General Platkin has gone far beyond merely issuing a subpoena. He has actively sought its enforcement through the New Jersey courts. As a result, First Choice's donors have been chilled, their views and association almost laid bare before a government official who remains "openly hostile" to crisis pregnancy centers like First Choice. Pet. App. 177a. Multiple donors have signed affidavits stating they would be less likely to donate to First

Choice if their information was handed over to Attorney General Platkin. Pet. App. 175a–77a. The Attorney General's conduct has confirmed their fears, taking steps to target crisis pregnancy centers like First Choice, including issuing a consumer alert warning targeting crisis pregnancy centers.[2]

The chill Platkin's subpoena has inflicted on First Choice, and its donors may be a constitutional violation even if it does not directly punish First Choice's speech. *Laird,* 408 U.S. at 11. Issuing a chilling subpoena may crowd the "breathing room" First Amendment rights need to survive. *Button*, 371 U.S. at 433. Like the charities that prevailed in *Bonta,* First Choice alleges a similar constitutional violation, namely their First Amendment rights would be chilled by forced donor disclosure to government. *Bonta*, 594 U.S. at 601–02. In fact, First Choice's situation has ripened beyond the facts the Court ruled on in *Bonta*. Here, the Attorney General is actively seeking enforcement of the subpoena through the New Jersey courts – not through making threats.

Ruling against First Choice would undermine *Steffel*. In *Steffel*, the threat to prosecute Steffel was sufficient for the Court to hear the claim. Analogous to enforcing the subpoena issued to First Choice, threatening prosecuting for future conduct meets the bar of a "credible threat" of enforcement. *See Driehaus,* 573 U.S. at 159. It is a means to enforce the law. Barring First Choice's federal arguments until a New Jersey Court has ordered First Choice to disclose

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[2] Consumer Alert, New Jersey Division of Consumer Affairs, https://perma.cc/5J8A-D4LB (Dec. 1, 2022).

its donors would have been like forcing Steffel to wait to make his claim after a court adjudicated him guilty. This would be far beyond what standard the Court has set. *Steffel*, 415 U.S. at 459. To be consistent with *Steffel,* the Court should hold First Choice's claims ripe.

First Choice's claim satisfies the constitutional element of ripeness.

B. First Choice's Injuries are Ripe for Resolution by the Federal Courts.

Under the two-prong prudential ripeness test derived from *Abbott Labs*, First Choice's claim is prudentially ripe. *Abbott Lab'ys v. Gardner,* 387 U.S. 136, 149 (1967). Federal courts operate under a "virtually unflagging" duty to exercise jurisdiction given to them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Abbott Labs ruled that when asked to grant equitable relief, challenging a final agency action, the Court weighs ripeness using (1) the fitness of an issue for a judicial review and (2) the harm to the parties of withholding judicial review. *Abbott Lab'ys*, 387 at 149. Later courts have applied these factors beyond the final agency action context. *Thomas,* 220 F.3d at 1141 (applying the *Abbott Labs* test to a First Amendment challenge to a state law); *Doe v. Bush,* 323 F.3d 133, 139 (1st Cir. 2003) (applying the *Abbott Labs* test to challenge to the constitutionality of a congressional authorization of military use of force). They describe the factors as the prudential element of ripeness – distinct from the constitutional element of ripeness. *Thomas,* 220 F.3d at 1138; *Doe,* 323 F.3d at 139

(calling the *Abbott Labs* factors "prudential considerations").

Claims have been found to be fit for judicial review when they are predominantly legal. *Pac. Gas,* 461 U.S. at 191. Legal questions require "little factual development." *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996). First Choice raising a predominantly legal question weighs in favor of finding the case ripe.

When analyzing the hardship to the parties of withholding judicial consideration, courts have set out a low bar. In the context of challenges to agency regulations, regulations where irremediable adverse consequences flowed from requiring a later challenge are likely to be ripe. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 810.

First Choice would suffer if the Court withheld review. First Choice and its donors would suffer "irremediable" harm if the Court forced First Choice to wait for possible future federal litigation. *Id.* First Choice and its donors will never be able to recoup the time their First Amendment rights were chilled while state court litigation unfolds. Withholding judicial review, forces First Choice to litigate its claims in state court, running up litigation costs. Importantly, as discussed below, by withholding review First Choice risks being precluded from ever bringing its claims in federal court if the New Jersey courts rule on the validity of First Choice's First Amendment claims. This harm would also irremediably flow from withholding judicial review. *Id.*

The *Abbott Labs* test counsels toward finding the case ripe.

II. The Court Should Avoid Recreating a "Catch-22" Similar to what it Eliminated in *Knick*.

In *Knick*, this Court held that federal civil rights claims ought to have their day in federal court. *See Knick*, 588 U.S. at 187. Consistent with *Knick*, the Court should allow First Choice's claims to proceed. To do otherwise would merely spring a "preclusion trap" in another context under 42 U. S. C. §1983.

In *Knick*, the plaintiff sought to vindicate his rights under the Takings Clause of the Fifth Amendment. *Id.* The Court rightfully dispensed with the *Williamson County* rule which required property owners to seek relief through a State "if a State provides an adequate procedure for seeking just compensation." *Knick,* 588 U.S. at 188. A property owner could not claim a violation of the Takings Clause until he used the available state procedure and been denied just compensation." *Id.* Under *Williamson County*, state courts were the first stop on the way to seek relief. *Id.* But they often became the last stop as well.

Because state court proceedings are often given full faith and credit, they will generally preclude federal courts from hearing the same issue. 28 U.S.C.

§ 1738.[3]

In *San Remo Hotel*, the Court confirmed that a plaintiff with an unripe claim who was forced into state court under the *Williamson County* rule would be precluded from litigating that claim in federal court, once the state court ruled. *San Remo Hotel,* 545 U.S. at 336. The plaintiff attempted to reserve his federal constitutional argument, arguing his claim under the state constitution. This failed. His federal claim was precluded by the state court litigation. *Knick*, 588 U.S. at 188. The *Knick* Court recognized the "Catch-22," explaining a plaintiff "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. The federal claim dies aborning." *Knick*, 588 U.S. at 184–85. The Court ruled "[t]he availability of any particular compensation remedy ... cannot infringe or restrict the property owner's federal constitutional claim." *Id*. at 191.

The case at bar is analogous to *Knick*. First Choice seeks a federal forum to make a claim under 42 U.S.C. § 1983. Pet. App. 114a. By rejecting their claim as unripe, the Third Circuit recreated, in the First Amendment context, the "Catch-22" remedied in *Knick*. 588 U.S. at 184–85. By stating that it contemplated future federal litigation, the Third

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[3] There is a notable exception to the full faith and credit doctrine where the state court willfully ignores a litigant's constitutional rights. *See, e.g.*, *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 482 (1982) (finding decisions which violate the Due Process Clause are not entitled to Full Faith and Credit in state or federal courts).

Circuit seems unaware its decision may eliminate any future federal litigation. Pet. App. 5a. If First Choice loses its constitutional argument in New Jersey's courts, First Choice could be precluded from arguing New Jersey's subpoena was unconstitutional in federal court.

Notably, the Third Circuit's language even parallels the defunct *Williamson County* language, switching out "adequate procedures for seeking just compensation" for "adequately adjudicate First Choice's constitutional claim." *Id; Knick*, 588 U.S. at 188.

Here, the Court should apply its well-reasoned analysis in *Knick*. 588 U.S. at 184–85. Just as holding the *Knick* plaintiff's claim unripe because of the availability of a state court remedy was inappropriate, holding First Choice's claim unripe because the state court may adequately adjudicate its claim is similarly incorrect. *Id.* Moreover, the Court should view the Third Circuit's finding that First Choice may "continue to assert" its constitutional arguments as evidence that the Third Circuit infringes on First Choice's right to a federal forum by teeing up a preclusive decision in New Jersey court. *Id.* at 191; Pet. App. 4a. Consistent with *Knick*, the Court should find the case is ripe.

Precedent demands 42 U.S.C.§ 1983 claims should be litigated in federal court. Section 1983 gives a right to pursue "suits in equity." 42 U.S.C.§ 1983. "[A] court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with [Congressional] intent." *Patsy v. Board of Regents,* 457 U.S. 496, 501–02. The Court has repeatedly held

plaintiffs need not run to state court to open the doors of federal court in Section 1983 cases.

Just the opposite is true. The Court has recognized that "[t]he 1871 Congress intended § 1 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." *Patsy,* 457 U.S. at 504 (internal quotation marks omitted).[4] The Act sought to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). When a plaintiff's constitutional rights are offended, a federal remedy is "supplementary to any state remedy, and the latter need not have been first sought and refused before the federal one was invoked." *Monroe,* 365 U.S. at 168. When litigating Section 1983 claims, the Court has recognized Congress intended for plaintiffs—not courts—to "choose the forum in which to seek relief." *See Patsy*, 457 U.S. at 506.

The Third Circuit's reasoning was incorrect. Reasoning that because a "state court will adequately adjudicate First Choice's constitutional claim," it need not exercise jurisdiction, undermines the Act. Pet. App. 5a. First Choice seeks the equitable relief guaranteed to it under the Act. 42 U.S.C. § 1983; Pet. App. 112a. While First Choice may make a constitutional argument in New Jersey court, here First Choice asks for relief under a statute, 42 U.S.C. § 1983, and Congress has not suggested federal courts

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[4] § 1 refers to the statute known today as 42 U.S.C § 1983. *See Patsy,* 457 U.S. at 504.

defer jurisdiction in these cases. Under *Patsy*, the Court should not defer jurisdiction. Ruling the claim is unripe would force First Choice's claims into state court. This would potentially preclude First Choice from ever raising its arguments in federal court, undermining the Act's aim of "throwing open" the doors of the federal courts. *Patsy*, 457 U.S. at 504.

Rather than federal courts being "interpose[d]" between the States and people, requiring state judicial proceedings would do the opposite. *Mitchum*, 407 U.S. 225, 242 (1972). Following an investigatory demand, any state's judiciary would hold the keys to any federal courthouse, and could lock the doors, protecting their state government. *Id.* By issuing rulings precluding the federal courts from hearing claims, the actors the law was meant to check would instead control. In the crucial context of free speech, the Court should not eliminate the supplementary remedy that Congress has provided. *Monroe,* 365 U.S. at 168.

First Choice's First Amendment claims should be heard in federal court.

CONCLUSION

For the foregoing reasons the Court should rule First Choice's case is ripe.

Respectfully submitted,

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