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 a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE SAVE THE STORKS AND TWENTY-THREE OF ITS PARTNERS IN SUPPORT OF PETITIONER

ANDREW NUSSBAUM
Counsel of Record
FIRST & FOURTEENTH, PLLC
2 N Cascade Ave Suite 1430
Colorado Springs, CO 80903
719-428-4937
andrew@first-fourteenth.com

JAMES COMPTON
FIRST & FOURTEENTH, PLLC
800 Connecticut Ave NW, Suite 300
Washington, DC 20006
202.998.1978
James@first-fourteenth.com

Attorneys for Amici

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INTEREST OF AMICI CURIAE[1]

Save the Storks is a 501(c)(3) non-profit organization and religious ministry dedicated to creating a true ecosystem of support where women and families can thrive. Storks's mission is to empower women with hope by providing life-affirming alternatives that elevate healthcare and strengthen long-term well-being. Through its National Partner program, Storks equips hundreds of medical clinics and pregnancy resource centers to deliver maternal-child healthcare and holistic resources to thousands of women across the country. Storks also engages community partners and churches to build a culture that values and champions moms, dads, babies, and families. Storks' signature mobile medical clinics—"Stork Buses"—bring state-of-the-art services like ultrasounds, pregnancy testing, and STI testing directly to women in need. Save the Storks stands out in the movement for life-affirming healthcare through its commitment to medical excellence and its comprehensive approach to long-term family flourishing.

Storks files this brief on behalf of itself and twenty of its partners from across the country: Alpha Care, Alpha Omega Center, Anchor of Hope, A Woman's Concern, Bright Hope Pregnancy Support Centers,

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than amici curiae, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission.

CareNet Pregnancy & Family Resources of Puget Sound, Choices Pregnancy Care Center, Crossroads Care Center, Jewel Women's Center, LC Medical & Support Services, Life Network, NorthState Care Clinic, Options for Her, Pregnancy Resource Center of Rockford, The Pregnancy & Family Life Center, PRC of Southwest Oklahoma, Real Choices, Reliance Center, The Lighthouse Women's Center, Triad Coalition for Life, True Choice Medical Clinics, and Women's Care Center of Erie County. Storks and their partners have firsthand experience of the issue presented by this case—retaliatory and vindictive governmental subpoenas and investigations. These investigations impose substantial costs in legal fees and administrative time spent gathering and reviewing thousands of documents, often spanning many years of organizational records. The mere existence of a government investigation creates a stigma that damages an organization's reputation, causes donors and supporters to withdraw their backing, and makes potential partners hesitant to associate with the organization. The invasive nature of these subpoenas, which often seek confidential donor information, internal communications, and sensitive operational details, forces organizations to divert resources from their core mission to respond to government demands. Even when organizations ultimately prevail, the prolonged uncertainty and public scrutiny during an investigation can irreparably harm their ability to serve their communities and advance their religious and pro-life missions.

For Storks and its partners, this case is the most impactful dispute to come before the Court since *Dobbs*.

SUMMARY OF ARGUMENT

This case represents a watershed moment for constitutional protection in the post-*Dobbs* landscape. Across the nation, government actors at every level are weaponizing their investigative powers to silence and intimidate pro-life and religious organizations through a campaign of regulatory harassment. The state-litigation requirement challenged here is not an isolated procedural hurdle. It is part of a broader judicial framework that systematically insulates government persecution from meaningful review.

But this constitutional impasse extends beyond state investigations to encompass federal agency investigation, which operate under an equally pernicious doctrine rooted in this Court's decision in *Reisman v. Caplin*, 375 U.S. 440 (1964). Federal courts routinely dismiss pre-enforcement challenges to administrative subpoenas, forcing religious and pro-life organizations to endure months or years of investigative abuse with no recourse to judicial protection. State actors can launch baseless investigations knowing that their targets have no realistic path to judicial relief. By recognizing the right to seek relief before irreparable harm occurs, this Court would not only vindicate the constitutional rights of pro-life and religious organizations, but also set a clear precedent

protecting all nonprofits and associations—regardless of their mission—from governmental overreach. Such a ruling would safeguard judicial consistency, promote fairness, and preserve the rule of law for every sector of civil society.

The cost is immense for organizations funded entirely by donors. Organizations are bankrupted by legal fees, abandoned by donors, and forced to shutter operations—all before any determination of wrongdoing.

While this Court's ruling in this case will provide essential protection against overreach of state agencies, the problem presented by this case will not be remedied until the Court addresses the parallel problem of federal investigations. The Court should clarify that *Reisman* does not categorically bar pre-enforcement challenges to administrative subpoenas. Modern standing doctrine establishes that the threat of enforcement creates cognizable injury, and administrative enforcement proceedings provide no meaningful substitute for civil litigation. Only by closing both avenues of investigative abuse (state *and* federal) can this Court ensure that constitutional rights receive real protection in practice.

ARGUMENT

I. This case is an example of a broader trend that extends to investigations by federal agencies.

The threat to constitutional liberties before the Court in this case is not unique to investigations by states or state attorneys general. Just as the state-

litigation requirement insulates state investigations from federal judicial review, lower-court interpretations of this Court's ripeness precedent insulate identical federal investigations. And just as state agencies increasingly abuse their protections to issue vexatious subpoenas to disfavored groups, federal agencies have begun wielding their power to harass religious and pro-life organizations. Recent years have seen shocking mistreatment of religious and pro-life groups at the hands of state and federal agencies. These abuses are coercive—the mere fact of an investigation is sufficient to injure an organization.

A. There is a growing threat of pernicious investigations into pro-life and religious organizations.

Following this Court's opinion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 228 (2022), there has been enormous pro-abortion backlash against religious and pro-life organizations. This backlash has even extended to the public sector as government agencies have taken part. Over-the-top rhetoric, harassment, and even violence have become commonplace experiences for supporters of life and this Court's decision in *Dobbs*.[2]

The events of this case are archetypal of the backlash; New Jersey's conduct in this case is not an isolated incident.

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[2] For example, the United States Senate Majority Leader himself told Justices Kavanaugh and Gorsuch that they would "pay the price" and wouldn't "know what hit [them]" if they overturned *Roe v. Wade*. Amy Howe, *Roberts Condemns Schumer Rally Remarks*, SCOTUSBLOG (MARCH 4, 2020), https://www.scotusblog.com/2020/03/roberts-condemns-schumer-rally-remarks/.

State Investigations. Around the country, state attorneys general are wielding their power to target pro-life and religious groups. In Washington State, for example, the attorney general launched an investigation into two faith-based pro-life nonprofits for supposed violations of state consumer protection laws. He issued a subpoena for thirteen years' worth of personnel, financial, and affiliate organization records. *Obria Grp., Inc. v. Ferguson*, No. 3:23-CV-06093-TMC, 2025 WL 27691, at *2 (W.D. Wash. Jan. 3, 2025). The same attorney general recently issued a subpoena to the Archdiocese of Seattle seeking records dating back to 1940. *Judge rules attorney general cannot enforce subpoena against Seattle Archdiocese*, National Catholic Reporter (July 18, 2024) https://www.ncronline.org/news/judge-rules-attorney-general-cannot-enforce-subpoena-against-seattle-archdiocese.

On the Washington State Health Department's website, one can find a page directing people to "Avoid Anti-Abortion Facilities." According to the site, these facilities to be avoided are "[s]ometimes called Crisis Pregnancy Centers." The site provides a link one can use to "report what you think might be an anti-abortion facility" to the Attorney General. *Avoid Anti-Abortion Facilities*, Washington State Department of Health (last visited August 15, 2025) https://doh.wa.gov/you-and-your-family/sexual-and-reproductive-health/abortion/avoid-anti-abortion-facilities.

To coordinate these kinds of anti-life efforts, sixteen state attorneys general recently issued a letter laying the groundwork for similar "consumer protection" investigations of crisis pregnancy centers. *See*

Open Letter From Attorneys Gen. Regarding CPC Misinformation and Harm (Oct. 23, 2023), https://tinyurl.com/bnnu36fy. Lawsuits against pro-life organizations have followed in New York and California. *See* Complaint, *People v. Heartbeat Int'l, Inc.*, No. 23CV044940 (Cal. Super. Ct. Sept. 21, 2023) (suit against crisis pregnancy centers alleging "false and misleading claims."); Attorney General James Sues Anti-Abortion Group and 11 New York Crisis Pregnancy Centers for Promoting Unproven Abortion Reversal Treatment, Office of N.Y. Att'y Gen. (May 6, 2024) https://perma.cc/NZM8-NKKD (same).

Federal Investigations. The trend also extends to the federal government. In 2022, the Department of Justice established a Reproductive Rights Task Force to "protect reproductive freedom under federal law." U.S. DEPARTMENT OF JUSTICE, "Reproductive Rights," https://www.justice.gov/reproductive-rights (accessed August 14, 2025). The result of that task force was a raft of prosecutions against pro-life activists and members of pro-life organizations. The Department of Justice used the Free Access to Clinic Entrances (FACE) Act to undertake these prosecutions. The FACE Act criminalizes obstruction of and attack on churches, pro-life pregnancy clinics, and abortion clinics. *See* 18 U.S.C. § 248.

From 2021 to 2024, the Department of Justice brought 24 FACE Act cases against 55 defendants. *Revisiting the Implications of the FACE Act: Part II: Hearing Before the H. Jud. Subcom. on the Constitution and Limited Government*, 118th Cong. (2024) (statement of Erin Morrow Hawley, Senior Counsel & Vice President of the Center for Life and Regulatory Practice). Only two of those cases were brought in

defense of pregnancy centers and none were brought in defense of churches. *Id.* This lopsided approach to enforcing the FACE Act was in spite of hundreds of documented attacks on churches and pregnancy resource centers following the *Dobbs* decision. *See, e.g., Tracking Attacks on Pregnancy Centers & Pro-Life Groups,* CATHOLIC VOTE (last updated Jan. 21, 2025), https://catholicvote.org/pregnancy-center-attack-tracker/; Arielle Del Turco, *Hostility Against Churches Is on the Rise in the United States*, FAMILY RESEARCH COUNCIL (Feb. 2024), https://www.frc.org/issueanalysis/hostility-against-churches-is-on-the-rise-in-the-united-states.

Even more shocking, the Federal Bureau of Investigation recently explored developing sources within the Catholic Church itself in order to surveil "radical-traditionalist" Catholics and engage in "threat mitigation." *See How The Biden-Wray FBI Manufactured A False Narrative Of Catholic Americans As Violent Extremists*, Interim Staff Report, Committee on the Judiciary, U.S. House of Representatives (July 22, 2025). The FBI went so far as to actually deploy an undercover agent and interview Catholic clergy during the project. *Id*.

Cert-stage amici have provided ample examples of further attacks on pro-life and religious organizations from state and federal agencies. *See, e.g.,* Br. of amici curiae Pennsylvania Pregnancy Wellness Collaborative, etl al. in Support of Petitioner; Br. of amici curiae Christian Legal Society et. al., in Support of Petitioner. Suffice to say that this is a widespread pattern that warrants urgent action from the Court.

B. Federal investigations are insulated from review in the same way as state investigations.

While eliminating the state-litigation requirement imposed in this case is one step toward proper judicial review of agency investigations, the Court must also address review of federal administrative subpoenas. Federal investigations enjoy functionally the same protection and are even more troubling.

The problem highlighted by this case—suppression of constitutional rights through burdensome state investigation without recourse to the federal courts—is equally present when an organization is served with a federal agency subpoena. In federal investigations, injured parties are barred from the federal courts by the principles of this Court's decision in *Reisman v. Caplin*, 375 U.S. 440, 447 (1964), and its subsequent applications by lower courts. To fully remedy the constitutional injuries suffered by the petitioners, the Court must vindicate their rights in this case and then take the next opportunity to clarify *Reisman*.

Reisman and its progeny bar pre-enforcement challenges to subpoenas in much the same way as the state-litigation requirement applied by the Third Circuit in this case. *Reisman* itself addressed a summons issued by the Internal Revenue Service to an accountant as part of an investigation into the tax filings of Martin and Allyn Bromley. 375 U.S. at 443–444. The summons sought testimony from the accountants and the production of the Bromleys' tax records. The Bromleys brought suit through their attorneys, alleging that the civil summons unconstitutionally sought

evidence that could be used in a criminal matter. *Id.* Noncompliance with the summons carried a fine of $500 per day.

The Court held that the Bromleys' attorneys could not challenge the summons because they would not be subject to sanctions until after an enforcement proceeding. IRS summons are not self-executing, the agency must apply to a court for enforcement. The *Reisman* Court held that the Bromleys' challenge was not properly before the Court until the IRS had applied for and obtained enforcement of the summons. More specifically, the Court held that the recipient of the summons must wait for an enforcement proceeding, raise its defenses, and then lose before a suit in federal court would be proper:

> this statute on its face does not apply where the witness appears and interposes good faith challenges to the summons. It only prescribes punishment where the witnesses 'neglects' either to appear or to produce. We need not pass upon the coverage of this provision in light of the facts here. It is sufficient to say that noncompliance is not subject to prosecution thereunder when the summons is attacked in good faith.
>
> *Id.* at 447.

Reisman now stands for the proposition that the recipient of an administrative subpoena must wait for the agency to seek enforcement before it can make any legal challenge to the subpoena. *See, e.g., Schulz v. I.R.S.*, 413 F.3d 297, 301 (2d Cir. 2005); *Shea v. Off. of Thrift Supervision*, 934 F.2d 41, 46 (3d Cir. 1991) ("The subpoenaed party faces actual harm only after a successful enforcement action has been brought.")

Belle Fourche Pipeline Co. v. United States, 751 F.2d 332, 334 (10th Cir. 1984) ("[T]he Supreme Court announced a rule strongly disfavoring any pre-enforcement review of investigative subpoenas."). This interpretation of *Reisman* acts like the state-litigation requirement imposed by the court below. Parties are barred from filing an action in federal court until they have litigated their claims in another, inadequate, forum.

Though some courts are willing to circumvent this bar if a plaintiff can plead a First Amendment injury stemming from the subpoena, others are not. *Compare Media Matters for Am. v. Paxton*, 732 F. Supp. 3d 1, 25 (D.D.C. 2024), *aff'd*, 138 F.4th 563 (D.C. Cir. 2025) (holding that the allegation of chilling of speech placed the case outside the scope of *Reisman*), *with Google, Inc. v. Hood*, 822 F.3d 212, 224 (5th Cir. 2016) (applying *Reisman* where the plaintiff alleged First Amendment injury). Considering a state subpoena, the Ninth Circuit recently held that *Reisman* does not apply in cases of First Amendment injury but then reached the same conclusion by applying the ripeness doctrine to hold that challenges to non-self-enforcing subpoenas are not ripe. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1176 (9th Cir. 2022).[3]

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[3] The circuit courts are also split on the actual rationale of *Reisman*. A long line of cases from the Second Circuit treats *Reisman* as a ripeness case. *See Schulz*, 413 F.3d at 301 (tracing this line of precedent). The Fifth and Tenth Circuits have treated it the same way. *See Hood*, 822 F.3d at 225; *Belle Fourche*, 751 F.2d at 335. In contrast, the Ninth Circuit and District of DC have expressly held that *Reisman* "has nothing to do with justiciability." *Media Matters*, 732 F. Supp. 3d at 23; *see Twitter*, 56 F.4th at 1179 ("Reisman also isn't about ripeness.").

These cases demonstrate that, even if *Reisman* was not intended to be a categorical bar to pre-enforcement challenges to administrative subpoenas, many of the lower courts have taken it to be one. Those courts use the decision to insulate federal agency investigations from judicial review.

II. The rule of *Reisman* perpetuates substantial constitutional injuries.

Barring recipients of federal agency subpoenas from filing pre-enforcement challenges perpetuates substantial constitutional harms. *Reisman* and its progeny operate on the assumption that subpoenas and summons only work cognizable injuries when enforced with a contempt sanction. This is simply not true. The very fact of a federal investigation can seriously harm an organization.

This Court has explicitly recognized that federal investigations can inflict constitutional harm. In *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court considered a case in which the National Labor Relations Board ordered a group of church-operated schools to cease certain labor practices and collectively bargain with employee unions. The schools filed suit, alleging that they fell outside the NLRB's jurisdiction. The Court sided with the schools, in part because allowing the NLRB to exercise jurisdiction over religious schools would itself harm the First Amendment rights of schools. In explaining this conclusion, the Court noted, "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, *but also the very process of inquiry leading to findings and conclusions*." *Id.* at 502 (emphasis added).

An example of such harm can be found in *Clark v. Library of Congress*, 750 F.2d 89, 92 (D.C. Cir. 1984). There, the FBI investigated a suspected socialist by interviewing his acquaintances, checking his employment records, and even examining his credit record. This investigation embarrassed the subject, Clark, and even caused his friends and family to encourage him to cease his political associations. *See* 750 F.2d at 91. Clark was able to obtain a court order stopping the investigation, but only because it was transparently discriminatory and because the agency exceeded its statutory authority. 750 F.2d at 104. Had the agency been more coy and used subpoenas rather than personally accosting people, it could very well have ruined Clark's life without ever subjecting its investigation to judicial review.

Whole Woman's Health v. Smith, 896 F.3d 362 (5th Cir. 2018), *as revised* (July 17, 2018), is also illustrative of the injuries that can attend a subpoena, especially when judicial oversight is limited. In that case, abortion providers issued a Rule 45 subpoena to the Texas Conference of Catholic Bishops. The subpoena was issued just before Holy Week, the return date was just after Easter Sunday, the subpoena sought documents without a time limitation, and it provided no exception for confidential religious communications. The court further compressed the timeline for compliance and then rejected the Bishops' constitutional and RFRA defenses out-of-hand. The Fifth Circuit catalogued at length the harm to the Bishops from the subpoena—not from disclosure, just the subpoena itself:

> [I]n addition to the significant cost of complying with the original subpoena (100 work hours and

> over $20,000 in attorney's fees), TCCB has delayed and missed ministry opportunities; suffered in relationships with other Catholic ministries whose communications it was forced to disclose; was required to cancel internal ministry reports and training materials; TCCB bishops and staff were discouraged from engaging in other public policy activities; and Texas Catholic cemeteries were deterred from participating in the fetal remains registry. TCCB's ability to conduct frank internal dialogue and deliberations was undermined, and not only because enforcement of the subpoena inhibits the further use of email communications.

Whole Woman's Health, 896 F.3d at 373.

Amici are well familiar with the injuries that attend an agency investigation. The chilling of speech that accompanies a raft of subpoenas, seeking thousands of documents prying into the most intimate aspects of the organization's ministry; the recoiling of donors when they read of a federal investigation; the time, energy, and fees associated with even minimal compliance. These are familiar to any pro-life or religious organization in the country.

Obria Group, referenced above, is a good example. In 2022, Obria, a Christian pro-life non-profit, received civil investigative demands from the Washington Attorney General. As a result of the demands, Obria lost commercial relationships, suffered a sevenfold increase in insurance premiums, and took down the website for its Washington affiliate. *See Obria*, 2025 WL 27691, at *3.

The potential for harm is magnified by federal agencies' ability to conduct investigations of perfectly legal conduct. The subject of a federal investigative subpoena cannot refuse to comply on the grounds that the investigation itself is unlawful. "As a general rule, substantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceeding." *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977); *see also Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) ("The petitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the subpoena"); *E.E.O.C. v. Children's Hosp. Med. Ctr. of N. California*, 719 F.2d 1426, 1429 (9th Cir. 1983) ("[A] party may not defeat agency authority to investigate with a claim that could be a defense if the agency subsequently decides to bring an action against it."); *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696, 700 (7th Cir. 2002) ("[E]nforcement of a subpoena cannot be resisted on the ground that the information the agency is seeking would not justify an enforcement action."). Some courts will not even consider res judicata at enforcement proceedings, meaning agencies are free to engage in self-evidently duplicative investigations. *See Children's Hosp. Med. Ctr. of N. California*, 719 F.2d at 1430.

By barring pre-enforcement suits challenging administrative subpoenas, the principles of *Reisman* allow agencies to harass pro-life and religious organizations. An agency can target an organization for a transparently baseless investigation, issue vexatious demands, and the organization must grin and bear it.

The only alternative is to defy the federal agency—a risky proposition—and await a subpoena enforcement proceeding. This regime perpetuates harm to constitutional rights, and the Court should clarify *Reisman* to eliminate it.

III. The Court should reconsider the bar on suits to quash investigative subpoenas.

The Court should clarify the rule of *Reisman*, both in light of the harm it perpetuates and because it has been undermined by subsequent developments in the law. Modern subpoena enforcement proceedings are summary in nature, far from the alternative to litigation that the *Reisman* Court envisioned. Moreover, *Reisman* predates the Court's pre-enforcement standing cases, which clearly establish that a controversy can be ripe well before actual enforcement. The Court should clarify for lower courts that *Reisman* does not announce a rule barring pre-enforcement suits against federal agency subpoenas.

A. Subpoena enforcement proceedings are not an adequate substitute for civil litigation.

Reisman relied heavily on the assumption that subpoena enforcement proceedings provide an adequate forum for a recipient to voice their objections to the subpoena. The Court's key rationale in *Reisman* was to note that the contempt statute did not apply "where the witness appears and interposes good faith challenges to the summons." *Reisman*, 375 U.S. at 447. "Furthermore," the Court noted, "we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground." *Id.* at

449. Courts continue to cite this justification when dismissing such suits. *See Lopes v. Resol. Tr. Corp.*, 155 F.R.D. 14, 16 (D.R.I. 1994) ("The *Reisman* rule is followed uniformly in all jurisdictions that have considered the issue of pre-enforcement review of administrative agency subpoenas . . . these courts have reiterated that the enforcement proceeding is an adequate remedy at law."); *In re Ramirez*, 905 F.2d 97, 98 (5th Cir. 1990) ("[C]ourts generally dismiss anticipatory actions filed by parties challenging such subpoenas as not being ripe for review because of the availability of an adequate remedy at law if, and when, the agency files an enforcement action."); *Belle Fourche*, 751 F.2d at 334 ("[*Reisman*] held that a pre-enforcement order enjoining an [IRS] subpoena was improper because an adequate legal remedy existed for challenging the validity of the subpoena in a subsequent enforcement hearing.").

In reality, subpoena enforcement proceedings are not an adequate substitute for civil litigation. Rather than full and fair opportunities to challenge a subpoena, administrative subpoena enforcement proceedings are "designed to be summary in nature." *Walsh v. Alight Sols. LLC*, 44 F.4th 716, 722 (7th Cir. 2022). The summary nature of the proceedings limits a party's ability to challenge the subpoena in several ways.

First, "[b]ecause subpoena enforcement proceedings are generally summary in nature and must be expedited, discovery is not usually permitted." *S.E.C. v. Lavin*, 111 F.3d 921, 926 (D.C. Cir. 1997). Though district courts can exercise their discretion to allow discovery, it is highly disfavored. Courts have held that discovery should only be granted where the recipient

"raise[s] doubts about the agency's good faith," *Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1388 (D.C. Cir. 1980), or demonstrates "extreme circumstances that would justify further inquiry into the propriety of the subpoenas." *United States v. RFB Petroleum, Inc.*, 703 F.2d 528, 533 (Temp. Emer. Ct. App. 1983).

Second, parties are limited in the arguments they can raise in enforcement proceedings. Rather than a broad forum for constitutional arguments related to a subpoena, an enforcement proceeding is focused only on whether an agency has met a relatively low burden. "As a general proposition, an investigative subpoena of a federal agency will be enforced if the 'evidence sought ... [is] not plainly incompetent or irrelevant to any lawful purpose' of the agency." *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 (D.C. Cir. 1987) (quoting *Endicott Johnson*, 317 U.S. at 509). To prevail at an enforcement hearing,

> An agency must show only [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within [its] possession, and [4] that the administrative steps required ... have been followed ....

N.L.R.B. v. Am. Med. Response, Inc., 438 F.3d 188, 192 (2d Cir. 2006) (internal quotation marks omitted).

Even where First Amendment concerns are implicated, courts only require that the agency make "some showing of need for the material sought beyond its mere relevance to a proper investigation," *Fed.*

Election Comm'n v. Larouche Campaign, 817 F.2d 233, 234–35 (2d Cir. 1987), unless the subpoena seeks to compel core First Amendment material, and then they apply a more exacting scrutiny. *See, e.g., Fed. Election Comm'n v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 389 (D.C. Cir. 1981) (citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)). This, of course, does not help when the harm stems from the investigation itself, not the required disclosure.

Additionally, as noted above, defenses that would bar an enforcement action by the agency do not bar enforcement of a subpoena. Recipients of a subpoena are limited to challenging the specific subpoena itself, doing so in a summary proceeding without discovery, and confining their arguments to the generous test for enforcement.

Limitations of this kind render subpoena enforcement proceedings an inadequate substitute for civil litigation. Congress has constructed an entire regime designed to vindicate the civil rights of groups like amici. Laws like Section 1983 of the Civil Rights Act and the "super-statute" Religious Freedom Restoration Act are designed to give plaintiffs tools to hold the government accountable for civil rights violations. But they are only effective when parties can actually deploy them to fend off unconstitutional actions. Subpoena enforcement proceedings substantially limit their ability to do so.

Contrary to the reasoning of *Reisman* and subsequent opinions, subpoena enforcement proceedings are not a venue that provides an adequate substitute for civil litigation.

B. Subsequent standing cases have further undermined the reasoning of *Reisman*.

Since *Reisman*, this Court has issued a number of opinions that clarify the scope of injuries cognizable under Article III. Those opinions substantially undermine the bar on pre-enforcement suits to quash administrative subpoenas. The Court should clarify that these cases control and recipients of administrative subpoenas can bring justiciable pre-enforcement challenges to administrative subpoenas.

In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), the Court addressed the question of "when the threatened enforcement of a law creates an Article III injury." *Susan B. Anthony List* was a suit brought by a pro-life organization that feared spurious prosecution under a false statements statute—almost precisely what has happened to petitioners here. In its opinion, the Court concluded that plaintiffs need not wait for actual injury in order to bring a suit. The Court held that "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" (quoting *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979)).

The reasoning of *Susan B. Anthony List*, *Babbit* and *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)) illustrates why pre-enforcement challenges to agency subpoenas should be allowed. A party bringing suit to quash an agency subpoena is indistinguishable from the plaintiffs in those cases. *Reisman* and subsequent cases have reasoned that a plaintiff may not bring a

pre-enforcement challenge to an administrative subpoena because "prior to the filing of an action to enforce an administrative subpoena, a party upon whom a subpoena has been served faces only the threat of action." *Shea*, 934 F.2d at 46. But this is the same reasoning that the Court has rejected in subsequent cases. As the Court said in *Babbit*, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." 442 U.S. at 298 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

Precedent is littered with contradictions like this. Courts often note that injury from an administrative subpoena is contingent on an actual order of enforcement because "if plaintiffs' defense to the [subpoena] has merit, they will not be exposed to civil fines." *Belle Fourche*, 751 F.2d at 335. But in *Susan B. Anthony List*, the Court explicitly rejected the argument that a potential defense to enforcement negates a pending injury. *See* 573 U.S. at 163. Courts tell plaintiffs that they "should have refused to comply with the subpoena and awaited any enforcement action by the" agency. *In re Ramirez*, 905 F.2d 97, 99 (5th Cir. 1990). But plaintiffs "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt*, 442 U.S. at 298, *see also Susan B. Anthony List*, 573 U.S. at 165 *(*applying *Babbit*'s reasoning to administrative action in addition to criminal prosecution).

Susan B. Anthony List got it right; plaintiffs should be able to bring federal civil suits without having suffered coercive sanctions. The Court should clarify that its holding in *Reisman* does not bar such pre-

enforcement suits against administrative subpoenas. This would help ameliorate the harms suffered by organizations like the Petitioner, who are injured by pernicious agency investigations.

CONCLUSION

For the reasons stated herein, the Court should reverse the Third Circuit and await a chance to clarify the standard for pre-enforcement review of federal administrative subpoenas. By recognizing the right to seek relief before irreparable harm occurs, this Court would not only vindicate the constitutional rights of pro-life and religious organizations, but also set a clear precedent protecting all nonprofits and associations—regardless of their mission—from governmental overreach. Such a ruling would safeguard judicial consistency, promote fairness, and preserve the rule of law for every sector of civil society

Respectfully submitted,

ANDREW NUSSBAUM
Counsel of Record
FIRST & FOURTEENTH, PLLC
2 N Cascade Ave Suite 1430
Colorado Springs, CO 80903
719-428-4937
andrew@first-fourteenth.com

JAMES COMPTON
FIRST & FOURTEENTH, PLLC
800 Connecticut Ave NW, Suite 300
Washington, DC 20006
202.998.1978
James@first-fourteenth.com

Counsel for Amici Curiae

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