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 THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Legislative Exchange Council ("ALEC") proudly serves as America's largest nonprofit, nonpartisan voluntary membership organization of state legislators in the country.[1] With a membership base of hundreds of private sector organizations and with legislator-members in all 50 States, ALEC's state legislative membership amounts to nearly one-quarter of the state legislators in the United States. ALEC and its members are dedicated to the principles of limited government, free markets, and federalism.

A state enforcement agency targeted Petitioner, First Choice Women's Resource Centers, Inc., and ALEC writes to provide further insight into the harms of such unwarranted actions. Various state agencies have raised unfounded suspicions against ALEC, which works with legislators and stakeholders to advance principled policy ideas, in efforts to score political points and undermine ALEC's reputation. Rather than persuading minds in a democratic debate, ALEC's ideological opponents, in conjunction with various states, initiated investigations under the pretense of lobbying and campaign finance violations in order to chill ALEC's speech, harm its reputation, and hinder its operations. This pretext is evidenced by, *inter alia*, the fact that these complaints demanded ALEC identify its members. Despite the obvious First Amendment violations of such inquiries, ALEC was forced to spend significant resources to defend itself.

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[1] No party or counsel for a party authored this brief in whole or in part. No person, other than Amicus, made any financial contribution to the preparation or the submission of this brief. *See* Sup. Ct. R. 37.6.

Naturally, ALEC prevailed in these state actions—but at great cost. To protect its constitutional rights against future political aggressions, ALEC should be able to avail itself of the federal courts.

SUMMARY OF THE ARGUMENT

Unfortunately, First Choice Women's Resource Centers, Inc., is one of many organizations to receive intrusive subpoenas from the State, prompted from First Choice's ideological opponents, that demand, under threat of sanctions, the identities of its donors. In an increasingly politically polarized environment, certain states use their political majorities to target organizations on the other side of the ideological spectrum. Here, ostensibly issued pursuant to a consumer protection investigation, the New Jersey Attorney General's subpoena chilled First Choice's and its donors' First Amendment rights. Accordingly, First Choice has a First Amendment claim that it can bring to federal court.

First, *ALEC* has received demands for the identities of its members from various state enforcement agencies. ALEC's ideological opponents—supporters of furthering larger, more centralized governments which act against the interests of individual liberty—instigated these investigations and demanded ALEC's membership lists. In fact, some enforcement agencies demanded that ALEC produce these membership lists before it was determined that the state's campaign finance or lobbying laws even applied to ALEC's activity. Malicious investigations such as these immediately and irreparably hinder organizations and their ability to carry out their educational mission with efficacy. The expense to defend against these inquiries is significant, and the cost multiplies when

factoring in the reputational damage of being under investigation. Ultimately, ALEC prevailed in each of these actions due to insufficient factual evidence and legal deficiencies, but its ideological opponents still achieved a partial victory. ALEC's ability to advocate for ideas, fundraise, recruit and educate legislative members, and participate in the policy process was inhibited by being forced to navigate the morass of various states' regulatory paradigms to protect its constitutional rights.

Second, the First Amendment vests First Choice with a claim. The New Jersey Attorney General's subpoena demanded compliance under the threat of contempt. This chilled First Choice's and its donors' First Amendment rights. Donors stated that if they knew that their identities were at risk of disclosure to the Attorney General, they may not have donated. That is the essence of a First Amendment claim.

The First Amendment protects the identities of an organization's members and donors under a rigorous application of exacting scrutiny. Here, the Attorney General is required to demonstrate that there is no less intrusive means to obtain the information needed for a consumer protection investigation. Such a requirement is especially necessary where, as here, no person has filed a consumer protection complaint against First Choice.

Third, where the First Amendment provides a federal claim, the Civil Rights Act provides a federal forum to adjudicate that claim. The Civil Rights Act does not impose a state level exhaustion requirement. Nor is the Civil Rights Act dependent on state court action before a person can sue a state official for violating the person's constitutional rights. Instead, the Civil Rights Act exemplifies vertical federalism to

protect civil liberties and enables people to sue state officials in federal court for federal constitutional violations.

ARGUMENT

I. VARIOUS STATE ATTORNEYS GENERAL, AT THE INSTIGATION OF ALEC'S IDEOLOGICAL OPPONENTS, HAVE SUBJECTED ALEC TO INTRUSIVE DEMANDS FOR THE IDENTITIES OF ALEC'S DONORS.

First Choice Women's Resource Centers, Inc., ("First Choice") received a subpoena from the New Jersey Attorney General demanding the production of, *inter alia*, the names of First Choice's donors, under the threat of contempt of court. Pet. for Cert. at 2; Petitioners' Op. Br. at 3. This demand violated First Choice's First Amendment rights. Pet. for Cert. at 2. Worse, the subpoena followed a consumer alert that the New Jersey Attorney General wrote jointly with First Choice's ideological opponent, Planned Parenthood. *Id.*

Unfortunately, First Choice is one of many organizations that frequently receive constitutionally intrusive demands instigated by ideological opponents. In these politically charged times, organizations across the ideological spectrum receive demands for the identities of their members and detailed explications of their activities. These organizations include the NAACP,[2] Americans for Prosperity Foundation,[3] Catholic

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[2] *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449 (1958).

[3] *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021).

Charities of the Rio Grande Valley in Texas,[4] the University of Virginia,[5] the AFL-CIO,[6] the Service Employees Union,[7] the Machinists Non-Partisan Political League,[8] supporters of traditional marriage,[9] and individuals and organizations allied with former Wisconsin Governor Scott Walker.[10] This practice of

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[4] *In re Office of the Attorney General of the State of Texas v. Catholic Charities of the Rio Grande Valley*, No. C-2639-23-C, Response and Objections to Rule 202 Petition at 4 (Hidalgo County District Court, July 3, 2024) (describing the information that the Texas Attorney General sought, including information concerning Catholic Charities oversight of its volunteers, which could include identifying its volunteers, and documents related to Catholic Charities grant applications) *available at* https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2024/07/7.3.24-Response-FILED.pdf (last visited Aug. 20, 2025).

[5] *Cuccinelli v. Rector and Visitors of the University of Virginia*, 722 S.E.2d 626, 628-29 (Va. 2012) (noting that the Virginia Attorney General sought internal communications from a professor related to grant applications).

[6] *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003).

[7] *Dole v. Service Employees Union, etc., Local 280*, 950 F.2d 1456, 1458 (9th Cir. 1991).

[8] *Federal Election Com. v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981).

[9] *See Nat'l Org. for Marriage, Inc. v. United States, IRS*, 24 F. Supp. 3d 518, 520-21, 524 (E.D. Va. 2014) (stating that the IRS mistakenly released NOM's confidential tax filing to a "known political activist" who then gave the tax filing to NOM's ideological opponent); *see also Citizens United v. FEC*, 558 U.S. 310, 481-83 (2010) (Thomas, J., dissenting) (detailing that disclosed donors to California's Proposition 8 campaign faced death threats and were fired from their jobs).

[10] *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 183 (Wis. 2015) (describing that the staggeringly broad search warrants against supporters of Scott Walker netted millions of documents including financial statements, family photos, personal letters).

demanding the identities of an organization's donors is becoming troublingly common—despite this Court's consistent rule that state enforcement agencies may obtain confidential membership lists and donor lists only after surviving exacting scrutiny. *See Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 610-11 (2021).

ALEC was the victim of this conduct, as it was served with unconstitutionally intrusive demands to produce its membership list.[11] In 2021, ALEC faced a persistent bombardment of complaints from 15 state enforcement agencies. These states included: Arizona, Connecticut, Florida, Maine, Michigan, Minnesota, New Mexico, Ohio, Oklahoma, New York, Pennsylvania, Tennessee, Texas, Utah, and Wisconsin.[12] Despite the shallowness of the complaints, ALEC was forced to expend significant resources to defend against them and ultimately vindicate its educational mission. Compounding the injury to ALEC's constitutional rights was that the genesis of the unconstitutionally intrusive demands for the identities of members came from ALEC's ideological opponents.[13] *See Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 164 (2014) (recognizing that because the universe of complainants before the Ohio Elections Commission is

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[11] *See, e.g.,* letter from the staff of the Maine Commission on Governmental Ethics and Election Practices to the Commission, *Investigation of ALEC CARE Software*, at 18 (Bates stamped ETH-9) (June 15, 2022) *available at* https://www.maine.gov/ethics/sites/maine.gov.ethics/files/inline-files/7%20-%20Staff%20Report%20on%20ALEC.pdf (last visited Aug. 20, 2025).

[12] *See id*. at 130 (Bates stamped ETH-121).

[13] *See id*. at 12-18, (Bates stamped ETH-3-ETH-9).

unrestricted, "there is a real risk of complaints from, for example, political opponents.").

Generally, the complaints alleged that ALEC made illegal in-kind political contributions. These nearly-uniform complaints alleged that ALEC provided a constituent management software program to its state legislative members called ALEC CARE, a membership benefit afforded to legislators to offer a new, innovative way for its membership-based organization to flourish.[14] And, among other remedies, such complaints asked that relevant state enforcement bodies compel ALEC to disclose all of ALEC's legislative members.[15]

The allegations and demands submitted to the 15 state agencies were nearly identical, including the demand for the identity of ALEC's legislative members in each respective state.[16] This required ALEC to hire counsel and spend time and resources in 15 states to protect the identities of its members. *See Susan B. Anthony List,* 573 U.S. at 165-66 (observing that Ohio's false statement statute permitted a speaker's ideological opponent to obtain an advantage by simply filing a false statement complaint without having to prove the statement's falsity and timing the complaint "to achieve maximum disruption" by requiring the speaker to divert time and resources away from the speaker's message). ALEC was required to submit written responses in most of the 15 states. ALEC was also required to then respond to written follow-up questions from multiple state enforcement agencies.

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[14] *See id*. at 1.

[15] *See, e.g., id*. at 18 (Bates stamped ETH-9).

[16] *See id*. at 142 (Bates stamped ETH-133); *id*. at 130 (Bates stamped ETH-121).

A few state enforcement agencies held hearings as well. Particularly worrisome for ALEC and its members is that it takes only one state agency to compel the production of membership lists to cause harm to ALEC.

Ultimately, no state found that ALEC committed a violation or required ALEC to disclose its members. Despite the lack of evidence of wrongdoing, however, Maine interviewed one of ALEC's employees concerning the ALEC CARE software program.[17] This employee provided a live demonstration of the software program and answered the Commission's questions.[18] Consistent with ALEC's earlier written submissions, ALEC demonstrated that the ALEC CARE software was for constituency service purposes, and expressly prohibited its use for campaign purposes.[19] Even still, to protect its constitutional rights, ALEC diverted significant time and resources for this witness to prepare for the interview and then participate in it.

Approximately one month after this demonstration, and approximately one year after the complaint was filed, the Commission's investigators recommended that the Commission dismiss the complaint for lack of sufficient evidence.[20] Despite the fact that no state found that ALEC violated its respective statutes,[21]

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[17] *See id*. at 5-8.

[18] *See id*. at 5-7.

[19] *See id*. at 5, 137, 142 (Bates stamped ETH-128, 133).

[20] *See id*. at 8-9.

[21] *See* letter from the staff of the Maine Commission on Governmental Ethics and Election Practices to the Commission, *Update—Investigation of ALEC CARE Software* at 1-3, (Feb. 16, 2022) *available at* www.maine.gov/ethics/sites/maine.gov.ethics

ALEC suffered the threat of having to disclose its membership information, and a hollowing of its Maine legislator-member base as a consequence.[22] As stated by a former Maine legislator, this was one of many baseless investigations into ALEC launched by the hand of an ideological opponent: the Center for Media and Democracy.[23]

Unfortunately, this was not the first time that an ideological opponent filed a complaint that caused a state enforcement agency to investigate ALEC. In May of 2012, the Minnesota Campaign Finance and Public Disclosure Board received a complaint from Common Cause Minnesota.[24] The complaint alleged that ALEC violated Minnesota's lobbying laws because ALEC did not register as a lobbyist principal and file the requisite reports required of lobbyists.[25] For these alleged violations, Common Cause Minnesota asked the Campaign Finance and Public Disclosure Board to conduct an audit of ALEC's finances which would

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/files/inline-files/5%20-%20ALEC_web.pdf (last visited Aug. 22, 2025).

[22] *See supra* n.11 at 18 (Bates stamped ETH-9).

[23] *See* Richard H. Campell, *Maine Compass: Ethics Commission Moves Forward with Nuisance Complaint Against Conservative Group*, Centralmain.com, (March 30, 2022) *available at* https://www.centralmaine.com/2022/03/30/maine-compass-ethics-commission-moves-forward-with-nuisance-complaint-against-conservative-group/ (last visited Aug. 26, 2025).

[24] *See Findings of Fact, Conclusions of Law, and Order In the Matter of the Complaint of Common Cause Minnesota Regarding the American Legislative Exchange Council*, Minnesota Campaign Finance and Public Disclosure Board (Feb. 3, 2015) *available at https://cfb.mn.gov/pdf/bdactions/archive/findings/02_03_2015_ALEC.pdf?t=1750464000* (last visited Aug. 20, 2025).

[25] *Id*. at 1.

effectively reveal the names and addresses of ALEC's donors.[26] *See United States v. Grayson County State Bank*, 656 F.2d 1070, 1074 (5th Cir. 1981) (observing that the fact of an objective chill in the exercise of First Amendment rights is readily apparent where the IRS subpoenas documents that will reveal the identities of an organization's members, where the organization opposes IRS policies). In fact, in one of its requests, the Board asked ALEC to both identify its members and to provide its communications with its members.[27]

As a result of the complaint and its ongoing investigation, ALEC was unable to engage in its organizational mission of recruiting and educating legislators in Minnesota for nearly three years. ALEC's Minnesota legislator-members also suffered harm. Legislator engagement in ALEC's various educational briefings and conferences provided to enhance their knowledge of public policy matters—the primary membership benefit for which legislators join ALEC—subsided. Because the complaint was founded on a violation of Minnesota lobbying laws, legislators' travel reimbursements for these educational opportunities—a benefit afforded to legislators by most states—also became problematic. Further, as this investigation ensued, so did reputational damage

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[26] *See Complaint for Violation of Campaign Finance and Public Disclosure Act Submitted by Common Cause Minnesota* at 8 (May 12, 2015) *available at* https://cfb.mn.gov/pdf/bdactions/archive/findings/Attachments%20to%20Findings/1%20%20Complaint.pdf (last visited Aug. 20, 2025).

[27] *See supra* n.24 at 2 ("[T]he Executive Director explained that staff planned to make a request for information from ALEC that would be more limited than previous requests and would not require ALEC to identify any of its members; an approach that would address one of ALEC's key objections.").

to ALEC, as the various news media outlet reports on these baseless allegations significantly impacted ALEC's operation and reputation, not only in Minnesota, but nationwide.

Almost three years later, and after ALEC submitted three written responses and had three of its publicly identified members give oral testimony, the Minnesota Campaign Finance and Public Disclosure Board dismissed the complaint.[28] The Board concluded that ALEC's activities throughout the United States and in Minnesota did not qualify as lobbying under Minnesota law.

In the end, through filing meritless complaints, ALEC's ideological opponents coaxed state enforcement agencies into demanding the identities of ALEC's donors and members. Thankfully, due to insubstantial factual and legal evidence, the complaints were dismissed. But still, relevant state enforcement agencies attempted to force ALEC to identify its members—even before those agencies determined that ALEC's activities violated an applicable law. Even if those enforcement bodies had the identities of ALEC's members, it would not have been helpful in determining whether there was a violation of campaign finance or lobbying law. *See Ams. for Prosp. Found.*, 594 U.S. at 614. Similarly, any potentially good-faith basis to demand ALEC's constitutionally protected information would be rendered dubious because the request was instigated by ALEC's ideological opponents. *See id.*

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[28] *See supra* n. 24 at 2-3 and 8.

State enforcement agencies utilize this dragnet approach when it comes to an organization's donor and membership list. In *Americans for Prosperity Foundation*, the California Attorney General demanded that nonprofit entities produce their unredacted Form 990, which would reveal their largest donors. *See* 594 U.S. at 614-15. With ALEC, its ideological opponents used state enforcement agencies to seek ALEC's membership lists before there was any conclusion that the state statutes at issue applied to ALEC's activity. And here, the New Jersey Attorney General demanded the identities of all of First Choice's contributors in a consumer protection investigation without identifying even one consumer protection complaint. Pet. for Cert. at 2-3. As the NAACP trenchantly observed before the Ninth Circuit in *Americans for Prosperity Foundation v. Becerra*, turning over constitutionally protected donor and membership lists to a state enforcement agency is like handing over a loaded gun, one that the enforcement agency can fire at will or fire accidentally, causing maximum First Amendment damage. *See* Brief for the NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae, *Americans for Prosperity Foundation v. Becerra*, No. 16-55727, Dkt. 45 (9th Cir. Jan. 27, 2017) at 28; *see also* Br. of Amicus Curiae, American Legislative Exchange Council at 4-9, *Americans for Prosperity Foundation v. Bonta*, Nos. 19-251 & 19-255, (U.S. March 1, 2021) (detailing how Senator Dick Durbin's efforts at contacting persons he suspected of being members and supporters of ALEC led to $2 million in lost revenue and nearly 400 state legislative members, including Democrat members, departing ALEC).[29] To combat this severely overbroad

[29] Accidental disclosures are also a risk. For example, in 2012, the IRS accidentally sent Matthew Meisel, a "known political

approach, which poses a significant risk of disclosing constitutionally protected information, organizations like First Choice and ALEC need an independent federal safety valve.

II. THE FIRST AMENDMENT VESTS FIRST CHOICE WITH A CLAIM.

As demonstrated above, state enforcement agencies, sometimes at the behest of the investigative target's ideological opponents, demand the production of private donor and membership information. This is done even before determining that a violation has occurred or that the law applies to the organization's activities. The First Amendment, however, provides both relief and protects organizations from the consequences of disclosure.

A. First Choice has Satisfied the Elements of a First Amendment Claim.

When an organization receives a subpoena demanding that, under the threat of contempt of court, the organization produce the identities of the organization's donors and members, the organization has a First Amendment claim. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association.") (cleaned

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activist," the National Organization for Marriage's ("NOM") unredacted confidential 990 revealing the names and addresses of all of NOM's donors who donated $5,000 or more. Meisel then sent the 990 to NOM's ideological opponent, the Human Rights Campaign which then sent the 990 to the Huffington Post. The Huffington Post then published the confidential donor information. *Nat'l Org. for Marriage,* 24 F. Supp. 3d at 520-21, 524.

up). This Court has recognized that one's speech is undeniably enhanced by association and that there is a vital link between the freedom to associate and the privacy of one's associations. *See id*; *see Buckley v. Valeo*, 424 U.S. 1, 15 (1976). Disclosure harms the right to associate because donors and members who want their identities to remain private will be less likely to participate if they know their identities will be revealed. *See Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006); *see also* Pet. for Cert. at 9, 26-27 (declarants stating that they want their donations to remain confidential and that the risk of disclosure to an ideological opponent and law enforcement official would make them less likely to donate).

Standing in the pre-enforcement context for First Amendment claims requires that a plaintiff have a credible fear of prosecution and that the plaintiff engage in a course of conduct that is "arguably effected with a constitutional interest" but is prescribed by statute. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). And in the First Amendment context, harm to free speech and associational rights occur even when there is no prosecution, only the threat of one. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (finding standing in a pre-enforcement challenge where enforcement authorities did not say they would not enforce the law and acknowledging that the harm is one of self-censorship, a harm that can occur without prosecution); *Susan B. Anthony List*, 573 U.S. at 159 (stating that threatened prosecution for engaging in a constitutionally protected course of conduct is sufficient to establish standing in the pre-enforcement context). Here, First Choice has a claim and it is ripe. First Choice received a subpoena demanding the identities of First Choice's donors and that subpoena carried with it the threat of

sanctions for non-compliance. Petitioner's Op. Br. at 3. The subpoena also caused an objectively reasonable chill to First Choice's donors. Pet. for Cert. at 9, 26-27. Therefore, the demand for First Choice's donor information, under the threat of sanctions, is sufficient for First Choice to have a First Amendment claim. Accordingly, First Choice's claim is ripe for adjudication.

B. To Protect the Identities of Donors and Members, this Court Rigorously Applies Exacting Scrutiny.

In *Americans for Prosperity Foundation v. Bonta*, this Court reviewed the constitutionality of California's requirement that prior to soliciting contributions in California, charities must register with the California Attorney General. 594 U.S. at 600-01. Part of the registration process includes disclosing the identities of the charity's major donors. *Id*. at 601. After multiple rounds of negotiations, the California Attorney General threatened to suspend Americans for Prosperity Foundation and prohibit it from soliciting contributions in California. *Id*. at 603. The Foundation responded by filing a lawsuit. *Id*. In recounting its opinion in *NAACP v. Alabama*, the Court noted that there is a "vital relationship between freedom to associate and privacy in one's associations." *Id*. at 606 (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

To obtain the identities of an organization's donors and members, state enforcement agencies must show that compelled disclosure of donors and members satisfies exacting scrutiny. *Ams. for Prosp. Found.*, 594 U.S. at 611. Embedded within the exacting scrutiny requirement is a demand that the state

enforcement agency show that there is no less intrusive way to prove their case. *Id*. at 610 ("[T]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."). Requiring a showing that there exists no less intrusive means to prove an enforcement agency's case satisfies the First Amendment's demand that when regulating free speech and association, governments are prohibited from conducting "broad and sweeping" investigations but may regulate "only with narrow specificity." *Id*.

The narrowly tailoring portion of the exacting scrutiny test is essential because disclosure itself "creates an unnecessary risk of chilling" the First Amendment rights of an organization's donors and members. *Id*. at 616. First Choice substantiated its concerns that its donors and members faced an objectively reasonable chill in their First Amendment rights. Pet. for Cert. at 9, 26-27. And those risks are "heightened" because "anyone with access to a computer can compile a wealth of information about anyone else, including such sensitive details as a person's home address or the school attended by his children." *Ams. for Prosp. Found.*, 594 U.S. at 617.

Here, it was First Choice's ideological opponent, Planned Parenthood, that collaborated with the New Jersey Attorney General to publish its consumer alert about First Choice. Pet. for Cert. at 2. Moreover, the New Jersey Attorney General is an elected official who promised to take action against First Choice. *Id*. It was therefore expected that the Attorney General's demand of the names and addresses of First Choice's donors had a chilling effect on those donors. Pet. for Cert. at 9, 26-27; *Grayson County State Bank*, 656 F.2d at 1074 (finding that revealing the identities of

members of an organization that opposed the IRS's policies to the IRS has a "readily apparent" chilling effect on the organization's members).

Accordingly, exacting scrutiny must be applied rigorously for "[t]he state has a special incentive to repress opposition and often wields a more effective power of suppression." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777, n.11 (1978). By collecting donor and member names and addresses, without identifying a single complaint or showing that First Choice has violated a law, the New Jersey Attorney General is loading a political gun that he may one day decide to fire. *See* Brief for the NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae, *Ams. for Prosp. Found. v. Becerra*, No. 16-55727, Dkt. 45 (9th Cir. Jan. 27, 2017) at 28.

It is not uncommon for attorneys general to accidentally publish confidential donor information. In *Americans for Prosperity Foundation*, the Ninth Circuit recognized that due to both a human coding error and to security lapses, thousands of confidential 990s containing the names and addresses of organizations' top donors were publicly available. The human coding error publicly revealed the names and addresses of 1,800 organizations' donors. Additionally, a security lapse caused all registered organizations' filings, amounting to 350,000 filings, containing the registered organizations' confidential donor information to become publicly available. *See Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000, 1018 (9th Cir. 2018).[30] Despite assurances of confidentiality, constitutionally protected donor information does not al-

[30] *Reversed and Remanded by Ams. For Prosperity Found. v. Bonta*, 594 U.S. 595 (2021).

ways remain confidential, especially when motivated ideological opponents try to obtain the information. *See Shelton v. Tucker*, 364 U.S. 479, 486 n.7 (1960) (noting that a witness testified that his organization was trying to obtain confidential information about organizations with which public school teachers belonged with the goal of discovering all teachers who belonged to the ACLU and other organizations and having them fired); *United States v. Rumely*, 345 U.S. 41, 57 (1953) (Douglas, J., concurring) (observing that both the government's subpoena power, and the government's mandated disclosure of sensitive information could make individuals "fear to read what is unpopular, what the powers-that-be dislike.").

Finding that First Choice's First Amendment claim is unripe will incentivize ideological opponents of organizations to cajole state enforcement authorities to demand confidential and constitutionally protected information. In *AFL-CIO v. FEC*, National Republican party committees filed complaints with the FEC alleging that the Democratic party committees and its candidates had unlawfully coordinated with the AFL-CIO. 333 F.3d 168, 171 (D.C. Cir. 2003). During the investigation, the Democratic National Committee, the AFL-CIO, and other organizations submitted to the FEC approximately 50,000 pages of documents that included sensitive internal campaign strategy communications. *See id*. At the conclusion of the investigation, the FEC, acting pursuant to one of its FOIA regulations, prepared the documents for publication. *See id*. at 172. The AFL-CIO and the Democratic National Committee petitioned the FEC to not disclose these documents contending that the First Amendment protected these documents from disclosure. *See id*. When the FEC denied the petition,

both the AFL-CIO and the Democratic National Committee sued. *See id*.

The D.C. Circuit held that the First Amendment protected these documents from disclosure. *See id*. at 178-79. As part of its reasoning, the court noted that permitting the FEC to disclose these documents would incentivize ideological and political opponents to file complaints. *See id*. These complainants would file complaints to both chill their ideological and political opponents' speech and to obtain confidential political strategy documents, membership lists, and donor lists. *See id*. at 178.

Here, the New Jersey Attorney General—who collaborated with Planned Parenthood in drafting a consumer alert—has not shown how having the names and addresses of 5,000 contributors is the least intrusive means to advance his consumer fraud investigation. *See Ams. for Pros. Found.*, 594 U.S. at 613. Before obtaining this information, a court should compel him to satisfy exacting scrutiny.

Exacting scrutiny requires that the Attorney General demonstrate that demanding First Choice's donor and member information is narrowly tailored to the enforcement of New Jersey's consumer protection statutes. In civil litigation, if a litigant were to demand the identities of an organization's members, donors, and their internal conversations, the litigant must show that the information is highly relevant and that the information sought is otherwise unavailable. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1161 (9th Cir. 2010); *see also Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981) (requiring litigants to prove that they have exhausted all other reasonable avenues to obtain the information sought before compelling opponent to disclose constitutionally protected

information); *cert. granted and vacated as moot Moore v. Black Panther Party,* 458 U.S. 1118 (1982);[31] *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (stating that one of the factors courts must analyze when evaluating First Amendment privilege arguments is whether the information sought is available from other less intrusive sources); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) (requiring that the government show it has a compelling need for documents that reveal the identities of members of an organization). Additionally, compelling disclosure of constitutionally protected information is an option not of first resort but of last resort in this context. *See Black Panther Party*, 661 F.2d at 1268. The New Jersey Attorney General, especially where no consumer protection complaints have been made against First Choice, should be held to the same standard.

At its most fundamental, the First Amendment provides First Choice with a First Amendment claim, and the Civil Rights Act gives First Choice an independent federal forum.

III. THE CIVIL RIGHTS ACT PROVIDES A FEDERAL FORUM TO BRING CONSTITUTIONAL CLAIMS AGAINST STATE ACTORS.

ALEC embraces and promotes the principles of federalism. From the very beginning of the Republic, it has been recognized that the federal government is a government of limited powers. *Marbury v. Madison*,

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[31] Although vacated, courts within the D.C. Circuit still follow the reasoning of the *Black Panther Party* decision. *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 n.6 (D.D.C. 2002).

5 U.S. 137 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written."). Accordingly, when Congress enacts a law, "it must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Similarly, the Judicial Power of the United States is limited to cases and controversies. *See* U.S. Const. art. III, § 2. It is these principles that protect our constitutional rights. Thus, the dual sovereignty structure of the United States maintains that states "retain[] a residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)). These two separate and distinct spheres of governance are "one of the Constitution's structural protections of liberty." *Id*. at 921 (noting that both horizontal federalism and vertical federalism serve to "reduce the risk of tyranny and abuse from either front."). As Madison recognized, when it comes to the protection of individual rights, it is dual sovereignty that provides dual security. "The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (J. Madison). And as this Court has made it emphatically clear that, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz*, 521 U.S. at 920.

With the Civil Rights Act, Congress saw the need to protect the liberties of the people from state officials who violated those liberties. After determining that the several states were unable to guarantee constitutional rights for all, Congress opened the federal courthouse doors to those who sought to vindicate their constitutional rights.

As Congress deliberated the Civil Rights Act of 1871, President Grant exhorted Congress to pass the Act because there was "a condition that existed in some States which rendered life and property insecure and which was beyond the power of state authorities to control." *Monroe v. Pape*, 365 U.S. 167, 230 n.46 (1961) (Frankfurter, J., concurring). Reflecting President Grant's position, congressional members stated that the Civil Rights Act was needed "to supplant state administration which was failing to provide effective protection for private rights." *Id*. Congress recognized that state law enforcement was ineffective in protecting individual constitutional rights. *Briscoe v. LaHue*, 460 U.S. 325, 338 (1983); *see also Monroe*, 365 U.S. at 230 n.46 (observing that because state authorities could not protect individual constitutional rights, "federal action to supplant state administration" was needed). To address this deficiency, congressional supporters of the Civil Rights Act contended that to protect their constitutional rights, the people needed "an independent federal remedy." *Briscoe*, 460 U.S. at 338. Accordingly, to obtain the benefits and protections of the Civil Rights Act, a plaintiff is not required to first exhaust all state court options before bringing claims in federal court. *See Monroe*, 365 U.S. at 183.

Less than one month "after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern States[]", Congress passed the Civil Rights Act. *Briscoe*, 460 U.S. at 337. The very central purpose of the civil rights statutes "is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett v. Grattan*, 468 U.S. 42, 55 (1984). Thus, the Civil Rights Act empowers the federal courts to grant "a uniquely federal remedy against incursions . . . upon

rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

The Third Circuit, however, ruled that First Choice could not vindicate their federal constitutional First Amendment claim in federal court, because First Choice can assert its constitutional claims in state court. Petitioner's Op. Br. at 3 and 16. The Third Circuit misunderstands the purpose of the Civil Rights Act.

Congress opened the federal courthouse doors to those persons whose constitutional rights were violated by state officials. *See Heck v. Humphrey*, 512 U.S. 477, 480 (1994). In doing so, Congress did not impose an exhaustion requirement where those victims of unconstitutional behavior by hostile state officials must first seek redress from the very same government whose official precipitated the injury. *Felder v. Casey*, 487 U.S. 131, 147 (1988).[32] Indeed, it would be an odd result when Congress was overwhelmingly concerned with the states' administration of justice and still imposed a requirement to go through the state court process and wait for certain state court action before seeking redress in federal court. *Mitchum*, 407 U.S. at 241-42 (stating that in crafting the Civil Rights Act, Congress recognized that state courts were failing to protect constitutional rights and therefore Congress placed the federal courts between the States and the people to protect individual

[32] *Felder*'s holding that the Civil Rights Act does not impose an exhaustion requirement was modified by Congress in the Prison Litigation Reform Act of 1997 which requires prisoners to exhaust administrative remedies prior to filing a civil rights action. 42 U.S.C. § 1997e(a). Since First Choice does not bring a Prison Litigation Reform Act claim, *Felder*'s holding remains good law.

constitutional rights). Instead, Congress acted appropriately with authority under the Fourteenth Amendment to protect the liberties of persons. This is an exercise in vertical federalism designed to protect liberty.

Additionally, having an independent federal forum to vindicate constitutional rights is especially important where a speaker, like First Choice, exercises speech that is contrary to the stated positions of the state official who wields enforcement power. This is so because here "[t]he state has a special incentive to repress opposition and often wields a more effective power of suppression." *First Nat'l Bank*, 435 U.S. at 777, n.11. Here, Planned Parenthood and the New Jersey Attorney General, both First Choice's ideological opponents, stand hand-in-hand. To vindicate its constitutional rights, therefore, First Choice needs the independent federal forum it is entitled to.

CONCLUSION

First Choice, like ALEC, is one of many organizations that receive subpoenas from ideological opponents that, under threat of contempt of court, seek to compel the disclosure of its donors. Such disingenuous attempts to undermine the promises of free speech and association which the Constitution guarantees deserve to be scrutinized in a federal forum. Due to the reasonably objective chill the New Jersey Attorney General's subpoena caused to First Choice's donors, compounded by the threat of enforcement, First Choice has a First Amendment claim which the Civil Rights Act provides an independent federal forum to adjudicate. This Court should permit First Choice to have its day in federal court.

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