No. 24-781

IN THE

# Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,

*Petitioner,*

*v.*

MATTHEW J. 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 INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* SUPPORTING PETITIONER

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## INTERESTS OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. Along with scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. To that end, this case interests the Institute not just because of the importance of strengthening the First Amendment's protections for donor privacy, but also because of the likelihood that this Court's decision here will broadly impact the availability of judicial relief in federal forums when state governments threaten the rights of individuals and organizations throughout the nation.

## SUMMARY OF THE ARGUMENT

The parallel between this case and the Court's landmark decision in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) ("*Patterson I*"), needs little explanation. In both cases, a rogue attorney general wields his broad power to punish an ideological enemy and drive it out of the state—clearly violating the First Amendment right of associational privacy.

But the parallels do not stop there. After this Court's decision in *Patterson I*, Alabama continued its crusade against the NAACP for six more years. Relying on a

1. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amicus or its counsel, financially contribute to preparing or submitting this brief. S. Ct. R. 37.6.

complicit state judiciary, Alabama's Attorney General successfully avoided federal review of the merits of his injunction against the NAACP through delay and procedural gamesmanship. It took four trips to this Court over eight years to end the saga.

What use is the First Amendment if a government determined to ignore it can manipulate federal jurisdiction to avoid meaningful review? That's the question posed in this case—and it was also the question posed in the lesser-known story about what happened after *Patterson I*. The history following *Patterson I* shows how New Jersey's ploy here to avoid federal review is nothing new. And it shows how critical it is to ensure that people and organizations like Petitioner are able to obtain prompt relief in a federal forum.

## ARGUMENT

New Jersey's Attorney General is not shy about his desire to run pregnancy centers like Petitioner out of his state. *See* Pet. Br. 7–8. Under the guise of protecting consumers, the Attorney General has followed the same path that countless state officials have taken before him—wielding government power to drive political or ideological enemies out of existence. The campaign against Petitioner is just one example of an unfortunately all-too-common practice.

But it's an example that looks eerily familiar to what this Court faced 70 years ago when Alabama set out on a mission to drive the NAACP out of its state. Part of that story is well known: Alabama's Attorney General sought access to the NAACP's membership list, which the

NAACP refused to turn over out of fear it would be used to harass those individuals on the list. This Court—in a case that would lay the foundation for the First Amendment's protection of associational privacy—unanimously rejected Alabama's ploy. *See Patterson I*, 357 U.S. at 466.

Yet that's only part of the story. Many are unaware that Alabama continued its crusade against the NAACP for years after this Court's landmark decision. In fact, this Court issued three more decisions against the state over the next six years until it finally relented. All told, Alabama kept the NAACP from operating in the state for eight years, avoiding meaningful federal review of its crusade through a series of delays and procedural gamesmanship.

History is a helpful guide. While the similarity between *Patterson I* and this case needs little elaboration, Alabama's manipulation of federal jurisdiction looks eerily like Petitioner's struggle for judicial relief here. The Court should reverse the judgment below and clarify that federal courts cannot abdicate their duty to exercise jurisdiction to protect people and organizations from this kind of harassment.

## I. The lesson of *NAACP v. Alabama* is as much about procedural gamesmanship as it is the First Amendment.

The Alabama Attorney General's unsuccessful attempt at obtaining the NAACP's membership list led the Court to recognize robust First Amendment protections against government intrusion into private associations. But the story of *NAACP v. Alabama* did not stop there. It

continued for six more years (including three more trips to this Court), thanks to an "attorney general, his assistants, and complicit state judges" who "kept acting as if they were bound by neither the Supreme Court nor the Constitution." Helen J. Knowles-Gardner, *"The ct is disposed to consider the merits…Wow!": Anthony Lewis Takes Us Inside the Oral Arguments in* NAACP v. Alabama ex rel. Flowers *(1964)*, 49 J. S. Ct. Hist. 213, 213 (2024). It's a story of how "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control . . . the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347 (1816).

In the summer of 1956, Alabama Attorney General John Patterson asked a state trial court to prohibit the NAACP "from further doing business in the State." Edwin Strickland, *Temporary Writ Is Issued Against NAACP in Alabama*, Birmingham News, June 1, 1956. Patterson feigned righteousness, lamenting that "[t]he good relations that have traditionally existed in our state between the White and Negro races [had] been jeopardized by acts of irresponsible groups and individuals," and proclaimed that the "grave problems" Alabama faced could "best be met without disrupting outside forces, such as the NAACP." *Id.* The state court judge granted an *ex parte* motion for a temporary restraining order half an hour after filing.

"Thus began" the story of one of this Court's most important First Amendment cases. Helen J. Knowles-Gardner, *The First Amendment to the Constitution, Associational Freedom, and the Future of the Country: Alabama's Direct Attack on the Existence of the NAACP*, 48 Seattle U. L. Rev. 1, 17 (2024). Alabama secured its restraining order on June 1, 1956. And that "temporary"

injunction remained in place for eight years. *See* Knowles-Gardner, *Inside the Oral Arguments*, *supra*, at 233.

Every student of the First Amendment knows about *Patterson I*. In that seminal decision, the Court unanimously held that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other forms of government regulation]." 357 U.S. at 462. In doing so, it laid the foundation for seven decades of decisions recognizing the First Amendment's protection against state-compelled disclosure of group association. *See Ams. for Prosp. Found. v. Bonta*, 594 U.S. 595, 607–08 (2022). The notion that compelled disclosure chills speech, if it was ever controversial, is now considered "inevitable." *Id.* at 607.

But *Patterson I* marked only the beginning of the NAACP's battle with Alabama. The organization asked the Court not just to rule on the compelled disclosure, but also to toss the temporary restraining order—which prohibited the NAACP from operating in the state—as well. 357 U.S. at 466. The Court declined. Instead, it declared that the contempt judgment arising from the NAACP's failure to comply with the order compelling it to disclose its members violated the First Amendment, and the Court sent the case back to the state court for further proceedings. *Id.* at 466–67.

The remand didn't last long. The NAACP was back before this Court the very next term after the Alabama Supreme Court affirmed the contempt judgment that this Court had just invalidated. *See NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) ("*Patterson II*"). How did that happen?

On remand, the Alabama Supreme Court held that the contempt judgment against the NAACP remained valid because the NAACP had failed to comply with other requirements of the trial court's discovery order. *Id.* at 241–42. In doing so, the Alabama Court "concluded that this Court was 'mistaken' in considering that, except for the refusal to provide its membership lists, [the NAACP] had complied, or tendered satisfactory compliance with" the other requirements in the trial court's order. *Id.* at 242. And so, the state high court concluded, this Court's holding that the contempt judgment violated the First Amendment did not matter because the NAACP had also failed to comply with other aspects of the order. *Id.*

In another unanimous opinion, the Court reversed the Alabama Supreme Court and chastised the Attorney General for his gamesmanship. When the Attorney General appeared in front of this Court in *Patterson I*, "[t]he State made not even an indication that other portions of the production order had not been complied with and, therefore, required its affirmance." *Id.* at 243. But after losing, the Attorney General shifted positions in front of the state court, devising a new basis for affirming a judgment this Court had just overturned. The Court saw through that maneuver, holding that Alabama's new claims came "too late." *Id.* at 243.

The Court was magnanimous in reversing the Alabama Supreme Court a second time just a year and a half after the first—excusing the state court for what, in retrospect, likely was not a mistake: "We take it from the record now before us that the Supreme Court of Alabama evidently was not acquainted with the detailed basis of the proceedings here and the consequent ground for our

defined disposition." *Id.* at 243–44. And so "[w]e assume," the Court wrote, "that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate [in *Patterson I*]." *Id.* at 245. Thus, the case returned to state court for further proceedings regarding the now three-year-old "temporary" restraining order.

The parties returned to the Supreme Court two years later. Five years after the court entered a temporary restraining order, the NAACP still had not had its day in court to challenge it on the merits. Knowles-Gardner, *Inside the Oral Arguments*, *supra*, at 227. It sought relief from the delays in this Court. In a short, one-paragraph per curiam decision, the Court ordered the state court "to proceed with the trial of the issues in this action within a reasonable time, no later than January 2, 1962"—or about two months later. *NAACP v. Gallion*, 368 U.S. 16, 16 (1961).

"On December 27, 1961, with the clock counting down to the January 2, 1962, deadline, [the trial judge] presided over the first of three days of arguments and testimony." Knowles-Gardner, *Inside the Oral Arguments*, *supra*, at 227. Then, "[r]ejecting all of the overwhelming evidence to the contrary, he ruled that the NAACP had continued to do business in Alabama (under the guise of other organizations)" despite the temporary restraining order. *Id.* The trial judge thus entered a permanent injunction barring the NAACP from operating in Alabama ever again. "And then the wheels of justice ground to a halt." *Id.*

The NAACP appealed once again to the state Supreme Court. And again, it lost. But the Alabama Supreme Court

ruled against the NAACP "without considering the merits." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 292–93 (1964). Instead, in a transparent effort to erect a "barrier to [federal] consideration of the constitutionality of the [NAACP's] ouster from Alabama," the state's high court "relied wholly on procedural grounds" to deny the NAACP's appeal. *Id.* at 293. And so when *Flowers* finally reached this Court, the primary issue was the state's contention that adequate and independent nonfederal grounds barred review.

The Court opened its opinion in *Flowers* with the observation that the NAACP's right to operate in Alabama "reaches this Court for the fourth time." *Id.* at 289. It then recounted the tedious procedural history of how the lower Alabama courts repeatedly obstructed not just the NAACP's ability to operate in the state, but also its ability to obtain meaningful judicial relief. *See id.* at 290–93.

That tone matched the Court's demeanor when it heard arguments in the case two months before. "Inside the courtroom on March 24, 1964, the justices were determined to issue a ruling that would bring this litigation to an end and allow the NAACP back into Alabama after an eight-year absence." Knowles-Gardner, *Inside the Oral Arguments*, *supra*, at 214. The justices grilled Alabama's attorney in a way that "expose[d] the Alabama court's obstructionist tactics." *Id.* at 229–30. Eventually, responding to Justice Stewart's "frustration with the actions of the Alabama Supreme Court," the state's attorney conceded it was "difficult" to "give an explanation as to why a court did a certain thing or its reasons for it." *Id.* at 230. "Sometimes I know, and sometimes I do not," he said. *Id.*

In its briefs, Alabama urged the Court to remand the case back to the state court if it found the procedural bar inadequate to sustain the decision. But during argument, "the lawyer stated that if the Court did wish to rule on the merits of the case, it should have the entire record before it." *Id.* at 230. What happened next surprised Anthony Lewis, the famed Supreme Court reporter for *The New York Times*: it ordered the state to submit the entire 1347-page record and asked the parties to brief the merits within the next 40 days. *Id.* "Wow!" Lewis wrote, taking notes during the argument. *Id.* at 231. After three remands over six years, the Court was no longer interested in handing the case back to the Alabama Supreme Court.

When the decision finally issued in *Flowers*, it was no surprise that the Court rejected Alabama's procedural gimmick—chastising the state court for having never "applied their [procedural] rules . . . with the *pointless severity* shown" to the NAACP. 377 U.S. at 297 (emphasis added). The Court then turned to the merits, ruled for the NAACP, and reversed the state court's judgment. *Id.* at 302–10.

But not without a final warning that the Court would not tolerate further gamesmanship by the lower courts. *Id.* at 310. "Should we unhappily be mistaken in our belief that the Supreme Court of Alabama will promptly implement this disposition, leave is given to the [NAACP] to apply to this Court for further appropriate relief." *Id.* The state courts got the message. Soon after that unanimous opinion, the NAACP finally began "reorganizing, restoring, and rebuilding the NAACP in Alabama . . . on Saturday October 31, 1964"—more than eight years after a trial judge's temporary restraining order shut

it down. Knowles-Gardner, *Inside the Oral Arguments*, *supra*, at 233.

## II. Abdicating the federal judiciary's duty to exercise jurisdiction here will only lead to more government officials exercising their power to harass political enemies.

1. New Jersey's ploy to obstruct federal review of its unconstitutional demand for donor information is just a new iteration of an old pattern. The parties and stakes may change, but the tactics remain the same.

Start by declaring your ideological enemies a menace to the public. Alabama's Attorney General accused the NAACP of breaching the peace. Knowles-Gardner, *Associational Freedom & the Future*, *supra*, at 17. And New Jersey's Attorney General issued a "consumer alert" to warn the public about Petitioner, accusing it of misleading its donors. Pet. Br. at 7, 9.

Next, put onerous demands on the target that make operating difficult or even impossible. Alabama demanded detailed information about the NAACP's members and fundraising activity—information that the organization could not possibly disclose. Knowles-Gardner, *Associational Freedom & the Future*, *supra*, at 19–20. New Jersey, likewise, demanded "the full names, phone numbers, addresses, and present or last known place of employment of every one of [Petitioner's] donors who gave through [a specific website]." Pet. Br. at 9.

And third, obstruct federal judicial review to maintain the coercive pressure on those who have been targeted.

Alabama—with the aid of "complicit state judges"—successfully kept the NAACP out of business for eight years by preventing this Court from reviewing the merits of the restraining order. Knowles-Gardner, *Inside the Oral Arguments*, *supra*, at 213. Here, New Jersey hopes to keep the Petitioner in perpetual limbo because of the possibility that its donors will be disclosed, unable to seek relief in federal court for possibly years to come. *See* Pet. Br. at 13.

These first two steps are well known to the Court, as it has frequently rebuffed governmental efforts to demand that individuals and organizations with dissident views identify their private associations. *See, e.g.*, *Gibson v. Fla. Legislative Investigation Comm'n*, 372 U.S. 539, 558 (1963); *Shelton v. Tucker*, 364 U.S. 479, 489–90 (1960). But the history described above shows that the third piece of this attack is just as problematic, and it has roots just as deep.

2. Of course, one difference today is the availability of § 1983. Although enacted in 1871, "[t]he post-Reconstruction judicial history of [§ 1983] is relatively skimpy up to 1939." Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw. U. L. Rev. 277, 282 (1965). Slowly that began to change as the Court refined its interpretation of the statute to cover an increasingly larger category of government misconduct. *Id.* at 287–94. Then, in 1961, the Court decided *Monroe v. Pape*, ushering in "an explosion of actions in the lower federal courts" brought under § 1983. *Id.* at 278. At that point, the NAACP had been ousted from the state and locked in litigation against Alabama for five years.

"The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quotation modified). Yet skepticism of this mechanism—based on the quaint notion that state tribunals will suffice to protect the people—was not new even in 1871. "The constitution [presumes] . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control . . . the regular administration of justice." *Hunter's Lessee*, 14 U.S. at 347. And in Section 1983, Congress "guarantee[d] a federal forum for claims" that state officials have violated federal law. *Knick v. Twp. of Scott*, 588 U.S. 180, 185 (2019) (quotation modified).

A key element of that guarantee—particularly with the First Amendment—is the right to pre-enforcement review. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–60 (2014). Not only does federal law provide organizations like Petitioner a statutory basis for protecting their First Amendment rights in federal court, but the Constitution also allows courts to prevent unlawful state action before it happens. *Id.* And when the threat of unconstitutional conduct reasonably chills speech, Article III vests federal courts with jurisdiction to hear the claim under § 1983. *See Laird v. Tatum*, 408 U.S. 1, 11 (1972).

3. Ignoring these longstanding principles, New Jersey's ploy here is simply the modern version of *Flowers*—updated to reflect newer developments in federal jurisdiction. New Jersey argues that Petitioner cannot get into federal court now because its claim is not ripe—and it won't ripen until a state court enforces the subpoena

by ordering production. BIO 26–27. But once that process starts, the state-court adjudication will prevent any federal court from ever having an opportunity to review the claim. Pet. Br. 13–14. Too early today, too late tomorrow—Petitioner is out of luck.

This Court should not make Petitioner wait for eight years and four trips through the appellate process to vindicate its rights. Federal law leaves no doubt about the unconstitutionality of the New Jersey Attorney General's attempt at obtaining the names of Petitioner's donors. *See* Pet. Br. at 30–33. Allowing procedural gamesmanship to thwart Petitioner from securing the relief it's entitled to would repeat the mistakes the Court made in giving the state judiciary the benefit of the doubt during the first three appeals in *NAACP v. Alabama*. And it will encourage more harassment by giving state governments a roadmap to avoid meaningful judicial review.

## CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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