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 SECOND AMENDMENT FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTEREST OF AMICUS CURIAE[1]

The Second Amendment Foundation (SAF) is a nonprofit organization that advocates for civil rights related to self-defense and gun ownership. Founded in 1974, SAF's mission is to defend and promote the right of peaceable, law-abiding individuals to own and use firearms for self-defense, hunting, and other lawful purposes. The organization's activities include initiating litigation to protect Second Amendment rights and challenge laws it believes to be unconstitutional; conducting public education campaigns about the lawful exercise of Second Amendment rights; and supporting research regarding benefits of firearm ownership. SAF funds these activities through donations from its members and supporters nationwide.

SAF is headquartered in Washington State. As a result of its constitutionally-protected advocacy, SAF often finds itself at odds with the Washington Attorney General's Office (AGO), a vocal proponent of gun control measures. Over the past several years, the AGO has used its investigatory enforcement powers to carry out an expansive and highly intrusive probe into the internal affairs of SAF. The AGO has issued excessively broad civil investigative demands (CID) to SAF, citing Washington's consumer protection laws.

After two years, it became increasingly clear to SAF that the AGO singled out SAF for a campaign of relentless harassment because of its political beliefs

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amicus curiae contributed monetarily to its preparation or submission.

and activities, including its positions on gun control, its outspoken public criticism of the AGO, and its legal challenges to the AGO's actions and policies. SAF sued the AGO in the Western District of Washington, asserting claims under 42 U.S.C. § 1983 for violations of its First and Fourth Amendment rights. The district court dismissed SAF's lawsuit as unripe for lack of a cognizable injury. On appeal, the Ninth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the case. The Ninth Circuit held the lower court had erred by dismissing the case and failing to grant SAF leave to amend the Complaint to further explain its allegations of injury.

The parties stipulated to an extension of the deadline for SAF to file its Amended Complaint in district court by September 20, 2025.

SAF's difficulty obtaining federal review of the AGO's speech-chilling actions—even in a circuit that has rejected a state exhaustion requirement—enables SAF to offer the Court unique insight into the hurdles plaintiffs face in seeking recourse in federal court and the need for this Court to provide further guidance to the lower courts on these important questions of federal jurisdiction.

SUMMARY OF ARGUMENT

Recipients seeking to challenge unlawful state investigative demands and recover damages arising from the infringement of their constitutional rights face significant obstacles in obtaining federal review prior to state court enforcement of the demand—even in the circuits that have adopted the majority view repudiating a state exhaustion requirement for section 1983 claims arising from pre-litigation

investigatory demands. The Court need look no further than SAF's own previously dismissed lawsuit in the Western District of Washington for an example of the barriers litigants face in seeking pre-enforcement federal review.

Adopting the majority view, the Ninth Circuit recognized in *Twitter, Inc. v. Paxton*, 56 F.4th 1170 (9th Cir. 2022), that a chilling of First Amendment rights or other cognizable harm can constitute a pre-enforcement injury. Yet, the Ninth Circuit nevertheless concluded that the expenses and burdens of responding to a CID prior to enforcement—including the resulting loss of time and money that would otherwise be deployed toward First Amendment activity—were "voluntary" and "self-inflicted" injuries that did not constitute legally cognizable harms because CIDs are not self-enforcing. *Id.* at 1175–76. The district court found *Twitter* dispositive in SAF's lawsuit, relying on the Ninth Circuit's reasoning to conclude that "the costs and burdens associated with voluntary compliance with a CID are not evidence of an injury in fact" where the "enforceability of the CIDs remains untested." *Second Amend. Found. v. Ferguson*, Case No. C23-1554 MJP, 2024 WL 97349, at *4 (W.D. Wash. Jan. 9, 2024). On appeal, the Ninth Circuit endorsed that analysis, stating, "Plaintiffs did not suffer a forced diversion of resources that chilled their speech because the Civil Investigative Demands (CIDs), absent a petition to enforce, did not compel Plaintiff to expend time and money responding to them." *Second Amend. Found. v. Ferguson*, Case No. 24-760, 2025 WL 1766794, at *1 (9th Cir. June 26, 2025).

Thus, absent further clarification from this Court on the type of injury that *is* ripe for pre-enforcement federal review, state attorneys general may attempt to co-opt *Twitter*'s holding to evade federal jurisdiction and limit a section 1983 plaintiff's recourse against the chilling of their constitutional rights to three options: (1) challenge the CID in state court, (2) refuse to cooperate and wait for the attorney general to bring a state court enforcement action, or (3) cooperate and hope the attorney general will one day decide to announce that the investigation has ended. Two of these options are precisely the type of state court exhaustion requirement that *Twitter* supposedly disclaimed, and the last is entirely dependent upon the attorney general's discretion in unilaterally ending the investigation. None of the options ensure meaningful or prompt federal review.

Having granted certiorari, the Court should confirm that the exhaustion of state remedies is not a prerequisite to a section 1983 action challenging a pre-litigation investigatory demand and provide guidance on the type of pre-enforcement injury that is sufficiently ripe for federal review.

ARGUMENT

I. The Court Should Resolve the Circuit Split and Provide Further Guidance to the Lower Courts.

The Brief for Petitioner astutely describes the need for this Court to clarify the state exhaustion requirement for section 1983 claims arising from pre-litigation investigatory demands. As evidenced by SAF's own lawsuit, however, even *Twitter*'s disavowal of the exhaustion requirement does not eliminate the

impediments litigants face in vindicating their constitutional rights against speech-chilling subpoenas in federal court. Without this Court's guidance, a CID recipient's ability to bring a pre-enforcement federal challenge against an unlawful investigation may be rendered illusory even in the circuits that have, on paper, rejected an exhaustion requirement.

A. *Twitter* demonstrates the need for this Court's guidance on the type of pre-enforcement injury that is ripe for federal review.

In *Twitter, Inc. v. Paxton*, 56 F.4th 1170 (9th Cir. 2022), the Ninth Circuit adopted the majority position rejecting an exhaustion requirement for section 1983 challenges to pre-litigation investigatory demands. Under *Twitter*, therefore, a plaintiff can assert section 1983 claims in a pre-enforcement challenge to a CID—provided that the three justiciability requirements of standing, mootness, and ripeness are met. *Id.* at 1173–74. But the court of appeals ultimately concluded that Twitter's allegations failed to establish constitutional standing and ripeness "because Twitter fails to allege any chilling effect on its speech or any other legally cognizable injury." *Id.* at 1175. *See also id.* at 1173 (noting that the "constitutional component of ripeness is synonymous with the injury in fact prong of the standing inquiry") (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003)).

In reaching its conclusion, the Ninth Circuit focused almost exclusively on the pre-enforcement posture of the case. Specifically, the Ninth Circuit concluded that the costs and burdens associated with

responding to a CID are not evidence of an injury "because the CID is not self-enforcing" and "the enforceability of the CID remains an open question." *Id.* at 1176. The court of appeals reasoned that any actions a recipient takes in response to a demand prior to enforcement are thus "self-inflicted because the actions were voluntary." *Id.*

The Ninth Circuit also rejected Twitter's argument that "informal threats of legal sanction, when used as a means to punish or restrict a person's exercise of First Amendment rights," can create a First Amendment injury. *Id.* The court relied on the "procedural safeguards" that "come with" the attorney general's actions: "If OAG moves to enforce the CID, Twitter can raise its First Amendment defense then, before there are any underlying charges. Twitter also could have challenged the CID in Texas state court." *Id.* at 1177. Put another way, the Court essentially concluded that Twitter's injury was not ripe for federal adjudication because it had "procedural safeguards" available in state court.

Following *Twitter*'s reasoning, a recipient of a CID cannot establish an injury even where the recipient expended significant time, burden, and expense in responding to a subpoena issued under threat of legal sanctions, because those actions constitute voluntary compliance[2] unless and until the

[2] SAF respectfully questions whether a recipient's compliance with a CID can be considered truly "voluntary" when many states require recipients to challenge a demand within a short period of time. *See, e.g.*, WASH. REV. CODE ANN. § 74.66.120(27)(a)(i) (petition to modify or set aside the demand must be made by the earlier of the return day or 20 days after service of the demand); OR. REV. STAT. ANN. § 646.750 (same); MONT. CODE. ANN. § 30-14-113 (same); ALASKA STAT. ANN. § 45.50.592 (same); HAW. REV.

attorney general brings an enforcement action or the recipient challenges the demand in state court.

The Court should settle the circuit split in favor of the majority view and answer the question left unresolved in *Twitter* by clarifying the type of injury, other than an actual chilling of speech, that *is* ripe for federal review prior to a state attorney general's enforcement of an investigatory demand.

B. Absent further guidance from this Court, state attorneys general can effectively reinstate a state exhaustion requirement to resist federal review.

SAF's litigation against the Washington Attorney General's Office demonstrates how, in the absence of further guidance from this Court, a state attorney general can co-opt *Twitter*'s holding to effectively reinstate a state exhaustion requirement and deprive plaintiffs of relief in a federal forum, in violation of section 1983.

SAF first sued the Washington AGO in the Western District of Washington in May 2023, asserting section 1983 claims for violations of the First and Fourth Amendments to the United States Constitution in connection with the CIDs issued by

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STAT. § 842-10 (same) IDAHO CODE ANN. § 48-109 (petition to modify or set aside demand must be made before the return date or within 30 days of service, whichever is later). Recipients who fail to timely challenge a CID risk waiving their defenses to the demand, even when the unconstitutional nature of the CID is not apparent until well after the brief window to challenge the demand has expired.

the AGO.[3] The AGO moved to dismiss SAF's lawsuit on grounds that primarily challenged federal jurisdiction. Rather than waste time and resources litigating jurisdiction and venue, SAF voluntarily dismissed its lawsuit without prejudice so that it could be refiled in state court. SAF refiled its lawsuit in Washington state court in September 2023, asserting the same claims as its prior lawsuit. But the AGO then removed the case back to the Western District of Washington and filed a second motion to dismiss, once again primarily based on lack of jurisdiction.

The district court granted the AGO's motion and dismissed the lawsuit. *Second Amend. Found. v. Ferguson*, Case No. C23-1554 MJP, 2024 WL 97349 (W.D. Wash. Jan. 9, 2024). The court concluded in relevant part that SAF's section 1983 claims were not constitutionally ripe, because SAF had "failed to identify an injury in fact caused by the CIDs and the AG's investigation." *Id.* at *4. Relying on *Twitter*, the district court concluded that SAF could raise its "First Amendment challenges *if* the Attorney General moves to enforce the CIDs," and that SAF could "force such a challenge by deciding to cease their voluntary compliance." *Id.* at *6 (emphasis added). The court also held that SAF's section 1983 claims were prudentially unripe because "the AG's office has yet to conclude the investigation or bring an enforcement action." *Id.* at *6. On appeal, the Ninth Circuit adopted the district court's analysis, explaining that, under *Twitter*, 56 F.4th at 1175-76, "Plaintiffs'

[3] SAF was one of several plaintiffs. Other plaintiffs included SAF's founder, Alan Gottlieb, and other Second Amendment advocacy organizations associated with Mr. Gottlieb.

voluntary compliance with the CIDs does not constitute a cognizable injury." *Second Amend. Found.*, 2025 WL 1766794, at *1.

Thus, under the district court's interpretation of *Twitter*, SAF can apparently only "bring their federal and state law claims should they challenge the CIDs. And it appears they can force an enforcement action should they simply cease voluntarily complying with the investigation. It also appears they can bring their claims once the investigation is complete." *Second Amend. Found.*, 2024 WL 97349, at *6. *See also Obria Grp., Inc. v. Ferguson*, No. 3:23-cv-06093, 2025 WL 27691, at *9 (W.D. Wash. Jan. 3, 2025) (relying on *Twitter* to conclude that plaintiffs' allegations of First Amendment chill and economic harm were "voluntary" and not a legally cognizable injury where plaintiffs "do not allege they are facing a court action or any other means of enforcement by [the AGO] to establish an injury").

In other words, district courts even in the Ninth Circuit are limiting a CID recipient's recourse to three options—two of which are *state* court remedies: (1) disregard the CID—which carries with it the threat of legal penalties—and wait for the state to bring an enforcement action in state court; (2) challenge the demand in state court within the state's truncated statutory timeframe for doing so, when the recipient may not yet even be aware that it has a basis for asserting constitutional defenses; or (3) wait until the attorney general unilaterally decides to conclude its investigation, which could take years, cost the recipient hundreds of thousands of dollars in attorney fees, and continuously divert the recipient's resources and attention from engaging in its constitutionally-

protected advocacy for an indeterminate amount of time (*i.e.*, chilling the recipient's First Amendment rights in the process). This third option is illusory, as there is often no requirement or reason to expect that the attorney general will announce to the recipient when its investigation is closed.

Such an interpretation of *Twitter* effectively resurrects the pre-*Knick v. Scott Township*, 139 S. Ct. 2162 (2009) requirement that a plaintiff first exhaust their state court remedies before bringing a section 1983 claim in federal court and the resulting "Catch-22" that will almost always preclude federal review after the state court action.[4] *See Google, Inc. v. Hood*, 822 F.3d 1355 (Fed. Cir. 2011); Petition at 4, 22–24.

The Court should settle the circuit split and ensure that recipients of state investigatory demands can promptly challenge the legality of those CIDs in federal court.

CONCLUSION

For the foregoing reasons, SAF respectfully submits that the Court should reverse the judgment of the Third Circuit Court of Appeals and confirm that the exhaustion of state remedies is not a prerequisite

[4] Even under the post-*Knick* standard, section 1983 plaintiffs still face other iterations of the procedural Catch-22 designed to prevent federal review of unlawful state action. A prime example: SAF voluntarily re-filed its lawsuit in state court after the AGO challenged federal jurisdiction, only for the AGO to then remove to federal court and obtain a dismissal based on lack of federal jurisdiction. SAF challenged the propriety of this procedural maneuver before the district court to no avail.

to a section 1983 action challenging a pre-litigation investigatory demand.

Respectfully submitted,

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