No. 24-781

In The Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,
Petitioner,

v.

MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY,
Respondent.

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

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

The **Foundation for Individual Rights and Expression (FIRE)** is a nonpartisan nonprofit that defends the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide through public advocacy, targeted litigation, and *amicus curiae* filings. FIRE represents speakers, without regard to their political views, in lawsuits across the United States. *See*, *e.g.*, Br. Amici Curiae FIRE, *et al.*, Supp. Pet'r, *N.R.A. v. Vullo*, 602 U.S. 175 (2024) (No. 22-842); Br. Amici Curiae FIRE, *et al.*, Supp. Resp'ts, *Murthy v. Missouri*, 603 U.S. 43 (2024) (No. 23-411). FIRE therefore has a strong interest in ensuring citizens have access to federal courts when their First Amendment rights are threatened.

The **American Civil Liberties Union ("ACLU")** is a nationwide, nonpartisan, nonprofit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has frequently appeared in First Amendment cases in this Court and courts around the country, both as counsel for a party and as amicus curiae. *See, e.g.*, *NRA v. Vullo*, 602 U.S. 175 (2024) (counsel for Petitioner); *Americans for*

1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief.

Prosperity Found. v. Bonta, 594 U.S. 595 (2021) (amicus); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) *(*amicus). The **ACLU of New Jersey** is one of the ACLU's state affiliates.

SUMMARY OF ARGUMENT

Just last year, this Court reaffirmed its longstanding rule against censorship by intimidation: When the government threatens sanctions against a private party "'to achieve the suppression' of disfavored speech," it violates the First Amendment. *NRA v. Vullo*, 602 U.S. 175, 180 (2024) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). Affirming the decision below would gut that holding. According to the Third Circuit, plaintiffs cannot seek relief from a subpoena that assertedly violates their First Amendment rights unless and until the government officials enforce the subpoena in state court. That's so even if plaintiffs allege that the issuance of the subpoena both discriminates based on viewpoint and has immediate and ongoing coercive and chilling effects. This Court should reject that view and reverse.

Petitioner First Choice is an anti-abortion nonprofit offering free prenatal services. It alleges in this case that the New Jersey Attorney General issued subpoenas seeking First Choice's donor information in retaliation for its views on abortion. Pet'r's App. 134a. New Jersey's intent, First Choice suggests, was not to enforce the law but rather to silence First Choice's advocacy and deter its donors from associating with it. *Id.* at 134a, 138a. Yet the Third Circuit held First

Choice's allegations, even if plausible, do not state a ripe constitutional claim. First Choice, it ruled, could "continue to assert its constitutional claims in state court" when the subpoenas are enforced. Pet'rs' App. 4a.

In support of Petitioner and reversal, this brief makes two points:

First, the Third Circuit was wrong to hold First Choice must wait until New Jersey's Attorney General enforces the subpoenas in state court. This Court's precedents have repeatedly reaffirmed that a speaker is not obligated to wait for formal enforcement before challenging the constitutionality of state action. Pre-enforcement challenges under 42 U.S.C. § 1983 exist precisely to permit plaintiffs to challenge such speech-chilling measures without being placed "between the Scylla of intentionally flouting state law and the Charybdis of forgoing … constitutionally protected activity in order to avoid … a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

Moreover, a subpoena seeking sensitive donor information can chill a disfavored speaker's protected associations long before it's ever enforced. Even unexecuted threats of government retaliation against disfavored speakers, such as an extortionate demand, or, as alleged here, an invasive subpoena, can create a First Amendment injury—chilling protected speech and association before the government lifts a finger. *See id.* at 180. Courts may "enjoin[an official's threat] even if it turns out to be empty—the victim ignores it,

and the threatener folds his tent." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015).

Second, use of investigatory or regulatory powers (including subpoenas) to squelch disfavored speech is spreading. In our polarized society, government actors increasingly abuse subpoenas and other investigatory tactics to silence speakers across the political spectrum. But First Amendment rights are not contingent on which party holds office, whether in Washington or the various state capitals. Federal courts must therefore remain open to claims that subpoenas, or any other state actions, unconstitutionally chill First Amendment freedoms.

There are any number of legitimate reasons for an attorney general to send a subpoena. But if, as First Choice alleges here, an attorney general is using the subpoena power to chill speech that he could not constitutionally silence otherwise, plaintiffs can sue to stop that misuse of power.

ARGUMENT

I. Americans Have a Right to a Federal Forum To Vindicate Their First Amendment Rights Against Subpoenas and Other Investigatory Threats.

People who refrain from First-Amendment-protected speech to avoid government sanction suffer an injury to their constitutional rights. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). So long as plaintiffs allege they refrained from speaking

in response to a "credible" threat of enforcement, this Court has not found it "troubling" to permit judicial review before the government actually carries out its threats. *Id.* at 160 (internal citations and alterations omitted). Pre-enforcement challenges are thus unexceptional in the First Amendment context, as illustrated by the long catalogue of landmark cases reaching this Court in that posture. *See*, *e.g.*, *id.* at 166–67; *303 Creative LLC v. Elenis*, 600 U.S. 570, 597 (2023); *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382 (1950); *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 789–90 (2011); *Citizens United v. FEC*, 558 U.S. 310, 321 (2010). In those cases, the statutes were not self-enforcing. But this Court rightly recognized that a speaker who fears punishment will, in the face of such statutes, self-censor.

A. Subpoenas can chill speech like any other threat to First Amendment rights.

It's no different with subpoenas, such as those alleged in this case. As this Court has previously affirmed, subpoenas for member information can threaten First Amendment rights. *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *summarily aff'd*, 393 U.S. 14 (1968). That's why plaintiffs can sue to enjoin a state attorney's subpoena in federal court, without waiting for state-court enforcement proceedings. *See id.* at 252–53; *cf. Susan B. Anthony List*, 573 U.S. at 165 (An "administrative action, like arrest or prosecution, may give rise to harm sufficient

to justify pre-enforcement review."). Even if a subpoena targeting First Amendment activity is never enforced in court, the subpoena will give its targets a very good reason to clam up. It will also give the target organization's members and supporters a very good reason to abandon the cause. That creates a First Amendment injury.

Self-censorship in response to government intimidation is "a harm that can be realized even without an actual prosecution," *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988), and offends the First Amendment just as much as punishment after the fact. This Court's practice of recognizing pre-enforcement challenges to vindicate First Amendment rights follows the "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Plaintiffs like First Choice "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Holder v. Humanitarian L. Project,* 561 U.S. 1, 15 (2010) (quoting *Babbit v. Farm Workers*, 442 U.S. 289, 298 (1979)).

That's true whether the threat comes from enforcement of a statute or of a subpoena. Governments cannot indirectly restrict speech by creatively chilling its expression. This Court's decisions "furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings

where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith v. California*, 361 U.S. 147, 150–51 (1959). Such "devices" include investigative subpoenas. Subpoenas seeking "[d]isclosure or threat of disclosure well may tend to discourage both membership and contributions thus producing financial and political injury to the party affected." *Pollard*, 283 F. Supp. at 258, *summarily aff'd*, 393 U.S. 14. Thus, a non-self-enforcing investigative subpoena can chill speech just as much as speech-restrictive statutes, which are also, by definition, not self-enforcing.

Perhaps not all investigative subpoenas will present more than "speculative" or "subjective" threats to speech. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 418 (2013). But the Third Circuit was wrong to hold that *under no circumstances* short of court-ordered enforcement can subpoenas create constitutional injuries.

The First Amendment doesn't require a speaker to call the state's bluff before bringing its claims to a federal court. State action that chills speech creates an injury that federal courts have a duty to redress, regardless of the state's angle of attack. State governments may pursue their policy preferences with a wide variety of tools, but coerced silence is not among them.

A state attorney general's subpoena power may not in itself offend the First Amendment. But using that

power to target and silence protected speech, as Petitioners have alleged here, would.

B. State action, in any form, restricting protected speech creates a constitutional injury.

Just last year, this Court reaffirmed that a government official's threat "need not be explicit" to coerce a speaker into silence, *NRA v. Vullo*, 602 U.S. 175, 193 (2024) (internal citation omitted). That's because even indirect threats intended to cause a speaker to self-censor (in *NRA*'s case, threats to third parties doing business with the targeted organization) can be just as damaging as open repression. To resist silencing by threats, and the abuse of power it presents, courts must "look through forms to the substance and recognize that informal censorship may sufficiently inhibit" the exercise of First Amendment freedoms to warrant judicial intervention. *Bantam Books, Inc.*, 372 U.S. at 67.

NRA is no outlier. This Court has repeatedly allowed litigants to challenge government power even before they are haled into court. For example, in invalidating Nebraska courts' practice of limiting press coverage of criminal trials, this Court rejected arguments that the petitioners' challenge was nonjusticiable without an active order against them. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 546–47 (1976) (rejecting mootness arguments).[2] The chilling

2. Though *Nebraska Press Ass'n* addressed mootness, the point is the same here where the justiciability issue is ripeness:

effects created by the Nebraska courts' practices sufficed as constitutional injury. Small, independent newspapers would rarely have the resources to challenge such orders in court or the clout to resist through other means; as one editor put it, "[t]he causes for which we contend and the problems we face are invisible to the world of power and intellect …. Our only alternative is obedient silence." *Id.* at 610 n.40 (Brennan, J., concurring). The resulting "chilling effect upon vigorous public debate" would fall most heavily on the least powerful. *Id*.

Today, the role once held by local papers is increasingly occupied by independent journalists on blog platforms. *Amicus* FIRE knows the harm legal threats alone can impose on those voices. That's why FIRE sued the San Francisco city attorney last year after his office issued demand letters to journalist Jack Poulson and his webhost, Substack. City Attorney David Chiu demanded immediate removal of an arrest report and related article that Poulson had published about the arrest of a controversial tech CEO.[3] Chiu should have been familiar with the long line of Supreme Court precedent establishing Poulson's right to publish lawfully obtained

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A party whose First Amendment rights are at stake through invocation of a procedural device can challenge threatened use *before* further constitutional harm occurs.

3. FIRE, *San Francisco City Attorney Uses California Law Prohibiting Distribution of Information "Relating" to Sealed Arrest Reports to Protect Tech CEO* (last accessed Aug. 25, 2025), https://www.thefire.org/cases/san-francisco-city-attorney-uses-california-law-prohibiting-distribution-information-relating.

information relating to a matter of public concern.[4] But that wouldn't have mattered if the threats had scared Poulson into taking the pages down. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books, Inc.*, 372 U.S. at 68.

In our polarized times, Americans justifiably fear harsh sanctions for taking public positions on controversial issues. "When it comes to 'a person's beliefs and associations,' '[b]road and sweeping state inquiries into these protected areas … discourage citizens from exercising rights protected by the Constitution.'" *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 610 (2021) (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)). All an attorney general needs to do is issue the subpoena and announce it in a press release. Potential donors, knowing a nonprofit's donor rolls are in the state's crosshairs, may reasonably fear that a state court proceeding will be inadequate to protect their constitutional rights. And they may well fear the nonprofit in question will cave to the pressure absent the escape valve of a federal forum to vindicate its speech and association rights. That chill persists as long as the subpoena remains pending, even if it is never enforced and "the threatener folds his tent." *Dart*, 807 F.3d at 231.

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4. *See The Fla. Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

A state can try to play "I'm not touching you!" all it likes; federal courts need not play along. And in general, they don't. When state action allegedly chills First Amendment rights, a claim challenging it is justiciable. Even the mere "threat" of state action, as well as "other means of coercion, persuasion, and intimidation," may "warrant injunctive relief." *Bantam Books, Inc.*, 372 U.S. at 67; *see also Dart*, 807 F.3d at 231. Such allegations are therefore ripe for federal adjudication.

Federal courts stand as the primary bulwark against the erosion of constitutional rights, a role cemented by the text and purpose of Section 1983. *See Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (describing "the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment"). Adjudication of civil-rights actions in a federal forum fulfills "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

* * *

To be clear, the New Jersey Attorney General may advocate for and exercise lawful authority according to his own policy preferences. "A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire

others." *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 188 (2024).

"What she cannot do, however, is use the power of the State to punish or suppress disfavored expression." *Id.* Here, it is alleged that the New Jersey Attorney General opposes First Choice's mission and its tactics. Fine. He can say so. "[P]ublic officials may criticize practices that they would have no constitutional ability to regulate, *so long as there is no actual or threatened imposition of government power or sanction*." *Am. Fam. Ass'n, Inc. v. City & Cnty. of San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002) (emphasis added). But using the subpoena power—or any other power—to censor, regulate, or chill disfavored speech violates the First Amendment. That's precisely what First Choice has alleged in this case, and it's sufficient to state a justiciable First Amendment claim.

II. Investigatory Actions and Threats of Government Action Are Increasingly Used to Silence Speakers Across the Political Spectrum.

State attorneys general are increasingly returning to the same playbook to suppress speech they know they can't target directly. This Court should stem the tide and reverse the decision below.

The problem is bipartisan.[5] The Attorney General of New Jersey is allegedly targeting crisis pregnancy centers here, while Florida's attorney general purses restaurants for hosting drag shows.[6] New York's attorney general sees offensive speech on social media and demands that platforms tell her what they're doing about it.[7] And the Missouri Attorney General issued his own demands to large-language-model chatbots to find out why they express disfavored views about President Trump.[8]

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5. *Amici* ACLU and ACLU of New Jersey do not here express a position on the specific examples discussed in this section.

6. Press Release, Office of Att'y Gen. James Uthmeier, *Attorney General James Uthmeier Launches Investigation into Sexualized Performance Advertised to Children; Issues Subpoena to Linda Moore, Vice Mayor of Vero Beach and Owner of Kilted Mermaid* (July 22, 2025), https://www.myfloridalegal.com/newsrelease/attorney-general-james-uthmeier-launches-investigation-sexualized-performance.

7. Press Release, Office of the N.Y. State Att'y Gen., *Attorney General James Calls on Social Media Platforms to Provide Answers after Terrorist Attacks in Israel Spark Violent Threats Online* (Oct. 13, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-calls-social-media-platforms-provide-answers-after.

8. Press Release, Office of the Att'y Gen. of Mo., *Attorney General Bailey Fights To Expose Big Tech Censorship Of President Trump As AI Chatbots Produce Fake News* (last visited Aug. 25, 2025), https://ago.mo.gov/attorney-general-bailey-fights-to-expose-big-tech-censorship-of-president-trump-as-ai-chatbots-produce-fake-news/.

But whether your viewpoint is safe shouldn't depend on the dominant politics of your state. Dissenting voices are a vital part of the American political tradition, and the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd,* 326 U.S. 1 (1945)).

The dangers of indirect attacks on speech are all the more acute because they so often respond to majoritarian demands. In today's polarized political climate, there are robust constituencies in both red and blue states that want to investigate disfavored speakers for any number of alleged infractions.[9] But there's a fine line between responding to the advocacy of one's constituents and bowing to the pressure of a mob. Unpopular speech is always vulnerable to majorities, and state attorneys general are thus liable to use their various powers against unpopular views. "[T]he recent history of Supreme Court First Amendment jurisprudence is a rogue's gallery of popular yet unconstitutional legislation." Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 96 (2015). That's why the First Amendment places our

9. *See* Press Release, Campaign for Accountability, *Watchdog Asks State Attorneys General to Investigate Crisis Pregnancy Centers for Deceptive Practices* (Apr. 23, 2024), https://campaignforaccountability.org/watchdog-asks-state-attorneys-general-to-investigate-crisis-pregnancy-centers-for-deceptive-practices.

right to speech and association "beyond the reach of majorities and officials." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Suppression-by-subpoena allows any government official with subpoena power to satisfy popular pressure and tell the mob they're doing something about the dangerous speech of their enemies, without risking a loss in court. For attorneys general, there is little downside risk: If they find something, all the better, but there are no consequences for a fishing expedition that turns up empty. The following examples illustrate just how this power can be abused.

1. For instance, Florida Governor Ron DeSantis has made no secret of his distaste for drag performances, despite their full protection by the First Amendment, *see, e.g.*, *Spectrum WT v. Wendler*, No. 23-10994, 2025 WL 2388306, *7 (5th Cir. Aug. 18, 2025). At the instigation of Gov. DeSantis's then-Chief of Staff, James Uthmeier, Florida officials in 2022 launched an investigation into a venue that had hosted a Christmas-themed drag show, alleging it had illegally allowed minors to witness "lewd, vulgar, and indecent displays."[10] Although the report filed by the state's own agents was clear they witnessed no such thing, the governor's office had on file dozens of emails from constituents demanding he do something about

10. Nicholas Nehamas and Ana Ceballos, *Undercover agents saw nothing "lewd" at Orlando drag show. Florida is going after venue anyway*, MIAMI HERALD (Mar. 22, 2023), https://www.miamiherald.com/news/politics-government/state-politics/article273247175.html.

drag shows that allowed minors to witness adult men lip-synching to Madonna's greatest hits.[11] Rather than risk losing its liquor license, the venue agreed to pay a fine and adopt a new policy prohibiting minors from attending similar shows in the future.[12]

Emboldened, Florida then enacted a new law targeting venues that host "adult live performances," arming the law with the power to revoke a venue's business license. *HM Fla.-ORL, LLC v. Governor of Fla.*, 137 F.4th 1207, 1213 (11th Cir. 2025). In May, the Eleventh Circuit affirmed a preliminary injunction against its enforcement, noting the law's sponsors characterized it as intended to stop a broad range of drag shows and holding it likely overbroad. *Id.* at 1245.

While the injunction remains in effect, Florida has no power to silence or punish disfavored speech by direct enforcement. But with the right tools, Attorney General Uthmeier can chill speech all the same, thus "obviating the need to employ criminal sanctions," while "eliminat[ing] the safeguards of the criminal process." *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 69–70. And after receiving a complaint from a parent about a drag performance hosted by a bar called the

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11. C.J. Ciaramella, *Inside Ron DeSantis' Crackdown on Drag Shows*, REASON (Nov. 9, 2023), https://reason.com/2023/11/09/inside-ron-desantis-crackdown-on-drag-shows.

12. Matt Levietes, *Florida settles with Miami hotel over drag queen Christmas show*, NBC NEWS (Dec. 1, 2023), https://www.nbcnews.com/nbc-out/out-politics-and-policy/florida-drag-ban-settlement-rcna127620.

Kilted Mermaid, he publicly announced an investigation into "the perversions of some demented adults," accompanied by a broad subpoena.[13]

Uthmeier's subpoena doesn't say what law he thinks the Kilted Mermaid violated. The press release is likewise unilluminating, but it does pointedly note that "Florida law protects children from sexualization."[14] The subpoena is breathtaking in scope. It demands all surveillance footage from the night of the performance, employee names and work schedules, names of performers and their contracts, and, most alarmingly, "guest lists, reservation logs, ticket sales records, entry logs or other documents identifying who attended the performance."[15]

These demands echo the post-World War II law enforcement practice of surveilling bars frequented by gay and lesbian patrons. Officers would look for signs of deviant behavior like men "pairing off" with other

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13. Jo Yurcaba, *Florida official under state investigation after hosting LGBTQ event*, NBC NEWS (July 22, 2025), https://www.nbcnews.com/nbc-out/out-news/florida-official-state-investigation-hosting-lgbtq-event-rcna220331.

14. Press Release, Office of Att'y Gen. James Uthmeier, *Attorney General James Uthmeier Launches Investigation into Sexualized Performance Advertised to Children; Issues Subpoena to Linda Moore, Vice Mayor of Vero Beach and Owner of Kilted Mermaid* (July 22, 2025), https://www.myfloridalegal.com/newsrelease/attorney-general-james-uthmeier-launches-investigation-sexualized-performance.

15. *Id.*

men to dance, or women with short haircuts and "mannish attire," anything that might indicate the establishment was a "resort for sexual perverts."[16] Police commonly released to the press the names and addresses of patrons caught up in raids on gay bars, using the profound social stigma of the time to deter even behavior that was fully lawful.[17] When the "Council on Religion and the Homosexual" sponsored a gala welcoming clergy and drag queens alike, the San Francisco Police Department—informed by the Council that it had no power to police the attire of attendees at a private event—sought instead to deter attendance by cordoning off all but one street, pointing floodlights at the entrance and photographing everyone they saw.[18]

2. The political priorities of California's current government have little overlap with those of Florida's. But California has followed Florida's lead in using investigations to suppress unpopular speech.

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16. *Kershaw v. Dep't of Alcoholic Beverage Control of Cal.*, 155 Cal. App. 2d 544 (1957), *disapproved of by Vallerga v. Dep't of Alcoholic Beverage Control*, 53 Cal. 2d 313 (1959) (quoting Cal. Bus. & Prof. Code § 24200(e))

17. Chris Johnson, *Before Stonewall, newspapers complicit with police in gay bar raids*, WASHINGTON BLADE (June 25, 2019), https://www.washingtonblade.com/2019/06/25/before-stonewall-newspapers-complicit-with-police-in-gay-bar-raids/.

18. Nora Neus, *San Francisco's Stonewall: the new year's ball that sparked a queer power movement*, THE GUARDIAN (Dec. 30, 2023), https://www.theguardian.com/us-news/2023/dec/30/california-hall-ball-police-raid-lgbt-rights-activist-history-san-francisco.

California Attorney General Rob Bonta announced an investigation into what he repeatedly characterized as the fossil fuel petrochemical industries' "campaign of deception" and role in climate change.[19] Bonta's press release placed the blame for increasing global temperatures on these industries and trade groups like the Plastics Industry Association and the American Chemistry Council, not for the products they sell, but for their role in "deceiving the public" by "perpetuating myths around recycling."[20]

Of course, the First Amendment doesn't limit California's power to respond with speech of its own. And linked at the bottom of the press release is a government website titled "The Plastic Crisis in California," which does precisely that.[21] The Attorney General should have stopped there. But there was political pressure to do something more to "hold the fossil fuel and petrochemical industries accountable" for their speech.[22] Campaign promises are

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19. Press Release, Office of the Att'y Gen. of Cal., *Attorney General Bonta Announces Investigation into Fossil Fuel and Petrochemical Industries for Role in Causing Global Plastics Pollution Crisis* (Apr. 28, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-investigation-fossil-fuel-and-petrochemical.

20. *Id.*

21. *Id.*

22. Press Release, Gov. Gavin Newsom, *"This is a Big Big Deal": Climate Leaders Praise California's Lawsuit to Hold Big Oil Accountable* (Sep. 18, 2023), https://www.gov.ca.gov/2023/09/

unconstrained by the limitations of the legal system—voters want to see action from their elected officials. And issuing subpoenas doesn't require the Attorney General to articulate any theory of tort liability that would survive a motion to dismiss. Hence the subpoena power serves as a ready substitute for legal actions with more procedural safeguards, letting officials threaten speakers with costly investigations if they don't change their speech.

3. Online platforms have likewise drawn the ire of attorneys general in states red and blue alike. In states like California and New York, concern about the proliferation of "hate speech" on social media prompted lawmakers to enact new laws that would compel online platforms to disclose detailed information about their content moderation policies and enforcement.[23] Naturally, nothing in those laws required the platforms to take any *particular* stance on offensive speech. But when lawmakers demand regular reports on what you're doing to stop a certain activity, "not much" is probably not an acceptable answer.

18/this-is-a-big-big-deal-climate-leaders-praise-californias-lawsuit-to-hold-big-oil-accountable/.

23. Kevin Goldberg, *Does Government Regulation of Social Media Violate the First Amendment?*, FREEDOM Forum (last accessed Aug. 25, 2025), https://www.freedomforum.org/government-regulation-social-media/.

Amicus FIRE has helped prevent those laws from taking effect.[24] A preliminary injunction that FIRE secured in New York remains in effect. But in October 2023, Attorney General James issued a series of letters to platforms including Google, Meta, X, and FIRE client Rumble, demanding they provide "detailed explanations of the steps they are taking to stop the spread of hateful content" and citing reports alleging a sharp rise in "violent rhetoric" following the October 7 Hamas attacks.[25] Once again, the letter made no mention of any *law* the platforms might be breaking.

As FIRE explained in a letter to the Attorney General, such a "request" from a government official doesn't need to be delivered by jackbooted thugs to get the message across.[26] Reminded of the still-extant injunction, Attorney General James withdrew the

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24. *See Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023); FIRE, *LAWSUIT: New York can't target protected online speech by calling it 'hateful conduct'* (Dec. 2, 2022), https://www.thefire.org/news/lawsuit-new-york-cant-target-protected-online-speech-calling-it-hateful-conduct.

25. Press Release, Office of the N.Y. State Att'y Gen., *Attorney General James Calls on Social Media Platforms to Provide Answers after Terrorist Attacks in Israel Spark Violent Threats Online* (Oct. 13, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-calls-social-media-platforms-provide-answers-after.

26. FIRE, Oct. 18, 2023 Letter to N.Y. Attorney General Leticia James *Re: Volokh v. James*, https://www.thefire.org/research-learn/volokh-v-james-letter-attorney-general-new-york.

request—as to Rumble. How the other platforms responded is anyone's guess.[27]

Meanwhile, Missouri Attorney General Andrew Bailey issued formal demands for Google, Meta, OpenAI, and Microsoft to explain their respective chatbots' failure to adequately praise President Donald Trump.[28] Remarkably—though not altogether unexpectedly—he characterized the demands as part of his office's "longstanding commitment to protecting consumers" from "politically motivated censorship." Perhaps even more remarkably, Bailey criticized the Biden administration's similar demands on social media platforms to remove posts concerning the Covid-19 pandemic. "Government must keep its hand off the editorial decisions of Internet service providers," he proclaimed, and FIRE agreed.[29] But politicians are commonly blessed with a large capacity for cognitive dissonance. The same day Bailey celebrated a court's injunction against the federal

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27. In a recent decision, the Second Circuit allowed the preliminary injunction to stand, but certified questions about New York's law to the New York Court of Appeals. *Volokh v. James*, No. 23-356, 2025 WL 2177513, at *21 (2d Cir. Aug. 1, 2025).

28. Press Release, Office of the Att'y Gen. of Mo., *Attorney General Bailey Fights To Expose Big Tech Censorship Of President Trump As AI Chatbots Produce Fake News* (last visited Aug. 25, 2025), https://ago.mo.gov/attorney-general-bailey-fights-to-expose-big-tech-censorship-of-president-trump-as-ai-chatbots-produce-fake-news/.

29. Br. Amici Curiae FIRE, *et al.*, Supp. Resp'ts at 7–8, *Murthy v. Missouri*, 603 U.S. 43 (2024) (No. 23-411).

government's demands, he found time to sign onto a letter to the retail chain Target. Alongside six other attorneys general, the letter expressed pointed concern about the retailer's Pride Month merchandise, suggesting it might somehow run afoul of state obscenity laws.[30]

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State attorneys general on the left and right have creative minds, and the expansive powers delegated to them provide plenty of avenues for suppressing dissent. But those powers have limits, and federal courts must enforce them. A blister may not require the same urgent attention as a stab wound, but if left to fester, it may kill just the same.

CONCLUSION

First Choice's allegations state a constitutional injury, and the Court should reaffirm that the First Amendment prohibits government officials from using investigatory tools and informal threats to chill protected speech. If left unchecked, such tactics will subject constitutional rights to the shifting winds of political power, thereby eroding free expression across the political spectrum. The judgment below should be reversed.

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30. Todd Rokita et al., July 5, 2023, Letter to Brian C. Cornell, https://ago.mo.gov/wp-content/uploads/target-letter-final-1.pdf.

Respectfully Submitted,

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