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 AMICI CURIAE CARE NET PREGNANCY CENTER OF PARADISE, LIFE LIGHT PREGNANCY HELP CENTER, OHANA HEALTH PREGNANCY CLINIC, CARE PREGNANCY RESOURCE CENTER, SANTA CLARITA VALLEY PREGNANCY CENTER, CALAVERAS PREGNANCY CENTER IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici Care Net Pregnancy Center of Paradise, Life Light Pregnancy Help Center, Ohana Pregnancy Clinic, Care Pregnancy Resource Center, Santa Clarita Valley Pregnancy Center and Calaveras Pregnancy Center are pregnancy resource centers located in California. Every year, they assist thousands of women who are facing challenges because of unexpected pregnancies. The centers provide pregnant women with counseling regarding abortion alternatives and post abortion healing, material assistance, emotional support, educational opportunities, and access to medical services. All their services are provided free of charge, thanks to the generosity of private donors.

Amici are well aware that the legislative and executive branches of the California government are ideologically committed to expanding abortion and therefore oppose the work of pregnancy resource centers. The California Legislature has passed several bills designed to infringe on and chill the operation of centers providing alternatives to abortion. This Court struck down one such law in *National Institute for Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018). Undeterred, California Attorney General Rob Bonta has targeted pregnancy resource centers with false accusations that they employ deceptive tactics and inaccurate information to prevent women from getting

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[1] No counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* or its counsel funded it.

abortions,[2] going so far as to issue a "consumer alert" to broadcast these unfounded claims.[3] He also has sued pregnancy resource centers for alleged consumer fraud.[4] Several amici themselves have received subpoenas demanding responses to interrogatories. They all justifiably fear receiving further, more burdensome and invasive demands for documents and information, including about their donors and staff.

Given the choice of forum afforded by section 1983, amici would choose to have their constitutional rights adjudicated in federal court. Pro-life groups operating in ideologically hostile states such as California need section 1983 to safeguard them from unconstitutional government harassment.

SUMMARY OF ARGUMENT

Pro-life pregnancy centers have been in Attorney General Platkin's crosshairs since this Court's decision in *Dobbs v. Jackson Women's Health*

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[2] *Attorney General Bonta Issues Consumer Alert Warning Californians that Crisis Pregnancy Centers Do Not Offer Abortion of Comprehensive Reproductive* Care, State of Cal. Off. of the Att'y Gen. (June 1, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-consumer-alert-warning-californians-crisis.

[3] *Know the Difference: Crisis Pregnancy Centers v. Reproductive Healthcare Facilities,* State of Cal. Off. of the Att'y Gen., https://oag.ca.gov/system/files/attachments/press-docs/Crisis%20Pregnancy%20Center%20Bulletin.pdf.

[4] *Attorney General Bonta Sues Anti-Abortion Group, Five California Crisis Pregnancy Centers for Misleading Patients*, State of Cal. Off. of the Att'y Gen. (Sept. 21, 2023), https://oag.ca.gov/news/press-releases/attorney-general-bonta-sues-anti-abortion-group-five-california-crisis-pregnancy.

Org., 597 U.S. 215 (2022). Pet'r's Br. 7-8. As part of his broader efforts to expand abortion,[5] the Attorney General has seized upon a tool of government harassment that this Court rejected in *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958): burdensome and invasive demands for membership lists, or, as in this case, donor information. The lower courts endorsed Attorney General Platkin's view that First Choice's claim is not ripe for adjudication until a state court first issues an order mandating the production of documents.

The District Court's holding, with the agreement of the Third Circuit, rested on an earlier 2-1 decision of the Third Circuit, *Smith & Wesson Brands, Inc. v. Att'y Gen. of N.J.,* 105 F.4th 67 (3d Cir. 2024) (holding that plaintiff's first-filed federal claim was precluded by a state court judgment which the court had ruled necessary before hearing the federal case). As the dissent in that case pointed out, the holding creates a preclusion trap preventing access to federal courts. *Id*. at 98-99. Moreover, this Court rejected a state exhaustion requirement in *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019) (holding that a landowner whose property had been

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[5] *Acting Attorney General Platkin, National Coalition of Attorneys General Issue Joint Statement Reaffirming Commitment to Protecting Access to Abortion Care*, N.J. Off. of the Att'y Gen. (June 27, 2022), https://www.njoag.gov/acting-attorney-general-platkin-national-coalition-of-attorneys-general-issue-joint-statement-reaffirming-commitment-to-protecting-access-to-abortion-care/ ("While the U.S. Supreme Court's decision reverses nearly half a century of legal precedent and undermines the rights of people across the United States, we're joining together to reaffirm our commitment to supporting and expanding access to abortion care nationwide.").

taken by the government was not required to pursue an inverse condemnation action in state court prior to bringing a section 1983 action). Here, as in *Knick*, because of res judicata, a state exhaustion requirement effectively deprives First Choice of access to the federal courts that is guaranteed by section 1983.

Regardless of the method used to impinge on First Amendment rights, whether a subpoena, a state law or regulation, or a state court order, the result should be same. Plaintiffs whose speech has been chilled as a result of state action have the right under section 1983 to seek redress in federal court, and a misguided deference to state procedures should not be used to deprive them of that right.

ARGUMENT

I. The Third Circuit's holding erroneously denies First Choice the broad access to federal courts provided by section 1983.

Section 1983 employs broad language as a means of enforcing constitutional protections when they are threatened by state and local authorities. It permits "*any* citizen" or "other person within the jurisdiction of the United States" to sue "*[e]very* person who, under color of" state law deprives that citizen or person of "*any* rights, privileges, or immunities secured by the Constitution" and applies to suits brought at law or, as in the instant case, in equity. This Court has repeatedly emphasized that a "broad construction of section 1983 is compelled by the statutory language." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (citation omitted) (allowing a section

1983 action alleging that laws levying state taxes and fees violated the Commerce Clause); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 686 (1978) ("Congress intended [section 1983] to be broadly construed.")

A. Federal courts have a duty under section 1983 to decide the constitutional issues presented to them.

The Third Circuit erred by relegating First Choice's constitutional claims to the state court in reliance on the adequacy of that court to protect First Choice's rights. Pet. App. 4a-5a ("It [First Choice] can continue to assert its constitutional claims in state court as that litigation unfolds. . . . We believe that the state court will adequately adjudicate First Choice's constitutional claims.")

Prior to the Civil War, state courts were responsible for deciding cases arising under the federal constitution and laws. Federal courts principally decided cases that arose between citizens of different states or cases where a federal right was denied by a state court. *Zwickler v. Koota*, 389 U.S. 241, 245-46 (1967) (reciting history of post-Civil War civil rights legislation).

After the Civil War, former Confederates organized the Ku Klux Klan and engaged in acts of violence against former slaves and their allies in the South. In order to address the deprivation of federal rights which was occurring in the southern states, in 1871 Congress passed section 1983 (a.k.a the "Ku Klux Klan Act") as part of the

Reconstruction Era legislation.[6] It enforced the provisions of the Fourteenth Amendment against state executive, legislative, or judicial action and recognized that even the courts were being used to harass individuals and often "were in league with those who were bent upon abrogation of federally protected rights." *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (allowing a section 1983 action to prevent enforcement of a public nuisance law against a bookstore); *Ex parte Virginia.*, 100 U.S. 339 (1879) (denying habeas corpus petitions of the State of Virginia and inmate judge who had excluded black people from a jury). Because state authorities could not be trusted to uphold federal rights, the Fourteenth Amendment and the civil rights laws together "alter[ed] the federal system" and established "the role of the Federal Government as a *guarantor* of basic federal rights against state power." *Mitchum*, 407 U.S. at 239. Moreover, "[t]hese [federal] courts became the *primary* and powerful reliances for vindicating every right given by the Constitution." *Zwickler,* 389 U.S. at 247 (emphasis in original).

The passage of section 1983 changed the old order by altering the relationship of the federal courts to the states. "In thus expanding federal judicial power, Congress imposed the *duty* upon all

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[6] *Ku Klux Klan Act of 1871, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes",* Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/historic-document-library/detail/ku-klux-klan-act-of-1871-april-20-1871-an-act-to-enforce-the-provisions-of-the-fourteenth-amendment-to-the-constitution-of-the-united-states-and-for-other-purposes.

levels of the federal judiciary" to hear and decide federal constitutional claims. *Zwickler,* 389 U.S. at 248 (emphasis added).

Although pregnancy centers have not faced the level of persecution that former slaves and their allies endured, they have nonetheless been targeted by pro-abortion forces in the state of New Jersey, prominently including Attorney General Platkin, in an effort to undermine their work. In response to the Attorney General's subpoena, First Choice properly brought its section 1983 case in federal court before the Attorney General filed his state action, and the Third Circuit was wrong to deny jurisdiction. Pet. App. 5a.

B. Section 1983 does not require that a litigant first exhaust state remedies but allows them to choose where to file their cases.

The Third Circuit's decision requiring First Choice to pursue its federal constitutional claims in state court before seeking relief in federal court (Pet. App. 4a-5a) violates the longstanding rule that exhaustion of state remedies is not a prerequisite to bringing a section 1983 claim. In fact, for the same reasons that Congress has imposed an affirmative duty upon federal courts to hear section 1983 claims (*see* Sec. I.A. *supra*), it has rejected a requirement of exhaustion of state remedies.

In *Patsy v. Bd. of Regents,* 457 U.S. 496 (1982), this Court considered the issue of whether Congress intended to impose a requirement of exhaustion of state administrative remedies before a litigant could file a section 1983 action. In holding

that Congress did not intend to impose such a requirement, the Court cited three recurring themes in the Congressional debates over the passage of the Act.

First, as noted above, it was clear that the federal courts were to be given a "paramount role" in protecting constitutional rights. *Id.* at 503.[7] Second, Congress would not have wanted to impose an exhaustion requirement because the Act was passed in the recognition that state authorities were unwilling or unable to protect the constitutional rights of all persons. *Id.* at 505.[8] Third, many legislators believed that the bill provided dual forums in the state and federal system, allowing the plaintiff *to choose* which forum in which to pursue

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[7] "The first remedy proposed by this bill is a resort to the courts of the United States. . . . [T]here is no tribunal so fitted, where equal and exact justice would be more likely to be meted out. . . . as that great tribunal of the Constitution." Cong. Globe, 42nd Cong. 1st Sess. 476 (1871), Available at https://babel.hathitrust.org/cgi/pt?id=uc1.c109461409&seq=1 (statement of Rep. Dawes) ("Globe").

[8] "[T]he local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." Globe at p. 374 (statement of Rep. Lowe).

"[H]as the Government of the United States the right under the Constitution, to protect a citizen of the United States in the exercise of his vested rights . . . by . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State." Globe at p. 389, (statement of Rep. Elliott) (emphasis added).

his claim. *Id.* at 506;[9] *Zwickler,* 389 U.S. at 248 ("Congress imposed the duty upon all levels of the federal judiciary to give due respect to *a suitor's choice of a federal forum* for the hearing and decision of his federal constitutional claims") (emphasis added).

This Court has not required exhaustion regardless of whether the case involved state judicial or administrative remedies. "When federal claims are premised on 42 U.S.C. § 1983 . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the *paramount role Congress has assigned to the federal courts* to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (emphasis added) (citations omitted) (holding that federal declaratory relief is not precluded when no state prosecution is pending and plaintiff demonstrates a genuine threat of enforcement of a state criminal statute.).

Furthermore, it is not enough to assert, even if it were true, that the federal courts would subsequently be available to First Choice (Pet. App. 5a) because "[p]lainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the

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[9] "I do not say that this section gives to the Federal courts exclusive jurisdiction. . . . It leaves, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court." Cong. Globe App., 42nd Cong., 1st Sess. 216 (1871), Available at https://digital.library.unt.edu/ark:/67531/metadc30894/m1/570/ (statement of Sen. Thurman).

United States." *Zwickler*, 389 U.S. at 248 (internal quotation marks omitted) (citation omitted).

The principle that litigants may choose to bring their cases in a federal, rather than a state, forum, has been reiterated by this Court time and again. In *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984) this Court noted that "[P]etitioner could have obtained a federal forum for her federal claim by *litigating it first in a federal court*." *Id.* at 85 (emphasis added) (holding that the res judicata preclusive effect of a state court judgment in which a party did not raise any constitutional issues, but could have, barred a later section 1983 lawsuit for wrongful termination). *Knick*, 588 U.S at 194 ("[P]laintiffs may bring constitutional claims under § 1983 without first bringing *any sort of state lawsuit*, even when state court actions addressing the underlying behavior are available." (emphasis added) (citations omitted).

What the District Court termed as an "extraordinary and novel maneuver" (Pet. App. 38a) on the part of First Choice in first suing in federal court has actually been standard practice in federal courts for more than a century, at least since *Ex parte Young*, 209 U.S. 123 (1908), which this Court called "the fountainhead of federal injunctions against state" proceedings. *Dombrowski v. Pfister*, 380 U.S. 479, 483 (1965).

Therefore, the Third Circuit was wrong to require First Choice to first raise its constitutional issues in state court because section 1983 allows a litigant his choice of forum, without first exhausting state remedies.

II. The Third Circuit opinion ignores this Court's precedents allowing pre-enforcement challenges under section 1983 to prevent chilling of First Amendment rights.

The Third Circuit erroneously displaced this Court's practice of allowing *pre*-enforcement challenges to state laws under section 1983 in favor of its reading of New Jersey laws and procedures. The district court stated, "New Jersey subpoena enforcement proceedings, by their nature, render Plaintiff's claims unripe until contempt is threatened." Pet. App. 26a. The Third Circuit concurred. Pet. App. 4a-5a.

But a plaintiff satisfies the Article III requirement of an injury in fact in a pre-enforcement action when 1) he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and 2) "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted) (holding that petitioners had demonstrated an Article III injury when they intended to engage in arguably prohibited speech and there was a history of past enforcement against them).

The ripeness issue concerns the second requirement, the credible threat of prosecution. Here, the Third Circuit agreed with the District Court that, applying New Jersey law, a state court must first enforce the subpoena under threat of contempt before the constitutional claim can be heard. Pet. App. 26a; Pet. App. 4a. But this Court has repeatedly held in the First Amendment context

that when an individual is subjected to a threat of enforcement, "an *actual arrest, prosecution, or other enforcement action* is not a prerequisite to challenging the law." *Id.* at 158 (emphasis added). *See also:*

- *Steffel*, 415 U.S. at 459 (1974) (allowing a section 1983 First Amendment challenge to a criminal trespass statute where "threats of prosecution" by law enforcement established an "actual controversy" and no state prosecution was pending);

- *303 Creative LLC v. Elenis,* 600 U.S. 570 (2023) (allowing a pre-enforcement challenge under the First Amendment to enforcement of a state law prohibiting discrimination on the basis of sexual orientation when the statute had been enforced against other speakers, and so plaintiff faced a credible threat of sanctions);

- *Wooley v. Maynard*, 430 U.S. 705, 710 (1977) ("[W]hen a genuine *threat* of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights.") (emphasis added);

- *NAACP v. Button*, 371 U.S. 415, 433 (1963) (emphasis added) ("These [First Amendment] freedoms are delicate and vulnerable, as well as supremely

> precious in our society. The *threat of sanctions* may deter their exercise almost as potently as the actual application of sanctions. . . . First Amendment freedoms need breathing space to survive");
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> - *Dombrowski v. Pfister*, 380 U.S. at 486 ("[W]e have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser");
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> - *Ams. for Prosperity v. Bonta*, 594 U.S. 595, 618 (2021) (holding that actual restrictions on the freedom of association are not required because "the risk of a chilling effect on association is enough").

The District Court, with the Third Circuit's agreement, seized upon the "non-self-executing" nature of the subpoena to downplay the threat of prosecution. As the court reads it, under New Jersey law the subpoena does not take on the "power of law" until a court determines it is enforceable. Pet. App. 56a. According to the District Court, prior to that point, "much is uncertain and therefore any alleged injury contemplating compliance is speculative in nature." Pet. App. 42a.

But the soothingly "non-self-executing" nature of the subpoena and the judicial enforcement

mechanism for it makes no difference in the section 1983 context. The chill on speech resulting from the subpoena is the same as if it had the force of law immediately upon being issued. Indeed, on its face, the subpoena states, twice, "Failure to comply with this Subpoena may render you liable for contempt of court and such other penalties as are provided by law." Pet. App. 89a-90a. This is an obvious and unambiguous threat of enforcement. A reasonable person reading the subpoena, complete with deadlines for compliance, would expect that the Attorney General intended to enforce it imminently and would have little or no knowledge or concern about state law technicalities regarding enforcement procedures. The recipient will believe, and is meant to believe, that he ignores the subpoena at his peril.

Moreover, the subpoena was issued in a climate of hostility on the part of the vociferously pro-abortion Attorney General toward pregnancy resource centers like First Choice, referring to pro-life groups as "extremists" and "warning" the public about them. Pet. App. 117a-26a. These polemics further support a subpoena recipient's reasonable belief that the Attorney General had every intention of following through on his threat of enforcement.

In the context of determining injury in section 1983 pre-enforcement challenges, the subpoena is not *materially different* from a law enacted by a legislature. In both cases, there are "imponderables and contingencies" involved in enforcement that "themselves may inhibit the full exercise of First Amendment freedoms" and form a basis for standing. *Dombrowski*, 380 U.S. at 486. Subjecting oneself to prosecution or civil suit in the hope that

one's constitutional rights will ultimately be vindicated is risky, as is going through the state subpoena enforcement process that *requires* a party to be threatened with contempt for failing to respond to a subpoena *before* constitutional issues can be heard. Pet. App. 42a. But this Court has stated:

> Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. . . . By permitting determination [under section 1983] of the invalidity of these statutes . . . we have, in effect, avoided making vindication of freedom of expression *await the outcome of protracted litigation*. Moreover, we have not thought that the *improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure*.

Id. at 486-87 (emphases added).

These "speculative" aspects of "non-self-executing" subpoena enforcement proceedings are therefore merely descriptive of the process and do not illuminate whether the issuance of the subpoena itself caused an Article III injury. In fact, the speculative nature of the proceedings contribute to the chill because such "imponderables and

contingencies []themselves may inhibit the full exercise of First Amendment freedoms." *Id*. at 486.

Finally, if there was any remaining question as to whether the subpoena constituted a "credible threat of enforcement," the Attorney General removed all doubt by filing an action in the N.J. Superior Court to enforce it.[10] In his complaint, the Attorney General alleged that First Choice had *already* violated the Charitable Registration and Investigations Act, the Consumer Fraud Act, and the Professions and Occupations Law "by failing to produce the documents requested in the Subpoena." J.A. 50 ¶ 36, 53 ¶ 45, 59 ¶ 54. The court responded by refusing the quash the Subpoena and granting the relief sought by the Attorney General "in full." Pet. App. 158a.

Other litigants subjected to similar threats have been held to have standing. In *Steffel*, the petitioner was twice warned by police to stop distributing handbills or he would be prosecuted. These threats were therefore not "imaginary or speculative." *Id*. at 459. In *Dombrowski*, the appellants were subjected to, among other things,

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[10] For other subpoena enforcement cases, *see Platkin v. Smith & Wesson Sales Co*., 474 N.J. Super. 476 (App. Div. 2023) (in action brought by Attorney General, holding that the investigatory subpoena was valid, clear, well-defined and enforceable); *Verniero v. Beverly Hills, Ltd., Inc*., 316 N.J. Super. 121 (App. Div. 1998) (in action brought by Attorney General, holding that subpoena was enforceable and defendant was not entitled to immunity from criminal prosecution); *Greenblatt v. N.J. Bd. of Pharmacy*, 214 N.J. Super. 269 (App. Div. 1986) (in case brought by subpoena recipient, holding that subpoena was valid and not proscribed by the U.S. Constitution).

continual threats of prosecution and public accusations by Louisiana officials that they were a Communist-front organization. This Court ruled that they had suffered irreparable injury. *Id*. at 487-88. In *303 Creative*, the petitioner had not herself been threatened with prosecution under the allegedly unconstitutional law, but others had been charged with violating it. *Id*. at 581-82.

But under the lower courts' reasoning here, an individual must first violate a law and be indicted or named in a civil enforcement action before litigation can move forward under section 1983. Such a prerequisite subverts the purpose and rejects *the very premise* of *pre*-enforcement actions as necessary to protect plaintiffs from the chilling effect of threatened enforcement of an unconstitutional law.

The "objectively reasonable chilling of its speech" *even prior to enforcement* is the injury. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1178 n.3 (9th Cir. 2022). First Choice has enumerated various ways in which the issuance of the subpoena has already chilled its First Amendment rights as well as that of its donors. Pet'r's Br. 12-13, 33-47. A section 1983 pre-enforcement action is ripe and necessary to protect those "supremely precious" (*Button*, 371 U.S. 433) First Amendment rights.

First Choice, like the pregnancy centers, is a small local organization run by a handful of people who have devoted their lives to ministering to women in crisis pregnancies. They simply are no match for a state attorney general who has vast amounts of financial and human resources at his

disposal.[11] For non-profits that survive on private donations, turning over donor records -- particularly so the Attorney General can contact and question individuals about the reasons for their support (JA 346) -- can have a severe negative impact on the centers' ability to fulfill their mission. Pet'rs Br. 2 ("Fearing harassment and reprisals, members quickly disassociated from the NAACP, and the group's membership plummeted 50% in southern states between 1955 and 1957.").

III. Requiring exhaustion of state remedies creates a "preclusion trap" which guarantees that First Choice will never have access to a federal court.

Without the ability to bring a pre-enforcement challenge in federal court, litigants are caught in a preclusion trap that undermines the relationship between state and federal courts that Congress intended in enacting section 1983. They are stranded in state court, subject to the same deprivations of rights that occurred prior to section 1983's passage.

The Third Circuit's holding that First Choice's constitutional claims should first be adjudicated in

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[11] "McGuire on Friday said he pleaded guilty to the charges because he couldn't afford to fight them in court. He made three minor omissions totaling $1,283.76 on a campaign finance report, he said. McGuire said James' office combed his finances for three years in what he characterized as politically motivated retaliation for his stance against her pro-abortion policies." Elizabeth Russell, *Family Policy Director Jailed for Campaign Finance Errors*, WORLD (July 25, 2025), https://wng.org/sift/family-policy-director-jailed-for-campaign-finance-errors-1753457727.

state court means that res judicata will prevent a federal court from ever hearing them. This preclusion trap was acknowledged by the District Court (Pet. App. 82a, n. 7) but not addressed at all by the Third Circuit, which apparently assumed that "future federal litigation" would still be possible. Pet. App. 4a-5a. The Third Circuit's state litigation requirement has "relegated" the First Amendment "to the status of a poor relation among the provisions of the Bill of Rights" by "hand[ing] authority over federal [] claims to state courts." *Knick v. Twp. of Scott*, 588 U.S. at 189 (2019) (internal quotation marks omitted) (citation omitted). This Court should reject such reasoning again, as it did in *Knick,* and restore the First Amendment "to the full-fledged constitutional status the Framers envisioned" when they included it in the Bill of Rights. *Id*.

The Full Faith and Credit statute requires that federal courts give preclusive effect to state court decisions whenever the courts of that state would do so under its laws. 28 U.S.C. § 1738. This law applies to cases brought under section 1983. *Migra,* 465 U.S. at 81. An exception to the rule is made if the party did not have a "full and fair opportunity" to litigate his claim in state court. *Allen v. McCurry,* 449 U.S. 90, 104 (1980) (holding that collateral estoppel barred a party's section 1983 action when his claim under the Fourth Amendment was rejected during his criminal trial).

The District Court below was well aware of this preclusion trap. In *Smith & Wesson*, a case that the District Court acknowledged presented the "exact scenario" in the instant case (Pet. App. 82a, n. 7), the Third Circuit upheld the preclusive effect of a state court ruling enforcing a subpoena issued by the

N.J. Attorney General even though, as in this case, the plaintiff first filed in federal court. *Id.* at 70. The blunt language of the dissent in that case applies with equal force to this one:

> "And in its crusades [against 'disfavored groups'], New Jersey follows the *familiar playbook* endorsed by this Court today, creating a 'preclusion trap' by initiating an order to show cause in state court to quickly secure enforcement of a subpoena before a federal challenge can be heard, and then arguing that the summary proceeding results in a 'permanent loss of [the] right to federal judicial review.'"

Id. at 99 (Matey, J., dissenting) (emphasis added).

The state Attorney General's abuse of power is the exact reason for the existence of section 1983, and this Court should apply its decision in *Knick* against this preclusion trap and not allow technical state procedures to undermine the federal law.

CONCLUSION

Attorney General Platkin has launched a crusade against First Choice, using the "familiar playbook" of issuing a subpoena and using state procedural law to trap his ideological opponents in state court. Whether the state court is capable of fairly and competently adjudicating the constitutional claims is irrelevant to this case

because section 1983 guarantees an aggrieved party access to *federal* courts. The Third Circuit should not be allowed to endorse the "playbook" of *Smith & Wesson* against yet another of Attorney General Platkin's political adversaries. Amici requests that the Court reverse the Third Circuit's clearly erroneous decision.

Respectfully submitted,

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