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 FOR RESPONDENT

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QUESTION PRESENTED

Whether Petitioner has alleged sufficient facts to establish a reasonably objective chill from issuance of this non-self-executing subpoena.

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INTRODUCTION

Petitioner First Choice misapprehends the dispute in this case. Petitioner frames the question this Court must answer as whether a subpoena recipient who "has established a reasonably objective chill of its First Amendment rights"—that is, who has a ripe Article III injury—is nevertheless barred from pressing its claims in federal court. Pet.Br.i. And its briefing spills considerable ink arguing against the imposition of a "state-litigation requirement" when federal courts otherwise retain jurisdiction. Pet.Br.19-29. But the parties have not disputed that question, and the Third Circuit did not rule against Petitioner on this basis. Indeed, the parties agree: if Petitioner has a ripe injury based on a showing of reasonably objective First Amendment chill, then Section 1983 offers it a federal forum to vindicate its claims. Consistent with *Knick v. Township of Scott*, 588 U.S. 180 (2019), there is no freestanding requirement that a party with a jurisdictionally appropriate claim seek relief from state court instead. So the answer to the question as Petitioner frames it for this Court is easy: parties with ripe injuries can seek relief in federal court.

Instead, the real dispute in this case—the question the Third Circuit actually decided—is *whether* Petitioner sufficiently alleged a reasonably objective chill of its First Amendment rights from this Subpoena. Two years ago, the New Jersey Attorney General and the Division of Consumer Affairs issued a Subpoena requesting information that bears on whether Petitioner engaged in deceptive or otherwise unlawful conduct. But under New Jersey law, that Subpoena is not self-executing—meaning Petitioner faces no penalties for failing to comply with it. Petitioner faces penalties for nonproduction only if a New Jersey state court issues

an order requiring the production of documents—and even then, only if Petitioner is held in contempt for failing to comply with that judicial order. Here, although the State issued the Subpoena in 2023, the state trial court has repeatedly declined to issue an order requiring document production and has ordered the parties to negotiate instead.

On these facts, Petitioner cannot establish "a reasonably objective chill of its First Amendment rights." Pet.Br.i. Petitioner argues that the Subpoena's single request for the identities of some of its donors will deter objectively reasonable donors from contributing to Petitioner in the future, thus chilling Petitioner's own speech and associational rights. Yet the record tells a different story. Initially, it remains unclear whether Petitioner will need to offer *any* donor identities in response to the State's demand—and indeed, the State narrowed its request for such information long before this Court granted this case. More fundamentally, a donor objectively would not be deterred by this Subpoena because donors can donate to Petitioner without incurring *any* risk of disclosure, and because production of the limited documents the State requested would not result in the deplorable harassment and violence Petitioner describes. That leaves Petitioner to attack the merits of the request, relying on *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) (*AFP*), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). But the strength of a plaintiff's claims has no bearing on standing or ripeness.

That forces Petitioner, backed by the Federal Government, to offer a more radical theory: that mere receipt of a non-self-executing subpoena that a State is likely to seek to enforce always creates Article III jurisdiction for any federal claim, even beyond the

First Amendment. But there is a good reason this argument appears nowhere in the question presented: no court has accepted it. It is contrary to basic Article III principles, as non-self-executing subpoenas impose no obligations of their own, and any obligation to produce is contingent on a neutral magistrate's issuance of an order requiring production. It is contrary to a century of history and tradition; indeed, Petitioner does not cite (and the State is not aware of) a single federal court that has *ever* held that Article III permits a pre-enforcement claim to proceed against such a subpoena outside the First Amendment. And it is contrary to this Court's precedents. The consequences of adopting Petitioner's rule would be far-reaching, turning every quotidian subpoena dispute into a federal case—a result not even the Federal Government can stomach, as it demands a bespoke exception for its own administrative subpoenas. So if this Court entertains this alternative theory, this Court should reject it.

Where Article III permits federal jurisdiction, Section 1983 allows federal claims against state officials. But the converse is also true: Section 1983 provides no basis for a federal suit unless Article III is satisfied. On this record, Petitioner cannot establish a ripe Article III injury allowing it to challenge a subpoena that may never require it to disclose donor information and may never result in sanctions—and that, in the interim, works no objectively reasonable chill.

STATEMENT OF THE CASE

A. Legal Background

1. For over 150 years, federal and state agencies have used administrative subpoenas to investigate potential violations of the laws they enforce. See, *e.g.*, Act of July 18, 1866, ch. 184, § 9, 14 Stat. 98, 101-02

(1866) (authorizing IRS tax assessors to issue summonses); Act of Apr. 18, 1871, ch. 140, § 14, 1871 Ill. Laws 300, 303 (giving railroad commissioners "power to issue subpoenas"); Act of Apr. 28, 1874, ch. 273, § 10, 1874 Wis. Sess. Laws 599, 603 (same); Railroad Commission Act, No. 269, § XV, 1879 Ga. Laws 125, 130 (same); Pacific Railway Commission Act, ch. 345, § 2, 24 Stat. 488, 491 (1887) (giving Pacific Railway Commission power to "require the attendance and testimony of witnesses and the production" of documents); Interstate Commerce Act of 1887, ch. 128, § 12, 26 Stat. 743, 743-44 (1887) (granting Interstate Commerce Commission "the right to obtain" necessary information from common carriers); Dairy Commissioner Act, ch. 404, § 3, 1907 Kan. Sess. Laws 581, 583 (giving state dairy commissioner power to "issue subpoenas" to investigate "unlawful operations" of dairies).

These administrative subpoenas are non-self-executing—meaning agencies lack power to enforce them on their own and instead must apply to a court for an order requiring production. As a result, noncompliance with a subpoena itself does not subject the recipient to penalties. Instead, a party is subject to penalties only if a neutral magistrate issues a judicial order requiring production and then holds the party in contempt for failing to comply with its order. See, *e.g.*, § 9, 14 Stat. at 102 (requiring tax assessor to "apply to the judge of the district court" for "an attachment against such person as for a contempt"); § XV, 1879 Ga. Laws at 130-31 (requiring railroad commission to apply to "superior court" to compel compliance and giving court "power to punish for contempt"); § 2, 24 Stat. at 491 (requiring railway commission to "invoke the aid of any court of the United States in requiring" compliance, and authorizing court to punish "any failure to obey such order of the court … as a

contempt"); § 3, 1907 Kan. Sess. Laws at 583 (requiring state dairy commissioner to apply to district court to compel production and allowing court to punish contempt); see, *e.g.*, *In re Meador*, 16 F. Cas. 1294, 1297 (N.D. Ga. 1869) (describing a "summons" as "simply a notice," and noting that once disobeyed, the official issuing the summons "must then apply to the proper officer ... to enforce obedience").

Congress has granted administrative subpoena power to most federal agencies. U.S. Dep't of Justice, Office of Legal Policy, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies & Entities* 6 (2002). Because the "power to punish is not generally available to federal administrative agencies," federal agencies can enforce these subpoenas only by obtaining an order from a federal court compelling compliance. *In re Nat'l Sec. Letter*, 33 F.4th 1058, 1063 (CA9 2022) (citation omitted); see, *e.g.*, *Schulz v. IRS*, 413 F.3d 297, 298-99 (CA2 2005) (IRS summonses "apply no force to the target, and no punitive consequences can befall a summoned party who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order"); *In re Ramirez*, 905 F.2d 97, 98 (CA5 1990) (non-self-executing subpoena issued under 8 U.S.C. § 1225 as part of an investigation into compliance by employers with immigration law); *Mobil Expl. & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1200 (CA10 1999) (Interior subpoena is non-self-executing).

State administrative subpoenas operate similarly. Attorneys General are the chief law enforcement officers of their States and have broad authority to investigate potential violations of state laws. See, *e.g.*, *Madison Equities, Inc. v. Office of Att'y Gen.*, 967

N.W.2d 667, 672-73 (Minn. 2021) (describing Minnesota Attorney General's subpoena power); *Exxon Mobil Corp. v. Attorney Gen.*, 94 N.E.3d 786, 798-99 (Mass. 2018) (subpoena power granted to Massachusetts Attorney General); *Perdue v. Baker*, 586 S.E.2d 606, 609 n.27 (Ga. 2003); *In re Addonizio*, 248 A.2d 531, 542 (N.J. 1968).

Like their federal equivalents, state administrative subpoenas are often non-self-executing, meaning they cannot be enforced without a court order.[1] See *Google, Inc. v. Hood*, 822 F.3d 212, 225 (CA5 2016). Recipients can move to quash or modify a subpoena in the appropriate state court prior to enforcement. See, *e.g.*, Ohio Rev. Code Ann. § 1345.06(C); Tenn. Code Ann. § 47-18-106(b). And recipients are subject to sanctions only if they refuse to produce documents *after* the court requires production; in those circumstances, the court holds the recipient in contempt for violating its

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[1] *E.g.*, Ala. Code § 8-19-9; Ariz. Rev. Stat. Ann. § 44-1527(A); Ark. Code Ann. § 4-88-112; Cal. Gov. Code § 11187; Colo. Rev. Stat. Ann. § 6-1-109; Conn. Gen. Stat. § 21a-439(b); Del. Code Ann. tit. 6, § 2520; D.C. Code § 1-301.88d(d); Fla. Stat. § 501.206(3); Ga. Code Ann. § 10-1-404(b); Haw. Rev. Stat. § 28-2.5(e); Idaho Code § 48-614; 815 Ill. Comp. Stat. 505/6; Ind. Code § 4-6-13-4(3); Iowa Code § 714.16(6); Kan. Stat. Ann. § 50-631(e); Ky. Rev. Stat. Ann. § 367.290; La. Stat. Ann. § 51:1413; Me. Stat. tit. 5, § 212; Mass. Gen. Laws ch. 93A, § 7; Mich. Comp. Laws § 445.908(3); Minn. Stat. § 8.31 sub-div 2a; Miss. Code Ann. § 75-24-17; Mo. Rev. Stat. § 407.090; Mont. Code Ann. § 30-14-134; Neb. Rev. Stat. § 59-1611(8); Nev. Rev. Stat. § 598.097; N.M. Stat. Ann. § 57-12-12(H); N.C. Gen. Stat. § 75-10; N.D. Cent. Code § 51-15-06; Ohio Rev. Code Ann. § 1345.06(D); Okla. Stat. tit. 15, § 760; Or. Rev. Stat. § 646.626; 71 Pa. Cons. Stat. Ann. § 307-3(a); 6 R.I. Gen. Laws § 6-13.1-7(f); S.C. Code Ann. § 39-5-100; S.D. Codified Laws § 37-24-17; Tenn. Code Ann. § 47-18-106(c); Tex. Bus. & Comm. Code Ann. § 17.62(b); Utah Code Ann. § 13-11-16(3); Vt. Stat. Ann. tit. 9, § 2460(c); Wash. Rev. Code § 19.86.110(9); W. Va. Code § 46A-7-104(3); Wyo. Stat. Ann. § 40-12-112(c).

order requiring production. See *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 57-58 (CA9 2024) (*SPU*) (explaining that a non-self-executing subpoena "carries no stick" and a recipient "would not face sanctions" until the recipient violates a court order compelling production).

2. New Jersey law likewise provides state agencies with authority to issue non-self-executing subpoenas. The Consumer Fraud Act ("CFA"), Charitable Registration and Investigation Act ("CRIA"), and Professions and Occupations Act ("P&O Law") empower the New Jersey Attorney General and the Division of Consumer Affairs to investigate a broad range of unlawful practices. The CFA prohibits deceptive and fraudulent commercial practices. N.J. Stat. Ann. § 56:8-2. CRIA prohibits deceptive or misleading conduct by charities relating to "the planning, conduct, or execution of any solicitation" for donations. N.J. Stat. Ann. § 45:17A-32(c)(1), (3), (7). And the P&O Law bars the unlicensed practice of medicine, N.J. Stat. Ann. § 45:1-18.2, and licensed medical professionals from engaging in deceptive and misleading practices, see, *e.g.*, N.J. Stat. Ann. § 45:1-21(b). The Attorney General and the Division are charged with enforcing these statutes and are empowered to "inquire to be assured of compliance." *Addonizio*, 248 A.2d, at 542.

These statutes authorize the Division to issue subpoenas to investigate a range of misconduct, but not to compel production unilaterally. Subpoenas issued pursuant to these laws are "non-self-executing." Pet.6; Pet.App.3a, 37a, 75a-76a; Pet.Br.23. To compel compliance with the Division's request, the Division must seek an order from the New Jersey Superior Court, which has exclusive power to issue an order requiring production and then levy contempt sanctions in the event of noncompliance with that judicial order.

See N.J. Stat. Ann. § 56:8-6 (CFA) (providing "the Superior Court" is the body that issues "an order … [g]ranting such other relief" as required for enforcement); N.J. Stat. Ann. § 45:17A-33(g)(3) (CRIA) (same); N.J. Stat. Ann. § 45:1-19(b) (P&O Law) (same).

That also affects whether and when the recipient must produce documents. The "failure" to produce documents in response to these subpoenas is not itself "treated as a violation" of state law, but is instead a basis for state officials to seek a court order "to compel compliance" with the request for production. *Smith & Wesson Brands v. Attorney Gen. of N.J.*, 27 F.4th 886, 893 (CA3 2022) (citing state court subpoena ruling). The recipient must produce documents only *if* that court order issues, and faces penalties only *after* refusing to comply with that later judicial order. See *ibid.* (noting "penalties are not self-executing; a court will impose them only after the subpoenaed party violates a court order"). At that stage, the recipient faces sanctions for violating the state court's order. *Ibid.* (recipient "in contempt only by violating the state court's order"); see N.J. Stat. Ann. § 2A:10-5 (Superior Court can fine "[a]ny person who shall be adjudged in contempt of the Superior Court by reason of his disobedience to a judgment, order or process of the court").

B. Factual and Procedural Background

1. This case arose from the Division's investigation into whether Petitioner was violating the CFA, CRIA, and the P&O Law by misleading donors and potential clients into believing that it was providing certain reproductive health care services.

At the outset, the Division reviewed the different websites that Petitioner maintains for different audiences. The principal website Petitioner created for

donors, https://1stchoicefriends.org, links to a donation-solicitation page stating that Petitioner has a pro-life mission to "protect the unborn." JA491. That page also explains that "pro-life donors like you have saved lives and served women considering abortion in New Jersey." *Ibid.* And its Volunteer Application confirms Petitioner is "committed to assisting women to carry to term." JA487. But Petitioner maintains two other sites—https://firstchoicewomancenter.com and https://1stchoice.org—that omit these same references to Petitioner's operations. JA418-21, JA493-553. Instead, one of the websites says that Petitioner is "a network of clinics providing the best care and most up-to-date information on your pregnancy and pregnancy options," JA513, and adds that women should "consult a medical professional" before seeking abortion care, JA522. Although both note Petitioner "does not perform or refer for termination services," JA407; see JA519, this language appears only at the bottom of the webpage and does not appear on the donation page of these sites at all, see JA407, JA418-21.

The State also had concerns that Petitioner may be violating state law in other respects. The State identified medical statements on Petitioner's websites that may be misleading or untrue. Compare JA527 ("a pre-abortion ultrasound is generally required before you take the abortion pill"), with U.S. Food & Drug Admin., Mifeprex (Mifepristone) Prescribing Information 17 (Mar. 2016), https://tinyurl.com/mr2au9mz (noting an ultrasound is an option, but not that it is required); see also JA475 (stating without citation that "[t]here is an effective process for reversing the abortion pill"). The State also identified conflicting evidence regarding the role of licensed professionals in Petitioner's operations—including whether individuals were performing diagnostic sonograms and purporting to

assess gestational age, viability, and ectopic pregnancies without possessing the requisite licensure. Compare JA401 (representing services are overseen by a physician), and JA504 (claiming to diagnose ectopic pregnancies and fetal viability), with JA449, 452 (Petitioner is not "an obstetrical medical practice" and "do[es] not use ultrasound to ... diagnose abnormalities"). And there were concerns about Petitioner's patient-privacy practices. Compare JA408, 500 (services are confidential), with JA422-25 (sharing information about patients with affiliates).

These concerns about the lawfulness of Petitioner's practices led the Division to send Petitioner a non-self-executing subpoena in November 2023. Pet.App.89a-110a. The Subpoena sought documents to assist in evaluating whether Petitioner had engaged in misrepresentations or otherwise violated the laws the Division enforces. Pet.App.100a-110a. Among the Subpoena's requests, two sought documents concerning Petitioner's advertisements and solicitations, Pet.App.100a-101a (Requests 1-2); twelve sought information about the services Petitioner provides to clients, including identification of the licensed medical personnel involved in its operations, Pet.App.101a-102a, 107a-108a, 110a (Requests 3-5, 13-19, 21, 27); and four sought documents substantiating medical and scientific claims on Petitioner's websites, Pet.App.102a-106a (Requests 6-9). One request sought information identifying donors so that the Division could determine whether any donors had been misled. See Pet.App.110a (Request 26 seeking documents identifying "donations made to [Petitioner] by any means other than through the Donor Solicitation Page"). The Subpoena requested a response by December 15, 2023. Pet.App.89a.

2. In the two years since, Petitioner's challenges to the Subpoena have spawned litigation before the state and federal courts.

a. Initial Federal Action. In December 2023, two days before Petitioner's deadline to respond to the Subpoena, Petitioner sued in federal court. Petitioner contended that the Subpoena violated its First Amendment rights because it was borne of retaliation or viewpoint discrimination; that the request for donors' names violated the First Amendment; and that the Subpoena was overbroad. See Pet.App.111a-147a.

In January 2024, the district court dismissed the challenge as unripe. See Pet.App.71a-84a. It reasoned that the State lacked power to enforce the Subpoena because New Jersey law vests exclusive authority to enforce a non-self-executing subpoena in the New Jersey Superior Court, and any injuries were contingent on that court's independent decision. Pet.App.75a-76a (citing N.J. Stat. Ann. §§ 56:8-6; 45:17A-33(g)). Because the federal court "cannot yet know whether the state court … will, in fact, enforce the subpoena in its current form," Petitioner's claims were "not ripe for resolution" in an Article III court "because no actual or imminent injury has occurred." Pet.App.81a.

Petitioner appealed. In February 2024, the Third Circuit denied an injunction pending appeal. JA64-65. This Court denied Petitioner's mandamus petition, *In re First Choice*, 144 S. Ct. 2552 (2024), and the parties proceeded to brief the appeal in the Third Circuit.

b. State Court Action. On January 30, 2024, the State moved to enforce the Subpoena in New Jersey Superior Court. JA39-63. In April 2024, Petitioner cross-moved to stay or quash the Subpoena, and the

parties disputed the same constitutional arguments Petitioner pressed in its federal suit. See JA69-115.

In May 2024, the state court issued an oral ruling denying Petitioner's cross-motion to quash the Subpoena. Pet.App.158a-159a, 168a-171a. The court found no evidence that the Subpoena as a whole resulted from "retaliation and bias on the State's part." Pet.App.154a-156a. The state court, however, found Petitioner's other challenges—including claims that one request for donor information would violate First Amendment associational rights, or that the Subpoena is overly burdensome or unreasonable—were "premature" because they "center[ed] on" the Subpoena's specific "scope" and subsets of its requests. Pet.App.155a-156a. The court explained that "the Attorney General has not, at this very preliminary juncture of this matter, violated any statutory or constitutional tenets which would lead to a quashing of the subpoena at issue." Pet.App.158a.

At the same time, the court granted the State's motion to enforce, Pet.App.158a-159a, memorializing its ruling across three orders, Pet.App.69a-70a; JA118-19. On June 18, in one of those orders, the court directed Petitioner to "respond fully" to the Subpoena by July 18. Pet.App.70a.

On July 18, instead of producing most of the documents the State requested, Petitioner identified the list of requests to which it still objected. Petitioner explained that the state court had only required it to "respond" to the Subpoena—which it took to mean *either* producing documents *or* raising any objections. See Pet.11. That is, Petitioner understood the state-court order not to require Petitioner to comply with any subpoena request to which it objected.

On November 19, the state trial court held a hearing clarifying two relevant points. JA207-300. *First*, although the parties disputed the meaning of the trial court's June 18 order, the trial court stated that it had *not* required Petitioner to produce any subpoenaed documents. Instead, in ordering Petitioner to "fully respond," the trial court allowed for responses in the form of objections. See Pet.App.64a-65a. Despite the State's continued request for an order to produce documents, the court rejected that request and declined to order production. The judge ordered the parties to meet and confer before returning to her with remaining constitutional disputes. See Pet.App.63a-66a.

Second, the State clarified the Subpoena's scope. Petitioner had expressed concern that the Subpoena requested the identities of a broad array of donors, including at galas and church fundraisers, or through other websites that clearly delineated Petitioner's operations. But the State confirmed Petitioner only had to provide the names of those donors who donated via https://1stchoice.org and https://firstchoicewomancenter.com, the specific websites that potentially misled as to Petitioner's operations. JA243-45.

c. Remaining Federal Proceedings. Meanwhile, following the June 18 state trial court order requiring Petitioner to "respond fully" (but before the trial court clarified in November 2024 that it did not require Petitioner to produce any documents), the State moved to dismiss Petitioner's pending federal appeal. See JA120-21. The State explained its (ultimately incorrect) view that the case had ripened because the state court had compelled document production. *Ibid.*

On July 9, the Third Circuit granted the State's motion, dismissed Petitioner's appeal, and remanded

to the district court. *Ibid.* On remand, Petitioner sought preliminary relief in the federal district court.

On November 12, the federal district court denied Petitioner's motion and dismissed its claims without prejudice. See Pet.App.57a-58a. That court concluded that, although the state court had required Petitioner to provide *responses* to the Subpoena, those responses could include objections, and so it "remain[ed] an open question" whether Petitioner would be compelled to disclose the materials that it believed were constitutionally protected. Pet.App.31a-32a. Because the state trial court had not decided whether to order *document production*, and because Petitioner still faced no sanctions absent any such order, the federal district court again held that the matter remained unripe. *Ibid.*

Following briefing and argument, the Third Circuit issued an unpublished, *per curiam* opinion holding that Petitioner's claims did not satisfy Article III. Pet.App.1a-5a. The panel did not adopt a bright-line rule regarding the ripeness of challenges to non-self-executing subpoenas. Instead, the panel found this action unripe based on the specific facts before it:

> Having considered the parties' arguments, we do not think First Choice's claims are ripe. It can continue to assert its constitutional claims in state court as that litigation unfolds; the parties have been ordered by the state court to negotiate to narrow the subpoena's scope; they have agreed to so negotiate; the Attorney General has conceded that he seeks donor information from only two websites; and First Choice's current affidavits do not yet show enough of an injury.

Pet.App.4a. Judge Bibas noted a dissent in a one-sentence footnote, explaining that he "would find [Petitioner's] constitutional claims ripe" pursuant to *AFP*, 594 U.S. 595. Pet.App.3a n.†.

SUMMARY OF ARGUMENT

The dispute between the parties is narrow. The parties agree that if the recipient of a subpoena "has established a reasonably objective chill of its First Amendment rights," the recipient can sue in federal court. The parties also agree that Section 1983 does not impose a "state-litigation requirement" barring jurisdictionally appropriate claims. The only remaining question is whether, on these facts, Petitioner has established a ripe Article III injury. It has not.

I. Petitioner has not sufficiently alleged that this Subpoena's single request for information regarding some of Petitioner's donors will impose "a reasonably objective chill of its First Amendment rights." Taken together, three key features of the Subpoena and the record refute Petitioner's allegations of chill. *First*, any risk that donors' identities will be produced is speculative and remains wholly contingent on a future state-court order requiring production. The Subpoena itself does not require Petitioner to do anything, and compliance is entirely voluntary. So concerns about disclosure hinge instead on whether a state court will issue an order requiring production. This case illustrates why such a court order remains too contingent, as the state trial court here repeatedly declined to compel document production. *Second*, even if some donor information were produced, donors would not reasonably be deterred from contributing in this specific case because the Subpoena explicitly carves out ways for donors to contribute without any risk of disclosure. The Subpoena itself explicitly requests no

information regarding the donors who contribute using https://1stchoicefriends.org, since there is no risk that such donors were misled by Petitioner. So donors have a path to donating without fearing disclosure—a path half of Petitioner's donors already take. The mere fact that donors might change the URL by which they donate to Petitioner does not establish First Amendment chill. *Third*, donors would not reasonably self-censor here because the record offers no basis for concluding that disclosure to state officials will result in the odious violence and harassment Petitioner describes.

II. Petitioner's alternative theory—that the mere receipt of a non-self-executing subpoena that a State is likely to seek to enforce automatically establishes Article III jurisdiction for a pre-enforcement challenge even beyond First Amendment chill claims—also fails. That argument falls outside the scope of Petitioner's question presented, as it would extend to all manner of non-First Amendment challenges. But even if the Court reaches this argument, it should reject it. After all, this theory runs counter to black-letter Article III principles, which make clear that a pre-enforcement challenge is not ripe where (as here) a party faces no penalties or consequences from the government action it challenges. It conflicts with history and tradition, as neither Petitioner nor the Federal Government cites a single federal case in the 150-year history of non-self-executing subpoenas holding that Article III permits a pre-enforcement challenge to such a subpoena to proceed outside the First Amendment context. It contravenes this Court's precedents. And it would open the federal courts to a flood of litigation challenging myriad state and local subpoenas. Nor do Section 1983 or concerns about preclusion compel this Court to bend

the usual rules of standing to create a federal forum where Article III precludes one.

ARGUMENT

Petitioner asks this Court to hold that, *once* a recipient of a subpoena "has established a reasonably objective chill of its First Amendment rights," then the "federal court in a first-filed action" is not "deprived of jurisdiction because those rights must be adjudicated in state court." Pet.Br.i. But the parties agree on that point, and the Third Circuit did not hold otherwise. If a subpoena recipient can establish an objectively reasonable chill from the issuance of a subpoena, the recipient has a ripe Article III injury. In those circumstances, Section 1983 naturally provides that party a federal forum with no mandatory state-court litigation requirement. This Court thus need not tarry long on this issue, to which Petitioner dedicates a substantial portion of its merits briefing. See Pet.Br.19-29.

Instead, the decision below resolved only the *premise* of the question presented: whether Petitioner "established a reasonably objective chill" from this Subpoena. That issue is dispositive, since a party without a ripe injury cannot proceed in federal court. Article III is a "bedrock constitutional requirement that this Court has applied to all manner of important disputes." *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 378 (2024); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("[n]o principle is more fundamental to the judiciary's proper role"). It governs when a plaintiff alleges violations of Section 1983—or any other statute. See, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (Section 1983 claimants "must satisfy the threshold requirement imposed by Article III"); *Lewis v. Casey*, 518 U.S. 343, 349 n.1, 351-52 (1996); *Leeke v. Timmerman*, 454

U.S. 83, 86-87 (1981). In short, Congress has not "guaranteed *federal* relief" under Section 1983 if a federal court lacks Article III jurisdiction. Pet.Br.21.

That is fatal to this challenge. Article III requires a "concrete, particularized, and actual or imminent" injury. *Clapper*, 568 U.S., at 408-09. An injury is not imminent—meaning that the federal claim is not constitutionally ripe—if it remains "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 592 U.S. 125, 131 (2020) (citation omitted); see *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (*SBA List*) (Article III standing and ripeness "boil down to the same question"). Adherence to these Article III rules "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" and avoids "judicial interference until" the "effects" are "felt in a concrete way by the challenging parties." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148-149 (1967).

Here, the chill-based First Amendment injury Petitioner asserts is not ripe. And the alternative Petitioner and the United States press—that receipt of these requests automatically creates a ripe injury so long as the State is likely to seek enforcement—is contrary to first principles, history, and precedent.

I. Petitioner Has Not Demonstrated A Ripe, Chill-Based Injury On These Facts.

Petitioner's principal standing theory is that the risk of disclosure from the Subpoena would cause objectively reasonable donors to stop donating to Petitioner, chilling Petitioner's speech and associational

rights. Pet.Br.35-46. On these facts, however, Petitioner has not alleged an objective chill.[2]

1. This Court has long recognized "that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Chill exists when the government's action leads an objectively reasonable individual to engage in the "'self-censorship' of speech that could not be proscribed—a 'cautious and restrictive exercise' of First Amendment freedoms." *Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (citation omitted). To ensure "enough 'breathing space' for protected speech," the law recognizes Article III injuries based on the objective deterrence of protected speech. *Id.*, at 82. All agree New Jersey officials could not bar donors from contributing to Petitioner, nor have they sought to do so. But chill doctrine allows Petitioner to sue still if the State's actions would actually or imminently cause a reasonable donor to stop making those contributions on their own. See *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1174 (CA9 2022) (Article III injury can be proven "by a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising his right to free expression").

But as the parties agree, a party has a ripe injury only if the chill is "objectively reasonable." See Pet.Br.i. After all, parties "cannot manufacture standing

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[2] Petitioner's standing arguments focus on the Subpoena's single request for information related to donors. See Pet.Br.34-38. Petitioner does not meaningfully suggest that the Subpoena's other requests for information, which do not involve donor identities, would chill Petitioner's speech or associational rights. So those remaining requests are not properly before this Court.

merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S., at 416. Thus, a litigant can claim a ripe chill-based injury only if a person of ordinary firmness would be chilled. See, *e.g.*, *Laird*, 408 U.S., at 14 (asking if claimant suffers "objective" harm); *Kenny v. Wilson*, 885 F.3d 280, 289 n.3 (CA4 2018) (explaining "action will be sufficiently chilling when it is likely to deter a person of ordinary firmness" from exercising First Amendment rights); *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 867 (CA9 2016) (same); *Surita v. Hyde*, 665 F.3d 860, 878 (CA7 2011) (same); *Smith v. Plati*, 258 F.3d 1167, 1177 (CA10 2001) (same). "The ordinary-firmness test is well established" to ascertain injuries from "violations of the First Amendment." *Garcia v. Trenton*, 348 F.3d 726, 728 (CA8 2003).

On the other hand, a chill-based injury is unripe when it remains speculative or subjective. For First Amendment injuries as others, the Article III harm must be "actual or imminent"—meaning it is "certainly impending"—and cannot be established by "allegations of *possible* future injury" alone. *Clapper*, 568 U.S., at 409; *Trump v. New York*, 592 U.S., at 131 (Article III is not satisfied if harm is "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all'" (citation omitted)). Thus, "[a]llegations of subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird*, 408 U.S., at 13-14; see, *e.g.*, *Twitter*, 56 F.4th, at 1174; *Salvation Army v. Department of Cmty. Affs.*, 919 F.2d 183, 193 (CA3 1990). So to support this injury, a plaintiff must reasonably self-censor their First Amendment rights; it is not enough merely to allege subjective fears.

2. For three reasons, especially taken together, Petitioner has not "clearly … allege[d] facts demonstrating" that this Subpoena actually or imminently would reasonably deter donors from associating with or contributing to Petitioner. See *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). *First*, any risk that donors' identities would be produced remains speculative and contingent on a future state-court order. *Second*, even were some donor information produced, donors would not reasonably be deterred from contributing, because the Subpoena carves out ways for donors to contribute without a risk of disclosure to the State. *Third*, donors would not reasonably self-censor because there is no factual or legal basis to find that future disclosure to these state officials furthers the unacceptable harassment and violence Petitioner describes.

a. Initially, that the State issued a non-self-executing Subpoena makes it significantly more difficult for Petitioner to establish chill.[3] As this Court noted in its seminal decision on chill, even though "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition," a challenger cannot satisfy Article III merely by "alleg[ing] that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity." *Laird*, 408 U.S., at 10-11;

[3] As the State has explained before, this Court need not decide whether the issuance of a non-self-executing subpoena can ever establish chill, because the allegations here do not support prospective chill regardless. See BIO.31; see also *Twitter*, 56 F.4th, at 1174 (rejecting view that a non-self-executing subpoena could *never* support a chill-based injury, but finding such injuries less likely as complaints about non-self-executing requests "speculate about injuries that have not and may never occur").

see *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (CA6 2019) ("'mere existence, *without more*, of a governmental investigative and data-gathering activity' is insufficient to present anything more than allegations of a subjective chill"). That makes sense: if a party is not subject to the "exercise of governmental power [that is] regulatory, proscriptive, or compulsory in nature," it is unlikely it reasonably has to self-censor. *Laird*, 408 U.S., at 11.

Non-self-executing subpoenas are not "regulatory, proscriptive, or compulsory," and so will scarcely create objectively reasonable chill, because they impose no binding obligations whatsoever on the recipient. *Ibid.* Recall, as explained above, that a non-self-executing subpoena under New Jersey law does not require a recipient to do anything. The Subpoena is a "voluntary" request for documents. *Twitter*, 56 F.4th, at 1176. Unlike statutes, regulations, agency orders, or self-executing subpoenas, no consequences attach for failure to comply: the subpoena "carries no stick" and recipients "would not face sanctions for ignoring it." *SPU*, 104 F.4th, at 57-58. So "failure" to produce documents in response to this request is not "treated as a violation" of New Jersey law, but is instead only a basis for state officials to seek a court order requiring the production of documents. *Smith & Wesson*, 27 F.4th, at 893. A recipient must produce documents only *once* a court order issues and faces penalties only after refusing to comply with *that* judicial order. See *ibid.* Thus, the risk of donor disclosure is contingent on a future state-court order requiring production, and disclosure is voluntary until then.

Courts are therefore particularly reticent to find that non-self-executing subpoenas alone "chill" speech sufficient for Article III jurisdiction. It is "speculative"

and "contingent" that a state court with the relevant statutory authority will require the production of documents—or require the production of exactly the documents the State requests. See *Clapper*, 568 U.S., at 401; *Trump v. New York*, 592 U.S., at 131. And the lack of any obligation to produce anything unless and until the issuance of a court order makes the decision to self-censor speech or association that much more self-imposed. See *Laird*, 408 U.S., at 11. In short, if a claim of chill turns on a decision to self-censor in light of a future mandate that "ha[s] not and may never occur," it is hard to demonstrate self-censorship is reasonable. *SPU*, 104 F.4th, at 57-58; *Twitter*, 56 F.4th, at 1179. Indeed, the Federal Government itself admits that the mere service of a non-self-executing subpoena would not necessarily support Article III injury just because the recipient claims it "will discourage its donors from associating with it." U.S.Br.31-32.

This case illustrates why. Petitioner asserts that a single request in this Subpoena could have led to disclosure of the "donor information for some 5,000 individual contributions … includ[ing] everyone who gave at First Choice's benefit dinners and through church baby-bottle campaigns." Pet.8; Pet.Br.9. And it offered an anonymous declaration from donors, at least one of whom donated at an in-person event and stated that disclosure to state officials would make them less likely to donate.[4] Pet.App.176a-177a. But for one, the declaration never once says that these donors will actually decline to donate if disclosure occurs, *ibid.*, and there is no evidence that any donor has

[4] At least one of the anonymous donors also contributed to Petitioner via https://1stchoicefriends.org, but as explained below, the Subpoena itself explicitly carved out any contributions via that website. See *infra* at 28-29.

stopped giving to Petitioner based on the issuance of the Subpoena, see *infra* at 29. Regardless, Petitioner has never been required to produce donor information—and could not face penalties unless a court orders production and Petitioner declines to comply with that judicial order. The donors' stated concern thus hinges on contingencies about future court action. And in reality, the state court has repeatedly *declined* (in the two years since the Subpoena issued) to compel production, instead requiring the State to negotiate—including on the State's lone request for donor information.

As a result of this meet-and-confer process, the State has narrowed its request for donor information to include only donors who contributed via the two websites of concern—https://1stchoice.org and https://firstchoicewomancenter.com—and clarified that Petitioner can comply in full without turning over any other donor identities, including those who gave in other ways, including at galas and church fundraisers. See *supra* at 13; JA243-44. Thus, there is no risk that any of the declarant donors will have any information disclosed via this Subpoena. See Pet.App.4a (Third Circuit emphasizing State is seeking "donor information from only two websites," for which no evidence of chill exists).[5] The chill Petitioner describes in its briefing is tied to disclosures that will not occur.

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[5] Nor does the Division's statement that the State seeks donor information from these two sites "at this time" mean the State may change course. See Pet.Br.45. The Division agreed to narrow the Subpoena's requests to seek donor information only from two websites, and it will not unilaterally broaden the Subpoena again. The Division, through counsel, was just reserving its right to seek different information—via a different, future subpoena—should new evidence of fraud come to light.

Petitioner rebuffs such developments as insufficient to establish mootness, Pet.Br.45-46, but that misunderstands the point: it was always speculative what donor information (if any) would have to be produced, and these developments illustrate the contingencies. See *Trump v. New York*, 592 U.S., at 131 (asking whether harm is "dependent on 'contingent future events'" (citation omitted)); *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 480 (2021) (claim unripe "if avenues still remain for the government to clarify or change its decision"). Petitioner's concerns about how negotiations and state-court proceedings would play out were "subjective" (and were never borne out) and cannot demonstrate an objective chill. See *Laird*, 408 U.S., at 13-14; *Clapper*, 568 U.S., at 409.

Petitioner's other arguments also prove unavailing. Petitioner asserts that penalties for violating state laws nearly always first require some judicial order finding a legal violation. Pet.Br.24. But non-self-executing subpoenas are different in kind. In a standard case where a party may be violating a statute, the party will not pay any civil or criminal penalties until a court finds her in violation. But if she loses, penalties can punish her for actions taken *before* the court order. To avoid that risk, she must begin self-censoring before a court decides the case. Not so for non-self-executing subpoenas, which impose no obligations or penalties and require no action. Instead, the legal duty to produce documents begins only when a court issues an order requiring production, and the recipient is subject to penalties only for violating that later order. See *SPU*, 104 F.4th, at 57-58; *Twitter*, 56 F.4th, at 1176;

Smith & Wesson, 27 F.4th, at 893. So a need to self-censor before that order is contingent too.[6]

In that respect, non-self-executing subpoenas are closer in kind to other interlocutory government actions that impose no obligations or penalties for noncompliance and that do not ordinarily give rise to an Article III injury. For example, parties cannot challenge proposed rules that an agency has issued, even if the agency usually finalizes its rules unchanged, and even if the affected parties started self-censoring as a result—because there is no operative legal mandate to challenge. A party likewise could not challenge a draft adverse order in an agency adjudication that has been written by agency staff but not yet finalized, even if a party started self-censoring as a result—as this injury likewise rests on a contingent mandate. In each case, the injury does not ripen until some future action that imposes a legal obligation. The same principle applies here: whatever information the State initially requests, the obligation to produce documents comes from a future court order alone.

Petitioner's reliance on *AFP* and *NAACP* is also misplaced. *AFP* considered a facial challenge to a California regulation requiring every charity to

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[6] Petitioner also fights the idea that these subpoenas are non-self-executing, see Pet.Br.24-25, but that state-law question falls outside the question presented. In any event, this Court consistently "accord[s] great deference to the interpretation and application of state law by the courts of appeals," as "lower federal courts 'are better schooled in and more able to interpret the laws of their respective States.'" *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017) (citations omitted); see *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 182-83 (2019). And the Third Circuit has repeatedly held that subpoenas under these New Jersey laws are non-self-executing. See *supra* at 8, 14.

disclose the names and addresses of any donor who contributed over $5,000. 594 U.S., at 602. Ripeness was uncontested, and for good reason: charities needed to comply with the regulation or risk losing registration or face fines. *Id.*, at 602-03. By contrast, this case involves a particularized request for information subject to negotiation and objections that will be adjudicated by a state court, and where there are no sanctions for violating the Subpoena—only for violating a potential future court order. *AFP* had nothing to say about Article III and non-self-executing subpoenas.

NAACP is more inapposite still. In that case, the Alabama Attorney General obtained an order compelling the NAACP to turn over "names and addresses of all its Alabama members and agents." 357 U.S., at 451, 453. The chill—that members might "withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations"—was not contingent on future orders. *Id.*, at 462-63. In other words, in *NAACP* and the cases Petitioner cites, Pet.Br.2, 31-32 (citing *Gibson v. Florida Legislative Invest. Comm.*, 372 U.S. 539, 540-43 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 294 (1961)), state courts had compelled production, and this Court was reviewing those orders—raising no ripeness issue at all.

b. Even if some donors can be chilled by a non-self-executing subpoena more generally, this Subpoena's request for some donor identities did not cause objective chill. That is because there always remained ways for donors to give to Petitioner without *any* risk of disclosure. So even assuming some disclosure reasonably deters donations, the allegations relating to this particular Subpoena reveal no ripe injury.

At every stage of this case, including from issuance of this Subpoena, there have always been ways for donors who "legitimately desire that the government not possess [their] confidential information," Pet.Br.36, to continue contributing without any risk of disclosure. Even before Petitioner filed this Complaint, the Subpoena made clear there were ways to donate to Petitioner without any risk of disclosure: the Subpoena excludes donors who contribute via https://1stchoice friends.org.[7] See Pet.App.110a. And there is no plausible risk that state officials will seek these identities in the future because there is no concern about fraud; this website states repeatedly and clearly Petitioner's operations. See JA485-91. Petitioner's briefing indicates that over half of current donors *already* contribute using that website. See Pet.Br.9 (arguing the Subpoena seeks identities for "nearly half" its donations). So if a donor wishes to still give to Petitioner without any risk of disclosure to the Division, they can contribute using https://1stchoicefriends.org—as over half of its donors evidently do.[8] Unless Petitioner can show that donating through https://1stchoice.org or https://firstchoicewom ancenter.com has expressive or associational value

[7] To be clear, this is distinct from the point above regarding the narrowing of the State's requests. See *supra* at 23-24 (explaining that before Petitioner sought certiorari, it was already clear officials were only seeking identities of donors who contributed via two specific sites, and not those who contributed in other ways). This independent carve-out existed from the beginning.

[8] This case is therefore unlike *Riley v. National Federation of the Blind*, 487 U.S. 781 (1998), where the challenged statute's requirement that fundraisers make specific disclosures had the "predictable result" of encouraging them to "refrain from engaging in [such] solicitations." *Id.*, at 799-800; see Pet.Br.46-47. Here, the predictable result is at most to change the URL by which one donates, not to stop donating.

that donating via https://1stchoicefriends.org lacks, Petitioner cannot show objective chill of its rights. Petitioner offered no such allegations (let alone evidence) here.

Indeed, despite years of briefing and multiple preliminary injunction applications, Petitioner has provided no evidence that donors in fact changed their behavior since this Subpoena issued. That is no surprise given that alternative pathways to donate without disclosure exist. The record thus provides no support for Petitioner's assertion of chill. See *Curley v. Village of Suffern*, 268 F.3d 65, 73 (CA2 2001) ("Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech."); *Moody v. Michigan Gaming Control Bd.*, 847 F.3d 399, 403 (CA6 2017) (no chilling effect where no evidence showed the plaintiff's behavior changed due to the challenged actions).

Petitioner's reliance on *AFP* and *NAACP* is again misplaced. *AFP* challenged a rule requiring each charity in California to disclose the names and addresses of *every* donor contributing more than $5,000. 594 U.S., at 602. Because there was no way for a donor to prospectively donate $5,000 (or more) without disclosure, any donor reasonably deterred by the disclosure to state officials would have to self-censor. So too in *NAACP*, where a court had required the NAACP to "reveal to the State's Attorney General the names and addresses of all its Alabama members and agents." 357 U.S., at 451. There, too, anyone who "fear[ed] exposure" to the Alabama officials, *id.*, at 463, had no option but to cease associating with the NAACP. This case is different. Any donor who seeks to avoid disclosure based on prospective donations need not self-censor their First Amendment activities; they can just donate

on the website that one declarant already uses, and that covers over half of current donations. Because the State's fraud investigation seeks substantially less information than the blunderbuss regulation from *AFP* and membership-targeting requests from *NAACP*, the objective chill looks different too.

c. Finally, Petitioner's theory that objectively reasonable donors would stop donating based on a single request in this Subpoena is speculative for another reason: even assuming their identities are produced to the Division, the factual record does not demonstrate that production to the State under a future protective order will increase the risk that Petitioner and its donors will experience the deplorable harassment or violence they fear. See Pet.Br.37-44.

To start, Petitioner supplies no allegations or evidence that show a reasonable risk of reprisal from the relevant New Jersey officials themselves. The donors face no risk of criminal or civil penalty from the State for donating to or associating with Petitioner; the laws the Attorney General and Division seek to enforce only penalize fraudulent solicitation—not donation. N.J. Stat. Ann. § 45:17A-32(c)(3), (7). To that end, the Subpoena requests donor identities only to investigate if donors were misled by Petitioner, not to investigate the donors themselves. The Subpoena itself cites fraud statutes that go to Petitioner's representations, not actions by its donors; asks about Petitioner's solicitations, not statements by donors; and expressly carves out donors who contributed on the website that is most explicit about Petitioner's purpose. See Pet.App.90a-110a.

Nothing in the record, including the history of New Jersey's investigations, demonstrates that Petitioner's donors should "reasonably fear reprisal" from state officials. Pet.Br.37. While Petitioner's Complaint and

brief attempt to identify prior instances of state officials purportedly harassing allegedly disfavored companies, Pet.Br.27-28; Pet.App.119a-126a, the Complaint alleges no instances in which New Jersey officials *ever* targeted donors for reprisal. And while the Complaint alleges troubling violence and harassment from third parties, Petitioner cites no harassment or violence attributable to the *officials*. Nor could it: the Attorney General and the Division abhor and condemn such harassment and violence.

Nor is there any basis to conclude that this Subpoena would objectively chill donors from contributing to Petitioner based on harassment and physical violence *by third parties*. Petitioner must at least allege a connection between this Subpoena and third parties' violence and harassment in order to support a ripe Article III injury from the Subpoena itself. See *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (holding that in order to satisfy Article III, party must show "the asserted injury was the consequence of the defendants' actions"); *Murthy v. Missouri*, 603 U.S. 43, 68 n.8 (2024). Because Petitioner does not allege that this harassment and physical violence will come from state officials, Petitioner tries to support its speculative chain of inferences by claiming that state officials will (either intentionally or unintentionally) leak this information to third parties, who will in turn engage in such misconduct, chilling the donors.

But Petitioner has offered no plausible allegations to support the view that the State is objectively likely to disclose or leak donor identities to the public. To the contrary, State law requires state officials to protect this information from disclosure. In New Jersey, "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal

information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J. Stat. Ann. § 47:1A-1. Petitioner contends that "[c]onfidential information is" nevertheless "routinely leaked from state government bureaucrats" and that "[h]acking, negligence, or the intentional release of sensitive information is commonplace." Pet.Br.37. But Petitioner offers no reason to believe that New Jersey's IT system is likelier to be successfully hacked than Petitioner's own private system, which already contains this information—especially given the relatively small amount of data at issue. And it cites no instances in which the Division (or even the Attorney General's office) intentionally or unintentionally disclosed donor data.

This case is again miles away from *AFP*. In finding a threat of disclosure as to that donor information, the *AFP* Court specifically relied on district court findings that California had been "unable to ensure the confidentiality of donors' information" based on evidence that plaintiff introduced of "nearly 2,000 confidential Schedule Bs that had been inadvertently posted to the Attorney General's website," and testimony from an expert "that he was able to access hundreds of thousands of confidential documents on the website simply by changing a digit in the URL." 594 U.S., at 604. No such allegations exist here: Petitioner has not alleged, much less provided evidence, that New Jersey has a history of leaking donor information. Further, New Jersey engaged with Petitioner in the meet-and-confer process to agree on a protective order, just as it traditionally does in such matters. Such an agreement would protect donors' names from disclosure—again in contrast to *AFP*. Without that risk of disclosure, there is no reasonable basis to tie the Subpoena to unacceptable harassment and violence by third parties.

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There are strong arguments that non-self-executing subpoenas cannot ever support ripe chill-based injuries, but this Court need not resolve that question here because the allegations in this case cannot support a prospective chill injury regardless. Petitioner's assertion that its speech and associational rights are chilled draws no support from the record. That leaves Petitioner's extensive briefing that speaks to the merits of its objections to this Subpoena, see Pet.Br.32-36, but its merits arguments are irrelevant to its Article III showing. In short, because donors would not objectively be deterred, there is no ripe chill-based injury from the State's request for donor information.

II. This Court Should Not Accept Petitioner's Alternative Theory That The Threat Of A Subpoena Enforcement Proceeding Automatically Establishes A Ripe Injury.

Petitioner gets no further by offering a more radical alternative theory—that the mere receipt of a non-self-executing subpoena automatically supports Article III jurisdiction, even beyond First Amendment chill claims, so long as the State is likely to move to enforce the subpoena. Pet.Br.47-52. That argument appears nowhere in Petitioner's question presented, which asks only whether a party with "a reasonably objective chill of its First Amendment rights" can sue. Pet.Br.i. And it is not clear this Court agreed to address a question having nothing to do with First Amendment chill, as neither Petitioner nor the Federal Government cites a *single* court that has adopted this position. Indeed, the only cases they cite for support involved fact-specific findings (or rejections) of First Amendment injury to a subpoena recipient.

If the Court reaches this argument, it should reject it. Petitioner's theory contravenes black-letter Article III principles: because non-self-executing subpoenas impose no penalties or other consequences, the alleged injury stemming from their issuance is too contingent to support standing. This theory also conflicts with a century of history, as Petitioner has not identified a single federal court that has ever allowed a pre-enforcement challenge to a non-self-executing subpoena outside the First Amendment. It is likewise contrary to this Court's precedents, which make clear that the possibility of subpoena-enforcement proceedings does not itself support standing. And it will cause extraordinary disruption, opening the federal courts to a flood of litigation challenging myriad subpoenas issued every day by governments across the country.

A. Petitioner's Theory Conflicts With Precedent, History, and Tradition.

1. Black-letter Article III principles establish that the mere receipt of a non-self-executing subpoena the State is likely to seek to enforce cannot itself establish a cognizable Article III injury.

To establish that a plaintiff will suffer an "imminent" injury sufficient to support standing, that injury must be "certainly impending." *Clapper*, 568 U.S., at 409; *supra* at 20. That burden cannot be satisfied by "allegations of *possible* future injury." *Ibid.* (citation omitted). And it cannot be satisfied if the harm is "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 592 U.S., at 131 (citation omitted). That is also true of pre-enforcement challenges, which require the challenger to show that a government policy "requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious

penalties." *Abbott Lab'ys*, 387 U.S., at 153. Thus, the plaintiff in the pre-enforcement context must "allege[] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *SBA List*, 573 U.S., at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (2014)). For good reason: if litigants engage in conduct arguably proscribed by a statute, regulation, or order, the effects are "felt in a concrete way by the challenging parties" because they risk penalties from the moment they engage in the conduct—not just from the time a court issues a decision. *Abbott Lab'ys*, 387 U.S., at 148-49. In those circumstances, Article III allows a plaintiff to sue before the government seeks to enforce the statute, regulation, or order. See *Ex parte Young*, 209 U.S. 123, 148 (1908).

Non-self-executing subpoenas, however, are different in kind from statutes, regulations, and agency orders. A non-self-executing subpoena does not require the recipient to do anything. See *supra* at 8, 22. There are no consequences to the recipient if it refuses to comply. See *Google*, 822 F.3d, at 224-25; *Twitter*, 56 F.4th, at 1176. Instead, if the recipient does not comply, the agency must obtain an order from a court requiring production. And if such a court order issues, the recipient faces penalties only for failing to comply with that subsequent judicial *order*, not the subpoena. See *supra* at 8, 22. Thus, even once the court issues an order requiring production, any penalties for noncompliance apply from the date of the court order, not the subpoena. Noncompliance with a subpoena itself triggers no consequences for the recipient.

The lack of consequences for noncompliance with a non-self-executing subpoena means the recipient

suffers no ripe injury from the issuance of the subpoena—so even a credible threat that the State will try to enforce the subpoena is insufficient to support Article III standing. The recipient's injury still depends entirely on "contingent future events"—the issuance of a court order requiring production. *Trump v. New York*, 592 U.S., at 131 (citation omitted). And the issuance of that order is especially contingent in this context, where parties routinely negotiate the terms of the subpoena—and are often required to do so by courts—before an order issues. See *supra* at 13 (court requiring parties to negotiate here). Often, as a result of that negotiation, the parties reach a compromise, or the government narrows the scope of the subpoena, obviating the need for a court order requiring production. See *Pakdel*, 594 U.S., at 480 (claim unripe "if avenues still remain for the government to clarify or change its decision"); *supra* at 13 (State narrowing requests in this Subpoena). And while negotiation is ongoing, the recipient incurs no penalties for refusing to produce.

Pre-enforcement challenges to non-self-executing subpoenas are therefore unlike pre-enforcement suits this Court has found to be justiciable. This Court has found a credible threat of enforcement supports standing where consequences or penalties flow from noncompliance with a challenged statute, regulation, or order. See, *e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 580-81 (2023) (statute imposed civil penalties); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010) (statute imposed criminal penalties); *SBA List*, 573 U.S., at 166 (same); *Abbott Lab'ys*, 387 U.S., at 153 (regulations imposed criminal and civil penalties). That is simply not true here.

2. History and tradition underscore that the mere receipt of a non-self-executing subpoena cannot be the

basis for a pre-enforcement challenge to that subpoena. In the more than 150 years that administrative subpoenas have existed, no federal court has *ever* held that issuance of a non-self-executing subpoena constitutes a ripe Article III injury simply because the State is likely to seek enforcement of the subpoena.

This Court has made clear that historical practice shapes the contours of Article III. See *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424-25 (2021); *Spokeo*, 578 U.S., at 340-41. The judicial power under Article III is restricted only to those cases "of the sort traditionally amenable to, and resolved by, the judicial process." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). "[A]dhering to that core principle" means treating "history and tradition" as a "guide for the types of cases that Article III empowers federal courts to consider." *United States v. Texas*, 599 U.S. 670, 676-77 (2023). That the plaintiff has "not cited any precedent, history, or tradition of courts" allowing a type of claim to proceed, *id.*, at 677, can offer a "telling indication of the severe constitutional problem" with the plaintiff's assertion of jurisdiction, *ibid.* (quoting *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

Just so here. Petitioner has failed to identify a single case in the 150-plus years that non-self-executing administrative subpoenas have existed where a federal court has held the threat of subpoena enforcement alone, without any further showing of harm, sufficient to create a cognizable Article III injury. Since the mid-nineteenth century, federal and state agencies have exercised subpoena power to investigate potential violations of federal or state laws. See *supra* at 3-6 (collecting statutes). Those subpoenas were not self-executing, meaning that the issuing agency had to

seek a court order requiring production. See *supra* at 4-7. Despite that lengthy pedigree, Petitioner has not identified a *single* case endorsing its theory. There is no history or tradition of federal courts finding that mere issuance of a non-self-executing subpoena that the government is likely to enforce is sufficient by itself to support Article III standing. That silence represents a "telling indication" that Petitioner's alternative theory is incorrect. *Texas*, 599 U.S., at 677.[9]

3. This Court's precedents further underscore that a credible threat of subpoena enforcement alone cannot establish Article III standing. In *Reisman v. Caplin*, 375 U.S. 440, 443-46 (1964), this Court held that the recipient of an IRS summons could not obtain an injunction until a court had enforced the summons. Because the recipient of the summons would have a "full opportunity for judicial review before any coercive sanctions may be imposed," this Court held that the recipient "would suffer no injury while testing the summons." *Id.*, at 449-450. This Court found that mere issuance of a summons visits "no injury" on the recipient until a court compels compliance and threatens sanctions. *Id.*, at 447-450. As it recognized, the recipient suffers no cognizable injury from having to litigate its objections in the forum designated by statute. This Court therefore dismissed the suit "for

[9] Even challenges to the issuance of non-self-executing subpoenas based on First Amendment injuries are of recent vintage. The State has identified cases holding that the chilling effect of a non-self-executing subpoena can establish a ripe Article III injury, see *Twitter*, 56 F.4th, at 1174, but only two actually found a cognizable First Amendment claim on the record before the court, see *Media Matters for Am. v. Paxton*, 732 F. Supp. 3d 1 (D.D.C. 2024), *aff'd*, 138 F.4th 563 (CADC 2025); *Media Matters for Am. v. FTC*, No. 25-1959, 2025 WL 2378009 (D.D.C. Aug. 15, 2025). Outside of the First Amendment, however, Petitioner offers nothing.

want of equity." *Id.*, at 443. And it reached the same result four decades earlier in *FTC v. Claire Furnace Co.*, 274 U.S. 160 (1927), which dismissed for "want of equity" a pre-enforcement challenge a non-self-executing order requiring companies "to furnish" voluminous information. *Id.*, at 166, 174. The Court held that a plaintiff "cannot suffer" a cognizable injury from mere receipt of the non-self-executing order. *Id.*, at 174.

Petitioner and the Federal Government incorrectly claim that this Court's dismissal of pre-enforcement challenges for "want of equity" does not implicate Article III ripeness. See Pet.Br.26; U.S.Br.23-24. *Reisman*, however, expressly framed its conclusion with the language of Article III: it held that the recipient "would suffer no injury" before a court enforced the summons. 375 U.S., at 449-450. That holding aligns with the ripeness principles this Court recognized just three years later in *Abbott Laboratories*, which made clear that a pre-enforcement challenge is appropriate only if agency action "requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties." 387 U.S., at 153. That is why federal courts have treated *Reisman* as a ripeness case and have uniformly held that a threat of enforcing a subpoena is insufficient alone to support Article III standing.[10] And that is why even the Federal Government—until now—had long read *Reisman* as a ripeness ruling that

[10] See, *e.g.*, *Google*, 822 F.3d, at 224-226; *Schulz*, 413 F.3d, at 303; *Mobil*, 180 F.3d, at 1203; *In re Ramirez*, 905 F.2d, at 98-100; *Shea v. Office of Thrift Supervision*, 934 F.2d 41, 45-46 (CA3 1991); *Belle Fourche Pipeline Co. v. United States*, 751 F.2d 332, 334-35 (CA10 1984); *General Fin. Corp. v. FTC*, 700 F.2d 366, 371 (CA7 1983); *Wearly v. FTC*, 616 F.2d 662, 667-68 (CA3 1980); *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 647-48 (CA5 1977).

requires the dismissal of anticipatory challenges to non-self-executing subpoenas.[11]

Indeed, even now, the Federal Government recognizes the problems with throwing the courtroom doors open to pre-enforcement challengers to such subpoenas and thus attempts to craft a bespoke carve-out for subpoenas by *its* agencies. The Federal Government asserts that federal agency "subpoenas are interlocutory, not final"—so they cannot be challenged as "final agency action." U.S.Br.23 (quoting 5 U.S.C. § 704). But that cuts the legs out from under the Federal Government's own ripeness argument. A subpoena is "interlocutory" if it does not "mark the consummation of the agency's decisionmaking process" and is "merely tentative." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The "tentative" or "interlocutory" nature of a subpoena is as much a problem for Article III ripeness as for final agency action: there are contingent steps between the issuance of a subpoena and the "consummation" of the subpoena-enforcement process. See *supra* at 22-24; see also *Pakdel*, 594 U.S., at 480 (claim unripe "if avenues still remain for the government to clarify or change its decision"). What the Federal Government claims makes these subpoenas "interlocutory" also makes them unripe—and the Federal Government offers no convincing explanation for drawing this ripeness-versus-finality line here.

Precedent also forecloses the assertion that the potential burden of litigating any subpoena-enforcement

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[11] See, *e.g.*, Br. for Appellee at 14, *Streifel v. United States*, 107 F.3d 24 (CA11 1997), 1996 WL 33478945; Br. in Supp. of Mot. to Dismiss at 18-23, *Complete Merch. Sols. v. FTC*, No. 2:19-cv-00963, (D. Utah Feb. 3, 2020), 2020 WL 5371939; Br. in Supp. of Mot. to Dismiss at 9-14, *Stryker Corp. v. U.S. Dep't of Justice*, No. 08-41111, (D.N.J. Oct. 17, 2008), 2008 WL 6971058.

proceeding is invariably an injury that supports Article III standing. U.S.Br.13-14. *Reisman* and *Claire Furnace* make clear that a subpoena recipient "suffer[s] no injury" from "testing the summons" during enforcement proceedings. *Reisman*, 375 U.S., at 449-450; *Claire Furnace*, 274 U.S., at 174. After all, if a party's asserted injury is that it must endure the expense of litigation, it is hard to see how bringing pre-enforcement litigation would do anything to redress that injury. That is why this Court has repeatedly explained that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)). The "expense and annoyance of litigation" cannot be the injury justifying pre-enforcement litigation. *Ibid.* (quoting *Petroleum Exp., Inc. v. Public Serv. Comm'n*, 304 U.S. 209, 222 (1983)). Particularly where (as here) no showing exists in the record that a subpoena enforcement proceeding would be any more burdensome than pre-enforcement litigation over the same subpoena, the burdens of litigation cannot suffice to open the courthouse doors.[12]

The cases on which the Federal Government relies, U.S.Br.14-15, do not support the proposition that the possible burden of litigating a subpoena-enforcement proceeding alone is sufficient to support Article III standing. *Ex parte Young* permitted a pre-enforcement

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[12] Being required to litigate in state court instead of federal court cannot itself impose an Article III injury without some showing that a state-court proceeding would impose additional burdens. To conclude otherwise would conflict with this Court's longstanding holding that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims" under federal law. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

challenge to a statute that imposed "enormous fines" and "possible imprisonment." 209 U.S., at 148, 153. That is, the "threatened commencement of suits to enforce the statutes" by a state officer was a "trespass" or "injury," and a pre-enforcement suit against that state officer was not barred by sovereign immunity. *Id.*, at 158. That says nothing about whether a pre-enforcement challenge to a government action that itself imposes *no* penalties or consequences for noncompliance is ripe. And in *SBA List*, the Court permitted a pre-enforcement challenge to a statute prohibiting "false statements" during a campaign because it directly imposed *both* a "threat of criminal prosecution" and of "burdensome" administrative proceedings. 573 U.S., at 166. The factual record in *SBA List* demonstrated that administrative proceedings would impose unique "burdens" litigation would not. *Id.*, at 165. And even then, the Court declined to decide whether those burdens "alone give[] rise to an Article III injury" given the role of the criminal penalties. *Id.*, at 166. The record here, unlike in *SBA List*, offers no indication that litigating the subpoena enforcement proceeding in state court instead would create any injury at all.

4. Adopting Petitioner's alternative standing theory would be enormously disruptive for federal courts and governments alike.

Federal, state, and local governments issue a large volume of non-self-executing subpoenas every day. These subpoenas play a critical role in investigations that protect the public from harm in a range of contexts, including for antitrust, securities, consumer fraud, and other violations. See, *e.g.*, Amicus Curiae Br. for 39 States at 1, 8-9, *Google*, 822 F.3d 212 (No. 15-

60205), 2015 WL 4094982[13]; see *supra* at 5-7 & n.1 (collecting statutes). Without such subpoenas, public officials and agencies may be unable to gather the facts necessary to enforce their laws—and "may be in the position of having to sue first and ask questions later." *Ports Petroleum Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 243 (Mo. 2001) (Wolff, J., dissenting).

Petitioner's argument that the recipient of an administrative subpoena can challenge that subpoena in federal court if it believes the government is likely to seek enforcement would turn myriad run-of-the-mill subpoenas into federal cases, moving the locus of subpoena-enforcement litigation from state court to federal court. That would dramatically increase the volume of state and local subpoena litigation in federal court. And that litigation would be premature in critical respects. Often, when a government agency issues a subpoena, it negotiates with the recipient to modify the subpoena. See, *e.g.*, *Mobil*, 180 F.3d, at 1195-96 (agency agreed not to seek penalties); *NLRB v. Uber Techs., Inc.*, 216 F. Supp. 3d 1004, 1010-11 (N.D. Cal. 2016) (noting that "the Board's requested scope of production has shifted as a result of the meet and confer process"). New information may prompt the government to narrow its request—as happened here, when Petitioner revealed that it holds in-person fundraisers, and the State agreed these donors were

[13] Although 19 States argue that Petitioner's claims here are ripe, Amicus Curiae Br. for 19 States & Arizona Legislature, many of these *amici* have argued against ripeness when addressing similar claims challenging their subpoenas, raising many of the arguments the State makes here, see, *e.g.*, Br. for Missouri Attorney General at 45, *Media Matters for Am. v. Bailey*, No. 24-7141 (CADC) (Dec. 10, 2024), 2024 WL 5097659. See also Br. for Texas at 34-45, *Media Matters for Am. v. Paxton*, 138 F.4th 563 (CADC 2025) (No. 24-7059), 2024 WL 2957006.

not part of its requests. See *supra* at 13. Or the parties may compromise on the scope of production. Petitioner's argument, however, would force federal courts to adjudicate avoidable subpoena disputes, imposing "unnecessary burdens upon the courts." Br. of U.S. at 50, *Reisman*, 375 U.S. 440 (No. 119), 1963 WL 105977.

Governments and the public, too, would suffer. Petitioner's argument would require governments—and ultimately taxpayers—to foot the bill for pre-enforcement lawsuits that could have been avoided through the negotiations and narrowing that so often happens after subpoena issuance. It would disincentivize subpoena recipients from negotiating once they receive a subpoena. And it would delay state and local governments from receiving timely information in response to subpoenas. See *ibid.* (pre-enforcement challenges to subpoenas cause "delay ... and disruption in the administration" of the law). All of this will make it harder for states and localities to investigate wrongdoing in their jurisdictions, undermining their effectiveness in protecting their residents from harm.

B. Section 1983 Does Not Require a Federal Forum for Unripe Claims.

Section 1983 also does not require the result Petitioner urges. Petitioner repeatedly emphasizes that Section 1983 requires a federal forum for its claims. See Pet.Br.20-23. But Petitioner gets the inquiry backwards. Section 1983 ensures a federal forum for federal claims against state officials where the federal courts have jurisdiction, but it cannot provide a cause of action *unless* a federal court has Article III jurisdiction in the first place. That is, Section 1983 does not authorize the federal courts to bend the rules of Article III jurisdiction to create a federal forum if Article III otherwise precludes one.

Claims under Section 1983—or any other federal statute—cannot proceed in federal court unless the plaintiff demonstrates that it has suffered a cognizable Article III injury. See *Lyons*, 461 U.S., at 101 (in Section 1983 case, "those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III"). Thus, this Court has regularly declined to extend Section 1983 plaintiffs a federal forum when they lack an Article III injury. See, *e.g.*, *Lewis*, 518 U.S., at 349 n.1, 351-52; *Lyons*, 461 U.S., at 105-110, 112; *Leeke*, 454 U.S., at 86-87. And while Petitioner asserts that *Heck v. Humphrey*, 512 U.S. 477 (1994), holds that "Section 1983 was enacted to guarantee 'a federal forum for claims of unconstitutional treatment at the hands of state officials,'" Pet.Br.4, *Heck* never held that such a forum is available in the absence of standing, let alone in the face of these cases holding the opposite.

Petitioner's concerns about preclusion also cannot justify its far-reaching Article III proposals. Relying on *Knick*, 588 U.S. 180, Petitioner contends that Article III must permit pre-enforcement challenges based on the mere issuance of a non-self-executing subpoena because holding otherwise would create a "preclusion trap" that would bar federal court review of Section 1983 claims challenging these subpoenas. Pet.Br.20-23. That argument misunderstands *Knick* and Article III. *Knick* rejected "an exhaustion requirement for § 1983 takings claims" that forced a property owner to "pursue state procedures for obtaining compensation before bringing a federal suit"—even where a federal court had jurisdiction. 588 U.S., at 194-95. In light of the "preclusion trap," a judicially-imposed requirement was wholly inappropriate. Here, by contrast, the issue is whether a Section 1983 claim is ripe under Article III. If it is, a federal court may adjudicate it; if not, the

federal court cannot. In other words, this case involves no judicially created exhaustion requirement as in *Knick*, and the Third Circuit's decision below created no such requirement. Pet.App.4a-5a.

Nor would rejecting Petitioner's all-comers theory of standing create the "preclusion trap" it fears. For one, all this Court need hold is that *this* Petitioner's allegations do not establish a ripe Article III chill injury, leaving the door open for a future plaintiff to allege a ripe chill injury on different facts. For another, even assuming no such claims are ripe, preclusion is not foreordained: parallel litigation in state and federal courts may produce a final judgment in one forum that is preclusive in the other, but that will depend both on case-specific facts and the preclusion law of the first forum. See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."). Finally, even if the state court in this case (or another) issues a judgment on such constitutional claims with preclusive effect on federal district court litigation, this Court's review remains available. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975); *NAACP*, 357 U.S., at 451 (involving this Court's review of a state court decision after plaintiff held in contempt for not complying with court order).

CONCLUSION

This Court should affirm.

Respectfully submitted,

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