

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*

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Attorney General parts ways with the district court and concedes that First Choice may vindicate its constitutional claims in federal court by showing a “reasonably objective First Amendment chill.” Resp.Br.1. In doing so, he retreats from the state-litigation requirement he asked the Third Circuit to adopt: that a subpoena challenge is “unripe unless and until a court with authority to enforce it actually compels production.” J.A.325.

Instead, the Attorney General pivots to challenge chill, which the Third Circuit did not even mention, Pet.App.3a–5a, and which his brief below barely discussed, J.A.329–32. His latest rationale for evading federal review fares no better. First Choice faces an objective chill from the Attorney General’s demand for its donor identities.

The Attorney General insists First Choice’s chill is *unreasonable* because the subpoena “does not require [First Choice] to do anything, and compliance is entirely voluntary.” Resp.Br.15. The subpoena says otherwise: it “command[s]” First Choice to comply or risk contempt and other penalties. Pet.App.89a–90a. And the Attorney General’s office recently told the Third Circuit that subpoenas “possess the ‘force of law’”; that “failure to obey is a wrongful act that can justify ... contempt”; and that various statutory penalties may be imposed for a mere “refusal to comply.” Appellees’ Br. at 22, *Smith & Wesson v. New Jersey*, 27 F.4th 886 (3d Cir. 2022) (No. 21-2492), 2021 WL 4427167, at *22–23 (quoting N.J. Stat. Ann. §§ 56:8-4, 56:8-6). The subpoena’s comply-or-else demands would objectively chill a person of ordinary

firmness. One might suspect that was the point of issuing it.

The Attorney General’s non-self-executing argument would insulate his subpoenas—and nearly every subpoena—from federal-court review. He admits nearly as much: “[t]here are strong arguments that non-self-executing subpoenas cannot ever support ripe chill-based injuries.” Resp.Br.33. And that theory would create the same Catch-22 preclusion trap this Court rejected in *Knick v. Township of Scott*, 588 U.S. 180 (2019).

First Choice also has pre-enforcement standing. The Attorney General does not dispute that a credible threat of enforcement exists. Resp.Br.36–38. And First Choice’s association and speech with its donors are both “affected with a constitutional interest” and “arguably proscribed” by the Attorney General’s coercive subpoena. This Court’s cases demand no more.

This Court should hold that a subpoena demand for donor identities necessarily chills associational and speech freedoms—especially where it threatens penalties on its face—and gives rise to a ripe Article III injury.

ARGUMENT

I. First Choice has established a ripe First Amendment chill.

First Choice is entitled to litigate its First Amendment challenge to a retaliatory subpoena in federal court. First, the Attorney General’s fixation on whether his subpoena is non-self-executing is incorrect as a matter of law. Second, regardless of the

precise contours of New Jersey law, standing exists where, as here, the associational rights of “a person of ordinary firmness would be chilled.” Resp.Br.20 (accepting this standard). Third, the Attorney General’s attempts to dodge chill fail. Finally, the subpoena also objectively chills First Choice’s protected speech.

A. First Choice’s noncompliance risks statutory penalties.

The Attorney General fixates on whether his subpoena is non-self-executing. Resp.Br.2–45 (referencing non-self-executing 39 times). He insists that First Choice “faces no penalties,” Resp.Br.1, and “no consequences attach” if it fails to comply with his subpoena, *id.* at 22. According to the Attorney General, his subpoena “does not require [First Choice] to do anything”—the small nonprofit can simply ignore it. *Id.* at 15. Were the Attorney General correct, one wonders why he issues subpoenas. But he is wrong.

On its face, the subpoena twice warns First Choice that “[f]ailure to comply with this Subpoena may render you liable for contempt of Court and such other penalties as are provided by law.” Pet.App.90a. That threat comes directly from the New Jersey code. N.J. Stat. Ann. § 56:8-4(a) (subpoenas “have the force of law”); § 56:8-6(a) (upon the failure to “obey any subpoena” the Attorney General may immediately seek contempt); § 56:8-6(c)–(d) (failure to “obey” subpoena may result in corporate charter revocation and other relief).

The Attorney General now insists that refusing to comply with a subpoena is not “a violation’ of state

law.” Resp.Br.8. But he told the state court the opposite *in this case*. In his state-enforcement action, he alleged that First Choice violated three separate state laws by failing to comply with his subpoena. J.A.50, 53, 59 (alleging that First Choice violated the CRIA, CFA, and P&O Law “by failing to produce the documents requested in the Subpoena”).

And the Attorney General’s office has elsewhere taken a similarly aggressive view of its subpoena power—one rooted in statutory text. New Jersey told the Third Circuit that penalties may be imposed simply for a “refusal to comply” with its subpoenas. Appellees’ Br., *Smith & Wesson*, 2021 WL 4427167, at *22–23 (quoting N.J. Stat. Ann. §§ 56:8-4, 56:8-6). The State explained that “fail[ing] to obey [subpoenas] is a wrongful act that can justify orders ‘adjudging such person in contempt of court’”—all before a court enforcement order. *Ibid.* Indeed, New Jersey *sought* such penalties there, asking that the recipient be held “in contempt of Court for failing or refusing to obey the Subpoena.” Compl. at 7, *Grewal v. Smith & Wesson Sales Co., Inc.*, No. ESX-C-25-21 (N.J. Super. Ct. Ch. Div. Feb. 12, 2021). “It would be naive to credit the State’s assertion that” this subpoena is “in the nature of mere legal advice” when it “plainly serve[s] as [an] instrument[] of regulation.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68–69 (1963).

The Attorney General relies on a single federal decision (*Smith & Wesson*) to claim New Jersey law does not mean what it says. Resp.Br.8. But that federal opinion is “not binding” on New Jersey courts. *Moore v. Sims*, 442 U.S. 415, 428 (1979). Presumably, that is why the Attorney General continues to issue subpoenas threatening contempt and to argue—

contra *Smith & Wesson*—that refusal to comply violates state law. J.A.50–59.

Nor is this a situation where this Court should defer to lower federal courts’ interpretation of state law. *Cole v. Richardson*, 405 U.S. 676, 683–84 (1972) (rejecting district court interpretation that conflicted with “[p]lain[]” meaning). The Court of Appeals did not address this question below, and the district court acknowledged that state courts may threaten contempt at any point during an enforcement proceeding. Pet.App.42a.n.22. Further, this Court need not defer where a lower court’s construction is as “clearly wrong” as *Smith & Wesson* is here. *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45–46 (2017) (citation modified). In fact, the only authority *Smith & Wesson* relied on—one state trial court decision—never says that penalties cannot be imposed for failing to obey a subpoena. See *Grewal v. 22Mods4all Inc.*, No. ESX-C-244-19, 2021 WL 12167665 (N.J. Super. Ct. Ch. Div. May 24, 2021).¹

Since state law authorizes punishment for the failure to comply, a subpoena is no different from the myriad criminal and civil statutes this Court has found to support pre-enforcement review. Pet.Br.47–

¹ The Attorney General suggests that whether his subpoena is “self-executing” is beyond the scope of the question presented. Resp.Br.26.n.6. Not so. This Court cannot determine whether his subpoena harms First Choice without considering its effect. See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014) (“*SBA List*”) (focusing on the character of “the threat of enforcement”). That is why First Choice’s petition focused on the nature of the subpoena’s threat, Pet.7–10, 31–32, and highlighted that the term self-executing is misleading because “most state laws” require a court to issue penalties, Pet.Reply.5.

52; *SBA List*, 573 U.S. at 162–67; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

B. The Attorney General’s coercive subpoena objectively chills associational rights.

The Attorney General’s myopic focus on the phrase “non-self-executing” elides the relevant legal question: whether First Choice’s chill is objective. See *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1175, 1178 n.3 (9th Cir. 2022). It is. The Attorney General’s demand for donor identities chills First Choice’s associational rights, especially given the subpoena’s coerciveness and the Attorney General’s demonstrated hostility toward pregnancy centers. This chill exists regardless of whether the subpoena is immediately enforceable. And First Choice’s allegations and evidence confirm that chill.

1. The donor disclosure demand is inherently chilling.

“The Constitution protects against the compelled disclosure of political associations and beliefs.” *Brown v. Socialist Workers ‘74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982). Because donor disclosure demands strike at the heart of the right to associate privately, this Court’s cases recognize that an inherent chill arises from such demands. In *AFP*, this Court held that heightened scrutiny “is appropriate” because a “deterrent effect on the exercise of First Amendment rights’ ... arises as an ‘*inevitable result*’ of the government’s conduct in requiring disclosure” of donor identities. *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021) (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 65 (1976)). Such

demands necessarily chill associational rights because they give rise to an objective “fear of exposure of [the donors’] beliefs shown through their associations.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958).

Here, the chill on First Choice and its donors is both inevitable and manifestly reasonable. The subpoena twice threatens First Choice with contempt for “[f]ailure to comply.” Pet.App.90a. No one can fault a small non-profit or its donors for taking an overtly hostile Attorney General at his word. That fact alone justifies the chill on First Choice’s associational relationships.

New Jersey law reinforces that objective chill by authorizing numerous penalties for the mere failure to comply. N.J. Stat. Ann. § 56:8-6(a)-(d). Having staked out the position that First Choice’s failure to produce donor information violates three different state laws, J.A.50–59, the Attorney General cannot now claim First Choice has nothing to fear from his supposedly “voluntary” subpoena.

The Attorney General demands specific allegations showing that First Choice donors stopped making contributions. Resp.Br.21, 29. That approach reduces associational rights to a mere monetary transaction. Associational rights broadly protect “privacy in group association,” *Patterson*, 357 U.S. at 462, including the right “not to disclose [one’s] true identity” in connection with protected activity, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341 (1995). Such “[a]nonymity is a shield from ... tyranny.” *Id.* at 357. That is why associational freedoms are infringed “simply by *disclosing* ... associational ties” to the government. *AFP*, 594 U.S.

at 616 (emphasis added); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (noting the “constant and heavy” pressure on teachers from disclosing associational ties to employers). The associational harm to First Choice and the harm to its donors are different sides of the same coin. When donors are chilled, First Choice is harmed, and vice versa.

This Court has never required an organization to prove that donors declined to give or members withdrew to show associational harm. *Patterson* did not force the NAACP to offer up a member who had bowed out of the organization. Instead, it was “apparent that compelled disclosure” of the NAACP’s membership was “likely to affect adversely ... their collective effort” and “may induce members to withdraw.” *Patterson*, 357 U.S. at 462–63. That was enough.

Similarly, *AFP* allowed a facial challenge even though “some donors might not mind—or might even prefer—the disclosure of their identities.” *AFP*, 594 U.S. at 616; *id.* at 615 (acknowledging some donors were “unlikely to be deterred”). Exacting scrutiny applies to “state action which *may* have the effect of curtailing the freedom to associate.” *Id.* at 616 (quoting *Patterson*, 357 U.S. at 460–61). The “risk of a chilling effect” on association suffices “[b]ecause First Amendment freedoms need breathing space to survive.” *Id.* at 618–19 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). If the “risk of a chilling effect” is enough to facially invalidate government action on the merits, it is sufficient for Article III.

AFP also forecloses the argument that First Choice must show “that donors in fact changed their behavior” to prove associational harm under a retaliation framework. Cf. Resp.Br.29 (citing *Curley*

v. *Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *Moody v. Michigan Gaming Control Bd.*, 847 F.3d 399, 403 (6th Cir. 2017)). To the contrary, associational harm occurs when a donor disclosure demand “creates an unnecessary risk of chilling,” “*may* have the effect of curtailing the freedom to associate,” or carries a “*possible* deterrent effect.” *AFP*, 594 U.S. at 616 (citation modified). The Attorney General’s lower-court cases are inapt. *Moody* was about third-party standing, not Article III. 847 F.3d at 402. And the quote from *Curley* has been rejected as “an imprecise statement of law.” *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) (per curiam).

The Attorney General’s heavy reliance on lower-court retaliation cases reinforces standing. Resp.Br.20, 29. First Choice has pressed a retaliation framework throughout this case. Pet.App.131a (alleging a retaliation claim); Pet.24–25. That legal theory “prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected [activity].” *Nieves v. Bartlett*, 587 U.S. 391, 398–99 (2019) (citation modified). Most courts ask whether retaliatory conduct would “chill a person of ordinary firmness.” *Id.* at 397; *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005) (collecting cases); accord Resp.Br.20. That standard protects the rights of “an unusually determined plaintiff” who persists in protected activity despite coercive state action. *Mendocino Env’t Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). And under the retaliation framework, the entire subpoena—not just its donor disclosure demand—violates First Choice’s rights. Contra Resp.Br.19.n.2.

The Attorney General’s view of standing would also compel speech. He would force organizations like the NAACP, Americans for Prosperity, or First Choice to detail why their donors wish to remain anonymous as a condition of entering federal court. The organization would have to explain, for example, why the viewpoints it advocates are controversial. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (noting deterrent effect of obligation to request mail delivery). Donors should not be forced to speak to defend their right to silently associate.²

2. Objective chill exists regardless of whether the subpoena is immediately enforceable.

The Attorney General suggests that only government actions that are “regulatory, proscriptive, or compulsory in nature” can objectively chill. Resp.Br.22–24. But the First Amendment protects “not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.” *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). “First Amendment plaintiffs can assert standing based on a chilling effect ... even where the plaintiff is not subject to criminal prosecution, civil liability, regulatory requirements, or other direct effects.” *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1096 (10th Cir. 2006) (en banc) (citation modified).

Take *Bantam Books*. In that case, this Court held that an informal threat from a commission without

² The Attorney General claims two websites could mislead donors. But one has no donation page (perma.cc/63S2-QNZS), and the other showcases smiling babies. J.A.383.

power to levy sanctions satisfied Article III. The plaintiff there—in contrast to *First Choice*—could have ignored the commission. Yet this Court instructed federal courts to “look through forms to the substance and recognize that informal censorship may sufficiently inhibit” the exercise of First Amendment freedoms to confer standing. *Bantam Books*, 372 U.S. at 67. Indeed, not only the “threat” of government action, but “other means of coercion, persuasion, and intimidation,” may warrant review. *Ibid.*

Or consider *Meese v. Keene*. There, this Court held that a politician had standing to challenge the government’s identification of three films he wished to exhibit as “political propaganda.” 481 U.S. 465, 473–74 (1987). The films were not his creation, and he could still view and show them. *Ibid.* Yet the plaintiff “demonstrated more than a ‘subjective chill’” because his affidavits explained that labeling the films would “harm his chances for reelection” and “adversely affect his reputation in the community.” *Ibid.* This was a “cognizable injury,” despite lacking a “direct effect on the exercise of his First Amendment rights.” *Id.* at 473. See also *National Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 198 (2024) (finding harm from third-party threats to violate the First Amendment).

All this comports with common sense. Ordinary “[p]eople do not lightly disregard [state’s] thinly veiled threats to institute ... proceedings against them.” *Bantam Books*, 372 U.S. at 68. As the ACLU and its co-amici explain, “[e]ven if a subpoena targeting First Amendment activity is never enforced in court, [it] will give its targets a very good reason to clam up” and its “supporters a very good reason to abandon the cause.” FIRE.Am.Br.6. A subpoena can

chill protected association “before the government lifts a finger.” *Id.* at 3.

3. First Choice’s allegations and evidence establish objective chill.

The record reinforces the subpoena’s inherent chill. At the pleading stage, this Court must “assume the well-pleaded factual allegations in the complaint are true” and “draw reasonable inferences in [the plaintiff’s] favor,” *Vullo*, 602 U.S. at 195; see also *Federal Bureau of Investigation v. Fikre*, 601 U.S. 234, 237 n.1 (2024) (noting the “general rule” for challenges to “subject-matter jurisdiction is to take allegations as true” (citation modified)). Further, this Court “presum[es] that general allegations embrace those specific facts that are necessary to support the claim.” *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (allegations of overall water reduction allowed Court to presume a reduction to plaintiffs) (citation modified).

First Choice alleged objective chill. The complaint details a coercive subpoena that “command[s]” First Choice to produce donor names, phone numbers, and addresses. Pet.App.89a–90a, 98a, 110a, 127a–29a. The subpoena expressly threatens First Choice with contempt and other penalties should it fail to comply. Pet.App.90a. And the complaint details the Attorney General’s hostility toward pregnancy centers. Pet.App.124a–26a.

First Choice also alleged how that chill occurs. “Donor anonymity is of paramount importance to First Choice,” and disclosing donor information “will likely result in a decrease in donations, as donors will be hesitant to associate with [First Choice] out of fear

of retaliation and public exposure.” Pet.App.130a. The subpoena may “cause individuals and entities who associate with First Choice to reasonably fear that they themselves will face retaliation or public exposure and thus discourages those individuals and entities from associating with First Choice.” Pet.App.137a. Complying with the subpoena would force staff to reduce “communicati[ons] with essential supporters.” Pet.App.130a. And its “unreasonable demands harass First Choice and discourage individuals and entities from associating with the Ministry.” Pet.App.139a. “This risk of loss of donors, employees, and associates greatly jeopardizes the Ministry’s ability to carry out its religious mission.” Pet.App.131a.

The resulting chill is far from theoretical. Upon hearing about the subpoena to First Choice, the medical director of another New Jersey pregnancy center resigned over safety concerns. Christian.Legal.Soc’y.Am.Br.22–23. That reflects employees’ reasonable “fear of retaliation and public disclosure”—a fear shared by First Choice staff. Pet.App.130a. Plus, the subpoena will cause others to “infer” First Choice “has engaged in wrongdoing, thereby discouraging those individuals and entities from associating with First Choice.” Pet.App.137a.

First Choice substantiated these allegations with un rebutted evidence. See *Meese*, 481 U.S. at 473–74 (affidavits sufficient to establish First Amendment chill); *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976) (plurality opinion) (similar). First Choice’s executive director emphasized the importance of donor confidentiality. Pet.App.181a. She was “concerned that if [First Choice’s] donors’ identities became public, they may be subjected to ... threats.”

Pet.App.182a. And since “[m]any donors desire for their donations and communications with First Choice to remain confidential,” the subpoena’s threatened disclosure compromises First Choice’s “ability to recruit new donors, personnel, and affiliates,” as well as its ability to “retain current donors, personnel, and affiliates.” Pet.App.182a–83a. “[D]ivulging [their] information would harm ... current relationships with these individuals and affiliates” and limit speech and association with new supporters. Pet.App.182a–84a.

In addition, First Choice donors testified that the subpoena was an imminent threat to their association with First Choice. Pet.App.177a–78a. They “would have been less likely to donate to First Choice if [they] had known information about the donation might be disclosed to an official hostile to pro-life organizations.” Pet.App.177a.

On this record, the Court does not “need to ‘wait and see’” whether donations dry up before evaluating the First Amendment claims. *Mahmoud v. Taylor*, 606 U.S. 522, 560 (2025).

C. The Attorney General’s other arguments fail.

1. The ability to give through a different URL does not defeat chill.

The Attorney General tries to refute chill by suggesting donors should just give through a different URL. Resp.Br.27–30. That fails for two reasons.

First, the Attorney General’s focus on prospective donor alternatives ignores that he demands disclosure of *past* gifts. That demand objectively chills

associational privacy of past donors and portends a decrease in future giving. Donors are much less likely to “affiliate with and support pro-life organizations, even privately,” if they know that the organization is subject to investigations by “openly hostile law enforcement officers.” Pet.App.177a. “[D]isclosing their identity to state officials ‘with hostile views’ could threaten their safety” and “chill their giving.” Anonymous.Donors.Am.Br.11.

Second, the Attorney General’s just-use-another-URL argument assumes that donors are sophisticated, steel-spined supporters rather than ordinary people. A reasonable person would be objectively chilled from associating with an organization that is subject to a disclosure demand by a hostile state actor. *Patterson*, 357 U.S. at 462. It is highly improbable that reasonable donors would be comfortable giving through alternative avenues, especially when the Attorney General acknowledges that he may target those channels later. Resp.Br.24.n.5; see Supp.Pet.App.2a (last-minute narrowing of his subpoena “at this time”). The threat still looms.

2. The Attorney General’s cases support standing.

The precedent cited by the Attorney General confirms that First Choice has suffered an Article III injury. To start, the Attorney General’s reliance on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), and *Laird v. Tatum*, 408 U.S. 1 (1972), is puzzling. In *Clapper*, the government had not acted against the plaintiffs. And the plaintiffs in *Laird* alleged a First Amendment chill caused “not by any specific action of the [government] against them,” but

“by the mere existence, *without more*,” of a government program they disliked. 408 U.S. at 3, 10 (citation modified; emphasis added).

Here, there is more. Much more. The Attorney General has trained his sights on First Choice, targeting it with a subpoena “command[ing]” it to produce donor contact information on pain of contempt. Pet.App.89a–90a. His disclosure demand backed by a sweeping investigatory power reasonably chills First Amendment activity. See *Washington Post v. McManus*, 944 F.3d 506, 519 (4th Cir. 2019). And he has aggressively pursued that disclosure, including through a motion for sanctions.

The Attorney General’s reliance on *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), is even more baffling. The court there held that an “implicit threat of punishment” was enough to “quell speech.” *Id.* at 765. This was true even though the Bias Response Team’s invitation was “voluntary,” and even though it “lack[ed] any formal disciplinary power.” *Ibid.* There is nothing “implicit” about the Attorney General’s threats here.

Trump v. New York, 592 U.S. 125 (2020) (per curiam), does not help the Attorney General either. In that case, which did not involve a First Amendment chill, implementation of the challenged policy was unknown. *Id.* at 133–34. Here, the Attorney General explicitly directed his subpoena to First Choice and steadfastly pursued its enforcement. First Choice and its donors are objectively chilled.

The Attorney General reads *Pakdel v. City & County of San Francisco*, 594 U.S. 474 (2021)—another case not involving the First Amendment—to say federal review is unavailable anytime the

government might modify its decision. Resp.Br.25. Such a rule would allow the government to chill vast amounts of protected speech and association on the pretext that its demands could change.

Similarly, the Attorney General is wrong that an objective chill evaporates when the parties might “negotiate.” Resp.Br.24. Parties can negotiate in *every* case, and being forced to the negotiating table by an unconstitutional demand is itself harmful. While the Attorney General posits that his late-breaking narrowing of the subpoena resulted from the meet-and-confer process, that narrowing did not occur *until* the Third Circuit granted expedited review. The Attorney General’s position would give the government the whip hand in any negotiation.

That is why this Court has imposed a “formidable standard” on defendants who *change* challenged conduct to avoid review. *Fikre*, 601 U.S. at 243. The Attorney General claims that the mere *possibility* he might change positions precludes this Court’s review. But this Court’s “constitutional authority cannot be so readily manipulated.” *Id.* at 241.

3. The Attorney General’s confidentiality promises do him no good.

The Attorney General argues that donors cannot be reasonably chilled because his office will protect their information. Resp.Br.31–32. That pinky promise does not cut it: “assurances of confidentiality may reduce the burden of disclosure to the State,” but “they do not eliminate it.” *AFP*, 594 U.S. at 616. Disclosure requirements are chilling even where made only to the government. *Shelton*, 364 U.S. at 485–86.

The Attorney General insists that First Choice’s donors need not fear state harassment. But he assembled a “Strike Force” targeting pregnancy centers, Pet.Br.7, warned New Jerseyans to “beware” of them, *ibid.*, “partner[ed]” with Planned Parenthood to issue a “consumer alert” against them, Pet.App.191a–96a, and threatened them with “numerous actions,” J.A.377—aside from his subpoenas. It is reasonable for donors to feel “pressure ... to avoid any ties which might displease” the Attorney General. *Shelton*, 364 U.S. at 486.

The Attorney General next touts the supposed protections of a “*future* protective order.” Resp.Br.30 (emphasis added). Yet no such order exists. And even his most generous proposal would permit disclosure to state and local government employees. See, e.g., Proposed Stipulated Protective Order at 2, *Platkin v. First Choice Women’s Resource Centers, Inc.* (No. ESX-C-22-24).

Regardless, First Choice’s “fear of public disclosure is neither theoretical nor groundless.” *Shelton*, 364 U.S. at 486. The State’s 2025 Cybersecurity Threat Assessment recently warned that New Jersey “faces an escalating wave of sophisticated cyberattacks that threaten the state’s essential operations and security.” *N.J. 2025 Cyber Threat Assessment*, perma.cc/4G8B-TFT3. In 2024 alone, state agencies reported 149 cybersecurity incidents to the New Jersey Office of Homeland Security and Preparedness. *Ibid.* If the Attorney General gets his way, sensitive donor information will be available not just on First Choice’s private system, but also on New Jersey’s public ones. That exposes First Choice’s donors to at least twice the risk.

D. The disclosure demand also objectively chills First Choice’s speech.

The subpoena chills not only the association but also the speech of First Choice and its donors by impairing solicitation and donor gifts alike. The Attorney General concedes that disclosure requirements have the “predictable result” of encouraging [targets] to ‘refrain from engaging in [charitable] solicitations.’” Resp.Br.28.n.8 (citing *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 799–800 (1988)). And for donors, “the predictable result is that [they] will be encouraged to ... refrain from engaging in [donations] that result in an unfavorable disclosure.” *Riley*, 487 U.S. at 800; Pet.App.177a, 182a–84a. Those principles control.

The Attorney General’s only answer to *Riley* is to “predict[]” that donors will “change the URL by which [they] donate[],” not that they will “stop donating.” Resp.Br.28.n.8. That blinks reality. The Attorney General’s aggressive pursuit of donor information “necessarily chill[s] speech.” *Riley*, 487 U.S. at 794. “Whether one views [it] as a restriction of [First Choice’s] ability to speak, or a restriction of the [donors’] ability to speak, the restriction is undoubtedly one on speech, and cannot be countenanced here.” *Ibid.* (citation modified).

At day’s end, the Attorney General’s proposed rule for non-self-executing subpoenas would foreclose federal review just as effectively as did *Williamson County*. The state-court litigation necessary to ripen a constitutional claim would “simultaneously bar[] that claim, preventing the federal court from ever considering it.” *Knick*, 588 U.S. at 188. The target of a state subpoena thus “finds himself in a Catch-22.”

Id. at 184. “He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court.” *Id.* at 184–85. Where, as here, a subpoena threatens contempt and was issued by an overtly hostile state official, Article III does not demand such a result.

II. A credible threat of enforcement also confers standing.

The Attorney General does not dispute that First Choice faces a credible threat of enforcement. Nor could he. He has *already* taken aggressive action to enforce his subpoena. Nor does the Attorney General dispute that the First Amendment protects First Choice’s speech and associational rights or that those rights are at least “arguably” burdened by the subpoena. That is all this Court’s cases require. See *SBA List*, 573 U.S. at 162.

Instead, he contends that “even a credible threat that the State will try to enforce the subpoena is insufficient to support Article III standing.” Resp.Br.36. This is just another variant of his claim that a non-self-executing subpoena generally cannot “establish a cognizable Article III injury.” Resp.Br.34. “[I]n reality [a subpoena] has a powerful coercive effect” on the recipient. *Bennett*, 520 U.S. at 169. At minimum, it “arguably” burdens First Amendment freedoms. See *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 60 (9th Cir. 2024) (finding pre-enforcement standing based on a demand letter and litigation hold request).

The Attorney General’s position would mean that litigants “have virtually no opportunity to seek federal review of [subpoenas] infringing on

constitutional rights.” *Id.* at 64. A state-court enforcement order will almost certainly resolve constitutional defenses and thus res judicata will bar the federal court door. Pet.Br.20–23. And even if the state court does not decide the constitutional issues, the Attorney General will argue *Younger* abstention—as he did in this very case. See Pet.App.26a–29a. Worse yet, the state court in this case has already issued an order finding the subpoena enforceable; the Attorney General thus demands *more* than a state-court enforcement order to satisfy Article III. Resp.Br.34–36. That state-court-enforcement-plus test would leave a vanishingly small window for federal review.

The notion that non-self-executing laws are immune from pre-enforcement challenge is incompatible with *SBA List*, which recognized federal jurisdiction in exactly those circumstances. 573 U.S. at 153, 161. There, standing was based on a credible threat of administrative proceedings, even though the only available penalty was a reprimand, and the possibility of a subsequent referral for prosecution was exceedingly remote. Pet.Br.49–50. If that was enough, the Attorney General’s overt command to respond or face sanctions surely is too.

The Attorney General argues that subpoenas are “different in kind” from state laws that threaten to violate First Amendment rights. Resp.Br.25. He’s right: they’re worse. First Choice was singled out—by the State’s highest law enforcement officer—for a disclosure demand backed by threat of punishment. That is markedly more coercive and chilling than a generally applicable law.

The Attorney General also maintains that subpoenas cannot inflict an Article III injury outside the First Amendment context. Resp.Br.33–34. This Court need not resolve that question because this *is* a First Amendment case. In fact, the Attorney General concedes that where a subpoena reasonably chills First Amendment exercise, that chill is an injury-in-fact. Resp.Br.1, 15, 17; see also *SBA List*, 573 U.S. at 165–66; *Media Matters for Am. v. Paxton*, 138 F.4th 563, 582–83 (D.C. Cir. 2025); *Whole Woman’s Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018); *In re First Nat’l Bank*, 701 F.2d 115, 118 (10th Cir. 1983); *Media Matters for Am. v. Federal Trade Comm’n*, 2025 WL 2988966, at *4 (D.C. Cir. Oct. 23, 2025) (per curiam); cf. *White v. Lee*, 227 F.3d 1214, 1228–29 (9th Cir. 2000).

In addition to chill, the subpoena gives rise to several other imminent injuries. First, the subpoena creates “a substantial risk that [First Choice] will bear the burden of litigating the enforcement proceeding.” U.S.Am.Br.13; *SBA List*, 573 U.S. at 165–66 (“time and resources” are an injury). Second, First Choice faces a substantial risk that a state court will issue an order compelling disclosure. *SBA List*, 573 U.S. at 161–66. Third, First Choice “faces a substantial risk that ... the state court will issue an adverse order” imposing contempt or other penalties. U.S.Am.Br.13–14; *SBA List*, 573 U.S. at 165–66 (“prospect[ive] issuance” of an adverse order is an injury).³

³ It is immaterial that a “litigation expense ... does not constitute irreparable injury” for purposes of equitable relief. Contra Resp.Br.41. It satisfies Article III. *SBA List*, 573 U.S. at 165–66.

The Attorney General errs by equating administrative *finality* with Article III injury-in-fact. Resp.Br.40. True, a federal subpoena recipient not subject to a “final agency action” has no cause of action under the APA. But Article III standing is distinct from cause-of-action requirements. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 177 (2011) (refusing to equate “person aggrieved” with Article III standing). For the same reasons, the Court should reject the Attorney General’s strained analogy to non-final agency rulemaking. Resp.Br.26. Unlike proposed rulemaking, subpoenas are authorized by statute and legally effective even before they are enforced. The Attorney General did not issue a “proposed” subpoena—he commanded First Choice to respond.

The Attorney General also confuses Article III jurisdiction with the questionable judge-made doctrine of prudential ripeness, which he does not even invoke. Most notably, he cites *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), as an Article III case, Resp.Br.18, 35, 36, 39, but *Abbott Labs* is a prudential ripeness case.

In the same vein, the Attorney General cites two other decisions involving federal agencies—*Reisman v. Caplin*, 375 U.S. 440 (1964), and *FTC v. Claire Furnace Co.*, 274 U.S. 160 (1927). Those cases do not apply for three reasons. First, neither case involved First Amendment harm. *Reisman*, 375 U.S. at 441–42 (contesting demand for work product); *Claire Furnace*, 274 U.S. at 165–66 (contesting business records demand). Second, they are decisions about equity jurisprudence, not Article III standing or ripeness. Pet.Br.25–26; U.S.Am.Br.23–25. Third, federal subpoena recipients are entitled to federal

court review after the administrative process, while the Attorney General’s approach all but ensures that state subpoena recipients will never have their day in federal court. Pet.Br.26.

Administrative law doctrine does not supersede either Article III or the First Amendment. That is why federal courts have quashed subpoenas for violating the First Amendment—before the administrative process has been exhausted—when equity demands judicial intervention. E.g., *Media Matters*, 2025 WL 2988966.

Finally, the Attorney General says that allowing federal review of challenges to subpoenas “would be enormously disruptive.” Resp.Br.42. But First Amendment review has been available for decades, e.g., *In re First Nat’l Bank*, 701 F.2d at 118, and the sky has not fallen. On the flip side, creating a subpoena exception to ordinary Article III principles “would empower” government officials “to issue sweeping demands that inflict concrete and ‘ongoing injuries’ that suppress [First Amendment rights] ... while simultaneously closing the courthouse doors to relief.” *Media Matters*, 2025 WL 2988966, at *4.

* * *

Targets of state donor disclosure demands deserve a federal forum, and First Amendment freedoms need breathing space to survive. Here, the Attorney General targeted an ideological opponent with a donor disclosure demand. “The gravity of the privacy concerns” caused by such subpoenas is “underscored by the filings of [dozens] of organizations as amici curiae in support of the petitioners.” *AFP*, 594 U.S. at 617. They span the ideological spectrum, from the ACLU to the Chamber

of Commerce, and reporters to big tech. “The deterrent effect feared by these organizations is real and pervasive.” *Ibid.* And that objective chill entitles First Choice to its day in federal court.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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