APPEAL NO. 24-3124

United States Court of Appeals for the Third Circuit

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,

Plaintiff-Appellant,

v.

MATTHEW PLATKIN, in his official capacity as Attorney General of the State of New Jersey,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Jersey
Case No.: 3:23-cv-23076

APPELLANT'S OPENING BRIEF

ERIK C. BAPTIST
DALTON A. NICHOLS
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
(571) 707-4789
ebaptist@ADFlegal.org
dnichols@ADFlegal.org

ERIN M. HAWLEY
LINCOLN DAVIS WILSON
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-86902
ehawley@ADFlegal.org
lwilson@ADFlegal.org

Counsel for Plaintiff-Appellant First Choice Women's Resources, Inc.

CORPORATE DISCLOSURE STATEMENT

First Choice Women's Resource Centers, Inc., incorporated as a 501(c)(3) faith-based organization under the laws of New Jersey, is neither a subsidiary nor a parent company of any other corporation under the laws of the United States and no publicly traded corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

For more than a year, First Choice Women's Resource Centers, Inc., has endured an unlawful and unreasonable Subpoena from New Jersey Attorney General Matthew Platkin, who publicly opposes pro-life pregnancy centers like First Choice because they "do NOT provide abortion." App.289. His Subpoena sought vast information from First Choice, and most egregiously, he demanded the identities behind nearly 5,000 donations. Faced with that threat, First Choice sought relief from the Subpoena by raising constitutional claims in federal court under the First and Fourth Amendments.

But no court has ruled on those claims. Over some twenty motions, the federal and state courts have refused to address First Choice's constitutional claims. First, the federal district court dismissed this case sua sponte, reasoning that it was unripe until a state court enforced the Subpoena. Then, the state court ruled that First Choice's constitutional challenge to the Subpoena was not ripe in state court either, but at the same time, it enforced the Subpoena under state law. The Attorney General has been only too happy to change his position on where and when First Choice's claims can be adjudicated to suit the exigencies of these rulings. And now, with an enforceable Subpoena in hand, the Attorney General demands that First Choice endure the violation of its constitutional rights before any court adjudicates its

claims. He demands First Choice produce its donor list before any court decides whether its donor identities are protected.

First Choice thought it was spared when this Court ruled last summer. After the state court held the Subpoena enforceable, the Attorney General conceded that this development made First Choice's federal action ripe and asked this Court to remand First Choice's appeal rather than rule on its motion for an injunction. This Court granted that request, noting it was "undisputed that [First Choice's] claims are ripe," and directing the district court to "address any requests for injunctive relief in the first instance." *First Choice v. Platkin*, 24-1111, Dkt. 56 (3d Cir. July 9, 2024). Yet after remand, almost four months passed before the district court ruled on First Choice's renewed motion for temporary restraining order and preliminary injunction. And when it did rule, it dismissed the case sua sponte—again—as unripe and denied First Choice's motion for a TRO and preliminary injunction.

That decision clashes with this Court's prior order, the Attorney General's admissions, and foundational principles of Article III justiciability. And First Choice has waited far too long for a decision on the merits of its constitutional claims, which grow ever more urgent in the shadow of fast-moving state-court proceedings. This Court should reverse the district court's dismissal and its denial of a preliminary injunction against further enforcement of the Subpoena. It should do so for two reasons.

First, First Choice is likely to prevail on its First Amendment association claims. Under *Americans for Prosperity v. Bonta*, demands for protected associational information like the donor list must meet "exacting scrutiny," which requires a showing that the threat to donor privacy is "narrowly tailored." 594 U.S. 595, 611 (2021). The Attorney General's demand is anything but. He purports to act out of concern that First Choice's donors may not know it is a pro-life organization. Even though First Choice sends regular updates to every donor and has never received a donor complaint, the Attorney General demands that First Choice disclose the names of every donor who did not give through the dedicated donor website. That is, he wants the names of those who gave at fundraiser banquets, through their church, or through baby bottle campaigns. In the district court, the Attorney General said this was narrowly tailored, citing *Perry v. Schwarzeneggar*, 591 F.3d 1147 (9th Cir. 2010), which he said compelled donor disclosure. App.442. The only problem is that *Perry* did the opposite: it granted mandamus to correct "clear error" when a district court compelled such donor disclosures. 591 F.3d at 1158. Neither his donor disclosure demand—nor his other demands for protected association information—can survive exacting scrutiny.

Second, First Choice is likely to succeed on its free speech claim. First Choice need only show a causal connection between its protected speech and the Attorney General's action, which shifts the burden to

him to prove he would have done the same thing but for the protected speech. The Attorney General's own admissions establish that causal connection. And he cannot meet his burden because he has exempted similarly situated pro-abortion organizations from any investigation. In fact, he asked Planned Parenthood to help him draft his enforcement theory against pregnancy centers like First Choice. App.091–121. Coupled with his open hostility to pregnancy centers, these facts show First Choice is likely to succeed on both its retaliation and its viewpoint discrimination claims.

These actions are an offense to the First Amendment. And the notion that First Choice cannot litigate those rights until it suffers their deprivation is an even greater offense still. This Court should reverse.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 over First Choice's section 1983 challenge to the Attorney General's investigatory subpoena. App.059. The district court first dismissed this action sua sponte as unripe on January 12, 2024, and First Choice appealed. App.203. After a state court held the Subpoena enforceable under state law, the Attorney General told this Court that "all agree the claims are ripe now" and moved to dismiss First Choice's appeal. *First Choice*, 24-1111, Dkt.50 at 2. On July 9, 2024, this Court granted the Attorney General's motion, holding that "[b]ased on subsequent developments in state court, it is now undisputed that Appellant's

claims are ripe," and dismissing the appeal "as moot." *First Choice*, 24-1111, Dkt.56. This Court therefore remanded so the district court could "address any requests for injunctive relief in the first instance." *Id.*

First Choice then filed a renewed motion for preliminary injunction. Roughly four months later, on November 12, 2024, the district court denied that motion and again dismissed the action sua sponte as unripe. App.045. The next day, First Choice filed a timely notice of appeal from that dismissal. App.001. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. If a state court rules a state investigatory subpoena enforceable under state law, is a federal challenge to the constitutionality of the subpoena ripe under Article III? App.248–249.

2. If a state official seeks to compel disclosure of the identities of donors to a nonprofit he publicly opposes, can he meet the "exacting scrutiny" standard of *Americans for Prosperity v. Bonta* based on suspicion that donors may not understand the nonprofit's mission even though the organization discloses its mission on every page of its website and in individualized mailings to each donor? App.222.

3. If a state official publicly opposes a nonprofit's mission and develops legal theories against it by collaborating with its similarly situated ideological opponent, does the official engage in unlawful

retaliation when he takes adverse state action against the nonprofit under those legal theories and no donor has complained? App.229.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Along with the proceedings in the district court, First Choice is aware of the following related proceedings:

1. *First Choice Women's Resource Centers, Inc. v. Platkin*, 24-1111 (3d Cir. July 9, 2024). This Court remanded the prior appeal as moot after the Attorney General conceded that "all agree" First Choice's claims were ripe in the district court.

2. *In re First Choice Women's Resource Centers, Inc.*, 23-941 (U.S. May 13, 2024). First Choice petitioned the Supreme Court for mandamus or certiorari to require the district court to decide its federal claims. The Supreme Court denied review.

3. *Platkin v. First Choice Women's Resource Centers, Inc.*, ESX-C-22-24 (N.J. Super. Ct., Essex County, Chancery). This ongoing parallel state proceeding concerns the Attorney General's efforts to enforce his Subpoena against First Choice. Any decision on pending motions is reserved for December 2, 2024.

4. *Platkin v. First Choice Women's Resource Centers, Inc.*, A-003615-23T4 (N.J. Super. Ct., App. Div.). This ongoing state proceeding concerns First Choice's appeal from the state trial court's order ruling the Attorney General's Subpoena enforceable without deciding First Choice's federal constitutional objections. The Appellate Division stayed

briefing in this appeal after granting the Attorney General's request to temporarily remand the matter to the state trial court for a decision on his motion to enforce litigant's rights and First Choice's motion for protective order.

STATEMENT OF THE CASE

I. Factual background

In New Jersey, two types of organizations focus on serving women with unplanned pregnancies: abortion clinics and pro-life pregnancy centers. While both types of organizations provide many similar services—such as STD testing, ultrasounds, and exams—they differ sharply in their views on abortion and human life. Abortion clinics like Planned Parenthood offer abortion, which they believe should be a protected right, while pro-life pregnancy centers do not because of their religious belief in the sacred nature of human life.

The First Amendment gives the freedom for all Americans—including politicians like the Attorney General—to take either view. But the Attorney General went beyond just taking sides in this dispute. Instead, he has used the power of his office to harass and punish the pregnancy centers that adopt the position opposite his. He has targeted faith-based pregnancy centers like First Choice—precisely because they do not provide abortion—while publicly supporting (and soliciting help

from) abortion clinics like Planned Parenthood. He put that animus into action in many ways, and now, he has directed it at First Choice.

A. Attorney General openly opposes pregnancy centers.

The Attorney General began his campaign against pregnancy centers by establishing a "Strike Force" to pursue enforcement actions and "strategic initiatives" in the name of promoting abortion. *See* App.063–068. The Strike Force "coordinated" the Attorney General's preparation of a statewide "consumer alert" to warn about pregnancy centers in New Jersey. App.063–068. The topline message of that alert is a prominent "WARNING" that pregnancy centers "do NOT provide abortion[s]." App.289. The alert then cautions—strangely—that pregnancy centers "[o]ffer free services (including pregnancy tests, ultrasounds, and adoption information) or supplies (including diapers and baby clothes) to individuals seeking … reproductive health care services." App.289. The Attorney General's alert tells New Jersey women they should not go to pregnancy centers for "reproductive health care" but should instead visit Planned Parenthood. App.290.

It is easy to see why the Attorney General's consumer alert tells women to go to Planned Parenthood—he enlisted the abortion provider's help in drafting it. His office forwarded a draft of the consumer alert to Planned Parenthood and requested comment on it. App. 091–121. Planned Parenthood gladly assisted, and the Attorney General readily incorporated its input. App.091–121.

The Attorney General is not at all shy about his support for Planned Parenthood. Attorney General Matthew Platkin (@NewJerseyOAG), Twitter (April 26, 2022, 12:35 PM), https://bit.ly/3RJs1x7; Press Release, The White House, Readout of Vice President Kamala Harris's Meeting with New Jersey State Legislators on Reproductive Rights (July 18, 2022), https://bit.ly/4adVx5e. And he is just as open about his opposition to pregnancy centers. His official Twitter account warns that "[i]f you're seeking reproductive care, beware of Crisis Pregnancy Centers!" Attorney General Matthew Platkin (@NewJerseyOAG), Twitter (Dec. 7, 2022, 3:20 PM), https://bit.ly/3uXydIx. He has accused pro-life pregnancy centers of "pretend[ing] to be legitimate medical facilities," *id.*, and referred to pro-life groups as "extremists attempting to stop those from seeking reproductive healthcare that they need." Attorney General Matthew Platkin (@NewJerseyOAG), Twitter (Oct. 11, 2023, 1:49 PM), https://bit.ly/47PBqZh.

The Attorney General did not leave these positions about pregnancy centers in the realm of personal views but made it a policy he put into practice. He co-authored an open letter with several state attorneys general repeating these allegations about pregnancy centers on a national scale. Attorney General Rob Bonta, Open Letter from Attorneys General Regarding CPC Misinformation and Harm, State of California Office of the Attorney General (Oct. 23, 2023),

http://bit.ly/3CtAShf. As with his consumer alert, the chief grievance of the open letter is that pregnancy centers "Do Not Provide Full-Scope Reproductive Healthcare"—that is, they "do not provide abortions or abortion services." *Id.* at 1. The letter maligns pregnancy centers writ large, calling them an "Insidious Threat" and "Designed to Deceive." *See id.* And it pledges "to take numerous actions" against them. *Id.* at 8.

B. Attorney General serves a retaliatory subpoena.

As he promised he would, the Attorney General took multiple actions against pregnancy centers. Roughly a year ago, he began by serving two pregnancy centers with investigatory subpoenas. One of those centers is First Choice—a pregnancy center with five locations that has been serving New Jersey women since 1985. App.059–060. Like other pregnancy centers, First Choice is a faith-based nonprofit that advocates the view that life begins at conception. App.061. It does not provide or refer for abortions, and it states so plainly on every page of its client website. App.060. Under a licensed physician medical director, First Choice provides many services to women, men, and their babies: pregnancy testing; pregnancy options counseling; STD and STI testing and referral; ultrasounds; parenting education; and material support, such as baby clothes and diapers, maternity clothes, and food. App.060. First Choice is funded exclusively by private donors and provides all its services for free. App.274.

The Attorney General served First Choice with a subpoena seeking extensive information about its activities for as much as a 10-year period. App.122–145. He invoked three statutory bases for this investigation: the New Jersey Consumer Fraud Act (NJCFA), the Charitable Registration and Investigation Act (CRIA), and his investigative authority over Professions and Occupations (P&O). App.124. The Subpoena demands documents related to a host of topics, including the following:

a. The identity of every one of First Choice's donors who gave through any means other than one specific donor website. App.137.
b. The identity of every licensed professional performing any service for clients at First Choice. App.136.
c. All documents—including all substantiation—for a variety of scientific and other statements about abortion on First Choice's websites. App.133–135.
d. All documents related to First Choice's relationships with partner pro-life organizations Heartbeat International, the Abortion Pill Reversal Network, and Care Net. App.136.

C. Attorney General wants names of First Choice donors.

The most troubling of the Subpoena's demands concerning First Choice's protected associations is its insistence that First Choice disclose the names of the people who made some 5,000 individual donations. First

Choice has never received a donor complaint, App.391, and the Attorney General has not cited one. Still, he speculates that some donors may have given to First Choice on the mistaken belief that this pro-life pregnancy center was a pro-abortion organization. Based on speculation, he demands that First Choice identify all its donors except those who gave through a specific donation portal. App.137. That demand—which embraces nearly half of First Choice's donations by number and 70% by amount—seeks the identities of the donors who gave at First Choice's benefit dinners, through church baby-bottle campaigns, or by a gift of stock. App.529–530.

Several donors whose names are subject to that demand submitted an anonymous declaration stating that they were not deceived by First Choice and do not want their identities known by a hostile state official. App.283–287. Plus, First Choice has produced the mailing material it sends to each of its donors, which is unmistakably clear about its pro-life mission. App.532–540. And to date, the Attorney General has never explained what he plans to do with the identities of First Choice's donors—for example, whether he wants to contact each donor and interrogate them about why they donated to First Choice.

II. Procedural history

As the district court observed, this case is a procedural "labyrinth" of complex shifts between federal and state proceedings. App.010. And

it has been made even more complex by the Attorney General's repeated shifts in position about where and when First Choice can get a decision on its federal claims. But it ends with the Attorney General asking the state court to compel First Choice to turn over its protected documents while the federal court finds First Choice faces no threat that gives it an Article III injury.

A. District court rules the federal claims unripe.

Before the Subpoena's compliance date, First Choice filed this section 1983 action challenging the constitutionality of the Subpoena, simultaneously moving for a temporary restraining order and preliminary injunction. In light of this Court's decision in *Smith & Wesson Brands, Inc. v. Att'y Gen. of N.J.*, 27 F.4th 886 (3d Cir. 2022), the Attorney General did not contest the district court's jurisdiction but opposed the application on the merits. App.146–191. But much to the parties' surprise, the district court dismissed the action sua sponte as unripe, holding that it lacked jurisdiction until "the state court enforces the Subpoena." App.199.

The district court said the case was unripe because there was "no *current* consequence for resisting the subpoena" and "the same challenges" could be "raised in state court." App.198–199. The district court found that it lacked jurisdiction until "the state court enforces the Subpoena." App.199. But the district court also realized this meant a federal challenge to a subpoena would "seldom if ever be ripe" because

"res judicata principles will likely bar . . . a claim in federal court" after the state-court adjudication. App.201.

This brought about the Attorney General's first change of position. Though he had not contested jurisdiction at first and stated he would not move to dismiss, once the district court dismissed sua sponte, he defended its ruling on appeal. He opposed an injunction pending appeal by arguing, among other things, that First Choice could litigate its federal objections in state court. *First Choice*, 24-1111, Dkt.14 at 12. This Court denied that motion and a motion to expedite, *id.*, Dkt.20, 29, which led First Choice to petition the U.S. Supreme Court for mandamus. *In re First Choice Women's Resource Centers, Inc.*, No. 23-941, Pet. for Writ of Mandamus (U.S. Feb. 26, 2024). The Attorney General opposed, emphasizing again that First Choice could still "seek relief from the state courts for the same federal constitutional claims." *Id.*, Br. in Opp'n at 11. The Supreme Court denied review.

B. State court rules the federal claims unripe.

That shifted the focus to state court, where the Attorney General filed a summary action to enforce his Subpoena. But while the parties briefed and argued First Choice's constitutional objections extensively, the state court declined to reach them, finding them "premature." App.258 (citing *Platkin v. Smith & Wesson Sales Co.*, 474 N.J. Super. 476 (App. Div. 2023)). The state court held that the constitutional defenses were not "ripe for adjudication" in state court but emphasized

that First Choice "has preserved its [federal constitutional] claims" to raise at some other stage. App.258–261 (quoting *Smith & Wesson*, 474 N.J. Super. at 494).

This led the Attorney General to seemingly change his position again. He had told the federal courts First Choice could seek relief on its constitutional objections in state court, and he briefed those issues up on the merits. But once the state court found First Choice's constitutional objections unripe, he shifted. Now, he agreed with the state court: "As Your Honor just ruled, there are no ripe constitutional issues at stake in this case." App.261. The state court emphasized this point: "My determination, as pointed out by the [State] here, is that there are no ripe constitutional arguments." App.263.

Having ruled the federal claims unripe, the state court enforced the Subpoena, "granting the relief sought by the [State] in full." App.260. The state court also reserved a decision on the scope of the Subpoena under state law and directed the parties to confer on those questions. App.258. And it required First Choice to respond fully to the Subpoena within 30 days. App.249 The parties began conferring about the scope of the Subpoena, and the Attorney General said he was "more than willing to continue to meet and confer about [First Choice's] responses and production once [he had First Choice's] written responses to the document requests." App.509. First Choice served timely written responses and objections to the Subpoena—including on its protected

associational information—and began producing documents on July 18, with a total of more than 2,300 pages produced to date. First Choice appealed the state court's order to the New Jersey Appellate Division. App.455–462.

C. This Court rules the federal claims ripe.

Though the state court did not decide the federal claims, both parties acknowledged that, even under the district court's reasoning, the state court's enforcement of the Subpoena under state law had ripened First Choice's federal lawsuit. First Choice asked this Court to return the case to the district court and enter an injunction pending disposition of its federal claims. *First Choice*, 24-1111, Dkt.34-1. But the Attorney General urged it was more prudent to leave the questions of injunctive relief to the district court—because "all agree" the claims are ripe, he said, this Court should remand the appeal as moot. *First Choice*, 24-1111, Dkt.50 at 2. This Court granted the Attorney General's motion to remand the appeal "as moot" and ruled that "[b]ased on subsequent developments in state court, it is now undisputed that [First Choice's] claims are ripe." *First Choice*, 24-1111 Dkt.56. And this Court directed First Choice to address its requests for injunctive relief to the district court "in the first instance." *Id.*

Back in federal court, the Attorney General changed his position about the federal claims again. In state court, he acknowledged and defended the court's ruling that there were "no ripe constitutional

issues" in state court. App.261. But when opposing injunctive relief in federal court, he maintained that the state court had in fact decided those claims on the merits, thus precluding First Choice from litigating them in federal court. App.432. And the Attorney General insisted that the district court should abstain under *Younger* based on the state-court proceedings. App.425. That motion was fully briefed as of August 2, 2024.

D. Amid more threats, district court rules case unripe.

Meanwhile, with proceedings recommenced in federal court, the Attorney General grew only more aggressive in state court. While First Choice was producing documents, it asked the state court to hold further compliance in abeyance so its constitutional claims could be decided in federal court. App.487–488. Though the Attorney General had said he would continue to confer about the scope of the Subpoena after receiving First Choice's written responses, he changed course. He opposed First Choice's request and filed his own motion to enforce litigant's rights. App.466. He demanded that First Choice give him everything he sought in his Subpoena—including the full scope of his demand for donor and personnel identities—along with an award of sanctions. App.467.

The state court declined to rule on the merits of any of these motions while First Choice's appeal was pending. So the Attorney General moved the Appellate Division to stay proceedings on First

Choice's appeal and temporarily remand the matter to the trial court to decide his motion. App.556. The Appellate Division granted that motion on November 5, 2024, and directed the trial court to complete action on remand by **December 2, 2024**. App.575.

Only then did the federal district court finally rule on First Choice's motion for TRO and preliminary injunction, which at that time was pending for nearly four months. Despite this Court's remand order, the state court's enforcement of the Subpoena, the Attorney General's threats of sanctions, and the Attorney General's concession of ripeness, the district court held—again sua sponte—that this case still was not ripe. App.045–046. Unlike the standard set by its prior ruling, the district court now said First Choice's claims would be ripe only if the state court (1) expressly ordered the disclosure of constitutionally protected information, (2) threatened First Choice with contempt, and (3) failed to rule on the constitutional issues. App.035. First Choice appealed the next day.

The Attorney General changed his position on ripeness yet again. Though he had told this Court that he agreed First Choice's claims were ripe, he told the district court that, if it found the state court had not rejected those federal issues on the merits, then "this case isn't ripe." App.597. And when First Choice argued this appeal should be expedited because the Attorney General had already agreed on the central question of ripeness, *First Choice v. Platkin*, 24-3124, Dkt.6 at 11, the

Attorney General opposed, saying he would need extra time to "appropriately brief . . . issues of ripeness." *First Choice*, 24-3124, Dkt.11 at 14, 17. This Court still granted an expedited appeal. *First Choice*, 24-3124, Dkt.12.

First Choice also moved this Court for an injunction pending appeal after the district court denied that relief. *First Choice*, 24-3124, Dkt.9. As of the date of this brief, that motion remains pending. Meanwhile, the state court held a hearing on the pending motions on November 19, 2024. The state court reserved decision on those motions for **December 2** (the last day allowed by the Appellate Division), except to state that it would deny the Attorney General's request for sanctions. App.666.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's dismissal of this case and its denial of First Choice's motion for a TRO and preliminary jurisdiction.

First, the district court had jurisdiction over this challenge to the Attorney General's threat of sanctions against First Choice for declining to produce constitutionally protected documents in response to his Subpoena. This Court already held there is jurisdiction. Every principle of Article III jurisprudence confirms that's true. And the Attorney General already admitted to this Court that there is jurisdiction. The district court's sua sponte dismissal was plain legal error.

Second, First Choice is entitled to a preliminary injunction. It is likely to succeed on its challenge to the Attorney General's vastly overbroad demand to disclose its donor and personnel identities because he cannot satisfy exacting scrutiny. First Choice is also likely to succeed on its speech claims challenging the Attorney General's unlawful retaliation against First Choice's protected pro-life speech. And there can be little question that the irreparable harm to First Choice from disclosure vastly outweighs the non-existent harm to the Attorney General, who has shown no urgent need for the sensitive internal documents of a small religious nonprofit.

This Court should reverse. And with state proceedings continuing to press forward, it should do so quickly.

ARGUMENT

I. The district court erred in dismissing this case as unripe.

This court reviews de novo a district court's ruling that it lacks subject matter jurisdiction. *Metro. Life Ins. Co. v. Price*, 501 F.3d 271, 275 (3d Cir. 2007). The district court's second sua sponte ripeness dismissal is even more flawed than the first. It contradicts this Court's order, fundamental principles of justiciability, and the Attorney General's own admissions. It cannot stand.

A. This Court already held First Choice's claims are ripe.

This Court's order remanding First Choice's first appeal resolved the ripeness issue. To be clear, there never was any merit to the district court's first dismissal, since the Supreme Court has spurned the notion that state-court proceedings are necessary to ripen a section 1983 action. *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019); *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). As this Court has recognized that "[f]ederal law authorizes just such a civil action" where a recipient of an investigatory subpoena "petitions a federal court to adjudicate its rights and obligations" rather than complying with the demand to produce. *Smith & Wesson*, 27 F.4th at 892–93. That ruling resolves jurisdiction here.

Moreover, the state court has now enforced the Attorney General's Subpoena. This Court specifically cited those "subsequent developments in state court" as having made ripeness "undisputed." *First Choice v. Platkin*, 24-1111, Dkt.56 (3d Cir. July 9, 2024). That was why it dismissed First Choice's prior appeal "as moot" and ordered the district court to consider injunctive relief "in the first instance." *Id.*

But the district court declined to do that. Instead, that court characterized this Court's order as having merely memorialized an agreement between the parties on "subject-matter jurisdiction," which "can never be forfeited or waived." App.024 (quotation omitted). That characterization is wrong. The central issue in the previous appeal was

the existence of subject-matter jurisdiction; this Court could not have declared the appeal moot *unless* it determined that subject-matter jurisdiction existed. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). In other words, the appeal was moot because the question of subject-matter jurisdiction was "no longer 'live.'" *Powell v. McCormack*, 395 U.S. 486, 496 (1969). That means this Court necessarily found jurisdiction existed, and the district court should have followed this Court's instruction to consider First Choice's request for injunctive relief. Because the district court refused to do that, this Court should.

B. First Choice faces imminent, irreparable harm.

Even apart from the controlling nature of this Court's order, the district court was wrong to say that First Choice faces no present threat from the Subpoena.

First, the Subpoena came with—and was enforceable through—an overt legal threat of sanctions. A subpoena recipient faces considerable penalties for noncompliance. These penalties include contempt, freezing operations, "[v]acating, annulling, or suspending [its] corporate charter," or any other relief necessary. N.J. Stat. Ann. § (c)–(d). And contrary to the district court's conclusion, App.030, these penalties do not become operative only if the subpoena recipient fails to follow a court order—instead, the law authorizes these penalties to make sure the recipient "obeys the subpoena." N.J. Stat. Ann. § 56:8-6(d). Such

extreme penalties could cripple First Choice's operations and severely impair its mission. App.278–281.

The U.S. Supreme Court held that the "combination" of threatened administrative action with crippling sanctions "suffice[d] to create an Article III injury." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 166 (2014). This case is no different. In fact, the threat is heightened now, where the state court has enforced the Subpoena under state law, and the Attorney General demands First Choice turn over its protected donor and personnel information—before First Choice ever has a court rule on its constitutional claims—and threatens sanctions.

Second, the prospect of these penalties gives weight to the Subpoena's direct threat to associational freedom. The demand for the identities of donors is the same kind of threat that the Supreme Court stopped in *Americans for Prosperity*, 594 U.S. at 603. If it was a per se First Amendment injury there, then it "unquestionably constitutes irreparable injury" here. *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (plurality op.). That harm is truly irreparable, for once the identities of First Choice's donors and personnel are disclosed—to a hostile state official—it will be impossible to un-ring the bell. *Ams. for Prosperity*, 594 U.S. at 617. The district court reasoned that the threat of this disclosure would not be realized until the state court ordered the production of donor information and threatened contempt for failing to comply. App.038. But First Choice is not suing over the state court's

threat. Rather, it is suing over the threat *from the Attorney General*—a state official who now insists that the law entitles him to this information and moved for sanctions for failing to give it. The district court's reasoning is untenable: it would mean that constitutional defenses to a subpoena enforcement proceeding are not ripe while the proceeding is being litigated and arise only after the proceeding is over.

Third, the threat behind the Subpoena's unlawful investigation of First Choice's protected pro-life speech has "a chilling effect on free expression," *Hohe v. Casey*, 868 F.2d 69, 73 (3rd Cir. 1989), which "can itself be the harm" satisfying ripeness. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1178 (9th Cir. 2022). The threat facing First Choice would make an ordinary person "think[] twice before speaking," which "[o]ne might suspect . . . is the whole point" of serving it. *Smith & Wesson*, 27 F.4th at 896–97 (Matey, J., concurring). And First Choice has already chilled its speech here by removing sensitive material from videos it had posted on the internet. App.275.

The district court acknowledged this self-censorship but set it aside as an "incidental inhibition of speech . . . discretionarily made." App.042. Of course, it is the discretion to speak that the First Amendment protects, and that harm is occurring now. The district court also reasoned there was no irreparable harm because First Choice could always "alter the video back to its original form" when the proceedings are over. App.041. Not so. The loss of the right to speak during self-

censorship can never be recovered or compensated and is thus irreparable. If the district court's reasoning were correct, there is no such thing as self-censorship since a person can always resume speaking when a conflict blows over. The Constitution rejects that premise—losing the freedom to speak "for even minimal periods of time" is not just an injury, but an irreparable one. *Elrod*, 427 U.S. at 373 (plurality op.).

C. Attorney General has conceded ripeness.

Finally, while the Attorney General has since attempted to back away from it, his position before this Court that these claims are ripe has been unmistakable. He said so repeatedly when he moved to dismiss First Choice's prior appeal:

- "[A]ll agree the claims are ripe now, and that Appellant may re-initiate proceedings in district court." *First Choice v. Platkin*, 24-1111, Dkt.50 at 2.
- "Here, too, intervening events have ripened the federal challenge." *Id.* at 5.
- "Because a state court has now enforced that Subpoena, all parties agree—and the district court's decision likewise compels—that Appellant's claims are ripe." *Id.* at 6.
- "[E]veryone agrees that Appellant's federal-court claims are now ripe." *Id.*
- "Appellant's claims are now ripe." *Id.* at 8.

He cannot walk back those concessions now.

Nor is there merit to the Attorney General's contention that, because he is only investigating and has not asserted substantive claims against First Choice, its constitutional claims can wait until later. App.440; App.596. First Choice does not assert protection against suit—it asserts a right not to be subject to an unconstitutional investigation. It says that investigation violates its rights by demanding protected associational information, by targeting it with harassing subpoenas because of its protected speech and religion, and by demanding it produce documents and information without a reasonable basis in law or fact. App.056–090. Those claims concern the investigation, not some later, unfiled substantive lawsuit. And so they must be adjudicated now.

Due process demands this. No state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. So state officials must "provide constitutionally required procedural safeguards to a person whom they deprive of liberty." *Zinermon v. Burch*, 494 U.S. 113, 135 (1990). At minimum, there must be notice and a hearing, and the hearing "*must precede* the 'deprivation of life, liberty or property.'" *Baird v. Bd. of Educ. for Warren Cmty. Unit Sch. Dist. No. 205*, 389 F.3d 685, 690 (7th Cir. 2004) (emphasis added) (citation omitted); *Zinermon*, 494 U.S. at 127.

That means First Choice must be able to litigate its constitutional challenges to the Subpoena before having to comply with it. The person

served with a subpoena "may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See v. City of Seattle*, 387 U.S. 541, 544–45 (1967). The law does not condone subpoena enforcement on "the unreviewed discretion of the enforcement officer in the field." *Id.* at 545. Rather, due process presumes that once a government entity seeks judicial enforcement of a subpoena, the subpoena respondent will receive her "day in court in a plenary adversary hearing" where the subpoena respondent can make "good faith objections to the subpoena." *United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982).

That's critical for the associational protection of First Choice's donor list. As the Supreme Court has recognized of legislative subpoenas, if a respondent claims the "inquiries and demands infringe substantially upon First and Fourteenth Amendment associational rights of individuals, the courts are called upon to, *and must*, determine the permissibility of the challenged actions." *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 545 (1963) (emphasis added). Anything short of a full adjudication of rights deprives the subpoena respondent of the right to mount an "appropriate defense" to the subpoena "surrounded by every safeguard of judicial restraint." *Okla. Press Pub'g Co. v. Walling*, 327 U.S. 186, 217 (1946).

Thus, the "First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that

legal sanctions will at his urging be imposed unless there is compliance with his demands." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015). But that's exactly what the Attorney General tried to do after the state-court proceedings. Even without a hearing having taken place on the federal claims, he moved to enforce litigant's rights and asked the state trial court to sanction First Choice for not having produced everything he had demanded. App.467. But due process prohibits First Choice from having to suffer penalties before receiving a hearing on the application of the Constitution's protections. *See Seattle*, 387 U.S. at 545. The Attorney General's theory that he can force First Choice to meet every one of his demands before facing any accountability for the constitutionality of his actions is meritless.

II. The district court erred in denying an injunction.

While this Court ordinarily reviews denial of a preliminary injunction for abuse of discretion, here, its review is de novo because the district court denied an injunction based on a purported lack of jurisdiction. *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212, 217 (1st Cir. 2004). To obtain a preliminary injunction, a plaintiff must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Or

if irreparable harm to the movant "decidedly outweighs any potential harm" to the opposing party, the Court need only find "serious questions going to the merits" to grant an injunction. *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015). Plus, "[i]n First Amendment cases ... [t]he government bears the burden" to prove the constitutionality of its action, *Greater Phila. Chamber of Com. v. City of Phila.*, 949 F.3d 116, 133 (3d Cir. 2020) (quotation omitted), which thus "favors the grant of an injunction." *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 109–10 (3d Cir. 2022).

First Choice is entitled to an injunction under these standards. And the district court should have granted one months ago.

A. First Choice will likely prevail on association claims.

The Attorney General's demand for First Choice's donor and personnel information directly threatens its protected association rights and the rights of its donors, employees, and partners. His unsupported justification for those demands based on a purported need to police charitable fraud—and his open hostility to pregnancy centers—shows he cannot meet the high bar the Constitution sets for such claims. And to rule otherwise would require ignoring Supreme Court precedent and splitting with the Ninth Circuit's leading decision on the question. This Court should decline to cleave that rift in settled jurisprudence.

1. The Subpoena must meet exacting scrutiny.

The First Amendment's "right to associate with others" "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. U. S. Jaycees*, 468 U.S. 609, 622 (1984)); *accord NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 462 (1958). Threats to the right of association must satisfy at least the standard of exacting scrutiny, if not strict scrutiny. *Compare Ams. for Prosperity*, 594 U.S. at 607 (plurality op.), *with id.* at 620 (Thomas, J., concurring in part), *and id.* at 621 (Alito & Gorsuch, J.J., concurring in part). Exacting scrutiny demands "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (cleaned up). "To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (cleaned up). And exacting scrutiny demands that any such compelled disclosure be "narrowly tailored to the government's asserted interest." *Ams. for Prosperity*, 594 U.S. at 608 (plurality op.). That high bar "is appropriate given the deterrent effect on the exercise of First Amendment rights that arises as an inevitable result of the government's conduct in requiring disclosure." *Id.* at 607 (plurality op.) (quotation omitted). The Attorney General's demand for First Choice's

donors and other associational information does not come close to meeting it.

2. The donor demand fails exacting scrutiny.

As in *Americans for Prosperity*, this case presents "a dramatic mismatch" between the interest the Attorney General asserts and the demands of his Subpoena. *Id.* at 612 (plurality op.). Proffering a demand that covers nearly half of First Choice's donations by number and 70% by amount, the Attorney General's demand is anything but narrow. App.529–530. It cannot survive exacting scrutiny.

The Attorney General says he needs donor information to protect those who may have donated through a link on First Choice's client website—rather than its donor website—based on the mistaken belief that it was not a pro-life organization. App.332–334, 344. Just like Planned Parenthood, First Choice operates separate websites for clients and donors. Its client website (https://1stchoice.org/) contains a link to donate to First Choice (*see* https://bit.ly/4bQdBBS). And its donor website (https://1stchoicefriends.org/about-us/) also contains a link to donate to First Choice (https://bit.ly/4cPeFHs). The Attorney General demands that First Choice identify every donor except those who specifically used the link on the donor website. App.137.

The Attorney General ignores that *every* page of the client website states that First Choice does not provide or refer for abortions. *See* App.335–337. That means a potential donor cannot get to the client

website's donation page without first hitting a webpage with this express disclaimer. He has no basis to suspect donors were misled.

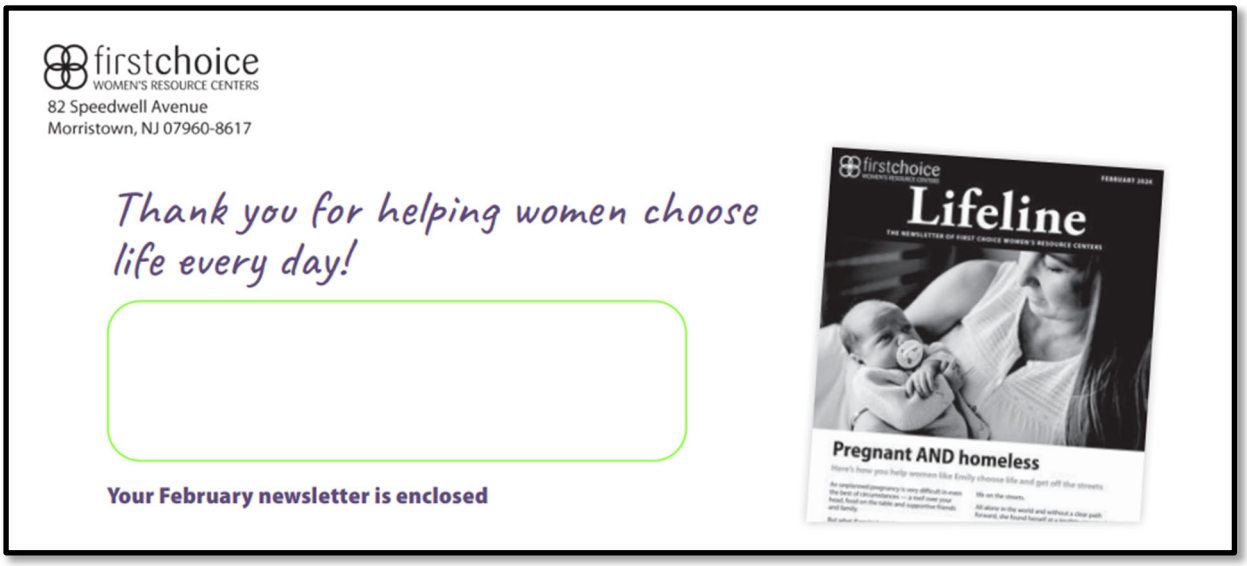
In addition, the Attorney General's demand is not narrowly tailored: it does not focus on the client website but demands in sweeping terms that First Choice "[i]dentify donations made to First Choice *by any means other than through*" First Choice's donor website. App.137 (emphasis added).

The Attorney General's donor disclosure demand is thus disconnected from his justification. Rather than finding a narrow method to investigate whether any donor may have been deceived by the client website, he demands the identities of donors who have in other ways. His demand includes every donor who gave at one of First Choice's fundraiser dinners, through a church, by dropping off a check, or by giving a gift of stock. Also, there is no reason to think that those who did visit the client website were prospective clients—many may have desired to donate to First Choice, searched its name on Google, and discovered the client website. And even those donors would have encountered First Choice's disclaimer before they reach the donation page. *See* App.546. (https://1stchoice.org/faqs/). This is simply not a narrowly tailored investigation looking into potential website deception. Instead, it's an unconstitutional demand to know the names of First Choice's donors, and a likely attempt to intimidate these donors from continuing their support of First Choice.

Americans for Prosperity establishes that a state's purported need to prevent fraud by charities does not justify a broad demand for donor information. In that case, there was an "important interest in preventing wrongdoing by charitable organizations," but that did not warrant a dragnet that would compel donor disclosure from every nonprofit. *Ams. for Prosperity*, 594 U.S. at 612. Further, the purported interest in policing fraud was quite weak when the state could not identify "a single, concrete instance" where compelled disclosure of donor information "did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." *Id.* at 613 (quotation omitted).

The Attorney General's case here is even weaker. Not only has he failed to identify anyone who claims to have been deceived by First Choice's website, but First Choice has never received any such complaints. App.391. That matters because First Choice sends every

one of its donors a mailing like the following, making its pro-life mission unmistakable:



App.532.

If any donors gave to First Choice thinking it was pro-abortion, they would likely have complained after receiving a mailing like this. Plus, even if any confused donors existed, the Attorney General's demand would be of little use in identifying them. Instead, it would identify scores of First Choice's most loyal and committed supporters—the Attorney General's likely purpose in the first place.

That directly harms both the donors and First Choice. Several anonymous First Choice donors proffered declarations. They worry that they could be subject to consequences if their identities are known by a state official who has shown overt hostility both to their pro-life beliefs and to the cause they support. App.286–287. Because "[m]any donors desire for their donations and communications with First Choice to

remain confidential," the "[f]ailure to protect their identities would cause them to cease donating to First Choice." App.276. Indeed, several of First Choice's donors, with gifts as large as $50,000, say they would be "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." App.287.

The Attorney General defended his demand for First Choice's donors as narrowly tailored by citing *Perry*, in which he says the Ninth Circuit "compel[ed] donor disclosure because the information was 'highly relevant' to claims in the litigation." App.442. But that's the opposite of what *Perry* held: the Ninth Circuit ruled that compelling discovery of identities of supporters of a ballot initiative was "clear error" that warranted mandamus. 591 F.3d at 1158. The district court approved the request, ruling that the First Amendment only protected the identities of "rank-and-file volunteers," but not of "high ranking members" of a political campaign. *Id.* at 1154. The Ninth Circuit held the opposite: mandamus was warranted because of the injury from "the disclosure itself," the "chilling effect" on making such communications discoverable, and the district court's "clear error" in subjecting associational protections to general relevance principles. *Id.* at 1158. The same concerns compel an injunction here.

Ruling for the Attorney General would create a split with *Perry*. There, the court held that discovery into protected associational

information must be "highly relevant," "otherwise unavailable," and "carefully tailored to avoid unnecessary interference with protected activities." *Id.* at 1161. The Attorney General's demand is none of these. The identities of First Choice donors are not "highly relevant" to identify potential fraud, for which the Attorney General cites no evidence and has other means of obtaining. If the Attorney General was truly concerned about fraud, he could review the public communications First Choice makes to donors. And his demand for donor disclosure bears little relation to the category of people he suggests may have been deceived.

The harm to First Choice and its donors from this demand is palpable. As in *Americans for Prosperity*, First Choice has "introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence." 594 U.S. at 617; *see* App.276–277. Nor does the Attorney General's promise that he will keep donor information confidential obviate the irreparable harm from disclosure. For one, he currently proposes that he be allowed to share this information with any other official in New Jersey state government and the federal government. App.507. And "disclosure requirements can chill association even if there is no disclosure to the general public." *Ams. for Prosperity*, 594 U.S. at 616 (cleaned up). An injunction is necessary to protect these critical rights.

3. Other demands also fail exacting scrutiny.

The Attorney General's demand for the identities of First Choice's medical personnel suffers from the same flaws. He professes concerns about licensing issues, which he supports based solely on the happenstance that when his investigator visited First Choice, the medical director was not in the office. App.162. That cannot withstand exacting scrutiny. That the medical director was not present during an unscheduled visit—itself an unremarkable fact—fails to support a demand to disclose the identity of every licensed individual who provides services for First Choice. It is not narrowly drawn because the licensing laws that the Attorney General invokes provide much more straightforward methods of resolving the questions he raises. For example, he could require First Choice to file "a statement or report in writing under oath . . . as to the facts and circumstances concerning the rendition of any service." N.J. Stat. Ann. § 45:1-18(a).

While this simple request would more than answer his concerns, he has refused to take First Choice up on it—instead, he continues to demand the names. His demand for disclosure of every licensed professional at First Choice is overbroad. The personal and professional repercussions that face those who associate with pro-life causes show the harm from this unwarranted disclosure. App.276–277; App.284–287.

The Subpoena's demand for information about First Choice's relationship with other national pro-life organizations—Heartbeat International, Care Net, and the Abortion Pill Reversal Network—is also problematic. The Attorney General has yet to explain how the mere fact of association has any potential bearing on a suspected violation of New Jersey law. It cannot survive exacting scrutiny.

Ultimately, there is no more connection between the Attorney General's demands and his stated purposes here than there was between Alabama's demand for the NAACP's membership list and its asserted interest in enforcing its corporate registration statute. *NAACP*, 357 U.S. at 464. Just as Alabama's hostility to the NAACP motivated its demand for the membership list, the Attorney General's hostility to the pro-life cause motivated his actions here. If he is genuinely concerned donors are being deceived, he should seek to identify any who have complained. If he is truly concerned that First Choice is providing unlicensed services, he should make a simple inquiry for a sworn statement addressing whether First Choice requires licenses. N.J. Stat. Ann. 45:1-18(a). And if he needs to know about First Choice's relationships with other national pro-life organizations, he should be able to articulate some basis for the need. But he has not done so.

The Attorney General's demands for this protected information are neither substantially related to his professed purpose nor narrowly tailored to achieve it. The Constitution forbids giving him what he asks.

B. First Choice will likely prevail on speech claims.

The Attorney General's subpoena is also unlawful selective enforcement that violates First Choice's First Amendment rights both as unlawful retaliation and as viewpoint discrimination.

The Supreme Court's recent decision in *National Rifle Association of America v. Vullo* reinforces how courts evaluate claims that a public official is improperly using his authority to punish or suppress speech. 602 U.S. 175 (2024). In *Vullo*, the plaintiff alleged that New York authorities violated the First Amendment by pressuring insurance companies not to do business with the plaintiff because of its disfavored views. Justice Sotomayor's unanimous opinion reaffirmed that "the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech." *Id.* at 198. Thus, while "[a] government official can share her views freely and criticize particular beliefs," she cannot "use the power of the State to punish or suppress disfavored expression." *Id.* at 188.

Critically, *Vullo* recognizes that an official's public statements and governmental actions bear directly on a showing of improper punishment of disfavored speech. Justice Sotomayor rejected the Second Circuit's attempt to dismiss the official's adverse public comments against the plaintiff's "permissible government speech and the execution of . . . regulatory responsibilities." 602 U.S. at 195 (quotation omitted). Rather, impermissible hostility may occur with press releases

and letters "on official letterhead" that "single[] out" disfavored speakers "as the targets of [the official's] call to action." *Id.* at 194. Or it may occur where an official focuses "enforcement actions 'solely'" on those making disfavored speech, while ignoring others engaged in similar activities. *Id.* at 192.

If the punishment of speech in *Vullo* was impermissible when the government attempts to manipulate a third party, it is even more problematic when the Attorney General acts against First Choice directly. He has already chilled First Choice's protected speech by causing it to remove speech from the internet that it suspects the Attorney General would target. App.275. His conduct is unlawful selective enforcement under two theories—retaliation and viewpoint discrimination.

1. First Choice has established retaliation.

The Attorney General's actions are unlawful retaliation against protected speech. "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). A plaintiff is subject to unlawful retaliation if "(1) [he] engaged in a protected activity, (2) [the] defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) ... There was a causal connection between the protected activity and the retaliatory

action." *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). First Choice has established each of these elements.

First Choice's protected activity. Its faith-based, pro-life message is constitutionally protected. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 776–78 (2018). The Attorney General makes clear with the "WARNING" at the top of his Consumer Alert why he has a problem with pregnancy centers: they "do NOT provide abortion[s]." App.289. But of course First Choice is entitled not to do so.

Deterring exercise of First Choice's rights. By subjecting First Choice to extensive and invasive investigations of that speech—which is core to its mission and from which First Choice garners no profit—the Attorney General has caused First Choice to censor its protected speech on its internet platform. App.275; *see also Citizens For A Better Lawnside, Inc. v. Bryant*, No. CIV 05-4286 RBK, 2007 WL 1557479, at *5 (D.N.J. May 24, 2007) (holding borough council investigation into background of reverend who vocally opposed zoning plan could chill reverend's speech).

Causal connection to First Choice's message. The record above shows First Choice's pro-life messaging "was a substantial factor" in the Attorney General's decision to issue the Subpoena. *See Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005) (quotation omitted). The Attorney General specifically established a "Strike Force" to support his views about abortion, and that strike force produced his Consumer

Alert. App.063–068. And again, the Consumer Alert shows that his chief problem with pregnancy centers is their core, pro-life message: they "do NOT provide abortion[s]." App.289.

2. Attorney General cannot meet his burden.

First Choice is likely to prevail on its retaliation claims because, as Justice Jackson recently explained in her concurrence in *Vullo*, those claims are subject to a burden-shifting framework of proof. *Vullo*, 602 U.S. at 204 (Jackson, J., concurring). Once First Choice shows a causal connection between its speech and the Attorney General's actions, the burden shifts to him to show that he would have issued the Subpoena "even in the absence of [First Choice's] protected conduct." *Id.* (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)). He cannot meet that burden.

If some concern other than the pro-life message motivated the Attorney General's investigation, one would suspect him to pursue similar theories against abortion clinics. First Choice and Planned Parenthood are plainly "similarly situated" for purposes of this comparison—that is, "they are alike in 'all relevant aspects.'" *Karns v. Shanahan*, 879 F.3d 504, 520 n.9 (3d Cir. 2018) (quoting *Startzell v. City of Phila.*, 533 F.3d 183, 203 (3d Cir. 2008)) (quotation omitted). Indeed, the Attorney General draws that comparison himself in his Consumer Alert. He specifically compares pregnancy centers to abortion clinics as providers of "reproductive care" and advises that New

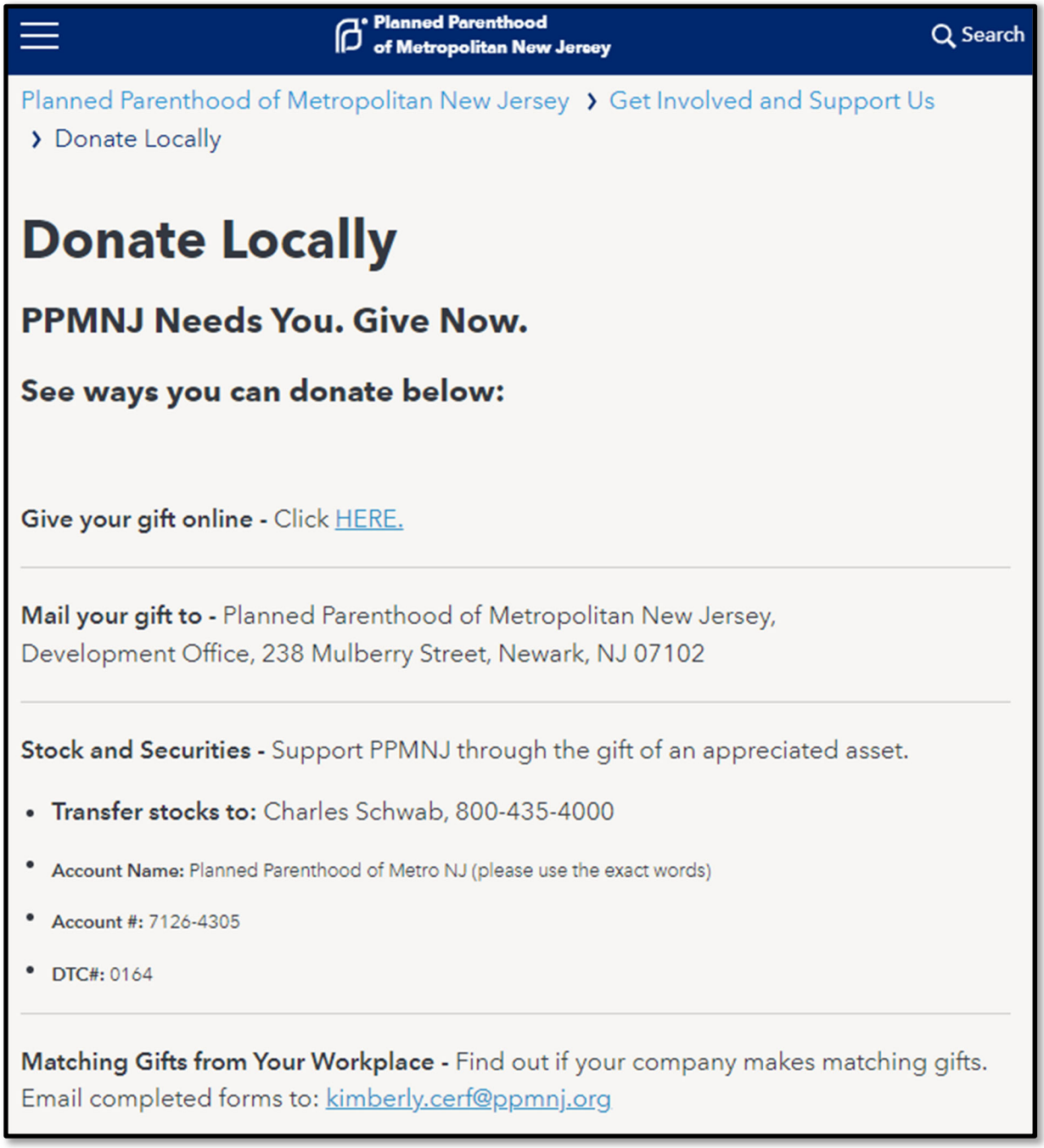
Jerseyans should visit Planned Parenthood, not pregnancy centers, because Planned Parenthood provides abortions. App.290. Indeed, the similarities abortion clinics share with pregnancy centers include clientele—*i.e.*, women and men seeking reproductive health services—and many services they provide—*e.g.*, pregnancy testing, STD testing, ultrasounds, and so on.

Plus, Planned Parenthood—unlike First Choice—provides real reasons to investigate. Unlike First Choice, Planned Parenthood charges for its services. And it makes public claims to women that are misleading. For example, Planned Parenthood makes the empirically false claim, contrary to the FDA approved labeling, that the prescription-only abortion drug is safer than over-the-counter Tylenol. *Compare* Planned Parenthood, *How safe is the abortion pill*?, https://bit.ly/3S9X58H , *with* Mifeprex (mifepristone) prescribing information, https://bit.ly/4bSIiXl (instituting FDA's black-box labeling and warning, among other things, of "[s]erious and sometimes fatal infections and bleeding"). This is plenty to go on for a consumer protection theory.

Yet rather than investigating Planned Parenthood over these misrepresentations, the Attorney General enlisted it to help him prosecute pregnancy centers. App.091–121. He asked Planned Parenthood to help him develop the theory against pregnancy centers. It is impossible for him to prove that he would have taken the same

action against groups who do not speak the pro-life message when he opted instead to collude with those groups to punish the pro-life view.

In the district court, the Attorney General offered just one attempt to distinguish his disparate treatment of Planned Parenthood—that First Choice maintains "a donation page [that] omits any mention of [its] mission" to protect the unborn, App.418–419, while Planned Parenthood does not maintain "webpages that hide its mission from its potential donors." App.445. But a few minutes of internet research show that just isn't true. In fact, just like First Choice, Planned Parenthood New Jersey maintains donation webpages that omit any mention of its pro-abortion mission:



See App.542 (image pulled from https://bit.ly/3ymvL0y). Of course, this donation page is not meaningfully different from the First Choice donation page that the Attorney General challenges. App.544 (https://bit.ly/4d3Y2YP). And both donation pages are reached through

websites that specifically disclose the organization's mission. App.546–547. (https://1stchoice.org/faqs/ and https://bit.ly/4dpcfiN). The Attorney General is manufacturing a purported ground of deception that cannot justify his disparate treatment. It thus cannot survive the First Amendment.

3. Attorney General discriminates by viewpoint.

The same facts that establish retaliation also show that the Attorney General has selectively enforced the law based on viewpoint. "[A]lthough prosecutorial discretion is broad, it is not unfettered." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (cleaned up). In a selective enforcement claim, which can be evaluated under both a First Amendment and a Fourteenth Amendment framework, a plaintiff must show two things: "(1) that he was treated differently from other similarly situated individuals; and (2) that this selective treatment was based on an unjustifiable standard, such as ... to prevent the exercise of a fundamental right." *Karns*, 879 F.3d at 520–21; *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 348 (3d Cir. 2017). The Attorney General's disparate treatment of Planned Parenthood establishes the first element, and his record of animus against pregnancy centers proves the second.

To prove the second element, the plaintiff need not prove the "challenged action rested *solely* on ... discriminatory purposes," but may instead make "a sensitive inquiry into such circumstantial and direct

evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "[G]overnment favoritism in public debate is so pernicious to liberty and democratic decisionmaking that viewpoint discrimination will almost always be rendered unconstitutional." *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1141 (D.C. Cir. 2023) (quotation omitted). Through his selective enforcement of New Jersey law, the Attorney General has discriminated on the basis of viewpoint and prevented the exercise of First Choice's First Amendment rights, which have been chilled by this investigation. App.275

Here, one need only look again to the chief objection of the Attorney General's Consumer Alert: he warns against pregnancy centers because they "do NOT provide abortion care." App.289. In any case, there is little question about the Attorney General's discriminatory intent here. He does not hide his hostility to pregnancy centers, which, as the record above shows, he has made a central feature of his political persona. Just as the Supreme Court held in *Vullo*, that intent cannot be dismissed as mere use of the bully pulpit of an elected official through "government speech." 602 U.S. at 195. Rather, it establishes his discriminatory purpose.

The Attorney General's actions against First Choice are particularly problematic because New Jersey's own Office of Legislative Services concluded that a legislative attempt to expand the NJCFA to

pregnancy centers, if passed, would likely not survive constitutional scrutiny. *See* N.J. Office of Legislative Services Opinion Letter (Feb. 21, 2024), *available at* http://media.aclj.org/pdf/I.O.-1551.pdf. For one, such a law "would likely be examined using the strict scrutiny standard," absent a showing that speech by pregnancy centers "was economically motivated in a commercially competitive context to make it possibly subject to regulation as commercial speech." *Id.* at 2.

The Attorney General has made no showing that any commercial speech is at issue. To the contrary, as the Western District of New York found in enjoining a related campaign against pregnancy centers by New York's Attorney General, "[n]othing could be fundamentally less commercial than this speech about how a woman might save her pregnancy." *National Institute of Family and Life Advocates v. James*, No. 24-CV-514 (JLS), 2024 WL 3904870, at *12 (W.D.N.Y. Aug. 22, 2024). First Choice has a core constitutional right to that speech and is thus likely to succeed on challenge to the Attorney General's actions.

C. The balance of harms tips sharply for First Choice.

Unlike the patent irreparable harm to First Choice, the Attorney General suffers no irreparable harm in having to wait for documents from an organization that has been lawfully operating in New Jersey for 40 years without incident. He has shown no immediate need for a list of donors and sensitive, internal documents from a faith-based nonprofit organization that provides all its services for free. He thus fails to show

any non-speculative harm from putting his intrusive requests on hold. Plus, "[t]here is a strong public interest in upholding the requirements of the First Amendment." *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 109 (3d Cir. 2022). The balance of harms tips thus sharply in favor of First Choice, such that even "serious questions going to the merits" suffice to grant an injunction. *In re Revel*, 802 F.3d at 570 (quotation omitted). So First Choice's showing of likelihood of success compels an injunction.

CONCLUSION

The Court should reverse the district court's dismissal and its denial of a preliminary injunction against enforcement of the Subpoena.

Dated: November 22, 2024 Respectfully submitted,

/s/ Lincoln Davis Wilson
ERIN M. HAWLEY
LINCOLN DAVIS WILSON
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
ehawley@ADFlegal.org
lwilson@ADFlegal.org

ERIK C. BAPTIST
DALTON A. NICHOLS
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
(571) 707-4789

ebaptist@ADFlegal.org
dnichols@ADFlegal.org

Counsel for Plaintiff-Appellant First Choice Women's Resource Centers, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 10,561 words, excluding parts exempted by Fed. R. App. P. 32(f).

This brief complies with Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

/s/Lincoln Davis Wilson

Counsel for Plaintiff-Appellant First Choice Women's Resource Centers, Inc.

November 22, 2024

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/Lincoln Davis Wilson

Counsel for Plaintiff-Appellant First Choice Women's Resource Centers, Inc.

November 22, 2024