NO. 23-941

IN THE

Supreme Court of the United States

IN RE: FIRST CHOICE WOMEN'S RESOURCE CENTERS INC.,

Petitioner.

On Petition for a Writ of Mandamus
To The United States District Court
for the District of New Jersey

BRIEF OF MANHATTAN INSTITUTE, INSTITUTE FOR FREE SPEECH, TEXAS PUBLIC POLICY FOUNDATION, ANIMAL ACTIVIST LEGAL DEFENSE PROJECT, & PEOPLE UNITED FOR PRIVACY FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici are organizations whose ability to effectively pursue their chosen policy goals requires the ability to freely associate with others without fear of reprisal.[1] They seek to provide their perspective on the harm suffered on receipt of a government demand for donor, member, and volunteer information and the importance of a federal forum for reviewing constitutional claims arising out of that demand.

The Manhattan Institute is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. It has historically sponsored scholarship and filed briefs opposing regulations that either chill or compel speech.

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Protecting individuals' ability to privately associate

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[1] No party or counsel for a party wrote any part of this brief. No person other than *amici* and their counsel made any financial contribution to the preparation of this brief. Counsel for all parties were notified of the intent to file this brief more than ten days in advance pursuant to Supreme Court Rule 37.2.

for political purposes is a core aspect of the Institute's mission.

The Texas Public Policy Foundation (the Foundation) is a nonprofit, nonpartisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans.

The Animal Activist Legal Defense Project (the Project) is housed at the University of Denver and serves as a law clinic styled educational course, but is funded exclusively by grants and donations. The Project works with a variety of unpopular activists accused of civil disobedience and direct action, and some of its donors prefer or require anonymity.

People United for Privacy Foundation is a nonprofit, nonpartisan public policy organization that envisions an America where all people can freely and privately support ideas and nonprofits they believe in so that all sides of a debate will be heard, individuals do not face retribution for supporting important causes, and all organizations have the ability to advance their missions because the privacy of their donors is protected.

As organizations that pursue policy goals that encounter varying degrees of political opposition in different areas of the country, *amici* rely upon the First Amendment as a bulwark against both direct and indirect attempts by the government to chill or silence their message. The ability to assert First Amendment claims in federal court provides a key protection for *amici*'s activities, serving to prospectively ward off unwarranted investigatory demands and as a means for redress if and when such demands occur. *Amici* confirm that receipt of a government demand for disclosure of donor, member, and volunteer information immediately chills and impedes their ability to pursue their chosen policy goals. For these reasons, *amici* urge this Court grant certiorari and resolve the circuit split by clarifying that a government demand for donor, member, and volunteer information ripens a First Amendment claim for federal-court adjudication under § 1983.

SUMMARY OF THE ARGUMENT

The First Amendment protects individuals' ability to collectively pursue common goals. The right to associate preserves "political and cultural diversity" and shields "dissident expression from suppression by the majority." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021).

Compelled disclosure of membership lists and donor information chills associational rights. It serves as a type of indirect regulation on speech. Groups targeted for unlawful compelled disclosure have viable First Amendment claims that can, and should, be adjudicated in federal court under 42 U.S.C. § 1983. *See id.* at 2387–88.

But the district court in this case and the Fifth Circuit in *Google, Inc. v. Hood*, determined that the targets of a non-self-executing civil investigative demand must litigate in state court to ripen their First Amendment claims. App.10a-14a; 822 F.3d 212 (5th Cir. 2016).

This despite the fact that state litigation would *bar* a subsequent federal claim, something the district court itself acknowledged. *See* App.13a n.7 (recognizing that subsequent federal claim would likely be barred by res judicata principles).

This cannot be. First, the government's threat to compel disclosure of donor, member, and volunteer information chills the recipient's associational rights as well as those of the donors, members, and volunteers. An enforcement action is unnecessary; the

First Amendment claim is already ripe.

Second, the Civil Rights Act of 1871 guarantees a federal forum for persons who have suffered constitutional violations at the hands of a state actor. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019). Requiring state litigation to ripen a federal claim deprives the claimant of this guarantee.

Third, this Court recently cleaned up the thirty-four-year mess that resulted from *Williamson County*'s imposition of a state-litigation requirement to ripen federal takings claims. *See Knick*, 139 S. Ct. at 2167–69. The Court should preclude replication of this failed experiment in the context of the First Amendment.

This Court should grant the writ of certiorari to resolve these issues.

The petition is styled as a petition for a writ of mandamus, to be construed alternatively as a petition for writ of certiorari. *Amici* address the petition as for a writ of certiorari because the New Jersey Attorney General agreed to adjourn state-court proceedings, which were originally scheduled for March 27, to allow the Court to consider the petition. *See* Petitioner's Letter Feb. 28, 2024.

ARGUMENT

I. The government's demand for disclosure, coupled with a credible threat of enforcement, chills First Amendment rights. Actual enforcement is not needed to ripen the claim.

"First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (cleaned up). This breathing space includes the ability of individuals to come together to pursue collective goals. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462–63 (1958).

Despite—or perhaps because of—the First Amendment's central role in facilitating democracy, governments have historically attempted to dissuade the exercise of First Amendment rights by impeding the right to associate. Government action is sometimes direct. *See Elrod v. Burns*, 427 U.S. 347 (1976) (patronage dismissals). At other times, it is indirect but impedes First Amendment rights just the same. Among indirect regulations, compelled disclosure of membership and donor information has an unfortunate and sordid history. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. at 453–54 (demanding full membership lists).

Compelled disclosure of associational ties impairs the right to free association, which, like the right to free speech, "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 485–86 (1960). In *Shelton v. Tucker*, an Arkansas statute mandated teachers disclose organizations to which they had belonged or

contributed in the previous five years. *Id.* at 480. This included every type of associational tie: social, professional, political, avocational, or religious. *Id.* at 488. The Court recognized that this disclosure requirement "broadly stifle[d] fundamental personal liberties." *Id.* at 488. It was undisputed that the required disclosure harmed the right to free association. *Id.* at 485–86. The Court recognized that the school board's review of a teacher's associational ties resulted in a "constant and heavy" pressure on the teacher. *Id.* at 486–87. And disclosure requirements often apply that pressure to prevent association with politically unpopular groups: one of the teachers was a member of the NAACP. *Id.* at 483.

It is no wonder why compelled disclosure is used frequently: this form of indirect regulation is intimidating and effective. "Broad and sweeping state inquiries" into "a person's beliefs and associations"—areas protected by the First Amendment—"discourage citizens from exercising rights protected by the Constitution." *Americans for Prosperity Found.*, 141 S. Ct. at 2384 (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)). This is particularly true in the 21st century; radical polarization is coupled with an abundance of easily available information. In this setting, disclosure of membership in, or donations to, an organization can (and does) lead to "bomb threats, protests, stalking, and physical violence." *Id.* at 2388.

People know this. An organization that is compelled to disclose its donors, members or volunteers will have serious difficulties garnering donations, members, and volunteers. But the harm to

First Amendment rights occurs before disclosure is required by a court. The *threat* of disclosure, coupled with a risk of enforcement, chills First Amendment rights and ripens a First Amendment claim. *See id.* at 2380.

This is illustrated by *Americans for Prosperity Foundation v. Bonta*. There, the Attorney General's regulations required charities to file information about major donors, including names, total contributions, and addresses, as part of annual registration and renewal. *Id.* at 2379–80. Two charities filed annual renewal documents for years, but always withheld donor information. *Id.* at 2380. Following a policy change, the AG sent deficiency letters to the two charities. *Id.* The charities refused to provide donor information. *Id.* In response, the "Attorney General threatened to suspend their registrations and fine their directors and officers." *Id.* The charities brought § 1983 claims in federal court, alleging the Attorney General violated both their First Amendment rights and the rights of their donors. *Id.* The charities claimed that compelled disclosure "would make their donors less likely to contribute and would subject them to the risk of reprisals." *Id.* There, the charities alleged sufficient associational harm based on the threat of enforcement by the AG. *See id.*

The chilling effect of threatened disclosure is real. When faced with the threat of compelled disclosure, taking into account the resulting consequences in an age where "anyone with access to a computer can compile a wealth of information about anyone else," *id.* at 2388 (cleaned up), new members will be

reluctant to join, donors will be reluctant to donate, and the ability of the targeted groups to pursue their goals will be impeded. Just as the disclosure requirement placed a "constant and heavy" pressure on the teachers in *Shelton*, 364 U.S. at 486–87, receipt of a CID demanding donor, member, and volunteer information burdens those considering whether to begin or continue involvement with the recipient organization.

The potential for a state court to scale back the scope of a demand during an enforcement proceeding is cold comfort. The threat of disclosure is in and of itself sufficient to impede the organization's effectiveness. Many donors, members, and volunteers won't take a "donate, join, or volunteer now and wait to see if the organization wins in court" approach. In *Americans for Prosperity Found.*, the § 1983 claims were ripe when the AG threatened to suspend the charities' registrations and levy fines. 141 S. Ct. at 2380. So it is here. When a demand is made and enforcement threatened, the target's rights are chilled and the harm is done.

Plaintiffs are not required to wait until the actual irreparable injury—compelled disclosure—occurs. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) ("Congress intended [§ 1983] to throw open doors of the United States courts to individuals *who were threatened with*, or who had suffered, the deprivation of constitutional rights, and to provide these individuals immediate access to the federal courts." (emphasis added) (cleaned up)).

The recipient of a demand for disclosure has, and

should have, the right to affirmatively assert any federal First Amendment claim that flows from the issuance of the demand, so long as the demand is accompanied by a credible threat of enforcement. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164–65 (2014).

II. Requiring a state enforcement action to ripen federal claims deprives the federal claimant of the federal forum guaranteed by the Civil Rights Act of 1871.

The Civil Rights Act of 1871 "guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials." *Knick*, 139 S. Ct. at 2167 (cleaned up). Over the years, the Court has protected the availability of the federal forum by repeatedly rejecting efforts to impose state-law exhaustion requirements on § 1983 claims. *See Patsy*, 457 U.S. at 500-501 ("[T]his Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*.").

Provision of a federal forum does, to some degree, deviate from pre-Civil-Rights-Act principles of federalism. But this is a feature of the Act, not a bug. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)). "[S]ince the Civil Rights Act of 1871,

part of 'judicial federalism' has been the availability of a federal cause of action when a local government violates the Constitution. 42 U.S.C. § 1983." *Knick*, 139 S. Ct. at 2177, n.8.

Civil investigative demands that infringe upon First Amendment rights—tools wielded frequently and aggressively on partisan issues—necessitate a federal forum to guard the people's federal rights. Across the ideological spectrum, state Attorney Generals increasingly pursue "high-visibility legal challenges" to advance policy preferences and increase a voter base. *See, e.g.*, Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L.J. 2100, 2144–46 (2015) (noting "the rise of politically salient regulatory lawsuits against private interests" by State AGs). But the guarantee of a federal forum "rings hollow" for plaintiffs who are "forced to litigate their claims in state court." *Knick*, 139 S. Ct. at 2167. That is precisely the effect of the district court's decision. *See* App.13a n.7 (recognizing that, under its decision, First Amendment claims arising from certain state subpoenas "may *seldom if ever* be ripe for adjudication in federal court" (emphasis added)).

The district court, like the Fifth Circuit in *Google*, grounded its decision in principles of comity. App.10a. Since the recipient of a non-self-executing federal subpoena would not be able to challenge the subpoena before a federal enforcement proceeding, the argument runs, surely the recipient of a similar *state* subpoena cannot do so. *Id.* at 7a-8a, 10a.

This gives short shrift to—or entirely ignores—the importance of the federal forum "guarantee[d]" by the Civil Rights Act of 1871. *Knick*, 139 S. Ct at 2168. The recipient of a federal non-self-executing subpoena may have to wait, but still eventually receives the guaranteed federal forum. Preclusion won't bar the recipient of the federal subpoena from presenting its federal claims to a federal court. The opposite is true for recipients of an equivalent state subpoena—they are all but guaranteed to be deprived of a federal forum and are instead forced to litigate their federal claims in state court. *See* App.13a n.7.

It also fails to recognize that the Civil Rights Act intentionally "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242. Principles of comity should not deprive federal claimants of the federal forum guaranteed by the Civil Rights Act of 1871.

This is not to say that every state-law investigation can be challenged in federal court. It is also not to say that every challenge filed in a federal forum will succeed. Many may not succeed; many may not advance past the pleading stage. *See Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1179 (9th Cir. 2022). The point is that a federal forum is available to adjudicate the federal claim—even if it turns out to adjudicate the *inadequacy* of a federal claim—without requiring a federal-claim-extinguishing, state-court litigation to ripen the federal claim.

III. The Court should prevent replication of the failed *Williamson-County*-ripeness approach in the First Amendment context.

The Court is no stranger to the mess created by requiring state litigation to ripen section 1983 claims; it cleaned one up five years ago in *Knick*.

In *Knick*, the Court recognized the initial allure of requiring a state adjudication to ripen the federal claim. The Fifth Amendment is not violated by a taking, per se; it is violated by a taking *without just compensation*. So it would be premature, the argument runs, for a federal court to intervene until the claimant has pursued, and the state has refused, just compensation through all available means, including a state-law claim for inverse condemnation. *See Knick*, 139 S. Ct. at 2169 (describing the reasoning of *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)).

The "unanticipated consequences" of the *Williamson County* approach "were not clear until 20 years later," when the Court determined that the state litigation required to *ripen* the federal claim would also *bar* the federal claim. *Id.* at 2169 (describing *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 331 (2005)).

This procedural "Catch-22" could not stand. *Id.* at 2169. Section 1983 "guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials." *Id.* at 2167 (cleaned up). "Exhaustion of state remedies is *not* a prerequisite to an action under 42 U.S.C. § 1983." *Id.* (cleaned up). Requiring

federal-claim-barring state litigation to ripen a federal claim under § 1983 made "the guarantee of a federal forum ring[] hollow" by "forc[ing]" the plaintiffs "to litigate their claims in state court." *Id.*

So it is here. If the district court's decision stands, plaintiffs with otherwise ripe First Amendment claims will—in some circuits, at least—be forced to assert the substance of those claims in a state enforcement action rather than in a federal forum. This creates every bit as much a "Catch-22" as the state-litigation requirement imposed in *Williamson County* and rejected in *Knick*. 139 S. Ct. at 2167. Just as under *Williamson County*, under the district court's decision "[t]he federal claim dies aborning." *Id.*

It took thirty-four years to recognize and correct the pernicious real-world effects of the state-litigation requirement imposed by *Williamson County*. The Court should grant certiorari to prevent replication of the failed *Williamson-County*-ripeness approach to First Amendment claims brought under section 1983.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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