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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

JAMES A. CAMPBELL
J. CALEB DALTON
GABRIELLA M. MCINTYRE
MERCER S. MARTIN
ALLISON H. POPE
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176

KEVIN H. THERIOT
JULIA C. PAYNE
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260

ERIN M. HAWLEY
JOHN J. BURSCH
LINCOLN DAVIS WILSON
Counsel of Record
TIMOTHY A. GARRISON
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
lwilson@adflegal.org

Counsel for Petitioner First Choice Women's Resource Centers Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

PETITIONER'S REPLY

Nothing in the Attorney General's response makes this case any less worthy of relief or review. Just five years ago, *Knick* v. *Scott Township* rejected the same "Catch-22" the district court imposed here—a "preclusion trap" that requires section 1983 plaintiffs to first litigate in state court before they can sue in federal court. 58 U.S. 180, 182 (2019). Yet the Attorney General relegates *Knick* to the end of his brief, where his sole attempt to distinguish it is to call it a case about "exhaustion," not "ripeness." BIO.29. That's exactly the mistake *Knick* fixed: a rule that "effectively established an exhaustion requirement" for section 1983 under the guise of "ripeness." 58 U.S. at 194, 204 (overruling *Williamson Cnty. Reg'l Plan. Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). By perpetuating the same error, the district court's unasked-for dismissal clearly and indisputably violated the "guarantee of a federal forum" in section 1983. *Id.* at 2176.

The Attorney General also says mandamus would not aid this Court's jurisdiction because the Court can still review the merits of First Choice's claims after state-court proceedings. BIO.10. That's incorrect. Only the federal courts can decide the question of federal jurisdiction here, and compelling the exercise of that jurisdiction is "[t]he traditional use" of mandamus "in aid of appellate jurisdiction." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). First Choice has no other recourse since the Third Circuit denied a request to enjoin enforcement of the Subpoena pending appeal. Even when First Choice sought expedited appeal—one day after the Attorney General's agreement to postpone state-court

proceedings until May 20 made such relief possible—the same Third Circuit panel denied that request too. So without relief from this Court, state-court proceedings will likely moot and preclude First Choice's federal claims and foreclose this Court's review of both jurisdiction *and* the merits.

The balance of the Attorney General's opposition amplifies the worthiness of this jurisdictional question for review. He does not dispute the existence of a circuit split, and his attempts to curtail its breadth rest on superficial distinctions. Nor does he dispute the importance of the question, which affects the constitutional rights of major corporations, animal rights activists, gun rights groups, pregnancy centers, Catholic immigrant shelters, LGBT advocates, and more. See *Google, Inc.* v. *Hood*, 822 F.3d 212 (5th Cir. 2016); Manhattan.Inst. Br.2, 6–12; 2nd.Am. Br.4–10; ACLJ Br.24–26; RFI Br.9–10; *PFLAG, Inc.* v. *Texas Attorney General*, No. D-1-GN-24-001276 (Tex. Dist. Ct., Travis County Mar. 1, 2024). This issue is unlikely to recur in the Fifth Circuit, and waiting for a decision by the Third Circuit will allow state-court proceedings to preclude First Choice's claims and bar effective federal relief.

The Attorney General agreed to adjourn state-court proceedings so the Court can decide this important question. See Ltr. to Scott Harris, Feb. 28, 2023. The Court should do so and grant the petition. *In re United States*, 583 U.S. 29, 31 (2017) (disposing of petition for mandamus/certiorari via certiorari and summary reversal).

I. First Choice Has a Clear and Indisputable Right to a Federal Forum.

As with "any other constitutional claim," First Choice was "guaranteed a federal forum under § 1983" for its challenge to the Subpoena. *Knick*, 588 U.S. at 189. The district court's error in taking that forum away was "clear and indisputable." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (cleaned up). That much is plain from *Knick*, where this Court overturned the *Williamson County* rule that "a property owner whose property has been taken by local government" does not have a ripe claim "until a state court has denied his claim for just compensation under state law." *Knick*, 588 U.S. at 184. That rule violated the Takings Clause and also imposed "unanticipated consequences": state-court litigation precluded the federal claims, thus "hand[ing] authority over federal takings claims to state courts." *Id.* at 188-89 (quotation omitted).

What was unanticipated in *Williamson County* is expressly contemplated here. The district court acknowledged that a federal challenge to a state investigatory demand will "seldom if ever be ripe" because "res judicata principles will likely bar a plaintiff from filing a claim in federal court" after the state-court litigation. App.13a n.7. Perhaps the Fifth Circuit's outlier rule in *Google* "may not have adequately tested the logic" of this "Catch-22," *Knick*, 588 U.S. at 184, 197, but the district court here embraced it overtly. And the risk of preclusion is hardly "speculative," cf. BIO.30 n.7, since the Attorney General successfully argued for it in nearly identical circumstances. *Smith & Wesson Brands, Inc.* v. *Grewal*, 2022 WL 17959579 (D.N.J. Dec. 27,

2022), *appeal pending*, No. 23-1223 (3d Cir.). The same fate looms here.

In his sole attempt to distinguish *Knick*, the Attorney General says this case "could hardly be more different" because it is "about ripeness (which does apply to Section 1983), not . . . exhaustion (which does not)." BIO.29. *Knick* shows this is no distinction at all. *Williamson County* held that a plaintiff could not "bring a 'ripe'" takings claim in federal court until the state courts had first denied compensation. *Knick*, 588 U.S. at 184. Later case law expressly defended that rule on "ripeness" grounds. See *id.* at 204. Yet *Knick* held this "ripeness" reading of *Williamson County* obscured "its error" in "effectively establish[ing] an exhaustion requirement" for section 1983 claims. *Id.* at 194. In that context, ripeness and exhaustion were two sides of the same coin. The district court's decision here is no different.

Nor is there any merit to the Attorney General's contention that First Choice "'suffer[s] no injury' from the mere issuance of a non-self-executing subpoena." BIO.29. The Attorney General's broad and burdensome Subpoena demands First Choice produce sensitive internal documents within 30 days or be "liable for contempt of Court and such other penalties as are provided by law," App.63a, including extreme sanctions. N.J. Stat. Ann. 56:8-6. The threat of enforcing those extensive demands reasonably chills First Choice's religious pro-life speech and protected associations and harms its Fourth Amendment interests too. *Twitter, Inc.* v. *Paxton*, 56 F.4th 1170, 1178 n.3 (9th Cir. 2022); *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2388 (2021); *Fed. Trade Comm'n* v. *Am. Tobacco Co.*, 264 U.S. 298, 305–06 (1924). Elsewhere, such demands have even

caused recipients to lose insurance coverage. *Obria Group* v. *Ferguson*, No. 3:23-cv-06093-TMC, Dkt.33 (W.D. Wash. Mar. 28, 2024). This "threatened enforcement" plainly "creates an Article III injury." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158, 166 (2014).

The Attorney General's cases on federal administrative subpoenas are inapposite, since they do not involve section 1983 or any risk of inter-jurisdictional preclusion. Cf. BIO.24-28. Unlike this case, *federal* administrative exhaustion does not deprive a litigant of a federal forum—rather, a federal appeal is constitutionally guaranteed. *Crowell* v. *Benson*, 285 U.S. 22 (1932). And none of the federal administrative subpoena cases alleged a chilling of First Amendment rights either.

The Attorney General cannot minimize his threatened enforcement—he bore it out by bringing suit in state court. His objectives are plain from his public statements against pregnancy centers and his assertion of a consumer protection theory developed by Planned Parenthood and discredited by New Jersey's legislative services office. Pet.8–9; App.85–90a; ACLJ.Br.25; *Online Merchants Guild* v. *Cameron*, 995 F.3d 540, 551–52 (6th Cir. 2021). The fact that the Attorney General "cannot … impose penalties" himself is immaterial, BIO.31, since that is true of essentially all his enforcement powers, nor can his post-litigation disclaimer of penalties unspeak the threat he already made. *Ibid.* And the Attorney General's suggestion that state courts would not impose penalties if "the recipient brings good-faith challenges to the subpoena's validity" just tells First Choice to avoid sanctions by surrendering its right to a federal forum. BIO.31.

Plus, there is no assurance that First Choice even *can* raise its federal defenses in a state-court adjudication. In similar cases, the Attorney General has first persuaded the state courts not to hear federal constitutional defenses and then convinced the federal courts that the state-court adjudication precludes those federal defenses. *Platkin* v. *Smith & Wesson Sales Co.*, 474 N.J. Super. 476, 496 (App. Div. 2023); *Smith & Wesson*, 2022 WL 17959579. His actions speak louder than his words.

II. First Choice Has No Other Way to Protect Its Right to a Federal Forum.

The Attorney General's opposition rests primarily on his claim that a writ would not aid appellate jurisdiction because "this Court would have jurisdiction over Petitioner's federal claims no matter whether they arose from a federal or state court judgment." BIO.2 (discussing 28 U.S.C. 1651(a)). That is deeply mistaken: this petition raises a question of federal jurisdiction, not substantive law, and that question can be reviewed *only* through the federal system. Indeed, "[t]he traditional use" of mandamus "in aid of appellate jurisdiction" is to compel a lower court "to exercise its authority when it is its duty to do so." *Roche*, 319 U.S. at 26; accord *Ex parte Kumezo Kawato*, 317 U.S. 69, 70–71 (1942); *In re Atl. City R. Co.*, 164 U.S. 633, 635 (1897) (collecting cases). And while mandamus is not to "be used merely as a substitute for the appeal procedure," *Roche*, 319 U.S. at 26, the "general rule" is that it is appropriate "'in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.'" *Ex parte U.S.*, 287 U.S. 241, 246 (1932) (quoting *McClellan* v. *Carland*, 217 U.S. 268,

280 (1910)); accord *Chandler* v. *Jud. Council of Tenth Cir. of U.S.*, 398 U.S. 74, 112 (1970) (Harlan, J., concurring).

The district court's erroneous dismissal threatens exactly that. Just as in *McClellan*, that dismissal made way for the Attorney General's parallel state-court enforcement proceeding, which "might render a judgment [that] would be *res judicata*, and thus prevent further proceedings in the Federal court." 217 U.S. at 282. If that happens, First Choice will have been denied its guaranteed federal forum and the only adjudication it can obtain is a ruling that its claims are precluded.

The Attorney General tries to explain away *McClellan*'s directly analogous use of mandamus with reasoning found nowhere in its text. He says "no federal court" in *McClellan* "would have had jurisdiction" without mandamus, while here, "this Court would retain full jurisdiction to review a final state-court judgment involving Petitioner's federal constitutional rights." BIO.14. But if the Attorney General's extra-textual gloss on *McClellan* were correct, then this Court would never be able to compel a district court to take jurisdiction of a claim that could also be litigated in state court. The Attorney General cites no decision that has so held. That's because it is not the law—again, compelling a district court to exercise its jurisdiction is "the traditional use" of mandamus. *Roche*, 319 U.S. at 26.

Moreover, relief is needed to preserve this Court's ability to review the ultimate merits. It is highly unlikely the federal issues here would survive state-court proceedings to this Court's review. For one, it is unclear whether the New Jersey courts will even *let*

First Choice litigate its federal objections to the Subpoena. *Supra* at 5–6. And even if they do so, preserving a live controversy for this Court would require First Choice to run the table on motions to stay enforcement through three layers of appellate review. BIO.14. The Attorney General holds out the prospect that First Choice could later sue for return of any wrongfully produced documents, BIO.15, but that is no more consolation for the loss of constitutional freedoms than the promised confidentiality of donor lists in *Americans for Prosperity*, 141 S.Ct. at 2388.

First Choice has exhausted all other options. Immediately after the district court's dismissal, it sought an injunction pending appeal, but the Third Circuit denied that relief shortly before a state-court hearing. App.21a (Krause, Freeman & Scirica, J.J.). So First Choice filed this petition, and the Attorney General surprisingly agreed to adjourn state-court proceedings by two months to give this Court time to rule. See Ltr. to Scott Harris, Feb. 28, 2024. That opened up the possibility that First Choice could obtain relief from an expedited Third Circuit appeal, which it requested the next day. But the same panel denied that request too, treating it as untimely and ignoring First Choice's explanation that the state's agreement to postpone state court proceedings made an expedited ruling possible. COA.Dkt.28–Dkt.29. Even though the Third Circuit recognizes a right to a federal forum in cases like this, *Smith & Wesson Brands, Inc.* v. *Att'y Gen. of New Jersey*, 27 F.4th 886, 892–93 (3d Cir. 2022), only this Court can protect that right before it is extinguished by state-court proceedings.

Finally, the Attorney General frets that if the Court grants mandamus here, the writ will soon be used to correct all manner of jurisdictional errors. BIO.12. But mandamus is warranted here only due to the extraordinary convergence of three unique factors unlikely to recur in a single case—a clearly erroneous jurisdictional dismissal, parallel state-court proceedings that imminently threaten preclusion, and the denial of any emergency relief by the court of appeals. In such an exceptional case, the Court should grant the writ.

III. The Right to a Federal Forum for Constitutional Claims Warrants Review.

A. The Circuits Are Split 4-1.

The Attorney General does not dispute that the Ninth Circuit's approval of challenges to investigatory demands "even prior to . . . enforcement" conflicts directly with the Fifth Circuit's state-litigation requirement. *Twitter*, 56 F.4th at 1178 n.3; *Google*, 822 F.3d at 225. And his attempt to limit the split to those two circuits is futile: the decisions of the Third, Sixth, and Eleventh Circuits are irreconcilable with the Fifth.

Third Circuit. The Attorney General says that *Smith & Wesson* did not address ripeness because the subpoena there had already been enforced at the time of the Third Circuit's decision. BIO.23. Not so—the Third Circuit specifically held that "[f]ederal law authorize[d]" Smith & Wesson to ask "a federal court to adjudicate its rights and obligations" rather than "producing the documents on the date specified on the subpoena." 27 F.4th at 892–93 (Hardiman, J.) (citing 42 U.S.C. 1983). Given *Smith & Wesson*, it is no

surprise the Attorney General did not even contest First Choice's standing in the district court.

Sixth Circuit. The Attorney General says *Online Merchants Guild* is inapposite because it concerned "*standing*," not ripeness. BIO.20. That makes no difference. "The doctrines of standing and ripeness originate from the same Article III limitation" and often "boil down to the same question." *S.B.A. List*, 573 U.S. at 158 n.5 (cleaned up).[1] Here too, they concern the same question of Article III injury. *Online Merchants Guild* held that a CID recipient showed a "threat of prosecution" that established "injury in fact," 995 F.3d at 552, which conflicts directly with *Google*'s rule that a "non-self-executing administrative subpoena" does not show an "injury ripe for adjudication." 822 F.3d at 228. Nor does a later unpublished decision in a case not involving section 1983 supersede this thorough analysis. Cf. BIO.20 (invoking *CBA Pharma, Inc.* v. *Perry*, No. 22-5358, 2023 WL 129240 (6th Cir. Jan. 9, 2023)).

Eleventh Circuit. The Attorney General says *Major League Baseball* v. *Crist*, 331 F.3d 1177 (11th Cir. 2003), has no bearing because the parties did not dispute jurisdiction. BIO.21. This ignores the Eleventh Circuit's thorough reasoning on why pre-enforcement challenges to investigatory demands must be available. Where the only options under state law were to "comply with the terms of the CIDs" at

---

[1] The Attorney General also tries to dismiss *Online Merchants Guild* as a challenge to a statute, not an investigation. BIO.20. But like this case, it was both: the plaintiffs sought a "pre-enforcement" injunction against adverse actions from the Attorney General "by subpoena, investigation, or prosecution." 995 F.3d at 546-47.

great expense or bring "suit in state court" before a skeptical judge, "an action in federal court" under section 1983 was the only realistic avenue of relief. *Major League Baseball*, 331 F.3d at 1180-81. First Choice faced the same dilemma here: complying with a Subpoena demanding sensitive internal information or litigating in a state court that has refused to entertain federal objections. See *Platkin*, 474 N.J. Super. at 496. So it invoked the right it would have for "any other constitutional claim" to a "guaranteed . . . federal forum under § 1983." *Knick*, 588 U.S. at 189. That no party disputed that right in *Major League Baseball* shows only how errant the Fifth Circuit's rule is—not that no circuit conflict exists.

B. This Case Presents an Ideal Vehicle to Resolve This Important Question.

This case presents an excellent opportunity to consider federal jurisdiction over constitutional challenges to state investigatory demands. The courts of appeals are sharply divided on the state-litigation rule, and this case would allow the Court to provide much needed guidance on the standards for evaluating jurisdiction in these cases. And the Court would do so against the background of a state-court system that has been particularly inhospitable to these federal rights. *Supra* at 5–6; *Smith & Wesson*, 27 F.4th at 896 (Matey, J., concurring).

This Court should take the opportunity. While the Fifth Circuit is the only circuit to impose the state-litigation rule, no case raising this question is likely to arise there, where such constitutional challenges—whether by Catholic immigrant shelters or LGBT advocates—must now proceed in state court. See *Annunciation House Inc.* v. *Paxton*, 2024DCV0616

(Tex. Dist. Ct., El Paso County Feb. 8, 2024); *PFLAG*, No. D-1-GN-24-001276. And though the Attorney General urges waiting for a merits decision by the Third Circuit, BIO.20, doing so would undermine review, since state-court proceedings will likely soon moot and preclude First Choice's federal claims. The Attorney General has agreed to adjournments to facilitate this Court's review, so now is the time to grant it.

CONCLUSION

The Court should grant mandamus or certiorari as requested in the petition.

Respectfully submitted,

JAMES A. CAMPBELL
J. CALEB DALTON
GABRIELLA M. MCINTYRE
MERCER S. MARTIN
ALLISON H. POPE
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176

KEVIN H. THERIOT
JULIA C. PAYNE
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260

ERIN M. HAWLEY
JOHN J. BURSCH
LINCOLN DAVIS WILSON
Counsel of Record
TIMOTHY A. GARRISON
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
lwilson@adflegal.org

APRIL 12, 2024