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

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INTRODUCTION

Section 1983 provides a federal cause of action to enjoin state officials who threaten to violate federal constitutional rights. Here, that official is New Jersey's Attorney General. For the last year, he has demanded that First Choice turn over thousands of documents—including the constitutionally protected identities of its donors—under an investigatory Subpoena backed by threats of statutory penalties.

That Subpoena is now chilling First Choice's First Amendment associational rights. In fact, "one might suspect" that discouraging First Amendment activities of disfavored organizations "is the whole point" of subpoenas like this one. *Smith & Wesson Brands, Inc. v. Att'y Gen. of N.J.*, 27 F.4th 886, 897 (3d Cir. 2022) (Matey, J., concurring). The district court erred in dismissing First Choice's constitutional claims as unripe.

The Attorney General now insists (though he had told this Court the opposite) that First Choice's federal action will not ripen until a state court enforces his Subpoena. But that does him no good, since the state court has *already* issued that order—as he notes, he "moved to enforce the Subpoena" and "the state trial court granted [his] application," Resp.Br.14, "in full." App.260. In any event, his cramped view of ripeness goes against controlling caselaw. Section 1983 claims ripen if state official action chills associational rights. And the state-court exhaustion rule he proposes would impose the "preclusion trap"

the Supreme Court rejected in *Knick v. Township of Scott*, 588 U.S. 180 (2019).

First Choice is likely to succeed in vindicating the irreparable harm it has faced now for twelve months. The Attorney General has wholly failed to show that his demand for donor identities is narrowly tailored. That demand falls far short of exacting scrutiny, even with his late-breaking attempt to "clarify" it in response to criticism by the state court. And his demand for the names of First Choice's personnel and its communications with other pro-life organizations are just as flawed.

The Attorney General fares no better in attempting to defeat First Choice's retaliation claims. He tries to impose a "lack of probable cause" element, but cites no decision that has required that element to challenge a retaliatory investigation. And he fails to meet his burden to prove that he would have taken the same actions even absent First Choice's protected speech.

In short, this action was ripe from the get-go. And the Attorney General's state-court filings and ever more aggressive threats have only sharpened the controversy. He has neither withdrawn nor disavowed his unconstitutional demands. This Court should reverse the district court's dismissal and denial of a preliminary injunction to put a stop to his unlawful actions.

ARGUMENT

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

This is not the first time this Court has considered the justiciability of a constitutional challenge to one of the Attorney General's subpoenas. In *Smith & Wesson*, this Court rejected the Attorney General's similar attempt to deprive a litigant of its federal forum by filing a later action in state court. As this Court explained, "[f]ederal law authorizes" a subpoena respondent to forgo compliance and instead to file "a civil action" asking "a federal court to adjudicate its rights and obligations." *Smith & Wesson*, 27 F.4th at 892–93. And again, in this very case, this Court remanded the first appeal as moot because it was "undisputed" the case was ripe after the state trial court's order enforcing the Subpoena. *First Choice*, 24-1111, Dkt.56. There should be little question that First Choice's claims are ripe.

A. The Subpoena chills First Choice's association rights.

The associational chill caused by the Attorney General's demand for the identities of donors and employees is a ripe injury. In the First Amendment context, a plaintiff has a cognizable injury if it experiences "a chilling effect" on its rights because of the defendant's actions. *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989). That chilling effect causes immediate injury and "can itself be the harm" satisfying ripeness. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1178 (9th Cir. 2022).

As the Supreme Court explained in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), a demand for the identity of supporters "must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Id.* at 462. That's because exposure may subject them "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* This causes associational harm, preventing an organization and its supporters from "pursu[ing] their collective effort to foster beliefs which they admittedly have the right to advocate," both by leading some to withdraw "and dissuad[ing] others from joining." *Id.* at 463.

The record supports those associational harms here. Several of First Choice's donors aver they would be less likely to give if their identities were known to the Attorney General. App.287. And as First Choice has shown, that would "also weaken [its] ability to recruit new donors, personnel, and affiliates, as prospective partners would be hesitant to risk the revelation of their personal information through government investigation." App.278. The same risks from *NAACP* are present here.

So significant are these risks that the Supreme Court held in *Americans for Prosperity v. Bonta*, 594 U.S. 595 (2021), that they required facially invalidating a state disclosure requirement, even though some donors might not object to the disclosure. *Id.* at 616.

"[T]hat some donors might not mind—or might even prefer—the disclosure of their identities to the State" is "irrelevant." *Id.* The First Amendment was triggered across the board because the state action "'may have the effect of curtailing the freedom to associate' … by the '*possible* deterrent effect' of disclosure." *Id.* (quoting *NAACP*, 357 U.S. at 460–461). Thus, the risk to supporters in general—for example, that they had "been subjected to bomb threats, protests, stalking, and physical violence"—caused associational harm. *Id.* at 617. In light of those dangers, a demand for compelled disclosure of identities "creates an unnecessary risk of chilling in violation of the First Amendment." *Id.* at 616–17 (quotation omitted).

Supporters of pregnancy centers like First Choice often face similar threats. "Since the publication of a leaked draft of the Dobbs opinion in 2022, pro-life organizations, especially pregnancy resource centers like First Choice, have been subjected to an increased level of criminal acts, intimidation, and harassment." App.276–77; *see also* Br. for Pa. Pregnancy Wellness Collaborative, et al., Dkt.15 at 2–12 (describing state hostility to pregnancy centers). In the six months after the *Dobbs* leak, more than 150 criminal acts—including arson, graffiti, assault, threats of assassination and violence, and at least one shooting—have been directed at entities and persons viewed as pro-life, with the largest portion of these acts being directed at pregnancy centers. *See* Jesse J. Norris, *"If Abortions Aren't Safe, Neither Are You:"*

A Mixed-Method Study of Jane's Revenge and Other Post-Dobbs Militancy, 33 J. for Deradicalization 108, 119–20 (2022); Religious Freedom Institute, Religious Pro-Life Americans Under Attack: A Threat Assessment of Post-Dobbs America (Sept. 2022), https://perma.cc/8X6Y-DF3K.

The threatened disclosure of supporters' names thus imperils First Choice's associational rights. Just as the NAACP saw a 50% decline in southern-state memberships amid the campaign of state officials to force disclosure of members' names, *see* Jack Greenberg, *Crusaders in the Courts* 221 (1994), First Choice reasonably fears the Attorney General's Subpoena here will do the same. App.277–78. "[F]earing the arrival of subpoenas," supporters will "think[] twice" before exercising their First Amendment rights. *Smith & Wesson*, 27 F.4th at 896–97 (Matey, J., concurring). The Attorney General's demand for these identities thus "creates an unnecessary risk of chilling in violation of the First Amendment." *Americans for Prosperity*, 594 U.S. at 616–17.

Nor is there merit to the Attorney General's argument that his Subpoena cannot cause harm because it is not "self-executing." Resp.Br.25. The Subpoena was not a paper tiger that First Choice was free to disregard. To the contrary, New Jersy law subjects First Choice to penalties for "failure" to "obey any subpoena issued by the Attorney General" in the first instance, including contempt of court, freezing

First Choice's operations, "[v]acating, annulling, or suspending [its] corporate charter," or any other relief necessary to compel compliance. N.J. Stat. Ann. § 56:8-6(c)–(d). Under New Jersey law, whether the Subpoena has yet been enforced does not matter to the power to impose penalties. *Id*. If "self-executing" requires a "threat of sanctions," the Attorney General's Subpoena fits the bill. Resp.Br.25.

Nor does it matter that the law requires another application to impose those sanctions. A party need not risk receiving penalties before a federal court can decide a constitutional challenge to the action that threatens those penalties. *S.B.A. List v. Driehaus*, 573 U.S. 149, 163 (2014). Rather, a "threat of enforcement" through devastating sanctions establishes "an Article III injury in fact" when the plaintiff's "speech and associational rights" are "being chilled and burdened." *Id.* at 155, 161.

Here, that threat began with the Subpoena, was followed by the Attorney General suing to enforce it, and continued with requesting attorneys' fees and other sanctions for noncompliance. App.464. First Choice has thus alleged "an objective chill of [its] [F]irst [A]mendment rights" from the Attorney General's Subpoena and is therefore "entitled to a determination of the lawfulness of the investigation." *Clark v. Libr. of Cong.*, 750 F.2d 89, 93 (D.C. Cir. 1984).

B. Ripeness does not require state-court exhaustion.

On appeal, the Attorney General jettisons the main arguments he made below—abstention and preclusion—and instead advances a point he conceded to this Court before. Last summer, he resisted a substantive ruling from this Court by admitting that First Choice's "claims are now ripe" based on the state court's order enforcing the Subpoena. *First Choice*, 24-1111, Dkt.50 at 8. But now, he moves the goalposts again, claiming that still more action is needed to ripen this case.

Relying on caselaw about federal administrative subpoenas, he says the state trial court must "order compliance" with his Subpoena before this Court can decide its lawfulness. Resp.Br.22–23. Claiming that First Choice "currently faces no harm for not complying with the Subpoena," he says the constitutionality of his demands may be litigated in the state-court proceeding he filed, but not in this Court. Resp.Br.27. This argument fails for at least five reasons.

First, along with this Court in *Smith & Wesson*, a clear majority of circuits recognize that a constitutional challenge to an attorney general's investigative demand is ripe "even prior to … enforcement" if the plaintiff alleges "objectively reasonable chilling of its speech or another legally cognizable harm." *Twitter, Inc.*, 56 F.4th at 1178 n.3.

In *Major League Baseball v. Crist*, 331 F.3d 1177, 1180–81 (11th Cir. 2003), for instance, the Eleventh Circuit upheld an injunction

protecting a recipient of an investigatory demand who filed "an action in federal court" rather than "comply with the terms" of the demand. The Sixth Circuit similarly held that a demand recipient had standing based on an attorney general's "past enforcement actions" and threats of future enforcement based on "reason to believe" the law was violated. *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 550–51 (6th Cir. 2021). And the Ninth Circuit recently held that even an attorney general's informal letter can ripen a challenge to his investigation if the letter causes "a real and reasonable apprehension that [the plaintiff] will be subject to liability." *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 60–61 (9th Cir. 2024).

Second, the sole circuit case holding otherwise is the Fifth Circuit's flawed decision in *Google v. Hood*, 822 F.3d 212 (5th Cir. 2016). That case held that a challenge to a non-self-executing subpoena becomes ripe only after the agency asks a court to enforce its subpoena. *Id.* at 225–26. But that holding mistakenly relied on cases that concern federal agency subpoenas that carry no consequences for failure to obey them. *See, e.g.*, *In re Ramirez*, 905 F.2d 97, 98 (5th Cir. 1990) (finding challenge unripe because there is no "provision penalties or the like for noncompliance"). The Attorney General repeats that flawed argument at length by citing scores of decisions involving federal administrative subpoenas. *See, e.g.*, *Shea v. Off. of Thrift Supervision*, 934 F.2d 41, 45–46 (3d Cir. 1991). Yet those cases did not involve a First Amendment

chill, a subpoena that carried significant penalties if the recipients "fail[ed] or refuse[d] to ... obey" it, nor a subpoena already held enforceable by a state court. N.J. Stat. Ann. § 56:8-6(c)–(d).

Plus, those cases do not apply, since the relationship between federal agencies and federal courts is distinct from the relationship between state official action and federal courts. While the law gives a party who challenges a federal agency subpoena in administrative proceedings the right to litigate later in federal court, attempting to challenge a state subpoena in state court first does the opposite—it bars a federal challenge because of preclusion and the *Rooker-Feldman* doctrine. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

Even so, this case is ripe even under *Google*'s rule. The Attorney General admits he "moved to enforce the Subpoena" and "the state court granted the State's application." Resp.Br.14. And the state court has acknowledged it "directed" First Choice "to comply with the subpoena." COA.Dkt.46-2 at 2. So *Google* doesn't help the Attorney General at all.

Third, the Attorney General's ripeness rule ignores that there is no state-court exhaustion requirement for section 1983 claims. *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). That was why the Supreme Court rejected a similar prudential ripeness rule under the Takings Clause. *Knick v. Twp. of Scott*, 588 U.S. 180 (2019). To require state-court litigation to ripen a case would result in a "preclusion trap" that

"hand[s] authority over federal . . . claims to state courts" (a result avoided here only because the state court did not decide the federal issues). *Id.* at 189. Under the Attorney General's rule, "the guarantee of a federal forum rings hollow" by forcing subpoena challengers "to litigate their claims in state court." *Id.* at 185.

Fourth, this case would be ripe even if the Attorney General's position were legally correct. That is because the state court *has* held the Subpoena enforceable, App.248–49; App.260, and First Choice *does* face current consequences from it, N.J. Stat. Ann. § 56:8-6(c)–(d). First Choice's retaliation and viewpoint discrimination claims assert that the Subpoena is void in its entirety. Yet if First Choice acts on those asserted rights and declines to confer further over the Attorney General's demands as ordered by the state court, *see* App.257–58, it risks contempt in state-court proceedings. So it is simply not true that First Choice "faces no sanctions" from the state-court proceedings. Resp.Br.20. And forcing First Choice to keep complying with the Subpoena without an adjudication of its First Amendment rights blatantly violates due process. *Zinermon v. Burch*, 494 U.S. 113, 135 (1990).

Fifth, by focusing on threats from state courts rather than threats from state officials, the Attorney General's theory proves too much. The Attorney General would have the Court believe that a non-self-executing threat by a state official is actionable only when a state court

order ratifies it. But if that's true, it would mean that there was no federal controversy in *NAACP until* the state court imposed contempt citations for failing to produce it. 357 U.S. at 454.

That can't be right. Article III permits pre-enforcement challenges precisely so that litigants need not subject themselves to punishment for exercising their constitutional rights. "Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law." *S.B.A. List*, 573 U.S. at 163. This Court should reject the Attorney General's argument that First Choice must play a game of chicken with state-court penalties before it can sue in federal court.

II. The district court should have granted an injunction.

First Choice was entitled to an injunction. Its injury concerns its First Amendment rights, so it is also irreparable harm. As this Court has held, "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Hohe*, 868 F.2d at 72 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). And First Choice has met the other injunctive factors because it is likely to succeed on the merits and the balance of harms tips in its favor. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. First Choice is likely to prevail on association claims.

The Attorney General does not dispute that "compelled disclosure requirements are reviewed under exacting scrutiny," which means that "the disclosure requirement be narrowly tailored to the interest it promotes." *Americans for Prosperity*, 594 U.S. at 608, 611. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive." *Id.* at 609 (quotation omitted). Plus, it is the Attorney General's burden to "affirmatively establish the reasonable fit" that narrow tailoring requires. *Id.* at 614 (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). He fails to meet that burden for any of his demands for First Choice's protected association information.

1. The donor demand fails exacting scrutiny.

The Attorney General is not narrowly tailored. His Subpoena demands the identities of everyone who gave through means other than First Choice's donor website. App.137. Again, that demand implicates nearly 5,000 donations in number and 70% of First Choice's total donations by amount. App.529–30. It is not a narrowly tailored means to investigate potential fraud. Rather, it is the same "dragnet for sensitive donor information" that *Americans for Prosperity* rejected. 594 U.S. at 614.

The Attorney General does not even try to defend the breadth of his demand, which seeks the names of those who gave at First Choice's fundraisers, through church campaigns, or through gifts of stock. Instead, he pivots, saying he has now "clarified" that he is "focused" on just the donations made through the client websites. Resp.Br.11; App.632–33. But any apparent narrowing provided by this clarification is illusory. That's because the Attorney General takes pains to state only that he is "currently" looking at the client websites, Resp.Br.45, and he has specifically reserved the right to ask for more later. App.633. He has not disavowed that broad demand and so he cannot stop the federal courts from passing on its validity. *See S.B.A. List*, 573 U.S. at 165.

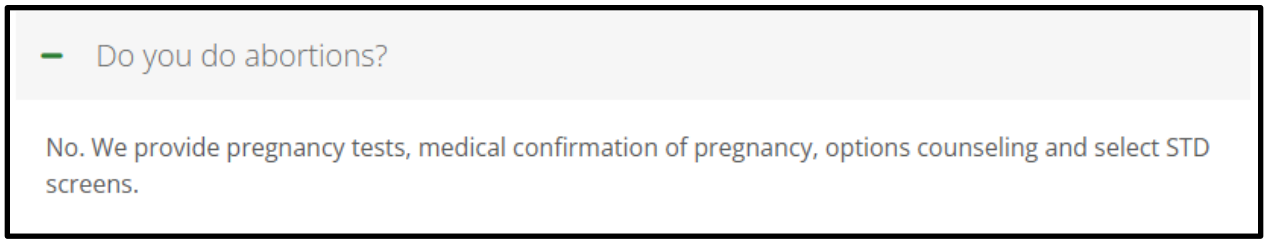
Further, the Attorney General offered this "clarification" for the first time at the November 19 state-court hearing. App.632–633. And that was after defending the full breadth of his request in a dozen motions over the last year. App.649–50. Because he did not even suggest this "clarification" until this case was on appeal, there is no merit to his attempt to fault First Choice for not having stated the number of donations that came through the client websites. Resp.Br.46 n.7.

In any event, limiting his request to the names of donors who gave through the client website would still not be narrowly tailored under *Americans for Prosperity*. In that case, the Supreme Court held that

exacting scrutiny was not satisfied because there was not "a single, concrete instance" where the compelled disclosure regime "did anything to advance the Attorney General's investigative, regulatory or enforcement efforts" in policing charitable fraud. 594 U.S. at 613. The Attorney General's case here is even weaker: not only has he failed to cite a single donor complaint against First Choice about this or any other matter, he hasn't even shown a situation when learning the names of any organization's donors helped him prosecute charitable fraud. He hasn't even pointed to another investigation where he asked for those names.

Instead, the Attorney General's donor disclosure demand hangs on bare speculation that a donor might be deceived by First Choice's website. But here too, the record provides no reason to think this is true. For one, Planned Parenthood uses the same message differentiation among different websites as First Choice, including by being overt about its pro-abortion agenda in some donation contexts and not mentioning it in others. App.541–54. And for another, it is impossible to reach the First Choice donation page that the Attorney General is concerned about without visiting its full website, which

specifically discloses on each page and in the FAQ (directly next to the "Give" button) that First Choice does not perform abortions:



(https://1stchoice.org/faqs/)

Moreover, the documents that First Choice has produced show that it sends each of its donors mailings that are unmistakably clear about its pro-life mission: "Thank you for helping women choose life every day!" App.532. The Attorney General piles speculation on speculation by suggesting that deceived donors may not have read those mailings (or even looked at the outside of the envelope). Resp.Br.46–47. But such guesswork does not satisfy narrow tailoring.

Finally, the Attorney General suggests that his demand is proper under *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), because his office "'cannot obtain … the information it seeks from other sources." Resp.Br.46 (quoting *Perry*, 591 F.3d at 1164) (cleaned up). But the availability of the information was not the only consideration *Perry* mentioned—it also looked at whether the information was "highly relevant" to the case and whether the request was "carefully tailored" to avoid causing associational harm. *Perry*, 591 F.3d at 1161. Narrow tailoring concerns whether the "governmental interest" in policing fraud

"can be more narrowly achieved." *Americans for Prosperity*, 594 U.S. at 609 (cleaned up). Yet here, just as in *Americans for Prosperity*, the Attorney General has apparently "not even considered alternatives" to demanding donor names. *Id.* at 613. That dooms his case, and greenlighting his demands would conflict directly with *Perry*.

Merely raising the specter of donor fraud does not entitle the Attorney General to constitutionally protected information. Because the Attorney General has not shown how his donor demand "form[s] an integral part of [his] fraud detection efforts," those efforts do not provide a compelling state interest in this case. *Americans for Prosperity*, 594 U.S. at 613. He has not pointed to a previous investigation where he needed to know the identities of donors to detect charitable fraud. Nor has he "demonstrated an interest in obtaining the disclosures . . . sufficient to justify the deterrent effect" on associational rights. *NAACP*, 357 U.S. at 463. The lack of such a showing proves his real "interest is less in investigating fraud and more in ease of administration"—or perhaps something more nefarious—which, in any case, "does not remotely reflect the seriousness of the actual burden . . . on donors' association rights." *Americans for Prosperity*, 594 U.S. at 614–15 (cleaned up). And so he cannot meet exacting scrutiny.

Finally, it ought to arouse suspicion that the Attorney General is pursuing this wide-ranging and aggressive investigation of charitable fraud not against an organization that has any record of such conduct,

but against an organization whose charitable mission he publicly opposes. At the very least, it precludes him from meeting exacting scrutiny.

2. The staff demand fails exacting scrutiny.

The Attorney General fares no better on his demand for the identities of First Choice's medical staff. He says there is no associational harm in disclosing these identities and that "the record lacks any evidence (or even allegation)" that medical personnel will be harmed by disclosure. Resp.Br.48. Not so. First Choice proffered a sworn declaration that because of the widespread increase in hostile and violent acts toward pregnancy centers since *Dobbs*, divulging the identities of staff would both impair its "ability to recruit" staff and make it harder "to retain current" staff. App.276–78. And those fears are more than reasonable given the uptick in hostility against pregnancy centers, *see supra* at 5–6, and particularly where the Attorney General's own consumer alert and open letter have fanned the flames. App.288–90; 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), https://perma.cc/6EC3-B2KJ. This record amply establishes that the "chilling effect" on association applies equally to employees and donors. *Americans for Prosperity*, 594 U.S. at 618–19.

The Attorney General has not met the exacting scrutiny that his demand for these identities requires. There is no question that ensuring medical professionals are appropriately licensed is a legitimate state interest, but the Attorney General has not shown how his demand is narrowly tailored to address it. He has shown only that First Choice offers some services that require a license and that its medical director was not present when his covert investigator visited. Resp.Br.8–9. First Choice does not dispute either of these points, but neither of them gives any reason to suspect that First Choice is performing any services without appropriate licenses. To the contrary, First Choice has stated repeatedly that all its employees maintain required licenses.

That assurance matters because, again, narrow tailoring turns on whether the "governmental interest . . . can be more narrowly achieved." *Americans for Prosperity*, 594 U.S. at 609 (cleaned up). Here, there is no question that it can be, since New Jersey's licensing law specifically provides a less intrusive mechanism. The Attorney General can simply require "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).

First Choice has offered several times to provide that sworn report. But rather than consider this alternative, the Attorney General has pressed forward on his demand for the most sensitive information—the identities of every one of its employees providing medical services

that require a license. As with the donor list, this raises suspicion that enforcing licensing requirements is not his motive for demanding information from an organization he opposes. He cannot meet exacting scrutiny. *Americans for Prosperity*, 594 U.S. at 609.

3. The partner demand fails exacting scrutiny.

On appeal, the Attorney General offers for the very first time a defense of his demand that First Choice disclose its communications with other pro-life organizations including CareNet and Heartbeat International. Even if this defense is not waived by his failure to raise it below, *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 253 (3d Cir. 2007), it is still meritless.

The Attorney General is deeply concerned that First Choice may be partnering with these other pro-life organizations in connection with providing so-called "Abortion Pill Reversal"—that is, the prescription of supplemental progesterone to reverse the effects of mifepristone for a woman who wishes to stop the chemical abortion process. App.061. But he never explains why that might be a problem under the law, much less how it involves "potential fraud." Resp.Br.50. It is legal for physicians to prescribe progesterone for this purpose in New Jersey. And other federal courts have enjoined both attempts to legislate otherwise and efforts to punish pregnancy centers for speaking about it. *Bella Health & Wellness v. Weiser*, 699 F. Supp. 3d 1189 (D. Colo. 2023); *Nat'l Inst. of Fam. and Life Advocs. v. James*, No. 24-CV-514 (JLS),

2024 WL 3904870 (W.D.N.Y. Aug. 22, 2024). The Attorney General has not shown how his demands for these protected communications between pro-life organizations are connected to any compelling interest, much less narrowly tailored to it. *Americans for Prosperity*, 594 U.S. at 608, 611; *NAACP*, 357 U.S. at 463. They necessarily fail exacting scrutiny.

B. First Choice is likely to prevail on speech claims.

1. The Attorney General cannot meet his burden.

First Choice presses its speech claims under two theories: retaliation and viewpoint discrimination. The Attorney General tries to conflate these two theories (and to suggest that First Choice did so too). Resp.Br.34 n.5. But while these theories are based on the same evidence, they have different elements and different burdens. For example, while viewpoint discrimination requires the plaintiff to show that the government treated similarly situated speakers differently, *Karns v. Shanahan*, 879 F.3d 504, 520–21 (3d Cir. 2018), for retaliation, the burden is flipped. Under retaliation, once the plaintiff shows that its speech was a substantial factor in the government's action, the burden shifts to the government to prove it would have taken the same action against the plaintiff regardless of its speech. *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). That is, for retaliation, the government must show that it treats similarly situated speakers the same. *See Nat'l Rifle Ass'n v. Vullo*, 602 U.S. 175, 204 (2024)

(Jackson, J., concurring) (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

That requirement dooms the Attorney General's Subpoena. His overt hostility to First Choice's pro-life views and his demand that First Choice provide scientific justification for its messages amply meets First Choice's burden. App.133–35. But he cannot prove he treats similarly situated speakers the same regardless of message. That's because his own consumer alert acknowledges that Planned Parenthood and pregnancy centers are similarly situated. That alert directly compares the two, condemning pregnancy centers only because of the pro-life views here—that they "do NOT provide abortion." App.289–90. Rather than treating those entities the same, he has aggressively pursued pregnancy centers while asking for Planned Parenthood's help in doing so. App.091–121. He cannot meet his burden, and First Choice is likely to succeed on the merits for this reason alone.

Even if the Attorney General had not already treated pregnancy centers and Planned Parenthood as similarly situated, his arguments would still fail. He does not identify any "legitimate prosecutorial factors that might justify making different prosecutorial decisions" between them. *Frederick Douglass Found., Inc. v. D.C.*, 82 F.4th 1122, 1137 (D.C. Cir. 2023). As noted above, Planned Parenthood maintains mission-differentiated websites just like First Choice. *See supra* at 15. And licensing is not a meaningful difference either because the

Attorney General has shown no facts that would cast doubt on First Choice's claims that all its employees maintain required licenses. *Cf.* Resp.Br.8–9.

Plus, on the question of misleading consumers, unlike First Choice, Planned Parenthood provides real reason to investigate. In contrast to First Choice's free services, Planned Parenthood actually has consumer relationships because it charges its patients. And Planned Parenthood makes prominent public statements to consumers on its website that are patently false, such as that the abortion drug mifepristone is as safe as Tylenol. *How safe is the abortion pill*, Planned Parenthood, https://perma.cc/GUY6-9GG9 (last visited December 4, 2024). Taken together, this record makes it impossible for him to meet his burden on a retaliation claim.

2. Lack of probable cause is not an element.

Unable to meet this burden, the Attorney General attempts to avoid liability for retaliation by adding an element to the claim: that First Choice must also prove he lacks probable cause for his investigation. He argues that because the Supreme Court imposed this requirement for retaliatory prosecutions in *Hartman v. Moore*, 547 U.S. 250 (2006), it also applies to cases challenging retaliatory civil litigation. Resp.Br.33–34. But this case is not about retaliatory civil litigation; it concerns a retaliatory *investigation*. And the Attorney

General does not cite any retaliatory investigation case that has ever imposed a lack of probable cause requirement.

It is easy to see why there are no such cases. The Supreme Court imposed the lack of probable cause requirement in *Hartman* because retaliatory prosecution cases differ from ordinary retaliation cases by implicating a third party who has absolute immunity—the prosecutor. *Hartman*, 547 U.S. at 262. This wrinkle requires an additional "allegation" to "bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action." *Id.* at 263. That bridge is "the absence of probable cause." *Id.* This requirement makes sense because "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Id.* at 261; *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (requiring "clear evidence" to displace presumption prosecutor acted lawfully).

Those distinctions are not present in retaliatory investigation cases. Here, "the government agent allegedly harboring the animus"—the Attorney General—"is also the individual allegedly taking the adverse action." *Hartman*, 547 U.S. at 259. A retaliatory investigation claim "is not within the category of cases in which the ultimate action complained of is taken by someone other than the defendant," even if

probable cause supported "the ensuing investigation, search, arrest and prosecution." *Gagliardi v. Fisher*, 513 F. Supp. 2d 457, 487 (W.D. Pa. 2007). The "problem of multi-layered causation does not exist" for retaliatory investigations because the "officials charged with having a retaliatory motive are the same officials who conducted the investigation." *Denney v. Drug Enf't Admin.*, 508 F. Supp. 2d 815, 830 n.4 (E.D. Cal. 2007); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916–22 (9th Cir. 2012) (applying probable cause requirement to malicious prosecution and false arrest claims but not to retaliation and selective enforcement claims).

The Attorney General's cases don't hold otherwise. *Nieves v. Bartlett* simply adopted "*Hartman*'s no-probable-cause rule" in retaliatory arrest's "closely related context." 587 U.S. 391, 404 (2019). And none of the circuit decisions he cites even involved an investigation—instead, all involved situations in which the state actors with animus were not the ones who took the action. In *DeMartini v. Town of Gulf Stream*, the attorneys who filed the civil lawsuit "were *not* the same individuals who allegedly harbored the retaliatory animus," which "widen[ed] the causal gap between the [defendant's] alleged animus and [the plaintiff's] injury." 942 F.3d 1277, 1304–06 (11th Cir. 2019). Likewise, in *Scott v. Tempelmeyer*, 867 F.3d 1067, 1070–72 (8th Cir. 2017), the official holding the animus (the city attorney) and the official executing the adverse actions (the building inspector) were not

the same person. *Id.* at 1071–72. So too in *McBeth v. Himes*, 598 F.3d 708, 717–20 (10th Cir. 2010), where the investigator holding the animus was not the department suspending the license. And in *Meadows v. Enyeart*, the Sixth Circuit applied *Hartman* when septic-system regulators launched a regulatory-enforcement hearing that would have an independent hearing officer. 627 F. App'x 496, 498, 504–07 (6th Cir. 2015). This is not a "dual actor" case, so First Choice need only prove the ordinary elements of retaliation.

3. Official statements prove motive under *Vullo.*

Finally, the Attorney General urges this Court to follow *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 707 (S.D.N.Y. 2018), which he says held that an official's "statements on climate change" were not "'direct evidence' of improper motive" against fossil fuel companies for retaliation purposes. Resp.Br.38. But the Supreme Court just rejected *Schneiderman*'s standard in *Vullo*.

In *Vullo*, the Second Circuit had held, like in *Schneiderman*, that a state official's public statements hostile to the plaintiff were simply "permissible government speech" and "legitimate enforcement action . . . carrying out her regulatory responsibilities." *Vullo*, 602 U.S. at 194. The Supreme Court rejected that framing. Writing for the Court, Justice Sotomayor said the Second Circuit could reach that conclusion only "by taking the allegations in isolation" and failing to evaluate those public statements "against the backdrop of other allegations in the complaint."

Id. at 194–95. Rather, in context, those public statements, far from showing permissible public advocacy by an official, were enough to show the official's unlawful purpose "purportedly adopted to target the [plaintiff's] advocacy." *Id.* at 197.

The application of this principle here is even more pointed. The Attorney General has made public statements via social media, consumer alert, and open letter specifically condemning pregnancy centers' mission. App.289–90; Opening.Br.8–10. He also colluded with First Choice's ideological opponent to develop and refine his legal theories against it. App.091–121. Then he put that theory into practice by serving a Subpoena that specifically demands that First Choice produce the scientific justification for its protected pro-life speech about life-saving medication. *National Institute of Family and Life Advocates*, 2024 WL 3904870, at *12. And like the state official's decision in *Vullo* to ignore enforcement against organizations that did not work with the plaintiff, the Attorney General here gave a pass to Planned Parenthood.

Justice Jackson said retaliation was a good fit for the facts in *Vullo*, 602 U.S. at 204 (Jackson, J., concurring). It is a good fit here too.

C. The balance of harms tilts decidedly for First Choice.

The vast irreparable harm from the ongoing threat to First Choice's First Amendment and due process rights is set forth above. But for the first time, the Attorney General now advances a source of potential irreparable harm to him. Quoting *Abbott v. Perez*, 585 U.S.

579 (2018), he says the "inability to enforce [his] duly enacted plans clearly inflicts irreparable harm on the State." Resp.Br.54 (quoting *Abbott,* 585 U.S. at 602 n.17). Yet he fails to mention that the "plans" in *Abbott* were districting plans that were to go into effect in an upcoming election, 585 U.S. at 584, not, as here, "plans" of a state official to obtain the identities of the donors to a small nonprofit. Even if the Attorney General's demands for those documents were justified, he suffers no irreparable harm from a delay in getting them. And under this Court's precedents, this lopsided tilt of the balance of harms demands an injunction based simply on a showing of "serious questions going to the merits." *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015). First Choice is entitled to an injunction under that standard as well.

CONCLUSION

The Court should reverse the district court's order dismissing this case and denying entry of a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 6,332 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.

I certify that I scanned the electronic version of Appellant's Reply Brief for viruses with the most recent version of a commercial virus scanning program, Cortex XDR, Agent version 8.4.1, and the document is free of viruses according to the program. I further certify that the text of the electronic brief is identical to the text in the paper copies filed with the Court in accordance with 3d Cir. L.A.R. 31.1(c).

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December 5, 2024

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 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.

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