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 *AMICUS CURIAE* RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONER

Nicholas J. Nelson
Counsel of Record
Ryan D. Wilson
CROSSCASTLE PLLC
333 Washington Ave. N.
Suite 300-9078
Minneapolis, MN 55401
(612) 429-8100
nicholas.nelson@crosscastle.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. RFI works to make religious freedom a priority for government, civil society, religious communities, businesses, and the general public.

RFI envisions a world that respects religion as an indispensable societal good and which promises religious believers the freedom to live out their beliefs fully and openly. RFI thus seeks to ensure that governments do not inhibit the free exercise of religion and that religious believers are entitled to the full measure of protections afforded to religious practice—including by having full access to federal courts to protect religious freedoms from politicized state government investigations.

---

[1] No counsel for any party to this case authored this brief in whole or in part. No party to this case and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, and their counsel made such a monetary contribution. All counsel of record received timely notice of the intent to file this brief under this Court's Rule 37.

SUMMARY OF ARGUMENT

42 U.S.C. 1983 serves a well-recognized and time-honored purpose in our system of federalism: when citizens claim that state officials are violating their rights under the federal Constitution, Section 1983 provides a federal forum for deciding those claims. This gives aggrieved citizens the choice of having their federal rights decided in federal courts, rather than in the courts of the same state whose officials are allegedly violating their rights.

In this case, the plaintiff claims that state officials have used a regrettably well-established method for curtailing the First Amendment rights of their political opponents: using the state's investigatory power to harass and interfere with the operation of organizations with which they disagree. Pregnancy resource centers are not the first type of religiously-inspired group to be subject to this kind of politically-motivated "investigation," and they are not likely to be the last. Indeed, examples of government "investigations" of religiously-motivated actors can be found on a wide variety of politically controversial issues, from racial integration to immigration to questions of sexual morality.

Whether a state investigation like that violates the First Amendment may be an easy question in some cases, and a difficult one in others. But the issue here is *who decides* that question. The decisions below would require First Amendment claimants to wait for state officials to bring an enforcement action, and then to present their federal constitutional arguments to the courts of the same state that is allegedly violating their rights. That squarely contradicts the central

promise of Section 1983—and the consistent theme of this Court's jurisprudence applying it—that plaintiffs should have access to a federal forum to decide their federal rights. The Court should grant the petition to vindicate that promise.

ARGUMENT

I. Section 1983 Provides A Federal Forum To Vindicate Federal Rights.

The plaintiff in this case came to court invoking 42 U.S.C. 1983, and claiming that an investigative subpoena served by state officials infringed on its First Amendment rights. The district court threw the plaintiff out, holding that it must assert its First Amendment rights as defenses in state court enforcement proceedings. As this Court has repeatedly recognized, that result—closing the federal courthouse doors to plaintiffs who allege that state officials are violating their federal constitutional rights—is exactly what Section 1983 was enacted to prevent.

Section 1983 and related enactments were "an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment." *Mitchum v. Foster,* 407 U.S. 225, 238 (1972). "During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws…. But that policy was completely altered after the Civil War." *Zwickler v. Koota*, 389 U.S. 241, 245–46 (1967). "As a result of the new structure of law that emerged" with the Fourteenth Amendment, Section 1983, and other related provisions, "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established." *Id.* at 238-239. The whole point of Section 1983, in other words, is "extending federal power in an attempt to remedy the state courts' failure to secure federal rights," *id.* at

241, and in particular "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (quoting *Mitchum*, 407 U.S. at 242).

Thus, this Court has recognized time and again, over many decades, that a "strong motive behind [Section 1983's] enactment was grave congressional concern that the state courts had been deficient in protecting federal rights," *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980), that the statute "reflected the regrettable reality that state instrumentalities could not, or would not, fully protect federal rights." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 177 (2023) (cleaned up), and that "[a] major factor motivating the expansion of federal jurisdiction" in Section 1983 was Congress' concern "that the state authorities had been unable or unwilling to protect the constitutional rights of individuals." *Patsy v. Bd. Of Regents of State of Fla.*, 457 U.S. 496, 505 (1982).

This is not to say that state courts or agencies are disabled or excused from enforcing federal rights. But Section 1983 reflects a fundamental decision by Congress, pursuant to its power to enforce the Fourteenth Amendment, that citizens with federal constitutional claims against state officials should have a choice between pursuing those claims in a federal or a state forum. Thus, in a variety of contexts, this Court has held that "[t]he federal remedy" under Section 1983 "is supplementary to [any] state remedy, and the latter need not be first sought and refused before the federal one is invoked," *Bd. Of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 491 (1980); that "the § 1983 remedy ... is, in all events, supplementary to any

remedy any State might have," *Health & Hosp. Corp. of Marion Cnty.*, 599 U.S. at 177 (cleaned up); and that Section 1983 "provide[s] dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Patsy*, 457 U.S. at 506. In short, "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims," and the federal courts "have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." *Zwickler*, 389 U.S. at 248.

II. Abuse Of State Investigatory Powers Is Precisely The Kind Of Overreach That Section 1983 Combats.

Although the Reconstruction era is over, Congress has chosen to keep Section 1983 on the books. And for good reason. Our modern political discourse has no shortage of "profound moral issue[s] on which Americans hold sharply conflicting views." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 223 (2022). And with these conflicts comes the perennial temptation for state government officials to overstep constitutional limits in using government power against citizens who take the other side on such issues. That danger is especially acute when state power is brought to bear against citizens who are on the minority side of a hot-button issue in one particular state. Especially in such cases, Section 1983's creation of a federal forum for vindicating federal rights continues to serve its vital purpose.

This case, in particular, involves a state attorney general's attempt to bring the state's investigatory authority to bear against an organization with which he sharply disagrees politically. Unfortunately, as one might expect in a divided nation, that is nothing new. Indeed, the number of stories from the past century that could be told about investigative overreach of this type may be limited only by the number of political controversies that have arisen.

In the 1940s and 1950s, the "Red Scare" included numerous and extensive state investigations into people suspected of holding communist beliefs. The abuse and harm resulting from investigations by the U.S. House of Representatives' Un-American Activities Committee are well known. But many states conducted their own investigations of a similar nature. *See* G. Calcott, Maryland and America, 1940 to 1980, at 109 (1985) (Maryland passed the strongest loyalty oath in the country and compiled lists of its potentially disloyal citizens well before McCarthyism became a national phenomenon); V. Countryman, Un-American Activities in the State of Washington (1951) (detailing investigations of the Canwell Committee, established by the state of Washington to monitor allegedly subversive activities); R. Fried, Nightmare in Red: The Mccarthy Era in Perspective 17 (1990) (discussing anti-Communist activities in New York, California, Washington, and Oklahoma prior to 1946); J. Selcraig, The Red Scare in the Midwest 1945-55: A State And Local Study 1-86 (1982) (analyzing the Red Scare in Wisconsin, Illinois, Indiana, Ohio, and Michigan). These investigations focused on—and all too frequently, threatened the constitutional rights of—individuals associated with universities, trade unions,

lawyers, literary societies, and professional associations. *See* The States and Subversion (W. Gellhorn ed., 1952) (chronicling government investigations designed to control disloyal or subversive conduct in California, Illinois, Maryland, Michigan, New York, and Washington).

In the 1950s and 1960s, state officials resisting racial integration infamously used their investigative powers to harass civil rights organizations. In the landmark case of *NAACP v. Alabama*, this Court held that Alabama could not compel the NAACP to reveal to the state's attorney general lists of its members' names and addresses. 357 U.S. 449, 467 (1958). This was after a lengthy battle in state and district courts, including disputes over whether federal courts had removal jurisdiction. R. Birkby & W. Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts*, 42 Tex. L. Rev. 1018, 1019 & n.7 (1964) (the ordeal "hampered the NAACP's recruiting and fund raising and … forced the association to spend time, money, and energy in defending itself;" describing state courts' resistance to vindicating the NAACP's rights).

III. Religious Organizations Must Be Able to Obtain Timely Relief From Political Persecution By A State.

More recent decades have continued to present such temptations—to state officials on both sides of the political aisle. And lamentably often, in modern times, these investigations seem to target religious organizations.

This case itself involves an infringement on the First Amendment rights of pregnancy resource centers by the New Jersey Attorney General. Such centers, of course, often are motivated by the religious beliefs of those who run them, and sometimes are explicitly religious organizations. And this is hardly an isolated investigation: more than a dozen politically-like-minded state attorneys general appear to be coordinating their efforts along similar lines. *See* Open Letter from Attorneys General, Regarding CPC Misinformation and Harm (Oct. 23, 2023), https://oag.ca.gov/system/files/attachments/press-docs/Open%20Letter%20re%20Crisis%20Pregnancy%20Centers%20FINAL.pdf.

Other examples abound. The Texas Attorney General, for example, demanded—with a one-day turnaround—logs of people who had been served by a Catholic organization that he regarded as being on the wrong side of the immigration debate.[2] The Washington Attorney General investigated a Christian university's hiring practices and sought sensitive internal documentation on religious decision-making processes.[3] And a city attorney in Houston subpoenaed sermons from several pastors,

---

[2] Suzanne Gamboa, *Catholic immigrant shelter battles Texas AG, who wants to shut it down*, NBC News (Feb. 21, 2024), https://www.nbcnews.com/news/latino/catholic-migrant-shelter-battles-texas-paxton-rcna139809

[3] Fox 13 News Staff, *Attorney General opens civil rights investigation into Seattle Pacific University, SPU sues in return*, Fox 13 Seattle (July 29, 2022), https://www.fox13seattle.com/news/attorney-general-opens-civil-rights-investigation-into-seattle-pacific-university

apparently based on disagreement with their beliefs about sexual morality.[4]

These cases—and many others in today's polarized political environment—raise obvious concerns related to the Constitution's protections for free speech, freedom of association, and the free exercise of religion. Simply being served with an investigative subpoena of this type creates a significant potential chilling effect on those rights. Consider a subpoena that—like the one at issue in this case, *see* Pet. at 12—demands that the targeted organization identify its employees, members, donors, volunteers, or others associated with it. Even if a such a subpoena requires additional procedural steps for its enforcement, simply receiving it places an organization on the horns of a dilemma: should it tell its current and potential members, donors, and others that the state government has demanded their identities, thus creating a series risk of curtailing their future involvement? Or should it stay mum about the subpoena and risk accusations of a breach of trust if it were later to be enforced? And of course, actually having to disclose such information creates an even greater potential burden on the subpoena target's First Amendment rights.

The question here is not whether any investigation or forced disclosure of this type actually violates the First Amendment, or any other constitutional right. The question, instead, is who will

---

[4] Josh Sanburn, *Houston's Pastors Outraged After City Subpoenas Sermons Over Transgender Bill*, Time (Oct. 17, 2014), https://time.com/3514166/houston-pastors-sermons-subpoenaed/

decide such claims. Will individuals targeted by such investigations be able to assert their federal rights in the federal forum promised by Section 1983? Or will their only option be to wait for enforcement action, and then present their federal plea to the courts of the same state that is allegedly violating their rights?

This Court's precedents make clear that Section 1983 creates a federal forum for just such decisions. As noted above, in many other contexts, this Court has rejected the contention that a plaintiff is required to present claims of federal constitutional violations to state courts, before or instead of asserting a Section 1983 claim in federal court. This Court's decision in *Knick v. Township of Scott, Pennsylvania* sharply illustrates why. As the Court there explained, a "state-litigation requirement" for vindicating a federal constitutional right would "relegate[] the [right] to the status of a poor relation among the provisions of the Bill of Rights," and would inappropriately "hand authority over federal … claims to state courts." 139 S.Ct. 2162, 2169-70 (2019).

The rulings below, and the principles on which they are based, would turn the First Amendment itself into a poor relation among the Bill of Rights. On those principles, whether the First Amendment protects citizens from "investigatory" demands by state officials who oppose them politically can be decided only by those officials' own state courts. If the state courts choose to enforce such a subpoena, that is the end of the matter—no federal review will be available (except in the rare case where this Court grants certiorari), either to determine whether the issuance of the subpoena violates the organization's First

Amendment rights, or to determine whether the forced disclosure itself infringes on the Constitution. That view contrasts sharply with the purpose of Section 1983 and this Court's continuous interpretation of that statute.

The Court should grant the petition to correct matters.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

Nicholas J. Nelson
Counsel of Record
Ryan D. Wilson
CROSSCASTLE PLLC
333 Washington Ave. N.
Suite 300-9078
Minneapolis, MN 55401
(612) 429-8100
nicholas.nelson@crosscastle.com

Counsel for Amicus Curiae