UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINAGE

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC., Plaintiff, v. MATTHEW J. PLATKIN, in his official capacity as Attorney General of the State of New Jersey, Defendant.	Hon. Michael A. Shipp, U.S.D.J. Hon. Tonianne J. Bongiovanni, U.S.M.J. Docket No. 23-CV-23076 **CIVIL ACTION** **(ELECTRONICALLY FILED)**

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Court Rules

Other Authorities

PRELIMINARY STATEMENT

The New Jersey Legislature vested the Attorney General and the Division of Consumer Affairs with broad statutory authority to investigate potential misconduct relating to consumer dealings, charitable solicitations, and licensed professionals. And it vested the New Jersey Superior Court's Chancery Division alone with the power to enforce subpoenas. After the State conducted a preliminary investigation that revealed concerns that Plaintiff First Choice Women's Resource Centers, Inc. may have engaged in conduct that misleads the public and otherwise violates state statutes and regulations, the State issued a subpoena on November 15, 2023. First Choice moved to quash the Subpoena, raising a bevy of constitutional and other defenses to the state court. That court considered and rejected those objections on May 28, 2024, ordering that First Choice "respond fully" to the Subpoena. Dkt. 41-3. But Plaintiff has barely complied, and now demands emergency relief from this Court to stave off any further compliance with that state-court order.

Plaintiff's emergency lawsuit reflects a direct assault on the state court's power to adjudicate challenges to the Subpoena and to enforce its own orders. When Plaintiff previously attempted to short-circuit the state court's authority, this Court rightly rejected them as jurisdictionally unripe. Dkt. 28. Now, Plaintiff presents an even greater affront: a demand for relief even *after* the state court ruled, and even as the state court considers how best to enforce its own already-issued order. After all,

at this stage in the case, an injunction would prevent the Chancery Division from enforcing its own prior court order in a proceeding currently before it after Plaintiff willfully failed to fully comply with the order enforcing the Subpoena. What's more, it would also require this Court to second-guess the Chancery Division's decision rejecting the very same claims Plaintiff brings here. And it would forestall the Appellate Division's consideration of Plaintiff's own appeal of the Subpoena-enforcement decision.

This Court should deny such an extraordinary request. Initially, Plaintiff is unlikely to succeed on the merits for three independent reasons. First, because an injunction would attack the "processes by which the State compels compliance with the judgments of its courts," *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987), abstention is required. Second, preclusion principles bar Plaintiff from relitigating the same claims and issues that were adjudicated between the same parties in state court. Because the Chancery Division already rejected Plaintiff's First Amendment claims, finding them to be both unsupported and premature, Plaintiff's recourse is an appeal to the Appellate Division, not a do-over in this court. *See Smith & Wesson Brands, Inc. v. Att'y Gen. of New Jersey*, 105 F.4th 67, 84 (3d Cir. 2024) ("*S&W II*"). Finally, Plaintiff's First Amendment theories fail. A targeted subpoena merely investigating potential fraud and misconduct based on a preliminary investigation neither violates associational rights nor constitutes selective enforcement.

The equitable considerations undercut Plaintiff, too. Plaintiff cannot establish irreparable harm for multiple reasons. For one, there are alternative (and far more traditional) forums available for relief from a state court order enforcing a state subpoena: the state courts. For another, Plaintiff cannot sustain its burden of showing likely irreparable harm in a case about document production, especially when the State has offered a confidentiality order. Still more, a hasty injunction on days' or weeks' consideration would be particularly inequitable when Plaintiff's litigation choices led to months-long delays, and where it did not act with alacrity in seeking relief in the state court. And on the other side of the ledger, the public-interest considerations are key: interfering with enforcement of the state court's order would undermine federalism, delay the State's efforts to investigate potential deceptive and unlawful practices (now eight and a half months after the Subpoena issued), and incentivize future recipients of subpoenas to rush to federal court to avoid compliance. This Court should deny the motion.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Investigation And Subpoena

The New Jersey Consumer Fraud Act ("CFA"), the Charitable Registration and Investigations Act ("CRIA"), and the Professions and Occupations law ("P&O law") each empower the Attorney General to investigate whether an entity is engaged in an unlawful practice. *See* N.J. Stat. Ann. § 56:8-3 (CFA); § 45:17A-33(c)

(CRIA); § 45:1-18 (P&O law). The statutes and their implementing regulations define a number of substantive unlawful practices. *See*, e.g., N.J. Stat. Ann. § 56:8-2 (CFA) (deceptive and fraudulent commercial practices); N.J. Stat. Ann. § 45:17A-32(a), -(c)(3), -(c)(7) (CRIA) (incorporating the CFA and addressing certain deceptive and misleading statements or omissions by charities); N.J. Stat. Ann. § 45:1-18.2, -21 (P&O law) (unlicensed practice of medicine, deceptive and misleading practices and other professional misconduct); *see also* N.J. Admin. Code § 13:35-6.10(c), -(d), -(g)(4).

In light of widespread concerns about crisis pregnancy centers engaging in deceptive practices, the State—"charged with seeing that [its] statute[s] are obeyed" and vested with power to "inquire to be assured of compliance," *In re Addonizio*, 248 A.2d 531, 542 (N.J. 1968)—initiated an investigation under the CFA, the CRIA, and the P&O laws. Early investigatory steps revealed First Choice may be violating the law under these statutes and regulations.

Initially, the State became concerned that Plaintiff may be misleading a subset of its potential donors. *See* Certification of Angela Cai ("Cai Cert.") Ex. 1 ("Turner Cert."), ¶¶ 4-10. Its site for donors, https://1stchoicefriends.org/, makes plain that Plaintiff has a pro-life mission to "protect the unborn." Turner Cert. Ex. 2 at AG181-82. That mission is said expressly on its donation-solicitation and volunteer application pages. *See id.* at AG175-82. But Plaintiff also maintains other websites,

https://1stchoice.org (which https://1stchoicefriends.org/ describes as a "Client Site") and https://firstchoicewomancenter.com/, that omit references to its mission and practices. These public sites instead promise medical consultations to facilitate "informed choice" for any individuals seeking abortions. *Id.* at ¶ 5-7, Exs. 1, 3 (Client Sites); *see also* CA3.Dkt.14 at 4; CA3.Dkt. 49-3 at 3-9. They invite anyone "considering an abortion" to "[l]earn more about the abortion pill, abortion procedures, and your options in New Jersey," Turner Cert. Ex. 1 at AG001. One of these websites provides a donation page, but omits any mention of Plaintiff's mission. *Id.* at AG023-26; *see also e.g.*, Turner Cert. Ex. 2 at AG180 (instructing volunteers not to wear "pro-life jewelry or buttons" when engaging with clients).

Moreover, the State became concerned about whether certain individuals are performing diagnostic sonograms and purporting to determine gestational age, viability, and ectopic pregnancies without the requisite qualifications and licensure. *Compare, e.g.*, Turner Cert. ¶¶ 5-7 (representation that Plaintiff's services are overseen by a physician); *id.* Ex. 3 at AG226 (representation that First Choice purports to diagnose ectopic pregnancies and determine fetal viability); *with id.* Ex. 1 at AG056, AG059 (pages of its website state that it is "not an obstetrical medical practice" and "does not use ultrasound to . . . diagnose abnormalities"). And the State became concerned that Plaintiff also makes numerous statements purporting to convey medical information that may be misleading or untrue. *Compare, e.g.*, Turner

Cert. Ex. 3 at AG249 (claiming "a pre-abortion ultrasound is generally required before you take the abortion pill"), *with* U.S. Food & Drug Admin., FDA Label at 17 (Mar. 2016) ("FDA Label"), https://tinyurl.com/2vndx5k3 (noting physicians "*may* do a clinical examination, an ultrasound examination, or other testing" to determine gestational age if medically necessary (emphasis added)). Plaintiff also claims that "[t]here is an effective process for reversing the abortion pill," Turner Cert. Ex. 1 at AG085, despite a lack of credible scientific evidence supporting such that factual claim, *see, e.g.*, Facts Are Important: Medication Abortion "Reversal" Is Not Supported by Science, ACOG, https://tinyurl.com/mrye7fsa (last visited July 29, 2024).

The investigation also revealed concerns about Plaintiff's patient-privacy practices. *See* Cai Cert. Ex. 6 at 7-9. For example, First Choice represents that its services are "confidential" and "private." *See* Turner Cert. Ex. 1 at AG007, AG055, AG061, AG074; *id*. Ex. 3 at AG215, AG222, AG232. But elsewhere, it claims that it is exempt from HIPAA because it does not accept insurance. *See id*. at AG275. That raised concerns about how and whether Plaintiff keeps health or other sensitive information private and secure.

To determine whether Appellant violated state law, the State issued the instant Subpoena on November 15, 2023. *See* Turner Cert. Ex. 4 at AG280-303. The

Subpoena set a December 15, 2023 deadline for response. *Id.* at AG280. Rather than respond, two days before the deadline, Plaintiff filed this suit. Dkt. 13, 12.

B. Procedural History.

Since then, Plaintiff's attempts to evade Subpoena compliance have been roundly rejected by multiple state and federal courts. First, this Court dismissed Plaintiff's case, finding Plaintiff's claims unripe, and denying Plaintiff's TRO and PI motion as moot. Dkt. 28 (opinion), 29 (order). The Third Circuit denied an injunction pending appeal on February 15, 2024. CA3.Dkt.20. The Supreme Court denied Plaintiff's petition for writ of mandamus to require this Court to exercise jurisdiction. *See In re First Choice Women's Res. Centers, Inc.*, No. 23-941, ___ S.Ct. ____, 2024 WL 2116515 (Mem.) (May 13, 2024). In the interim, the Third Circuit denied Plaintiff's request for expedited consideration of its appeal, noting that Plaintiff did not "promptly file a motion to expedite" and that it failed to inform the Court that it was "simultaneously pursuing extraordinary relief from the Supreme Court and representing to that Court that expedited treatment is not necessary." CA3.Dkt.29 (reminding Plaintiff of duty of candor).

Meanwhile, the State moved to enforce the Subpoena in New Jersey Superior Court on January 30, 2024. Cai Cert. Ex. 5, Ex. D; Cai Cert Ex. 8. Plaintiff cross-moved to stay or quash the Subpoena on April 1, 2024, Cai Cert Ex. 5, Ex. E ("Cross-Motion"), and the parties briefed the very same arguments that Plaintiff raised in this

court, *see id.*; Cai Cert. Exs. 6, 8, 9. On May 28, after reviewing extensive briefing and three hours of argument, *see* Dkt. 41-11 (transcript of argument), the state court granted the State's application to enforce the Subpoena, denied Plaintiff's cross-motion to quash, and denied Plaintiff's motion for a stay pending appeal.[1] *See* Dkt.41-4 ("Oral Ruling") at 16-17; 31-33.

First, the state court denied Plaintiff's request for a stay pending federal court resolution. Oral Ruling at 6:5-20 (noting a stay would inappropriately "halt future civil investigations in their formative stages").

Next, the court found no "basis to deny the [State's] order to show cause and quash the subpoena." *Id.* at 6:21-23; 16:12-17:2. The court offered several bases for its ruling. It rejected Plaintiff's theory that the Subpoena resulted from "retaliation and bias on the State's part," as "speculation," *id.* at 10:5-18, and spurned Plaintiff's claim that a state official loses its authority to investigate potential fraud because he had taken public positions on reproductive healthcare issues, *see id.* at 10:5-11:17 (emphasizing that "[p]ublic officials, including the Attorney General, frequently make statements of public concern" (quoting *Platkin v. Smith & Wesson Sales Co.*, 289 A.3d 481, 487 (N.J. Super. Ct. App. Div. 2023) ("*S&W State Decision*"))). The court also rejected "the parts of [the Plaintiff's] arguments which center on" the

[1] The court memorialized its rulings in a series of orders dated May 30 (denying stay pending appeal), June 6 (denying cross-motion to stay or quash), and June 18 (granting motion to enforce) ("June 18 Order"). Cai Cert. Ex. 2.

Subpoena's "scope"—including association and Fourth Amendment claims—as Plaintiff had never met with the State to discuss such issues. *Id.* at 11:18-12:10; *id.* at 28:16-29:15 (explaining that it would not grant a stay because "You're asking me to [declare the Subpoena] on its face, [to] be a constitutional violation of your client's rights and I've already decided that it isn't … .").

Additionally, as a "[f]urther" basis for rejecting Plaintiff's claims, *id.* at 12:11, the court concluded that merely requiring compliance with the Subpoena does not violate constitutional rights: "the Attorney General has not, at this very preliminary juncture of this matter, violated any statutory or constitutional tenets which would lead to a quashing of the subpoena at issue," *id.* at 16:12-18. The court thus concluded that Plaintiff's "constitutional arguments are … premature" at the subpoena-enforcement stage. *Id.* at 12:11-13; 13:17-15:20. The state court also denied Plaintiff's motion for a stay pending appeal. *Id.* at 32:6-8; 33:5-24.

Plaintiff waited 52 days from the May 28 ruling to appeal, and did not seek a stay pending appeal from the Appellate Division. Cai Cert. Ex. 3. Instead, on July 18, on the very deadline for compliance with the state court's order, Plaintiff filed a motion for a protective order with the Chancery Division that effectively attempted to renew its application for the stay of enforcement the court had already denied on May 28. *Id.* at Ex. 10. On July 26, the State opposed that motion and cross-moved

to enforce its litigants' rights based on Plaintiff's failure to "respond fully" to the Subpoena as ordered. *Id.* at Ex. 4.

After the May 28 state-court ruling, the State moved to dismiss Plaintiff's appeal of this Court's decision on ripeness as moot over Plaintiff's objection on June 14—after failing to obtain Plaintiff's agreement. CA3.Dkt.50. Plaintiff opposed and again moved for an injunction pending appeal. CA3.Dkt.49, 49-1. On July 9, the Third Circuit dismissed the appeal as moot and remanded the matter to this Court. CA3.Dkt.56-1. Ten days later, on July 19, Plaintiff filed the instant motion.

ARGUMENT

The Court should deny an emergency injunction. The "[f]our canonical guideposts" for granting such an "extraordinary" remedy are "(1) the likelihood of success on the merits; (2) the risk of irreparable injury …; (3) the balance of equities; and (4) the public interest." *Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec.*, No. 23-1633, __ F.4th ___, 2024 WL 3406290, at *5-6 (3d Cir. July 15, 2024) ("*DSSA*"). The first two factors are required "gateway factors[]" for granting relief, *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), but "any one factor" is enough to deny relief. *DSSA*, 2024 WL 3406290, at *6. Moreover, the primary purpose of emergency relief is not harm prevention or to prejudge the merits, but "to preserve the court's power to render a meaningful decision." *Id.* at *4.

Because Plaintiff demands a mandatory injunction, its burden is "over and above the showing required to maintain the status quo." *Kim v. Hanlon*, 99 F.4th 140, 155 (3d Cir. 2024). Plaintiff must show that its right to relief is "indisputably clear," *id.*, and must make "a *strong showing* that [it] is likely to succeed on the merits" and that the other factors justify extraordinary relief, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (emphasis added). Plaintiff cannot succeed on this heightened burden.[2]

I. PLAINTIFF IS UNLIKELY TO SUCCEED ON THE MERITS.

Plaintiff's claims lack merit, but before even reaching that issue, its claims are barred both by *Younger* abstention and by preclusion.

A. *Younger* Abstention Bars Federal Courts From Enjoining State Court Proceedings In Furtherance Of Their Judicial Functions.

Plaintiff seeks an injunction to relieve it of "compliance obligation[s] pending in state court." PBr.2. It thus asks this Court to enjoin the Chancery Division from performing a quintessential judicial function: ensuring compliance with its own prior orders. *Younger v. Harris*, 401 U.S. 37 (1971) requires this Court to abstain.

[2] At a minimum, a TRO must be denied, since Plaintiff has not demonstrated that it would suffer irreparable harm between now and this Court's adjudication of the PI motion. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Loc. No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974) (TROs exist to avoid "irreparable harm just so long as is necessary to hold a hearing, and no longer.").

Younger, and abstention generally, describe classes of cases in which a federal court must abstain from rendering a decision even though it has jurisdiction to do so. *Younger* is driven by the need for "limits" on the federal courts' "equity jurisdiction" to ensure both that the federal courts "avoid a duplication of legal proceedings and legal sanctions" with the state courts, and to ensure "comity, that is, a proper respect for state functions[.]" *Id.*; *see also PDX N., Inc. v. Comm'r N.J. Dep't of Labor & Workforce Dev.*, 978 F.3d 871, 882 (3d Cir. 2020); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 431 (1982) (adding that the policies underlying *Younger* reflect "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

There are two steps to the *Younger* analysis. First, as the Supreme Court most recently explained in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), *Younger* abstention applies where the state proceeding fits one or more of three categories summarized: (1) state criminal prosecutions, (2) civil enforcement proceedings, and (3) civil proceedings that are uniquely in furtherance of the state court's ability to perform their judicial function." *PDX*, 978 F.3d at 882. Second, if one of those categories applies, the court considers the *Middlesex* factors to decide

whether to abstain: "(1) whether there are ongoing judicial proceeding[s]; (2) whether those proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceeding to raise constitutional challenges." *Id.* (citation omitted).

At the threshold step, this case fits perfectly within the third *Sprint* category. As the Supreme Court has explained, this category of abstention requires the federal courts to stay their hand where there is a pending state civil proceeding involving orders "uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 73. And the Supreme Court has had multiple occasions to clarify and illustrate what this category encompasses. In *Pennzoil v. Texaco*, the Court required a federal court to abstain from adjudicating a case alleging federal constitutional claims where the federal plaintiff sought an injunction preventing the defendant "from taking any action to enforce" a previously-issued state-court judgment. 481 U.S. at 6. And in *Juidice v. Vail*, 430 U.S. 327 (1977), the Court expressly held that where a federal plaintiff is in "disobedience of a court-sanctioned [state] subpoena," a federal court should abstain from deciding a challenge that would interfere with "the resulting process" in state court "leading to a finding of contempt of court." *Id.* at 335-36. It reasoned that the process of enforcing a prior court order is so integral to the functioning of the state-court's functioning that "federal-court interference … is an offense to the State's interest …

likely to be every bit as great as it would be if this were a criminal proceeding." *Id.* at 336 (citation omitted).[3]

Here, Plaintiff collaterally attacks the "processes by which the State compels compliance with the judgments of its courts." *Pennzoil*, 481 U.S. at 13. The June 18 Order is a final judgment adjudicating First Choice's constitutional objections to the Subpoena; it ordered that First Choice "respond fully to the Subpoena." Cai Cert. Ex. 2. First Choice did not fully respond, but, instead, sought a stay. Cai Cert. Ex. 10 at Br.1-3 (seeking relief from "further compliance" with the State's subpoena); *id.* Ex. 4 at Br.1-8 (detailing noncompliance). The State cross-moved to enforce litigants' rights under N.J. R. 1:10-3, under which the Chancery Division has "discretion in fashioning relief to litigants when a party does not comply with a[n] … order." *In re Adoption of N.J.A.C. 5:96*, 110 A.3d 31, 41 (N.J. 2015). Plaintiff's

[3] The courts of appeal have repeatedly relied on this language to abstain from cases enforcing state-court orders and other quintessential state court functions. *See e.g.*, *Silver v. Ct. of Common Pleas of Allegheny Cnty.*, 802 Fed. Appx. 55, 58 (3d Cir. 2020) (abstaining from federal-court First Amendment claim seeking to enjoin state-court order that "governs the post-judgment conduct of attorneys and litigants."); *Dandar v. Church of Scientology Flag Serv. Org., Inc.*, 619 Fed. Appx. 945, 947-48 (11th Cir. 2015) (a "pending state proceeding involving enforcement of a settlement agreement entered into in a state-court case" required *Younger* abstention to avoid federal court interference with "a state court's administration of its duties."); *Falco v. Justs. Of the Matrimonial Parts of Supreme Ct. of Suffolk Cnty.*, 805 F.3d 425, 427 (2d Cir. 2015) (abstaining in federal constitutional challenge to a state-court order because the order "implicates the way that New York courts manage their own divorce and custody proceedings–a subject in which 'the states have an especially strong interest.'").

requested injunction would stop the Chancery Division's proceedings to adjudicate whether Plaintiff has violated its own June 18 Order and to determine what remedies are appropriate to compel compliance. *See, e.g.*, Cai Cert. Ex. 10 at Br.6 (arguing federal injunction would prevent Chancery Division "from addressing any issues related to scope or other enforcement disputes"). Such an injunction would attack "the core of the administration of a State's judicial system" to require its orders be followed, and would "be interpreted 'as reflecting negatively upon the state courts' ability to enforce constitutional principles." *Juidice*, 430 U.S. at 335-336. *Younger* "mandates that the federal court stay its hand." *Pennzoil*, 481 U.S. at 14.

To be clear, "not all state court orders trigger abstention." *Smith & Wesson Brands, Inc. v. Att'y Gen. of New Jersey*, 27 F.4th 886, 893 (3d Cir. 2022) ("*S&W I*"). *S&W I* held that an effort by the Attorney General to obtain an order compelling compliance with an administrative subpoena in the first place does not itself trigger *Younger*, *see id.* at 893-94—which is why the State did not raise *Younger* when this federal case was first filed, before the state court had issued any order requiring compliance. But crucial to *S&W I* was the distinction between suits by the executive agency seeking orders compelling compliance with the subpoena and subsequent enforcement proceedings to *assure* compliance with a *previously-issued* court order—because the latter, not the former, reflects the "processes by which the State compels compliance with the judgments of its courts." *Id.* at 894; *see also Malhan*

v. Sec'y U.S. Dep't of State, 938 F.3d 453, 463 (2019) (drawing distinction between initial order as "output" of court functions and subsequent enforcement proceeding of such orders, such as those in *Pennzoil* and *Juidice*); *Silver*, 802 Fed. Appx. at 58 (same). This case is about the latter: the pending post-judgment enforcement proceedings in the Chancery Division concern the *state court's* ability to enforce its prior order, not the entry of the order in the first place.

The non-dispositive *Middlesex* factors likewise support abstention. First, there is an "ongoing" proceeding regarding enforcement of the June 18 Order. Plaintiff filed its preemptive state-court motion seeking relief from noncompliance on July 18, Cai Cert. Ex. 10, before the instant request for a federal injunction. The State initiated its own cross-motion a week later on July 26. *Id.* at Ex. 4. *Younger* applies with "full force" "where state ... proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *see also, e.g.*, *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 328 (1984) (same); *M&A Gabaee v. Cmty. Redevelopment Agency of L.A.*, 419 F.3d 1036, 1039-40 (9th Cir. 2005) (same).

This Court has yet to hold proceedings of substance on the merits of First Choice's claims. It previously dismissed the Complaint on ripeness grounds alone. Dkt. 28. And *Younger* applies when a state-court action was initiated after the filing

of a federal-court TRO or PI motion. *See JMM Corp. v. Dist. of Colum.*, 378 F.3d 1117, 1126 (D.C. Cir. 2004) (abstaining when state-court action was initiated two months after federal complaint was filed); *Fairfield Cmty. Clean-Up Crew Inc. v. Hale*, 735 Fed. Appx. 602, 604-05 (11th Cir. 2018) (abstention proper where state court action was filed ten days after federal suit and PI). Abstention is especially warranted here, because the State *could not* have moved to compel compliance with the June 18 Order in state court until after the date to comply—July 18—had passed. Plaintiff's next-day rush to this Court does not undo the principles that undergird *Younger* abstention. *See Monster Beverage Corp. v. Herrera*, 650 Fed. Appx. 344, 346 (9th Cir. 2016) (to hold otherwise "would encourage gamesmanship").

Second, the state-court proceedings implicate two important state interests. It concerns the strong interest in ensuring compliance with state-court orders. *Juidice*, 430 U.S. at 335–36. The underlying dispute also implicates the state's strong interests in ably and expeditiously investigating deception and professional misconduct. *See ICC v. Gould*, 629 F.2d 847, 851-52 (3d Cir. 1980) (noting harms of "stop[ping] … investigation[s] in the public interest").

Finally, Plaintiff continues to press its constitutional challenges in state court, which is an adequate forum for such disputes. "[A] federal court should assume that state procedures will afford an adequate remedy," *Pennzoil*, 481 U.S. at 15. Plaintiff must show "procedural barriers to the presentation of the federal challenges" to state

law claims, *Gonzalez v. Waterfront Comm'n of N.Y. Harbor,* 755 F.3d 176, 184 (3d Cir. 2014), not merely that it is dissatisfied with the outcome, s*ee Forty One News v. Cty. of Lake*, 491 F.3d 662, 667 (7th Cir. 2007). And even if a state forum explicitly "refused to consider" Plaintiff's constitutional claims, as Plaintiff incorrectly claims, *Younger* would still apply so long as Plaintiff is "permitted to ... raise[] his federal claims in his appeal to the New Jersey Superior Court, Appellate Division." *Gonzalez* 755 F.3d at 183-84.

B. The State Court Judgment Has Preclusive Effect.

Even without abstention, Plaintiff's claims still fail out of the gate. "Litigants get one opportunity to make their arguments. Not two. And they cannot file a federal lawsuit to hedge against a potentially unfavorable state ruling." *S&W II*, 105 F.4th at 84. Preclusion bars Plaintiff from returning to this Court for a do-over after the Chancery Division has already rejected its constitutional claims.

The claim preclusion doctrine ensures "the just and expeditious determination in a single action of the ultimate merits of an entire controversy between litigants." *McNeil v. Legis. Apportionment Comm'n*, 828 A.2d 840, 858 (N.J. 2003).[4] All three elements of claim preclusion are met here because: (1) the two proceedings involve "identical" parties; (2) the proceedings raise the same claims that arise "out of the

[4] "[T]he preclusive effect of a state court judgment or order is determined by the law of the state that rendered the judgment." *S&W II*, 105 F.4th at 73.

same transaction or occurrence;" and (3) the state-court holding is "valid, final, and on the merits;" *McNeil*, 828 A.2d at 859. This court therefore already noted that "res judicata principles will likely bar a plaintiff from filing a claim in federal court pertaining to the state-court enforced subpoena." Dkt. 28 at 10, n.7.

The first two claim preclusion factors are met here because the federal and state proceeding plainly involve the same parties and same claims that arise from the same transaction or occurrence. In both actions, (1) "the acts complained of and the demand for relief are the same"; (2) "the theory of recovery is the same"; (3) "the witnesses and documents necessary at trial are the same"; and (4) "the material facts alleged are the same." *Wadeer v. N.J. Mfrs. Ins. Co.*, 110 A.3d 19, 28 (N.J. 2015). Claim preclusion "does not require exact sameness," but only a "high degree of similarity between the two actions." *S&W II*, 105 F.4th at 76 n.7. On that basis, the Third Circuit recently held preclusion applicable on a virtually identical posture, where a party filed a federal suit to enjoin enforcement of a subpoena issued by the Attorney General, and asserted "the same constitutional concerns" in a cross-motion to quash in a state-court action to enforce the Subpoena—precisely what Plaintiff is doing here. *Id.* at 70-72, 76-79 & n.7.

Plaintiff's Cross-Motion shares the federal complaint's facts, theories, proofs, and demand for relief. *See, e.g.*, Compl. ¶¶ 16-66; Cross-Motion at 13-16, 18. In both proceedings, Plaintiff seeks an order barring Subpoena enforcement. *Compare*

Compl. ¶ 11 *with* Cross-Motion at 2; *see also* Oral Ruling 30:13-14. Both raise the same theories: First Amendment retaliation, viewpoint discrimination and selective enforcement, free exercise, and freedom of association.[5] *Compare* Compl. ¶¶ 80-177 *with* Cross-Motion at 13-24, 27-31. Plaintiff cites the same facts regarding the State's issuance of the Subpoena in both proceedings. *Compare* Compl. ¶¶ 5, 9, 16-66, 67-68 *with* Cross-Motion at 1, 13-16, 18.

As to the third factor, the state court's May 28 decision is also on the merits under state preclusion law.[6] The state court conclusively denied the Cross-Motion, finding that the Subpoena did not "violate[] any statutory or constitutional tenets" to justify quashing the Subpoena. Oral Ruling 16:12-16. It enforced the Subpoena "in full," leaving "nothing pending before the Court." Oral Ruling 16:17 to 17:3-5; Cai Cert. Ex. 2. Indeed, after rejecting Plaintiff's first-filed argument, Oral Ruling 5:23-6:23, the state court went on to consider whether there was "any other basis" to

[5] Plaintiff's instant motion does not address all claims in the Complaint, such as those under the Fourth Amendment, First Amendment overbreadth, or the Due Process Clause. The State reserves the right to challenge those as precluded in a dispositive motion, since all were also raised and adjudicated in state court.

[6] Plaintiff acknowledges the decision was final. *See* Oral Ruling at 24:1-11 (Plaintiff's counsel confirming the decision was not interlocutory); Cai Cert. Ex. 3 (notice of appeal); N.J. Rule 2:2-3(a)(1) (appeals of right permitted only "from final judgments of the Superior Court trial divisions"). The pending appeal changes nothing; under New Jersey law, for preclusion purposes "a judgment is final even pending an appeal." *Bondi v. Citigroup, Inc.*, 32 A.3d 1158, 1187 (N.J. Super. Ct. App. Div. 2011).

"quash the subpoena," in light of the substantial briefing and oral argument on the constitutional claims, *id.* 6:22-23. It found there was not, for three separate reasons.

First, the court rejected, Plaintiff's theories underlying its First Amendment claims. The court noted that "[m]uch of [the Cross-Motion] centers on [Plaintiff's] claim of retaliation and bias … due to [the Attorney General's] disagreement with the views expressed by First Choice." *Id.* 10:5-8. The court disagreed as a matter of law. Addressing Plaintiff's theory that the Subpoena resulted from "retaliation and bias on the State's part," the court called its arguments "speculation," invoking and applying the "same reasoning" as the *S&W State Decision*. Oral Ruling at 10:5-11:17 ("Public officials, including the Attorney General, frequently make statements of public concern." (quoting *S&W State Decision*, 289 A.3d at 487)). The state court averred that Plaintiff identified "few actual facts" other than "selected quotes from the Attorney General's public statements," which cannot support its claims. *Id.* 14:4-10 (quoting *S&W State Decision*, 289 A.3d at 494); *see id.* 12:11-13; 14:1-15:15. Thus, the court rejected the basis for all of Plaintiff's First Amendment claims—that the Attorney General's public policy stances on reproductive healthcare could support a constitutional violation. *See id.* 16:12-18. That is a merits holding with claim-preclusive effect, notwithstanding any "tendentious reading" to the contrary. *S&W II*, 105 F.4th at 75. Plaintiff conveniently fails to mention this discussion when asserting that the state court did not reach the merits of its constitutional claims. *See*

PBr. 33-35. But it cannot ask in this court for a reevaluation of the exact same claims of selective enforcement, *id.* at 19-29, that were already rejected.

Second, the state court found Plaintiff failed at a threshold step of its associational (and Fourth Amendment claims) because it had not met and conferred with the State on a protective order, Oral Ruling 11:18-12:10; 28:16-29:15, which the State had argued would resolve any associational injury that Plaintiff asserted, Cai Cert. Ex. 6 at 48. That doomed Plaintiff's challenge, because, as the state court put it: "You're asking me to get into the idea of the association and how that's going to, on its face, be a constitutional violation of your client's rights and I've already decided that it isn't." Oral Ruling 29:11-15. Plaintiff reasserts the same freedom of association claims here, PBr. 12-19, but the State remains open to a confidentiality order that addresses those claims. *See* Cai Cert. Ex. 4 at Br.15. The fact that Plaintiff has now refused to agree to such an order on baseless grounds is no different than their prior refusal to entertain such an order at all. Given the state court had already held that a facial associational claim cannot stand when such an order protecting confidentiality is *available*, that holding is preclusive.

Finally, the state court separately concluded that the entirety of First Choice's challenge fails. It concluded that "at this very preliminary juncture," where all the State has done is issue a Subpoena and seek compliance, "the Attorney General has not … violated any statutory or constitutional tenets which would lead to a quashing

of the subpoena at issue." Oral Ruling at 16:12-18. *See also Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986) (government "violates no constitutional rights by merely investigating" conduct that might violate its laws). The state court drew on the prematurity analysis in the *S&W State Decision*, noting that the constitutional claims were aimed at a hypothetical future *enforcement* action, not a mere demand for document production. *See id.* at 11:10-17. Thus, all of Plaintiff's claims at this subpoena-enforcement juncture failed because at this time, "the Attorney General has not … violated *any* statutory or constitutional tenets." Oral Ruling 16:12-18 (emphasis added). If the State initiates an enforcement action against Plaintiff, the state court decision would not preclude Plaintiff from challenging *that* action. *See S&W II*, 105 F.4th at 84 ("The preclusive effect of the state court judgment only concerns the subpoena at issue—not any nascent and further investigative step or future enforcement action."). But "entangle[ment]" in that "abstract" hypothetical now is unnecessary. Oral Ruling 15:8-15 (quoting *S&W State Decision*, 289 A.3d at 494).

This prematurity holding rests on the fundamental defects in First Choice's claims, rather than the state court's "procedural inability to consider a case," PBr.34, and is preclusive. At no point did the state court conclude it lacked power to decide Plaintiff's claims; it *rejected* them. *See* Oral Ruling 16:12-18. Moreover, under well-settled New Jersey law, preclusion *does* apply to a holding that certain claims are

premature. *See Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 591 A.2d 592, 600–01 (N.J. 1991). "[A] judgment can be preclusive even if it does not result from a plenary hearing on the substantive claims." *Id.*; Restatement (Second) of Judgments § 20 (judgment for a defendant that "rests on the prematurity of the action … does not bar another action by the plaintiff instituted *after the claim has matured*") (emphasis added). And that makes sense: Plaintiff's injunction request requires this Court to assess whether Plaintiff has cognizable constitutional claims at the subpoena-enforcement stage. That is the very same question that the state court has already answered. Thus, relitigating that same question is incompatible with preclusion's core principles: "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness." *Winters v. N. Hudson Reg'l Fire & Rescue*, 50 A.3d 649, 659 (N.J. 2012) (citation omitted).

Finally, Plaintiff's claims are separately barred by the less demanding and more "flexible" standards of issue preclusion. *Id.* at 660. Issue preclusion merely requires that "(1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the

earlier proceeding." *First Union Nat. Bank v. Penn Salem Marina, Inc.*, 921 A.2d 417, 424 (N.J. 2007) (citation omitted).

Here, the identity of parties and issues are not reasonably in dispute. And as *S&W II* confirmed, the Chancery Division's consideration of briefing and argument on a motion to quash a subpoena means Plaintiff was "provided a full and fair opportunity" to litigate the issues, 105 F.4th at 80, notwithstanding any "difference in posture" from the federal litigation, *id.* at 81. The state court issued a final decision on the merits of those very issues, which were by definition central to the court's decision on those issues. *See supra* at 18-21. Thus, even if the state court's prematurity holding was construed (incorrectly) as a jurisdictional holding that lacks claim-preclusive effect, issue preclusion still applies. Issue preclusion forecloses "[e]ven subject-matter jurisdiction" from being relitigated. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009). A prior "dismissal based on a determination that plaintiffs lacked standing under the federal civil rights law, although not on the merits, precludes reconsideration of that issue." *Watkins*, 591 A.2d at 604; *see also Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("It has long been the rule that [preclusion] principles ... apply to jurisdictional determinations[.]"). "Otherwise[,] there would be nothing to prevent the incessant relitigation of the same jurisdictional challenges by the same parties." *Orlando Residence, Ltd. v. GP Credit Co., LLC*, 553 F.3d 550, 556 (7th Cir. 2009)

(Posner, J.). In sum, the state court decision precludes relitigation of Plaintiff's federal constitutional claims in this Court.

C. Plaintiff's First Amendment Claims Fail.

Even if this Court were to reach Plaintiff's First Amendment theories, Plaintiff cannot succeed because it has not made a "strong showing" on those claims. *Hilton*, 481 U.S. at 776. It cites no precedent holding that the mere production of non-privileged records in response to a state-law fraud and professional standards Subpoena violates First Amendment rights. As the Supreme Court has held, the State "violates no constitutional rights by merely investigating" conduct that may violate its laws. *Ohio Civil Rights Comm'n*, 477 U.S. at 628. Should the State eventually bring a substantive enforcement proceeding, Plaintiff can raise its claims then.

1. Plaintiff's Associational Claims Fail

Even if the Court considers Plaintiff's claims now, they cannot justify emergency relief. Plaintiff exaggerates the scope of the requested disclosures and obfuscates their rationale. It complains that the Subpoena seeks "every one" of its donors other than through one website, the identities of "every licensed professional," and correspondence with national organizations. PBr.8 (citing subpoena Requests ¶¶ 8, 14, 22-23, 26). That is not correct: Request ¶ 26 seeks only identifying information for those who donated since January 2021—not "the last ten years," PBr.8—"by any means other than through the Donor Solicitation Page." Cai

Cert. Ex. 1 at AG295. The "one website" that Request ¶ 26 exempts also demonstrates that the Subpoena is tailored: it does not ask for disclosures of donations stemming from the donor solicitation page on First Choice client-facing site, which expressly states the organization's mission. And the Subpoena does not seek identifying information about First Choice's staff and volunteers generally. Rather, its requests are focused on individuals who are regulated professional licensees and those who provide medical services. *See id.* at AG294 (Request ¶ 14). And because the veracity of First Choice's claims regarding "Abortion Pill Reversal" support an inquiry into whether individuals—including donors—were misled, Requests ¶¶ 22-23 seek documents related to Plaintiff's sources of information, including from national organizations. *Id.*

Even if Plaintiff had valid associational concerns about these Requests, they can be resolved by a state-court confidentiality order. Indeed, after Plaintiff initiated a meet-and-confer for the first time nearly six months after the Subpoena's issuance, the State proposed a standard confidentiality order that would prevent disclosure of personal identifying information. Cai Cert. Ex. 4 at Br.5. Plaintiff's resistance of that order—currently before the Chancery Division—is no basis to argue that its associational rights are being harmed.

Plaintiff's reliance on *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) ("*AFP*"), only highlights the reasonableness of the State's approach.

AFP concerned California's prophylactic disclosures, known as "Schedule B," which required all charities to disclose every donor who gave over $5,000 on their annual tax registrations. *Id.* at 600-02. The Court acknowledged the state's legitimate anti-fraud interest, but found that requiring annual disclosures from 60,000 charities was overbroad. *Id.* at 610-11. The Court, however, expressly held that the State *could* use narrower alternatives "such as a subpoena or audit letter," when the State had a basis to investigate specific concerns about fraud. *Id.* at 612-13. Here, the State seeks to do just that. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,* 538 U.S. 600, 623-24 (2003) (discussing validity of the State's efforts to combat fraud on charitable donors); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800-01 (1988) (same); *New York v. New York v. VDARE Fdn., Inc.*, No. 453196/2022, 2023 WL 360633 (N.Y. Sup. Ct. Jan. 23, 2023)(same).

Even if the donor disclosure request were subject to "exacting scrutiny," it would survive such scrutiny because it is narrowly tailored[7] and necessary to advance the State's investigation into donor fraud. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1160-61 (9th Cir. 2010) (compelling donor disclosure because the information was "highly relevant" to claims in the litigation); *AFT Michigan v. Project Veritas*, 2023 WL 2890152 at *5-6 (E.D. Mich. April 10, 2023) (applying

[7] The Subpoena need not be the least restrictive means to obtain the information sought. *AFP*, 141 S. Ct. at 607-08.

AFP to find the same); *Evergreen Ass'n, Inc. v. Schneiderman*, 153 A.D.3d 87, 100-01 (N.Y. App. Div. 2017) (upholding subpoena disclosure related to provision of medical services against First Amendment challenge).

Plaintiff's objections likewise find no support in *NAACP v. Alabama ex rel. Patterson*. Unlike First Choice, NAACP did *not* object to disclosing its employees, directors or officials, 357 U.S. 449, 463-64 (1958); instead it "complied satisfactorily with the production order, except for the membership lists . . . ." *id.* at 465. Far from holding disclosure to be a *per se* associational violation, the Court merely held that membership disclosure did not further the investigative purpose because NAACP had already made admissions, complied with the production order and provided significant information for that investigative purpose. *NAACP,* 357 U.S. at 463-66. By contrast, Plaintiff continues to evade compliance with the Subpoena and has made no meaningful effort to provide documents or information necessary for the State to determine whether Plaintiff is violating State laws. Plaintiff has "no right to absolute immunity from state investigation," and the State has the "right to obtain from it such information as the State desires" concerning this entirely lawful and well-grounded investigation. *NAACP*, 357 U.S. at 463-64.

2. Plaintiff's Selective-Enforcement Claims Fail.

For its myriad theories of selective enforcement, First Choice must meet the high burden of demonstrating not only that the enforcement agency was in fact

driven by an improper purpose, but also that the agency lacked sufficient cause to justify the action. *See Hartman v. Moore*, 547 U.S. 250, 256-58, 263 (2006) (in a selective prosecution case, plaintiff has the burden of proving *lack* of probable cause to initiate a prosecution to overcome "presumption that a prosecutor has legitimate grounds for the action he takes"); *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1304-09 (11th Cir. 2019) (applying *Hartman*'s test to retaliatory-motive challenge against government-initiated civil suit). Plaintiff cannot show that the State lacked a sufficient basis for this Subpoena, given what the Division uncovered, *see supra* at 4-7, and given that other jurisdictions have investigated and litigated similar claims of fraud against crisis pregnancy centers, *see, e.g.*, *People v. Heartbeat Int'l, Inc.*, No. 23CV044940 (Cal. Sup. Ct.); *Obria Grp., Inc. v. Ferguson*, No. 3:23-cv-06093, 2024 WL 1697777 (W.D. Wash. Feb. 20, 2024).

Moreover, Plaintiff cannot show improper motive. As the state court expressly found, Plaintiff's First Amendment "claim of retaliation and bias" is based on mere "speculation." Oral Ruling at 10:5-11:9. Although Plaintiff cites miscellaneous statements from the Attorney General regarding reproductive rights and his past meetings with advocates and reproductive health care providers, Dkt. 41-1 at 22-23, as the state court rightly noted, *supra* at 8-9, such meetings and statements do not show an investigation is "not based on a good faith belief that [the recipient] may have violated state laws." *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679,

686, 704, 710 n.29 (S.D.N.Y. 2018), *aff'd in part, appeal dismissed in part sub nom Exxon Mobil Corp. v. Healey*, 28 F.4th 383 (2d Cir. 2022); *see also SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 130 (3d Cir. 1981) (same). Nor has Plaintiff identified similarly-situated entities that avoided investigation. To the contrary, the State issues subpoenas of this sort to individuals and organizations across the spectrum of industries, including many secular organizations. Cai Cert. Ex. 7 at Exhibits 1, 9, 10, 13.[8]

Plaintiff's reliance on *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024) is misplaced. *Vullo* concerned allegations that a New York agency official violated the First Amendment by coercing regulated entities to cease doing business with the NRA and thereby suppress the organization's gun advocacy. *Id.* at 180-81. The decision did "not break new ground" but only "reaffirm[ed] the general principle" that "a government official cannot do indirectly what she is barred from doing directly." *Id.* at 190, 197 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-69 (1963)). The contrast between *Vullo* and Plaintiff's claims could hardly be

[8] While Plaintiff repeatedly complains that the Attorney General has not investigated Planned Parenthood, PBr.23, 25, 26, it cites no evidence that Planned Parenthood (or any other charity) maintains webpages that hide its mission from its potential donors. *See Who We Are*, Planned Parenthood of Northern, Central, and Southern N.J., https://tinyurl.com/54c9y3s (last visited July 29, 2024) (describing mission); *Donor FAQ*, Planned Parenthood, https://tinyurl.com/nkntzr4k (last visited July 29, 2024) (FAQs linked on donation page). Plaintiff has therefore failed to substantiate its "speculation" of bias or discriminatory intent.

sharper. *Vullo* involved particular allegations that "could be reasonably understood to convey a threat of adverse government action in order to punish or suppress [the challenger's] speech," 602 U.S. at 191, including an alleged meeting at which the official stated that DFS would "ignore" non-NRA insurance violations if that particular company "ceased underwriting NRA policies and disassociated from gun-promotion groups," even though "there was no indication that [other gun] groups had unlawful insurance policies," *id.* at 177, 193. Plaintiff offers nothing of the sort.

For similar reasons, Plaintiff's free-exercise claims cannot justify emergency relief. The fact that Plaintiff's mission is religiously motivated "does not relieve [it] of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [its] religion prescribes (or proscribes)." *Emp. Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). Each of the statutes that authorize the Subpoena are neutral laws of general application, and are subject to rational basis review. *Id.* at 878-82. Plaintiff offers no evidence that the State is improperly targeting it with this Subpoena based on its religious views or activities. The Subpoena is motivated by concerns about First Choice's potential factual misrepresentations and omissions and other misconduct, not by First Choice's religious beliefs or statements. Plaintiff points to no comparable secular entity that has, *inter alia*, published inconsistent statements regarding its mission and conduct

across websites, let alone that linked representations about the role of medical professionals with this potentially misleading medical information. *See, e.g., Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002); *Fulton v. City of Phila.*, 593 U.S. 522, 531-32 (2021). The free-exercise claim is thus also unlikely to succeed.

II. THE EQUITABLE FACTORS WEIGH AGAINST A TRO OR PI.

Courts must weigh all the factors for preliminary relief, which are not "a mechanical algorithm." *DSSA*, 2024 WL 3406290, at *6. The factors "help the court balance the risks of mootness against the perils of injunctions." *Id.* Here, none of the equitable factors favor Plaintiff.

1. As the Third Circuit explained, the equitable power of injunction applies "only when there [is] no adequate remedy at law." *DSSA*, 2024 WL 3406290, at *3; *see also Sampson v. Murray,* 415 U.S. 61, 90 (1974). But an adequate remedy at law exists, and this Court should "withhold this extraordinary remedy" of a TRO or PI. *DSSA*, 2024 WL 3406290, at *5. First, Plaintiff has asked the Chancery Division to "hold[] further compliance with the Subpoena in abeyance pending the federal district court's disposition of First Choice's federal claims." Cai Cert. Ex. 10 at Br.8. Plaintiff's simultaneous request to another tribunal that can grant it the very relief it seeks here means no federal injunction is warranted. Second, Plaintiff has appealed the June 18 Order to the Appellate Division—yet another forum for potential relief.

Cai Cert. Ex. 3.[9] Third, "at the end of the case," *this* very court "can still grant an adequate remedy." *DSSA*, 2024 WL 3406290, at *4. A live controversy would still exist for this Court's resolution even after document production because Plaintiff could obtain judicial relief through an order that "prohibit[s] [] the use of the summoned documents." *Gluck v. United States*, 771 F.2d 750, 754 (3d Cir. 1985); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 15 (1992) (compliance with IRS subpoena did not moot appeal because "a court could order" that the records be "returned or destroyed"); *Healey*, 28 F.4th at 393 (same). In short, proceedings in the state court would not moot this Court's ability to render a ruling on the controversy presented by Plaintiff's Complaint, so the "limited purpose" of the extraordinary remedy of emergency injunction would not be served. *DSSA*, 2024 WL 3406290, at *4.

2. Plaintiff's own conduct is incompatible with its demand that this Court issue an emergency injunction—which requires this Court "to prejudge the merits" in the course of days or weeks. *Id.* at *6. "Delay in seeking enforcement of [litigants'] rights …. tends to indicate at least a reduced need for such drastic, speedy action." *Id.* at *8 (citation omitted); *see also* Dkt. 42.

[9] Nor does the appeal itself work irreparable harm. *See FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) ("[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

For one, Plaintiff "ch[ose] not to hasten" its efforts to seek relief in the state courts. *DSSA*, 2024 WL 3406290, at *8. It declined to pursue an emergent request for stay pending appeal at the Appellate Division, even though it represented to the Chancery Division that it would seek such relief. *See* Oral Ruling at 18:16-20 (Plaintiff counsel stating it would like to appeal and "ask for a stay"); 35:19-36:2 (court indicating it would immediately enter order denying stay pending appeal so that Plaintiff could seek further relief). And in the nearly two-month period since the Chancery Division's May 28 Oral Ruling, Plaintiff did not seek relief or guidance from the Chancery Division regarding the scope of the subpoena or the parameters of the confidentiality protective order, despite the Chancery Division's express invitation to do so without resort to formal motions. *See* Oral Ruling at 36:3-22.

For another, Plaintiff's own litigation choices in federal court show that any emergency it pleads to this Court is self-created. Plaintiff could have consented to a dismissal or remand of the Third Circuit appeal of this Court's January 12 jurisdictional decision. But its refusal to do so led to a month's worth of motions practice in the Third Circuit that ultimately led to that Court agreeing with the State and dismissing the appeal as moot. CA3.Dkt.56.[10] Had Plaintiff acted differently, a motion for TRO and PI could have been presented to this Court in early June. "A

[10] Even at the Third Circuit, Plaintiff did not act with alacrity. It took no action for 18 days after the Chancery Division's May 28 ruling, filing its motion for an injunction pending appeal before the Third Circuit on June 14. *See* Dkt. 42.

classic maxim of equity is that it assists the diligent, not the tardy." *DSSA*, 2024 WL 3406290, at *8 (internal quotation marks omitted). Thus, this Court may exercise its substantial discretion in denying such extraordinary equitable relief to a litigant whose demands for immediate action are incompatible with its own dilatory conduct.

3. Even putting aside those core equitable principles, Plaintiff has also failed to meet its "burden of proving a clear showing of immediate irreparable injury." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992) (internal quotation marks omitted). While it is often the case that courts have presumed First Amendment harms to be irreparable, such as where the State is imposing a direct or discriminatory restraint on speech or the exercise of religion, *see DSSA*, 2024 WL 3406290, at *7, courts have also long held that the mere production of information in response to a Subpoena, standing alone, does not constitute an irreparable harm. *See, e.g.*, *FTC v. Church & Dwight Co.*, 756 F. Supp. 2d 81, 86-87 (D.D.C. 2010) (rejecting claim that subpoena response is irreparable harm); *In re Platinum Partners Value Arbitrage Fund L.P.*, 18cv5176, 2018 WL 3207119, at *6-7 (S.D.N.Y. June 29, 2018).[11]

The facts in this case do not support a likelihood of irreparable harm. See *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989) (noting "the assertion of First

[11] Even if Plaintiff appears to acknowledge that the State is likely to prevail on its motion to enforce litigants' rights, it cannot show that the state court is likely to enter any immediate penalty, much less one that works irreparable harm.

Amendment rights does not automatically require a finding of irreparable injury" even if the plaintiff can show likelihood of success). The sole harm Plaintiff discusses is something far more speculative: the risk of chill from the production of documents that identify staff or donor identities. PBr.30-31. Putting aside that the majority of the Subpoena does not even relate to this concern, Plaintiff cannot satisfy its burden of showing immediate irreparable injury will result.

Initially, the State has already proposed a confidentiality order that would prevent disclosure of donor and staff identities during the course of its investigation. *See* Cai Cert. Ex. 5 at Ex. P. Moreover, Plaintiff's anonymous donor declaration that purportedly supports its claim of chill does not hold up to scrutiny. *See* Dkt. 41-6. Plaintiff did not submit an anonymized declaration or affidavit. Instead, it contains only an attorney's declaration that he "obtained" an "affidavit" from an unidentified number of donors, but contains only a set of unverified statements. *Id.* Finally, even on its own terms, the donors' claimed statements do not plausibly show how document production in this case would bring irreparable harm. For one, although the donors who gave through https://www.myegiving.com/App/Giving/firstchoicewrc express concern regarding the disclosure of their identities, *Id.* at 2-3, that is the very website for which the Subpoena is *not* seeking donor information, because that is the very website where First Choice more fulsomely represented its

mission and work.[12] In any event, even if this unspecified set of donors were to withhold donations during the pendency of this litigation, that hardly shows *irreparable* harm. If this Court ultimately resolves the claims in Plaintiff's favor, Plaintiff is not foreclosed from obtaining any interim donations that were held back.

4. Finally, an injunction would work a profound harm to the State and the public. To begin, the State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018). But the harm goes deeper here: in this case, the continued delay in enforcing the Subpoena—issued in November 2023—undermines the State's efforts to assess whether Plaintiff has engaged in fraud, and if so, ameliorate that fraud. *See ICC*, 629 F.2d at 851-52 (agencies must be able to investigate "without undue interference or delay"). And an injunction would incentivize subpoena recipients to misuse the federal courts as an alternative source of review of state court orders, in lieu of the usual state-court process. That would not only compromise lawful state investigations but undermine the authority of New Jersey state courts generally.

Indeed, a federal injunction now would undermine federalism and comity by second-guessing a state court's order and by suspending the state court's ability to

[12] By contrast, the Subpoena seeks information regarding those who gave through a link on the client-facing site, https://www.myegiving.com/App/Form/24dff450-d338-49d3-b2f9-7ac52352d9f4 (last visited July 29, 2024), which conceals its mission.

enforce its own prior decisions. If the Court agrees with the State on abstention or preclusion and denies an injunction, no such harm would ensue. But even if this Court disagrees, it should still consider the harm of entering an injunction that would work "a serious federalism infringement." *See J.B. v. Woodard*, 997 F.3d 714, 722-23 (7th Cir. 2021). While any TRO or PI requires "forecasting the merits" in a manner that "risks prejudging them," the upshot of this particular TRO or PI is that such a "tentative forecast[]," *DSSA*, 2024 WL 3406290, at *3, would be used to "change … the direction and course of the state court proceedings," *J.B.*, 997 F.3d at 723. In such a circumstance, respect for comity and federalism means "federal courts need to stay on the sidelines," *id.*, especially at such an early juncture.

CONCLUSION

This Court should deny Plaintiff's motion for an emergency injunction.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: */s/ Angela Cai*
Angela Cai
Deputy Solicitor General

Dated: July 29, 2024

CERTIFICATE OF SERVICE

I certify that on July 29, 2024 I electronically filed the foregoing Opposition To Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction with the Clerk of the United States District Court for the District of New Jersey. Counsel for all parties are registered CM/ECF users and will be served via CM/ECF.

By: */s/Angela Cai*
Angela Cai
Deputy Solicitor General

Dated: July 29, 2024