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Justices' Ruling Alters Playing Field For State Subpoena Suits

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For the recipient of a subpoena from a state attorney general or other state regulator, the prospect of successfully blocking the subpoena through litigation can seem dim.

State laws governing investigative subpoenas may be permissive, and state judges who hear motions to quash may be sympathetic to the regulator. Federal courts may offer an attractive alternative — at least when federal law provides a basis for challenging the subpoena — but subpoena recipients have been required to overcome significant procedural hurdles before federal courts even consider the merits of their claims.

By lowering one of those hurdles, the U.S. Supreme Court's April 29 decision in *First Choice Women's Resource Centers v. Davenport* will invite more federal challenges to state subpoenas. But First Choice focuses on only one of the procedural defenses that state regulators most often raise to avoid the merits of federal challenges to their subpoenas: standing and ripeness, Younger abstention and claim preclusion.

Together, these defenses create a dilemma for the subpoena recipient. Sue too soon, and risk dismissal for lack of standing or ripeness. Wait to sue, and run the risk that a federal court will abstain due to pending state proceedings or find the federal litigation barred by a state court judgment.

A subpoena recipient pursuing federal litigation must navigate all these issues and more, and often must do so while defending against a subpoena enforcement action in state court.

This article discusses how First Choice does — and does not — change the playing field.

STANDING AND RIPENESS

First Choice confirms that the recipient of an investigative subpoena from a state regulator may, in some circumstances, satisfy Article III's standing and ripeness requirements to challenge that subpoena in federal court. At least when the plaintiff can show that the pending subpoena chills activity protected by the First Amendment, the plaintiff should not be required to litigate the subpoena's enforceability in state court before seeking relief in federal court.

Before First Choice, federal courts reached different answers to the question of how the recipient of a state subpoena can establish standing and ripeness. Underlying these courts' distinct approaches was a difference of opinion on the significance of whether a subpoena is self-executing — i.e., whether it is enforceable under state law without a court order compelling the recipient's compliance.

In 2016 in *Google Inc. v. Hood*, the U.S. Court of Appeals for the Fifth Circuit had ruled that a challenge to a state attorney general's non-self-executing subpoena is necessarily unripe until a state court has enforced the subpoena.[1] The U.S. Courts of Appeals for the Ninth and D.C. Circuits had rejected that categorical rule, reasoning that even if the non-self-executing nature of a subpoena informs the justiciability analysis, a federal challenge may proceed if the plaintiff can otherwise demonstrate standing and ripeness.[2]

First Choice involved a First Amendment challenge to a subpoena issued by former New Jersey Attorney General Matthew Platkin to a nonprofit organization that provides services to pregnant women but does not offer abortions or abortion referrals. The subpoena sought documents — including donor information — as part of an investigation into whether the organization was misleading donors and clients about its services.

Rather than comply, First Choice responded with a federal lawsuit alleging numerous constitutional violations. Platkin then moved to enforce the subpoena in state court, and First Choice cross-moved to stay or quash the subpoena, including on constitutional grounds.

The case "proceeded in concurrent litigation in both state and federal court" and "traveled up and down both court systems" until the Third Circuit affirmed the dismissal of First Choice's federal complaint on ripeness grounds.[3] In finding the case unripe, the Third Circuit noted that First Choice could litigate — and was litigating — its constitutional claims in state court.

But the court also cited fact-specific considerations, like the parties' ongoing negotiations regarding the subpoena's scope, the narrowness of the request for donor information, and the insufficiency of First Choice's affidavits regarding its alleged injuries.

The Supreme Court unanimously reversed. Reframing the issue as one of standing rather than ripeness, the court identified the crux of the case to be whether the plaintiff had identified an ongoing "injury in fact" stemming from the subpoena itself.

First Choice had met its burden to establish standing, the court ruled, because the subpoena's demands for private donor information discouraged donors from donating to the organization and therefore "injure[d] the group's First Amendment associational rights." The attorney general's arguments that his request for donor information was limited to donations through certain platforms and that he had agreed to a confidentiality order spoke only to "how badly the Attorney General has burdened First Choice's associational rights," not "whether he has burdened those rights at all."

More broadly, the Supreme Court rejected the view that, "as a categorical matter," a non-self-executing subpoena cannot cause the recipient an injury sufficient to support federal standing until it is enforced in state court.

First Choice's approach to standing and ripeness opens the federal courthouse door to some challenges to state

subpoenas. How wide the door is open will be litigated in future cases. Given the opinion's exclusive focus on First Amendment associational rights, it remains to be seen how courts will treat challenges premised on other rights.

Likewise, First Choice left undecided whether the recipient of a non-self-executing subpoena can establish standing based on future injuries attributable to a threatened state lawsuit to enforce the subpoena. The answer to that question will be critical in cases where the subpoena recipient is not a charitable organization resisting a request for donor information.

ABSTENTION

Plaintiffs who can establish standing may still need to overcome other threshold requirements before they can obtain a decision on the merits. As noted in First Choice, for example, "certain abstention doctrines supply narrow exceptions" to the general rule that "federal courts have a virtually unflagging obligation to exercise the jurisdiction given them."

Younger v. Harris, a 1971 U.S. Supreme Court ruling, allows federal courts to abstain — in "exceptional" cases — from exercising their jurisdiction while parallel proceedings unfold in state court.[4]

Outside of criminal prosecutions, however, Younger abstention is available only if the pending state proceeding is a civil enforcement action "akin to a criminal proceeding" or if it involves a state court order uniquely in furtherance of the court's judicial functions, as noted in the Supreme Court's 2013 decision in *Sprint Communications Inc. v. Jacobs*.[5]

A state agency's mere issuance of a subpoena or initiation of subpoena enforcement litigation does not easily fit the criteria for Younger abstention.[6] Nonetheless, federal courts and state regulators do sometimes invoke Younger to avoid the merits of a federal challenge to a state subpoena. And the nod to abstention in First Choice suggests they will continue to do so.

As a result, subpoena recipients should be aware that Younger abstention may become more likely the longer they wait to sue.

For example, in *PDX North Inc v. Commissioner New Jersey Department of Labor and Workforce Development* — another Third Circuit case — the court addressed challenges by two plaintiffs raising the same legal challenges to actions by the same state agency under the same statutory scheme. The court held that Younger abstention was appropriate in the case of one plaintiff — whom a state agency had preliminarily determined was in violation of state law — but not in the case of another plaintiff — whom the agency had merely begun to audit.[7]

CLAIM PRECLUSION

A bigger risk than Younger abstention for federal court challenges to state subpoenas is what the court in First Choice called the "preclusion trap."

The preclusion trap exists because state agencies confronted with a federal court challenge to one of their subpoenas frequently respond with lawsuits in state court to enforce that subpoena. If the regulator's subpoena

enforcement action reaches final judgment before the federal court case, that state court judgment may preclude the subpoena recipient's federal suit.

The U.S. Court of Appeals for the Second Circuit's 2025 decision in VDARE Foundation Inc. v. James demonstrates how a federal litigant challenging a state subpoena can get caught in the preclusion trap.[8]

As in First Choice, the case involved a state attorney general's subpoena to a charitable organization — VDARE, known for its anti-immigration viewpoint — for documents regarding its governance, finances and contractors. Also as in First Choice, VDARE filed a constitutional lawsuit in federal court and New York Attorney General Letitia James responded with a subpoena enforcement action in state court.

After the Supreme Court of the State of New York, County of New York, entered a final judgment for the attorneys general in the subpoena enforcement action, James sought dismissal of the federal lawsuit on res judicata grounds, and the U.S. District Court for the Northern District of New York granted it. While VDARE's appeal to the Second Circuit was pending, it unsuccessfully pursued appeals of the state court judgment and was held in contempt for noncompliance with the state trial court's order to respond to the subpoena.

The Second Circuit affirmed the Northern District of New York's dismissal of VDARE's federal lawsuit as barred by res judicata. Applying New York law, the Second Circuit held that the resolution of the subpoena enforcement action barred the first-filed federal litigation because the state court litigation had resulted in a final judgment on the merits between the same parties and involving the same subject matter (i.e., the enforceability of the attorney general's subpoena).

The Second Circuit also rejected several arguments from VDARE as to why it could not have fully and fairly litigated its federal constitutional claims in the subpoena enforcement action.

First Choice pointed to this preclusion trap as one reason why state subpoena recipients should not be required to wait for state court litigation to play out before they can raise their federal claims in federal court. But the trap remains set.

As long as state regulators can initiate parallel state court litigation when subpoena recipients challenge subpoenas in federal court, the federal lawsuit risks being overtaken — and then precluded — by the state court proceedings. State regulators often will have the inside track in that race due to many state courts' streamlined procedures for actions to enforce agency subpoenas.

And while subpoena recipients can take steps to accelerate the federal proceedings or slow the state proceedings, their relative pace generally will not be fully within the parties' control.

KEY TAKEAWAYS

First Choice will lead to more federal court challenges to state subpoenas, but the procedural defenses that remain available to state regulators will continue to prevent some plaintiffs from obtaining a decision on the merits of their federal claims.

Navigating the obstacles to a merits decision will continue to require careful timing and managing each step in the

parallel federal and state proceedings.

At the same time, First Choice should change how plaintiffs weigh the risks of suing too early versus too late. The likelihood of dismissal on standing or ripeness grounds is now lower, so fewer plaintiffs will try to wait for their federal lawsuit to ripen only to increase the risks of abstention and preclusion.

State regulators, on the other hand, could draw different lessons from the decision. Some may be more inclined to respond to federal litigation with a subpoena enforcement action in state court, now that the federal lawsuit is less likely to be dismissed at the outset. For other regulators, the prospect of defending against more federal lawsuits may accelerate an existing trend toward filing civil enforcement lawsuits without first conducting extensive prelitigation investigations.

How the playing field shifts ultimately will depend on how lower courts implement First Choice and how state regulators and their subpoena targets react to the signals from those decisions.

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[1] Google Inc. v. Hood, 822 F.3d 212, 224?-27 (5th Cir. 2016).

[2] Media Matters for Am. v. Paxton, 138 F.4th 563, 579-83 (D.C. Cir. 2025); Twitter Inc. v. Paxton, 56 F.4th 1170, 1173?-79 & n.3 (9th Cir. 2022).

[3] First Choice Women's Res. Centers Inc. v. Att'y Gen. of N.J., No. 24-3124, 2024 WL 5088105, *1 (3d Cir. Dec. 12, 2024).

[4] Younger v. Harris, 401 U.S. 37 (1971).

[5] Sprint Comms. Inc. v. Jacobs, 571 U.S. 69, 78-79 (2013).

[6] See, e.g., Smith & Wesson Brands Inc. v. Att'y Gen. of N.J., 27 F.4th 886, 890-96 (3d Cir. 2022); Google, 822 F.3d at 222–24.

[7] PDX N. Inc. v. Comm'r of the N.J. Dep't of Lab. and Workforce Dev., 978 F.3d 871 (3d Cir. 2020).

[8] VDARE Foundation Inc. v. James, 162 F.4th 77 (2d Cir. 2025).

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