No. _____

In the Supreme Court of the United States

MICHAEL QUINN SULLIVAN,

Petitioner,

v.

TEXAS ETHICS COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Texas Court of Appeals, Third District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Seventy years ago, this Court in *United States v. Harriss*, 347 U.S. 612, 625 (1954), held that Congress's informational interest in "self-protection" justified federal lobbyist registration requirements. A crevasse has since developed between *Harriss* and this Court's modern First Amendment jurisprudence. Although this Court has subsequently clarified that "political speech must prevail against laws that would suppress it, whether by design or inadvertence," *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), governments nationwide continue to abuse *Harriss* to justify draconian speech and petitioning restrictions not just on professional lobbyists, but on ordinary citizens.

Chapter 305 of the Texas Government Code is a paradigmatic example. It requires ordinary citizens to register, make burdensome disclosures, and pay a substantial fee to speak to government officials about political issues that matter to their families, their communities, and their livelihoods. Failure to register is punishable by massive fines and up to one year of jailtime. Chapter 305 was enforced in this case to impose a $10,000 fine on Petitioner Michael Quinn Sullivan for failure to register and pay the required fee before sending mass emails to legislators about concerns relevant to his job as the leader of a small nonprofit organization.

The question presented is whether—and if so, under what circumstances—the First Amendment permits the government to require ordinary citizens to register and pay a fee to communicate with their government representatives.

PARTIES TO THE PROCEEDING

Petitioner Michael Quinn Sullivan was appellant in the Texas Court of Appeals, Third District.

Respondent Texas Ethics Commission was appellee in the Texas Court of Appeals, Third District.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

Sullivan v. Texas Ethics Commission, No. 23-0080, Texas Supreme Court. Petition for review denied on March 8, 2024. Motion for rehearing denied on August 30, 2024.

Sullivan v. Texas Ethics Commission, No. 03-21-00033-CV, Texas Court of Appeals, Third District. Judgment entered on August 31, 2022. Motion for rehearing denied on December 19, 2022.

Texas Ethics Commission v. Sullivan, No. D-1-GN-17-001878, 250th District Court, Travis County. Notice of interlocutory appeal filed on June 14, 2017. Judgment entered on December 15, 2020. Notice of appeal filed on January 19, 2021.

In re Sullivan, No. 20-0554, Texas Supreme Court. Petition for writ of mandamus denied on July 22, 2020.

In re Sullivan, No. 03-20-00245-CV, Texas Court of Appeals, Third District. Petition for writ of mandamus denied on July 20, 2020.

Sullivan v. Texas Ethics Commission, No. 18-0580, Texas Supreme Court. Petition for review of interlocutory appeal denied on June 14, 2019.

Sullivan v. Texas Ethics Commission, No. 03-17-00392-CV, Texas Court of Appeals, Third District. Judgment of interlocutory appeal entered on May 17, 2018.

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INTRODUCTION

In *United States v. Harriss*, this Court upheld the Federal Regulation of Lobbying Act against First Amendment challenge based on Congress's "vital" interest in legislative "self-protection." 347 U.S. 612, 625-26 (1954). That law, the Court explained, helped prevent "the voice of the people" from being "all too easily … drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* at 625.

Since *Harriss*, this Court has made clear that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Speech "express[ing] … a desire for political change," *Meyer v. Grant*, 486 U.S. 414, 421 (1988), is "a precondition to enlightened self-government and a necessary means to protect it," *Citizens United*, 558 U.S. at 339. For that reason, "[l]aws that burden political speech are 'subject to strict scrutiny.'" *Id.* at 340 (citation omitted).

Despite this Court's recent pronouncements on these foundational First Amendment principles, governments nationwide continue to abuse *Harriss* to justify draconian speech and petitioning restrictions not just on highly compensated professional lobbyists, but on ordinary citizens who merely wish to express their concerns to their elected representatives about the laws that impact their livelihoods, their schools, and their communities. Many States require licenses before allowing their citizens to engage in political speech and petition for redress of grievances. Most

require licensing fees, which can range from $10 to $1,000. And the fines States impose to punish nonregistration can reach into the tens (or potentially hundreds) of thousands. These laws pose a threat to the health of our representative democracy—and in particular to the "poorly financed causes of little people." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 163 (2002).

Chapter 305 of the Texas Government Code typifies these draconian political speech restrictions. It requires anyone who "communicate[s] directly with a member of the legislative or executive branch to influence legislation or administrative action" to register with the State, disclose intrusive details, and pay a $750 licensing fee (or, for nonprofit employees, a $150 fee). Tex. Gov't Code § 305.003(a). That person need neither make any expenditures, nor receive "any compensation for the communication in addition to the[ir] salary for th[eir] regular employment." *Id.* § 305.003(b). If a person fails to satisfy these requirements, the State may impose a civil fine of up to three times the person's compensation and jail them for up to one year. *Id.* §§ 305.031-.032.

Texas applied Chapter 305 here to stifle the political speech, petitioning, and free association of Petitioner Michael Quinn Sullivan, the President and CEO of a small nonprofit organization. As director of that organization, Mr. Sullivan published for voters a "Fiscal Responsibility Index" grading Texas legislators' votes on pending legislation. Before grading a vote, Mr. Sullivan would give notice to all legislators via mass email so that they would not be

surprised when the scores were published. He received no compensation for those communications other than his ordinary salary, and he did not make any expenditures. Two legislators who scored poorly on the Index complained to Respondent the Texas Ethics Commission ("TEC") that Mr. Sullivan had failed to register as a "lobbyist" and pay the necessary fee. The State agreed and fined Mr. Sullivan $10,000. The Texas court of appeals relied on *Harriss* to uphold Chapter 305 against Mr. Sullivan's facial and as-applied First Amendment challenges.

The court of appeals' decision is wrong, and it implicates splits among courts over the meaning of *Harriss*. Courts do not agree on the proper level of scrutiny to apply to "lobbyist" registration laws: strict scrutiny, or something less? Nor do they agree on which government interests are sufficiently important to justify such laws: are informational interests enough, or must such laws be aimed at *quid pro quo* corruption? The result of all this confusion is that States in some parts of the country are able to curtail the freedoms of speech, petition, and assembly by branding ordinary citizens "lobbyists" and threatening them with severe financial penalties.

This Court's review is sorely needed to clarify the circumstances under which the government may require citizens to pay a fee and obtain a license to communicate with their government representatives. Unless and until this Court does so, States can continue—as Texas has done here—to use such requirements to harass or silence those whose speech is disfavored. The Court should grant the petition.

OPINIONS BELOW

The order of the Texas Ethics Commission is not reported. App.49a-61a. The trial court's order is not reported. App.46a-48a. The opinion of the court of appeals is reported at 660 S.W.3d 225. App.4a-45a. The order of the Supreme Court of Texas denying a petition for review is not reported. App.1a-3a. The order of the Supreme Court of Texas denying rehearing is not reported. App.62a-64a.

JURISDICTION

The court of appeals entered judgment on August 31, 2022. App.41a. The Supreme Court of Texas denied a timely petition for review on March 8, 2024, App.1a, and denied a timely motion for rehearing on August 30, 2024, App.62a. On November 19, 2024, Justice Alito granted an extension of the time to file a petition for a writ of certiorari until December 28, 2024. On December 17, 2024, Justice Alito granted an extension of the time to file a petition for a writ of certiorari until January 24, 2025. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides: "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Relevant provisions of Chapter 305 are reprinted in the appendix to this petition. App.65a-95a.

STATEMENT

A. Regulatory Background

1. In 1954, this Court in *United States v. Harriss* upheld a federal lobbyist registration requirement.

Seventy years ago, this Court by a 5-3 vote upheld certain federal lobbyist restrictions under the First Amendment. In *United States v. Harriss*, the petitioners were charged with violating provisions of the Federal Regulation of Lobbying Act requiring a person "'who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation'" to "register with Congress" and report contributions and expenditures made "for the purpose of influencing the passage or defeat of any legislation by Congress." 347 U.S. at 614-15 (citation omitted). The law did not impose any fee for registration.

This Court adopted a narrowing construction of the law to hold that these provisions did not violate the First Amendment. As the Court explained, the law "was designed to help prevent" the "voice of the people" from being "drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* at 625. The Court did not "expect[]" "individual members of Congress … to explore the myriad pressures to which they are regularly subjected." *Id.* So to provide legislators with that information, the law required disclosure of "who is being hired, who is putting up the money, and how much." *Id.* In this way, the Court

reasoned, the law "safeguard[ed] a vital national interest" in legislative "self-protection." *Id.* at 625-26. The Court thus concluded that it did not violate the "freedom[s] to speak, publish, and petition the Government." *Id.* at 625.

Justices Douglas, Jackson, and Black dissented. Justice Douglas was concerned that the Court's decision "can easily ensnare people who have done no more than exercise their constitutional rights of speech, assembly, and press." *Id.* at 628. Allowing "registration requirements [for] the exercise of First Amendment rights" would leave "all who might possibly be covered to act at their peril" and would thus "in practical effect be a deterrent to the exercise of First Amendment rights." *Id.* at 632.

Justice Jackson observed that while the government might have the "power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts," the majority's view would too easily "permit applications which would abridge the right of petition." *Id.* at 636. "[T]o reach the real evils of lobbying without cutting into the constitutional right of petition," he explained, "is a difficult and delicate task for which the Court's action today gives little guidance." *Id.*

States like Texas have now proven that the dissents' fears were well founded.

2. Texas enacted Chapter 305 to require people to register and pay a fee to speak to government officials.

Twenty years after *Harriss*, the Texas Legislature enacted the State's first comprehensive lobbyist registration law. *See* Lobby Control Act, 63d Leg., R.S., ch. 422, 1973 Tex. Gen. Laws 1096. That law has been modified over the years and can now be found in Chapter 305 of the Texas Government Code, titled "Registration of Lobbyists." *See* Tex. Gov't Code § 305.001 *et seq*. Chapter 305 is administered and enforced by the Texas Ethics Commission ("TEC"). The TEC also enforces the State's Judicial Campaign Fairness Act. Tex. *See* Elec. Code § 253.151 *et seq*.

Chapter 305 generally requires people who "communicate directly with a member of the legislative or executive branch to influence legislation or administrative action" to register with the State. Tex. Gov't Code § 305.003(a). This includes communications made "by telephone, telegraph, letter, facsimile, electronic mail, or other electronic means." *Id.* § 305.002(2).

Everyone required to register "shall file a written registration with the [TEC]" each year. *Id.* § 305.005(a).[1] If not made before a communication, registration must be made within five days after. *Id.* § 305.005(e). That registration must disclose vast information, including:

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[1] Those who must register generally must also file monthly expenditure reports. Tex. Gov't Code § 305.006.

1. "the registrant's full name and address";
2. "the registrant's normal business, business phone number, and business address";
3. "the full name and address of each person" who "reimburses, retains, or employs the registrant to communicate" and "on whose behalf the registrant has communicated";
4. "the subject matter of the legislation or of the administrative action that is the subject of" the communication;
5. information about "each person employed or retained by the registrant for the purpose of assisting in direct communication";
6. "the amount of compensation or reimbursement paid by each person who reimburses, retains, or employs the registrant" for the communication;
7. "a statement of whether the registrant is or is required to be registered as a foreign agent under the Foreign Agents Registration Act of 1938"; and
8. "the full name and address of each person who compensates or reimburses the registrant … for services, including political consulting services … from … a political contribution."

Id. § 305.005(f), (j), (l), (m).

If the communication is made "on behalf of the members of a group or organization, including a business, trade, or consumer interest association," the registrant must disclose:

1. "the number of members";
2. "the name of each person in the group or organization who determines [its policy] relating to influencing legislative or administrative action";
3. "a full description of the methods by which the registrant develops and makes decisions about positions on policy"; and
4. "a list of those persons making a grant or contribution … that exceeds $250 per year."

Id. § 305.005(h).

Likewise, if the communication is made "on behalf of a corporation the shares of which are not publicly traded," the registrant must disclose:

1. "the number of shareholders";
2. "the name and address of each officer or member of the board of directors"; and
3. "the name of each person owning 10 percent or more shares."

Id. § 305.005(i).

Those who are required to register also "shall submit a registration fee" each year. *Id.* § 305.005(a). That fee is $150 for those who are employed by nonprofits and $750 generally for those who are not. *Id.* § 305.005(c).

Chapter 305's registration and fee requirements may be triggered by satisfying either a compensation threshold or an expenditure threshold. *Id.* § 305.003(a). During the period relevant here, if a person spent more than $500 per calendar quarter in

communicating with legislative or executive officials, then he was required to register and pay the fee. *Id.* § 305.003(a)(1); 1 Tex. Admin. Code § 34.41 (2011). Similarly, if a person made more than $1,000 per calendar quarter to communicate with legislative or executive officials, then he was required to register and pay the fee. *See* Tex. Gov't Code § 305.003(a)(2); 1 Tex. Admin. Code § 34.43 (2011). This compensation threshold can be satisfied based solely on a person's "regular employment" and does not require "any compensation for the communication in addition to the salary for that regular employment." *See* Tex. Gov't Code § 305.003(b).[2]

Chapter 305 also has a time threshold. During the period relevant here, a person was not required to register and pay the fee based on compensation unless he spent at least 5% of his compensated time "engaging in lobby activity." 1 Tex. Admin. Code § 34.43(b) (2011).[3] This includes time spent "preparing to communicate" to legislative or executive officials, including by "participation in strategy sessions," "review and analysis of legislation," "research," and "communication with the employer/client." *Id.* § 34.3. Accordingly, even a single communication following sufficient "research," "review … of legislation," or

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[2] The expenditure and compensation thresholds are currently $970 per calendar quarter and $1,930 per calendar quarter, respectively. 1 Tex. Admin. Code § 18.31(a).

[3] The time threshold is currently 26 hours by statute, Tex. Gov't Code § 305.003(b-3), and 40 hours by regulation, 1 Tex. Admin. Code § 34.43(b).

"communication with the employer" can trigger Chapter 305's registration and fee requirements. *Id.*

Those who register as "lobbyists" under Chapter 305 are granted certain special privileges in terms of giving gifts to government officials. A person who is not registered under Chapter 305 cannot spend more than $50 on a gift to a public servant. Tex. Penal Code §§ 36.09, .10(a)(6). A registered "lobbyist," meanwhile, can spend up to $500 per year on one or more gifts to a state officer or employee. Tex. Gov't Code § 305.024(a)(2)(C). As the TEC has explained, "a registered lobbyist may actually be able to give a more valuable gift to a state officer or employee than a person who is not registered as a lobbyist."[4]

Chapter 305 contains a long list of gerrymandered exceptions to its registration and fee requirements. *Id.* § 305.004(1)-(7). One notable section is Chapter 305's media exception, which encompasses anyone who "owns, publishes, or is employed by a newspaper, any other regularly published periodical, a radio station, a television station, a wire service, or any other bona fide news medium" that "disseminates news, letters to the editors, editorial or other comment, or paid advertisements that directly or indirectly oppose or promote legislation or administrative action," so long as "the person does not engage in further or other activities that require registration under this chapter and does not represent another person in connection

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[4] TEC, *Lobbying in Texas: A Guide to the Texas Law* 17 (Jan. 1, 2024), https://perma.cc/3ZP8-F6XZ.

with influencing legislation or administrative action." *Id.* § 305.004(1).

Violations of Chapter 305 can carry steep penalties. Anyone who fails to register "shall pay a civil penalty" of up to "three times the compensation, reimbursement, or expenditure" at issue. *Id.* § 305.032. And an "intentional[] or knowing[]" failure to register and pay the required fee is a "Class A misdemeanor," *id.* § 305.031(a), punishable by a jail term of up to one year, a fine not to exceed $4,000, or both, Tex. Penal Code § 12.21.

* * *

All told, Chapter 305 requires registration, burdensome disclosures, and a fee for just about anybody who has a job and wishes to speak to their representatives about issues important to their employment. Those people could include, for example:

- A pastor who wishes to call his representative to urge action on a cause that is important to his congregation.
- A dairy farmer who writes a letter to the Department of Agriculture opposing a pending regulation that he believes would harm his farming business.
- The owner of a small auto body shop who messages his representative on Facebook to urge adoption of pending legislation that he believes would help his business.
- A journalist who, in the course of interviewing a legislator about a pending bill for an online magazine, remarks that the bill is a good idea.

If any of these people does not register and pay the required fee, then his political speech could leave him with massive fines and up to one year in jail.

B. Factual Background

Michael Quinn Sullivan was the President and CEO of Empower Texans, a small nonprofit organization focused on fiscal responsibility. App.6a. As an officer and director of Empower Texans, Mr. Sullivan sought to provide voters with information about how their representatives voted. App.52a.

As relevant here, Empower Texans published a legislative rating called the "Fiscal Responsibility Index." The Index sought to inform voters by grading legislators' votes on pending legislation based on considerations related to taxes and spending. App.52a. So that legislators knew which votes the Index would include—and would not be surprised after the fact—Mr. Sullivan sent a mass email to legislators before each vote informing them both that the vote would be included in the Index and how he would be scoring it. App.52a. Mr. Sullivan would send these mass emails to a list that included both legislators and the private individuals who subscribed to Empower Texans' email list. App.33a-34a. They included an "unsubscribe" option to stop them at any time. *See, e.g.*, CR237.[5] Mr. Sullivan did not make any expenditures to legislative officials in connection with the Index or otherwise.

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[5] Citations to "CR" are to the Clerk's Record in the court of appeals.

C. Procedural Background

In 2012, two legislators who had scored poorly on the Index filed complaints with the TEC alleging that Mr. Sullivan had violated Chapter 305 by failing to register as a "lobbyist" in 2010 and 2011. App.6a.[6]

The TEC ultimately agreed. App.60a-61a. In so doing, the TEC rejected Mr. Sullivan's argument that Chapter 305 violated the First Amendment both facially and as applied to him. App.56a. The TEC "presumed" Chapter 305 to be constitutional and stated that it "cannot and will not unilaterally refuse to enforce the lobbyist registration statute." App.56a. The TEC held that Mr. Sullivan had a duty to register and pay a fee under Chapter 305 based primarily on his mass emails. App.60a-61a. It imposed "the maximum allowable civil penalty of $10,000 ($5,000 for each violation)." App.60a.

Mr. Sullivan appealed the TEC's orders directly to a state district court. Mr. Sullivan moved for summary judgment, again arguing that Chapter 305 violated the First Amendment both facially and as applied to him. App.135a-144a. The trial court disagreed, denying summary judgment to Mr. Sullivan and granting summary judgment to the TEC. App.46a-48a.

Mr. Sullivan appealed to the court of appeals. The court of appeals affirmed the district court's First

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[6] *2011 Fiscal Index*, Texans for Fiscal Responsibility, https://perma.cc/F52U-853F (Rep. Keffer scored 59 and Rep. Truitt scored 69).

Amendment determination without oral argument. App.11a-20a.

The court of appeals noted that this Court "upheld federal lobbyist-registration laws" in *Harriss*. App.11a. According to the court, under *Harriss*, lobbyist "disclosure statutes" are subject to "exacting scrutiny" rather than "strict scrutiny." App.12a & n.3. The court applied what it deemed "intermediate [i.e., exacting] scrutiny." App.13a (alteration in original) (citation omitted). It explained that such scrutiny is satisfied so long as the "substantial governmental interest" at issue "would be achieved less effectively without the restriction." App.13a (quoting *Service Emp. Int'l Union, Local 5 v. City of Houston* ("*SEIU*"), 595 F.3d 588, 596 (5th Cir. 2010)).

The court of appeals held that Chapter 305 satisfies "intermediate … scrutiny." App.13a (citation omitted). According to the court, Texas has a "substantial governmental interest[]" in "promot[ing] transparency and integrity in the legislative process," App.15a-16a, including by "prevent[ing]" the "voice of the people" from being "too easily … drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal," App.15a (quoting *Harriss*, 347 U.S. at 625). The court further concluded that Chapter 305 was an "effective" means of achieving that end. App.17a. The court stated that the registration requirement did not "prohibit[] any speech," and that the fee was "both nominal … and significantly less than the compensation or reimbursement threshold." App.16a (citation omitted). The court of appeals thus

determined that Mr. Sullivan was liable for his failure to register as a lobbyist under Chapter 305. App.11a-20a.[7]

The court of appeals reversed, however, the district court's assessment of a $10,000 civil penalty and remanded the case for a jury trial on the amount of the penalty. App.41a. As the court explained, "the issue of the amount of penalty" is a "material fact issue" that should have been submitted "to a jury per Sullivan's request" and not assessed by the district court "as a matter of law." App.37a-38a.

Mr. Sullivan filed a petition for review in the Texas Supreme Court, once again arguing that Chapter 305 violated the First Amendment both facially and as applied. App.124a-133a. Lacking a full complement of Justices, the Texas Supreme Court denied review, App.1a-3a, and then denied rehearing, App.62a-64a.

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[7] The court of appeals disregarded the media exception because it "operates merely as a safe harbor for specified individuals associated with a bona fide news medium … *but only if* those individuals do not *also* engage in activities identified in Chapter 305 as requiring registration." App.19a.

REASONS FOR GRANTING THE PETITION

I. A Crevasse Has Developed Between *Harriss* and This Court's Modern First Amendment Precedents.

The court of appeals reflexively followed *Harriss* as the seminal case on "lobbyist-registration laws," notwithstanding that this case embodies the exact concerns the *Harriss* dissents presciently raised. App.11a. The First Amendment landscape, however, looks very different today than it did in 1954. In the seventy years since *Harriss*, this Court has developed a robust body of First Amendment precedents making clear that "political speech"—including speech aimed at government officials advocating for political change—"must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340. This Court's review is sorely needed to bring the court of appeals' decision—and the law on lobbyist registration requirements more broadly—into step with modern First Amendment jurisprudence and the proper understandings of the rights to speak, petition, and freely associate.

As this Court has reiterated time and again, "political speech … is central to the meaning and purpose of the First Amendment" and "is beyond all doubt protected." *Id.* at 329, 336. Such speech encompasses "[d]iscussion of public issues and debate on the qualifications of candidates," *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011), as well as "the expression of a desire for

political change and a discussion of the merits of the proposed change," *Meyer*, 486 U.S. at 421.

Political speech is "indispensable to decisionmaking in a democracy." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978). It "is the means to hold officials accountable to the people." *Citizens United*, 558 U.S. at 339. And it facilitates "the bringing about of political and social changes desired by the people." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (citation omitted); *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government." (citation omitted)).

The First Amendment protects this valuable political speech multiple times over. Laws hampering political speech pose serious problems not just under the Free Speech Clause, *see, e.g.*, *Citizens United*, 558 U.S. at 337, but also under the Petition Clause, *see, e.g.*, *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011) ("The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives."), and the Assembly Clause, *see, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (noting "the close nexus between the freedoms of speech and assembly").

For these reasons, "the First Amendment requires [courts] to err on the side of protecting political speech rather than suppressing it." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007). This Court has repeatedly instructed that "[l]aws that burden political speech are 'subject to strict scrutiny.'"

Citizens United, 558 U.S. at 340 (citation omitted); *see Bennett*, 564 U.S. at 734; *Wis. Right to Life*, 551 U.S. at 464. That applies both to "heavy-handed frontal attack[s]" and to "more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Put simply, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340.

A simple hypothetical illustrates the crevasse that has emerged between *Harriss* and this Court's more recent precedents: Suppose a citizen writes and self-publishes a book on a legislative issue, such as abolishing the death penalty. If he wishes to distribute that book for free on the street corner, the First Amendment guarantees his right to do so. *See id.* at 336-37. But suppose the street corner is outside the Texas Capitol, and some of the passersby are legislators (or legislative employees). According to the decision below, under *Harriss*, the citizen's right to distribute that book suddenly evaporates absent a special license granted by the State. That cannot be consistent with the Constitution.

II. Courts Are Divided on the Meaning of *Harriss* and How to Assess the Constitutionality of Lobbyist Registration Laws in Light of This Court's More Recent Precedents.

Justice Jackson complained that *Harriss* gave "little guidance" at the time it was decided. 347 U.S. at 636 (Jackson, J., dissenting). It gives even less guidance today. In light of the aforementioned

crevasse that has developed over the decades, lower courts disagree on how to read and apply *Harriss* when assessing the constitutionality of laws that purport to regulate "lobbyists." Those courts are split on multiple issues: What level of scrutiny applies? What government interests are sufficient? This confusion has persisted for decades and is unlikely to resolve itself absent this Court's intervention.

A. Courts are split on the proper level of constitutional scrutiny to apply.

Harriss was decided "before the full development of the modern tiers of scrutiny." *Calzone v. Summers*, 942 F.3d 415, 427 (8th Cir. 2019) (en banc) (Grasz, J., concurring); *see Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 14 (D.C. Cir. 2009) ("The Supreme Court decided *Harriss* before it adopted the current language of levels of scrutiny."); *Fla. League of Pro. Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) ("In *Harriss,* the Supreme Court was not explicit about the level of constitutional scrutiny applied."). And courts disagree about how to square *Harriss* with those modern tiers of scrutiny.

1. The court of appeals here applied intermediate scrutiny to Texas's lobbying registration and fee requirements. *See* App.12a n.3. Although the court purported to apply "exacting scrutiny," App.12a, it was clear that it was actually applying "*intermediate* [i.e., exacting] scrutiny." App.13a (alteration in original) (citation omitted) (emphasis added).

The court relied on cases applying intermediate scrutiny to define the standard it was applying. In

SEIU, the Fifth Circuit explained that, "[i]n the context of intermediate scrutiny, narrow tailoring does not require that the least restrictive means be used." 595 F.3d at 596. Likewise, in *Ward v. Rock Against Racism*—a case the Fifth Circuit cited in *SEIU*, 595 F.3d at 596—the Supreme Court explained that intermediate scrutiny is satisfied if a law "promotes a substantial government interest that would be achieved less effectively absent the regulation." 491 U.S. 781, 798 (1989) (citation omitted).

The court of appeals proceeded to hold that Chapter 305 satisfied intermediate scrutiny. Per the court, Chapter 305 "advances substantial governmental interests" in "promot[ing] transparency and integrity in the legislative process." App.15a-16a. And means other than Chapter 305 would be "less effective at achieving" those interests. App.17a.

2. The Eighth Circuit, meanwhile, has "repeatedly applied strict scrutiny when reviewing lobbying disclosure statutes." *Calzone*, 942 F.3d at 427 (Grasz, J., concurring); *see Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005) ("Both the Supreme Court and this court have upheld lobbyist-disclosure statutes based on the government's 'compelling' interest in requiring lobbyists to register and report their activities, and avoiding even the appearance of corruption.").

In *Minnesota State Ethical Practices Board v. National Rifle Association of America*, the Eighth Circuit applied strict scrutiny to uphold a law requiring "lobbyists" who spent a certain amount of

money to "file registration forms and make regular reports of their lobbying activities." 761 F.2d 509, 510-11 (8th Cir. 1985) (per curiam). It explained that, in the lobbying context, "laws which inhibit the exercise of first amendment rights are unconstitutional unless they serve a 'compelling' state interest." *Id.* at 511. And it determined that the lobbyist registration law at issue served a "compelling interest in requiring lobbyists to register their activities." *Id.* at 512 (citing *Harriss*, 347 U.S. at 625-26).

This case would have come out differently in the Eighth Circuit. As explained below, Chapter 305 is not narrowly tailored to serve a compelling state interest, so it would fail strict scrutiny. *See infra* pp.35-38.

3. The D.C. and Eleventh Circuits have both noted this "debate over the appropriate test to apply" to lobbyist registration laws. *Taylor,* 582 F.3d at 11; *see Meggs*, 87 F.3d at 460. But both skirted the issue by holding that the lobbyist registration law at issue satisfied strict scrutiny in any event. *See Taylor,* 582 F.3d at 11 ("the debate over the appropriate test to apply … makes no difference to our disposition"); *Meggs*, 87 F.3d at 461 ("the interests of the state of Florida are compelling"). This debate is entrenched, widely recognized, and unlikely to resolve itself absent this Court's guidance.

B. Courts disagree on which government interests are sufficient.

Harriss has also spawned confusion over which government interests are sufficient to justify lobbyist registration laws.

1. Some courts have held that informational interests can justify lobbyist registration laws. The court of appeals here, for instance, justified Chapter 305 as furthering a purported interest in "transparency and integrity in the legislative process." App.16a.

The D.C. Circuit in *Taylor* likewise upheld a lobbyist registration law based on the government's "compelling interest in providing the public and its elected representatives with information" regarding "'who is being hired, who is putting up the money, and how much' they are spending to influence public officials." 582 F.3d at 15 (quoting *Harriss*, 347 U.S. at 625). This "informational interest that Congress and the public have in knowing who is lobbying," the court explained, was "sufficient to survive strict scrutiny." *Id.* at 16 n.11.

The Eleventh Circuit, too, has upheld a lobbyist registration law based on "the correlative interests of voters (in appraising the integrity and performance of officeholders and candidates, in view of the pressures they face) and legislators (in 'self-protection' in the face of coordinated pressure campaigns)." *Meggs*, 87 F.3d at 460. As that court explained, these "interests … are compelling." *Id.* at 461.

Some state supreme courts since *Harriss* have credited similar informational interests in upholding lobbyist registration statutes. *See Kimbell v. Hooper*, 164 Vt. 80, 87 (1995) (interest in "[p]roperly evaluating the governmental process, and the influence lobbyists bring to bear upon it"); *Fair Pol. Pracs. Com. v. Super. Ct.*, 25 Cal. 3d 33, 47 (1979)

("interest in determining the source of voices seeking to influence legislation"); *Fritz v. Gorton*, 83 Wash. 2d 275, 309 (1974) (interest in "fostering openness in … government").

2. The Eighth Circuit, however, explicitly held that informational interests are not sufficient to require lobbyist registration. In *Calzone*, the en banc Eighth Circuit held that "legislators['] need to know" and "the public['s] … right to know who is speaking" are "not 'sufficiently important' to justify" a registration requirement. 942 F.3d at 424-25. As the Eighth Circuit explained, "speakers ordinarily have the right to keep their identities private." *Id.* at 425. And that "principle applies with particular force" when "'core political speech' is at issue." *Id.* (citation omitted). Neither a "'simple interest in providing voters with additional relevant information'" nor "legislative curiosity" can justify forced "disclosure of information that legislators can presumably find out on their own." *Id.* (citation omitted).

Once again, this case would have come out differently in the Eighth Circuit. The only government interest identified was an interest in "transparency and integrity in the legislative process," App.16a, which the Eighth Circuit in *Calzone* held insufficient to justify curtailment of political speech.

The court of appeals here was wrong to distinguish *Calzone*. The Eighth Circuit did not broadly "acknowledge[] the legitimate governmental interest of the 'specter' of corruption or its appearance." App.14a. Rather, it recognized a very narrow interest in "target[ing] only a specific type of

corruption—'*quid pro quo*' corruption." *Calzone*, 942 F.3d at 424 (citation omitted). Nor does the fact that the lobbyist registration law in *Calzone* "include[d] persons who neither receive[d] any compensation nor ma[d]e any expenditures in connection with their lobbying" render that case inapposite. App.14a. Chapter 305 includes people like Mr. Sullivan who receive no compensation beyond their ordinary salary and make no expenditures. In these circumstances, as in *Calzone*, there "clearly is no 'quid' because [the person] does not spend or receive money, nor offer anything of value to legislators." *Calzone*, 942 F.3d at 424.

* * *

All told, *Harriss* continues to cause significant confusion among courts across the country. Unless and until *Harriss* is clarified, States—as Texas has here—can exploit that confusion to stifle political speech by ordinary constituents in the name of regulating "lobbying." "Allowing states to sidestep strict scrutiny" by asserting that a law regulates "lobbying" would "risk[] transforming First Amendment jurisprudence into a legislative labeling exercise." *Missourians for Fiscal Accountability v. Klahr*, 892 F.3d 944, 949 (8th Cir. 2018) (citation omitted). Only this Court's guidance can prevent that costly gamesmanship.

III. This Issue Is Important to Our Democracy, and This Case Is an Ideal Vehicle for Addressing It.

A. The resolute protection of political speech is an exceptionally important issue. *See Wis. Right to*

Life, 551 U.S. at 503 (Scalia, J., concurring in part and concurring in the judgment) ("It is perhaps our most important constitutional task to ensure freedom of political speech."). As noted, speech "expressi[ng] … a desire for political change" and "discussi[ng] … the merits of the proposed change," *Meyer*, 486 U.S. at 421, is "an essential mechanism of democracy," *Citizens United*, 558 U.S. at 339; *see supra* pp.17-19. When that speech is curtailed, our representative democracy cannot function as the Framers designed it to.

But speech advocating for (or against) political change is exactly what Chapter 305 regulates. It is triggered by "communicat[ions] directly with a member of the legislative or executive branch to influence legislation or administrative action." Tex. Gov't Code § 305.003(a)(2). Chapter 305 thus imposes registration and fee requirements on ordinary constituents for critical political speech that would "hold officials accountable to the people." *Citizens United*, 558 U.S. at 339. It makes government less "responsive to the will of the people" and threatens "the security of the Republic." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Chapter 305 is especially pernicious because it targets the political speech of everyday citizens—not just professional lobbyists. Restricting the political speech of ordinary citizens does not help the legislature "protect[]" itself, *Harriss*, 347 U.S. at 625, nor does it "promote[] transparency," App.16a. Rather, it operates to obstruct constituents from sharing their wants, needs, and concerns with their representatives.

Whereas some with deeper pockets may find other ways to make their views known to government officials, direct communication is an indispensable tool for ordinary citizens. The "poorly financed causes of little people," *Watchtower Bible*, 536 U.S. at 163, are hurt the most by registration and fee requirements like Chapter 305's. Review is especially important to ensure that these interests are not silenced.

B. This issue has nationwide importance, as regulations of "lobbying" are on the books in all fifty States and the District of Columbia—as well as in many localities.[8] These regulations, however, differ widely in their particulars.

Twelve States expressly exempt those who are not compensated for lobbying or whose lobbying activities are merely incidental to their employment from any registration requirements.[9] The compensation thresholds for state lobbying regulations range from *any* compensation (Iowa and Tennessee) to $5,000 (New York).[10] And the expenditure thresholds range from $50 (Missouri) to $5,000 (New York).[11] Eight

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[8] *See, e.g.*, City of Miami Code ch. 2, art. VI; Dall. City Code ch. 12A, art. V; L.A. Mun. Code ch. IV, art. 8.

[9] Ala. Code § 36-25-1; Ariz. Rev. Stat. Ann. § 41-1231; Colo. Rev. Stat. § 24-6-303; Fla. Stat. § 11.045; Ga. Code Ann. § 21-5-70(5); Idaho Code § 67-6618; La. Stat. Ann. § 24:51; Me. Stat. tit. 3, § 312-A; Mont. Code Ann. § 5-7-102; Neb. Rev. Stat. § 49-1434; 65 Pa. Cons. Stat. § 13A06; Tenn. Code Ann. § 3-6-301.

[10] Iowa Code § 68B.2; N.Y. Legis. Law § 1-e; Tenn. Code Ann. § 3-6-301.

[11] Mo. Rev. Stat. § 105.470; N.Y. Legis. Law § 1-e.

States (like Congress) do not require a registration fee.[12] The ones that do have fees ranging from $10 (Idaho, Missouri, and Rhode Island) to $1,000 (Massachusetts).[13] Noncompliance penalties are also highly variable. Twenty States do not impose criminal penalties for violations.[14] And the civil fines imposed range from $50 (North Dakota) to $10,000 (Georgia, Vermont, Illinois, Connecticut, and Washington) to three times the amount of compensation at issue (Texas).[15]

Against this backdrop, Chapter 305 presents the perfect opportunity to pronounce principles that govern States' abilities to require a license to engage

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[12] Ark. Code Ann. § 21-8-601; Del. Code Ann. tit. 29, § 5832; Ga. Code Ann. § 21-5-71(f); Haw. Rev. Stat. § 97-2; Iowa Code § 68B.36; Mich. Comp. Laws § 4.417; Minn. Stat. § 10A.03; Or. Rev. Stat. § 171.740; *see* 2 U.S.C. § 1603.

[13] Idaho Code § 67-6617; Mass. Gen. Laws ch. 3, § 41; Mo. Ethics Comm'n, *About Lobbyists*, https://perma.cc/7TA5-KC9Q; R.I. Dep't of State, *Lobbying in Rhode Island*, https://perma.cc/BF94-MQCL.

[14] Ark. Code Ann. § 21-8-607; Cal. Gov't Code § 86100 *et seq.*; Fla. Stat. § 11.045; Ga. Code Ann. § 21-5-71(f)(2)(B)-(C); Haw. Rev. Stat. § 97-7; 25 Ill. Comp. Stat. 170/10; Iowa Code § 68B.32D; Kan. Stat. Ann. § 46-280; Ky. Rev. Stat. Ann. § 6.807; La. Stat. Ann. § 24:58; Me. Stat. tit. 3, § 319; Minn. Stat. § 10A.03; Mont. Code Ann. § 5-7-305; Neb. Rev. Stat. § 49-1480; N.M. Stat. Ann. § 2-11-9; Ohio Rev. Code Ann. § 101.72; Or. Rev. Stat. § 171.785; Utah Code Ann. § 36-11-401; Vt. Stat. Ann. tit. 2, § 263; Wis. Stat. § 13.69.

[15] Conn. Gen. Stat. § 1-99; Ga. Code Ann. § 21-5-71; 25 Ill. Comp. Stat. 170/10; N.D. Cent. Code § 54-05.1-03; Tex. Gov't Code § 305.032; Vt. Stat. Ann. tit. 2, § 268; Wash. Rev. Code § 42.17A.755.

in political speech. Texas does not expressly exempt those who receive no compensation or whose lobbying activities are incidental to their employment from its registration requirements. *See* Tex. Gov't Code § 305.003(b). The $750 fee it requires is on the high end. *See id.* § 305.005(c). And it allows for criminal penalties, as well as massive civil penalties of up to three times an accused person's salary. *See id.* §§ 305.031-.032.

The time has come for this Court to clarify the circumstances under which a State may require an ordinary citizen to obtain a license to speak with his government representatives. Unless and until those rules are set, States will continue to undermine the democratic process through abusive political speech restrictions dressed up as "lobbying" laws that serve primarily to silence legislators' own critics.

C. This case is an ideal vehicle to address under what circumstances the First Amendment permits the government to require citizens to obtain a speech license, under the label of "lobbying," to speak to government officials and elected representatives.

This Court has on many occasions granted certiorari to reverse decisions of the Texas courts of appeals—including in First Amendment cases. *See, e.g.*, *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (reversing Texas court of appeals on First Amendment grounds); *see also Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580 (2022) (reversing Texas court of appeals); *Water Splash, Inc. v. Menon*, 581 U.S. 271 (2017) (same).

And the facts of this case would allow the Court to cleanly address the question presented. As noted, Chapter 305 falls on the more onerous end of the spectrum of similar state regulations. *See supra* pp.28-29. And Mr. Sullivan brought both facial and as-applied challenges to Chapter 305 in his defense against enforcement of the law against him. App.11a-20a. This case thus entails no need to "'speculat[e]' about the law's coverage and its future enforcement." *Moody v. NetChoice LLC*, 603 U.S. 707, 723 (2024) (citation omitted). The TEC is *already* enforcing Chapter 305 against Mr. Sullivan. *See supra* pp.14-16.

The nature of the TEC's enforcement brings the constitutional issues to the fore. Mr. Sullivan was unquestionably engaged in core political speech. He communicated on his own behalf with legislators for the purpose of producing educational content for voters. *See supra* p.13. When it comes to Mr. Sullivan, registration can serve no interest in preventing *quid pro quo* corruption because he made no expenditures in connection with his political speech and received no compensation beyond his ordinary salary. *See supra* p.13.

Nor can registration serve any purported informational or transparency interest, as Mr. Sullivan already disclosed in his communications nearly all of the information required to be disclosed under Chapter 305. Mr. Sullivan's mass emails contained his identity, Tex. Gov't Code § 305.005(f)(1); his contact information, *id.* § 305.005(f)(1)-(2); his employer, *id.* § 305.005(f)(3); and the subject matter of his communications, *id.* § 305.005(f)(4). *See, e.g.*,

CR237. The only information the emails lacked was his salary as CEO of Empower Texans, *id.* § 305.005(f)(6), which was already publicly available on Empower Texans' Form 990. CR2343-2391. Chapter 305 would therefore not have solicited any useful information. Instead, it was leveraged by legislators who disliked Mr. Sullivan's speech to penalize him for scrutinizing their voting records. *See supra* p.14.

IV. The Decision Below Is Wrong.

The court of appeals here upheld Chapter 305 under "intermediate … scrutiny." App.13a. That was error under this Court's modern First Amendment precedents.

A. The court of appeals erred in upholding Chapter 305 under "intermediate" scrutiny.

1. Chapter 305 regulates core political speech. It imposes onerous requirements—and penalties for failure to satisfy those requirements—on anyone who "communicate[s] directly with a member of the legislative or executive branch to influence legislation or administrative action." Tex. Gov't Code § 305.003(a)(2). It is thus tailor-made to regulate "the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer*, 486 U.S. at 421.

Chapter 305 burdens this core political speech in two ways the First Amendment's guarantees of free speech, petition, and assembly do not tolerate.

First, Chapter 305 requires registration with the government. As this Court has recognized, "a law requiring a permit to engage in [political] speech constitutes a dramatic departure from our national heritage and constitutional tradition." *Watchtower Bible*, 536 U.S. at 166; *see Thomas v. Collins*, 323 U.S. 516, 539 (1945) ("[A] requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly."). Such registration requirements "make[] impossible the *free and unhampered*" dissemination of speech. *Watchtower Bible*, 536 U.S. at 162 (citation omitted).

In this way, Chapter 305 calls to mind the sort of "governmental restraint[]" the First Amendment was "designed and intended to remove … from the arena of public discussion." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (citation omitted). At the Founding, "[t]he liberty of the press" was understood to "consist[] in laying no *previous* restraints upon publications." 4 William Blackstone, *Commentaries* *151. Such restraints had proliferated under the Crown, and they had the effect of "subject[ing] all freedom of sentiment to the prejudices of one man." *Id.* at *152. The Framers crafted the First Amendment to avoid such evils.

Second, unlike the federal law in *Harriss*, Chapter 305 requires payment of a fee to communicate with government officials. Putting a price tag on speech naturally operates to stifle that speech. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943) ("A license tax applied to activities guaranteed by the First Amendment would have [a] destructive effect.").

Taxes on free speech were another concern of the Framers. Prior to the Founding, the Crown had imposed "newspaper stamp tax[es]" as well as "tax[es] on advertisements." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 247 (1936). The Massachusetts Legislature adopted similar taxes prior to the Constitution, which were met with "violent opposition." *Id.* at 248. The "controlling aim" of these taxes was to prevent "the acquisition of knowledge by the people in respect of their governmental affairs." *Id.* at 247. And they had the intended "effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses." *Id.* at 246.

The combined effect of Chapter 305's burdens is to stifle political speech, petitioning, and association. A $750 fee may not be much for a professional lobbyist, but for an ordinary citizen deciding whether to make his first trip to the Capitol, it can be prohibitive. And Chapter 305's "prolix laws" leave those ordinary citizens to "'guess at [their] meaning.'" *Citizens United*, 558 U.S. at 324 (citation omitted). Lest they subject themselves to massive fines or jailtime—or protracted enforcement proceedings—ordinary people who could possibly fall within Section 305's broad scope will instead opt to forgo their political speech altogether. That includes the pastor advocating for the interests of his congregation, as well as the small business owner seeking to protect his business. *See supra* p.12.

2. Strict scrutiny applies for the additional reason that Chapter 305 is content based. Chapter

305's registration and fee requirements are triggered by communications meant "to influence legislation or administrative action." Tex. Gov't Code § 305.003(a)(2). This distinction based on the "function or purpose" of speech is "facial[ly]" content based. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 74 (2022) (explaining that a distinction for speech "designed to influence the outcome of an election" is content based (citation omitted)).

3. The court of appeals declined to apply strict scrutiny because it deemed Chapter 305 a "disclosure statute[]." App.12a. And this Court has previously applied "exacting scrutiny" to laws that "compel[]" certain "disclosure[s]." *Ams. for Prosperity Found. v. Bonta* ("*AFP*"), 594 U.S. 595, 607-08 (2021); *see Citizens United*, 558 U.S. at 366. The court of appeals was wrong to rely on these precedents for two reasons.

First, the court of appeals did not apply "exacting scrutiny" as this Court has defined it. *AFP*, 594 U.S. at 607-08. Instead, it applied "intermediate … scrutiny." App.13a (citation omitted). These are distinct standards. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (distinguishing intermediate and exacting scrutiny). And exacting scrutiny requires a law to be "narrowly tailored to the government's asserted interest" in a way intermediate scrutiny does not. *AFP*, 594 U.S. at 608; *see Ward*, 491 U.S. at 799 (intermediate scrutiny requires only that government's interest "would be achieved less effectively absent the regulation" (citation omitted)).

Second, Chapter 305 is a far cry from the sort of "disclaimer and disclosure provisions" this Court has analyzed under exacting scrutiny. *Citizens United*, 558 U.S. at 366. The provisions in *Citizens United* required a disclaimer on certain advertisements and the filing of a statement with the FEC disclosing past expenditures. *Id.* The provisions in *AFP* required the disclosure of the "identities of … major donors." 594 U.S. at 601. Neither of those laws required government registration nor payment of any fee to speak.

Chapter 305 is fundamentally different. It prohibits ordinary people from talking to their representatives unless they have registered with the government and paid a fee. Chapter 305 operates effectively as a licensing scheme that "prevent[s] [people] from speaking." *Citizens United*, 558 U.S. at 366 (citation omitted). So strict scrutiny must apply.

B. Chapter 305 cannot satisfy strict scrutiny.

Strict scrutiny requires that a law (1) "further[] a compelling interest" and (2) be "narrowly tailored to achieve that interest." *Id.* at 340 (citation omitted). Chapter 305 falters on both fronts.

1. Chapter 305 does not serve any compelling government interest. This Court has held that there is "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *FEC v. Cruz*, 596 U.S. 289, 305 (2022); *see FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of

corruption is the financial *quid pro quo:* dollars for political favors."). "'[C]orruption,' loosely conceived, … is not legitimately regulated under the First Amendment." *Cruz*, 596 U.S. at 308.

The court of appeals did not determine that Chapter 305 serves any interest in preventing *quid pro quo* corruption. Rather, it suggested that Texas's registration law furthers a vague government interest in "promot[ing] transparency and integrity in the legislative process." App.16a (citing *Harriss*, 347 U.S. at 625).

But a "loosely conceived" interest in legislative integrity is not enough to justify burdens on political speech. *Cruz*, 596 U.S. at 308. As this Court has explained, the mere "appearance of influence and access … will not cause the electorate to lose faith in our democracy." *Citizens United*, 558 U.S. at 360. Nor can any interest in informational "transparency," App.16a, justify the curtailment of core political speech, *see Calzone*, 942 F.3d at 424-25. The "First Amendment prohibits … legislative attempts to 'fine-tun[e]' the electoral process, no matter how well intentioned." *McCutcheon*, 572 U.S. at 207 (citation omitted). And the evidence in fact shows that overly burdensome disclosure requirements yield little to no informational benefit.[16] Meanwhile, they may be

[16] *See, e.g.*, David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 Election L. J. 114, 114 (2013) ("disclosure information provides few marginal benefits for voters").

leveraged by political opponents as a tool to harass and silence.[17]

This case illustrates the point, as Mr. Sullivan already disclosed nearly all of the information Chapter 305 would have required. *See supra* pp.30-31. The legislators who filed complaints against him did so not because they were lacking any information but rather to silence a critic.

The court of appeals also suggested that lobbyist registration statutes can prevent the voice of "the people" from being "drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." App.15a (quoting *Harriss*, 347 U.S. at 625). But this Court has reiterated time and again since *Harriss* that the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam); *see Moody*, 603 U.S. at 742; *McCutcheon*, 572 U.S. at 207; *Bennett*, 564 U.S. at 741.

2. Even if it served some compelling government interest, Chapter 305 is not the least bit tailored. Chapter 305 sweeps more broadly than the sort of "professional lobbyists" who pose dangers of *quid pro quo* corruption. It requires registration for just about

---

[17] *See, e.g.*, Luke Wachob, Center for Competitive Politics, *Misusing Disclosure: How a Policy Intended to Increase Voter Knowledge Often Misleads the Public* 2 (Aug. 2014) ("activists can easily create the appearance of conspiracies, or disreputable associations").

anybody with a job who communicates with government officials on their own behalf about their job—even if they spend or receive no additional money for their communications. *See supra* p.12. In such circumstances, there is no *quid* offered. "So whatever 'quo' [is] receive[d] must be due to [a person's] speech, not corruption." *Calzone*, 942 F.3d at 424.

Chapter 305 also requires redundant disclosures that carry no marginal informational value. *See supra* p.36. On the other hand, Chapter 305 can require extraordinarily intrusive disclosures, such as "a full description of the methods by which [a person] develops and makes decisions about positions on policy." Tex. Gov't Code § 305.005(h)(3); *see supra* pp.8-9.

And Chapter 305's hefty fee does nothing to fight corruption. It certainly is "not a nominal fee" designed "to defray the expenses of policing the activities in question." *Murdock*, 319 U.S. at 113-14. In fact, when the fee was increased in 2011, the State noted the rate hike would generate an additional $738,500 in annual revenue.[18]

Chapter 305 is also underinclusive. It is subject to a long list of exceptions. *See supra* pp.11-12. And it grants special gifting privileges to those who are registered as "lobbyists"—only increasing the specter of *quid pro quo* corruption or its appearance. *See supra* p.11.

---

[18] House Rsch. Org., SB1 Bill Analysis at 32 (June 9, 2011), https://perma.cc/H37Q-74S9.

* * *

The court of appeals' decision is a blueprint for States that wish to exploit *Harriss* to "ensnare people who have done no more than exercise their constitutional rights of speech, assembly, and press." *Harriss*, 347 U.S. at 628 (Douglas, J., dissenting). This Court should grant review to resolve the persistent confusion that exists over the meaning of *Harriss* and safeguard the precious right to freely engage in political discourse.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JANUARY 2025

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APPENDIX A — ORDER DENYING REVIEW OF THE TEXAS SUPREME COURT, FILED MARCH 8, 2024

RE: Case No. 23-0080
COA #: 03-21-00033-CV
STYLE: SULLIVAN v. TEX. ETHICS COMM'N

DATE: 3/8/2024
TC#: D-1-GN-17-001878

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. (Justice Young not participating)

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APPENDIX B — OPINION OF THE TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN, FILED AUGUST 31, 2022

TEXAS COURT OF APPEALS, THIRD DISTRICT,
AT AUSTIN

NO. 03-21-00033-CV

MICHAEL QUINN SULLIVAN,

Appellant,

v.

TEXAS ETHICS COMMISSION,

Appellee.

FROM THE 250TH DISTRICT COURT
OF TRAVIS COUNTY
NO. D-1-GN-17-001878, THE HONORABLE
CATHERINE MAUZY, JUDGE PRESIDING

OPINION

Michael Quinn Sullivan appeals from the trial court's summary judgment determining that Sullivan is liable to the Texas Ethics Commission for a civil penalty for failing to register as a lobbyist. *See* Tex. Gov't Code §§ 305.003 (a)(2), .032. In a de novo appeal to the trial court of the Commission's final administrative order concluding that Sullivan violated the lobbyist-registration statute, Sullivan

lodged constitutional challenges to the statute, which the trial court determined had no merit. On appeal to this Court, Sullivan raises the same constitutional issues and challenges the trial court's jurisdiction over this cause, the sufficiency of the evidence supporting the judgment, and the amount of penalty. For the following reasons, we reverse the portion of the trial court's summary judgment assessing a $10,000 penalty and remand that issue for further proceedings. We affirm the remainder of the trial court's judgment.

BACKGROUND

The Commission was created in 1991 by a constitutional amendment. *See* Tex. Const. art. III, § 24a; *see also* Tex. Gov't Code § 571.021 ("This chapter applies to the Texas Ethics Commission created under Article III, Section 24a, of the Texas Constitution."). Chapter 571 of the Government Code provides for the Commission's powers, duties, and procedures related to administration and enforcement of the statutes under its purview, *see* Tex. Gov't Code §§ 571.002-.177, and expressly endows it with administrative and enforcement authority over specified chapters of the Government and Election Codes, *see id.* § 571.061 ("Laws Administered and Enforced by the Commission"). Among those is Chapter 305 ("Registration of Lobbyists") of the Government Code, requiring lobbyists to register with the Commission and pay a specified fee. *See id.* §§ 305.003 (the registration statute), .005 (the fee statute). The policy underlying Chapter 305 attempts to balance individuals' rights to "petition their government for the redress of grievances and to

express freely their opinions" to legislators and other government officers while "preserv[ing] and maintain[ing] the integrity of the legislative and administrative processes" by requiring public disclosure of the identity, expenditures, and activities of certain persons who engage in direct communication with government officers to persuade them to take specific actions. *See id.* § 305.001; *see also id.* § 571.001 (noting purpose of Chapter 571 is to "protect the constitutional privilege of free suffrage by regulating elections and prohibiting undue influence while also protecting the constitutional right of the governed to apply to their government for the redress of grievances").

This dispute centers on Sullivan's failure to register as a lobbyist in 2010 and 2011, when he was president and CEO of Empower Texans, Inc. Empower Texans, also doing business as Texans for Fiscal Responsibility, is a non-profit corporation that has described itself as promoting a legislative agenda of "free market solutions," "low taxes," and "responsible government." The undisputed summary-judgment evidence shows that Sullivan, acting on behalf of Empower Texans in 2010 and 2011, sent over a dozen communications to members of the Texas House of Representatives and Senate and their staffs that encouraged recipients to support or oppose specific legislation or other matters pending in the legislature—consistent with Empower Texans's stated priorities—and to contact him with any questions about the organization's positions.[1]

1. In his response to the Commission's summary-judgment motion, Sullivan lodged objections to some of the Commission's evidence. Sullivan neither identifies in the record any rulings by

Although he registered as a lobbyist on behalf of Empower Texans from 2001 to 2009, Sullivan did not register in 2010 and 2011. For lobbyists employed by non-profit corporations, like Sullivan, the registration fee during those years was $100. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 899, § 1.01, 2005 Tex. Gen. Laws 3098, 3098 (current version, requiring fee of $150 for those lobbying for non-profit corporations, at Tex. Gov't Code § 305.005(c)(1)). In April 2012, the Commission received two sworn complaints filed by Texas legislators alleging that Sullivan violated Chapter 305 of the Government Code. *See* Tex. Gov't Code § 305.035 (providing that Commission, attorney general, or any county or district attorney may enforce chapter and for filing of sworn statements with appropriate prosecuting attorney or Commission alleging violation of chapter). After a formal hearing, the Commission issued its final order in July 2014 concluding that Sullivan violated the registration statute for both years and was required to pay a statutory penalty of $5,000 per violation. *See id.* § 571.132 ("Formal Hearing: Resolution"). Sullivan filed a de novo appeal from that order in Denton County district court, *see id.* § 571.133 ("Appeal of Final Decision"); the Commission prevailed on its motion to transfer venue to Travis County, arguing that Sullivan did not reside in Denton County, *see id.*; and Sullivan unsuccessfully attempted to dismiss his own de

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the trial court on his objections nor raises any appellate issues in connection therewith. *See* Tex. R. App. P. 33.1 (requiring preservation of error), 38.1 (listing requirements of appellant's brief). We therefore consider all the Commission's evidence accompanying its motion as well as the evidence Sullivan attached to his motion that was included in the appellate record.

novo appeal under the Texas Citizens Participation Act (TCPA), *see Sullivan v. Texas Ethics Comm'n*, 551 S.W.3d 848, 851-52 (Tex. App.—Austin 2018, pet. denied).

On remand from this Court, Sullivan's de novo appeal of the Commission's order was litigated in tandem with a related matter in which Sullivan and Empower Texans sought a declaratory judgment that the Commission's enforcement authority is unconstitutional because it violates the separation-of-powers provision in the Texas Constitution. Sullivan's and Empower Texans's appeal of the trial court's ruling on the related declaratory-judgment matter is currently pending at the Eighth Court of Appeals in Cause Number 08-20-00153-CV. As for this cause, Sullivan and the Commission filed with the trial court competing motions for summary judgment. The trial court granted the Commission's motion, denied Sullivan's, and decreed that Sullivan is liable to the Commission for a $5,000 civil penalty for each of the two years at issue. Sullivan perfected this appeal.

DISCUSSION

The registration statute provides, in relevant part,

> (a) A person must register with the commission under this chapter if the person:
>
> > (1) makes a total expenditure of an amount determined by commission rule but not less than $200 in a calendar quarter, not including

the person's own travel, food, or lodging expenses or the person's own membership dues, on activities described in Section 305.006(b) to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action; or

(2) receives, or is entitled to receive under an agreement under which the person is retained or employed, compensation or reimbursement, not including reimbursement for the person's own travel, food, or lodging expenses or the person's own membership dues, of more than an amount determined by commission rule but not less than $200 in a calendar quarter from another person to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b) Subsection (a)(2) requires a person to register if the person, as part of his regular employment, has communicated directly with a member of the legislative or executive branch to influence legislation or

> administrative action on behalf of the person by whom he is compensated or reimbursed, whether or not the person receives any compensation for the communication in addition to the salary for that regular employment.

Tex. Gov't Code § 305.003 ("Persons Required to Register"). In its summary-judgment motion, the Commission asserted that its attached evidence conclusively established each of the statutory elements requiring Sullivan to register for years 2010 and 2011 and that he was, therefore, "liable for the civil penalty provided for by statute."[2] *See id.* §§ 305.032 ("Civil Penalty for Failure to Register"), 571.173 ("Civil Penalty for Delay or Violation").

In his summary-judgment motion, Sullivan prayed for the court to order that the Commission "take nothing by its claims" because (1) it would be unconstitutional for the Commission to "carry forward this case" in violation of the Texas Constitution's separation-of-powers provision; (2) the registration and fee statutes are unconstitutional facially and as applied to him; and (3) the Commission was seeking to impose a criminal penalty on him that is neither authorized by statute nor brought in a proceeding affording him adequate due process.

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2. In its live pleading "as realigned plaintiff" in Sullivan's de novo appeal of its order, the Commission pleaded two causes of action—Sullivan's failure to register for years 2010 and 2011—and sought the "imposition of a civil penalty" on Sullivan pursuant to Government Code Section 305.032 "in an amount not to exceed $5,000."

Appendix B

This Court reviews an order granting or denying a motion for summary judgment de novo. *Texas Mun. Power Agency v. Public Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007). When both parties move for summary judgment and the trial court grants one motion and denies the other, we "review the summary judgment evidence presented by each party, determine all questions presented, and render judgment as the trial court should have rendered." *Id.*

First Amendment challenge

In his first issue, Sullivan contends that the registration and fee statutes violate the First Amendment both facially and as applied to him. He lodges both a "typical facial attack" and a facial attack under the "overbreadth" doctrine. *See United States v. Stevens*, 559 U.S. 460, 472-73, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (explaining two types of facial challenges). We first note that in considering challenges to the constitutionality of a statute, we presume that the statute is constitutional and "must, if possible, construe statutes to avoid constitutional infirmities." *Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996); *see also* Tex. Gov't Code § 311.021(1) ("In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended.").

The U.S. Supreme Court has upheld federal lobbyist-registration laws against First Amendment challenges, *see United States v. Harriss*, 347 U.S. 612, 625, 74 S. Ct. 808, 98 L. Ed. 989 (1954) (noting that Congress had thereby "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect

or spend funds for that purpose"), and has explained that requiring disclosure of First Amendment activities (such as lobbying or making political advertisements) is a "less restrictive alternative to more comprehensive regulations of speech," *see Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 369, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). That high court has determined that disclosure statutes—those that require persons to reveal their identity and divulge their First Amendment activities—are subject to review under the legal standard known as "exacting scrutiny."[3] *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383-85, 210 L. Ed. 2d 716 (2021). That is, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," and the disclosure requirement must "be narrowly tailored to the interest it protects." *Id.* at 2385. A restriction is "narrowly tailored" when it does not "burden substantially more speech than is necessary to further the government's legitimate

3. Sullivan argues that the registration statute is "content-based" rather than "content-neutral" and, therefore, that the applicable standard of review is the more rigorous "strict scrutiny." *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-64, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). However, the U.S. Supreme Court has drawn a distinction and has expressly applied the exacting-scrutiny standard to disclosure and registration statutes because they "do not prevent anyone from speaking." *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366-67, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (citations omitted); *see also Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383-85, 210 L. Ed. 2d 716 (2021) (reaffirming standard); *Calzone v. Summers*, 942 F.3d 415, 423 (8th Cir. 2019) (reviewing Missouri's lobbyist-registration law under exacting-scrutiny standard).

interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); *Ex parte Lee*, 617 S.W.3d 154, 161 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd) (citing *McCullen v. Coakley*, 573 U.S. 464, 486, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014)). "In the context of intermediate [i.e., exacting] scrutiny, narrow tailoring does not require that the least restrictive means be used. As long as the restriction promotes a substantial governmental interest that would be achieved less effectively without the restriction, it is sufficiently narrowly tailored." *Service Emp. Int'l Union, Local 5 v. City of Houston (SEIU)*, 595 F.3d 588, 596 (5th Cir. 2010) (citing *Ward*, 491 U.S. at 799).

Sullivan acknowledges that the Supreme Court has upheld the federal lobbyist-registration statutes, *see Harriss*, 347 U.S. at 613, but contends that Texas's statutes are "unique" in that they (1) require a fee (while registration under the federal scheme is free) and (2) require registration of persons who, like Sullivan, are employees and officers of the organization on whose behalf they lobby (and from whom they receive compensation therefor) but who do not make any expenditures in connection with their speech. While he is correct that the federal statute does not require payment of a registration fee, *see* 2 U.S.C. §§ 1601-1614 (comprising Chapter 26, entitled "Disclosure of Lobbying Activities," of Title 2 of the U.S. Code), he is incorrect that the federal statute does not require registration of persons who lobby on behalf of their employers but make no related expenditures, *see id.* §§ 1602 (defining "client" to include "person or entity whose employees act as lobbyists on its own behalf"),

1603 (requiring "lobbyist" who is employed to make "lobbying contact" to register unless such person's total income for matters related to "lobbying activities on behalf of a particular client" does not exceed $2,500 per quarter); *Harriss*, 347 U.S. at 614 & n.1 (reciting text of then-effective statute as similarly requiring registration by persons "receiving any contributions" above specified threshold for purpose of "influenc[ing], directly or indirectly, the passage or defeat of any legislation").

Besides his latter incorrect assertion, Sullivan relies on an opinion from the Eighth Circuit holding Missouri's lobbyist-registration statute facially unconstitutional, but that case is distinguishable because the statute at issue there required registration (and payment of a filing fee) of a person who "neither spends nor receives money in connection with his advocacy." *Calzone v. Summers*, 942 F.3d 415, 424 (8th Cir. 2019). The Eighth Circuit acknowledged the legitimate governmental interest of the "specter" of corruption or its appearance, and expressly based its holding on the fact that the statute targeted lobbyists who neither receive nor spend money in an attempt to influence legislators. *See id.* Because that statute cast its net too broadly to include persons who neither receive any compensation nor make any expenditures in connection with their lobbying, it was not narrowly tailored. *See id.*

Unlike the statute in *Calzone* but like the federal statute, the Texas registration statute does not apply unless a person, in the course of lobbying, *either* "makes a total expenditure" *or* "receives, or is entitled to receive,

. . . compensation or reimbursement" at or above the threshold levels specified by statute and the Commission's rules. *See* Tex. Gov't Code § 305.003; 1 Tex. Admin. Code § 34.43 (Tex. Ethics Comm'n, Compensation & Reimbursement Threshold) (2022). This is the type of regulation—directed towards the exchange of money for lobbying communications—the U.S. Supreme Court has determined passes constitutional muster because it advances substantial governmental interests. *See Harriss*, 347 U.S. at 625 ("[T]he evil which the Lobbying Act was designed to help prevent" is that "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."); *see also* Tex. Gov't Code §§ 305.001 (noting policy of lobbyist regulations to include "preserv[ing] and maintain[ing] the integrity of the legislative . . . processes"), 571.001 (noting that purpose of chapter includes "prohibiting undue influence while also protecting the constitutional right of the governed to apply to their government for the redress of grievances"); *Osterberg v. Peca*, 12 S.W.3d 31, 44 (Tex. 2000) (upholding Texas's election-expenditure reporting requirements as "reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of [the] election system to public view" (quoting *Buckley v. Valeo*, 424 U.S. 1, 82, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976))); *Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) (collecting cases and noting that "[s]everal other courts have similarly interpreted *Harriss* and have rejected broad constitutional attacks on lobbying disclosure requirements").

Appendix B

The Texas registration statute neither prohibits any speech nor requires registration by a person communicating with legislators in an attempt to influence legislation when done solely for oneself—an activity that lies at the heart of the First Amendment. *See* U.S. Const. amend. I (outlining rights to free speech and to petition government for redress of grievances). Rather, the statute promotes transparency and integrity in the legislative process through its registration requirements when a person makes such communications not on one's own behalf but as the paid mouthpiece of another. As the U.S. Supreme Court held many decades ago, and in analogous cases since, such registration requirements do not violate the First Amendment. *See Harriss*, 347 U.S. at 625; *see, e.g., Bonta*, 141 S. Ct. at 2383-85. Following *Harriss*, we hold that the Texas registration statute is not unconstitutional by requiring registration by those who make no expenditures in furtherance of their lobbying activities but are compensated by another person for lobbying on their behalf.

Furthermore, because the registration fee under the Texas statute is both nominal (especially for those who lobby on behalf of non-profits) and significantly less than the compensation or reimbursement threshold that triggers the registration requirement, we conclude that the imposition of the fee is narrowly tailored to meet the legitimate governmental interests noted above. The Commission is charged with administering and enforcing the lobbyist-registration statutes in Chapter 305. It is reasonable to conclude that the Commission incurs administrative costs to carry out its duties and

would be less effective at achieving the legislative policies underlying those duties—including the investigation of sworn complaints about individuals allegedly attempting to circumvent those policies—without its collection of the nominal registration fees. *See SEIU*, 595 F.3d at 596 (noting that regulation is narrowly tailored if governmental interest would be less effectively achieved without it). We hold that the registration and fee statutes are not facially unconstitutional.

As to Sullivan's overbreadth challenge, the U.S. Supreme Court has noted that application of the doctrine is "strong medicine," has been employed sparingly, and is not invoked when "a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). An overbreadth challenge may succeed "if a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 n.6, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). A party claiming overbreadth must establish from the statute's text and "from actual fact" a danger that the statute will be applied unconstitutionally to prohibit a "substantial" amount of protected expression and that such danger is realistic and not based on "fanciful hypotheticals." *See Stevens*, 559 U.S. at 485.

Sullivan argues that the registration statute is unconstitutionally overbroad because it would subject the following persons to the registration requirements: (1) a

person employed by his own corporation who makes "a single communication" to a legislator urging legislative action and (2) a journalist who happens to "express an opinion about legislation to a legislator while on the job."[4] However, neither scenario presents any realistic danger that the statute will be applied unconstitutionally. As for the first hypothetical, the statute expressly limits its application to persons who (a) "communicate directly with a member of the legislative or executive branch to influence legislation" and (b) receive above-the-threshold compensation from another person either *explicitly to make such communications* or *as part of their regular employment and on behalf of their employer. See* Tex. Gov't Code § 305.003 (a)(2), (b). It further provides an exception for a person who demonstrates that he did not spend "more than 26 [compensated] hours, or another amount of time determined by the commission," per quarter engaging in activity—"including preparatory activity" as defined by Commission rule—"to communicate directly" with legislators to influence legislation. *See id.* § 305.003(b-3). Thus, straightforward construction of the statute's definition of "Persons Required to Register" excludes any casual, one-off communications to legislators—even those made by the president of one's own corporation—either (a)

4. The statute excepts from the registration requirements a person who "owns, publishes, or is employed by . . . [a] bona fide news medium that in the ordinary course of business disseminates news" or other content that "directly or indirectly oppose[s] or promote[s] legislation or administrative action" from the registration requirement *if* the person does not "engage in further or other activities that require registration under this chapter and does not represent another person in connection with influencing legislation or administrative action." Tex. Gov't Code § 305.004(1) ("Exceptions").

in the absence of a showing that the person gets paid more than a specified amount *to make such communications* or (b) if the person at issue demonstrates he does not spend more than a specified amount of time engaging in lobbying activities on behalf of his corporation. *See id.* § 305.003(a)(2), (b), (b-3).

The second hypothetical also does not present any danger of casual, one-off communications triggering the registration requirements. The media exception operates merely as a safe harbor for specified individuals associated with a bona fide news medium whose dissemination of content opposes or promotes legislation *but only if* those individuals do not *also* engage in activities identified in Chapter 305 as requiring registration. *See id.* § 305.004(1). Thus, a hypothetical journalist's promoting or opposing legislation in direct communication with a legislator while acting in the course of investigating or reporting for his "bona fide news medium" would not subject him to the registration requirements unless he also got paid (above the threshold) by that medium or a different individual or entity *to engage in lobbying*. Sullivan argues that the media exception grants a "special privilege" to the media class, making the registration regime unconstitutional, citing *Citizens United*, 558 U.S. at 310 ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."), but the provision in the media exception requiring registration if the journalist engages in any of the activities otherwise requiring registration belies his argument. We hold that the registration statute is not unconstitutionally overbroad.

Appendix B

To succeed on his "as applied" challenge, Sullivan must show that although the registration statute is generally constitutional, it is "unconstitutional because of the way in which [it was] applied to" him in this "particular case." *HCA Healthcare Corp. v. Texas Dep't of Ins.*, 303 S.W.3d 345, 349 (Tex. App.—Austin 2009, no pet.), *abrogated on other grounds by PHI Air Med., LLC v. Texas Mut. Ins.*, 641 S.W.3d 542, 552 (Tex. App.---Austin 2022, no pet.). When considering this challenge, this Court cannot "entertain hypothetical claims or consider the potential impact of the statute on anyone other than" Sullivan. *In re G.X.H.*, 584 S.W.3d 543, 550 (Tex. App.—Houston [14th Dist.] 2019, no pet.), *rev'd on other grounds*, 627 S.W.3d 288 (Tex. 2021).

To the extent that we understand Sullivan's as-applied argument, he appears to be contending that he was entitled to the media exception because he "was engaged in the practice of gathering and reporting news." We need not reach the question of whether the facts support such contention, however, because we have already determined that the presence of the media exception (and one's falling under it) is not the end of the inquiry for whether a person is otherwise engaged in Chapter 305 activities that trigger the registration requirements. We address the question of whether Sullivan was engaged in such activities infra in response to his fifth appellate issue, but we do not see how such argument constitutes an as-applied constitutional challenge.

We overrule Sullivan's first issue.

Appendix B

Separation-of-powers challenge

In his second issue, Sullivan argues that the Commission cannot enforce the registration statute because by doing so the Commission—purportedly a "legislative branch agency"—would be violating the Texas Constitution's separation-of-powers provision. *See* Tex. Const. art. II, § 1 (providing for division of State government into "three distinct departments," and that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted"). He supports his argument with the following facts: (1) the provision creating the Commission appears in Article III of the Texas Constitution, entitled "Legislative Department," *see id.* art. III, § 24a; and (2) the Commission is composed entirely of commissioners "nominated" by members of the legislature, with two members appointed directly by the Speaker of the Texas House of Representatives, *see id.* § 24a(a)(1)-(4). Thus, Sullivan concludes, the Commission is an agency of the legislative branch but is statutorily charged with administering and enforcing the registration statute, among others, *see* Tex. Gov't Code § 571.061, and such powers belong exclusively to the executive branch, *see Robertson County v. Wymola*, 17 S.W.3d 334, 341 (Tex. App.—Austin 2000, pet. denied) ("[T]he executive branch . . . is charged with investigating and enforcing the laws of the State."); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200, 207 L. Ed. 2d 494 (2020) (describing Consumer Financial Protection Bureau's ability to seek "daunting monetary penalties

against private parties on behalf of the United States in federal court" as "a quintessentially executive power"). Therefore, Sullivan argues, the trial court should have granted his summary-judgment motion and denied that of the Commission.

"A separation of powers challenge is a challenge to the facial constitutionality of a statute." *Texas Dep't of Fam. & Protective Servs. v. Dickensheets*, 274 S.W.3d 150, 155 (Tex. App.—Houston [1st Dist.] 2008, no pet.). As such, it is the "most difficult challenge to mount successfully," and the Court must presume the statute is constitutional. *Allen v. State*, 614 S.W.3d 736, 741 (Tex. Crim. App. 2019). A violation of the separation-of-powers provision occurs when (1) one branch of government assumes or is delegated a power "more properly attached" to another or (2) "one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." *Dickensheets*, 274 S.W.3d at 156. In analyzing whether such violation exists, courts should recognize that "all three branches of government are to some extent interdependent." *Government Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 564 (Tex. 1963). "[I]t is well established that [the separation of powers] states a principle of government and not a rigid classification as in a table of organization." *Coates v. Windham*, 613 S.W.2d 572, 576 (Tex. App.—Austin 1981, no writ).

As for the placement of Section 24a in Article III of the Texas Constitution—entitled "Legislative Department"—we conclude that such placement is not

controlling.[5] *See Comptroller v. Landsfeld*, 352 S.W.3d 171, 175 (Tex. App.—Fort Worth 2011, pet. denied) (noting that title of statute—"statute of limitations"—was not controlling in determination of whether statute's requirements were jurisdictional or merely mandatory); *Hill v. Texas Council Risk Mgmt. Fund*, 20 S.W.3d 209, 214 (Tex. App.—Texarkana 2000, pet. denied) ("the title of a statute is not controlling over the unambiguous language which appears in the body of the statute"); *see also In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010) (citing guidance in Section 311.024 of Code Construction Act that statute's heading "cannot limit or expand the statute's meaning"). Furthermore, the Commission's exercise of administrative, civil enforcement authority under Chapters 305 and 571 of the Government Code is pursuant to a lawful and express delegation in Section 24a(d): "The Commission has the powers and duties provided by law." *See* Tex. Const. art. III, § 24a(d). Besides providing that the Commission has such powers and duties and for the appointment of the Commission's members, the only other topics covered in Section 24a concern the Commission's (1) discretion to "recommend" (for voter approval) the salaries of legislators and (2) mandate to

5. Nor is the following dictum in the background section of a 2015 opinion from our sister court involving these same parties: "The Texas Ethics Commission (the TEC) is a constitutionally created state agency, which is part of the legislative branch of Texas government, that is charged with administering and enforcing statutes governing elections and related governmental processes." *See Texas Ethics Comm'n v. Sullivan*, No. 02-15-00103-CV, 2015 Tex. App. LEXIS 11518, 2015 WL 6759306, at *1 (Tex. App.—Fort Worth Nov. 5, 2015, pet. denied) (mem. op.).

"set the per diem" (which is not to exceed federal-income-tax-deduction amounts) of legislators. *See id.* § 24a(e), (f). We cannot conclude that the text of Section 24a, despite its location in the "Legislative Department" portion of the Constitution, conclusively evidences an intent that the entity falls under the umbrella of the legislative branch.

Moreover, Section 24a creating the Commission describes it as a "state agency," and the Government Code explains that state agencies are part of the executive branch. *See* Tex. Gov't Code § 2004.001(2) ("'State agency' means an office, department, commission, or board of the executive branch of state government."). Other state agencies have been created under Article III but are similarly more appropriately described as executive agencies rather than legislative ones. *See, e.g.*, Tex. Const. art III, §§ 49-b (creating Texas Veterans' Land Board), 49-c (creating Texas Water Development Board); Tex. Nat. Res. Code § 161.011 (designating Veterans' Land Board as "state agency"); Tex. Water Code § 6.011 (describing Texas Water Development Board as "state agency"). Also, other provisions of the Government Code expressly recognize that the Commission functions as an executive agency: Section 326.001 defines "legislative agencies" as used in Chapter 326 to include certain enumerated entities (including the Senate and House of Representatives) but expressly excludes from that list the Commission, *see* Tex. Gov't Code § 326.001, and Section 306.008(e)(1) similarly excludes the Commission from its list of "legislative agenc[ies]," *see id.* § 306.008(e)(1).

As for Sullivan's contention that the members of the Commission are "nominated" by the legislative

branch, to support his argument that the Commission is a legislative agency, we note that while Section 24a mandates the legislature to compile a list of nominees, the governor and lieutenant governor select six of the eight Commission members, and the governor "may reject all names submitted" and require a new list to be submitted for the four members he appoints.[6] *See* Tex. Const. art. III, § 24a(a)(1)-(4), (b). The fact that the majority of the members of the Commission are appointed by the highest members of the executive branch, *see id.* art. IV, § 1 (listing members comprising executive department), further supports our conclusion that the Commission is an executive agency, not a legislative one. We overrule Sullivan's second issue and hold that the challenged statutes do not violate the separation-of-powers provision.

Due-process challenge

In his third issue, Sullivan contends that he has been denied due process because the penalty the Commission sought to enforce against him is actually criminal in nature, not civil, and he was therefore entitled to the type of due process required for criminal prosecutions. He alternatively argues that the civil penalty was not authorized because he was not first convicted of a criminal

6. The lieutenant governor appoints two members "of different political parties" from "a list of 10 names submitted by the members of the senate from each political party required by law to hold a primary," and the remaining two of the eight members are "appointed by the speaker of the house of representatives from a list of at least 10 names submitted by the members of the house from each political party required by law to hold a primary." Tex. Const. art. III, § 24a(a)(3), (4).

offense under Section 305.031. *See* Tex. Gov't Code § 305.031 (providing that intentional or knowing violation of Chapter 305 is Class A misdemeanor or third-degree felony, depending on provision violated).

Sullivan's latter argument runs counter to Section 305.031, which expressly provides, "This section does not prohibit the commission from imposing a civil penalty for a violation." *See id.* § 305.031(e). Similarly, Section 305.032 provides that "[i]n addition to the criminal penalties prescribed by Section 305.031, a person who [violates the registration statute] shall pay a civil penalty in an amount determined by commission rule." *See id.* § 305.032; *see also id.* § 571.173 (broadly granting Commission discretion to "impose a civil penalty" for violation of any law administered and enforced by Commission). The fact that the civil penalty for violation of the registration statute is expressly cumulative of (i.e., "in addition to") the criminal penalty (which requires scienter while the civil penalty does not) negates Sullivan's argument that the civil penalty can be imposed only in the event of a criminal conviction under Section 305.031. *See BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 15 (Tex. 2016) (noting that remedies that are "cumulative" are "in addition to" other remedies that remain in force whether or not they are enforced). Our conclusion is further supported by the fact that the Commission may simultaneously refer a matter for consideration of criminal prosecution to the appropriate prosecuting attorney *and* initiate a civil-enforcement action.[7] *See* Tex. Gov't Code § 571.171(a)

7. The record does not indicate that the Commission referred any matters in this case to any prosecuting attorney.

("On motion adopted by an affirmative vote of at least six commission members, the commission may initiate civil enforcement actions and refer matters to the appropriate prosecuting attorney for criminal prosecution."); *see also Ex parte Cronin*, No. 03-06-00016-CR, 2006 Tex. App. LEXIS 8062, 2006 WL 2589172, at *2 (Tex. App.—Austin Sept. 7, 2006, pet. ref'd) (mem. op., not designated for publication) (rejecting auctioneer's argument that civil penalty imposed for violation of professional rule incorporated criminal elements because legislature made civil penalty "an alternative to the criminal sanction"); *Ex parte Sheridan*, 974 S.W.2d 129, 133 (Tex. App.—San Antonio 1998, pet. ref'd) ("It is well settled that the legislature 'may impose both a criminal and a civil sanction in respect to the same act or omission,'" but its doing so "is insufficient [alone] to render the [civil penalty] a criminal punishment.").

As for Sullivan's argument that the civil penalty operates effectively as a criminal penalty, we first note that the legislature not only expressly indicated that the penalty is civil (both in the sections' titles and in their texts) but also so indicated impliedly by including a separate section labeled "Criminal penalties." *Compare* Tex. Gov't Code § 305.031 (entitled "Civil Penalty for Failure to Register" and mandating in text that violator of registration statute "shall pay a civil penalty"), *and id.* § 571.173 (entitled "Civil Penalty for Delay or Violation" and providing that Commission "may impose a civil penalty" for violation "of a law administered and enforced by the commission"), *with id.* § 305.032 (entitled "Criminal Penalties" and providing in text that section "does not prohibit the commission from imposing a civil penalty").

Appendix B

In determining whether a penalty is civil or criminal in nature, a reviewing court "must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference of one label or the other." *Ex parte Drake*, 212 S.W.3d 822, 825 (Tex. App.—Austin 2006, pet. ref'd). Here, not only did the legislature expressly indicate a preference for the label "civil penalty," but it explicitly differentiated that type of penalty from the criminal ones. It belies common sense and the plain language of the statutes at issue—especially the two sequential ones in Chapter 305—to conclude that the legislature intended Section 305.032's or 571.173's penalty to be criminal. *See United States v. Ward*, 448 U.S. 242, 251, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980) (when there is "overwhelming evidence" that legislature "intended to create a civil penalty in all respects" and only "quite weak evidence of any countervailing punitive purpose," it would be "anomalous to hold" that statute "created a criminal penalty").

Although there is a clear expression of legislative intent that Sections 305.032 and 571.173 create civil penalties, Sullivan maintains that a civil penalty can be so punitive in nature as to be transformed into a criminal penalty. *See Hudson v. United States*, 522 U.S. 93, 99-100, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) ("Only the clearest proof of punitive intent will transform what the Legislature intended to be a civil penalty into a criminal penalty."). The factors courts employ to make that determination are whether (1) the sanction involves an affirmative disability or restraint, (2) the sanction has historically been regarded as a punishment, (3) the

sanction comes into play only upon a finding of scienter, (4) the sanction's operation will promote the traditional aims of punishment-retribution and deterrence, (5) the behavior to which the sanction applies is already a crime, (6) an alternative purpose to which the sanction may rationally be connected is assignable for it, and (7) the sanction appears excessive in relation to the alternative purpose assigned. *Id.*

The civil penalty imposed on Sullivan cannot reasonably be considered an affirmative disability or restraint. *See id.* at 104 (noting that, unlike imprisonment, monetary penalties are not considered "a restraint as that term is normally understood"). He has not demonstrated that the penalty or his failure to pay it has prevented or will prevent him from engaging in any speech. Neither Section 305.032 nor 571.173 contains a scienter requirement, and failure to register as a lobbyist is not already a crime (except upon meeting the scienter requirement in Section 305.031). Although a monetary penalty may act as a deterrent to violations of the registration statute, the mere presence of this purpose is insufficient to render the sanction criminal because such deterrence serves civil as well as criminal goals, such as promoting compliance with the registration statute, in furtherance of the goals of Chapter 571. *See Hudson*, 522 U.S. at 105; *see also Ragsdale v. Progressive Voters League*, 790 S.W.2d 77, 84 (Tex. App.—Dallas 1990) (noting that civil penalty in Election Code "promotes compliance with the provisions of the Code," in furtherance of legislature's goal to protect "free suffrage from undue influence or other improper practice"), *aff'd in part, rev'd in part*, 801 S.W.2d 880

(Tex. 1990) (affirming portion of appellate court's holding that assessed civil penalty). The civil penalty may also serve in part to defray the Commission's enforcement costs, which in this near decade-long dispute may well have surmounted the penalty. The penalty assessed, while more than nominal, is not so large as to be considered excessive in relation to the purposes of Chapter 571 and the Commission's interests in fulfilling its statutory duties by promoting compliance with the laws it is charged with enforcing.[8] On balance, we determine that the civil penalty is not so punitive in its purpose or effect as to make it a criminal penalty. We overrule Sullivan's third issue.

Trial court's jurisdiction

In his fourth issue, Sullivan contends that the trial court lacked jurisdiction over the Commission's claim because the Commission had no standing to enforce the lobbyist-registration statute due to its "lack [of a] legally cognizable injury." He explains that the Commission "has only asserted bare violations of law that purport to offend the sovereignty of the State"—that is, merely a "sovereign injury" rather than a "proprietary injury to the Commission" itself—and that, therefore, the Commission lacks standing to assert a sovereign injury on behalf of

8. Nor does Sullivan contend that the amount imposed on him is excessive. Rather, he contends that the cap of $5,000 per violation is due only to current Commission rules, which could change at any time to allow for the statutory maximum of three times a lobbyist's annual compensation—amounting in many cases, including this one, to upwards of several hundreds of thousands of dollars. However, we cannot review speculative scenarios.

the State. Instead, he contends, the State of Texas was required to bring the enforcement action against him.

The Commission is expressly authorized by statute to bring administrative-enforcement actions, as State agencies routinely are. *See* Tex. Gov't Code § 305.035(a) ("The commission, the attorney general, or any county or district attorney may enforce this chapter."); *Roman Forest Pub. Util. Dist. No. 4 v. McCorkle*, 999 S.W.2d 931, 932 (Tex. App.—Beaumont 1999, pet. denied) (holding that utility district had standing and was appropriate party to bring suit to enforce rules and regulations that legislature authorized it to enforce under Water Code; this gave district "a justiciable interest peculiar to [it]"); *see also* Tex. Gov't Code §§ 305.032 (providing for Commission's assessment of civil penalties), 571.061(a) ("The [C]ommission shall administer and enforce . . . Chapter[] 305."), .121(a) ("The [C]ommission may . . . render decisions on complaints or reports of violations as provided by this chapter."), .173 (also providing for Commission's assessment of civil penalties). Sullivan has not cited any persuasive authority to the contrary. We accordingly overrule his fourth issue.

Propriety of summary judgment

In his fifth issue, Sullivan argues that the Commission failed to meet its summary-judgment burden to establish its right to judgment as a matter of law that he violated the registration statute. *See* Tex. R. Civ. P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). To be entitled to summary judgment,

the Commission was required to conclusively prove that Sullivan (1) received compensation of at least $1,000 (2) from another person (3) to communicate directly with a member of the legislative or executive branch (4) to influence legislation or administrative action. *See* Tex. Gov't Code § 305.003(a)(2); 1 Tex. Admin. Code § 34.43(a) (2008) (during years at issue, providing compensation threshold of $1,000 received in calendar quarter to trigger registration requirement).

On appeal, Sullivan does not directly dispute the Commission's proof of the first element—the amount of his compensation—but merely reasserts his constitutional argument about a "single act of speech" allegedly being enough to require registration, which we have already disposed of. In any event, the summary-judgment evidence—in the form of tax records and the deposition testimony of Empower Texans's corporate representative—conclusively established that Sullivan was compensated by Empower Texans for each quarter of 2010 and 2011 in amounts in excess of the then-applicable $1,000 threshold.

As to the second requirement—that Sullivan have received his compensation "from another person"—Sullivan argues that he effectively *was* Empower Texans (by virtue of being its officer and director) and therefore that he was not speaking on behalf of "another person" as required by Section 305.003(a)(2) but on behalf of himself. Again, however, Sullivan reasserts his constitutional argument that the statute is overly broad—that it "would subject any person who received compensation *from almost any source*, including their own unincorporated

business or social club, to a significant fine if they engaged in a *single communication* with their elected officials in their role as a business owner, employee, or club member without paying the speech registration fee." He does not cite any authority supporting his bare assertion that he and Empower Texans are the same "person" or entity for purposes of the registration statute, and he does not allege that Empower Texans is his alter ego or sole proprietorship. Rather, as the Commission argues, the statute defines "person" to include a "corporation," *see id.* § 305.002(8), which necessarily includes Empower Texans, and it is blackletter law that corporations have a separate legal existence from their owners, *see, e.g., Hoffmann v. Dandurand*, 180 S.W.3d 340, 347 (Tex. App.—Dallas 2005, no pet.) ("Generally, a corporation is a separate legal entity that insulates its owners or shareholders from personal liability."). The evidence conclusively established that Empower Texans is a nonprofit corporation—i.e., a "person" under the statute—and is the "person" from whom Sullivan received the compensation at issue.

As to the third requirement—that Sullivan have received the compensation from Empower Texans to communicate directly with members of the legislative branch—Sullivan argues that his mere sending of e-mail "blasts" to "a group of subscribers numbering in the tens of thousands" "cannot be considered direct communications." The statute defines "communicates directly with" to mean "contact in person or by telephone, telegraph, letter, facsimile, electronic mail, or other electronic means of communication." Tex. Gov't Code § 305.002(2). "Member of the legislative branch" means a "member, member-elect, candidate for, or officer of the legislature or of a legislative

committee, or an employee of the legislature." *Id.* The evidence the Commission proffered in support of its summary-judgment motion conclusively established that Sullivan sent numerous e-mails directly from himself, on behalf of Empower Texans, to members of the legislative branch, including some that were addressed directly to particular members of the legislature. Moreover, the statute does not distinguish between e-mails sent as "blasts" or to solely one recipient. We decline to construe the statute as Sullivan advocates.

Sullivan argues that because there is no evidence of any contract providing him compensation in exchange specifically for lobbying activities on behalf of Empower Texans, the Commission failed to meet its summary-judgment burden. However, we initially note that the statute does not require any express compensation contract for a person to fall under its reach. Moreover, the registration statute expressly provides that the element requiring another person to pay a lobbyist to engage in lobbying communications may be met when an employee has made such communications "as part of his regular employment." *See id.* § 305.003(b); *see also* Tex. Att'y Gen. Op. No. JH-0583 (1975) (opining that it is "sufficient" to meet Section 305.003(b)'s requirement if employee, "as an incident of his employment," makes lobbying communications "on behalf of and at the express or implied direction of" employer).[9] In its motion, the Commission

9. While the registration statute provides an exception to registration for individuals who demonstrate they spend "not more than 26 hours, or another amount of time determined by" Commission rule in a calendar quarter engaging in lobbying activity, *see* Tex.

cited the deposition of Empower Texans's chief operating officer, Dustin Matocha, in which Matocha testified that Sullivan was president and CEO of the company during 2010 and 2011, acting as "the executive that led all of the employees." In that role and during those years, Sullivan sent e-mails on behalf of the company to members of the legislature and their staff. The e-mails "concern[ed] matters pending before the Texas state legislature." Additionally, the Commission cited an article penned by Sullivan appearing on Empower Texans's website acknowledging that the company's "communications with legislators are an extension of [its] discussions with Texas' citizens." We conclude that such evidence conclusively established that Sullivan made the communications at issue "as part of his regular employment" with Empower Texans and that the Commission, therefore, established the third requirement of its claim.

Lastly, as to the fourth requirement, we conclude that the Commission's evidence conclusively established that Sullivan's communications were made "to influence legislation." *See* Tex. Gov't Code § 305.003(a)(2). The

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Gov't Code § 305.003(b-3); 1 Tex. Admin. Code § 34.43(b) (Tex. Ethics Comm'n, Compensation and Reimbursement Threshold) (2011) (explaining that for purposes of Section 305.003, threshold for compensated time spent engaging in lobby activity is 5% in calendar quarter), during this litigation Sullivan and the Commission filed a Rule 11 agreement containing a stipulation that Sullivan spent more than the minimum of compensated time engaging in lobbying activity during the years at issue and that the Commission would not "be required to prove as any part of [its] claims" that Sullivan's time alleged to be "spent engaging in lobby activity" constituted "more than 5.0%" of his "compensated time during a calendar quarter."

statute broadly defines "legislation" to include "a bill, resolution, amendment, nomination, or other matter pending in either house of the legislature," as well as "any matter that is or may be the subject of action by either house or by a legislative committee, including the introduction, consideration, passage, defeat, approval, or veto of the matter." *See id.* § 305.002(6). Sample communications attached to the Commission's summary-judgment motion indicate that Sullivan outlined issues that Empower Texans anticipated would be considered in the 82nd legislative session and encouraged the legislative recipients to make decisions consistent with Empower Texans's priorities and interests by, for example, "oppos[ing] the creation of new taxes, granting additional taxing authority, or creating any new taxing entities." While Sullivan does not challenge the Commission's evidence on this requirement, he asks this Court to construe the statute to require that the communications be "solely" intended to influence legislation. We cannot. Moreover, Sullivan judicially admitted that this requirement was met when in his prior TCPA motion he argued that his communications were about matters of public concern because they "pertained to legislative proceedings and were in connection with issues under consideration by the Legislature or were reasonably likely to encourage consideration by the Legislature."

Because the summary-judgment evidence conclusively established the Commission's claims that Sullivan was required to register in 2010 and 2011 (and undisputedly did not), we overrule Sullivan's fifth issue.

Appendix B

Amount of penalty assessed

In his final issue, Sullivan contends that the trial court erred by summarily imposing the maximum penalty without submitting the matter to a jury. He cites a recent opinion from this Court to support his argument that the amount of penalty to be assessed is a material fact issue. *See Villarreal v. State*, No. 03-18-00752-CV, 2020 Tex. App. LEXIS 8746, 2020 WL 6576158, at *9 (Tex. App.—Austin Nov. 10, 2020, no pet.) (mem. op.). We agree with Sullivan that the trial court erred in imposing the maximum penalty as a matter of law instead of submitting the issue, which we conclude is a material fact issue, to a jury per Sullivan's request.

In its summary-judgment motion, after arguing that it was entitled to summary judgment that Sullivan had violated the registration statute, the Commission prayed that the trial court enter judgment against Sullivan "for the civil penalty provided for by statute." After granting the Commission summary judgment on its claim that Sullivan had violated the registration statute, the trial court rendered final judgment that "Sullivan is liable to the Commission for a $5,000 civil penalty for his failure to register as a lobbyist in 2010, and a $5,000 civil penalty for his failure to register as a lobbyist in 2011"—the maximum penalty permissible under Section 571.173. But, Section 571.173 does not expressly "provide for" any penalty at all, nor does it specify the amount of any penalty that is assessed. *See* Tex. Gov't Code § 571.173. Rather, it provides a penalty range—should a penalty be imposed—

up to the greater of $5,000 or "triple the amount at issue." *See id.* ("The commission may impose a civil penalty of not more than $5,000 or triple the amount at issue under a law administered and enforced by the commission, whichever amount is more, for . . . a violation of a law administered and enforced by the commission.").[10] While the statute makes both the imposition and the amount of a penalty discretionary on the part of the Commission in the first instance, we conclude that when a Commission final order is appealed to the district court for a "trial de novo," the issue of the amount of penalty, if any, becomes one of fact, and the trial court therefore erred in assessing the maximum penalty as a matter of law. We conclude so for three reasons.

First, upon Sullivan's filing of his appeal of the Commission's final order, that final order was automatically vacated—in other words, there was no longer (1) a finding that he had violated the registration statute or (2) any assessment of a penalty. *See Sullivan*, 551 S.W.3d at 852 ("As a result of Sullivan's petition, the Commission's final decision was automatically vacated."); *see also* Tex. Gov't Code § 2001.176(b)(3) ("[T]he filing of the petition vacates a state agency decision for which trial de novo is the manner of review authorized by law[.]"). Thus, upon its summary

10. *See also* Tex. Gov't Code § 305.032 (setting civil penalty for failure to register as "amount determined by commission rule . . . but not to exceed an amount equal to three times the compensation, reimbursement, or expenditure"). The parties have not cited any Commission rules specifying the civil penalty for failure to register, nor have we found any, and we therefore refer to the general civil penalty provided in Section 571.173.

determination that Sullivan violated the registration statute, the trial court *could have* rendered judgment as a matter of law per the Commission's prayer—i.e., "as provided for by statute"—but *only if* the statute (or a Commission rule) explicitly provided for a specific penalty. It does not. Instead, it provides a penalty range (from zero to the greater of $5,000 or "triple the amount at issue"). *See id.* § 571.173.

Secondly, the trial de novo Sullivan is afforded by statute requires the trial court to "try all issues of fact and law in the manner applicable to other civil suits in this state" and entitles him to "a jury determination of any issue of fact on which a jury determination is available in other civil suits in this state." *See id.* § 571.133(d). We previously acknowledged in *Villarreal* that a mandatory penalty within a specified statutory range is a question of fact, but the State in that case had properly "remove[d] the material fact issue as to the per diem amount of penalty by stipulating [in its summary-judgment motion] to the minimum per diem amount." *See Villarreal*, 2020 Tex. App. LEXIS 8746, 2020 WL 6576158, at *9. While the statute at issue here (1) is discretionary, not mandatory; and (2) has no minimum to which the Commission could have stipulated, we deem those differences immaterial with respect to *Villarreal*'s acknowledgment that the assessment of a civil penalty within a statutory range is generally a material fact issue. *See id.*

Finally, Subchapter F—which contains Section 571.173—specifies mandatory factors the Commission "shall consider" in assessing a civil penalty. *See* Tex.

Gov't Code § 571.177.[11] This Court has previously held that it is the factfinder who "is tasked with determining the amount of a civil penalty" to be assessed within a prescribed statutory range when the statute lists factors the factfinder must consider. *See In re Volkswagen Clean Diesel Litig.*, 557 S.W.3d 78, 84-85 (Tex. App.—Austin 2017, no pet.); *cf. Texas Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 851 (Tex. App.—Austin 2002, pet. denied) (reviewing district court's assessment of penalty within statutory range under abuse-of-discretion standard but noting that statute did not "provide a rule or principle by which [a] district court [i]s to be guided in assessing a penalty," unlike statutory factors outlined here). Although the statutes at issue in both *Villarreal* and *In re Volkswagen* expressly identify the "court or jury" as the factfinder tasked with determining the

11. Section 571.177 provides,

> The [C]omission shall consider the following factors in assessing a sanction:
>
> (1) the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the violation;
>
> (2) the history and extent of previous violations;
>
> (3) the demonstrated good faith of the violator, including actions taken to rectify the consequences of the violation;
>
> (4) the penalty necessary to deter future violations; and
>
> (5) any other matters that justice may require.

Tex. Gov't Code § 571.177.

"proper" penalty within the respective statutory ranges, *see Villarreal*, 2020 Tex. App. LEXIS 8746, 2020 WL 6576158, at *9; *In re Volkswagen*, 557 S.W.3d at 84-85—and here Section 571.173 places the initial assessment of a penalty within the Commission's discretion—we fail to see why the determination of the amount of penalty, if any, would not become an issue for the jury when the statutory scheme expressly vacates the Commission's order, affords the alleged violator a trial de novo, and requires a jury determination of all issues of fact on which a jury determination is available in other civil suits.

We believe that the statutory scheme, viewed as a whole, compels the conclusion that Sullivan is entitled to a jury trial on the amount of civil penalty, if any. Accordingly, we sustain Sullivan's sixth issue and hold that the trial court erred in its judgment assessing a penalty as a matter of law.

CONCLUSION

We reverse the portion of the trial court's summary judgment assessing a total civil penalty of $10,000 and remand the issue of the penalty amount, if any, for further proceedings in accordance with this opinion. We affirm the remainder of the summary judgment.

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, and Smith
Concurring Opinion by Justice Goodwin

Affirmed in Part; Reversed and Remanded in Part

Filed: August 31, 2022

Appendix B

TEXAS COURT OF APPEALS, THIRD DISTRICT,
AT AUSTIN

NO. 03-21-00033-CV

MICHAEL QUINN SULLIVAN,

Appellant,

v.

TEXAS ETHICS COMMISSION,

Appellee.

FROM THE 250TH DISTRICT COURT
OF TRAVIS COUNTY
NO. D-1-GN-17-001878, THE HONORABLE
CATHERINE MAUZY, JUDGE PRESIDING

CONCURRING OPINION

Because I cannot agree with its analysis, I concur in the Court's judgment only.

Among my concerns is the Court's analysis of the trial court's assessment of a civil penalty of $10,000 under Section 571.173 of the Texas Government Code. To me, whether the assessment of the penalty amount is a question of law or fact appears to be a more difficult question than the Court's analysis conveys. *Cf. Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307 n.30 (Tex. 2006) (noting that "the level of punitive damages is not

really a 'fact' 'tried' by the jury" (quoting *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 437 (2001)).

Nevertheless, the Court does not need to—and therefore should not—determine in this appeal whether the issue of the penalty amount is a question of fact that required submission to the jury or a question of law. As Sullivan notes in his appellant's brief:

> The [Commission] had no grounds to seek summary affirmation of its $10,000 civil penalty through a Motion for Summary Judgment. Sullivan objected to this request. The [Commission] offered neither evidence nor argument as to why its fine should be awarded deference. . . . Despite not being presented with any argument or evidence, the trial court summarily granted the [Commission]'s request for the imposition of the maximum penalty without submitting the matter to a jury.

(Internal record citations omitted.) The Commission's motion for summary judgment did not state the grounds for awarding the maximum amount of the discretionary penalty under Section 571.173 of the Texas Government Code. *See* Tex. R. Civ. P. 166a(c) ("The motion for summary judgment shall state the specific grounds therefor."); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 339 n.2 (Tex. 1993) ("Consistent with Rule 166a, we use the term 'grounds' to refer to the reasons entitling the movant to summary judgment."). Instead, the Commission's merely prayed:

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> FOR THE FOREGOING REASONS, the Commission respectfully requests that this Court grant its motion for summary judgment, and enter final judgment in favor of the Commission providing that Defendant Sullivan violated [Tex. Gov't Code] § 305.003(a)(2) in each of calendar years 2010 and 2011 and that he is therefore liable for the civil penalty provided for by statute.

The Commission's motion addressed only the grounds for "liab[ility] for the civil penalty," not the grounds for determining the amount of the civil penalty.[1] In his response to the Commission's motion, Sullivan objected as follows:

> Sullivan also objects that the [Commission] may not seek affirmation of its $10,000 civil penalty through a Motion for Summary Judgment. . . . The [Commission] has offered no evidence or argument why its fine should be awarded deference, or why, in the face of a request by both parties for a trial by jury, that the

1. As noted by the Court, the Legislature also provided that the Commission "shall consider" five factors in assessing a sanction: (1) "the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the violation"; (2) "the history and extent of previous violations"; (3) "the demonstrated good faith of the violator, including actions taken to rectify the consequences of the violation"; (4) "the penalty necessary to deter future violations"; and (5) "any other matters that justice may require." *Ante* at ___ (citing Tex. Gov't Code § 571.177). The Commission's motion does not reference or cite these factors.

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> Court should render a judgment imposing the maximum penalty sought by the [Commission].

The Commission's reply in support of its motion did not respond to this objection or address any grounds for why the maximum $10,000 civil penalty should be affirmed.

Thus, the Commission's motion is insufficient as a matter of law to establish the penalty amount that should be awarded, and the trial court erred by granting summary judgment awarding $10,000 as the penalty amount. *See* Tex. R. Civ. P. 166a(c); *McConnell*, 858 S.W.2d at 342 ("[I]f the grounds for summary judgment are not expressly presented in the motion for summary judgment itself, the motion is legally insufficient as a matter of law."). Rather than reversing the penalty award because the penalty amount is allegedly a question of fact that was required to be submitted to the jury, as the Court concludes, I would reverse the penalty award because the Commission's motion for summary judgment does not state the specific ground for determining the amount of the penalty award.

/s/_____
Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Smith

Filed: August 31, 2022

APPENDIX C — FINAL JUDGMENT OF THE DISTRICT COURT, TRAVIS COUNTY, TEXAS, 250TH JUDICIAL DISTRICT, FILED DECEMBER 15, 2020

IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
250th JUDICIAL DISTRICT

CAUSE NO. D-1-GN-17-001878

TEXAS ETHICS COMMISSION,

Plaintiff,

v.

MICHAEL QUINN SULLIVAN,

Defendant.

Filed: December 15, 2020

FINAL JUDGMENT

On November 19, 2020, the Court conducted a hearing on the Texas Ethics Commission's motion for summary judgment (the "Commission's MSJ"), Michael Quinn Sullivan's cross-motion for summary judgment ("Sullivan's Cross-MSJ"), Sullivan's Motion for Protection from Deposition Notice ("Motion for Protection"), and the Commission's Motion to Compel and for Rule 193.4 Hearing ("Motion to Compel"). Both parties appeared

through counsel to present argument on these motions. At the conclusion of the hearing, the Court took each of these motions under advisement for further consideration. Having considered the motions, responses and any replies thereto, arguments of counsel, applicable law, and the case file, the Court now rules as follows:

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

1. The Commission's MSJ is GRANTED.

2. Sullivan's Cross-MSJ is DENIED.

3. Sullivan is liable to the Commission for a $5,000 civil penalty for his failure to register as a lobbyist in 2010, and a $5,000 civil penalty for his failure to register as a lobbyist in 2011, as required by Chapter 305 of the Texas Government Code and the applicable rules of the Texas Ethics Commission effective in 2010 and 2011.

4. The Commission is awarded all taxable costs it incurred in this de novo appeal against Sullivan, in accordance with Texas Rule of Civil Procedure 131.

5. The Commission is awarded post-judgment interest on the entire amount of the judgment, at a rate of 5.0% compounding annually, beginning on the date this judgment is rendered and ending the day the judgment is satisfied, in accordance with Texas Finance Code §§ 304.003, .005, and .006.

6. Having granted the Commission's MSJ, Sullivan's Motion for Protection and the Commission's Motion to Compel are both DISMISSED AS MOOT.

All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

This judgment finally disposes of all claims and all parties in this suit. All other relief not expressly granted herein is denied. This is a final, appealable judgment.

SIGNED this 15th day of DECEMBER , 2020.

/s/ Catherine A. Mauzy
The Honorable Catherine A. Mauzy
Presiding Judge

APPENDIX D — FINAL ORDER ON BEHALF OF THE TEXAS ETHICS COMMISSION, DATED JULY 21, 2014

TEXAS ETHICS COMMISSION

BEFORE THE TEXAS ETHICS COMMISSION
SC-3120487 AND SC-3120488

IN THE MATTER OF
MICHAEL QUINN SULLIVAN,

Respondent.

FINAL ORDER

On June 25, 2014, the Texas Ethics Commission held a formal hearing on two sworn complaints alleging that Michael Quinn Sullivan was a paid lobbyist who failed to register. At the hearing, the evidence revealed that part of Mr. Sullivan's regular employment involved making direct contact with members of the Texas Legislature and their staffs to influence the outcome of bills, nominations, and other matters that were subject to legislative action. Accordingly, Texas law required him to register as a lobbyist. Mr. Sullivan failed to respond to the evidence of his paid lobbying with any meritorious defense. Instead, Mr. Sullivan presented the Commission with baseless arguments that would destroy the ability of the State of Texas to require public registration of paid lobbyists, while never denying that he was paid to tell legislators how to vote. For the reasons summarized below, the

Commission imposes the maximum civil penalty allowed by law for the violations raised in the sworn complaints.

I. Findings of Fact

The Texas Ethics Commission unanimously finds that Mr. Sullivan, as part of his regular employment, communicated directly with members of the legislative branch to influence legislation without properly registering as a paid lobbyist.

1. In 2010, Mr. Sullivan was paid $132,399 in compensation by Empower Texans and its related entities.

2. In 2011, Mr. Sullivan was paid $128,571 in compensation by Empower Texans and its related entities.

3. On behalf of Empower Texans, Mr. Sullivan directly communicated with members of the Texas Legislature in 2010 and 2011. The evidence at the hearing showed that Mr. Sullivan made dozens of communications to legislators and legislative staff during the fourth quarter of 2010 and the first and second quarters of 2011 regarding pending matters before the Legislature.

4. The evidence reflected dozens of direct communications from Michael Quinn Sullivan with direct assertions, often sent to multiple members of the Texas House of Representatives, for example:

a. Exhibit 34, Page 687, 5/23/2011 email sent to Representative Perry: "*support* the Geren Amendment" [SB 5 and SB 1581].

b. Exhibit 25, Page 519, 3/4/2011 memo sent to Representative Harless: "opposed taking such an action at this time" [use of Economic Stabilization Fund for current biennium].

c. Exhibit 33, Page 653, 4/28/2011 email sent to Matthew Miller, Legislative Director for Representative Orr: "As you consider SB 655, please know that we **support** the bill as carried by Rep. Keffer."

d. Exhibit 33. Page 652, 5/3/2011 email sent to Matthew Miller, Legislative Director for Representative Orr: "recommend opposing HB 3640."

e. Exhibit 33, Page 636, 5/20/2011 email sent to Matthew Miller, Legislative Director for Representative Orr: "*do not support the swap*" [CSSB1811].

f. Exhibit 41, Page 783, 5/24/2011 email sent to Representative Zedler: "I urge you to support SB 8."

g. Exhibit 13, Page 297, 6/9/2011 email sent to Mark Dalton, Chief of Staff for Representative Anderson: "Senate Bills 1 and 2 are subject to scoring."

Such communications are plainly evidence of direct communications intended to influence legislative action.

5. Moreover, Mr. Sullivan operates a sophisticated scorecard system to direct legislative action. The creation and publication of a "legislative scorecard" in the public domain is not in and of itself direct communication requiring registration as a lobbyist. However, the evidence presented at the hearing showed that Mr. Sullivan used the scorecard as a means of directly influencing votes on pending legislation, as part of his paid employment. He notified members of the Legislature directly that if they did not vote on pending legislative matters in the manner advocated by Empower Texans and its related entities 80% of the time, the members would not receive the endorsement of Empower Texans and its related entities, and would be subject to a political challenge. Mr. Sullivan would then send notices in advance of each vote and give members of the Legislature individualized "draft" scores just a few weeks before the legislative session was over. Exhibit 43, Page 836 is an instance of the "draft" score letter sent to Representative Laubenberg: Her draft score was listed as 87%. Exhibit 43, Page 835 is an instance of the direction: "we will be including HB 272 on the 2011 Fiscal Responsibility Index. We hope you will support this important legislation." Exhibit 43, Page 830 shows her final score: A+, for 95% or higher. Notably, the final score letter is not a direct communication to influence pending legislation. However, the draft score, combined with the direction on how to vote, resulting in an "improved" final score is direct communication to influence pending legislation.

6. The Commission heard testimony that often written communications from Mr. Sullivan would be placed on the desk of every legislator in the Texas House prior to votes on bills or amendments that Empower Texans and its related entities supported or opposed. Such additional direct advocacy falls directly within the plain language of the lobby disclosure statute that we must construe.

7. The Commission does not find that the conduct that required Mr. Sullivan to register as a lobbyist falls within the media organization exclusion of Tex. Gov't Code § 305.004(1). The conduct that required Mr. Sullivan to register was his paid direct advocacy with legislators and their staff concerning matters before the Legislature. The Commission does not need to determine whether general publications by Mr. Sullivan, alone or through Empower Texans or related entities, would constitute materials disseminated through a "bona fide news medium," and thus fall within the media organization exclusion. The exclusion only applies in situations where the publication of news articles, paid advertisements, or editorials is the only conduct at issue. If a person engages in other activity that requires registration, as Mr. Sullivan did, the media organization exclusion does not apply.

8. **The Texas Ethics Commission unanimously finds that based on the facts presented, the following conduct, standing alone, by Mr. Sullivan would not constitute direct communication with a member of the Legislature to influence pending legislation, and would not require lobbyist registration:**

Appendix D

a. Writing about what is going on in the Legislature.

b. Maintaining a website that provides information regarding the Legislature.

c. Publishing a rating on a website of how fiscally responsible legislators are.

d. Writing news articles and posting them to a website.

e. Writing opinion pieces and posting them to a website.

f. Communicating with donors to the organization.

g. Publishing a scorecard on a website.

h. Publishing on a website a list of bills and amendments that will be on the scorecard.

i. Publishing on a website a list of which way to vote on bills and amendments on the scorecard.

j. Publishing a legislator's "fiscal responsibility grade" on a website.

k. Telling the public through a website or otherwise how legislators will be graded.

l. Giving awards to legislators.

m. Owning, publishing or writing for a newspaper.

n. Publishing paid advertisements that directly or indirectly oppose or promote legislation or administrative action.

o. Facebook posts.

p. Twitter posts.

II. Conclusions of Law

The findings of fact described in Section I support the following conclusions of law:

9. The Commission determines that Mr. Sullivan was required to register as a lobbyist in 2010 and 2011 because, as part of his regular employment, he communicated directly with members of the legislative or executive branch to influence legislation or administrative action on behalf of the person by whom he was compensated or reimbursed, and his compensation in 2010 and 2011 exceeded the amount triggering registration. Tex. Gov't Code § 305.003; 1 TAC § 34.43(a). Accordingly, Mr. Sullivan violated section 305.003 of the Government Code by failing to register as a lobbyist in 2010 and 2011.

10. Mr. Sullivan did not qualify for the media exception, because he engaged in further activities that require registration, including direct communication with members of the Legislature and their staffs regarding pending legislative action. Tex. Gov't Code § 305.004(1).

11. Mr. Sullivan's lawyer claims that the Commission should dismiss the complaints because the Texas lobbyist registration law is unconstitutional. During the course of our consideration of these sworn complaints, Mr. Sullivan has filed three separate lawsuits against the Commission in state and federal district courts, purportedly to stop "unconstitutional" restrictions on free speech. Mr. Sullivan has not pointed the Commission to any court decision that has held the Texas lobbyist registration statute to be unconstitutional. Rather, he asks the Commission not to enforce laws passed by duly elected representatives of the people of the State of Texas. The Texas Government Code states that a statute passed by the Legislature is presumed to be constitutional. Tex. Gov't Code § 311.021(1). The Commission cannot and will not unilaterally refuse to enforce the lobbyist registration statute.

III. Procedural History of Formal Hearing

12. On April 3, 2012, sworn complaints SC-3120487 and SC-3120488 were filed with the Commission.

13. On August 8 and October 29, 2013, the Commission held preliminary review hearings on the sworn complaints and determined that there was credible evidence that Mr. Sullivan had violated the Texas lobbyist registration statute, section 305.003 of the Government Code. The sworn complaints were not resolved at the completion of the preliminary review hearings, leading to the formal hearing before the Commission.

14. On February 12, April 3, and May 28 (continued to May 29), 2014, the Commission held prehearing conferences in connection with the formal hearing.

15. At the February 12, 2014 prehearing conference, the Commission voted to issue subpoenas duces tecum in connection with the formal hearing. On April 3, 2014, the Commission voted to issue revised subpoenas. On April 21, 2014, Mr. Sullivan filed objections to the revised subpoenas.

16. On May 29, 2014, after two hearings on motions to quash, the Commission issued an order directing Mr. Sullivan to comply with production of documents responsive to the Commission-issued subpoena duces tecum. On June 13, 2014, Mr. Sullivan produced about 80 pages of documents. However, the evidentiary record at the formal hearing revealed hundreds of pages of direct communications from Mr. Sullivan located in the files of Texas legislators that were not produced pursuant to the subpoena. The Commission is left with the inescapable conclusion that Mr. Sullivan and Empower Texans have destroyed or lost thousands of emails sent to members of the Legislature during 2010 and 2011, despite having received written requests for such information in 2012.

17. On June 18 and 19, 2014, Mr. Sullivan and the Commission staff engaged in a prehearing exchange of exhibits and witness lists.

18. The formal hearing was held on June 25, 2014. The hearing was conducted pursuant to the Administrative

Procedures Act and the Texas Rules of Evidence. The evidentiary burden was preponderance of the evidence. At the formal hearing, Mr. Sullivan and the Commission staff were allotted four hours each to present evidence and argument. The Commission staff used its four-hour time allotment. Mr. Sullivan used approximately three hours of his time allotment.

19. Also in connection with the formal hearing, the Commission issued a witness subpoena summoning Mr. Sullivan to appear before the Commission at the formal hearing. The Commission staff called Mr. Sullivan as a witness. Mr. Sullivan refused to testify. Mr. Sullivan refused to answer any questions asked by the Commission staff or the Commissioners themselves.

20. Mr. Sullivan's lawyer explained that Mr. Sullivan was asserting his rights under the First, Fourth, and Fourteenth Amendment as a basis for his refusal to testify. Mr. Sullivan did not invoke a Fifth Amendment right not to testify. The Chair overruled these objections. Mr. Sullivan still refused to testify. When asked by the Commission to explain the basis for a claimed right not to testify based on the First Amendment, Mr. Sullivan's lawyer cited a free association case from California. In *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009), private parties to a lawsuit, who intervened in a lawsuit challenging the constitutionality of a California ballot measure, obtained a protective order from a court against compelled disclosure of internal campaign documents and documents listing members of its organization, on the basis of a First Amendment freedom of association right.

The court's ruling was limited to compelled disclosure of specific information that the court determined was constitutionally protected from compelled disclosure. This case provides no support for Mr. Sullivan's global refusal to answer questions on subjects such as his employment with Empower Texans and related entities and his direct contact with legislators to influence legislation. Mr. Sullivan did not assert that answering such questions would require him to reveal constitutionally protected information. Instead, he chose not to respond, and a conclusory invocation of the First, Fourth, and Fourteenth Amendment cannot mask or justify his refusal to respond. The evidence adduced at the formal hearing allowed the Commission to make the factual conclusions set forth in this order, regardless of whether Mr. Sullivan testified or refused to testify. However, Mr. Sullivan's abject and unjustified refusal to answer questions before the Commission permitted the Commission to draw inferences adverse to Mr. Sullivan that supported the allegations of the sworn complaints. For an example of how this presumption was applied in administrative proceedings, see *Andrews v. Texas Department of Health*, 2007 WL 486488 (Tex. App. – Austin 2007, no writ).

21. In connection with a formal hearing, the Commission is authorized to subpoena documents and examine witnesses that directly relate to a sworn complaint. Tex. Gov't Code § 571.137(a). If a person to whom a subpoena is directed refuses to appear, refuses to answer inquiries, or fails or refuses to produce books, records, or other documents that were under the person's control when the demand was made, the Commission shall report that fact

to a district court in Travis County. The district court can then enforce the subpoena by attachment proceedings for contempt in the same manner as the court enforces a subpoena issued by the court. *Id.* § 571.137.

22. If every participant in an administrative proceeding could simply refuse to participate in any meaningful way, the entire sworn complaint process would fail its statutory purpose. The Commission does not and will not tolerate such dilatory tactics. However, a contempt action at this time would only needlessly delay resolution of these complaints because the relevant facts in question were provided by numerous sources and Mr. Sullivan's refusal to cooperate only bolsters the case against him.

IV. Conclusion

23. The Commission orders that Mr. Sullivan pay the maximum allowable civil penalty of $10,000 ($5,000 for each violation) to the State of Texas within 30 days of the date of this order.

24. This order is not confidential.

25. In summary, it is apparent that Mr. Sullivan is a professional lobbyist compensated by Empower Texans and its related entities for employment activities that include direct advocacy. Advocacy is indisputably legal, but being paid to directly advocate without registering as a lobbyist is not. The communications reviewed by the Commission advocate passage or defeat of specific legislative action on behalf of a special interest group.

Appendix D

Regardless of political orientation or message, no paid advocate who engages in direct communications with Texas legislators is above the disclosure laws of the State of Texas. The Commission's unanimous opinion is that Mr. Sullivan is a paid lobbyist who is required to register under Texas law.

FOR THE COMMISSION

Date: July 21, 2014

/s/
Jim Clancy
Chairman
On behalf of the Texas Ethics Commission

APPENDIX E — ORDER DENYING REHEARING OF THE SUPREME COURT OF TEXAS, DATED AUGUST 30, 2024

RE: Case No. 23-0080 DATE: 8/30/2024
COA #: 03-21-00033-CV TC#: D-1-GN-17-001878
STYLE: SULLIVAN v. TEX. ETHICS COMM'N

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. (Justice Young not participating)

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APPENDIX F — STATUTORY PROVISIONS INVOLVED

V.T.C.A., Government Code § 305.001. Policy

The operation of responsible democratic government requires that the people be afforded the fullest opportunity to petition their government for the redress of grievances and to express freely their opinions on legislation, pending executive actions, and current issues to individual members of the legislature, legislative committees, state agencies, and members of the executive branch. To preserve and maintain the integrity of the legislative and administrative processes, it is necessary to disclose publicly and regularly the identity, expenditures, and activities of certain persons who, by direct communication with government officers, engage in efforts to persuade members of the legislative or executive branch to take specific actions.

Appendix F

V.T.C.A., Government Code § 305.002. Definitions

In this chapter:

(1) "Administrative action" means rulemaking, licensing, or any other matter that may be the subject of action by a state agency or executive branch office, including a matter relating to the purchase of products or services by the agency or office. The term includes the proposal, consideration, or approval of the matter or negotiations concerning the matter.

(2) "Communicates directly with" or any variation of the phrase means contact in person or by telephone, telegraph, letter, facsimile, electronic mail, or other electronic means of communication.

(2-a) "Communicates directly with a member of the legislative or executive branch to influence legislation or administrative action" or any variation of the phrase includes establishing goodwill with the member for the purpose of later communicating with the member to influence legislation or administrative action.

(3) "Compensation" means money, service, facility, or other thing of value or financial benefit that is received or is to be received in return for or in connection with services rendered or to be rendered.

(4) "Member of the executive branch" means an officer, officer-elect, candidate for, or employee of any state agency, department, or office in the executive branch of state government.

(5) "Expenditure" means a payment, distribution, loan, advance, reimbursement, deposit, or gift of money or any thing of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure.

(6) "Legislation" means:

(A) a bill, resolution, amendment, nomination, or other matter pending in either house of the legislature;

(B) any matter that is or may be the subject of action by either house or by a legislative committee, including the introduction, consideration, passage, defeat, approval, or veto of the matter; or

(C) any matter pending in a constitutional convention or that may be the subject of action by a constitutional convention.

(7) "Member of the legislative branch" means a member, member-elect, candidate for, or officer of the legislature or of a legislative committee, or an employee of the legislature.

(8) "Person" means an individual, corporation, association, firm, partnership, committee, club, organization, or group of persons who are voluntarily acting in concert.

(9) "Registrant" means a person required to register under Section 305.003.

(10) "Commission" means the Texas Ethics Commission.

(11) "Immediate family" means a spouse or dependent child.

(12) "Client" means a person or entity for which the registrant is registered or is required to be registered.

(13) "Matter" means the subject matters for which a registrant has been reimbursed, retained, or employed by a client to communicate directly with a member of the legislative or executive branch.

(14) "Person associated with the registrant" or "other associated person" means a partner or other person professionally associated with the registrant through a common business entity, other than a client, that reimburses, retains, or employs the registrant.

Appendix F

V.T.C.A., Government Code § 305.002. Definitions

(2011)

In this chapter:

(1) "Administrative action" means rulemaking, licensing, or any other matter that may be the subject of action by a state agency or executive branch office, including a matter relating to the purchase of products or services by the agency or office. The term includes the proposal, consideration, or approval of the matter or negotiations concerning the matter.

(2) "Communicates directly with" or any variation of the phrase means contact in person or by telephone, telegraph, letter, facsimile, electronic mail, or other electronic means of communication.

(3) "Compensation" means money, service, facility, or other thing of value or financial benefit that is received or is to be received in return for or in connection with services rendered or to be rendered.

(4) "Member of the executive branch" means an officer, officer-elect, candidate for, or employee of any state agency, department, or office in the executive branch of state government.

(5) "Expenditure" means a payment, distribution, loan, advance, reimbursement, deposit, or gift of money or any thing of value and includes a contract,

promise, or agreement, whether or not legally enforceable, to make an expenditure.

(6) "Legislation" means:

(A) a bill, resolution, amendment, nomination, or other matter pending in either house of the legislature;

(B) any matter that is or may be the subject of action by either house or by a legislative committee, including the introduction, consideration, passage, defeat, approval, or veto of the matter; or

(C) any matter pending in a constitutional convention or that may be the subject of action by a constitutional convention.

(7) "Member of the legislative branch" means a member, member-elect, candidate for, or officer of the legislature or of a legislative committee, or an employee of the legislature.

(8) "Person" means an individual, corporation, association, firm, partnership, committee, club, organization, or group of persons who are voluntarily acting in concert.

(9) "Registrant" means a person required to register under Section 305.003.

(10) "Commission" means the Texas Ethics Commission.

(11) "Immediate family" means a spouse or dependent child.

(12) "Client" means a person or entity for which the registrant is registered or is required to be registered.

(13) "Matter" means the subject matters for which a registrant has been reimbursed, retained, or employed by a client to communicate directly with a member of the legislative or executive branch.

(14) "Person associated with the registrant" or "other associated person" means a partner or other person professionally associated with the registrant through a common business entity, other than a client, that reimburses, retains, or employs the registrant.

Appendix F

V.T.C.A., Government Code § 305.003.
Persons Required to Register

(a) A person must register with the commission under this chapter if the person:

> (1) makes a total expenditure of an amount determined by commission rule but not less than $200 in a calendar quarter, not including the person's own travel, food, or lodging expenses or the person's own membership dues, on activities described in Section 305.006(b) to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action; or
>
> (2) receives, or is entitled to receive under an agreement under which the person is retained or employed, compensation or reimbursement, not including reimbursement for the person's own travel, food, or lodging expenses or the person's own membership dues, of more than an amount determined by commission rule but not less than $200 in a calendar quarter from another person to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b) Subsection (a)(2) requires a person to register if the person, as part of his regular employment, has communicated directly with a member of the legislative or executive branch to influence legislation or administrative

action on behalf of the person by whom he is compensated or reimbursed, whether or not the person receives any compensation for the communication in addition to the salary for that regular employment.

(b-1) Subsection (a)(2) does not require a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state to register. This subsection does not apply to an officer or employee of a quasi-governmental agency. For purposes of this subsection, "quasi-governmental agency" means a governmental agency, other than an institution of higher education as defined by Section 61.003, Education Code, that has as one of its primary purposes engaging in an activity that is normally engaged in by a nongovernmental agency, including:

(1) acting as a trade association; or

(2) competing in the public utility business with private entities.

(b-2) Subsection (a)(2) does not require an officer or an employee of a state agency that provides utility services under Section 35.102, Utilities Code, and Sections 31.401 and 52.133, Natural Resources Code, to register.

(b-3) Subsection (a)(2) does not require a person to register if the person spends not more than 26 hours, or another amount of time determined by the commission, for which the person is compensated or reimbursed during

the calendar quarter engaging in activity, including preparatory activity as defined by the commission, to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b-4) If a person spends more than eight hours in a single day engaging in activity to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action, the person is considered to have engaged in the activity for only eight hours during that day for purposes of Subsection (b-3).

(c) A person who communicates directly with a member of the executive branch to influence administrative action is not required to register under Subsection (a)(2) if the person is an attorney of record or pro se, the person enters his appearance in a public record through pleadings or other written documents in a docketed case pending before a state agency, and that communication is the only activity that would otherwise require the person to register.

Appendix F

V.T.C.A., Government Code § 305.003.
Persons Required to Register

(2011)

(a) A person must register with the commission under this chapter if the person:

(1) makes a total expenditure of an amount determined by commission rule but not less than $200 in a calendar quarter, not including the person's own travel, food, or lodging expenses or the person's own membership dues, on activities described in Section 305.006(b) to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action; or

(2) receives, or is entitled to receive under an agreement under which the person is retained or employed, compensation or reimbursement, not including reimbursement for the person's own travel, food, or lodging expenses or the person's own membership dues, of more than an amount determined by commission rule but not less than $200 in a calendar quarter from another person to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b) Subsection (a)(2) requires a person to register if the person, as part of his regular employment, has communicated directly with a member of the legislative or executive branch to influence legislation or administrative

action on behalf of the person by whom he is compensated or reimbursed, whether or not the person receives any compensation for the communication in addition to the salary for that regular employment.

(b-1) Subsection (a)(2) does not require a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state to register. This subsection does not apply to an officer or employee of a quasi-governmental agency. For purposes of this subsection, "quasi-governmental agency" means a governmental agency, other than an institution of higher education as defined by Section 61.003, Education Code, that has as one of its primary purposes engaging in an activity that is normally engaged in by a nongovernmental agency, including:

(1) acting as a trade association; or

(2) competing in the public utility business with private entities.

(b-2) Subsection (a)(2) does not require an officer or an employee of a state agency that provides utility services under Section 35.102, Utilities Code, and Sections 31.401 and 52.133, Natural Resources Code, to register.

(c) A person who communicates directly with a member of the executive branch to influence administrative action is not required to register under Subsection (a)(2) if the person is an attorney of record or pro se, the

person enters his appearance in a public record through pleadings or other written documents in a docketed case pending before a state agency, and that communication is the only activity that would otherwise require the person to register.

Appendix F

V.T.C.A., Government Code § 305.004. Exceptions

The following persons are not required to register under this chapter:

(1) a person who owns, publishes, or is employed by a newspaper, any other regularly published periodical, a radio station, a television station, a wire service, or any other bona fide news medium that in the ordinary course of business disseminates news, letters to the editors, editorial or other comment, or paid advertisements that directly or indirectly oppose or promote legislation or administrative action, if the person does not engage in further or other activities that require registration under this chapter and does not represent another person in connection with influencing legislation or administrative action;

(2) a person whose only direct communication with a member of the legislative or executive branch to influence legislation or administrative action is an appearance before or testimony to one or more members of the legislative or executive branch in a hearing conducted by or on behalf of either the legislative or the executive branch and who does not receive special or extra compensation for the appearance other than actual expenses incurred in attending the hearing;

(3) a person whose only activity is to encourage or solicit members, employees, or stockholders of an entity by whom the person is reimbursed, employed, or retained to communicate directly with members of the legislative or executive branch to influence legislation or administrative action;

(4) a person whose only activity to influence legislation or administrative action is to compensate or reimburse an individual registrant to act in the person's behalf to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action;

(5) a person whose only activity to influence legislation or administrative action is attendance at a meeting or entertainment event attended by a member of the legislative or executive branch if the total cost of the meeting or entertainment event is paid by a business entity, union, or association;

(6) a person whose only compensation subject to Section 305.003(a)(2) consists of reimbursement for any wages not earned due to attendance at a meeting or entertainment event, travel to and from the meeting or entertainment event, admission to the meeting or entertainment event, and any food and beverage consumed at the meeting or entertainment event if the meeting or entertainment event is attended by a member of the legislative or executive branch and if the total cost of the meeting or entertainment event is paid by a business entity, union, or association; and

(7) a person who communicates directly with a member of the legislative or executive branch on behalf of a political party concerning legislation or administrative action, and whose expenditures and compensation, as described in Section 305.003, combined do not exceed $5,000 a calendar year.

Appendix F

V.T.C.A., Government Code § 305.005. Registration

(a) Each person required to register under this chapter shall file a written registration with the commission and shall submit a registration fee.

(b) A registration filed under this chapter expires at midnight, December 31, of each year unless the registrant submits a registration renewal form to the commission on a form prescribed by the commission and submits the registration renewal fee. The registrant may file the registration renewal form and the fee anytime in December of the year in which the registration expires.

(c) The registration fee and registration renewal fee are:

(1) $150 for a registrant employed by an organization exempt from federal income tax under Section 501(c)(3), 501(c)(4), or 501(c)(6), Internal Revenue Code of 1986;

(2) $75 for any person required to register solely because the person is required to register under Section 305.0041; or

(3) $750 for any other registrant.

(d) Repealed by Acts 1999, 76th Leg., ch. 62, § 8.01, eff. Sept. 1, 1999.

(e) A person required to register under this chapter who has not registered or whose registration has expired shall file the registration form and submit the registration fee not later than the fifth day after the date on which the person or the person's employee makes the first direct communication with a member of the legislative or executive branch that requires the person's registration.

(f) The registration must be written and verified and must contain:

(1) the registrant's full name and address;

(2) the registrant's normal business, business phone number, and business address;

(3) the full name and address of each person:

(A) who reimburses, retains, or employs the registrant to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action; and

(B) on whose behalf the registrant has communicated directly with a member of the legislative or executive branch to influence legislation or administrative action;

(4) the subject matter of the legislation or of the administrative action that is the subject of the registrant's direct communication with a member of

the legislative or executive branch and, if applicable, the docket number or other administrative designation of the administrative action;

(5) for each person employed or retained by the registrant for the purpose of assisting in direct communication with a member of the legislative or executive branch to influence legislation or administrative action:

(A) the full name, business address, and occupation of the person; and

(B) the subject matter of the legislation or of the administrative action to which the person's activities reportable under this section were related and, if applicable, the docket number or other administrative designation of the administrative action; and

(6) the amount of compensation or reimbursement paid by each person who reimburses, retains, or employs the registrant for the purpose of communicating directly with a member of the legislative or executive branch or on whose behalf the registrant communicates directly with a member of the legislative or executive branch.

(g) Compensation or reimbursement required to be reported under Subsection (f)(6) shall be reported in the following categories unless reported as an exact amount:

(1) $0 if no compensation or reimbursement is received;

(2) less than $10,000;

(3) at least $10,000 but less than $25,000;

(4) at least $25,000 but less than $50,000;

(5) at least $50,000 but less than $100,000;

(6) at least $100,000 but less than $150,000;

(7) at least $150,000 but less than $200,000;

(8) at least $200,000 but less than $250,000;

(9) at least $250,000 but less than $300,000;

(10) at least $300,000 but less than $350,000;

(11) at least $350,000 but less than $400,000;

(12) at least $400,000 but less than $450,000;

(13) at least $450,000 but less than $500,000; and

(14) $500,000 or more.

(g-1) Notwithstanding any other provision of this section, compensation or reimbursement required to be reported under Subsection (f)(6) shall be reported as an exact amount if the compensation or reimbursement received exceeds $500,000.

(h) If a registrant's activities are done on behalf of the members of a group or organization, including a business, trade, or consumer interest association but excluding a corporation, the registration form must include:

(1) a statement of the number of members in the group;

(2) the name of each person in the group or organization who determines the policy of the group or organization relating to influencing legislative or administrative action;

(3) a full description of the methods by which the registrant develops and makes decisions about positions on policy; and

(4) a list of those persons making a grant or contribution, in addition to or instead of dues or fees, that exceeds $250 per year.

(i) If a registrant's activities are done on behalf of a corporation the shares of which are not publicly traded, the registration form must include:

(1) the number of shareholders in the corporation;

(2) the name and address of each officer or member of the board of directors; and

(3) the name of each person owning 10 percent or more shares of the corporation.

(j) If the person described by Subsection (f)(3) is a business entity engaged in the representation of clients for the purpose of influencing legislation or administrative action, the registrant shall give the information required by that subdivision for each client on whose behalf the registrant communicated directly with a member of the legislative or executive branch.

(k) If there is a change in the information required to be reported by a registrant under this section, other than Subsection (h) or (i), and that changed information is not timely reported on a report due under Section 305.007, the registrant shall file an amended registration reflecting the change with the commission not later than the date on which an amended registration is due under Section 305.0065 or the next report is due under Section 305.007, as applicable.

(l) The registration form must include a statement of whether the registrant is or is required to be registered as a foreign agent under the Foreign Agents Registration Act of 1938 (22 U.S.C. Section 611 et seq.).

(m) The registration form must include the full name and address of each person who compensates or reimburses the registrant or person acting as an agent for the registrant for services, including political consulting services, rendered by the registrant from:

(1) a political contribution as defined by Title 15, Election Code;

(2) interest received from a political contribution as defined by Title 15, Election Code; or

(3) an asset purchased with a political contribution as defined by Title 15, Election Code.

Appendix F

V.T.C.A., Government Code § 305.005. Registration

(2011)

(a) Each person required to register under this chapter shall file a written registration with the commission and shall submit a registration fee.

(b) A registration filed under this chapter expires at midnight, December 31, of each year unless the registrant submits a registration renewal form to the commission on a form prescribed by the commission and submits the registration renewal fee. The registrant may file the registration renewal form and the fee anytime in December of the year in which the registration expires.

(c) The registration fee and registration renewal fee are:

(1) $100 for a registrant employed by an organization exempt from federal income tax under Section 501(c) (3) or 501(c) (4), Internal Revenue Code of 1986;

(2) $50 for any person required to register solely because the person is required to register under Section 305.0041 of this chapter; or

(3) $500 for any other registrant.

(d) Repealed by Acts 1999, 76th Leg., ch. 62, § 8.01, eff. Sept. 1, 1999.

(e) A person required to register under this chapter who has not registered or whose registration has expired shall

file the registration form and submit the registration fee not later than the fifth day after the date on which the person or the person's employee makes the first direct communication with a member of the legislative or executive branch that requires the person's registration.

(f) The registration must be written and verified and must contain:

(1) the registrant's full name and address;

(2) the registrant's normal business, business phone number, and business address;

(3) the full name and address of each person:

(A) who reimburses, retains, or employs the registrant to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action; and

(B) on whose behalf the registrant has communicated directly with a member of the legislative or executive branch to influence legislation or administrative action;

(4) the subject matter of the legislation or of the administrative action that is the subject of the registrant's direct communication with a member of the legislative or executive branch and, if applicable, the docket number or other administrative designation of the administrative action;

(5) for each person employed or retained by the registrant for the purpose of assisting in direct communication with a member of the legislative or executive branch to influence legislation or administrative action:

(A) the full name, business address, and occupation of the person; and

(B) the subject matter of the legislation or of the administrative action to which the person's activities reportable under this section were related and, if applicable, the docket number or other administrative designation of the administrative action; and

(6) the amount of compensation or reimbursement paid by each person who reimburses, retains, or employs the registrant for the purpose of communicating directly with a member of the legislative or executive branch or on whose behalf the registrant communicates directly with a member of the legislative or executive branch.

(g) Compensation or reimbursement required to be reported under Subsection (f)(6) shall be reported in the following categories unless reported as an exact amount:

(1) $0 if no compensation or reimbursement is received;

(2) less than $10,000;

(3) at least $10,000 but less than $25,000;

(4) at least $25,000 but less than $50,000;

(5) at least $50,000 but less than $100,000;

(6) at least $100,000 but less than $150,000;

(7) at least $150,000 but less than $200,000;

(8) at least $200,000 but less than $250,000;

(9) at least $250,000 but less than $300,000;

(10) at least $300,000 but less than $350,000;

(11) at least $350,000 but less than $400,000;

(12) at least $400,000 but less than $450,000;

(13) at least $450,000 but less than $500,000; and

(14) $500,000 or more.

(g-1) Notwithstanding any other provision of this section, compensation or reimbursement required to be reported under Subsection (f)(6) shall be reported as an exact amount if the compensation or reimbursement received exceeds $500,000.

(h) If a registrant's activities are done on behalf of the members of a group or organization, including a business, trade, or consumer interest association but excluding a corporation, the registration form must include:

(1) a statement of the number of members in the group;

(2) the name of each person in the group or organization who determines the policy of the group or organization relating to influencing legislative or administrative action;

(3) a full description of the methods by which the registrant develops and makes decisions about positions on policy; and

(4) a list of those persons making a grant or contribution, in addition to or instead of dues or fees, that exceeds $250 per year.

(i) If a registrant's activities are done on behalf of a corporation the shares of which are not publicly traded, the registration form must include:

(1) the number of shareholders in the corporation;

(2) the name and address of each officer or member of the board of directors; and

(3) the name of each person owning 10 percent or more shares of the corporation.

(j) If the person described by Subsection (f)(3) is a business entity engaged in the representation of clients for the purpose of influencing legislation or administrative action, the registrant shall give the information required by that subdivision for each client on whose behalf the registrant

communicated directly with a member of the legislative or executive branch.

(k) If there is a change in the information required to be reported by a registrant under this section, other than Subsection (h) or (i), and that changed information is not timely reported on a report due under Section 305.007, the registrant shall file an amended statement reflecting the change with the commission not later than the date on which the next report is due under Section 305.007.

Appendix F

V.T.C.A., Government Code § 305.031.
Criminal Penalties

(a) A person commits an offense if the person intentionally or knowingly violates a provision of this chapter other than Section 305.022 or 305.028. An offense under this subsection is a Class A misdemeanor.

(b) A person commits an offense if the person intentionally or knowingly violates Section 305.022. An offense under this subsection is a felony of the third degree.

(c) Repealed by Acts 2003, 78th Leg., ch. 249, § 4.12 and Acts 2003, 78th Leg., ch. 1322, § 2.

(d) This chapter does not affect the criminal responsibility of a person under the state laws relating to perjury.

(e) This section does not prohibit the commission from imposing a civil penalty for a violation.

Appendix F

V.T.C.A., Government Code § 305.032.
Civil Penalty for Failure to Register

In addition to the criminal penalties prescribed by Section 305.031, a person who receives compensation or reimbursement or makes an expenditure for engaging in direct communication to influence legislation or administrative action and who fails to file a registration form or activities report required to be filed under this chapter shall pay a civil penalty in an amount determined by commission rule, but not to exceed an amount equal to three times the compensation, reimbursement, or expenditure.

Appendix F

1 TAC § 34.41. Expenditure Threshold

(a) A person must register as a lobbyist under chapter 305 of the Texas Government Code if the person makes total expenditures of more than the amount specified in Tex. Gov't Code §305.003(a)(1), as amended by Figure 2 in 1 TAC §18.31 in a calendar quarter, not including expenditures for the person's own travel, food, lodging, or membership dues, on activities described in Government Code §305.006(b) to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action.

(b) An expenditure made by a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state acting in his or her official capacity is not included for purposes of determining whether a person is required to register under Government Code, §305.003(a)(1).

(c) An expenditure made in connection with an event to promote the interests of a designated geographic area or political subdivision is not included for purposes of determining whether a person has crossed the registration threshold in Government Code, §305.003(a)(1), if the expenditure is made by a group that exists for the limited purpose of sponsoring the event or by a person acting on behalf of such a group.

Appendix F

1 TAC § 34.41. Expenditure Threshold

(2011)

(a) A person must register under Government Code, § 305.003(a)(1), if the person makes total expenditures of more than $500 in a calendar quarter, not including expenditures for the person's own travel, food, lodging, or membership dues, on activities described in Government Code, § 305.006(b), to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action.

(b) An expenditure made by a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state acting in his or her official capacity is not included for purposes of determining whether a person is required to register under Government Code, § 305.003(a)(1).

(c) An expenditure made in connection with an event to promote the interests of a designated geographic area or political subdivision is not included for purposes of determining whether a person has crossed the registration threshold in Government Code, § 305.003(a)(1), if the expenditure is made by a group that exists for the limited purpose of sponsoring the event or by a person acting on behalf of such a group.

Appendix F

1 TAC § 34.43. Compensation and Reimbursement Threshold

(a) A person must register as a lobbyist under chapter 305 of the Texas Government Code if the person receives, or is entitled to receive under an agreement under which the person is retained or employed, more than the amount specified in Tex. Gov't Code §305.003(a)(2), as amended by Figure 2 in 1 TAC §18.31 in a calendar quarter in compensation and reimbursement, not including reimbursement for the person's own travel, food, lodging, or membership dues, from one or more other persons to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b) For purposes of Government Code, §305.003(a)(2), and this chapter, a person is not required to register if the person spends not more than 40 hours for which the person is compensated or reimbursed during a calendar quarter engaging in lobby activity, including preparatory activity as described by §34.3 of this title (relating to Compensation for Preparation Time).

(c) For purposes of Government Code, §305.003(a)(2), and this chapter, a person shall make a reasonable allocation of compensation between compensation for lobby activity and compensation for other activities.

Appendix F

1 TAC § 34.43. Compensation and Reimbursement Threshold

(2011)

(a) A person must register under Government Code, §305.003(a)(2), if the person receives, or is entitled to receive under an agreement under which the person is retained or employed, more than $1000 in a calendar quarter in compensation and reimbursement, not including reimbursement for the person's own travel, food, lodging, or membership dues, from one or more other persons to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b) For purposes of Government Code, §305.003(a)(2), and this chapter, a person is not required to register if the person spends not more than 40 hours for which the person is compensated or reimbursed during a calendar quarter engaging in lobby activity, including preparatory activity as described by §34.3 of this title.

(c) For purposes of Government Code, §305.003(a)(2), and this chapter, a person shall make a reasonable allocation of compensation between compensation for lobby activity and compensation for other activities.

APPENDIX G — EXCERPT OF PETITIONER'S MOTION FOR REHEARING IN THE SUPREME COURT OF TEXAS, FILED APRIL 22, 2024

No. 23-0080

IN THE SUPREME COURT OF TEXAS

MICHAEL QUINN SULLIVAN,

Petitioner,

v.

TEXAS ETHICS COMMISSION,

Respondent.

From the Third Court of Appeals at Austin, Texas
(No. 03-21-00033-CV)

PETITIONER'S MOTION FOR REHEARING

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In the alternative to dismissing the TEC's case outright, this Court should grant rehearing, issue a summary reversal of the court of appeals' misapplication of "exacting scrutiny," and remand this case to the court of appeals to (a) apply strict scrutiny, and/or (b) require the Texas Ethics Commission to present evidence of narrow tailoring.

ARGUMENT

I. The Texas Lobby Law is Content Based.

The Texas lobby law is a content-based speech regulation that applies to core First Amendment-protected speech. Its extensive regulations apply to Texans who "communicate directly with one or more members of the legislative or executive branch[es] to influence legislation or administrative action." TEX. GOV'T CODE § 305.003; .005.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Such regulations are subject to strict scrutiny. *Id.* at 163-64. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

Application of the 2010-11 Texas lobby law necessarily and inherently requires an examination of the content of that speech—both whether the speech is for the purpose

of "influenc[ing] legislation or administrative action," as well as whether the speech is made "directly with one or more members of the legislative or executive branch." Tex. Gov't Code § 305.003. This requires a review of the content of the speech—its purpose and recipient—not to mention its quantity in relation to other missives, as well as many other factors. Indeed, here the Commission based its entire case on the content of Sullivan's communications. CR7; CR 2184-85.

In response, the TEC cites *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 72 (2022). Resp. Br. at 21-22. But *Reagan* didn't undo *Reed*. 576 U.S. at 163. Instead, it confirmed *Reed's* holding that laws which require the government to examine the content of a speaker's message are content-based. *Reagan*, 596 U.S. at 142. A plain application of *Reed* shows that laws like the 2010-11 Texas lobby law are "content-based" and subject to strict scrutiny.

II. The Court of Appeals Mistakenly Applied Exacting Scrutiny Instead of Strict Scrutiny.

But the court of appeals ignored binding precedent in *Reed* instructing it on which test to apply. *Sullivan v. Tex. Ethics Comm'n*, 660 S.W.3d 225, 233 (Tex. App.—Austin 2022, pet. denied). Instead of applying strict scrutiny, the court of appeals picked from the non-binding plurality portion of *Americans for Prosperity Found. v. Bonta* (Section II-B-1) to justify its position that "exacting scrutiny" rather than "strict scrutiny" applied to "disclosure and registration statutes." *Sullivan*, 660

S.W.3d at 233 n.3 *(citing Bonta*, 141 S. Ct. 2373, 2383-85 (2021)). But Chief Justice Roberts' position in *Bonta* that "exacting scrutiny" applied to disclosure laws did not even draw majority support. *See* 141 S. Ct. at 2389 (Thomas, J., concurring except to Part II-B-1 and III-B) and 141 S.Ct. at 2391 (Alito, J. and Gorsuch, J. concurring except to Pat II-B-1). Moreover, nothing about the holding in *Bonta* undercut the Supreme Court's holding in *Reed* that a content-based law, such as the 2010- 11 Texas lobby law, is subject to strict scrutiny. 576 U.S. 155, 163 (2015). The statute at issue in *Bonta* required charities registered in California to provide a copy of their Form 990 Schedule B, which pertains to the identify of major donors. 141 S.Ct. at 2380. Accordingly, *Bonta* didn't deal with a contest-based speech regulation at all. It was a pure associational freedom case.

To allow the court of appeals opinion to stand invites Texas courts to put the cart ahead of the horse. Rather than analyzing whether a law is content- based to select a level of scrutiny, Texas courts are invited to look first at what types of regulations (disclosure and registration vs. an outright ban) are applied and select a test based on the degree of the regulation.

Under the court of appeals' standard, because the 2010-11 lobby law requires registration and disclosure (never mind its caps, the Byzantine nature of its regular reports, or its fee) the law gets exacting scrutiny review, even though it targets speech on the basis of its content. This holding cuts the legs out from under *Reed's* "clear and firm rule governing content neutrality." 576 U.S. at 171.

The Supreme Court has instructed that content neutrality rule is "an essential means of protecting the freedom of speech" that may result in laws which are "entirely reasonable" being "struck down because of their content- based nature." *Reed*, 576 U.S. at 171. Under the court of appeals' test, however, Texas courts never even reach the question of whether a law is "content based" if they first determine the law requires "registration and disclosure," which the court finds to be "reasonable" compared to an outright ban. *Sullivan*, 660 S.W.3d at 235. This precisely inverts *Reed*'s holding. To allow this holding to stand puts the free speech rights of 30 million Texas in danger.

III. Even Under Exacting Scrutiny, The TEC Was Required to Present Evidence to Prove Narrow Tailoring.

To the extent *Bonta* is relevant, it stands for the proposition, as Justice Alito put it, that exacting scrutiny is "scrutiny with teeth[.]" 141 S.Ct. at 2391 (Alito, J., concurring). But the so-called "*exacting*" scrutiny applied by the court of appeals was *no scrutiny at all* because the court failed to require the TEC to present any evidence of narrow tailoring. *Sullivan*, 660 S.W.3d at 233.

"Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Bonta*, 141 S. Ct. at 2384 (2021). *Bonta* holds that unnecessary burdens weigh against satisfying exacting scrutiny's requirement of narrow tailoring. *Id.* at

2385 ("a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.").

The TEC put on no evidence of narrow tailoring in its response to Sullivan's motion for summary judgment. CR 2887-2926. Narrow tailoring is not something the Court is tasked to divine without evidence, and here the TEC did not put on evidence that the statute was narrowly tailored; it simply asserted it, and the Court found the assertion "reasonable." *Sullivan*, 660 S.W.3d at 235.

But "*that sounds reasonable*" is not enough. "To meet the requirement of narrow tailoring, the government must **demonstrate** that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (emphasis added).

"When the Government restricts speech, **the Government bears the burden of proving** the constitutionality of its actions. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816-17 (2000) (emphasis added); *see also Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U.S. 173 (1999) ("**The Government bears the burden of identifying** a substantial interest **and justifying** the challenged restriction"); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997) ("The breadth of this content-based restriction of speech imposes **an especially heavy burden on the Government**

to explain why a less restrictive provision would not be as effective . . . "); *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U.S. 469, 480 (1989) ("**The State bears the burden of justifying** its restrictions . . . ") (emphases added).

Because the TEC did not put on evidence for the court to weigh of the supposed narrow tailoring of the 2010-11 Texas lobby law, the court of appeals erred in finding the TEC's burden to demonstrate narrow tailoring was met, whether applying strict scrutiny or exacting scrutiny.

IV. Summary Reversal Would be Appropriate.

While the issues involved in this case are vitally important to the free speech rights of 30 million Texans, the issues addressed in this Motion are sufficiently narrow that the Court should consider a per curiam reversal to correct the error below. *See* TEX. R. APP. P. 59.1; *see also*, *e.g.*, *U.S. Polyco, Inc. v. Tex. Cent. Bus. Lines Corp.*, 20223 WL 7238791 (Tex. Nov. 3, 2023) (per curiam).

With or without oral argument, the court can summarily reverse the court of appeals misapplication of exacting scrutiny. This Court should remand this case to the court of appeals with instructions that the court should apply strict scrutiny and/or that the Texas Ethics Commission must carry its

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APPENDIX H — EXCERPT OF PETITIONER'S BRIEF ON THE MERITS IN THE SUPREME COURT OF TEXAS, FILED OCTOBER 2, 2023

No. 23-0080

IN THE SUPREME COURT OF TEXAS

MICHAEL QUINN SULLIVAN,

Petitioner,

v.

TEXAS ETHICS COMMISSION,

Respondent.

From the Third Court of Appeals at Austin, Texas
(No. 03-21-00033-CV)

PETITIONER'S BRIEF ON THE MERITS

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Oral Argument Requested

affiliation of an agency can be determined by the text of the Texas Constitution. Texas Courts should look to the nature of the powers constitutionally assigned to an agency to determine the executive, legislative, or judicial nature of that agency.

II. The Texas Lobby Law Is Unconstitutional.

Next, the TEC's case against Sullivan must fail because the Texas lobby law is an unconstitutional infringement of the First Amendment rights to speak and petition government. For this reason, Sullivan's motion for summary judgment should have been granted.

A. Revenue Generating Taxes on Speech are Unconstitutional.

Long ago the Supreme Court rejected governmental attempts to meddle and interfere with the exercise of First Amendment freedoms by the imposition of a license tax. "The power to impose a license tax on the exercise of [First Amendment] freedoms is indeed as potent as the power of censorship. . . ." *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943). "On their face [license taxes] are a restriction of the free exercise of those freedoms which are protected by the First Amendment." *Id*. at 114. The Court in *Murdock* laid down the principle that "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Id.* at 113. Therefore, "a person cannot be compelled 'to purchase,

through a license fee or a license tax, the privilege freely granted by the constitution.'" *Id.* at 114; *see also Moffett v. Killian*, 360 F. Supp. 228, 232 (D. Conn. 1973) (striking down as unconstitutional the imposition of a $35 fee on lobbying and enjoining prosecution of a defendant for failure to pay it).

"[T]he power to tax involves the power to destroy . . . ." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819). Nothing is more dangerous and in need of strict scrutiny than the power to tax speech. Indeed, to this point, the legislative history behind the Texas lobby law's most recent fee increase is illuminating.

The bill enacting the increased fee was Senate Bill 1 of the First Called Session of the 82nd Legislature, raising the fee in 2011 from $100/$500 to $150/$750. Acts 2011, 82nd 1st C.S., ch. 4, Tex. Gen. Laws. The main purpose of SB 1 was to raise $7,327,438,898 in revenue to balance the state budget during the 2011 budget shortfall. Part of this revenue increase was accomplished through a roughly 50% increase in lobbying speech registration fees. The particular fee increase was anticipated to raise $738,500 in revenue for the state. House Research Organization bill analysis, SB 1, https://lrl.texas.gov/scanned/hroBillAnalyses/82-1/SB1.PDF, at 32.

The HRO report recognized the deterrent effect the fee increase could have on registration:

> Art. 24 would significantly increase the fee for some lobbyists to register, from $500 to

> $750. Lobbyists would bear the highest fees of any profession. The purpose of the current law is to encourage registration. The proposed increases could be counterproductive and could result in fewer registrations for those who chose to register because they were close to the spending threshold. Fewer registrations could result in less disclosure, when more disclosure is what should be encouraged.

Id. at 34.

The mere existence of a revenue-generating tax on speech renders the Texas lobby law's registration requirement unconstitutional. Therefore Sullivan cannot be punished for failing to comply with it.

B. The Lobby Law Is a Content-Based Speech Restriction That Does Not Satisfy Strict Scrutiny.

In reaching its decision, the court of appeals applied the wrong standard of scrutiny and as such, reached the erroneous conclusion of allowing a content-based tax on speech. Under modern First Amendment jurisprudence, strict scrutiny applies to Texas's lobby law. It cannot withstand this level of scrutiny.

i. The Lobby Law is a Content-Based Regulation of Speech, Therefore Strict Scrutiny Applies.

The Texas lobby law is a content-based speech restriction that applies to core First Amendment-protected speech. This content-based restriction limits the speech a person can "communicate directly with one or more members of the legislative or executive branch[es] to influence legislation or administrative action" unless that person first pays a registration fee. TEX. GOV'T CODE § 305.003; .005.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* Both are distinctions drawn based on the message a speaker conveys and are therefore subject to strict scrutiny. *Id.* at 163-64. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

"[A] clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-

based nature.'" *Reed*, 576 U.S. at 171. Even "facially content-neutral laws, will be considered content-based regulations of speech" if the laws "cannot be 'justified without reference to the content of the regulated speech." *Id*. at 164. "An innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id*. at 166. "Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Id*.

The registration scheme and fee imposed on Texans for the privilege of speaking to their representatives under Tex. Gov't Code Chapter 305 necessarily and inherently requires an examination of the content of that speech—both whether the speech is for the purpose of "influenc[ing] legislation or administrative action," as well as whether the speech is made "directly with one or more members of the legislative or executive branch." Tex. Gov't Code § 305.003. This requires a review of the content of the speech—its purpose and recipient—not to mention its quantity in relation to other missives, as well as many other factors. Categorically this is not content neutral, and as such, the court of appeals erred when it applied intermediate scrutiny. *See Sullivan*, 660 S.W. 3d at 233 ("[D]isclosure statutes—those that require persons to reveal their identity and divulge their First Amendment activities—are subject to review under the legal standard known as "exacting scrutiny.")

Indeed, here the Commission based its entire case on the content of Sullivan's communications. For example, to prove that Sullivan was required to register, the TEC alleged, for example:

- Sullivan "made numerous direct communications to state legislators and legislative staff concerning matters pending before the Legislature." CR 7.

- Sullivan outlined in his emails issues Empower Texans anticipated would be the subject of proposed legislation in the 82nd Legislature and encouraged the recipient legislators to make decisions consistent with Empower Texans' priorities and interests. CR 2184.

- Sullivan "urged them to '[o]ppose the creation of new taxes, granting additional taxing authority, or creating any new taxing entities'; '[p]rotect the state's Rainy Day Fund'; '[r]educe property taxes, and pursue policies to phase out the school M&O tax'; 'uncap the number of charter schools that can exist in Texas'; '[w]ork against federal overreach by limiting Texas' reliance on federal grants and other funds . . . and circumventing or overturning ObamaCare'; and 'elect a specified representative as Speaker.'" CR 2184-2185.

This is quintessentially a review based on the content of speech, making struct scrutiny the appropriate level for the court to apply. Therefore, the court of appeals erred in applying intermediate scrutiny.

ii. Anti-Corruption Is the Only Compelling Governmental Interest Justifying Restrictions on Speech.

Federal precedent has made clear that the only compelling governmental interest that justifies restrictions on political speech is anti-corruption; the transparency interest at issue here cannot alone meet strict scrutiny. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club*, 564 U.S. at 734. Here, there is a lack of a compelling state interest, as explained in the analogous decision of the Eighth Circuit in *Calzone v. Summers*, 942 F.3d 415, 418 (8th Cir. 2019).

Despite acknowledging *Calzone*, the court of appeals put Texas in conflict with the Eighth Circuit's holding that the only compelling governmental interest that justifies restrictions on political speech is an anticorruption interest and not a regular transparency interest.

Sitting *en banc*, the Eighth Circuit in *Calzone* struck down the State of Missouri's lobbyist regulation statute as applied to Ron Calzone, an activist who, like Sullivan, did not make lobbying expenditures. *Id.* at 418. The court reasoned, "[g]iven that Calzone's political activities do not involve the transfer of money or anything of value, either to

him or to anyone else, Missouri's interest in transparency does not "reflect the seriousness of the actual burden on [his] First Amendment rights." *Id.* at 425.

Like Sullivan, Calzone was an officer of the organization on whose behalf he allegedly lobbied and did not engage in any expenditure in connection with his speech. CR 9-10. The only substantive difference in the cases is that Calzone did not receive a salary from his organization. *Id.* at 422n.5.

And yet, the Eighth Circuit's reasoning does not support a conclusion that receiving regular employee compensation should be treated any differently; anticorruption interests are not implicated simply because a person is compensated to speak. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014). ("[a]ny regulation must . . . target what [the Supreme Court has] called quid pro quo corruption or its appearance."); *see also Fed. Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) ("[i]n drawing that line [between avoiding corruption and limiting political speech], the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.").

The Eight Circuit contrasted a state's *legitimate* interest in transparency and its *compelling* interest in avoiding *quid pro quo* corruption or its appearance. *Calzone*, 942 F.3d at 425 ("We do not doubt that when money changes hands, the nature of Missouri's transparency interest changes too, because the risk of quid pro quo corruption increases.")

In explaining this citation, first the court focused on two cases dealing with the distinction between political contributions, express advocacy, and other forms of independent political speech, implicitly applying this campaign-finance framework to lobbying speech. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)). In *Buckley*, the Supreme Court upheld compelled disclosure of "large contributions and expenditures" to "deter actual corruption and avoid the appearance of corruption." 424 U.S. 1, 67. This interest was later defined as "compelling." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). But in *McIntyre*, the Ohio regulations at issue were distinguished from those considered in *Buckley* precisely because they were not limited to independent expenditures that "expressly advocate the election or defeat of a clearly identified candidate," concluding the Ohio regulations "rest[] on different and *less powerful* state interests." *McIntyre*, 514 U.S. at 356 (emphasis added).

The Eighth Circuit then transitioned to a discussion of *United States v. Harriss* using the signal "c.f."—which is used to introduce cited authority that supports a proposition different from the main proposition but sufficiently analogous to lend support. *Calzone*, 942 F.3d at 425; The Bluebook: A Uniform System of Citation R. 1.2(a), at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010); 347 U.S. 612, 613 (1954). The court pointed to *Harriss* as holding a "legislature has a *legitimate interest* in knowing 'who is being hired, who is putting up the money, and how much'." 347 U.S. at 625 (emphasis added).

In summary, the 8th Circuit looked to *Buckley* as a source of a *compelling* governmental interest (avoidance of quid pro quo corruption) whereas it looked to *Harriss* as a source for a less powerful *legitimate* governmental interest (knowing who has hired a lobbyist).

This is precisely the analysis that Sullivan advanced in the trial court and has attempted to advance in this appeal. Like the 8th Circuit, this Court should look to campaign finance cases in the *Buckley* line in examining these matters related to lobbying speech. It should draw from them that there is a compelling governmental interest in avoiding quid pro quo corruption and its appearance, but that the government's informational interest in knowing who hires a lobbyist is something less than compelling—only a "legitimate interest."

Turning to Texas's lobbying registration law, a case under the law's expenditure prong could implicate the compelling interest of avoiding quid pro quo corruption or its appearance. Indeed, the issue of giving transportation, lodging, meals, and entertainment to elected officials is rife with the potential for corruption.

But this case is prosecuted exclusively under the lobby law's compensation prong. Taking guidance from modern First Amendment jurisprudence relating to campaign finance, there is simply no caselaw that suggests the mere fact that a person is employed to engage in independent speech implicates concerns of quid pro quo corruption.

Here, the TEC seeks to apply the lobby registration scheme to Sullivan solely on the grounds that he received

compensation as part of his regular employment as CEO and a board member of Empower Texans. Because this case does not involve lobbying expenditures—such as buying dinners or gifts for legislators—the connection to the compelling government interest of avoiding quid pro quo corruption or its appearance is non-existent. The only money changing hands was between Sullivan and his employer, not Sullivan and any legislator. Sullivan's job as the head of a nonprofit does not implicate the state's compelling interest in avoiding quid pro quo corruption or its appearance. Accordingly, the statute categorically fails strict scrutiny as applied to Sullivan.

iii. The Lobby Law's High Registration Fee is Not the Least Restrictive Means Nor is it Narrowly Tailored.

Perhaps the most blatant deficiency in the lobby law is its registration fee, ranging from $150 to $750.[8] The significant registration fee, in light of Congress's and many other states' decisions to forgo imposing any registration fee at all, is obviously not the "least restrictive means" of regulating lobbying. But the existence of the fee is also evidence of a failure to narrowly tailor the statute. There is no evidence that the fee is necessary to the effectiveness of the state's lobby program. And to the extent this Court finds that some fee would be tolerable, the TEC has offered no evidence of narrow tailoring to show why the state has chosen to impose such significant fees on speech.

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8. The fee's range was increased from $100 to $500 to $150 to $750 during 2011, the period at issue in this matter.

iv. The Lobby Law Is Not Narrowly Tailored Because a Single Statement Can Trigger Registration.

Under TEX. GOV'T CODE § 305.003, a person must register as a lobbyist and pay the registration fee if the person "receives . . . compensation . . . to communicate directly with a member of the legislature . . . ." This primary language sets *no threshold on the quantity of speech* required to trigger registration. And it does not require compensation be tied directly to the communication. The statute applies, "whether or not the person receives any compensation for the communication in addition to the salary for that regular employment." TEX. GOV'T CODE § 305.003(b).

In 2011, the Commission by rule "limited" application of the statute to those who spend more than 5% of their time on lobbying activity. 1 TEX. ADMIN. CODE § 34.43 (2011). But that limitation is illusory because it incorporates time spent "preparing to communicate," which includes:

- " Participation in strategy sessions;"
- "Review and analysis of legislation or administrative matters;"
- "Research;" and
- "Communication with [one's] employer." *Id.*[9]

9. The legislature subsequently codified a 26-hour per quarter floor for registration. TEX. GOV'T CODE § 305.003 (adopted

Accordingly, even under the 5% rule, a person who regularly reads legislation, engages in "research," or simply talks to his employer could be deemed a lobbyist if he engages in a *single communication* with an elected official. Indeed, as the publisher of the Fiscal Responsibility Index, Sullivan often read legislation and watched the proceedings of the legislature to report on them to Texans. CR 2776. Accordingly, the 5% rule offered no relief to Sullivan at all.

With this extreme standard lacking any tangible limiting principle, registration can be required of any person who communicates with an elected official while at work. Not only is this not the least restrictive means, it's not even close to narrowly tailored. The court of appeals refused to examine these important questions in its cursory analysis of narrow tailoring.

C. Exacting Scrutiny is Scrutiny With Teeth, But the Court of Appeals Merely Pointed to *Harriss*.

Rather than apply strict scrutiny, the Austin Court of Appeals purported to apply exacting scrutiny to Texas's speech registration scheme. *Sullivan* 660 S.W.3d at 233. Even so, the so-called "*exacting*" scrutiny applied by the court was *no scrutiny at all*.

2015). However, this floor remains illusory because it incorporates by reference "preparatory activity as defined by the commission." Accordingly, even today, a single communication may trigger a requirement to register under the statute.

Appendix H

"Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021). *Bonta* means that the protections afforded under exacting scrutiny review have "real teeth." *Id.* at 2391 (Alito, J., concurring).

Thus, even if Texas were not required to use the least restrictive means to achieve its end of regulating and taxing lobbying speech, it must nevertheless narrowly tailor its statute to achieve legitimate ends. Indeed, *Bonta* holds that unnecessary burdens weigh against satisfying exacting scrutiny's requirement of narrow tailoring. *Id.* at 2385 ("a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.").

Here, the Texas lobby law starts by blanketly forbidding communications "directly with a member of the legislative or executive branch to influence legislation or administrative action." TEX. GOV'T CODE 305.003(a)(2). It then grants permission to engage in such speech after registration and the payment of the fee. This is of particular concern because "[n]arrow tailoring is crucial where First Amendment activity is chilled— even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Bonta*, 141 S. Ct. at 2384. And yet here, First Amendment activity is more than chilled—it is forbidden, unless the mandatory fee is first paid.

Appendix H

Forbidding an entire category of speech directed at an entire category of persons is a "dramatic mismatch," with the interest the TEC claims the Texas lobby law is based on. *Id.* at 2386. Indeed, in attempting to regulate lobbying by requiring payment of a fee to the government to speak, the Texas lobby law "falls far short of satisfying the means-end fit that exacting scrutiny requires." *Id.* at 2386. As in *Bonta*, "[Texas] is not free to enforce any [lobby law] regime that furthers its interests. It must instead demonstrate its need for [a speech registration fee] in light of any less intrusive alternatives." *Id.* at 2386. There simply is no attempt at a means-end fit here between requiring a lobbying registration fee to be paid and preventing the appearance of quid pro quo corruption.

The court of appeals, rather than analyzing these issues, justified Texas's law under the Supreme Court's precedent upholding dissimilar congressional lobby regulations in *United States v. Harriss*, 347 U.S. 612, 613 (1954). But the Texas law is far different from the federal law examined nearly 70 years ago:

- At the federal level, registration is free. 2 U.S.C. § 1603.

- Unlike at the federal level, Texas requires employees and officers of an organization on whose behalf they speak to register, *even if they make no expenditure in connection with their speech*. TEX. GOV'T CODE § 305.001 et seq.

- At the federal level, organizational registration is not required unless total expenses exceed or are expected to exceed $10,000. 2 U.S.C. § 1603.

On top of factual dissimilarities, the Supreme Court in Harriss justified the federal regulations on the basis that they served Congressional interest in "self-protection," a holding called into question by 70 years of precedent from the campaign finance context. 347 U.S. at 625.

The court of appeals also pointed to *Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) for the proposition that courts have relied on *Harriss* to reject "broad constitutional attacks on lobbying disclosure requirements." *Sullivan*, 660 S.W.3d at 234. But *Fla. League* predates *Reed*, focuses on disclosure, and doesn't hold that states can impose a content-based, revenue-generating fee as part of a lobby law. Indeed, as the key law review article cited in *Fla. League* explains, "The Court's cursory treatment of the First Amendment [in *Harriss*] did little to explain the constitutional standing of the right to lobby" and "its precedential value was limited." Steven Browne, Note, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government,* 4 Wm. & Mary Bill Rts. J. 717, 731 (1995).

Instead of superficially following *Harriss* and paying lip service to exacting scrutiny, the court of appeals should have actually analyzed whether the lobby law was narrowly tailored.

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APPENDIX I — EXCERPT OF PETITION FOR REVIEW, FILED FEBRUARY 2, 2023

No. _____

IN THE SUPREME COURT OF TEXAS

MICHAEL QUINN SULLIVAN,

Petitioner

v.

TEXAS ETHICS COMMISSION

Respondent

From the Third Court of Appeals at Austin, Texas (03-21-00033-CV) and the 250th Judicial District Court, Travis County, Texas (D-1-GN-1878)

PETITION FOR REVIEW

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Oral Argument Requested

This Court should resolve the conflict at the courts of appeals, analyze the separation of powers issue using federal precedent, and make clear that statutes do not modify constitutional provisions.

II. The Texas Lobby Law Is Unconstitutional.

A. The Lobby Law Is a Content-Based Speech Restriction That Does Not Satisfy Strict Scrutiny.

This Court should grant review because the court of appeals applied the wrong standard of scrutiny and gave the green light to a content-based tax on speech.

i. The Lobby Law Imposes a Tax Based on the Content of Speech, so Strict Scrutiny Applies.

The Texas lobby law is a content-based speech restriction that applies to core First Amendment-protected speech. This content-based restriction imposes limits on the amount of speech a person can "communicate directly with one or more members of the legislative or executive branch[es] to influence legislation or administrative action" unless that person pays a registration fee. TEX. GOV'T CODE § 305.003; 305.005.

Appendix I

The registration scheme and fee imposed on Texans for the privilege of speaking to their representatives under TEX. GOV'T CODE CHAPTER 305 necessarily and inherently requires an examination of the content of that speech—both whether the speech is for the purpose of "influenc[ing] legislation or administrative action," as well as whether the speech is made "directly with one or more members of the legislative or executive branch." TEX. GOV'T CODE § 305.003. In other words, regulators must look at the content of speech to determine whether the speech triggers registration.

Indeed, here the Commission based its entire case on the content of Sullivan's communications. CR 2264-2342; 2397-2483.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* Both are distinctions drawn based on the message a speaker conveys and, therefore, are subject to strict scrutiny. *Id.* at 163-64. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

Texas has essentially imposed a license tax on speech, which fails strict scrutiny review. "A person cannot be

compelled 'to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.'" *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943); *See also Moffett v. Killian*, 360 F. Supp. 228, 232 (D. Conn. 1973) (striking down as unconstitutional the imposition of a $35 fee on lobbying and enjoining prosecution of a defendant for failure to pay it).

ii. Anti-Corruption Is the Only Compelling Governmental Interest Justifying Restrictions on Speech.

Despite acknowledging *Calzone v Summers*, the court of appeals puts Texas in conflict with the Eighth Circuit's holding that the only compelling governmental interest that justifies restrictions on political speech is an anti-corruption interest.

The Eighth Circuit, sitting *en banc*, recently struck down the State of Missouri's lobbyist regulation statute as applied to Ron Calzone, an individual who was not compensated and, like Sullivan, did not make lobbying expenditures. *Calzone v. Summers*, 942 F.3d 415, 418 (8th Cir. 2019). The court reasoned, "[g]iven that Calzone's political activities do not involve the transfer of money or anything of value, either to him or to anyone else, Missouri's interest in transparency does not "reflect the seriousness of the actual burden on [his] First Amendment rights." *Id.* at 425.

Like Sullivan, Calzone was an officer of the organization on whose behalf he allegedly lobbied and did not engage

in any expenditure in connection with his speech. CR 9-10. The only substantive difference in the cases is that Calzone did not receive a salary. *Id.* at 422n.5.

And yet, the Eighth Circuit's reasoning does not lead to the conclusion that simply receiving compensation should be treated any differently; anti-corruption interests are not implicated simply because a person is compensated to speak. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014). ("[a]ny regulation must . . . target what [the Supreme Court has] called quid pro quo corruption or its appearance."); *see also Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) ("[i]n drawing that line [between avoiding corruption and limiting political speech], the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.").

Because the Commission seeks to apply the speech registration fee to Sullivan solely on the grounds that he was compensated to engage in speech about legislation, rather than because he engaged in lobbying expenditures—such as buying dinners or gifts for legislators—the connection to the compelling governmental interest of avoiding quid pro quo corruption or the appearance thereof is non-existent. Sullivan's job as the head of a non-profit advocating on behalf of taxpayers does not implicate the state's compelling interest in avoiding quid pro quo corruption or the appearance thereof. Accordingly, the statute fails strict scrutiny as applied to Sullivan.

B. The Court of Appeals Did Not Even Apply Exacting Scrutiny.

Rather than apply strict scrutiny, the Austin Court of Appeals purported to apply exacting scrutiny to Texas's speech registration scheme. Op. at 7. Even so, the so-called "*exacting*" scrutiny applied by the court was *no scrutiny at all*.

i. Exacting Scrutiny Is Scrutiny With Teeth, but the Court of Appeals Merely Pointed to *Harriss*

"Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021). Thus, even if Texas were not required to use the least restrictive means to achieve its end of regulating and taxing lobbying speech, it must nevertheless narrowly tailor its statute to achieve that end. Indeed, *Bonta* holds that unnecessary burdens weigh against satisfying exacting scrutiny's requirement of narrow tailoring. *Id*. at 2385.

Here, the Texas lobby law starts by blanketly forbidding communications "directly with a member of the legislative or executive branch to influence legislation or administrative action." TEX. GOV. CODE 305.003(a)(2). It then grants permission to engage in such speech after registration and the payment of the fee. This is of particular concern because "[n]arrow tailoring is crucial

where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Bonta*, 141 S. Ct. at 2384. And yet here, First Amendment activity is more than chilled—it is forbidden, unless the fee is first paid.

The court of appeals, instead of engaging in an analysis of the above, justified Texas's law under the Supreme Court's precedent upholding dissimilar congressional lobby regulations in *United States v. Harriss*, 347 U.S. 612, 613 (1954). But the Texas law is far different than the federal law:

- At the federal level, registration is free. 2 U.S.C. § 1603.

- Unlike at the federal level, Texas requires employees and officers of an organization on whose behalf they speak to register, *even if they make no expenditure in connection with their speech.* TEX. GOV'T CODE *§ 305.001 et seq.*

- At the federal level, registration is not required unless total expenses exceed or are expected to exceed $10,000. 2 U.S.C.A. § 1603.

In addition to factual dissimilarities, the *Harriss* Court justified the federal regulations on the basis that they served Congressional interest in "self-protection," a holding that has been called into question by subsequent

rulings of the Supreme Court. 347 U.S. at 625. The court of appeals, instead of blindly following *Harriss* and paying lip service to exacting scrutiny, should have actually analyzed whether the statute was narrowly tailored.

ii. The Lobby Law Is Not Narrowly Tailored Because a Single Statement Triggers Registration.

Under TEX. GOV'T CODE § 305.003, a person is required to register as a lobbyist and pay the registration fee if the person "receives ... compensation ... to communicate directly with a member of the legislature ...." This primary language sets *no threshold on the quantity of speech* required to trigger registration. And it *does not require compensation be tied directly to the communication*. The statute applies, "whether or not the person receives any compensation for the communication in addition to the salary for that regular employment." TEX. GOV'T CODE §305.003(b).

In 2011, the Commission "limited" application of the statute to those who spend more than 5% of their time on lobbying activity by rule. 1 TAC § 34.43 (2011). However, the limitation is illusory because it incorporates time spent "preparing to communicate," which includes:

- "Participation in strategy sessions;"
- "Review and analysis of legislation or administrative matters;"

- "Review and analysis of legislation or administrative matters;"

- "Communication with [one's] employer." *Id.*[1]

Accordingly, even under the 5% rule, a person who regularly reads legislation, engages in "research," or simply talks to his employer could be required to register under the statute if he engages in a *single communication* with an elected official. Indeed, as the publisher of the Fiscal Responsibility Index, Sullivan often read legislation and watched the proceedings of the legislature in order to report on them to Texans. CR 2776. Accordingly, the 5% rule offered no relief at all.

With this extreme standard lacking any tangible limiting principle, registration can be required of any person who communicates with an elected official while at work. Not only is this not the least restrictive means, it's not even close to narrowly tailored.[2] The Court of Appeals refused to examine these important questions in its cursory analysis of narrow tailoring.

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1. The legislature subsequently codified a 26-hour per quarter floor for registration. TEX. GOV'T CODE § 305.003 (adopted 2015). However, this floor remains illusory because it incorporates by reference "preparatory activity as defined by the commission."

2. Moreover the mere presence of a substantial fee ($150/$750) is evidence the state has not narrowly tailored its statute; Texas could easily have made registration free, as it is at the federal level.

III. The Court of Appeals Radically Expanded the Statute.

The Court of Appeals rejected every opportunity to narrow the lobby statute, instead endorsing every radical interpretation advanced by the Commission.

A. Rejecting a Major Purpose Test, the Court of Appeals Held That a Dozen Blast Emails Is Enough.

The court of appeals refused to narrow the scope of the lobby law to communications intended solely to support or oppose legislation. Op. 26. The court thus rejected a major purpose test or other bright-line rule, such as the rule adopted by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 44 n. 52,

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APPENDIX J — EXCERPT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS, 250TH JUDICIAL DISTRICT, FILED OCTOBER 30, 2020

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
250TH JUDICIAL DISTRICT

CAUSE NO. D-1-GN-17-001878

TEXAS ETHICS COMMISSION,

Plaintiff,

v.

MICHAEL QUINN SULLIVAN,

Defendant.

Filed October 30, 2020

DEFENDANT MICHAEL QUINN SULLIVAN'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW Defendant Michael Quinn Sullivan and files this Motion to Quash and Motion for Protection from a deposition notice and subpoena issued by the Texas Ethics Commission in the above-styled case. Defendant Michael Quinn Sullivan would show the Court as follows:

Appendix J

A. Introduction

1. To the knowledge of Sullivan and his counsel, this case represents the TEC's, and indeed the State of Texas', first attempt ever to punish someone for failing to register as a lobbyist when that person has asserted their speech does not fit within the state's regulations. In this case, the TEC asserts that Sullivan, in 2010 and 2011, engaged in *too much of the wrong kind of speech*, and failed to pay a $150 lobbyist speech registration fee to the TEC in order to have such a privilege. Indeed, in its own Motion for Summary Judgment, the TEC made clear that its threshold for lobbyist registration could be as low as a single communication between a Texas citizen and their representatives in government. This speech

* * *

unconstitutional for the TEC to carry forward this case, judgment should be rendered in Sullivan's favor that the TEC take nothing by its claims.

D. Texas's Lobbying Speech Restrictions Are Unconstitutional Both Facially and as Applied to Sullivan

27. Alternatively, Summary Judgment should be granted in Sullivan's favor because the lobbyist registration provisions of Texas Government Code Chapter 305 that the TEC seeks to enforce against Sullivan are unconstitutional both facially and as applied to Sullivan. For this reason, the TEC lacks a cause of action and therefore this Court lacks subject-matter jurisdiction and should therefore render judgment

in Sullivan's favor stating that the TEC should take nothing by its claims.

28. In this case, several key facts are not in dispute. In 2010 and 2011, Michael Quinn Sullivan served as CEO of Empower Texans, Inc. He was not only an employee, but was also an officer of the corporation and a member of its board of directors. In 2010 and 2011, Sullivan was involved in gathering and reporting news and editorially content that directly or indirectly opposed or promoted legislation. These facts were confirmed in the affidavit of Dustin Matocha, previously admitted without objection in this matter in a hearing on January 7, 2020, and attached to this Motion as Exhibit A.

29. The TEC justifies the lobbyist registration scheme under the Supreme Court's precedent upholding dissimilar congressional lobby regulations in *United States v. Harriss*, 347 U.S. 612, 613 (1954). The Court justified the federal regulations on the basis that they served Congressional interest in "self-protection." *Id.* at 625.

30. The Texas lobby registration statute though is unique from the federal regime in that it imposes a substantial registration fee and requires those who, like Sullivan, are employees and officers of the organization on behalf of whom they are deemed to lobby to register even if they make no expenditure in connection with their communications. Tex. Gov't Code § 305.001 et seq. For example, under the current federal lobbyist registration statute, 2 U.S.C.A. § 1603, those individuals whose employees who engage in lobbying activities on behalf of an employing organization

and whose total expenses do not exceed or are not expected to exceed $10,000 are not required to register. Chapter 305 provides no such exemption making compensation thresholds contingent on expenditures.

31. Moreover, the holding in *Harriss* has been called into question by subsequent rulings of the Supreme Court delineating the permissible purposes for which government can regulate speech impacting the political process. Legislative "self-protection" has not been held to be such a permissible purpose. Citation.

32. The Texas lobbyist registration statute is indisputably a content-based speech restriction on speech. It imposes limits on the amount of political speech a person can "communicate directly with one or more members of the legislative or executive branch[es] to influence legislation or administrative action" lest that person be required to pay a $750 registration fee. Tex. Gov't Code § 305.003; 305.005.[3]

33. "The power to impose a license tax on the exercise of [First Amendment] freedoms is indeed as potent as the power of censorship." *Murdock v. Com. of Pennsylvania*, 319 U.S. 105 (1943). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Over a forty-year period from approximately 1974 to 2014, the U.S. Supreme Court has "spelled out how to draw the

3. The fee is reduced to $150 for persons affiliated with non-profit entities.

constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014). "Any regulation must . . . target what [the Supreme Court has] called quid pro quo corruption or its appearance." *Id.*

34. "The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 209 (2014). In addition, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Id. citing Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (opinion of ROBERTS, C.J.).

35. The regulation of lobbying speech under TEX. GOV'T CODE CHAPTER 305 necessarily requires an examination of the content of the speech—both whether the speech is for the purpose of "influenc[ing] legislation or administrative action," but also whether the speech is made "directly with one or more members of the legislative or executive branch." TEX. GOV'T CODE § 305.003.

36. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function

or purpose." *Id.* Both are distinctions drawn based on the message a speaker conveys and, therefore, are subject to strict scrutiny. *Id.* at 163-64. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). While the "informational interest," the governmental interest in providing information to the public, has been found to justify certain disclosure and disclaimer regulations, it is not a compelling interest sufficient to justify restrictions on speech. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010).

37. The TEC seeks to enforce Tex. Gov't Code § 305.003 based solely on the allegation that Sullivan met the threshold for registration based on the allegation he received compensation from his employer—an organization for which he served as an officer and director. The Commission does not allege that Sullivan made any expenditure in connection with any alleged lobbying activity. Because there is no allegation of an expenditure relating to communications with legislators—such as an expenditure on a meal or a gift, there can be no allegation of an interest by the State of Texas to avoid *quid pro quo* corruption or the appearance thereof. Accordingly, under the facts alleged by the TEC, the application of the lobby registration statute to Sullivan is unconstitutional as applied to Sullivan.

38. The Eighth Circuit, sitting *en banc*, recently struck down the State of Missouri's lobbyist regulation statute as applied

to Ron Calzone, an individual who was not compensated and did make lobbying expenditures. *Calzone v. Summers*, 942 F.3d 415, 418 (8th Cir. 2019). "Given that Calzone's political activities do not involve the transfer of money or anything of value, either to him or to anyone else, Missouri's interest in transparency does not "reflect the seriousness of the actual burden on [his] First Amendment rights," the Court reasoned. *Id.* at 425. Although Calzone was similar to Sullivan in that he was an officer of the organization on whose behalf he allegedly lobbied, he also did not receive compensation from the organization. However, the Court's reasoning does not lead to the conclusion that a person like Sullivan, who is alleged to have spoken on behalf of an organization for which he is was an officer and from which he was compensated, but who is not alleged to have engaged in any expenditures in support of his activities, would be treated any differently. There is simply no explanation given as to how compensation by the organization would alter the court's analysis.

39. The TEC's own Motion for Summary Judgment reinforces the extremity of Texas's Lobbying Speech Restriction. In order to be required to register with the Commission, pay the lobbying registration fee, and file mandatory disclosures, a citizen need only receive $1,000 in compensation from "another person" to communicate within the scope of his employment "directly with a member of the legislative or executive branch to influence legislation or administrative action." This applies even if that citizen is an employee of a corporation he is simultaneously an officer and director for. In other words, since the corporation has no other face except for its representatives in the form of

its officers and directors, if a person employs themselves to speak, under the statute they are required to register lobbyist! This means that a person, speaking on behalf of a business they themselves own and operate, would be required to either forgo speaking or register as a lobbyist and pay the registration fee in order to engage in a single communication with their representative urging some sort of legislative action.

40. The TEC seeks to apply this unconstitutional burden to Sullivan, but it is easy to see how they could apply this standard to nearly anyone who has a job and speaks to their representatives about issues important to them. For example, a pastor who calls or emails his representative to urge action on an issue relevant to his congregation could have his speech criminalized under the statute. Indeed, a person who makes a phone call to the Capitol from their work phone, or sends an email to their representative from their work email is ripe for being accused of a breach of Texas lobbying speech restrictions.

41. The existence of an "affirmative defense" under TEC Rules that has been removed as an issue in this case by agreement of the parties provides no protection from this extreme statutory standard because of the Commission's open-ended definition of "preparation time." 1 TEC § 34.43. Under TEC Rule § 34.3, any person who spends their time "preparing to communicate," which includes "participation in strategy sessions, review and analysis of legislation or administrative matters, and research and communication with the employer," can have their speech restricted if they engage in a single communication with a legislative or executive official following such "preparation."

42. Accordingly, the Texas lobbying speech restriction applies to the utterance of a single word or a single phrase. This extreme standard is facially unconstitutional, and particularly unconstitutional as applied to Sullivan, who was engaged in the practice of gathering and reporting news. This standard means that any person who watches the legislature and reads legislation and then makes a single communication to their legislator in their capacity as an employee/officer/director of another entity, be it a business, a church, or a community organization, must pay a $750 fee for the privilege of doing so.

43. This standard dramatically criminalizes the profession of journalism. It effectively means that any Capitol reporter who ever expressed an opinion about legislation to a legislator while on the job, perhaps even in the form of a leading question, would do so at risk of criminal and civil prosecution. This is intolerable under the United States and Texas Constitutions and exposes the faultiness of the Texas lobbying speech restriction statute.

44. The Texas lobby law is also unconstitutional because of its media exception. Chapter 305 purports to provide a media exception rendering "a person who owns, publishes, or is employed by . . . a bona fide news medium" exempt from the registration requirement. Tex. Gov't Code Ann. § 305.004 (1). This privilege for those determined to be "news media" is unconstitutional under *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 352–53 (2010) ("[B]y its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. . . . This differential treatment

cannot be squared with the First Amendment."). *See also Id.* at 905 ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.").

45. "The Supreme Court . . . has repeatedly refused in non-defamation contexts to accord greater First Amendment protection to the institutional media than to other speakers." *Obsidian Fin. Group, LLC v. Cox*, 740 F.3d 1284, 1290 (9th Cir. 2014). "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. Fed. Election Com'n*, 558 U.S. 310 (2010). Many courts have adopted an "intent test" for determining whether a person qualifies as a member of the media. The intent test requires that "the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered, or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process." *VonBulow v. VonBulow*, 811 F.2d 136, 144 (2d Cir. 1987). Here the Texas Legislature has rejected an intent-test and has attempted to grant a privilege to the media as a class, which is not allowed under constitutional law.

46. The Texas Legislature's decision to define special privileges for the news media causes the entire statute to be unconstitutional because the news media cannot be afforded special privileges not available to ordinary citizens.

47. Moreover, here, the TEC seeks to prove that Sullivan is not eligible for the media exception because it only applies "if the person does not engage in further or other activities that require registration under [Chapter 305]." TEX. GOV'T CODE ANN. § 305.004. In doing so, they seek to engage in unconstitutional regulation of the activities of the news media.

48. By making the media exception a nullity, the TEC seeks to place itself in a position of censor: constantly analyzing what speech between journalists and legislators and legislative staff crosses the line from being journalistic activities to lobbying speech. This interpretation would force journalists to employ an attorney in order to analyze what they can and cannot say to legislators in order to avoid a requirement to register, pay a significant fee, and file disclosures. Such a burden is itself an infringement of First Amendment rights to free speech and freedom of the press. The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 324 (2010).

49. Because the registration requirements in TEX. GOV'T CODE § 305.003 are unconstitutional, both facially and as applied to Sullivan, the Texas Ethics Commission lacks a cause of action against Sullivan and the court should render judgment in Sullivan's favor that the TEC take nothing by their claims.