No. 24-803

In the Supreme Court of the United States

MICHAEL QUINN SULLIVAN, PETITIONER
v.
TEXAS ETHICS COMMISSION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS, THIRD DISTRICT

BRIEF OF AMICUS CURIAE KEN PAXTON, ATTORNEY GENERAL OF TEXAS, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Ken Paxton is the Attorney General of Texas—a constitutional, State-wide elected officer. Tex. Const. art. IV, §1. As Attorney General, one of his chief functions is "to represent the State in civil litigation." *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001). General Paxton, however, has also sworn an oath to "preserve, protect, and defend the Constitution and laws of the United States." Tex. Const. art. XVI, §1. When those obligations conflict, General Paxton may decline to defend a State entity whose actions violate the U.S. Constitution, and that entity may retain outside counsel.

Here, General Paxton has determined that Respondent the Texas Ethics Commission's as-applied enforcement of Chapter 305 of the Texas Government Code against Petitioner Michael Quinn Sullivan violates the First Amendment to the U.S. Constitution. It is antithetical to the First Amendment that a private citizen working for a nonprofit organization dedicated to fiscal responsibility that does not provide gifts to lawmakers nonetheless must register with the government, make disclosures to the government, and even pay a fee to the government to simply email elected officials about matters of significant public concern. General Paxton thus has declined to defend the Commission in this litigation. Given his constitutional and statutory duties under Texas law and the importance of this First Amendment issue to Texans, General Paxton has a significant interest in this Court's resolution of the petition.[1]

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. This brief is being filed timely in compliance with Supreme Court Rule 37.2.

SUMMARY OF ARGUMENT

The First Amendment stands as a bulwark against government efforts to prevent citizens from speaking with their elected representatives. By its plain terms, the government "shall make no law … abridging the freedom of speech … or the right of the people … to petition the Government for a redress of grievances." U.S. Const. amend. I. No free citizen should have to register with the government and pay a special fee just to send letters or emails to the government about matters of public importance.

Here, the Commission has disregarded that bedrock principle. As detailed in the petition and set forth in the decisions of the Texas courts, Sullivan—a well known grassroots activist in Texas who focuses on fiscal responsibility and is associated with nonprofit organizations that also focus on fiscal responsibility—gave notice via mass emails to elected legislators about his opinion with respect to votes on taxing and spending legislation. He did not provide gifts to lawmakers but instead sought to persuade them through speech. Yet the Commission fined Sullivan for failing to register. That plainly violates the First Amendment. Neither the Constitution nor precedent, properly understood, permits the Commission to ignore the First Amendment by stifling Sullivan's free speech.

What happened here should never be allowed in the United States. No elected official likes to be criticized, but discussing political issues with elected officials is indispensable to democracy. In recent years, the Court has repeatedly stressed the importance of robust political discussion. Unfortunately, confusion remains

about how the First Amendment applies to situations like this one. Certiorari is warranted.

ARGUMENT

I. The First Amendment Does Not Tolerate What Happened Here.

A. In Texas, debates over how the Legislature taxes and spends the People's money are charged. Many Texans are intensely interested in this issue. Low taxes have long been one of the hallmarks of Texas, and many voters are worried—understandably—that if the State is not careful about how it spends money, that heritage will be lost. Disputes about fiscal policy therefore are some of the fiercest in the entire State. As a former member of the Texas House of Representatives and the Texas Senate, General Paxton has first-hand knowledge about how serious voters take these debates.

Sullivan—in connection with Empower Texans, a nonprofit organization dedicated to fiscal responsibility—published the "Fiscal Responsibility Index." Pet.App.52a. To create this Index, Sullivan graded lawmakers based on their legislative votes with respect to taxing and spending bills. *Id.* Because of his focused attention and political speech, voters could learn whether their elected representatives were raising taxes and how they were spending money, which are important questions in deciding whom to support in electoral politics. Most voters do not have the time to watch every legislative vote themselves, but they can rely on trusted watchdogs to learn about what is happening and vote accordingly. Nor is the Index the only such accountability tool in Texas or elsewhere. As the Court well knows, many

organizations use tools like the Index to inform voters about key legislative matters.

Not all elected officials enjoy the attention that comes from accountability tools like the Fiscal Responsibility Index. By design, these tools shine light on key legislative votes, which is not always appreciated by lawmakers. But such accountability tools are common—especially in grassroots politics—*because* they shine light on what lawmakers are doing, thus providing information to voters. Of course, elected officials often disagree with the grades they receive or how their votes are characterized, just like restaurant owners may disagree with Yelp ratings. Evaluating elected officials, however, is important, and elected officials who dislike what is said about them or how their vote has been described can respond by explaining to voters why they voted as they did. After all, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

B. In connection with his Fiscal Responsibility Index, Sullivan would repeatedly send mass emails to members of the Texas Legislature to inform them about which proposed legislation would be included in the Index and how he would score particular votes. Pet.App.50a-52a. These emails naturally reminded legislators that their votes were being watched and that voters at large would learn about Sullivan's assessment. *Id.*

Such communications to elected officials are within the heartland of the First Amendment. Reminding those who create our laws that they will be held politically accountable for what laws they create is central to democracy. If lawmakers disagree with how their votes are portrayed, they can offer counter speech to defend their

position—thus resulting in a more complete public debate. This is how democracy is supposed to work. As anyone who has been elected to political office knows, such exchanges are a powerful way to ensure that laws reflect the views of voters and to generate a more robust debate and greater understanding.

Here, however, the Commission fined Sullivan based largely on the fact that he mass emailed the Texas legislature about his view of their fiscal performance. *See* Pet.App.50a-52a. According to the Commission, it was irrelevant that Sullivan—in connection with a nonprofit organization dedicated to the very issue he was emailing about—was articulating his own views and that he did not give gifts to legislators. Instead, because of his view that legislators may not "score" well if they did not consider factors included in the Index, *see* Pet.App.52a, the Commission argued that he was communicating with lawmakers without registering or paying a fee.

C. Consistent with his oath of office and duty to defend the U.S. Constitution, General Paxton does not believe that the First Amendment permits what happened here. Rather, the First Amendment protects the freedom of speech, which necessarily extends to emailing lawmakers about important legislative votes.

Sullivan should not be punished for communicating his views without first registering with the government and paying a fee. Many people do not have the resources to pay such fees and do not understand the registration requirement; Sullivan's publicized punishment will discourage the public from sending letters and emails to lawmakers. But even those who do understand how Chapter 305 works are protected by the First Amendment from having to register and pay money to send

emails to lawmakers before legislation is enacted that will significantly affect the public. "Power—*government* power—is what generates passion in politics." *Emily's List v. FEC*, 581 F.3d 1, 33 (D.C. Cir. 2009) (Brown, J., concurring in part). If lawmakers don't like the speech they are hearing, or other members of the community would like other messages to be shared, the answer is more speech.

No one doubts that Sullivan is sincerely committed to fiscal responsibility and that his emails communicated that commitment. Nor can anyone dispute that many concerned citizens and grassroots organizations communicate with lawmakers about significant policy issues by sending letters or other forms of written communication. It cannot be that the mere act of communicating with lawmakers in this way—so long as enough time or resources are spent—means that the government can impose registration and payment requirements on core political speech to elected representatives about issues near and dear to the hearts of citizens.

The need to follow the Constitution's plain language is especially weighty here. It is hard to overstate how seriously voters take legislation relating to taxation and government spending. Without public scrutiny, it is easy for legislators to spend other people's money profligately; it often takes dedicated, sustained efforts by grassroots individuals and organizations to combat that temptation. In fact, efforts to regulate communications between constituents and lawmakers about these issues—efforts which lawmakers eager to avoid criticism no doubt try to couch in high-minded rhetoric—are dangerous precisely because it is easier for legislators to

spend money than not spend it. Political speech helps combat that temptation.

Even if the First Amendment's language was not enough, precedent confirms that what happened here is unconstitutional. Political speech is at the heart of the First Amendment. *See, e.g.*, *FEC v. Cruz*, 596 U.S. 289 (2022). The Court has also indicated that placing burdens like those here on that core political speech is improper. *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 191-92 (2014) (plurality op.). "If those beautifully fierce words 'Congress shall make no law' are to do anything but condemn our constitutionalism as a failed experiment, then *at least* political speech in all its forms should be free of government constraint." *Emily's List*, 581 F.3d at 33 (Brown, J., concurring in part) (following, *inter alia*, *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984)).

Based on the First Amendment's plain language and this Court's precedent applying the First Amendment, General Paxton concluded that he would not defend the Commission's constitutional violation. A direct regulation of communication between citizens and lawmakers like what happened here cannot withstand scrutiny.

II. The Court Should Grant Review.

General Paxton agrees with Sullivan that this case warrants certiorari. The constitutional violation here is obvious and indefensible. General Paxton also does not believe that *United States v. Harriss*, 347 U.S. 612 (1954), supports what the Commission did. Unfortunately, instead of distinguishing *Harriss*, the Texas Court of Appeals gave it a broad reading that is

out of step with more recent jurisprudence. *See* Pet.App.11a-20a.

Nor is this confusion limited to Texas. As the petition explains, there is a split of authority about which registration laws are permissible and under what circumstances. The Court thus should grant review to address that confusion and facilitate public debate.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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