No. 24-803

In the Supreme Court of the United States

MICHAEL QUINN SULLIVAN,
Petitioner,
v.

TEXAS ETHICS COMMISSION,
Respondents.

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

BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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.

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. It has historically sponsored scholarship and filed briefs opposing regulations that either chill or compel speech. This case interests MI because it involves a regulation of speech that burdens citizens' ability to petition their elected representatives for redress of grievances.

SUMMARY OF ARGUMENT

The Texas Ethics Commission's long-running efforts to enforce political speech regulations against Mr. Sullivan raise several First Amendment concerns. While Chapter 305 of the Texas Government Code purports merely to create a basic registration requirement for political activists it in fact strikes against the heart of First Amendment speech protections. Chapter 305 can serve as a form of censorship that silences speech under the veil of a "registration requirement."

In the Founding Era, freedom of speech and of the press were thought of as protections against "prior restraints." That is, these protections exempted people from needing to get permission from anyone to exercise their free-speech rights. William Blackstone famously wrote that "prior restraints" on speech, as opposed to subsequent damage penalties for an injury speech may cause, were a pernicious silencing of open expression.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

Licensing schemes, though they may appear harmless, can often serve as proxy "prior restraints." Licensing prohibits behavior and then selectively permits it. Whereas most laws aim to prevent injury and provide remedies to those who have suffered it, licensing prohibits broadly and then redefines what is lawful and permitted as that which is licensed. This dynamic subverts the traditional presumption of liberty—namely, that in the absence of a law prohibiting a certain behavior, the individual is free to act. A licensing scheme essentially supplants that assumption and creates a situation where the individual is free to exercise his right only if he first gets a "license" or "registers."

In this sense, licensing requirements can undermine the proper relationship between individuals and government, creating a situation where individuals must first obtain permission from the government before engaging in their constitutional rights. That is the situation with Texas's Chapter 305, under which the presumption of liberty is replaced by an obscure and constraining licensing regime that serves as an impediment to individual rights.

The licensing of political speech then is a particular affront to the American experiment. Indeed, it has been well-founded in this Court's jurisprudence that licensing of political speech is possibly the worst violation of the First Amendment. Historically, licensing was a tool of authoritarian regimes to suppress free speech and individual rights. From the medieval Inquisition to the Court of Star Chamber of the English monarchs, licensing schemes, often subtly disguised (such as "printing licenses") have been used to impose prior restraints on the rights of citizens to express themselves. All this was well understood at the

Founding—and has been historically upheld by this Court as central to the First Amendment. This brief describes some of that classical jurisprudence.

This brief also brings to the Court's attention the worrisome ways in which federally led licensing schemes have been used throughout America's universities to stifle scientific inquiry and research. Through the establishment of Institutional Review Boards (IRBs), mandated for research institutions that receive federal funding, government agencies have been able to stifle and direct the type of research in which students and faculty throughout the country can engage. The development of IRBs has served as a tool for federal and local bureaucrats to clamp down on what is essentially the scientific speech of researchers throughout the nation.

ARGUMENT

I. TEXAS'S REGISTRATION REQUIREMENT IS AN IMPEDIMENT TO FREE SPEECH, AKIN TO THE LICENSURE THAT THE FOUNDERS SOUGHT TO PROHIBIT

It is axiomatic that the First Amendment protects political speech. Here, Texas has erected an unconstitutional barrier by requiring registration and the payment of a fee to access that fundamental right. Licensing requirements, when used to limit speech, have been found to be unconstitutional. For example, in *Murdock v. Pennsylvania*, this Court found that licensing requirements for door-to-door solicitations were unconstitutional because they impeded the ability of Jehovah's Witnesses to freely exercise their religion. 319 U.S. 105, 117 (1943). The Court found that even though the licensing requirement was a minimal

impediment as it cost little money, it still was an effective limitation on a constitutionally protected privilege. *Id*. at 115–16. Similarly, the Court has found that even requiring citizens or associations to ask government agencies for permission to engage in speech is prohibited. *See generally*, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010). And yet that is exactly what Chapter 305 of the Texas Government Code does. It empowers the Texas Ethics Commission (TEC) to require those who communicate with members of the legislature to register and pay a registration fee.

But on a more fundamental level, licensing laws undermine the proper relationship between individuals and government. By requiring citizens to get permission for their speech, licensing laws supplant the authority of the individual over government and create a new social conception that can have deleterious effects on speech. This problem was keenly understood by the Founding generation. In fact, in 1791, when the First Amendment was adopted, the freedoms of speech and of the press were ordinarily understood as freedom from licensure. *See* Philip Hamburger, *Getting Permission*, 101 Nw. L. Rev. 405 (2007). While this freedom may have focused on freedom from licensing of the press, being that this was the primary form of licensing that existed in 17th-century England, it was a freedom from licensing more broadly.

In 16th- and 17th-century England the Crown empowered the Star Chamber to require licensure. Indeed, acting companies in Shakespeare's time needed a license to perform plays. *See* Philip Hamberger, *The Censorship You've Never Heard Of*, Commentary, July 2013. Similarly, licensure was one of the primary tools of the Inquisition. Galileo Galilei had to obtain a

license to print his writings in 1630 but was subsequently punished in 1633, because he had not explained to the licensing agent that he had been warned not to advocate his ideas.

William Blackstone considered prior licensing, or "prior restraints" to speech to be the quintessential violation of press freedom. He distinguished between the problems of prior restraints and defamation which only imposed penalties on speech after its publication: "liberty of the press . . . consists in laying no prior restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." *See* Wm. Blackstone, *Commentaries on the Law of England, Volume 4*.

The understanding of licensure as a "prior restraint" that would clamp down on the freedom of the press and on freedom of expression carried into American constitutional jurisprudence. Justice Holmes wrote that the "main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments," *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (cleaned up). Even as the Supreme Court expanded the protections of the First Amendment Chief Justice Hughes still maintained that the "struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938). And the liberty of the press became initially a

right to publish "without a license what formerly could be published only with one." *Id*. (citation omitted).

Like Blackstone, the Court has understood that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546, 559 (1975) (emphasis original). Indeed, the Court has gone so far as to declare "prior restraints" on speech as "the most serious and the least tolerable infringement on the First Amendment." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). In this sense, Chapter 305's registration requirement strikes at the heart of First Amendment protections. It is essentially a block on speech akin to the licensure so decried by the founding generation—a concern reinforced by this Court's jurisprudence.

II. TEXAS'S REGISTRATION REQUIREMENT IS BUT ONE EXAMPLE OF ADMINISTRATIVE LICENSING THAT HARMS PUBLIC DICOURSE

The TEC's registration requirement is not the only administrative regulation of speech. Restraints of the sort levied by the TEC are becoming widespread throughout the United States. Similar to Texas's Chapter 305, assorted forms of federal speech licensure, registration, and prior restraint have arisen.

For example, the Department of Health and Human Services and other government agencies have established Institutional Review Boards (IRBs) that suppress vast amounts of research and speech. IRBs exist at every university and most research institutions. Institutions receiving federal funding must assure the government that all human-subject research,

regardless of funding, is done in accordance with certain principles set out in what is known as the Belmont Report. *See* 45 C.F.R. § 46.103(b)(1). The Belmont Report establishes a single ethical standard for all research related to "human subjects." Human-subject research is in turn defined as research about a living individual done through personal interaction or with identifiable private information.

Although the Belmont Report was intended to protect human rights, it is nonetheless surprising that all researchers must abide by this single standard. In its absence, researchers would adopt different ethical principles depending on the nature of their research—whether testing blood or questioning a criminal. Furthermore, researchers would adopt ethical principles that best comport with their area of study and particular views. Researchers are also expected to abide by the Common Rule, which provides further detailed licensing rules. Most concerning is that the government authorizes IRBs at each institution to add their own requirements—thereby essentially giving federal authorization for local licensure.

IRBs were established to prevent harm to and inhumane treatment of research participants. They began in the wake of outrage about the federally run Tuskegee experiments. But the government overreacted by setting restrictions on all human-subject research, even that which is private and nonmedical. That process inevitably led to the suppression of speech. For professors to get a research grant, they must assure HHS that human-subject research will comply with Belmont Report principles. The government will also invite research institutions to voluntarily adopt Common Rule standards for all human

subject research. In practice, most institutions will assume that all research related to human subjects must receive IRB licensing. It is assumed that an institution is violating its duty of care if it did not require IRB licensing for human-subject research.

The IRB can set standards much beyond the simple requirement of adopting the Belmont Report and Common Rule. IRBs can make requirements that bloat to the point that they impair and control research. Researchers must present their proposed project to the IRB, which can approve, deny, or approve on the condition that the research methods be altered. For example, the IRB may restrict the information used, or with whom the information is shared. The IRB can also rewrite the questions or academic method of the researcher. IRBs can direct researchers not to ask academic questions of their study participants that will cause them discomfort, or direct researchers to destroy data or wholly halt their research altogether. The penalties for non-compliance are devastating, taking any future career prospects away from researchers who do not abide by all guidelines set by the university's IRB. This leads to faculty and students simply abandoning certain areas of inquiry altogether.

While it is perfectly legitimate for universities to seek to control and direct the research conducted on their campuses, the fact that this scheme is essentially carried out by government mandate makes it problematic. When the government is able to expand the scope of IRB research rules to require licensing, what began as a rights-protecting initiative ends up stifling speech and free inquiry. Basic research questions or theories are redefined as "systemic investigations" that require approval and licensing from an IRB. This allows IRBs

not simply to license physical experiments or conduct but to limit speech on topics related to human-subject research, resulting in prior restraints.

This sort of backdoor licensing imposed on universities censors the speech of thousands of researchers in ways akin to the TEC's "Lobbyist Registration" rules' suppression of political speech. The Court should take this opportunity to act against this silencing of speech through prior restraints. It should likewise reassert its traditional free-speech jurisprudence with respect to this unusual Texas law. Cutting back registration requirements for political speech will help protect against free-speech infringements by IRBs and other government-regulated private actors.

CONCLUSION

This case presents an important free-speech issue, one that should not evade review based on lawyerly gamesmanship. For the foregoing reasons, and those stated in the petition, the Court should grant cert.

Respectfully submitted,

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