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 THE CATO INSTITUTE AND FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Dated: February 18, 2025

QUESTION PRESENTED

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.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case interests Cato because the right to engage in political speech is fundamental to democracy.

The Foundation for Individual Rights and Expression (FIRE) defends the right of all Americans to freedom of speech, expression, and conscience—the essential qualities of liberty. Through litigation and advocacy, FIRE seeks to vindicate First Amendment rights without regard to the speakers' views. *See, e.g.*, Br. Amici Curiae FIRE *et al.* Supp. Resp'ts, *Murthy v. Missouri*, 603 U.S. 43 (2024). FIRE also has a particular interest in this case: FIRE regularly provides materials to legislators, including its annual *Spotlight on*

[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 *amici* funded its preparation or submission.

Speech Codes,[2] *Guide to Free Speech on Campus*,[3] and *Guide to Due Process and Justice*.[4]

[2] FIRE, *Spotlight on Speech Codes 2024*, https://tinyurl.com/fmkhhxdj.

[3] Harvey Silverglate *et al.*, *FIRE's Guide to Free Speech on Campus* (Greg Lukianoff & William Creeley eds., 2d. ed. 2012), https://tinyurl.com/5yvtvuy9.

[4] Harvey Silverglate & Josh Gewolb, *FIRE's Guide to Due Process and Justice* (William Creeley ed., 2014), https://tinyurl.com/mssv6dfv.

SUMMARY OF ARGUMENT

Under Texas law, anyone who "communicate[s] directly with a member of the legislative or executive branch to influence legislation or administrative action" is required to register with the state as a lobbyist. TEX. GOV'T CODE § 305.003(a). If an individual fails to comply with these provisions, the Texas Ethics Commission ("TEC") may impose a civil fine up to "three times the compensation, reimbursement, or expenditure" at issue and jail time for up to one year. *Id.* at §§ 305.031–02.

Although many states have lobbying registration schemes that may satisfy constitutional scrutiny, Texas's law has multiple features that make it unduly burdensome. First, unlike the federal lobbying registration provisions, Texas requires payment of a sizeable fee from those registering as lobbyists before they may communicate with legislative or executive officials (or up to five days after the communication). *Id.* at § 305.005(a), (e). Second, Texas's law is far-reaching in scope. The law is so broadly written that it functions as a prior restraint on those wishing to engage in core political speech. Ill-defined and burdensome lobbying registration laws like the one Texas has enacted do not target professional lobbyists engaged in *quid pro quo* corruption; instead, they target well-meaning Americans trying to communicate with their representatives about matters of concern.

Petitioner Michael Quinn Sullivan's case illustrates how the provisions in Chapter 305 stifle core political speech. Sullivan was the president and CEO of a small nonprofit organization called Empower Texans. App.6a. In his role, Sullivan provided voters with information about their representatives by publishing

a legislative rating called the "Fiscal Responsibility Index" (the "Index"), which graded how legislators' votes would affect taxes and spending. App.52a. In 2012, two legislators were ranked poorly by the Index and subsequently filed complaints with the TEC alleging that Sullivan failed to register as a lobbyist in 2010 and 2011. App.6a. Although Sullivan did not make any expenditures in connection with this project, the TEC imposed the maximum penalty of a $10,000 fine on Sullivan.

When Sullivan argued that Chapter 305 violated his First Amendment rights, the district court granted summary judgment to the TEC. App.46a–48a. The court of appeals affirmed on the First Amendment question, holding that Chapter 305 satisfied intermediate scrutiny. App.11a-20a. However, the court of appeals reversed the district court's assessment of the $10,000 penalty because it determined that the amount of the penalty is a factual issue that should have gone to a jury. App.37a–41a.

This Court should grant *certiorari* to clarify when state lobbying registration laws violate the First Amendment as unduly burdensome. In particular, the Court should grant this petition to strike down Texas's law because the law is far more onerous than the Federal Regulation of Lobbying Act upheld in *United States v. Harriss*, 347 U.S. 612, 614–15 (1954). The Texas law chills core political speech that the First Amendment protects.

ARGUMENT

I. THE FREEDOM TO ENGAGE IN POLITICAL DISCOURSE IS VITAL TO DEMOCRACY AND GOVERNMENT ACCOUNTABILITY.

The First Amendment provides that "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." U.S. CONST. amend. I.

Before the ratification of the First Amendment, the British had a long history of using taxation to suppress publications that were critical of the crown. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 248 (1936). In fact, the "English experience" of taxing publications was "the predominant influence" for adopting the First Amendment. *Id.* Specifically, "the object of the constitutional provisions was to prevent previous restraints on publication . . . ." *Id.* at 249. The Framers recognized the danger of prior restraints, so they adopted the First Amendment to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Given this history, political speech is entitled to the utmost First Amendment protection.

Communications with officials regarding political change is at the "core" of the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Since the First Amendment's ratification, this Court has declared that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Thus, "political speech must prevail against

laws that would suppress it, whether by design or inadvertence." *Id.*

Here, Sullivan contacted his representatives to inform the public about the representatives' voting records and how the votes would affect taxes and spending. As this Court has previously acknowledged, political speech like Sullivan's plays a crucial role in a democratic system where voters need to stay informed and keep government officials accountable. Yet, the TEC penalized Sullivan for engaging in protected political speech because he did not register and pay a fee before communicating with the representatives. This penalty did not just stifle Sullivan's speech; it chills the general public's right to participate in the democratic process and hold government officials accountable. Living in fear of government retaliation for political speech is incompatible with the First Amendment traditions of our democracy.

In determining whether lobbying registration laws are constitutional, "the First Amendment requires us 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). In light of the significant First Amendment interests at stake here, the Court should grant Sullivan's petition to protect "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus," which "is a precondition to enlightened self-government . . . ." *Citizens United*, 558 U.S. at 339.

II. TEXAS CHAPTER 305 IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON POLITICAL SPEECH.

This Court should grant *certiorari* because a state lobbying registration scheme that functions as a prior restraint on political speech raises significant First Amendment concerns. "Prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The First Amendment "embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940). This is true regardless of whether a person is speaking individually or on behalf of an organization. *See FTC v. Super. Ct. Trial Laws. Ass'n*, 493 U.S. 411, 426 (1990).

Chapter 305's reach is extensive. During the period relevant to this litigation, an individual who spent over $500 or was paid over $1,000 per calendar quarter on communications to legislative or executive officials was required to register and pay a fee of $750 (discounted to $150 if the individual is an employee of a nonprofit). *See id.* at §§ 305.003(a)(1)–(2), 305.005(c); *See* 1 TEX. ADMIN. CODE § 34.43 (2011). The individual must file a written registration with the TEC each year with details about the communications including, but not limited to, "the subject matter of the legislation or of the administrative action that is the subject of" the communication, or "a full description of the methods by which the registrant develops and makes decisions about positions on policy" if the communication

is made on behalf of an organization. *See id.* at § 305.005(f), (h).

Notably, the compensation threshold is easily triggered by individuals speaking on behalf of a nonprofit organization, since it can be satisfied by the individual's regular salary—*id.* at § 305.003—and applies if the individual spends more than five percent of their compensated time "engaging in lobby activity." 1 TEX. ADMIN. CODE § 34.43(b) (2011). Lobbying activity includes any time that the employee spends "preparing to communicate," through "participation in strategy sessions," "review and analysis of legislation," "research," and "communication with the employer/client." *Id.* at § 34.3. Under the compensation threshold, a single communication following preparation of this sort may require an individual to register as a lobbyist and pay the fee. *Id.* This compensation threshold is problematic because it does not require the individual to be compensated directly for the communication—only that they be compensated *at all*—thus requiring a broad segment of nonprofit employees to register as lobbyists before they can speak on matters of public concern.

Further, Texas's lobbying registration law is effectively a speech licensure scheme. Prior to speaking, the individual must disclose detailed information about their speech and must pay the state. Individuals will inevitably refrain from engaging in political speech where the state puts a high cost on exercising the right. Here, it is likely that the average Texan will choose to refrain from speaking where they have to fill out extensive paperwork, and where the cost of speaking is a $750 fee. The First Amendment is designed to

prevent the government from enacting schemes like the one presented here.

The en banc Eighth Circuit held that a similar Missouri lobbying law was unconstitutional where an individual had to register as a lobbyist when he "neither spen[t] nor receive[d] money in connection with his advocacy." *Calzone v. Summers*, 942 F.3d 415, 424 (8th Cir. 2019). The Eighth Circuit found the state's interest in "transparency" insufficient to justify the burden on the plaintiff's speech. *Id.* at 423, 425 (discussing the time spent filling out paperwork, the filing fee, and the loss of his anonymity as "straightforward" burdens).

Here, like in *Calzone*, Sullivan never spent or received any money in connection with his advocacy other than his regular salary. Because the government "may target only a specific type of corruption— '*quid pro quo*' corruption, . . . or its appearance" and there was no exchange of money related to Sullivan's discussions with representatives, Texas does not have a legitimate interest in burdening Sullivan's speech to this degree. *See id.* at 424 (quoting *McCutcheon v. FEC*, 572 U.S. 185, 206–07 (plurality opinion)).

Unlike *Calzone*, where the filing fee was 10 dollars, the filing fee imposed by Texas is substantial. *See id.* at 438. Here, the state of Texas requires individuals to pay up to $750 in fees prior to speaking with their own representatives. App.81a. This scheme is reminiscent of Britain's tax on publications, which worked to "suppress the publication of comments and criticisms objectionable to the Crown." *Grosjean*, 297 U.S. at 246. As discussed above, the First Amendment was "meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint . . . ." *Id.* at 249. It

is antithetical to the First Amendment's text and original meaning to require citizens to ask permission and pay a fee to the state before communicating with their own political representatives.

Further, "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Citizens United*, 558 U.S. at 349. Here, two representatives weaponized Texas's law to retaliate against Sullivan for criticizing their political acts. The TEC imposed a fine of $10,000 against Sullivan for merely failing to register for two years. App.60a. In other words, the state used its lobbying registration laws as a sword against its political opponent. This is precisely the harm that the First Amendment seeks to prevent.

This Court should grant the petition because a burdensome speech licensing scheme, particularly one impacting core political speech, cannot survive First Amendment scrutiny.

III. BURDENSOME LOBBYING REGISTRATION LAWS CHILL THE CORE POLITICAL SPEECH OF AVERAGE AMERICANS.

While states may have some leeway to implement lobbying registration laws to promote government transparency, states must not make these laws so burdensome that they chill core political speech.

Unlike the federal lobbying regulations (which do not require individuals to pay a registration fee), Texas imposes heavy fees on citizens who want to communicate with legislative and executive officials. If an individual is not a professional lobbyist and merely expresses concerns to their representatives, a fee of $750

will likely dissuade them from exercising their right to do so.

Not only is Chapter 305 unduly burdensome in terms of its disclosure and fee requirements, but it is also unclear as to when a person would be required to register as a lobbyist.[5] The First Amendment "gives significant protection from overbroad laws that chill speech . . . ." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). As this Court explained in *Citizens United*, "[p]rolix laws chill speech for the same reason that vague laws chill speech: people of common intelligence must necessarily guess at the law's meaning and differ as to its application." 558 U.S. at 324. Accordingly, "[t]he First Amendment does not permit laws that force speakers to . . . seek declaratory rulings before discussing the most salient political issues of our day. *Id.* Here, Texas's lobbying laws are complex, and the TEC is constantly clarifying its provisions.[6] Because Chapter 305's expenditure and compensation thresholds are low, non-professional lobbyists are often subject to its requirements. For the average person, even one who is not actually required to register, these burdens are enough to prevent them from exercising their right to speak with their representatives.

Texas imposes significant penalties on individuals for failing to comply with these complex requirements. Under the First Amendment, "a law imposing criminal penalties on protected speech is a stark example of

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[5] To give just one example, there is significant uncertainty as to what qualifies as a "bona fide news medium" for purposes of the media exception. TEX. GOV'T CODE § 305.004(1).

[6] Last year alone, the TEC issued sixteen ethics advisory opinions. Available at https://tinyurl.com/53yzhvsw.

speech suppression." *Ashcroft*, 535 U.S. at 244. Although speaking to legislative and executive officials on behalf of an organization is clearly protected speech under the First Amendment, Texas may impose hefty fines and jail time for the failure to register as a lobbyist under Chapter 305. The average person will likely hesitate before exercising their right to communicate with representatives, because if they are mistaken about the law, the cost is steep.

The message sent by this case is clear—if citizens dare criticize government officials, those officials may use the lobbying registration laws as an avenue for retaliation. Unfortunately for Sullivan, this was the price he paid for exercising his First Amendment rights. This Court should grant *certiorari* and declare this lobbying scheme unconstitutional.

CONCLUSION

For the foregoing reasons, and those present by Petitioner, this Court should grant the petition.

Respectfully submitted,

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