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* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and by restoring constitutional limits on the power of government. As part of that mission, the Institute litigates free-speech cases nationwide to defend the free exchange of a wide array of ideas, including speech about political issues. The Institute for Justice has also commissioned important original research on the costs and benefits of mandated disclosure schemes, which show that the benefits of these schemes are frequently overstated, while their costs are frequently underestimated. See, *e.g.*, Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 Indep. Rev. 567 (2009); Dick Carpenter & Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us About the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 Fordham Urb. L. J. 603 (2012).

The Institute is filing this amicus brief in support of Petitioner because this case offers an important opportunity for the Court to clarify the constitutional standards that apply to activity at the core of the First

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[1] No party or its counsel authored any of this brief, and no person other than the Institute for Justice (IJ), its members, or its counsel contributed monetarily to this brief. The undersigned contacted every parties' counsel of record with timely notice that IJ was filing this brief in support of Petitioner.

Amendment's protection: communicating with government officials about matters of public importance.

SUMMARY OF ARGUMENT

The case presents an opportunity for this Court to do something it has not done in more than 70 years: apply the First Amendment to a regulation of lobbying. At the time this Court decided *United States* v. *Harriss*, 347 U.S. 612 (1954), its last significant foray into this area, First Amendment doctrine was in its infancy—indeed, the Court had yet to strike down a single federal law for violating the First Amendment and would not do so until *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), more than a decade later.

Since *Harriss*, there have been revolutionary changes in First Amendment law, not only in the adoption of much greater protection for speech, but also in a growing recognition of the unique dangers of government regulation of political speech. But while those changes have led to massively increased protection for activities such as the financing of political campaigns, the treatment of lobbying has, for three generations, remained frozen in amber.

It is well past time to change that. In addition to the reasons set forth in the petition, this Court should grant certiorari for two more reasons.

First, this case presents not only an opportunity to analyze Texas's lobbying registration law under modern First Amendment doctrine, but also to conduct that analysis in light of modern social science understanding about the costs and benefits of mandated

disclosure. Though mandated disclosures are omnipresent in the United States, they may also be the "least successful regulatory technique in American law." Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure 3 (2014). Why, then, do these laws proliferate? The short answer is that "[d]isclosure is politically attractive partly because lawmakers rarely assess its benefits or burdens." *Id.* at 146. But this Court's First Amendment jurisprudence requires more.

Second, this case presents an important opportunity for this Court to examine lobbying regulation through a lens it has not seriously employed before: the Petition Clause. Indeed, it is surprising that this Court has not more regularly considered the act of communicating with elected officials about their official acts under that clause. Yet at the time of the Founding, the Petition Clause may well have been the most important clause in the First Amendment. Review is warranted.

ARGUMENT

Communicating with elected officials about their actions is indisputably activity at the core of the First Amendment's protection. Yet, as this case shows, such communication can trigger burdensome regulations and expose speakers to significant liability whenever the state characterizes this activity as "lobbying."

In section I, *Amicus* will discuss why constitutional scrutiny of these burdens should be informed

by what social science has actually found about the benefits and costs of mandated disclosure. In section II, *Amicus* will discuss why the case's implications for the Petition Clause make it a uniquely compelling candidate for review.

I. The alleged benefits of disclosure are significantly oversold, while its costs are underestimated.

In Section A, *Amicus* will discuss the alleged benefits of disclosure and show that, in general, the benefits of this disclosure have been significantly oversold, particularly when the information made available through disclosure is considered alongside the wide array of other information that is easily available to decision-makers. In Section B, *Amicus* will suggest that these findings, along with insights from public choice theory, suggest that mandatory disclosures should be greeted with more skepticism than it typically receives.

A. The primary alleged benefit of disclosure is that it provides cues for evaluating a speaker's argument.

In evaluating disclosure policies, one must understand, first, what disclosure policies are intended to achieve. Without a clear picture of what the alleged benefits of disclosure are, it is impossible to determine whether disclosure laws are tailored to achieving those benefits. Once we have a clear picture of those alleged benefits, we can then look to whether disclosure policies achieve those benefits in the real world.

As explained below, the primary alleged benefit of disclosure is that it provides decision-makers with helpful informational "shortcuts," known as cues. But social science evidence suggests that disclosure information has little benefit when considered alongside other information already available to political decisionmakers. Although this evidence focuses chiefly on voter behavior and campaign-finance disclosure, it is instructive because lobbying registration and disclosure is thought to operate in essentially the same way, by enabling elected officials to better evaluate the competing arguments they are exposed to from various constituencies.

At their heart, the alleged informational benefits of disclosures are about *cues*. Cues are shortcuts to help people decide where they stand on a question of public policy.

The idea behind cues is that gathering information about policies is costly. So, the theory goes, decision-makers benefit if they can be provided a mental shortcut—a cue—that will help them cast votes or make decisions that reflect the views they would hold if they were fully informed.

In the context of lobbying registration and disclosure, if a government official learns that a "lobbyist" represents the interests of, say, an oil company, that official can better evaluate where he stands on a piece of proposed legislation, even if he does not fully understand the consequences of that legislation.

Although that theory may sound reasonable enough, a growing body of social science evidence

gives reason to be skeptical that disclosure laws achieve these benefits in the real world. The reason is simple: In the real world, disclosure data is relevant only if it provides *additional* information about an issue beyond what is already available to decision-makers, and if that information is *pivotal* in a decision-maker's calculus (i.e., leads them to draw meaningfully different conclusions about that issue). But in the real world, decision-makers have access to lots of cues beyond those provided by disclosure data. This raises the question of the *marginal benefit* of disclosure data in an already information-rich environment.

Professor David Primo of the University of Rochester studied this question in a 2013 paper focused on *information at the margin* in the context of campaign finance disclosure.[2] The logic is straightforward. In an informational vacuum, a single piece of data about a candidate or ballot measure might have a huge effect on a citizen's assessment of how to vote. But as more information is gathered or available, the *marginal* effect of an additional piece of information declines.

In the modern world, individuals who wish to seek out information about the positions of politicians, or about the consequences of a ballot measure, will not have to look far to acquire such information. Candidates issue public statements and are endorsed by parties, other politicians, interest groups, and even

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[2] David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 Election L.J. 114 (2013).

celebrities. Ballot measures are often discussed in voter guides containing pro and con positions, and like candidates, they are endorsed or opposed publicly, including by parties, politicians, and interest groups. More generally, in today's information-rich world, there is virtually no issue or election on which a voter cannot become well-informed. In such an informational environment, then, mandated donor disclosure adds little value *at the margin*.

In Dr. Primo's paper, he conducted a survey experiment to test this claim. Depending on the treatment, a control group had access to no information about a ballot measure besides a brief description, a second group had access to voter guides and news articles in addition to the brief description, and a third group had access to all the information just described plus disclosure information embedded in news articles. These respondents were then asked to identify the positions of interest groups on the ballot measure. Respondents in the treatment group with access to the disclosure information, unsurprisingly given Dr. Primo's theory, did no better than respondents without access to such information in identifying those positions.

Recent research bolsters Dr. Primo's *information at the margin* theory. In a 2023 article, Dr. Thomas S. Robinson of the London School of Economics used an experimental technique known as conjoint analysis to show that when a realistic political environment is created (i.e., one with multiple sources of information about a candidate or ballot measure election), there is "little evidence that campaign finance information has a distinct impact on vote choice conditional on

other highly-salient cues [such as party ID]."[3] The one exception was having a majority of donors from within the state, which improved perceptions of the candidate or ballot measure position. Crucially, however, this information was not about the *identity* of donors. Put another way: Dr. Robinson finds no evidence that personally identifying information about a donor affects voter decision making.

Unlike Dr. Primo's and Dr. Robinson's findings, studies finding significant benefits from cues have done so only in highly artificial environments. A recent study by Dr. Cheryl Boudreau and Dr. Scott A. MacKenzie, for example, found that when given no other information about who is in favor or opposed to a ballot measure except for campaign finance disclosure information, high-knowledge voters act on donor disclosure cues.[4] But in the real world, this disclosure information is *not* a voter's only source of cues. Instead, voters are likely to have access to other sorts of information about where various groups stand on any given ballot measure, such as party endorsements or information disclosed in voter guides.

Further, even in these highly artificial environments, cues do not work for everyone. Boudreau and MacKenzie find that cues can backfire on low-

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[3] Thomas S. Robinson, *When Do Voters Respond to Campaign Finance Disclosure? Evidence from Multiple Election Types*, 45 Pol. Behav. 1309, 1311 (2023).

[4] Cheryl Boudreau & Scott A. MacKenzie, *TRENDS: Following the Money? How Donor Information Affects Public Opinion about Initiatives*, 74 Pol. Rsch. Q. 511 (2021).

information voters who cannot make use of donor disclosure cues because they lack the political knowledge base to do so. The result: they sometimes end up voting against their interests. This is consistent with earlier research in this area finding that political novices misuse cues and that cues are unlikely to be effective for the ill-informed.[5]

But it gets worse. Recent research suggests that interest group cues may lead voters of all knowledge levels, not just low-information voters, to make mistakes relative to their preferences. In recent survey experiments, researchers identified a phenomenon they term "heuristic projection," in which voters in candidate elections assume that interest groups they are unfamiliar with agree with them.[6] Using a survey experiment, the authors find that, in fact, voters do engage in heuristic projection, and politically knowledgeable voters are also prone to such errors. As the study's authors put it, "Our results, therefore, raise doubt about widely-shared hopes that interest group cues would improve accountability."[7]

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[5] Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 Am J. Pol. Sci. 951 (2001); James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, *in* Elements of Reason: Cognition, Choice, and the Bounds of Rationality 153 (Arthur Lupia et al. eds., 2000).

[6] David E. Broockman et al., *Heuristic Projection: Why Interest Group Cues May Fail to Help Citizens Hold Politicians Accountable*, 54 Brit. J. Pol. Sci. 69 (2023).

[7] *Id.* at 72.

To sum up, no systematic body of peer-reviewed research establishes that mandated disclosure information improves voter knowledge *at the margin*, and there is reason to believe that disclosure-related cues (among others) might lead voters to make incorrect (relative to their preferences) evaluations of a candidate or ballot measure. The takeaway? Courts reviewing disclosure laws should not assume that they provide meaningful benefits.

These findings suggest that similar caution is appropriate here. Indeed, there is even more reason to be skeptical that Texas's lobbying registration laws would have provided useful information to the elected officials who complained to the Texas Ethics Commission about Mr. Sullivan. Mr. Sullivan was a well-known political activist in Texas and his views and associations were widely known by allies and opponents alike. The complaints against him were, quite evidently, not filed because the complainants were confused by Mr. Sullivan's political loyalties, but rather because they knew precisely who he was—and wanted him punished.

B. Public choice concerns bolster the case for meaningful scrutiny of disclosure laws.

As *Amicus* has shown, there are good reasons to be skeptical about the alleged informational benefits of disclosure. These findings suggest that courts evaluating mandatory disclosure laws should not simply assume that disclosures achieve their alleged benefits in a narrowly tailored way.

Insights from public choice scholarship reinforce this conclusion. Public choice theory uses the tools of economics, with its foundation in understanding incentives, to study political decision making. This lens is useful for understanding the motivation behind disclosure rules. Disclosure rules emerge from the political processes they seek to regulate, and public choice suggests that these rules may seek to serve the interests of those proposing the rules. In other words, despite public-spirited rhetoric about protecting the integrity of the legislative process, politicians' actual motive for enacting lobbying regulations may be to impose additional costs on certain types of political speakers.

These are sometimes stated quite candidly. For instance, Senator Sheldon Whitehouse, in advocating for stronger campaign finance disclosure laws, argues, "[A] torrent of dark money spending has for too long prevented Congress from pursuing solutions that are overwhelmingly supported by the public."[8] In other words, disclosure laws are needed to get the "correct" policies enacted. Although disclosure laws are framed as designed to provide informational benefits, it appears that another goal is to move substantive policies in the direction its advocates prefer.

This Court has adopted various forms of heightened scrutiny precisely because government officials

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[8] Press Release, Sen. Sheldon Whitehouse, Whitehouse Introduces DISCLOSE Act to Restore Americans' Trust in Democracy (Apr. 11, 2019), https://www.whitehouse.senate.gov/news/release/whitehouse-introduces-disclose-act-to-restore-americans-trust-in-democracy.

may cloak illegitimate interests in public-spirited slogans. These forms of scrutiny help smoke out those illegitimate purposes by "requiring courts to consider evidence" going to "the substantiality of the asserted legitimate interest * * * and the closeness of the fit between that interest and the terms of the law." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 453 (1996). Thus, even in the context of commercial speech, this Court has held that evidentiary "burden is not satisfied by mere speculation or conjecture." *Edenfield* v. *Fane*, 507 U.S. 761, 770 (1993). Rather, the government has an affirmative evidentiary burden to "demonstrate that the harms it recites are real" and that the law it has enacted "will in fact alleviate them to a material degree." *Id.* at 771.

Amicus submits that there is no reason to hold the government to a lesser evidentiary standard in the context of disclosure laws. Not only do such laws concern speech at the core of the First Amendment's protection, there is even greater reason to worry that politicians will tailor those laws for political advantage. Thus, if "exacting scrutiny" is to live up to its name, this Court should grant certiorari to make clear that it, too, cannot be satisfied by mere speculation and conjecture, particularly when, as here, the Court has not considered the constitutionality of a lobbying disclosure regime in decades.

II. This case's implications for the Petition Clause make it a uniquely compelling candidate for review.

Separate and apart from the Free Speech Clause, Texas's lobbying registration law implicates the Petition Clause of the First Amendment. In addition to safeguarding free speech, the First Amendment guarantees "the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. amend I. And speaking with elected officials to present them with information about how they can govern better is at the heart of what the Petition Clause protects. "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives[.]" *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 388 (2011). Or, as the D.C. Circuit has put it, "providing information, commenting on proposed legislation, and other lobbying activities implicate First Amendment * * * petition rights." *United States* v. *Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013); see also *Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) ("[E]very person or group engaged, as this one allegedly has been, in trying to persuade Congressional action is exercising the First Amendment right of petition."). Or as the Eight Circuit in *Miller* v. *Ziegler* said, "petitioning the Government for a redress of grievances, even on behalf of others," is at the core of the First Amendment. 109 F.4th 1045, 1049 (8th Cir. 2024) (internal quotation marks and brackets omitted).

Mr. Sullivan's "Fiscal Responsibility Index" fits comfortably within all these views on the core scope of the Petition Clause. That publication expressed

opinions to elected representatives about the wisdom of their votes on various legislative proposals. Going back to colonial times, providing that sort of feedback to elected officials was viewed as one of the essential purposes of petitioning:

> In communities that lacked developed media or party structures and that provided limited suffrage, petitioning supplied vital information to assemblies. Few representatives were trained as legislators; most were farmers, holding short terms of office and busy with private responsibilities. They had neither time nor expertise to discover independently the colony's woes or to determine solutions.

Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 153 (1986). "Information from petitions was essential" to these part-time citizen-legislators getting up to speed on community needs and being able to do their job. *Ibid.* And it was precisely from these "roots in local assemblies" that the eventual First Amendment's Petition Clause emerged. *Id.* at 157.

These principles make Mr. Sullivan's case a particularly strong candidate for review. The Petition Clause was not an idle enactment. This Court has described the right to petition as one of the "most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am.* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). It was, at the time of

its ratification, viewed as the "cornerstone of the Anglo-American constitutional system" Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1153 (1986). It deserves better than to be relegated to the status of a footnote. This Court can and should begin that process now.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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