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 COURT OF APPEALS OF TEXAS, THIRD DISTRICT

BRIEF OF UNITED STATES SENATORS JOHN CORNYN AND TED CRUZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are United States Senators John Cornyn and Ted Cruz. Senator Cornyn is the senior United States Senator from the State of Texas. Senator Cornyn previously served as the Republican Whip, the second-highest ranking position in the Senate Republican Conference. Before representing the State of Texas in the United States Senate, Senator Cornyn served as a Texas district court judge, a member of the Supreme Court of Texas, and the Attorney General of Texas. Senator Cruz also represents the Lone Star State and serves as Chairman on the U.S. Senate Committee on Commerce, Science, and Transportation. Before becoming a United States Senator, Senator Cruz served at the Department of Justice, the Federal Trade Commission, and as the Solicitor General of Texas.

Amici have a strong interest in ensuring citizens can exercise their First Amendment right to engage in political speech and speak with their elected officials.

SUMMARY OF THE ARGUMENT

"Political speech is 'the primary object of First Amendment protection' and 'the lifeblood of a self-governing people.'" *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 228 (2014) (Thomas, J., concurring) (citation omitted). "The freedom of speech . . . guaranteed by

1. Per Rule 37, 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 funded its preparation or submission other than *amici* and their counsel.

the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 469 (2007) (citation omitted).

Because the constitution guarantees citizens the right to engage in political speech, "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (citation omitted).

While laws restricting political speech would normally be subject to strict scrutiny, this Court has not yet considered how this tier of scrutiny should impact courts' review of lobbying restrictions that also regulate the political speech of individuals who are not professional lobbyists. This Court's seminal opinion evaluating the constitutionality of a lobbyist-registration law came 70 years ago in *United States v. Harriss*—long before the robust First Amendment jurisprudence and modern tiers of scrutiny were developed. 347 U.S. 612 (1954). In the gap of time since *Harriss*, courts have wrestled with the appropriate level of scrutiny to apply in evaluating the constitutionality of a lobbying restriction. Some say strict scrutiny should apply. Others say a less demanding standard is appropriate. Given the decades-long debate about the proper level of review, this is the ideal time and case for the Court to provide much-needed clarity about the proper tier of review. Such clarity would ensure the right to engage in political speech is only restricted when the government can show that its interest and means of restriction are constitutionally permissible.

ARGUMENT

I. CLARIFYING THE PROPER TIER OF SCRUTINY FOR LOBBYING RESTRICTIONS IS VITAL TO SAFEGUARDING THE RIGHT TO ENGAGE IN POLITICAL SPEECH.

The American people should be able to engage in protected political speech without government restrictions, unless such limits are constitutionally permissible. And courts should know which tier of scrutiny is required to adequately safeguard political speech when evaluating laws and regulations aimed at lobbying.

In modern constitutional law, this Court has generally applied three different tiers of scrutiny: (1) rational basis; (2) intermediate scrutiny; and (3) strict scrutiny.

These ascending tiers of judicial rigor can strongly influence the outcome of many cases. For instance, rational basis only requires that a statute "bear some rational relationship to legitimate state purposes" to pass constitutional muster. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973). This means a law is constitutional "if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022).

In contrast, intermediate scrutiny "'is satisfied 'so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' and does not 'burden substantially more speech than is necessary' to further that interest." *TikTok Inc.*

v. Garland, 145 S. Ct. 57, 70 (2025) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Intermediate scrutiny is "a less rigorous analysis" than strict scrutiny. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 213 (1997).

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) (quoting *Citizens United,* 558 U.S. at 340). Other iterations of this standard indicate that the law must be the "least restrictive means" of regulating the protected speech to further the compelling government interest. *Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). This "daunting two-step examination" subjects government action to the harshest level of review available. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023).

In addition to these three tiers of scrutiny, some courts have applied "'exacting scrutiny', which requires a 'substantial relation' between the [law] and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366–67 (citation omitted). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008)). But exacting scrutiny, while distinctly defined in some cases, has also been applied as some form of strict scrutiny in others. For instance, this Court concluded "[u]nder *exacting scrutiny*, the Government may regulate protected speech only if such regulation *promotes a compelling interest* and *is the least*

restrictive means to further the articulated interest"—language mirroring strict scrutiny, not the exacting scrutiny test articulated in *Citizens United*. *McCutcheon*, 572 U.S. at 197 (emphasis added). Such dueling definitions demonstrate that even within the levels of review, clarity is needed.

Applying the appropriate tier of scrutiny when evaluating lobbyist disclosure requirements is crucial to ensuring protected political speech is not unlawfully restricted or silenced. Barriers to corresponding with elected representatives, like registration requirements, must be properly evaluated. This evaluation must include the risk that they would chill the otherwise protected political speech of individuals who want to express their views and ask questions to their elected officials. And our democratic republic would be worse off without such input because "our constitutional system . . . allow[s] the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts." *Harriss*, 347 U.S. at 635 (Jackson, J., dissenting).

Lobby laws typically target *quid pro quo* corruption or its appearance. "[T]he '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.'" *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 308 (2022) (quoting *McCutcheon*, 572 U.S. at 209). That is, "mere influence or access" cannot be the justification for such laws. *Id.* "And in drawing that line, 'the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.'" *Id.* (quoting *Wisconsin Right to Life, Inc.*, 551 U.S. at 457

(opinion of Roberts, C.J.)). Providing a clear statement on the appropriate level of judicial review for lobbying restrictions that impact political speech will ensure that the constitutional right to engage in political speech is safeguarded against unlawful proscriptions.

II. THE SPLIT OPINIONS AMONG LOWER COURTS SHOW THIS ISSUE IS RIPE FOR REVIEW.

The debate about the proper tier of scrutiny in lobbying restriction cases has spanned over half a century without resolution. The advent of the tiers of scrutiny combined with the fact that *Harriss* "was not explicit about the level of constitutional scrutiny applied" means courts are torn over the proper level of review. *Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996). Thus, in evaluating lobbying restrictions some courts apply strict scrutiny, others apply exacting scrutiny, and still others throw up their hands by concluding a scrutiny determination is unnecessary as the challenged rule satisfies all levels of review.

The D.C. Circuit, for instance, concluded "the debate over the appropriate test to apply is irrelevant because it makes no difference to our disposition." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 11 (D.C. Cir. 2009). Meanwhile, the Eighth Circuit "has repeatedly applied strict scrutiny when reviewing lobbying disclosure statutes." *Calzone v. Summers*, 942 F.3d 415, 427 (8th Cir. 2019) (Grasz, J., concurring); *see also Miller v. Ziegler*, 109 F.4th 1045, 1050 (8th Cir. 2024) ("The next step is to apply strict scrutiny to what the lobbying ban prevented these plaintiffs from doing."). In contrast, the Eleventh Circuit determined *Harriss* "did not subject the lobbying restrictions to the

demands of strict scrutiny." *Florida League of Prof'l Lobbyists, Inc.*, 87 F.3d at 460.

State appellate courts and federal district courts have also joined the discussion of which tier of scrutiny to apply. In the case at hand, the Texas court of appeals looked to *Harriss* and applied exacting scrutiny in upholding the lobbying requirements. *Sullivan v. Texas Ethics Comm'n*, 660 S.W.3d 225, 233, 235 (Tex. App.—Austin, 2022). Per the court, this level of "intermediate [i.e., exacting] scrutiny" only required the restriction to "promote[] a substantial governmental interest that would be achieved less effectively without the restriction[.]" *Id.* at 233. Other courts have taken similar approaches when interpreting *Harriss*. For instance, the Supreme Court of California refused to apply strict scrutiny to registration and reporting requirements, noting that such requirements have only "an incidental effect on exercise of protected rights" and could be upheld under *Harriss*. *Fair Political Practices Comm'n v. Superior Court of Los Angeles Cty.*, 599 P.2d 46, 53–54 (Cal. 1979). A federal district court in New York opined that "lobby disclosure laws are traditionally subject to less scrutiny than laws that sanction 'pure speech[,]'" and concluded "the New York lobby law is fairly susceptible to a constitutional construction." *Comm'n on Indep. Colls. & Univs. v. New York Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 494, 497 (N.D.N.Y. 1982).

The split among courts on whether to apply strict scrutiny or a less demanding tier of review when evaluating lobbying restrictions is evident. Because the same types of laws are evaluated unevenly by courts at every level, in both state and federal systems, the First

Amendment's guarantee of the right to engage in political speech is subject to confusion. Without clear precedent from this Court, lobbying restrictions that impact political speech could have a chilling effect on Americans' ability to interact with their elected officials.

CONCLUSION

Does the First Amendment permit the government to require ordinary citizens to register and pay a fee to communicate with their government representatives? With the current split of authority, the answer depends on which court hears the case.

This case is an apt vehicle for the Court to clarify the level of scrutiny that should apply to lobbying restrictions that impact political speech. This clarity will ensure any restriction on political speech is constitutionally permissible.

For the foregoing reasons, and those stated in the petition, the Court should grant the petition.

Respectfully submitted,

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