No. 23-0080

In the Supreme Court of Texas

MICHAEL QUINN SULLIVAN,
Petitioner

v.

TEXAS ETHICS COMMISSION,
Respondent

On Petition for Review from the
Third Court of Appeals at Austin, Texas
(Dist. Ct. No. 1:23-cv-01370-DII)

BRIEF OF
THE INSTITUTE FOR FREE SPEECH
AS *AMICUS CURIAE*
IN SUPPORT OF REVERSAL

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The parties have correctly identified themselves and their counsel.

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INTEREST OF *AMICUS CURIAE*

The Institute for Free Speech is a nonpartisan, non-profit organization dedicated to the protection of the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Protecting individuals' ability to speak about politics and associate for political purposes online is a part of the Institute's organizational mission in fostering free speech and association.

The Institute for Free Speech has not received, nor will receive, any fee for the preparation and submission of this brief.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Tex. Gov't Code § 22.001(a) because Michael Quinn Sullivan's appeal presents a question of law that is important to the jurisprudence of the state.

STATEMENT OF THE CASE

The Institute for Free Speech incorporates by reference, and substantially adopts, the Statement of Facts provided by Sullivan in his Brief on the Merits filed October 2, 2023.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously decided questions of constitutional significance in this matter. Texas's lobbyist disclosure and fee statutes should be reviewed under First Amendment strict scrutiny. Instead, the Court of Appeals misapplied U.S. Supreme Court decisions to employ "exacting scrutiny." Reviewed under the proper standard, both Texas laws are unconstitutional. The registration regulation fails strict scrutiny as applied to Sullivan. And the licensure tax fails strict scrutiny both facially and as applied to Sullivan.

The government cannot usurp First Amendment freedoms by simply asserting unspecified interests in lobbyist identification information and preventing corruption. Instead, it must demonstrate how these interests are served by what its laws require from Sullivan. Here, Texas has failed to show its regulations are properly tailored to serve a compelling government interest. Neither Texas's informational nor its anti-corruption interests are served by prosecuting Sullivan for failing to provide information on a government form when he voluntarily provided the requisite information directly to the government officials he was trying to persuade. Nor are such interests served by forcing Sullivan, or others, to pay a licensure tax for government permission to engage in First Amendment activity.

This Court should grant Sullivan's petition for review, reverse the decision below, and render summary judgment in his favor.

ARGUMENT

I. STRICT SCRUTINY APPLIES TO LOBBYING REGULATIONS.

Lobbying the government is a fundamental right. Indeed, the First Amendment guarantees that all Americans can "petition the Government for a redress of grievances." U.S. Const., amend. I. And it protects the "freedom of association for the purpose of advancing ideas and airing grievances . . . not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). As this case shows, that is all lobbying is. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 9 (D.C. Cir. 2009) (noting that lobbying disclosure laws can burden Petition Clause rights). The Texas Ethics Commission charged Sullivan with violating the state's lobbying laws simply because he—as president of Empower Texans—advocates for (or against) legislation by publishing news and editorial content about various matters of public policy. Such a direct infringement on Sullivan's right to engage in core political speech requires overcoming strict scrutiny.

"The Constitution protects against compelled disclosure of political [activities]." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982). And "it is an essential prerequisite to the validity of [government action] which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information

sought and a subject of overriding and *compelling* state interest." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) (emphasis added). Thus, as the U.S. Supreme Court has explained for decades, the government must have a "compelling" interest to require disclosure of one's political conduct because of the "vital relationship" between privacy and political activity. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). These First Amendment rights should "yield only to a subordinating interest of the State that is *compelling*, and then only if there is a substantial relation between the information sought and an overriding and compelling state interest." *Brown*, 459 U.S. at 91-92 (cleaned up) (emphasis added); *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (holding that the government's purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

This is the familiar language of strict scrutiny. Indeed, before the Supreme Court adopted today's familiar tiers of scrutiny, it upheld the federal lobbyist disclosure regulations only after first finding they served a "vital national interest" in a "manner restricted to its appropriate end." *United States v. Harriss*, 347 U.S. 612, 626 (1954). As with the cases cited above, this analysis closely resembles modern-day strict scrutiny. It requires the state to prove the highest interest possible, and tailor its regulation to "the least restrictive means of achieving a compelling state interest." *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

Applying strict scrutiny to laws regulating lobbyists makes sense. "The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring). By mandating that individuals disclose their identity before engaging in speech about legislation, the law directly burdens "the right to associate anonymously" and thus "should be subject to the same scrutiny as laws directly burdening other First Amendment rights." *Id.* (Thomas, J., concurring). Moreover, because the law draws distinctions based on speech content—only speech expressed "to influence legislation or administrative action" (Tex. Gov't Code § 305.003(a)) is regulated — strict scrutiny must apply. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015); *see also* Pet. Br. at 30-33.

However, primarily relying on *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) ("*AFPF*") and, to a lesser degree, *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court of Appeals applied "exacting scrutiny" to Sullivan's case. *See Sullivan v. Tex. Ethics Comm'n*, 660 S.W.3d 225, 233, 235 (Tex. App. 2022). As the Court of Appeals explained, exacting scrutiny is a less "rigorous" review than strict scrutiny that only requires "'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,'" that is "'narrowly tailored to the interest it protects.'" *Id*. at 233 & n.3 (quoting *AFPF*, 141 S. Ct. at

2385). Relying on *AFPF*, the Court of Appeals ruled that all “disclosure statues” are subject to exacting scrutiny review. *See id*. at 233.

In *AFPF*, the U.S. Supreme Court did not garner a majority on whether exacting scrutiny or strict scrutiny applied to the disclosure law at issue. *See AFPF*, 141 S. Ct. at 2379 (“Chief Justice Roberts delivered the opinion of the Court, except as to Part II-B-1.”). Rather, only three justices joined the portion of the opinion adopting exacting scrutiny for disclosure laws. *Id.* Two justices in the majority declined to decide whether strict or exacting scrutiny applied because it was unnecessary. *Id.* at 2391 (Alito, J., joined by Gorsuch, J., concurring). And Justice Thomas wrote that strict scrutiny must apply to all compelled disclosures. *Id.* at 2389 (Thomas, J., concurring). The plurality opinion adopting exacting scrutiny for disclosure statutes thus does not resolve the question.

Citizens United does not require exacting scrutiny either. Fundamentally, *Citizens United* ruled that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.” 558 U.S. at 340. Accordingly, “[l]aws that burden political speech are subject to strict scrutiny.” *Id*. (quotations omitted). And when circumstances arose for *Citizens United* to employ exacting scrutiny, it merely applied the reasoning of *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curium*). *See Citizens United*, 558 U.S. at 366-367 (“…‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently

important' governmental interest") (quoting *Buckley*, 424 U.S. at 66). Notably, *Buckley* conflated strict and exacting scrutiny, making its application to other contexts unclear. *Compare* 424 U.S. at 66, 75 (emphasis added) ("The *strict test* established by *NAACP vs. Alabama* [*ex rel. Patterson*, 357 U.S. 449, 462-63 (1958)] is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. . . . In considering [a disclosure law] we must apply the same *strict standard of scrutiny*, for the right of associational privacy developed in *NAACP vs. Alabama*.") *with* 424 U.S. at 64 (emphasis added) ("Since *NAACP v. Alabama* we have required that [compelled disclosure laws] must survive *exacting scrutiny*.").

In any event, disclosures made during an ongoing election raise materially different issues than those present here. The government regulates speech as part of its exclusive function of administering elections. Intuitively, a lower level of scrutiny is more appropriate for election disclosures, because of the government's role in fulfilling the electorate's informational interest and preventing the appearance of *quid pro quo* corruption. *See, e.g., Buckley*, 424 U.S. at 25-29, 81. But government has no role in the exercise of anyone's petition rights. Lobbying is simply political speech attempting to influence government action. *See Harriss*, 347 U.S. at 620 ("[L]obbying in its commonly accepted sense" is communicating with government officials on "pending or proposed" legislation or regulations) (internal quotation

marks omitted)). "Laws 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*, 558 U.S. at 340 (internal quotation marks omitted).

II. THE LOBBYIST REGISTRATION AND FEE STATUTES FAIL STRICT SCRUTINY.

Texas requires lobbyists to register with the state and pay a licensure tax. *See* Tex. Gov't Code §§ 305.003, 300.005. But the "right to petition [i]s one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation marks omitted). Accordingly, Sullivan's "political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden [his] political speech are subject to strict scrutiny." *Citizens United*, 558 U.S. at 340 (internal quotation marks omitted).

A. **The registration regulation is unconstitutional as applied to Sullivan**.

Texas asserts that lobbyist registration is a compelling interest because "it is necessary to disclose publicly and regularly the identity, expenditures, and activities of certain persons who, by direct communication with government officers, engage in efforts to persuade members of the legislative or executive branch to take specific actions." Tex. Gov't Code § 305.001. Accordingly, Texas's "asserted justification is 'transparency,'" which "seems to encompass two ideas. The first is an interest in sharing information about advocacy activities in order to prevent actual or apparent

public corruption. The second is a general interest in having the world know who is trying to influence the work of [government officials].” *Calzone v. Summers*, 942 F.3d 415, 423 (8th Cir. 2019).

But ‘“corruption,’ loosely conceived, . . . is not legitimately regulated under the First Amendment.” *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1654 (2022). There is “only one permissible ground for restricting political speech: the prevention of ‘*quid pro quo*’ corruption or its appearance.” *Id*. at 1652. *Quid pro quo* corruption is “the exchange of a thing of value for an official [government] act.” *McDonnell v. United States*, 579 U.S. 550, 574 (2016) (internal quotation marks omitted).

The record shows that Sullivan’s salary is the only thing of value in this case. Sullivan’s correspondence with government officials does not offer or appear to offer a thing of value in exchange for anything—much less an official government act. Therefore, the Texas lobbying registration law does not serve the government’s anti-corruption interest as applied to Sullivan. *See McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (plurality opinion) (internal quotation marks and citation omitted) (recognizing that the appearance of corruption can arise from “large individual financial contributions to particular candidates,” which is absent from Sullivan’s communications).

Furthermore, the government’s informational interest is served by the contents of Sullivan’s correspondence regardless of his registration status. Texas requires each

lobbyist to reveal: (1) his identity; (2) his basic contact information; (3) his employer; (4) the subject matter of his advocacy; (5) the identities of lobbyists he directly employs; and (6) the amount of compensation he receives from his employer. *See* Tex Gov't Code § 305.005(f).

The messages Sullivan sent to government officials disclosed the required registration information. Sullivan's letterhead and emails list his name, basic contact information, and employer. CR 2264-2277, 2286-2336. No employees are listed because Sullivan does not directly employ anyone. *Id*. And his correspondence discusses the subject matter of his advocacy. *Id*. Texas's registration law cannot be properly tailored when the same requisite information that must be disclosed on a government form is freely provided by individuals, like Sullivan, directly to the government officials they are trying to influence.

The *only* information Sullivan omits from his correspondence is his salary. Even so, the government never explained how either its informational or anti-corruption interests are served by knowing Sullivan's income.

"Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than 'simply posit the existence of the disease sought to be cured.'" *Ted Cruz for Senate*, 142 S. Ct. at 1653 (quoting *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U. S. 604, 618 (1996)). Sullivan disclosed his identity and lobbying agenda to the government. Texas must

demonstrate how compelling disclosure of his salary is tailored to serve a compelling government interest. But, because knowing Sullivan's income does not deter actual or perceived government *quid pro quo* corruption or make his lobbying efforts more or less persuasive to government officials, the regulation fails strict scrutiny as applied to him.

B. **The registration fee is unconstitutional both facially and as applied to Sullivan**.

Texas never placed evidence in the record to explain the purpose of its lobbyist registration fee. Indeed, the Court of Appeals had to *assume* the fee served some government interest. *See Sullivan*, 660 S.W.3d at 235 (concluding the government probably needs the fee to finance "its duties" and "achiev[e] [its] legislative policies"). That alone requires reversal. The state bears the burden "to substantiate" its reason for regulating political activities. *See AFPF*, 141 S. Ct. at 2386–87.

"A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). "A license tax applied to activities guaranteed by the First Amendment" has a "destructive effect," and is "as potent as the power of censorship." *Id*. Thus, the Government may only "exact narrowly tailored fees to defray administrative cost of regulation." *TK's Video, Inc. v. Denton Cnty., Tex.*, 24 F.3d 705, 710 (5th Cir. 1994) (citing *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941)). It "cannot tax First Amendment rights." *Id*.

There is no evidence in the record that the fee is related to the State's need "to defray the expenses of policing" lobbyists. *Murdock,* 319 U.S. at 114 & n.8. The text of the law makes plain that it is a "tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." *Id*. at 114. Texas never offered a compelling interest for the fee or explained how it was properly tailored to pass strict scrutiny. *See TK's Video, Inc.*, 24 F.3d at 710 (upholding a license fee only after finding the "amounts tied to the cost of investigating applicants and processing licenses"). Indeed, how a license tax prevents *quid pro quo* corruption or helps the state identify who is trying to influence government officials is a mystery.

What's more, no one can be a lobbyist without paying a fee, and the fee amount discriminates based on who the person represents. *See* Tex. Gov't Code § 305.005(c). Regardless of the constitutional problems with differential treatment based on the identity of a speaker, the fee cannot be narrowly tailored to "defray administrative cost of regulation" when the amount changes based on who is lobbying. *TK's Video, Inc.*, 24 F.3d at 710. And certainly, the Texas Ethics Commission did not produce any evidence to meet its burden on this issue.

The Court of Appeals also erred in upholding the tax because of the "nominal" amount of the fee. *Sullivan*, 660 S.W.3d at 235. "There is no *de minimis* exception for a [First Amendment] restriction that lacks sufficient tailoring or justification."

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 567 (2001); *see also Paxton v. City of Dall.*, 509 S.W.3d 247, 284 (Tex. 2017) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) ("minimal" burdens on fundamental rights '"constitutes irreparable injury.'"). An unconstitutional tax "does not become more constitutional because it is a small tax." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 136 (1992).

Because the lobbyist registration fee is a licensure tax that restrains First Amendment liberties and serves neither a compelling governmental interest nor is tailored to one, it is unconstitutional facially and as applied to Sullivan.

CONCLUSION

The lower court's ruling should be reversed and Sullivan's motion for summary judgment should be granted.

Dated: January 12, 2024

Respectfully submitted.

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I certify that on January 12, 2024, the foregoing Amicus Brief was electronically served on all counsel of record by the Electronic Filing Service Provider.

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