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 INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. Along with scholarly and educational work, IFS represents individuals and civil society organizations in litigation securing their First Amendment liberties. IFS represented the plaintiff in *Calzone v. Summers*, 942 F.3d 415 (8th Cir. 2019) (en banc)—one of the cases contributing to the circuit split identified in the petition. *See* Pet.21. Lobbying registration requirements like those in Texas burden core political speech, and a ruling from this Court on the constitutionality of such laws is long overdue.

SUMMARY OF THE ARGUMENT

Anonymous advocacy is “an honorable tradition” in America. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995). But seventy years ago, the Court upended that tradition when it held that a lobbying registration requirement furthers the “vital” interest of making a legislator’s job easier. *United States v. Harriss*, 347 U.S. 612, 626 (1954). That rationale has plagued the First Amendment since.

In the decades after *Harriss*, states like Texas have enacted laws that would have treated Alexander Hamilton

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1. *Amicus* notified counsel for all parties of its intention to file this brief more than 10 days prior to filing. S. Ct. R. 37.2. Counsel for *amicus* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel have made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6.

as an unregistered lobbyist based on insignificant details like whether James Madison reimbursed him for the cost of printing *The Federalist Papers*. These laws do not prevent any meaningful danger, but they chill the kind of speech that helped give birth to our Nation. And they continue to exist not because they hold up to scrutiny under the First Amendment, but because *Harriss* continues to bind lower courts long after this Court has repudiated its rationale.

The premise of *Harriss* is wrong. The government cannot burden the First Amendment right to speak anonymously because disclosure is convenient for elected officials. *Ams. for Prosp. Found. v. Bonta*, 594 U.S. 595, 615 (2021) ("*AFPF*"). While legislating might often be difficult because of conflicting pressure from various constituents, that's what being an elected official is all about. The solution for a legislator who lacks the "ability" to evaluate such pressure, *Harriss*, 347 U.S. at 625, is to find a new job—not burden the First Amendment rights of his constituents. And *Harriss*'s reliance on the government's purported interest in making things easier for itself "does not remotely reflect the seriousness of the actual burden" that disclosure creates. *AFPF*, 594 U.S. at 615 (cleaned up).

Nor can lobbying registration requirements be saved by adopting this Court's decisions about disclosing campaign speech. Several courts have tried just that. But the rationale for disclosing the source of campaign speech does not fit for lobbyists who do not make expenditures for the benefit of a public official. Such speech does not raise any appearance of *quid pro quo* corruption, and members of the public have no general interest in knowing who is talking to elected officials. That does not change simply

because an individual engages in political speech as part of his job.

This Court has never addressed lobbying registration requirements under its modern First Amendment doctrine for compelled disclosures. This case is the perfect opportunity to do so. The Court should grant the petition.

ARGUMENT

A law mandating that individuals register with the government before talking to their elected officials about public policy should set off alarm bells. Surely the government would need an important reason for conditioning the "precious" right to petition on an agreement to give up one's privacy. *Lozman v. City of Riviera Beach*, 585 U.S. 87, 101 (2018). And so surely any such law would be rare—narrowly confined to a particular "danger." *McIntyre*, 514 U.S. at 357.

If only it were so.

Virtually every government imposes a labyrinth of lobbying regulations that treat petitioning government officials with suspicion. In some states (like Texas), an individual might trigger these laws by spending less money than it costs to print and file a brief with this Court. *See, e.g.*, Tex. Gov't Code § 305.003(a)(1); 1 Tex. Admin. Code § 34.41; *id.* § 18.31 (Figure 2); Conn. Gen. Stat. § 1-91(12). Other states impose more forgiving (but perhaps murkier) rules, exempting those whose primary job does not include lobbying. *See, e.g.*, Ala. Code § 36-25-1(21)(b)(6). But no matter where one lives, the government

classifies some category of political speech as "lobbying" and requires publicly disclosing the activity.

Yet this Court has "not heard argument in a [lobbying disclosure] case for nearly [seventy] years." *Silvester v. Becerra*, 583 U.S. 1139, 1148 (2018) (Thomas, J., dissenting from denial of certiorari). The Court decided *Harriss* in 1954—long "before it adopted the current language of levels of scrutiny," *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 14 (D.C. Cir. 2009), and when the idea of a "compelling state interest" had only just emerged. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal History 355, 364 (2006). That's four years before the Court decided *NAACP v. Alabama*,[2] twenty years before *Buckley v. Valeo*,[3] forty years before *McIntyre*, fifty years before *Citizens United v. FEC*,[4] and sixty years before *AFPF*. Those decisions have dramatically reshaped First Amendment doctrine in different ways—many of which undermine the foundation on which *Harriss* stands.

So it's no surprise that courts have struggled to apply *Harriss* over the last half century. *See* Pet.19–25. Recent decisions make clear that America's "honorable tradition" of protecting anonymous speech, *McIntyre*, 514 U.S. at 357, puts a heavy burden on governmental efforts to compel disclosure, *see AFPF*, 594 U.S. at 611–15. That should require the government to "substantiate" whatever problem it believes that undisclosed lobbying

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2. 357 U.S. 449 (1958).

3. 424 U.S. 1 (1976).

4. 558 U.S. 310 (2010).

may cause. *Id.* at 614. But many courts—like the Texas court below—interpret *Harriss* as giving states a blank check to regulate lobbying in the name of "transparency and integrity." App.16a. All that's required to justify intrusive disclosure obligations is to disparagingly call someone like Petitioner a "paid mouthpiece" and suggest there's something nefarious about engaging in political speech on behalf of another. *Id.* In any other context, the First Amendment requires more. *See AFPF*, 594 U.S. at 611–15. But *Harriss* stands in the way.

The Court should grant certiorari to revisit *Harriss* and make clear that the government has no interest in regulating lobbying when it takes the form of pure political speech like Petitioner's.

I. Alexander Hamilton: unregistered lobbyist?

Any good civics student can tell the story behind *The Federalist Papers*. Three of our founders penned a series of anonymous essays urging the states to ratify the newly proposed Constitution. The essays "first appeared in New York City newspapers" under the pseudonym "Publius." Ctr. for the Study of the Am. Const., Univ. of Wisconsin-Madison, *Publication and Sale of the Federalist, Volume I* (Mar. 22, 2022), https://perma.cc/P8FV-4R77. But eventually, the authors commissioned a printer to produce them as pamphlets. *Id.* This allowed the authors to distribute the essays to a wider audience and "counteract the Antifederalist material that was being sent" to other states in opposition to ratification. *Id.*

We know today that the three authors were Alexander Hamilton, John Jay, and James Madison. But at the

time, "most people did not know who Publius was." Jeff Kosseff, *The United States of Anonymous*, 22 (2022). This was the norm during the founding era. "[A]uthors of newspaper letters and essays and of pamphlets, at least on political subjects, nearly always wrote anonymously or pseudonymously." Robert G. Natelson, *Does "The Freedom of the Press" Include a Right to Anonymity? The Original Meaning*, 9 N.Y.U. J.L. & Liberty 160, 198–99 (2015). And "[t]his was certainly true of writing on the Constitution." *Id.* at 199.

But could it happen today? Maybe not in Texas.

Alexander Hamilton spent what would be thousands of dollars today to print *The Federalist Papers* and send copies across the colonies. *See* Anthony J. Gaughan, *James Madison,* Citizens United, *and the Constitutional Problem of Corruption*, 69 Am. U.L. Rev. 1485, 1509 (2020). He distributed pamphlets "to subscribers and others throughout America, most particularly in Virginia and New York whose conventions were scheduled to meet" in June 1788. *Publication and Sale of the Federalist, Volume I*, *supra* at 5. Among his recipients? Delegates, like Virginia Governor Edmund Randolph, who would vote on whether to ratify the constitution. *Id.* Hamilton sent "'40 of the common copies & twelve of the finer ones' to Governor Randolph . . . for distribution among [the delegates]." *Id.* (quoting Letter from A. Hamilton to J. Madison (May 19, 1788), https://perma.cc/4LE8-6J7J).

But Hamilton did not do this on his own. Madison "command[ed]" him to send *The Federalist Papers* to Governor Randolph. *See* Hamilton, *supra* at 6. And while "[i]t is unknown whether Madison paid Hamilton back for

any portion of the publication costs, . . . it is possible that he did." Gaughan, 69 Am. U.L. Rev. at 1509. Madison, after all, "had a wealthy father and stood to inherit a large estate." *Id.* He had the ability to reimburse Hamilton for expenses that no "person of ordinary means [could] pay." *Id.* at 1510.

Whether Madison reimbursed Hamilton for his expenditures in distributing *The Federalist Papers* is a historical question of no serious importance. Yet in Texas, that determines whether Hamilton would face civil penalties for not registering as a lobbyist and disclosing his activities. *See* Tex. Gov't Code § 305.003(a)(2); 1 Tex. Admin. Code § 34.43(a); *id.* § 18.31 (Figure 2). That's because a lobbyist includes anyone who receives "reimbursement . . . from another person" for expenses incurred to influence public officials through "direct communic[ation]." Tex. Gov't Code § 305.003(a)(2). A simple cost-sharing agreement among friends like Hamilton and Madison could trigger the law.

But what state interest justifies drawing such a line? Would one of "the most famous example[s] of . . . anonymous political writing" in American history become dangerous if Madison reimbursed Hamilton for distribution costs? *McIntyre*, 514 U.S. at 360 (Thomas, J., concurring). Would the risk of corruption have increased if the three authors incorporated Publius as a nonprofit and paid Hamilton a salary to speak on its behalf? It's hard to see why that would be.

Yet that's Petitioner's story here. The Texas Court of Appeals called him a "paid mouthpiece" for emailing legislators on behalf of his small nonprofit. App.16a.

Perhaps that kind of denigrating language with "an unsavory connotation" is meant to obscure what's really going on. *See Meese v. Keene*, 481 U.S. 465, 484 n.19 (1987) (quoting *The New Columbia Encyclopedia* 1598 (1975)). Petitioner didn't buy any legislators expensive gifts. He didn't curry favor by taking officials to a nice dinner or concert. He simply spoke. What "danger" does such pure speech create that gives Texas the right to compel Petitioner to publicly identify himself? *See McIntyre*, 514 U.S. at 357.

America's "honorable tradition of [anonymous] advocacy" did not stop with Alexander Hamilton or *The Federalist Papers*. *Id.* Yet people like Petitioner face complex and burdensome disclosure rules that often "outlaw[]" such speech, *id.*, and chill even more. No state interest justifies such an incursion on the First Amendment.

II. The government lacks a legitimate interest in disclosing pure speech directed at public officials.

"[O]ur society accords greater weight to the value of free speech than to the dangers of its misuse." *Id.* A lobbying registration law requires speakers to identify themselves and who they're speaking for—a clear burden on "the right to remain anonymous" that the First Amendment protects. *Id.* So when does political advocacy called "lobbying" pose enough risk to justify discarding the protections for anonymous speech?

This Court half-heartedly answered that question once—seventy years ago. *See Harriss*, 347 U.S. at 625–26. But since then, it has steadily undermined the basis

for that decision. So it's long past time for the Court to reexamine whether the government has any interest in requiring that individuals publicly disclose when they engage in pure political speech—speech, like Petitioner's, that is not paired with any expenditures made for the benefit of a public official. And reexamining this question leaves no doubt that the current web of lobbying rules that ensnare countless people lacks any coherent justification.

A. The "self-protection" rationale in *Harriss* conflicts with everything this Court has said about the First Amendment in the decades since.

Harriss held that "members of Congress cannot be expected" to ably distinguish between advocates who represent "special interest[s]" and advocates who are honest "proponents of the public weal." 347 U.S. at 625. The "pressures" are too much, and legislating is too "complex[]." *Id.* And so, *Harriss* concluded, disclosure rules for lobbyists protect the "full realization of the American ideal of government" by making it easier for legislators "to properly evaluate such pressures." *Id.*

That conclusion rests on two ideas this Court has now rejected several times over. First, that the government can burden speech rights (by compelling disclosure) for its own convenience. And second, that the government has any interest in regulating speech to equalize how effective certain speakers may be. Neither justification stands up under modern First Amendment doctrine.

1. "[T]he prime objective of the First Amendment is not efficiency." *McCullen v. Coakley*, 573 U.S. 464, 495

(2014). Because of that, the government cannot compel disclosure of one's political speech and associations for "convenience." *AFPF*, 594 U.S. at 615. Such a justification "does not remotely reflect the seriousness of the actual burden" that compelled disclosure of private speech inflicts. *Id.* (cleaned up).

Yet *Harriss* rests firmly on elevating the convenience of elected officials over the right to "privacy in one's associations." *AFPF*, 594 U.S. at 606. The Court justified lobbying disclosure rules because it's hard to evaluate the "pressures" a legislator faces. *Harriss*, 347 U.S. at 625. But it's no answer to the First Amendment's demand of a sufficiently important government interest that legislating is hard. In fact, that difficulty is why we have a representative democracy. We elect officials to represent us—rather than governing by a popular vote—so that their "wisdom may best discern the true interest of their country." *The Federalist No. 10*, at 59 (James Madison) (Modern Library ed. 2001). Sacrificing the First Amendment because elected officials lack the "ability to properly evaluate" the strength of a lobbyist's argument turns the "American ideal of government" upside down. *Harriss*, 347 U.S. at 625.

Nor does it matter that this Court has held disclosure rules can further an informational interest by helping listeners "evaluate the [speaker's] arguments." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 n.32 (1978). Those decisions govern campaign speech—that is, speech designed to give *voters* information about how to make their own decision on election day. *See id.*; *see also McIntyre*, 514 U.S. at 353. Unlike elected officials, voters might have limited time and resources to judge

the credibility of campaign speech, and so publicly identifying the source of such speech can give valuable information and prevent an election from being "swayed" by "last-minute misinformation to which there is no time to respond." *McIntyre*, 514 U.S. at 352 n.16 (quotation omitted). But elected officials face neither constraint. They have the time and resources to sort through "conflicting" messages, *Bellotti*, 435 U.S. at 791–92, and have been elected to do exactly that. After all, even "the common man" is typically "intelligent enough to evaluate" speech from an unknown source. *McIntyre*, 514 U.S. at 348, n.11. If that's too hard for a legislator, the solution is to find a new job, not burden the constituents' First Amendment rights.

A legislator's purported informational interest in identifying who a lobbyist speaks for is "convenience" by another name. And the government's convenience never suffices to justify compelled disclosure. *AFPF*, 594 U.S. at 615.

2. Making matters worse, the *Harriss* Court worried that the voice of "special interest groups" would "drown[] out" more virtuous speakers. *Harriss*, 347 U.S. at 625. But "*Buckley* rejected the premise that the Government has an interest in equalizing the relative ability of individuals and groups to influence" the political process. *Citizens United*, 558 U.S. at 350 (quotation omitted). A disclosure rule designed to prevent disfavored "special interest groups" from having too much sway relative to "the voice of the people," *Harriss*, 347 U.S. at 625, pursues an impermissible goal. And even if disclosure is less burdensome than an outright ban on speech, the government lacks *any* interest in leveling the marketplace

of ideas. *Citizens United*, 558 U.S. at 350. This Court has thoroughly repudiated *Harriss*'s reliance on the fear that "special interest groups" would be too influential.

B. The informational interests justifying campaign disclosures do not apply to lobbying.

Perhaps recognizing *Harriss*'s flaws, lower courts have improvised by importing decisions about campaign speech into the lobbying context. *See, e.g.*, *Taylor*, 582 F.3d at 9, 14. But doing so requires ignoring everything this Court has said in those cases. The rationale for disclosing the source of campaign speech has no application to private lobbying.

1. In *Taylor*, the D.C. Circuit upheld a lobbying disclosure law based on the government's "hardly novel" interest in "increasing public awareness of the efforts of paid lobbyists." 582 F.3d at 15–16 (quotation omitted). But this Court has never held that *the public* has an interest in knowing about the "efforts of paid lobbyists." As discussed above, *Harriss* focused on the interest that *legislators* have because disclosure makes navigating the "legislative complexities" more convenient. *See Harriss*, 347 U.S. at 625–26. That reasoning does not apply to the members of the public, who do not vote on legislation and need not evaluate the pressures that come from lobbyists.

The Eleventh Circuit made a similar move in *Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457 (11th Cir. 1996). It held that "[t]he Supreme Court has made clear that circumstances like these implicate the correlative interests of voters (in appraising the integrity and performance of officeholders and candidates, in view of

the pressures they face) and legislators (in 'self-protection' in the face of coordinated pressure campaigns)." *Id.* at 460. But nothing in *Harriss* or any other decision from this Court even suggests that information about who is lobbying a public official is relevant to voters "appraising" a candidate for election—much less, that giving voters this information justifies burdening the First Amendment.

2. To fill the gap, both *Taylor* and *Meggs* relied on *Buckley* to explain why members of the public also have an interest in knowing the identity of paid lobbyists. But the analogy doesn't work.

Lobbying disclosure rules "rest[] on different and less powerful state interests." *See McIntyre*, 514 U.S. at 356. The audience of a lobbyist is different from the audience of campaign speech. The purpose of lobbying is different from the purpose of campaign speech. And absent any expenditures for the benefit of a public official, lobbying neither evinces support for a candidate nor provides a "*quid*" that might preview future *quid pro quo* corruption. So the justifications for disclosing campaign speech do not map onto private lobbying.

Buckley rooted the informational interest in disclosing the source of campaign speech to the benefits it provides the voters tasked with pulling the lever on election day. It gave three justifications. First, disclosure tells the public "where political campaign money comes from," which helps voters evaluate candidates by alerting them to what people and issues a candidate is mostly likely to respond to. 424 U.S. at 66–67. This helps voters "predict[]" the "future performance" of a candidate. *Id.* at 67. Second, disclosure rules "deter actual corruption

and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. Arming the public "with information about a candidate's most generous supporters" helps voters "detect any post-election special favors that may be given in return." *Id.* And disclosure itself "may discourage" those from corruptly using money in the first place. *Id.* Third, disclosure is "an essential means of gathering the data necessary to detect violations of [campaign-finance laws]." *Id.* at 67–68.

Since *Buckley*, this Court has continued to tie the government's interest in disclosing the source of campaign speech to how it provides valuable information *to voters* about persuasive, election-related speech that may affect their vote. Disclaimers for campaign ads, for example, inform voters "about the person or group" speaking to them, *Citizens United*, 558 U.S. at 368, which can help "evaluate the arguments to which they are being subjected," *Bellotti*, 435 U.S. at 792 n.32. Disclosures in this context "provid[e] the electorate with information" that voters will use to make their decision. *McConnell v. FEC*, 540 U.S. 93, 196 (2003).

The same is not true for disclosing the source of private lobbying. Voters have no need to "judg[e] and evalut[e]" a lobbyist's argument because voters are not making the decision about what to do. *See Bellotti*, 435 U.S. at 791. In fact, voters aren't even aware of what those arguments are. Unlike a campaign ad that the voter reads or sees, lobbying communications are done in private. So there is nothing for members of the public to even "make [a] judgment" about once they learn who is funding communications with their elected officials. *Id.* at 791–92.

The government's interest in identifying "the source of advertising . . . so that people will be able to evaluate the arguments to which they are being subjected," *id.* at 792 n.32, makes no sense as a reason to publicly disclose the source of private lobbying.

Nor does it work to recast a lobbyist as some kind of "generous supporter" to claim voters gain important information from knowing who is talking to their elected officials. *Buckley*, 424 U.S. at 67. While lobbying laws do require that people disclose all sorts of intrusive information about their private associations, they typically don't require disclosing which individuals a lobbyist speaks to. *See, e.g.*, Pet.8; Tex. Gov't Code § 305.006. Such laws give voters no information relevant to evaluating particular candidates for office.

Even still, lobbying (when it takes the form of pure speech) is not about supporting a public official—it's about persuading the public official to support the lobbyist. So the fact that a lobbyist talks to a legislator reveals no information about where the official falls on "the political spectrum" or which "interests" the official "is most likely to be responsive" to. *Buckley*, 424 U.S. at 66–67. And the state has no interest in encouraging voters to scrutinize and punish elected officials based on who talks to them, rather than how they vote or act. *See Calzone v. Summers*, 942 F.3d 415, 424–25 (8th Cir. 2019) (en banc).

This case exemplifies the problem of reimagining lobbyists as supporters to fit these rules into *Buckley*'s framework. Petitioner lobbied by sending a "mass email to legislators" informing them that the vote on several bills "would be included in" Petitioner's Fiscal Responsibility Index. Pet.13. Two of those legislators filed complaints

with the Texas Ethics Commission after they "scored poorly." Pet.14. Does Petitioner's lobbying reveal him as a "generous supporter" of those two legislators? *See Buckley*, 424 U.S. at 67. Of course not. Asking an elected official to vote a particular way is an entirely different species of advocacy than asking the public to vote for that elected official. And the information that voters gain from the latter cannot justify requiring disclosure of the former.

Likewise for the concern over policing *quid pro quo* corruption. *Buckley* reasoned that disclosing a candidate's financial supporters deters corruption and gives the public information to "detect any post-election special favors." 424 U.S. at 67. But when lobbying takes the form of pure speech, there's no "corrupt use of money" to worry about. *Id.* The lack of a "*quid*" means "whatever 'quo' [a lobbyist] receives must be due to his speech, not corruption." *Calzone*, 942 F.3d at 424.

Of course, that question changes for lobbying rules targeted at expenditures made for the benefit of a public official. *See id.* Laws that require individuals to disclose gifts to public officials or other expenditures made while lobbying raise entirely different issues. Such expenditures look like campaign contributions and thus fall squarely within the state interests that *Buckley* identified. But "indiscriminately outlawing" Petitioner's pure speech because he made it in the course his employment has "no necessary relationship to the danger sought to be prevented" when a lobbyist spends money for the benefit of public officials. *See McIntyre*, 514 U.S. at 357. And the wholesale adoption of *Buckley*'s informational interest by courts analyzing lobbying disclosure rules overlooks the

"dramatic mismatch" between these two circumstances. *AFPF*, 594 U.S. at 612.

* * *

Absent any expenditures for the benefit of a public official, the government has no legitimate reason to require individuals to publicly identify themselves when they communicate directly with their elected officials about matters of public policy. *Harriss* greenlit such disclosures on a foundation that crumbles under modern scrutiny. The Court should grant the petition to reevaluate when the state's interest in disclosure can overcome an individual's First Amendment right to privately engage in core political speech.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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