

No. 08-20-00153-CV

**IN THE COURT OF APPEALS FOR THE
EIGHTH JUDICIAL DISTRICT OF TEXAS
AT EL PASO, TEXAS**

EMPOWER TEXANS, INC. AND MICHAEL QUINN SULLIVAN,
Appellants,

v.

TEXAS ETHICS COMMISSION,
Appellee.

Appeal from the 345th Judicial District Court of Travis County, Texas
Cause No. D-1-GN-15-004455

**BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER
IN SUPPORT OF APPELLEE**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Campaign Legal Center (“CLC”) is a nonpartisan nonprofit organization working for a more transparent, inclusive, and accountable democracy at all levels of government, including by representing the public perspective in legal proceedings interpreting and enforcing campaign finance, lobbying, ethics, and election laws throughout the nation. *See* <https://campaignlegal.org/about>.

CLC has a longstanding, demonstrated interest in the constitutionality and efficacy of ethics commissions and the laws they enforce. CLC has participated in numerous past cases addressing state and federal ethics, campaign finance, and political disclosure laws, including every major U.S. Supreme Court campaign finance case since *McConnell v. FEC*, 540 U.S. 93 (2003). CLC has also been active in the development of federal and state regulations and other administrative guidance interpreting governmental ethics laws, including the drafting of, and advocacy effort for, the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007), which stands as the last large-scale reform of the federal gift, ethics, and lobbying laws.

No person or entity other than CLC and its counsel made a monetary contribution to this brief’s preparation or submission.

SUMMARY OF ARGUMENT

Appellants Empower Texans, Inc. and Michael Quinn Sullivan attempt to undermine nearly thirty years of accountability and transparency in Texas’s political system. To avoid disclosing their political expenditures and lobbying activities as Texas law requires, Appellants argue that the entity responsible for enforcing those political laws—the Texas Ethics Commission (“TEC” or the “Commission”)—lacks the constitutional authority to do so. *See* Appellants’ Opening Brief (Oct. 15, 2020). As explained in the Appellees’ Brief, however, the Commission’s authorities *derive* from Article III, Section 24a of the Texas Constitution, which expressly authorizes the state legislature to delegate to the Commission of the “powers and duties” necessary to achieve its purposes: stamping out corruption and ensuring integrity and transparency in state political processes. Thus, there is no basis for Appellants’ sweeping claim that the Commission’s exercise of its enforcement authority violates the Texas Constitution’s separation of powers provision. The trial court was right to reject this argument, and this Court should do the same.

The purpose of this brief is to provide the Court with a broader historical and national context for state ethics commissions and the important interests they serve. As our survey indicates, the Commission is closely aligned with its peers with regard to its mandate and institutional role within state government. Moreover, and as long experience confirms, limiting the Commission’s authority or jurisdiction risks

exposing Texas to the kinds of government corruption scandals that precipitated the need for a state ethics commission in the first place—at profound cost to the public’s confidence in democratic institutions.

Amicus urges the Court to avoid that outcome here.

First, state ethics commissions are crucial for ensuring government accountability and have been a staple of American democracy for more than fifty years. The American public is familiar with ethics commissions and understands that their purpose is to promote “voters’ confidence in policymakers and political institutions by ensuring that the groups under their jurisdictions follow state ethics laws.” Megan Comlossy, *Ethics Commissions: Representing the Public Interest* at 9, Nat’l Conf. of State Leg. (2011), https://www.ncsl.org/documents/lss/Ethics_Commissions.pdf.

Second, Texas is joined by forty-five other U.S. states in having established an ethics commission. Thirty-six of those states—including Texas—have granted their commissions broad jurisdictional authority over state executive branch officials and legislators, irrespective of whether the commissions are executive or legislative branch agencies under state law.

Third, the public corruption concerns that originally prompted the creation of the Commission remain as pressing today as they were three decades ago. Recent corruption scandals only confirm the need for ongoing and robust enforcement of

anti-corruption laws. Eliminating Texas's ability to efficiently and neutrally enforce the laws within its jurisdiction would harm the public's trust in Texas government.

Finally, courts, legislators, and voters across the country have recognized that strong political transparency laws are essential to protecting the public's interest in open and accountable government. The comprehensive campaign finance and lobbying disclosure regimes administered by the Commission are uniquely important to effective democratic self-government. Weakening the Commission's power to enforce political disclosure requirements is not in the public's interest.

For all these reasons, this Court should affirm the judgment of the trial court.

ARGUMENT

I. State Ethics Commissions Have Historically Been Granted Broad Powers Across Branches of Government.

To better understand the Commission's singular role in the Texas state government, this Court should consider the nature of state ethics commissions from a nationwide perspective. A survey of the history, function, and structure of state ethics commissions across the country reveals that states create these institutions out of necessity and endow them with broad authority to ensure their effectiveness. Moreover, the vast majority of ethics commissions have authority over legislative and executive branch officials irrespective of whether the commission is established under either branch. Like its peers in other states, the Commission plays an essential and unique role in state government, and it is structured accordingly. Any new restrictions on its authority would be a consequential step backwards.

A. State Ethics Commissions Are Vital Mechanisms of Governmental Accountability Engrained in American Democracy.

State ethics commissions have been a staple of American democratic accountability for more than fifty years. Their purpose is to promote “voter confidence in policymakers and political institutions by ensuring that the groups under their jurisdictions follow state ethics laws.” Comlossy, *supra*, at 9. Ethics commissions are “watchdogs for the public,” ensuring that “conflicts of interest are exposed, financial dealings are done ‘in the daylight,’ and the decision-making

process is transparent.” Jonathan Rauh, *Predicting Political Influence on State Ethics Commissions: Of Course We Are Ethical—Nudge, Nudge, Wink, Wink*, 75 *Pub. Admin. Rev.* 98 (2015); *see also* Tex. Gov’t Code § 571.001(5) (providing that the Texas Ethics Commission is responsible for ensuring “the public’s confidence and trust in its government”).

The proliferation of state ethics commissions began in 1964, when Louisiana became the first state to authorize the creation of a commission responsible for enforcing state ethics laws for “all state employees,” save elected officials subject to oversight by a separate ethics board. *See Womack v. La. Comm’n on Gov’t Ethics*, 199 So.2d 891, 899 (La. 1967). Four years later, Hawaii became the first state to establish a state ethics commission, and New Jersey soon followed suit. *See* 1967 Haw. Sess. Laws 263 at 411-417; N.J. Stat. Ann. § 52-13D-21 (1971).¹

From the beginning, state ethics commissions have been born largely of scandal. *See, e.g.*, Joseph F. Sullivan, *So Far, Drive in New Jersey Has Indicted 131*, *N.Y. Times* (June 29, 1972), <https://www.nytimes.com/1972/06/29/archives/so-far-drive-in-jersey-has-indicted-131.html> (describing the indictment of 131 New Jersey public officials, including the Secretary of State, between 1969 and 1972). Indeed, “[t]he common thread throughout the rise of ethics commissions . . . is their link to

¹ New Jersey passed enabling legislation in 1971 and established an ethics commission in 1973.

either a specific act of corruption or a series of ethics scandals by government officials, which, in turn, prompted cries from the public to improve the ethical environment of government.” Robert W. Smith, *Enforcement or Ethical Capacity: Considering the Role of State Ethics Commissions at the Millennium*, 63 Pub. Admin. Rev. 283 (2003); *see also* Beth A. Rosenson, *Against Their Apparent Self-Interest: The Authorization of Independent State Legislative Ethics Commissions, 1973–96*, 3 State Pol. & Pol’y Q. 42, 45 (2003) (“[S]candal . . . was clearly the strongest influence on ethics commission establishment.”); Rauh, *Predicting Political Influence on State Ethics Commissions*, 75 Pub. Admin. Rev. at 99 (“Even today . . . new ethics regulations tend to follow visible and public scandals.”).

No scandal did more to accelerate adoption of state ethics commissions than Watergate, “[t]he event that broke open the flood gates of public distrust” in government. William Jonathan Rauh, *Changing Ethics Policies Without Scandal: State Responses to Published Reports and the Importance of Accurate Information*, 18 Pub. Integrity 308, 310 (2016); *see also* Ethan Wilson & Peggy Kerns, *States Continue to Turn to Ethics Commissions*, Nat’l Conf. of State Leg., LegisBrief 24.14 (2016), <https://www.ncsl.org/research/ethics/states-continue-to-turn-to-ethics-commissions.aspx>. Watergate forced Americans to confront “deceit and misuse by elected officials” on an unprecedented scale, and ignited calls from people “across the nation . . . for accountability from their governments.” Or. Ethics Comm’n,

Agency Jurisdiction, <https://www.oregon.gov/ogec/about-us/Pages/Agency-Jurisdiction.aspx> (last accessed Jan. 25, 2021); *see also* Okla. Ethics Comm’n, *Commission History*, https://www.ok.gov/ethics/Commission/Commission_History (last accessed Jan. 25, 2021).

As a result of the decline in public trust precipitated by Watergate, “states took up the mantle of protector of democracy and began to empower state ethics commissions” to address corruption and restore confidence in government. Rauh, *Changing Ethics Policies Without Scandal*, 18 Pub. Integrity at 310; *see also* Nicole Casal Moore & Peggy Kerns, *State Ethics Commissions*, Nat’l Conf. of State Leg., LegisBrief 14.23 (2006), <https://www.ncsl.org/Portals/1/Documents/ethics/item0190001423.pdf> (“State governments, in particular, began to create an ethics infrastructure that included stronger laws, ethics training, and oversight entities to ensure compliance by public officials.”). Between 1973 and 1979 alone, twenty-one states established ethics commissions.² Eleven more states—including Texas—

² *See* Ala. Code §§ 36-25-3–36-25-4.3 (1973); Iowa Code § 68B.32 (1973); Mich. Comp. Laws §§ 15.341–15.348 (1973); Ohio Rev. Code Ann. ch. 102 (1973); Fla. Stat. §§ 112.320–112.326 (1974) and Fla. Const. art. II, § 8 (1976); Ga. Code Ann. §§ 21-5-1–21-5-76 (1974); Ind. Code § 4-2-6-1–4-2-6-17 (1974); Kan. Stat. Ann. §§ 25-4119a, 46-253 (1974); Minn. Stat. §§ 10A.01–10A.38 (1974); Or. Rev. Stat. §§ 244.250–244.345 (1974); Cal. Gov’t Code §§ 81000–91014 (1975); Mont. Code Ann. §§ 13-37-101–13-37-131 (1975); Nev. Rev. Stat. §§ 281.411–281.575 (1975); S.C. Code Ann. §§ 8-13-310–8-13-365 (1975); Me. Rev. Stat. Ann. tit. 1, §§ 1001–1051 (1976); Neb. Rev. Stat. §§ 49-14,105–49-14,140 (1976); Conn. Gen. Stat. §§ 1-80–1-101rr (1977); Mass. Gen. Laws chs. 268A & 268B (1978); Md.

followed suit during the 1980s and early 1990s.³ Since then, states have continued to establish ethics commissions at a steady rate: four more states created commissions by 2010,⁴ and five states formed commissions in the last five years.⁵ Today, only four states—Arizona, Idaho, New Hampshire,⁶ and Wyoming—have no commission of any kind overseeing government ethics.

Texas therefore is in good company—with forty-five of her sister states—in recognizing the vital role that state ethics commissions play in ensuring “the public’s confidence and trust in its government.” Tex. Gov’t Code § 571.001(5); *see also* Tenn. Code Ann. § 3-6-102 (purpose of ethics commission is “to sustain the public’s

Code Ann., State Gov’t §§ 15-101–15-105 (1979) (current version at Md. Code Ann., State. Gov’t §§ 5-201–5-210 (2014)); Miss. Code Ann. §§ 25-4-1–25-4-31 (1979); 65 Pa. Stat. and Const. Stat. Ann. §§ 401–413 (1979) (current version at 65 Pa. Stat. and Const. Stat. Ann. §§ 1101–1113 (1998)).

³ *See* Alaska Stat. §§ 24.60.130–24.60.180 (1984); R.I. Const. art. III, §§ 7, 8 (1986); N.Y. Exec. § 94 (1987); W. Va. Code §§ 6B-2-1–6B-2-10 (1989); Okla. Const. art. 29 (1990); Ark. Code. Ann. § 7-6-217 (1991); Mo. Rev. Stat. § 105.955 (1991); Tex. Const. art. III, § 24a (1991); Ky. Rev. Stat. Ann. §§ 6.651–6.666 (1993); Del. Code Ann. tit. 29, §§ 5801–5839 (1994); Wash. Rev. Code Ann. §§ 42.52.310, 42.52.350 (1994).

⁴ *See* 5 Ill. Comp. Stat. 430/1-1–430/99-99 (2003); Colo. Const. art. XXIX (2006); N.C. Gen. Stat. §§ 138a-6–138a-15 (2006); Tenn. Code Ann. §§ 3-6-101–3-6-117 (2006); Utah Const. art. VI, § 6 (2010).

⁵ *See* Va. Code Ann. §§ 30-355–3-358 (2015); Vt. Stat. Ann. tit. 3, §§ 1201-1226 (2017); N.M. Const. art. 5, § 17 (2018); N.D. Const. art. XIV (2018); S.D. Codified Laws §§ 3-24-1–3-24-11 (2019).

⁶ While New Hampshire does not have a state ethics commission, it does have separate ethics committees for each branch of government with limited advisory powers. N.H. Rev. Stat. Ann. §§ 14-B:2, 21-G:29, 38-A:35; N.H. Sup. Ct. R. 38-9.

confidence in government by increasing the integrity and transparency of state and local government”); Del. Code Ann. Tit. 29, § 5802 (same); Fla. Const. art. II, § 8 (same); N.D. Const. art. XIV § 1 (same); W.Va. Code § 6B-2-1 (same); 65 Pa. Stat. and Const. Stat. Ann. § 1101.1 (“[P]ublic confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials.”).

B. The Vast Majority of State Ethics Commissions Have Broad Jurisdiction Irrespective of Whether the Commission is an Executive Branch or Legislative Branch Agency.

State ethics commissions fall into two general categories based on the breadth of their jurisdictional authority. First, there are ethics commissions with broad jurisdiction over both executive branch and legislative branch officials. Second, there are ethics commissions with limited jurisdiction over a single branch of government. Of the forty-six state ethics commissions, the vast majority have broad jurisdiction. Specifically, thirty-six state commissions⁷ exercise broad jurisdiction

⁷ *State Ethics Commissions: Jurisdictions*, Nat’l Conf. of State Leg. (Oct. 12, 2020), <https://www.ncsl.org/research/ethics/50-state-chart-state-ethics-commissions-jurisdic.aspx> (listing the ethics commissions of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin as having jurisdiction over more than one branch of government).

over executive and legislative branch officials. Ten state commissions⁸ have limited jurisdiction.

Even more importantly for this case, of the thirty-six states that have granted their ethics commissions broad jurisdiction, most have not made clear whether the commission itself sits in the executive branch or legislative branch. Of the thirty-six states, Virginia is the only state where the law expressly denotes in which branch of government the commission sits. *See* Va. Code Ann. § 30-355 (the Virginia Conflict of Interest and Ethics Advisory Council is “an advisory council in the legislative branch”). The other thirty-five states have either described their ethics commissions as independent bodies or have ambiguous authorizing law as to whether the commission is an executive or legislative branch agency.

Regardless of where they technically reside within a state’s constitutional framework, state ethics commissions should be functionally independent from the branches of government they oversee.⁹ This independence is necessary because of

⁸ *Id.* (listing the ethics commissions of Alaska, Illinois, Indiana, Kentucky, Maine, Michigan, Ohio, South Dakota, Utah, and Washington as having jurisdiction limited to one branch of government).

⁹ *See, e.g.,* Campaign Legal Center, *Principles for Designing an Independent Ethics Commission* (2018), <https://campaignlegal.org/sites/default/files/2018-06/Principles%20for%20Designing%20an%20Independent%20Ethics%20Commission.pdf> (“[A]n ethics commission should have features that allow it to operate as independently as possible. An ethics commission benefits from these legal arrangements by making clear that its activities are less dependent on the officials it oversees.”); John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative*

the critical role ethics commissions play in rooting out corruption from government institutions.

II. Limiting the Texas Ethics Commission’s Ability to Effectuate its Important Mandate Will Erode Public Trust in Texas Government.

The Court should carefully weigh the potential consequences of any decision that would constrain the Commission’s authority or jurisdiction, especially given the Commission’s important role in ensuring the integrity and transparency of state political institutions and mitigating corruption. A review of the historical corruption scandals in Texas that prompted the creation of the Commission is a reminder of its importance—and, more importantly, recent experience confirms that state government remains susceptible to the same pressures if effective anti-corruption controls are not in place. At a time when the American public’s trust in the integrity of government is already at a low ebb, weakening the Texas agency specifically charged to ensure government integrity will severely erode public confidence in state political institutions and governance.

Functions, 66 Temp. L. Rev. 1205, 1267 (1993) (acknowledging the varied ways states approach separation of powers questions and noting that “the presence of legislative as well as executive appointees [on Louisiana’s Board of Ethics for Elected Officials] serves both to insure the Board’s impartiality and independence, and to strengthen the public’s perception of that impartiality and independence—both of which are necessary for the Board to do its job.”).

A. TEC Was Established to Address Endemic Public Corruption.

In line with the pattern across states, the Commission, like “most” of Texas’s ethics laws, “was born in scandal.” Ross Ramsey, *Analysis: The Long and Winding Road to the Texas Ethics Commission*, Tex. Trib. (July 22, 2016), <https://www.texas-tribune.org/2016/07/22/analysis-long-and-winding-road-texas-ethics-commis>.

Indeed, the creation of the Commission in 1991 represents only the culmination of iterative reforms, dating back to the 1970s, driven by episodes of corruption in state government.¹⁰

In January 1971, the federal Securities and Exchange Commission filed suit against former Texas attorney general Waggoner Carr, former state insurance commissioner John Osorio, Houston developer Frank Sharp, Sharp’s businesses, and several others, alleging a far-reaching stock manipulation scheme wherein Sharp traded stocks for political favors, including passage of legislation benefiting his businesses. *See* Sonia Smith & Erica Grieder, *Sharpstown, Revisited*, Tex. Monthly (Feb. 4, 2013), <https://www.texasmonthly.com/politics/sharpstown-revisited>; Sam Kinch Jr., *Sharpstown Stock-Fraud Scandal*, Tex. State Hist. Ass’n, Handbook of Tex., <https://www.tshaonline.org/handbook/entries/sharpstown-stock-fraud-scandal>

¹⁰ This is not to suggest that corruption in Texas started in the 1970s, *see, e.g.*, Elizabeth Kaderli, *Veterans’ Land Board Scandal*, Tex. State Hist. Ass’n, Handbook of Tex., <https://www.tshaonline.org/handbook/entries/veterans-land-board-scandal> (last accessed Jan. 25, 2021), only that state ethics reform driven by corruption began then.

(last accessed Jan. 25, 2021). This initial scandal led journalists and prosecutors to uncover additional abuses by government officials, “including widespread (and illegal) hiring of relatives, politicking on government time, and theft.” Jay Root, *Texas Ethics Reform: A Long, Tortured History*, Tex. Trib. (Feb. 1, 2013), <https://www.texastribune.org/2013/02/01/texas-ethics-reform-long-tortured-history>.¹¹

When the dust finally settled, sitting Governor Preston Smith had been named an unindicted coconspirator in the stock scheme, House Speaker Gus Mutscher and two associates had been indicted on felony charges, and roughly half of the state’s legislators “had been voted or shamed out of their jobs.” *Id.* As one state legislator explained, “I think the times caught up with the way the Legislature did business.” *Id.* (quoting State Rep. Lyndon Olson).

The far-reaching scandal, dubbed the Sharpstown scandal, spawned sweeping state ethics reforms in the areas of campaign finance, lobbying, open government, and financial disclosure. *See* 1973 Tex. Gen. Laws 1101-12; *see also* Jay Root, *Ethics reform not swept under rug, but not sweeping either*, Tex. Trib. (June 1,

¹¹ Some lawmakers even “stole[] their government stamp allocations, cashing them in to buy cars or, in one case, to pay off a loan.” Root, *Texas Ethics Reform*, *supra*. *See also* David Montgomery, *In Texas, political scandals are big, too*, El Paso Times (Nov. 9, 2015), <https://www.elpasotimes.com/story/news/2015/11/09/texas-political-scandals-big-too/75293488> (describing Northern Texas lawmaker who used \$1,995 in state-owned stamps to buy a pickup truck, ultimately pleading guilty to three misdemeanors).

2017), <https://www.texastribune.org/2017/06/01/ethics-reform-not-swept-under-rug-not-sweeping-either>.

Since then, scandal has continued to drive Texas ethics reform. In 1980, for example, House Speaker Billy Clayton was the subject of a bribery investigation, nicknamed “Brilab,” involving a \$5,000 cash contribution to his campaign. Clayton was indicted but acquitted. Nevertheless, the next year, Clayton spearheaded an ethics bill limiting cash campaign contributions to \$100. *See* Root, *Texas Ethics Reform, supra*.

The push and pull between scandal and ethics reform culminated in the late 1980s, when blatant corruption again propelled ethics to the top of Texas’s legislative agenda. In 1989, during a special legislative session on workers’ compensation laws, Lonnie “Bo” Pilgrim, an East Texas chicken processor, handed out \$10,000 personal checks with the payee’s name left blank on the floor of the Texas State Senate, just two days before the Senate was set to vote. Associated Press, *Texas Businessman Hands Out \$10,000 Checks in State Senate*, N.Y. Times (July 9, 1989), <https://www.nytimes.com/1989/07/09/us/texas-businessman-hands-out-10000-checks-in-state-senate.html>. Pilgrim, who stood to benefit from the legislation at issue, defended his action as “a way of gaining lawmakers’ attention.” *Id.* It apparently worked, as nine of the Senate’s thirty-one members accepted the checks,

id., though most returned the money after public outrage erupted.¹² Ross Ramsey, *Analysis: In Texas, a seasonal shift away from election politics*, Tex. Trib. (Nov. 9, 2020), <https://www.texastribune.org/2020/11/09/texas-politics-legislature>.

The blatancy of Pilgrim's corruption thrust government ethics to the fore of the public conscience once again and led the Texas Legislature to pass wholesale ethics reform in 1991, imposing new restrictions on lobbyists, requiring lawmakers to disclose their business dealings, and most importantly here, creating the Texas Ethics Commission. *See* Tex. Const. art. III, § 24a; Tex. Gov't Code §§ 571.001–571.177.

Since its establishment, TEC has uncovered and held public officials accountable for abuses of power and corruption.¹³ Creation of a state ethics commission does not mean, however, that Texas is now immune to public

¹² While this was the most notorious corruption scandal of the era, it was not the only one. Just one year later, Speaker of the House of Representatives Gib Lewis was indicted for accepting an illegal gift and not reporting it. Lewis accepted a plea deal, which included admitting to a misdemeanor violation, paying a \$2,000 fine, and giving up his seat. *See* Root, *Texas Ethics Reform*, *supra*.

¹³ *See, e.g.*, Kailey Broussard, *Arlington Mayor Jeff Williams violated Texas election codes, ethics commission rules*, Fort Worth Star-Telegram (Dec. 4, 2020), <https://www.star-telegram.com/news/local/arlington/article247607960.html>; Morgan Smith, *Keller Gets Record Ethics Fine*, Tex. Trib. (Apr. 30, 2010), <https://www.texastribune.org/2010/04/30/sharon-keller-gets-record-ethics-fine>.

See generally TEC, Sworn Complaint Open Orders Listed by Date Issued (updated Dec. 7, 2020), https://www.ethics.state.tx.us/enforcement/sworn_complaints/orders/issued.

corruption.¹⁴ An empowered Commission responsible for overseeing state ethics laws is as vital today as ever to promote public confidence in politicians and public institutions. Indeed, “[s]o long as America remains a representative democracy, lawmakers will face ethical dilemmas and . . . oversight entities such as ethics commissions will help ensure the public trust.” Comlossy, *supra*, at 11.

B. TEC’s Enforcement Authority Is Essential to Fulfilling Its Mission of Combatting Corruption and Promoting Public Confidence in Government.

Eliminating the Commission’s ability to efficiently and neutrally enforce the laws within its jurisdiction would harm the public’s trust. State ethics commissions support good, trustworthy government precisely because of their enforcement power. Thus, dismantling or weakening the Commission’s ability to perform its essential enforcement functions will inflict irreparable harm on the public’s trust in their state government—trust that is necessary to the effectiveness of state democratic institutions.

¹⁴ See, e.g., Emma Platoff, *Texas Attorney General Ken Paxton is back in hot water. He’s escaped before.*, Tex. Trib. (Nov. 11, 2020), <https://www.texastribune.org/2020/11/11/texas-ag-ken-paxton-criminal-allegations>; Doug Delony, *House Speaker Bonnen will not seek reelection after release of audio tape in corruption allegations*, KHOU (Oct. 22, 2019), <https://www.khou.com/article/news/local/texas/house-speaker-dennis-bonnen-will-not-seek-reelection/285-1d7ecbf7-4a33-4c17-8af8-446edd044da7>; Alan Greenblatt, *Why Is Public Corruption So Common in South Texas?*, *Governing* (May 2016), <https://www.governing.com/archive/gov-public-corruption-crystal-city-texas.html>; Kevin D. Williamson, *Texas Has a Corruption Problem*, *Nat’l Rev.* (Mar. 23, 2015), <https://www.nationalreview.com/magazine/2015/03/23/texas-has-corruption-problem>.

The correlation between Texans’ trust in government and a fully functioning ethics commission is evident in the history and stated statutory purposes of the commission described above. The Commission is responsible for “eliminat[ing] opportunities for undue influence over elections and governmental actions” and “ensur[ing] the public’s confidence and trust in government.” Tex. Gov’t Code § 571.001(2), (5). To those ends, the Commission is empowered to “administer and enforce” the laws relating to, *inter alia*: lobbyist registration, reporting, and activities; campaign finance and political advertising; and ethical conduct of state officers and employees. *See id.* §§ 571.061(a).

The Commission’s enforcement power is crucial to its ability to effectuate its mandate. As Texas’s dedicated ethics agency in state government, TEC is “authorized to undertake civil enforcement actions on its own motion or in response to a sworn complaint, hold enforcement hearings, issue orders, and impose civil penalties.” TEC, A Brief Overview of the Texas Ethics Commission and its Duties, <https://www.ethics.state.tx.us/data/about/Bethic.pdf> (last visited Jan. 25, 2021). Stripping the Commission of its ability to enforce violations of laws under its jurisdiction is likely to result in less efficient and timely enforcement of ethics, lobbying, and campaign finance violations.

A majority of American voters see corruption in the political system as the nation’s most pressing problem, thanks in large part to secret spending in political

campaigns and the influence of big money from corporations and special interests in governmental decision-making. Sara Swann, *Political corruption seen as America's biggest problem, another poll shows*, The Fulcrum (Nov. 18, 2019), <https://the-fulcrum.us/big-picture/political-corruption-poll>. Now is not the time for Texas to step back from its commitment to ethical government. A body of ethics laws, no matter how robust and complete, cannot achieve its purposes without congruently robust and complete enforcement mechanisms—without which the whole system is at risk, “because the perception of corruption, or of opportunities for corruption, threatens the public’s faith in democracy.” *Ognibene v. Parkes*, 671 F.3d 174, 186 (2d Cir. 2011).

Neutering the TEC would signal that the government is unwilling to invest in meaningful efforts to hold officials and other political actors accountable when they violate the public trust. Texans must be confident that state institutions are not only protected by strong ethics laws, but also that anyone who breaks those laws will be held accountable. Removing enforcement power from an ethics commission that has been successfully holding violators accountable for thirty years would shatter that confidence.

Recent events only confirm that Texas remains susceptible to potential corruption at all levels of state government.¹⁵ Without a dedicated agency like TEC with the powers necessary to effectuate the important laws it administers, Texans will lose confidence that state government is operating in the public's best interest. Once that trust is lost, it is not easily regained.

C. The Disclosure Provisions Enforced by TEC Are Vital to Securing Informed Public Participation in the Political Process and Maintaining Confidence in State Government.

The Commission administers and enforces an array of important political transparency laws, including the comprehensive regime of campaign finance disclosure provisions in Title 15 of the Texas Election Code and the lobbyist registration and reporting requirements in Chapter 305 of the Government Code. *See* Tex. Gov't Code § 571.061. Effective enforcement is vital to achieving the core public purposes these laws serve: enhancing the integrity of and public confidence in state government and increasing public access to information about the political process. Curtailing any of the Commission's prerogatives in these areas would be harmful to Texans, as citizens and voters.

¹⁵ *See, e.g.,* Elvia Limón, *Who is Ken Paxton, the Texas attorney general accused of bribery and abuse of office?*, Tex. Trib. (Oct. 5, 2020), <https://www.texastribune.org/2020/10/05/texas-ken-paxton-bribery>.

1. Transparency laws enable informed public debate and participation in self-government.

As federal and state courts have long recognized, disclosure laws promote First Amendment values of “robust” and “wide-open” public debate about candidates and issues and promote public confidence in government, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam); so too do the campaign finance and lobbying disclosure laws administered by the Commission.

Transparency laws are a bulwark against corruption and its appearance. In the famous words of Justice Brandeis, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” *Id.* at 67 (quoting Louis D. Brandeis, *Other People’s Money* 62 (Nat’l Home Library Found. ed.1933)). The U.S. Supreme Court thus has recognized that, in elections, “[a] public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return,” *id.*, and that such disclosure also prevents the “eroding of public confidence in the electoral process through the appearance of corruption.” *McConnell v. FEC*, 540 U.S. 93, 136-37 (2003) (citations and quotation marks omitted), *abrogated in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

Moreover, “like other measures aimed at protecting the integrity of the [electoral] process,” campaign finance disclosure rules like those in Title 15

“tangibly benefit public participation in political debate.” *Id.* at 137. Political transparency through disclosure thus advances important First Amendment interests directly. As the Supreme Court has explained, “the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982).

To participate effectively in the political process, voters need information to determine who supports which positions and why.¹⁶ Indeed, the Supreme Court has recognized that disclosure requirements promote informed participation in the political process and ensure that officeholders remain accountable to the people—core First Amendment values in a democracy where “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” *Citizens United*, 558 U.S. at 339. *See also, e.g., Doe v. Reed*, 561 U.S. 186, 199 (2010) (“Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.”); *Buckley*, 424 U.S. at 66-67. Indeed, the Supreme Court has criticized plaintiffs challenging a federal disclosure law for “‘ignor[ing]

¹⁶ *See, e.g.,* Abby K. Wood, *Campaign Finance Disclosure*, 14 Ann. Rev. L. & Soc. Sci. 11, 19 (2018) (“Voters use heuristics, or informational shortcuts, to help them make the vote choice most aligned with their priorities without requiring encyclopedic knowledge . . . on every issue.”).

the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.” *McConnell*, 540 U.S. at 197.

Other courts have likewise recognized that “[p]roviding information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment.” *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). *See also, e.g., Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 498 (7th Cir. 2012) (noting that disclosure requirements can “advance the democratic virtues in informed and transparent public discourse without impairing other First Amendment values”).

The compelling interest in securing public access to information about political processes also extends beyond the electoral context. Lobbyist registration and reporting laws like those in Chapter 305 similarly protect the public’s right to be informed about and participate in the processes of state government. And “[t]ransparency in government, no less than transparency in choosing our government, remains a vital national interest in a democracy.” *Nat’l Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 14 (D.C. Cir. 2009) (en banc) (“*NAM*”) (quoting *Buckley*, 424 U.S. at 81).

Indeed, as the Supreme Court confirmed when first upholding a federal lobbying disclosure law almost seventy years ago, “full realization of the American ideal of government by elected representatives depends to no small extent on their

ability to properly evaluate” the pressures posed by “those who for hire attempt to influence legislation or who collect or spend funds for that purpose.” *United States v. Harriss*, 347 U.S. 612, 625-26 (1954). Texas’s lobbyist registration provisions likewise seek “[t]o preserve and maintain the integrity of the legislative and administrative processes” by requiring “public[] and regular[]” disclosure of “the identity, expenditures, and activities” of the persons and groups that are attempting to sway “members of the legislative or executive branch to take specific actions.” Tex. Gov’t Code § 305.001. Like similar lobbying disclosure statutes upheld by state and federal courts, Texas’s law “provid[es] the public and its elected representatives with information regarding ‘who is being hired, who is putting up the money, and how much’ they are spending to influence public officials.” *NAM*, 582 F.3d at 15 (quoting *Harriss*, 347 U.S. at 625). This information enables citizens to “apprais[e] the integrity and performance of officeholders and candidates, in view of the pressures they face.” *Fla. League of Prof’l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996).

2. To achieve their purposes, political disclosure laws must be paired with effective enforcement.

While courts, legislators, and voters across the country have recognized that robust political transparency laws are essential to protecting the public’s interest in

open and accountable government,¹⁷ experience shows that even the most comprehensive disclosure law will fail to secure meaningful transparency unless paired with effective enforcement. Indeed, for more than a century, Congress has sought to “shed the light of publicity” on campaign-related spending by requiring disclosure of its sources. *Buckley*, 424 U.S. at 81. Before Watergate, congressional efforts to require disclosure in connection with federal campaigns were largely unsuccessful; it was not until the creation of a dedicated national agency tasked with administering and enforcing disclosure laws—the Federal Election Commission—that those efforts bore fruit. *See, e.g., id.* at 62 & n.71.

Moreover, the Fifth Circuit has specifically recognized that “Texas’s [campaign finance] disclosure scheme . . . plays a relatively more important role in preventing corruption or its appearance in Texas than in many other states.” *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 441 (5th Cir. 2014) (declining to invalidate treasurer-appointment requirement applicable to certain political committees because “[t]he treasurer serves as the cornerstone of Texas’s entire general-purpose committee campaign-finance disclosure regime”). The Court

¹⁷ *See, e.g., Justice v. Hosemann*, 771 F.3d 285, 287 (5th Cir. 2014) (“Reflecting Justice Brandeis’s observation that ‘[s]unlight is said to be the best of disinfectants,’ most states require disclosure of financial contributions to political campaigns.”); Austin Graham, CLC, *Transparency and the First Amendment: How Disclosure Laws Advance the Constitution’s Promise of Self-Government* (2018), https://campaignlegal.org/sites/default/files/2018-11/Transparency%20and%20the%20First%20Amendment_0.pdf.

further noted that disclosure requirements have only become more critical in the wake of decisions like *Citizens United*, which limited Texas’s ability to enact other forms of campaign regulation and thereby “deepen[ed] [its] reliance on prompt and full compliance with its disclosure requirements in order to deter and detect corruption.” *Id.* (“The need for an effective and comprehensive disclosure system is especially valuable after *Citizens United*.”) (quoting *Madigan*, 697 F.3d at 490).

The specific enforcement tools available under a regulatory disclosure scheme are often key to its overall efficacy—and thus, to whether the disclosure laws achieve the important public purposes they target. In enforcement actions brought by the FEC to remedy violations of the Federal Election Campaign Act (“FECA”), for example, courts have routinely recognized that “civil penalties play a crucial role in protecting the public interest, and remedying the injury to the public, as ‘there is always harm to the public when FECA is violated.’” *FEC v. O’Donnell*, No. CV 15-17-LPS, 2017 WL 1404387, at *3 (D. Del. Apr. 19, 2017) (citation omitted). And the “‘public harm’ factor” has been deemed particularly acute in the context of remedying and deterring disclosure violations, where district courts weighing civil penalties can generally “presume harm to the public from the magnitude or seriousness” of the violation given “[t]he importance of the FECA’s reporting and disclosure provisions.” *FEC v. Furgatch*, 869 F.2d 1256, 1259 (9th Cir. 1989). As these courts have recognized, “reporting and disclosure provisions serve the critical

purpose of providing citizens with information necessary for meaningful political participation,” and providing for their enforcement is thus “indispensable to the proper and effective exercise of First Amendment rights.” *Id.* at 1259 n.3.

At the state level, the pursuit of transparency can be even more muscular. The State of Washington, for example, provides for vigorous defense of the core transparency interests underlying its Fair Campaign Practices Act (“FCPA”), which regulates state campaign finance and lobbying activity. *See State v. Grocery Mfrs. Ass’n (GMA)*, 461 P.3d 334, 342 (Wash. 2020) (noting that “[o]ne of the key policies underlying the FCPA is ‘[t]hat political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided’”). In Washington, failure to register and file reports as a political committee can have serious consequences—the FCPA authorizes civil penalties of up to \$10,000 for each reporting violation, \$10 per day for each day a required report is delinquent, and/or the equivalent of the total amount of an unreported contribution or expenditure, which can be trebled if the violation is intentional, *State v. GMA*, 475 P.3d 1062, 1067 (Wash. Ct. App. 2020). State courts have upheld applications of these penalty provisions as necessary to effectuate the FCPA’s purposes and protect the public’s right to know about the sources of campaign-related funding. *See id.* at 1070.

Most recently, a Washington state appellate court upheld an unprecedented multi-million-dollar civil penalty imposed on a national trade association after it

failed to register as a political committee and report the sources of millions of dollars it funneled into defeating an unsuccessful 2013 state ballot measure (I-522). *Id.* at 1065. On appeal, GMA argued that, *inter alia*, the state disclosure provisions violated its First Amendment rights, and the penalty constituted an excessive fine under the Eighth Amendment because it was “grossly disproportionate to the gravity of the FCPA violations, which GMA characterize[d] as solely a reporting offense that did not harm the voting public.” *Id.*

The court of appeals roundly disagreed, finding instead that “GMA’s offense caused *significant* harm.” *Id.* at 1070 (emphasis added). “Voters evaluating I-522 were deprived of the opportunity to ‘follow the money’ And GMA’s violations had the potential of eroding the public’s confidence in Washington’s electoral process.” *Id.* Moreover, as the Washington Supreme Court observed, GMA’s First Amendment arguments “fail[ed] to recognize ‘that the right to receive information is the fundamental counterpart of the right of free speech.’” *GMA*, 461 P.3d at 346 (citation omitted). “GMA and its member companies [were] not the only ones with First Amendment rights at stake; the public . . . has the right to know who is lobbying for their votes.” *Id.*

Texas disclosure laws target many of these same concerns. The Texas Legislature created—and voters approved—the Commission in 1991 and tasked it with reducing “opportunities for undue influence over elections and governmental

actions,” securing “full[] disclos[ure]” of “information related to expenditures and contributions for elections,” improving “the potential for individual participation in electoral and governmental processes,” and ensuring “the public’s confidence and trust in its government.” Tex. Gov’t Code §§ 571.001, .021. The comprehensive campaign finance and lobbying disclosure regimes the Commission administers operate in a uniquely important and sensitive area of law, at once vital to effective democratic self-government and suffused with partisan political interests. Like numerous other jurisdictions, therefore, Texas tasked an expert agency with implementing these important transparency laws in the first instance—and, importantly, equipped that agency with strong disclosure laws and the means to enforce them.

To these ends, the Texas Legislature vested the Commission with broad authority over a range of disclosure requirements for candidates, elected officials, and lobbyists, among other transparency and anti-corruption measures, and empowered it to implement and enforce the laws under its purview. *See id.* §§ 571.062, .121–.142, .171–.177, .091 (authorizing the Commission to adopt rules; receive and investigate complaints; issue subpoenas; initiate civil enforcement actions; assess civil penalties; and issue advisory opinions). Effectuating the transparency purposes of the Election Code and Chapter 305—and the Commission’s corollary mandate to “preserve the public’s confidence and trust in

its government,” *id.* § 571.001—requires preserving the full range of regulatory tools at the Commission’s disposal. And effectuating those purposes is vitally important: as the legislature well recognized, “[d]emocracy works ‘only if the people have faith in those who govern.’” *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 390 (2000) (citation omitted).

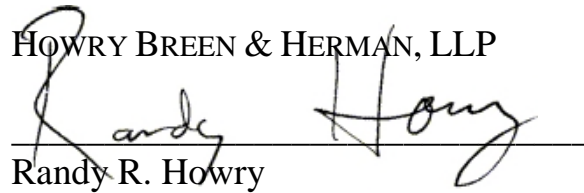
CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: January 26, 2021

Respectfully submitted,

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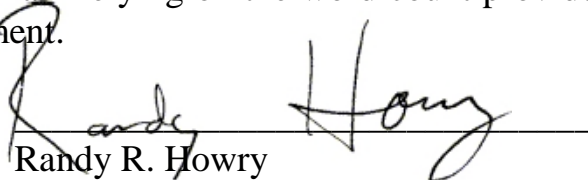
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CERTIFICATE OF COMPLIANCE

As required by Rule 9.4(e) of the Texas Rules of Appellate Procedure, I certify this is a computer-generated document created in Microsoft Word 2016, using 14-point typeface for all text, except for any footnotes, which are in 12-point typeface.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was delivered on January 26, 2021, in compliance with Rules 9.5(b) of the Texas Rules of Appellate Procedure, to the parties listed and in the manner indicated below.

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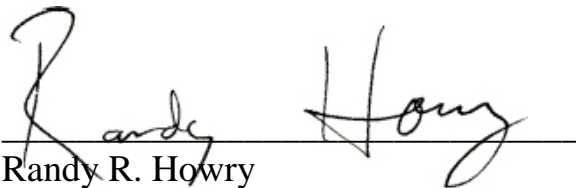
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