No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,
Appellant,
v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from
the United States District Court
for the District of Columbia

BRIEF OF AMICUS CAMPAIGN FINANCE SCHOLARS IN SUPPORT OF APPELLANT, CITIZENS UNITED

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INTEREST OF THE *AMICUS CURIAE* [1]

Amicus are a group of scholars who study the role of money in politics. Each has published scholarly works on this topic. Amicus are concerned about the

[1] Counsel for all parties consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. The expenses to produce this brief are borne entirely by Professor Hayward, and no other person or entity public or private has made any monetary or in-kind contribution to its preparation or submission.

broadening scope of regulation in this area, and the deleterious effects regulation has on democracy.

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[2] Affiliations are provided for each amici for identification purposes only, and the views contained herein should not be construed to reflect the views of the affiliated institutions.

Amicus intend to share with the Court the historic context behind federal campaign finance enactments. We believe this will help inform the Court's deliberations on whether Congress is entitled to deference when it regulates the political speech of non-governmental participants.

SUMMARY OF ARGUMENT

In *United States v. International Union United Automobile, Aircraft, and Agricultural Implement Workers of America*, 352 U.S. 567 (1957) [hereinafter *Auto Workers*], the landmark decision establishing congressional power to regulate political expenditures by labor unions, the Court described a history of Congress's reasonable and measured regulation of campaign finance. Subsequent decisions have relied heavily on this history to justify deference to Congress and state legislatures in this area.

This brief corrects the flawed history depicted in *Auto Workers* by illustrating how reforms have been dictated by political strategy. Legislators used reform to exploit public sentiment and reduce rivals' access to financial resources. These initiatives have been controversial, and the terms of that controversy have not changed much through the decades.

The Court should accordingly examine the appropriate scope and effect of campaign finance regulations and not defer to legislative choices. Undue deference permits political actors to curtail the exercise of protected political rights. Rejecting the flawed historical account is an essential step toward restoring appropriate scrutiny of campaign finance legislation.

ARGUMENT

The history of the corporate and labor expenditure ban is a history of political opportunism. The Court should consider this history in the context of the present claims in *Citizens United v. FEC*, and its review of its *Austin* and *McConnell* precedents, because the justification for barring corporate and union funds from electioneering communications rests on this same historical account.

If, out of misplaced respect for a flawed account of history, the Court upholds laws that unduly burden political activity, citizens and activists outside the bubble of congressional protection risk disproportionate punishment for exercising political rights. The political process becomes less responsive, representatives need be less "representative," and elections do a poorer job of reflecting public preferences for leadership and policy. Setting courts to the task of closely evaluating all these laws would go some distance to restoring proper checks upon campaign restrictions.

Not all campaign regulation is inappropriate. But any argument favoring the present broad and indiscriminate bans on the use of corporate or labor funds in politics must show that the law is tailored and justified. Thus far, that case has not been made. That argument must reflect an honest assessment of why these laws were enacted, what really happened, why it happened, and what effects were felt afterward. Only then can advocates make a convincing case that specific regulations are in fact the correct prescription for some real political ailment.

I. THE *AUTO WORKERS* OPINION HAS ALLOWED THIS COURT AND LOWER COURTS TO DEFER TO LEGISLATIVE JUDGMENTS WHEN CAMPAIGN FINANCE LAWS DESERVE SPECIAL SCRUTINY

The constitutional burdens imposed by restrictions on corporate and labor political activity should be reexamined. Revisiting the history of campaign finance reform articulated in this Court's *Auto Workers* decision is key. Thus far, the Court has adopted *Auto Workers* uncritically in several opinions, to show that lawmaking in this field has proceeded logically and reasonably toward the goal of reducing corruption in political campaigns.

This Court's opinion in *McConnell v. FEC*, 540 U.S. 93 (2003), is one example. In *McConnell*, the Court upheld against constitutional challenges the Bipartisan Campaign Reform Act of 2002 ("BCRA") Pub. L. No. 107-155, 116 Stat. 81 (2002). That opinion began with a recitation of the history of reform as presented in *Auto Workers*. *Id*. at 115-17. It commenced with an invocation of the "sober-minded Elihu Root," drawn directly from that opinion. *Id*. at 115. The Court included this extensive reference to *Auto Workers* to justify judicial deference: "Congress's careful legislative adjustment of the federal election laws, in a cautious advance step by step . . . warrants deference." *Id*. at 117.

The Court relied on the same historical account in *FEC v. Beaumont*, 537 U.S. 146, 152 (2003); *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 452 (2001); and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000). In *Beaumont*, the majority reasoned, a statutory prohibition on contributions by ideological non-profit

organizations fit comfortably within this legislative history, and such a "historic prologue would discourage any broadside attack on corporate campaign finance regulation." 537 U.S. at 156.

Auto Workers is also important to the Court's opinion in *FEC v. National Right to Work*, 459 U.S. 197, 208-09 (1982). Here, the Court considered whether federal law could restrict an ideological group from soliciting political contributions from certain donors. This opinion noted that the history in *Auto Workers* "is set forth in great detail" and concluded that it "need only summarize the development here." *Id*. at 208. Notably, when this Court in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 661 (1990) relied on *National Right to Work* for showing "that the federal campaign statute, 2 U.S.C. 441b, 'reflect[ed] a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation'" it was citing, in reality, *Auto Workers* to justify deference.

II. RESTRICTIONS ON CORPORATIONS AND UNIONS IN POLITICS HAVE NOT BEEN THE PRODUCT OF CAREFUL LEGISLATIVE JUDGMENT, BUT INSTEAD HAVE BEEN A WEAPON DEPLOYED AGAINST POLITICAL RIVALS

Auto Workers opened by asserting that the first corporate contribution restrictions were a remedy for inadequate publicity laws. It explained the imposition of corporate contribution prohibitions as a logical step in the wake of the "failure" of publicity laws. 352 U.S. at 570-71. This passage stands as one of the most frequently cited, and thus most influential, in the *Auto Workers* decision. Yet it is not accurate.

A. The Roots of Corporate Campaign Finance Restrictions

Statutes banning corporate contributions were not a product of dissatisfaction with publicity laws. The first law requiring disclosure of campaign finance activity—especially expenditures—was part of a larger effort to thwart corrupt campaign practices, vote buying, bribery, and voter intimidation centered in the "machines"—parties and candidate campaigns. PERRY BELMONT, RETURN TO SECRET PARTY FUNDS: VALUE OF THE REED COMMITTEE 134 (1927); George Fox, *Corrupt Practices and Elections Laws in the Unites States Since 1890*, 2 PROCEEDINGS OF THE AM. POL. SCI. ASS'N 171, 177 (1905); Abram C. Bernheim, *The Ballot in New York*, 4 POL. SCI. Q. 151 (1889). Corporate contribution bans arose once particular corporations provoked the ire of legislators. *See* E. Dana Durand, *Political and Municipal Legislation in 1897*, 11 ANNALS OF AM. ACAD. POL. & SOC. SCI. 38, 43 (1898).

Since Elihu Root's address to the 1894 New York Constitutional Convention continues to receive favorable attention from the Court, one should take special care to appreciate the context of that speech. As *Auto Workers* notes, New York first considered a corporate contribution ban during this convention.

> As early as 1894, the sober-minded Elihu Root saw the need for more effective legislation. He urged the Constitutional Convention of the State of New York to prohibit political contributions by corporations:
>
> > The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggrega-

> tions of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public.

352 U.S. 570-71.[3] Root, a Republican leader at the convention, possessed great influence. Proposing a corporate contribution ban at the 1894 New York constitutional convention allowed the Republicans controlling the convention to score political points by exploiting another unpopular corporate activity—in this case the unfolding Sugar Trust scandal, to the embarrassment of Democrats. *See* SPECIAL COMMITTEE TO INVESTIGATE ATTEMPTS AT BRIBERY, S. REP. NO. 606 (2d Sess. 1894). Democratic Party leaders found themselves targets of public outrage, as that party had campaigned successfully against the "McKinley tariff" in 1892, only to succumb to the demands of the Sugar Trust. *The Democratic Failure*, HARPER'S WKLY, Aug. 25, 1894, at 794.

Yet Elihu Root called up his amendment banning corporate contributions out of order on Labor Day, when convention attendance was low. 3 REVISED RECORD OF CONSTITUTIONAL CONVENTION OF NEW YORK 876 (1900). The oft-quoted passage from his address castigating political activity by large corporations was made in response to other delegates worried about his amendment's impact on political groups. *Id*. at 894-95. In context, Root meant to

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[3] Root continued: " . . . the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes . . . " In 1894, $50,000 had the purchasing power of about $1.18 million in 2007 dollars. Inflation calculation courtesy of www.westegg.com/inflation, visited July 23, 2009.

draw a distinction between incorporated political organizations (that should not be limited) and large corporations like the Sugar Trust. Root was emphasizing his proposed amendment's limited scope.

Even with Root's central role in the convention's leadership, the amendment failed. The fatal blow came from a Republican colleague just one day after the vote to adopt it. 3 REVISED RECORD at 979. The full account of the parliamentary manipulation that led to this defeat, and Root's likely complicity, is beyond the scope of this brief.[4] In short, one should conclude that Root and the amendment's other supporters had not expected the corporate contribution ban to survive.

The *Auto Workers* version of the 1894 corporate contribution debate is deficient in several respects. First, it describes a logical progression not supported by any evidence. Corporate contribution laws were not advocated as a remedy for deficient publicity laws. Publicity laws were intended to expose bad acts by committees and candidates. Corporate contribution bans struck back at specific corporations and the "supply side" of political finance.

Second, *Auto Workers* quoted fragments from the 1894 constitutional convention debate out of context. Root's address meant to reassure the convention that his amendment would only affect large entities like the Sugar Trust spending enormous sums of money, not corporations formed for political purposes. Third, the *Auto Workers* account leaves the reader ignorant of the partisan implications, and why this issue would be appealing to Republicans. In any case, the

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[4] *See* Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. LEGIS 421, 434-40 (2008).

wave of corporate contribution legislation appeared over a decade afterwards, in the wake of the New York life insurance scandal, which resulted in the passage of several state bans, as well as a federal ban in the Tillman Act. Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 259–70 (1981).

B. Extending Campaign Finance Restrictions to Labor Unions

With the preceding "history of progress" in campaign finance regulation as prologue, *Auto Workers* then addresses the roots of the corporate and labor expenditure ban—the statute at issue in *Auto Workers*, and eventually in *Massachusetts Citizens for Life*, *Austin v. Michigan Chamber of Commerce*, and *Citizens United v. FEC*. Congress took its first step toward the expenditure ban in 1943, when it added a labor union contribution ban to federal law. As *Auto Workers* states:

> Thus, in 1943, when Congress passed the Smith-Connally Act to secure defense production against work stoppages, contained therein was a provision extending to labor organizations, for the duration of the war, § 313 of the Corrupt Practices Act. 57 Stat. 163, 167. The testimony of Congressman Landis (R-Ind.), author of this measure, before a subcommittee of the House Committee on Labor makes plain the dominant concern that evoked it:
>
> > [P]ublic opinion toward the conduct of labor unions is rapidly undergoing a change. . . . The public was aroused by many rumors of huge war chests being maintained by labor unions,

> of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials. . . .

352 U.S. at 578-79. Yet the 1943 extension of the contribution ban to unions is more persuasively traced to two political factors: the relative strength of anti-labor members in the 1943-44 Congress, and the staggering unpopularity of the United Mine Workers' 1943 strike. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS 153 (1988). The labor contribution ban was added not in committee (as the excerpt suggests), but on the floor during a flood of activity, and had been drafted mere hours before. 89 Cong. Rec. 5328 (1943). The subsequent vote on the bill was marked by procedural confusion. *Id.* at 5341-47. Moreover, "the provisions were not germane to the main purpose of the bill . . . [and] were inserted with little discussion of underlying issues." Louise Overacker, *Presidential Campaign Funds 1944*, 39 AM. POL. SCI. REV. 899, 919 (1945).

Roosevelt vetoed Smith-Connally in part because it included the labor contribution ban, which "obviously ha[d] no relevancy to a bill prohibiting strikes." S. Doc. No. 78-75, at 3 (1943). Noting that Congress had not focused on this section, Roosevelt added: "If there be merit in the prohibition, it should not be confined to wartime, and careful consideration should be given to the appropriateness of extending the prohibition to other nonprofit organizations." *Id.* Both Houses overrode Roosevelt's veto that same day, a mere three hours later, with something less than "full consideration." Arthur Sears Henning, *Pass Strike Law Over Veto*, Chi. Daily Trib., June 26, 1943, at 1.

After a careful look at the events surrounding the 1943 labor contribution ban, it is impossible to see any exercise of reasoned policy judgment. Congress's attention was focused on unpopular strikes and how to bring the UMW to heel. The contribution ban was a lucky stowaway swept into the law by the parliamentary footwork of certain House Republicans. If the Court's deference depends on Congress's use of reasoned legislative judgment, on this occasion such care was not evident.

Two weeks after enactment, the Congress of Industrial Organizations ("CIO") established the first political action committee. JOSEPH GAER, THE FIRST ROUND: THE STORY OF THE CIO POLITICAL ACTION COMMITTEE 60–63 (1944). The CIO PAC openly favored Democrats. Nicholas A. Masters, *The Politics of Union Endorsement of Candidates in the Detroit Area*, 1 MIDWEST J. OF POL. SCI. 136, 142–44 (1957). Union officers and counsel contended that the scope of "contribution" in Smith-Connally did not reach this union spending. Joseph Tanenhaus, *Organized Labor's Political Spending: The Law and Its Consequences*, 16 J. OF POL. 441, 447 (1954). On this point, the Department of Justice concurred with the unions. *Department of Justice Clears PAC*, 4 LAW. GUILD REV. 49 (1944) (quoting Department press release).

C. Congress Bans Corporate and Labor Expenditures

Unions' willingness to invest time, energy, and money in politics alarmed Republicans and anti-labor Democrats. After the 1946 election, Republicans dominated both houses of Congress, and the Labor Management Relations Act of 1947 (or "Taft-Hartley") moved up the legislative agenda. Section 304 of that Act made permanent the union contribution ban

and added an expenditure ban against both corporations and unions.

As the *Auto Workers* history described it:

> Shortly thereafter, Congress again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power . . . this section gave rise to little debate in the House. . . . the Senate as a whole did not consider the provisions of § 304 until they had been adopted by the Conference Committee.

352 U.S. at 582-83. "Little debate" here meant that, over a three-day debate in the House, only one member, George P. Miller (D-Cal.), mentioned Section 304 at all, calling it "irrelevant" and "unnecessary." 93 Cong. Rec. 3522–23 (1947). One may sense a pattern by now, in which successful efforts to limit contributions and expenditures are enacted as obscure and little-debated provisions buried in hotly contested legislation.

The *Auto Workers* narrative suggested that extending this ban to expenditures was the only logical next step. But other approaches to reform, among them a proposal to remove limits and rely instead on publicity, were considered at the time. S. REP. NO. 79-101, at 80–83 (1945); Overacker, *supra* at 924–25. Reasoned congressional deliberation should include weighing the advantages of different approaches, or at least involve some debate, argument, and responsive amendments. Yet, again, only after the Taft-Hartley conference committee had met and submitted its report for final passage, *very* late in the legislative day, did members ponder the Taft-Hartley expenditure ban.

President Truman's Taft-Hartley veto message criticized the expenditure ban as a "dangerous intrusion on free speech, unwarranted by any demonstration of need, and quite foreign to the stated purposes of this bill." H.R. DOC. NO. 80-334 (1947) at 9. Truman noted that the Section 304 expenditure ban would extend as well to radio and newspaper corporations. *Id*. at 9-10. As the *Yale Law Journal* stated in a 1948 comment evaluating Taft-Hartley, "[T]he prohibition on 'expenditures' may be interpreted as placing drastic limitations upon the activity of any political group, such as, for example, the League of Women Voters, which happens to be corporate in structure." *Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity*, 57 YALE L.J. 806, 811 n.19 (1948).

Five days after Congress overrode Truman's veto, AFL counsel advised all affiliated unions to "affirmatively violate" the new law "to bring about a constitutional test of the law." *AFL to Scorn No-Strike Rule Pay Contracts*, WASH. POST, June 29, 1947, at M1. The first case arose quickly out of the endorsement of a candidate in a special election of July 1947 by the *CIO News*. The District Court dismissed the indictment, finding that the expenditure ban violated the First Amendment. *United States v. CIO*, 77 F. Supp. 355 (D.D.C. 1948). This Court concluded that Congress could not have intended Taft-Hartley to reach this activity and refused to consider the constitutional question. *United States v. CIO*, 335 U.S. 106, 121–22 (1948).

By the time the Department of Justice proceeded against the UAW in *Auto Workers*, federal prosecutors had litigated three other cases alleging union violations of Taft-Hartley's expenditure ban. *United*

States v. CIO, 335 U.S. 106; *United States v. Painters Local Union No. 481*, 172 F.2d 854 (2d Cir. 1949), *rev'g* 79 F. Supp 516 (1948); *United States v. Const. & Gen. Lab. Union No. 264*, 101 F. Supp 869 (W.D. Mo. 1951). As with the case against the *CIO*, none went well.[5] After these defeats, the Department of Justice declined to prosecute union political expenditures for about six years. The Department doubted that the Court would find the expenditure ban constitutional. After all, no Justice on the *CIO* Court signaled any inclinations in that direction. FEDERAL ELECTION ACT OF 1955: HEARING ON S. 636 BEFORE THE S. COMM. ON RULES AND ADMIN., 84th Cong. 201–10 (1955) (statement of Warren Olney III, Assistant Attorney General).

Yet times change, and in July 1955 the Eisenhower Administration's Justice Department empanelled a Detroit grand jury, seeking indictment of the United Auto Workers Union. The union had spent about $5,000 on four *Meet the UAW-CIO* broadcasts, part of a regular series covering unions news and activities on Detroit's WJBK-TV. The Department argued that these episodes contained "expressions of political advocacy . . . intended by defendant to influence the electorate generally, including electors who were not members of defendant union." *UAW is Indicted for Election TV*, WASH. POST & TIMES HERALD, July 21, 1955, at 34. .

The district court granted the UAW's motion to dismiss the indictment. Following what the court saw to be *CIO*'s clear precedent, it described the govern-

[5] Similarly, a 1948 federal trial against Michigan auto dealers for making illegal corporate contributions ended with acquittal. *Cleared in Political Case*, N.Y. TIMES, Nov. 10, 1948 at 25.

ment's efforts to distinguish *CIO* and other adverse authority as "either futile or picayune." *United States v. UAW-CIO*, 138 F. Supp. 53, 58 (E.D. Mich. 1956).

The Government appealed under the Criminal Appeals Act to the Supreme Court, and this time prevailed, partially. 352 U.S. at 567. In *Auto Workers* this Court held that the facts could state a violation of the federal statute prohibiting labor expenditures in federal elections. The Court declined to reach whether prosecution would violate the union's constitutional rights. The constitutional issues avoided in this round of *Auto Workers* never matured. After a trial on the merits, on November 6, 1957, a jury found the union defendants not guilty. *UAW Found Innocent of Charge of Illegal Electioneering in '54*, WALL ST. J., Nov. 7, 1957, at 8.[6]

III. WHY DID THE COURT ADOPT THIS VERSION OF HISTORY?

After reviewing the context and legislative manipulation behind campaign finance regulation, in particular the ban on expenditures in federal elections, one may now wonder why Justice Frankfurter, writing for the Court's majority, included this long historical passage in the *Auto Workers* decision. As the opinion ultimately rests on the statute's text, it would seem a long discourse on history in defense of

[6] The District Court's jury instructions noted that no union members objected when their dues were set in 1954, and that the jury should take this into account when deciding whether the money for the broadcasts was obtained on a voluntary basis. John F. Lane, *Political Expenditures by Labor Unions*, 9 LAB. L.J. 725, 733–35 (1958).

deference would be unnecessary to reach the Court's modest conclusion.

Two of Frankfurter's colleagues welcomed the additional history in the opinion enough to comment on it specifically. Justice Burton wrote in his note concurring with Justice Frankfurter's draft that "the legislative history is appropriate and extremely helpful," and Justice Reed called the draft "a fine example of the persuasiveness of the historical treatment." Hayward, *supra* at 468. The dissenters focused on the law's constitutionality, noting that "[u]ntil today, political speech has never been considered a crime." 352 U.S. at 594.

Moreover, the drafters found this history ready-made in an older brief to the Court. The Government briefed the history of campaign finance reform thoroughly, yet unsuccessfully, in its *CIO* brief. That brief is practically identical in many places to *Auto Workers*. Hayward, *supra*, at 464-65; Brief for the United States, *U.S. v. Congress of Industrial Organizations*, 335 U.S. 106 (1948) available at *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832-1978,* www.gale.cengage.com. For instance, the precise quote from Elihu Root's 1894 address is in the Government's *CIO* brief (although deeming him "sober-minded" was Justice Frankfurter's flourish.) Hayward, *supra* at 464-65. One might be troubled when the Court uncritically adopts an advocate's account: "The lawyer's use of history is entirely pragmatic or instrumental. His history may be fiction from the standpoint of a scholarly historian, but if it produces victory it has served its purpose." CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 192 (1969).

Whatever the reason, the Court's invocation of this history has had important consequences. It has suppressed legitimate questions about the purpose, scope, and permissibility of legislative restrictions on corporations and unions in politics. In many other areas of the law, judges question regulations articulated by those who stand to benefit. This conflict of interest justifies greater scrutiny and less deference. In campaign finance, Congress's compromised position instead has been overshadowed by its claimed expertise in campaigns, justifying deference from the Court.

CONCLUSION

This Court may be persuaded that the *Auto Workers* history is unreliable and conclude that previous reliance on it was misplaced. Conversely, it might conclude that this argument, while potentially interesting, is of limited present relevance. Were this a stable area of constitutional law, this second perspective might be more persuasive. In this world, however, litigants continue to raise difficult questions about the propriety of restricting political speech, especially by incorporated advocacy groups or political groups supported by business corporations or unions.

Instead of relying on a flawed history of campaign reform "progress," defenders of political regulation must argue their positions on the merits, fully accounting for how similar reforms may have worked, or not, before. This Court should take a fresh look at the scope, tailoring, intent, and effects of the Taft-Hartley corporate and labor expenditure ban at issue in *Auto Workers*, *Massachusetts Citizens for Life*, *Austin* and *Citizens United*. Campaign finance regulation, like war, is politics by other means, with

serious implications for the constitutional rights of targeted individuals and groups.

Respectfully submitted,

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