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 THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AND CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 850 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than three decades.

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Constitution and to preserve the rights and freedoms it guarantees.

SUMMARY OF ARGUMENT

Since our Nation's founding, our constitutional story has been one of democratic progress, moving American democracy toward broader enfranchisement and more meaningful political participation for individual American citizens. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 423 (2005). Through constitutional amendments, our modern democracy has been constructed on the foundation of our original Constitution: the Fifteenth Amendment guaranteed the right to vote free from racial discrimination; the Seventeenth Amendment gave the people in each State the right to vote for U.S. senators; the Nineteenth Amendment extended the franchise to women; the Twenty-fourth Amendment freed the federal election process from poll taxes; and the Twenty-sixth Amendment secured the right to vote for young adults. Statutory enactments, such as the Voting Rights Act in 1965 and campaign finance regulation beginning with the Tillman Act in 1907, have also been central to the story of our hard-won, modern, inclusive democracy.

Prevention of improper corporate influence in the electoral process—like the extension of the franchise, anti-discrimination mandates, and the bedrock equality principle of one-person, one-vote—is a pillar of our modern democracy. Concern that corporations were corrupting elections motivated passage of the Tillman Act of 1907, the first piece of

federal corporate campaign finance legislation, as well as the ratification of the Seventeenth Amendment in 1913, which was intended to prevent corporate influence in the selection of U.S. senators. The idea that government can act to prevent improper corporate influence in elections is thus woven into the very fabric of our constitutional system and has been reflected in more than a century of campaign finance regulation.

While our Constitution reflects an increasingly expansive view of individual participation in the political process, it does not reflect a similar solicitude for corporate participation. To the contrary, our constitutional history reflects a growing concern over the influence of corporations, and the distinction between the legal protections afforded to living persons and corporations has been part of our constitutional law from the Founding. Corporations are never specifically mentioned in the Constitution, and from the earliest days this Court has held that the government need not treat corporations the same way it treats individual citizens. The Tillman Act and the Seventeenth Amendment built upon this solid foundation of constitutional text and history in preventing corporations from dominating our electoral system.

If the Court takes this opportunity to "return to first principles," as suggested by Citizens United, Supp. Br. for Appellant at 2, *amici* submit that these first principles support preserving, not dismantling, corporate campaign finance regulations. To change course and create a new

constitutional right for corporations to make unlimited expenditures in candidate elections would reverse our centuries-long march of progress toward greater democracy and run contrary to constitutional text and history.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE RIGHTS OF INDIVIDUAL CITIZENS TO PARTICIPATE EFFECTIVELY IN THE POLITICAL PROCESS AND ALLOWS REGULATION OF CORPORATE INFLUENCE IN ELECTIONS.

As constitutional scholar Akhil Amar has observed, the Constitution's "chronological format highlights the grand arc of constitutional history," demonstrating, at a glance, "how democracy has swept forward across the centuries." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 459 (2005). While "America's Founding gave the world more democracy than the planet had thus far witnessed," *id.* at 14, it nonetheless took almost two centuries of constitutional amendments and statutory enactments to achieve our modern American democracy.

With the Fifteenth Amendment, ratified in 1870,[2] the franchise was guaranteed to citizens regardless of race or color; with the Seventeenth Amendment, ratified in 1913,[3] citizen participation was advanced through direct election of U.S.

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[2] U.S. CONST., amend. XV.
[3] U.S. CONST., amend. XVII.

senators; with the Nineteenth Amendment, ratified in 1920,[4] women gained the right to vote; and with the Twenty-fourth Amendment, ratified in 1964,[5] and the Twenty-sixth Amendment, ratified in 1971,[6] the Constitution extended the right to vote to the poor and young adults, respectively. *See generally* AMAR, AMERICA'S CONSTITUTION, at 18-19, 408. While none of these amendments speaks directly to campaign finance, concerns about corporate influence in politics and elections have, throughout this history, intertwined with constitutional efforts to safeguard the rights of individual voters. Preventing improper influence of corporate wealth in elections has gone hand-in-hand with modern democracy's embrace of the principle of political equality. *See* Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239 (2005).

Serious concerns about corporate influence in government began in the post-Civil War era, around the time the Fifteenth Amendment was ratified. This "Gilded Age" is when the story of campaign finance reform properly begins, "when a variety of political reform movements began to question the growing influence of trusts and other organized economic interests within the American democratic system." Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 603 (2008).

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[4] U.S. CONST., amend. XIX.
[5] U.S. CONST., amend. XXIV.
[6] U.S. CONST., amend. XXVI.

Industrialization, economic growth, and government contracts awarded during the war combined to give American corporations remarkable wealth and power in the aftermath of the Civil War. In 1864, President Abraham Lincoln presciently predicted that "as a result of the war, corporations have become enthroned, and an era of corruption in high places will follow." MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 7 (2005). In 1874, conservative jurist Thomas Cooley similarly warned that "the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually [have] greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence." Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 279 n.2 (3d ed. 1874). By 1888, corporate power in politics had become so overwhelming that President Rutherford Hayes remarked with dismay in his diary that the United States had become "a government of corporations, by corporations, and for corporations." Rutherford B. Hayes, THE DIARY AND LETTERS OF RUTHERFORD B. HAYES, NINETEENTH PRESIDENT OF THE UNITED STATES 374 (Charles Richard Williams ed., Ohio State Archaeological & Historical Society 1922), available at http:// www.ohiohistory.org/onlinedoc/hayes/ volume04/Chapter45/March11.txt.

Reformers began to heed these warnings about corporate financial influence in elections. The

process by which United States senators were selected by state legislatures was seen as particularly prone to corporate corruption, and reform of this process ranked high on reformers' agenda.[7] While the Seventeenth Amendment was not ratified until 1913, corporate influence in the selection of U.S. senators was seen as a sufficiently serious problem before the turn of the century that prominent members of Congress spoke out against it. In 1892, Representative Tucker observed that:

> [t]he wonderful growth of our country has been greatly accelerated by the combinations of wealth in corporate forms [but] when they leave their legitimate fields of operation and seek to control, against the interests of the people, the legislation of the country, whether they be banks or railroads, corporations or trusts, or combines, they will meet with the indignant protests of all true friends of the people . . . The standard for the exalted position of United States Senator is thus debased by corporate influence."

23 Cong. Rec. 6063 (1892).

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[7] The selection of U.S. senators by state legislatures was viewed as particularly susceptible to corporate corruption because special interests could pay off state lawmakers to vote a certain way in Senate contests. Supporters of direct election of senators by the people believed that "it is harder to bribe a large group of ad hoc decisionmakers—such as ordinary voters—than a small group of standing officials." AMAR, AMERICA'S CONSTITUTION, at 413.

Political leader William Jennings Bryan further explained that the concern over corporate political influence had grown since the time of the Founding, and required new regulation. In arguing for direct election of senators, he said:

> We all recognize that there is a reason for the election of Senators by a direct vote today that did not exist at the time the constitution was adopted. We know that today great corporations exist in our States, and that these great corporations, different from what they used to be one hundred years ago, are able to compass the election of their tools and their agents through the instrumentality of Legislatures, as they could not if Senators were elected directly by the people.

26 Cong Rec. 7775 (1894).

In addition to seeking structural change in senatorial elections, reformers also responded to criticism of businesses financing political campaigns by proposing regulation of corporate political activity. "Campaign finance reform was viewed as a logical complement" to other reforms aimed at combating political corruption and providing political equality. Pasquale, *supra*, at 605.

Accusations of corporate corruption in the election of Theodore Roosevelt in 1904 created an opportunity for the country to consider corporate campaign finance regulation. As Justice

Frankfurter explained, "[c]oncern over the size and source of campaign funds so actively entered the presidential campaign of 1904 that it crystallized popular sentiment for federal action to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *United States v. UAW*, 352 U.S. 567, 571-72 (1957). As Roosevelt's defeated challenger stated, "[t]he greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?" *Id.* at 572.

Public sentiment in favor of corporate campaign finance regulation was informed not just by a belief that corporations were wielding too much power in elections by virtue of their extraordinary wealth, but also by the belief that the political process should be left to the American people themselves, not artificial corporate entities. In 1905, the New York Tribune expressed its views, which were widely shared: "A corporation is not a citizen . . . . It is an artificial creation . . . and attempts by it to exercise rights of citizenship are fundamentally a perversion of its power." N.Y. TRIBUNE, Sept. 18, 1905, at 6 *quoted in* Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1255 (1999).

President Roosevelt responded to the calls for corporate campaign finance reform, recommending in his annual message to Congress that "[a]ll contributions by corporations to any political committee or for any political purpose should be

forbidden by law." 40 Cong. Rec. 96 (1905). In his message to Congress the following year, Roosevelt "listed as the first item of congressional business a law prohibiting political contributions by corporations." *UAW*, 352 U.S. at 575 (citing 41 Cong. Rec. 22 (1906)).

In turn, Congress passed the Tillman Act of 1907, 34 Stat. 864 (Jan. 26, 1907), which prohibited corporate contributions in federal elections and prevented national banks or corporations organized under the laws of Congress from making "a money contribution in connection with any election to any political office." *Id.* The Senate Report explained that the Tillman Act was "calculated to promote purity in the selection of public officials." S. Rep. No. 59-3056, at 2 (1906). As this Court noted, the Act was intended to "eliminate the apparent hold on political parties which business interests . . . seek and sometimes obtain by reason of liberal campaign contributions." *Cort v. Ash*, 422 U.S. 66, 82 (1975) (citation omitted).

Having achieved the first federal campaign finance regulation, reformers re-focused on attacking corruption in senatorial elections. The Seventeenth Amendment imported the Tillman Act's opposition to corporate election influence into the Constitution. Proposed in 1912 and ratified the following year, the Seventeenth Amendment provided that U.S. senators would be chosen directly by each state's voters rather than by state legislatures. Supporters of direct election, like the supporters of the Tillman Act, argued that "their system would result in cleaner, less corrupt

government and would counter the undue effects of large corporations, monopolies, trusts, and other special-interest groups in the Senate election process." AMAR, AMERICA'S CONSTITUTION, at 412. *See also* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VANDERBILT L. REV. 1347, 1353 (1996) (observing that "state legislative corruption and special interest group control were perhaps the greatest evils associated with indirect election"). While there were concerns among some in Congress about the efficacy of the Seventeenth Amendment in eliminating corporate influence,[8] there was general consensus that corporate wealth in the political process was a problem requiring an attempt at a solution.

Given the similar motivations behind the Tillman Act and the Seventeenth Amendment, the Amendment's history is particularly relevant to questions about the constitutionality of corporate-focused campaign finance reform. The interaction of the First Amendment and campaign finance reform "must account for or consider the Seventeenth Amendment, which, while not facially concerned with political speech, was enacted in part to curb the influence of money in the selection of United States Senators." Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1505 n.178 (2001). "[T]he Seventeenth Amendment's language and history . . . supports the view that in reposing the power to elect Senators directly in the people,

[8] *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 541 (1997).

Congress also intended that the people have residual authority to effectuate one of the principal purposes of the Amendment, the reduction of the influence of money in selecting Senators." *Id.*

The ratification of the Seventeenth Amendment, coming so close on the heels of the Tillman Act's ban on corporate contributions and the attendant national conversation on corporate influence in political campaigns, strongly suggests that our political leaders and the people themselves understood regulation of corporate political activities to be constitutional—and good for modern democracy. Indeed, the Congress that passed the Seventeenth Amendment also enacted campaign finance regulation that required certain disclosures and imposed spending limits. Act of Aug 19, 1911, 37 Stat. 25 (1911).

In its efforts to enhance the power of the people and prevent corruption by special interests, the Progressive-era movement sought, in addition to campaign finance reform, passage of the Seventeenth and Nineteenth Amendments. *See* Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 137-38 (1998). This era bridged the first Reconstruction, in which the Fifteenth Amendment was ratified to guarantee the franchise regardless of race, and the Second Reconstruction of the civil rights movement, in which the promise of the Fifteenth Amendment was made a reality through the Voting Rights Act and the poor and young were brought into the electorate through the Twenty-fourth and Twenty-sixth Amendments. Along with these Amendments, the Tillman Act and

subsequent campaign finance reform legislation stand for the principle that democratic self-governance belongs to individuals, not business corporations. While the Constitution provides for equal political participation for individual Americans, corporations have "no obvious standing to participate in a democratic polity." *Id.* at 194.

II. THE CONSTITUTION'S TEXT AND HISTORY ALLOW FEDERAL AND STATE GOVERNMENTS TO IMPOSE GREATER RESTRICTIONS UPON CORPORATIONS THAN UPON INDIVIDUAL CITIZENS.

While the text and history of the Constitution show an ever-expanding concern for the rights of individuals to vote and participate in the political process, constitutional text and history do not suggest an intention to treat corporations in the same manner. To the contrary, the Constitution gives federal and state governments broad power to regulate the acts of corporations.

From the very beginnings of our Nation's history, the legal protections afforded to living persons and corporations have been fundamentally different. At the Founding, the Bill of Rights was added to the Constitution to protect the fundamental rights of the citizens of the new nation—the "We the People" who ordained and established the Constitution—reflecting the promise of the Declaration of Independence that all Americans "are endowed by their Creator with certain unalienable rights." *See* AKHIL REED AMAR,

THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 3-133 (1998).

Corporations—never specifically mentioned in the Constitution itself—stood on an entirely different footing. A corporation, Chief Justice John Marshall explained, "is an artificial being, invisible, intangible, and existing only in contemplation of the law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it . . . ." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). James Madison described the charter of incorporation as a bill that "creates an artificial person previously not existing in law." Annals of Congress, 1st Cong., 3rd Sess. 1949 (1791). *See also Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch.) 127, 167 (1804) (describing corporation as "mere creature of the act to which it owes its existence").

At the Founding, corporations existed at the behest, and by the creation, of the government to serve public purposes, such as "supplying transport, water, insurance, or banking facilities." JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 15 (1970). Because charters conferred on corporations special privileges that enabled them to amass wealth and property, the Constitution's framers were "suspicio[us] of corporate charters based on the view that special privileges generally led to monopoly" and specifically rejected proposed constitutional language that would have given Congress an

explicit power to charter corporations. *See* Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 6, 7-10 (2008).

Consistent with this original understanding, both the Constitution's text and the Court's early case-law reflect that the Constitution's individual-rights guarantees do not apply equally to corporations, and that federal and state governments have broad power to regulate the acts of corporations.

Many of the individual-rights provisions of the Constitution—including the Bill of Rights and the Civil War Amendments, which were added to the Constitution to ensure the equal citizenship of the newly freed slaves—use words that make little sense as applied to corporations. For example, as artificial entities, corporations themselves cannot "keep and bear Arms." U.S. CONST., amend. II. A corporation cannot claim the right not to be "compelled to be a witness against himself." U.S. CONST., amend. V; *see United States v. White*, 322 U.S. 694 (1944) (finding that corporations do not enjoy the privilege against self-incrimination). With respect to the voting amendments, only individual citizens enjoy the right to vote. The constitutional right to vote "in letter and spirit encompassed not merely the equal right to *vote for legislators* and other elected officials, but also the equal right to vote *in legislatures*, the equal right to be *voted for* and *serve in* any elective post, and the

equal right to vote *in juries*[9] of all sorts." AMAR, AMERICA'S CONSTITUTION, at 399. Corporations do not share in these rights—they cannot vote in elections, stand for election, or serve as an elected official or member of a jury.

Indeed, early in this Nation's history, the Supreme Court confirmed that corporations do not share in the substantive protections the Constitution affords to American citizens. In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), the Supreme Court held that corporations were not entitled to the protection of Article IV's Privileges and Immunities Clause, which provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Court reasoned that a corporation could not claim both the special privileges conferred by corporate status and the protections the Constitution guarantees to individuals. "If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens," an approach inconsistent with the corporation's special privileges. *Id.* at 586.

Bank of Augusta and other precedents of the Court settled that the foundational document setting out the corporation's substantive legal rights was the corporate charter, not the

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[9] Most states at the Founding and in the early twentieth century provided that jurors should be drawn from the pool of eligible voters. *See* AMAR, AMERICA'S CONSTITUTION, at 426.

Constitution. *Accord First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting) (noting that "it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons"). Although the Constitution might protect the vested rights of a corporation spelled out in the corporate charter, *see Dartmouth College*, 17 U.S. at 636-45, the Constitution did not, of its own force, grant any substantive fundamental rights to corporations. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868) ("The term citizen [in the Privileges and Immunities Clause] applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."); *Northwestern Nat'l Life Ins. Co v. Riggs*, 203 U.S. 243, 255 (1906) ("The liberty referred to in th[e Fourteenth] Amendment is the liberty of natural, not artificial, persons."); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907) (holding that a corporation was not a citizen protected by the Privileges or Immunities Clause of the Fourteenth Amendment).

Not only did the legal rights of corporations derive from their charters, not the Constitution, but corporations—being creatures of the charter creating them—could be extensively regulated to ensure that corporations did not abuse the special privileges conferred on them by the government, whether federal or state. *See Northern Securities Co. v. United States*, 193 U.S. 197, 332-51 (1904) (recognizing congressional power to regulate

corporations under its Article I powers); *Sinking Fund Cases*, 99 U.S. 700, 721 (1878) ("[W]hatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment."); *Tomlinson v. Jessup*, 82 U.S. 454, 459 (1872) (holding that reservation clause giving the State the right to amend the corporate charter "affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State"). While the Court has noted that states may not "define the rights of their creatures without constitutional limit," *Bellotti*, 435 U.S. at 778 n.14, it has never held that corporations enjoy the full measure of rights that individuals enjoy under the First Amendment. *See id.* at 777.

Accordingly, if a "return to first principles is in order," Supp. Br. of Appellant at 2, it is important to recall precisely what those first principles are with respect to regulation of corporate activity. Far from treating living persons and corporations identically, the Constitution's text and history recognize that "[a] corporation . . . is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business," *Northern Securities*, 193 U.S. at 362 (Brewer, J., concurring), and necessarily "subject to legislative control so far as its business affects the public interest." *Sinking Fund Cases*, 99 U.S. at 719.

* * *

From the Declaration of Independence, through our Nation's Founding, and as reflected in our amended Constitution, broad citizen participation in fair elections has been a central ideal of American democracy. Our modern system, more democratic than any before in history, achieves this ideal in part through regulation of corporate influence in the election process. Corporate campaign finance reform is intertwined with and incorporated into our modern constitutional democracy. The Constitution allows federal and state government to regulate corporations and does not require that artificial corporate entities be treated the same as individual citizens.

CONCLUSION

For the foregoing reasons, the judgment of the district court—and the continued vitality of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. FEC*, 540 U.S. 93 (2003)—should be affirmed.

Respectfully submitted.

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