STATEMENT OF

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BEFORE THE

COMMITTEE ON JUDICIARY,

UNITED STATES SENATE

AT A HEARING REGARDING

SENATE JOINT RESOLUTION 19

PRESENTED ON

JUNE 3, 2014

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TUESDAY, JUNE 3, 2014
WASHINGTON, D.C.

I appreciate your invitation to appear today to offer my views on S.J.19. The description of the constitutional amendment it proposes states, in its text, that it "relate[s] to contributions and expenditures intended to affect elections." That's one way to say it, but I think it would have been more revealing to have said that it actually "relate[s] to *speech* intended to affect elections." And it would have been even more revealing, and at least as accurate, to have said that it relates to *limiting* speech intended to affect elections. And that's the core problem with it. It is intended to limit speech about elections and it would do just that.

When James Madison introduced the Bill of Rights to the First Congress he stated that the courts—"independent tribunals of justice," he called them—would "consider themselves … the guardians of those rights," that they would serve as an "impenetrable bulwark against every assumption of power in the legislative or executive" and that "they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution."[1] In no area has that been more true than with respect to the First Amendment. "No other nation," Charles Fried has written, "claims as fierce and stringent a system of legal protection for speech. It is the strongest affirmation of our national claim that we put liberty above other values."[2] It has been, of course, the Supreme Court, serving as the guardian of the First Amendment, that has accomplished that

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1 James Madison, Speech to Congress (June 8, 1789).

2 Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59, U.CHI. L. REV.225, 229 (1994)

and has thus assured that the United States became and remains the freest nation that ever existed in the history of the world.

Of course, many of the Court's opinions have been controversial. Some have not withstood the demands or judgments of history. But no ruling before and after that in the *Citizens United* case, providing First Amendment protection, has ever been reversed by a constitutional amendment. No speech that the Court has concluded warranted First Amendment protection has ever been transformed, via a constitutional amendment, into being unprotected speech and thus a proper subject of criminal sanctions. In fact, no amendment has ever been adopted limiting rights of the people that the Supreme Court has held were protected by the Bill of Rights in any of the first ten amendments.

In that context, it's worth recalling at the outset what sort of speech we routinely protect under the First Amendment and how it compares with the sort of speech you are now being asked to permit both the federal and state governments to criminalize. Chief Justice John Roberts put it well in his recent opinion in *McCutcheon v. Federal Election Commission.* "Money in politics," he observed, "may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."[3]

The proposed amendment you meet today to consider deals with nothing but political campaign speech. It does not deal with money that is spent for any purpose other than persuading the public who to vote for or against and why. As such, it would limit speech that is at the heart of the First Amendment. And S.J. 19 does so in a sweepingly broad manner. It would not only

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[3] *McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434, 1441 (2014).

effectively reverse the *Citizens United* ruling and cases such as *McCutcheon* that followed it but also cases that long predate it. Most tellingly, it would reverse *Buckley v. Valeo*, the 1976 decision joined in by such free expression defenders as Justices William J. Brennan, Thurgood Marshall and Potter Stewart. S.J.19 rejects the central teaching of *Buckley* that Congress may not, for the asserted purpose of "equalizing the relative ability of individuals and groups to influence the outcome of elections," limit the spending and hence the speech of those who wished to participate in the political process by persuading people who to vote for or against and why.[4] Under *Buckley*, individuals and groups are thus free to make independent expenditures in any amount in the election process. In the most memorable observation of the Court in *Buckley*, it observed that the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment …."[5] Yet that is precisely the notion, in the name of equality, that is at the heart of this proposed amendment.

The title of the proposed amendment goes even farther, claiming that it would "Restore Democracy to the American People." The notion that democracy has already been lost, as we begin what will obviously be a hard fought election season in which virtually anything can and will be said, could be dismissed as rather typical Washington rhetorical overkill. But the notion that democracy would be advanced – saved, "restored" – by *limiting* speech is nothing but a perversion of the English language. It brings to mind George Orwell's observation, in his enduring essay "Politics and the English Language," that "[i]n our time, political speech and writing are largely the defense of the indefensible," and that the word "democracy," in particular, "has several different meanings which cannot be reconciled with each other" and "is often used in a con-

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4 *Buckley v. Valeo*, 424 U.S. 1, 48, 96 S.Ct. 612, 649 (1976).

5 *Id.* at 48-49.

sciously dishonest way." So let me say in the most direct manner that it is deeply, profoundly, obviously undemocratic to limit speech about who to elect to public office.

There could be little disagreement, for example, that it would be undemocratic, not to say unconstitutional, for the federal or any state government to prevent a newspaper from repeatedly, even incessantly, praising or denouncing any candidate for public office, or to limit how often an Internet website could do so. There is no distinction in principle between what the First Amendment protects in these all but unthinkable hypothetical cases and what S.J.19 would leave unprotected.

Indeed, the Supreme Court, in its unanimous ruling in 1966 in *Mills v. Alabama,* struck down as violative of the First Amendment an effort to assure fairer elections by barring "electioneering," including newspaper editorials, on Election Day only. The argument in favor of the statute, wrote Justice Hugo Black for the Court, was that it imposed only a brief limitation on expression to avoid the danger of a confused or misled public that could result from last minute charges and countercharges that "cannot be answered or their truth determined until after the election is over."[6] However reasonable that might seem to some, the Supreme Court could hardly have been clearer or more emphatic in concluding that "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election." There is no reason to think that that case would have been decided differently if it had involved an entity other than a newspaper. As the Court there stated, "[w]e deal here with the rights of free speech and press in a basic form: the right to express views on matters before the electorate."[7] The same is true here.

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6 *Mills v. Alabama*, 384 U.S. 214, 220, 86 S.Ct. 1434, 1437 (1966) (quoting the Alabama Supreme Court's decision).

7 *Id.* at 221 (Douglas, J., concurring).

There is another pervasive problem with the proposed amendment. S.J. 19 is rooted in the disturbing concept that those who hold office in both federal and state legislatures, armed with all the advantages of incumbency, may effectively prevent their opponents from becoming known to the public, by adopting legislation, which the proposed amendment would empower them to do, limiting the total amounts they may raise and spend in an effort to do so. Put another way, the amendment will create countless David versus Goliath bouts, with Goliath allowed to make up the rules of the game as it goes along. Such problems have always existed as federal and state legislatures adopted regulations in this area. But they would be compounded by the adoption of S.J.19 which would appear to insulate such legislation from judicial review by providing unfettered legislative authority to "se[t] limits" on both the amount of contributions and expenditures. In this area, as Justice Antonin Scalia has observed, "as everyone knows … evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored. In other words, *any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents."[8] Contribution limits, by way of example, make it more difficult for challengers to close this incumbent advantage gap. Historically, challengers have relied upon large contributions from a small group of family, friends and admirers to raise sufficient funds for TV ads and other mass media needed to familiarize the voting public with candidate and his or her views.

It is no secret that the prime target of the proposed amendment is the *Citizens United* opinion of the Supreme Court. I'd like to begin my commentary on that case by offering a very general comment. The jurists who joined in the *Citizens United* ruling did not conjure up the

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[8] *McConnell v. Federal Election Commission*, 540 U.S. 93, 249, 124 S.Ct. 619, 720-21 (2003).

First Amendment concepts they were articulating. Those concepts have been with us for many years. The first law that barred entities such as corporations and unions from using their funds to make independent expenditures designed to affect federal elections was the Taft-Hartley Act adopted in 1947. From its adoption, its constitutionality was viewed as dubious because of First Amendment concerns. President Harry S. Truman vetoed it, in part on just those grounds, concluding that it was a "dangerous intrusion on free speech."[9]

The Supreme Court quickly questioned the constitutionality of the new provisions in *United States v. CIO*, and concluded that unless the Taft Hartley Act was read extremely narrowly, "the gravest doubt would arise in our minds as to [the statute's] constitutionality."[10] In those days, it was the liberal jurists who were particularly concerned by the First Amendment implications of such legislation. In the *CIO* case, Justices Wiley Rutledge, Hugo Black, William O. Douglas, and Frank Murphy, probably the four most liberal jurists ever to sit on the Court at the same time, concluded that whatever "undue influence" was obtained by making such large expenditures was outweighed by "the loss for democratic processes resulting from the restrictions upon free and full public discussion."[11] A decade later, in *United States v. Automobile Workers,* liberal jurists again expressed the gravest constitutional concerns about the law. A dissenting opinion by Justice Douglas (joined by Chief Justice Earl Warren and Justice Black) even more clearly presaged the later ruling of Justice Kennedy and the majority in the *Citizens United* case, concluding:

> Some may think that one group or another should not express its views in an election because it is too powerful …[b]ut these are not justifications for withholding First Amendment rights from any group—labor or corporate…First Amendment rights are part of the heritage of all persons and groups in this country. They are

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9 Harry S. Truman, Veto of the Taft-Hartley Labor Bill (June 20, 1947).

10 *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121, 68 S.Ct. 1349, 1357 (1948).

11 *Id.* at 143 (Rutledge, J., concurring).

> not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.[12]

Justice Kennedy's ruling in *Citizens United* was rooted in views consistent with those set forth by the jurists I have just quoted in *CIO* and *Automobile Workers*. Two long established legal propositions were central to the ruling in *Citizens United*. The first was that political speech – and in particular political speech about who to vote for or against—was at the core of the First Amendment. This was and is hardly controversial. There is no doubt that generally, as Justice Kennedy put it, "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[13] Nor is it disputable that, as Justice Kennedy repeated from an earlier case, that the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office."[14]

The second critical prong of Justice Kennedy's opinion addressed the issue of whether Citizens United's corporate status could be held to limit its First Amendment rights. This too (and notwithstanding repeated public and press misapprehension as to the matter) was not in the slightest controversial. In support of the proposition that corporations routinely had received First Amendment protection for their speech, Justice Kennedy cited 25 Supreme Court cases in which that had been established. Many of them involved powerful newspapers owned by large corporations, entities capable of shaping public opinion to an extraordinary degree. Other cases involved non-press corporations such as a bank, a real estate company and a public utility company. Justice Stevens' dissenting opinion (but not much of the overheated public criticism of the

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12 *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567, 597 (Douglas, J., dissenting).

13 *Citizens United v. Federal Election Commission*, 558 U.S. 310, 340 (2010).

14 *Id.* at 349 (quoting *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 233 (1989)).

Citizens United ruling) took no issue with any of this, stating that "[w]e have long since held that corporations are covered by the First Amendment."[15]

The language in Section 3 of the proposed amendment purportedly exempting any conduct that falls within the rubric of freedom of the press (but not speech) hardly begins to solve the problems presented by S.J.19. One thing is clear about the language. By treating freedom of the press differently from and more protected than freedom of speech, the intention to limit the latter freedom is manifest. But why should the press, however defined, receive more protection than others to engage in the identical advocacy of or condemnation of candidates for public office? If Citizens United were treated as a speaker rather than as a publisher (as the Federal Election Commission did during the *Citizens United* case but not afterwards) why should it receive less protection because of that designation? Or if, as is the case now, Citizens United is viewed as a publisher, why should it receive greater protection than some other corporate entity that decided to verbally assault a candidate for public office?

For those of you who disagree with the *Citizens United* ruling, I want to be clear that in this brief testimony, I can make no extended effort to convert you to accept its correctness. The vote on the Supreme Court was close and while the ruling was, in my view, plainly correct and certainly supportable by significant First Amendment case law, it was contrary in significant respects to another ruling of the Court, also decided by a very close vote that went the other way just a few years before. Today's issue, though, is not whether you agree with *Citizens United*. It is whether you are prepared to take the extraordinary, never before taken, step of amending the Constitution to assure that *less* in the way of First Amendment protection should be afforded than the Supreme Court has held was warranted.

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15 *Id.* at 432 (Stevens, J., dissenting).

It is in that context that I ask you to consider the facts of the *Citizens United* case. As the 2000 campaign for the presidency commenced and prior to the political conventions of that year, a small conservative organization completed its creation of a documentary denouncing then-Senator Clinton, then viewed as the likely Democratic nominee. With a powerful and dramatic musical background, the documentary assembled an array of critics of the Senator, all of whom harshly, often mockingly, criticized her and all of whom made their concern explicit about her being elected President. It was the sort of piece that many find distasteful; it was angry, negative, defamatory. It was also a quintessential example of the sort of speech most obviously protected by the First Amendment—an attack on a sitting Senator who was seeking the presidency, an attack based on her supposed character flaws, lack of competence, and the like. It is inconceivable to me that that such speech could be viewed as unprotected by the First Amendment. But S.J.19 would permit a state (or the federal government) to impose "limits" on the funding of that documentary that would have made its production impossible.

Indeed, on the face of the federal statute challenged in the *Citizens United*, it violated the law for that film, produced by a corporation which was, in turn, partially funded by corporations, to be shown on television, cable or satellite, within 30 days of a primary or 60 days of a general election. And when, in the first of two arguments held in the case, counsel for the United States acknowledged—as he was obliged to in candor with the Court—that under the law "a corporation could be barred from using its general treasury funds to publish [a] book" supporting a candidate for the presidency within the time limits set in the statute,[16] the die was cast for a potentially broad opinion by the Court, an opinion as broad as those dissenting opinions from earlier serving liberal justices might have suggested. And that was the opinion that the Court did issue,

[16] Statement of Malcolm L. Stewart, Deputy Solicitor General, Transcript of Oral Argument at 29, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (No. 08-205)

one rightly summarized by Professor Joel Gora as articulating "a unified, universal and indivisible view of the First Amendment, namely that the rights it protects should be available to all those individuals and groups which seek to exercise them and inform the public."[17]

In quoting Professor Gora, I think I should mention that he had served as counsel for the American Civil Liberties Union in the *Buckley* case I cited earlier and that on the issue before you the ACLU has remained firm in its defense of the First Amendment. As Laura Murphy, the Director of the ACLU's Washington Legislative Office, has stated: "if there is one thing we absolutely should not be doing, it's tinkering with our founding document to prevent groups like the ACLU (or even billionaires like Sheldon Adelson) from speaking freely about the central issues in our democracy. Doing so will fatally undermine the First Amendment, diminish the deterrent factor of a durable Constitution and give comfort to those who would use the amendment process to limit basic civil liberties and rights. It will literally 'break' the Constitution."[18]

I want to close with a comment or two about the supposed consequences of the *Citizens United* case itself. When the government submitted its brief to the Supreme Court in that case, it offered a doomsday scenario about what would occur if the Court were to rule as it finally did. Fortune 100 companies, the government argued (and I am quoting now) had "combined revenues of $13.1 trillion and profits of $605 billion. If those 100 companies alone had devoted just one percent of their profits (or one-twentieth of one percent of their revenues) to electoral advocacy, such spending would have more than doubled the federally-reported disbursements of all American political parties and PACs combined."[19] Such an "amount of corporate spending," the gov-

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17 Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 950 (2011).

18 Laura W. Murphy, *"Fixing"* Citizens United *Will Break the Constitution*, HUFFINGTON POST POLITICS (June 28, 2012, 7:21 PM), *available at* http://www.huffingtonpost.com/laura-w-murphy/citizens-united_b_1632317.html.

19 Brief for Appellee at 17, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (No. 08-205).

ernment urged, "could dramatically increase the reality and appearance of quid pro quo corruption."[20]

Over four years have passed since that brief was filed, and since the Supreme Court issued its *Citizens United* decision. Contrary to the government's dire predictions, there is no basis to conclude that any increase in quid pro quo corruption has occurred within the federal government, within the 24 states that, as of the ruling in *Citizens United*, imposed restrictions on contributions or expenditures or, of course, in the 26 states that as of that time imposed no such restrictions. This result (or lack thereof) should come as no surprise. Studies repeatedly have shown no correlation between a state's level of corruption and its campaign finance laws with respect to corporations. In fact, three of the five states deemed "best managed" in a recent nonpartisan study allowed unlimited corporate contributions. The five states deemed "worst-governed?" Two of them limited corporate contributions, and the remaining three prohibited them entirely.[21]

Further, *Citizens United* has not caused any massive rush of spending, corporate or otherwise. While it is true that a few corporations have made large contributions to Super PACs from entities taking the corporate form, figures from the FEC, Center for Responsive Politics, and Campaign Finance Institute reflect that such contributions are extremely rare. In general, the corporations that have contributed to Super PACs are far more "Main Street" than "Wall Street" in nature. In fact, not a single Fortune 100 Company appears to have contributed even a cent to any of the ten highest-grossing Super PACs in either the 2010, 2012, or 2014 election cycles. To date, the *only* significant Super PAC contribution from a Fortune 100 company appears to have

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[20] *Id.*

[21] *See* Matt Nese, Center for Competitive Politics, Issue Analysis No. 7, *Do Limits on Corporate and Union Giving to Candidates Lead to "Good" Government?* (Nov. 2013), *available at* http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf.

been a $2.5 million dollar contribution from Chevron to the Congressional Leadership Fund (ranked 13th in total receipts) in 2012.[22] Two other Fortune 100 company contributions Super PACs – Express Scripts, Inc. and Walgreen Company each made a $5,000 contribution to JANPAC, a Super PAC supporting Arizona Governor Jan Brewer. This insignificant level of corporate giving bears no resemblance to the tidal wave of corporate money from enormous corporate entities predicted by the government in its *Citizens United* brief. And based on figures from the FEC and the Center for Responsive Politics, as well as the Campaign Finance Institute, while the rate of overall spending has increased since the *Citizens United* ruling, the rate of increase has been consistent with that of past years. As Jan Baran has pointed out, the total amount of spending in presidential years after *Citizens United* "rose, although at a rate no higher than in previous elections."[23] In fact, the highest rate of change occurred between 2000 and 2004 (51%) while the rate of increase from 2008 to 2012 was 20%.

I conclude as I began. It is not some sort of coincidence that until today no decision of the Supreme Court affirming First Amendment rights has ever been overruled by amendment. Emotions have run high before about decisions of the Supreme Court which provided a higher level of protection of liberties set forth in the Bill of Rights than many in this body would have though appropriate. Self-restraint on the part of enough members of this body carried the day and no constitutional amendment followed. This proposed amendment, S.J. 19, would shrink the First Amendment and in doing so set a precedent that would be both disturbing and alarming.

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[22] *See* Open Secrets List of Highest Grossing Super PACs, 2012 Election Cycle, *available at* http://www.opensecrets.org/pacs/superpacs.php?cycle=2012. Thus far in the 2014 Election Cycle, Congressional Leadership Funds total receipts of $1,319,028 rank it 37th among all Super PACs. *See* Open Secrets List of Highest Grossing Super PACs, 2014 Election Cycle, *available at* http://www.opensecrets.org/pacs/superpacs.php?cycle=2014.

[23] Jan Baran, *Symposium: McCutcheon and the Future of Campaign Finance Reputation*, SCOTUSBLOG (April 4, 2014, 2:59 PM).