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MEMORANDUM

Re: Impact of *McConnell v. FEC* on Constitutionality of Campaign Expenditure Limits
By: Brenda Wright, Managing Attorney
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Background

In *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*), the Supreme Court struck down limits on campaign spending by congressional candidates while upholding limits on the size of individual donations to candidates, reasoning that the latter would be sufficient to stem the reality and appearance of corruption and undue influence in federal elections. The experience of more than a quarter-century of unlimited campaign spending has proven this optimistic prediction wrong. Unlimited campaign spending fosters just as serious a threat of corruption and its appearance as do unlimited contributions, and undermines the ideal of a truly participatory democracy.

Unlimited spending has left candidates locked in an arms race in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. In 1974, the average cost of a winning U.S. House campaign was $100,000, while in the 2000 elections the average winning campaign cost $840,000. Even when adjusted for inflation, this reflects an increase of over 400% in expenditures on a winning campaign.

To compete in the arms race, candidates are too often forced to court support from special interests who can raise huge sums for their campaigns. Elected officials become full-time fundraisers instead of full-time public servants, while average citizens are left wondering whether their votes really count for anything when stacked against the huge piles of money that special interests can invest in campaigns. And many qualified candidates never run at all, deterred by an incumbent's massive war chest and the sheer cost of becoming "viable." Without electoral competition, the very possibility of a vibrant political debate is missing; there can be no debate when the election is uncontested.

Because of the serious threat to our democracy posed by unlimited campaign spending, NVRI, joined by many other reformers, has long sought to urge the courts to

revisit the constitutionality of expenditure limits. While some have argued that *Buckley* foreclosed the constitutionality of spending limits for all time, NVRI believes that a new and different factual record, with detailed evidence supporting the need for spending limits, would allow some limits on spending to survive constitutional scrutiny by the courts. Currently pending in two federal appellate courts are NVRI cases from Vermont and Albuquerque, New Mexico, that directly present the opportunity to revisit *Buckley*'s holding on spending limits.[1]

This memorandum addresses how the Supreme Court's December 10, 2003 decision upholding most major features of the Bipartisan Campaign Reform Act ("BCRA"), *McConnell v. FEC,* 124 S. Ct. 619 (2003), may affect the prospects for NVRI's Vermont and Albuquerque cases and the overall effort to revisit the constitutionality of campaign spending limits.

Although a detailed description of the lengthy *McConnell* decision is beyond the scope of this memorandum, brief background is necessary. At issue in *McConnell* were numerous provisions of BCRA, which was enacted to address the many problems stemming from unlimited "soft-money" contributions to political parties. Such soft-money contributions often came in the form of donations of hundreds of thousands – or even millions – of dollars by corporations and wealthy individuals. Because the FEC allowed parties to use soft money to fund media advertisements so long as the ads did not contain "express advocacy" – i.e., so long as the ads avoided words such as "vote for", "vote against", and the like – these unlimited donations became a major source of funding for elections.

BCRA was enacted to close that major loophole. Its two central provisions (1) banned unlimited "soft-money" donations to federal political parties, subjecting all donations to dollar limits (Title I of BCRA); and (2) barred corporations and unions from spending general treasury funds on "electioneering communications" – defined to cover a much broader range of campaign advertisements than those merely using the "magic words" of express advocacy (Title II of BCRA). In *McConnell*, the Supreme Court upheld these key provisions of BCRA as well almost all of the other BCRA provisions challenged in the lawsuit.

Of course, BCRA does not place limits on the amount of money candidates may spend on their campaigns, and accordingly the *McConnell* decision had no occasion to address directly the constitutionality of such limits. Nevertheless, several aspects of the decision deserve discussion for the light they may shed on this question. In brief, *McConnell* in no way forecloses the arguments NVRI has put forward to support the constitutionality of campaign expenditure limits, and some of the Court's analysis is

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[1] *Landell v. Sorrell,* No. 00-9159, currently is pending in the Second Circuit; *Homans v. City of Albuquerque*, No. 02-2244, currently is pending in the Tenth Circuit.

quite supportive of those arguments. To mention just a few of these points, the *McConnell* decision:

(1) appears to confirm that limits on campaign spending are subject to close scrutiny but are not unconstitutional *per se;*
(2) shows the Court's willingness to take into account factual developments since *Buckley* in assessing the continuing viability of *Buckley*'s analysis;
(3) adopts a broad view of corruption, finding that curbing "undue influence" of money on legislative policy is a basis for campaign finance regulation; and
(4) recognizes that BCRA will not be the last word on necessary campaign finance regulation.

All of these aspects of *McConnell* may auger well for the constitutionality of limits on campaign spending.

1. McConnell Does Not Suggest that Spending Limits Are Unconstitutional *Per Se.*

In striking down the expenditure limits at issue in *Buckley*, the Court held that limits on spending must be subjected to closer judicial scrutiny than limits on campaign contributions, reasoning that spending limits involve direct restraints on speech while contribution limits do not. In NVRI's current cases defending spending limits in Vermont and Albuquerque, our opponents have argued that the scrutiny required by *Buckley* is not merely strict, but fatal: they interpret *Buckley* as precluding any court from upholding campaign spending limits regardless of the facts or interests put forth to support them. NVRI has argued, to the contrary, that the exacting scrutiny required by *Buckley* is not the same as a *per se* rule making spending limits automatically unconstitutional. While our arguments in the Vermont and Albuquerque cases accept the distinction between contribution limits and spending limits, and acknowledge that spending limits require more exacting scrutiny, we contend that strict scrutiny means just that: scrutiny, not automatic invalidation. Because the Supreme Court, in the 27 years since *Buckley,* has not confronted another case involving limits on candidates' campaign spending, it has not spoken further on whether spending limits are unconstitutional *per se.*

McConnell does not purport to resolve this issue, but its description of the distinction between spending limits and contribution limits is consistent with NVRI's view of *Buckley.* The *McConnell* Court stated: "In Buckley and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions." 124 S.Ct. at 655 (emphasis added).[2] It would be odd to

[2] Unless otherwise noted, citations are from the majority opinion co-authored by Justices Stevens and O'Connor, and joined by Justices Souter, Breyer, and Ginsburg.

describe the distinction between spending limits and contribution limits in this manner if the Court believed that spending limits could not conceivably be upheld under any set of circumstances. The distinction is comparative, not absolute, as described in *McConnell*. The *McConnell* Court, however, was not called upon to explore further the implications of the "closer scrutiny" required for campaign expenditure limits.

2. The *McConnell* Court Was Willing To Take Into Account Factual Developments Since *Buckley* In Assessing The Continuing Viability Of *Buckley's* Analysis.

One of NVRI's key arguments in support of campaign spending limits is that the courts must take note of post-*Buckley* developments when assessing the justifications for imposing limits on spending. The *McConnell* Court was called upon to make a similar assessment of whether post-*Buckley* developments affected its analysis of the issues presented by BCRA. The *McConnell* Court was highly receptive to such arguments.

Most notably, the *McConnell* decision acknowledged that *Buckley*'s distinction between "express advocacy" and "issue advocacy" had been undermined by developments of the last 27 years, particularly by the emergence of sham "issue ads." *Buckley* had held that, to avoid potential First Amendment problems of vagueness and overbreadth, one of FECA's definitions must be interpreted to encompass regulation only of "express advocacy," not "issue advocacy." "Express advocacy," as defined in *Buckley,* referred to advocacy using words such as "vote for," "vote against", "support," "oppose," or their close synonyms. In the years after *Buckley*, this distinction, along with the soft-money loophole created by the FEC, began to be exploited by political parties and other groups who created ads that eschewed the *Buckley* "magic words" yet clearly were understood by voters to advocate a candidate's election or defeat – so-called "sham issue ads."

The *McConnell* Court unequivocally recognized that developments since *Buckley,* as revealed in the record compiled by BCRA's defenders, called upon the Court to reconsider *Buckley* 's treatment of "issue advocacy." As *McConnell* stated:

> Indeed, the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that Buckley's magic-words requirement is functionally meaningless. [124 S. Ct. at 689]
>
> Buckley's express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system. [*Id.*]

The *McConnell* Court's willingness to take a practical view of post-*Buckley* developments, and to consider the lessons derived from a new and different factual

record, are clearly hopeful signs that the Court may be willing to be guided by new evidence in assessing the constitutionality of other campaign finance regulations, including spending limits.

3. The *McConnell* Court Adopted a Broad View of Corruption, Finding That Curbing "Undue Influence" of Money on Legislative Policy Is a Basis for Campaign Finance Regulation.

The *McConnell* decision adopts a broad view of the kinds of evils Congress (and, by extension, state and local governments) may combat under the rubric of deterring corruption and its appearance. The Court specifically rejected arguments that government must bring forward evidence of actual quid pro quo corruption as a basis for any campaign finance regulation, instead endorsing the view that the danger of undue influence on legislative policy is a sufficient basis for action:

> Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation. [124 S.Ct. at 666]

Of equal importance to the broad view of corruption adopted by the Court was the Court's willingness to be guided by "the realities of political fundraising exposed by the record in this litigation" in reaching its judgment. *Id.* at 665 ("[The dissent's] crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation").

The records developed by NVRI in both the Vermont and Albuquerque cases carefully demonstrate how unlimited campaign spending fosters both the reality and appearance that money unduly influences legislative policy. For example, we have documented how a regime of unlimited spending fosters the practice of "bundling," which makes contribution limits alone ineffective. A corporation, for example, may ask its executives and employees (and their spouses) to make contributions to a candidate during a particular time period or at a fundraising event. Although the contributions come from individuals, candidates understand the role of the corporation (or industry) in raising such large aggregate donations. The evidence in both cases included testimony by current and former elected officials or expert witnesses describing how such industry-controlled fundraising efforts affect pending or proposed legislation. Furthermore, the donations in question are hard-money donations, meaning that

restrictions on soft money do nothing to address this practice (and indeed, BCRA has made the problem much worse at the federal level by raising the individual hard-money contribution limit to $2,000 per election). Limiting overall campaign spending – and thus removing the necessity of relying on such aggregated donations from special interests – thus remains necessary to address comprehensively the problem of undue influence exercised by wealthy interests.

4. The *McConnell* Court Recognized That BCRA Will Not Be The Last Word On Necessary Campaign Finance Regulation.

One of the most important passages in the *McConnell* majority opinion may well be its closing words:

> Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." We abide by that conviction in considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system. We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.

124 S. Ct. at 706 (citation omitted). In sweeping language, the Court acknowledged the reality that no single reform – and no single court decision – can lay to rest the problem of money in politics. That Justice O'Connor joined in such a broad expression of the Court's openness to addressing new solutions to new campaign finance problems is particularly encouraging, suggesting a turning point in the Court's willingness to balance First Amendment interests against the strong governmental interest in protecting the integrity of democratic governance. The decision thus only strengthens NVRI's view that now is the time to press forward in our legal campaign to revisit *Buckley*'s holding on campaign expenditure limits.