No. 04-413

In the Supreme Court of the United States

THE CITY OF ALBUQUERQUE, *ET AL.*, PETITIONERS

V.

RICK HOMANS AND SANDER RUE, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE HONORABLE SENATORS ERNEST F. HOLLINGS, THEODORE F. STEVENS, ROBERT C. BYRD, JOHN F. REED, DIANNE E. FEINSTEIN, CHARLES E. SCHUMER, CHRISTOPHER J. DODD, AND ARLEN SPECTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Dated: October 25, 2004

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INTEREST OF THE AMICI CURIAE

With the attached written consent of all parties, the Honorable Senators Ernest F. Hollings, Theodore F. Stevens, Robert C. Byrd, John F. Reed, Dianne E. Feinstein, Charles

[1] Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity other than counsel for the *amici curiae* made any monetary contribution to the preparation or submission of this brief.

E. Schumer, Christopher J. Dodd, and Arlen Specter[2] (collectively, the "Amici Members") submit this brief in support the Petitioners' request for a writ of certiorari. The Amici Members have campaigned for elected office under the current federal system of unlimited campaign expenditures and have witnessed firsthand the effects of this system on the fulfillment of elected duties and the public's faith in representative democracy. As former Governors, Lieutenant Governors, state legislators and city officials, Amicus Members understand the importance of preserving the flexibility of state and local governments to craft legislative solutions that serve compelling governmental interests.

SUMMARY OF ARGUMENT

The Court should grant Petitioners' request for a writ of certiorari to resolve a clear circuit conflict regarding the extent to which this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) permits legislative bodies to determine that campaign spending limits serve compelling governmental interests, and to craft limits that will serve those interests while preserving effective political speech.

Unlike a recent and conflicting decision of the Second Circuit, the Tenth Circuit has interpreted *Buckley* to prohibit the City of Albuquerque from enacting candidate campaign spending limits as a matter of law. This effectively reads *Buckley* to preclude any future legislative deliberation at the local level – or at the state or federal levels, for that matter –

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[2] The Honorable Senator Specter agrees that the requested writ should be granted. While he believes that campaign spending limits can be constitutional, his joining in this brief should not be construed as evincing his full agreement with its contents.

concerning whether campaign spending limits might ever be justified to protect the integrity of the electoral process, the effective functioning of representative government, and the public's faith in democracy itself. The Tenth Circuit incorrectly interpreted *Buckley* to prohibit any legislative action in this area. If the Tenth Circuit correctly interpreted *Buckley*, then *Buckley* should be reconsidered against the ensuing 28-year record of the corrosive and disruptive impact of unfettered campaign spending, and the post-*Buckley* decisions permitting legislative bodies greater flexibility to craft campaign finance systems.

ARGUMENT

I. **The Threats Posed by Unlimited Campaign Spending.** Since this Court's *Buckley* decision, campaigns for federal elected office have been conducted with strict limits on the amount of money that may be contributed by any individual to a candidate's campaign, but with no limits whatsoever on the total amounts candidates may spend on their own campaigns. As periodic participants in the federal election cycle, the Amici Members are intimately familiar with the real-world implications of this bifurcated system.

The Petitioners' description of modern-day campaign fundraising as an "arms race . . . in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent," Petition for Writ of Certiorari ("Petition") at 3, finds ample support in both the ever-rising cost of conducting campaigns for federal office and the experiences of the Amici Members. According to the Federal Election Commission, Congressional candidates spent more than $1 billion on campaigns during the 1999-2000 election cycle, up from approximately $340 million in the 1981-1982 cycle. *See* News Release, Federal Election Commission, FEC Reports on Congressional Financial Activity for 2000 (May 15, 2001), *available at*

http://www.fec.gov/press/press2001/051501congfinact/051501congfinact.html. The average House candidate spent almost $275,000, and the average Senate candidate more than $1.3 million. *Id.* According to the Center for Responsive Politics, in more than half of Congressional districts, the winner outspent the second-highest vote-getter by a factor of at least ten to one; in approximately 85 percent of districts, the winner spent at least double the amount spent by the runner-up. *See* Center for Responsive Politics, *The Big Picture: Winning vs. Spending, 2000 Cycle*, *at* http://www.opensecrets.org/bigpicture/bigspenders.asp?cycle=2000 (last visited Oct. 21, 2004). Similarly, winners spent at least twice as much as second-place finishers in more than half of Senate races. *See id*.

Candidates for federal elected office fully understand the correlation between total campaign expenditures and their prospects for victory. They also fully expect their competitors to amass the largest possible campaign war chests, and thus are under considerable pressure to amass even larger war chests themselves. Moreover, candidates are all too aware that, given the strict limits that federal campaign finance laws place on individual contribution amounts, they must seek out and obtain as many individual contributions as possible.

Special interests of all stripes also understand the practical challenges candidates face in financing ever-more-expensive campaigns with restricted individual contributions. It is not surprising, therefore, that the phenomenon of "bundling" has become ever more prevalent. *See* Petition at 3 & n.2. Through bundling, individuals and organizations that otherwise would be restricted in their campaign contributions are able to associate their names, and

their agendas, with large aggregations of individual contributions.[3]

Given the restrictions placed upon "soft money" contributions by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the efforts of special interests to bundle restricted individual contributions, and to present them to current and potential makers of policy as their handiwork, should be expected to increase. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, __, 124 S. Ct. 619, 706 (2003) ("Money, like water, will always find an outlet.").[4] Moreover, if history is any indicator, there can be little doubt

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[3] In the 2002 election cycle, for example, large corporations and political interest groups alike amassed contributions in the hundreds of thousands of dollars, bundled those contributions, and presented them to the campaigns of individual candidates for the Senate, both Republican and Democrat. *See* News Release, Federal Election Commission, FEC Releases Congressional Fundraising Summary (Sept. 9, 2002), *available at* http://www.fec.gov/press/press2002/20020909canstats/20020909canstat.html. In recent Presidential races, the major party candidates have bestowed special distinction upon those able to amass significant amounts of restricted individual contributions. *See, e.g.*, Tom Humphrey, "Bush's bundlers best Kerry's collectors," *The Knoxville News-Sentinel*, Sept. 26, 2004, at A1 (describing Bush campaign's "ranger" designation for bundlers of at least $200,000, and Kerry campaign's "trustee" designation for bundlers of at least $250,000).

[4] Humphrey, *supra* n. 3 (quoting corporate CEO: "It's put more of a premium on getting money from a number of people, [b]ut basically, I think it's just a new set of ground rules that I think fund-raisers have adapted to. That's the way you play the ballgame."); Peter H. Stone, "The Return of Hard Money," *Nat'l J.*, Oct. 19, 2002 (quoting former party official and current lobbyist: "I think you'll see major corporations and trade associations do a lot of bundling.").

that special interests will increasingly use bundling as a mechanism for obtaining access to, and seeking influence over, makers of federal policy. Indeed, one anonymous party fundraiser was admirably candid about why, after BCRA, special interests should be expected to devote increased attention and effort to bundling: "'This law will further elevate the check raisers' . . . . Those who are most successful in the pursuit of hard money will, like soft-money donors before them, 'get access to elected officials and administration people[.]'" Stone, *supra* n.4.[5]

The Amicus Members can attest to the difficulty of providing access to all of their constituents, as there are only so many hours in each day. In allocating those hours, the pressure to respond to the inquiries of constituents who are campaign contributors – and, in particular, to those who have the ability to secure and aggregate the restricted individual contributions of others – is inescapable. As former Senator Paul Simon aptly put it:

> I have never promised anyone a thing for a campaign contribution. But if I end up at midnight in a hotel and there are 20 phone calls waiting for me, 19 of them from names I do not recognize, the 20th is

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[5] Bundling-for-access is not a strictly federal phenomenon. *See, e.g.*, Ted Sherman, "Special-interest cash greases political wheels," *The Star-Ledger (Newark, N.J.)*, Oct. 21, 2001, at 1 (quoting local Republican party chairman in New Jersey: "I think both parties collect money from professionals; lawyers and engineers who hope to do business with the town or county. There is no secret about that"; also quoting head of county Democratic Party organization in New Jersey: "You rely on money from the traditional vendors – architects, engineers and attorneys who want to have a record of giving to the parties").

> someone who gave me a $1,000 campaign contribution – at midnight I am not going to make 20 phone calls. I might make one. Which one do you think I am going to make? The reality is you feel a sense of gratitude to people who are generous enough, and obviously wise enough, to contribute to your campaign. But it means that the financially articulate have inordinate access to policymakers.

142 CONG. REC. S6680, 6696 (daily ed. June 24, 1996) (statement of Sen. Simon on S. 1219).[6] In combination, the practical need to triage responses to constituents and the ability of some constituents to fuel the engine of unlimited fundraising create a real risk that bundlers will gain favored access to elected representatives.

The need for elected officials to amass ever-increasing campaign war chests not only creates an environment of preferred special-interest access, but also makes it increasingly difficult for elected officials to attend to the duties they have been elected to fulfill. The Amici Members can attest that time spent collecting as many limited individual contributions as possible is a significant imposition upon time that otherwise could be spent doing the critical work of Congress. Members cannot be on the floor participating in the marketplace of ideas when they are away from Washington competing in the marketplace for campaign funds. History has demonstrated that both Member attendance and the length of the legislative

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[6] *See also* 142 CONG. REC. S377, 384 (daily ed. Jan. 25, 1996) (statement of Sen. Bradley on S. 1528 & S.J. Res. 47) ("Congress, except in unusual moments, will inevitably listen to the 900,000 Americans who give $200 or more to their campaigns ahead of the 259,600,000 who don't.").

workweek have decreased as aggregate campaign expenditures have increased.[7] Accordingly, the race for unlimited campaign funds has a fundamentally distorting and disruptive impact on the core functioning of representative democracy. Although bundling helps relieve the time pressures Members of Congress face, it undermines another vital governmental interest by exacerbating the perception of preferred special-interest access.

The concerns expressed by the Amici Members in this brief are not new. Since *Buckley*, at least 15 pieces of legislation have been introduced on the floor of the House or the Senate to address the risks presented by unlimited campaign spending.[8] In floor debate on these bills, Members

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[7] *See* 147 CONG. REC. S2853, 2863 (daily ed. Mar. 26, 2001) (statement of Sen. Hollings on S.J. Res. 4) ("There is no doubt that our current campaign finance system has bred absenteeism in the Senate chamber. We no longer arrive to work at 9 o'clock in the morning on Monday and struggle to close shop by 5 o'clock in the afternoon on Friday like we once did. Now on Monday and on Tuesday morning, there is no real floor debate because so many people are out raising money. On Wednesdays and Thursdays, we request time windows so that we can do more fund raising. And then as soon as Friday rolls around, we bolt from the starting blocks for another leg in the money race. If curing this sickly system isn't in the governmental interest, then I don't know what is.").

[8] *See* S. 1684 & S. 1185 (98th Congress); S. 59 (99th Congress); H.R. 2473 (100th Congress); H.R. 1456 (101st Congress); H.R. 3571 & H. Res. 168 (103d Congress); H.R. 3651 & H.R. 3658 (104th Congress); S. 1057, H.R. 77, H.R. 243, H.R. 1366, H.R. 3851 (105th Congress); S. 1502 (106th Congress). In addition, numerous resolutions have been introduced seeking to amend the Constitution explicitly to permit reasonable expenditure limits in campaigns for federal elected office. *See* S.J. Res. 313 (99th Congress); S.J. Res. 21 & S.J. Res. 282 (100th Congress); S.J. Res. 48 (101st Congress); S.J. Res. 35 & S.J. Res. 60 (102d Congress); S.J. Res. 10 & S.J.

of Congress have repeatedly noted the pressures to provide favored access to the special interests that fund the feeding frenzy of unlimited election spending.[9] Members also have

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Res. 37 (103d Congress); S.J. Res. 18 (104th Congress); S.J. Res. 2, S.J. Res. 18 & H.J. Res. 119 (105th Congress); S.J. Res. 6 (106th Congress); S.J. Res. 4 & S.J. Res. 33 (107th Congress); S.J. Res. 5 (108th Congress).

[9] *See* 131 CONG. REC. S74 (daily ed. Jan. 3, 1985) (statement of Sen. Goldwater on S. 59) ("Mr. President, my concern is that unchecked, runaway campaign spending is corrupting the political process by making candidates vulnerable to special interest influence and creating the impression of undue influence even where it may not exist."); 143 CONG. REC. S2379, 2380 (daily ed. Mar. 18, 1997) (statement of Sen. Byrd on S.J. Res. 18) ("The American people believe that the way to gain access and influence on Capitol Hill is through money. And the American people are exactly right. The way to gain access on Capitol Hill, the way to get the attention of Members of this body is through money."); 145 CONG. REC. S10391, 10395 (daily ed. Aug. 5, 1999) (statement of Sen. Reed on S. 1502) ("I believe that the biggest culprit fueling the public perception that politicians, political parties and representational government is beholden to special interests, not the needs of the average citizen, is our campaign financing system. When politicians depend upon wealthy special interests, which represent less than one percent of the citizenry, for the political contributions that fuel campaigns the public is left to conclude that its voice will not, cannot, be heard, never mind addressed."); 147 CONG. REC. S2853, 2877 (daily ed. Mar. 26, 2001) (statement of Sen. Biden on S.J. Res. 4) ("I defy anyone to look me in the eye and say they believe all this additional money in the electoral process is not polluting and corrupting the process. It puts honorable young women and men . . . who are getting into the process in the position of shaving their views very nicely before they get there. No one is going to pay them off, but they are not stupid."); 148 CONG. REC. S1991, 1992 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold on BCRA) ("Every day Members of Congress accept huge campaign contributions with one hand and vote on issues affecting

repeatedly warned of the potential for neglect of elected duties presented by the pressure to amass enormous campaign funds.[10]

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their contributors with the other. And, every day the public naturally questions whether their Representatives are giving special treatment to the wealthy interests that fund their campaigns and bankroll their political parties.").

[10] *See* 131 CONG. REC. S74 (daily ed. Jan. 3, 1985) (statement of Sen. Goldwater on S. 59) ("[T]he demands of the fundraising treadmill will force more and more office holders to neglect their duties to patronize big donors and PAC events around the Nation. The 3-day legislative week is already becoming commonplace in Washington, DC, so that Members can escape town to fulfill the never-ending quest for campaign funds."); 142 CONG. REC. S6680, 6696 (daily ed. June 24, 1996) (statement of Sen. Simon on S. 1219) ("Frequently people who visit here, Mr. President, are astounded at the few numbers of Senators who are on the floor. I think they would be more astounded and more outraged if they knew [that] right now, this minute, there are more Senators raising money than are on the floor of the Senate . . . . It is a usurpation of the time that we ought to be devoting to issues . . . ."); 143 CONG. REC. S2382, 2383 (daily ed. Mar. 18, 1997) (statement of Sen. Hollings on S.J. Res. 18) ("This obsession with money distracts from the people's business. It corrupts and degrades the entire political process."); 144 CONG. REC. H4443, 4463 (daily ed. June 10, 1998) (statement of Rep. Gephardt on H.J. Res. 119) ("The Founding Fathers . . . certainly could not have imagined the non-stop fundraising carousel that candidates must ride in order to run for office."); 147 CONG. REC. S2853, 2856 (daily ed. Mar. 26, 2001) (statement of Sen. Hollings on S.J. Res. 4) ("We can't get any work done . . . . We can't give people the time they deserve working at the job of being a U.S. Senator because we have to work at the job of staying a U.S. Senator."); *id*. at S2857 (statement of Sen. Byrd) ("It is a vicious circle that requires candidates to spend more and more time raising money and less and less time listening to the people and working for the people, once they are elected, whom they wish to represent."); *id*. at S2862 (statement of Sen. Dodd) ("I regret there

The most compelling victim of limitless campaign spending is public faith in the integrity of the political process, a faith upon which the very health of that process depends. The public cannot help but perceive corruption.[11] Former Senator Paul Wellstone articulated this well:

> I think all of us should want to change this system because I think, when we are involved in the fundraising, the perception – and I do not accuse one colleague here of any individual corruption – but the perception of people is often that we are out there raising money from this person or that person or this

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are not more Members here to engage in this debate today . . . . [P]eople are probably out holding fundraisers all across the country.").

[11] *See McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 513 (D.D.C.) (summarizing polling data showing that (1) 75 percent of Americans "believe that big contributions to political parties have at least some impact on decisions made by the federal government"; (2) 71 percent "think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or even if it's not what they think is best for the country"; (3) 84 percent "think that members of Congress will be more likely to listen to those who give money to their political party in response to their solicitation for large donations"; (4) 68 percent "think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives"; (5) 80 percent "think a Member of Congress would be likely to give special consideration to the opinion of an individual, issue group, corporation, or labor union who donated $50,000 or more to their political party"; and (6) only 24 percent "think that a member of Congress is likely to give the opinion of someone like them special consideration"), *aff'd in part and vacated in part*, 540 U.S. 93, 124 S. Ct. 619 (2003).

> PAC or that PAC, and people just simply lose confidence in the political process. All of us who care fiercely about public service, all of us who care fiercely about good politics, all of us who are proud to serve in the U.S. Senate ought to be concerned about the fact that people have lost confidence in this process.

142 CONG. REC. S6680, 6689 (daily ed. June 24, 1996) (statement of Sen. Wellstone on S. 1219).[12] The Amici Members believe that, given the current state of affairs, unlimited campaign spending should no longer be deemed a constitutional necessity, if it ever was.

II. **The Albuquerque Experiment with Limited Campaign Spending.** The City of Albuquerque, New Mexico amended its charter in 1974 to limit candidate expenditures on campaigns for city office to the salary of the office sought, an amount that in 1999 was increased to twice the salary of the office. *See Homans v. City of Albuquerque*, 217 F. Supp. 2d 1197, 1200 (D.N.M. 2002), *aff'd*, 366 F.3d 900 (10th Cir. 2004). Ninety percent of Albuquerque voters approved the initial decision to restrict campaign spending. *See Homans v. City of Albuquerque*, 366 F.3d 900, 902 (10th

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[12] *See also* 142 CONG. REC. S9471, 9472 (daily ed. Aug. 2, 1996) (statement of Sen. Feingold) ("The voters have become inherently mistrustful of any individual elected to public office because they know that individual is now part of the Washington money chase, where their principal goal as an elected official sometimes looks like not representing their communities but, instead, raising the requisite millions of dollars for their reelection efforts."); 146 CONG. REC. S1793, 1795 (daily ed. Mar. 28, 2000) (statement of Sen. Lieberman on S.J. Res. 14) ("Money and the never ending chase for it are threatening the integrity of our political system and jeopardizing the essence of our democracy.").

Cir. 2004). In the ensuing years, Albuquerque has operated as a rare post-*Buckley* laboratory for measuring the effects of reasonable limits on campaign expenditures. The record of the Albuquerque experiment illustrates both that robust and competitive elections can flourish in the presence of carefully crafted spending limits, and that such limits can serve to enhance public faith in representative democracy.

The District Court in *Homans* found that voter turnout for the City's elections between 1974 and 1999 was approximately 40 percent, compared to an average turnout of 25 to 35 percent in cities without expenditure limits. *Homans*, 217 F. Supp. 2d at 1201. When the City's expenditure limits were temporarily suspended by court injunction in 1997, voter turnout decreased substantially. *Id.* at 1200. Despite the oft-stated concern that campaign spending limits promote incumbency, Albuquerque has *never* re-elected an incumbent Mayor since the limits were put in place, whereas 88 percent of incumbent mayors nationwide were reelected in 1999. *Id.* Many successful mayoral candidates in Albuquerque have spent far less than the maximum expenditures permitted. *Id.* at 1200-01. By contrast, in the 2001 Mayoral election, in which the expenditure limits were enjoined by the District Court, three candidates each spent far more than those limits. *Id.* at 1202, 1203.

As the District Court also found, of City voters surveyed, only 23 percent strongly believed that elections for City office are overly influenced by special-interest money, while 57 percent strongly believed that federal elections are so influenced. *Id.* at 1201. By a margin of more than two to one, the voters surveyed responded that the City's spending limits improved the fairness of elections. *Id.* at 1202. By contrast, most of the City's voters believed that removing the spending limits would increase the potential for corruption

and lead elected officials to spend more time soliciting contributions from, and entertaining the views of, special interests. Brief for Appellants at 13, *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004) (No. 02-2244). Fifty-nine percent of surveyed Albuquerque voters said they would have "less faith in the integrity of the election process in Albuquerque" if spending limits were removed. *Id.* Thus, it is not surprising that 82 percent of surveyed Albuquerque voters favored maintaining spending limits in City elections. *Homans*, 217 F. Supp. 2d at 1200-01.

III. **The Tenth Circuit's Decision and an Earlier Sixth Circuit Decision Conflict with a Recent Second Circuit Decision Holding that Vermont's Campaign Spending Limits Serve Compelling Governmental Interests.** A writ of certiorari is appropriate to resolve the conflict among the circuits over whether, after Buckley, campaign spending limits can ever be narrowly tailored to serve compelling governmental interests. Unless this conflict is resolved, legislators at the local, state, and federal levels will lack clear guidance on whether campaign spending restrictions can ever be constitutionally permissible.

The majority opinion of the Tenth Circuit on the merits of Albuquerque's spending limits (set forth in the concurrence of Judge Tymkovich) held that, in light of *Buckley*, campaign expenditure restrictions "cannot be supported as a matter of law." *Homans*, 366 F.3d at 902, 914. The court took a "quid pro quo" view of corruption – "dollars for political favors" – and reasoned that "expenditures by a candidate to promote the candidate's political agenda do not pose a particular risk of corrupting the *candidate* making the expenditure." *Id.* at 916 (citations omitted, emphasis in original). *But see McConnell*, 540 U.S. at __, 124 S. Ct. at 664 ("Our cases have firmly established that Congress' legitimate interest extends beyond preventing

simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'") (quoting *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)). Thus, the Tenth Circuit found "no basis to retreat from *Buckley's* essential teaching that campaign spending restrictions are not narrowly tailored to further the governmental interest in reducing corruption." *Homans*, 366 F.3d at 917.

The Tenth Circuit also rejected the other interests advanced by Albuquerque in support of the campaign spending limits – including the "preservation of officeholder time" – as "neither new nor compelling." *Id.* at 914. The court opined that "*Buckley* forecloses a finding that spending limitations can be narrowly tailored to further governmental justifications other than the anti-corruption interest sustained by the Supreme Court, no matter what evidence may be presented." *Id.* at 916. In particular, the court viewed Albuquerque's arguments concerning distraction of elected officials as indistinguishable from the interest in "controlling the costs of campaigns" rejected in *Buckley*. *Id.* at 918.[13]

By contrast, the Second Circuit recently held that *Buckley* does not foreclose the possibility that Vermont's

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[13] In reaching its decision, the Tenth Circuit explicitly agreed with the Sixth Circuit's decision in *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998). *Homans*, 366 F.3d at 914, 917, 918. Like the Tenth Circuit, the Sixth Circuit held in *Kruse* that "campaign spending limits cannot be justified by the anti-corruption rationale." *Kruse*, 142 F.3d at 915. The court also held that "the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending." *Id.* at 917.

restrictions on campaign spending might pass constitutional muster. *See Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *pet. for reh'g en banc filed* (2d Cir. Sept. 1, 2004). The Second Circuit read *Buckley* as a decision based on the record before the Court, not a ruling "that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations," *id.* at 107, and thus that, "like the federal expenditure limitations considered in *Buckley*, [Vermont's] expenditure limitations rise or fall on whether they have been narrowly tailored to a compelling governmental interest," *id.* at 110. Critically, the court found that Vermont's campaign spending limits served two interests that, taken together, were compelling: preventing the appearance of corruption by special interests, and the protection of the time of elected officials to interact with voters and perform their official duties. *Id.* at 124.

IV. **The Tenth Circuit Misinterpreted the Scope of *Buckley*.** *Buckley* did not forever hamstring legislators from finding that campaign spending limits serve compelling governmental interests, and from attempting to craft limits that preserve effective political speech. Rather, *Buckley* was decided on the record with which the Court was presented at the time – not the record of Albuquerque's experience, or the record of the deleterious effects of unfettered federal campaign spending in the 28 years since *Buckley* was decided. *See* 424 U.S. at 55. In particular, the Court believed the government's stated interest in preventing corruption or its appearance would be adequately served by the statute's contribution limits. *Id.* at 56-57 ("There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions."). The

Court also held that two other interests advanced by the government for the spending limits – equalizing the financial resources of candidates and "reducing the allegedly skyrocketing costs of political campaigns" – were legally insufficient. *Id.*

The Tenth Circuit's approach, which takes the *Buckley* Court's determinations on the record and morphs them into broad constitutional rules, is inconsistent with this Court's teachings on the scope of constitutional rulemaking and judicial review. *See McConnell*, 540 U.S. at __, 124 S. Ct. at 688 ("We have long 'rigidly adhered' to the tenet '"never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,"' for '[t]he nature of judicial review constrains us to consider the case that is actually before us.'") (citations omitted). The Tenth Circuit's approach is also fundamentally inconsistent with this Court's teachings on the nature of strict scrutiny, which is not "a straightjacket that disables Government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996).[14]

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[14] In particular, this Court has explicitly "dispel[led] the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted), and in fact has permitted restrictions of campaign expenditures after subjecting those restrictions to strict scrutiny, *see Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660-61 (1990) (holding that restrictions on independent corporate expenditures in political campaigns survived strict scrutiny). Because it exaggerated the *Buckley* Court's findings, the Tenth Circuit never actually subjected the Albuquerque limits to strict scrutiny. This was error.

The Tenth Circuit's reasoning, as applied to the matter before it, also undermines the invaluable role that state and local governments play in the federalist system. This Court has recognized that an important advantage of this system is that it "allows for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). By crafting campaign spending restrictions that both targeted the ills associated with unlimited spending and enhanced public faith and participation in the democratic process – and by creating a record of the results of its efforts – the City of Albuquerque has served as a laboratory for the Nation as a whole. *Buckley* should not and need not be interpreted to preclude at the outset future local or state experiments in this arena.

V. **The First Amendment Permits Legislative Bodies to Tailor Campaign Spending Limits Narrowly to Prevent the Appearance of Corruption and the Distraction of Elected Officials from Their Duties.** As discussed above, and as the Second Circuit has recognized, *Buckley* did not forever foreclose the anti-corruption and time-preservation interests as compelling in the context of campaign spending limits. If *Buckley* may be read to have done so, then it should be reconsidered.

This Court has clarified since *Buckley* that the compelling governmental interest in preventing corruption is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000); *see also McConnell*, 540 U.S. at __, 124 S. Ct. at 660. Moreover, this Court has emphasized that preventing even the appearance of corruption is a compelling governmental interest, as such an appearance "could jeopardize the willingness of voters to take part in democratic governance." *Shrink*, 528 U.S. at

390. The current system of federal campaign finance, with its limited individual contributions and unlimited campaign expenditures, has created an environment in which special interests sell bundled contributions for access, undermining the faith of the electorate in the fundamental fairness of the system. The Amici Members submit that there is no governmental interest more compelling than combating public perception that the essence of representative democracy is corrupted.

Further, there is a compelling governmental interest in ensuring that elected representatives perform the functions they have been elected to perform – an interest not only recognized by the Second Circuit as compelling in the campaign spending context, but also found compelling by this Court and other circuit courts in the context of public election financing. *See Buckley*, 424 U.S. at 96 ("Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions") (citations omitted); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). Furthermore, individual Justices of the Court have noted that protecting the time of elected officials may be a sufficiently compelling governmental interest to support campaign expenditure restrictions. *See Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting) (leaving open the possibility that "Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions thus permitting officeholders to concentrate their time and effort on official duties rather than on fundraising"); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 649-50 (1996) (Stevens, J., joined by Ginsburg, J., dissenting). Even if *Buckley* could be read to foreclose "time protection" as a

compelling governmental interest, *Buckley* was rendered "[b]efore the advent of pervasive war chests and candidate-PAC merchandising bazaars." *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1287 (1994).

The Amici Members have experienced firsthand the increasing difficulties faced by Congress in conducting the business of government when its individual Members must focus on waging an increasingly expensive campaign finance war.[15] Legislative bodies must retain the flexibility to combat this threat to the fulfillment of elected responsibilities.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Hon. Ernest F. Hollings	Hon. Theodore F. Stevens
Hon. Robert C. Byrd	Hon. John F. Reed
Hon. Dianne E. Feinstein	Hon. Charles E. Schumer
Hon. Christopher J. Dodd	Hon. Arlen Specter

October 25, 2004

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[15] *See* 143 CONG. REC. S2379, 2381 (daily ed. Mar. 18, 1997) (statement of Sen. Byrd on S.J. Res. 18) ("I served as majority leader from the years 1977 through 1980 and again in the years 1987 and 1988, and I served as minority leader during the 6 years in between. It was a constant problem to be a leader and to program the Senate and to operate the Senate, and became increasingly a problem because of . . . the needs of the money chase.").