

1 **UNITED STATES COURT OF APPEALS**
2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term 2004

6
7 Docket Nos. 00-9159 (L), 00-9180 (Con), 00-9231 (xap),
8 00-9239 (xap), & 00-9240 (xap)
9

10 At a stated term of the United States Court of Appeals for the
11 Second Circuit, held at the Thurgood Marshall United States
12 Courthouse, at Foley Square, in the City of New York, on the
13 11th day of May, two thousand and five.
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18 MARCELLA LANDELL,

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20 Plaintiff-Appellee,

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22 DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC.,
23 Political Committee, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD,
24 JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT
25 REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-
26 FUND FOR INDEPENDENT POLITICAL EXPENDITURES,
27

28 Plaintiffs-Appellees-Cross-Appellants,

29
30 -- v. --

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32 WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY,
33 LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE,
34 JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W. FLYNN, JAMES P. MONGEON,
35 TERRY TRONO, DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,
36

37 Defendants-Appellants-Cross-Appellees,

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39 VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF
40 VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT
41 ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL
42 HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL
43 PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA
44 THOMPSON,
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46 Intervenors-Defendants-Appellants-Cross-Appellees.
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3 **ORDER**

4 Plaintiff-appellee and plaintiffs-appellees-cross-appellants
5 filed a petition for rehearing with request for rehearing en banc
6 from the amended opinion of the panel filed on August 18, 2004.
7 A poll on whether to rehear the case en banc was conducted among
8 the active judges of the court upon the request of an active
9 judge of the court. Because a majority of the court's active
10 judges voted to deny rehearing en banc, rehearing en banc was
11 **DENIED** by order of the court filed on February 11, 2005, and
12 amended on April 11, 2005, and April 20, 2005.

13 The court hereby **AMENDS** that order to reflect that, upon
14 consideration by the panel that decided the appeal, as of the
15 date of that order, the petition for rehearing was **DENIED**. Judge
16 Winter dissents from the denial of rehearing.

17
18 The court also **AMENDS** the February 11, 2005, order to
19 reflect (1) the opinions concurring in the court's denial of
20 rehearing en banc filed by Judge Calabresi, Judges Straub and
21 Pooler, and Judges Sack and Katzmann, and (2) the opinions
22 dissenting from the court's denial of rehearing en banc filed by
23 Chief Judge Walker, Judge Jacobs, Judge Cabranes, and Judge
24 Raggi.

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26 Judges Calabresi, Straub, Pooler, Sack, Sotomayor, Katzmann,
27 and B.D. Parker concur in the denial of rehearing en banc. Chief
28 Judge Walker and Judges Jacobs, Cabranes, Raggi, and Wesley
29 dissent from the denial of rehearing en banc. With this order,
30 Judge Calabresi is filing a concurring opinion; Judges Straub and
31 Pooler are filing a concurring opinion; Judges Sack and Katzmann
32 are filing a concurring opinion, in which Judges Sotomayor and
33 B.D. Parker join; Chief Judge Walker is filing a dissenting
34 opinion, in which Judges Jacobs, Cabranes, and Wesley join; Judge
35 Jacobs is filing a dissenting opinion, in which Chief Judge
36 Walker and Judges Cabranes and Wesley join; Judge Cabranes is
37 filing a dissenting opinion, in which Chief Judge Walker and
38 Judges Jacobs and Wesley join; and Judge Raggi is filing a
39 dissenting opinion.
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42 FOR THE COURT:
43 Roseann B. MacKechnie, Clerk
44

45 By: _____
46 Richard Alcantara, Deputy Clerk

1 CALABRESI, *Circuit Judge*, concurring in the denial of rehearing
2 en banc.

3 I.

4 The prudential reasons given in the thoughtful opinion of
5 Judge Sack and Judge Katzmann, *infra* at 14, would, in themselves,
6 justify concurring in a denial of a rehearing en banc. I write
7 separately, though, because I have an additional and rather
8 different reason for voting against such a rehearing.

9 It seems to me that there are two principal values at play
10 in the campaign finance debate. One is the desire to let
11 individuals express the intensity of their political feelings,
12 and to do so in a very particular way – that is, through money in
13 the form of either campaign expenditures or contributions. This
14 value has been consistently treated as deserving of First
15 Amendment protection. *See, e.g., McConnell v. Federal Election*
16 *Commission*, 540 U.S. 93, 134-38 (2003); *Buckley v. Valeo*, 424
17 U.S. 1, 19-22 (1976). Nonetheless, it is not absolute. For
18 example, no one argues that a state is precluded from prohibiting
19 the purchase of votes, even though buying votes amounts to the
20 most direct way in which intensity of feeling can be expressed
21 through the use of money. *See* 42 U.S.C. § 1973i(c). *Cf. Brown*
22 *v. Hartlage*, 456 U.S. 45, 54-55 (1982).¹

¹ One could argue that *Buckley* expressed skepticism toward characterizing “intensity” of political feeling, as manifested by the amount of money spent, as an *independent* First Amendment value. Thus, with respect to political contributions, *Buckley*

1 The other value is the deeply felt desire not to have the
2 wealthy be able to influence elections more than the poor.² This
3 value, however, has two distinct aspects. The first is the

stated that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Moreover, even with respect to campaign expenditures, much of *Buckley's* focus was on the impact that restricting the purchase of speech, by a candidate or other advocate, would have on the "marketplace of ideas," rather on the diminishment of the speaker's unilateral right to communicate his or her belief, and the intensity thereof. See, e.g., *id.* at 19-20, 47-48, 52-53.

Nevertheless, and at times in tension with its statements concerning "undifferentiated, symbolic" acts of contribution, the *Buckley* Court clearly stated that the *quantity* and *volume* of individual political expression through contributions and expenditures was a protected First Amendment interest. Thus, in invalidating limitations on independent expenditures (often made by PACs), *Buckley* noted that the restrictions "preclude[d] most associations from *effectively amplifying the voice of their adherents*," and therefore were not only an interference with the groups' speech rights, but were "simultaneously an interference with the freedom of (their) adherents." *Id.* at 22 (internal quotations and citation omitted) (emphasis added). *Buckley* also said that spending caps directly interfere with the spender's "right to speak" his or her mind and "to engage in vigorous advocacy" in the course of an election, and it described these as rights that are "no less entitled to protection under the First Amendment than the discussion of political policy generally." *Buckley*, 424 U.S. at 48 (internal quotations and citations omitted); see also *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) ("[F]or purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more than \$1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.").

² My "wealthy" and "poor" nomenclature is, of course, shorthand. The same analysis applies with as great of force to members of the middle class.

1 generalized egalitarian desire not to advantage one group in
2 society over another. The second – which is inextricably linked
3 to the “intensity of expression” value and hence partakes of its
4 First Amendment attributes – is that, given the unequal
5 distribution of wealth, money does not measure intensity of
6 desire equally for rich and poor. In other words, and crucially,
7 a large contribution by a person of great means may influence an
8 election enormously, and yet may represent a far lesser intensity
9 of desire than a pittance given by a poor person. *Cf. Federal*
10 *Election Commission v. Massachusetts Citizens for Life, Inc.*, 479
11 U.S. 238, 257-58 (1986) (discussing the “threat” posed to the
12 “political marketplace” by corporate spending where “[t]he
13 resources in the treasury of a business corporation” do not
14 directly correlate to intensity of “popular support for the
15 corporation’s political ideas”). This way of looking at things
16 is anything but new. *See, e.g., Luke 21:3-4* (English Standard
17 Version) (“Truly, I tell you, this poor widow has put in more
18 than all of them. For they all contributed out of their
19 abundance, but she out of her poverty put in all she had to live
20 on.”).³ Significantly, though, this second aspect is reflective

³ *See also Buckley*, 424 U.S. at 21-22 & n.22 (noting that “[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor’s support for the candidate,” and that “[o]ther factors relevant to an assessment of the ‘intensity’ of the support indicated by a contribution include the contributor’s financial ability and his past contribution history.”). *But see id.* at 56 (observing that

1 not only of egalitarian concerns, but as much of First Amendment
2 libertarian ones.

3 The notion that intensity of desire is not well-measured by
4 money in a society where money is not equally distributed has
5 been, since *Buckley*, the huge elephant – and donkey – in the
6 living room in all discussions of campaign finance reform.
7 *Buckley*, by fiat, declared the state's explicit recognition and
8 amelioration of wealth distribution problems in the electoral
9 marketplace to be an insufficiently compelling interest to pass
10 constitutional muster. *Buckley*, 424 U.S. at 17, 48-49. And yet,
11 I submit, it remains at least implicitly behind much campaign
12 finance reform legislation.

13 The odd thing about *Buckley*'s exclusion of this interest
14 from the field of discussion is that, as mentioned above, this
15 concern is in part directly linked to the Supreme Court's
16 asserted First Amendment concern – the desire to protect the
17 right for people to express, in money terms, the intensity of
18 their political ideas and affiliations. It may be that the High
19 Court's failure to recognize this fact occurred because the Court
20 in *Buckley* focused its attention on the desire not to favor one
21 group, the rich, over another, the poor – or vice versa, see *id.*

unlimited campaign expenditures are appropriate in part because, given contribution limitations, "the financial resources available to a candidate's campaign . . . will normally vary with the size and intensity of the candidate's support").

1 at 48-49. And, in deciding not to give weight to that value, the
2 Court failed to realize that it was also excluding – as a
3 potentially compelling state interest – the First Amendment right
4 to have one’s intensity of desire, as expressed in monetary
5 terms, be measured equally.

6 Be that as it may, the *Buckley* framework, which establishes
7 that the desire to express intensity of political position
8 through money is fundamental, at the same time prohibits the
9 states from seeking to find a way of gauging and treating
10 intensity of desire equally among its citizens, rich and poor.⁴

⁴ Of course, it remains true that money is not the only means by which intensity of political belief may be expressed. In light of this obvious fact, it may perhaps be asserted that there is no compelling interest in giving individuals who lack financial resources an ability equal to that afforded to wealthier individuals to express intensity of feeling in the monetary marketplace of political discourse. But then the converse must also be true. That is, people or entities of means, whose contributions and expenditures campaign finance legislation might seek to limit, also enjoy alternate mechanisms for expressing the intensity of their political beliefs. And, if there is nothing uniquely important, in a First Amendment context, about expressing intensity of belief in monetary terms for those who do not have money, the same must presumably be true for those who do. In either case, though, the centrality of money in political campaigns makes it a uniquely important mechanism by which intensity of political belief is expressed. *Cf. Buckley*, 424 U.S. at 18 n.17 (observing that the argument that “just as the decibels emitted by a sound truck can be regulated consistently with the First Amendment,” so too may the “volume of dollars in political campaigns” be constitutionally restricted “underscores a fundamental misconception. The decibel restriction . . . limit[s] the manner of operating a soundtruck but not the extent of its proper use. By contrast, the [Federal Election Campaign] Act’s dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information.”).

1 As a result of this odd decision, the judicial discussion since
2 *Buckley* has centered on other values, which, though by no means
3 unimportant, are, I believe, not really at the core of the
4 debate. There is much talk of "corruption" and what controls are
5 necessary to avoid it, and of the danger that what is done under
6 the guise of controlling corruption may be used to protect
7 incumbents. There is, likewise, concern about the cost of
8 fundraising and similar factors. I do not mean to suggest that
9 these are not serious questions. But a treatment of campaign
10 financing that focuses primarily on those issues is surely
11 impoverished, for it does not deal with what is at least as
12 important, and, perhaps, at the very heart of the problem.

13 Indeed, because of *Buckley*, even academicians have focused
14 on campaign finance reform primarily in the light of these
15 subsidiary goals. Thus, some have tried to "solve" the campaign
16 finance problem by providing for anonymous contributions. See,
17 e.g., Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating*
18 *Donor Anonymity to Disrupt the Market for Political Influence*, 50
19 *Stan. L. Rev.* 837 (1988). But that does nothing to ameliorate
20 the fact that "intensity of desire" under *Buckley* depends on the
21 underlying wealth of the donor, and hence is measured by a rubber
22 yard stick. And this is so regardless of whether the donation is
23 made openly or secretly. Others, trying to avoid corruption and
24 protection of incumbents, and also to counter the advantage

1 Buckley gave to the rich, seek to overwhelm individual
2 contributions with massive funds made available to everyone for
3 campaign spending. See, e.g., Bruce Ackerman, *Crediting the*
4 *Voters: A New Beginning for Campaign Finance Reform*, *Am.*
5 *Prospect*, Spring 1993, at 71; Edward B. Foley, *Equal-Dollars-*
6 *Per-Voter: A Constitutional Principle of Campaign Finance Reform*,
7 94 *Colum. L. Rev.* 1204 (1994). But they do so in a way that
8 undercuts the capacity of people, *both* poor and rich, to give
9 financial expression to the relative intensity of their desire.
10 Moreover, even the most sophisticated "hybrid" campaign finance
11 proposals, in advocating complex combinations of donor anonymity,
12 public funding, and controlled private giving, do not directly
13 address this difficulty. See, e.g., Bruce Ackerman & Ian Ayres,
14 *Voting with Dollars: A New Paradigm for Campaign Finance* 25-44
15 (2002).

16 Solutions that take into account both (a) the perceived need
17 to protect the right to express one's intensity of desire in
18 political matters through (among other mechanisms) money, and, at
19 the same time, (b) the wish to measure and give effect to that
20 intensity of desire in a way that is fair to the rich and the
21 poor alike, are not obvious. Some potentially fruitful, if
22 logistically challenging, suggestions have been made in other
23 contexts. See, e.g., Philip Bobbit & Guido Calabresi, *Tragic*
24 *Choices* 98-117 (1978) (discussing possibilities and limitations

1 of wealth-distribution-neutral markets). But it remains the case
2 that the finding of such solutions in the world of campaign
3 financing has been, and will continue to be, severely hampered if
4 the discussion taking place in legislatures and courthouses is
5 centered – as it now is – not on the problem, but on collateral
6 issues.

7 This is so, moreover, even if one considers those issues
8 that I described as “collateral” – corruption, incumbent
9 protection, fundraising, time, etc. – to be, themselves, of
10 primary importance. Efforts to tailor all campaign finance
11 reform to corruption – the one state interest heretofore
12 recognized by the Supreme Court as sufficiently compelling to
13 justify spending restrictions of any sort⁵ – surely have
14 constrained possibilities for creative proposals that may not fit
15 comfortably into the proffered box.

16 II.

17 I believe that it is not out of the question that Vermont,
18 in passing Act 64, was as likely to be concerned with the goal of
19 enabling of all Vermonters – be they political candidates or
20 political contributors – to have something of an “equal”
21 opportunity to express intensity of political desire, as it was

⁵ Cf. *National Conservative Political Action Committee*, 470 U.S. at 496-97 (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling interests *thus far identified* for restricting campaign finances.” (emphasis added)).

1 with the possibility of corruption, saving time, or on the
2 alleged desire to protect incumbents. *Cf. Landell v. Sorrell*,
3 382 F.3d 91, 100-02 (2d Cir. 2004) (setting forth legislative
4 findings in support of Act 64, including: (1) that “[a]s a result
5 [of the rising cost of campaigns] many Vermonters are financially
6 unable to seek election to public office”; (2) that “large
7 contributors” gain time and access to candidates to an extent
8 that “those who make small or no contributions” do not; and (3)
9 that “public financing of campaigns, coupled with generally
10 applicable contribution and expenditure limitations, will level
11 the financial playing field among candidates and provide
12 resources to independent candidates”). Indeed, I think that in
13 Vermont, no less than in other places, interests and values such
14 as corruption and time-saving are often defined in expansive ways
15 so as to allow the introduction (under *Buckley*’s doctrinal radar)
16 of values that are directly related (1) to the wish to protect
17 the right to express through money the intensity of one’s desire,
18 and (2) to make sure that that intensity is not measured
19 differently for rich and for poor.⁶

⁶ The Supreme Court itself has seemingly endorsed a broader understanding of the “corruption” rationale than what *Buckley* enunciated – an understanding that could perhaps be read as gesturing toward some of the “equality” considerations that *Buckley* purportedly purged from the debate. Thus, the Court in *Shrink*, rejecting the notion that “corruption” encompassed solely the notion of quid-pro-quo contribution arrangements, announced that the interest encompassed “the broader threat from politicians too compliant with the wishes of large contributors”

1 I cannot help but suspect, however, that the sort of
2 conversation taking place in Vermont (and elsewhere) would be a
3 far more fruitful one – from the standpoints both of campaign
4 finance policy and constitutional jurisprudence – were it able to
5 be brought out from under *Buckley*'s corruption mantle and into a
6 framework that more honestly reflects the issues at play.

7 **III.**

8 I do not know whether the decision of the panel in the case
9 before us is consistent with *Buckley v. Valeo*. I do know that if
10 I were on a panel I would have to decide that question, for I
11 would be bound to follow *Buckley*, however much I think that that
12 decision has diverted the campaign finance reform discussion from
13 the fundamental First Amendment-level values at stake. If I am
14 called upon to vote on a panel, I, of course, follow what I
15 believe the Supreme Court to have held, and I do so whether or
16 not I agree with that holding.

17 A vote on whether to grant an en banc rehearing, instead, is
18 a "free vote." As the concurring opinion by Judge Sack and Judge
19 Katzmann so elegantly points out, *infra* at 15-18, we may decline
20 to vote to go en banc for any number of reasons, and we need not
21 vote to rehear a case en banc simply because we think that an
22 opinion is wrong or is possibly inconsistent with a prior Supreme

– that is to say, politicians who give *unequal* weight to
constituents on the basis of wealth. 528 U.S. at 389 (emphasis
added); see also *McConnell*, 540 U.S. at 143, 150-52 (2004).

1 Court decision. There are many prudential considerations that
2 may, in different circumstances, properly guide us in our
3 consideration of whether an en banc is appropriate. And so, in
4 deciding whether to vote to rehear *this* case en banc, I posed
5 myself the following question: which vote is most likely to
6 bring back into the discussion the issues that I believe to be
7 fundamental with respect to campaign finance legislation?

8 Ultimately, only the Supreme Court can, by reconsidering
9 *Buckley*, encourage a free and open discussion of what is moving
10 states in this field, and of what ways there might be of best
11 serving the apparently conflicting interests at stake. Not
12 surprisingly, a majority of the Supreme Court itself has
13 indicated an inclination to reopen the question. *See Federal*
14 *Election Commission v. Colorado Republican Party*, 533 U.S. 431,
15 465 (2001) (Thomas, *J.*, dissenting) (stating, joined by Justices
16 Kennedy and Scalia, that "*Buckley v. Valeo* . . . should be
17 overruled"); *Shrink*, 528 U.S. at 398-99 (2000) (Stevens, *J.*,
18 concurring) (suggesting disagreement with *Buckley's* "[r]eliance
19 on the First Amendment framework to justify the invalidation of
20 campaign finance regulations"); *id.* at 405 (Breyer, *J.*,
21 concurring) (stating, joined by Justice Ginsburg, that
22 reconsideration of *Buckley* may be necessary); *id.*, 528 U.S. at
23 410 (Kennedy, *J.*, dissenting) ("[T]he existing distortion of
24 speech caused by the halfway house we created in *Buckley* ought to

1 be eliminated.”). And some have even urged reconsideration on
2 grounds that could potentially recognize the need for equality in
3 gauging intensity of desire in monetary terms. *See, e.g., id.* at
4 401 (Breyer, *J.*, concurring) (“[B]y limiting the size of the
5 largest contributions, such restrictions aim to democratize the
6 influence that money itself may bring to bear on the electoral
7 process.” (citing *Reynolds v. Sims*, 377 U.S. 533, 565 (1964),
8 thereby linking campaign finance jurisprudence to one-person,
9 one-vote jurisprudence)).

10 I believe such a reconsideration to be essential. And,
11 because I conclude that a reconsideration is more likely to occur
12 if we do *not* rehear this case en banc than if we do, I concur in
13 the denial of such a rehearing.

14
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16 STRAUB and POOLER, Circuit Judges, concurring in the denial of
17 rehearing *en banc*:

18 We concur in the Court’s decision to deny rehearing *en banc*.

19
20

21 Sack and Katzmann, Circuit Judges, with whom Sotomayor and B.D.
22 Parker, Circuit Judges, join, concurring in the decision to deny
23 rehearing *en banc*:

24 We agree with the decision of the Court not to rehear the
25 decision of the panel en banc. We think it appropriate, in light

1 of the opinions that are being filed dissenting from this view,
2 to add a few words.

3 The issue for us, of course, is not whether the opinion for
4 the panel majority or the dissent was right. Judge Winter's
5 opinion dissenting from the panel opinion, see Landell v.
6 Sorrell, 382 F.3d 91, 149 (2d Cir. 2004) (Winter, J.,
7 dissenting), is indeed thorough and forceful. Assuming that it
8 is as sound as the dissenters say that it is, however, as Judge
9 Feinberg reminded us in Baker v. Pataki, 85 F.3d 919 (2d Cir.
10 1996) (en banc) (per curiam), "[m]ere substantive disagreement
11 with a panel decision is not, under FRAP 35,⁷ sufficient reason
12 for an in banc rehearing. If we do not follow the clear spirit
13 of the Rule, we will become mired in endless internal review,"
14 id. at 941 (citing Jon O. Newman, Foreword: In Banc Practice in
15 the Second Circuit, 1984-1988, 55 Brook. L. Rev. 355, 369 (1989);
16 Jon O. Newman, Foreword: In Banc Practice in the Second Circuit:
17 The Virtues of Restraint, 50 Brook. L. Rev. 365, 382 (1984)); see
18 also James L. Oakes, Personal Reflections on Learned Hand and the
19 Second Circuit, 47 Stan.L. Rev. 387, 392-93 (1995). The issue
20 for us, then, is whether to grant a rehearing en banc because

⁷ "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

1 "the proceeding involves a question of exceptional importance."
2 Fed. R. App. P. 35(a)(2).

3 Whether the question here is "of exceptional importance" is,
4 for us, a close call. The issue of campaign finance and its
5 relationship to First Amendment protection for political
6 expression is obviously important, at least as a general matter.
7 It is less clear to us, though, that the decision in the case
8 that we are being asked to review is, at this stage, itself
9 "exceptionally" important.

10 This case has been remanded to the United States District
11 Court for the District of Vermont for further proceedings.
12 Vermont and Vermonters may, in the course of or in connection
13 with the proceedings in the district court, resolve these issues
14 themselves. As for the impact of the decision elsewhere, if any,
15 we simply do not know. We could only join the dissenters in
16 speculation.⁸ But if the Supreme Court does not grant certiorari
17 in Landell or otherwise resolve the questions raised, and the
18 panel opinion does lead other legislative bodies in this Circuit
19 to enact campaign finance laws that share the characteristics of

⁸ Chief Judge Walker speculates, post at 21-22, that the panel opinion "could lead other legislative bodies in Vermont, and in other states within and without this circuit, to enact campaign-finance laws that trammel free-speech rights," and Judge Jacobs asserts, post at 43-44, that "[t]he green light has been given to New York and Connecticut (signatories to the States' amicus brief in support of the Act), the hundred counties, and the thousand municipalities under our jurisdiction, to consider and adopt similar limitations on campaign expenditures."

1 the Vermont law that Judge Winter thought constitutionally
2 flawed, the doors to this Court will be open to a challenge. The
3 resolution of such a challenge may ultimately indeed require en
4 banc review. We may at that time need to reconsider the merits
5 of the panel's decision en banc.

6 We think that some disputes, because of their highly
7 partisan and political cast, should be addressed by the federal
8 judiciary only when and insofar as is necessary. And we think
9 that this is such a dispute. The resolution of this sort of
10 campaign financing issue is bound to have, or at least to be seen
11 to have, an impact favoring one political side or another
12 depending on the result. We would prefer not to enter into a
13 process that would likely result in a decision of our full Court
14 that would therefore be vulnerable to accusations that it is
15 driven by result rather than by legal analysis.⁹ We should avoid
16 it if we can do so responsibly.

⁹ As noted, we think it unnecessary to take issue with the substantive views of our colleagues dissenting from the denial of an en banc hearing. We do note, nonetheless, the remarkable proposition asserted in part V of Judge Jacobs' dissent, post at 45-47 (apparently one of the things, as he puts it, that he "cannot resist saying," id. at 37): that at the heart of the panel majority's problems are "constitutional-law professors" and "news organs" subverted by a hidden agenda of some sort, post at 45-46. Suffice it to say that we doubt it. But it is this sort of suspicion of hidden agendas when addressing things political that helps animate our view that en banc rehearing is unwise at this time.

1 We very much doubt, moreover, that were we to rehear this
2 case en banc our work would add substantively to the Supreme
3 Court's deliberations. Were the Supreme Court to decide to grant
4 certiorari in this case, it would have before it the panel
5 majority and dissenting opinions sharply defining the issues as
6 well as the dissenting and concurring views as to whether this
7 Court should undertake to rehear the panel decision en banc. If
8 the dissenters are correct that the panel majority opinion fails
9 to pass constitutional muster, a rehearing en banc of the panel
10 decision would only forestall resolution of issues destined
11 appropriately for Supreme Court consideration.

12 When it becomes, to use Chief Judge Walker's phrase, our
13 "constitutional responsibilit[y]" to rehear this issue en banc --
14 as it was the constitutional responsibility of the panel to hear
15 it in the first place -- of course we should do so. Until then,
16 we think the Court has rightly decided to respect what Judge
17 Newman referred to as the "Virtues of Restraint." See Jon O.
18 Newman, Foreword: In Banc Practice in the Second Circuit: The
19 Virtues of Restraint, supra.

1 JOHN M. WALKER, JR., Chief Judge, with whom DENNIS JACOBS, JOSÉ
2 A. CABRANES, and RICHARD C. WESLEY, Circuit Judges, concur,
3 dissenting from the denial of rehearing en banc:

4 Among the many questionable features of Vermont's campaign-
5 finance statute, the limits placed on campaign expenditures
6 plainly violate Supreme Court precedent and the First Amendment.
7 After a panel majority, over a well-reasoned dissent by Judge
8 Winter, held that those limits were supported by a compelling
9 interest, the full court should have reheard this case en banc.
10 I dissent.

11 **I. Background**

12 In 1997, the Vermont Legislature enacted Act 64, a
13 comprehensive campaign-finance statute scheduled to take effect
14 on November 4, 1998. See Vt. Stat. Ann. tit. 17, §§ 2801-2883.
15 In May 1999, a voter, a prospective candidate, and a political-
16 action committee brought suit in federal court in Vermont
17 alleging that the statute infringed their First Amendment rights.
18 See Landell v. Sorrell, 118 F. Supp. 2d 459, 463, 475-76 (D. Vt.
19 2000) (Landell I). The district court consolidated that suit
20 with two other subsequent actions and permitted various other
21 interested groups to intervene. Id. at 463. After a ten-day
22 bench trial in May and June of 2000, the district court upheld
23 most of Act 64's challenged provisions but struck down its
24 limitations on (1) how much money political parties could
25 contribute to candidates, (2) how much money candidates could

1 accept from out-of-state contributors, and (3) how much money
2 candidates could spend on their campaigns. Id. at 468, 493.

3 Four years later, in 2004 (after having withdrawn an opinion
4 issued in 2002), a divided panel of this court upheld in part and
5 reversed in part the district court's decision. Landell v.
6 Sorrell, 382 F.3d 91 (2d Cir. 2004) (Landell II). The panel
7 unanimously upheld the district court's determination that the
8 Vermont statute's limitation on out-of-state contributions was
9 unconstitutional. Id. at 146; id. at 152 (Winter, J.,
10 dissenting) (concurring in this holding). The panel also
11 unanimously reversed the district court's decision that
12 contributions to candidates by political parties could not
13 constitutionally be limited. Id. at 143 (so holding, but
14 remanding for further findings on, among other issues, how Act 64
15 affects relations between national parties and state and local
16 affiliates); id. at 152, 184-85 (Winter, J., dissenting)
17 (concurring in this holding though challenging statutory
18 provisions that treat party affiliates as one unit for some
19 purposes). The panel was divided, however, over the
20 constitutionality of the Vermont statute's limitations on
21 candidates' campaign expenditures. Judge Winter, in dissent,
22 would have upheld the district court's determination that
23 campaign-expenditure limits are unconstitutional under Buckley v.
24 Valeo, 424 U.S. 1 (1976) (per curiam). Landell II, 382 F.3d at

1 153-56, 185-89 (Winter, J., dissenting). But the panel majority
2 decided that the expenditure limits were supported by two
3 government interests – preventing corruption and preserving
4 candidates’ time – that, taken together, were sufficiently
5 compelling that the expenditure limits might be constitutional if
6 the statute were sufficiently narrowly tailored to advance those
7 two interests. Id. at 124-25. The majority therefore vacated
8 the district court’s holding as to the expenditure limits and
9 remanded the case for further proceedings to determine whether
10 the limits were sufficiently narrowly tailored to survive strict
11 scrutiny. Id. at 135-36.

12 Judge Winter, in an impassioned, insightful, and carefully
13 reasoned dissenting opinion, analyzed the Vermont statute in
14 detail and identified a series of constitutional infirmities that
15 the panel majority failed to consider sufficiently. Id. at 149-
16 210 (Winter, J., dissenting). While I agree with virtually all
17 of Judge Winter’s analysis of the Vermont statute’s many flaws,
18 the panel majority erred most obviously, and most importantly, in
19 not striking down the Vermont law’s campaign-expenditure limits
20 as violating the First Amendment’s free-speech guarantee.

21 By leaving open the possibility that meager, incumbent-
22 protective spending limits might pass constitutional muster, the
23 majority has done a huge disservice to Vermont voters and has
24 established a dangerous precedent that could lead other

1 legislative bodies in Vermont, and in other states within and
2 without this circuit, to enact campaign-finance laws that trammel
3 free-speech rights and ensure incumbent protection.

4 Supreme Court precedent – principally the landmark holding
5 in Buckley v. Valeo – leaves no doubt that the constitutional
6 protection of political speech is essential to the very framework
7 on which our political system is built. That precedent also
8 plainly forbids campaign-expenditure limits like Vermont’s. The
9 en banc court should have reheard this exceptionally important
10 case, found categorically that the Vermont law’s expenditure
11 limits violate the First Amendment, and wiped out the panel’s
12 holding that not only accepted a justification for Vermont’s
13 expenditure limits that the Supreme Court has rejected, but also
14 glossed over the fact that the limits are so low that they
15 unconstitutionally entrench incumbents. Instead, regrettably,
16 the law of the circuit now conflicts both with Supreme Court case
17 law and with decisions from the Tenth and Sixth Circuits holding
18 similar campaign-expenditure limits unconstitutional. See Homans
19 v. City of Albuquerque, 366 F.3d 900 (10th Cir. 2004); Kruse v.
20 City of Cincinnati, 142 F.3d 907 (6th Cir. 1998).

21 **II. Discussion**

22 **A. Supreme Court precedent compels reversal**

23 In the nearly thirty years since Buckley, the Supreme Court
24 has not retreated from Buckley’s holding that laws limiting

1 campaign expenditures are subject to "the exacting scrutiny
2 applicable to limitations on core First Amendment rights of
3 political expression." 424 U.S. at 44-45. Although contribution
4 limits merit "less rigorous scrutiny," McConnell v. FEC, 540 U.S.
5 93, 141 (2003), expenditure limits must survive strict scrutiny –
6 i.e., they must be "narrowly tailored to serve a compelling state
7 interest." Austin v. Mich. State Chamber of Commerce, 494 U.S.
8 652, 657 (1990). First Amendment protections extend to campaign
9 expenditures because "[c]ertainly, the use of funds to support a
10 political candidate is 'speech'" Id. As Buckley
11 explained:

12 A restriction on the amount of money a person or group
13 can spend on political communication during a campaign
14 necessarily reduces the quantity of expression by
15 restricting the number of issues discussed, the depth
16 of their exploration, and the size of the audience
17 reached. This is because virtually every means of
18 communicating ideas in today's mass society requires
19 the expenditure of money.

20 424 U.S. at 19 (footnote omitted).

21 The Court has identified only one distinct compelling state
22 interest that can support campaign-finance restrictions:
23 preventing corruption and the appearance of corruption. See FEC
24 v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496-
25 97 (1985) ("We held in Buckley and reaffirmed in Citizens Against
26 Rent Control that preventing corruption or the appearance of
27 corruption are *the only* legitimate and compelling government
28 interests thus far identified for restricting campaign

1 finances.”) (emphasis added). The Court has relied on that
2 interest, with a limited exception not relevant here, to uphold
3 only contribution limits, *not* expenditure limits.¹⁰ See
4 McConnell, 540 U.S. at 154, 161 (rejecting constitutional
5 challenge to § 323(a) of the Federal Election Campaign Act, which
6 “regulates *contributions*, not activities”); FEC v. Beaumont, 538
7 U.S. 146, 151-52 (2003) (rejecting constitutional challenge to
8 federal ban on campaign contributions by corporations); Nixon v.
9 Shrink Mo. Gov’t PAC, 528 U.S. 377, 381-85 (2000) (Shrink
10 Missouri) (rejecting constitutional challenge to Missouri statute
11 limiting campaign contributions); Cal. Med. Ass’n v. FEC, 453
12 U.S. 182, 184-85 (1981) (rejecting constitutional challenge to
13 federal statute limiting contributions to multicandidate
14 political committees); Buckley, 424 U.S. at 23-36, 38 (rejecting
15 constitutional challenge to federal statute limiting campaign
16 contributions). The Court has also upheld restrictions designed
17 to prevent the circumvention of contribution limits, but because
18 those limits were themselves justified by an anticorruption
19 rationale, anti-circumvention is not an independent state
20 interest. See, e.g., McConnell, 540 U.S. at 161 (noting that
21 § 323(b) of the Federal Election Campaign Act, which the Court

¹⁰The Court has upheld limits only on campaign expenditures by corporations out of the corporate treasury. See Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

1 upheld, "is designed to foreclose wholesale evasion of § 323(a)'s
2 anticorruption measures").

3 Further, in sweeping language Buckley rejected the state
4 interest in limiting the overall cost of campaigns as a
5 justification for campaign-finance restrictions:

6 The First Amendment denies government the power to
7 determine that spending to promote one's political
8 views is wasteful, excessive, or unwise. In the free
9 society ordained by our Constitution it is not the
10 government, but the people – individually as citizens
11 and candidates and collectively as associations and
12 political committees – who must retain control over the
13 quantity and range of debate on public issues in a
14 political campaign.

15 424 U.S. at 57.

16 Along with limiting the potential justifications for
17 campaign-finance restrictions and establishing that expenditure
18 limits are subject to no less than strict scrutiny, Buckley,
19 properly read, established a per se ban on limiting candidates'
20 campaign spending out of personal funds. To be sure, reasonable
21 jurists disagree about whether Buckley should be read to have
22 declared *all* campaign-expenditure limits per se unconstitutional.
23 Compare Landell II, 382 F.3d at 152 (Winter, J., dissenting)
24 ("[Buckley] held, without qualification, that government may not
25 limit campaign expenditures by candidates for electoral
26 office."), with Homans, 366 F.3d at 915 (Tymkovich, J.,
27 concurring) ("I agree that the Buckley Court did not adopt a per
28 se rule against campaign spending limits."). Perhaps it is most

1 accurate to say that Buckley's ban on expenditure limits is as
2 close as possible to being a per se ban without the Court having
3 used those exact words.

4 In any event, Buckley's language about limiting what
5 candidates can spend on their campaigns from their own personal
6 resources is surely unequivocal. After explaining that
7 governmental interests in preventing corruption and equalizing
8 candidates' relative financial resources could not justify
9 restricting what candidates for federal office could spend out of
10 their own pockets on their campaigns (a restriction found in
11 § 608(a) of the Federal Election Campaign Act of 1971), Buckley
12 concluded: "[M]ore fundamentally, the First Amendment simply
13 cannot tolerate § 608(a)'s restriction upon the freedom of a
14 candidate to speak without legislative limit on behalf of his own
15 candidacy. We therefore hold that § 608(a)'s restriction on a
16 candidate's personal expenditures is unconstitutional." 424 U.S.
17 at 54.

18 In light of Buckley's exceptionally strong language about
19 First Amendment protection for campaign expenditures – speech
20 that goes to the heart of our constitutional democracy – it is
21 not surprising that the Court has "routinely struck down
22 limitations on independent expenditures by candidates, other
23 individuals, and groups" FEC v. Colo. Republican Fed.

1 Campaign Comm., 533 U.S. 431, 441 (2001) (Colorado Republican
2 II).

3 When viewed in light of this Supreme Court case law that
4 reflects a deep suspicion of – indeed, hostility to – legislative
5 attempts to restrict political speech by limiting campaign
6 spending, Vermont’s campaign-expenditure limits fare no better
7 than the limits struck down in Buckley.

8 **B. No compelling interest supports Vermont’s expenditure**
9 **limits**

10 The Landell II majority purported to apply strict scrutiny
11 to the Vermont statute’s expenditure limits and concluded that,
12 taken together, the state’s announced interests in (1) preventing
13 corruption and the appearance thereof and (2) reducing the amount
14 of time devoted by candidates to fundraising were sufficiently
15 compelling to justify those limits. Landell II, 382 F.3d at 124-
16 25. The majority went on to find that it lacked enough
17 information to decide whether the limits were sufficiently
18 narrowly tailored to survive strict scrutiny and ordered that the
19 case be remanded to the district court for consideration of
20 whether less-restrictive alternatives could have fulfilled the
21 same goals. Id. at 133-36.

22 Putting aside spending limits on a candidate’s use of his or
23 her own funds (which, as noted above, Buckley flatly prohibits,
24 but which the Vermont law imposes and the Landell II majority did
25 not strike down), Buckley required, at minimum, that the Landell

1 II panel find that Vermont's candidate-expenditure limits as a
2 whole could not survive strict scrutiny for want of a compelling
3 state interest. Here there was no compelling interest that could
4 withstand strict scrutiny, and the panel therefore never had to
5 reach narrow tailoring. The remand order was both unnecessary
6 and unjustified.

7 First, Buckley makes plain that although the interest in
8 reducing corruption or the appearance thereof may justify
9 *contribution* limits, this interest cannot justify *expenditure*
10 limits. As the Court noted in relation to the expenditure limits
11 found in § 608(c) in the Federal Election Campaign Act of 1971,
12 "[t]he interest in alleviating the corrupting influence of large
13 contributions is served by the Act's contribution limitations and
14 disclosure provisions rather than by § 608(c)'s campaign
15 expenditure ceilings." 424 U.S. at 55. This language forecloses
16 courts from relying on the corruption-prevention rationale to
17 support expenditure limits. Indeed, courts have regularly
18 applied Buckley to strike down expenditure limits that were
19 ostensibly justified by the need to prevent corruption. See
20 Homans, 366 F.3d at 917 (Tymkovich, J., concurring, writing for
21 panel) (observing that "candidate spending limits cannot be
22 justified by the anti-corruption rationale"); Kruse, 142 F.3d at
23 915 (same); see also Colorado Republican II, 533 U.S. at 441.
24 The Supreme Court has determined that the less-restrictive

1 alternative of contribution limitations and disclosure
2 requirements (both of which are found in Vermont's legislative
3 scheme) suffice to prevent corruption, and it is not for us to
4 gainsay this determination. The majority in Landell II paid lip
5 service to this aspect of Buckley, see 382 F.3d at 119, but by
6 relying on the anticorruption rationale in conjunction with the
7 time-preservation rationale to justify expenditure limits, the
8 majority ignored Buckley's holding that preventing corruption
9 cannot justify expenditure limits.

10 Further, under the strict scrutiny that Buckley requires,
11 the time-preservation rationale also cannot support expenditure
12 limits. Indeed, the majority in Landell II implicitly
13 acknowledges the time-preservation rationale's weakness by
14 joining it to the anticorruption rationale as a means of ginning
15 up a sufficiently compelling interest. Landell II, 382 F.3d at
16 125 ("Vermont has established two interests that, *taken together*,
17 are sufficiently compelling to support its expenditure limits . .
18 . .") (emphasis added).

19 First, Buckley expressly rejected cost containment (of which
20 candidate time preservation is a function) as a justification for
21 expenditure limits. 424 U.S. at 57. The Landell II majority,
22 seizing on the fact that Buckley "alluded to this time-protection
23 interest only in passing," 382 F.3d at 120, argues both that the
24 Court did not consider it and that it (together with the

1 discredited anticorruption interest) is a compelling
2 justification for expenditure limitations. Both arguments fail.
3 The time-preservation rationale was indeed argued to the Court
4 under the rubric of cost containment, and it gains no strength
5 from the fact that the Court rejected it summarily rather than at
6 length. As Judge Tymkovich explained in Homans, "the Buckley
7 Court did consider the exact argument made here, that the 'thirst
8 for money has forced candidates to divert time and energy to
9 fund-raising and away from other activities, such as addressing
10 the substantive issues.'" 366 F.3d at 918 (Tymkovich, J.,
11 concurring, writing for panel) (quoting Buckley, Br. of Appellees
12 Center for Public Financing of Elections, Common Cause, League of
13 Women Voters of the United States at 72-73); see also Landell II,
14 382 F.3d at 188-89 (Winter, J., dissenting). The Sixth Circuit
15 in Kruse also rejected the time-preservation rationale, noting
16 that under Buckley, "because the government cannot
17 constitutionally limit the cost of campaigns, the need to spend
18 time raising money, which admittedly detracts [sic] an
19 officeholder from doing her job, cannot serve as a basis for
20 limiting campaign spending." 142 F.3d at 916-17.

21 Moreover, in the nearly thirty years since Buckley, no court
22 of appeals has found that saving a candidate's time from
23 fundraising is a sufficient interest to justify stifling
24 political speech. Candidate time preservation cannot be a

1 compelling interest because, while the government may have a
2 generalized interest in reducing impediments to an officeholder's
3 performance of her job, the government has *no legitimate interest*
4 in keeping incumbents in office at the expense of challengers.
5 Where an officeholder complains that taking time to fundraise
6 makes it harder to do the job and that the government has an
7 interest in preventing this, the officeholder is saying in
8 effect, "The government has an interest both in my doing my job
9 and in getting me reelected by making campaigning (fundraising)
10 easier." It has an interest in the former, but certainly not the
11 latter. The decision to fundraise is the candidate's and, unless
12 incumbent protection is a legitimate interest, not the business
13 of the legislature. Judge Tymkovich suggests as much in Homans
14 when he notes,

15 [O]fficeholders are not "forced" to spend any time
16 making calls or otherwise seeking funds. That they
17 choose to do so (allegedly at the expense of their
18 other duties) seems to be a rather weak reason to
19 override core First Amendment concerns. Freeing
20 politicians from having to make that choice is not a
21 compelling governmental interest.

22 366 F.3d at 919 (Tymkovich, J., concurring, writing for panel)
23 (footnote omitted). Weighed against Buckley's broad protection
24 of political speech, concerns about fundraising time pale in
25 significance.

26 Finally, by holding that preserving candidates' time is a
27 compelling justification for Vermont's expenditure limits, the

1 Landell II majority has given its blessing to circular, self-
2 justifying legislation. The Vermont statute forbids candidates
3 to accept individual contributions from nonfamily members
4 exceeding \$200 (if running for state representative or local
5 office), \$300 (if running for state senator or countywide
6 office), or \$400 (if running for statewide office). Vt. Stat.
7 Ann. tit. 17, § 2805(a). Though laughably low, the panel
8 majority unanimously found these contribution limits to be
9 constitutional. Setting aside my serious doubts on that score,
10 such low limits require candidates to spend more time fundraising
11 than would higher limits. In other words, the Vermont law's
12 contribution limits increase demands on candidates' time, and the
13 expenditure limits are then justified on the basis of time
14 pressures that the law itself has intensified. The Landell II
15 majority recognized that "without spending limits, the
16 contribution limits would exacerbate the time problem," 382 F.3d
17 at 123, but was untroubled by the self-evident circularity of the
18 time-preservation rationale. Justifying a statute based on
19 problems that the statute itself creates makes about as much
20 sense as Baron von Munchausen's boast that he pulled himself up
21 out of a swamp by his own hair. See, e.g., The Adventures of
22 Baron Munchausen (Columbia Pictures 1989).

1 **C. The Vermont law's expenditure limits are so low that**
2 **they give incumbents an unfair electoral advantage**

3 If the majority in Landell II gives too little deference to
4 Buckley's guiding force, it gives too much deference to the
5 Vermont legislature. Even Justice Breyer, who would prefer to
6 give legislators more leeway in regulating campaign finance than
7 governing Supreme Court doctrine provides them, cautioned against
8 deferring to legislators if that deference "risk[s] such
9 constitutional evils as, say, permitting incumbents to insulate
10 themselves from effective electoral challenge." Shrink Missouri,
11 528 U.S. at 402 (Breyer, J., concurring).

12 Vermont's expenditure limits (and, in my view, its
13 contribution limits) are set so low and in such a fashion that
14 only a desire to protect incumbents can explain them. At a time
15 when the costs of political campaigns are routinely counted in
16 the millions, what are Vermont's expenditure limits? To persuade
17 voters of the merit of their candidacies, those who seek the
18 office of state representative can only spend \$2000 (in single-
19 member districts) to \$3000 (in two-member districts); state
20 senate candidates are limited to \$4000 (in single-member
21 districts) plus \$2,500 per additional seat in the district (in
22 multi-member districts); candidates for governor and lieutenant
23 governor are capped at \$300,000 and \$100,000, respectively; and
24 candidates for other statewide offices can only spend \$45,000.
25 Vt. Stat. Ann. tit. 17, § 2805a.

1 The Landell II majority held that these limits were not
2 unconstitutionally low because they approximated average spending
3 in past elections. 382 F.3d at 128-31. As Judge Winter points
4 out, however, these limits are drastically below realistic
5 spending levels for competitive races. First, average spending
6 across all elections understates the cost of competitive
7 elections because it includes elections “that were not seriously
8 contested or perhaps not contested at all – elections in which
9 little communication took place and little was spent.” Landell
10 II, 382 F.3d at 173 (Winter, J., dissenting). Second, reported
11 spending numbers for elections held before Act 64's passage
12 include only spending by candidates, not related spending by
13 their supporters. Id. at 172-73 (Winter, J., dissenting).
14 Because Act 64 defines candidate expenditures to capture related
15 expenditures by supporters, see Vt. Stat. Ann. tit. 17, § 2809,
16 just to keep spending under the new law at historical levels
17 would require setting expenditure limits *above* those historical
18 levels. Finally, Act 64 includes within the expenditure limits
19 “substantial costs of compliance with its terms that were not
20 encountered under the prior law.” Landell II, 382 F.3d at 173
21 (Winter, J., dissenting). For example, fees of attorneys – who
22 are a virtual necessity under this reticulated statute – are
23 included as campaign expenditures. Such compliance costs will
24 further eat into limits that, because they are based on past

1 average spending, are already so low that they unconstitutionally
2 magnify the advantage of incumbents.

3 Only one aspect of Vermont's campaign-finance legislation
4 seems to point away from incumbent protection as a motivation
5 (and the panel majority seizes upon it, see id. at 128):
6 incumbents can spend only 85 to 90 percent of what challengers
7 can spend, depending on the office. Vt. Stat. Ann. tit. 17,
8 § 2805a(c). This small gesture is greatly outweighed, however,
9 by other features of the legislation and the natural advantages
10 of incumbency. Most significantly, the spending caps cover a
11 two-year election cycle and do not set separate caps for primary
12 and general elections. Id. § 2805a(a). As Judge Winter aptly
13 notes, this provision "will in the main favor incumbents, who
14 face serious primary challengers less frequently than those
15 seeking a party nomination to challenge an incumbent. Indeed,
16 there appears to be little other reason justifying the choice of
17 the two-year cycle." Landell II, 382 F.3d at 180 (Winter, J.,
18 dissenting). By contrast, the expenditure limits struck down in
19 Buckley at least had the virtue of providing separate limits for
20 primary and general elections. See 424 U.S. at 54-55. Further,
21 the Vermont expenditure limits are so low that they
22 "significantly increase[] the reputation-related [and] media-
23 related advantages of incumbency and thereby insulate[]

1 legislators from effective electoral challenge.” Shrink
2 Missouri, 528 U.S. at 404 (Breyer, J., concurring).

3 **III. Conclusion**

4 This case began in the district court almost six years ago;
5 it was argued before a panel of this court almost four years ago.
6 Instead of cleanly resolving, on the basis of Buckley, that
7 Vermont’s campaign-expenditure limitations are unconstitutional,
8 the panel majority has now sent the case back to the district
9 court for yet more proceedings. I well appreciate and support
10 the Second Circuit’s traditional reluctance to hear cases en
11 banc. See Jon O. Newman, The Second Circuit Review 1982-83 Term
12 – Foreword: In Banc Practice in the Second Circuit: The Virtues
13 of Restraint, 50 Brook. L. Rev. 365 (1984). By refusing to hear
14 this important case en banc, however, the court has failed to
15 live up to its constitutional responsibilities. I respectfully
16 dissent.

17
18

19 DENNIS JACOBS, Circuit Judge, joined by JOHN M. WALKER, JR.,
20 Chief Judge, and JOSÉ A. CABRANES and RICHARD C. WESLEY, Circuit
21 Judges, dissenting from the denial of rehearing *en banc*:

22 I dissent from the denial of rehearing *en banc*.

23 I cannot add to the number or force of the arguments set out
24 in Judge Winter’s dissent from the majority opinion. Landell v.
25 Sorrell, 382 F.3d 91, 149 (2d Cir. 2004) (Winter, J., concurring

1 in part and dissenting in part) [hereinafter Landell Dissent].
2 Compelling as Judge Winter's dissent is qua dissent, it
3 transcends the genre. It is scintillating; it marshals the facts
4 and authorities in a way that is learned and witty, often at the
5 same time; it is a crackling good read by any standard of law or
6 letters.

7 I will therefore confine myself to (i) reasons why *en banc*
8 review is warranted now rather than after the remand, and (ii)
9 things I cannot resist saying.

10
11 **I**

12 It cannot be seriously disputed that the issues presented
13 are of exceptional significance. Vermont's Act 64 rations the
14 political speech of all candidates seeking any state office in
15 one of the three states within our jurisdiction, and it applies
16 all the time, in back-to-back two-year cycles. See 1997 Vermont
17 Campaign Finance Reform Act (codified as Vt. Stat. Ann. tit. 17,
18 §§ 2801-2883).

19 To justify this sweeping limit on political speech, the
20 Vermont Legislature invokes two interests: (a) fighting
21 corruption (and the appearance thereof) and (b) conserving the
22 time of public officials. The majority opinion accepts these
23 interests as the genuine purposes of the Act and holds that,
24 taken together, they are a compelling justification that

1 satisfies strict scrutiny; it remands only for the district court
2 to decide whether the Act's expenditure limits are narrowly
3 tailored. Landell, 382 F.3d at 124-25, 135-37. This remand for
4 narrow tailoring presumes--erroneously--that the Legislature's
5 professed interests are compelling. I conclude they are not
6 compelling, and that we may not take on trust that the interests
7 professed by the incumbents who enacted the Act are their
8 interests in fact--especially since the dominant but
9 impermissible effect of the Act is to protect incumbents.

10
11 A. *The Legislature's Asserted Interests Are Not Compelling*

12 Buckley unambiguously rejected the anti-corruption rationale
13 for limiting (candidate and independent) expenditures in
14 political campaigns. See Buckley v. Valeo, 424 U.S. 1, 45-47,
15 53, 55-58 (1976) (*per curiam*).¹ The interest in saving the time
16 of elected officials is demolished by Judge Winter in his
17 dissent, 382 F.3d at 192-94. Ironically, Vermont officials could
18 reduce the amount of their time spent fundraising simply by
19 raising or eliminating the contribution caps they previously
20 enacted (and further reduce by the Act), which obviously require
21 contacts with more donors in order to raise a given amount of

¹ Over the intervening three decades, the Supreme Court has deviated from this holding just once and narrowly, to deal with concerns raised by the "unique state-conferred corporate structure." Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659-60 (1990).

1 money. See Landell, 382 F.3d at 123-24. Thus the *more-*
2 *restrictive* expenditure limits have been enacted to mitigate the
3 inevitable and predictable side-effects of the *less-restrictive*
4 contribution limits. See id. at 123-24, 127-28. It is as though
5 a town were to justify a ban on adult establishments by citing
6 the noxious concentration of them caused by a prior ordinance
7 designating a single block as the sole zone for such enterprises.
8 Strict scrutiny does not tolerate such bootstrapping. Thus in
9 Buckley, the Court warned that because expenditure limits
10 directly restrict political speech, FECA's independent
11 expenditure limits could not "be sustained simply by invoking the
12 interest in maximizing the effectiveness of the less intrusive
13 contribution limitations." 424 U.S. at 44.

14 The panel opinion contends that the combination of these two
15 insufficient interests are enough, a sort of synergy of nothing
16 with nothing. Strict scrutiny is not so yielding, especially
17 here: "[I]t can hardly be doubted that the constitutional
18 guarantee has its fullest and most urgent application precisely
19 to the conduct of campaigns for political office.'" Buckley, 424
20 U.S. at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272
21 (1971)). A remand for narrow tailoring cannot remedy the root
22 defect that the Act's prohibition on speech serves no compelling
23 state interest (just as tailoring was not the problem with the
24 Emperor's New Clothes).

1 B. *The Act Entrenches Incumbents*

2 By remanding for narrow tailoring, the majority opinion
3 implicitly assumes that the interests cited by the Vermont
4 Legislature are genuine (as well as sufficient), and that the
5 sole effect of the Act will be to advance those interests. But
6 when a law restricts speech in a way that tends to insulate
7 office-holders from challenge, it is neither reasonable nor
8 prudent to treat legislative motive as an issue of fact. See
9 Landell, 382 F.3d at 112-14 (“[W]e do not question the validity
10 of the factual findings developed by the legislature in support
11 of Act 64[.]”). Protecting speech requires that courts be
12 skeptical and assume the worst--not as a matter of fact, but as a
13 matter of prudence and policy.

14 Here, it is easy to demonstrate that the salient effect of
15 the Act is to entrench incumbents--an effect that is fatal under
16 the First Amendment. Buckley characterized as “more serious” the
17 argument that contribution and expenditure limits, taken
18 together, “invidiously discriminate against major-party
19 challengers and minor-party candidates.” 424 U.S. at 31 n.33.
20 The Court warned that though “the Act, on its face, appears to be
21 evenhanded[, t]he appearance of fairness . . . may not reflect
22 political reality.” Id. Given the powerful built-in advantages
23 of incumbency, “the overall effect of the contribution and

1 expenditure limitations [in FECA] could foreclose any fair
2 opportunity of a successful challenge." Id.

3 Strict scrutiny therefore requires that we consider the
4 Vermont Act, and specifically the Legislature's proffered
5 interests, with a cold eye. That is what the Supreme Court did
6 in Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001). The
7 Government cited budgetary and prudential reasons for legislation
8 curtailing funds for legal service organizations that challenged
9 existing welfare law. Velazquez disregarded those reasons
10 because the effect of the legislation was unconstitutionally to
11 "insulate the Government's interpretation of the Constitution
12 from judicial challenge." Id. at 547-49. Here, the undeniable
13 effect of the Act is to insulate incumbents from effective
14 electoral challenge--a much more direct and effective way to
15 insulate the government from criticism and ouster.

16 It is beyond dispute that campaign-expenditure caps magnify
17 the already formidable advantages of incumbency. Among those
18 advantages are name recognition and news coverage; free staff use
19 and constituent services; official letterheads and websites;
20 franking privileges; the celebrity and glamor that attends
21 office-holders when they visit diners, schools, nursing homes,
22 churches, hospitals, clubs, bus-stops and barbershops; etc., etc.
23 See Landell Dissent, 382 F.3d at 178-81. The Act further
24 benefits incumbents because the expenditure caps are the same

1 whether or not a candidate faces a primary contest--which of
2 course is more frequently a hurdle for challengers than for
3 incumbents. See id. at 160-61, 180.

4 The panel majority urges that the Act's expenditure limits
5 "are not so radical in effect as to drive the sound of a
6 candidate's voice below the level of notice." Landell, 382 F.3d
7 at 128-31 (quotation omitted). But as Judge Winter points out,
8 under a "level of notice" standard, an incumbent, who by virtue
9 of her position already enjoys prominence in the community,
10 starts her campaign "at the 'level of notice' at which a
11 challenger's campaign may be stopped by government." Landell
12 Dissent, 382 F.3d at 199.

13 It would take a childlike credulity to think that these
14 advantages to incumbency have gone unnoticed by Vermont's elected
15 officials.² That is why I am unimpressed by the argument that the
16 Act was adopted by an overwhelming bipartisan majority. See
17 Landell, 382 F.3d at 100. If one is an incumbent office-holder
18 in Vermont, what's not to like?

19

² A fig leaf provides that incumbents may spend only 85 or 90% of the full limits (depending on the race). See Vt. Stat. Ann. tit. 17, § 2805a(c). This just shows that the Legislature understood that offense is better than defense; not a word in the record suggests that this marginal differential is sufficient to overcome the numerous and powerful advantages of incumbency.

1 **II**

2 The panel majority upholds without remand provisions of the
3 Act that enforce the caps on fundraising and contributions by
4 treating local, county, state, regional, and national affiliates
5 of a political party as a single unit. See Vt. Stat. Ann. tit.
6 17, §§ 2801(5), 2805. These provisions will stifle local
7 politics by weakening (or killing) county, municipal, and village
8 party organizations across the state. This is no small thing.
9 Local parties frequently part company from the state and national
10 party in order to appeal to the social, political, cultural, and
11 demographic profiles of their communities. No such pervasive
12 suppression of political activity has ever been accepted by an
13 American appellate court with scrutiny so deferential and
14 perfunctory. See Landell, 382 F.3d at 143-44.

15
16 **III**

17 Delay pending remand saves us nothing. No matter what
18 happens on remand, there will be an appeal by one side or the
19 other, maybe both. And in the interval--while the case is on
20 remand in the district court, and during the post-remand appeal--
21 the holdings of the majority opinion will be law of this Circuit.
22 The green light has been given to New York and Connecticut
23 (signatories to the States' amicus brief in support of the Act),
24 the hundred counties, and the thousand municipalities under our

1 jurisdiction, to consider and adopt similar limitations on
2 campaign expenditures.

3 Moreover, the terms of the remand create problems of their
4 own. What evidence is a judge supposed to examine to determine
5 whether one type of regulation or one particular dollar amount is
6 "as effective" as another at preventing corruption or conserving
7 an office-holder's time? See id. at 133-36. Worse, the district
8 court is being asked to make findings as to what level of
9 spending will induce Vermont politicians to make corrupt
10 decisions. See id. at 134-36. This kind of inquiry is grossly
11 inappropriate for a federal court.

12 13 **IV**

14 There is another (overriding) problem that cannot be fixed
15 on remand. Obviously, the Act was engineered to provide an
16 opportunity for the Supreme Court to revisit existing law in this
17 area. The Vermont Secretary of State has publicly noted the
18 "express legislative goal of giving the Supreme Court an
19 opportunity to reevaluate its decision in Buckley v. Valeo."
20 Memorandum from Secretary of State Deborah L. Markowitz re:
21 Review of Practical Policy and Legal Issues of Vermont's Campaign
22 Finance Law (Jan. 9, 2001), available at
23 <http://vermont-elections.org/elections1/2001GAMemoCF.html>. But
24 until the Supreme Court alters course, we must follow straight.

1 See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (“[I]t is this
2 Court’s prerogative alone to overrule one of its precedents.”);
3 see also Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490
4 U.S. 477, 484 (1989) (“If a precedent of this Court has direct
5 application in a case, yet appears to rest on reasons rejected in
6 some other line of decisions, the Court of Appeals should follow
7 the case which directly controls, leaving to this Court the
8 prerogative of overruling its own decisions.”). Activists on
9 every side may start or incite litigation with test cases and
10 test laws. But it is not our role to provoke the Supreme Court
11 into reconsidering its precedent by an aggressive (or fanciful)
12 ruling on a vital subject. This is a matter of hierarchy.

13
14 **V**

15 Would any judge uphold *any* limit on political speech if it
16 were not that many constitutional-law professors and news media
17 lend their prestige and voice to such measures? It is a big
18 mistake, however, to decide a case on the buried assumption that
19 these self-described protectors of the First Amendment confer a
20 reliable imprimatur.

21 Constitutional rulings cannot safely be made on the
22 assumption that constitutional-law professors serve the
23 Constitution as disinterested scholars and technocrats. These
24 professors take no oath to support the Constitution. Granting

1 that some of them have expertise derived from long and
2 painstaking study, we should keep in mind that many of them
3 regard the Constitution instrumentally--the way a safecracker
4 regards a safe.

5 Similarly, the news organs are interested players in
6 political controversy. It is a fallacy to think that the press
7 is a reliable defender of speech or that the First Amendment is
8 safe in its hands. True, the mainstream press assiduously
9 defends its own expressive and commercial rights, as well as the
10 rights of those whose speech generates saleable news and those
11 who do not compete with the press for influence (such as
12 skinheads, pornographers, performance artists, and the like).
13 But no one should be surprised that the largest news media,
14 secure in their editorial powers, join avidly in suppressing
15 speech by competing sources of information and opinion at
16 campaign time.

17 One arresting irony of this case is that the present Act can
18 be used to limit the speech of the newspapers and the broadcast
19 media. If a newspaper wishes to publish a story on a candidate
20 and requests a photo, interview, or statement, and if the
21 candidate provides such materials, the value of the ensuing
22 publication counts against the candidate's contribution and
23 expenditure limits. See Landell Dissent, 382 F.3d at 168-69.
24 And in time, Vermont's legislators may conclude that the

1 newspapers and broadcast media so control the public agenda, so
2 forcefully channel legislative energies to serve publishers'
3 views and interests, and so thoroughly monopolize the time of
4 legislators vying for journalistic coverage and approval, that
5 some reasonable limits should be placed on them. The Fourth
6 Estate may be able to defend itself, but under the majority's
7 decision, the Fourth Estate may not be able to get much help in
8 the federal courts of this Circuit.

9
10 * * * *

11 States may be laboratories of democracy, and they should
12 have leeway to experiment, but innovation is limited by the
13 Constitution. The Act at issue in this case is as
14 unconstitutional as if Vermont were to create a dukedom, apply
15 the thumbscrew, or tax Wisconsin cheese.

16
17
18 JOSÉ A. CABRANES, *Circuit Judge*, with whom WALKER, *Chief Judge*,
19 and JACOBS and WESLEY, *Circuit Judges*, join, dissenting from the
20 denial of rehearing *en banc*:

21 I am pleased to join the opinions of Chief Judge Walker and
22 Judge Jacobs, dissenting from the denial of rehearing *en banc*. I
23 add only a brief comment.

24 In his comprehensive and fully persuasive dissent from the
25 decision of the panel, with which I concur fully, Judge Winter

1 ably and admirably identified the grave constitutional concerns
2 raised by Vermont's Campaign Finance Reform Act, codified at Vt.
3 Stat. Ann. tit. 17, §§ 2801-2883 ("Act 64"). Judge Winter's
4 opinion is a *tour de force* and, as Judge Jacobs aptly observes, a
5 great read. I take this opportunity to commend Judge Winter's
6 opinion to readers, including most especially the Justices of the
7 Supreme Court. I write separately only to reemphasize one
8 concern with our Court's decision to deny *en banc* review of this
9 case.

10 Under *Buckley v. Valeo*, 424 U.S. 1 (1976), Act 64's campaign
11 expenditure limits are, without a doubt, unconstitutional. See,
12 e.g., *Buckley*, 424 U.S. at 39 (recognizing that campaign
13 expenditure limits, even when "neutral as to the ideas expressed,
14 limit political expression 'at the core of our electoral process
15 and of the First Amendment freedoms'"). In our system, the
16 Supreme Court is free to revisit this question and free to
17 overrule its own precedents. A court of appeals is not at
18 liberty to do the same.

19 The particular expenditure limits imposed by Act 64 are so
20 laughably low³ that they cannot but impede meaningful debate of

³ See Vt. Stat. Ann. tit. 17, § 2805a (limiting campaign expenditures based on office candidate is seeking: \$300,000 for governor; \$100,000 for lieutenant governor; \$45,000 for secretary of state, state treasurer, auditor of accounts or attorney general; \$4,000 for state senator, plus an additional \$2,500 for each additional seat in the senate district; \$4,000 for county office; \$3,000 for state representative in a two-member district;

1 public issues in violation of the First Amendment's guarantee of
2 free speech. See *Buckley*, 424 U.S. at 93 n.127. The attempts of
3 the Vermont legislature to dress up the "legitimate" rationales
4 buttressing Act 64—fighting corruption and conserving public
5 officials' time—collapse under the weight of Act 64's more
6 probable consequences, which include (1) an almost certain and
7 drastic reduction of political speech, (2) potentially
8 insurmountable disadvantages to challengers of incumbents, and
9 (3) severe limitations on press coverage of political races. See
10 *Landell v. Sorrell*, 382 F.3d 91, 176-82 (2d Cir. 2004) (Winter,
11 J., dissenting).

12 Where government seeks to "regulate political speech the way
13 it regulates public utilities," *id.* at 153, and protects
14 incumbents at the expense of political expression, it is the role
15 of the courts to defend the Constitution and to promote the
16 principles of free speech that sustain our democratic order, not
17 to enable bald-faced political protectionism.

18 The majority's ruling is a clear departure from the Supreme
19 Court's ruling in *Buckley*. I therefore dissent from the denial
20 of rehearing *en banc*.

21

22

and \$2,000 for state representative in a single-member district).

1 REENA RAGGI, *Circuit Judge*, dissenting from the denial of
2 rehearing en banc:

3 I dissent from the court's denial of rehearing en banc
4 without joining in the thoughtful opinions of my dissenting
5 colleagues. I think that this case presents serious questions
6 that warrant further consideration by the whole court, but I am
7 disinclined to express an opinion on the merits without the
8 benefit of further briefing and argument.