

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 11<sup>th</sup> day of April, two thousand and five.  
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17 MARCELLA LANDELL,

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19 Plaintiff-Appellee,

20  
21 DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC.,  
22 Political Committee, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD,  
23 JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT  
24 REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-  
25 FUND FOR INDEPENDENT POLITICAL EXPENDITURES,  
26

27  
28 Plaintiffs-Appellees-Cross-Appellants,

29  
30 -- v. --

31  
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,

38  
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 in banc  
6 from the amended opinion of the panel filed on August 18, 2004.  
7 A poll on whether to rehear the case in 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 in banc, rehearing in banc was  
11 **DENIED** by order of the court filed February 11, 2005.

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

17 The court also **AMENDS** the February 11, 2005, order to  
18 reflect the opinions dissenting from the court's denial of  
19 rehearing in banc filed by Chief Judge Walker, Judge Jacobs, and  
20 Judge Cabranes.  
21

22 Chief Judge Walker and Judges Jacobs, Cabranes, and Wesley  
23 dissent from the denial of rehearing in banc. Simultaneously  
24 with this order, Chief Judge Walker is filing a dissenting  
25 opinion, in which Judges Jacobs, Cabranes, and Wesley join; Judge  
26 Jacobs is filing a dissenting opinion, in which Chief Judge  
27 Walker and Judges Cabranes and Wesley join; and Judge Cabranes is  
28 filing a dissenting opinion, in which Chief Judge Walker and  
29 Judges Jacobs and Wesley join.  
30

31 Other judges of the court have indicated that they expect to  
32 file opinions concurring in the denial of in banc rehearing in  
33 due course. Further dissenting opinions may also be forthcoming.  
34 If further opinions or amended opinions are filed, this order  
35 will be amended as necessary to reflect those opinions.  
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39 FOR THE COURT:  
40 Roseann B. MacKechnie, Clerk  
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44 By: \_\_\_\_\_  
45 Richard Alcantara, Deputy Clerk  
46  
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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 in 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 in 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 in 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.<sup>1</sup> 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

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<sup>1</sup>The 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 in  
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 in banc, however, the court has failed to  
15 live up to its constitutional responsibilities. I respectfully  
16 dissent.

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19  
20 DENNIS JACOBS, Circuit Judge, joined by JOHN M. WALKER, JR.,  
21 Chief Judge, and JOSÉ A. CABRANES and RICHARD C. WESLEY, Circuit  
22 Judges, dissenting from the denial of rehearing *in banc*:  
23  
24

1 I dissent from the denial of rehearing *in banc*.

2  
3 I cannot add to the number or force of the arguments set out  
4 in Judge Winter's dissent from the majority opinion. Landell v.  
5 Sorrell, 382 F.3d 91, 149 (2d Cir. 2004) (Winter, J., concurring  
6 in part and dissenting in part) [hereinafter Landell Dissent].  
7 Compelling as Judge Winter's dissent is qua dissent, it  
8 transcends the genre. It is scintillating; it marshals the facts  
9 and authorities in a way that is learned and witty, often at the  
10 same time; it is a crackling good read by any standard of law or  
11 letters.

12 I will therefore confine myself to (i) reasons why *in banc*  
13 review is warranted now rather than after the remand, and (ii)  
14 things I cannot resist saying.

15  
16  
17 **I**

18  
19 It cannot be seriously disputed that the issues presented  
20 are of exceptional significance. Vermont's Act 64 rations the  
21 political speech of all candidates seeking any state office in  
22 one of the three states within our jurisdiction, and it applies  
23 all the time, in back-to-back two-year cycles. See 1997 Vermont

1 Campaign Finance Reform Act (codified as Vt. Stat. Ann. tit. 17,  
2 §§ 2801-2883).

3 To justify this sweeping limit on political speech, the  
4 Vermont Legislature invokes two interests: (a) fighting  
5 corruption (and the appearance thereof) and (b) conserving the  
6 time of public officials. The majority opinion accepts these  
7 interests as the genuine purposes of the Act and holds that,  
8 taken together, they are a compelling justification that  
9 satisfies strict scrutiny; it remands only for the district court  
10 to decide whether the Act's expenditure limits are narrowly  
11 tailored. Landell, 382 F.3d at 124-25, 135-37. This remand for  
12 narrow tailoring presumes--erroneously--that the Legislature's  
13 professed interests are compelling. I conclude they are not  
14 compelling, and that we may not take on trust that the interests  
15 professed by the incumbents who enacted the Act are their  
16 interests in fact--especially since the dominant but  
17 impermissible effect of the Act is to protect incumbents.

18  
19 A. *The Legislature's Asserted Interests Are Not Compelling*

20  
21 Buckley unambiguously rejected the anti-corruption rationale  
22 for limiting (candidate and independent) expenditures in  
23 political campaigns. See Buckley v. Valeo, 424 U.S. 1, 45-47,

1 53, 55-58 (1976) (*per curiam*).<sup>1</sup> The interest in saving the time  
2 of elected officials is demolished by Judge Winter in his  
3 dissent, 382 F.3d at 192-94. Ironically, Vermont officials could  
4 reduce the amount of their time spent fundraising simply by  
5 raising or eliminating the contribution caps they previously  
6 enacted (and further reduce by the Act), which obviously require  
7 contacts with more donors in order to raise a given amount of  
8 money. See Landell, 382 F.3d at 123-24. Thus the *more-*  
9 *restrictive* expenditure limits have been enacted to mitigate the  
10 inevitable and predictable side-effects of the *less-restrictive*  
11 contribution limits. See id. at 123-24, 127-28. It is as though  
12 a town were to justify a ban on adult establishments by citing  
13 the noxious concentration of them caused by a prior ordinance  
14 designating a single block as the sole zone for such enterprises.  
15 Strict scrutiny does not tolerate such bootstrapping. Thus in  
16 Buckley, the Court warned that because expenditure limits  
17 directly restrict political speech, FECA's independent  
18 expenditure limits could not "be sustained simply by invoking the  
19 interest in maximizing the effectiveness of the less intrusive  
20 contribution limitations." 424 U.S. at 44.

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<sup>1</sup> 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           The panel opinion contends that the combination of these two  
2 insufficient interests are enough, a sort of synergy of nothing  
3 with nothing. Strict scrutiny is not so yielding, especially  
4 here: “[I]t can hardly be doubted that the constitutional  
5 guarantee has its fullest and most urgent application precisely  
6 to the conduct of campaigns for political office.” Buckley, 424  
7 U.S. at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272  
8 (1971)). A remand for narrow tailoring cannot remedy the root  
9 defect that the Act’s prohibition on speech serves no compelling  
10 state interest (just as tailoring was not the problem with the  
11 Emperor’s New Clothes).

12  
13  
14           B. *The Act Entrenches Incumbents*

15  
16           By remanding for narrow tailoring, the majority opinion  
17 implicitly assumes that the interests cited by the Vermont  
18 Legislature are genuine (as well as sufficient), and that the  
19 sole effect of the Act will be to advance those interests. But  
20 when a law restricts speech in a way that tends to insulate  
21 office-holders from challenge, it is neither reasonable nor  
22 prudent to treat legislative motive as an issue of fact. See  
23 Landell, 382 F.3d at 112-14 (“[W]e do not question the validity  
24 of the factual findings developed by the legislature in support

1 of Act 64[.]"). Protecting speech requires that courts be  
2 skeptical and assume the worst--not as a matter of fact, but as a  
3 matter of prudence and policy.

4 Here, it is easy to demonstrate that the salient effect of  
5 the Act is to entrench incumbents--an effect that is fatal under  
6 the First Amendment. Buckley characterized as "more serious" the  
7 argument that contribution and expenditure limits, taken  
8 together, "invidiously discriminate against major-party  
9 challengers and minor-party candidates." 424 U.S. at 31 n.33.  
10 The Court warned that though "the Act, on its face, appears to be  
11 evenhanded[, t]he appearance of fairness . . . may not reflect  
12 political reality." Id. Given the powerful built-in advantages  
13 of incumbency, "the overall effect of the contribution and  
14 expenditure limitations [in FECA] could foreclose any fair  
15 opportunity of a successful challenge." Id.

16 Strict scrutiny therefore requires that we consider the  
17 Vermont Act, and specifically the Legislature's proffered  
18 interests, with a cold eye. That is what the Supreme Court did  
19 in Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001). The  
20 Government cited budgetary and prudential reasons for legislation  
21 curtailing funds for legal service organizations that challenged  
22 existing welfare law. Velazquez disregarded those reasons  
23 because the effect of the legislation was unconstitutionally to  
24 "insulate the Government's interpretation of the Constitution

1 from judicial challenge." Id. at 547-49. Here, the undeniable  
2 effect of the Act is to insulate incumbents from effective  
3 electoral challenge--a much more direct and effective way to  
4 insulate the government from criticism and ouster.

5 It is beyond dispute that campaign-expenditure caps magnify  
6 the already formidable advantages of incumbency. Among those  
7 advantages are name recognition and news coverage; free staff use  
8 and constituent services; official letterheads and websites;  
9 franking privileges; the celebrity and glamor that attends  
10 office-holders when they visit diners, schools, nursing homes,  
11 churches, hospitals, clubs, bus-stops and barbershops; etc., etc.  
12 See Landell Dissent, 382 F.3d at 178-81. The Act further  
13 benefits incumbents because the expenditure caps are the  
14 same whether or not a candidate faces a primary contest--  
15 which of course is more frequently a hurdle for challengers  
16 than for incumbents. See id. at 160-61, 180.

17 The panel majority urges that the Act's expenditure limits  
18 "are not so radical in effect as to drive the sound of a  
19 candidate's voice below the level of notice." Landell, 382 F.3d  
20 at 128-31 (quotation omitted). But as Judge Winter points out,  
21 under a "level of notice" standard, an incumbent, who by virtue  
22 of her position already enjoys prominence in the community,  
23 starts her campaign "at the 'level of notice' at which a

1 challenger's campaign may be stopped by government." Landell  
2 Dissent, 382 F.3d at 199.

3 It would take a childlike credulity to think that these  
4 advantages to incumbency have gone unnoticed by Vermont's elected  
5 officials.<sup>2</sup> That is why I am unimpressed by the argument that  
6 the Act was adopted by an overwhelming bipartisan majority. See  
7 Landell, 382 F.3d at 100. If one is an incumbent office-holder  
8 in Vermont, what's not to like?

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10  
11 **II**  
12

13 The panel majority upholds without remand provisions of the  
14 Act that enforce the caps on fundraising and contributions by  
15 treating local, county, state, regional, and national affiliates  
16 of a political party as a single unit. See Vt. Stat. Ann. tit.  
17 17, §§ 2801(5), 2805. These provisions will stifle local  
18 politics by weakening (or killing) county, municipal, and village  
19 party organizations across the state. This is no small thing.  
20 Local parties frequently part company from the state and national

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<sup>2</sup> 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 party in order to appeal to the social, political, cultural, and  
2 demographic profiles of their communities. No such pervasive  
3 suppression of political activity has ever been accepted by an  
4 American appellate court with scrutiny so deferential and  
5 perfunctory. See Landell, 382 F.3d at 143-44.

6  
7 **III**

8  
9 Delay pending remand saves us nothing. No matter what  
10 happens on remand, there will be an appeal by one side or  
11 the other, maybe both. And in the interval--while the case  
12 is on remand in the district court, and during the post-  
13 remand appeal--the holdings of the majority opinion will be  
14 law of this Circuit. The green light has been given to New  
15 York and Connecticut (signatories to the States' amicus  
16 brief in support of the Act), the hundred counties, and the  
17 thousand municipalities under our jurisdiction, to consider  
18 and adopt similar limitations on campaign expenditures.

19 Moreover, the terms of the remand create problems of  
20 their own. What evidence is a judge supposed to examine to  
21 determine whether one type of regulation or one particular  
22 dollar amount is "as effective" as another at preventing  
23 corruption or conserving an office-holder's time? See id.

1 at 133-36. Worse, the district court is being asked to make  
2 findings as to what level of spending will induce Vermont  
3 politicians to make corrupt decisions. See id. at 134-36.  
4 This kind of inquiry is grossly inappropriate for a federal  
5 court.

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9 **IV**

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

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

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15  
16 **V**  
17

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

1           Constitutional rulings cannot safely be made on the  
2           assumption that constitutional-law professors serve the  
3           Constitution as disinterested scholars and technocrats. These  
4           professors take no oath to support the Constitution. Granting  
5           that some of them have expertise derived from long and  
6           painstaking study, we should keep in mind that many of them  
7           regard the Constitution instrumentally--the way a safecracker  
8           regards a safe.

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

21          One arresting irony of this case is that the present Act can  
22          be used to limit the speech of the newspapers and the broadcast  
23          media. If a newspaper wishes to publish a story on a candidate  
24          and requests a photo, interview, or statement, and if the

1 candidate provides such materials, the value of the ensuing  
2 publication counts against the candidate's contribution and  
3 expenditure limits. See Landell Dissent, 382 F.3d at 168-69.  
4 And in time, Vermont's legislators may conclude that the  
5 newspapers and broadcast media so control the public agenda, so  
6 forcefully channel legislative energies to serve publishers'  
7 views and interests, and so thoroughly monopolize the time of  
8 legislators vying for journalistic coverage and approval, that  
9 some reasonable limits should be placed on them. The Fourth  
10 Estate may be able to defend itself, but under the majority's  
11 decision, the Fourth Estate may not be able to get much help in  
12 the federal courts of this Circuit.

13  
14 \* \* \* \*

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

20  
21  
22 JOSÉ A. CABRANES, *Circuit Judge*, with whom WALKER, *Chief Judge*, and JACOBS and WESLEY, *Circuit*  
23 *Judges*, join, dissenting from the denial of rehearing *in banc*.

1 I am pleased to join the opinions of Chief Judge Walker and Judge Jacobs, dissenting from  
2 the denial of rehearing *in banc*. I add only a brief comment.

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

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

16 The particular expenditure limits imposed by Act 64 are so laughably low<sup>3</sup> that they cannot  
17 but impede meaningful debate of public issues in violation of the First Amendment’s guarantee of  
18 free speech. *See Buckley*, 424 U.S. at 93 n.127. The attempts of the Vermont legislature to dress up  
19 the “legitimate” rationales buttressing Act 64—fighting corruption and conserving public officials’  
20 time—collapse under the weight of Act 64’s more probable consequences, which include (1) an

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<sup>3</sup> 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; and \$2,000 for state representative in a single-member district).

1 almost certain and drastic reduction of political speech, (2) potentially insurmountable disadvantages  
2 to challengers of incumbents, and (3) severe limitations on press coverage of political races. *See*  
3 *Landell v. Sorrell*, 382 F.3d 91, 176-82 (2d Cir. 2004) (Winter, J., dissenting).

4 Where government seeks to “regulate political speech the way it regulates public utilities,” *id.*  
5 at 153, and protects incumbents at the expense of political expression, it is the role of the courts to  
6 defend the Constitution and to promote the principles of free speech that sustain our democratic  
7 order, not to enable bald-faced political protectionism.

8 The majority’s ruling is a clear departure from the Supreme Court’s ruling in *Buckley*. I  
9 therefore dissent from the denial of rehearing *in banc*.