UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2004

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

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

MARCELLA LANDELL,

Plaintiff-Appellee,

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

Plaintiffs-Appellees-Cross-Appellants,

-- v. --

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

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

ORDER

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

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

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

Chief Judge Walker and Judges Jacobs, Cabranes, and Wesley dissent from the denial of rehearing in banc. Simultaneously with this order, Chief Judge Walker is filing a dissenting opinion, in which Judges Jacobs, Cabranes, and Wesley join; Judge Jacobs is filing a dissenting opinion, in which Chief Judge Walker and Judges Cabranes and Wesley join; and Judge Cabranes is filing a dissenting opinion, in which Chief Judge Walker and Judges Jacobs and Wesley join.

Other judges of the court have indicated that they expect to file opinions concurring in the denial of in banc rehearing in due course. Further dissenting opinions may also be forthcoming. If further opinions or amended opinions are filed, this order will be amended as necessary to reflect those opinions.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By:_____
Richard Alcantara, Deputy Clerk

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

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

I. Background

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

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

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

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

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

By leaving open the possibility that meager, incumbent-protective spending limits might pass constitutional muster, the majority has done a huge disservice to Vermont voters and has established a dangerous precedent that 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 ensure incumbent protection.

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

II. Discussion

A. Supreme Court precedent compels reversal

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

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

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

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

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

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

[1]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).

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

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

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

424 U.S. at 57.

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

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

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

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

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

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

B. No compelling interest supports Vermont's expenditure limits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

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

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

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

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

I

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

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

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

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

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

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

[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).

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

B. *The Act Entrenches Incumbents*

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

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

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

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

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

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

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

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

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

II

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

[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.

demographic profiles of their communities. No such pervasive suppression of political activity has ever been accepted by an American appellate court with scrutiny so deferential and perfunctory. See Landell, 382 F.3d at 143-44.

III

Delay pending remand saves us nothing. No matter what happens on remand, there will be an appeal by one side or the other, maybe both. And in the interval--while the case is on remand in the district court, and during the post-remand appeal--the holdings of the majority opinion will be law of this Circuit. The 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.

Moreover, the terms of the remand create problems of their own. What evidence is a judge supposed to examine to determine whether one type of regulation or one particular dollar amount is "as effective" as another at preventing corruption or conserving an office-holder's time? See id. at 133-36. Worse, the district court is being asked to make

findings as to what level of spending will induce Vermont politicians to make corrupt decisions. See id. at 134-36. This kind of inquiry is grossly inappropriate for a federal court.

IV

There is another (overriding) problem that cannot be fixed on remand. Obviously, the Act was engineered to provide an opportunity for the Supreme Court to revisit existing law in this area. The Vermont Secretary of State has publicly noted the "express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in Buckley v. Valeo." Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law (Jan. 9, 2001), available at http://vermont-elections.org/elections1/2001GAMemoCF.html. But until the Supreme Court alters course, *we* must follow straight. See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); see also Rodriguez de Quijas v. Shearson/Am.

Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Activists on every side may start or incite litigation with test cases and test laws. But it is not our role to provoke the Supreme Court into reconsidering its precedent by an aggressive (or fanciful) ruling on a vital subject. This is a matter of hierarchy.

V

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

Constitutional rulings cannot safely be made on the assumption that constitutional-law professors serve the Constitution as disinterested scholars and technocrats. These professors take no oath to support the Constitution. Granting that some of them have expertise derived from long and

painstaking study, we should keep in mind that many of them regard the Constitution instrumentally--the way a safecracker regards a safe.

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

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

forcefully channel legislative energies to serve publishers' views and interests, and so thoroughly monopolize the time of legislators vying for journalistic coverage and approval, that some reasonable limits should be placed on them. The Fourth Estate may be able to defend itself, but under the majority's decision, the Fourth Estate may not be able to get much help in the federal courts of this Circuit.

* * * *

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

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

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

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

Under *Buckley v. Valeo*, 424 U.S. 1 (1976), Act 64's campaign expenditure limits are, without a doubt, unconstitutional. *See, e.g.*, *Buckley*, 424 U.S. at 39 (recognizing that campaign expenditure limits, even when "neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms'"). In our system, the Supreme Court is free to revisit this question and free to

overrule its own precedents. A court of appeals is not at liberty to do the same.

The particular expenditure limits imposed by Act 64 are so laughably low[3] that they cannot but impede meaningful debate of public issues in violation of the First Amendment's guarantee of free speech. *See Buckley*, 424 U.S. at 93 n.127. The attempts of the Vermont legislature to dress up the "legitimate" rationales buttressing Act 64—fighting corruption and conserving public officials' time—collapse under the weight of Act 64's more probable consequences, which include (1) an almost certain and drastic reduction of political speech, (2) potentially insurmountable disadvantages to challengers of incumbents, and (3) severe limitations on press coverage of political races. *See Landell v. Sorrell*, 382 F.3d 91, 176-82 (2d Cir. 2004) (Winter, J., dissenting).

Where government seeks to "regulate political speech the way it regulates public utilities," *id.* at 153, and protects incumbents at the expense of political expression, it is the role of the courts to defend the Constitution and to promote the

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

principles of free speech that sustain our democratic order, not to enable bald-faced political protectionism.

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

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

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