CENTER for COMPETITIVE POLITICS

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House Bill 188: A Grave Threat to Nonprofits' Speech

The Center for Competitive Politics[1] writes to comment on several very serious constitutional and practical problems raised by a vaguely written provision in House Bill 188 that attempts to regulate nonprofit organizations as "committees," should they satisfy certain requirements related to their activities and expenditures. Reportedly, H.B. 188 will be offered as a floor amendment to Senate Bill 11 upon the House's return from Spring Break. Aside from raising public policy concerns, these weaknesses could subject the state to costly litigation.

While it's commendable for the General Assembly to consider ethics provisions that would clarify and enhance existing provisions in Missouri law, this legislation's inclusion of a non-germane provision that would regulate many nonprofits as political committees is practically deficient and constitutionally questionable. In particular, this language in H.B. 188 ignores decades of jurisprudence establishing the necessity of a "major purpose" test in its misguided attempt to regulate organizations that engage primarily in issue advocacy as political committees, all based on an unconstitutionally vague standard. By flouting this well-established jurisprudence, H.B. 188 creates significant harms for Missourians by placing immense regulatory burdens on many moderately-sized organizations in defiance of recent judicial precedent, diluting the value of disclosure by perversely creating "junk disclosure," and subjecting individuals to harassment based on their political beliefs.

Accordingly, if H.B. 188 becomes law as written, its expanded definition of "committee" is likely to be challenged. Any potential legal action stemming from the broadened "committee" definition will cost the state a great deal of money defending this provision, and will distract the Attorney General's office from meritorious legal work. Additionally, it is probable that the state will be forced by the courts to pay legal fees to any potential plaintiffs. Legal fee awards can cost governments well over one hundred thousand dollars.

This memo outlines three serious constitutional flaws with H.B. 188, followed by three significant harms that are likely to result from this ill-conceived provision.

[1] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado, Delaware, and Nevada. We are also involved in litigation against the state of California.

I. The bill flouts the landmark *Buckley v. Valeo* decision and decades of jurisprudence establishing the necessity of a "major purpose" test in order to compel filings as a political committee.

H.B. 188 would force nonprofit organizations to register and file reports that are identical to those that must be filed by political committees by expanding the existing definition of what entities constitute "committees" under Missouri law to include organizations that spend more than 25 percent of their overall annual budget "influencing or attempting to influence the action of voters for or against the nomination or election to public office of one or more candidates."[2] This is directly contrary to the landmark U.S. Supreme Court decision in *Buckley v. Valeo*, an omnibus challenge to the then-recently enacted Federal Election Campaign Act (FECA). The *Buckley* decision is notable for its ruling that shields groups that primarily engage in issue speech from having to file as political committees, as was mandated by FECA.[3] In its decision, the Court found the government could only compel reporting as a political committee for "organizations that are under the control of a candidate *or the major purpose of* which is the nomination or election of a candidate."[4]

H.B. 188 clearly fails this "major purpose" test for nonprofit groups, including 501(c)(4) social welfare groups and 501(c)(6) trade associations, which this legislation implicitly covers under the definition of "committee." According to IRS tax laws and regulations and existing Missouri law unaltered by this bill, these groups must have non-political activities as their "primary or principal" purpose. H.B. 188 further ignores the "major purpose" test by defining "entit[ies] domiciled outside of this state" as political committees if these organizations make *aggregate* annual expenditures on political activity greater than 25 percent of their budgets *in all fifty states*.[5] In such a circumstance, an organization could conduct pure issue advocacy or educational activities in Missouri and still be required to meet the onerous regulatory requirements of a political committee because of incidental express advocacy conducted entirely outside of the state.

Essentially, the bill appears to treat any organization that spends just over a quarter of their funding on loosely-defined political activity and receives contributions in excess of $500 (or in excess of $250 from a single contributor)[6] as a political committee, regardless of the character and scope of its other activities, including whether they took place in Missouri or any other state. This blurs the distinction between groups that exist for electing and defeating candidates, and groups that do not, but happen to engage in some political advocacy for or against candidates. Such a distinction is a bedrock principle of First Amendment law. Violation of this principle would make the state of Missouri highly susceptible to a legal challenge on First Amendment grounds.

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[2] Missouri House Bill 188 (as Introduced), 98th General Assembly (2015 Session), p. 18: lines 79-80.
[3] *Buckley v. Valeo*, 424 U.S. 1 at 42-44 (1976).
[4] *Id*. at 79 (emphasis added).
[5] Missouri House Bill 188 (as Introduced), 98th General Assembly (2015 Session), p. 18-19: lines 82-86.
[6] "When to Form & Register a Committee," Missouri Ethics Commission. Retrieved on March 27, 2015. Available at: http://www.mec.mo.gov/WebDocs/PDF/CampaignFinance/Forming_Registering_Committee.pdf (June 2012), p. 2.

II. It is constitutionally impermissible to use a monetary trigger, rather than an analysis of an organization's major purpose, to determine whether an organization qualifies as a political committee.

In 1976, the U.S. Supreme Court heard *Buckley v. Valeo*, an omnibus challenge to the then-recently enacted Federal Election Campaign Act. Among the cornerstones of First Amendment law, the Court's decision is notable for its determined policy in favor of shielding issue speech from the force of federal regulation.[7] The relevant portion of FECA had a "plan[ed] effect…to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations from voicing their views relative to a clearly identified candidate through means that entail aggregate expenditures of more than $1,000 in a calendar year."[8] Because of this, the Court found the government could only regulate contributions and expenditures made by "organizations that are under the control of a candidate *or the major purpose* of which is the nomination or election of a candidate."[9]

More recently, in *Human Life of Washington, Inc. v. Brumsickle,* the Ninth Circuit examined the major purpose test in the context of an organization opposed to euthanasia.[10] The court noted that the inclusion of a "primary purpose" requirement could shield a statute from constitutional scrutiny:

> The Disclosure Law does not extend to all groups with "a purpose" of political advocacy, but instead is tailored to reach only those groups with a "primary" purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy. Under this statutory scheme, the word "primary" – not the words "a" or "the" – is what is constitutionally significant.[11] While we do not hold that the word "primary" or its equivalent is constitutionally necessary, we do hold that it is sufficient in this case to ensure that the Disclosure Law is appropriately tailored to the government's informational interest.[12]

Likewise, in *New Mexico Youth Organized v. Herrera* ("*NMYO*"),[13] the Tenth Circuit held that New Mexico campaign finance law's definition of "political committee" must satisfy "the major purpose test."[14] Significantly, the challenge dealt with political committee registration and disclosure, at issue in H.B. 188, and not any challenge to electioneering communication disclosure.[15]

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[7] *Buckley v. Valeo*, 424 U.S. 1 at 42-44 (1976).
[8] *Id*. at 39-40 (internal quotation marks omitted). This figure has the equivalent buying power today of approximately $4,761.10.
[9] *Id*. at 79 (emphasis added).
[10] *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 995 (9th Cir. 2010).
[11] *See North Carolina Right to Life v. Leake*, 525 F.3d at 328 (Michael, J., dissenting) ("The key word providing guidance to both speakers and regulators in 'the major purpose' test or 'a major purpose' test is the word 'major,' not the article before it.").
[12] *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d at 1011.
[13] *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010).
[14] *Id*. at 677.
[15] *Id*. at 672.

The facts of the NMYO case were typical: one nonprofit organization, NMYO, worked with another nonprofit organization, Southwest Organizing Project, to disseminate mailings, as both nonprofits had a history of education on issues relating to youth, equality, and government transparency issues.[16] The mailings suggested that certain legislators were beholden to health insurance interests, and highlighted that the legislators' donors included health insurance companies.[17]

The Tenth Circuit, using *Buckley* as a guide, held that a political committee may "only encompass organizations that are under the control of a candidate or *the major purpose of* which is the nomination or election of a candidate."[18] The court found that because neither group spent "a *preponderance* of its expenditures on express advocacy or contributions to candidates,"[19] neither could be regulated as a political committee. A "preponderance" standard, as used in law, is accepted to mean 50 percent – a standard that H.B. 188 would fail to meet.

As recently as 2012, in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, the *en banc* Eighth Circuit, which has jurisdiction in Missouri, struck down a law requiring independent expenditure funds to have "virtually identical regulatory burdens" as PACs.[20] This included having to file periodic reports, even if the fund no longer engaged in political activity.[21] Ultimately, the *Swanson* Court required the major purpose test to ensure that only political organizations face that burden – and not organizations that lack such a major purpose.[22] H.B. 188 would fail that test.

If this bill becomes law, it will raise the very concerns addressed by the above cases.

III. H.B. 188 is unconstitutionally vague with regard to what activity constitutes "influencing or attempting to influence the action of voters."

As written, H.B. 188 retains Missouri's unconstitutional definition of the type of activity that would trigger "committee" status. That language would trigger regulation if expenditures are made for "influencing or attempting to influence the action of voters for or against the nomination or election to public office of one or more candidates."[23] Courts have repeatedly struck down this type of language because it is unconstitutionally vague. Indeed, virtually identical language in Wisconsin's law was recently ruled unconstitutional.[24]

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[16] *Id*. at 671.
[17] *Id*. at 671-72.
[18] *Id.* at 677 (quoting *Buckley*, 424 U.S. at 79) (emphasis added).
[19] Furthermore, the New Mexico statute in *NMYO* provided that $500 in expenditures in a year is "sufficient" to establish the organization's "major purpose" as political. *NMYO*, 611 F.3d at 678 (citing N.M. Stat. Ann. § 1-19-26(L)) (emphasis added). Notably, the Tenth Circuit also held that a monetary trigger was not constitutionally sufficient as a stand-in for "the major purpose" test. *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007). The *NMYO* court applied *Colorado Right to Life Committee* and held the $500 trigger unconstitutional. *Id.* at 679. There are now two major Tenth Circuit cases rejecting monetary triggers as stand-ins for an organization's "major purpose," which is what H.B. 188 purports to do.
[20] *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d at 872 (8th Cir. 2012).
[21] *Id*.
[22] *Id*.
[23] Missouri House Bill 188 (as Introduced), 98th General Assembly (2015 Session), p. 18: lines 79-80.
[24] *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014) (law enjoined on remand); *Wisconsin Right to Life v. Barland*, 2015 U.S. Dist. LEXIS 11012 (E.D. Wis. Jan. 30, 2015).

Clearly, many forms of speech on legislative or policy issues would influence indirectly how some person might vote on a candidate, but it is far from clear what speech would trigger regulated activity and what would not. Given the breathtaking scope of this provision, it would greatly chill speech about any public policy matter, whether the speech is intended to affect an election or not.

A core principle of constitutional law is that people of reasonable intelligence must be able to ascertain which laws apply to them, and what those laws prohibit. Poorly drafted laws that do not provide this guidance are unconstitutionally vague. Even if the greater than 25 percent monetary threshold for political committee status were constitutional, the factors considered for establishing that status would be deemed impermissibly vague.

The *Buckley* Court put the danger of vague laws into perspective in this specific First Amendment context:

> No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning…Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[25]

This language highlights the vagueness problem in H.B. 188's definition of "committee." It is not at all clear what activities the phrase "influencing or attempting to influence the action of voters" would encompass. To eliminate unconstitutional vagueness, H.B. 188 should clearly define what activities are covered, such as contributions to candidates or parties, or express advocacy in support of or opposition to any candidate. Indeed, *Buckley* itself turned upon vagueness in the phrase "relative to a clearly identified candidate" to draw the distinction between "express advocacy" and speech that could not trigger burdens intended only for political committees.[26]

The danger of such an unconstitutionally vague definition is clear. If H.B. 188 becomes law, nonprofit organizations advocating on behalf of issues of public importance will be unsure if their issue ads fall under the rubric of "influenc[ing] the action of voters." Does a nonpartisan voter guide that mentions the names of candidates constitute influence? Does an issue advertisement that supports a bill named after the legislators who championed that bill? What about an issue ad urging Missourians to write their local elected officials? When such questions remain unclear, many organizations will avoid the threat of repercussions from the state for failure to comply with the law and opt not to speak at all. Such suppression of speech is

[25] 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516 (1945)).

[26] 424 U.S. at 43 ("The key operative language of the provision limits 'any expenditure…relative to a clearly identified candidate.' Although 'expenditure,' 'clearly identified,' and 'candidate' are defined in the Act, there is no definition clarifying what expenditures are 'relative to' a candidate. The use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech.")

tremendously harmful and runs contrary to the free speech protections guaranteed by the First Amendment.

Thus, even if a finding that contributions or expenditures constituting more than 25 percent of an organization's activity could constitutionally trigger political committee status – which it cannot – H.B. 188's means of measuring that activity are unconstitutionally vague. As written, they pose both a trap for the unwary and an inducement to the unprincipled.

IV. H.B. 188 would likely be unconstitutional in many of its applications due to the burdens it would impose on many moderately sized organizations.

While the Supreme Court upheld certain disclosure in *Citizens United v. Federal Election Commission*,[27] it addressed only a narrow and far less burdensome form of disclosure to that contemplated by H.B. 188. The Court merely upheld the disclosure of an electioneering communication report, which disclosed the *entity making the expenditure* and the purpose of the expenditure. Such a report only disclosed contributors giving over $1,000 *for the purpose of furthering the expenditure*.[28]

By contrast, this legislation would require disclosure of the names, mailing addresses, and occupations/employers of any individual who contributes over $5,000 to an entity[29] if that entity spends more than 25 percent of its annual budget to "influenc[e] or attempt[] to influence" voters anywhere in the country. This registration and reporting is required regardless of the donor's intent to support the quarter plus of the organization's budget engaged in such activities, and regardless of whether that activity occurred in Missouri.

In contrasting the disclosure burdens dealt with by the Court in the 1986 case of *Massachusetts Citizens For Life, Inc. v. Federal Election Commission* ("*MCFL*"),[30] the *Citizens United* Court specifically held that the limited disclosure of an independent expenditure report is a "less restrictive alternative to more comprehensive regulations of speech."[31]

In *MCFL*, both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements. The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only "members" rather than the general public.[32] Likewise, Justice O'Connor was concerned with the "organizational restraints," including "a more formalized organizational form" and a significant loss of funding availability.[33]

Accordingly, the disclosure requirements imposed on "committees" under H.B. 188 that compel generalized donor disclosure would likely be deemed unconstitutional, if challenged.

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[27] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[28] 52 U.S.C. § 30104(f); *Citizens United*, 558 U.S. 366-67.
[29] "About Campaign Finance – Committee Reporting Requirements for Contributions Received," Missouri Ethics Commission. Retrieved on March 27, 2015. Available at: http://www.mec.mo.gov/EthicsWeb/CampaignFinance/CF_Info.aspx (2015).
[30] *Massachusetts Citizens For Life, Inc. v. Federal Election Commission*, 479 U.S. 238 (1986).
[31] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[32] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).
[33] *Id*. at 266 (O'Connor, J., concurring).

Conversely, language that only requires the disclosure of those contributions *specifically intended* for political contributions or expenditures would be constitutional, pursuant to a nearly forty-year-old unbroken chain of U.S. Supreme Court litigation.[34]

Essentially, the proposed bill would force a nonprofit to either face disclosure to the government of many of its donors while bearing extensive regulatory costs, or use a smaller portion of its budget – nationwide – to engage in political speech. *MCFL* noted that these sorts of "incentives" serve to "necessarily produce a result which the State [can]…not command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free."[35]

V. H.B. 188 would often uncouple the disclosed "donor" from the actual speech funded, resulting in "junk disclosure" that associates a donor with a communication they have no knowledge of or may not even support.

In addition to the significant regulatory burdens imposed on organizations whose major purpose is not political, the disclosure information required of those organizations covered by the expanded definition of "committee" in H.B. 188 will mislead rather than enlighten voters.

When we traditionally speak of political committees and political parties, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes. The same is not true of donors to 501(c) membership organizations and other forms of incorporated advocacy groups, which are likely to fall under the snare of this bill. As a result, if a group decides to spend over 25 percent of its annual budget "influencing or attempting to influence" voters in all 50 states, many of its supporters could potentially be made public, regardless of whether their donations were intended to be used for contributions or expenditures related to an election.

This is problematic, as many of these donors will have given for very different reasons. Imagine the small business owner in Independence, Missouri, who is a proud annual supporter of her professional association, the Chamber of Commerce, and also a proud Democrat. The Chamber runs ads accounting for 30 percent of its budget opposing Democratic politicians who wish to raise the minimum wage in multiple states (but not Missouri), but also funds a variety of educational opportunities and resources for small business owners that this small Missouri business owner finds invaluable. Under H.B. 188, *this business owner will find herself listed as contributing to ads that she disagrees with, and opposing legislators or candidates she may actually support*; it is "junk disclosure."

The same example could plainly apply to any supporter of the American Civil Liberties Union, NAACP, National Association of Manufacturers, National Rifle Association, National Right to Life Committee, Planned Parenthood, Sierra Club, or any other nonprofit active throughout the country, no matter how big or small, broadly covered by the bill. People give to trade associations and nonprofits not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a valuable service. To publicly identify contributing individuals with expenditures of which they had no

[34] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).
[35] *MCFL*, 479 U.S. at 256 (plurality opinion).

advance knowledge and may even oppose is both unfair to members and donors and will often be misleading to the public. Our small businesswoman in the above hypothetical does not take issue with raising the minimum wage and those elected officials who support that policy; again, it is "junk disclosure."

This problem is further exacerbated by temporal issues with donations to nonprofits. The small business owner in the above example may have given her donation in January of 2015, nearly two years before the 2016 election, and long before the organization to which she contributed decided to engage in political activity. Thus, she is being reported as an opponent of a candidate *who may not have even declared their candidacy* when she contributed to the organization and therefore could not have factored into her motivation for contributing. This again amounts to "junk disclosure" – disclosure that is primarily used by other parties to look for potential donors and by prying neighbors to search their fellow citizens' political activity and affiliations.

In short, ignoring the major purpose test, as H.B. 188 does, creates "junk disclosure." Such disclosure regimes fall outside the purview of legitimate state interests and go beyond reporting requirements approved by the Supreme Court. It is difficult to argue that such public reporting advances the legitimate purposes of informing the public and preventing corruption.

VI. Disclosure information can result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

In considering this bill, it's worth noting that disclosure laws implicate both citizen privacy rights and touch on Supreme Court precedent. Indeed, the desire to preserve privacy stems from a growing awareness by citizens and the Supreme Court that threats and intimidation of individuals because of their political views is a very serious issue. Much of the Supreme Court's concern over compulsory disclosure lies in its consideration of the potential for harassment. This is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[36] In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[37] This is why even anonymous political activity has been protected in certain contexts.[38]

Much as the Supreme Court sought to protect African Americans in the Jim Crow South and those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular causes still need protection today. It is hardly impossible to imagine a scenario in 2016 in which donors that contribute to nonprofit groups advocating on behalf of controversial causes in Missouri – for or against same-sex marriage; for or against abortion rights; or even groups associated with others who have been publicly vilified,

[36] *NAACP v. Alabama*, 357 U.S. 449 (1958).
[37] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.
[38] *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337-338 (1995).

such as the Koch family, George Soros, Michael Bloomberg, or Tom Steyer, might be subjected to similar threats.

This may seem unrealistic, but it illustrates the fundamental problem with the approach taken. The assumption seems to be that citizens are dangerous to government, and the government must be protected from them. Little thought is given to protecting citizens from government, as is required by the First Amendment. Worse still is that little can be done once individual contributor information – a donor's full name, street address, and occupation – is made public under government compulsion. It can then immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. We believe, therefore, that the problem of harassment is best addressed by limiting the opportunities for harassment, and that this is best done by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates* – and not to organizations engaging primarily in issue advocacy about a particular topic relevant to the voters of Missouri.

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens,[39] who receive their information because of the forced disclosure. In short, mandatory disclosure of political activity requires a strong justification and must be carefully tailored to address issues of public corruption and provide the provision of only such information as is particularly important to voters. It is questionable that the new disclosure regime mandated by H.B. 188 for organizations, which lack a major purpose of influencing elections, but may opt to speak about a particular issue, is sufficient to meet this standard.

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Ultimately, House Bill 188 ignores decades of jurisprudence regarding the need for a "major purpose" test in its treatment of nonprofit organizations as political committees based on an unconstitutionally vague standard, consequently places an unreasonable and legally-suspect burden on many smaller organizations, will perversely create "junk disclosure," and may subject supporters of many nonprofit groups to harassment. As a result, the expanded "committee" definition in this legislation raises serious legal concerns.

Should you have any questions regarding this legislation and its impact on the First Amendment or any other campaign finance proposals, please do not hesitate to contact Center for Competitive Politics' External Relations Director Matt Nese at (703) 894-6800 or by e-mail at mnese@campaignfreedom.org.

[39] *Brown v. Socialist Workers' '74 Campaign Comm.*, 458 U.S. 87 (1982).