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FAUX CAMPAIGN FINANCE REGULATION AND THE PATHWAY TO AMERICAN
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Faux Campaign Finance Regulation and the Pathway to American Oligarchy

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Introduction

The collapse of campaign finance regulation in the United States has facilitated a path toward oligarchic power redistribution. Americans did not adopt the current set of rules favoring the influence of the ultrarich over who is elected and what candidates do once in office through democratically-promulgated legislation. Instead, a long-term litigation strategy using the First Amendment of the United States Constitution as a deregulatory cudgel has decimated reasonable limits enacted by Congress and curtailed even disclosure of some political activity. Remaining campaign finance rules are easily circumvented, leading to faux regulation that makes it hard for ordinary people to understand the increased power of the wealthy.

Under the current campaign finance regime, American billionaires have begun giving tens—and increasingly hundreds—of millions of dollars to nominally independent political groups (including “super PACs”) to support candidates for President and other offices. These outside groups may accept unlimited funding to coordinate with candidates, including staffing their entire field operations, without running afoul of the legalistic prohibition on “coordination.” Such spending buys outside group funders unprecedented candidate access. With plutocratic power rising, other actors are constrained: political parties remain severely limited in their ability to coordinate and raise funds. Strict direct individual contributions limits curtail the average

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voter's influence and can trap less sophisticated donors who lack lawyers navigating them through the loopholes.

Part I describes the litigation strategy that led to deregulation with a false appearance of continued regulation. Part II describes the state of campaign financing in federal elections in the United States, with special attention paid to the activities of the ultrawealthy in the 2024 elections, especially Elon Musk. Part III explains how the new campaign finance regime, facilitated by litigation-driven deregulation, raises the risk of American oligarchy.

I. Deregulation via Legal Strategy¹

Congress passed two major pieces of campaign finance regulation in the last 50 years: the 1974 Amendments to the Federal Election Campaign Act (FECA)² and the Bipartisan Campaign Reform Act of 2002 (BCRA, more commonly known as “McCain-Feingold” for its two leading sponsors in the United States Senate).³

Congress adopted FECA following the Watergate scandal involving President Richard Nixon.⁴ It imposed a comprehensive set of reforms for money raised and spent in federal elections including: contribution limits on how much money people could give to candidates, parties, and committees; spending limits on individuals spending money relative to a clearly identified candidate for office and capping spending of Senate and House candidates; rules

¹ This section describes what the courts did as a matter of doctrinal change. On how lawyers organized for these changes, and the shift from liberal and conservative coalitions challenging such laws to mostly conservative lawyers, see ANN SOUTHWORTH: *BIG MONEY UNLEASHED: THE CAMPAIGN TO REGULATE CAMPAIGN SPENDING* (2023).

² Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, 26, 47, and 52 U.S.C.).

³ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 18, 28, 36, 47, and 52 U.S.C.).

⁴ For a detailed history, see Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES* 345 (Richard W. Garnett & Andrew Koppelman eds., 2012); RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 15-36 (2016).

requiring the disclosure of most contributions and expenditures; an opt-in public financing scheme for presidential campaigns; and the establishment of the Federal Election Commission to administer the new campaign finance rules.

In the 1976 case, *Buckley v. Valeo*,⁵ the United States Supreme Court considered a broad constitutional challenge arguing that various parts of FECA violated the United States Constitution's First Amendment protecting freedom of speech and association. Most important for our purposes, the Court upheld contribution limits as justified by an anticorruption interest and as imposing only a marginal restriction on speech rights. But it struck down spending limits applied to individuals and candidates on grounds that independent spending could not corrupt; nor was it permissible under the First Amendment to limit spending to promote political equality. The Court also upheld disclosure laws, reasoning that although disclosure requirements affected speech rights, government-mandated disclosure was justified on grounds of preventing corruption, providing valuable information to voters, and helping to enforce other campaign finance laws. The Court also held that a particular contributor or spender showing she would face harassment from disclosure must be exempted from the disclosure rules.⁶

Over the years, the Court vacillated in its willingness to uphold campaign laws.⁷ In a set of deeply divided decisions following *Buckley*, for example, the Court upheld spending limits applied to corporations on what appeared to be political equality grounds. But the Court's *Buckley* opinion construed some parts of the law so narrowly so that it became easy to circumvent.

⁵ 424 U.S. 1 (1976); HASEN, *supra* note 4.

⁶ For more on such exemptions, see *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

⁷ For the history through *Citizens United*, see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

In response to these perceived loopholes Congress enacted BCRA. At first, the Supreme Court narrowly upheld BCRA's key provisions including expanded corporate and labor union spending limits.⁸ A few years later, after changes in Supreme Court personnel, the Court reversed course and struck down these limits and more, most notably in the 2010 case, *Citizens United v. Federal Election Commission*.⁹

The root of the current problems date back to *Buckley*, not *Citizens United*. The *Buckley* Court interpreted the First Amendment to allow an individual to spend unlimited sums independently supporting or opposing candidates for office, reasoning that truly independent spending could not corrupt.¹⁰ In that same opinion, however, the Court upheld a \$5,000 limit on the amount that an individual could contribute to political committees that supported federal candidates.¹¹ Thus, right after *Buckley*, nothing would have stopped a billionaire from spending \$100 million or more to independently support or oppose a candidate for office, so long as the money was not contributed to a candidate or a political committee or spent in coordination with them. Yet despite *Buckley* and other similar holdings, it was rare (and it remains rare) for individuals to engage in significant independent expenditures.

The ultra-wealthy likely did not want to engage in large independent expenditure operations which would expose their names on ads supporting or opposing candidates, as federal campaign disclosure law requires.¹² And they also probably did not want to have to hire and oversee someone to spend money on their behalf: it would be far easier to give the money to a candidate's committee or another professional group supporting or opposing candidates. But

⁸ *McConnell v. FEC*, 540 U.S. 93 (2003).

⁹ 558 U.S. 310 (2010).

¹⁰ *Buckley*, 424 U.S. at 47 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.").

¹¹ *Id.* at 35-36.

¹² *E.g.*, 52 U.S.C. § 30104 (2025).

contributions to outside groups, that could help put some distance from the donor's name and the ads, were capped at \$5,000, rendering this path for big money unavailable.

This \$5,000 contribution cap to political committees came under political pressure and constitutional attack. In the 2004 elections, George Soros gave millions in contributions to a group, Americans Coming Together (ACT) (then referred to as a "527 group" because of a different provision of the Internal Revenue Code) supporting the election of Democrat John Kerry for President over incumbent George W. Bush.¹³ Soros and ACT claimed that because of how ACT spent its money (by avoiding election ads explicitly calling for Kerry's election or Bush's defeat), the \$5,000 cap didn't apply. After 2004, the Federal Election Commission reined in the practice of using 527 groups to circumvent the limits on contributions to political committees.¹⁴

Then came the *Citizens United* revolution. In 2010, the United States Supreme Court reversed two key earlier precedents that limited the independent spending of corporations in federal elections on grounds that such spending could "distort" the political marketplace by giving corporations influence disproportionate to their support in society.¹⁵ The actual holding of *Citizens United v. FEC* rejecting antidistortion as an impermissible equality rationale for limiting corporate campaign money was less important than the reasoning employed by the Supreme Court. Roughly speaking, the Court made a number of technical doctrinal moves that facilitated campaign finance deregulation.¹⁶ Most importantly, the Court significantly narrowed the

¹³ Richard L. Hasen, *Super PACs, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 6-7 (2014).

¹⁴ Kenneth P. Vogel, *Soros-Linked Group Hit with Huge Fine*, POLITICO (Aug. 29, 2007), <https://www.politico.com/story/2007/08/soros-linked-group-hit-with-huge-fine-005555>.

¹⁵ *Citizens United*, 558 U.S. 310 (overturning *Austin v. Michigan Chamber of Com.*, 494 U.S. 652 (1990) and portions of *McConnell v. FEC*, 540 U.S. 93 (2003)).

¹⁶ See Hasen, *supra* note 7.

definition of “corruption” from one that included the sale of access to political figures by large donors to one more akin to *quid pro quo* bribery.

Citizens United—and especially the charry “corruption” definition and the irrebuttable statement that independent spending cannot corrupt—led to a series of additional Supreme Court and lower court cases and Federal Election Commission rulings that further deregulated the campaign finance system.¹⁷ Many of these decisions engaged in a kind of bootstrapping where First Amendment litigation made a hole in the law, and then challengers pointed to the that hole as a reason to make more holes, on grounds that the remaining laws were no longer effective.

The most important example of this deregulatory bootstrapping occurred in relation to political committees that engage only in spending money independently in campaigns. The argument in an important D.C. Circuit case called *SpeechNow*¹⁸ was that if independent spending could not corrupt given *Buckley* and *Citizens United*, then pooled contributions to engage in the same kind of independent spending could not corrupt either. The *SpeechNow* court, citing *Citizens United* 13 times, agreed that the Constitution required the government to allow unlimited contributions funding independent expenditure campaigns, leading to the creation of entities, now known as “super PACs.” (This ruling essentially overturned that part of *Buckley* upholding the \$5,000 limit on contributions to political committees so long as they acted independent of candidates.) Super PACs function just like ACT did for Soros in 2004, but now such groups are blessed as legal.

The rulings allowing super PACs are especially pernicious because the rationale for the rulings is that this spending is non-corrupt because it is independent. But federal law only forbids

¹⁷ *E.g.*, FEC Advisory Op. 2010-11 (Aug. 2, 2010), <https://www.fec.gov/updates/ao-2010-11-contributions-to-an-independent-expenditure-committee/>.

¹⁸ *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

a particular, narrow type of coordination between candidates and outside entities: there must be independence in campaign advertising. Super PACs can serve as shadow campaigns: they can undertake all kinds of work campaigns used to do including get-out-the-vote activities and massive spending on advertising that simply copies the themes of the campaign. They can be run by former staffers or even close relatives of the candidate. The candidate may endorse super PACs as worthy and raise unlimited sums for the Super PAC, so long as the candidate does not ask for a specific dollar amount above \$5,000. The concept of “independence” has been drained of its meaning.¹⁹

And the super-PAC is far from the only loophole. Congress has not updated its disclosure laws to keep up with creative campaign lawyers and with new technology. It is possible to shield many contributions from disclosure by funneling money through certain nonprofit organizations (most importantly so-called 501(c)(4) groups).²⁰ Additionally, campaign ads shared over the Internet are subject to weak or no disclosure requirements despite the huge rise in Internet campaign spending because FECA and BCRA were written before the Internet’s major role in campaigns, and Republicans in Congress have resisted further regulation.

Some campaign finance limits remain. A federal candidate still may accept only \$3,500 per election from an individual and nothing from corporations.²¹ And political parties remain limited in the contributions they can take and spend in coordination with candidates, rules that are now being challenged in First Amendment litigation that is likely to succeed in causing

¹⁹ See Hasen, *supra* note 13.

²⁰ Richard L. Hasen, *Nonprofit Law as the Tool to Kill What Remains of Campaign Finance Law: Reluctant Lessons from Ellen Aprill*, 56 LOY. L.A. L. REV. 1233 (2023).

²¹ BCRA set the limit at \$2,000 and indexed it to inflation. The 2025-2026 limit is \$3,500 per election. *Contribution Limits*, FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/>.

further deregulation.²² But the limits are not meaningful for anyone who wants to spend big money in elections.

In addition, new First Amendment attacks on the constitutionality of disclosure could soon bear fruit at an increasingly deregulatory Supreme Court.²³ So in the near future, voters may not even know which donors are seeking to influence federal elections and elected officials.

In the end, Americans live under a campaign finance regime created not by Congress but by piecemeal litigation orchestrated by lawyers committed to deregulation via the courts. The sheer complexity of the American campaign finance system and its byzantine structure of permitted financial vehicles obscures both the stakes as well as the role of money from the superrich to support candidates.

II. The New Frontier of Campaign Spending: The Nine-Figure Donor

In the 2024 elections, the top six donors supporting or opposing federal candidates each reported contributing at least \$100 million.²⁴ These donors—Elon Musk (\$291.5 million), Timothy Mellon (\$197 million), Miriam Adelson (\$148.3 million), Richard and Elizabeth Uihlein (\$143.5 million), Ken Griffin (\$108.4 million), and Jeffrey and Janine Yass (\$101.1 million)—all exclusively supported Donald Trump and other Republican candidates (except for the Yasses, who gave a nominal \$1,500 contribution on the Democratic side). The biggest donor on the liberal side (after Trump-supporting \$64.8 million donor Paul Singer) was former New

²² Nat'l Republican Senatorial Comm. v. FEC, *petition for cert filed*, (U.S. Dec. 4, 2024) (No. 24-621), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-621.html>.

²³ See Hasen, *supra* note 20.

²⁴ These data are gathered from the website Open Secrets, and in particular the web page, *Who Are the Biggest Donors?*, <https://www.opensecrets.org/elections-overview/biggest-donors?cycle=2024> (last visited Apr. 8, 2025).

York City mayor and publisher Michael Bloomberg, who gave \$64.3 million total, with all but \$1 million going to the Democratic side.

We have never seen so many nine-figure donors in an election. In the 2022 midterm elections, the sole nine-figure donor was George Soros (\$178.8 million), with his contributions going to help Democrats.²⁵ In earlier election seasons, nine-figure donors also were rare: there were two in 2020 (Sheldon and Miriam Adelson and Michael Bloomberg),²⁶ one in 2018 (Sheldon Adelson),²⁷ and none before then.

These numbers do not include all of the spending and contributing by these ultrawealthy individuals (including amounts contributed to non-disclosing political organizations). Take the spending of the world's richest man, Elon Musk. Even the \$291.5 million figure does not include the value of content on his social media platform X (formerly Twitter), which reaches hundreds of millions of users.²⁸ Musk reportedly tweaked the platform's algorithm to promote content favorable to Donald Trump,²⁹ something quite valuable but hard to precisely value. Nor do these figures include the value of the publicity for his controversial get-out-the-vote effort in swing states which include a \$1 million per day lottery for registered voters that could well have violated federal law.³⁰

Aside from these nine-figure donors, the ultrawealthy more broadly have an oversized influence in politics. Open Secrets data show that the top 100 donors gave almost 70 percent of

²⁵ See *id.* at <https://www.opensecrets.org/elections-overview/biggest-donors?cycle=2022> (last visited Apr. 8, 2025).

²⁶ See *id.* at <https://www.opensecrets.org/elections-overview/biggest-donors?cycle=2020> (last visited Apr. 8, 2025).

²⁷ See *id.* at <https://www.opensecrets.org/elections-overview/biggest-donors?cycle=2018> (last visited Apr. 8, 2025).

²⁸ Lorraine Mallinder, *The Elon Musk Effect: How Donald Trump Gained from the Billionaire's Support*, AL JAZEERA (Nov. 7, 2024), <https://www.aljazeera.com/features/2024/11/7/the-elon-musk-effect-how-donald-trump-gained-from-billionaires-support>.

²⁹ Anthony Cuthbertson, *Elon Musk Appears to Have Tweaked X's Algorithm to Promote Trump, Study Claims*, THE INDEPENDENT (Nov. 4, 2024), <https://www.the-independent.com/tech/elon-musk-trump-x-algorithm-bias-b2640976.html>.

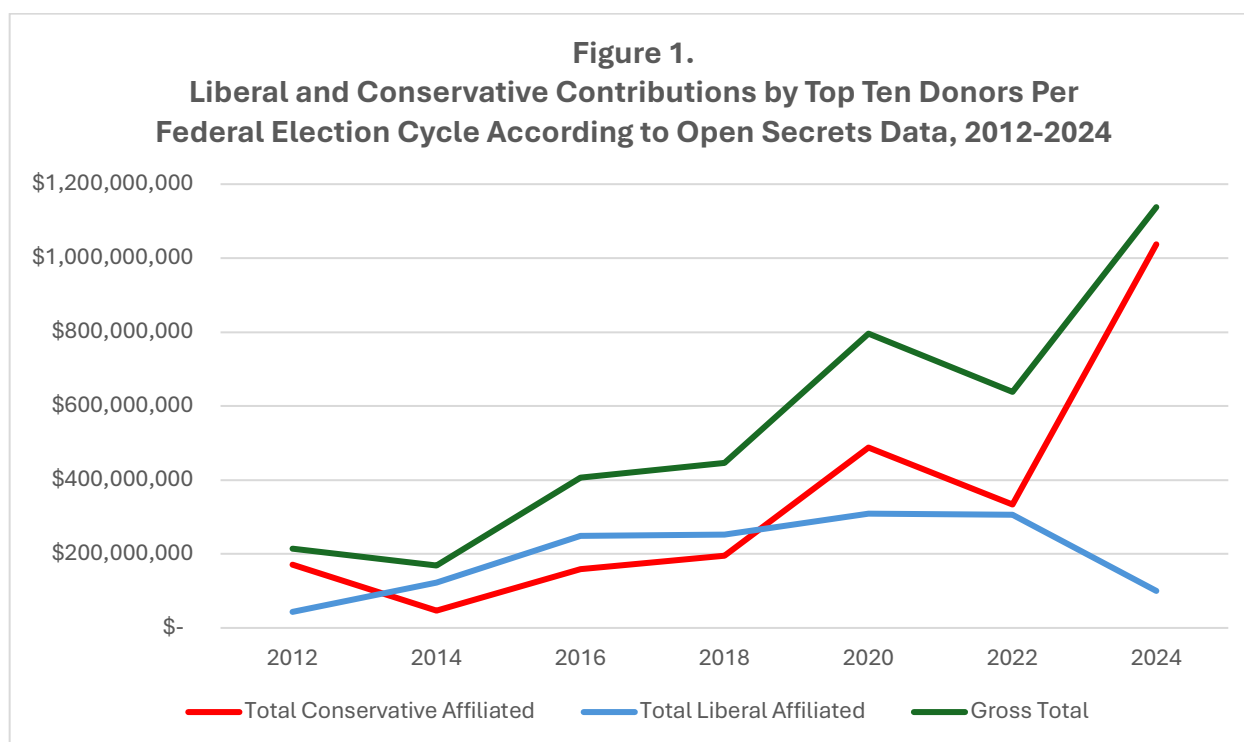
³⁰ Richard L. Hasen, *Elon Musk Might Have Broken the Law Against Bribing Voters. Whoops!*, SLATE (Oct. 16, 2024), <https://slate.com/news-and-politics/2024/10/elon-musk-2024-election-bribing-voters-trump.html>.

total money to outside groups like super PACs.³¹ The top 1 percent of donors gave 98 percent of the outside money.³² And thanks to changes in technology such as the rise in social media, the ultrawealthy have new ways to transform their economic heft into political might without running afoul of any regulation.

It is hard to know whether the severely lopsided spending by the ultrawealthy in 2024 in favor of Republicans is a new trend or a blip. Looking at the top 10 donors in each of the last few elections from 2012 to 2024 does not show a clear pattern of conservative dominance until 2024. Indeed, in some races, such as when Democrats were trying to retake the House in 2018, liberal spending outpaced conservative spending. The question is how the ultrawealthy will react in 2026 and 2028 to both the 2024 spending and the current volatile political conditions in the United States. See Figure 1.

³¹ *Super PACs: How Many Donors Give*, OPEN SECRETS, <https://www.opensecrets.org/outside-spending/donor-stats> (last visited Apr. 8, 2025).

³² *Id.*



It is also hard to pinpoint what exactly changed with donors psychologically in 2024 to unleash this torrent of \$100 million+ donors. The Super PAC path had been available in a few previous election cycles. Perhaps it is that the few who spent this much in earlier elections faced no public backlash for the extravagant spending. Perhaps it is because large donors (like many others) have become more polarized and see more at stake and are therefore willing to part with more money. In any case, a psychological barrier seems to have been broken.

There was some backlash to Elon Musk's \$20 million spending in a high profile 2025 Wisconsin state supreme court race.³³ That reaction might cause some very large donors to become less willing to be out there publicly promoting candidates in the way that Musk did. It

³³ Richard. L. Hasen, *What Elon Musk Won in Wisconsin*, SLATE (Apr. 3, 2025), <https://slate.com/news-and-politics/2025/04/elon-musk-won-in-wisconsin-long-term.html>.

may also push more money into nondisclosing 501(c)(4) groups and other entities. We will need a few more election cycles to see precisely where things may lead with the ultrawealthy.

III. How Deregulation Facilitates Oligarchy

One might downplay the importance of the rise of nine-figure donors and say it does not matter. In the 2024 presidential election campaign Harris and her allies raised nearly \$2 billion compared to Trump and his allies' \$1.45 billion.³⁴ Overall money did not determine the outcome of the presidential election compared to other factors that influenced voter choice given that each side had ample funding to get out their message and run their campaigns.

This minimization of the problem ignores two key points. First, the U.S. presidential election is unique in that it always attracts so much money with high stakes and high interest. Money, even from a megadonor, is not likely to be determinative because both sides will each be amply financed.³⁵ But this is not necessarily true for lower stakes races. For example, when Elon Musk spent significant sums to influence the outcome of a Wisconsin Supreme Court race, or when Nicole Shanahan (who ran as RFK Jr.'s running mate for President) threatened to fund super PACs supporting Republican candidates to challenge incumbent Senators who do not support Trump's cabinet nominees for confirmation.³⁶ Money can be much more influential in such races, especially if the Senators are running in otherwise non-competitive general election races where the real fight is to win the party primary.

³⁴ See the Open Secrets data archived at: <https://electionlawblog.org/wp-content/uploads/OpenSecrets.pdf>.

³⁵ Richard L. Hasen, *The Transformation of the Campaign Financing Regime for US Presidential Elections*, in *THE FUNDING OF POLITICAL PARTIES: WHERE NOW?* 225 (Keith D. Ewing, Jacob Rowbottom & Joo-Cheong Tham eds., 2012).

³⁶ Alex Nitzberg, *Scorched-Earth Shanahan: RFK Jr.'s Former Running Mate Threatens Political War Against Confirmation Opponents*, FOX NEWS (Jan. 29, 2025), <https://www.foxnews.com/politics/scorched-earth-shanahan-rfk-jr-s-former-running-mate-threatens-political-war-against-confirmation-opponents>.

More important is what the money buys. Even putting aside the possibility of *quid pro quo* deals, the money buys influence and access. Elon Musk has gained unprecedented access to Trump and unparalleled influence over the new Trump Administration through his White House office and activities for the amorphous “DOGE” organization that is cutting government employees and programs, and engaging in deep mining of government data (in many cases on issues with which Musk, the world’s richest man, has a financial conflict of interest).³⁷ Republican Senators toed the line and voted for Trump cabinet nominees, potentially out of fear of a Shanhan- or Musk-funded Republican primary challenge.

These are not the only examples. Right after coming into office, Trump gave TikTok a reprieve,³⁸ something that benefited supportive megadonor Jeff Yass, who owns a stake in its parent company.³⁹ Miriam Adelson cares about Israel policy, and she had plenty of meetings with Trump to make her case for her preferred Middle Eastern foreign policy.⁴⁰ Again, one does not need a *quid pro quo* to see how the access makes it more likely that policy favors the interests of the superrich.

All of this portends the rise of an American oligarchy in which the richest individuals have outsized influence on politics and public policy, all made possible only because of the Supreme Court’s First Amendment decisions, beginning in *Buckley* and continuing in *Citizens*

³⁷ Terry Gross, *How Did Elon Musk Become So Powerful in the Trump Administration?*, NPR: FRESH AIR (Feb. 12, 2025), <https://www.npr.org/2025/02/12/g-s1-48392/how-did-elon-musk-became-so-powerful-in-the-trump-administration>.

³⁸ Haleyula Hadero, *Trump Has Promised to ‘Save Tik-Tok’. What Happens Next is Less Clear*, AP (Nov. 12, 2024), <https://apnews.com/article/trump-tiktok-ban-congress-president-282d8df7b91dce270316509badd39978>.

³⁹ Brian Schwartz & Kalhan Rosenblatt, *Who is Jeff Yass? The Billionaire Donor with Investments in TikTok’s Parent Company*, NBC NEWS (Mar. 12, 2024), <https://www.nbcnews.com/tech/tech-news/jeff-yass-billionaire-donor-investments-tiktoks-parent-company-rcna142531>.

⁴⁰ Alex Isenstadt, *Trump Meets with GOP Megadonor Miriam Adelson*, POLITICO (Feb. 11, 2024), <https://www.politico.com/news/2024/02/11/trump-gop-megadonor-miriam-adelson-00140860>; Asaf Elia-Shalev, *Miriam Adelson Gives \$100 Million to Trump Campaign, Making Good on Reported Pledge*, TIMES OF ISR. (Oct. 17, 2024), <https://www.timesofisrael.com/miriam-adelson-gives-100-million-to-trump-campaign-making-good-on-reported-pledge/>.

United and other cases. Even if the wealthy are not buying election outcomes, they are buying higher probabilities of affecting both election outcomes and government decisions in their favor.⁴¹ And, with the ability to purchase social media platforms, AI systems and other new means of communication, knowledge production and information dissemination, the wealthy will have new effective pathways to influence public debate in disproportionate ways.

Plutocracy and oligarchy, rule by the wealthy and superwealthy, threaten democracy. As I have long argued,⁴² the Court took wrong turns in *Buckley* and *Citizens United* in rejecting societal attempts to achieve political equality (or at least minimize grotesque political inequality) as “wholly foreign to the First Amendment.”⁴³ Instead, reasonable limitations on the ability of oligarchs and plutocrats to convert their vastly unequal economic power into political muscle, combined with ample protection for robust political debate through searching judicial review, can assure both greater equality and the promotion of First Amendment values, thereby enhancing American democracy.

⁴¹ I make this case in HASEN, *supra* note 4, at 63-83.

⁴² See generally *id.*

⁴³ *Buckley*, 424 U.S. at 49.