

One-Page Litigation & Advocacy Memo

Weaponized Personhood: Attacking *Citizens United*

For: Litigators, Advocates, Legislative Counsel

From: Thomas William Hornig, The Execution Gap Project

Re: Doctrinal Framework for Challenging *Citizens United v. FEC*

Date: November 2025

Core Thesis

Citizens United rests on a category error: It grants corporations political citizenship (*civitas*) based on their economic capacity (*capacitas*), conflating two categories Roman law separated for two millennia.

Reframe the question:

✗ *Not:* "May government restrict corporate speech?"

✓ *Instead:* "May artificial entities created for economic purposes acquire political standing reserved for natural citizens?"

Key Doctrinal Hooks

1. "We the People" (Democratic Legitimacy)

Argument: First Amendment protects political *civitas* of natural persons—members of the *demos*. Corporations are legal fictions, not constitutional subjects.

Case law: *Reynolds v. Sims* (1964)—"one person, one vote"; equal standing in political community.

Strategy: Distinguish corporate political spending from natural persons' associational rights. Shareholders/employees retain full speech rights; only the *entity's* independent expenditures are constrained.

2. Anti-Distortion (Rehabilitate *Austin*)

Argument: State may prevent conversion of economic power (*capacitas*) into disproportionate political power (*super-civitas*).

Case law: *Austin v. Michigan Chamber of Commerce* (1990)—upheld corporate spending restrictions to prevent "corrosive and distorting effects of immense aggregations of wealth."

Strategy: Frame as **personhood boundary rule**, not "leveling." Corporate wealth acquired through state-granted privileges (limited liability, perpetual existence) should not translate into electoral dominance.

3. Associational Rights vs. Entity Rights

Argument: The *universitas* (corporate entity) lacks independent *civitas*. Regulating the entity ≠ suppressing individuals' associational speech.

Case law: Natural persons' right to associate (*NAACP v. Alabama*) derives from their constitutional standing—not extended to artificial legal containers.

Strategy: Force distinction between (1) association of citizens (protected) and (2) state-created legal fiction with no citizenship obligations (regulable).

4. Overruling Standards

Argument: *Citizens United* is wrongly decided, unworkable, and causes demonstrable harm.

Case law: *Janus v. AFSCME* (2018)—quality of reasoning paramount for constitutional precedents.

Strategy: Build record showing: (1) fabricated history (Conkling forgery), (2) 688% spending increase, (3) donor concentration (top 100 = 16% of spending), (4) democratic capture.

Four Remedy Pathways

Route	Vehicle	Timeline	Key Advantage
A. Reinterpretation	Shareholder approval requirements	1-3 years	Avoids <i>stare decisis</i> ; preserves corporate governance
B. Overruling	Direct challenge in receptive circuit	5-10 years	Clean resolution; restores full congressional authority
C. Statutory	DISCLOSE Act; SEC rules	Immediate	Congressional action; works within <i>CU</i> constraints
D. Amendment	State resolutions → ratification	10-20 years	Ultimate authority; hard-codes <i>capacitas/civitas</i> distinction

Litigation Strategy: Model Test Case

Plaintiff: Shareholders challenging corporate political spending without approval

Claim: Management's independent expenditures violate shareholders' **associational rights** (First Amendment) and **fiduciary duties** (corporate law).

Question Presented:

> "Whether the First Amendment prohibits states from requiring publicly-traded corporations to obtain majority shareholder approval before making independent political expenditures, where such requirements protect shareholders' associational rights and do not restrict the quantum of permissible speech."

Argument:

1. *Citizens United* reasoned corporations are "associations of citizens" → corporate speech = associational speech
2. But empirical evidence shows **shareholders oppose** corporate political spending (lack democratic will)
3. Shareholder approval requirement protects **true associational rights** of natural persons
4. Regulates **corporate governance**, not speech content → rational basis review
5. Preserves economic *capacitas* (commercial speech, investor relations) while limiting political *civitas*

Relief Sought:

- Declaratory judgment upholding state shareholder approval statute
- Distinguish *Citizens United* as inapplicable to governance regulations
- Alternatively, certiorari to Supreme Court for explicit reconsideration

Key Empirical Data (Post-*Citizens United*)

- **Outside spending:** \$574M (2008) → **\$4.5B (2024)**—688% increase
- **Top 100 donors:** 1.5% (2008) → **16% (2024)** of total spending—10× concentration
- **Billionaire families:** **\$1.9B (16.7% of total)** in 2024; 160× increase since 2010
- **Dark money:** **\$1.9B** annually; transparency fell from 97% → 50%
- **Megadonor:** **10 individuals = 44% of Trump funding** (\$481M of \$1.09B)
- **Small donors:** Declined from 26% → **16%** despite grassroots mobilization

Comparative Law Support

Every advanced democracy regulates corporate political participation:

- **France:** Complete corporate/union contribution ban (natural persons only)
- **Canada:** Third-party spending caps; corporate contribution ban
- **UK:** "Permissible sources" doctrine (genuine democratic stake required)
- **13 of 27 EU states:** Ban all legal entity donations

Conclusion: Corporate restrictions are **compatible with robust democracy and free expression**.

Roman Law Vocabulary (Use Consistently)

- **Capacitas:** Economic capacity—own property, contract, sue (commercial function)
- **Civitas:** Political citizenship—membership in *demos*, political participation rights
- **Universitas:** Collective entity/corporation created for economic purposes
- **Persona:** Legal role/mask; allocable, not metaphysical

Framework: Corporations possess *capacitas* for commercial function but lack *civitas* for political participation. *Citizens United* conflates the two—**this is the category error**.

Model Language for Briefs

Opening:

> "The question is not whether corporations are 'people,' but whether artificial entities created by the state for economic purposes may wield political influence proportional to accumulated capital rather than citizenship. For two millennia, from Roman *universitates* to modern democracies worldwide, the answer has been no: commercial capacity (*capacitas*) does not entail political standing (*civitas*)."

Closing:

> "*Citizens United* grants super-personhood to wealth-concentrating legal fictions, inverting the constitutional hierarchy that vests sovereignty in 'We the People.' The state may regulate corporate political expenditures—not to silence speech, but to preserve the foundational principle that political voice derives from citizenship, not capital."

Next Steps

Immediate:

1. Identify plaintiff (shareholder group or state AG)
2. Draft model statute (shareholder approval requirement)
3. File in receptive circuit (9th, D.C., or state supreme court)

Coordinate with:

- Campaign Legal Center
- Brennan Center for Justice
- Public Citizen
- State attorneys general coalitions

Resources: Full white paper + executive summary at www.executiongap.org

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