FRIENDS OF THE COURT AND FRIENDS ON THE COURT:

RELIGIOUS EXPRESSION AND AMICUS BRIEFS

IN THE UNITED STATES SUPREME COURT

by

SARAH BURNS

(Under the Direction of J. Derrick Lemons)

ABSTRACT

Designed from its inception to be insulated from public pressure, the Supreme Court is generally regarded to be above the political fray by which the other two governmental branches are culturally defined. Quietly but surely, however, influence has seeped in. Inspired by interest groups' use of the Court's amicus arm as a lobbying mechanism, Christian-nationalist groups have begun building a wave of amicus briefs designed to pull the Court toward their perspectives. Their use of the amicus machine is starkly different from that of the interest groups who sparked such utilization, though, as their presentation of their purpose in front of the Court is starkly disparate from how they speak about it in public forums outside the Court's purview. The Court historically has not policed these briefs and accepts them for consideration without critical review. In this way, these amicus—"friends of the court"—have found friends *on* the Court.

INDEX WORDS: United States Supreme Court, amicus curiae briefs, religious expression, religious freedom, Christian nationalism

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INTRODUCTION

The academic and journalistic conversations about Christian nationalism in the United States have been growing more and more frequent in recent years, but despite that fact and even despite the belief system's increasing visibility in the aftermath of the January 6, 2021 insurrection at the nation's Capitol, many people may not realize how prevalent the belief system is in the United States or how far its influence is reaching. A 2022 study by Pew Research Center found that 45% of Americans think that the United States "should be a 'Christian nation,'" but that 64% of Americans think that it is not one currently and only 33% think that it is.[1] One piece of information missing from this study that could be additionally interesting is what the religious identities are of those 33% that believe the U.S. already *is* a Christian state; my suspicion is that this group has a surprising number of non-Christians represented in it, as someone looking from the societal outskirts inward at the cultural power that Christianity holds in the U.S. might be more likely to recognize that cultural power than the people who hold it.[2]

Regarding the identity of people who would like a U.S. Christian-nationalist state, though, a survey conducted by Politico around the same time as the one by Pew found that much of the desire for the U.S. to be declared a Christian state originates from evangelical Republicans.[3] Out of this group, 78% want the U.S. to have such a label, while only 48% of other Republicans, 52% of evangelical Democrats, and 8% of other Democrats do.[4] And yet, according to this same survey,

[1] See Smith, Rotolo, and Tevington.
[2] See Norton 11.
[3] See Rouse and Telhami.
[4] See Rouse and Telhami.

70% of Americans—57% of Republicans and 81% of Democrats—said that a religious branding of this kind on the U.S. government would be unconstitutional.[5]

Given that 45% of the population thinks that the U.S. should be a Christian nation and 70% say that such a label would be unconstitutional, there is some cross-section in the population, then, that understands that Christian nationalism would fundamentally go against the foundational law of the United States and yet desires to see it implemented nonetheless, which would constitute a reshaping of the American governance structure. Stepping back from that cross-section and looking at the broader picture of the groups pushing for a Christian-nationalist state, however, it appears that there is a strong desire in such groups to see their identity and beliefs reflected in governance, rather than simply accepted alongside everyone else's.[6] There seems to be, in some way, a sense of ownership over the country imbued into such a mindset. But perhaps another irony lies in the advocacy that such groups undertake—how they advocate for themselves in branches of the government that would ultimately be fundamentally changed if their mission were to succeed, particularly the Supreme Court.

Despite the fact that the Supreme Court was designed to be insulated from public pressure and thus features a system of appointments for the Justices that form its bench, rather than of political elections,[7] religious groups are seeking to influence the outcome of Supreme Court cases through a loophole carved by other interest groups: the use of *amicus curiae* briefs as advocacy measures. But while using the amicus mechanism in this way is not an invention by the religious groups, part of what distinguishes these religious groups' use of it from the other advocates who

[5] See Rouse and Telhami.
[6] See Whitehead and Perry 15.
[7] See Shapero.

have lobbied the Supreme Court through this method is a difference in how they present their advocacy work when they are in front of the Court versus how they do in the broader public.

This thesis thus examines *amicus curiae* briefs used by Christian groups to lobby the Supreme Court; it focuses in particular on the difference between how many such groups present their aims to the Court—to present a legal argument on its merits and provide a novel line of reasoning for the Court to consider—and how they present their aims to the public via their websites, social media, and self-advocacy—to sway the Court specifically for their own religiously oriented purposes. With this deliberate veiling of intent in mind, I ultimately argue here that these disguised briefs are a form of religious expression and should be considered such by the Court. A question then follows of whether, given the fact that amicus briefs are currently unpoliced and may be submitted by anyone for the Court's acceptance and reference, this shift in our perspective on these expressive briefs should require a change in policy regarding the Supreme Court's acceptance and use of amicus briefs filed by advocacy groups.

To set a foundation for this discussion, though, in Part I we will first review the policies surrounding the filing and use of amicus briefs in cases before the Supreme Court, and chart their prevalence. In Part II, we will compare this conversation regarding religious-group usage against their use by advocacy groups beyond religious spaces, and evaluate what this means in practice. We will achieve the last element by reviewing the use of amicus briefs in recent cases and the organizations that filed them, comparing the language in the briefs against how those briefs are discussed by the groups in public spaces the Court will not see. In Part III, we will then track through our definition of religious expression, explore how this definition applies to the amicus briefs we have reviewed, and establish how the Court has historically treated the concept in order to gain context on how their perspective is currently shifting in precedent-changing ways. Finally,

in Part IV, we will connect that current perspective to the question here of how the Court likely would respond to the amicus briefs discussed in this thesis if they were indeed understood to be elements of religious expression.

I. FRIENDS OF THE COURT

A. Amicus Briefs

Amicus curiae briefs, also known as "friend of the court" briefs, are filed by entities who are outside the case in question and are not involved in the situation that led to its being before the Court. In its Roman origin, an "amicus curiae" would be a neutral third party who was permitted—sometimes even invited—to present unbiased information.[8] This method of information-gathering was incorporated into English common law and then carried over into the Supreme Court of the United States at the time of its genesis.[9] The intention in its inclusion in the Supreme Court's framework was initially the same as in the original Roman context: for non-argumentative context to be provided to the Court by outsiders who had no stake in the proceedings being considered. And the amicus avenue for receiving additional background information was both unique for and uniquely valuable to the U.S. Supreme Court, as the Court was otherwise designed to be insulated from external political pressures. This goal of insulation was reinforced through the Court's life-long terms and its strict specifications on what information it accepted: only petitioners' and respondents' briefs, and those of amicus. In other words, the Court was intended to stay stable and sequestered from the society whose laws it shapes, with little to no opportunity for external opinions to be shared.

[8] See Larsen and Devins 1909.
[9] See Krislov 694.

The intended unbiased aspect of amicus briefs became gradually more complicated in the United States around the turn of the twentieth century, however, when they started being used more and more frequently for advocacy efforts, rather than for the plain contextualization that was the intention for amici previously.[10] By the 1930s, these briefs had become a full-fledged advocacy arm for organizations that had previously been kept entirely excluded from the Court unless they were an implicated party (plaintiff or defendant) in one of the cases. And this lobbying dynamic has carried forward into—and is continually reinforced within—our current context. Meanwhile, the shift from contextualization-amicus to advocacy-amicus brought with it also the use of amicus briefs for legal argumentation, as the Court invited novel reasoning to be provided by external perspectives.

Theoretically, anyone can now file an amicus brief for the Court's consideration, whether as a simple advocacy measure or as an argument that aims to guide the Court's legal reasoning. Indeed, "[t]he general practice of the U.S. Supreme Court . . . is to allow essentially unlimited amicus participation."[11] And this is a fact that is heavily taken advantage of even as the submission of amicus briefs grows in quantity; in fact, some "organizations are established at least in part for the very purpose of filing amicus briefs."[12] There are no regulations on this whatsoever: The only requirements for a brief relate to the color of its cover (for organizational purposes, to distinguish amici from the plaintiff and the defendant), *when* in a case's proceedings a brief can be filed, and the brief's word count.[13] Some religious groups have taken this lack of regulation as an opportunity to have their voices heard before the Court in ways they otherwise do not have access to—and,

[10] See Larsen and Devins 1910.
[11] See Caldeira and Wright 785.
[12] See Caldeira and Wright 785.
[13] See Harris.

more specifically, to do so for cases in which they desire a specific outcome. Before we turn to studying those groups, however, it still remains to overview the general use of amicus briefs in recent years. We therefore turn now to how prevalently amicus briefs are used before the Court and who files them.

B. Amicus Lengths

The use of amicus briefs has risen sharply in recent years, due at least in part to their usefulness to interest groups as a lobbying mechanism, as the low cost of their production "allows groups to influence public policy while expending a minimal amount of resources" and thus makes these briefs "the primary technique used by interest groups."[14] It was not always this way though: When the form was first created, it was primarily used by governmental bodies to protect governmental interests, starting in 1823 with the case Green v. Biddle, and was thus always more adversarial than one would expect from its name and stated intent.[15] The first amicus brief filed by a nongovernmental interest group did not come until 1904, in Ah How v. United States.[16] The organization was the Chinese Charitable and Benevolent Association of New York; the brief raised to the Court's attention that the government had been abusing Chinese immigrants in the New York City area and it suggested that the Court rule that the appellants, who were members of the disabused group, did not need to be removed from the United States as another court had ordered them to be. The Supreme Court ruled in a way that was unfavorable to the amicus brief's argument, but the brief nonetheless had the impact of creating a previously unexplored channel by which groups could approach the Court and voice their concerns on behalf of their select group.

[14] See Collins 35.
[15] See Banner 131.
[16] Ah How v. United States, 193 U.S. 65 (1904); Krislov.

Many of the amicus briefs filed over the following years would be concerned most particularly with the fight for civil rights and liberties by people of color—it is rare to read an article on the history of amicus briefs without coming across specific sections dedicated to the many briefs filed by the National Association for the Advancement of Colored People and the American Civil Liberties Union in particular—but other organizations participated as well. For example, in 1908, the National Consumers League filed a brief to provide evidence on the detrimental effects that working long hours has on women. As the amicus mechanism grew in popularity as a lobbying method, briefs began to be in conversation with one another, with opposing groups filing on behalf of their memberships and standing in opposition to one another before the Court. An instance of this can be seen in the 1936 case United States v. Butler,[17] in which agricultural and economic groups squared off with one another to dispute the constitutionality of the Agricultural Adjustment Act.

The amicus form grew in popularity after its inception as a lobbying function in 1904, its numbers rising slowly but surely until 118 amicus briefs were filed in the 1949 term alone. In 1950, the Court temporarily began requiring that any amicus get the consent of each party to the case (the plaintiff and defendant) before they filed a brief, which had a limiting impact on the number of briefs submitted over the following years. During the 1950 term, it dropped to 70; in 1951, to 44; and in 1953, it hit a final low of 34.[18] This requirement was removed in 1957, though, and the amicus boom resumed, rebounding to its previous high levels by the early 1960s.[19] The

[17] United States v. Butler, 297 U.S. 1 (1936).
[18] See Schubert 74.
[19] See Collins 45.

growth only continued from there, to the extent that it has been described by scholars as a "rising tide."[20]

Amici had filed in a total of 324 cases from 1920 to 1936; in the period between 1936 to 1952, 443 briefs had been submitted; and between 1953 to 1966, 521 briefs.[21] (The difference between the second and third segments here alone is remarkable, as the thirteen-year period between '53 and '66 saw an increase of 78 briefs over the total of the entire 26 years immediately preceding this period—an increase of 425%, *even with* the decrease in filings from 1950 to 1957 described above.) From 1966 to 1975, the number of briefs continued to jump higher and higher, multiplying by 392% to 2042, and from 1976 to 1985, by 205% to 4182.[22] In the period from 1986 to 1995, the growth slowed, only increasing by 725 to a total of 4,907 briefs for the entire timespan. And the growth continued, although not at such exponential rates. For context, the 1995 term alone saw 400 amicus briefs filed;[23] in 2014, that number was almost double, at 781;[24] in 2020, it had risen further, to 911 in a single term.[25] In other words, in 2020 alone, 144 more amicus briefs were filed than in the entire span of time from 1920 to 1952.

This exponential growth in amicus-brief filings tracked with their growing use by interest groups. By 1963, Samuel Krislov was already describing amicus briefs as "no longer a neutral, amorphous embodiment of justice, but an active participant in the interest group struggle."[26] At the time of his writing, the briefs had only just begun their exponential growth; the fact of their

[20] See Kearney and Merrill 751.
[21] See Puro 54.
[22] See Kearney and Merrill 752; O'Connor and Epstein 317.
[23] See Collins and Solowiej 961.
[24] See Franze and Anderson (2015).
[25] See Franze and Anderson (2020).
[26] See Krislov 717

importance to interest groups has only grown more and more in the years since then. We move now to a peek at the comparative rates at which interest groups file amicus briefs.

II. FRIENDS IN THE COURT[27]

A. Availing Advocacy

With such high spikes in amicus-brief activity over the years, a natural next question relates to who is filing these briefs in such escalating numbers—who these friends are *in* the Court. The answer varies, depending on what cases the Court hears in a given term; after all, a controversial case on civil liberties will receive far more amicus briefs than a noncontroversial case on, say, patents.[28] But broadly speaking, the government itself files many amicus briefs. These are generally from entities such as the Department of Justice, the Attorneys General, various federal governance arms, or state-government entities, and are filed to express the government's official position on an issue if governmental interests are implicated in the case at hand. Government briefs comprise a large portion of the current number of total briefs filed—in 1990, roughly 51.5% of the briefs filed in cases in which writ of certiorari was granted (meaning cases that appealed the outcome of a lower court's ruling) and 32.8% of the briefs filed in cases "heard on merit" (meaning cases that are decided based on the application of the law) were from governmental entities.[29] Amicus briefs by trade and professional groups accounted for 12.9% of amicus briefs in appealed cases and 16.8% of those in merit cases; corporations for 11.8% of briefs of appeal-case briefs and 8.1% of merit-case briefs; unions for 2.3% and 2% respectively; peak associations for 2.6% and 3%; miscellaneous entities (such as individuals) for 4.8% and 5.1% total; charities and community

[27] This section draws on my previous work for my comprehensive examination.
[28] See Puro 54.
[29] See Caldeira and Wright 793.

groups for 2.8% and 2.8%; and, finally, last and most relevant to this thesis, interest-group and public-interest amicus briefs comprised 7.2% of the briefs filed in appealed cases and 23.1% of the briefs filed in cases heard on merit.

The specific numbers and percentages for the categories above grow more and more difficult to determine in present-day contexts, as the number of amicus briefs filed continues to rise, with over double the amicus briefs being filed now as in 1990. But interest-group participation has similarly only continued to rise. And for our purposes specifically, there has been a matching rise in religious-lobby activity. The number of religious-lobby organizations have risen dramatically over the last century: 16 in 1950, 80 in 1985, 120 in 1994, and over 200 in 2012.[30] Much of the academic research related to the religious lobbying activity dropped off after 2012, but as we will see, the religious lobby has continued to grow impressively large and organized, as is evidenced by the many amicus briefs filed by organizations oriented towards religious advocacy we will soon review.

More generally, though, it is important to note that an organization with religion-oriented interests is not required to do anything to register itself as such or even to acknowledge that fact publicly—it can simply register as a standard non-profit. The organizations that identify themselves as specifically religious have increased in number, but the growth in non-profits more generally has outpaced this trend by far, growing tenfold from the 1950s to present-day, from just over 30,000 to 1,080,000 in 2019.[31] Countless religious entities register as these public nonprofit organizations, known as 501(c)(3)s, in order to benefit from the form's tax-exempt status.[32] (In fact, churches and religious groups *must* register as a 501(c)(3) in order to be eligible for tax

[30] See Devins and Fisher 270.
[31] See NCCS Team.
[32] See, for example, the number of 501(c)(3) organizations listed when simply searching for "ministry" on CharityNavigator. See "Search: Ministry," *CharityNavigator*.

exemption.[33]) And while 501(c)(3)s are technically limited on the extent to which they can lobby, that limitation can be worked around, particularly if the lobby-like undertakings are a minor part of the organization's overall activities[34]—such as an amicus brief can be. What all of this means in practice is that the number of religion-focused organizations that function in some way as an advocacy machine is certainly higher than can possibly be tracked by simple categorizations. In some way, given the proliferation of religious nonprofits that are involved in advocacy and outreach efforts, it can be seen as an invisible—veiled and concealed—extension of the religious lobby.

B. A Veil Lifted

We move now to lift the veil—to spotlight some of the figures that are taking advantage of the lack of regulations on amicus briefs. As mentioned before, the number of amicus briefs filed on a case is heavily influenced by the type of case it is: its topic, how controversial its context and content is, and whether there is some expectation that the Justices will shift precedent in some way. And because there is also a large range of groups filing amicus briefs now, often across blurred boundaries of categorization (for instance, an individual who files an amicus brief seeking to advocate with a public-interest intent could be categorized as either an individual or as a public-interest entity), it makes a broad overview of categorical statistics nigh on impossible. Perhaps a more effective approach to achieve an understanding of how religious groups are lobbying the Court through amicus briefs is to examine one case in particular, pick through some of the specific groups who filed in it, and evaluate their approach.

[33] See *Internal Revenue Service*; Mathias.
[34] See *Bolder Advocacy*.

For this examination, Dobbs v. Jackson (2022) seems a natural fit. Just this past term, its ruling overturned the longstanding precedent of Roe v. Wade (1973), in the process delegitimizing the constitutional right to abortion that had previously been located in the right to privacy. It was clear from *Dobbs*' initial placement on the Court's schedule that it was going to be controversial and thus attract a large number of briefs, but the number is impressive even so: 141 amicus briefs were filed in *Dobbs* alone.[35] For context, the Court received 911 amicus briefs *total* in the entirety of its 2019–2020 term, for an average of 16 per case.[36] And that was a year of high amicus yield—the year before, the case average had been 11 amicus briefs per case. In other words, *Dobbs* received nearly ten times the average number of amicus briefs other cases received during the same term, despite the term receiving a relatively high number of amicus briefs already.

The high amicus number for *Dobbs* was reflected on both sides of the advocacy aisle: 81 briefs were filed on behalf of the petitioners (arguing that the Mississippi law banning abortions after 15 weeks should be upheld), 52 on behalf of the respondents (arguing that the Mississippi law should be struck down), and 8 briefs had been filed at the petition stage simply to argue that the Court should agree to hear the case. Even though the 52 pro-respondent briefs achieve an abnormally high number of amicus briefs on a single case by themselves, they are still clearly heavily outnumbered by the 81 pro-petitioner amici, some of whom were also responsible for the 8 petition-stage briefs. And again, that high number on behalf of the petitioner is to be expected: There had long been a furor in Christian communities to overturn Roe v. Wade, to the extent that the issue of abortion has become linked in certain circles to one's religious identity.[37] It is therefore upon the pro-petitioner (anti-abortion) amici that we will focus here.

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[35] See Docket for 19-1392.
[36] See Franze and Anderson 2 (2020).
[37] See *The Pluralism Project*.

Although the pro-petitioner amici were all arguing for the same outcome—for the Court to diminish the right to an abortion, at the very least, if not remove it altogether—they were by no means a monolithic group. The entities present and involved in the effort, if they were to be loosely grouped, included politicians, amici self-identified in such a way as to claim the representation of a minority interest group, state actors, anti-abortion organizations, medical associations (some of which are religiously affiliated, but not all), clearly religious groups, and—for lack of a better description—a number of lobbyist groups whose names vaguely gesture towards "law," "liberty," "ethics," "justice," and "family." A few notes follow on each of these in turn, although we will focus primarily on the last two groups for most of this section.

As to the first group mentioned, the politicians generally are not named individually and instead title themselves "Women Legislators," "228 Members of Congress," and "Five Democratic Legislators."[38] This, combined with the fact that these groups decline to identify their membership within their briefs, effectively means that the individuals participating in these briefs—other than the counsel on record (the attorney who filed the brief)—are invisible to the Court and to the public unless those individuals choose to claim credit for their contributions to the filing via other avenues, like a public-facing website. In the most charitable understanding of this dynamic, this anonymity could shield politicians from facing public backlash for supporting a controversial position before the Court; in the most cynical, it could allow a complete falsification of the amici's identity, as there is generally no guarantee that the briefs filed under a political-group identification such as "legislators" or "members of Congress" are indeed coming from such a gathered group.

[38] See Brief for Women Legislators and the Susan B. Anthony List as *Amici Curiae* Supporting Petitioners; Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners; Brief *Amici Curiae* for Democrats for Life of America Five Democratic Legislators from Five Individual State Legislatures on Behalf of Petitioners; Brief of *Amici Curiae* Rep. Steve Carra and 320 State Legislators from 35 States in Support of Petitioners; Brief of Governor Henry McMaster And 11 Additional Governors as *Amici Curiae* in Support of Petitioners.

We see here that there are already large potential loopholes in the amicus-brief system. There are politicians who *do* choose to identify themselves—such as Josh Hawley and Ted Cruz,[39] both of whom regularly file amicus briefs before the Court—but they are the exception rather than the rule, and those who file in this way are typically doing so individually, using their own voices and knowledge of the law rather than filing as part of a group. (Both senators are law-school graduates: Ted Cruz attended Harvard Law[40] and Josh Hawley attended Yale Law.[41]) We see the same self-identification loophole in action in other amici that claim to be a specific group, such as those filing as African American civil rights leaders, women scholars, and biologists.[42] We do not know—and do not have the means to know—the extent to which the groups are actually made up of members representative of the group's claimed title. The potential suspicion this can cause is amplified particularly in the biologist brief, in which it seems like the brief is attributed to biologists only because it presents a biology-focused argument and cites a survey in which biologists agreed that human life begins at fertilization.[43]

As a contrast that highlights how absurd the briefs just discussed can be, state actors, on the other hand, do not seem to allow this same ambiguity in their filing efforts. For example, there is a pro-petitioner amicus brief filed for *Dobbs* from 24 state governments that lists out individually the states participating.[44] This brief is also the only one from state actors filed in support of the

[39] See Amicus Brief of Senators Josh Hawley, Mike Lee, and Ted Cruz in Support of Petitioners.
[40] See Cruz.
[41] See Hawley.
[42] See Brief for Amici Curiae African-American, Hispanic, Roman Catholic and Protestant Religious and Civil Rights Organizations and Leaders Supporting Petitioners; Brief of 240 Women Scholars and Professionals, and Prolife Feminist Organizations in Support of Petitioners; Brief of Biologists as Amici Curiae in Support of Neither Party.
[43] See Brief of Biologists 24.
[44] See Brief for the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming as Amici Curiae in Support of Petitioners.

petitioner (and in support of the 15-week Mississippi law), which speaks to the level of coordination undertaken by these separate governments to speak with one voice. We know for certain that this brief came from these state governments not only because of the specificity with which they are named, but also because it was filed by the attorneys general and solicitors general of Texas, the lead amicus state listed.

Similarly, the identities of the organizations that file as amicus are more straightforwardly identified by name, but that fact is not without its own complications. While most filing organizations that were specifically *formed* to fight abortion are named clearly to indicate their leanings—for example, Moral Outcry, Right to Life, Americans United for Life, Foundation to Abolish Abortion, etc.—this is not true of most of the medical associations that file amicus briefs. Some are identifiably and explicitly religious, such as the Christian Medical & Dental Associations and the Catholic Medical Association.[45] Others, however, present as facially neutral but upon closer inspection turn out to be politically motivated bodies. For example, the Association of American Physicians & Surgeons sounds like a professional organization that any physician or surgeon might want to join, until exploration into their legal advocacy reveals that they are deeply conservative, fighting against vaccine mandates, and contending with the Food & Drug Administration to "end its arbitrary restrictions on" hydroxychloroquine,[46] which was mistakenly touted by right-wing groups as a covid-preventative drug despite the scientific community broadly speaking to the contrary for the past two years.[47] The AAPS thus are clearly not as neutral as their name seems to imply and their activity in the legal field is remarkably high for a community that

[45] See Brief of *Amicus Curiae* Christian Medical & Dental Associations in Support of Petitioners; Brief of the Catholic Medical Association, The National Association of Catholic Nurses-USA, Idaho Chooses Life and Texas Alliance for Life as Amici Curiae in Support of Petitioners.
[46] See "Legal Matters," *Association of American Physicians and Surgeons*.
[47] See Finnegan.

is supposedly medicine-focused. Similarly, the American Association of Pro-Life Obstetricians & Gynecologists seems on its face to have a straightforward identity as well, but their website reveals that each of their six affiliated associations are Christian organizations.[48] Their group has named itself to appear religion-neutral, but closer inspection reveals this is not the case. Without that examination, though—in other words, if the amicus briefs they file are simply taken at face value—they appear to be presenting insight to the Court that is based on medical expertise alone.[49]

What has been highlighted so far is the fact that amicus documents are difficult to trust with certainty in terms of who the briefs are being filed by and what their intentions for the brief actually are, although there are exceptions where the origins of the brief are clear, such as with the state governments that filed collectively. This general untrustability is because the briefs may feature participation from actors who are difficult to identify with certainty, as we have seen with groups claiming to be politicians or claiming to be advocacy bodies who can speak with authority on the experience of minority communities. But the unusual factors in the groups truly under study here—the specifically religious groups, which come next in this discussion and will be the focus moving forward—remain noteworthy even in this context of ambiguous difficulty. As mentioned before, this is because some of them veil their true intentions behind their legal argumentation, file briefs beyond their organization's specified purview, and flood the Court with multiple amicus briefs from various arms of their operations and partnerships. We will examine this in more detail within the context of *Dobbs*, looking most closely at the organizations who are most participative and lobbyist-minded in these efforts.

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[48] See *AAPLOG*.

[49] See Brief of *Amici Curiae* The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG), Right to Life of Michigan, Inc., and The National Catholic Bioethics Center in Support of Petitioners.

First, it is important to delineate the religious groups that are approaching the Court with a self-advocacy message versus those who are seeking to persuade the Court using an argument disconnected from their identity. A perfect example of this is the *Dobbs* brief from the Jewish Pro-Life Foundation and Coalition for Jewish Values.[50] In this brief, the amici argue that "abortion is antithetical to Torah principles"[51] and that "Jewish experiences historically as state sponsored targets of genocide and eugenics give us a unique opportunity to recognize the injustices wrought on our innocent brothers and sisters in the womb."[52] Their choice to relate abortion to genocide and eugenics is doubtlessly a controversial move, but the fact remains that the amicus brief focuses on Jewish identity and its connection to the topic, and therefore on how the subject of abortion interacts with Jewish interests. Its relevance to the case—meaning how or why Jewish identity is particularly salient to questions of national constitutional rights—is never quite established, so it seems unlikely that the advocacy effort landed as it was intended to; nevertheless, it remains a clearly delineated *advocacy effort*.

This is the only brief that makes such a clear identity-based defense of the Mississippi law. The closest other example was filed by Foundation for Moral Law & Lutherans for Life, and it argued that "the viability test has no foundation in law, science, history, Biblical, or church tradition."[53] It makes no assertions on the basis of its filers' religious beliefs, but it does reference their religious text reverentially without providing a non-religious justification for doing so. Perhaps this is because the Foundation for Moral Law, as they state in the brief, "believes that [the laws of the United States] should reflect the moral basis upon which the nation was founded,"

[50] See *Amicus Curiae* Brief of Jewish Pro-Life Foundation, The Coalition for Jewish Values, Rabbi Yakov David Cohen, Rabbi Chananya Weissman, and Bonnie Chernin, (President, Jewish Life League) on the Merits in Support of Petitioners.
[51] See *Amicus Curiae* Brief of Jewish Pro-Life Foundation 26.
[52] See *Amicus Curiae* Brief of Jewish Pro-Life Foundation 27.
[53] See Brief for *Amici Curiae* Foundation for Moral Law & Lutherans for Life in Support of Petitioners 16.

implying by reference to "the unalienable God-given right to life" that this "moral basis" would create a national interest in incorporating God into legal structures and thus justify referencing the Bible in a legal brief.[54]

The fact that the Foundation for Moral Law expresses this belief within the amicus brief is itself surprising, as generally the other religious groups who file amicus briefs will stick to making legal arguments in their briefs and only are revealed to be some form of Christian-nationalist group when they are investigated through other means, such as their websites. Even Intercessors for America, the only other amicus to cite the Bible heavily in favor of abortion restrictions in *Dobbs* (and who accuses the Court in its brief of "de facto establish[ing] paganism as our nation's religion") does not advocate so explicitly for their religious identity to shape the law.[55] They clearly believe the Court has gone wrong in its previous decisions, namely *Roe v. Wade*, but there is no specific claim given by them that Christianity is the only fix.

Other groups handle the Court even more gingerly. We shift now to looking at the groups that represent themselves to be religiously motivated outside the Court but to be only motivated by legal argumentation when they are before the Court. This category comprises the majority of the religious groups who file amicus briefs. Such an identity-juxtapositioning dynamic is particularly interesting in examples like the amicus brief involving the Billy Graham Evangelistic Association filed by the National Legal Foundation or the amicus brief filed by the Center for Religious Expression. The National Legal Foundation describes its mission on its website thus: "To prayerfully create and implement innovative strategies that, through decisive action, will cause

[54] See Brief for *Amici Curiae* Foundation for Moral Law & Lutherans for Life in Support of Petitioners 1.
[55] See Brief Amicus Curiae of Intercessors for America Including Its Intercessor Prayer Partners in Support of Petitioners 18.

America's public policy and legal system to support and facilitate God's purpose for her."[56] Their aims, in other words, are directly motivated by religion.

Yet, even when filing a brief in conjunction with Billy Graham's evangelistic organization, their argument does not even reference religion, but rather relies on the time-contextualized Fourteenth Amendment's understanding of "person" in order to argue that fetuses qualify as human beings and therefore are entitled to legal protection.[57] The types of arguments they use in their brief—how they represent their interests in front of the Court—as well as their self-descriptions in the brief are deeply disconnected from how they describe themselves in public, away from the Court. In the brief, they describe themselves as "a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built."[58] Meanwhile, their website proclaims they intend to "vigilantly protect[] America's legal system from being usurped to ends which run counter to God's purposes" and "creatively us[e] the legal system to undo the damage of those who have called good 'evil' and evil 'good.'"[59] The difference in tone is not unintentional or mistakable: The National Legal Foundation is veiling their intentions from the same Court that they are intending to "creatively use" for their own purposes.

They are not alone in this. The amicus briefs in *Dobbs* are flush with examples of groups that are outspoken in public forums about their intentions and then tone down their rhetoric in front of the Court in order to present themselves more favorably. Each of them follow a similar path: They present a legal argument, but their websites and public materials have drastically different

[56] See "About," *National Legal Foundation*.
[57] See Brief of Amici Curiae Billy Graham Evangelistic Association, Samaritan's Purse, Illinois Family Institute, Family Watch International, National Legal Foundation, International Conference of Evangelical Chaplain Endorsers, and Founding Freedoms Law Center.
[58] See Brief of Amici Curiae Billy Graham Evangelistic Association et al. 2.
[59] See *National Legal Foundation*.

approaches. For example, the Lonang Institute pushes on its website for God in the legal system[60] but yet presents an argument in its *Dobbs* amicus brief that focuses on the Constitution more broadly and does not even mention religion.[61] The Alabama Center for Law and Liberty says on its website that it "fight[s] every day for the fundamental rights our Creator endowed us with,"[62] which apparently includes the "inalienable right to acknowledge God in Court,"[63] but yet is carefully non-religious in its brief for the Court.[64]

Similarly, the Center for Religious Expression states on its website that we "live in a unique time in American history where orthodox religious beliefs run counter to the predominant culture, often causing Christians and others to be targets of discrimination" and describes themselves as being specifically "dedicated to defending Christians, Christian ministries, Christian-owned businesses and churches."[65] Their primary issue, it seems, is that "[t]hose in power are exhibiting less and less tolerance for Christian expression outside of church walls."[66] They are fighting, then, not for the right to practice faith peacefully in general, but to practice Christianity publicly and with privilege. To the Court, however, they only say that they are "a nonprofit legal organization dedicated to religious liberty and expression" that they "represent[] individuals and entities who wish to share religious views opposing abortion on [sic] public ways."[67] There is no push against discrimination in front of the Court, nor any explicit push for a Christian perspective to be privileged present in their language.

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[60] See "LONANG Curriculum Site Map," *Lonang Institute*.
[61] See Brief for the Lonang Institute as Amicus Curiae in Support of Petitioners.
[62] See "Home," *Alabama Center for Law and Liberty*.
[63] See "About," *Alabama Center for Law and Liberty*.
[64] See Brief of Amicus Curiae Alabama Center for Law and Liberty in Support of Petitioners.
[65] See "Home," *Center for Religious Expression*.
[66] See "Mission Vision." *Center for Religious Expression*.
[67] See Brief of Center for Religious Expression as Amicus Curiae in Support of Petitioners.

Along the same lines, the Institute for Faith & Family states on its website that it "uses media, communications, *amicus briefs*, and other platforms to help drive a for-faith and for-family culture,"[68] and that "[f]aith shouldn't be regulated; it should be celebrated!"[69] In front of the Court, however, it does not hint at how deeply embedded it wants religion to be in society or how unregulated; rather, it simply says it is "a North Carolina nonprofit, tax-exempt corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to life."[70]

The Family Research Council, while it openly identifies itself to the Court that as "a nonprofit research and educational organization that seeks to advance faith, family, and freedom in public policy from a biblical worldview,"[71] fails to admit to the Court that it believes that "[c]hurches, private organizations, public servants, and other individuals have the right to proclaim their faith in public settings and to bring their religiously-informed moral values to bear in all aspects of public life, including public policy decisions"[72] and that it is entering its amicus brief fueled explicitly by a desire to not only have a Biblical worldview represented in the Court, but to have Christianity dictating public policy. If this stance—Christian nationalism, to put a term to it—were to become the norm, politicians and government officials could bring about the explicit entrance of God into national governance, crumbling the American separation between church and state further.

There are plenty more examples of organizations speaking openly about their intentions publicly but then veiling them in front of the Court. These specific quotes are just to exemplify a

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[68] See "Our Mission," *Institute for Faith and Family*.
[69] See "Faith-Driven Citizens Produce Flourishing Societies," *Institute for Faith and Family*.
[70] See Brief of *Amici Curiae* Inner Life Fund and Institute for Faith and Family in Support of Petitioners.
[71] See Brief of *Amicus Curiae* Family Research Council in Support of Petitioners.
[72] See "Domestic Religious Freedom," *Family Research Council*.

few. But it is also notable how widely these organizations can extend their religiously motivated intentions. There are organizations—both overlapping with and separate from those who keep their motivations intentionally veiled in front of the Court—that file briefs in cases outside their specified purview. For an example outside the topic of this thesis, the European Centre for Law and Justice focuses specifically on the United Nations,[73] and yet somehow ended up filing a brief in *Dobbs* about American law regarding abortions.[74] For a more topical example, the Center for Religious Expression similarly was outside its organizational title when it filed a brief for *Dobbs*,[75] but it also describes itself as "defending the Christian voice and conscience" on its website.[76] Perhaps these groups do not see their advocacy work as being outside of their purview even when it falls outside of their organization's stated interests, and perhaps this is because it falls within their personal interests. Both groups, and the others like them, link back explicitly to religious interest groups with advocacy efforts that stretch into many areas and cases. The Center for Religious Expression, for example, works in areas spreading across education, business, evangelism, gender, marriage, public gathering, public worship, and public speech—as well as others.[77] The reach of many of these advocacy groups stretches unexpectedly long, across multiple subject areas unconnected to their apparent original intent, if their name is anything to go by.

But even the groups that remain specifically within their stated topical purview stretch themselves out in unexpected ways. There are multiple abortion-specific groups—such as Right to Life and Moral Outcry—that filed multiple amicus briefs under various branches of their subsidiaries. But it was not the subsidiaries who were actually drafting and filing the briefs, as is

[73] See "Home," *European Centre for Law & Justice*.
[74] See Amicus Brief of the European Centre for Law and Justice in Support of Petitioners.
[75] See Brief of Center for Religious Expression as *Amicus Curiae* in Support of Petitioners.
[76] See "Home," *Center for Religious Expression*.
[77] See "The CRE Blog," *Center for Religious Expression*.

evidenced by their Counsels of Record on file: It was the parent companies utilizing their own shadow arms to have a louder voice before the Court. The national Right to Life association had at least seven of its state ancillary organizations file briefs separately, even though the content of their arguments was roughly the same: They each argued the viability rule (a legal standard for the point at which a fetus becomes viable) was unworkable. Moral Outcry, which is itself a subsidiary of the Justice Foundation, filed four different briefs under different names, one claiming to represent "375 Women Injured"[78] but which was highly similar to its seemingly primary brief[79] and also similar to the separate one attributed to Moral Outcry's founder.[80] These groups—and those who are not topic-specific, such as the American Center for Law & Justice—flood the amicus system with redundant briefs, presumably to get and hold the Court's attention.

One quick note that is additionally worthwhile is that it is not clear what religious identity these groups would ascribe to themselves other than that they are Christian. Across the board, there is no mention of denomination or particular doctrine, beyond perhaps some generalized specification by a group on their website that they are "pro-family and pro-life." But in each instance we see here, there is some infringement into restricted governmental space by these groups, and they push in to infringe with the desire to influence the Court into ruling in a way the groups want to see—in a way that would bring them closer to achieving their goal of bringing God into the legal structure of the United States. This centers our understanding of their identity around

[78] See Brief of *Amici Curiae* 375 Women Injured by Second and Third Trimester Late Term Abortions and Abortion Recovery Leaders in Support of Petitioners.
[79] See Brief of *Amici Curiae* 375 Women Injured by Second and Third Trimester Late Term Abortions and Melinda Thybault, Individually and Acting on behalf of 336,214 Signers of the Moral Outcry Petition, in Support of Petitioners.
[80] See Amicus Curiae Brief of Melinda Thybault, Founder of the Moral Outcry Petition, (Individually and Acting on Behalf of 539,108 Signers of the Moral Outcry Petition), 2,249 Women Injured by Abortion, The National Institute of Family and Life Advocates (NIFLA), and Florida Voice for the Unborn in Support of Petitioners for Reversal on the Merits.

Christian nationalism specifically, even though we may not be able to ascertain their denominations or their particular dogmatic beliefs.

Another natural question may be how this behavior differs from other amicus briefs—briefs that are filed by non-religious groups. In the same case, one group filing an amicus brief to advocate for keeping abortion laws unchanged was the National Women's Law Center. In their brief, they partnered with seventy-two other gender-equality organizations to contend that "if this Court were to overturn decades of precedent safeguarding the right to abortion, it would deprive people who can become pregnant of the liberty and equality guaranteed by the Fourteenth Amendment."[81] The National Women's Law Center describes itself in that brief as "a nonprofit legal advocacy organization founded in 1972 dedicated to the advancement and protection of the legal rights and opportunities of women, girls, and all who face sex discrimination. The Center focuses on issues including economic security, workplace justice, education, health, and reproductive rights…"[82] Meanwhile, parallel to this description, their website describes them as "fight[ing] for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. We use the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us…"[83] The phrasing is different, but the two presentations are synonyms of each other, at the very least: There is no veil between them and the Court. They are not trying to present themselves any differently to the Court than they do to the public.

It would be natural to wonder whether this lack of veiling by the National Women's Law Center is specifically because their organization's purpose is closely related to the case's topic of

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[81] See Brief of *Amici Curiae* National Women's Law Center and 72 Additional Organizations Committed to Gender Equality in Support of Respondents 3.
[82] See Brief of *Amici Curiae* National Women's Law Center et al. 1.
[83] See "About," *National Women's Law Center*.

abortion. But the lack of veiling continues with the other non-religious advocacy organizations filing amicus briefs as well. The Freedom from Religion Foundation describes itself to the Court in its amicus brief as "a national educational nonprofit organization" and "the largest association of free-thinkers in the United States, representing more than 35,000 atheists, agnostics, and other nonreligious Americans," and argues that "religious ideology has always been and remains the primary threat to reproductive freedom in the United States."[84] On its website, the Freedom from Religion Foundation describes its purposes as "to promote the constitutional principle of separation of church and state, and to educate the public on matters relating to nontheism" and itself as "the nation's largest freethought association with more than 39,000 freethinkers: atheists, agnostics, and skeptics of any degree. FFRF is a non-profit, tax-exempt educational organization under Internal Revenue Code 501(c)(3)."[85] Once again, their public persona and the one before the Court is synonymous and unveiled, and this is the honest participation typical of an advocacy group.

It might also be natural to wonder whether the issue of disingenuous religious-group briefs is self-contained to controversial issues with histories intertwined with religious-group lobbying, like abortion. It is not, however. A perfect example of this is the American Center for Law and Justice (ACLJ)'s amicus brief for Biden v. Nebraska, the case in which the Court recently considered the constitutionality of President Biden's plan to forgive student-loan debt. The ACLJ describes itself on its website as being "[f]ounded in 1990 with the mandate to protect religious and constitutional freedoms," and its field of interest as "religious liberties work, . . . [and] constitutional law involving issues of national security, human life, judicial nominations, and

[84] See Brief of the Freedom from Religion Foundation, Center for Inquiry, and American Atheists as Amici Curiae in Support of Respondents 1.
[85] See "About the Freedom from Religion Foundation," *Freedom from Religion Foundation*.

protecting patriotic expression such as our National Motto and Pledge of Allegiance."[86] Before the Court, however, this is abridged to make it seem more pertinent: In its brief, the ACLJ says it "is an organization dedicated to the defense of constitutional liberties secured by law. . . . The proper resolution of this case is a matter of utmost concern to the ACLJ . . . because of their commitment to separation of powers."[87] They hid even their interest in religious-liberty law in order to make their approach to the case seem relevant, despite the opposite being clear on their website.

And while the ACLJ example is included in its totality because of the randomness of one of these groups being so interested in the outcome of a student-debt-relief case, the examples continue: The Life Legal Defense Foundation—a group, based on its website, that is specifically geared to be a "pro-life, pro bono law firm" that "handle[s] a wide array of cases in the defense of human life, including protecting the right to pro-life speech, employment discrimination for pro-life views, [and] forced abortion"[88]—filed an amicus brief in 303 Creative LLC v. Elenis "urging the Supreme Court to overturn a court ruling forcing a Christian graphic artist to design wedding websites for same-sex marriages" because they said that "it [was] easy to imagine" how "Colorado's 'compelling interest' in protecting the dignity of marginalized groups" would result in the state's Anti-Discrimination Act and "laws like [it being] used to compel pro-abortion speech."[89] The connection is a stretch at best. But this is a theme that is consistent across many of the amicus briefs filed by these religious-lobby groups: Their interest in influencing the Court extends beyond the controversial cases and into not only more mundane ones, but also ones that

[86] See *American Center for Law and Justice*.
[87] See Amicus Brief of American Center for Law and Justice in Support of Respondents, Biden v. Nebraska, 600 U.S. __ (2023).
[88] See "About Life Legal," *Life Legal Defense Foundation*.
[89] See "Totalitarian Forced Speech," *Life Legal Defense Foundation*.

are disconnected from their fields of relevant interests. Their reach, it seems, is ever trying to extend itself.

So what does it all amount to? Religious groups are lobbying the Supreme Court through the amicus-brief system. Some of them—many of them—do so in a way that is intentionally misleading in at least one way, if not multiple, as compared to the honesty of other advocacy groups filing on behalf of their membership. The issue is not so much that these religious groups file beyond their purview, although that is interesting. It *is* problematic that some flood the Court with duplicative briefs with the only probable desired outcome being the creation of an impression that their stance has more support than it does, especially since the Court has strict restrictions that prohibit an amicus from filing more than one brief.[90] It also seems clear that there is also coordination cross-organizationally, given the amount the briefs tend to be highly similar to one another. But the real problem is that the amicus briefs lack a reliable source of identification—not just of who the group filing is, but of their intent and the persona they present to the public. The Court has no process for definitively knowing who is telling them what, and yet they are still continuing to listen.

This remains true even though the helpfulness of amicus briefs in general has been examined under a microscope in recent years. In 2005, Judge Richard Posner termed amicus briefs as mere "advocacy documents"—worth very little in terms of legal argumentation and only representing voices that would otherwise be unheard in court, for better or for worse.[91] But even beyond that point, their accuracy more broadly has been called into question by academic communities. Caitlin Borgmann writes that "[a]micus briefs, in particular, are often submitted by

[90] See Harris 6.
[91] See Posner 48.

advocates and may be replete with dubious factual assertions that would never be admitted at trial."[92] Because the parties in a case—the petitioner and the defendant—can respond to one another's briefs with rebuttals and defenses, the facts contained in the documents submitted to the Court by the parties themselves are carefully checked by both parties.[93] Amicus briefs, by contrast, cannot be responded to by other amici and are filed after the parties have filed all of their relevant documents. While the parties are technically able to respond to amicus briefs, there are so many being filed now and the preparation of a case for the Supreme Court is already a heavy enough load that it is an impracticality at best for the parties to respond to one, let alone to all of them. The norm is therefore for the parties to give a blanket consent for all amicus briefs to be accepted.

Because the amicus briefs are thus highly unlikely to be responded to by the parties and cannot be responded to by their fellow amici, there is no incentive for them to be strictly accurate like there is for the parties to the case. In fact, the Clerk's Office in the Supreme Court specifies for amici filers that the Court "will not accept a reply brief from an amicus,"[94] which effectively seals off each amicus brief into its own container, separate from one another. Amicus briefs, having no possibility of receiving a response from either the parties to the case or other amici, can then only be fact-checked by the Court itself, which simply does not happen.[95] There is no process by which amicus briefs are checked for accuracy, and this fact has consequences: As Allison Orr Larsen discovered in her research, even in typical amicus briefs sometimes "the amicus will cite a study that it funded itself. Sometimes the numbers supplied by an amicus to support an assertion of fact are not even publicly available but instead remain 'on file with' the amicus. And it is not

[92] See Borgmann 1216.
[93] See Rustad & Koenig 94.
[94] See Harris.
[95] See Larsen 1762.

uncommon for an amicus to present factual evidence that, in reality, rests on methods which have been seriously questioned by others working in the field."[96] In short, amicus briefs are generally unreliable *and* unpoliced, and the Court has no way—and has never created one—for themselves to know whether the information being given to them is trustworthy or not.

But the Justices seem to still see amicus briefs positively—as being trustworthy. For example, Justice Samuel Alito is on record saying that "[e]ven when a party is very well represented, an amicus may provide important assistance to the court . . . [by] collect[ing] background or factual references that merit judicial notice."[97] And the Justices cite these briefs in decisions, often alone and without additional supporting authorities, meaning that the Justices "are using these briefs are more than a research tool," but rather as "factual authorities," positioning the amici—all amici—to the Court as genuine experts whose words should be trusted implicitly and cited in major legal precedent without fact-checking.[98]

The amicus system in the Supreme Court remains unpoliced to this day. And given the fact that the Court's amicus yield continues to grow from term to term, that means that this issue is continuing to grow: that the possibility for amicus briefs to give misleading information and yet to be influential continues to grow. But this is a multi-tiered issue, since the Court, first, seems to not recognize the trustability problems inherent in its amicus system and, second, is entirely unprepared to recognize how the religious groups we discuss here are using the system's loopholes to disguise their true intentions and identities from the Court even as they file briefs in an attempt to sway the Court. Because the issue is not a visible one to the Court, it itself is veiled, just as the groups themselves are. The question remains how to effectively pull back that curtain, at least in

[96] See Larsen 1764.
[97] Neonatology Assocs., P.A. v. Comm'r, 293 F.3d 128, 132 (3d Cir. 2002).
[98] See Larsen 1762.

part. We begin moving towards that goal with an idea on how to understand these briefs and thus on how to reclassify them: as emblems of religious expression.

III. FRIENDS ON THE COURT[99]

A. Religious Expression

It is time now to define what is meant here by religious expression. This in itself is a difficult task, as its meaning is often assumed to stretch across all religious behavior or evidence of belief—as being present by virtue of belief being present. For example, the first chapter of Franklyn Haiman's book *Religious Expression and the American Constitution* begins: "Insofar as we know anything about the history of humankind, it appears that the need to engage in religious expression has always been present. African and Native American tribes, the Egyptians, Greeks, and Romans all had their pantheon of gods"[100] and a definition of what is meant by "religious expression" itself is never given. Haiman presumes that what we would classify as religions in ancient civilizations necessitated expression and furthermore he is even implying that people were drawn to develop these presumed religions out of a desire to engage in religious expression. But a religious belief can exist without expression: Imagine, for example, someone who was raised religious and still believes as an adult, but does not speak about it openly or follow typical demonstrations of belief such as praying or attending services. Such a person is still religious even if it is not being expressed.

In their work on religious freedom more broadly, Rex Ahdar and Ian Leigh never specifically define religious expression, similarly to Haiman, but they conceptualize positive

[99] This section draws on my work for a RELI 8700 presentation during the Fall 2022 semester.
[100] See Haiman 1.

religious liberty as "the freedom to actively manifest one's religion or belief in various spheres (public, private) and in myriad ways (worship, teaching, and so on)."[101] These possible manifestations seem to comprise Ahdar and Leigh's understanding of expression itself, as they refer to it later offhandedly as "words" or "ideas promoted."[102] But "words" and "ideas" do not extend as broadly to the variety of behavior an individual can exhibit as the manifestation of their religion that Ahdar and Leigh themselves previously alluded to above; for example, "words and ideas" does not include the wearing of religious garments or the undertaking of ritual behavior like prayer.

We must develop our own working definition then. At its core, regardless of which group is using it, the term "religious expression" denotes the articulation—whether physical or verbal—of a religious practice, belief, or support. What forms of expression the term encompasses in practice differs amongst its audiences, especially since "articulation" can take many forms. It can indicate formal undertakings—such as ritualistic behavior practiced throughout the day or verbal expression of religious ideology—as well as everyday formulations of belief like praying before bedtime or even arguing with one's neighbor over how a religious holiday should be celebrated. And it is worthwhile to note that there is potential crossover between those categories, as praying before bedtime in an everyday formulation of belief may also be considered a ritualistic behavior. Behaviors that fall into one of the two categories may also qualify for the other. Religious expression is, in this way, a Venn diagram.

Religious expression is also, as a concept, closely tied to our own current temporal and societal context. Such a phrase would be entirely anachronistic in times or places where religious

[101] See Ahdar and Leigh 127.
[102] See Ahdar and Leigh 443.

identity and citizenhood were melded together, where a specific faith was held so broadly by a group of people that it was part of their expected daily life, or where other options of religious organization were not available or were otherwise unknown[103] (all of which further rules out the understanding of religious expression given by Haiman above). In other words, in our understanding of it, religious expression is only notable to the individual undertaking it when it is an *intentional* expression of faith and is juxtaposed against a backdrop of other actionable options. In any setting that did not satisfy at least those two requirements—intentionality and other options—religious expressions could hardly be considered reflections of choice, and therefore those actions would not be particularly notable to the practitioners of that religion.

I will underscore now that, in this thesis's understanding of religious expression, the key perspective at play is that of a practitioner of the religion being expressed. It is not for the viewer to decide *what* expression is being created; rather, only someone fluent in the context in which and from which the expression is created can do so. This is because an external observer might notice aspects of an unfamiliar social culture and assume them to be significant religious expressions, even though those observed practices are not understood to be such by internal practitioners. Refraining from assuming the fact of an expression is key, as to do otherwise is to risk projecting expectations—our own culturally informed perspectives—over the real experiences of people engaging in simply living their lives.

Religious expression can be inaccessibly immaterial—too small to observe—to an outsider unfamiliar with the intention behind each element. It is not the size of the expression that defines it so much as it is the intention behind the action taken. If something is *intended* to be an element of religious expression, in other words, it *is* one. But religious expression can also be undertaken

[103] See Nongbri.

either singularly by an individual or collectively by a community. This means that religious expression could be undertaken by an endless list of various bodies: by a person, by their family, by the congregation they are a part of, by an organization they volunteer for, by a denomination they affiliate with, by municipal authorities, by a region, by a national government—the list goes on and varies widely in size and implications.

Religious expression, then, as the above list exemplifies, can be understood as a realm of endless possibility that in action can either be conceptualized as a noun or a verb. In its noun form, it is an abstraction that can feature participation from an entire group, whether or not the people in that group are affiliated with one another individually. This noun-framing does not focus on religious expression as a constantly ongoing practice, but rather is a term created to encapsulate the collective fact of its existence. In its verb form, religious expression is an action taken by an individual. The action can be undertaken as part of a group, but the focus in the verb-framing is on the distinctive choice made on a personal level.

The application of religious expression as a label to the amicus briefs we have just surveyed may seem presumptuous. After all, if religious expression is an articulation of some kind that cannot be determined to be as such by an outsider with full reliability, how could the briefs be labeled as elements of religious expression by someone who did not file them? The answer comes from how the groups themselves discuss the briefs. Because they describe themselves as being directly motivated by their religious beliefs in their seeking to influence the Court through the briefs they file, they themselves identify those efforts as intentional articulations of their beliefs—as elements of religious expression.

Now, this is not to say that every group who is religious and files an amicus brief before the Supreme Court meets the benchmark of that brief being understood as an element of religious

expression, nor is it to say that a brief filed to advocate for a religious group should be considered an example of religious expression. If a group is litigiously oriented and is seeking to represent its identity as an advocacy measure, it may simply be a group seeking to register its voice with the Supreme Court as an effort to be heard, which fits into the Court's norms at this point, given how amicus briefs have come to be used as advocacy measures over the last century. The question of religious expression only comes into play when a group is filing an amicus brief in order to try to sway the Court into ruling in a way that the group seeks specifically for a reason they see as being religiously motivated.

The irony here is that the groups who identify themselves as advocacy groups—and thus were not veiling their intentions—are the ones who express upfront that they represent a religious constituency. If an organization is clear about their identities and their intentions while they are representing them, in other words, they are an interest group using the amicus mechanism the same way as other interest-group organizations. Religious groups are just as justified in seeking to participate in advocacy measures as any other special-interest groups are. However, if an organization does not clearly communicate their identity to—or actively conceals it from—the Court, they are not participating in clear advocacy. This leaves their briefs both misleading and unhelpful; these are not amicus briefs in the way they were ever intended to be used or in the way other groups use them. Instead, they are floods of expression designed to influence the Court to favor a religious perspective, whether or not the Court knows it.

B. Express Religion

The question next becomes how the Court would respond to the issue of religious expression. We therefore move now into a brief overview of how the Court understands religious expression in order to understand their likely perspective on the issue of briefs being considered

elements of religious expression themselves. To begin, for the sake of our examination into how the Supreme Court conceptualizes religious expression, it is important to keep in mind the Court's legal context for such discussions. There are three primary constitutional guardrails for the Supreme Court in its consideration of religion, all of which are based in the interpretive history of the First Amendment: the Free Speech, Free Exercise, and Establishment clauses. The first two are permissive, while the last is restrictive.

The Free Speech Clause has been understood broadly to guarantee a freedom of general expression—the right to speak freely—to individuals and the press by prohibiting Congress from restricting such a right.[104] In other words, it is a restriction of the government that allows individuals to express themselves without governmental interference or regulation. The Free Speech Clause is closely related in religious practice with the Free Exercise Clause, but its primary purpose is that individuals may freely *express* religious belief. It is therefore permissive of the individual.

Along similar lines, the Free Exercise Clause is a prohibition against the government to restrict the exercise of religion within the United States. This is a protection of the individual to practice a chosen religion as they please, "so long as the practice does not run afoul of 'public morals' or a 'compelling' governmental interest."[105] What "public morals" or a "compelling governmental interest" realistically include is up to the Court's discretion when it hears cases that raise specific questions about the outlines of this clause. The takeaway, however, is similarly meant to be permissive. When combined with the Free Speech Clause just discussed, the Free Exercise Clause therefore enables individuals to *practice* a religion freely and morally, and to *speak* about it freely and openly.

[104] See *Legal Information Institute*.
[105] See "First Amendment and Religion," *U.S. Courts*.

The Establishment Clause, however, is straightforwardly restrictive of the government.[106] It essentially prohibits the government from "establishing" a religion, such as the Anglican Church. But the precise definition of "establishment" is murky. This clause has thus been interpreted to mean that the government should also not sponsor or publicly align itself with any religion, even if it is already in existence. The government, in this way, has been theoretically positioned as an areligious structure, and the right of religion has been given only to individuals and organizations, rather than to governing bodies.

The Supreme Court's understanding of religion has thus, at least ideally, been underlined by weighted balances in the Constitution aimed at allowing free speech and religious practice while simultaneously blocking governmental endorsement of a particular religion. The question is to what extent those considerations—the actual weights and balances—have actually framed its approach to handling religious expression. To that end, we turn now to a brief review of the Court's approach to religion and how it has evolved since the Court's creation. While there is not space here to undertake a detailed description of such a long and winding narrative, we perhaps can manage to understand its trajectory succinctly by examining its beginning and its current point.

The first case on religion heard by the Court came in 1871, Watson v. Jones, regarding Walnut Street Presbyterian Church in Louisville, Kentucky. In response to a question regarding the adjudication of disputes over church property, the Court held that "[i]n such cases where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as

[106] See *Legal Information Institute*.

conclusive, and be governed by it in its application to the case before it."[107] This effectively gave religious organizations internal control of their own property—legal sovereignty, in a certain sense. The church's governmental body, the Court said, "is charged with maintaining the spiritual government of the congregation, for which purpose they have various powers, among which is the power . . . to concert the best measures for promoting the spiritual interests of the congregation."[108] In theory, this concessionary language—delegating authority to pursue "the best measures for promoting [the congregation's] spiritual interests"—could extend far beyond property ownership and set precedent for more extensive issues of church governance.

However, seven years later, the Court was much less comfortable with church sovereignty when it came to the question of a more controversial religious practice that clashed against American criminal law at the time. In Reynolds v. United States, a member of the Church of Latter-Day Saints sought to defend himself against the criminal charge of bigamy by protesting that it was his religious duty to take more than one wife and that the law therefore violated the right granted him by the First Amendment's Free Exercise Clause.[109] The Court, declining this argument, affirmed Reynolds's criminal conviction, saying that "[a] party's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land."[110] They further held that "[m]arriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties with which government is necessarily required to deal."[111] It was not in the interest of

[107] Watson v. Jones, 80 U.S. 679, 680 (1871).
[108] *Watson* 681.
[109] Reynolds v. United States, 98 U.S. 145 (1878).
[110] *Reynolds* 145.
[111] *Reynolds* 165.

the government, it reasoned, to allow someone to practice polygamy, and it was therefore within the reach of congressional power to prohibit it.

A few things are noteworthy within this case. First, the appellant made an appeal to the First Amendment—the first to do so in a religious context—but the Court responded by gesturing to Congress and criminal law, rather than responding to the argument's constitutional content. Second, the Court also replied with a sociological slant, as the implication of their argument was that society would not only be benefited if marriage remained specifically monogamous regardless of religious beliefs, but that it would face dastardly consequences otherwise. Third, in the same paragraph, the Court expresses their belief in the sacrality of marriage—a religiously loaded sentiment in direct opposition to the appellant's own religious sentiments. Yet the Court positions the jurisdiction of marriage as falling within civil law in order to make it governable by congressional powers rather than religious ones. It is, by and large, a response deliberately tilted against the appellant, without recognition of the constitutional right to which he was appealing.

To this point, the Court stated that "[w]hile every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of a reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case."[112] The appellant, in other words, did not have a *right* to complain about society being against him on the grounds of disagreement with his religious practice. This same sentiment was further echoed in Davis v. Beason two years later, in which the Court upheld federal laws criminalizing polygamy that had resulted in the indictment and imprisonment of over 1,300 Mormons.[113] There was then a long silence in the Court on religion—the next case came in 1930, after more than forty

[112] *Reynolds* 168.
[113] Davis v. Beason, 133 U.S. 333 (1890).

years, and concerned the use of governmental money for the purchase of textbooks in private schools.[114] The next-following case did not appear until 1944, when the Court heard the case of a family who had been indicted for fraud and ruled that the veracity of a religious belief is judicially irrelevant as long as the belief is sincerely held.[115] This was, seventy-three years after the first case on religious issues was heard by the Court, the first time that the First Amendment's protections for religion—here referred to as a general "guarantee of religious freedom"[116]—were applied by the Supreme Court. In doing so, the Court relied on precedent from its application of the First Amendment in other arenas—freedom of speech, for example, and freedom of religious assembly.

The next case came in 1947 and its decision extended the Establishment Clause beyond the federal realm and stretched it into state law as well, and comprises an anchor for our understanding of the Court's current perspective as compared to its historical one.[117] Contained in the landmark Everson v. Board of Education decision written by Justice Black was the statement:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[118]

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[114] Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).
[115] United States v. Ballard, 322 U.S. 78 (1944).
[116] *Ballard* 78.
[117] Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947).
[118] *Everson* 15.

For our purposes, the latter half of this quote is the most impactful, as it not only encompasses the Court's first mention of religious expression in a case and establishes a right to profess belief, but also counterweights that right as well with the acknowledgement that "religious expression" might be coerced and that there is also a right not to be compelled by the government to such an end. This understanding aligns with the one we set out at the beginning of this section: Religious expression is the right of the individual undertaking it to define. But this case also denotes an understanding of the vastness of religious practice in the United States—how varied and shifting religious practice can be, and how many different religious groups there are that this decision would affect.

Following this decision, the issue of religious freedom quickly became much more prevalent, with many more cases brought before and heard by the Supreme Court in the soon-following years. Religion in schools—and, in particular, government aid to church-related schools, but also religion in public schools—has been a consistently litigious issue since then, with the first case concerning religion in public schools coming the year after *Everson* and beginning an avalanche that quickened in the 1960s and came to full power in the 1980s and early '90s.[119] The most recent of these, Kennedy v. Bremerton School District, is the most current representation that we have access to of the Court's perspective on religious expression. In the majority opinion, Justice Gorsuch writes: "Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head."[120] In this view, "religious expression"

[119] McCollum v. Board of Education, 333 U.S. 203 (1948).
[120] Kennedy v. Bremerton School District, 597 U.S. __, 36 (2022).

denotes individual *actions*, rather than an overarching noun. It is conceptual to the Court so much as it is a verb enacted by a person, whether subtly or otherwise.

C. Expressions of Religion

The emphasis for the current Court is on the individual, then, to the complete exclusion of our noun-form religious expression, which allows for a more facially neutral, group-oriented facet of religious expression. This perspective from the Court is notably different from that of an academic, which first calls to mind the fact that the Supreme Court is technically a professional court, not an academic one. In other words, it is a court that is not expected to read scholarship or develop its own, but rather a court whose profession it is to simply make decisions based on an interpretation of the law that may shift over time. Another thing it calls to mind is the fact that the Justices themselves have personal interests at play in the question of religious expression. Each of the Justices themselves has a religious background: John Roberts, Clarence Thomas, Samuel Alito, Sonia Sotomayor, Brett Kavanaugh, and Amy Coney Barrett are all Catholic; Elena Kagan is Jewish; and Neil Gorsuch and Ketanji Brown Jackson are Protestant.[121]

As an example of these personal investments, during the case just mentioned, Justice Amy Coney Barrett made a casual reference during oral arguments to a personal belief in "the Almighty."[122] This inclusion and expression of religion in the country's highest court by one of its Justices is unprecedented in the modern era of the Court, and signals a willingness by the Court to affirm religious expression, but in a far more limited way than the one outlined in our working definition here. By focusing on the piece of the umbrella they understand—the individual—the

[121] See Coyle.
[122] See Mayer.

Court shifts the narrative away from an understanding of a variety of religions and back to a specific person.

Actions by an individual, as the Court understands religious expression to be, can be influenced by a group identity or can interact with that of another person, however. A blindness to this dynamic, such as the Court seems to have adopted by focusing so specifically on the singular-style behaviors listed in the majority *Kennedy* opinion, can have further impacts on those other individuals affected by actions undertaken by a religious person. For example, in *Kennedy*, the issue at hand was a high-school football coach who prayed on the field during halftime and invited his teenaged players to join in, despite some of those players not being religious.[123] The issue, as expectant audiences predicted,[124] was situated by the Court as a form of protected, *private* religious speech—something the coach had a constitutional right to do within his own social autonomy. But this rendition of events ignores the fact that the prayer was conducted in public and on state property; that teenagers were present and were invited to join in, despite not wanting to; and that the coach held a position of authority over these underage highschoolers that could have resulted in them experiencing social repercussions if he became displeased with them. With just a few added background elements, it becomes clear that, as much as someone might have a right to private religious speech, not only is the claim of private speech in this situation contestable, but it also involves a power imbalance between the parties present at the time.

Yet the Court did indeed decide this was an example of protected private speech—actions taken by an individual in religious observance that were his constitutional right. But how could speech conducted in public, on state property, by a state employee, during a school event be

[123] See Liptak.
[124] See Hudson 28.

considered private? According to Coach Kennedy's representation, the speech can be classified as private because Coach Kennedy was "communicating to God,"[125] not to the people around him, and it is with this argument that the Court sided. The other details of the case—its public and state-owned location, and the people involved and in the surrounding area—still did not move the Court to think of the ramifications on the group of people surrounding the action taking place, or of the fact that Coach Kennedy's actions associated him with a specific religious group. It did not matter to the Court that Coach Kennedy was speaking in front of—and inviting into his prayer—other people, some of whom did not share his religious identity and were made uncomfortable by his conduct. These elements of religious-group self-identification by Coach Kennedy and corresponding personal discomfort within his group of students did not change the Court's focus on Coach Kennedy as an individual and on his speech as private. They focused, instead, on those ideas to the exclusion of the group dynamics at hand.

There is a question as to *why*—why the consideration of an individual (verb-form) religious expression requires a lack of consideration by the Court for the collective version of it too (noun-form) that is more able to accommodate the experience of the group. Perhaps an obvious answer to this would be that the Justices' personal backgrounds may be skewing their perspectives, at least in the Justices that form the current ideological majority. There is some evidence for this, although it is limited by nature of how closely internal the Court keeps its business: As mentioned before, Justice Barrett specifically made reference to "the Almighty" during an oral-argument session this past term, with a remarkable level of comfort in bringing divine identity into the courtroom despite the noteworthy nature of that act itself. But even more importantly, Justice Alito has recently been discovered to have been dining with religious lobbyists in 2014, before the decision was released

[125] See Mayer.

for a religious-freedom case they had interest invested in, to tell them that he was authoring the decision and their interests would win out.[126] He shared this as good news—as news in which he himself had an invested personal interest.

Perhaps Gorsuch's majority opinion in *Kennedy* is so remarkable because, within his description of religious expression and its importance to society as he sees it, there rings a quiet chime that points to a similar personal investment on his part. Perhaps Gorsuch conceptualizes religious freedom as the act of an individual because that is how he understands it himself—that is how he sees himself as practicing his own. And while it would be impossible to ask that the Justices be entirely impersonal automatons within our legal system—they are, after all, people themselves, with pasts, present contexts, and future goals of their own as such—it remains realistic and helpful to keep them accountable regarding whether or not they allow those pasts, presents, and futures to dictate their approach to the law and their personal investment in its outcomes. Them doing so has implications for the country, after all: By excluding the piece of the umbrella they do not understand—the noun form of religious expression, the fact of its being larger than one person's actions—the Court risks diverging even further away from the noun-form, group-action understanding of religious expression specifically and religion more generally. The consequences of this may be far-reaching, as such an oversight could constitute an ignorance in the Court of the impact that organized religion—a collective body, rather than individuals understood on their own merit—can have through its expressions on society and on the individuals experiencing those actions.

Looping back around to the primary topic of this thesis, though, the question remains what the Court's response should be to this misuse of the amicus mechanism by religious groups who

[126] See Lithwick.

veil their intentions and flood cases with briefs to make it look like their position has more ideological support behind it than it does. Suggestions for reform of the amicus arm have been suggested by others in the legal field, especially since there are no regulations currently in place that would block such exploitation of this gap in the insulation around the Court.[127] And those suggested reforms certainly are warranted: Beyond the question of allowing single organizations to flood the amicus system, the current lack of oversight for amicus briefs means that amici could cite anything they want in their footnotes and the veracity of those "studies" or comments will likely never be checked. The avenues for reform that have been proposed for that kind of problem are: to limit amicus briefs to ones that make arguments on questions of law; to let the Justices do their own research on these topics and remove amicus altogether; to require transparency of the data submitted and the methods used in gathering it; to adequately flag factual issues; or to require response to any significant counter-evidence.[128]

The suggested option of requiring transparency of data and methods speaks in some way to the issue we consider here in this thesis. Shifting that suggestion to requiring transparency from the figures filing the briefs could, at the very least, make it more difficult for the organizations to flood the amicus channel with matching briefs and would also make it more easily discernible what figures are actually behind the briefs being filed. This second part may be more reassuring than it would be directly helpful, as identity brings with it accountability, but filing a brief with false facts in it is not technically illegal and an entity who chose to do so may not face any legal repercussions. But it could allow for a sense of trust—or distrust—to develop between the Court and the amici, or even the amici and the reader. If someone is known to file unhelpful brief after

[127] See Larsen 1764.
[128] See Larsen 1809.

unhelpful brief, perhaps that in itself would be helpful to know, as the briefs filed by more figures who develop a reputation for trustworthiness and solid briefs could be moved to a higher priority for reference, rather than being shuffled into the middle of the stack, and the briefs filed by untrustworthy entities moved to the bottom.

It may also help to have an oversight mechanism in place where some entity, whether inside the Court or outside it, is in charge of verifying where each brief originates from and making note of how the organizations are talking about their desires regarding the Court—whether to sway or to inform, to manipulate or to advance. The practicality of this is not quite solid, however, as groups could simply scrub their websites and social media of any mentions they had made regarding their intentions in interacting with the Court. But, at minimum, there would be an incentive for groups to keep the messaging consistent in the public regarding what the amicus briefs were being filed for, which could have a trickle-down effect of improving the legitimacy surrounding the Court. If groups are seen to be speaking openly about their attempts to sway the Court and they appear to be successful in those efforts, the Court's image will become only more and more political.

These are some suggestions on how to address the current situation with the amicus arm more generally, as well as the situation with the religious groups who take advantage of its weaknesses. However, the last questions we will consider is whether we should want the issue fixed and also whether the Court would, if they accepted the idea of amicus curiae briefs as articulations of religious expression. The answer to the first seems straightforward: In order for us to have trust in our institutions, we need to know that they are making decisions on our behalf that are informed, measured, and thoughtful of the accurate facts and dynamics present in the case. If we cannot be certain that the Court is not rejecting false information, we cannot fully trust it as an

institution that shapes our laws. And as of right now, it provides groups a funnel through which they can send the Court cherry-picked (or even falsified) facts, and it does so without any oversight or policing. That should change, not just for the benefit of our perspective on the Court, but for the sake of the Court's healthy functioning as well. When reading the briefs submitted to them and deciding the cases before them, the Court should be able to trust that the information before them is honest and verifiable, even if the Justices do not have time to do the verification work themselves.

But also, more to the point of this thesis, groups should not be allowed to attempt an exertion of religiously geared influence over the highest court in the land unless the Constitution changes in such a way that the separation of church and state is dispelled—especially not when the rates of participation in the briefs are so heavily Christian organizations specifically, rather than representative of a variety of religious beliefs. To have it be otherwise is to have a specific religion entering into a place of governance with some sort of privilege. The groups filing with religious intent in this arena are groups who want to see Christian principles reflected in our governance structures, in our laws, in our courts—in other words, they are part of the Christian-nationalist segment that comprises 45% of the U.S. population. And as 70% of the population recognizes, an explicitly religious governance structure would conflict with the Constitution's mandate that the government shall not make any law "respecting an establishment of religion" within it.[129]

Beyond that, though, the Supreme Court is a public institution, by nature of it being part of the governmental structure. As was indicated in the *Kennedy* case, there are laws against conducting religious proceedings in a public forum in a way that—whether implicitly or

[129] U.S. Const., amend. 1.

explicitly—favors one religion over another. And since the Supreme Court is a public space that constitutes the highest court in the land, in which cases are debated and law is created that affects the entirety of the country, it seems to be *the* broadest public forum available. And if it is a public forum—of any size, but with particular urgency given how large it actually is—that would by necessity have certainly blocked the constitutionality of any religious expressions being inserted into its court proceedings up until *Kennedy*. And while the question of whether that is still true in a post-*Kennedy* Court remains unanswered as yet, as it is theoretically possible that the Justices could bring religious speech by governmental employees in public spaces into their own building and implement it in the Court, we must remember until it is definitively answered the intention of it being deemed unconstitutional for so long in the first place: It would be unconstitutional to make governmental speech spaces religious ones that favor one belief system over another.

But as to the question of whether the current Court would realistically want to block off groups from lobbying with veiled religious intent, we can separate the answer into two segments: whether the Court would be open to lobbying and whether the Court would be open to veiled religious intent. To the first portion, the answer seems to be yes: As mentioned earlier, Justice Alito has dined with religion lobbyists with stakes in a major case before the Court just before its decision was released. And more recently, it has been discovered that Justice Thomas has maintained a decades-long personal relationship with billionaire lobbyist Harlan Crow, who has had various stakes in cases that came before the Court as well, and Justice Thomas never reported the many trips taken, favors done, and gifts given to him on Mr. Crow's dime.[130] The Court, despite being called upon to establish ethical safeguards for the Justices, has so far declined to do so even

[130] See Kaplan, Elliott, and Mierjeski.

in the light of these revelations.[131] The majority of the current Justices, in other words, seem open to this kind of relationship with lobbyists existing.

To the second element of the question, which is whether the Justices would be open to religious expression being submitted to them in the form of briefs, the language that Justice Gorsuch used in *Kennedy* seems to hint that the answer would be yes there as well. After all, the majority opinion states that "[r]espect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head."[132] In other words, there is a clear expression of support for the manifestation of an individual's religious expressions, and it has no qualifications. The case setting was on public property, just as the Court is a governmental entity. And the Court affirmed the religious expression of an individual not only in the public space, but as a governmental employee operating in the public space within which he worked.

Kennedy seems to be, in essence, a resounding statement by the Court that they will support religious expression unequivocally. It tells us, through the language the Court uses and how strongly it endorses prayer by governmental employees in public positions of power, that we should understand that the current Court is highly unlikely to regulate at least the form of religious expression shown there—Christian prayer—and also seems unlikely to regulate other forms of Christian religious expression either. The fact that the religious expressions we have studied here are being performed by groups of people in the Court's space itself via a lobbying amicus mechanism is not likely to singularly change the Court's mind on this and is therefore also not likely to ever be regulated by the current Court in such a way that it dams the flooding briefs.

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[131] See Millhiser.

[132] Kennedy v. Bremerton School District, 597 U.S. __, 36 (2022).

CONCLUSION

The amicus mechanism in the Supreme Court has shifted in its use from an adversarial tool for the government's use to an advocacy arm for interest groups to utilize as they seek to lobby the Supreme Court for the benefit of their members. Even with these other efforts in context, though, the briefs filed by religious groups remain remarkable, in particular the ones who veil their intent before the Court but profess it loudly in public. The fact that the resulting documents are neither advocacy efforts nor novel legal arguments lands them in an uncomfortable gray area—a no-man's-land between the group's desire for the briefs' impact and the truth of their uselessness to the Court, if such briefs are to be evaluated on their merits. In some way, these briefs are direct expressions of the group's religious beliefs, as they are drafted and filed with the Court for the sole purpose of influencing the Court to decide cases in ways that the groups want specifically for reasons they directly identify as being religious. The Court is likely to be receptive to these efforts, though, given the religious involvement and expressions of several of the current Justices themselves, who currently comprise the Court's ideological majority. And so, as much as higher regulation of the unpoliced amicus briefs would be helpful for maintaining the Court's legitimacy to the public, it seems unlikely to happen. The "friends of the Court" amici have found friends *on* the Court in the Justices themselves.

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