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Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy

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HEARING VOICES: NON-PARTY STORIES IN ABORTION AND GAY RIGHTS ADVOCACY

Linda H. Edwards*

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INTRODUCTION

During the twelve years after *Roe v. Wade*,¹ the Supreme Court considered a number of abortion issues,² but *Thornburgh v. American College of Obstetricians & Gynecologists*³ was the first case to raise a direct call for *Roe*'s demise.⁴ *Thornburgh* challenged Pennsylvania's Abortion Control Act,⁵ which imposed a variety of

* E.L. Cord Foundation Professor of Law, University of Nevada, Las Vegas. This symposium contribution is dedicated in deep gratitude to Matthew Wright, without whose assistance neither this project nor any other research project I have undertaken since 2008 would have been possible.

1. 410 U.S. 113 (1973). *Roe* was decided along with its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973).

2. Cases included *Doe*, 410 U.S. 179 (procedural restrictions on abortion); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (spousal or parental consent); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (a wide variety of restrictions); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (the value of the life and health of the mother); *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (mandatory hospitalization). For a summary of the Court's rulings between *Roe* and *Thornburgh*, see Keith Grady, *The Value of Life: Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986), 10 HAMLINE L. REV. 623 (1987).

3. 476 U.S. 747 (1986).

4. Ann E. Fulks, Note, *Thornburgh: The Last American Right-to-Abortion Case?*, 26 J. FAM. L. 771, 780 (1987-88).

5. 18 PA. CONS. STAT. §§ 3201-14 (1982).

restrictions on abortion procedures.⁶ Seeking to broaden the issue to a full-fledged attack on all abortion rights, however, the Reagan administration's Justice Department asked the Court to overturn *Roe* outright.⁷

Not surprisingly, the issues galvanized interests on all sides.⁸ Among the welter of amicus briefs filed before the Supreme Court in *Thornburgh* was a remarkable brief destined to create a new, controversial, and potentially powerful form of appellate advocacy. Primarily authored by Lynn Paltrow, the brief was submitted on behalf of the National Abortion Rights Action League (NARAL) and sixteen other organizations advocating for abortion rights.⁹ Like a Brandeis Brief, the *Thornburgh* brief relies on sources outside the trial court record. Unlike a Brandeis Brief, however, the NARAL brief does not treat women as the *objects* of social science research. It does not treat women as “other”—that is, using the distancing third-person pronoun “they.” Instead, living, breathing, real-life women speak with the first-person pronoun “I.” Never before had real people not parties to the case been able to speak directly to the Court in a proceeding that would profoundly affect their own lives and those of others like them. This is the story of that first Voices Brief, its young author, and its civil rights legacy.

6. *Thornburgh*, 476 U.S. at 759-61. The Act required “informed consent” including fetal pictures; parental consent or judicial approval for minors; and a reporting scheme making information on performed abortions publically available. Fulks, *supra* note 4, at 780-82, 782 n.62.

7. Brief for the United States as Amicus Curiae in Support of Appellants, *Thornburgh*, 476 U.S. 747 (Nos. 84-495, 84-1379), 1985 WL 669620, at *24 (“[T]his Court should overrule [*Roe*] and return the law to the condition in which it was before that case was decided.”).

8. In addition to the briefs of the parties, twenty-one amicus briefs were filed.

9. Brief for the National Abortion Rights Action League et al. as Amici Curiae in Support of Appellees, *Thornburgh*, 476 U.S. 747 (Nos. 84-495, 84-1379), 1985 WL 669630 [hereinafter NARAL Brief]. The brief is reprinted in Rosalind Pollack Petchesky, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN'S RTS. L. REP. 3, 7-24 (1986). The brief and its progeny have become known as “Voices” Briefs. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 40 (2010).

I. THE *THORNBURGH* BRIEF

Lynn Paltrow had begun her work in support of reproductive rights for women while still a law student at New York University.¹⁰ With the support of David Richards, her constitutional law professor, and Sylvia Law, another NYU mentor, Paltrow became a student intern with the ACLU's Reproductive Freedom Project (RFP). A feminist since high school,¹¹ Paltrow began to immerse herself in the reproductive issues of the day. When *City of Akron* came up for oral argument, she slept on the steps of the Supreme Court building in order to get a seat at the argument. After graduation in 1983, Paltrow was selected to be a Women's Law and Public Policy Fellow at Georgetown. She asked to be placed at a reproductive rights organization and thus was placed at NARAL. When *Thornburgh* came before the Court,¹² it fell to Paltrow—a scant two years out of law school—to write NARAL's amicus brief.¹³

Paltrow knew that the Appellees and many pro-choice amicus filers would make strong traditional legal arguments. That ground likely would be covered thoroughly and well. But Paltrow suspected that these precedential arguments would do little to counter common naive assumptions about women who sought abortions. Traditional legal arguments would not communicate what the women's own

10. Telephone Interview with Lynn Paltrow, Executive Director, Nat'l Advocates for Pregnant Women (Mar. 12, 2015). All facts about Lynn Paltrow and her work, if not otherwise attributed, are from the author's interview with Paltrow on March 12, 2015, and subsequent email communications. Notes and emails are on file with the author.

11. Paltrow marks her feminist beliefs at least as far back as high school, when she remembers her cousin giving her a copy of the book "Feminism for Teenagers."

12. The Court could have avoided the abortion issue in *Thornburgh* by basing its disposition on a procedural question of finality. Fulks, *supra* note 4, at 782-83. Instead, the Court chose to use the case to re-affirm its holding in *Roe. Id.*

13. To be admitted to practice before the Supreme Court, one must have been admitted to practice in another jurisdiction for at least three years immediately prior to the date of application. *See* SUP. CT. R. 5. Paltrow could not yet meet that admission requirement, so she could not be listed as Counsel of Record on her own brief. Paltrow would remind us, though, that in addition to Lynn Miller, whose name appears as the official counsel of record, she was able to call on many others for help and advice, including Jane Malmo, her former NYU Lawyering instructor; Cliff Zimmerman, a young lawyer who volunteered at NARAL; NARAL staff, especially Marcia Niemann who led the Silent No More Campaign; Maureen Burke, Jim Brewer, Marianne Vakiener, Andrew Dwyer, and Paul Kohlbrenner; and Sarah E. Burns, who was then Assistant Director of the Georgetown Sex Discrimination Clinic.

stories could convey—that their decisions to have abortions were directly related to the most fundamental aspects of liberty as defined by the Supreme Court. Paltrow realized that the depth, richness, complexity, and generosity of women’s lives were apparent when they spoke in their own voices. She became convinced of the importance of educating the Court about the relevant realities of women’s lives.

Several aspects of Paltrow’s experience coalesced to inspire her vision for the NARAL brief. While Paltrow was in law school, Carol Gilligan had published the groundbreaking book *In a Different Voice*,¹⁴ which included the stories of women deciding whether to undergo an abortion.¹⁵ In Gilligan’s book, for almost the first time in social science literature, women told their own stories in their own voices and with their own dignity and integrity. Further, during Paltrow’s summer work as a student intern at RFP, she had gathered sources for an amicus brief to be filed in *City of Akron*. As part of that project, she had researched the use of non-record medical facts in the briefs in *Roe*.¹⁶ First-person stories are quite different from medical facts, of course, but the research had taught Paltrow that, contrary to widespread assumptions, appellate briefs are not limited to the evidentiary facts in the trial court record.¹⁷ Also, along with many others, Paltrow had assisted Marcia Neimann with NARAL’s “Silent No More” project, in which women had written letters telling their own abortion stories. As part of her work at NARAL, Paltrow had read many of these powerful and moving first-person narratives.¹⁸

14. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

15. *Id.* at 128-50 (“Women’s Rights and Women’s Judgment”).

16. To the best of Paltrow’s recollection, Janet Benshoof, Nan Hunter, and Susanne Lynn were responsible for assigning the research at the RFP that summer. The original memo does not survive, but an addendum, complete with Paltrow’s whimsical original poem about *Roe*, is provided here as Appendix A.

17. On appeal, social science data and other non-record information is not submitted as evidence. No Court rule limits the kinds of *sources* that can be cited in an appellate brief. Even citation to “unpublished” opinions is now permissible. *See* FED. R. APP. P. 32.1. Only one Court rule—Supreme Court Rule 24(6)—limits the kinds of *arguments* that can be made before the Court. That rule prohibits “irrelevant, immaterial, or scandalous matter.” SUP. CT. R. 24(6). No precedent indicates that this rule has ever been interpreted to prohibit arguments of the kind used in Voices Briefs.

18. Paltrow later stated, “I first got the idea for the brief when I had the privilege of reading some of the thousands of letters written by women and men from all over the country in response to NARAL’s call for letters under the ‘Silent

When the Solicitor General's brief articulated the issue in *Thornburgh* as whether to "return the law to the condition" before *Roe*,¹⁹ Paltrow realized that the "Silent No More" stories could be the missing link in helping the Court understand "the condition" before *Roe*. Calling on the same creativity that had prompted her to write her research memo in verse,²⁰ Paltrow envisioned a radical strategy. She would create what Rosalind Petchesky has called a "participatory courtroom," for the first time metaphorically bringing women before the Court to speak in their own voices.²¹

Knowing that the strategy would be controversial, Paltrow would have to explain to the Court what these letters were and how they had been gathered. She used the required statement, "Interest of Amici," to introduce the letters:

The NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL) is a national organization dedicated to keeping abortion legal, safe and accessible. It has more than 150,000 national members plus 33 affiliates with their own membership. NARAL spearheaded the May 1985 "Abortion Rights: Silent No More" action which gave voice to the millions of American women who have chosen to have abortions.²²

Then in the Summary of the Argument, Paltrow introduced the women and explained the use of the letters:

Amici submit this brief to place the realities of abortion in women's lives before this Court and to urge this Court to reaffirm *Roe v. Wade*. . . . The circumstances of women's lives and women's compelling reasons for choosing to have abortions elucidate the strong Constitutional foundations for this Court's decision in *Roe v. Wade*.

In addition to presenting social science and medical data, *Amici* present excerpts from some of the thousands of letters received in response to the national campaign "Abortion Rights: Silent No More." As part of this action, people wrote letters describing why they or people they knew chose to have abortions. The letters came from people from all walks of life. Many writers described themselves in their letters:

I am a Christian. I have a college degree and am a registered nurse. . . .

I am a 32 year old Black female. I am a Baptist by faith. . . .

No More' Campaign." Petchesky, *supra* note 9, at 3. Paltrow recalls that NARAL brought in Marcia Niemann to run the Silent No More Campaign.

19. Brief for the United States, *supra* note 7, at *24.

20. See *supra* note 16.

21. Petchesky, *supra* note 9, at 4-5.

22. NARAL Brief, *supra* note 9, at *1.

I was a nice Irish Catholic girl dating a nice Irish boy from Queens. . . .

I was born in Puerto Rico, and I grew up and went to school there. . . .

I have been married 38 years; I am the mother of 5 wanted and thoroughly loved children; grandmother of 3

Then, I was a young lieutenant in the regular army. . . .

While these letters do not constitute sworn testimony or record evidence, they do provide an invaluable source of information about the lives of women who choose to have an abortion. When abortion is examined in the context of women's lives, the constitutional foundations for a woman's right to decide "whether or not to terminate her pregnancy" become obvious. What also becomes clear is that this Court's decision in *Roe v. Wade* is firmly rooted in our nation's most fundamental traditions of personal integrity and human dignity.²³

This text in the brief is accompanied by footnotes that cite to sources in which some of the letters had been or soon would be published.²⁴ To invite the Court to read more and to address any concerns about statements taken out of context, the first footnote explains that "the letters from which excerpts have been taken are reproduced in a volume lodged with this brief. . . . The letters and excerpts have been quoted and reproduced as sent, without corrections in punctuation, grammar or spelling."²⁵

But Paltrow had to do more than explain the origin of the letters. Since no brief had ever before presented argument in the form of the stories of non-parties,²⁶ Paltrow had to justify their use. Perhaps the easiest way was to use the stories as part of a policy argument invited by the Solicitor General's articulation of the issue. Paltrow could (and did) use the stories to argue, in the words of the brief's first point heading, that "*Roe v. Wade* Has Dramatically Improved the Lives and Health of American Women."²⁷ In that

23. *Id.* at *5 (footnotes omitted) (citations omitted). Ending the introduction with a reference to personal integrity and human dignity was a perfect rhetorical move, because that is the fundamental difference between treating women as objects of research and treating women as human beings who are responsible moral actors in their own right.

24. *E.g., id.* at *5 n.1.

25. *Id.*

26. A similar strategy had been used in lower courts in prior decades, when attorneys challenged abortion restrictions by filing cases on behalf of hundreds of named women plaintiffs. Petchesky, *supra* note 9, at 5 n.11. That strategy, however, placed the women in the position of litigants, so it was within customary practice.

27. NARAL Brief, *supra* note 9, at *7.

section, the brief presents moving stories of women desperate enough to seek dangerous illegal or cross-border abortions;²⁸ women who were sexually abused by back-alley abortion providers;²⁹ women who nearly died or did die from illegal abortions;³⁰ and women who committed suicide because they could not obtain an abortion.³¹

After the brief explains how the letters were collected, the stories are dropped smoothly into the text of a traditional policy argument. The structure is much like a video documentary art form. The commentator's consistent voice provides facts that explain the abstract policy point to be made. Then individual voices demonstrate the reality of those facts. For instance, here is an early example:

Before this Court's decision in *Roe v. Wade*, state governments were free to substitute their political judgments for the personal, moral judgments of women and the medical judgments of doctors. . . . Women obtained illegal abortions despite the illegality and grave risks involved, as these excerpts from the letters reveal:

I remember Tijuana. I remember bugs crawling on walls as I waited for the "second part" of my abortion to take place. . . . I was sent to a "hotel" to wait three hours—a stinking cesspool of urine, sweat, filthy sheets and bugs—unidentifiable crawling creatures all over the walls, floors and crevices. . . . Where else could I have gone in 1963?³²

Each page of the ten-page policy argument contains at least one excerpt from a Silent-No-More letter presented in just this way. Another example is found on page ten:

Estimates of illegally induced abortions in the United States in the 1960's ranged between 200,000 and 1,200,000 a year. Illegal abortions caused large numbers of deaths. In 1965, for example, 235 or 20 percent of all deaths related to pregnancy and childbirth were attributed to abortion. Thus, many women who obtained illegal abortions did not survive:

On November 18, 1971, my twin sister Rose Elizabeth, died from an illegal abortion. This was after a very brutal rape . . .

28. "I remember Tijuana. I remember bugs crawling on walls" *Id.* at *8.

29. "[I had] treatment by a doctor who sexually abused me while supposedly giving me injections to induce a miscarriage . . . [and who later] used a scalpel to rupture the opening of my uterus." *Id.* at *15.

30. "I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life; that I might never again see my two children, or my husband, or anything else of this world." *Id.* at *9.

31. "I could imagine the young girl's despair as she made her decision to end her life rather than face the stigma of giving illegitimate birth." *Id.* at *11.

32. *Id.* at *8-9.

The traumas of being raped and pregnant, knowing she would die if she didn't have an abortion, the embarrassment, the pain, the guilt. She called a close friend who knew of a person who would do the abortion. She decided to wait until we all had left for church, then called her friend to pick her up, (I can still remember opening the door of that old half abandoned building, and seeing her laid out on the table bleeding to death.) She never made it out alive . . . For this reason I speak out today, for I believe if there had been a place where women, especially young women, could have gone for an abortion, where the environment was safe and clean, Rose Elizabeth, would still be with us today.³³

Some letters support policy arguments in the brief's second point heading³⁴ as well:

Women are fertile from, approximately, the age of 15 to 45. Most women will spend the majority of these 30 years trying not to get pregnant. But no contraceptives are one hundred percent safe and effective and they often fail despite conscientious use:

I was a married woman using the birth control methods available at the time; a diaphragm and a spermicide jelly. My first child was planned and I was very happy. Slightly more than two years later I had another planned child. Then I found myself pregnant with a child that would be only 17 months younger than the second child. I had used my birth control methods assiduously but to no avail. I accepted the fact of that child and loved it. Then I got pregnant again. This one would be only 13 months younger than the third child. I was faced with the unpleasant fact that I could not stop the babies from coming no matter what I did . . . [The abortion] was a tremendous relief and I have never regretted it. My husband then had a vasectomy You cannot possibly know what it is like to be the helpless pawn of nature. I am a 71 year old widow.³⁵

Using non-party stories to support a policy argument was a new persuasive strategy, though in some ways it resembled social science information used in just the same way. But Paltrow also wanted to use the stories directly in support of traditional doctrinal argument. She needed a connection to a constitutional standard already articulated by the Court's precedent—ideally something that resembled a familiar rule-like framework. She hit upon a brilliant strategy. She would highlight the link between *Roe*'s right-to-privacy

33. *Id.* at *10 (citations omitted).

34. The second point heading is: "To 'Return the Law to the Condition' Before *Roe* Would Deny Women Their Fundamental Constitutional Rights." *Id.* at *17.

35. *Id.* at *19 (footnote omitted) (citations omitted).

language and the Fourteenth Amendment's concept of individual liberty.³⁶ With that link in place, she could frame the letters as "stories of American women trying to lead meaningful, responsible, and caring lives."³⁷ From there, it was a seemingly small step to a holding others might have thought of as "lateral precedent."³⁸ Paltrow could remind the Court of its opinion in *Meyer v. Nebraska*, where the Court had stated:

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.³⁹

In this paragraph of its *Meyer* opinion, the Court had articulated six aspects of the constitutional right to liberty. Paltrow used those six aspects—announced fortuitously in masculine-gendered language⁴⁰—to organize and present the women's stories. She created six corresponding sub-headings and presented several stories under each. Thus, under a sub-heading titled, "To engage in any of the common occupations of life," Paltrow presented stories of women who sought an abortion because of their need to prepare for or preserve their jobs:

36. "In *Roe v. Wade*, this Court held that the 'right of *privacy* . . . founded in the Fourteenth Amendment's concept of personal *liberty* and restrictions on state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'" *Id.* at *18 (emphasis added) (citation omitted).

37. *Id.*

38. GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 68 (2009) (stating lateral precedent is "precedent from one doctrinal area . . . used to frame and even decide a case in what would seem to be a different doctrinal area").

39. 262 U.S. 390, 399 (1923). The issue in *Meyer* had been the constitutionality of a statute restricting the classroom use and teaching of foreign languages. Paltrow's use of *Meyer*, which she remembered from her constitutional law class with David Richards, is another example of the creativity she has brought to her lawyering.

40. The gendered language allowed Paltrow to set up the precise comparison she wanted to use to demonstrate the issue of equality—that without reproductive rights, women could never enjoy the same liberty as men can expect as a matter of course.

I needed that job desperately to support the kids. . . . If I had had the baby I would have had to quit my job and go on welfare. Instead I was able to make ends meet and get the kids thru school.⁴¹

Under a sub-heading titled “To acquire useful knowledge,” Paltrow presented stories of women struggling for an education:

I am a junior in college and am putting myself through I have promised to help put my brother through when I graduate next year and its [sic] his turn.⁴²

Under the heading “To Marry,” we find women whose decisions were based on maintaining relationships or rejecting sham marriages:

I had an abortion . . . because I could not go through with a loveless marriage⁴³

The heading “To establish a home and bring up children” introduces stories of women who chose abortion because of their responsibilities to existing family members:

I had my two boys to care for, and Norma, a baby girl. I already had all that I could handle, because my third child, our daughter was a spina bifida baby, and I had made a promise to myself . . . that I would take care of her until the end⁴⁴

The section “To worship God according to the dictates of his own conscience” presents stories of women whose religious practice and tradition led them to choose an abortion:

I was a Christian then, as I am now, and [in] constant prayer . . . God guided me toward that decision⁴⁵

The final sub-heading brings the question back to the core concept that the right to choose abortion is fundamental to equality for women (“And generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).⁴⁶ There, Paltrow presented stories of women who were simply trying to live the kinds of fulfilling and responsible lives men could take for granted:

I kept being struck by the ultimate unfairness of it all. I could not conceive of any event which would so profoundly impact upon any man. Surely my husband would experience some additional financial burden, and

41. NARAL Brief, *supra* note 9, at *23 (emphasis omitted).

42. *Id.* at *24 (emphasis omitted).

43. *Id.* at *25 (emphasis omitted).

44. *Id.* at *25-26 (emphasis omitted).

45. *Id.* at *27 (emphasis omitted).

46. *Id.* at *28-30 (emphasis omitted).

additional “fatherly” chores, but his whole future plan was not hostage to this unchosen, undesired event. Basically his life would remain the same progression of ordered events as before.⁴⁷

The NARAL brief moved abortion discourse toward acknowledging that women need access to abortion services if they are to function fully in the public domain.⁴⁸ The brief has been described as managing “to recreate a kind of abortion speakout right before the justices’ eyes.”⁴⁹ Paltrow herself describes the brief’s stories as akin to thousands of acts of civil disobedience.⁵⁰ In choosing abortion, the women had defied criminal statutes and other statutory prohibitions; had violated overwhelming social norms; and in some cases, had disobeyed religious proscriptions. They made this choice not as intentional acts of civil and political disobedience but rather because the seriousness of their own personal situations rendered them willing to face the possibility of extreme consequences, including imprisonment or, in some cases, death. Nonetheless, as Paltrow correctly observed, “[T]heir collective action had many of the characteristics of planned and self-conscious civil disobedience.”⁵¹ Writing several years later, Paltrow described the women’s actions:

Like individuals who consciously chose to engage in civil disobedience, these women also chose to violate a law and did so in a nonviolent manner. They believed, as civil disobedients do, in the political and legal system, but viewed anti-abortion laws as wrong generally or at least unjust when applied to them. In conformity with the principles of civil disobedience, their actions in obtaining illegal abortions were taken after serious moral analysis, including consideration of the meaning and potential value of life and the legal, medical, and moral consequences of their decisions.⁵²

And even if their initial choice did not constitute civil disobedience in the technical sense, their later decision to share their stories in a public forum almost certainly did.

47. *Id.* at *29.

48. Petchesky, *supra* note 9, at 4.

49. *Id.*

50. Lynn M. Paltrow, *Women, Abortion and Civil Disobedience*, 13 NOVA L. REV. 471, 472 (1989).

51. *Id.* “As one woman who had an illegal abortion in the 1950’s explained, they sought abortions despite ‘the gut-twisting fear of being “found out” and locked away for perhaps 20 years.’” *Id.* at 473-74.

52. *Id.* at 474 (footnote omitted).

The Court's majority opinion in *Thornburgh* unreservedly reaffirmed *Roe*.⁵³ When the decision was announced, the National Organization of Women and the National Right-to-Life Committee were meeting in Denver hotels just a few blocks apart.⁵⁴ While pro-choice advocates were thrilled and called the holding a tremendous victory,⁵⁵ not all the news was good. On the one hand, a majority of the Court had strongly reaffirmed *Roe*. On the other hand, *Roe*'s 7–2 majority had now shrunk to a bare 5–4.⁵⁶ Despite the closeness of the case, however, *Roe* was still the law of the land.⁵⁷



Lynn Paltrow (left) and Marcia Niemann (NARAL staffer & organizer of “Silent No More” project) filing the brief in *Thornburgh* (1985).

We cannot know for certain what impact Paltrow's daring brief may have had on saving *Roe* by the narrowest of margins, but it is difficult to believe that the powerful stories presented there could have left members of the Court unaffected.⁵⁸ Equally important,

53. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

54. David Fernandez, *Thornburgh v. American College of Obstetricians: Return to Roe?*, 10 HARV. J.L. & PUB. POL'Y 711, 711 (1987).

55. RFP's director, Janet Benshoif, called the opinion a “‘tremendous pro-choice victory’ and an ‘absolute rejection of the Reagan Administration’s request . . . to overturn [*Roe*].’” *Id.* at 711 n.5.

56. *Id.* at 711-12; Fulks, *supra* note 4, at 785.

57. Some commentators concluded that *Thornburgh*'s 5–4 split belied what was actually a greater victory, finding in *Thornburgh*'s rhetoric a return to the rhetoric of *Roe*—rhetoric that had seemed weakened in intervening opinions. Fernandez, *supra* note 54, at 716-27.

58. It is quite possible that some members of the Court do not read all amicus briefs as a matter of course, but their law clerks almost surely read all filings

however, are two other effects of the brief and its stories. First, the stories would serve to educate the Justices for future cases. Paltrow has been among the first to remind us that in civil rights advocacy, it is shortsighted to view the goal as simply winning the case presently before the Court. Rather, advocacy strategies must be focused on the long term and must always be looking ahead.⁵⁹ Arguments made now, even if they do not win the present day, are part of the process of re-framing the discourse. In the end, it is the discursive frames that will make the difference, for good or for ill.

Second, Paltrow's brief has inspired several generations of appellate advocates who have used the stories of non-parties in civil rights litigation. In fact, the strategy has been adopted by both progressive⁶⁰ and conservative⁶¹ litigants. Paltrow recalls that after filing the brief, she would receive calls from other lawyers asking, "Can we really do this?" As the next Parts demonstrate, the answer is a resounding "yes."

II. THE WEBSTER AMICUS BRIEF

Once they were heard before the Court, women's voices continued to speak. By three years later, when the Court's next major abortion case came along, NARAL and the National Organization for Women's Legal Defense and Education Fund (NOW-LDEF) spearheaded the filing of another Voices Brief. The brief was filed in *Webster v. Reproductive Health Service*,⁶² and the primary author was Sarah Burns.⁶³ This time the voices amicus brief was not filed on

in the case and bring to the Justices' attention any briefs that add relevant information. And given the nature of the brief and its wide dissemination, it is likely that at least some members of the Court read the brief. See *infra* text accompanying notes 99-104.

59. Lynn M. Paltrow, *Missed Opportunities in McCorvey v. Hill: The Limits of Pro-Choice Lawyering*, 35 N.Y.U. REV. L. & SOC. CHANGE 194, 201 (2011).

60. See *infra* Parts II, IV.

61. See *infra* Parts III, IV.

62. 492 U.S. 490 (1989).

63. Others assisted with the brief, including Helen Neuborne, Alison Wetherfield, and Dawn Johnsen (appearing on the brief's title page) and Carole Cleaver, who is acknowledged on page 65. Brief for the Amici Curiae Women Who Have Had Abortions & Friends of Amici Curiae in Support of Appellees (Names of 2887 Amici Curiae & 627 Friends of Amici Curiae Set Forth in Appendix A), *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1115239, at *65 [hereinafter LDEF Brief]. At the brief's conclusion, the brief

behalf of an organization but rather directly on behalf of individual women. The brief identifies itself as “Brief for the *Amici Curiae* Women Who Have Had Abortions and Friends of *Amici Curiae* In Support of Appellees (Names of 2887 *Amici Curiae* and 627 Friends of *Amici Curiae* Set Forth in Appendix A).”⁶⁴

Once again the non-party stories take center stage. Beginning on page one with the required section “Interest of *Amici Curiae*,” the brief explains:

We, the amici curiae submitting this brief, are not organizations, religious groups or politicians. We are women. We are among the millions of American women who have faced an unplanned or problematic pregnancy and decided that having an abortion, legal or illegal, was the right choice for us, our loved ones and our lives. Some of us have given our names; others of us have not. Those of us who disclose our names sacrifice our privacy in order to preserve our liberty, and the liberty of all women to choose to have safe, legal abortions.⁶⁵

The brief then introduces the “Friends of the *Amici Curiae*”:

We are individuals, women and men, who have not had abortions but wish to join the courageous women who have, and to explain to the Court how critically important it is to women, their loved ones, friends, colleagues, and [their health care providers] that abortion remain legal, safe and available.⁶⁶

The brief explains that all of the letters of the amicus filers are being lodged with the Clerk of the Court⁶⁷ and that those actually cited or quoted in the brief itself are provided in the brief’s appendices.⁶⁸ Then the Argument section begins by placing the abortion decision in context:

Inevitably a woman’s decision whether to bear a child or to have an abortion is a resolution of sharply competing demands. When a woman is confronted with that decision, she not only considers her responsibilities for the well-being of the life she may bring forth but also examines her own life, health and essential well-being and the well-being of her spouse

recognizes Lynn Paltrow “for her leadership in ensuring that the voices of women concerning abortion reach this Court.” *Id.*

64. *Id.* at caption.

65. *Id.* at *1-2.

66. *Id.* at *3.

67. *Id.* at *2 n.2.

68. *Id.* at *3 n.3, apps. A-C. Appendix A provides the names of all the amicus filers in twenty-eight pages set out in full textual paragraph format. *See id.* at *A1-A28. Appendix B provides, in ninety-four pages, the full text of the cited letters from women who had abortions. *See id.* at *B1-B94. Appendix C provides, in thirty-eight pages, the full text of the cited letters of family members and friends of women who had abortions. *See id.* at *C1-C38.

or significant other, her parents, her child[ren], and others close to her Finally, she must weigh her obligations to the larger community and to her spiritual values. Each woman faced with this decision will weigh various considerations differently in new and unique circumstances.⁶⁹

The balance of the Argument section makes policy arguments demonstrating the wisdom of *Roe* and the profoundly personal nature of the abortion decision. The text makes those points, in significant part, by quoting at length from the letters of amicus filers.⁷⁰ Policy facts and figures are often placed in footnotes supporting the stories rather than vice versa.⁷¹ Other footnotes contain additional cross-references to letters too numerous to quote in the brief's text.⁷² While the brief in *Thornburgh* was only 31 pages in length,⁷³ the *Webster* amicus ran a hefty 65 pages, with its appendices adding another 160 pages.⁷⁴

The *Thornburgh* and *Webster* amicus briefs caught the attention of civil rights activists and academics alike. The Women's Rights Law Reporter published the *Thornburgh* brief in its entirety, describing it as "a breath of fresh air" in the "retrograde political-legal framework" of abortion litigation and observing that it "transform[ed] the terms of abortion discourse."⁷⁵ Professor Nancy Levit has commented that the briefs' storytelling technique "was based on the idea that 'moral convictions are changed experientially and empathically, not through argument.'"⁷⁶ Levit describes the briefs as:

[A] collection of stories of women from all walks of life who had abortions both legally and illegally. These were teenagers, women who were raped when they sought abortion services, women who were prosecuted when they had illegal abortions, those who had abortions in unsafe conditions when abortions were illegal, those who had abortions after *Roe v. Wade* in safe, clean, and supportive environments, women who had health problems that made childbirth dangerous, those who did not have financial resources to raise children, some who had cancer while

69. *Id.* at *5-7.

70. *See, e.g., id.* at 14-17, 19-21, 22-24.

71. *See, e.g., id.* at 11 n.8 (incidents of violence); *id.* at 24 n.15 (mortality rates); *id.* at 34 n.25 (household burdens); *id.* at 37-38 nn.27-28, 40 n.29 (economic circumstances).

72. *See, e.g., id.* at 18 n.13, 25 n.16, 26 n.17, 30-32, nn.19-21.

73. NARAL Brief, *supra* note 9.

74. LDEF Brief, *supra* note 63.

75. Petchesky, *supra* note 9, at 4; *see also* LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 283-84, 353-55 (2012).

76. Levit, *supra* note 9, at 40 (quoting Robin L. West, *The Constitution of Reasons*, 92 MICH. L. REV. 1409, 1435-36 (1994)).

pregnant, divorced professional women, married women with physically abusive spouses, some who suffered failed birth control methods, women who were pregnant as a result of rape (including a former nun raped by a priest), those afflicted with severe illnesses that necessitated abortion to save their lives, some who were addicted to drugs or alcohol, and some who carried fetuses with genetic diseases such as Tay-Sachs. These were not paradigm plaintiffs; they were Everywoman. The brief, directed at a Court composed [almost entirely of older men],⁷⁷ was intended to show that abortion decisions are not made frivolously or easily and to illuminate the many circumstances in which abortion is a justifiable choice.⁷⁸

Professor Robin West, who has long taught these briefs when discussing abortion issues, has described that experience:

Every year at least one student . . . tells me that the brief changed his mind on abortion. . . . [The Voices Brief] *shows*—illustrates—the terrible consequences of rolling back *Roe v. Wade*. Obviously, one does not have to have *been there* to understand what those consequences might be. However, one must indeed somehow be shown those consequences. The consequence that matters is that, in a world of illegal abortion, some of us, but only some of us, live out a regime of terror, torture, and unnecessary death. This is not a hard point to grasp. But, to be grasped, it must be shown. Principles and reason do not make the case.⁷⁹

III. THE *CARHART* AMICUS BRIEF

Taking a lesson from pro-choice advocacy, the next Voices Brief was filed on the pro-life side. In *Gonzales v. Carhart*,⁸⁰ an amicus brief was filed on behalf of “Sandra Cano, the Former ‘Mary Doe’ of *Doe v. Bolton*, and 180 Women Injured by Abortion.”⁸¹ The issue in the case primarily concerned the exception for the health of the pregnant woman,⁸² and the amicus brief addresses women’s health in terms of potential emotional effects of abortion.⁸³

The text of this brief relies primarily on social science data, thus speaking of women in the third-person (“they”).⁸⁴ The footnotes

77. During the pendency of *Thornburgh* and *Webster*, the Court included only one woman, Justice Sandra Day O’Connor.

78. Levit, *supra* note 9, at 40 (footnote omitted).

79. West, *supra* note 76, at 1436.

80. 550 U.S. 124 (2007).

81. Brief of Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, & 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, *Carhart*, 550 U.S. 124 (No. 05-380) [hereinafter Cano Brief].

82. *Carhart*, 550 U.S. at 143.

83. See Cano Brief, *supra* note 81, at 5.

84. *E.g., id.* at 19 (“Although for some women, the initial response is one of relief, many women later avoid the problem through repression and denial, usually

provide citations to sources for the data and sometimes provide additional data. The text of the brief does not refer to the women's statements provided in the appendices and only occasionally do the footnotes quote them.⁸⁵ However, Appendix A provides an affidavit of Sandra Cano, in which she recants her position in *Doe v. Bolton*, maintains that she was pressured and misled, calls her participation in that case a "fraud upon the Court," and urges the Court to reject abortion rights.⁸⁶ The brief introduces her affidavit:

At the heart of this case is the future of the "health" exception articulated in *Roe v. Wade* and *Doe v. Bolton*. Amici Sandra Cano is the "Doe" of *Doe v. Bolton*. It was *Doe v. Bolton* which provided for the health exception and led to partial-birth abortion and abortion on demand. While it is unusual for a successful litigant to file an amicus brief opposing the health exception which was the heart of her case, Mrs. Cano in fact never wanted an abortion in *Doe v. Bolton* and fraud was perpetrated on the Court. Her Affidavit is Appendix A. . . . Mrs. Cano supports Congress' position omitting the "health" exception and urges this Court to give deference to Congress and hold the ban on partial-birth abortion constitutional.⁸⁷

Appendix B provides sworn affidavits (as opposed to letters) of 178 women describing negative effects they attribute to their abortions.⁸⁸ These affidavits are introduced on page one. The brief justifies their use as part of an argument to enlarge the health exception to include judicial determinations about whether the choice to have an abortion might be unwise for a woman's emotional health.⁸⁹ Implicitly and rhetorically, however, the goal is to narrow the exception and to omit or deemphasize the concern for women's actual physical health:

Other amici are 180 post-abortive women who have suffered the adverse emotional and psychological effects of abortion. Congress in its findings only discussed the physical health consequences of abortion. However, other health consequences not stated in Congress' findings would be helpful to the Supreme Court in making its decision. The women attest to the fact that there are adverse emotional and psychological health effects that have affected their lives.⁹⁰

for years" (citing J.C. WILLKE & BARBARA WILLKE, *ABORTION: QUESTIONS & ANSWERS: LOVE THEM BOTH* 50 (2d ed. 2003)).

85. *E.g., id.* at 7 n.10 (providing two short excerpts).

86. *Id.* at app. 9, ¶ 24.

87. *Id.* at 1.

88. *Id.* at app. 11 (The women are named on pages 2-4).

89. *See id.* at 1.

90. *Id.* at 1.

These affidavits, described as “evidence,”⁹¹ are asserted to be different from and more reliable than other “non-evidence based assumptions” made before abortion was legal:

Although the Supreme Court only made non-evidence based assumptions in *Roe v. Wade* and *Doe v. Bolton* because abortion was generally not legal or widespread, the post-abortive women amici provide this Court with their real life experiences and attest that abortion in practice hurts women’s health.⁹²

The *Carhart* pro-life Voices Brief is 30 pages long, and Appendices A and B add another 106 pages in length.⁹³ The brief does not describe the sources and methodologies that produced the affidavits. More significantly, the affidavits do not describe the circumstances that prompted the women to choose to have an abortion. Rather, the affidavits respond to only one question:

Post-abortive women were asked, “How has abortion affected you?” Some of the women’s Affidavit testimony is in the brief with the complete answer to that question from the amici in Appendix B.⁹⁴

The authors of the *Carhart* amicus brief mimicked the pro-choice strategy; they found a way to link non-party statements⁹⁵ with the legal issue raised by the case. That legal issue—the second-trimester exception for a woman’s health—provided the rationale for a form of advocacy they wanted to use for much broader purposes.⁹⁶

* * *

Have these strategies been effective? Without direct reference in any opinion of the Court, it is difficult to tell, but some reading of the tea leaves may provide a hint. The *Thornburgh* amicus brief was filed in 1985,⁹⁷ and the *Webster* amicus brief was filed in 1989.⁹⁸ Three years later, the Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁹⁹ As at least one commentator has observed, the portion of the 1992 *Casey* decision attributed to

91. “The sworn Affidavit evidence of post-abortive women also demonstrates that abortion hurts women . . .” *Id.* at 5.

92. *Id.* at 2.

93. Cano Brief, *supra* note 81.

94. *Id.*

95. The degree to which the statements constitute stories may be debatable since the statements are not contextualized, as stories should be.

96. Even if the issues are articulated more narrowly, the ultimate goal of most abortion litigation is either to protect or eliminate abortion rights generally.

97. NARAL Brief, *supra* note 9.

98. LDEF Brief, *supra* note 63.

99. 505 U.S. 833 (1992).

Justice Kennedy echoes the pro-choice voices¹⁰⁰ and may well reflect the impact of the non-party stories in *Thornburgh* and *Webster*. Justice Kennedy wrote:

Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.¹⁰¹

Then, in *Carhart*, after the filing of the amicus brief and its affidavits about women's "health," Justice Kennedy wrote, "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."¹⁰² It may not be too much of a stretch to hear in each of Justice Kennedy's comments echoes of the non-party stories offered to the Court in *Thornburgh*, *Webster*, and *Carhart*.

And if we listen closely, we may hear echoes in the comments of other justices as well. Writing in response to Justice Kennedy's *Carhart* comment, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, described the abortion issue as a matter of full citizenship, just as Paltrow's *Thornburgh* brief had framed the issue:¹⁰³

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." . . . Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.¹⁰⁴

100. Reva B. Siegel, *Abortion and the "Woman Question": Forty Years of Debate*, 89 *IND. L.J.* 1365, 1377-78 (2014).

101. *Casey*, 505 U.S. at 852.

102. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

103. See *supra* text accompanying notes 36-48 and especially text accompanying notes 46-48.

104. *Carhart*, 550 U.S. at 171-72 (Ginsburg, J., dissenting) (citations omitted).

IV. LGBT RIGHTS: THE LEGACY CONTINUES

Not surprisingly, non-party stories have appeared also in amicus filings in cases concerning LGBT rights. The first brief to move in that direction was filed in *Lawrence v. Texas*¹⁰⁵ on behalf of the Human Rights Campaign (HRC) and thirty other organizations working for LGBT equality.¹⁰⁶ The brief was written by Walter Dellinger and a team of lawyers from O'Melveny & Myers.¹⁰⁷ Filed in early 2003, the brief was not a classic Voices Brief because it did not provide non-party, first-person stories.¹⁰⁸ Instead, the brief relied primarily on traditional social science data describing gay men and lesbians with the third-person pronoun "they."¹⁰⁹ For example, on page 11 we read, "That kind of message has its intended effect: some gay people internalize the message that they are inferior, resulting in self-loathing and associated emotional dysfunctions."¹¹⁰ In footnote 39, we read, "One recent study concluded that gay, lesbian, and bisexual teens report 'significantly greater exposure to violence' than their peers, are three times as likely to miss school because they feel unsafe, [and] are twice as likely to have been injured or threatened with a weapon at school."¹¹¹

The brief comes the closest to using a voices strategy on pages 19-20. There, the brief refers the Court to the litigants in its own prior cases, in which the Court had considered the situations of:

[S]chool teachers from Oklahoma, a bartender from Georgia, a "covert electronics technician" at the CIA, "descendants of the Irish immigrants" from Boston, a diverse group of Colorado citizens, "some of them government employees," an "exemplary" New Jersey Eagle Scout, and now two gay men—one black, one white—from Texas. This range of litigants alone suggests the diversity of the gay community and of the lives led by gay citizens.¹¹²

Here, the brief relies implicitly on the stories of parties in past cases. These are technically non-parties in the present case, but they were previously parties in other cases—people whose stories had been proffered originally through the usual evidentiary routes. The brief

105. 539 U.S. 558 (2003).

106. Amicus Brief of Human Rights Campaign et al. in Support of Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152347.

107. *Id.*

108. *See id.*

109. *See id.*

110. *Id.* at *11.

111. *Id.* at *14 n.39.

112. *Id.* at *19.

does not recount those stories again, hoping instead that some members of the Court will remember some of those stories. In only one paragraph does the brief refer to stories of non-parties:

These are the people branded as criminals by laws like Texas' Homosexual Conduct Law. Another is Mark Bingham, who on September 11, 2001, called his mother from United Airlines Flight 93 and then helped to save countless American lives by fighting against the terrorists aboard his plane. To his country, Mr. Bingham is a hero; in Texas, he is a criminal. On the same day that Mr. Bingham died, the Reverend Mychal F. Judge, chaplain to the New York City Fire Department and also gay, was killed by falling debris in the lobby of the World Trade Center shortly after administering last rites to a dying firefighter.¹¹³

While the amicus brief in *Lawrence* inched LGBT advocacy in the direction of using non-party stories, an amicus brief filed in *United States v. Windsor*¹¹⁴ and *Hollingsworth v. Perry*¹¹⁵ completed the move. The brief supported the challenge to the Defense of Marriage Act (DOMA) and was filed on behalf of six organizations working for LGBT rights and Sarah Gogin, a young author and activist who had written a book about her experiences growing up with partnered lesbian parents.¹¹⁶ The DOMA amicus brief provided the Court with crucial voices often omitted from debates about same-sex families—the voices of the affected children. The brief presented first-person stories of children raised in same-sex families and first-person stories of LGBT teenagers adversely affected by governmental disapproval of same-sex families.¹¹⁷ The brief is especially moving because it is composed almost entirely of children's voices, with the legal argument and social science data playing only a supporting role.

Most of the stories are presented in the text of the brief rather than in footnotes or appendices. On page one, the brief's Introduction begins with two epigrams:

[T]he whole idea of same-sex marriage in the United States and everywhere, I think it's affected me because my friends are talking about it, too. It's interesting to hear their opinions on it . . . it's interesting hearing what they have to say because some people I thought, you know, they're cool with my family. But then when it comes to same-sex marriage,

113. *Id.* at *20 (footnotes omitted).

114. 133 S. Ct. 2675 (2013).

115. 133 S. Ct. 2652 (2013).

116. Brief of Amici Curiae Family Equality Council et al. Addressing the Merits & Supporting Affirmance, *Hollingsworth*, 133 S. Ct. 2652 (Nos. 12-144, 12-307).

117. *Id.* at 3.

they have a different opinion. They're like, "I don't think they should get married. I think things are fine the way they are now." But they don't realize that they're talking about my family, too.

Sarah Gogin, then 16, in *In My Shoes: Stories of Youth with LGBT Parents*

My life is pretty typical for an eighth grader: I play football and baseball for my school, I'm an honor student, I like girls, and I enjoy hanging out with my friends. My mom and her partner, Michelle, have been a family, along with my two brothers and I, for five years. I want to talk today about how kids all over the state are affected by the current limitations on marriage. I want you to understand that denying gays and lesbians their right to marry doesn't just affect adults.

Samuel Putnam-Ripley, then 14, testifying before Maine Joint Committee on Judiciary¹¹⁸

After the epigrams, the Introduction is composed of three paragraphs of text explaining that “[t]he voices of children . . . are too often unheard in the debates about same-sex couples”¹¹⁹ and ends with this single-sentence paragraph: “This brief presents the voices of these children.”¹²⁰

Each major section following the Introduction begins with epigrams, statements by affected children speaking in their own voices. The brief includes quotations from many other children folded into the text, sometimes in phrases, sometimes in one or two sentences, sometimes in block quotes, and occasionally in footnotes. The source for each statement is cited. Some of the statements were previously published in books, articles, or newspapers. Some were part of legislative testimony. Some were statements made to one of the amicus organizations.

Like other Voices Briefs, the DOMA amicus connects the children’s stories to the legal issues before the Court. This brief makes that connection in two ways. First, the brief makes the point that debates about same-sex families rely on assumptions about the lives of children without hearing from the real children actually living in same-sex families. Second, the brief repeatedly uses the stories in direct rebuttal to the arguments made in the opposing briefs. Citing to the Petitioner’s brief, the amicus brief argues that the families of the quoted children “are successfully fulfilling the mission of ‘responsibly creating and nurturing the next generation’ that the *Hollingsworth* Petitioners insist is at the heart of

118. *Id.* at 1-2 (footnote omitted).

119. *Id.* at 2.

120. *Id.* at 3.

marriage.”¹²¹ Later in the Argument, the amicus brief refers to the Petitioner’s claim of an interest in stable family structure and Petitioner’s disclaimer of any intent to stigmatize or demean same-sex families.¹²² The amicus brief uses the children’s stories to show that the Petitioner’s articulated interests are necessarily undermined by the Petitioner’s own legal position.¹²³

Bringing the *Thornburgh* brief’s legacy to the present day, the current same-sex marriage case, *Obergefell v. Hodges*,¹²⁴ has seen an explosion of Voices Briefs by amicus filers. Among the 148 amicus briefs filed with the Court, at least 16 (over 10%) included voices components.¹²⁵ These Voices Briefs are almost equally distributed between the two sides of the case. Nine support same-sex marriage and seven oppose same-sex marriage.¹²⁶ Most of the sources for these non-party stories are news reports; web sites; statements to various organizations; filings in other litigated cases; and legislative testimony.¹²⁷ Space here does not permit analysis of all these briefs, but a summary may be instructive:

121. *Id.* at 16.

122. *Id.* at 24.

123. *Id.* at 25.

124. The appeal is composed of four combined cases: *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014); *Deboer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); and *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014).

125. *Amicus Briefs on the Merits*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/> (last visited Nov. 5, 2015).

126. *Id.* It is interesting to note, however, that three of the briefs opposing marriage equality were filed by the same counsel of record. Each of those briefs relates the stories of only two individuals, as compared with the Voices Briefs supporting marriage equality, which combine many more stories in each brief. *Id.*

127. *Id.*

**VOICES BRIEFS SUPPORTING CONSTITUTIONAL PROTECTION FOR
SAME-SEX MARRIAGE¹²⁸**

1st-Listed Filer & Counsel of Record	Use of Non-Party Stories
Colage (Jeffrey Trachtman)	Twelve stories told primarily in the third-person but with first-person quotations; some have separate headings referencing the names and home cities of the individuals; some are included as part of the author's text.
County of Cuyahoga, Ohio (Majeed G. Makhlof)	Thirteen affidavits provided as an appendix; first-person stories of stable relationships, parenting, children of same-sex parents, health issues and denial of benefits, bullying, and deaths; first-person stories of an estate planning attorney and child welfare professionals.
Kristin Perry & Sandra Stier, & three other married same-sex couples (Ted Olson)	Stories of these four married, same-sex couples who have successfully challenged state prohibitions on same-sex marriage; stories are told mostly in the third-person but are generously sprinkled with first-person quotations; the stories are unattributed to a source outside the brief itself.
PFLAG (Andrew Davis)	Eight stories of individuals and couples, including parents and friends of same-sex couples; most stories include a color family photograph of the individuals, couples, or other family members.
Marriage Equality USA (Martin Buchanan)	Stories appear on nearly every page, including under headings for elder couples, military and veteran couples, parents, and children.
Survivors of Sexual Orientation Change Therapy (Sanford Rosen)	The filers are five survivors, one mother, and the sister of a man who was subjected to the "therapy" and later committed suicide; most were amicus filers or witnesses in prior cases; multiple non-party stories told in the third-person, spanning pages 8-24.
Ninety-two Plaintiffs in Marriage Cases [in fifteen states] (Richard Bernstein)	Traditional legal brief, but with twenty-one-page appendix composed of forty-seven stories of these amicus filers; stories are told in the third-person; the stories are unattributed to a source outside the brief itself.
Family Equality Council (Katherine Keating)	First-person stories, mostly of teenagers raised in families with same-sex parents, appear on nearly every page.
Experiential Learning Lab at NYU School of Law (Peggy Cooper Davis)	Brief is written in the first person ("As students and heirs of antislavery traditions, we argue that . . .") and includes stories of slaves seeking to marry.

128. See *supra* note 126.

**VOICES BRIEFS OPPOSING CONSTITUTIONAL PROTECTION FOR
SAME-SEX MARRIAGE¹²⁹**

1st-Listed Filer & Counsel of Record	Use of Non-Party Stories
Parents & Friends of Ex-Gays (Dean Broyles)	A variety of first-person stories of people who identify as “ex-gays.”
Dawn Stefanowicz & Denise Shick (David Boyle)	The first-person stories of two women raised by same-sex male partners.
Heather Barwick & Katy Faust (David Boyle)	The first-person stories of two women raised by same-sex female partners.
Oscar Lopez & B.N. Klein (David Boyle)	The first-person stories of two men raised by same-sex female partners.
Religious Orgs, Public Speakers, & Scholars Concerned About Free Speech (Kelly Shackelford)	Stories of individuals who spoke about their opposition to same-sex marriage and claim to have been terminated from their government employment or suffered other employment-related harm as a result.
Same-Sex Attracted Men & Their Wives (Darrin Johns)	First-person stories of same-sex attracted men who have married women.
Organization that Promote Biological Parenting (Timothy Tardibono)	Stories of adoptees who lament their lack of information about their biological parent.

While not a Voices Brief, one other brief merits mention because it marks another development in the movement toward democratization of advocacy before the Supreme Court. The brief was filed on behalf of the “Human Rights Campaign [HRC] and 207,551 Americans as *Amici Curiae*.”¹³⁰ Colloquially called “The People’s Brief,”¹³¹ the argument presents a traditional legal- and policy-based argument, authored by Roberta Kaplan.¹³² After Kaplan drafted the brief, the HRC circulated the brief via the Internet, along with an invitation addressed to any American who would like to join the brief and be represented as amici in the case.¹³³ The brief makes its legal argument in a traditional third-person authorial voice, but

129. See *supra* note 126.

130. Brief of the Human Rights Campaign & 207,551 Americans as *Amici Curiae* Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 15-571, 14-574) [hereinafter *People’s Brief*].

131. *HRC Delivers “People’s Brief” with Over 200,000 Signatures in Support of Marriage Equality*, HRC BLOG (Mar. 6, 2015), <http://www.hrc.org/blog/entry/hrc-delivers-peoples-brief-with-over-200000-signatures-in-support-of-marria>.

132. *Id.*

133. See *id.*

this authorial voice speaks on behalf of multitudes of first-person voices joining the brief. The brief provides the Court with the names of its signatories via an electronic database maintained by counsel of record and explains the method by which the names were collected.¹³⁴ As part of joining the brief, the 207,551 individuals filled out a form attesting that they had read the brief, agreed with its arguments, and wished to be included as amicus filers.¹³⁵ They also selected one of the following assertions about themselves:

- I am lesbian, gay, bisexual or transgender (LGBT)
- I have lesbian gay, bisexual or transgender family members
- I have LBGT friends
- I own or work for a business that would benefit from LGBT people having the right to marry
- None of the above, but I believe that the U.S. Constitution requires marriage equality¹³⁶

These first-person assertions constitute yet another way to include the voices of American citizens in the crucial determinative processes of the Supreme Court. Still, as Nancy Levit has observed, “The strategic challenge in [LGBT] rights litigation is how to get courts to see sexual minorities as people worthy of equal dignity and respect.”¹³⁷ Thus, as helpful as it is to show strong popular support, the stories in true Voices Briefs—briefs that introduce the LGBT persons as human beings with the same hopes, dreams, and human qualities as any other human being—are even more important.

CONCLUSION

The use of non-party stories has come a long way since *Thornburgh*. A few characteristics have remained constant: Always the stories have been used only on appeal and only in an amicus filing. Always they have been used to help the Court decide a constitutional issue of immense personal importance to many individual American citizens.

Otherwise, the manner of use has varied. Sometimes the stories have been told in the third-person by the brief writer; sometimes they have been told in the first-person voice of the individual who lived that story. Some of the stories supplement the stories of the parties

134. People’s Brief, *supra* note 130, at 13a.

135. *See id.*

136. *Id.*

137. Levit, *supra* note 9, at 21.

themselves, providing additional examples of the same kind of harm the parties suffered. Some of the stories provide different kinds of examples or allow the Court to hear from groups of people not represented by the named parties. Sometimes the stories have been used to support key policy and social science arguments. Sometimes they have been used to elucidate a legal standard announced in a previous case or the particular legal question before the Court. Sometimes the stories have been used to directly rebut arguments from opposing briefs. Sometimes the stories have been meticulously attributed to sources outside the brief. Sometimes they are told for the first time, at least in that form, in the brief itself. Sometimes the original versions of the stories have been lodged with the Court; sometimes the original versions have been kept on file by the counsel of record or the amicus filer.

These variations matter little, however. The explosion of Voices Briefs currently being filed with the Court show that civil rights lawyers and litigants realize the importance of humanizing the issues. As Carlos Ball observed, “In many ways, overcoming invisibility is the first step in successfully demanding basic civil rights.”¹³⁸ The use of non-party stories to humanize crucial issues of individual rights likely will continue to play a key role in civil rights litigation for years to come.

138. Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1534 (2006).

APPENDIX A
LYNN PALTROW ADDENDUM TO RESEARCH MEMO

MEMORANDUM

TO: Janet Benshoof
FROM: Lynn Paltrow, Legal Intern
DATE: June 28, 1982
RE: Addendum to June 14, 1982 memorandum on the use of new medical and scientific evidence in the briefs for Akron Center for Reproductive Health v. City of Akron

Question Presented

(1) Whether Plaintiff and Amici in Roe v. Wade and Doe v. Bolton presented new extra record materials in their briefs to the Supreme Court.

Brief Answer and Procedural History of Roe v. Wade (in Rhyme).

Linda M. Coffee
sat on her toffee
eating her curds and whey
when along came a plaintiff
who said it'd be a shame if
we didn't sue old Henry Wade.

So Linda and Sarah
said they would share a
suit against old Henry Wade.
But first they would go
find plaintiffs with names ending in oe
who were pregnant but not too afraid.

They found Mary Roe
with no place to go
cause Texas had outlawed abortion.
They wanted the courts to declare
that the law was unfair,
in fact, a constitutional distortion.

The two didn't know much
about Federal practice and such
and they really didn't think they would win.
They wouldn't bet more than a coin
that a Federal court would enjoin
the law making abortion a sin.

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Without more than a prayer
their case they prepared
for three District Court judges to hear.
To the judges they spoke
urging them to invoke
that mysterious right that's so dear.

It's in the amendment the first
or in the ninth at the worst
and it's known as the privacy right.
It makes homes secure
and it's used to insure
the people's freedom to do as they might.

The hearing was brief
and to the judge's relief
no factual questions were tried.
The record was short
cause this three judge court
needed no facts to decide.

It took no statistics
to find the statute sadistic
overbroad, vague, awful and wrong.
No medical evidence was needed
for the judges to have conceded
that the privacy argument was strong.

So the Plaintiff's had won --
so far had they come
a surprising result indeed.
Whoever thought
a three judge District Court
would find for a woman in need.

But the judicial function
didn't extend to injunction
and the three judges wouldn't go the full way.
Yet, their fate wasn't sealed;
the Plaintiffs appealed
they would see what the Supreme Court had to say.

No chance would they take
no mistake would they make
in the highest high court of our land.
No proof they would lack
they'd show with their facts
that abortion could no longer be banned.

To the library they went,
for data they sent,
and they looked in every nook, cranny and shelf.
They talked to physicians,
medical statisticians,
and into the science books they did delve.

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They would show it to the Court
and hope it wasn't for nought
since this data was all newly presented.
The data they knew,
supported their view
and hoped it would not be resented.

This panel of nine
took its sweet time
making them all argue twice
But right till the end
the amici's did send
the material the judges call Brandeis.

Much to their pleasure
the judges took the data in measure
and the case was finally over and done.
The decision, heaven sent,
with only two in dissent,
was written by Justice H. Blackmun.

In '73
who thought the judges would be
against "human life" and pro choice!
Who thought they'd believe
all the data they received
and give us all reason to rejoice.

Discussion

The Plaintiffs in both Roe v. Wade and Doe v. Bolton relied extensively on extra-record published scientific and medical data. Both cases were heard before a statutory three judge District Court under 28 USCA §§2281. (USCA §§2281 was repealed in 1976, Pub. L. 94-381, §§1, 2, Aug. 12, 1976, 90 Stat. 119). There were no contested issues of fact in the Roe and Doe District Court cases and no trials. The cases were heard on the merits and the findings were based on considerations of affidavits, briefs and arguments of counsel. All of the data relied on by the Supreme Court was introduced by the parties and amici as Brandeis material and accepted by the Court through judicial notice.

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In Roe v. Wade the only medical data presented was in the affidavit of Paul Carey Trickett M.D. in support of plaintiff's motion for summary judgement and in the affidavit of Plaintiff-Intervenor James Hubert Hallford, M.D. No exhibits were attached to their affidavits. And, the indexes to the record appendix of both cases indicates that there were no scientific or medical exhibits introduced at the District Court level.

The District Courts made their judgements in 1970 and the Supreme Court decision was not rendered until January, 1973. During the intervening years, the Supreme Court accepted the new studies and data presented in the jurisdictional statements, briefs, supplemental briefs and amici briefs. Thus, studies published as late as the fall of 1972 were accepted by the court.

The Supreme Court's willingness to consider extra record material is best exemplified by its acceptance of an appendix prepared by Roy Lucas and presented to the Court both as the supplemental appendix to the plaintiff's brief in Roe v. Wade and as a supplemental appendix to A.C.O.G.'s amicus brief in Doe v. Bolton. This appendix presented in full, materials on the legal, medical and social impact of abortion law restrictions in the United States.

The Plaintiffs and Amicus concluded their introduction to the appendix by candidly stating that:

Much of the scientific data relevant to this case was not in assembled or published form until recent months. Other items were not unearthed from medical libraries until recently. Supplementary Appendix to Brief for Appellants, p. 3. (The introduction to the appendix is attached).

Conclusion

In deciding Roe v. Wade and Doe v. Bolton, the Supreme Court took judicial notice of extra record materials presented in the plaintiffs' and amici briefs.

