

MINISTERING (IN)JUSTICE: THE SUPREME COURT'S MISRELIANCE ON ABORTION REGRET IN *GONZALES V. CARHART*

J. Shoshanna Ehrlich*

INTRODUCTION

In 2007, in the case of *Gonzales v. Carhart*,¹ the United States Supreme Court upheld the federal “Partial-Birth” Abortion Ban Act of 2003 criminalizing the performance of intact dilation and evacuation (“D & E”) abortions unless necessary to save the life of the pregnant woman. Discounting expert testimony that this late second trimester procedure, in which the fetus is removed from the uterus intact, may be a woman’s safest option,² the Court instead deferred to the determination of Congress that these abortions bear a “disturbing similarity” to the “killing of a newborn infant.”³ The Court further asserted in accord with Congressional findings that these procedures had a “power to devalue human life,” and that a ban was therefore appropriate in order to draw “a bright line that clearly distinguishes abortion and infanticide.”⁴

Laying the foundation for its embrace of the abortion regret trope, which is the focus of this Article, the Court indicated that this procedure is inherently incompatible with women’s true nature in light of the fact that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for

* Professor, Women’s and Gender Studies Department, University of Massachusetts, Boston. This article is part of a larger research project being undertaken in collaboration with Alesha Doan, Associate Professor, School of Public Affairs & Administration, and Political Science, University of Kansas. I am grateful for the opportunity to work with such an enthusiastic, and brilliantly insightful colleague. This article has also benefitted from the excellent research assistance provided by the following students: Hui Chen, Hella Dijsselbloem, Gabby Fiore, and Caroline Reilly. I would like to acknowledge that select passages of this article are taken from an earlier chapter co-authored with Alesha Doan entitled: “*Teaching Morality by Teaching Science*”: *Religiosity and Abortion Regret*, in *REPRODUCTIVE ETHICS: NEW CHALLENGES AND CONVERSATIONS*, (Lisa Campo-Englestein & Paul Bucher, eds., forthcoming 2017).

¹ 550 U.S. 124 (2007).

² *Id.* at 161.

³ *Id.* at 158 (quoting Partial Ban Abortion Act of 2003, Pub. L. No. 108-105, § 2(14)(L), 117 Stat. 1201).

⁴ *Id.* (quoting § 2(14)(G), (L)).

her child.”⁵ Grounded in this maternalist framing of female identity, while acknowledging the lack of “reliable data to measure the phenomenon,” Justice Kennedy, writing for the majority, nonetheless asserted it was “unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained” and that “[s]evere depression and loss of esteem can follow.”⁶ In support of this proposition, the Court cited the amicus curiae brief filed by the conservative Justice Foundation on behalf of Sandra Cano⁷ (the original plaintiff in *Doe v. Bolton*,⁸ the companion case to *Roe v. Wade*)⁹ and “180 Women Injured by Abortion,” whose sworn testimonies of abortion trauma were solicited by Operation Outcry—a self-described ministry of the Justice Foundation.¹⁰

Considerable criticism has been leveled at the Court’s invocation of regret to justify upholding the federal ban on intact D & E abortions. In this regard, some commentators have focused on the Court’s misuse/miscomprehension of the concept of regret itself (what I refer to as content-based concerns), while others have turned their critical gaze to the Court’s singular reliance on the Justice Foundation’s amicus brief to support its factual claim regarding the unexceptional nature of abortion regret (what I refer to as process-oriented concerns).¹¹

However, the religious origins and consolidating power of the abortion regret trope have not received in-depth treatment in this body of critical scholarship.¹² This Article seeks to fill that gap. Following a discussion of some of the key themes raised in this literature, this Article then examines the deep religiosity of this trope as invoked by the Court. Tracking the above distinction between content and process, this exploration proceeds in two parts. First, the Ar-

⁵ *Id.* at 159.

⁶ *Id.* It should be noted that Congress did not actually make any findings regarding either women’s inherent maternalism or the likelihood of abortion regret. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L. J. 1694, 1698 (2008).

⁷ Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 263 (2011).

⁸ 410 U.S. 179 (1973).

⁹ 410 U.S. 113 (1973).

¹⁰ Brief of Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-380) [hereinafter *Brief of Sandra Cano*].

¹¹ I am purposefully avoiding the terms “substantive” and “procedural” as my focus is not on formal legal conventions or rules; rather, my interest lies in unpacking the psychological and cultural meanings of regret (content) and in tracing how the concept found its way into the *Carhart* decision (process).

¹² This is not to say that other authors have not discussed religious themes. See, e.g., Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 897 (2009); Siegel, *supra* note 6, at 1722; Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1673–75 (2008).

ticle interrogates the work of David C. Reardon, a prime architect of the “woman-protective” antiabortion strategy, in order to unpack his impassioned elucidation of regret as a psychological manifestation of a moral problem, experienced by women who turn their backs on God’s plan for their lives. It then traces the revelatory origins of the legal strategy that brought the voices of “post-aborted” women to the Supreme Court by way of the amicus brief filed by the Justice Foundation with a focus on the troubling nature of the Court’s reliance on a divinely inspired authority as the sole basis for its factual finding regarding the unexceptional nature of abortion regret. In conclusion, the Article discusses the implications of the Court’s reliance on an inherently religious concept that was packaged as a legitimate secular rationale for upholding the challenged federal law—a rationale that has since infiltrated our political and legal discourse to support the assertion that abortion harms women.

I. REGRET MISCONSTRUED

The *Carhart* Court’s concern about post-abortion regret and the “severe depression and loss of esteem [that] can follow” was a central factor in its decision to uphold the federal ban on intact D & E abortions.¹³ However, its invocation of regret was not actually linked to this challenged procedure. Rather, as explained by the Court, the presumed emotional precarity of “a mother who comes to regret her choice to abort” primes her for greater psychological trauma in the context of this procedure if her doctor fails to “disclose precise details of the means that will be used,” such that she does not learn until after the fact that she allowed him/her “to pierce the skull and vacuum the fast-developing brain of her unborn child.”¹⁴ However, rather than, as urged by dissenting Justice Ginsberg, requiring disclosure of these details so as to enable women to make fully informed choices,¹⁵ the Court instead chose to uphold the federal ban on intact procedures in order to protect them from this presumptive cascade of emotional injuries.¹⁶

¹³ *Carhart*, 550 U.S. at 159. Protecting women from regret was not, however, the sole basis for the Court’s decision to uphold the law. For further discussion of the *Carhart* decision, see generally Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915 (2010); Rebecca E. Ivey, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in Gonzales v. Carhart*, 94 VA. L. REV. 1451 (2008); Martha K. Plante, “Protecting” Women’s Health: How *Gonzales v. Carhart* Endangers Women’s Health and Women’s Equal Right to Personhood Under the Constitution, 16 AM. U.J. GENDER SOC. POL’Y & L. 387 (2008); Ronald Turner, *Gonzales v. Carhart and the Court’s “Women’s Regret” Rationale*, 43 WAKE FOREST L. REV. 1 (2008).

¹⁴ *Carhart*, 550 U.S. at 159–60.

¹⁵ *Id.* at 184 (Ginsburg, J., dissenting).

¹⁶ As I argue elsewhere, it is possible that the Court rejected an informed consent approach because, although disclosure of the details of this procedure may have served to avoid the enhanced emotional distress it associated with an intact D & E abortion, the majority Justices did not believe that any amount of information would suffice to alleviate the underlying regret it associated generally with abortion in light of its maternalistic assumptions regarding

The Court's decision to opt for protectionism over disclosure brings us directly to what is perhaps the most significant criticism of the weight and meaning it assigned to the concept of regret. Specifically, as Justice Ginsberg acerbically remarked in dissent, the majority invoked regret as a proxy for "ancient notions about women's place in the family and under the Constitution . . . that have long since been discredited," in order to justify depriving them "of the right to make an autonomous choice."¹⁷ As Reva B. Siegel puts it, upon examination, the Court's embrace of this "pro-woman" approach turns out to be a form of gender paternalistic reasoning, which like "the old gender paternalism" is based on "stereotypes about women's capacity and women's roles" that serve to "deny women agency" for the ostensible purpose of protecting them "from coercion and/or freeing them to be mothers."¹⁸ In short, regret effectively served as a safe cover under which Kennedy was able to successfully smuggle outmoded conceptions of women's decisional competence into its abortion jurisprudence in order to deprive them of the right to choose an abortion procedure it deemed barbaric.

Other content-based critiques focus on the Court's misapprehension of the psychological and cultural underpinnings of regret. According to Chris Guthrie, although the Court implicitly assumed that "a woman contemplating abortion is unable to anticipate the prospect of regret and is somehow caught off guard when she experiences it," his examination of "an elaborate body of psychological research" shows that among other critical decision-making strategies "most of us find the prospect of regret unappealing."¹⁹ Accordingly, we tend to factor considerations of regret "into our decisionmaking and take steps to avoid it."²⁰

Rather than being passive victims of a flawed decision-making process, Guthrie instead contends that most women will in fact anticipate the possibility of regret and actively factor this into their abortion decision. He thus argues that due to the Court's failure to account for what he labels "regret aversion," as well as other protective decisional strategies, it "should not abrogate the abortion right or any other Constitutional right on the basis of regret,"²¹ particularly given that the "bulk of the empirical evidence on postabortion well-being . . . strongly suggests that most women fare quite well following abortion."²²

women's true nature. See J. Shoshanna Ehrlich, *Turning Women into Girls: Abortion Regret and the Erosion of Decisional Autonomy*, 35 WOMEN'S RTS. L. REP. 329, 354-55 (2014).

¹⁷ *Carhart*, 550 U.S. at 184-85 (Ginsburg, J., dissenting).

¹⁸ Siegel, *supra* note 6, at 1792.

¹⁹ Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 881-82 (2008).

²⁰ *Id.* at 881.

²¹ *Id.* at 882. In addition to the Court's miscomprehension of "regret aversion," as detailed in his article, Guthrie argues that it also failed to account for the dynamics of "regret overestimation, regret dampening, and regret learning." *Id.*

²² *Id.* at 903.

Terry Maroney offers another perspective on the psychological underpinnings of regret, which she persuasively argues must be considered in conjunction with an individual's own value system. Defining regret as a person's belief that "she has made a negative self-evaluation based on past voluntary action now judged to be an avoidable mistake, and that she has coupled that evaluation with a wish for an imagined reality that would have obtained had the action been different"²³ she argues that by invoking the concept of regret in "close narrative conjunction with the invocation of mother-love," the *Carhart* Court has implicitly infused the concept with a relativistic cultural meaning.²⁴

Specifically, by giving "regret pride of place," Maroney argues that the Court is "subtly signaling endorsement of an account of the world in which abortion properly is regarded as the killing of a child by its mother," and that it consequently "regards such regret as being a significant part of the natural order of things," in accordance with the Operation Outcry testimonials.²⁵ Elaborating, she explains that these testimonials reveal distinct belief structures, which, although "legitimate on their own terms," as the expression of a worldview in which these women "have come to see themselves as mothers, their aborted fetuses as dead children, and the abortion as murder;"²⁶ the perspective "underlying their emotional reality is not properly generalizable to other people, for it relies on [contested]—and, indeed, profoundly contested—beliefs and values."²⁷ Accordingly, rejection of "any aspect of the underlying belief structure disrupts the resulting emotional consequences of abortion."²⁸

Maroney is thus highly critical of the Court's reliance on what she refers to as its "common sense" understanding of the emotion of regret, by which she means an "unreflective knowledge [that is] not reliant on specialized training or deliberative thought."²⁹ Accordingly, she argues that to "cabin the rights of all pregnant women . . . , even those for whom regret is a nonissue, is therefore to validate and privilege that contested set of underlying beliefs."³⁰ In short, much as Ginsberg's view that regret is a stand-in for "ancient notions" about women's roles and capacities, as presented by Maroney, it is a stand-in for a highly contextualized and contested understanding of the significance and impact of abortion in women's lives.

In addition to these content-based critiques, which effectively assert that the Court has misappropriated the concept of regret to justify depriving women of the ability to choose a procedure that it regarded as "laden with the power to

²³ Maroney, *supra* note 12, at 892–93.

²⁴ *Id.* at 893.

²⁵ *Id.* at 891, 894.

²⁶ *Id.* at 894–96.

²⁷ *Id.* at 896.

²⁸ *Id.* at 897.

²⁹ *Id.* at 852.

³⁰ *Id.* at 899.

devalue human life,”³¹ other scholars have critiqued the Court’s reliance on a single authority, namely the amicus curiae brief filed by the Justice Foundation, to support its factual finding regarding the unexceptionalism of post-abortion regret. As developed below, this critique does not simply take aim at the *Carhart* decision; rather, it is enfolded within a growing body of scholarship which challenges the conventional wisdom that the “expertise-providing role for the amicus curiae is a good thing,” particularly when it comes to providing the Court with specialized factual knowledge.³²

Leading the way, Allison Orr Larsen forcefully argues that the time has come to re-evaluate this traditional knowledge-gap-filling role of amicus briefs in light of the dramatic upsurge in filings—a rise of 800 percent over the past fifty or so years³³—coupled with the reality of a modern “data-rich and data-hungry world,” in which vast amounts of information are but a click away; thus arguably making it increasingly difficult for the Justices “to sort the reliable amici information from the unreliable,”³⁴ or, as Joëlle Anne Moreno puts it, “to distinguish science from its counterfeits.”³⁵ Of particular concern in this regard is the Court’s reliance on amicus briefs as the basis for making findings of legislative or social facts, which, in contradistinction to case-specific adjudicative facts, entail a generalized claim about the world,³⁶ such as, for example, that abortion regret is unexceptional.

According to Larsen, factual information contained in amicus briefs may be untrustworthy for a number of reasons. These include: reliance upon unpublished studies that are “on-file” with the author and not generally available for public review, rather than upon reputable peer-reviewed studies;³⁷ the use of studies that were undertaken for purposes of litigation, and thus may not “follow the scientific truth-seeking norms that regulate valid research;”³⁸ or are based upon “the presentation of an authority who holds a minority view in his field without revealing the countervailing evidence.”³⁹

Of course, these problematic submissions would be of less concern if the Justices were able to accurately sort the reliable from the unreliable briefs.

³¹ *Carhart*, 550 U.S. at 158.

³² Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1759–62 (2014).

³³ *Id.* at 1758.

³⁴ *Id.* at 1762, 1765.

³⁵ Joëlle Anne Moreno, *Extralegal Supreme Court Policy-Making*, 24 WM. & MARY BILL RTS. J. 451, 458 (2015).

³⁶ For further discussion of the difference between these kinds of facts, see Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1191–96 (2013).

³⁷ Larsen, *supra* note 32, at 1784–96.

³⁸ *Id.* at 1789 (quoting Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993)).

³⁹ *Id.* at 1795.

However, as documented by Michael Rustad and Thomas Koenig, the authors of an early and influential study on the problematic nature of the Court's reliance on amicus briefs to establish social facts, the Justices lack an effective mechanism for reliably ascertaining whether "amici are distorting findings, citing unreliable data or drawing questionable normative arguments from incomplete data."⁴⁰ This is not simply an academic concern, as studies by both Larsen, as well as Rustad and Koenig, uncovered multiple examples of the Court's citation to briefs to establish legislative fact that rest on social science findings, which had been "distorted for partisan purposes" or did not otherwise conform to standard research norms.⁴¹

Compounding the potentially problematic nature of the Court's reliance on amicus briefs to establish legislative facts, in her study of the fact-based amicus briefs cited by the Court between 2008 and 2013, Larsen found that "[m]ore often than not a Justice citing an amicus brief to support a factual claim relies on *only* the amicus brief as authority without accompanying evidence (studies, articles, statistics, etc.) that can be found from within the brief."⁴² She thus concludes that rather than regarding them as "research tool[s]," the Justices have come to regard the amici themselves "as experts."⁴³ By way of further concern, as Larsen also found in her study, this thick reliance on amicus briefs does not just occur with respect to establishing facts that are peripheral to the Court's decision on the merits, but also includes instances where the citation is "central to the Justice's explanation for his or her decision."⁴⁴ In short, a single amicus may be cited to answer an "outcome-determinative question[]." ⁴⁵

Turning this critical gaze on the *Carhart* decision, Justice Kennedy's citation to the amicus brief filed by the Justice Foundation as the basis for its factual finding regarding the unexceptionable nature of abortion regret is often held out as a prime example of the problematic nature of the Court's reliance on these briefs to establish legislative facts. As an overarching concern, the brief is the sole referenced authority on this subject, thus implicitly elevating the Justice Foundation to the principal expert on women's post-abortion experiences. However, although regret occupied, to quote Maroney, "pride of place"⁴⁶ in the majority opinion, its conclusory encapsulation of women's post-abortion emotional experiences is grounded in highly problematic sources.

First, the pages of the Justice Foundation's amicus brief, relied upon by Justice Kennedy to support the abortion regret claim, draws upon the work of David C. Reardon whose minority views about the traumatic nature of abortion

⁴⁰ Rustad & Koenig, *supra* note 38, at 152; *see also* Larsen, *supra* note 32, at 1762.

⁴¹ Rustad & Koenig, *supra* note 38, at 94; *see also* Larsen, *supra* note 32, at 1784–1800.

⁴² Larsen, *supra* note 32 at 1779 (emphasis in original).

⁴³ *Id.*

⁴⁴ *Id.* at 1783.

⁴⁵ *Id.* at 1782.

⁴⁶ Maroney, *supra* note 12, at 894.

have been soundly and consistently discredited by highly reputable organizations, including the American Psychological Association and the American Medical Association.⁴⁷ Moreover, although Reardon is characterized in the brief as “one of the world’s leading experts on the effects of abortion on women,”⁴⁸ as discussed below, his expertise is rooted in his religious belief that abortion disrupts God’s gendered order of creation.

Second, in addition to referencing the work of Reardon, the specific pages cited by Justice Kennedy also include excerpts from the complete testimonies provided by the 180 women injured by abortion that are set-out in the brief’s appendix.⁴⁹ As Linda Greenhouse makes clear, the group of women whose testimonies are included in the Justice Foundation’s brief hardly constitutes a representative sample of women who have had abortions, as those who respond to a survey from an organization dedicated to refuting the lie that “abortion is good and safe for women,”⁵⁰ are far more likely than other women to attribute the difficulties in their lives to their abortion experience, thus “severely less-en[ing] [the] generalizability” of their experiences.⁵¹

Compounding the methodological problems with their testimonies, as Greenberg further points out, none of the 180 women whom responded to the Operation Outcry call for post-abortion narratives actually linked their emotional grief to the aftermath of an intact D & E abortion. In fact there is nothing to indicate that any of them actually underwent this particular procedure, thus effectively making their testimonies “beside the point” vis-à-vis the actual issue before the Court.⁵² In addition, as Brianne J. Gorod points out, the Court “did not actually have the opportunity to hear these women testify;” accordingly, the “extra-record” facts embedded in their narratives were not tested by the rigors of the adversarial process, which might have revealed these shortcomings.⁵³ Moreover, although these excerpted portions are devoid of religious references, as discussed in greater detail below, many of the uncut testimonies are imbued with a deep religiosity.

Speaking in what is clearly a rhetorical manner, Greenberg ponders whether it might have been possible that “the briefs and the available evidence were simply so one-sided that upholding the statute was the only reasonable path

⁴⁷ Larsen, *supra* note 32, at 1796–98; *see also* Linda Greenhouse, *The Counter-Factual Court: Brandeis Lecture*, *Louis D. Brandeis School of Law, University of Louisville*, March 5, 2008, 47 U. LOUISVILLE L. REV. 1, 13 (2008); Moreno, *supra* note 35, at 509–13.

⁴⁸ *Brief of Sandra Cano*, *supra* note 10, at 22.

⁴⁹ *Id.* at app. B.

⁵⁰ *Who We Are*, OPERATION OUTCRY, <http://www.operationoutcrystories.org/about/who-we-are> [<https://perma.cc/2RBR-N66G>] (last visited Apr. 26, 2017).

⁵¹ Greenhouse, *supra* note 47, at 11–13, 16. This tracks Maroney’s content-focused objection to the Court’s reliance on these testimonies. *See* Maroney, *supra* note 12, at 897–99.

⁵² Greenhouse, *supra* note 47, at 12.

⁵³ Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 2–8, 32–34 (2011).

open to the [*Carhart*] Court?”⁵⁴ Quickly disposing of this possibility, she reveals that “[e]ven a cursory review of the impact of abortion on women’s lives demonstrates how selective Justice Kennedy was in marshaling and presenting his ‘facts.’”⁵⁵ First, as she points out, the majority Justices had ready access to the almost one dozen scientific papers on the subject of post-abortion trauma that were cited by dissenting Justice Ginsberg, which challenge its conclusion regarding the unexceptional nature of abortion regret.⁵⁶ Second, the Justices also had access to the amicus brief of the American Medical Women’s Association and the American Public Health Association, which poignantly documents that in instances of a wanted pregnancy that was terminated because of serious health considerations or fetal anomalies, an intact D & E procedure may “‘offer[] psychological benefits’ as compared with second-trimester abortions that result in fetal dismemberment” as it allows “the patient ‘to see and hold the fetus, and mourn its death.’”⁵⁷ Finally, Greenberg reminds us that the *Carhart* majority could also have turned to the “amicus curiae brief that matched the [Justice Foundation’s] brief in offering personal testimonies, based on interviews with and letters from 150 women who underwent second-trimester abortions,” documenting how, in the course of making their abortion decision, they “rel[ie]d upon intimate moral, religious, and personal values to make the right decision[s] for themselves and their families.”⁵⁸

Having reviewed these critiques of the *Carhart* decision, we now turn our attention to another deeply troubling dimension of the Court’s embrace of the abortion regret trope. As discussed in the following section, although presented to the Court as secular in nature, not only is the concept of abortion regret redolent with religious meaning, it entered the Court’s jurisprudence by way of a divine revelation.

II. ABORTION REGRET: THE “DEVIL’S BARGAIN”⁵⁹

In 1996, David C. Reardon published the book *Making Abortion Rare: A Healing Strategy for a Divided Nation*, in which he called upon “pro-life” activists to place the grieving women who had lost a child to abortion at the center of their strategy to “create a culture where abortion is not just illegal, but is

⁵⁴ Greenhouse, *supra* note 47, at 14.

⁵⁵ *Id.* at 13.

⁵⁶ *Id.* at 14.

⁵⁷ *Id.* at 14–15 (quoting Brief of Amicus Curiae American Medical Women’s Assn., American Public Health Ass’n. et al. in Support of Respondents at 15 n. 10).

⁵⁸ *Id.* at 15 (quoting Brief of the Institute for Reproductive Health Access et al. as Amici Curiae in Support of Respondents, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-1382), 2006 WL 2736633, at *29).

⁵⁹ DAVID C. REARDON, *MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION* 109 (1996).

unthinkable.⁶⁰ Inspired by the woman-centered approach of counselors in crisis pregnancy centers (“CPCs”),⁶¹ he hoped to channel their therapeutic narrative regarding the emotional harms of abortion into a transformative strategy for realizing the movement’s ultimate goal of protecting the unborn.

By way of a brief explanation, CPCs provide direct services to “abortion-minded” women, including directive counseling, free material aide, such as diapers and formula, and evangelical missionizing, which are aimed at dissuading them from pregnancy termination. By steering them towards motherhood in a devout and deeply feminized space, counselors hope to save women from a predicted lifetime of abortion regret.⁶² For many CPC counselors, this work is rooted in their own personal embodied experience of abortion as a profoundly traumatizing event, which is typically rooted in their abiding belief that the deliberate termination of a pregnancy disrupts God’s gendered order of creation in which all babies are a divine gift and all women—loving mothers.⁶³

As Reva Siegel documents, this effort by Reardon and other male leaders to transform a therapeutic discourse that otherwise might “have remained embedded in the movement’s crisis pregnancy centers”⁶⁴ was a well-calculated strategic move designed to counter the growing perception that, in the words of Jack Wilke, President of the National Right to Life Committee, “pro-life people were not compassionate to women and that we were only ‘fetus lovers’ who abandoned the mother after the birth.”⁶⁵ Accordingly, as Reardon explains in *Making Abortion Rare*, in order to convert the “ambivalent majority,” the movement must place the grieving “post-aborted” woman at the center of their antiabortion platform.⁶⁶ In short, as he argues, the creation of a pro-life society requires battling the opposition on their “own turf.”⁶⁷

However, as Reardon somewhat ruefully acknowledges in the Introduction to *Making Abortion Rare*, prior to embarking on this evangelizing mission he faced the daunting task of persuading his colleagues that “post-abortion issues are *the key* to converting hearts—*the key* to winning the battle for life,”⁶⁸ and

⁶⁰ *Id.* at xv (emphasis in original).

⁶¹ *Id.* at vii.

⁶² See generally ZIAD W. MUNSON, *THE MAKING OF PRO-LIFE ACTIVISTS* (2008); Kimberly Kelly, *In the Name of the Mother: Renegotiating Conservative Women’s Authority in the Crisis Pregnancy Center Movement*, 38 SIGNS 203 (2012).

⁶³ For further discussion, including excerpts from interviews with CPC counselors, see Alesha Doan and J. Shoshanna Ehrlich, “Teaching Morality by Teaching Science:” Religiosity and Abortion Regret, in *Reproductive Ethics: New Challenges and Conversations*, Eds. Lisa Campo-Engelstein and Paul Burcher, (Forthcoming, 2017).

⁶⁴ Siegel, *supra* note 6, at 1714.

⁶⁵ *Id.* at 1716 (quoting John Wilke. *Life Issues Institute is Celebrating Ten Years with a New Home*, LIFE ISSUES INST. (Feb. 1, 2001), <http://www.lifeissues.org/2001/02/life-issues-institute-celebrating-ten-years-new-home> [https://perma.cc/EX5Z-U3JF]).

⁶⁶ Reardon, *supra* note 59, at 28, 31; see *infra* notes 88–91.

⁶⁷ *Id.* at x (emphasis added).

⁶⁸ *Id.* at vii (emphasis in original).

that this strategic shift in focus would not undermine the “moral high ground of opposing abortion simply because all human life is sacred.”⁶⁹ Accordingly, although Reardon himself acknowledged the outcome was a forgone conclusion, he nonetheless proposed subjecting his proposition to a “moral examination” in order to establish that “the pro-woman approach is not only consistent with the pro-life moral imperative, it is, in fact, a fuller and more complete expression of it.”⁷⁰ It is here, in Reardon’s moral examination of his proposed “pro-woman/pro-life” strategy that the deep originating religiosity of abortion regret is first revealed.

Reardon begins his moral inquiry with “a very simple observation,”—namely, that “[i]n God’s ordering of creation, it is only the mother who can nurture her unborn child. All that the rest of us can do, then, is to nurture the mother.”⁷¹ Grounded in God’s dictate that “the best interests of the child and the mother are always joined,” he thus insists that “from a natural law perspective, we can know in advance that abortion is inherently harmful to women. It is simply impossible to rip a child from the womb of a mother without tearing out a part of the woman herself.”⁷²

Having presumptively established that the “psychological complications of abortion” are the direct manifestation of a “moral problem,”⁷³ Reardon further explains that a woman’s decision-making process regarding the outcome of a pregnancy is in fact a pitched battle between Christ and Satan over her fate. Pulling the woman in one direction, Christ urges her not to “do this thing,” and implores her to “[p]lace your hope in Me.”⁷⁴ Pulling her in the opposite direction, Satan insists “[y]ou must get rid of it . . . You have no choice. . . . Do this one thing and then you will be back in the driver’s seat of life.”⁷⁵

However, Reardon reassuringly promises that all is not necessarily lost for the “desperate woman” who rejects God’s gift of life and instead follows Satan to the abortionist’s door. If she subsequently repents and embraces his gift of forgiveness, she will “escape from the tar pit of despair” in which she would otherwise be mired.⁷⁶ On the other hand, if she is paralyzed by the “horror of [her] sin,”⁷⁷ and thus does not believe she is deserving of God’s mercy, she will instead find herself consigned to a living hell where Satan seeks to “pump[] as much despair into [her life] as he can generate.”⁷⁸ Standing now as her “fiercest

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 4.

⁷¹ *Id.*

⁷² *Id.* at 5.

⁷³ *Id.* at 10.

⁷⁴ *Id.* at 108.

⁷⁵ *Id.*

⁷⁶ *Id.* at 110–11.

⁷⁷ *Id.* at 109.

⁷⁸ *Id.*

accuser,” he taunts her that she is “beyond redemption There is no one who can love YOU—a murderer. You are alone,” and entreats her to escape this misery by seeking “what little comfort you can in the bottom of a booze bottle, in the silence of suicide, or in the embrace of an affair.”⁷⁹

As Reardon explains, this “devil’s bargain” by which Satan first encourages a woman to abort and then fans the flames of despair, is aimed at separating her from God, and sending her spiraling towards atheism, which Reardon identifies as the “greatest tragedy of abortion.”⁸⁰ Tracking Satan’s jeering admonition that a woman’s only hope for comfort now lies in death, adultery, or addiction, Reardon likewise asserts that “annihilation of [the] self,” either through the literal act of suicide or through “death’s semblance in abusive relationships or the mind-deadening effects of drug or alcohol abuse,” is her only chance for escape from a life of despair.⁸¹

The concept of the “devil’s bargain” crystalizes the animating religiosity of Reardon’s proposed “pro-woman” antiabortion strategy. The tragic figure of the wounded “post-aborted” woman is the literal embodiment of Satan’s victory over God, and despair—the linear consequence of her repudiation of God’s sacred design for her life. He thus offers his colleagues the opportunity to step into the vaunted role of avenging angel come to wrest suffering womanhood from Satan’s vicious grasp in order to advance “the Christian renewal of our society.”⁸² As Reardon unabashedly exhorts his readers, his is a crusade for the “defense of human dignity and for the glory of God.”⁸³

Further elaborating on why post-abortion issues are central to the prolife mission, Reardon characterizes “women who grieve over their lost children,” as the most “compelling advocates of all for the unborn.”⁸⁴ He thus proclaims that it will be through listening to their testimony that the ambivalent majority will finally be forced to acknowledge “the unborn for whom the tears are wept.”⁸⁵ Seeking to further harness the transformative power of the grief of “post-aborted” women, Reardon exhorts the “pro-life movement and the Church” to create a healing environment to help them overcome their pain and sense of shame, both for their own benefit and, strategically, so they will feel empowered to sue their abortionists for malpractice based on the systematic violation of their rights.⁸⁶ Reardon thus confidently predicts that if women aggressively pursue this course of action, the risk of performing an abortion will become so great that “even if it remains legal, no physician will dare risk the liability of

⁷⁹ *Id.* at 108–09 (emphasis in original).

⁸⁰ *Id.* at 109, 112.

⁸¹ *Id.* at 112.

⁸² *Id.* at 99.

⁸³ *Id.* at viii.

⁸⁴ *Id.* at 9, 14.

⁸⁵ *Id.* at 9.

⁸⁶ *Id.* at xii, 99–100.

performing one,” resulting in the eventual shut down of the “abortion industry.”⁸⁷

Recognizing, however, that the nonbelievers who populate what he refers to as the “ambivalent majority” are not likely to be moved by this sacred mission, Reardon instead proposes reaching them through “an alternative way of evangelizing.”⁸⁸ As he explains, since they are not likely to appreciate that a breach of God’s moral laws is “injurious to our happiness,” it is incumbent upon committed prolife activists to develop a secular research agenda that will “teach[] morality by teaching science.”⁸⁹ In short, he argues that “if our faith is true, we would expect to find . . . that acts [such] as abortion . . . lead, in the end, not to happiness and freedom, but to sorrow and enslavement,”—a truth that can be presented as the result of a “scientific” research agenda, thereby enabling the prolife movement to “bear witness to the protective good of God’s law in a way which even unbelievers must respect.”⁹⁰ Taking this a step further, he stresses that this “research and education” agenda is not “just grist for political reform,” but is also “leaven for spiritual reform,” since, as “people become more aware of all the hardships abortion causes . . . they will begin to respect the wisdom of God’s law,” and thus recognize that “these religious folk weren’t so crazy after all.”⁹¹

As we have just seen, the concept of abortion regret originated in the moral sphere in which natural law casts all children as wanted gifts from God, and all women as loving mothers; however, the *Carhart* Court emptied the concept of its sacred meaning. Nowhere in the decision do we get so much as a hint that despair signals Satan’s victory over God, leaving the “post-aborted” woman hurtling towards the “annihilation of the self.”⁹² Rather, regret takes center stage as a secular referent to women’s precarious emotionality. Of course, this divestiture of religiosity is exactly what Reardon urged as a way to reach nonbelievers who, at least initially, are unlikely to “acknowledge a moral truth for the love of God.”⁹³ It is thus not surprising, as discussed in the following section, that the secularized amicus brief filed by the Justice Foundation relies upon the authority of Reardon in the guise of an irreligious expert on abortion regret

⁸⁷ *Id.* at viii–ix. Prior to writing *Making Abortion Rare*, Reardon was commissioned by the staunchly antiabortion Life Dynamics to write a book entitled *Abortion Malpractice* for personal injury lawyers.

⁸⁸ *Id.* at 11.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² However, as discussed above, Maroney suggests that by placing regret in “close narrative conjunction with the invocation of mother-love,” the Court was quietly signaling its embrace of a view of the world that is compatible with this belief structure. Maroney, *supra* note 12, at 893–94.

⁹³ Reardon, *supra* note 59, at 11.

with no hint of his animating belief that post-abortion despair is the direct result of the “devil’s bargain.”

III. THE LORD INSTRUCTED ME TO BRING THE VOICES OF WOMEN HURT BY ABORTION TO THE SUPREME COURT

In addition to the problematic nature of the *Carhart* Court’s invocation of the concept of regret to justify the imposition of limitations on women’s abortion rights, which, as we have seen, emanates from a religious conception of abortion as disruptive of God’s gendered order of creation, like other commentators, I too am deeply concerned about the Court’s reliance on the amicus curiae brief filed by the Justice Foundation as its sole source of authority on post-abortion harm. Building upon the above-discussed critiques, and tracking the focus of this paper, I direct my attention to the revelatory origins of this brief, which, as we will see, brought the voices of 180 “post-aborted” women to the Supreme Court as witnesses to the truth.

In 2000, Allen Parker, an attorney and President of the Justice Foundation, was instructed by God to pursue a legal reform strategy aimed at ending the nation’s covenant with death. Like Reardon’s plan to empower “women who grieve for their lost children” to bring malpractice actions against the doctors who performed their abortions, this divinely inspired plan also sought to deploy women’s embodied abortion experiences as the catalyst for legal change.⁹⁴ More specifically, as Parker recounts to his followers, as he was on his way home from the March for Life rally in Washington D.C., the Lord spoke to him in the Dallas-Fort Worth airport to inform him that “only through the testimonies of women hurt by abortion could [they] refute the lie that abortion is good for women.”⁹⁵

The Lord subsequently instructed Parker to bring these testimonies to the Supreme Court in order to persuade the Justices, who, like Reardon’s ambivalent majority, had been deceived into thinking that abortion helped women, “that you [cannot] take the life of your own child without it deeply impacting your soul, your body, your emotions.”⁹⁶ The Lord also provided Parker with scriptures to confirm the importance of bringing the testimonies of aborted women before the Court. Significantly, as recounted by Parker, he included a passage from Isaiah, which he notes has long sustained the work of the Justice Foundation and its Operation Outcry ministry, predicting that “[h]ail shall

⁹⁴ E-mail from Allan E. Parker, President, The Justice Foundation, to Shoshanna Ehrlich, author (Nov. 11, 2015, 5:49 PM) (on file with author) [hereinafter Parker E-mail 1]; *see also Army of Justice Video: 39 Years of Roe v. Wade and Doe v. Bolton*, OPERATION OUTCRY, <http://www.operationoutcristories.org/2014/08/11/army-of-justice-video> [https://perma.cc/B8Y4-9MXJ] (last visited Apr. 26, 2017).

⁹⁵ Parker E-mail 1, *supra* note 94.

⁹⁶ *39 Years of Roe v. Wade and Doe v. Bolton*, *supra* note 94.

sweep away the refuge of lies and the waters will overflow the hiding place. Your covenant with death will be annulled.”⁹⁷

Seeking to implement the Lord’s legal reform strategy, the Justice Foundation accordingly filed its amicus brief in the *Carhart* case on behalf of Sandra Cano and 180 women “injured by abortion,” whose heartfelt stories of post-abortion suffering are included in an appendix to the brief and excerpted in the body of the brief itself.⁹⁸ Although the brief is silent about this divinely inspired pathway to the Court, according to Parker, these testimonies are the direct “fruit of that revelation.”⁹⁹

It is thus not surprising to find that the uncut testimonies in the appendix are laced with religious themes. While spiritually-oriented motifs are implicitly embedded in a number of the narratives of post-abortion grief, in which, for example, women speak of their guilt at having murdered their child, or of the unborn child’s humanity, approximately 20 percent of the testimonies contain explicit religious references.¹⁰⁰ These attest to a fear of divine retribution, emotional distress over the loss of a relationship with God, and guilt at having intentionally interfered with God’s procreative plans.

Capturing some of these unambiguously religious references, J.L.M., for example, explains that her overly protective relationship with her son emanates from her fear that “God could still punish me by taking this child away.”¹⁰¹ She goes on to explain that this fear has “mired my motivation and hindered my career (ironically since my reasoning in part to have an abortion was so my career wouldn’t be hindered).[.] It has cut the soul out of my entire life.”¹⁰² Although shorn of its religious references in the body of the brief, Donna M. Razin’s full testimony captures her highly freighted relationship with God following her abortion:

Deep regret—initially I was suicidal—as the years have progressed I have developed a heightened level of bitterness and anger and self-hate. I feared God, have not been able to attend church because of my fear of God, unforgiveness, shame, guilt, condemnation, inability to bond and fit in with other women, inability to be intimate. The deep emotional scars were a large contributing factor in my divorce—a very, very catastrophic choice! Great sense of loss and grief.¹⁰³

Identifying another potent source of anguish, S.B.M.’s testimony cogently captures Reardon’s natural law ideology. As she writes: “For years, I was in

⁹⁷ Parker E-mail 1, *supra* note 94.

⁹⁸ *39 Years of Roe v. Wade and Doe v. Bolton*, *supra* note 94.

⁹⁹ Parker E-mail 1, *supra* note 94.

¹⁰⁰ This figure is based on a preliminary analysis conducted by the author together with Alesha Doan.

¹⁰¹ *Brief of Sandra Cano*, *supra* note 10, at app. B, 14.

¹⁰² *Id.*

¹⁰³ *Id.* at app. B, 12.

denial, but I was bound by shame and guilt. It is the *unspeakable* deed and harms a woman deep to her core—As a woman, nurturer, child of God . . . it distorts the image of my life.”¹⁰⁴

Hewing, however, to Reardon’s admonition that the moral message of the prolife movement must be packaged in secular terms to reach those who do not appreciate that the violation of God’s law inevitably leads to “alienation and suffering,”¹⁰⁵ the excerpts that are included in the body of the brief have either been stripped of religious referents or lacked them in the first place. However, as we have just seen, one need only turn to the full testimonies to realize that, despite the representation of post-abortion suffering as an earthly matter in the sanitized pages of the brief in main, the uncut testimonies provide accountings of grief that are redolent with sacred themes.

The revelatory origins of the Justice Foundation’s amicus brief and the embedded religious motifs in the testimonies add another troubling layer to the already robust concerns discussed above regarding the Court’s reliance upon it to establish the unexceptional nature of abortion regret. Specifically, although on the surface the Justice Foundation presents itself as a secular organization, which “seeks to mobilize citizens, through financial and service contributions to provide free legal representation in landmark cases to protect and restore justice,”¹⁰⁶ a review of the organization’s website, together with the linked website of its Operation Outcry ministry and Alan Parker’s organizational communications, makes clear that, at least where abortion is concerned, its wellspring of action is rooted in the divine.

Turning first to the organization’s mission page, in addition to the above pronouncement regarding its commitment to protecting and restoring justice, the page also includes an embedded video asking viewers “whose side are you on?” and inviting them to join the Foundation’s “Army of Justice.”¹⁰⁷ By way of inspiration, following a recitation of the historic good that God has done, including, for example, the destruction of both communism and Hitler, viewers are informed that “God is sending a Deliverer who is greater than all the deliverers of the past,” namely the “King of Kings” and the “Lord of Lords,” who is “coming to bring Justice to the Earth with an Army of the Redeemed,” (which undoubtedly includes recruits to the Army of Justice), and once again inquires of them “whose side are you on?”¹⁰⁸

The Justice Foundation’s website also includes a linked description of its Operation Outcry ministry, and is also directly hot-linked to Operation Outcry’s companion website. As the website makes clear, Operation Outcry’s sin-

¹⁰⁴ *Id.* at app. B, 50 (emphasis in original).

¹⁰⁵ Reardon, *supra* note 59, at 11.

¹⁰⁶ *Mission Statement*, JUSTICE FOUND., <http://thejusticefoundation.org/mission-statement> [<https://perma.cc/N5KH-2N47>] (last visited Apr. 27, 2017).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

gular mission is “to end the pain of abortion by exposing the truth about its devastating impact on women, men and families . . . through *prayer* and with the testimonies of women and men who have suffered harm from abortion.”¹⁰⁹ Tracking Reardon’s message regarding the importance of post-abortion healing, Operation Outcry also offers “hope, healing and forgiveness through *Christ-centered, Biblically-based* abortion recovery programs,” to those “suffering in silence from their secret shame and guilt.”¹¹⁰

Further underscoring the deeply religious orientation of the Justice Foundation, Allen Parker, who describes himself in a video on the Operation Outcry website as a “born again Christian who trusts in Jesus Christ as his savior,”¹¹¹ signs the e-mails that he sends in his capacity as the President of the Foundation “Advancing Life, Liberty, and Justice in Him.”¹¹² His communications are also saturated with religious references. For example, in a 2015 e-mail entitled “Praise Report,” he begins by informing his readers that “Things have been incredibly busy and blessed at The Justice Foundation. We are praising God for many miracles and His miraculous provision in amazing ways.”¹¹³ In what he then denotes as an “URGENT!” request, he asks his readers to “pray that the Supreme Court take the appropriate cases [at the time, cases were on appeal to the Court from Arkansas, Mississippi, North Dakota and Texas] that God wants them to take to change the constitutional protection for abortion.”¹¹⁴

As we now know, the Court chose to review the case of *Whole Woman’s Health v. Hellerstedt* from Texas, in which it ultimately invalidated statutory provisions that held abortion clinics to the standards of ambulatory surgical centers and required doctors who performed abortions to have hospital admitting privileges.¹¹⁵ On the day the decision was handed down, the Justice Foundation issued a press release characterizing the result as a “crime[] against humanity,” which, again quoting Isaiah, apocryphally warned:

Without massive repentance America is doomed as a nation. We are going to experience much more destruction and more terror and the probable elimination of America as a nation. But God is still saying “America, return to me and I will return to you.” But time is very short. . . . [T]he words of Isaiah still ring true today that God himself says, “Your covenant with death will be annulled, your

¹⁰⁹ *Operation Outcry*, JUSTICE FOUND., <http://thejusticefoundation.org/cases/operation-outcry> [<https://perma.cc/YN3F-QTLE>] (last visited Apr. 27, 2017) (emphasis added).

¹¹⁰ OPERATION OUTCRY, *supra* note 50 (emphasis added).

¹¹¹ *39 Years of Roe v. Wade and Doe v. Bolton*, *supra* note 94.

¹¹² See, e.g., E-mail from Allan Parker, President, The Justice Foundation, to Shoshanna Ehrlich, author (Dec. 21, 2015, 9:06 AM) (on file with author).

¹¹³ E-mail from Allan Parker, President, The Justice Foundation, to Shoshanna Ehrlich, author (Nov. 16, 2015, 2:33 PM) (on file with the author).

¹¹⁴ *Id.*

¹¹⁵ 136 S. Ct. 2292, 2300 (2016).

agreement with the grave will not stand” and “it will be sheer terror to understand the message.”¹¹⁶

And in a same-day e-mail communiqué to supporters, Parker also issued a stern cautionary message about the likely consequences of this decision:

There is not much fear of the Lord left in the land, or even more sadly, in ourselves as the Body of Christ. There needs to be! I believe the Day of the Lord is coming, a day of burning like an oven. . . . So fear God, and do not give up on doing good!¹¹⁷

He therefore advised them that “The only way to prepare fully for the disaster ahead is to know Jesus as your Savior and Lord! (Boss!).”¹¹⁸

CONCLUSION

As we have seen, the Supreme Court’s reliance on amicus briefs to establish social facts raises the serious concern that “[w]ithout the procedural safeguards employed at the trial level, scientific and other evidence of questionable validity can easily find its way into [a] case.”¹¹⁹ Nonetheless, once the Court makes a factual finding, such as it made in the *Carhart* case regarding the unexceptional nature of abortion regret with its ensuing depression and loss of esteem, it may well become “embedded in the law as [an] immutable statement[] of reality,” and treated as “gospel” by lower courts despite the possibility of a shaky evidentiary foundation.¹²⁰ Exemplifying this problematic phenomena, the Eighth Circuit Court of Appeals, sitting en banc, recently cited *Carhart* for the proposition that “[s]evere depression and loss of esteem can follow” an abortion,¹²¹ as the basis for upholding a state law requiring that women seeking an abortion be warned of an “[i]ncreased risk of suicide ideation and suicide,” thus further entrenching a deeply religious and divinely inspired understanding of women’s post-abortion experiences into law.¹²²

Although advocacy groups who file amicus briefs certainly do so with the hope of influencing legal outcomes, political scientists have further observed that they may also do as well in order to “strengthen ties with their constituents

¹¹⁶ Press Release, The Justice Foundation, Supreme Court Commits Crimes (June, 27, 2016), <http://thejusticefoundation.org/category/news/press-release> [<https://perma.cc/PL7U-AE3K>] (last visited Apr. 27, 2017) (citation omitted).

¹¹⁷ E-mail from Alan E. Parker, President, The Justice Foundation, to Shoshanna Ehrlich, author (June 27, 2016, 2:25 PM) (on-file with the author).

¹¹⁸ *Id.*

¹¹⁹ Borgman, *supra* note 36, at 1216.

¹²⁰ Gorod, *supra* note 53, at 63–66 (discussing the uncertainty regarding the extent to which lower courts “are—or should be—bound by higher courts’ factual findings”); *see also*, Borgman, *supra* note 36, at 1216–18.

¹²¹ *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889, 899 (8th Cir. 2012) (citing *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007)).

¹²² *Id.* at 892 (citing S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii)).

and to contribute to organizational unity.”¹²³ In short, the primary audience may actually be “the membership of the group sponsoring the brief.”¹²⁴ Of particular relevance here, a citation in a Supreme Court decision may offer legitimacy to a group, and signal that it “has ‘access’ to or ‘influence’ with the Court,” which can, in turn, be used “to obtain new members and contributions.”¹²⁵

This is certainly born out in the present case. Notably, in the wake of the *Carhart* decision, a Justice Foundation memo proudly proclaimed that “The Court is listening.”¹²⁶ The memo went on to “thank the Lord for the progress being made,” with respect to the Court’s willingness to listen for the first time to the “‘wailing women’ who can ‘teach our nation to mourn’ for children lost to abortion,” thus extolling the group’s ability to influence the Court.¹²⁷ Reinforcing this implicit message, the memo also proudly announced that the “ruling is an invitation to provide further evidence of the harm of abortion.”¹²⁸

Directly relevant here is an intriguing argument made by Tiffany Ferris—if one regards the citation of an amicus brief as a performative act by which the Court is actively signaling its endorsement of the filing organization’s views, then the “mere act of citation, of naming a religious amici in an opinion” may “run[] afoul of the Court’s own Establishment Clause jurisprudence” as it is sending a clear message of support “for the religion with which that organization is inextricably and clearly linked.”¹²⁹ Whether or not the citation of an amicus brief filed by an organization, such as the Justice Foundation, actually constitutes an endorsement of its views in violation of the Establishment clause, what is significant here is that through its citation the Court has implicitly embraced a particularized understanding of the emotional consequences of abortion that is saturated with religious meaning. It is imperative that we recognize the woman-protective antiabortion argument for what it truly is—a religious assault on a woman’s right to control her reproductive fate based on the belief that abortion is a deliberate repudiation of God’s gendered map of the universe—that is currently working its way into our legal and political discourse as a legitimate secular rationale for limiting women’s right to abortion.

¹²³ Steven Puro, *The Role of the Amicus Curiae in the United States Supreme Court: 1920–1966*, at 247 (Feb. 1971) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with author).

¹²⁴ Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 824 (2000); see also, Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 639 (1993).

¹²⁵ Kearney & Merrill, *supra* note 124, at 825; see also Puro, *supra* note 123, at 247.

¹²⁶ *Operation Outcry Testimony Influences Four Major Court Victories!*, JUSTICE FOUND., <http://www.operationoutcristories.org/wp-content/uploads/2012/01/Fourth-Major-Court-Victory.pdf> [https://perma.cc/3N8G-2K7A].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Tiffany Marie Westfall Ferris, Note, *Justices Hawking Jesus: Endorsement Through Citation to Religious Amici in Supreme Court Opinions*, 21 WM. & MARY BILL RTS. J. 1259, 1267, 1278 (2013).

