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# JUSTICES HAWKING JESUS: ENDORSEMENT THROUGH CITATION TO RELIGIOUS AMICI IN SUPREME COURT OPINIONS

Tiffany Marie Westfall Ferris\*

## INTRODUCTION

On June 20, 2002, the Supreme Court handed down its opinion in *Atkins v. Virginia*,<sup>1</sup> holding that the execution of mentally retarded criminals is a cruel and unusual punishment prohibited by the Eighth Amendment. As part of its reasoning, the Court strove to demonstrate a broad social consensus that execution of the mentally retarded was an unwelcome practice, stating that “representatives of widely diverse religious communities in the United States . . . have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all ‘share a conviction that the execution of persons with mental retardation cannot be morally justified.’”<sup>2</sup> The Court’s cited source for the religious consensus was an amicus brief submitted by the United States Catholic Conference (USCC).<sup>3</sup>

Though the citation to the USCC’s amicus brief was couched in a footnote, it still earned the ire of Justice Scalia’s pen. In his scathing dissent, Justice Scalia awarded the “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’” to the Court’s appeal “to the views of . . . professional and religious organizations.”<sup>4</sup> He then specifically addressed the Court’s use of the USCC’s brief, noting that the Conference is made up of the active Catholic Bishops of the United States, a group whose “attitudes . . . regarding crime and punishment are so far from being representative, even of the views of Catholics, that they are currently the object of intense national . . . criticism.”<sup>5</sup>

Justice Scalia’s major complaint about the Court’s use of the information contained in the religious amicus brief seems to be that the information is not at all representative. That is, the information is not necessarily true and the Court does not

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\* J.D. candidate, 2013, William & Mary School of Law. I thank Professor Allison Orr Larsen for the help and guidance she supplied. Many thanks to my parents for the never-ending encouragement and support provided throughout my education, especially while writing this Note.

<sup>1</sup> 536 U.S. 304 (2002).

<sup>2</sup> *Id.* at 316 n.21.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 347 (Scalia, J., dissenting).

<sup>5</sup> *Id.* at 347 n.6.

possess the requisite institutional competency to vet any and all information that comes to it through the amici process.<sup>6</sup> There is, however, an underlying concern with the Court's citation to such a brief, a concern that has something to do with the group by whom the brief was actually submitted. The Court charges its opinions with a sort of tension when it uses information and arguments presented by religious organizations. Justice Scalia felt that tension in *Atkins*.<sup>7</sup> The United States is a country built on the premise of the separation of church and state, as embodied primarily through the First Amendment to the Constitution.<sup>8</sup> Something about the highest court of the nation—the great bastion of neutrality, the last stop on the road of justice—citing to amicus briefs of religious organizations is just odd enough to give readers pause. This pause stems from a general understanding that religion and government should not be linked to certain degrees or in certain ways, and readers may begin to wonder if that which is odd is merely strange, or if it is a serious constitutional problem.

There is, indeed, a First Amendment problem when the U.S. Supreme Court cites to amicus curiae briefs submitted by religious organizations—a problem created by the Court's own interpretation of the Amendment. When the Court cites to amicus briefs submitted by religious organizations, it cloaks that organization with the aura of the Court's power and status in American society. Doing so communicates approval of the organization itself, raising First Amendment concerns. The Court's endorsement of religious organizations through citation in opinions runs afoul of its own Establishment Clause jurisprudence and, in an age when the public eye is critically trained on issues of religion in society, creates certain dangerous harms.

This Note seeks to explain the problems created by such endorsement in four parts. Part I explains the amicus process, including who submits amicus briefs and how, as well as the Court's changing use of amicus briefs over time. Part II describes the evolution of the Court's First Amendment jurisprudence, specifically focusing on the development of the endorsement theory and its move to the forefront in Establishment Clause cases, and also explains why endorsement is the appropriate test under which to evaluate citation of religious amicus briefs. Part III of this Note explains how citation to religious amicus briefs violates the endorsement test and demonstrates the collision between religious amici and the First Amendment through a study of three recent Supreme Court cases containing such citations. Finally, Part IV addresses why endorsement is happening, why it is problematic, and what the Court can do to rectify the problem.

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<sup>6</sup> See, e.g., *id.* at 346–48.

<sup>7</sup> See *id.* at 347–48.

<sup>8</sup> See U.S. CONST. amend. I.

I. “YOU ARE MY FRIENDS IF YOU DO AS I COMMAND YOU”:  
THE ROLE OF THE AMICUS CURIAE

*A. Historical Evolution of Amici*

The role of the amicus curiae, the friend of the court,<sup>9</sup> has a history dating back to Roman law.<sup>10</sup> Amicus briefs were originally a tool that allowed a neutral third party to provide information to the court in a case to which he was not a party.<sup>11</sup> In the early life of the judiciary, amicus curiae functioned as a sort of research assistant, finding cases about which the judge was unaware and presenting them to him.<sup>12</sup>

As the United States began to develop its judiciary, the role of the amicus within that system began to change. The American federal court system has a complex set of procedural hoops through which parties must jump.<sup>13</sup> Such procedural requirements made it difficult for persons who were not parties to the litigation to be directly involved in the court proceedings, essentially forcing non-parties to file amicus briefs or do nothing at all.<sup>14</sup> The role of the amicus thus transformed from a neutral friend of the court to a less-than-neutral friend of a party or position. Indeed, current Supreme Court Rules regarding filing of amicus briefs support the partisan nature of the “friends”: the cover of every amicus brief submitted must identify the party it supports.<sup>15</sup> Amici are thus forced to declare a side<sup>16</sup> in an adjudicatory battle.

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<sup>9</sup> BALLENTINE’S LAW DICTIONARY 69 (3d ed. 1969).

<sup>10</sup> Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 676 (2008).

<sup>11</sup> *Id.* (citing Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2012 (1985)).

<sup>12</sup> Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1963) (referring to this duty as “oral ‘Shepardizing’”).

<sup>13</sup> *See* Simard, *supra* note 10, at 675–76 (noting that “traditional litigants must meet the requirements of justiciability and subject matter jurisdiction”); *see also* U.S. CONST. art. III, § 2, cl. 1 (establishing the “case or controversy” requirement); 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); 28 U.S.C. § 1332 (2006) (establishing the requirements for diversity jurisdiction of federal courts); FED. R. CIV. P. 1 (setting the scope of the Federal Rules of Civil Procedure as applicable to all civil actions and proceedings in United States district courts to “secure the just, speedy, and inexpensive determination of every action” and proceeding.).

<sup>14</sup> Simard, *supra* note 10, at 677; *see also* Krislov, *supra* note 12, at 720 (“In the United States, in particular, [the amicus curiae brief] has allowed representation of governmental and other complex interests generated by the legal involutions of federalism.”).

<sup>15</sup> SUP. CT. R. 37.

<sup>16</sup> Supreme Court Rule 37 does not preclude amici from submitting briefs for both sides, though each brief must still indicate the party whom it is intended to support. *See id.* In this instance, amici can be understood as “playing both sides.”

As the nature of amicus participation has changed, so has the rate of participation. Through as recently as the first few decades of the twentieth century, amicus briefs were filed in only about ten percent of the Supreme Court's cases.<sup>17</sup> More recent decades have seen a radical about-face. Scholars have estimated that amicus briefs have been filed in anywhere from eighty-five to ninety-five percent of Supreme Court cases.<sup>18</sup> Professors Kearney and Merrill have found that between 1946 and 1995, the number of amicus filings increased by more than eight hundred percent while the number of cases that the Court has decided on the merits has actually fallen.<sup>19</sup>

The parties participating as amici have also changed as the nature and rate of participation has changed. In its earliest history, participating in litigation as amicus curiae meant an interaction between an *individual* and a court.<sup>20</sup> In the earliest years of the Court, only individual persons could serve as amici.<sup>21</sup> It was not until the early twentieth century that courts began to consider briefs as belonging to organizations.<sup>22</sup> Recognizing the organizations behind the briefs was a more realistic approach to recognizing the new function of the amici as active participants in the struggle.<sup>23</sup> Racial minority groups, securities and insurance interests, and liquor interests were all among the first private interest groups to take advantage of the opportunities provided by submitting group-backed amicus curiae briefs.<sup>24</sup>

#### *B. Amici in the Twenty-First Century*

When they venture into the Supreme Court today, amici are viewed in three ways: as parties who may bring suit at some future date; as supporters of the party for whom they have submitted briefs; and as standard-bearers of interests not directly represented in the litigation.<sup>25</sup> At its core, the amicus brief provides interested

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<sup>17</sup> Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000) (citing Steven Puro, *The Role of Amicus Curiae in the United States Supreme Court: 1920–1966*, at 56 tbl. III-1 (1971) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with the University of Pennsylvania Law Review)).

<sup>18</sup> *See, e.g., id.* at 744 (“In recent years, one or more amicus briefs have been filed in 85% of the Court’s argued cases.”); Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 193 (2009) (“Between 1996 and 2003, at least one amicus brief was filed in 95% of cases.” (citing Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 129 fig. 1 (2005))).

<sup>19</sup> Kearney & Merrill, *supra* note 17, at 749.

<sup>20</sup> Simard, *supra* note 10, at 677.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (citing Krislov, *supra* note 12, at 703).

<sup>23</sup> Krislov, *supra* note 12, at 703.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 704.

persons and organizations the ability to participate in litigation as a sort of third-party clerk, cloaked in the guise of neutrality created by their nonparty status.<sup>26</sup> Amici continue the clerk role when they suggest arguments that appeal to a judge's moral compass,<sup>27</sup> or educate the judge on technical or scientific information, or provide a pulse of public opinion on the issue.<sup>28</sup> A recent study has shown that amici playing such roles enjoy a certain amount of persuasive power, at least where the Justices of the Supreme Court are concerned.<sup>29</sup>

Participation of amicus curiae, especially at the Supreme Court level, provides a service arguably greater than that of educating Justices. The American government is one of separation of powers.<sup>30</sup> Theoretically, the Supreme Court's function in such a system is to blindly administer justice to all who come before it.<sup>31</sup> When amici participate in disputes before the Supreme Court, they provide the American public with a form of political symbolism that reassures the people that the Court is not a detached body, indifferent to the concerns of the public at large.<sup>32</sup>

Helpful as they can be, amicus briefs can also present a serious challenge to the judicial process, one to which Justice Scalia alluded in his *Atkins v. Virginia* dissent: the Court lacks appropriate mechanisms to evaluate the information presented.<sup>33</sup> Amicus briefs are not entered into evidence and the information they contain bypasses the procedural safeguards traditionally imposed by evidentiary rules.<sup>34</sup>

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<sup>26</sup> Simard, *supra* note 10, at 680.

<sup>27</sup> *See id.* (citing CLEMENT E. VOSE, CAUCASIANS ONLY 166 (1959)); *see also* Krislov, *supra* note 12, at 711 (“[Amici] may perform a valuable subsidiary role by introducing subtle variations of the basic argument, or emotive and even questionable arguments that might result in a successful verdict, but are too risky to be embraced by the principal litigant.”).

<sup>28</sup> Simard, *supra* note 10, at 680; *see also* Kearney & Merrill, *supra* note 17, at 745 (listing the ways in which amicus briefs can provide assistance to the Court as presenting arguments or citing authorities not found in party briefs and providing important technical or background information).

<sup>29</sup> Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 505 (citing PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 106–09 (2008)).

<sup>30</sup> *See, e.g.*, U.S. CONST. art. 1, § 1 (vesting all legislative powers in Congress); U.S. CONST. art. 2, § 1, cl. 1 (vesting executive powers in a President); U.S. CONST. art. 3, § 1 (vesting judicial power in one supreme Court).

<sup>31</sup> Simmons, *supra* note 18, at 187 (describing the role of the Court as “ensuring some degree of both horizontal and vertical equity for the polity”).

<sup>32</sup> *Id.* at 190, 198 (“Democratic features in the judicial context are especially compelling because they provide symbolic reassurance for threatened or vulnerable groups who lack political capital in other venues such as Congress where political spoils go to the well-funded and well-organized.”).

<sup>33</sup> *Atkins v. Virginia*, 536 U.S. 304, 346–48 (2002) (Scalia, J., dissenting); *see also* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 99 (1993).

<sup>34</sup> Simard, *supra* note 10, at 704.

When religious amici<sup>35</sup> submit briefs to the Supreme Court, they perform all of the aforementioned functions, complete with benefits and dangers.

It is undisputed that religious amici have every right to participate in the process. First, the Supreme Court's rules governing the process provide multiple avenues through which an amicus can submit a brief,<sup>36</sup> and the rules have been interpreted quite liberally; the Court's current practice is to grant almost all motions for leave to file when a prospective amicus has been denied leave to file by one of the parties.<sup>37</sup> Second, religious organizations have a constitutional right to free speech, which encompasses writing and filing amicus briefs.<sup>38</sup> Though the religious organizations have the right to participate in the process, that participation has the potential to create tension with other First Amendment guarantees, namely those represented by the Free Exercise Clause.

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<sup>35</sup> Readers should understand that legal definitions of the terms "religious group" or "religious organization" typically used for purposes of statutory interpretation—like determining if an organization qualifies for a tax or ministerial exemption—are not implied by use of such terms. This Note uses a definition specifically crafted to capture those organizations and groups that may be considered "religious" by the general public. For the purposes of this Note, a "religious amicus," "religious organization," or "religious group" is any group that: (1) is composed solely of members of a particular religious sect for the purpose of advancing that religion; or (2) is strongly, publicly affiliated with a particular religion (or religions) and has as its publicly stated goal the advancement of that religion. Of premier importance in defining amici this way is a nexus between the organization and a particular religion or denomination such that the organization serves as a "symbol" for the religion. *See infra* discussion Part III.A.2. The USCC is a religious organization under (1), as it is "an assembly of the hierarchy of the United States and the U.S. Virgin Islands who jointly exercise *certain pastoral functions* on behalf of the Christian faithful of the United States" and whose purpose is to "promote the greater good which the Church offers humankind." *About USCCB*, U.S. CONF. CATH. BISHOPS, <http://usccb.org/about/index.cfm> (last visited Apr. 16, 2013) (emphasis added). The Alliance Defending Freedom qualifies as a religious organization under (2), as it is clearly an organization founded by "more than 30 prominent Christian leaders" and dedicated to advancement of Christianity: The "Alliance Defending Freedom is a servant ministry building an alliance to keep the door open for the spread of the Gospel by transforming the legal system and advocating for religious liberty, the sanctity of life, and marriage and family." ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/about> (last visited Apr. 16, 2013). The Alliance Defending Freedom was formerly known as the Alliance Defense Fund. *See Alliance Defense Fund Is Now Alliance Defending Freedom*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/page/new-name> (last visited Apr. 16, 2013).

<sup>36</sup> *See, e.g.*, SUP. CT. R. 37(3)(a) ("An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule.").

<sup>37</sup> Kearney & Merrill, *supra* note 17, at 762 (citing Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 650 (1993)).

<sup>38</sup> Andrew S. Mansfield, *Religious Arguments and the United States Supreme Court: A Review of Amicus Curiae Briefs Filed by Religious Organizations*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 343, 377 (2009); *see also* U.S. CONST. amend. I (providing for freedom of speech).

II. WALKING THE LABYRINTH:  
AMICI, THE SUPREME COURT, AND THE FIRST AMENDMENT

A. *Conspicuous Absences*

The glaring absence of religious amicus briefs in Supreme Court opinions is demonstrative evidence of the potential First Amendment problems with the briefs.<sup>39</sup> The Court has generally responded to the rise in amicus participation by increasing the frequency of references to amici in issued opinions.<sup>40</sup> In their study of amici, Professors Kearney and Merrill found a total of 936 decisions containing one or more references to an amicus, a figure that represents about twenty-eight percent of all cases between 1946 and 1995 for which one or more amicus brief was filed.<sup>41</sup>

This trend of increasing citation with increasing participation has not carried over to instances in which the brief was submitted by a religious organization.<sup>42</sup> Andrew Mansfield completed a study of religious amicus curiae briefs submitted to the Court from *Brown v. Board of Education*,<sup>43</sup> in 1954, to *Ayotte v. Planned Parenthood of Northern New England*,<sup>44</sup> in 2006, and found that while religious organizations are actively and extensively lobbying the Court through amicus briefs, the Court does not explicitly adopt or discuss briefs submitted by such groups.<sup>45</sup>

Lack of citation does not correlate to a lack of influence.<sup>46</sup> Amicus briefs are generally considered to be influential.<sup>47</sup> A set of interviews with Supreme Court clerks found that a mere frequency count of citations to amicus briefs does not

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<sup>39</sup> See Mansfield, *supra* note 38, at 377.

<sup>40</sup> See, e.g., Kearney & Merrill, *supra* note 17, at 757.

<sup>41</sup> *Id.*

<sup>42</sup> Mansfield, *supra* note 38, at 373–74.

<sup>43</sup> 347 U.S. 483 (1954).

<sup>44</sup> 546 U.S. 320 (2006).

<sup>45</sup> Mansfield, *supra* note 38, at 374; see also *id.* at 346 (“While the *briefs* demonstrate that religious organizations are participating in arguing issues before the Supreme Court, a reader of the Supreme Court *decisions* might have no idea such a debate is occurring. Little, if any, explicit mention is made of the concerns of *amici* or their participation in the process in the Supreme Court’s decisions.”).

<sup>46</sup> See, e.g., Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 36 (2004).

<sup>47</sup> See, e.g., Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984) (“Amicus briefs have shaped judicial decisions in many more cases than is commonly realized.”); Leo Pfeffer, *Amici in Church-State Litigation*, 44 L. & CONTEMP. PROBS. 83, 108 (1981) (giving examples of cases in which the Court adopted and “ma[de] its own a claim asserted only by an amicus” including *Epperson v. Arkansas*, 393 U.S. 97 (1968), and *Mapp v. Ohio*, 367 U.S. 643 (1961)).



represent the impact of those briefs on the Justices' decision-making process.<sup>48</sup> The proposition that Justices are not citing to religious amicus briefs does not necessarily implicate the conclusion that the briefs do not influence the Justices.<sup>49</sup> Still, the default rule has been that the number of citations equates to influence on the Justices.<sup>50</sup>

If Justices are generally influenced by amicus briefs, and if Justices generally cite to amicus briefs in written opinions, then why are citations to religious amicus briefs noticeably absent from Supreme Court opinions? Mansfield contends that religious amicus briefs do not find their way into opinions because Justices believe that religious principles should not be introduced into policy discussions.<sup>51</sup> He further argues that Justices restrain themselves from explicitly referencing religious arguments so as to not come into conflict with the Court's own Establishment Clause jurisprudence.<sup>52</sup>

Though Mansfield's argument that Justices avoid discussion of religious arguments in order to avoid collision with the First Amendment is rational, it merely scratches the surface of the inherent problems presented by religious amici. Mansfield's concern is primarily with the Court's use (or lack thereof) of *religious arguments*,<sup>53</sup> the kind of reasoning that may, for example, encourage the Court to rule one way or another based on religious beliefs or tenets.<sup>54</sup> Adopting a religious viewpoint advanced in an amicus brief—ignoring law, precedent, and other forms of reasoning—is certainly a way to raise First Amendment issues. It is not, however, the only way.

Though it has admittedly done so only rarely, the Supreme Court has explicitly cited to briefs submitted by religious amici in its opinions.<sup>55</sup> This Note contends that

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<sup>48</sup> See, e.g., Lynch, *supra* note 46, at 36 (explaining that there are "more subtle ways in which the Court relies upon amicus briefs" than are expressed through citation in written opinions).

<sup>49</sup> See *id.*; Simmons, *supra* note 18, at 224.

<sup>50</sup> Kearney & Merrill, *supra* note 17, at 757 ("A mere passing familiarity with the Court's decisions reveals that amicus briefs are often referred to by the Justices.")

<sup>51</sup> Mansfield, *supra* note 38, at 374–75 (citing RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE 11 (1996)).

<sup>52</sup> *Id.* at 377, 389.

<sup>53</sup> *Id.* at 344; see also *id.* at 377 (discussing the "almost complete silence of the Court in adopting or discussing positions set forth" in religious amicus briefs and the Court's adherence to an effort not to adopt a non-secular basis for legal decisionmaking).

<sup>54</sup> Readers are likely familiar with arguments in this category surrounding the same-sex marriage and abortion contexts.

<sup>55</sup> See, e.g., Citizens United v. FEC, 130 S. Ct. 876, 916 (2010) (citing Brief of Amicus Curiae Alliance Defense Fund in Support of Appellant, *Citizens United*, 130 S. Ct. 876 (No. 08-205)); Pleasant Grove City v. Summum, 555 U.S. 460, 480 n.7 (2009) (citing Brief Amicus Curiae of the American Catholic Lawyers Association in Support of Petitioner, *Summum*, 555 U.S. 460 (No. 07-665)); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2008) (citing Brief of Amicus Curiae United States Catholic Conference et al. in Support of Petitioner, *Atkins*, 536 U.S. 304); FEC v. Wisconsin Right to Life, 551 U.S. 449, 481 n.10

there mere act of citation, of naming a religious amici in an opinion, runs afoul of the Court's own Establishment Clause jurisprudence.<sup>56</sup>

*B. The Evolution of the Court's Establishment Clause Jurisprudence*

An understanding of the Court's First Amendment jurisprudence is crucial to understanding how citation can constitute an endorsement. The First Amendment, in relevant part, reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>57</sup> The two clauses contained in this short phrase are generally referred to as the Establishment Clause and the Free Exercise Clause. They are often, perhaps erroneously, seen as in tension with one another.<sup>58</sup> The Establishment Clause is the portion of the First Amendment relevant to this Note, as it is the clause that operates to restrain government actors.<sup>59</sup>

Deciphering the Court's stance on the Establishment Clause is a bit like trying to navigate Minos's labyrinth. The Court has not yet settled on a single test for violations of the Establishment Clause.<sup>60</sup> A general foray through the twists and turns of the Court's First Amendment maze, however, indicates that one test, the endorsement test, may be preferred to the others.

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(2007) (citing Brief of Family Research Council et al. as Amici Curiae in Support of Appellee, *Wisconsin Right to Life*, 551 U.S. 449 (Nos. 06-969, 06-970)). Individual Justices have also cited to such amicus briefs in their separately written opinions. *See, e.g.*, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 3012 (2010) (Alito, J., dissenting) (quoting Brief Amici Curiae of American Islamic Congress et al. in Support of Petitioners, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371)).

<sup>56</sup> This is not to say that citation to religious amici *should* violate the Establishment Clause. That is a determination better left to scholars of the intersection between law, policy, and religion. This Note merely contends that the practice *does* violate the Clause *as it has been interpreted by the Supreme Court*.

<sup>57</sup> U.S. CONST. amend. I.

<sup>58</sup> *See, e.g.*, Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 887 (2001) (arguing that "no-establishment" applies to government actors and therefore should not be seen as infringing on free exercise, which is a freedom of the individual citizen); *see also* Andrew R. Cogar, Note, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W. VA. L. REV. 279, 290 (2002) ("Thus the Establishment Clause may be reasonably perceived as limiting the Free Exercise Clause only when government offers *exclusive* benefits to religion.").

<sup>59</sup> Esbeck, *supra* note 58, at 886–87 n.9. The assertion of Establishment Clause relevancy because of its reach to government actors necessarily implies that the Supreme Court is a government actor.

<sup>60</sup> *See, e.g.*, Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences: Larson in Retrospect*, 8 N.Y. CITY L. REV. 53, 53 (2005); *accord* James A. Campbell, Note, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541, 542 (2006) ("Currently, the Court employs a multi-test, patchwork approach in determining whether a government act violates the Establishment Clause.").

The Establishment Clause was incorporated against the states by *Everson v. Board of Education*<sup>61</sup> in 1947, beginning the Court's search into the meaning of non-establishment.<sup>62</sup> The Court explained that the primary evil addressed by the Clause was the persecution of religious minorities.<sup>63</sup> Over the next twenty-three years, the stated aim of the Clause morphed until it was described as "insur[ing] that no religion be sponsored or favored, none commanded, and none inhibited."<sup>64</sup> One year later, the Court decided *Lemon v. Kurtzman*,<sup>65</sup> and took what seemed like a step toward formulating formal Establishment Clause guidelines.

In *Lemon*, the Court addressed complaints as to Pennsylvania and Rhode Island statutes that provided state aid to church-related primary and secondary schools.<sup>66</sup> The Court formalized a three-part test to determine whether a state legislative action avoids violating the Establishment Clause: (1) there must be a "secular legislative purpose"; (2) the principal effect of the statute must be one that does not advance or inhibit religion; and (3) the statute must not create an "excessive" entanglement between government and religion.<sup>67</sup> Chief Justice Burger, writing for the majority in *Lemon*, was particularly fearful that if the general public were forced to confront religion in a political way, the very divisiveness the Establishment Clause seeks to avoid could infiltrate society.<sup>68</sup> While the Court does continue to apply the three-prong *Lemon* test,<sup>69</sup> it has done so inconsistently, and with slight changes to the doctrine.<sup>70</sup> While the *Lemon* test was originally stated in "and" language, the Court later stated that "[s]tate action violates the Establishment Clause if it fails to satisfy any of these prongs."<sup>71</sup> The shifting landscape of the *Lemon* test has allowed for the development of other tests in the Establishment Clause line.<sup>72</sup>

A decade after articulating the *Lemon* test, the Court decided *Larson v. Valente*<sup>73</sup> and began to "muddy-up" the three-factor test.<sup>74</sup> *Larson* involved Minnesota's

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<sup>61</sup> 330 U.S. 1 (1947).

<sup>62</sup> Patrick-Justice, *supra* note 60, at 59.

<sup>63</sup> *Everson*, 330 U.S. at 8–9, 15–16.

<sup>64</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

<sup>65</sup> 403 U.S. 602 (1971).

<sup>66</sup> *Id.* at 606.

<sup>67</sup> *Id.* at 612–13.

<sup>68</sup> Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 693 (2002).

<sup>69</sup> *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002) (applying the "purpose" and "effect" tests of *Lemon*).

<sup>70</sup> *See, e.g., Campbell, supra* note 60, at 552–53.

<sup>71</sup> *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (emphasis added).

<sup>72</sup> *Campbell, supra* note 60, at 553. *But see* Patrick-Justice, *supra* note 60, at 60 ("The flexible *Lemon* test continues to be the primary method of evaluating conduct under the Establishment Clause, even though it has met frequent criticism and revision." (citations omitted)).

<sup>73</sup> 456 U.S. 228 (1982).

<sup>74</sup> *See, e.g., Patrick-Justice, supra* note 60, at 55–56.

Charitable Solicitation Act,<sup>75</sup> which exempted from registration and reporting requirements only those religious organizations that obtained more than half of their total contributions from members or affiliated organizations.<sup>76</sup> The Court determined that laws granting a preference to one denomination (as opposed to religion generally over non-religion) demand a strict scrutiny standard of review in judging constitutionality.<sup>77</sup> Though it seemed as though the Court was abandoning the *Lemon* test in favor of a new, strict scrutiny approach, it nevertheless applied *Lemon*'s excessive government entanglement test.<sup>78</sup> *Larson* articulated a new standard of review for a particular category of Establishment Clause violations, but that standard was not applied to determine the constitutionality of the Minnesota Act in question.<sup>79</sup> In the quarter century since its announcement, the Court has not used the *Larson* test to invalidate challenged legislation, nor has the Court ever even held the test as explicitly applicable.<sup>80</sup> It has become the vermiform appendix in the body of Establishment Clause jurisprudence—present, but, for all intents and purposes, it is useless.<sup>81</sup>

Just one year after announcing *Larson*'s denominational neutrality test, the Court articulated a third standard of Establishment Clause review. In *Marsh v. Chambers*,<sup>82</sup> a taxpayer challenged the constitutionality of the Nebraska legislature opening each session with a publicly funded prayer by a chaplain.<sup>83</sup> The Court reasoned that because the practice of opening legislative sessions with prayer is one that has essentially been performed since the nation's founding, there is no inherent Establishment Clause danger.<sup>84</sup> This version of the Court's Establishment Clause test reared its head again in 2004 in the opinions filed by Justices O'Connor and Thomas in *Elk Grove Unified School District v. Newdow*,<sup>85</sup> more commonly known as the Pledge of Allegiance case. Application of the *Marsh* test, it seems, is limited to instances in which the religious expressions possess a long-standing history and benign context, like the phrase "under God" in the Pledge of Allegiance.<sup>86</sup>

Three different standards for judging the constitutionality of government acts under the Establishment Clause were articulated in as many years.<sup>87</sup> The Court's

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<sup>75</sup> Minn. Stat. §§ 309.50–309.61 (1969 & Supp. 1982).

<sup>76</sup> *Larson*, 456 U.S. at 230.

<sup>77</sup> *Id.* at 246.

<sup>78</sup> *Id.* at 252.

<sup>79</sup> *Id.* at 246; see also Patrick-Justice, *supra* note 60, at 74.

<sup>80</sup> Patrick-Justice, *supra* note 60, at 87.

<sup>81</sup> *Id.*

<sup>82</sup> 463 U.S. 783 (1983).

<sup>83</sup> *Id.* at 784–85.

<sup>84</sup> *Id.* at 795.

<sup>85</sup> 542 U.S. 1 (2004) (the case was not decided on the merits, as the majority found *Newdow* lacked standing).

<sup>86</sup> *Id.* at 35 (O'Connor, J., concurring); see also Campbell, *supra* note 60, at 563.

<sup>87</sup> See *Lynch v. Donnelly*, 465 U.S. 668 (1984) (applying the three-prong *Lemon* test); *Marsh v. Chambers*, 463 U.S. 783 (1983) (applying the "long-standing history" test); *Larson v. Valente*, 456 U.S. 228 (1982) (applying strict scrutiny standard of review).

1984 term, however, saw a return to the *Lemon* standard in *Lynch v. Donnelly*.<sup>88</sup> The majority in *Lynch* applied the three-prong test to a crèche included in a city's annual holiday display,<sup>89</sup> and found that the display did indeed pass constitutional muster according to *Lemon*.<sup>90</sup> Newly appointed Justice Sandra Day O'Connor, however, was dissatisfied with the purpose and effect prongs of the *Lemon* test, and chose to use her concurrence in *Lynch* to articulate a new standard, a standard under which the proper inquiry is whether the government's action conveys a message of endorsement or disapproval of religion.<sup>91</sup> Justice O'Connor explained: "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."<sup>92</sup>

Justice O'Connor likely meant only to reformulate the *Lemon* test, condensing and refining the purpose and effect prongs into a question of whether the government was endorsing a religion.<sup>93</sup> The most junior Justice may have been out on a limb all by herself, but her endorsement theory was rapidly embraced and used to decide the next religious holiday paraphernalia case, just five short years after *Lynch*.<sup>94</sup>

*County of Allegheny v. ACLU*<sup>95</sup> involved another crèche display.<sup>96</sup> The majority adopted Justice O'Connor's endorsement test, stating:

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."<sup>97</sup>

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<sup>88</sup> 465 U.S. 668 (1984).

<sup>89</sup> *Id.* at 670–71.

<sup>90</sup> *Id.* at 685.

<sup>91</sup> *Id.* at 691 (O'Connor, J., concurring).

<sup>92</sup> *Id.* at 692.

<sup>93</sup> *See id.* at 690 ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether . . . the practice under review in fact conveys a message of endorsement or disapproval."); *see also* Feldman, *supra* note 68, at 695 ("In effect, then, Justice O'Connor proposed a purposive theory of the Establishment Clause that accounted for all three doctrinal pieces of *Lemon*.").

<sup>94</sup> Marci A. Hamilton, *The Endorsement Factor*, 43 ARIZ. ST. L.J. 349, 370 (2011).

<sup>95</sup> 492 U.S. 573 (1989).

<sup>96</sup> *Id.* at 578.

<sup>97</sup> *Id.* at 593–94 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

The language of the endorsement test is reminiscent of the “none sponsored, none favored” language of *Walz v. Tax Commission*,<sup>98</sup> issued nearly twenty years earlier.

Though there were some dissenters in *Allegheny*, within twenty years—by the turn of the millennium—every Justice had at some point accepted the endorsement test.<sup>99</sup> Interestingly, the Court has not abolished any of the other Establishment Clause tests, though instances of ceremonial deism and strict scrutiny appearing in Supreme Court opinions are rare.<sup>100</sup> The *Lemon* test, however, is still occasionally put to use.<sup>101</sup>

This Note evaluates First Amendment concerns with citation to religious amicus briefs under the endorsement test for several reasons. First, the practice is not one with a long-standing history,<sup>102</sup> so it cannot logically be evaluated under a ceremonial deism standard. Second, as *Larson*’s strict scrutiny standard has never actually been applied,<sup>103</sup> it does not make sense to start application now. The *Lemon* test and the endorsement test both seem to be applicable here. Considering the Court’s reformulation of the *Lemon* test to an “or” standard,<sup>104</sup> a practice is violative of the Establishment Clause under *Lemon* if “the practice under review in fact conveys a message of endorsement or disapproval.”<sup>105</sup> The effect prong of *Lemon* is the endorsement test.<sup>106</sup>

### III. PRODUCT PROMOTION: HOW CITATION TO RELIGIOUS AMICI CAN CONSTITUTE ENDORSEMENT

At first blush, it seems odd that there is a problem when the Court includes citations in its opinions. Certainly citation is desirable—it prevents plagiarism and helps readers follow the Court’s stream of logic. Even if citation is generally desirable, citation to religious amici flies in the face of the Court’s own endorsement

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<sup>98</sup> 397 U.S. 664 (1970).

<sup>99</sup> Feldman, *supra* note 68, at 698 (discussing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

<sup>100</sup> *See supra* notes 73–80 and accompanying text (discussing *Larson*’s application of strict scrutiny); *see also supra* notes 82–83 (discussing *Marsh*’s “long-standing history” test).

<sup>101</sup> Much to Justice Scalia’s dismay: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

<sup>102</sup> *See infra* Part IV.A.

<sup>103</sup> *See* Patrick-Justice, *supra* note 60, at 87.

<sup>104</sup> *See* *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

<sup>105</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

<sup>106</sup> *Id.* at 691–92.

theory of the First Amendment. Understanding how this is so requires a closer look at endorsement in its colloquial and legal contexts.

To say that someone endorses something has a particular and widely shared meaning in modern American culture.<sup>107</sup> One need only look to television commercials to know that celebrities routinely endorse products<sup>108</sup>: Jimmy Fallon and Capital One Credit Cards;<sup>109</sup> Drew Brees and NyQuil;<sup>110</sup> Michael Jordan and Hanes.<sup>111</sup> To endorse is to openly approve and express support.<sup>112</sup> The entire point of Brand A hiring a celebrity endorser is to convince the consumer that Brand A's product is superior to all others.<sup>113</sup> Judges typically decline to give their support in this way, refusing to endorse products and books; they are forbidden from endorsing political candidates.<sup>114</sup>

The ideas behind legal endorsement are similar to those behind colloquial endorsement. The non-endorsement principle as applied to First Amendment issues is meant to ensure that the government does not signal its approval and/or support of a particular religion (or religious denomination).<sup>115</sup> In a colloquial endorsement, the point of which is persuasion to purchase, the focus is on the end result: was the consumer so swayed by a snoring quarterback with a cold that he purchased NyQuil instead of Advil Cold and Sinus? With a governmental endorsement of religion, however, the concern is less about whether a citizen chooses to practice a certain religion (or hold a certain belief), and more about the messaging sent about the relationship between citizens and the structure of American government.<sup>116</sup>

The endorsement test, recall, is concerned with whether government "appear[s] to take a position on questions of religious belief" or makes religion relevant to

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<sup>107</sup> See, e.g., Hamilton, *supra* note 94, at 385.

<sup>108</sup> See *id.*

<sup>109</sup> Geoff Williams, *Credit Cards and Celebrity Pitches: Who Should Be the Next Star?*, CARDRATINGS.COM (Sept. 23, 2011), <http://www.cardratings.com/5-best-credit-cards-with-mock-celebrity-pitches.html>.

<sup>110</sup> *Drew Brees, Athlete, Celebrity Endorsements*, CELEBRITY ENDORSEMENT ADS, <http://www.celebrityendorsementads.com/celebrity-endorsements/celebrities/drew-brees/> (last visited Apr. 16, 2013).

<sup>111</sup> Elizabeth Olson, *Hanes Banks on Strong Tie with Star*, N.Y. TIMES, June 2, 2010, <http://query.nytimes.com/gst/fullpage.html?res=9F04E5DA143FF931A35755C0A9669D8B63>.

<sup>112</sup> Hamilton, *supra* note 94, at 385 (citing *Endorse Definition*, MERRIAM-WEBSTER ENGLISH DICTIONARY, <http://www.merriam-webster.com/dictionary/endorse>).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (citing MODEL CODE OF JUD. CONDUCT R. 4.1(A)(3) (2007), available at [http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf)).

<sup>115</sup> Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 612 (2011).

<sup>116</sup> Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 769 (2006) ("[E]ndorsements 'make religion relevant, in reality or public perception, to status in the political community.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring))).

political standing.<sup>117</sup> Prohibiting endorsement places members of differing religions, or religious denominations, as the case may be, on the same political ground.<sup>118</sup> When reasonable observers feel like outsiders because they perceive in government action an approval of religion or religious denominations, the endorsement test demands that such action be held unconstitutional.<sup>119</sup> Citation to religious amicus curiae briefs satisfies these criteria and is therefore a First Amendment violation under the Court's current jurisprudence.

#### *A. How the Court Is Capable of Endorsement*

Citations in Supreme Court opinions may not be the most likely place to find a violation of the Establishment Clause. Citations as displays are certainly less ostentatious than a forty-five-foot Christmas tree or eighteen-foot menorah.<sup>120</sup> An action need not be grandiose to constitute a violation of the Establishment Clause,<sup>121</sup> and citations fit the bill despite the small typeface in which courts deliver them.

##### 1. The Court as a Strong State Actor

Before citation can be considered a government action, the U.S. Supreme Court must be understood as a government actor.<sup>122</sup> Though there is precedent for judicial state action,<sup>123</sup> logic dictates that the Court is a government actor. It is common knowledge to anyone who has undergone elementary-level civics courses that the United States has three branches of government, one of which is the judiciary. Surely, then, the courts are capable of being government actors.

In addition to common sense, federal procedure supports the idea that federal courts are state actors. Suits may be maintained against individual federal agents

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<sup>117</sup> *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989).

<sup>118</sup> *See Gey, supra* note 116, at 738 (describing the endorsement test as a prohibition of establishment that places “everyone on an equal political footing, regardless of their idiosyncratic religious beliefs or lack of belief”); *see also Feldman, supra* note 68, at 695 (“The purpose of the Clause was to make religion irrelevant to standing in the political community.”).

<sup>119</sup> Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 521 (2002).

<sup>120</sup> *See Cnty. of Allegheny*, 492 U.S. at 573.

<sup>121</sup> *Id.* at 590–91.

<sup>122</sup> *See Esbeck, supra* note 58, at 886–87 (noting that the Establishment Clause only affects government actors).

<sup>123</sup> *Shelley v. Kraemer*, 334 U.S. 1, 14–17 (1948) (explaining that actions of state courts and judicial officers should be considered state action for the purposes of the Fourteenth Amendment). *Shelley's* primary concern was with state (as opposed to federal) courts because the issue involved in the case was about state equal protection. *Id.* at 8. There does not seem to be a reason that the same premises and principles are not equally applicable to federal courts—even the Supreme Court—under the auspices of other constitutional provisions.



for violation of constitutional protections. Federal judges may be sued through *Bivens* actions.<sup>124</sup> The judge in such an instance would still have judicial immunity,<sup>125</sup> but the fact that the suit may be brought at all indicates that federal courts are government actors.

It is appropriate to consider the Supreme Court, especially as compared to lower courts, as an institution deserving of the “government actor” label. It is the highest court of the land, the final destination for a challenge to a law or practice.<sup>126</sup> Under the doctrine of judicial review, the Court has the power to invalidate laws or actions passed by the legislative or executive branches of government.<sup>127</sup> If the bodies that are able to create a statute<sup>128</sup> or erect a display<sup>129</sup> may constitute government actors, then surely the body with the power to invalidate the statute or require the deconstruction of the display should be considered a government actor as well.<sup>130</sup>

## 2. Citation as a Government Action

The endorsement test is typically applied when the Court decides a case involving “government-sponsored speech or displays.”<sup>131</sup> Rather than limit the application of endorsement to things like holiday displays, the test seems to be one that can be

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<sup>124</sup> 46 AM. JUR. 2D *Judges* § 66 (1974); see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

<sup>125</sup> 46 AM. JUR. 2D *Judges* § 66 (1974).

<sup>126</sup> *The Court and Constitutional Interpretation*, SUP. CT. U.S., <http://www.supremecourt.gov/about/constitutional.aspx> (last visited Apr. 16, 2013) (“The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.”).

<sup>127</sup> *Id.* (“The complex role of the Supreme Court in this system derives from its authority to invalidate legislation or executive actions which, in the Court’s considered judgment, conflict with the Constitution. This power of ‘judicial review’ has given the Court a crucial responsibility in assuring individual rights, as well as in maintaining a ‘living Constitution’ whose broad provisions are continually applied to complicated new situations.”); see also *Simmons*, *supra* note 18, at 189 (“The Supreme Court cannot escape the reach of its decisions. It functions as a proxy for the entire judicial system.”).

<sup>128</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (deciding the constitutionality of an Alabama school prayer and meditation statute).

<sup>129</sup> See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) (deciding the constitutionality of a county government placing copies of the Ten Commandments on display in county courthouses).

<sup>130</sup> See *Simmons*, *supra* note 18, at 199 (“The Court is unavoidably an independent body and a political actor.”).

<sup>131</sup> *Campbell*, *supra* note 60, at 554 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (O’Connor, J., concurring)).

applied to the general category of “government action.”<sup>132</sup> Citations are inherently different from supersized Christmas trees and menorahs. They are, after all, just a few words on a page. They are found in footnotes<sup>133</sup> or in citation sentences.<sup>134</sup> They are not set apart in a different font size than the surrounding opinion. They are simply citations to arguments or facts that were not of the Court’s own making. It is not simply the citation itself, however, that is the problematic government action—though the citation itself does implicate the First Amendment. Rather, the *act* of citing also implicates the First Amendment.

Citation as an action, rather than as a function of language, is not immediately apparent to most speakers of the English language. Speech act theory helps to bridge the gap between language and action.<sup>135</sup> Speech act theory considers how language is used and sees language not as serving a merely descriptive function, as performing some action—as “*doing*.”<sup>136</sup> The example used most frequently to illustrate language *doing* something is the phrase, “I promise you I will be there.”<sup>137</sup> As one scholar explains it, that phrase “is not [used] to describe a state of affairs but to perform an act—namely the act of promising.”<sup>138</sup> Speech act theory is most concerned with the effects of language and the power of words that it is with what the words mean in a literal sense.<sup>139</sup> When the Court cites to a religious amicus brief, the literal meaning is to credit a source. The effect, however, is to call positive, approving attention to

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<sup>132</sup> See, e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592 (“In recent years, we have paid particularly close attention to whether the challenged *governmental practice* . . . ‘endors[es]’ religion . . . .” (emphasis added)).

<sup>133</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing Brief of Amicus Curiae United States Catholic Conference et al. in Support of Petitioner, *Atkins*, 536 U.S. 304).

<sup>134</sup> See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (citing Brief of Amicus Curiae Alliance Defense Fund in Support of Appellant, *Citizens United*, 130 S. Ct. 876 (No. 08-205)).

<sup>135</sup> Speech act theory is a body of theory in the overlapping fields of philosophy and language. See J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962). Several scholars have applied speech act theory, and its related branch of theory expressivism, to legal issues. See generally David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559 (2002); Alex Geisinger & Ivan E. Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN ST. L. REV. 77 (2007); John Greenman, *On Communication*, 106 MICH. L. REV. 1337 (2008).

<sup>136</sup> See B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705, 733 (2010). Whether the avenue is expressivism, see *infra* notes 140–48 and accompanying text, or speech acts, logical analysis connects both branches of theory so that the eventual conclusions in this Note are applicable to both.

<sup>137</sup> B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 512 (2005).

<sup>138</sup> *Id.* (citing J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962)).

<sup>139</sup> Hill, *supra* note 136, at 713.

a religious group in the official United States reports. The “doing” involved when the Court “speaks” through its citations to religious amici is endorsement.

Expressivism theory is related to speech act theory and can aid in understanding why the Court’s citation of religious amici is problematic.<sup>140</sup> Expressivism is a branch of interpretive theory based on the idea that “actions speak.”<sup>141</sup> When an action speaks, it is said to convey a social meaning, which is defined as “the semiotic content attached to various actions, or inactions, or statuses, within a particular context.”<sup>142</sup> Consider segregation: on its face, the policy imposed only a separation of races, but the action of segregating “spoke” and told Americans that some among them were inferior.<sup>143</sup> Citation on its face is a requisite for plagiarism-free writing. It is also more. It is an act that *does* something, something other than provide guideposts for understanding the Court’s logic. Precisely what it does is dependent on its context,<sup>144</sup> which is explored more fully in the coming sections of this Note.

Expressivism provides a different avenue for viewing citation as action than does speech act theory, though the distinction is admittedly very subtle.<sup>145</sup> Under speech act theory, the language of the citation endorses.<sup>146</sup> Under expressivism, citation is an action that conveys a meaning.<sup>147</sup> The citations themselves may be seen as displays or symbols. In this instance, the cite is analogous to a crèche erected in a government display.<sup>148</sup> A government actor (the city) may erect a nativity scene (the display) and endorse Christianity (the religion associated with the display). The syllogistic analogy in terms of this Note is that the Court (a government actor) may “erect” a display (the citation) and endorse the religion with which the group cited is associated.

### *B. Testing Citation for Endorsement*

Having established that the Supreme Court is capable of being a government actor and that citation constitutes an action, the endorsing power of citation may be explored. At least one scholar has argued that the Court avoids the public interaction with religious amici that comes from citation because, should it do so, it may be seen as favoring or endorsing that group.<sup>149</sup> As this Note demonstrates, the Court

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<sup>140</sup> *Id.* at 752 n.199.

<sup>141</sup> Hill, *supra* note 137, at 508.

<sup>142</sup> *Id.* (quoting Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995)).

<sup>143</sup> *Id.* at 508–09.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 511–12.

<sup>146</sup> *See id.* at 512.

<sup>147</sup> *Id.* at 494, 507.

<sup>148</sup> *See* *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

<sup>149</sup> *See* Mansfield, *supra* note 38, at 389.

cites to religious amicus briefs at times and sends a message of endorsement when it does so.

The Court need not necessarily intend to send a message of support or approval to endorse.<sup>150</sup> When the government, including the Court, sends a message, intent is simply implied.<sup>151</sup> But what message is the Court sending when it cites to religious amici? This question is at the heart of the endorsement inquiry.<sup>152</sup>

In evaluating government action under the endorsement test, one must look to the action in context to decide if it, “has the effect of endorsing or disapproving [religion].”<sup>153</sup> The lens through which this determination is made should be one of the “reasonable observer,”<sup>154</sup> though it is difficult to say just who he is.<sup>155</sup> Justice O’Connor has suggested that the reasonable observer for the endorsement inquiry is a bolstered version of the observer typically seen in a tort-like setting<sup>156</sup>: he should be aware of the “history and context of the community and forum in which the religious display appears.”<sup>157</sup>

The history and context here is that of Supreme Court decisions and citations. Between 1969 and 1981, eighteen percent of all cases in which amicus briefs were submitted actually referenced one or more of the briefs in the opinion.<sup>158</sup> The number of cases that go before the Supreme Court, however, remains relatively low. In

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<sup>150</sup> Recall that the endorsement theory is concerned with effect, rather than purpose, and that the *Lemon* test has been reformulated as disjunctive, rather than conjunctive. *See supra* notes 71, 91–92.

<sup>151</sup> *See, e.g., Hill, supra* note 137, at 505.

<sup>152</sup> *Id.* at 506 (explaining that “the endorsement inquiry focuses on determining what [the action] ‘means’”).

<sup>153</sup> *Cnty. of Allegheny*, 492 U.S. at 597.

<sup>154</sup> Critics may argue that the endorsement by citation is not possible because the Court does not write its opinion for the general public, but for lawyers and judges who, in turn, should understand that the Court is not endorsing a religious group. This argument falls apart, however, because the Supreme Court interprets the Constitution, a document of “the People.” *See* Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 730 (2007) (“The Court will always be ‘torn between defining its audience as the community of professional lawyers, and defining its audience as the general American public.’”); *see also* discussion *infra* Part IV.B.1.

<sup>155</sup> Hill, *supra* note 137, at 499 (“Thus, the reasonable observer’s perception is not to be gleaned merely from surveying individuals in the community; beyond this, though, it is not easy to say how a judge is to put herself in the position of the reasonable observer. One can only conclude, perhaps, that one element of the ‘context’ to which the endorsement test looks is the understanding or consensus of the society as a whole.”).

<sup>156</sup> *See* Choper, *supra* note 119, at 512 (quoting Justice Stevens who described Justice O’Connor’s reasonable person as “a well-schooled jurist, a being finer than the tort-law model”).

<sup>157</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring); *accord* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O’Connor, J., concurring) (“[T]he ‘reasonable observer’ must embody a community ideal of social judgment, as well as rational judgment . . .”).

<sup>158</sup> *Kearney & Merrill, supra* note 17, at 757.

2009, 8,159 petitions for certiorari were filed.<sup>159</sup> Of those cases, eighty-two were argued and seventy-seven were resolved.<sup>160</sup> This means that only about two percent of cases submitted to the nation's highest tribunal were decided in some way.<sup>161</sup>

When the Court decides it will take a case and briefs are submitted, there is no guarantee that an amicus curiae brief will even pass under the Justices' noses. A 2004 study of former Supreme Court clerks revealed that clerks often screen briefs for their Justices and decide whether the Justice should spend time reading them.<sup>162</sup> There is also no guarantee that every organization that wants to submit a brief will be able to do so. Though the rules governing submission are generous,<sup>163</sup> costs may be prohibitive. At least one firm has estimated that the cost to prepare and submit a single amicus curiae brief would tally approximately \$50,000.<sup>164</sup>

Taken together, these factors suggest that it is a tremendous honor to be cited as an amicus curiae in the Official Reports of the U.S. Supreme Court. If the reasonable observer is equipped with this knowledge, then the leap from citation to endorsement becomes a small step. A reasonable observer could rationally believe that if the Supreme Court is citing to an amicus brief submitted by a religious organization, the Court is sending a message of support not just for that organization, but for the religion with which that organization is inextricably and clearly linked.

### C. Endorsement in Action

In recent years, the Court has cited to religious amici in cases involving both religious and non-religious issues. This section presents three of those instances in an effort to further demonstrate, using the principles already articulated in this Note, how a reasonable observer could find endorsement.

#### 1. *Citizens United v. Federal Election Commission*

*Citizens United v. FEC*<sup>165</sup> is an instance of citation to a religious amicus brief in a case about a non-religious issue. The Court decided this campaign finance case in

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<sup>159</sup> 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY app. at 9 (2010), available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

<sup>160</sup> *Id.* at 9–10.

<sup>161</sup> See also Kearney & Merrill, *supra* note 17, at 817 (citing LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 82–83 (2d ed. 1996)) (estimating that the Court grants certiorari in about four percent of cases).

<sup>162</sup> Lynch, *supra* note 46, at 44 (“To facilitate their screening, clerks relied upon a number of identifying features, such as the summary of arguments, table of contents and section headings—all required features of any amicus brief filed with the Supreme Court—to determine whether the brief could contribute anything novel.”).

<sup>163</sup> See *supra* note 36 and accompanying text. See generally *supra* Part I.B.

<sup>164</sup> Lynch, *supra* note 46, at 58 (discussing the 2004 estimate of Sidley Austin Brown & Wood LLP).

<sup>165</sup> 130 S. Ct. 876 (2010).

2010, holding that the First Amendment does not permit the government to suppress corporations' political speech.<sup>166</sup> The Court's majority opinion cited to the Alliance Defense Fund's (now the Alliance Defending Freedom) amicus brief; The Alliance Defense Fund (ADF) is a religious organization for the purposes of this Note.<sup>167</sup> The Court cited to the ADF brief because the ADF raised certain examples under which the statute in question would be deemed unconstitutional, examples which the Court believed to be favorable to Citizens United.<sup>168</sup>

The reasonable observer is justified in inferring endorsement of ADF from this particular citation beyond the historical context of non-citation and long odds of being cited. The ADF brief was not the sole source of information in which the Court was interested.<sup>169</sup> In fact, the Court cited to another amicus curiae brief, that of the Institute for Justice.<sup>170</sup> The Institute for Justice is a secular, libertarian civil liberties law firm.<sup>171</sup> Citing to both secular and religious amicus briefs for a singular proposition begs the question of why a citation to the religious group is necessary. This question rings especially poignantly where, as here, the actual party to the case cannot avail itself of the information cited. A reasonable observer could believe that the Court gave a superfluous citation to the ADF simply because the Court supports, approves of, favors, or endorses the ADF and the Evangelical Christianity with which it is so inextricably tied.<sup>172</sup>

## 2. *Pleasant Grove City, Utah v. Summum*

*Pleasant Grove City v. Summum*<sup>173</sup> involved an instance of citation to a religious amicus brief in a case about a quasi-religious issue. Summum, a religious organization, alleged that Pleasant Grove City infringed its free speech rights when the city denied its request to put a religious monument in a park in which a Ten Commandments statue was already displayed.<sup>174</sup> The Court held that when the City allows or denies permanent monuments to be placed in a public park, it is exercising government

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 916; *see also supra* note 35.

<sup>168</sup> *Citizens United*, 130 S. Ct. at 916 ("Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. In *McConnell*, the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. The examples cited by *amici* are cause for concern." (citations omitted)).

<sup>169</sup> *See id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See generally About IJ: Our Mission*, INST. J., <http://ij.org/about> (last visited Apr. 16, 2013).

<sup>172</sup> Much as the nexus between a crèche and Christianity is so close.

<sup>173</sup> 555 U.S. 460 (2009).

<sup>174</sup> *Id.* at 465.

speech that is not subject to the Free Speech Clause.<sup>175</sup> Before reaching its ultimate conclusion, however, the Court cited to the American Catholic Lawyers Association's amicus brief.<sup>176</sup> The American Catholic Lawyers Association (ACLA) is a religious organization for the purposes of this Note.<sup>177</sup> The Court cited to the ACLA for support of the proposition that a jurisdiction that accepts one monument may be asked to provide equal treatment for a donated monument concerning the same subject matter or commemorative cause.<sup>178</sup> The ACLA's support came in the form of a very specific example: because New York City accepted a donated statue of Balto, "the sled dog who brought medicine to Nome, Alaska, during a diphtheria epidemic," it may be pressed to accept monuments of other, similarly heroic dogs.<sup>179</sup> The ACLA was not cited for the proposition of accepting monuments similar to the Balto statue, but rather for the fact that the Balto statue exists in New York City.<sup>180</sup>

The reasonable observer has several reasons to see a message of endorsement in this opinion. The Court had no reason to require such a specific example. The proposition stated is clear without using Balto as an illustration. It makes logical sense that if a City performs Act 1 for Organization A, it could be expected to perform Act 1 for Organization B. If a reasonable observer sees a citation that is clearly unnecessary, he will likely infer that the citation is there for some other purpose, like conveying support or approval of the organization cited and the religion to which it is tied.

In addition to the unnecessary character of the citation involved, *Summum* suffers from the same defect as *Citizens United*: superfluous citation. The Court cited the New York City Brief as well as the brief submitted by the ACLA to show that a Balto statue was donated to New York City and that it stands in Central Park.<sup>181</sup> The City of New York is a secular group. As with *Citizens United*, the reasonable

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<sup>175</sup> *Id.* at 481.

<sup>176</sup> *Id.* at 480 n.7.

<sup>177</sup> The American Catholic Lawyers Association is a religious organization under both tests articulated in note 35 *supra*. "The ACLA is a non-profit *religious organization run by Catholics, to defend the rights of Catholics*. Among other activities, we engage in pro bono, free legal services *on behalf of Catholics* needing legal defense in matters of faith and conscience." *Purpose of Our Work*, AM. CATH. LAW. ASS'N, <http://www.americancatholiclawyers.org/about.htm> (last visited Apr. 16, 2013) (emphasis added).

<sup>178</sup> *Summum*, 555 U.S. at 480.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Brief Amicus Curiae of the American Catholic Lawyers Association in Support of Petitioner at 12, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (No. 07-665) (listing as one of the monuments in America the "*Balto Sculpture*, Central Park, New York, New York, donated by the Balto Monument Committee to the City of New York in 1925"); Brief Amicus Curiae of the City of New York in Support of Petitioners at 2, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (No. 07-665) (explaining that one of the fifty-two fountains, monuments, and sculptures in Central Park commemorates "the 1925 dog-sled race that brought an urgently needed supply of antitoxin to Nome, Alaska, during a diphtheria outbreak there").

observer is left wondering why a religious organization's brief needs to be cited if the same, arguably unnecessary, information is contained in a secular brief.

The message of endorsement in this case is bolstered by social climate information with which the reasonable observer would be equipped. In 2009, the general public was aware of the religious composition of the Supreme Court and the five Catholics on the Court.<sup>182</sup> It is not much of a leap to see endorsement in an unnecessary, superfluous citation to a Catholic organization by a Court, the composition of which is more than half Catholic. This is not to say that Catholic judges, or judges of any religion, are biased. In fact, the opposite is likely true. Recall that it was Justice Scalia, a Catholic, who voiced concerns over the Court's use of the USCC's amicus brief in *Atkins v. Virginia*.<sup>183</sup> Endorsement, though, is concerned with the public's *perceptions* and feelings,<sup>184</sup> and it is perfectly reasonable to perceive an endorsement of Catholicism when a "display" to a Catholic "symbol" is erected by a predominantly Catholic Court.

### 3. *Federal Election Commission v. Wisconsin Right to Life*

*FEC v. Wisconsin Right to Life, Inc.*<sup>185</sup> is another example of a quasi-religious case in which the Supreme Court cited to a religious amici. The Court held that certain campaign reform provisions passed by the Federal Election Commission violated Wisconsin Right to Life's free speech rights concerning its issue-advocacy advertisements.<sup>186</sup> The Court's opinion cited to the amicus brief of the Family Research Council (FRC).<sup>187</sup> The FRC is a religious organization for the purposes

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<sup>182</sup> See, e.g., PBS, *Religion and the Courts*, RELIGION & ETHICS NEWSWEEKLY (May 29, 2009), <http://www.pbs.org/wnet/religionandethics/episodes/may-29-2009/religion-and-the-courts/3114/> (stating that if then-nominee Sotomayor were confirmed to the Supreme Court, "that would leave us with six justices out of the nine being Catholics for the very first time"); see also *6 Supreme Court Justices Attend Catholic Service Red Mass; Cardinal Pleads for Rights of Unborn*, HUFFINGTON POST (Oct. 4, 2009), [http://www.huffingtonpost.com/2009/10/04/6-supreme-court-justices\\_n\\_309173.html](http://www.huffingtonpost.com/2009/10/04/6-supreme-court-justices_n_309173.html) (describing a service attended by "five of the six Roman Catholics on the high court" as well as Justice Breyer, who is Jewish); Dahlia Lithwick, *Articles of Faith: Why Americans Can't Talk About Religion and the Supreme Court*, SLATE (Dec. 10, 2009), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/12/articles\\_of\\_faith.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/12/articles_of_faith.html) (discussing the then-impending retirement of Justice Stevens and noting that "[p]opular opinion once held that even one Catholic was too many on the court" and that, at the time of the article, there were six Catholic Justices).

<sup>183</sup> See *supra* notes 1–7 and accompanying text.

<sup>184</sup> Choper, *supra* note 119, at 521 (explaining that "perceptions of state approval or endorsement which beget legitimate feelings of alienation or offense by a segment of the population . . . trigger a holding of unconstitutionality").

<sup>185</sup> 551 U.S. 449 (2007).

<sup>186</sup> *Id.* at 481.

<sup>187</sup> *Id.* at 481 n.10.



of this Note.<sup>188</sup> The Court cited the FRC brief because it advanced an argument encouraging the distinction between nonprofit groups funded by individuals and those funded by “general treasuries.”<sup>189</sup> In its very next breath, though, the Court declared that the FRC’s argument was one which it would not consider: “We do not pass on this argument in this as-applied challenge because WRTL’s funds for its ads were not derived solely from individual contributions.”<sup>190</sup>

Here, the reasonable observer is confronted with citation to a religious organization’s amicus brief for an argument that will not be considered. Knowing what he does about the odds that an amicus brief will even be read, let alone cited, the reasonable observer is apt to conclude that the Court is citing to an organization whose argument it will not consider because it approves of the “Judeo-Christian worldview” with which the association is bound.<sup>191</sup>

#### IV. EVALUATING CAMPAIGN RESULTS: THE WHY, WHAT, AND WHAT NEXT OF SUPREME COURT ENDORSEMENT

The endorsement test questions whether government “appear[s] to take a position on questions of religious belief” or makes religion relevant to political standing.<sup>192</sup> The test is concerned with a certain type of harm—the creation of “insider” and “outsider” status.<sup>193</sup> It is therefore not enough to analyze Supreme Court citation to religious amici under the endorsement test to say that the practice violates the First Amendment; there must be some sort of harm.<sup>194</sup> This Part will analyze the harm involved in citation to religious amici and present non-legal policy arguments against the practice. It also provides several recommendations to rectify the problem of potential Supreme Court violation of the First Amendment.

##### *A. Why Has the Court Changed Its Citing Practices?*

Perhaps one of the strangest things about citing to amicus briefs submitted by religious organizations is that it seems to fly in the face of a sort of standard operating

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<sup>188</sup> See *Vision and Mission Statements*, FAM. RES. COUNCIL, <http://www.frc.org/mission-statement> (last visited Apr. 16, 2013) (“Family Research Council’s mission is to advance faith, family and freedom in public policy and the culture from a Christian worldview.”).

<sup>189</sup> *Wisconsin Right to Life*, 551 U.S. at 481 n.10.

<sup>190</sup> *Id.*

<sup>191</sup> See *About FRC*, *supra* note 188.

<sup>192</sup> *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989).

<sup>193</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).

<sup>194</sup> *Id.* at 691–92.

procedure the Court seems to have adopted. Andrew Mansfield's 2009 study of amicus curiae briefs filed by religious organizations revealed that while religious organizations generally provide significant advice to the Court, the Court avoids discussing that advice.<sup>195</sup> What accounts for the recently observed citations to religious amici? Part of the development can be traced to a shift in judicial theory during the twentieth century from legal formalism to legal realism.<sup>196</sup> The Court generally became more accepting of social science, extra-legal facts, and amicus briefs.<sup>197</sup> Without these developments, citations generally would likely be less prevalent.

It is difficult to discern why amicus briefs written by religious organizations have begun to appear in Supreme Court decisions after such a demonstrable absence for such a long period of time. They are not likely the result of an ardent fervor for the Bluebook, nor can it be true that they are just *there*, thrown in for no particular reason at all. Purposeless writing goes against every tenet not only of good writing in general, but of solid legal writing. It can hardly be said that citations serve no purpose but to take up extra room in opinions;<sup>198</sup> Justices do not get assigned a minimum word count they must fill when they are assigned an opinion to write. It is true that Supreme Court opinions are longer now than they once were. Opinions issued during the Court's first twenty years had a median length of 763 words, while those issued more recently quintupled to 4,250 words.<sup>199</sup> That majority opinion word counts have increased does not mean that Justices write just to write; their words are still purposed.<sup>200</sup>

So it is with citation. The fact that religious organizations submit briefs so frequently and are cited so very infrequently<sup>201</sup> naturally leads to the inference that instances in which religious organizations *are* cited are significant.<sup>202</sup> The work

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<sup>195</sup> Mansfield, *supra* note 38, at 346.

<sup>196</sup> Simmons, *supra* note 18, at 194–95.

<sup>197</sup> *Id.* at 195.

<sup>198</sup> See Cross et al., *supra* note 29, at 490 (likening citations to “the currency of the legal system”).

<sup>199</sup> Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 634 (2008); see also Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1 (noting that the decision in *Brown v. Board of Education* was fewer than 4,000 words while *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), was approximately 47,000 words).

<sup>200</sup> See Black & Spriggs, *supra* note 199, at 652, for an explanation of how the need to win signatures to a majority opinion influences a Justice's writing. “This strategic view of Court decisionmaking suggests Court opinions result in part from the interaction of the Justices as they bargain and negotiate to an outcome.” *Id.*; see also Liptak, *supra* note 199 (explaining Chief Justice Roberts's desire for unanimous opinions and describing his preferred approach to opinion writing as the one “that can get the most justices to sign on to it”).

<sup>201</sup> See generally Mansfield, *supra* note 38, for a study of religious organizations' amicus participation and the Court's non-use of their briefs.

<sup>202</sup> While some critics may staunchly argue that Supreme Court Justices cite for citation's sake, or for no reason at all, this Note refuses to take the position that the jurists of this nation's

performed by citation to a religious amicus brief is part of what makes these citations dangerous—they win friends for the Court.

It is a dangerous error to view the Court as a quiet actor in the background of American society, dispensing neutral opinions without regard to current climate. The Supreme Court is not just a court, not just the head of one of the three branches of American government.<sup>203</sup> The Court is an active member of society, an institution with goals that it would like to realize.<sup>204</sup> One of these goals is for the public to accept the Court's role as a strong branch of the three-branch system.<sup>205</sup> To be successful at this, the Court must influence the impressions others have of it.<sup>206</sup> When the Court cites to a religious organization's amicus brief, it effectively turns that organization—and more importantly, the religion or religious denomination with which it is associated—into a friend. This has the unfortunate effect of magnifying the harm of the endorsement; religious organizations that feel as though they have a friend in the Court can exploit that friendship to their own ends.<sup>207</sup>

#### *B. Why Endorsement Via Citation Is a Problem*

Endorsement in general is not as ostentatious as a stamp of approval on any given religious organization. It has a subtle, almost insidious character that is part of what makes it more dangerous than, for example, a violation of the Establishment Clause stemming from a state's attempt to create its very own church. If, for example, Virginia tried to form the State Christian Church of the Commonwealth, many

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highest tribunal do pointless things for no reason. That position is simply beyond the bounds of reason. *Cf.* Interview by Brian Lamb with Justice Ruth Bader Ginsburg, in Justice Ginsburg's Chambers (July 1, 2009), available at <http://supremecourt.c-span.org/assets/pdf/RBGinsburg.pdf> (discussing Justice Scalia's writing and noting that "[h]e cares about how you say it").

<sup>203</sup> Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1034 (2007).

<sup>204</sup> *Id.* at 1034–35.

<sup>205</sup> *Id.* at 103; *cf.* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1833 (2005) (explaining that the Court rarely remains at odds with aroused public opinion for long and that Justices are undoubtedly influenced by popular political movements and evolving attitudes of society). *But see* Interview by Susan Swain with Justice Antonin Scalia, in the East Conference Room (June 19, 2009), available at <http://supremecourt.c-span.org/assets/pdf/AScalia.pdf> ("[The Court's] proper role is in the democracy to give a fair and honest interpretation to the meaning of dispositions that the people have adopted . . . . It's simple as that, no more and no less.").

<sup>206</sup> Wells, *supra* note 203, at 1035 ("Just as any of us in our daily lives will try to control the impressions others have of us in order to win the confidence of our various audiences, so also do the Justices."); *see also* Interview by Susan Swain with Justice Anthony Kennedy, in West Conference Room (June 25, 2009), available at <http://supremecourt.c-span.org/assets/pdf/AKennedy.pdf> ("It's important for the public to make sure that people always want to come up these steps because we're doing the job the right way.").

<sup>207</sup> *See* discussion *infra* Part IV.B.2.

people would immediately recognize this as a violation of the First Amendment and take steps to stop it.<sup>208</sup> Endorsement, on the other hand, is not such an apparent violation. This is especially true when the Supreme Court is the body doing the endorsing and when the method is citation.

### 1. The Court's Legitimacy Makes It an Especially Powerful "Spokesperson"

When the Supreme Court speaks, there is no one to respond.<sup>209</sup> Supreme Court decisions, with their established procedures and independence gleaned from being an extra-electoral body, deserve greater respect than declarations from the executive or legislative branches of government.<sup>210</sup> There is something about the Court, some sort of unknown quality, that gives it a legitimate standing in American society.<sup>211</sup> Like parents who have the ability to make their children believe something is so because "mommy said it," the Court has the power to cloak people, arguments, and organizations in its aura of legitimacy.

Describing the Court as a "legitimate" institution is to say that the "public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."<sup>212</sup> This is known as sociological legitimacy,<sup>213</sup> and it seems to belong to the Court as an institution. That is, the perception of the Court as a legitimate body does not vary sharply with its opinions.<sup>214</sup>

The Supreme Court's legitimacy comes from several sources. First, some of it is derived from the Constitution itself.<sup>215</sup> Americans tend to treat the Constitution as

<sup>208</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("[T]he Establishment Clause forbids an established Church or anything approaching it.").

<sup>209</sup> See *Wells*, *supra* note 203, at 1018 (explaining that "the Court may thwart the will of the democratic branches by handing down constitutional rulings that cannot be overturned through the ordinary legislative process").

<sup>210</sup> See, e.g., *Simmons*, *supra* note 18, at 198 (explaining that "other government branches" have procedures that "may appear more ad hoc, arbitrary, less transparent, and less independent" than those of the Supreme Court, and therefore the latter body deserves more respect).

<sup>211</sup> See, e.g., James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 L. & SOC'Y REV. 469, 470–71 (1989) (considering the "special abilit[ies]" of the Supreme Court to "legitimize government policies and actions" and offering possible sources of such legitimizing power).

<sup>212</sup> Fallon, *supra* note 205, at 1795.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1829 (describing the result of "recent surveys show[ing] that *Bush v. Gore* has had almost no impact on 'diffuse support' for the Court" and postulating that the Court "possesses a reservoir of trust that is not easily dissipated"); see also VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 119 (2003) ("Many Scholars conclude that support for the Court rests upon more enduring attitudes about the legitimacy of the Court and its role in the system of government, rather than on agreement or disagreement with specific decisions.").

<sup>215</sup> See, e.g., *Wells*, *supra* note 203, at 1020; see also U.S. CONST. art. III, § 1.

a sort of religious document, and often “conflate the Court and the Constitution.”<sup>216</sup> In some ways, then, the Court has a special status because it interprets the Constitution and the Constitution is special.<sup>217</sup> Second, popular culture plays a role.<sup>218</sup> The Court often serves as a character in books and movies, underlining the importance of the institution in society.<sup>219</sup>

Perhaps the largest contributing factors to the Court’s legitimacy are the practices and procedures undertaken by the tribunal. Unlike the President or members of Congress, Justices tend to have limited media appearances and “generally honorable dispositions.”<sup>220</sup> There are limits on both public and media access to the Court, and the Justices themselves have tended to stay out of the public eye, all of which helps preserve the integrity of the institution.<sup>221</sup> There is something mysterious about the Court. It operates in a venue without television cameras, with procedures unknown to the general public, and outside of the traditional electoral process by which public officials are often placed in positions of power.

The legitimacy of the Court is especially important in discussions of endorsement. The public generally views the Court as “an unassailable paragon of virtue . . . in an otherwise irreverent age.”<sup>222</sup> As far as the public is concerned, the Court vindicates objective constitutional rights, deciding momentous cases according to some abstract concept of the law.<sup>223</sup> When the Court acts, it does so without “the power of the purse and the sword” meaning that the Court’s only power to enforce its own decisions comes from its own legitimacy.<sup>224</sup> When it endorses, it cloaks organizations,

<sup>216</sup> Wells, *supra* note 203, at 1039 (quoting MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 9 (1986)).

<sup>217</sup> Constitutional law is also a difficult field for the general public to understand. If the Supreme Court deals with such a difficult subject, then surely it deserves a certain amount of respect and support just for doing what it does (in much the same way that non-medical professionals view doctors). See Fallon, *supra* note 205, at 1825–26 (“The American people have allowed constitutional law to become what legal elites, especially the Supreme Court, say that it is under interpretative standards evolved by the courts and little understood outside the legal elite.”).

<sup>218</sup> See Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Counter-majoritarian Problem*, 73 *UMKC L. REV.* 53, 54 (2004) (describing popular culture as the primary source of the public’s knowledge about the Supreme Court and the legal system in general).

<sup>219</sup> See *id.* at 71. See, e.g., MARGARET TRUMAN, *MURDER IN THE SUPREME COURT* (1982); *THE PELICAN BRIEF* (Warner Bros. Pictures 1993).

<sup>220</sup> BARBARA A. PERRY, *THE PRIESTLY TRIBE: THE SUPREME COURT’S IMAGE IN THE AMERICAN MIND* 122 (1999).

<sup>221</sup> *Id.* at 2 (“Traditional limits on public access to the Court will help to preserve its integrity and legitimacy by preventing the kind of trivialization experienced by the presidency and Congress, which has resulted, at least in part, from overexposure.”).

<sup>222</sup> Burton, *supra* note 218, at 73.

<sup>223</sup> See *id.* at 60; Siegel, *supra* note 154, at 703.

<sup>224</sup> HOEKSTRA, *supra* note 214, at 153.

and the religions with which they are associated, with its mystical legitimizing capacity. The Supreme Court is the ultimate “celebrity” endorser.

It is not just the Court’s power, but the reach of that power that contributes to making its endorsement more dangerous than that of other courts. Though only a small number of citizens ever see the Court in session, written opinions provide a means of reaching the public.<sup>225</sup> This means that when the Court decides to endorse through its opinions, it does so on a national stage. “Every citizen is . . . a member of the audience to whom opinions are addressed.”<sup>226</sup> Critics will argue that the general public does not read Supreme Court opinions, but gets its information from lawyers, talk show hosts, water cooler chatter—anywhere but the actual opinion.<sup>227</sup> If the people reading opinions are lawyers and legal correspondents, this argument continues, then there should not be an endorsement problem.

This vein of reasoning is flawed. The Court does not write merely for the legal elite. Justices are aware that the public is part of the Court’s audience. Justice Breyer has stated that written opinions help the “ordinary American” know the law.<sup>228</sup> Chief Justice Roberts expects that an “educated layperson” could pick up an opinion, read it, and understand it.<sup>229</sup> This argument also ignores what is perhaps the biggest problem with endorsement via citation—that the party benefitting from the endorsement can advertise.

## 2. An Endorsement from the Court Is Marketing Gold

Political scientists have theorized that the real audience for amicus briefs is not actually the Court or its Justices, but members of the group from which the brief originated.<sup>230</sup> If this is the case, then the USCC, for example, is aiming its brief at members of the Conference and fellow Catholics. It is through this lens that one of the biggest problems with citation to religious amicus curiae briefs emerges: “Citation or quotation of a brief in the Official Reports of the United States Supreme Court can lend legitimacy to a group, and may be used by the group in its publicity efforts to create the impression that it has ‘access’ to or ‘influence’ with the Court.”<sup>231</sup>

It is perfectly logical for an organization to want to have access to or influence with the Court. A group, religious or not, always has an interest in satisfying its membership that being a part of the group actually does produce benefits.<sup>232</sup> A group that is able to influence a body of government that limits public access is certainly

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<sup>225</sup> PERRY, *supra* note 220, at 12.

<sup>226</sup> Wells, *supra* note 203, at 1040–41.

<sup>227</sup> *Id.* at 1041.

<sup>228</sup> STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 151 (2010).

<sup>229</sup> Liptak, *supra* note 199.

<sup>230</sup> Kearney & Merrill, *supra* note 17, at 824.

<sup>231</sup> *Id.* at 825.

<sup>232</sup> See Geisinger & Bodensteiner, *supra* note 135, at 115; Simmons, *supra* note 18, at 207.

a benefit to the members of that group. Where that group is a religious organization, however, the flip side of the benefits to group members is harm to non-members.

Consider as an example the highly visible television host and Evangelical Christian Pat Robertson.<sup>233</sup> If he is successful in having one of his organizations cited by the Court, he can then advertise to all the *700 Club* viewers across the nation that the Supreme Court has agreed with their point of view. This is most certainly an endorsement not just of Mr. Robertson's organization, but also of the religion with which it is associated, with which it has a close nexus—Evangelical Christianity.<sup>234</sup> Evangelical Christians who feel supported then have something about which to feel superior. When group members then broadcast that superiority, perhaps to gain new membership or to continue to show current members the benefits of their affiliation, they create an outsider status for all those who are not aligned with Evangelical Christian positions. A Muslim, for example, may feel that she has no influence with the Court while her Christian neighbors do. She may begin to think and feel that the only way for her to gain access to the Court is to become a member of a Christian organization. In this scenario, the endorsement has done more than make her an outsider; it has made her question whether she and all those who share her beliefs can have influence at all. She is put in the position of choosing between effective political participation and her religion, exactly the sort of harm the First Amendment seeks to prohibit.<sup>235</sup>

### 3. [Religious] Amicus Briefs May Contain False Facts

There are certain dangers inherent in citing to amicus curiae briefs, whether they are submitted by religious or secular organizations. Factual information, unlike legal arguments, is not subject to much judicial scrutiny.<sup>236</sup> This gives rise to instances like *Atkins v. Virginia*, in which the Court cited to the USCC brief in order to show a moral consensus amongst various religious groups.<sup>237</sup> There is no indication in the

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<sup>233</sup> This Note considers Mr. Robertson as an example because readers are likely to be familiar with him (and his organization—the *700 Club*) simply because he is often on television.

<sup>234</sup> For information about the *700 Club* and its viewership, see *About the 700 Club*, CBN, <http://www.cbn.com/700club/showinfo/About/about700Club.aspx> (last visited Apr. 16, 2013); see also Nancy J. Knauer, *The September 11 Relief Efforts and Surviving Same-Sex Partners: Reflections on Relationships in the Absence of Uniform Legal Recognition*, 26 WOMEN'S RTS. L. REP. 79, 80 n.7 (describing the *700 Club* as an “evangelical Christian television show”).

<sup>235</sup> See *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (describing the goal of the Establishment Clause as ensuring that “no religion be sponsored or favored, none commanded, and none *inhibited*” (emphasis added)). Inhibition of religion takes many forms, not merely a governmental ban on practice. The Muslim woman in this example feels that she cannot practice both effective political involvement and her religion because her religious practices have been inhibited.

<sup>236</sup> Simard, *supra* note 10, at 705.

<sup>237</sup> 536 U.S. 304, 316 n.21 (2002).

opinion that the Court vetted this information, that the Justices sent their clerks out on a quality-control research mission.<sup>238</sup> Part of Justice Scalia's gripe in his dissent is that the organization is not representative of the views of Catholics generally,<sup>239</sup> implying that the Court took at face value that which it should not.

### *C. What Should the Court Do About It?*

By citing to amicus curiae briefs submitted by religious organizations, the Court is engaging in endorsement, a violation of the Establishment Clause under its own jurisprudence. This is a problem without an ideal solution. The Court could return to the practice of refusing to cite to religious amicus briefs, even where citation would be appropriate. This encourages a sort of academic dishonesty and sets a poor example for the rest of the legal community. Imposing requirements to cite to all religious amicus briefs or none stifles judicial freedom. More than anything else, the fact that the endorsement problem exists with respect to citation of religious amicus curiae briefs suggests that the Court needs to return to the area of First Amendment jurisprudence to clarify the standard under which government actions are to be evaluated. If the Court does so and continues to use the endorsement test, it needs to offer more guidance on exactly who the "reasonable observer" is.

## CONCLUSION

This Note has argued that when the Supreme Court cites to an amicus curiae brief submitted by a religious organization, it cloaks that organization and the religion or religious denomination to which it is inextricably tied in the legitimizing aura of the Court. This is a violation of the Establishment Clause under the endorsement test.<sup>240</sup> While it is not entirely clear that all, or even most, governmental actions should be evaluated under the endorsement standard, this Note has nevertheless chosen to analyze the practice of Supreme Court citation to amicus briefs submitted

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<sup>238</sup> This Note is not particularly concerned with the institutional competency of the Court in verifying information submitted by amici beyond what has already been described. That is a separate, though related, matter better left to other writers. *See, e.g.*, Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012). There is, however, good reason to believe that the information submitted via amici should be vetted. Justice Scalia has indicated that organizations have every motivation to present information so as to advance their causes. *See Jaffee v. Redmond*, 518 U.S. 1, 36 (1996) (Scalia, J., dissenting) ("There is no self-interested organization out there devoted to pursuit of the truth in the federal courts.").

<sup>239</sup> *Atkins*, 536 U.S. at 347–48 n.6 (Scalia, J., dissenting).

<sup>240</sup> *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring) (describing "government endorsement or disapproval of religion" as a violation of the Establishment Clause).



by religious organizations under that standard. When the Court, as a government actor, cites to a religious organization's brief, it endorses the religion with which that organization is so inextricably tied.

Endorsement from the Supreme Court can be more devastating than endorsement from other, lower courts. Endorsement from the highest court in the land, the arbiter of disputes over the Constitution, is a sort of "celebrity" endorsement that can have devastating effects on those people and groups who do not fall under the ambit of the religion endorsed. When government actions make certain people feel isolated, ostracized, and left out of the political process, the First Amendment steps in to stop the action, restore balance, and remove from the airwaves the endorsement causing the problems. The Supreme Court is as capable of violating the Clause and causing these harms as any other governmental body. Not only is the Court capable, it is guilty.

If something seems inherently wrong with the idea that citation to a religious amicus group by the Supreme Court can constitute an endorsement of religion, that is, quite simply, because there *is* something inherently wrong with it. Common sense indicates that the public expects that those bodies who enforce the laws do not break them. The Court is responsible for the very existence of the endorsement test, for articulation of the harms which it seeks to prevent. And yet, the Court is complicit in causing those very harms.

But something else is odd. Something besides the violation is troubling, namely the fact that a violation is possible. Children who are told not to do something are incensed when they find their parents violating the rule that they laid down for the children. That is the situation involved in the Court's missteps with the Establishment Clause, but it is not as simple as a double standard. That the Court is capable of violating its own jurisprudence through a practice as typically benign and boring as citation begs the question as to whether the endorsement test is really a good standard under which to judge government actions or displays relating to religion.

The Establishment Clause cases are, unfortunately, a tangle of tests, holdings, and variations that leave little clear guidance for lower courts, government actors, or citizens. Perhaps the fact that it is capable of violating its own jurisprudence should act as a signal to the Supreme Court that it needs to return to the area of Establishment and clearly articulate not just a standard under which cases should be evaluated, but the harms to be prevented and the extent to which government actions should be stopped in favor of preventing those harms. Until that happens, Supreme Court citations to amicus briefs submitted by religious organizations constitute impermissible endorsements and the Court should be more careful in navigating its own First Amendment jurisprudence.