NO. 12-144

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS HOLLINGSWORTH, et al.,
Petitioners,

v.

KRISTIN M. PERRY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF SCHOLARS OF HISTORY AND RELATED DISCIPLINES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The work of *amici* entails decades of scholarly engagement in the humanities and social sciences including history, law, and matters of civil society. They believe the historical context provided by this brief will assist this Court in addressing the claim that the U.S. Constitution mandates a redefinition of marriage. The names of *amici* (with affiliations noted for identification purposes only) follow.

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SUMMARY OF THE ARGUMENT

Respondents' claim that marriage should be redefined to include same-sex couples finds no support in our Nation's history, traditions, or practices. Before 2003, same-sex marriage had never existed in the United States and it still is comparatively rare. Indeed, before 2000 it had never existed in human history. That fact is highly relevant to this Court's equal protection analysis, which cannot be conducted in an historical vacuum.

This brief demonstrates that the male-female definition of marriage enshrined in Proposition 8 is consistent with the universal understanding of marriage throughout history and across cultures. While the procedures and incidents of marriage have varied over time and across cultures, its primary form and legal meaning have remained remarkably constant. The traditional definition of marriage

centers on the community's profound interest in encouraging potentially reproductive relationships between men and women to take place within marriage so that children can be known, loved, and reared by the mothers and fathers who brought them into the world.

Marriage as an opposite-sex institution is a universal phenomenon. It has, from the earliest historical epoch, served child-centered purposes. This linking of marriage's male-female nature to children's needs has deep biological and sociological roots, extending perhaps to pre-historic developments.

Specially, the Western cultures that influenced American law treated the male-female component of marriage as a core element of its legal recognition. They understood that doing so was an important way to regulate procreation in the interest of children.

Following that tradition, American law has always recognized marriage as the union of a husband and wife. Courts and prominent legal commentators have remarked on the importance of this aspect of marriage and its powerful links to interests in procreation.

The district court attempted to discredit the historical record by pointing to atypical instances such as anti-miscegenation laws and the doctrine of coverture. These types of laws were not understood to be central to the meaning of marriage and have

not enjoyed the unanimous acceptance accorded the opposite-sex requirement.

The courts below also downplayed the significance of the remarkable unanimity in the treatment of marriage by highlighting the fact that some married couples do not have children. This is hardly a reason for redefining marriage. It would be difficult and unconstitutionally intrusive to conduct pre-marriage inquisitions into who may or may not have children. Moreover, married couples who cannot bear their own children often adopt, thereby furthering as far as possible adoptive children's interest in having mothers and fathers. Infertile marital unions also reinforce the social norm that male-female sexuality should be expressed within marriage.

California voters have acted rationally and in harmony with this Nation's—and indeed the world's—traditions and collective wisdom in retaining the universal, child-centered understanding of marriage.

ARGUMENT

I. THE HISTORY AND TRADITION OF MARRIAGE CONSTRAIN THE COURT'S ANALYSIS UNDER THE FOURTEENTH AMENDMENT.

Every claim under the Fourteenth Amendment equal protection and substantive due process clauses requires the Court to account for history and

tradition. While "our Nation's history, legal traditions, and practices,"[2] are typically associated with substantive due process analysis, these considerations are nevertheless relevant to respondents' equal protection arguments because "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked"[3] by their common concern with protection from arbitrary laws.[4] History and tradition may not be "the ending point" of constitutional analysis,[5] but in a case like this they are surely the place to begin, for even in equal protection cases "history will be heard."[6] This

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[2] *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997)

[3] *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

[4] *See also M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (noting that "the Court's decisions concerning access to judicial processes [in areas involving sensitive family choices] ... reflect both equal protection and due process concerns"); *compare Collins v. City of Harker Heights*, 503 U.S. 115, 127 n.10 (1992) ("the Due Process Clause, like its forbear in the Magna Carta ... was 'intended to secure the individual from *the arbitrary exercise of the powers of government* ....") (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)), *quoted in Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis added) *with Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (citing the "traditional view of the core concern of the Equal Protection Clause as *a shield against arbitrary classifications*") (emphasis added).

[5] *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

[6] *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 746 (2007). *See, e.g.*, *id.* at 735 (looking to "[the Court's] precedents and our Nation's history of using race in public schools" to decide whether assigning children to public schools based on their race violates equal protection); *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("[S]keptical

is especially true here since respondents continue to base their challenge to Proposition 8 on overlapping equal protection and substantive due process grounds. *See* Br. Opp. Perry Respondents at 31.

It is highly relevant, therefore, "whether or not the objective character of [California's limitation of the term 'marriage' to opposite-sex couples] is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning"—an inquiry that binds the Court to "objective considerations, including history and precedent, [as] the controlling principle."[7] As with all cases touching on socially important issues where the Constitution's terms provide no express direction, this Court should be guided by "respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[8]

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scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.").

[7] *County of Sacramento*, 523 U.S. at 857-58 (Kennedy, J., concurring). *Accord Glucksberg*, 521 U.S. at 767 (Souter, J., concurring in the judgment) ("[A] court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by 'the traditions from which [the Nation] developed,' or revealed by contrast with 'the traditions from which it broke.'") (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

[8] *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment).

These considerations utterly belie respondents' asserted right to same-sex marriage. Quite simply, as demonstrated in greater depth below, this Nation lacks anything resembling a deeply rooted history, legal tradition, or practice of gay marriage. Indeed, before 2003 when the Massachusetts Supreme Judicial Court mandated same-sex marriage in that State,[9] same-sex marriage had never existed in this Nation. Since 2003, every State but two—New Mexico and Rhode Island—has directly considered whether to redefine marriage. A majority of 39 States have expressly rejected same-sex marriage, with 30 embodying their opposition in democratically-enacted constitutional amendments like Proposition 8.[10] More broadly, throughout world

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[9] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

[10] States rejecting same-sex marriage through a constitutional amendment or statute include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *See* Brief of *Amici Curiae* National Ass'n of Evangelicals, *et al.*, *Hollingsworth v. Perry*, No. 12-144, at 1a-13a (Aug. 31, 2012) (containing a verbatim transcription of State provisions defining marriage in traditional opposite-sex terms). Since this appendix was prepared, Maine changed its policy in the November 2012 election and now recognizes same-sex marriage. *See* 2012 Me. Legis. Serv. Ch. 1 (I.B. 3) (L.D. 1860) (West) (An Act to Allow Marriage Licenses for Same-Sex Couples and Protect Religious Freedom). Even in New Mexico, New Jersey and Rhode Island, the marriage laws have (unsurprisingly) been interpreted to reflect the opposite-sex nature of marriage. *See Lewis v. Harris*, 908 A.2d 196, 208 (N.J. 2006); N.M. Att'y Gen. Advisory Letter from Attorney

history—regardless of politics, culture, or religion—marriage has always been defined as the union of man and woman oriented toward the bearing and rearing of children.[11] By contrast, same-sex marriage is an historically rare anomaly that has existed for merely a dozen years. Thus, retaining the age-old definition of marriage, as Proposition 8 does, cannot be deemed unreasonable or arbitrary under the Fourteenth Amendment. To hold otherwise would drain the notions of

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General Patricia A. Madrid to State Senator Timothy Z. Jennings (Feb. 20, 2004); *Chambers v. Ormiston*, 935 A.2d 956, 962-65 (R.I. 2007).

[11] At the outset, it is important to note that the existence of polygamy does not undercut this reality since even polygamous marriages were opposite-sex, not the unions of three men or three women or numbers of men and women all being married to one another. Polygamy still involves the union of a man and a woman even if it also allows for more than one of these unions to take place for a particular man at a given time. As anthropologist Bronislaw Malinowski explains, "polygamy . . . implies the existence of individual marriage. . . . a legal contract between one man and one woman, guaranteeing to each mutual rights and obligations, and guaranteeing to the children a legal status. Polygamy, on such a definition of marriage, is a series of individual contracts." Bronislaw Malinowski, *What Is a Family?* in MARRIAGE, PAST AND PRESENT: A DEBATE BETWEEN ROBERT BRIFFAULT AND BRONISLAW MALINOWSKI 42 (M. F. Ashley Montagu, ed., 1956). The example of Islam is instructive. The Quran, despite sanctioning polygamy under certain conditions, repeatedly employs in the sense of "spouse" the word *zawdj*, a word that originally denoted "two animals yoked together," and uses the cognate *zawdjayn* to mean a "pair" composed of a man and a woman. C.E. Bosworth, *Zawdj* in THE ENCYCLOPEDIA OF ISLAM vol. 11 at 464-465 (P.J. Bearman, et al., editors, 2d edition 2002).

"reasonableness" and "arbitrariness" from the very context that gives them meaning.

II. IN RETAINING THE DEFINITION OF MARRIAGE SHARED THROUGHOUT HISTORY, THE PEOPLE OF CALIFORNIA WERE ACTING REASONABLY TO ADVANCE THE INTERESTS MARRIAGE HAS ALWAYS SERVED.

When the people of California approved Proposition 8, amending their state constitution to retain the definition of marriage that had prevailed in the state from its earliest existence until a few months before the vote, they reaffirmed an understanding of marriage consistently accepted across nearly all cultures throughout recorded history. Such remarkable consensus can be at least partially explained by the need for societies to advance important child-centered interests by encouraging the potentially procreative relationships of men and women to take place in a setting where the children who may result have the opportunity to know and be reared by a mother and father firmly bound to one another and to any children their union produces.

A. Reflecting Biological and Social Realities, Marriage Has Universally Been Understood To Be the Union of a Man and a Woman and to Serve, Among Other Purposes, Interests Related to Procreation.

Marriage, as the union of opposite-sex couples, is widely understood to be as close to a universal institution as any institution can be. The New York Court of Appeals recognized: "Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex."[12]

The universality of marriage is related to basic realities of sex difference and the related procreative capacity of male-female couplings. As the distinguished anthropologist Claude Lévi-Strauss explained: marriage is "a social institution with a biological foundation."[13]

A group of respected family scholars explains: "As a virtually universal human idea, marriage is about regulating the reproduction of children, families and society."[14] Marriage has, of course, served a variety of purposes across a variety of cultures and times, but this one purpose has been

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[12] *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

[13] Claude Lévi-Strauss, *Introduction* in A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (vol. 1, Andre Burguiere, et al., eds. 1996).

[14] W. BRADFORD WILCOX, ET AL., WHY MARRIAGE MATTERS 15 (2d ed. 2005).

consistent. As Georg Simmel, an early sociologist, explained: "The peculiar combination of subjective and objective, personal and super-personal or general elements in marriage is involved in the very process that forms its basis—physiological pairing. It alone is common to all historically known forms of marriage, while perhaps no other characteristic can be found without exceptions."[15]

This ubiquitous recognition of marriage is not arbitrary, much less a multicultural, multi-millennial conspiracy to exclude identified groups. Rather, it is an acknowledgment that marriage should serve purposes directly connected to the nature of the relationship. Specifically, marriage has been universally recognized as a way to encourage those who are responsible for creating a child, a mother and father, to take responsibility for the child that their union alone may produce. A prominent sociologist explains: "[t]he genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring."[16] Another concurs: "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere

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[15] GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 131 (Kurt H. Wolff, ed. 1950).

[16] Kingsley Davis, *The Meaning & Significance of Marriage in Contemporary Society* in CONTEMPORARY MARRIAGE: PERSPECTIVES ON A CHANGING INSTITUTION 7-8 (Kingsley Davis, ed. 1985).

desire for children, and the sex that makes children possible, does not solve."[17]

This reality has been widely remarked upon. Lévi-Strauss noted: "[T]he family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society."[18] Another historian noted: "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."[19] Philosopher Bertrand Russell argued that, "But for children, there would be no need for any institution concerned with sex. . . . [I]t is through children alone that sexual relations become of importance to society."[20] Eminent anthropologist Bronislaw Malinowski said "the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents."[21] The Anthropological Institute of Great Britain defined marriage "as a union between a man and a woman such that children borne by the woman are recognized as the legitimate offspring of both partners."[22]

There is reason to believe that the origin of marriage as a social institution is rooted deeply in

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[17] JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2003).
[18] CLAUDE LÉVI-STRAUSS, THE VIEW FROM AFAR 40-41 (1985).
[19] G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988).
[20] BERTRAND RUSSELL, MARRIAGE AND MORALS 77, 156 (1929).
[21] BRONISLAW MALINOWSKI, SEX, CULTURE AND MYTH 11 (1962).
[22] ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN, NOTES AND QUERIES ON ANTHROPOLOGY 71 (6th ed. 1951).

biology. In 1936, sociologist Edward Westermarck said marriage has "a deep biological foundation" that "most probably developed out of a primeval habit: that even in primitive times it was the habit of a man and a woman, or several women, to live together, to have sexual relations with each other, and to rear their offspring in common, the man being the guardian of the family and the woman his helpmate and the nurse of their children. This habit was sanctioned by custom, and afterwards by law, and thus transformed into a social institution."[23]

More recently, authors of an article in *Evolutionary Psychology* conclude: "Across cultures, men develop extended pair-bonds with women (they marry women) and provision these women. The men also nurture their own children. Within the context of these two universals, the argument is presented that the affiliation which mediates these behaviors is, in part, neuro-hormonal in character and thus part of the phylogenetic heritage of our species."[24] Dr. C. Owen Lovejoy proposes a model whereby "advanced material culture and the Pleistocene acceleration in brain development are sequelae to an already established hominid character system, which included intensified parenting and social relationships, monogamous pair binding, specialized sexual-reproductive behavior, and bipedality. It implies that the nuclear family and human sexual

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[23] EDWARD WESTERMARCK, THE FUTURE OF MARRIAGE IN WESTERN CIVILIZATION 5 (1936).

[24] Ronald S. Immerman & Wade C. Mackey, *Perspectives on Human Attachment (Pair Bonding): Eve's Unique Legacy of a Canine Analogue* 1 EVOLUTIONARY PSYCHOLOGY 138, 146 (2003).

behavior may have their ultimate origin long before the dawn of the Pleistocene."[25]

Whatever the precise origin and contours of the marriage relationship over time and across societies, it is clear that this social institution is rooted in deep realities and oriented towards a purpose uniquely tied to its nature as the union of the sexes—a pairing that alone may naturally create a child and provide that child with a social context that accounts for his or her biological origins.

B. The Marriage Laws of the United States and their Close Antecedents Have Consistently Recognized the Realities Underlying the Universality of the Marriage Institution.

The western legal tradition that contributed most directly to the legal system of the United States has, of course, followed the same pattern of recognizing marriage as solely the union of a husband and wife with a core purpose of advancing procreative interests. Legal historian John Witte explains: "The western tradition inherited from ancient Greece and Rome the idea that marriage is a union of a single man and a single woman who unite for the purposes of mutual love and friendship and mutual procreation and nurture of children."[26]

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[25] C. Owen Lovejoy, *The Origin of Man* 211 SCIENCE 341, 348 (Jan. 23, 1981).

[26] JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 17 (2d ed. 2012).

Greek society could be very tolerant of homosexual conduct, but its thinkers nevertheless understood marriage as the union of husband and wife for the purpose of bearing and rearing children. Professor Witte explains that "[a]lready in the centuries before Christ, classical Greek philosophers treated marriage as a natural and necessary institution designed to foster mutual love, support, and friendship of husband and wife, and to produce legitimate children who would carry on the family name and property."[27]

The Roman Stoic philosopher Musonius Rufus, writing in 30 A.D., extolled marital procreation as flowing out of and intrinsically part of the rich companionate relationship that should prevail between husband and wife:

> The husband and wife ... should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals. But in marriage there must be

[27] *Id*. at 3.

> above all perfect companionship and mutual love of husband and wife, both in health and in sickness and under all conditions, since it was with this desire as well as for having children that both entered upon marriage.[28]

In pre-Christian Roman law there "were steady efforts by lawmakers to provide institutional support for marriage and to recognize marriage as the means by which the next generation should come into being and be trained to accept its responsibilities."[29]

Following this same pattern, in "the early medieval west of the sixth through eleventh centuries, the High Middle Ages of the twelfth through fifteenth centuries, and the Anglican high church and theological culture of the early modern period . . . the procreative dimension of marriage was, in each of these societies, the central organizing principle of legal analysis and social life."[30] In his 13th Century treatise which formed the introduction to case law for jurists that would follow, Henri de Bracton noted the "law which men of all nations use . . . the union of man and woman, entered into by the mutual consent of both, which is called marriage." [31]

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[28] Musonius Rufus, *Fragment 13A, What is the Chief End of Marriage?* in MUSONIUS RUFUS: THE ROMAN SOCRATES 89 (Cora E. Lutz, ed. & trans. 1947).

[29] Charles J. Reid, *Marriage in Its Procreative Dimension: The Meaning of the Institution of Marriage Throughout the Ages* 6 U. ST. THOMAS L. J. 454, 455 (2009).

[30] *Id*.

[31] HENRI DE BRACTON, 2 ON THE LAWS AND CUSTOMS OF ENGLAND 27 (Samuel E. Thorne, transl. 1968).

Of it, he says: "From that same law there also comes the procreation and raising of children."[32]

In his influential treatise, William Blackstone listed marriage among the "great relations of private life," saying the relationship "of husband and wife . . . is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." [33] The next great relationship was "[t]hat of parent and child, which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated."[34] Later, he cites Montesquieu for the proposition that "the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children."[35]

Like Blackstone and Montesquieu, John Locke had a profound influence on the thinking of the Framing generation. He too wrote of marriage as a procreative, companionate institution that binds fathers and mothers to care for their children:

> Conjugal society is made by a voluntary compact between man and woman, and though it consist chiefly in such a communion and right in one another's

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[32] *Id*.
[33] WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 410 (1765).
[34] *Id*.
[35] *Id*. at 435.

> bodies as is necessary to its chief end, procreation, yet it draws with it mutual support and assistance, and a communion of interests too, as necessary not only to unite their care and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them till they are able to provide for themselves.[36]

Locke went so far as to argue that marriage "has no necessary form or function beyond this 'chief end' of procreation."[37]

The principal founding text of Scots Law, Viscount Stair's 1681 *Institutions of the Law of Scotland* which influenced the thinkers of the Scottish Enlightenment (David Hume, Thomas Reid, Adam Smith, Dugald Stewart, etc.) who in turn influenced the Framers of the U.S. Constitution, treats the relationship of marriage between a man and a woman as a primary example of the Natural Law to which statutory law is indebted as source and as authority. Stair writes: "Law is the dictate of reason determining every rational being to that which is congruous and convenient for the nature and condition thereof . . . . Obligations arising from voluntary engagement take their rule and substance from the will of man and may be framed and

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[36] JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§78-79 (1690).

[37] JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 280 (2d ed. 2012).

composed at his pleasure; but so cannot marriage, wherein it is not in the power of the parties, though of common consent, to alter any substantial . . . . Marriage ariseth even from the primitive law of nature . . . and it is given for the very example of the Natural law."[38]

David Hume, another important philosophical influence in the early United States, noted that "[t]he long and helpless infancy of man requires the combination of parents for the subsistence of their young."[39]

Given this intellectual and cultural heritage, American treatise writers naturally spoke of marriage as a legal status with a chief end of regulating procreation, by which they understood not merely the fact of begetting children but also their education and maintenance. Indeed, Noah Webster's 1828 dictionary includes an account of the institution's divine origin "for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children."[40]

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[38] JAMES DALRYMPLE, VISCOUNT STAIR, 1 THE INSTITUTIONS OF THE LAW OF SCOTLAND 1, 24 (1681) (spelling and capitalization modernized).

[39] DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 66 (1751).

[40] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE n.p. (1st ed. 1828); see also SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (defining marriage as the "act of uniting a man and woman for life").

Justice Story wrote: "Marriage is not treated as a mere contract between the parties . . . . But it is treated as a civil institution, the most interesting and important in its nature of any in society. Upon it the sound morals, the domestic affections, and the delicate relations and duties of parents and children essentially depend."[41] New York Chancellor James Kent said: "We may justly place to the credit of marriage, a great share of the blessings which flow from . . . the education of children."[42] Perhaps the most prominent treatise writer in mid-nineteenth century America was Joel Prentiss Bishop who wrote, presciently: "Marriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby."[43] In his 1851 legal encyclopedia, John Bouvier explained: "The end of marriage is the procreation of children and the propagation of the species."[44]

In a treatise published in 1905, James Schouler described the parent and child bond as "a relation which results from marriage."[45] A few decades later, Frank Keezer's family law treatise says: "Marriage is universal; it is founded on the law of nature" in which "[n]ot only are the parties themselves

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[41] JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 168 (1834).

[42] JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 76 (3d ed. 1838).

[43] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE §225 (1st ed. 1852).

[44] JOHN BOUVIER, 1 INSTITUTES OF AMERICAN LAW 113-114 (1851).

[45] JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS §235 (1905).

interested but likewise the state and the community" since it is "the source of the family."[46] He specifically defines "legal marriage" as "a union of a man and a woman in the lawful relation of husband and wife, whereby they can cohabit and rear legitimate children."[47]

This understanding was not merely academic. It was widely accepted by state and federal courts. This Court said: "no legislation can be supposed more wholesome and necessary . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony."[48] A few years later, this Court said marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[49]

In 1859, the California Supreme Court said: "The first purpose of matrimony, by the laws of nature and society, is procreation."[50] In 1952, the same court said marriage advances important social interests by "channel[ing] biological drives that might otherwise become socially destructive" and "ensur[ing] the care and education of children in a

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[46] FRANK H. KEEZER, A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE §55 (1923).
[47] *Id*. at §56.
[48] *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).
[49] *Maynard v. Hill*, 125 U.S. 190, 211 (1888).
[50] *Baker v. Baker*, 13 Cal. 87, 103 (1859).

stable environment."[51] As late as 2008, the California Court of Appeals noted that historically "annulments based on fraud have only been granted in cases where the fraud relates in some way to the sexual, procreative or child-rearing aspects of marriage," since these went "to the very essence of the marriage regulation."[52] This link has been commonly noted in cases throughout the country.[53]

When this Court first applied the right to marry to invalidate a state law limiting marriage, it cited two cases as precedent.[54] The first was *Skinner v. Oklahoma*, which had explicitly linked marriage and procreation: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the

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[51] *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952).

[52] *In re Marriage of Ramirez*, 81 Cal Rptr. 3d 180, 184-185 (Cal. Ct. App. 2008).

[53] *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975) ("procreation of offspring could be considered one of the major purposes of marriage."); *Heup v. Heup*, 172 N.W.2d 334, 336 (Wis. 1969) ("Having children is a primary purpose of marriage."); *Zoglio v. Zoglio*, 157 A.2d 627, 628 (D.C. App. 1960) ("One of the primary purposes of matrimony is procreation."); *Stegienko v. Stegienko*, 295 N.W. 252, 254 (Mich. 1940) ("procreation of children is one of the important ends of matrimony"); *Gard v. Gard*, 169 N.W. 908, 912 (Mich. 1918) ("It has been said in many of the cases cited that one of the great purposes of marriage is procreation."); *Grover v. Zook*, 87 P. 638, 639 (Wash. 1906) ("One of the most important functions of wedlock is the procreation of children."). *See also* Defendants-Intervenors-Appellants' Opening Brief, Perry v. Brown, 671 F.3d 1052 (9th Cir. September 17, 2010) at 58-59 note 26 (collecting cases from 41 states and the District of Columbia on this point).

[54] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

very existence and survival of the race."[55] The other case was *Maynard v. Hill* which, as noted above, called marriage "the foundation of the family."[56]

State courts addressing arguments for redefining marriage have noted the links between marriage and procreation in the right to marry cases. The Washington Supreme Court said: "Nearly all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and childrearing."[57] Maryland's highest court said:

> All of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species. . . . Thus, virtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves participation (in ways either intimate or remote) by a man and a woman.[58]

In short, the antecedents of U.S. law from ancient to modern times, as well as U.S. law itself,

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[55] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
[56] *Maynard v. Hill*, 125 U.S. 190, 211 (1888).
[57] *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006).
[58] *Conaway v. Deane*, 932 A.2d 571, 621 (Md. 2007).

have consistently recognized the biological and social realities of marriage, including its universal nature as a male-female unit advancing purposes related to procreation and childrearing.

III. HISTORICAL EVIDENCE MAKES CLEAR THAT ATTEMPTS TO DOWNPLAY THE SIGNIFICANCE OF THE STATE INTERESTS IN MARRIAGE RELATED TO PROCREATION ARE MISGUIDED.

In an effort to dilute or distract from these basic facts about marriage throughout history, the courts below and proponents of marriage redefinition have raised a number of objections to the historical record. These efforts are, however, unavailing.

A. The District Court's Portrayal of the Historical Evidence Was Deeply Flawed.

The district court sought to tar the male-female marriage institution by associating it with repugnant and discredited notions and to dilute the evidence of the universality of marriage's male-female requirement by suggesting that it was but one of many elements of marriage that have been gradually evolving out of favor.

This effort is misguided. Though, as noted, the procedures and incidents of marriage have varied over time and across cultures, some elements of the legal and social understanding of marriage have been remarkably consistent, even universal. Among these are the understandings that marriage unites men and women and that marriage serves important

interests related to procreation and children's needs. As even the district court admitted, race and sex "restrictions were never part of the historical core of the institution of marriage."[59] Thus, it is strange that the district court brings up anti-miscegenation laws in an attempt to portray Proposition 8 as of a piece with those discriminatory provisions.[60]

The history of these racially-discriminatory laws makes clear that the district court's admission is correct—that race restrictions, unlike gender restrictions, were never central to marriage. "Under the common law of England, difference in race was not a disability rendering parties incapable of contracting marriage."[61] In the United States, Joel Bishop described racial restrictions on marriage as "impediments, which are known only in particular countries, or States."[62] Nearly half of the thirteen colonies did not have these laws, some states never enacted them, and even in the Southern states it was only during Reconstruction that anti-miscegenation laws "spread to a number of Southern states for the first time."[63] Additionally, "many

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[59] *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010).

[60] *Id*. at 957-958 (findings of fact 24 & 25).

[61] Robert Kovach, Note, *Miscegenation Statutes and the Fourteenth Amendment* 1 CASE W. RES. L. REV. 89, 89 (1949); Irving G. Tragen, *Statutory Prohibitions Against Interracial Marriage*, 32 CAL. L. REV. 269, 269 & n.2 (1944).

[62] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE §213 (1st ed. 1852).

[63] Jill Elaine Hasday, *Federalism and the Family Reconstructed* 45 UCLA L. REV. 1297, 1345 n. 172 (1998); Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s* 70 CHI.-KENT L. REV. 371, 372 (1994);

states repealed their anti-miscegenation laws after ratification of the Civil War amendments."[64] Throughout history, race has never been a central feature of the core definition of marriage.

By contrast, as the forgoing demonstrates, gender has always been at the core. Hence, just five years after this Court invalidated Virginia's anti-miscegenation law, it summarily and unanimously rejected a claim that the Fourteenth Amendment required a state to redefine marriage to include same-sex couples.[65]

The district court also attempts to link the opposite-sex and procreative aspects of marriage to the doctrine of coverture. One of its findings of fact says that the California attorney general "admits that the doctrine of coverture, under which women, once married, lost their independent legal identity and became the property of their husbands, was once viewed as a central component of the civil institution of marriage."[66] To the extent the court meant that coverture was "central" to the definition of marriage, the assertion is false. To be sure, gender roles within marriage have varied across time and

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Lynn Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the 'Loving Analogy' for Same-Sex Marriage*, 51 HOW. L.J. 117, 180-81 (2007).

[64] James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy* 73 B.U. L. REV. 93, 98 (1993) (citing ROBERT J. SICKELS, RACE, MARRIAGE AND THE LAW 64 (1972).

[65] *Baker v. Nelson*, 409 U.S. 810 (1972).

[66] *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 958 (N.D. Cal. 2010).

cultures; what it means to be a "husband" or "wife" changes. But what has remained fundamentally unchanged is the core understanding that marriage exists to unite a man and a woman for procreative and child-rearing ends. The district court later makes the implausible assertion that trial "evidence suggests many reasons for this tradition of exclusion [of same-sex couples from marriage], including gender roles mandated through coverture."[67] There is no evidence for this absurd assertion. Coverture was abandoned without any hint of altering the basic opposite-sex definition of marriage. And societies without coverture did not define marriage as the union of any two persons irrespective of gender.

Indeed, the prominent and influential legal commentators noted above endorsed the opposite-sex nature of marriage and its procreative purposes while noting that the doctrine of coverture was not similarly central to the marriage institution. Justice Story said that the "jurisprudence of different nations contains almost infinitely diversified regulations upon [the] subject" of "the incidents of marriage. These may respect the personal capacity and powers of the husband and wife, or the rights of each in regard to the property, personal or real, acquired, or held by them during the coverture."[68] Joel Bishop similarly noted a "distinction between the marriage status and those property rights which are attendant upon and more or less closely

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[67] *Id*. at 993.

[68] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§125-126 (1834).

connected with it." [69] He explained that while "[r]ights of property are attached to [marriage] on very different principles in different countries" so that "in some there is a *communio bonorum*, in some each retain their separate property; by our law it is vested in the husband."[70] Thus, he notes the contingent nature of this particular marriage incident and concludes: "Marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them."[71]

Contrast this with his comments about the centrality of the opposite-sex nature of marriage: "It has always, therefore, been deemed requisite to the entire validity of *every* marriage . . . that the parties should be of different sex."[72]

William Blackstone explained that coverture was not part of the civil law tradition. [73] California, which had originally been a civil law jurisdiction, did not fully establish coverture in its laws.[74]

Any comparison between the opposite-sex requirement of marriage and the doctrine of coverture is unfounded.

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[69] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE §37 (1st ed. 1852).
[70] *Id*.
[71] *Id*.
[72] *Id*. at §225 (1st ed. 1852).
[73] WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 432 (1765).
[74] *See* JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS 182 (1905); CAL. CONST. art. XI, § 14 (1849).

B. Common Objections to Social Interests in Marriage Related to Procreation are Similarly Flawed.

Another tactic for avoiding the historical lesson of male-female marriage's universality and link to children has been to suggest it is irrelevant because of instances where married couples cannot or do not have children.

Thus, the district court said: "The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry."[75]

This is a red herring. The existence of infertile married couples does not mean that the child-centered purposes of marriage, universally recognized through time and across cultures, are invalid. None of the major commentators on marriage has thought that allowing infertile couples to marry undermines the primary meaning of marriage as a procreative, child-centered union. They have of course understood that some couples cannot or will not have children.[76] But the fact that the traditional marriage model might include some male-female couples who do not fulfill marriage's primary social function does not mean that such unions either undermine it or fail to fulfill other

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[75] *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010).

[76] *Wendel v. Wendel*, 30 A.D. 447, 449 (N.Y. App. 1898) ("it has never been suggested that a woman who has undergone [menopause] is incapable of entering the marriage state").

functions. Marriage is an essential social paradigm, a model, a norm that teaches, guides, and molds, albeit imperfectly and incompletely. As one of the dissenters in Massachusetts' same-sex marriage case noted: "Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism."[77] Allowing infertile couples to marry does not change this in the least.

One obvious practical reason government does not limit marriage to fertile couples is that it would be difficult (if not impossible) and certainly inappropriately intrusive to determine ahead of time which couples are fertile.[78] Whether a couple is fertile is often unknowable. It is not uncommon to hear of married couples who learn that they cannot have children, adopt a child, and are then surprised to learn that the wife has become pregnant.

Moreover, some couples who do not initially plan to have children may later change their minds or conceive unintentionally.[79] Even in an age of easily-available contraception, a large majority of births

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[77] *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting).
[78] *Standhardt v. Superior Court*, 77 P.3d 451, 462-463 (Ariz. App. 2003); *Adams v. Howerton*, 486 F.Supp. 1119, 1124-1125 (C.D. Cal. 1980).
[79] *Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Ind. App. 2005).

are reportedly "unintended" by either the mother or father.[80]

The Indiana Court of Appeals addressed and cogently rejected the same fertility argument accepted by the district court by noting that it was essentially a defective "overbreadth argument":

> A reasonable legislative classification is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude all others . . . There was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not. This is true, regardless of whether there are some opposite-sex couples that wish to marry but one or both partners are

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[80] Joyce C. Abma, et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth* 23 VITAL HEALTH STATISTICS 28, table 17 (1997) (70.4 percent of births to married women were intended by both parents, compared to just 28 percent of births to unmarried mothers). *See also* Stanley K. Henshaw, *Unintended Pregnancies in the United States* 30 FAMILY PLANNING PERSPECTIVES 24, 28, table 3 (1998); Haishan Fu, et al., *Contraceptive Failure Rates: New Estimates from the 1995 National Survey of Family Growth* 31 FAMILY PLANNING PERSPECTIVES 55, 56 (1999); James Trussel & Barbara Vaughn, *Contraceptive Failure, Method-Related Discontinuation and Resumption of Use: Results from the 1995 National Survey of Family Growth* 31 FAMILY PLANNING PERSPECTIVES 64, 71 (1999).

physically incapable of reproducing.[81]

Further, a married husband and wife who cannot or do not have a child through their own sexual relationship still advance the historically-recognized procreative purposes of marriage. First, the interest in procreation is not solely that it take place, but also that children are reared by a mother and father in a family unit. As the New York Court of Appeals explained, the state's interest in procreation includes more than just biological reproduction: the state can "rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."[82] The court explained: "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."[83] While "[i]t is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—[] the Legislature could find that the general rule will usually hold."[84]

A legal historian likewise notes:

> Procreation, however, means more than just conceiving children. It also means rearing and educating them for spiritual and temporal living—a

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[81] *Morrison*, 821 N.E.2d at 27.
[82] *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).
[83] *Id.*
[84] *Id.*

> common Stoic sentiment. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife for the sake of their children.[85]

A number of the historical sources cited above clearly note that the purposes served by marriage include child well-being in addition to mere propagation.[86] As Maryland's Court of Appeals explained, marriage is "conferred on opposite-sex couples not because of a distinction between whether various opposite-sex couples actually procreate, but rather because of the *possibility* of procreation."[87]

Thus, couples who rear children via adoption (or its predecessor statuses such as guardianship or

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[85] John Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage* 76 NOTRE DAME L. REV. 1019, 1035 (2001).

[86] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE n.p. (1st ed. 1828) ("securing the maintenance and education of children"); JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 76 (3d ed. 1838 ("We may justly place to the credit of marriage, a great share of the blessings which flow from . . . the education of children."); FRANK H. KEEZER, A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE §56 (1923) ("a union of a man and a woman in the lawful relation of husband and wife, whereby they can cohabit and rear legitimate children."); *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952) ("the institution of marriage" serves "the public interest" by "channel[ing] biological drives that might otherwise become socially destructive" and "ensur[ing] the care and education of children in a stable environment.").

[87] *Conaway v. Deane*, 932 A.2d 571, 633 (Md. 2007).

other informal relationships) are still serving these "procreative" functions. Children who would otherwise be deprived of a mother or father because of death, abuse, neglect, or abandonment still have that opportunity with another married man and woman.

In addition to the need to provide mothers and fathers for children who would otherwise not have the opportunity to be reared by a father and mother, the law is also concerned with encouraging those who might create children to take responsibility for them and not to create children in unstable nonmarital settings. As one commentator has explained, the law's "concern with illegitimacy was rarely spelled out, but discerning it clarifies why courts were so concerned with sex within marriage and renders logical the traditional belief that marriage is intimately connected with procreation even as it does not always result in procreation."[88] As Massachusetts Supreme Judicial Court Justice Cordy explains: "The institution of marriage encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children."[89]

Additionally, if only one spouse in a marriage is infertile, the norms of marriage will discourage the

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[88] Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage* 102 COLUM. L. REV. 1089, 1114-15 (2002).
[89] *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

fertile spouse from engaging in irresponsible procreation outside of marriage.

Even couples who neither have nor rear children set an important example for those that may. Married infertile couples still support the norm that sexual relationships between men and women should take place within marriage. Their observance of vows of faithfulness reinforces the social norm that children should ideally enjoy the security, nurture, and love of their father and mother and not be subject to the turbulence of impermanent couplings that lead to motherless or fatherless families.

Notwithstanding the occurrence of exceptional circumstances, the historical record is still clear that marriage has universally advanced child-centered purposes by encouraging adults whose types of relationship may produce children to enter marriage.

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When the People of California adopted Proposition 8, they acted to retain in their law an understanding of marriage that, until very recently, was recognized universally and without exception throughout time and across cultures. That conception of the institution of marriage has consistently been understood to advance crucial social interests in procreation, understood as the bearing and rearing of children. The remarkable consistency of this understanding makes clear that the decision of the People of California to enact Proposition 8 was anything but irrational.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the decision of the court below.

Respectfully submitted,

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