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No 20371

IN THE SUPREME COURT STATE OF HAWAII

NINIA BAEHR, GENORA DANCEL, TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON, JOSEPH MELILLO, Plaintiffs-Appellees, vs. LAWRENCE H. MIIKE, in his official capacity as Director of the Department of Health, State of Hawaii, Defendant-Appellant. CIVIL NO. 91-1394-05 (Injunctions) APPEAL FROM THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FIRST CIRCUIT COURT HONORABLE KEVIN S.C. CHANG

AMICUS CURIAE BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

APPENDIX A
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AMICUS CURIAE BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

I. SUMMARY OF THE INTEREST OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

The Church of Jesus Christ of Latter-day Saints has more than 9.5 million members worldwide, with more than 110 congregations in the State of Hawaii. Central to the teachings and beliefs of the Church is the family, which the Church teaches is the foundation of society and the crucial relationship through which children are taught basic values and public virtue:

The family is ordained of God. Marriage between man and woman is essential to His eternal plan. Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity. Happiness in family life is most likely to be achieved when founded upon the teachings of the Lord Jesus ChrIst...

...[W]e warn that the disintegration of the family will bring upon individuals, communities, and nations the calamities foretold by ancient and modern prophets.

We call upon responsible citizens and officers of government everywhere to promote those measures designed to maintain and strengthen the family as the fundamental unit of society.

A Proclamation to the World, *The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints*, September 23,

1995 (attached hereto as Appendix A).

II. STATEMENT OF THE QUESTION PRESENTED

The outcome of this case is of immeasurable import to the moral and social stability of families, the State of Hawaii our nation, and the world. The question presented is:

Whether there is a compelling state interest to preserve the fundamental unit of society - the institution of traditional marriage and the family - by finding Hawaii's marriage law constitutional, as amended by Act 217 of the 1994 Hawaii Session Laws.

III. ARGUMENT

The traditional family - made up of a mother, a father, and their children - is the most essential relationship in all of Western civilization. Older than our nation, our Constitution, and the centuries of common law upon which our society is founded, this family relationship is more highly valued than any other:

While societies and even systems of government evolve throughout the ages, the family unit, as a repository of society's more important values, remains timeless in its function within each society and political structure. The importance of maintaining the integrity of that function is inestimable.

In re Agosto, 553 F.Supp. 1298, 1326 (D.Nev. 1983) (emphasis added).

A decision by this Court to strike down the requirement that marriage must be between a man and a woman will substantially and irreversibly weaken this venerable and indispensable institution, and thereby cause great harm to society as a whole. Homosexual marriage is wrong, both from a moral and social point of view. Its recognition will have grave consequences for every individual, for every family, for every community, for every state, and for American society.

A. The Traditional Family Lies at the Heart of Society Providing Benefits Which Can Be Realized From No Other Source.

One need not refer to social analysis or to expert testimony in order to understand the essential role that the family has played in the development of our society, and to find a compelling state interest in preserving its preeminent role in society.[fn1] No institution has done more in the past - and no institution has the potential to do more in the future - than a loving father, mother, and children fused together into a single family unit, providing for the physical, social and emotional well-being of each family member. Landmark decisions from the United States Supreme Court - accompanied by numerous rulings from state courts - "establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (emphasis added; quotations omitted). Reverence for this crucial societal unit occurs, not based upon "isolated factors" or (as plaintiffs would have this Court believe) on some outdated view of human interaction, but "upon the historic respect - indeed sanctity would not be too strong a term - traditionally accorded to the relationships that develop within the unitary family." Id. at 123.

Recognizing the importance of this basic unit of society, courts in

a wide variety of jurisdictions and in numerous varied contexts have moved to protect the family from destabilizing or destructive effects.[fn2] Indeed, despite direct attacks from activists proclaiming the traditional family to be old

[fn1] Cf. *Bethel School District v. Fraser*, 478 U.S. 675 (1986), in which the United States Supreme Court found a compelling governmental interest without "insist[ing] on a scientific demonstration of psychic injury." *Action for Children's Television v. FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995), cert. denied 116 S.Ct. 701 (1996).

[fn2] There are literally dozens of courts which have written on the crucial importance of the family. Due to space limitations, we cite only two here: *Amezquita-Soto v. I.N.S.*, 708 F.2d 898, 908 (3d Cir. 1983) ("The family and relationships between family members occupy a place of central importance in our nation's history and are a fundamental part of the values which underlie our society.") (quotations omitted); *In re Kozak*, 92 Mich.App. 579, 581, 285 N.W.2d 378, 380 (1979) ("The family relationship occupies a basic position in our society's hierarchy of values, and is of great importance.").

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fashioned and no longer necessary to human interaction, courts have afforded the traditional family the utmost in protection precisely because of its vital importance to society's survival:

Despite a vast array of recent challenges to the traditional concept of the family, our civilization still places inestimable value on the importance of family life.

C.C. v. A.B., 406 Mass. 679, 690-91, 550 N.E.2d 365, 373 (1990). Courts and commentators have identified numerous reasons why the traditional family is held in such high regard, and why its continued strong existence is so necessary. These reasons generally may be clustered into at least three groups.

First, better than any other governmental or private institution, in the family "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504(1977). As one court insightfully concluded:

The family, as the basic unit of American society, is the milieu in which such values are inculcated into individuals, and thus into society as a whole. Consequently, the child learns to relate to society and have respect for society within the initial framework of his own relationship to his parents and other family members.

In re Agosto, 553 F. Supp. 1298, 1326 (D.Nev. 1983).

Thus, ideally, it is in the family that a child first learns about honesty, trustworthiness, obedience, sacrifice, selflessness, and reverence for the basic freedom that we all enjoy. Ideally, it is in the family that a mother and father learn about sacrifice, about selflessness, and about genuine concern for others. And ideally, it is in the family that all members become aware of each other's needs and each other's dreams, focusing together on family goals which will also allow each member of the family to reach his or her full potential. As William J. Goode, a renowned family expert and professor of sociology at Columbia University recognized more than two decades ago:

[T]he family is the fundamental instrumental foundation

of the larger social structure, in that all other institutions depend upon its contributions. The role behavior that is learned within the family becomes the model or prototype for role behavior required in other segments of the society. The content of the socialization process is the cultural traditions of the society; by passing them on to the next generation the family acts as a conduit or transmission belt by which the culture is kept alive.

W. Goode, *The Family as an Element in the Social Structure*, in *Marriage and Family in the Modern World* 15 (R. Cavan ed., 4th ed. 1974) (emphasis in original).

Perhaps of most importance to society, the traditional family is best situated to teach public virtue to children, and to perpetuate its growth in adults. This virtue, expounded by the founding fathers as a crucial component in the American system, requires self-control self-sacrifice, and a desire to work for

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the good of society, often setting aside one's personal desires for the good of others.[fn3] Yet, almost by definition government cannot teach this most important of virtues; it must be left to basic family units, where children and adults learn in microcosm the values and virtues necessary to the functioning of society:

Because this essential social - even political - ingredient [i.e. public virtue could not be a coercive State function, American society has relied to a considerable extent on the family not only to nurture the young but also to instill the habits required by citizenship in a self-governing community. We have relied on the family to teach us to care for others, and to moderate self-interest. This connection between home and society has made it clear since the early days of the Republic that it was more important to keep pure the headwaters of humanity than simply to worry about downstream pollution. With this perspective, the family in a democratic society not only provides emotional companionship, but is also a principal source of moral and civic duty.

Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Mich. L.Rev. 463, 477 (1983) (quotations and citations omitted, emphasis added).

Second, the traditional family provides the nurturing and caring environment needed by all human beings for appropriate development. "Children grow up best under conditions of intense emotional involvement with their parents." Hafen, 81 Mich. L. Rev. at 477 (quotation, ellipses and brackets omitted). These conditions require that a child have access to an adult whom she trusts implicitly, and who will be extremely sensitive on a day-to-day basis about what she is experiencing. All children need a place to call home, not just a place providing protection, but caring persons providing protection. Proper psychological and emotional development most often depends upon the child's ability to share his deepest fears and his highest dreams with someone who cares deeply about him, and with someone committed long-term to assisting him in his endeavors:

[T]he family is committed to the cognitive, emotional, and spiritual development of its members, and hence is

committed to creating and sustaining the sense of being valued, the sense of being cared about, the sense of being accepted "as is," and the sense of permanence of affectional ties. The family unit is, in this sense, a primary context for need-attainment.

Terkelsen, *Toward a Theory of the Family Life Cycle*, in the *Family Life Cycle: A Framework for Family Therapy* 28 (E. Carter & M. Goidrick, eds., 1980). The traditional family, ideally comprised of a mother,

[fn3] See generally Horwitz, *John Locke and the Preservation of Liberty: A Perennial Problem of Civic Education*, in *The Moral Foundations of the American Republic* 131 (R. Horowitz ed. 1979).

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father, and children, provides the best environment for value, care, tolerance, and affection to all of its members - needs which are essential to the proper development of the individual and therefore to the proper development of society.

Third, heterosexual marriages provide crucial male/female role models to children that homosexual marriages simply cannot. The law has always recognized the "primary role of the parents in the upbringing of their children". *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This upbringing requires more than a basic education and sustenance while the child matures into adulthood; it also requires that children be taught how to relate to other human beings generally, and how to treat members of the opposite sex. In this context, both a male and a female role model are crucial. Ideally, every boy learns how to treat girls and women in general, and his future wife in particular, by watching the way his father treats his mother. Ideally, every girl learns how to relate to boys and men in general, and her future husband in particular, by watching how her mother relates to her father. And children of both sexes learn very early how to communicate with and relate to a member of the opposite sex, who in many different contexts, may have a very different way of viewing things.[fn4]

For this reason, commentators and family law experts have long recognized the unique responsibilities of traditional heterosexual marriage in providing an example to all children within the family relationship:

The heterosexual dimension of the relationship is at the very core of what makes marriage a unique union and is the reason why marriage is so valuable to individuals and to society. The concept of marriage is founded on the fact that the union of two persons of different genders creates a relationship of unique potential strength and inimitable potential value to society. The essence of marriage is the integration of a universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity.

Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996

B.Y.U. L. Rev. 1, 39 (emphasis added). Homosexual marriage obviously cannot provide society or children with this unique and indispensable benefit.

[fn4] See, e.g., Deborah Tarmen, *You Just Don't Understand: Women and Men in Conversation* (Ballantine Books, 1991).

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B. Courts Have Long-Recognized that the Protection of the Traditional Family and the Benefits it Provides Constitute a Compelling State Interest.

Speaking generally, there are a wide number of court decisions which have recognized that protection of the traditional family is a compelling state interest of the highest order.[fn5] Of most assistance to this Court in its analysis, however, are those cases which have directly confronted the specific issue of whether protection of the traditional family is a compelling state interest in support of Hawaii 5 decision not to issue marriage licenses to homosexual couples.

Two cases are highly instructive. In the first, *In re Estate of Cooper*, 149 Misc.2d 282, 564 N.Y.S.2d 684 (1990), aff'd 187 A.D.2d 128, 592 N.Y.S.2d 97 N.Y.A.D. 1993), the surviving partner of a homosexual relationship brought suit seeking a declaration that he had the right to elect against his homosexual partner's will as a "surviving spouse" under New York law. *Id.* at 183, 564 N.Y.S.2d at 685. Petitioner argued to the court that his relationship with the decedent was "identical to that of husband and wife," and that the only reason they did not enter into formal marriage was that "New York State will not issue licenses to persons of the same sex." *Id.*

Initially determining that petitioner was not entitled to heightened scrutiny because there was no invidious discrimination in the state's refusal to recognize homosexual marriage, the court upheld the state's prohibition on homosexual marriage. 149 Misc.2d at 288, 564 N.Y.S.2d at 688. However, even assuming that heightened scrutiny was required, the court determined that the state's marriage law was valid because it directly furthered a compelling governmental interest:

In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in fostering procreation of the race and providing status and stability to the environment in which children are raised.

* * * *

[T]he State has a compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or in nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as

[fn5] See, e.g. *Oliverson v. West Valley City*, 875 F.Supp. 1465, 1485 (1).Utah 1995), in which the court concluded:

[The traditional family] has tremendous societal value which helps to explain why it alone continues to serve as the only legitimate referent for our political and public discussions about intimacy, sexuality, and morality, as well as defining for us what are appropriate family policies and needed law reforms. Therefore, if this is so, it is appropriate for the state legislature to criminalize adultery in support of legitimate family interests. (quotations omitted)

fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values.

149 Misc.2d at 287, 564 N.Y.S.2d at 688 (emphasis added). This conclusion is squarely on point with the present case. Like the State of New York, the State of Hawaii has a compelling state interest in prohibiting homosexual marriage in order to advance its policy of "nurturing and keeping alive the concept of marriage and family as the basic fabric of our society." *Id.*

The second case is *Adarns v. Howerton*, 486 F.Supp. 1119 (C.D.Cal. 1980 aff'd 673 F.2d 1036 (9th Cir.), cert. denied 458 U.S. 1111(1982)). In that case, a male Australian citizen and a male American citizen sought to have their informal marriage ceremony recognized by the state in order to prohibit the I.N.S. from deporting the Australian. Plaintiffs argued that their informal marriage should be recognized by the court under governing state and federal law, and that if either law prohibited a same-sex union, "it is unconstitutional under due process and equal protection." *Id.* at 1121. In adjudicating these claims, the district court concluded:

In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals.

Id. at 1124 (emphasis added). Significantly, the court then expressly and specifically responded to the plaintiffs' argument that even if there were a compelling governmental interest in protecting the traditional family, prohibition of homosexual marriage is not narrowly tailored to that interest because today many persons enter the marriage relationship without the desire or ability to have children:

There is no real alternative to some over breadth in achieving this goal. The state has chosen to allow legal marriage as between all couples of opposite sex. The alternative would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family. Such tests and inquiries would themselves raise serious constitutional questions.

Thus, it seems to me that the state has chosen the least intrusive alternative available to protect the procreative relationship. When the legislative classification is narrowly tailored to serve a compelling state interest, there is no constitutional infirmity even when there is a strict scrutiny requirement. Such a narrowly tailored classification exists here.

Id. at 1124-1125 (citations and footnote omitted, emphasis added).

Exactly as the court found in *Adams*, the Hawaii Legislature has made known its strong desire to protect the traditional family and the role it plays in "the propagation of the human race." 1994 Haw.

Session Laws, Act 217, Sec. 1. That purpose generally has been recognized as a compelling governmental interest by numerous state and federal courts, and it has specifically been recognized as a compelling governmental interest by two courts which faced the almost identical question regarding homosexual marriage that this Court faces today. Protecting the traditional family by "encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised" is a recognized compelling government interest. Adams, 486 F.Supp. at 1124 see also Cooper, 149 Misc.2d at 284, 564 N.Y.S.2d at 686. Moreover, given current societal and constitutional constraints, a ban on homosexual marriage is "the least intrusive alternative available to protect the procreative relationship." Adams, 486 F.Supp. at 1125.

The traditional family is under assault on many fronts, but none so direct and none so potentially devastating as in this case. The very definition of family is in peril here, a fact which leading homosexual rights activists fully understand, and even apparently advocate.[fn6] Whether the traditional family can survive after its definition is expanded to include relationships which have never been viewed as familial before, and whether the traditional family can continue to provide crucial benefits to society after its structure is so fundamentally altered, is a question of deep concern for all. Surely, it is a question which lies within the province of a state legislature, which after consulting with the people, determines that the protection of the traditional family as presently recognized and constituted presents an extremely important societal interest.[fn7]

No matter how homosexual marriage advocates may characterize the homosexual relationship, that relationship simply cannot provide any of the essential benefits to society which are provided by the traditional family, such as (1) procreation and child bearing, (2) child rearing in the ideal setting with

[fn6] In a recent nationally circulated magazine article, the executive director of the National Gay and Lesbian Task Force, Melinda Paras, discusses the upcoming battles regarding recognition of homosexual marriage and the changes it will have upon legislation and society. She then is quoted as saying, "By the time equality finally gets won universally, we'll be in a whole other place about the definition of family, and gay marriage may become almost irrelevant." B. Findlen, "is Marriage the Answer?", Ms. 86, 91 (May/June 1995).

[fn7] Indeed, courts have long recognized and given wide deference to legislative actions when they deal with crucial family issues. See, e.g., Hansen v. Department of Social Services, 193 Cal.App. 3d 283, 293, 238 Cal.Rptr. 232, 238 (2nd Dist. 1987); ("The Legislature has recognized that the family unit is of fundamental importance to society in nurturing its members, passing on values, averting potential social problems, and in providing the secure structure in which citizens live out their lives.") (quotations and ellipses omitted); In the Interest of D. B., 187 Ga.App. 66, 369 S.E.2d; 81 1(1988) ("it should be noted that promoting the interest of the family was placed in the Preamble of Georgia's latest Constitution of 1983 in order to once again emphasize the high priority of value and importance to matters relating to family concerns").

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both a male and a female parent, and (3) social stability. That is because homosexual relationships are built upon conduct that is wrong, both morally and socially. As one court concluded when faced with the contention that a

lesbian relationship should be afforded all of the respect, rights and obligations associated with heterosexual marriage:

The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race... Inherent in that definition [of marriage] is the union of a man and woman for the purpose of procreation and rearing of children...

...The same cannot be said for the lesbian relationship, whether it be analyzed from the traditional, legal or social point of view. To equate it on the same level as the traditional family, by presuming equality with such a family, is a fallacy.

...The test of equality between the traditional family and the homosexual relationship cannot be met by the homosexual relationship. Simply put, if the traditional family relationship (lifestyle) was banned, human society would disappear in little more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society. It is clearly evident that the concept of family is essential to society, homosexual relationships are not. A primary function of government and law is to preserve and perpetuate society, in this instance, the family.

Constant A. V. Paul C.A., 344 Pa. Super. 49, 496 A.2d 1, 6-7 (1985) (emphasis added).

IV. CONCLUSION

Homosexual relationships will not and cannot provide the essential benefits to society that the traditional family has, and therefore should not be accorded the preferential status of marriage. Recognition of homosexual marriage will trivialize the traditional family - the basic building block of society - thereby having deleterious effects upon society as a whole. At a time when the traditional family needs more protection than ever before, Hawaii's prohibition on homosexual marriage is surely narrowly tailored to further a compelling state interest. This Court should therefore rule in favor of the State.

DATED: Honolulu, Hawaii; April 14, 1997.

/s/FREDERICK W. ROHLFING III
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Christ of Latter-day Saints

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APPENDIX A [Poster's note: this is a copy of a two-column article that was reformatted for ease of reading after broadcasting.]

THE FAMILY

"A PROCLAMATION TO THE WORLD"

THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

WE, THE FIRST PRESIDENCY and the Council of the Twelve Apostles of The

Church of Jesus Christ of Latter-day Saints, solemnly proclaim that marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children.

ALL HUMAN BEINGS - male and female - are created in the image of God. Each is a beloved spirit son or daughter of heavenly parents, and, as such, each has a divine nature and destiny. Gender is an essential characteristic of individual premortal, mortal, and eternal identity and purpose

IN THE PREMORTAL REALM, spirit sons and daughters knew and worshiped God as their Eternal Father and accepted His plan, by which His children could obtain a physical body and gain earthly experience to progress toward perfection and ultimately realize his or her divine destiny as an heir of eternal life. The divine plan of happiness enables family relationships to be perpetuated beyond the grave. Sacred ordinances and covenants available in holy temples make it possible for individuals to return to the presence of God and for families to be united eternally.

THE FIRST COMMANDMENT that God gave to Adam and Eve pertained to their potential for parenthood as husband and wife. We, declare that God's commandment for His children to multiply and replenish the earth remains in force. We further declare that God has commanded that the sacred powers of procreation are to be employed only between man and woman, lawfully wedded as husband and wife.

WE DECLARE the means by which mortal life is created to be divinely appointed. We affirm the sanctity of life and of its importance in God's eternal plan.

HUSBAND AND WIFE have a solemn responsibility to love and care for each other and for their children. "Children are an heritage of the Lord" (Psalms 127-3). Parents have a sacred duty to rear their children in love and righteousness, to provide for their physical and spiritual needs, to teach them to love and serve one another, to observe the commandments of God and to be law-abiding citizens wherever they live. Husbands and wives - mothers and fathers - will be held accountable before God for the discharge of these obligations.

THE FAMILY is ordained of God. Marriage between man and woman is essential to His eternal plan. Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity. Happiness in family life is most likely to be achieved when founded upon the teachings of the Lord Jesus Christ. Successful marriages and families are established and maintained on principles of faith, prayer, repentance, forgiveness, respect, love, compassion, work, and wholesome recreational activities. Mothers are primarily responsible for the nurture of their children. In these sacred responsibilities, fathers and mothers are obligated to help one another as equal partners. Disability, death, or other circumstances may necessitate individual adaptation. Extended families should lend support when needed.

WE WARN that individuals who violate covenants of chastity, who abuse spouse or offspring, or who fail to fulfill family responsibilities will one day stand accountable before God. Further, we warn that the disintegration of the family will bring upon individuals, communities, and nations the calamities foretold by ancient and modern prophets.

WE CALL UPON responsible citizens and officers of government everywhere to promote those measures designed to maintain and strengthen the family as the fundamental unit of society.

This proclamation was read by President Gordon B. Hinckley as part of his message at the General Relief Society Meeting held September 23, 1995, in Salt Lake City, Utah.

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"I personally do not intend to stay in a politics dominated by smearing and mudslinging--a politics which has all too often been characteristic of recent years in this country."

--Newt Gingrich, 1983

~~~~~  
Fred and Martin
24 years,
yet strangers before
the law
~~~~~