

No. A12-1149

A12-1258

State of Minnesota

In the Supreme Court

Warren Limmer, Steve Gottwalt, Dan Hall, Steve Drazkowski, Sean Nienow, Paul Gazelka, Julianne Ortman, Peggy Scott, Michelle Benson, Ernie Leidiger, Bob Dettmer, Glenn Gruenhagen, Bob Gunther, Joyce Peppin, and Mike Benson, all individuals, registered voters, and Members of the Minnesota Legislature; John Helmberger, an individual and a registered voter; and Minnesota for Marriage, an association of individuals and registered ballot committee,

Petitioners,

vs.

Mark Ritchie, in his official capacity as Secretary of State of the State of Minnesota, and Lori Swanson, in her official capacity as Attorney General of the State of Minnesota.

Respondents,

PETITIONERS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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INTRODUCTION

Article IX, Section 1 of the Minnesota Constitution establishes a two-step process to propose and adopt amendments, a process that involves only the State Legislature and the voters. First, “[a] majority of the members elected to each house of the legislature may propose amendments to this constitution.” Second, the amendment is “submitted to the people for their approval or rejection at a general election.” Minn. Const. art. IX, § 1. The constitution gives no role to the Executive Branch in the amendment process. Yet, here, Respondents Secretary of State Mark Ritchie (“Secretary”) and Attorney General Lori Swanson (“Attorney General”) (collectively “Respondents”) are attempting to usurp the Legislature’s prerogative by substituting the ballot title they prefer for the one the Legislature required for the Marriage Amendment in 2011 Minn. Laws Chapter 88, Senate File 1308. (*See* Petr’s Br. at 2-3). Respondents are in error.

ARGUMENT

In defending Respondents’ errors and omissions, Respondents and their amici¹ make three critical errors. First, Respondents and their amici improperly elevate the statutorily enacted ministerial duty of Minn. Stat. 204D.15 over the Constitutional

¹ Amici include 19 Minnesota law professors, many of whom are publicly out-spoken opponents of the Marriage Amendment. *See, e.g.*, Richard W. Painter, *Marriage amendment? Leave marriage well enough alone*, StarTribune, May 9, 2011, <http://www.startribune.com/opinion/commentaries/121416574.html?source=error>; *William Mitchell College of Law faculty opposes anti-marriage amendment*, William Mitchell College of Law, Apr. 11, 2011, <http://web.wmitchell.edu/news/2012/04/william-mitchell-college-of-law-faculty-opposes-anti-marriage-amendment/>. Many of the Law Professors’ arguments are addressed by Respondents’ brief, albeit in varying detail. Notably, the amici failed to electronically serve their Compendium by the Court’s deadline.

provisions of Article IX, Section 1. (Respondents’ Br. at 4-6; Law Professors’ Amici Brief at 1,4). Second, Respondents and their amici improperly give legal effect to the Governor’s campaign against the amendment, including his so-called “symbolic veto,” which the Governor himself stated “symbolic as it may be, I am exercising my legal responsibility to either sign it or veto it.” Upon this foundation of sand, the Secretary has attempted to unconstitutionally amend the work of the Legislature. (Respondents’ Br. at 2-6; Law Professors’ Amici Br. at 13-16). Third, and in the alternative, even if the Secretary possessed a role in this matter, Respondents and their amici misrepresent the appropriateness of the Secretary’s chosen title, ignoring its negative connotations (Respondents’ Br. at 8-9; Law Professors’ Amici Br. at 20).

I. Section 204D.15 Does Not Limit the Legislature’s Authority to Title Constitutional Amendments.

The Minnesota Constitution grants the Legislature two distinct legislative processes: to (1) pass ordinary legislation, subject to the Governor’s veto and (2) to propose constitutional amendments, subject to the people’s approval.² Respondents and their amici fail to acknowledge the important procedural distinctions between these two processes—namely, approval by the Governor versus by the people—and, by confusing and combining the two, attempt to justify their actions in this matter. This case concerns the second: proposing constitutional amendments to the people as set forth in Article IX, section 1 of the Minnesota Constitution.

² See Flowcharts on Legal Mechanics for Legislation and Constitutional Amendments. (Supplemental Appendix at A-2, 3).

The Constitution clearly vests the authority to propose constitutional amendments with the Legislature, and not with the Executive Branch. Minn. Const. art. IX, § 1. According to this Court, because the Constitution is silent on the form and manner of submitting an act of amendment, such decisions are “left to the judgment and discretion of the legislature, subject only to the implied limitation that they must not be so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote.” *State ex rel. Marr v. Stearns*, 72 Minn. 200, 218, 75 N.W. 210, 214 (Minn. 1898), *rev’d on other grounds*, 179 U.S. 223 (1900). And the Legislature cannot “propose” a constitutional amendment to the people without accompanying language on the ballot. Thus, the Legislature’s power to author the ballot title is undeniably part of its constitutional power to “propose.”

A. The Legislature Has Sole Constitutional Authority to Propose Constitutional Amendments.

Respondents elevate the statutory, ministerial duties of the Secretary and Attorney General over the Legislature’s constitutional authority to oversee the process of proposing constitutional amendments. (Respondents Br. at 4-6). But Respondents’ position conflicts with findings of this Court providing the Legislature with the discretion to submit the form and function of such amendments. Their position further violates basic canons of construction, including that a statute cannot violate or supersede the Constitution. Minn. Stat. § 645.17(3) (2008).

Respondents argue that “[s]ection 204D.15 plainly empowers the Secretary to provide titles for all proposed constitutional amendment.” (Respondents’ Br. at 5). But

Respondents argue in a vacuum, failing to acknowledge that the Legislature is the source of that ministerial duty. Because of the superior, constitutional authority of the Legislature to propose constitutional amendments, the Legislature may step in and exercise its power to determine the ballot title instead of delegating that decision to the Secretary of State and the Attorney General under § 204D.15. The Legislature did so here.

Additionally, the authority relied upon by Respondents for their statement, *Breza v. Kiffmeyer*, 723 N.W.2d 633 (Minn. 2006), is not on point. In *Breza*, the Legislature had not provided a title for the constitutional amendment. Therefore, pursuant to § 204D.15, the Secretary of State provided a title. The Court's mere acknowledgement of the function of § 204D.15 does not support the conclusion that § 204D.15 "plainly empowers" Respondents to exercise the power in § 204D.15 when the Legislature has already exercised that power itself.

Under Respondents' analysis, the ministerial privilege granted by § 204D.15 somehow totally removes the Legislature's underlying constitutional authority to title ballot questions, unless the Legislature can convince the Governor to sign legislation modifying or repealing § 204D.15. On its own weight, this argument collapses, as the Legislature itself cannot permanently give away or change the pure nature of its own constitutional power.³ According to Respondents, the Legislature that enacted § 204D.15

³ The Legislature retains the authority to exercise its constitutional authority to set the ballot title for any proposed constitutional amendment. If the Respondents insist that the only way the Legislature can do so is by passing a new bill to amend or repeal § 204D.15, subject to veto of the Governor, then § 204D.15 is an unconstitutional delegation of the

restricted the ability of the present Legislature (and any subsequent Legislature) to prescribe the form of any proposed constitutional amendment. (Respondents' Br. at 5-6.)⁴ But, this Court has found that one Legislature cannot bind its successors in prescribing the form and substance of questions submitted to the populace. *State v. Duluth & Northern Minnesota Railway Co.*, 102 Minn. 26, 30, 112 N.W. 897, 898 (Minn. 1907). *Cf. State v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 360 (Minn. 2007) (explaining the limits of the ability for legislatures to bind their successors in the contract context).

Also Respondents' argument means that the Executive Branch could perpetuate the Legislature's delegation of power to the Respondents to title ballot measure by vetoing bills that changed § 204D.15, or that listed a specific title for a specific proposed

exclusive authority the Constitution grants solely to the Legislature to propose constitutional amendments. However, this Court does not need to declare § 204D.15 unconstitutional in order to rule in favor of the Petitioners, especially because statutory canons of construction instruct that the Legislature intends to pass constitutional laws. *Brayton v. Pawlenty*, 781 N.W.2d 357, 364 (2010) (referencing Minn. Stat. § 645.17(3)). This Court can find that the Legislature retains the power to set the ballot titles for proposed constitutional amendments, and that it can exercise it whenever it proposes a constitutional amendment, as it did here and with the Legacy Amendment. The Governor cannot veto or approve the Legislature's exercise of that authority. When the Legislature chooses not to declare the ballot title, then the Secretary of State and the Attorney General are free to act within the delegated grant of authority under § 204D.15.

⁴ Also, Respondents' amici improperly rely on *Howard Jarvis Taxpayers Ass'n v. Bowen*, 192 Cal. App. 4th 110 (Cal. Ct. App. 2011). In that case, the Legislature had delegated authority to the Attorney General to provide ballot question titles, among other things, while at the same time enacting statutory barriers to its own ability to provide titles, as well as a ballot labels and summaries. *Howard Jarvis*, 192 Cal. Appl. 4th at 127 ("The Legislature can take over those functions only if it obtains the approval of the electorate to do so prior to placement of the measure on the ballot."). No such barriers exist in this case to the Minnesota Legislature's power to provide a ballot question title as part of its plenary authority to propose amendments.

amendment. This would result in a gross violation of the separation of powers. The Governor cannot deny or limit the Legislature's constitutional authority to propose constitutional amendments and the process of conferring the proposal to the voters for their approval or rejection. The Legislature retains its power to propose amendments to the voters and to write the titles that will appear on the ballot, even though § 204D.15 exists. That statute gives a reservoir of delegated authority to the Secretary and the Attorney General when the Legislature decides not to write the ballot title to a proposed amendment it passes.

In other words, when the Legislature itself does not fully "propose" the matter to the people, it has designated the Secretary to complete the portions of the "proposal" that it did not complete. But in the instant case, the Legislature itself fully "proposed" the matter to the people, leaving no power for the Secretary to exercise. In and of itself, § 204D.15 is merely a vehicle for the exercise of power if and when that power exists. When the Legislature has fully exercised its constitutional power and fully "proposed" the matter to the people, § 204D.15 is hollow.

Further, Respondents and amici do not point to, and Petitioners have not found, any indication that the Legislature intended § 204D.15 to give the Secretary exclusive authority over choosing ballot titles. *See State v. American Family Mut. Ins. Co.*, 609 N.W. 2d 1, 7 (Minn. App. 2000) ("If the Legislature has intended that [the Executive official] have exclusive authority, it could have stated this explicitly.")⁵

⁵ The Respondents' reliance on the Missouri Court of Appeals case, *Bergman v. Mills*, 988 S.W.2d 84 (Mo. App. 1999), is misguided. In Missouri, legislation is adopted one of

When interpreting a statute the court must “ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2008). The Court is to be guided by the presumption that “the legislature does not intend to violate the Constitution of the United States or of this state.” *Brayton*, 781 N.W.2d at 364 (citing Minn. Stat. § 645.17(3)).

In order for § 204D.15 to adhere to Minn. Const. art. IX, § 1, it must be read as a limited delegation of authority to the Secretary of State. The legislative intent and proper interpretation of § 204D.15 is to delegate to the executive branch the authority to title *untitled* Constitutional Amendments. Contrary to the interpretation proposed by Respondents’ amici, (Law Professors’ Amici Br. at 11), this is the default rule because § 204D.15 extends legislative power that comes from its constitutional power to propose constitutional amendments, not from its power to enact legislation.

three ways: (1) through the Legislature and then presented to the Governor; (2) through the Legislature and presented to the people; or (3) the people may prepare and place initiatives on the ballot through a specific ballot initiative process. Mo. Const. art. III, Sec. 31, 49-53. In the context of this constitutional scheme, the Missouri Legislature developed an extensive process by which various executive branch officials would prepare “true and impartial” official summaries, fiscal notes, fiscal note summaries, as well as ballot questions and titles for both legislatively referred legislation and popularly referred referenda. *See* Mo. Gen. Stat. § 116.160 et seq. Therefore, in 1999, when the Missouri Legislature presented *legislation* (not a constitutional amendment) to the people regarding concealed firearms, the Missouri Legislature was bound by this complex statutory scheme and various executive officials were required to prepare the notes, summaries, as well as the ballot question and title, all in a specific process designed to be an independent check on the Missouri legislative process. *Bergman*, 988 S.W.2d at 91. Unlike the Missouri Legislature, which had bound itself to a rather complex statutory scheme, the Minnesota Legislature’s power to propose constitutional amendments is plenary and notwithstanding the fact that it has delegated the ability to prepare ballot titles in some cases, it has retained its inherent Constitutional authority to draft ballot titles.

The Legislature cannot surrender its right to make amendment proposals to the voters. If the Legislature intended for § 204D.15 to give the Secretary of State exclusive authority, such a grant would be unconstitutional, as the Legislature can no more permanently yield its constitutional duties as this Court can yield its function to the Governor.

Further, when the Legislature passes a provision specifically relating to how the ballot title should read, that action would supersede any role the Secretary may have absent the Legislature exercising its prerogative. Minn. Stat. § 645.26, subd. 1, provides that:

When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. *If the conflict between the two provisions be irreconcilable, the special provision shall prevail* and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

Id. (emphasis added.); *see, e.g., Bonhiver v. Fugelso, Porter, Simich and Whiteman, Inc.*, 355 N.W.2d 138, 141 (Minn. 1984) (finding that a specific provision applies over a general provision.) Accordingly, the Legislature's act of entitling the Marriage Amendment is a specific exercise of its constitutional authority, and if this exercise is somehow in conflict with § 204D.15, the provisions should be read together to give effect to both. The Legislature's title, therefore, must be given effect.

Respondents' amici have inverted the proper constitutional and statutory analysis in asking whether the "titling law" should be construed "so as to abrogate Respondents' legal duties." (Law Professors' Amici Br. at 12). The correct question is whether the

Legislature has plenary control over proposing an amendment to the voters. Because proposing an amendment is completely the prerogative of the Legislature, as explained supra at I.A., and also relatively infrequent, it is clear when the Legislature is determining the title or when it is delegating the authority. Amici admit that, from time to time, the Legislature has dictated terms that would otherwise be at the discretion of the Secretary, including the title of the Legacy Amendment. (Law Professors' Amici Br. at 8). Continuing that practice in titling the Marriage Amendment is no "abrogation" of Respondents' "legal duties," it merely is a continued valid exercise of the Legislature's constitutional authority in proposing amendments.

B. Respondents Have Acknowledged the Legislature's Ability to Title Constitutional Amendments.

Notably, Respondents and their amici ignore the fact that, in 2008, the Legislature (then controlled by the Democratic-Farmer-Labor party) provided a mandatory title for a constitutional amendment and the very same Secretary involved here put the Legislature's title on the ballot. (Law Professors' Amici Br. at 10). Petitioners found no indication that the Secretary submitted that title to the Attorney General, and that the Attorney General approved it, prior to it being placed on the ballot. The Secretary and Attorney General, therefore, did not exercise the ministerial duty under § 204D.15 because such exercise was unnecessary.

II. The Governor's Symbolic "Veto" Has No Legal Effect on a Proposed Constitutional Amendment.

Respondents and their amici improperly see legal significance in the Governor's public relations campaign against the amendment, particularly his so-called "symbolic

veto” of the Marriage Amendment. (Respondents’ Br. at 2, 6; Law Professor Amici Br. at 16). This argument flies in the face of the conclusion reached by the Legislature, the Revisor of Statutes,⁶ and even the Governor himself that the so-called “veto” was symbolic, strictly for public relations, and has no force of law. Nevertheless, Respondents and their amici point to the so-called “veto” as the basis for their duty, nay, *mandate* to alter the title. (Respondents’ Br. at 3-5, Law Professors’ Amici Br. at 6-7, 13).⁷

Respondents fail to appreciate the distinctions between the Legislature’s role in passing legislation and proposing constitutional amendments. Practically speaking, with ordinary legislation, the Governor serves as a check on the Legislature’s actions by either signing or vetoing the legislation before it is enacted.

Here, the people of Minnesota must affirmatively approve the proposed amendment before it becomes part of the Constitution—a process which, by design, is devoid of substantive involvement by the Executive Branch. The people provide the check on the Legislature’s actions. Given that the Constitution vests the Legislature with the exclusive authority to propose amendments, the Executive Branch does not play a role in the process. Because of this, the House Clerks and Senate Registrar process the proposed amendment differently than ordinary legislation. (Respondents’ Addendum at 1)(clerk noting the bill was delivered to the Governor “for you information.”) Likewise,

⁶ The Revisor of Statutes is a creature of Statute. The Revisor is responsible for drafting, publishing and distributing the Laws of Minnesota. See Minn. Stat. § 3C.01 et seq.

⁷ Notably, Respondents and their amici fail to explain whether, if, as they say, the Governor’s “veto” nullifies the Legislature’s title and imposes upon the Secretary the duty to provide a title, then would the Governor signing the proposed amendment validate the Legislatively-given title and remove any authority under § 204D.15.

the House Clerks, Senate Registrar, and Secretary process the Governor's symbolic "veto" differently than they do a veto that carries the force of law.

In his letter to the President of the Senate dated May 25, 2011, the Governor explained that he "do[es] not have the power to prevent" this "act proposing an amendment to the Minnesota Constitution . . . recognizing marriage as only a union between one man and one woman" from "appearing on the ballot in November." (Letter from Mark Dayton, Governor, to Michelle Fischbach, President of the Senate (May 25, 2011)). He continued, "symbolic as it may be, I am exercising my legal responsibility to either sign it or veto it." (Letter of Governor Dayton).⁸ This "veto" appears nowhere in the official legislative record. *See* Office of the Revisor of Statutes, SF1308 Status in Senate for Legislative Session 87, *available at* https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=senate&f=SF1308&ssn=0&y=2011 (last visited 7/17/2012). Because it is not a part of the official record, the Legislature lacks a mechanism to have the "vetoed" constitutional amendment returned to the Legislature in order to override the purported "veto," even if it had meaning. Further, Section 2(b) of

⁸ *See also*, Letter from Gov. Pawlenty to Speaker Sviggum (May 19, 2005), *available at* http://www.leg.state.mn.us/archive/vetoes/2005veto_ch88.pdf (explaining that his veto applies to the ordinary legislation but noting that the constitutional amendment provision "will go forward notwithstanding my veto because constitutional amendments are not subject to veto."). The Governor's veto of the ordinary legislation was noted in the record. Office of the Revisor of Statutes, *HF2461 Status in House for Legislative Session 84*, *available at* https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=HF2461&ssn=0&y=2005 (last visited 7/18/2012). As is explained in Petitioners' Brief (Petr's Br. at 13-16) and contrary to amici's assertions (Law Professors Amici Br. at 14-15), the Governor's "veto" of the Marriage Amendment did not affect any "ordinary legislation" (as there was none in the bill). If it had, the clerk's report would have referenced the veto as it did in 2005.

the Marriage Amendment did not amend or repeal Section 204D.15, but rather, it was a plenary exercise of the Legislature's constitutional authority. The Secretary understood that the Governor had not actually vetoed anything because his letter of May 25, 2011 depositing the Marriage Amendment for preservation states that the Marriage Amendment was a proposed constitutional amendment, "not requiring [G]overnor approval." Minn. S. Journal 87th Legislature, 1st Sess., at 3591 May, 24 2011, <http://www.senate.mn/journals/2011-2012/2011comsub.pdf#Page1>.

Also, the Secretary gave no indication that he considered the constitutional amendment proposal as "vetoed," therefore giving him power to rewrite the ballot title, until his letter of June 15, 2012, well over a year after he reported that the proposed amendment was "deposited" in his office for "preservation." Therefore, over a year after the Secretary gave no indication that he considered the amendment "vetoed," he asserted that it was. The Legislature, which may only be called into a special session by the Governor, was already adjourned, giving it no time to rectify the Secretary's actions contrary to the expressed will of the Legislature. As such, the Marriage Amendment in its entirety should be submitted to the people pursuant to Article IX, Sec. 1 of the Minnesota Constitution.

III. The Secretary's Ballot Title Is Not Appropriate Because He Misstates or Ignores the Recognition of Marriage in Minnesota.

Alternatively, even if the Secretary has the authority to provide a title, the title he has chosen, and that the Attorney General has approved, is not appropriate. Specifically, the Secretary's title, "LIMITING THE STATUS OF MARRIAGE TO OPPOSITE SEX

COUPLES” is misleading.⁹ Respondents attempt to justify the Secretary’s title by claiming that it is consistent with the Attorney General’s chosen statement of purpose and effect. Consistency with the Executive branch’s statement of the amendment is immaterial to the question of whether the title appropriately describes the Marriage Amendment.

As explained in Petitioners’ opening brief, the Secretary’s proposed title is misleading because it states that the Marriage Amendment would “limit” marriage in Minnesota. As explained in Petitioners’ Brief, at 1-3, the Marriage Amendment seeks to synchronize the Minnesota Constitution with Minnesota statutes and the common understanding of marriage in Minnesota. The Secretary’s title involves carefully chosen words aimed at “tilt[ing] the playing field.” Pat Kessler, *Legal Action Planned Against Amendment Wording Changes*, CBS Minnesota, July 10, 2012, <http://minnesota.cbslocal.com/2012/07/10/legal-action-planned-against-amendment-wording-changes/> (video discussing that “limit,” used by the Secretary in his title, is one of the seven words that political scientists avoid so as to not unduly influence voters.)¹⁰

⁹ The Legislature did not provide a standard of proof in section 204D.15. This Court has held that a preponderance of the evidence standard is used when the Legislature does not provide a standard of proof. *Weiler v. Ritchie*, 788 N.W.2d 879, 883 (Minn. 2010). This Court has addressed this question; it need not look to Alaska, Maryland, or Montana as amici suggest. (Law Professors’ Amici Br. at 19 n.62). Therefore, the reasonableness standard proposed by Respondents’ amici, (Law Professors’ Amici Br. at 18-19), is not applicable in this case.

¹⁰ Informal polling regarding the Secretary’s change to the Marriage Amendment ballot title shows that, as of July 17, 2012, 78% of responders answered “yes” to the question: “Do you think the language above a ballot question can affect the outcome of the vote?” <http://applevalley-rosemount.patch.com/articles/poll-do-you-approve-of-the-ballot-title-for-the-marriage-amendment>

Definitions clarify the meaning of a term, and are not usually described with a negative term like “limiting.” Even small changes in the wording of ballot measures and titles can have a dramatic effect on the election results. *See* Shauna Reilly and Sean Richey, *Ballot Question Readability and Roll-Off: The Impact of Language Complexity*, 2011 Political Research Quarterly 64. So, not only have Respondents acted without authority by defying the will of the Legislature and substituting their own ballot title, the substitute title is not appropriate. Not only is the title approved by the Legislature more appropriate in terms of the language used (Petr’s Br. at 16-19) but when the Legislature dictates a title, that title is the only one which is “appropriate,” and hence the only one which the Secretary should include on the ballot.

CONCLUSION

Petitioners respectfully request an entry of judgment in their favor and against Secretary of State Mark Ritchie in his official capacity as the chief election official of the State of Minnesota and Lori Swanson, the Attorney General of the State of Minnesota, finding that they erred in substituting and approving the proposed ballot title, respectively; Ordering the Secretary to print the ballot as specified in the Marriage Amendment, Chapter 88, Senate File 1308, including the title “Recognition of Marriage Solely Between One Man and One Woman;” and any and all other such relief as may be just and equitable.

This 18th day of July, 2012.

Respectfully submitted,



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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,087 words. This brief was prepared using Microsoft Word 2010.

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Respectfully submitted,



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