THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2015-0253

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IN THE MATTER OF DEBORAH MUNSON AND CORALEE BEAL

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APPEAL FROM A FINAL DECREE ON PETITION FOR DIVORCE
OF THE 10TH CIRCUIT – FAMILY DIVISION - DERRY

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# BRIEF FOR *AMICI CURIAE* GAY & LESBIAN ADVOCATES & DEFENDERS AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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GAY & LESBIAN ADVOCATES & DEFENDERS

AMERICAN CIVIL LIBERTIES UNION OF
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## QUESTIONS PRESENTED

1. Did the trial court engage in an unsustainable exercise of discretion or commit error as a matter of law when it determined that the parties' 20+ year relationship, including four years being joined in a civil union and then marriage, was short-term and relied essentially exclusively on this finding to allocate the bulk of marital property to one spouse as though the parties had no interdependent relationship prior to their first opportunity to enter into a legal relationship in 2008?

2. Did the trial court's analysis and result create a constitutional question that can be avoided by recognizing that, where a same-sex couple engages in a long-term relationship that possesses the indicia of a marital partnership but cannot be formalized into a marriage because of an unconstitutional ban on marriage for such a couple, the relationship cannot be treated as short-term under New Hampshire's divorce law such as to justify an unequal division of property and against the statutory presumption of an equal division?

## RELEVANT AUTHORITY

RSA 458:16-a Property Settlement

I. Property shall include all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes, but is not limited to, employment benefits, vested and non-vested pension or other retirement benefits, or savings plans. To the extent permitted by federal law, property shall include military retirement and veterans' disability benefits.

II. When a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution of property, unless the court establishes a trust fund under RSA 458:20 or unless the court decides that an equal division would not be appropriate or equitable after considering one or more of the following factors:

(a) The duration of the marriage.

(b) The age, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources of income, needs and liabilities of each party.
(c) The opportunity of each party for future acquisition of capital assets and income.
(d) The ability of the custodial parent, if any, to engage in gainful employment without substantially interfering with the interests of any minor children in the custody of said party.
(e) The need of the custodial parent, if any, to occupy or own the marital residence and to use or own its household effects.
(f) The actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either or both of the parties.
(g) Significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and education of the children and the care and management of the home.
(h) Any direct or indirect contribution made by one party to help educate or develop the career or employability of the other party and any interruption of either party's educational or personal career opportunities for the benefit of the other's career or for the benefit of the parties' marriage or children.
(i) The expectation of pension or retirement rights acquired prior to or during the marriage.
(j) The tax consequences for each party.
(k) The value of property that is allocated by a valid prenuptial contract made in good faith by the parties.
(l) The fault of either party as specified in RSA 458:7 if said fault caused the breakdown of the marriage and:
    (1) Caused substantial physical or mental pain and suffering; or
    (2) Resulted in substantial economic loss to the marital estate or the injured party.
(m) The value of any property acquired prior to the marriage and property acquired in exchange for property acquired prior to the marriage.
(n) The value of any property acquired by gift, devise, or descent.
(o) Any other factor that the court deems relevant.

[Sections III and IV are omitted.]

## INTERESTS OF AMICI CURIAE

Founded in 1978, Gay & Lesbian Advocates & Defenders ("GLAD") is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the

rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD's history includes litigating before the courts of the State of New Hampshire, including this Court most recently in In re Guardianship of Madelyn B., 166 N.H. 453 (2014); In re Guardianship of Matthew L., 164 N.H. 484 (2012); and Bedford v. N.H. Cmty. Tech. College Sys., Nos. 04-E-229, 04-E-230, 2006 N.H. Super. LEXIS 6, 2006 WL 1217283 (N.H. Super. Ct. May 3, 2006) (unpublished; case appealed to this Court and dismissed before argument). Nationally, GLAD was counsel, along with the ACLU and other attorneys, for the petitioners in the United States Supreme Court case *Obergefell v. Hodges*__ U.S. __, 135 S. Ct. 2584, 2015 U.S. LEXIS 4250 (2015), which held that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. GLAD has an enduring interest that the rule of law adequately protects all citizens.

The American Civil Liberties of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union – a nationwide, nonpartisan, public interest organization with approximately 500,000 members (including over 3,500 New Hampshire members). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae,* to encourage the protection of rights guaranteed by the federal and state constitutions, including the right of all citizens to be protected in their equality and dignity. For example, the ACLU-NH and other public-interest organizations filed an amicus brief in In re Guardianship of Madelyn B., 166 N.H. 453 (2014). Nationally, the ACLU was counsel, along with GLAD and other attorneys, for the petitioners in the United States Supreme Court case *Obergefell v. Hodges*__ U.S. __, 135 S. Ct. 2584, 2015 U.S. LEXIS 4250 (2015).

The interests of the ACLU-NH and GLAD in ensuring that all citizens are treated equally and that their constitutional rights are fully protected led to their involvement in this case.

## STATEMENT OF THE CASE

Amici rely upon the State of the Case of the respondent/appellant.

## STATEMENT OF THE FACTS

It is undisputed on the record before the Court that the petitioner, Deborah Munson ("Deborah"), and the respondent, Coralee Beal ("Coralee"), were in a long-standing, committed relationship for at least 20 years from the time they decided to live together until they separated in 2013.[1] During that 20+ year period, the parties' relationship possessed all the elements of a marriage.[2] Specifically, the parties behaved as a couple in very typical ways, maintaining an exclusive relationship of economic and emotional interdependence. Among other things, they: (1) shared household chores and responsibilities; (2) created and maintained joint bank accounts; (3) deposited earnings and other income into the joint accounts to cover household expenses; (4) shared credit cards; and (5) created estate plans in 1995 leaving their entire estates to each other. In addition, from 1992 onward, Deborah designated Coralee as beneficiary of her life insurance policy.

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[1] Coralee has maintained that the parties started living together in 1992 while the court chose to use a 1993 date without either granting or denying Coralee's request for a finding on the point. (Final Decree, pp. 1, 10).

[2] The trial court's ruling on Coralee's requested finding on this point – Request No. 15 – is uncertain. The Final Decree indicates that the court both granted and denied this specific request. (Final Decree, p. 10).

Early in their life together, the parties held a "marriage" ceremony and exchanged paper rings.[3] True to that commitment, when Deborah was diagnosed with breast cancer in 1997, Coralee put her schooling and career on hold for more than a year to care for Deborah.

Ultimately, when finally a civil legal status was available to same-sex couples in New Hampshire, Coralee and Deborah joined in a civil union in 2008.[4] They allowed that civil union to become a marriage under New Hampshire law as of January 1, 2011.

## SUMMARY OF ARGUMENT

Although the parties began a long-term, committed relationship in 1992, as a same-sex couple they were prohibited from marrying. As a result, they only obtained their first legal status as a couple in 2008 when New Hampshire created civil unions for same-sex couples. That civil union then became a marriage after New Hampshire lifted its ban on marriage for same-sex couples on January 1, 2010.

In their divorce proceedings, the trial court ordered a vastly unequal division of marital property essentially relying on the single factor of duration of the marriage. RSA 458:16-a, II(a). The court treated the couple as having a short-term marriage, using their 2008 civil union as the measuring date and disregarding the previous 16 years of their interdependent relationship. Amici present two arguments concerning the Court's order.

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[3] Of course, any such ceremony could not be a legal, civil marriage because marriage was not available to same-sex couples anywhere in the country at that time.

[4] New Hampshire made civil unions available to same-sex couples as of January 1, 2008. RSA 457-A (repealed effective January 1, 2010). Under the civil union law, parties to a civil union were "entitled to all the rights and subject to all the obligations and responsibilities provided for in state law that apply to parties who are joined together pursuant to RSA 457 [governing marriage]." RSA 457-A:6. Dissolution of a civil union was subject to RSA 458, governing annulments, divorce and separation. RSA 457-A:7.

First, the order was in error and constituted an unsustainable exercise of discretion. It was objectively unreasonable to characterize this 20+ year relationship as short-term and is also contrary to every relevant principle of New Hampshire law and policy which support the recognition of premarital cohabitation periods.

Under New Hampshire law, the time factor justifying a potential, unequal division of property is not duration per se but only a short-term duration where it is possible to return the parties to their pre-marriage position. That is not realistic here when the parties have a long-term relationship which is a mix of years of economically interdependent cohabitation and marriage.

In addition, RSA 458:16-a, I treats all property at divorce as marital property, demonstrating the relevance of premarital property and the premarital relationship. A cohabiting and economically interdependent relationship is also respected as a common law marriage in certain circumstances (despite the State's preference for ceremonial marriage) and gives rise to equitable and legal remedies for unmarried couples upon separation. If New Hampshire will adjust the rights of cohabiting couples who never marry, it is only logical and just to consider the full length of a relationship of a couple whose cohabitation evolves into a marriage.

In every case that amici discovered from "all property" states like New Hampshire (that is, states that regard all property at divorce as marital regardless of when or how acquired or by whom), the courts uniformly consider the cohabitation and marriage years together for assessing equitable division of property.

As this is true for any cohabiting and economically interdependent relationship, it is particularly objectively unreasonable to characterize as short-term a 20+ year relationship of a same-sex couple where they were barred from marrying for the first 18 years of their relationship.

Second, in order to avoid an unconstitutional interpretation of RSA 458:16-a, the trial court's application of a short-term relationship analysis in this case must be reversed. Constitutional avoidance is a well-established doctrine. It violates Equal Protection to limit access to a state benefit, i.e., presumptively equal division of marital property, to those who are married where same-sex couples were denied the opportunity to marry. Here, the lower court perpetuated the effects of the past exclusion on same-sex couples marrying and thus imposed the same type of unconstitutional spousal limitation in this case. In addition, the Obergefell decision of the U.S. Supreme Court in June 2015 compels the same result since bans on marriage for same-sex couples were, and are, unconstitutional. Therefore, to effectively rely on that bar and disregard the full length of a same-sex couple's cohabiting and economically interdependent relationship today also violates Obergefell. Finally, it would violate Equal Protection if a different-sex couple's period of economically interdependent cohabitation was acknowledged in assessing the duration of the marriage but a same-sex couple's like relationship was not.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN MAKING A SIGNIFICANTLY UNEQUAL DIVISION OF PROPERTY VIRTUALLY IN EXCLUSIVE RELIANCE ON A DETERMINATION THAT THE PARTIES HAD A SHORT-TERM MARRIAGE.

#### A. The Trial Court's Ruling.

In choosing to reject the presumptive "equal division" of property as required by RSA 458:16-a, II and instead provide for a vastly unequal distribution, the trial court relied upon "the duration of the marriage." RSA 458:16-a, II(a).[5] (Final Decree, p. 4). Duration is only one of

[5] The trial court also cited the catchall provision, RSA 458:16-a, II(o), noting that "… Deborah has been the majority wage earner and has been the majority financial support for the couple during the time of their relationship." (Final Decree, p. 4). However, this relates inextricably to the court's short-term marriage analysis as otherwise it would assume a joint

the 15 statutory factors identified in RSA 458:16-a, II that may justify an unequal property distribution at divorce.

Based upon the view that the parties had a "short-term marriage," commencing with their 2008 civil union, (Final Decree, p. 4), the court gave the overwhelming majority of the assets to Deborah – a home, other real estate, and the bulk of Deborah's retirement assets. (Final Decree, pp. 7-8).

B. The Trial Court's Ruling Was An Unsustainable Exercise Of Discretion.

1. The standard of review.

This Court reviews equitable divisions of property pursuant to RSA 458:16-a, II for an "unsustainable exercise of discretion." In re Chamberlin, 155 N.H. 13, 16 (2007). In turn, this standard turns on "whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." State v. Lambert, 147 N.H. 295, 296 (2001). To show that a decision is unsustainable, the challenger "must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of [her] case." Id. The respondent/appellant has sustained that burden.

2. In all respects relevant to property division under RSA 458:16-a, the parties' relationship cannot legally be characterized as short-term and it was objectively unreasonable for the trial court to do so.

In this Court's jurisprudence on RSA 458:16-a and the question of short-term marriages, two things are clear. First, the Court generally assumes there was no marriage-like relationship or economic partnership between the parties prior to the marriage. See Rahn v. Rahn, 123 N.H. 222, 225 (1983) ("In a short-term marriage, it is easier to give back property brought to the

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economic partnership during a long-term marriage such that the simple fact of earnings disparity per se would not justify a vastly unequal division of property. See In re Harvey, 153 N.H. 425 (2006); Dombrowski v. Dombrowski, 131 N.H. 654 (1989).

marriage and still leave the parties in no worse position than they were in prior to it."). And, even then, there is no requirement to return "parties in a short-term marriage to their premarital financial positions," In re Sarvela, 154 N.H. 426, 431 (2006), "where the parties have invested money and effort for years in an asset like a family business or house." Rahn, 123 N.H. at 225. In addition, the length of the marriage is but one factor for the court to consider and does not by itself mandate any particular result as to property division. In re Sarvela, 154 N.H. at 431; In re Crowe, 148 N.H. 218, 221 (2002). In sum, this Court's gloss on RSA 458:16-a, II(a) indicates that the time factor relevant to a potential, unequal division of property is not duration per se but rather only a short-term duration, which might then prove significant.

Beyond this, this Court has not yet expressly addressed a question that is broadly important to different-sex and same-sex couples alike: whether a period of economically interdependent cohabitation prior to marriage should be factored into the duration question. Hoffman v. Hoffman, 143 N.H. 514, 522 (1999) (no need to decide whether correct to tack five-year cohabitation period onto 12-year marriage period as it was proper, in any event, to consider the 12-year marriage as long-term); In re Crowe, supra at 222 (no need to reach premarital cohabitation as trial court's decision was otherwise sustainable). However, New Hampshire law and policy strongly support the recognition of such premarital cohabitation period as relevant to an equitable property division.

First, as noted above, the true factor justifying a potential, unequal distribution is not duration per se but short-term duration where it is possible to return the parties to their pre-marriage position. Rahn, supra; In re Crowe, supra at 221 (same); see Hoffman, supra at 520 (one factor supporting an unequal distribution is "a short marriage"); In re Hampers, 154 N.H. 275, 286 (2006) ("it may be proper, in some cases, to treat a short-term marriage differently from

a long-term marriage"). Where the reality of a divorcing couple's lives is a mix of years of economically interdependent cohabitation followed by a "short" marriage, the notion of returning the parties to their original pre-marital position is unrealistic and unjust where the relationship was not, in any relevant way, short-term.

Second, New Hampshire is one of a minority of states where all property is marital property and subject to the presumption of an equal distribution, thus signifying the importance of the pre-marital period to a couple that marries and later divorces. Property is considered marital regardless of whether it was "property brought to the marriage by the parties" or "acquired during marriage" such that "all property owned by each spouse, regardless of the source, may be included in the marital estate." In re Crowe, supra at 222; In re Preston, 147 N.H. 48, 50-51 (2001) ("in New Hampshire all property of the parties is subject to distribution" if acquired prior to date of decree of legal separation or divorce; legislature's intent was that "any property … would be subject to equitable distribution." (emphasis in text)); In re Harvey, 153 N.H. 438 (same); In re Sarvela, supra at 431 (same). This policy choice and this Court's cases demonstrate the relevance of premarital property to the marital estate. This is all the more true where the premarital property reflects a mutually interdependent relationship and economic partnership of the couple. Put another way, the policy choice presuming that premarital property should be considered as marital property also speaks to the lower court's unsustainable exercise of discretion and error of law in artificially truncating the duration of the parties' relationship into a short-term marriage. (Final Decree, p. 4).

Third, state policy and law also allow unmarried couples who have held themselves out as married or who have lived in a marriage-like domestic relationship to seek legal and equitable remedies to adjust their property rights upon separation. See RSA 457:39 (limited recognition of

common law marriage); In re Estate of Bourassa, 157 N.H. 356 (2008); Joan S. v. John S., 121 N.H. 96, 99-100 (1981) (unmarried couple who lived together for 15 years had no marriage dissolution remedies of Chapter 458 but could seek "equitable adjustment of the rights of the parties" or an action in contract).

Where the Court will recognize and adjust the rights of a cohabiting couple who never marry, and considers "all" property at divorce as marital, then the relationships of previously economically interdependent couples who later marry must be relevant to the duration of their relationship and the Court's obligation to divide marital property equitably at divorce. For such couples, the property issues should be resolved at divorce rather than requiring the divorcing couple to file a separate action to resolve the distribution of premarital property. In re Sarvela, 154 N.H. at 431 (RSA 458:16-a, I "makes no distinction between property brought to the marriage by the parties and that acquired during the marriage" so that "all property owned by each spouse at the time of divorce is … included in the marital estate; see Liebson v. Liebson, 412 Mass. 431, 433, 589 N.E.2d 1229, 1230 (1992) (wife brought both a divorce action and a complaint in equity, bringing the latter to protect her interests vis-à-vis premarital cohabitation; the court upheld dismissal of the equity action as the wife had an adequate remedy at law in the divorce proceeding where all property could be distributed).

Fourth, State law authorizing pre-marital agreements "allows couples to alter the ordinary legal incidents of divorce, and determine their own destinies," Macfarlane v. Rich, 132 N.H. 608, 613 (1989). See RSA 458:52 (recognizing "binding and enforceable prenuptial contracts concerning [persons'] respective property rights"); RSA 460:2-a (parties "may enter into a written interspousal contract" in "contemplation of marriage"). This law too recognizes that a couple's marriage – indeed, any long-term committed relationship – is most likely an "economic

partnership," which should be addressed in its entirety. See In re Harvey, 153 N.H. 439; Dombrowski v. Dombrowski, 131 N.H. 654, 660 (1989).

Finally, in every case that the amici have discovered from jurisdictions that – like New Hampshire – have an "all property" view of marital property, the courts have uniformly considered the full relationship period of different-sex couples – cohabitation and marriage – for purposes of assessing an equitable distribution. See Collins v. Wassell, 133 Haw. 34, 36, 42, 45, 323 P.3d 1216, 1218, 1224, 1227 (2014) (cohabitation period counts if there is a premarital economic partnership); McLaren v. McLaren, 268 P.3d 323, 332-333 (Alaska 2012) (also noting that parties became an "economic unit" with cohabitation); In re Marriage of Clark, 316 Mont. 327, 331, 71 P.3d 1228, 1231 (2003) (under facts, inequitable to disregard parties' premarital cohabitation); Hendricks v. Hendricks, 784 N.E.2d 1024, 1027 (Ind. Ct. App. 2003) (would be against public policy to ignore a spouse's contribution in a pre-marriage cohabitation period; discussing and applying Chestnut v. Chestnut, 499 N.E.2d 783, 786 (Ind. Ct. App. 1986)); Northrop v. Northrop, 2001 ND 31 ¶12, 622 N.W.2d 219, 222 (2001) (appropriate to consider all time together in dividing marital property); Wall v. Moore, 167 Vt. 580, 580-581, 704 A.2d 775, 777 (1997) (15-year relationship; married for four years; no error in considering entire length of the relationship); Moriarty v. Stone, 41 Mass. App. Ct. 151, 157-158, 668 N.E.2d 1338, 1344 (1996) (court can consider contributions during cohabitation period prior to marriage; discussing and applying Liebson v. Liebson, 412 Mass. 432-433, 589 N.E.2d 1230); In re Marriage of Dubnicay and Dubnicay, 113 Ore. App. 61, 64, 830 P.2d 608, 610 (1992) (time of cohabitation "usually included in determining the duration of a relationship for the purpose of a property division" unless there was no comingling of finances); Murray v. Murray, 788 P.2d 41, 42 (Alaska 1990) (so long as parties marry, court is free to consider the parties' entire relationship,

including premarital cohabitation); In re Marriage of Miller, 452 N.W.2d 622, 623-624 (Iowa Ct. App. 1989) (premarital cohabitation properly considered); Nielsen v. Nielsen, 179 Mich. App. 698, 699-700, 446 N.W.2d 356, 356-357 (1989) (trial court properly considered 15-year cohabitation prior to three-year marriage; treating this as a "short-term marriage" not favored); Malek v. Malek, 7 Haw. App. 377, 380, 768 P.2d 243, 246 (1989) (no restriction on considering what happened before parties were legally married); In re Marriage of Burton and Burton, 92 Ore. App. 287, 289 n.2, 758 P.2d 394, 395 n.2 (1988) ("period of cohabitation before the marriage is relevant to determining the length of the marriage.").

For all of these reasons, the Court should determine that it is objectively unreasonable to view a long-term, marriage-like relationship and economic partnership as short-term for the purposes of an unequal property division simply because the parties' years of legal marriage – viewed in isolation and apart from the reality of their lives – was relatively short, especially where the length of the marriage was due to (now unconstitutional) constraints that then existed under New Hampshire law.

As this should be true for any relationship, it is particularly objectively unreasonable to characterize as short-term what was, in fact, a 20+ year relationship of a same-sex couple where it is undisputed that they could not have legally married for the first 18 years of their committed relationship and that they obtained a legal status for their relationship – a civil union – when such status became available in New Hampshire in 2008.

In sum, the trial court committed an unsustainable exercise of discretion that requires reversal of the Final Decree.

C. The Trial Court's Application Of RSA 458:16-a Should Be Reversed To Avoid An Unconstitutional Interpretation Of The Statute.

As noted above, Coralee and Deborah were in a committed relationship for 18 years before the State of New Hampshire offered them the ability to be legally married. RSA 457:1-a (effective January 1, 2010). Prior to January 1, 2010, same-sex couples were prohibited from marrying in New Hampshire. See RSA 457:1 and 457:2 (1992).

The trial court's application of RSA 458:16-a on the facts of this case to treat the parties here as if they had only a short-term relationship – and, thus, justifying a hugely unequal division of property upon divorce – presents serious constitutional questions. In order to avoid these serious constitutional questions[6], this Court should interpret RSA 458:16-a to recognize the long-term relationships and economic partnerships of same-sex couples and not limit such couples by the very recent availability of marriage licenses in order to avoid an unconstitutional application of RSA 458:16-a.[7]

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[6] As this Court recently noted, constitutional avoidance is a "well-established doctrine [that] requires us, whenever reasonably possible, to construe a statute so as to avoid bringing it into conflict with the constitution." State v. Paul, 167 N.H. 39, 44-45 (2014); see also, e.g., Martin v. Gardner Mach. Works, 120 N.H. 433, 435 (1980) (same; to construe a statute of limitations provision to extinguish an existing cause of action "would raise serious questions concerning the constitutionality of [the provision]," citing State v. Smagula, 117 N.H. 663, 666 (1977)).

[7] This is not an isolated problem confined necessarily to this particular couple. Although there have been serious issues of undercounting of same-sex households in the United States and in individual states, the U.S. Census Bureau data shows a "preferred estimate" of 358,390 unmarried, same-sex partner households in the U.S. in 2000 and 646,464 such households in 2010. U.S. Census Bureau, *Households and Families: 2010, 2010 Census Briefs*, (April 2012), p.5, Table 2, https://census.gov/prod/cen2010/briefs/c2010br-14.pdf (last visited Nov. 3, 2015). The American Community Survey shows approximately 5,467 such households in New Hampshire in 2005 and approximately 3,092 such households in 2010. U.S. Census Bureau, *American FactFinder, Doc. S1101, Households and Families, 2014 American Community Survey 1-Year Estimates* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_S1101&prodType=table (with versions available for N.H. for each year from 2005 through

First, the trial court's ruling denies a state-created benefit on the same-sex nature of the parties' relationship. It has now been settled by the U.S. Supreme Court that state bars on access to marriage are unconstitutional. Obergefell v. Hodges, __ U.S. __, 135 S. Ct. 2584, 2015 U.S. LEXIS 4250 (2015). That Court found the marriage laws to be "unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right." 135 S. Ct. at 2604, 2015 U.S. LEXIS, at *42. Moreover, that civil ruling has retroactive effect, see, e.g., Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995), such that any unconstitutional state bar is "inoperative as if it had never been passed." Chicago, I. & L.R. Co. v. Hackett, 228 U.S. 559, 566 (1913).

In short, same-sex couples in this State, like Deborah and Coralee, were – but should not have been – barred from marrying until 2010 when the Legislature affirmed the right of same-sex couples to marry.

Here, relegating Coralee and Deborah's 20+ year committed relationship to a four-year "short-term" relationship for purposes of RSA 458:16-a effectively wipes out 17 years of their relationship for reasons wholly outside their power to control, and creates an Equal Protection problem.

> The equal protection provisions of the State Constitution are designed to ensure that State law treats groups of similarly situated citizens in the same manner. "The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently."

McGraw v. Exeter Region Coop. Sch. Dist., 145 N.H. 709, 711 (2001) quoting LeClair v. LeClair, 137 N.H. 213, 222 (1993); Gonya v. Comm'r, N.H. Ins. Dep't, 153 N.H. 521, 532

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2014) (figures calculated by multiplying the number of total households in N.H. by the percentage of same-sex unmarried partner households) (Guided Search on "Housing," "Occupancy Characteristic," "Household Type," "New Hampshire," and "Households and Families") (last visited Nov. 3, 2015).

(2006) ("two basic prerequisites of the equal protection inquiry are the existence of a classification and the differing treatment of persons so classified.").

Married same-sex and different-sex couples petitioning for divorce – the proper comparators – are not treated in the same manner under RSA 458:16-a where the length of their legal marital status can be used to avoid the presumptive equal distribution of the marital estate.

Even before Obergefell, a number of courts found Equal Protection violations where spousal limitations were used to control the availability of a State-created benefit but where same-sex couples were prohibited from marrying. See, e.g., Alaska Civ. Liberties Union v. State, 122 P.3d 781 (Alaska 2005) (limiting public employee benefit programs to spouses violates the state equal protection rights of unmarried employees' same-sex domestic partners where they were prohibited from marrying and thus received substantially less compensation); Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 444-448 (Ore. App. 1998) (same; since same-sex couples may not marry, "the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility."); Collins v. Brewer, 727 F. Supp. 2d 797 (D. Ariz. 2010), aff'd sub nom Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011) (federal Equal Protection claim; enjoining enforcement of a statute that eliminated family insurance coverage for same-sex domestic partners; statute creates different burdens based on sexual orientation where same-sex couples could not marry and so requires Equal Protection scrutiny); Bassett v. Snyder, 951 F. Supp. 2d 939 (E.D. Mich. 2013) (federal Equal Protection claim; enjoining state statute that prohibited public employers from providing medical benefits to couples unless married; a sexual orientation classification was created where same-sex couples were barred from marrying); State v. Schmidt, 323 P.3d 647 (Alaska 2014) (residential property tax exemption violated the Equal Protection rights of same-sex couples

where same-sex couples could not get benefits to the same extent as different-sex couples because marriage was not available to them); cf. Bedford v. N.H. Cmty. Tech. College Sys., Nos. 04-E-229, 04-E-230, 2006 N.H. Super. LEXIS 6, 2006 N.H. Super. LEXIS 6, 2006 WL 1217283 (N.H. Super. Ct. May 3, 2006) (unpublished opinion) (denial of health and dental insurance to domestic partners of employees of regional community technical colleges constituted sexual orientation employment discrimination in violation of RSA 354-A:7 where same-sex couples cannot marry).

Although the present case does not involve a current prohibition of marriage for same-sex couples, it involves the application of RSA 458:16-a to perpetuate the effects of the past exclusion of same-sex couples from marriage and thus involves, in substance, the same unconstitutional imposition of a spousal limitation as in the previously cited cases. Prohibited from marrying until 2010, married same-sex couples are treated differently from other couples who could always choose to marry. This is particularly true here where this couple had a "marriage" ceremony and exchanged rings.[8]

In addition, as in the previously cited cases, there can be no rational basis to justify treating same-sex couples differently – here, using the past prohibition on marriage to alter the proper analysis for the division of property in a current divorce.[9] If civil marriage had been

[8] The trial court's ruling also seemingly accords different treatment to divorcing same-sex and different-sex couples. Assuming, as this Court's cases and the statutes suggest, a divorcing couple's pre-marital economic and interdependent partnership are relevant in current divorce practice to the division of "all" property, then the trial court's ruling here impermissibly disregarded these parties' whole relationship by focusing on the "short-term" duration of the marriage.

[9] As in the spousal benefits cases above, it does not matter what level of scrutiny applies because a spousal limitation cannot survive even the most minimal level of scrutiny. However, it is worth noting that the trial court's application of RSA 458:16-a results in Coralee, as a litigant, coming before the court subject to dissimilar conditions resulting in discrimination subject to

available to Coralee and Deborah in 1993, then on the record available to this Court, there would have been a presumptive, equal division of marital property. Moreover, as noted in Section I.B.2., above, New Hampshire public policy already points squarely against any per se rule barring acknowledgement of a premarital emotional and economic partnership that later folds itself into a marriage.

Beyond this analysis and in light of Obergefell, the constitutional problem presented by the lower court's decision becomes even clearer. Put simply, because of Obergefell, the New Hampshire bar on marriage for same-sex couples was, and is, unconstitutional; and, therefore, effectively relying on that bar today to treat Coralee and Deborah's relationship as short-term violates Obergefell as well. Coralee and Deborah had as committed a relationship as they could have had, and they had no ability to marry until 2010 because of a prohibition that we now know was unconstitutional at the time.

Put another way, duration of marriage can only matter legally to create consequences vis-à-vis a couple's interaction with a required state-created process – such as the division of marital property in divorce – where the couple had an actual legal choice to marry or not. Where that choice has unconstitutionally been denied, the state process cannot rely on a duration-of-marriage requirement without violating Obergefell.

For these additional reasons, in order to avoid a constitutional violation, this Court should hold that the trial court erred in applying RSA 458:16-a such that the parties were found to have a short-term marriage justifying, essentially by definition, an unequal distribution of the marital property.

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middle tier scrutiny. Trovato v. Deveau, 143 N.H. 523 (1999); Alonzi v. Northeast Generation Servs. Co., 156 N.H. 656 (2008); Cmty. Res. for Justice v. City of Manchester, 154 N.H. 748, 760-763 (2007) (middle tier requires party seeking to uphold a law to show a substantial relation to an important governmental objective).

## CONCLUSION

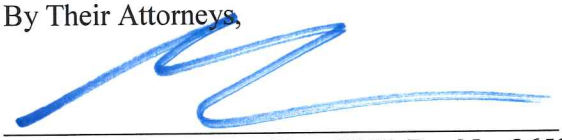
For all of the foregoing reasons, the amici support the position of the respondent/appellant and respectfully request that the Final Decree of the trial court be reversed.

Respectfully submitted,

GAY & LESBIAN ADVOCATES & DEFENDERS

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

By Their Attorneys,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Brief of *Amici Curiae* Gay & Lesbian Advocates & Defenders and the American Civil Liberties Union of New Hampshire was served this 10th day of November, 2015 by first class mail, postage prepaid, and by electronic mail on (i) counsel for Coralee Beal (Carmen J. Gagnon, Esq., Paul R. Kfoury, Esq., Andrea Labonte, Esq., and Courtney Hart, Esq.), and (ii) counsel for Deborah Munson (Kysa M. Crusco, Esq.)

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