NEW HAMPSHIRE SUPREME COURT

No. 2020-0211

IN THE MATTER OF
MOLLY BLAISDELL
Petitioner / Appellee,
and
ROBERT BLAISDELL
Respondent / Appellant

ON INTERLOCUTORY APPEAL FROM RULING OF THE MANCHESTER FAMILY COURT

BRIEF OF
RESPONDENT – APPELLANT
ROBERT BLAISDELL

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15 minutes Oral Argument
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QUESTIONS PRESENTED

1. In 2003, when people of the same gender were not allowed to marry, this court construed the undefined term "adultery" in RSA 458:7, II to be limited to sexual intercourse involving "insertion of the penis into the vagina." *In re Blanchflower*, 150 N.H. 226, 227 (2003). But effective January 1, 2010, the legislature expanded the definition of marriage to include same-sex couples, recognized gay marriages from other jurisdictions, and terminated the practice of granting civil unions to gay couples. Did these enactments impliedly abrogate or derogate the *Blanchflower* decision, such that this court should construe the term "adultery" to include same-sex extramarital sexual affairs?
2. Should the court overrule the *Blanchflower* decision, because in the wake of the 2009 enactment and recognition of gay marriage, changes in society's views towards sexuality and marriage, and change in the very definition of "sexual intercourse" considerations of *stare decisis* should not deter this court from overruling the decision?
3. If an "adultery" statute like the one in RSA 458:7, II is construed to be limited to sexual intercourse between a man and a woman, despite the legislature's adoption of

gay marriage and despite the national mandate from the United States Supreme Court that States recognize gay marriage, does that construction violate substantive due process or equal protection under the 5th and 14th Amendments to the United States Constitution?

4. In the event that the court answers any of the above questions in the affirmative, must its decision apply to this case and these parties?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This Rule 8 interlocutory appeal arises out of divorce proceedings. Respondent /Appellant Robert Blaisdell (Robert) filed a cross-petition for divorce in the 9th Circuit Family Division Manchester Court that alleged adultery as a fault-based ground. Specifically, he alleged that Molly Blaisdell committed adultery with a female partner. The person alleged to be the female partner is not participating in this appeal. This brief does not include any further statement of the facts below, because the issue on appeal raises a pure question of law.

That question arises out of a motion to dismiss filed by petitioner / Appellee Molly Blaisdell (Molly), seeking to dismiss the petition for divorce based on adultery. The motion relied on *In re Blanchflower*, 150 N.H. 226 (2003). Add. 4.[1] In *Blanchflower*, a decision issued years before people of the same gender were allowed to marry, this court construed the undefined term “adultery” in RSA 458:7, II to be limited to sexual intercourse involving “insertion of the penis into the vagina.” 150 N.H. at 227. Thus, the alleged affair of Mrs. Blanchflower with another woman was held to not constitute adultery within the meaning of RSA 458:7, II. *Id.* at 228.

[1] “Add. #” refers to the Addendum at the end of this brief.

Robert objected to Molly's motion to dismiss. Add. 6. He argued that since the 2003 *Blanchflower* decision, the legislature had enacted civil unions in 2008, then same-sex marriage effective January 1, 2010, and then converted all previous same-sex civil unions to marriages effective January 1, 2011. Add. 6-7. He further pointed out that in 2015, the United States Supreme Court held that marriage laws discriminating against gay couples violated the federal constitution. Add. 7. Robert argued that in view of these developments, he must be allowed to argue that his wife's alleged conduct constituted adultery. Add. 8.

On November 18, 2019, the Family Division (Hon. David J. Burns) granted Molly's motion to dismiss. Add. 3, 5. The order in its entirety reads: "Based on the holding in The Matter of David G. Blanchflower and Sian E. Blanchflower this Motion is granted." Add. 5.

On February 20, 2020, on Robert's motion, the family court ordered the interlocutory transfer of the following question:

> Whether, as a matter of law and in light of the United States Supreme Court holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *In re Blanchflower*, 150 N.H. 226 (2003) is a violation of the United States Constitution's Equal Protection Clause and the Constitution of the State of New Hampshire.

App. 10, 16.

On May 12, 2020, this Court accepted the appeal, ordering that it would be scheduled for oral argument before the full court. The court, on Robert's motion, extended his briefing deadline to July 13, 2020.

On July 2, 2020, Molly filed a motion for summary disposition. On July 6, 2020, Robert filed a motion to strike appellee's motion for summary disposition, or in the alternative, to deny the motion. As of the filing of this brief, this court has not ruled on the motion for summary disposition.

On July 6, 2020, Robert filed a motion to expand the scope or description of the issue on appeal. Specifically, whether in the wake of New Hampshire's 2010 legislative adoption of same-sex marriage, RSA 457:1-a and 457:46, the statutory definition of adultery must be construed to include extramarital sexual relationships between same-sex partners. The motion also asked the court to expand the scope of the issue in terms of how the constitutional issue is framed.

SUMMARY OF ARGUMENT

This brief begins by discussing, in sections (B) and (C), the 2003 *Blanchflower* decision and the 2009 legislative expansion of the marriage laws to include and recognize same-sex marriage. In section (D), this brief argues that the legislature, when it enacted the same-sex marriage laws in 2009, impliedly abrogated or derogated this court's ruling in *Blanchflower* that limited the reach of the adultery statute to heterosexual sexual intercourse. Alternatively, the brief in section (E) contends that this court should overrule *Blanchflower*, because it relied on antiquated and outdated definitions of adultery, because it became a mere remnant of obsolete doctrine when the legislature enacted gay marriage, and to avoid deciding the constitutional challenge.

In section (F), this brief explains why a definition of adultery limited to heterosexual sexual intercourse, by discriminating against gay couples and failing to provide the same protections of marriage afforded to heterosexual couples, violates substantive due process and/or equal protection under the United States Constitution. And finally in section (G), this brief argues that this court's ruling must apply to this case and these parties.

ARGUMENT

A. Introduction

Years before the state legislature recognized the right of same-sex couples to enjoy the full rights, benefits and responsibilities of marriage, and indeed, years before the state legislature enacted a short-lived compromise allowing gay couples to enter into a civil union, this court held in 2003 that a same-sex extramarital sexual affair did not constitute adultery. This court need not assess the wisdom of that decision in its own time, in order to reach the conclusion that time passed it by when the legislature enacted laws establish the right of gay couples to marry and recognizing foreign gay marriages. These laws abrogated or derogated a judicial construction of the adultery law that cannot be reconciled with the evident legislative purpose in recognizing same-sex marriage and that would all but remove the protection afforded by the adultery statute for certain couples.

B. The *Blanchflower* Decision.

In Blanchflower, the husband/petitioner filed for divorce, eventually amending his petition to cite his wife's extramarital affair with a woman (co-respondent). *In re Branchflower*, 150 N.H. 226-27 (2003). Co-respondent argued that a homosexual relationship did not constituted adultery

under RSA 458:7, II and appealed the trial court's decision to deny her motion to dismiss the amended petition. *Id.*

RSA 458:7, II does not define, and has never defined, the term, "adultery." The *Blanchflower* court, in a 3-2 ruling, held that the definition of adultery under RSA 458:7, II is limited to sexual intercourse, and it further defined "sexual intercourse" to require penetration of the vagina by the penis. *Id.* at 227. The majority reached this conclusion through a series of steps that relied on a 1961 dictionary definition of adultery, and historical definitions of adultery. *Id.* The path that this court took to arrive at that conclusion, and the contrasting view of the two dissenting justices, are discussed in greater detail in section (E) below.

At the time of the *Blanchflower* decision, a relationship between two people, regardless of duration, closeness or intimacy, could not be recognized as a marriage in New Hampshire unless between persons of the opposite gender. This was true not only in New Hampshire, but in most of the country. As of 2003, and continuing until 2009, no state legislature enacted same-sex marriage. *Obergefell v. Hudges*, 135 S. Ct. 2584, 2614-15 (2015) (Roberts, C.J., dissenting). Only one state court had mandated same-sex marriage under its state constitution, and that was the same year as the *Blanchflower* decision. *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003).

C. Enactment of the Same-Sex Marriage Law.

In 2009, six years after the *Blanchflower* decision, the New Hampshire legislature enacted a historic alteration of the definition of marriage, by expanding the concept of marriage to include same-sex marriages. RSA 457:1-a. The new definition of marriage became: "Marriage is the legally recognized union of 2 people. Any person who otherwise meets the eligibility requirements of this chapter may marry any other eligible person regardless of gender." *Id.*

The new amendments to our marriage laws officially recognized same-sex marriages from other jurisdictions, and recognized civil unions from other jurisdictions as marriages. RSA 457:3. Previously, the legislature had enacted a law that allowed same-sex couples to enter into a civil union. RSA 457-A:1 (repealed 2009). Thus, from 2008 until January 1, 2010, same sex couples were provided their own legal status, separate from heterosexual couples. Even if a same-sex couple had lawfully married in another jurisdiction, our law recognized that relationship only as a civil union. RSA 457-A:8 (repealed 2009).

But the new marriage laws enacted in 2009 provided: "[N]o new civil unions shall be established on or after January 1, 2010." RSA 457:46, I. Instead, the statute allowed pre-existing civil unions to be recorded as a marriage "without any additional requirements of payment of licensing fees or

solemnization…." *Id.* And the statute provided that pre-existing civil unions would automatically convert to marriages by operation of law on January 1, 2011. RSA 457:46, II.

With the exception of that last provision, the legislature set January 1, 2010 as the effective date of all of these enactments. The new laws did not make any express changes to the divorce laws in RSA 458 et seq. It appears that this Court has not yet construed any of these laws granting the right of gay couples to marry, recognizing foreign same-sex marriages, and allowing them to convert a previous civil union to a marriage.

D. The Same-Sex Marriage Laws Enacted in 2010 Impliedly Abrogated Marital Laws that Either Textually Discriminate Against Gay Couples, or were Previously Interpreted to be Limited to Straight Couples.

As stated, the legislature made no changes to any of the divorce laws when it enacted gay marriage. Thus, the fault-based ground of "adultery" remained an undefined term, just as it was undefined when construed by the *Blanchflower* Court in 2003. But basic principles of statutory construction compel the conclusion that when it enacted the same-sex marriage laws, the legislature impliedly abrogated or derogated prior interpretations of the laws governing marriage to the extent that those prior interpretations are incompatible with full legislative recognition of same-sex marriage.

Here, the issue is not whether the enactment of the gay marriage laws abrogated or derogated a statute, but merely whether it requires judicial re-examination of the meaning of an undefined term in a statute. "Adultery" remained a fault-based ground for divorce following the enactment of the same-sex marriage laws. But could the definition of adultery remain one that was limited to heterosexual sex, even after the legislature's full adoption and recognition of marriage equality?

Because the legislature fundamentally altered the definition of marriage after the *Blanchflower* decision, this Court can decide this case as a matter of statutory interpretation without having to decide the constitutional issue transferred by the lower court. Since January 1, 2010, it is no longer reasonable to interpret other provisions of our marriage laws to apply only to heterosexual conduct and relationships. And specifically, ever since 2010, it is no longer reasonable to define the term "adultery" in RSA 458:7, II to exclude sexual intercourse with a same-sex partner.

This would be consistent with three fundamental principles of statutory interpretation. First, "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to [legislative] intent.'" *Polonsky v. Town of*

Bedford, 171 N.H. 89, 96 (2018) (quoting *DeBartolo Corp. v. Fla. Gulf Coast Trade Council*, 485 U.S. 568, 575 (1988)). Indeed, "even when a dispositive statutory issue is not raised by the parties, the court may consider it as the way to avoid a needless constitutional decision." *State v. Hodgkiss*, 132 N.H. 376, 379 (1989). As discussed in section (G) below, a judicial construction of the adultery statute that limited its reach to heterosexual conduct would be unconstitutional. Accordingly, this court should rule that the legislature, when it enacted the gay marriage laws, impliedly abrogated or derogated the *Blanchflower* construction of the adultery statute to the extent it excluded same-sex intercourse.

Mr. Blaisdell is not arguing that the *Blanchflower* decision should be cast aside in all respects. The majority opinion's determination that adultery can only be committed by sexual intercourse, 150 N.H. at 229, rather than by say, kissing and hugging, can remain good law without undermining the legislative purposes in enacting gay marriage. It is only the further holding that same-sex couples cannot have "sexual intercourse," that cannot stand in the wake of the adoption of gay marriage. As further explained in section E) below, this view of the *Blanchflower* majority was wrong as a matter of regular English usage, even at the time, and certainly by January 1, 2010.

Second, "[w]hen interpreting two statutes that deal with a similar subject matter, [the court] construe[s] them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." *Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012). The statutes involved in this appeal deal with a similar subject matter: RSA 457:1-a *et seq* set forth the requirements necessary for the State to approve or recognize a marriage, and RSA 458:7 provides the list of acts that, if committed by a spouse, provide legal grounds for the State to terminate the marriage.

RSA 457:1-a allows a man to marry another man, and allows a woman to marry another woman. For these same-sex couples, excluding sexual intercourse with a same-sex partner from the definition of adultery, based on a court decision construing an ambiguous statute that predates the enactment of same-sex marriage, would neither lead to reasonable results, nor effectuate the legislative purpose of the statutes. That purpose, which is evident on its face, is to put gay couples on the same footing as straight couples.

In *Prof. Fire Fighters of Wolfeboro*, the court explained that "when a conflict exists between two statutes… the later statute will control, particularly when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion." 164 N.H. at 22. Here,

the later and more specific statute is the same-sex marriage law, whereas the earlier enactment, the adultery statute, treated the subject in a general fashion, with no statutory definition. The later and more specific statute should inform the meaning of adultery for marriages after January 1, 2010, not the earlier and more general statute that had been construed by the court in the context of a very different set of marriage laws.

Indeed, the need to construe the various laws governing the rights and responsibilities of married couples in harmony with each other is well illustrated by examination of the alternative. What happens if one construes other marriage-related statutes in isolation to the overall scheme? This is most dramatically seen with the antenuptial agreements statute, which by its literal language makes antenuptial agreements available only to heterosexual couples. RSA 460:2-a ("A *man and woman* in contemplation of marriage may enter into a written interspousal contract….")(Emphasis added); *In re Estate of Hollett*, 150 N.H. 39, 42 (2003) (RSA 460:2-a (1997) permits *a man and a woman* to enter into a written contract 'in contemplation of marriage.'"). But would any lawyer seriously argue, based on the plain language of RSA 460:2-a and based on the *Hollett* decision, that gay couples cannot enter into antenuptial agreements?

As another example: Adultery is just one of the several grounds for a fault-based divorce set forth in RSA 458:7. Another ground found within the same statute provides: "When either party has joined any religious sect or society which professes to believe the relation of *husband and wife* unlawful, and has refused to cohabit with the other for 6 months together." RSA 458:7, VIII (Emphasis added). The literal language of the law would not apply to a party that joined a religious sect or society that professed to believe the relation of *husband and husband* unlawful. There are undoubtedly many more groups that hold that belief (gay relationships are immoral and should not receive the protection of the law), as opposed to groups that believe unlawful the relation of husband and wife. *See Snyder v. Phelps*, 562 U.S. 443 (2011) (First Amendment protects the right of members of the Westboro Baptist Church to picket military funerals with signs that disparage and condemn gay people and gay rights).

The legislature did not amend RSA 458:7, VIII to expressly include groups that condemn same-sex marriages when it enacted the gay marriage laws, just as it did not amend the antenuptial agreements statute to expressly make them available to same sex couples. But it would not be reasonable to infer from legislative oversight, that the legislative purpose was to limit these provisions to their literal

terms. And these are statutes written by the legislative body. It would be even more unreasonable to infer from legislative silence that the legislature intended to endorse and maintain a preexisting judicial gloss on the textually gender-neutral adultery statute.

Third, this Court does "not construe statutes in isolation; instead, [the court] attempt[s] to do so in harmony with the overall statutory scheme." *Estate of Gordon-Couture v. Brown*, 152 N.H. 265, 272 (2005). While the *Blanchflower* court did not expressly apply this principle, it did produce a result at least somewhat in harmony with the overall statutory scheme. A marriage required both a man and a woman, and an adulterous act required both a man and a woman.

But the legislature wrote a new song when it expanded marriage to include same-sex couples. Since January 1, 2010, gay couples have entered into marriages in this State with the reasonable expectation that their marriage, including the promise of marital fidelity, would receive the same legal protection as heterosexual couples. A construction of the adultery statute that did not include sexual intercourse with a person of the same sex would be discordant with the overall statutory scheme, not harmonious. Indeed, such an interpretation would "'demea[n] the lives of homosexual persons,'" and destabilize their marriages, by undermining

the deterrent value of the adultery statute and removing the protection the adultery law provides against an unfaithful spouse. *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S. Ct. 2472 (2003) (quoted in *Obergefell*, 135 S. Ct. at 2596).

E. To correctly Interpret the Marriage Laws, and to Avoid the Constitutional Issues, this Court Must Overrule *Blanchflower*.

In the alternative, rather than relying on the doctrine of implied abrogation or derogation, this court should overrule *Blanchflower*. In view of the enactment of gay marriage, and other changes in the law and in our society that have fully integrated gay people into American life, and in view of changes in society's definition of the term "adultery" that had taken hold even before *Blanchflower*, the *Blanchflower* construction of the adultery statute can no longer be justified as representing anything more than a remnant of abandoned doctrine.

Of course, this court does not lightly overrule precedent. "The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." *Union Leader Corp. v. Town of Salem*, ___ N.H. ___, No. 2019-0206, Slip Op. at 9 (May 29, 2020)(quotations omitted).

On the other hand, “the doctrine of stare decisis is not one to be either rigidly applied or blindly followed.” *Id.* (quotations omitted). Thus, this court applies several factors, no single factor being dispositive:(1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. *Id.*

Here, the third and fourth factors strongly support overruling *Blanchflower*, while the first and second factors do not weigh against overruling it. With respect to the third factor, in view of the legislature’s enactment and recognition of gay marriage, “the law has developed in such a manner as to undercut the prior rule.” *State v. Balch*, 167 N.H. 329, 335 (2015). “Such development could arise upon the promulgation of new laws… that render past decisions obsolete….” *Id.* The fact that the United States Supreme Court held in *Obergefell* that the States cannot define marriage to discriminate against gay couples, provides further evidence that the law has developed in a manner that undercuts the rule.

With regard to the fourth factor, whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification: The world has fundamentally changed, since the time of the historical antecedents that the *Blanchflower* court relied on in excluding intimate same-sex activity from the scope of the adultery statute. In fact, the world had already changed, as of the time of the *Blanchflower* decision, in a manner obscured by the majority's reliance on an outdated edition of a dictionary.

The majority opinion's analysis begins by acknowledging that the legislature did not define the term adultery, and that accordingly, the court would ascribe the "plain and ordinary meaning[]" of the word. 150 N.H. at 227. The court then relied on the 1961 edition of the Webster's Third New International Dictionary, which defined "adultery" as "voluntary sexual intercourse…", defined "sexual intercourse" as "sexual connection esp. between humans: COITUS, COPULATION," and defined "coitus" as "'insertion of the penis in the vagina.'" *Id.* (citing Webster's Third New International Dictionary at 30, 2082, and 441).

But the majority, and the dissenting opinion, overlooked that the court relied on an outdated edition of the dictionary. The 1961 unabridged edition of the Webster's Third New International Dictionary is updated periodically. A copyright

notice in the opening pages identifies the year of publication. The edition that states "COPYRIGHT 2002" in the opening pages, the year before the *Blanchflower* decision, includes the following definition of "sexual intercourse" on page 2082, the same page cited by the *Blanchflower* majority:

> **Sexual intercourse** n **1** : heterosexual intercourse involving penetration of the vagina by the penis : COITUS **2** : *intercourse involving genital contact between individuals other than penetration of the vagina by the penis.*

Webster's Third New International Dictionary 2082 (Unabridged ed. 1961)(Emphasis added); *see Blanchflower*, 150 N.H. at 227 (indicating that the definition of "sexual intercourse" appears on page 2082 of the dictionary).[2]

Thus, the *Blanchflower* court began its analysis with what it presented as a "plain and ordinary meaning" of the words "sexual intercourse," which was already no longer the plain and ordinary meaning of the words as of the date of publication. As the dissenting justices put it, "[t]o strictly adhere… [to a 1961 dictionary definition], is to avert one's

[2] It is not clear if the majority opinion in *Blanchflower* relied on the actual book published in 1961, or a later edition, as it referred to the book simply by its original first edition publication date. It appears that this court has cited to the 2002 edition in hundreds of decisions. *E.g., Impact Food Sales, Inc. v. Evans*, 160 N.H. 386, 393 (2010)(citing to the same edition relied on in this brief, as "Webster's Third New International Dictionary … (unabridged ed. 2002)"); *Motion Motors, Inc., v. Berwick*, 150 N.H. 771, 777 (2004)(same). There are no citations to the 2002 edition earlier than the 2004 *Motion Motors* decision, so perhaps the Court had not yet purchased the book as of the time of the *Blanchflower* decision.

eyes from the sexual realities of our world." *Id.* at 230 (Brock, C.J., joined by Broderick, J., dissenting). The dissent further pointed out that courts in other jurisdictions had construed adultery statutes to reach same-sex extramarital sexual relationships. *Id.* at 231 (citing decisions from Florida, Georgia, New Jersey, and South Carolina). Thus, the "facts ha[d] so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," not just in the years since the decision, but before the decision was even published.

The second factor, whether reliance interests would produce hardship, does not point towards maintaining the *Blanchflower* rule. "Reliance interests are most often implicated when a rule operates within the commercial law context, where advance planning of great precision is most obviously a necessity." *Union Leader Corp. v. Town of Salem*, ___ N.H. __ at 11 (quotations omitted). But in the world of love and sexual attraction, as has been said by a variety of commentators from Emily Dickinson to Bob Dylan, the heart wants what the heart wants. It is difficult to imagine a heterosexual person, in good faith, claiming that he or she intentionally had an extramarital sexual affair with a same-sex partner for the purpose of insulating themselves against a fault-based divorce. In other words, people rely on their libido

and romantic sensibilities, not judicial decisions, when deciding who to be intimate with.

To the extent that a person might claim she entered into a same-sex extramarital affair to insulate herself against a fault-based divorce in reliance on the *Blanchflower* decision, that would not be the kind of *reasonable* reliance interest that courts look to protect. *State v. Duran,* 158 N.H. 146, 157 (2008) (court "inquire[s] into the cost of a rule's repudiation as it would fall on those who have relied *reasonably* on the rule's continued application.")(Emphasis added; quotations omitted). For public policy reasons, strategic selection of paramour by gender to avoid legal consequences for an extra-marital sexual affair is not the sort of reliance interest that courts should be in the business of protecting.

As far as the first stare decisis factor goes, the *Blanchflower* court certainly provided a workable rule, but its continued enforcement would be intolerable because it discriminates between heterosexual relationships and other sexual relationships, destabilizes their marriages by immunizing them from claims of adultery, and ultimately undermines the legislative intent underlying the gay marriage laws.

For these reasons, in addition to the reasons discussed in Section (D) above, the *Blanchflower* construction of the adultery statute is little more than an artifact of a different

era in law, and a different era in American life. This court should overrule *Blanchflower* to the extent that it defines adultery as not only requiring sexual intercourse, but also requiring heterosexual intercourse.

F. If this Court Construes RSA 458:7, II to Continue to Limit the Concept of Adultery to Intercourse Involving a Man and a Woman, and/or a Penis and a Vagina, it Must Rule that its Construction of the Statute Violates Substantive Due Process and Equal Protection Under the *Obergefel* Decision.

In the event that this court disagrees and determines that the *Blanchflower* construction of the adultery statute was not derogated by the enactment of the gay marriage laws, and should not be overruled as a matter of statutory interpretation, this court should hold its own construction of the statute unconstitutional as violative of substantive due process and equal protection under the federal constitution. U.S. Const., 5th and 14th Amendments; *Obergefell*, 135 S. Ct. 2584; *Lawrence v. Texas,* 539 U.S. 558.

Just as the New Hampshire legislature did not embrace gay marriage until relatively recently, courts did not begin protecting the rights of gay persons until relatively recently. Thus, in 1986, the Court upheld the constitutionality of a Georgia law that criminalized homosexual sex. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2481 (1986). But ten years later, as societal attitudes towards gay people continued

to change, the court held that the equal protection rights of gay people were violated by an amendment to Colorado's constitution that precluded any protection of persons against discrimination based on sexual orientation. *Romer v. Evans*, 517 U.S. 620, 624, 636, 116 S. Ct. 1620 (1996). And then, in 2003, the court overruled *Bowers*, holding that laws making same-sex intimacy a crime violate the right to substantive due process under the 5th and 14th Amendments. *Lawrence*, 539 U.S. at 575.

As States began to recognize gay marriage, their laws came into conflict with Section 3 of the federal Defense of Marriage Act (DOMA), which denied federal recognition of same-sex marriages. In 2013, the United States Supreme Court struck down Section 3, holding it to violate the due process clause of the Fifth Amendment. *United States v. Windsor*, 570 U.S. 744, 775 (2013). And then two years later, the court held that state laws denying marriage to same sex couples violate the federal constitution. *Obergefell*, 135 S. Ct. 2584.

The *Obergefell* court partly grounded its decision in the language of individual rights. Marriage "is 'one of the vital personal rights essential to the orderly pursuit of happiness by free men.'" *Id.* at 2598 (quoting *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817 (1967)). But importantly to this appeal,

the *Obergefell* Court, in explaining and justifying its decision, went far beyond the language of rights.

Thus, the court also based its decision on the constitution's protection of individual dignity and autonomy. "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Id.* at 2599. The *Obergefell* court further based its decision on the protection that marriage itself affords the individual. "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other." *Id.* at 2600.

The *Obergefell* court went on to identify still another basis to protect the right to marry: The institution protects "children and families" by "giving recognition and legal structure to their parents' relationship" and "afford[ing] the permanency and stability important to children's best interests…." *Id.* And finally, the *Obergefell* court relied on cases and traditions that "make clear that marriage is a keystone of our social order." *Id.* at 2601. "[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union." *Id.* at 2601. Thus, the court reasoned, "laws excluding same-sex couples from the

marriage right impose stigma and injury of the kind prohibited by our basic charter." *Id.* at 2602.

The court's focus, not only on a *right* to marry the adult of one's choice, but on the *responsibilities* of marriage and the *institution* of marriage itself, make clear that an adultery statute that effectively limits its reach to heterosexual individuals and couples would violate the substantive due process and equal protection rights of parties to same-sex marriages. For gay couples, a heterosexual-only adultery law would undermine a core benefit of marriage, the security and stability inherent in a legal structure that provides a legal entitlement to divorce against an unfaithful partner. "No union is more profound than marriage, for it embodies the highest ideals of love, *fidelity*, devotion, *sacrifice*, and family." *Id.* at 2608 (Emphasis added).

Thus, a heterosexual-only adultery law, like a ban on same-sex marriage, would inflict harm on children, as they would "suffer the stigma of knowing their families are somehow lesser." *Id.* at 2600. Their parents can be disloyal and unfaithful to one another without the same potential legal consequence that would befall a heterosexual couple.

The *Obergefell* court also undergirded its decision in the right to equal protection, providing further support for the argument that a heterosexual-only adultery law would violate that right. "Under the Constitution, same-sex couples seek in

marriage *the same legal treatment* as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right." *Id.* at 2602 (Emphasis added). But an adultery law restricted to heterosexual conduct would "disrespect and subordinate" gay people, *id.* at 2604, ultimately denying all the full rights, responsibilities, and legal benefits of marriage.

This court should reject any argument that the *Blanchflower* definition of adultery treats marriages between different-sex partners and marriages between same-sex partners the same, because in each instance, a spouse may not engage in intercourse with a member of the opposite sex. This sort of formalistic approach has repeatedly been rejected by courts in the context of marriage equality for decades.

Thus, in *Loving v. Virginia*, 388 U.S. 1, 8 (1967), the State of Virginia argued that laws forbidding and criminalizing interracial marriage do not constitute an invidious discrimination "because … miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage." The court rejected that argument, because it still constituted disparate treatment based on race. *Id.* Similarly, the court in *Lawrence v. Texas* declined to base its decision on equal protection principles, explaining: "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition [against

sodomy] would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." 539 U.S. at 575.

Accordingly, this court must hold that any judicial construction of the adultery statute that is limited to heterosexual sexual conduct violates the right to substantive due process and to equal protection under the *Obergefell* decision.

G. This Court's Decision, Whether Based on Statutory Interpretation, or Constitutional Analysis, Applies to the Parties in this Case.

Finally, whether this court grounds its decision in principles of statutory interpretation, or constitutional analysis, this court should clarify that its decision applies to the conduct of the parties in this divorce proceeding. This court should so clarify, because appellee Molly, in her motion for summary disposition, appears to argue that the court's decision should not apply to these parties or other spouses harmed by same-sex adultery in the decade since the gay marriage laws were enacted into law. *See* Appellee's Motion for Summary Disposition at 2 (stating that appellee would "not contest the prospective statutory or constitutional issue posed by Robert in his interlocutory appeal statement," but asking that the court "remand for a resumption of her divorce

proceeding with instructions that any change in the law does not apply retroactively.”).

First, judicial interpretations of a statute are retroactive. “Judicial construction of a statute becomes part of the legislation from the time of its enactment.” *In re Cole*, 156 N.H. 609, 611 (2007); see also *Hampton Nat'l Bank v. Desjardins,* 114 N.H. 68, 73 (1974)("Under common-law theory, court opinions and decisions operated retroactively, for in saying what the law is they were saying what the law always was."). Under these principles, a judicial determination that the statutory definition of adultery necessarily changed when the definition of marriage changed would be retroactive to January 1, 2010, the effective date of legislative enactments that extended marriage to include same-sex couples.

In the event that this court decides this case based on federal constitutional law, it would also apply to the conduct of the parties in this divorce proceeding. Even if the rule in *Obergefell* is non-retroactive, it was decided in 2015, so any application that it may have to adultery statutes that exclude same-sex extramarital sexual intercourse would govern the issues raised in this divorce. If *Obergefell* prohibits disparate treatment of heterosexual versus homosexual relationships in the laws governing gay marriage at all, it does so as of 2015,

not as of the date that a state court, years later, applies the *Obergefell* decision to a particular set of facts.

Based on appellee's apparent intent to argue non-retroactivity in her brief, a simple answer by this court of the question posed in the interlocutory appeal statement would not, standing alone, provide the lower court sufficient guidance going forward. Presumably, the lower court approved this issue for interlocutory transfer, not as a purely academic exercise, but to determine what rule will govern the litigation in this case. Accordingly, this court should rule not only that the concept of adultery includes sexual intercourse between a spouse and another person of the same gender, but also that its ruling applies to the subject matter of this litigation, the conduct of the parties during their marriage.

CONCLUSION

WHEREFORE, Mr. Blaisdell respectfully requests that this Court rule that the definition of adultery includes sexual intercourse between a spouse and another person of the same gender, and that its decision applies to this case and the conduct of these parties.

Undersigned counsel, who would present oral argument, requests 15 minutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2020, copies of this brief were distributed to all registrants subscribed to this e-filing matter, including Joshua Gordon, Esq., and Daniel Will, Esq., New Hampshire Attorney General's Office, and one copy to Robert Blaisdell.

Theodore Lothstein