No. 00-85898-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

MATTHEW R. LIMON
Defendant-Appellant

APPELLANT'S OPENING BRIEF ON REHEARING

Appeal from the District Court of Miami County, Kansas
Honorable Richard M. Smith
District Court Case No. 00 CR 36

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ORAL ARGUMENT: 30 Minutes

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NATURE OF THE CASE

After a bench trial, Matthew Limon was convicted of criminal sodomy under K.S.A. § 21-3505(a)(2), which results in mandatory registration as a sex offender, and was sentenced to 206 months in prison and 60 months of post-release supervision. Matthew appealed, lost, and petitioned the United States Supreme Court for *certiorari*. The Supreme Court granted *certiorari,* vacated the decision upholding Matthew's conviction and sentence and remanded for reconsideration in light of *Lawrence v. Texas,* 123 S. Ct. 2472 (2003).

STATEMENT OF ISSUES

1. The provision that limits the Romeo & Juliet law to teenagers who are "members of the same sex" violates the Equal Protection Clause by imposing harsher punishments and consequences of conviction based on sexual orientation.
2. The provision that limits the Romeo & Juliet law to teenagers who are "members of the same sex" violates the Equal Protection Clause by imposing harsher punishments and consequences of conviction based on sex.
3. Reversal of Matthew's conviction is the only remedy that will adequately protect Matthew's equal protection rights.

STATEMENT OF FACTS

Matthew and another male teenager, M.A.R., both attended the same residential school for developmentally disabled youth. R. Vol. VI at 4-5. One week after Matthew's eighteenth birthday, Matthew performed consensual oral sex on M.A.R. R. Vol. I at 41;

R. Vol. IV at 4-6. M.A.R. was nearly fifteen years old – three years, one month and a few days younger than Matthew. *Id*.

Matthew was charged with criminal sodomy under K.S.A. § 21-3505(a)(2), but argued that he should have been charged with the more specific offense of unlawful voluntary sexual relations under K.S.A. § 21-3522, Kansas's so-called "Romeo & Juliet law." R. Vol. I at 4, 16-17. Matthew moved to dismiss the charge, arguing that the provision in the Romeo & Juliet law that limits its application to teenagers who engage in prohibited conduct with "members of the opposite sex" violates the Equal Protection Clause of the Fourteenth Amendment by discriminating based on a defendant's sex and sexual orientation.[1] *Id.* at 17-22; R. Vol. III at 2-14. The district court rejected Matthew's arguments. R. Vol. I at 38. Matthew was tried and convicted on stipulated facts, *id.* at 48; R. Vol. IV at 3-6, and was sentenced to 206 months in prison and 60 months of postrelease supervision. R. Vol. VI at 38. He appealed. R. Vol. I at 58.

On February 1, 2002, this Court upheld Matthew's conviction and sentence, reasoning that, under *Bowers v. Hardwick,* 478 U.S. 186 (1986), "[t]he United States

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[1] Matthew also asserted, and continues to assert, that his conviction and sentence violate the Eighth Amendment by punishing him based on his status as a teenager with a same-sex sexual orientation, R. Vol. I at 50-52, R. Vol. VI at 28-29, and violate §§ 1 and 18 of the Kansas Constitution. R. Vol. I at 22-29, R. Vol. III at 2-14. Moreover, Matthew asserted and continues to assert that the judicial increase in his sentence from a maximum of 61 months to a minimum of 206 months based on a prior juvenile adjudication that was never pled in the Complaint, stipulated to, or proved to a jury violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *See* Original Supplemental Brief of Appellant (presenting argument under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). All of those claims were briefed before this Court in conjunction with the initial hearing, and Matthew hereby incorporates those briefs by reference.

Supreme Court does not recognize homosexual behavior to be in a protected class requiring strict scrutiny of any statutes restricting it. Therefore, there is no denial of equal protection when that behavior is criminalized or treated differently[.]" Memorandum Opinion, Kansas Court of Appeals (Feb. 11, 2002) ("Opinion") at 12.

The Kansas Supreme Court denied Matthew's petition for review, and Matthew filed a petition for *certiorari* with the United States Supreme Court. The Supreme Court delayed its decision on Matthew's petition while it resolved a similar challenge to Texas's "Homosexual Conduct" law. On June 26, 2003, the Supreme Court struck down the Texas law and overruled *Bowers v. Hardwick*. *See Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (attached hereto). The day after its decision in *Lawrence*, the Supreme Court granted Matthew's petition for *certiorari,* vacated the decision upholding his conviction and sentence under Kansas's criminal sodomy law, and remanded the case to this Court for reconsideration in light of *Lawrence*.

ARGUMENTS AND AUTHORITIES

When this Court considered Matthew's appeal last year, the case was complicated by the fact that the Supreme Court's due process and equal protection jurisprudence seemed to be in conflict. Now, the Supreme Court has resolved that conflict and has signaled decisively – by overruling *Bowers v. Hardwick,* 478 U.S. 186 (1986), by reaffirming *Romer v. Evans,* 517 U.S. 620 (1996), and by remanding this case for rehearing – that punishing Matthew more severely because he engaged in consensual sexual activity with a teenager of the same sex rather than with a teenager of the opposite

sex violates the Equal Protection Clause of the Fourteenth Amendment. *See Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (attached hereto) [2]

I.

The Provision that Limits the Romeo & Juliet Law to Teenagers Who Are "Members of the Same Sex" Violates the Equal Protection Clause by Imposing Harsher Punishments and Consequences of Conviction Based on Sexual Orientation

A. Standard of Review

"A challenge to the constitutionality of a statute is one of law," and this Court's review is "de novo and unlimited." *State v. Watson,* 273 Kan. 426, 364, 44 P.3d 357 (2002).

B. Gay Teenagers Are Excluded from the Protections of the Romeo & Juliet Law

Kansas criminalizes consensual sexual activity between teenagers under two different statutes with dramatically different penalties. The sex and sexual orientation of the defendant determine which statute – and therefore which penalty – applies. Kansas's

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[2] *Lawrence* also provides grounds for revisiting Matthew's claims under the Eighth Amendment, *see Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002) ("even though imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual, it may not be imposed as a penalty for the "status" of narcotic addiction because such a sanction would be excessive . . . . Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold") (quoting *Robinson v. California,* 370 U.S. 660, 666-67 (1962)) (internal marks omitted), and under §§ 1 and 18 of the Kansas Constitution, *see, e.g., Farley v. Engelken,* 241 Kan. 663, 667, 740 P.2d 1058 (1987) (holding Kansas Constitution provides at least as much protection as the federal constitution), for all the same reasons that it warrants revisiting Matthew's equal protection claims under the U.S. Constitution. Of course, the Court should consider the Eighth Amendment and *Apprendi* issues again only if it denies Matthew's claims under the Equal Protection Clause and under §§ 1, 18 of the Kansas Constitution because only an equal protection decision in his favor will provide Matthew with the full measure of relief. *See infra* at III.

general criminal sodomy statute prohibits "sodomy with a child who is 14 or more years of age but less than 16 years of age," without regard to consent, the age of the offender or the sex of the participants. K.S.A. § 21-3505 (the "criminal sodomy law"). In contrast, Kansas's so-called Romeo & Juliet law provides for comparatively mild criminal penalties when two teenagers engage in voluntary sexual intercourse, sodomy or lewd touching; the younger teenager is between 14 and 16 years old; the older teenager is less than 19 years old; the age difference is less than 4 years; there are no third parties involved; and the two teenagers "are members of the opposite sex." K.S.A. § 21-3522 (the "Romeo & Juliet law"); *see also* K.S.A. § 21-3501 (defining oral sex as a form of sodomy).

The punishments for the two crimes are radically different.[3] Under the relevant section of the Romeo & Juliet law (a severity-level 9 offense), an offender with a criminal history score of "C" through "I" faces presumptive probation, and an offender like Matthew with a criminal history score of "B" faces a maximum presumptive sentence of 15 months imprisonment. *See* K.S.A. § 21-4704(a). Under the criminal sodomy law with which Matthew was charged (a severity-level 3 offense), an offender with a criminal history score of "I" faces a maximum presumptive sentence of 61 months. *Id*. The maximum presumptive sentence for an offender like Matthew with a criminal history score of "B" is 228 months. *Id*. In addition, unlike a violation of the Romeo & Juliet law, criminal sodomy is categorized as a "sexually violent crime" that automatically

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[3] Because both the Romeo & Juliet law and the criminal sodomy law apply to juvenile offenders, the same disparities in sentencing arise even when the two teenagers are both 14 or 15 years old.

triggers mandatory sex offender registration. *See* K.S.A. § 22-4902(c)(4). The more specific Romeo & Juliet law controls whenever a specified activity is covered by both the Romeo & Juliet law and the criminal sodomy law. *See State v. Williams,* 250 Kan. 730, 736-37, 829 P.2d 892 (1992).

All of the requirements of the Romeo & Juliet law apply in Matthew's case, save one: he and M.A.R. were not "members of the opposite sex." Had Matthew been a girl who performed the *identical sexual act* on M.A.R., or had he performed consensual oral sex on a girl instead of on another boy, he would have been charged, convicted and sentenced under the Romeo & Juliet law with a presumptive range of 13 to 15 months and would not have been subject to mandatory registration as a sex offender.

By restricting the Romeo & Juliet law to teenagers who engage in consensual sex with members of the opposite sex, Kansas's statutory scheme subjects defendants with a same-sex sexual orientation to an additional criminal penalty and to an additional consequence of conviction under the criminal sodomy law: mandatory registration as a sex offender. In Matthew's case, the additional criminal penalty means that instead of receiving a maximum sentence of 15 months under the Romeo & Juliet law, he was sentenced under the criminal sodomy law to more than 17 years in prison and five years of supervised release.

Under the criminal sodomy law, barring good time credits, Matthew is not scheduled to be released until he is 36 years old, at which point he will have spent half his life in jail and will be required to begin his adult life as a registered sex offender. Had

Matthew been convicted and sentenced under the Romeo & Juliet law, he would have completed his sentence by May 2001.

C. The Decision in Lawrence *Supports Matthew's Equal Protection Claim*

When this Court originally considered Matthew's equal protection claims, it relied on a three-pronged argument to uphold the exclusion of gay teenagers from Kansas's Romeo & Juliet law. The Court explained: "The impact of *Bowers* on our case is obvious. The United States Supreme Court does not recognize homosexual behavior to be in a protected class requiring strict scrutiny of any statutes restricting it. Therefore, there is no denial of equal protection when the behavior is criminalized or treated differently[.]" Opinion at 12.

The Supreme Court's decision in *Lawrence v. Texas,* 123 S. Ct. 2472 (2003), sweeps away all three prongs of that argument. First, *Lawrence* overrules *Bowers* and establishes that moral disapproval of homosexuality is not a legitimate basis for laws that criminalize consensual sexual intimacy between members of the same sex. Second, *Lawrence* confirms that the equal protection analysis in *Romer v. Evans,* 517 U.S. 620 (1996), controls the outcome in cases, like this one, that involve legislation directed at gay people based on their same-sex sexual conduct. And, third, *Lawrence* reiterates the fundamental principle that all legislative classifications, even those that do not affect a suspect or protected class, must bear at least a rational relationship to an independent and legitimate state interest.

1. *Bowers* Has Been Overruled

Bowers stood for the proposition that criminalizing sodomy was a rational way to enforce the majority's view "that homosexuality is immoral and unacceptable." 478 U.S. at 196. Although the decision in *Bowers* technically addressed the validity of a general sodomy law under the Due Process Clause, and not the validity of a discriminatory sodomy law under the Equal Protection Clause, the Supreme Court's focus in the decision on "homosexual sodomy" transformed *Bowers* into the leading justification for laws that disadvantaged gay people. After *Bowers*, courts reasoned that if moral disapproval of homosexuality provided a rational basis under the Due Process Clause for criminalizing sodomy, then it must also provide a rational basis under the Equal Protection Clause for discriminatory sodomy laws that applied only to members of the same sex, *see Lawrence v. Texas*, 41 S.W.3d 349, 355 (Tex. Ct. App. 2001) (holding "preservation and protection of morality [was] a legitimate state interest" justifying discriminatory sodomy law), *rev'd*, 123 S. Ct. 2472 (2003), as well as for other forms of discrimination, including firing gay employees, *see Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987).

Now, however, *Bowers* has been overruled and its premise – that moral disapproval of a group of people can justify criminal laws aimed at gay people – has been rejected. The Supreme Court held in *Lawrence* that "*Bowers* was not correct when it was decided, and it is not correct today." 123 S. Ct. at 2484. That decision wipes the slate clean, calling into question the validity of every decision that ever relied on *Bowers* and specifically rejecting the argument that moral disapproval of homosexuality justifies either government intrusion into gay people's intimate lives or government discrimination

targeted at gay people. *Id*. at 2483-84 (holding a State's view that a particular practice is immoral is not a sufficient reason for a law prohibiting the practice).

By repudiating the holding in *Bowers* that moral condemnation of gay people justifies laws that outlaw same-sex intimacy, *see Lawrence,* 123 S. Ct. at 2484, *Lawrence* brings the Court's due process cases in line with its existing equal protection jurisprudence. Over the last century, both State and federal governments have used morality to defend what we now recognize as violations of equal protection. They have argued that the Equal Protection Clause allows the government to discriminate in order to express moral or religious disapproval of unrelated individuals living together, *see Moreno v. U.S. Dep't of Agric.*, 345 F. Supp. 310, 314 (D.D.C. 1972), of women working outside the home, *see Bradwell v. Illinois,* 83 U.S. 130, 141 (1872) (Bradley, J., concurring), of interracial relationships, *see Loving v. Virginia,* 388 U.S. 1, 3 (1967), and of the mentally disabled, *see Penn. Ass'n of Retarded Children v. Penn.,* 343 F. Supp. 279, 294 (E.D. Penn. 1972); *Buck v. Bell*, 274 U.S. 200, 207 (1926). Ultimately, the Supreme Court has made it clear in each context that States may not promote morality by punishing people for who they are. *See Loving,* 388 U.S. at 11-12 (striking down law aimed at interracial couples), *United States v. Virginia,* 518 U.S. 515, 550 (1996) (striking down law aimed at women working in traditionally make profession); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (striking down law aimed at hippies); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (striking down law aimed at developmentally disabled people).

Lawrence establishes that the same principle applies to gay people. States may not promote morality by punishing gay people for being who they are, which includes "with full and mutual consent from each other, engag[ing] in sexual practices common to a homosexual lifestyle." 123 S. Ct. at 2484. "Moral disapproval of a group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id*. at 2486 (O'Connor, J., concurring).

2. *Romer* Applies to All Class-Based Legislation Aimed at Gay People, Whether It Is Directed at Same-Sex Orientation or Same-Sex Conduct

Like other courts that struggled over how to harmonize the Supreme Court's due process decision in *Bowers* and its equal protection decision in *Romer v. Evans*, this Court concluded that *Romer* did not apply in an equal protection challenge to a discriminatory sodomy law like the Romeo & Juliet law because *Romer* was about "the right to engage in the political process" and not about "the right to engage in sodomy." Opinion at 13; *see also Lawrence,* 41 S.W.3d at 355 (Tex. Ct. App.) (holding *Romer* applied only in cases involving "the right to seek legislative protection from discriminatory practices"), *rev'd*, 123 S. Ct. 2472. *Lawrence* confirms that *Romer* applies to all forms of discrimination directed at gay people – rather than just to discrimination in access to the political process – and applies whether the discrimination is based on same-sex sexual orientation or on same-sex sexual conduct. *Id*. at 2482.

Romer invalidated an amendment to the Colorado constitution that deprived gay people of protection under state anti-discrimination laws. 517 U.S. at 623. The Court described two different reasons for striking down the Colorado law: first, it was a

"literal" violation of equal protection because it singled out one group of people and made it more difficult for them to seek protection from the government, second, it failed even the minimum level of equal protection review, rational basis review. *Id*. at 633-35. To satisfy the rational basis standard, discrimination must have a legitimate governmental aim and must rationally advance that aim. *Id*. The Colorado law did neither. It disadvantaged gay people based on animosity toward them, which is never a legitimate purpose. *Id*. at 634. And it was an irrational method of advancing the only legitimate justifications that were offered (respecting the religious liberties of landlords and employers and conserving resources to fight discrimination against other groups). *Id*. at 635. Prohibiting gay people from obtaining protection from discrimination was "so far removed" from these asserted purposes that it did not rationally advance them. *Id*. Given the lack of any rational relationship to legitimate state interests, the Court struck down the Colorado law. *Id*.

The *Lawrence* Court was well aware that its decision in *Bowers* had been misapplied in equal protection cases involving gay people, including in cases involving discriminatory sodomy laws, and the Court took pains to correct that misapplication. First, *Lawrence* confirmed that *Romer* applies in *all* equal protection cases involving classifications that disadvantage gay people and is not limited to cases that involve the right to participate in the political process. *Lawrence*, 123 S. Ct. at 2482. Although the Colorado Supreme Court had based its decision in *Romer* on a right to participate in the political process, the United States Supreme Court explicitly resolved the case "on a rationale different from that adopted by the State Supreme Court." *Romer,* 517 U.S. at

626. As the Court explained again in *Lawrence, Romer* applies to *all* "class-based legislation directed at homosexuals" that has "no rational relation to a legitimate governmental purpose." *Lawrence*, 123 S. Ct. at 2482 (quoting *Romer,* 517 U.S. at 634 (internal marks omitted)).

Second, *Lawrence* rejected a related argument that *Romer* does not apply in cases involving "homosexual behavior," *see* Opinion at 12-13, or "homosexual conduct," *see Lawrence,* 41 S.W.3d at 355 (Tex. Ct. App.), *rev'd*, 123 S. Ct. 2472; *see also Shahar v. Bowers,* 114 F.3d 1097, 1110 (11th Cir. 1997) (rejecting equal protection challenge to termination of government employment based on same-sex wedding ceremony and stating "*Romer* is about people's condition; this case is about a person's conduct"). As the Supreme Court reiterated in *Lawrence, Romer* applies to all legislation that is aimed at the "solitary class [of] persons who [are] homosexuals, lesbians, or bisexual either by 'orientation, *conduct*, practices or relationships.'" *Lawrence,* 123 S. Ct. at 2482 (quoting *Romer,* 517 U.S. at 624).

In other words, there is no difference, as far the Equal Protection Clause is concerned, between discrimination against people with a same-sex sexual *orientation* and discrimination against people who engage in intimate sexual *conduct* or *relationships* with a member of the same sex. As Justice O'Connor recognized in striking down Texas's "Homosexual Conduct" law on equal protection grounds, "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is

targeted at more than conduct. It is instead directed toward gay people as a class." *Id.* at 2487 (O'Connor, J., concurring).

Finally, the *Lawrence* Court stated explicitly that *Romer* itself had cast *Bowers* into doubt long before the decision in *Lawrence*, and explained that the equal protection principles set forth in *Romer* provided a tenable alternative basis for striking down Texas's discriminatory sodomy law. *Id*. at 2481-82. The Court explained that "[e]quality of treatment," the central purpose of the Equal Protection Clause, would best be served by overruling *Bowers* on due process grounds – and thereby getting rid of all consensual sodomy laws – because even sodomy laws that technically apply to everyone serve as "an invitation to subject [gay people] to discrimination both in the public and in the private spheres." *Id.* at 2482. Recognizing the importance in equal protection cases of the due process principles it announced in *Lawrence*, the Supreme Court warned against reading its decision narrowly and explained that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 2482.

In short, while *Lawrence* was decided on due process grounds, it was driven by equal protection concerns. The equal protection argument cited with approval by the *Lawrence* Court and relied upon by Justice O'Connor in her concurrence in *Lawrence* is the same argument Matthew asserts here: a law that more severely punishes consensual sexual intimacy between members of the same sex violates the Equal Protection Clause

because it is "born of animosity" toward gay people and lacks any rational relationship to a legitimate governmental purpose. *Id*. at 2482 (quoting *Romer,* 517 U.S. at 634).

3. The Equal Protection Clause Applies to Everyone, Not Just to Members of a Suspect Class

This Court concluded in its original decision that treating gay teenagers who engage in sodomy differently from heterosexual teenagers who engage in the same sexual activities was not a denial of equal protection because gay people are not "in a protected class requiring strict scrutiny." Opinion at 12. While many *statutory* protections apply only to members of a group defined in the statute as a "protected class," *Lawrence* makes it clear that the Equal Protection Clause applies to all people, whether or not they are members of a "suspect class" based on something like race, illegitimacy or national origin. *See, e.g., Lawrence,* 123 S. Ct. at 2482 (approving argument that discriminatory sodomy law could be struck down under equal protection rational basis test); *id*. at 2484-85 (O'Connor, J., concurring) (striking down discriminatory sodomy law under rational basis test). As *Lawrence* confirms, whether or not gay people constitute a suspect class, laws that discriminate against them must have at least "a rational relation to a legitimate governmental purpose." 123 S. Ct. at 2482; *see also Romer*, 517 U.S. at 631 (stating no person shall be denied equal protection and striking down legislation under the rational basis test without determining whether gay people constitute a suspect class).

Even under the rational basis test – the most deferential form of equal protection analysis – a legislative classification must at least rationally advance an independent and

legitimate governmental interest. *See Romer,* 517 U.S. at 631; *see also Lawrence,* 123 S. Ct. at 2485 (O'Connor, J., concurring). As the Supreme Court explained in *Romer,*

> The search for the link between classification and objective gives substance to the Equal Protection Clause . . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Id. at 632-33. That principle must be applied with particular care when a law imposes a criminal penalty. When discrimination is "embodied in a criminal statute[,] . . . the power of the State weighs most heavily upon the individual or the group" disadvantaged, requiring particular sensitivity to the policies of the Equal Protection Clause. *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). In order to satisfy the Equal Protection Clause, Kansas's discriminatory exclusion of gay teenagers from the protections of the Romeo & Juliet law must, at a minimum, rationally advance an independent and legitimate state interest.

The Supreme Court has struck down State laws under the rational basis test on numerous occasions, and has been especially likely to do so where laws were designed to disadvantage a class of people simply to make them "unequal to everyone else." *Romer,* 517 U.S. at 635. For example, in *Moreno*, the Court struck down a law that denied food stamps to households that contained unrelated individuals because its purpose was to "discriminate against hippies." 413 U.S. at 534-35. In *Cleburne,* the Court struck down a law that required a group home for the developmentally disabled to get a special use permit but that did not require a fraternity or an apartment building to get a special permit because the purpose of the law was to discriminate against developmentally disabled

people. 473 U.S. at 448. Similarly, in *Romer*, the Court struck down a law that prohibited legal protections for gay people because it was "born of animosity toward the class of persons affected." 517 U.S. at 634.

It does not matter whether this Court adopts Justice O'Connor's characterization of the test in *Moreno, Cleburne* and *Romer* as "a more searching form of rational basis review," *Lawrence,* 123 S. Ct. at 2485-86 (O'Connor, J., concurring), or simply follows the Supreme Court's holdings that laws fail traditional rational basis review when the legislature disadvantages a particular group of people in order to "make them unequal to everyone else," *Romer,* 517 U.S. at 635, out of animosity toward them, *id*. at 634, or to express moral disapproval of them, *Lawrence,* 123 S. Ct. at 2483; *see also id*. at 2485-86 (O'Connor, J., concurring). In either case, when "the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality [is] suspect," *Romer,* 517 U.S. at 633 (quoting *Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 181 (1980) (Stevens, J., concurring)), and the legislation violates the Equal Protection Clause.

This Court's original decision to deny Matthew's equal protection claim rested on three premises: *Bowers* was controlling, *Romer* did not apply, and discrimination against gay people could violate equal protection only if gay people made up a suspect class. After *Lawrence,* none of the three premises retain any validity.

As the following analysis establishes, excluding gay teenagers from the protections of Kansas's Romeo & Juliet law violates the Equal Protection Clause even under the rational basis test. Consequently, the Court need not consider whether to apply heightened scrutiny unless it concludes that excluding gay teenagers from the protections

of the Romeo & Juliet law rationally advances an independent and legitimate governmental interest. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (explaining that where level of scrutiny is an open question and the government action will not survive even the most lenient rational basis review, the proper course is to resolve the case without deciding whether heightened scrutiny is appropriate); *see also Lawrence,* 123 S. Ct. at 2488 (O'Connor, J., concurring) (concluding that Texas's same-sex only sodomy law "runs contrary to the . . . Equal Protection Clause, under any standard of review").[4]

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[4] Matthew continues to assert, in the alternative, that the exclusion of gay teenagers from the protections of the Romeo & Juliet law should be subjected to heightened scrutiny and incorporates here by reference his original briefs on appeal arguing that sexual orientation is a suspect or quasi-suspect classification that triggers heightened scrutiny. *See, e.g., Tanner v. Oregon Health Sci.Univ.,* 971 P.2d 435, 447 (Or. Ct. App. 1998); *Watkins v. United States Army,* 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); L. Tribe, *American Constitutional Law,* p. 1616 (2d ed. 1988); *see also Romer,* 517 U.S. at 632-33, 635 (remaining silent on standard of review for classifications based on sexual orientation where classification failed rational basis test).

In addition, the exclusion in the Romeo & Juliet law must satisfy heightened scrutiny because it provides gay teenagers with differential access to a fundamental right. While a teenager's constitutional rights are more limited than an adult's rights, and while the state is more likely to have a significant or compelling state interest that justifies intruding upon a teenager's rights, it is well established that teenagers – including gay teenagers – have a due process liberty interest in being free from state compulsion in personal decisions relating to marriage, procreation, contraception, family relationships and sexual intimacy; it is also well established that laws that burden a teenager's liberty interest must be narrowly tailored to advance a compelling governmental interest unless they advance "a significant state interest that is not present in the case of an adult." *Carey v. Population Services Int'l,* 431 U.S. 678, 684, 693 (1977) (plurality) (holding minors have liberty interest protected by the Due Process Clause of the Fourteenth Amendment); *see also Lawrence,* 123 S. Ct. at 2481 (establishing that liberty interest in personal autonomy includes matters of private, intimate conduct and protects gay people just as it protects heterosexuals).

D. The Romeo & Juliet Law Classifies Teenagers Based on Sexual Orientation

Limiting application of the Romeo & Juliet law to members of the opposite sex discriminates against gay teenagers by punishing them more severely than their heterosexual peers when they "commit intrinsically the same quality of offense." *McLaughlin v. Florida,* 379 U.S. 184, 194 (1964). Kansas subjects gay teenagers to harsher penalties not because they engage in different conduct but because they engage in the prohibited conduct with members of the same sex.

By excluding gay teenagers from the Romeo & Juliet law, Kansas differentially burdens their freedom to exercise that liberty interest. Laws that differentially burden the exercise of a fundamental right must be necessary to promote a compelling governmental interest. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632 (1974); *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). In *Mosley,* the Supreme Court held that even if a school could prohibit all picketing (because it had a compelling interest in preventing disruption), it could not deny non-labor protestors the First Amendment right to picket while allowing labor protestors to picket unless it had a compelling reason for the discrimination. 408 U.S. at 95. As in *Mosley*, while Kansas arguably has a significant interest in punishing *all* teenagers who have consensual sexual relationships with their peers, no compelling interest justifies punishing gay teenagers more severely than heterosexual teenagers for exercising the same liberty interest and engaging in the same conduct. In other words, Kansas can offer no compelling interest that justifies sharply punishing gay teenagers who explore their sexuality while giving heterosexual teenagers a slap on the wrist when they do so.

If this Court concludes that the exclusion in the Romeo & Juliet law satisfies the rational basis test, the Court must then determine whether gay people constitute a suspect or quasi-suspect class, whether the exclusion in the Romeo & Juliet law provides gay teenagers and heterosexual teenagers with differential access to the fundamental liberty interest in forming intimate relationships, and whether the classification can survive heightened scrutiny. Of course, the Court need not – and should not – reach any of these questions in this case because the exclusion in the Romeo & Juliet law fails even rational basis equal protection review.

The exclusion in the Romeo & Juliet Law treats teenagers differently based on their sexual orientation. As this Court has already recognized, "[l]iterally, the [Romeo & Juliet] statute criminalizes particular acts as opposed to sexual orientation. But practically, the argument that it is not aimed at homosexuals cannot be made with a straight face." Opinion at 6. Justice O'Connor reached the same conclusion in *Lawrence,* where she explained that, by making sodomy a crime only if a person

> engages in deviate sexual intercourse with another individual of the same sex[,] . . . Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by [Texas's Homosexual Conduct law]. The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct – and only that conduct – subject to criminal sanction. . . .While it is true that the [Texas Homosexual Conduct law] applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. After all, there can hardly be a more palpable discrimination against a class than making the conduct that defines the class criminal."

123 S. Ct. at 2486-87 (O'Connor, J., concurring); *see also id*. at 2482 (majority op.) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private sphere). Like the Texas sodomy law that punished only members of the same sex, the exclusion in the Romeo & Juliet law creates a classification based on sexual orientation.

In *Lawrence*, the Supreme Court rejected a distinction between laws that target people based on a same-sex sexual orientation and laws that target people based on same-sex sexual conduct. *See Lawrence,* 123 S. Ct. at 2482 (noting that *Romer* applies to laws

that single out gay people as a "solitary class . . . either by 'orientation, conduct, practices or relationships'"); *see also supra* at I(C)(2). The Court's recognition that discrimination based on orientation and conduct are functionally the same makes sense because the physical acts that constitute sodomy – oral and anal sex – are identical for same- and opposite-sex couples. Certainly the act at issue in this case – performing oral sex on a male teenager – is precisely the same whether the two teenagers are members of the opposite sex or members of the same sex.[5] Because the physical acts involved are the same regardless of the sex of the participants, any distinction between "homosexual activity" and "heterosexual activity," Opinion at 6, 9, necessarily refers not to different activities but to the sexual orientation of the people involved in the activity. Matthew's exclusion from Kansas's Romeo & Juliet law is based on the fact that he and M.A.R. "were homosexual . . . or bisexual either by orientation, *conduct*, practices or relationships." *Lawrence,* 123 S. Ct. at 2482 (quoting *Romer,* 517 U.S. at 624) (emphasis added). Whether this Court calls the resulting discrimination "a classification based on sexual orientation" or "a classification based on expression of sexual orientation through

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[5] In fact, a review of the relevant statutory definitions reveals that – with one exception (two boys cannot engage in sexual intercourse as defined) – all of the physical acts that trigger application of K.S.A. § 21-3522 are precisely the same regardless of the sex of the participants. Sexual intercourse means any penetration of the female sex organ by a finger, the male sex organ or any object. *See* K.S.A. § 21-3501. Accordingly, like opposite-sex teenagers, two girls can engage in sexual intercourse. Sodomy is defined to include oral contact or oral penetration of female genitalia or oral contact of the male genitalia or anal penetration of a male or female by any body part or object. *Id.* As a result, both opposite-sex and same-sex couples can engage in sodomy. And, of course, both opposite-sex and same-sex couples can touch one another. In short, there is no statutorily-defined activity in which two boys can engage that cannot be performed by two girls or by an opposite-sex couple.

conduct," it amounts to the same thing; the exclusion of gay teenagers from the Romeo & Juliet law is "class-based legislation directed at homosexuals." *Id*.

E. Excluding Gay Teenagers from the Protections of the Romeo & Juliet Law Does Not Rationally Advance Any Independent and Legitimate Governmental Purpose

To satisfy the rational basis test, Kansas must both advance an independent and legitimate purpose for excluding gay teenagers from the Romeo & Juliet law and explain how its discrimination against gay teenagers rationally advances that same purpose. *See Romer,* 517 U.S. at 635; *Lawrence,* 123 S. Ct. at 2482; *id*. at 2484 (O'Connor, J., concurring). While this Court previously found that the purpose of the Romeo & Juliet law "is to recognize the judgment that consensual sexual activity between a young adult and a not-quite adult, although wrong, is not as criminal as sexual activity between persons farther apart in age," Opinion at 6, that broader purpose is not part of the equal protection analysis; it is simply beside the point. The issue here is not the purpose of the Romeo & Juliet law or the purpose of the criminal sodomy law, but the purpose of the exclusion that makes the Romeo & Juliet law inapplicable to two teenagers who are members of the same sex. It is the *discriminatory exclusion* that Kansas must justify in order to satisfy the Equal Protection Clause. *See Romer*, 517 U.S. at 631.

Kansas has not suggested any independent and legitimate governmental purpose that is rationally advanced by punishing gay teenagers more severely than heterosexual teenagers when they engage in the very same sexual acts. Although Kansas has argued that excluding gay teenagers from the protection of the Romeo & Juliet law furthers both the State's interest in promoting moral disapproval of homosexuality and the State's

interest in protecting children, the first is not a legitimate interest and the second is simply not furthered by the exclusion.

Indeed, the exclusion in the Romeo & Juliet law was so plainly established to express disapproval of gay teenagers, that this Court never even discussed the State's asserted interests in its initial decision. Instead, the Court frankly acknowledged that "the argument that [the exclusion] is not aimed at homosexuals cannot be made with a straight face." Opinion at 6. Because Kansas has singled out gay teenagers for harsher punishment in an apparent attempt to make them "unequal equal to everyone else," *Romer*, 517 U.S. at 635, there is an "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *id*. at 634. As a result, the Court must give "careful consideration," *id*. at 633, to the relationship between Kansas's discrimination against gay teenagers and the justifications the State offers to explain it in order to determine whether it is possible "to credit them," *id*. at 635. Kansas's proffered justifications fail even the most minimal level of examination.

1. The State's Moral Disapproval of Homosexuality Is Not an Independent and Legitimate Justification for the Exclusion in the Romeo & Juliet Law

While punishing gay teenagers more severely than their peers rationally advances the State's asserted interest in promoting moral disapproval of homosexuality, that interest is neither legitimate nor independent. Kansas asserted in prior briefing that it discriminates against gay teenagers "to promote morality." Original Brief of Appellee at 6. Restricting the Romeo & Juliet law to members of the opposite sex advances only one moral view: disapproval of gay teenagers. Yet, at its core, the Equal Protection Clause

means that a State may not establish a classification in order to express moral disapproval of the group burdened by the law. *See supra* at I(C)(1).

First, moral disapproval of a group cannot be the basis for discrimination because it is not *independent* from the classification; when moral disapproval is the only governmental interest advanced, the classification has been "drawn for the purpose of disadvantaging the group burdened by the law." *Lawrence,* 123 S. Ct. at 2486 (O'Connor, J., concurring) (quoting *Romer,* 517 U.S. at 633 and explaining that Texas' invocation of morality "proves nothing more than Texas' desire to criminalize homosexual sodomy") (internal marks omitted); *see also id*. at 2482 (majority op.) (citing with approval argument that Texas's discriminatory sodomy law, like the law in *Romer,* was "born of animosity" toward gay people).

Second, moral disapproval of homosexuality is not a *legitimate* governmental interest. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer,* 517 U.S. at 634 (quoting *Moreno,* 413 U.S. at 534) (emphasis in original). Just as the Supreme Court held in *Romer* that a law may not be based on "animosity" toward gay people, or on a desire "to make them unequal to everyone else," *Romer,* 517 U.S. at 634-35, the Court has now confirmed in *Lawrence* that a law may not be based on moral disapproval of homosexuality. After *Lawrence,* "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for a law prohibiting the practice[.]" *Lawrence,* 123 S. Ct. at 2483 (citing *Bowers,* 478 U.S. at 216

(Stevens, J., dissenting)). Like laws that express moral disapproval based on living arrangements, sex, race or disability, laws that express moral disapproval based on sexual orientation serve no "legitimate governmental interest under the Equal Protection Clause." *Id*. at 2486 (O'Connor, J., concurring) (quoting *Romer,* 517 U.S. at 633).

Rather than establishing the independent and legitimate state interest necessary to satisfy the Equal Protection Clause, Kansas's invocation of morality simply confirms that Kansas's law is "aimed at homosexuals," as this Court previously found. Opinion at 6. A law that disadvantages gay teenagers because the State disapproves of them is a quintessentially impermissible "classification of persons undertaken for its own sake." *Lawrence,* 123 S. Ct. at 2486 (O'Connor, concurring) (quoting *Romer,* 517 U.S. at 635). "[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law." *Lawrence,* 123 S. Ct. at 2487 (O'Connor, J., concurring); *see also id.* at 2483 (majority op.) (holding moral views cannot be the sole justification for laws prohibiting a particular practice). This basic principle of democracy derives from a basic principle of human nature: "'there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally[.]'" *Id.* at 2487 (O'Connor, J., concurring) (quoting *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

2. Imposing Harsher Punishments When Teenagers Engage in Same-Sex Sexual Activity Does Not Rationally Advance the State's Legitimate Interest in Protecting Children

Kansas has not argued that its exclusion of gay teenagers from the Romeo & Juliet law protects children; it has argued only that the Romeo & Juliet law as a whole protects children. But the fact that the Romeo & Juliet law *as a whole* may relate to some legitimate purpose is immaterial. To satisfy the Equal Protection Clause, the *discriminatory classification* must itself advance the legitimate aim of the legislature. *See Romer*, 517 U.S. at 631. While the State's interest in protecting children is both independent and legitimate, the interest in protecting children bears no rational relationship to the State's discrimination against gay teenagers.

Kansas has not explained, nor is it possible to discern, how punishing gay teenagers more severely for engaging in the same consensual sexual activities as their heterosexual peers protects children. To paraphrase the Supreme Court in *Cleburne*: the question is whether it is rational to treat gay teenagers differently. It is true that they can be distinguished from their peers based on sexual orientation; but why this difference warrants the imposition of severe criminal sanctions not imposed on others is not at all apparent. 473 U.S. at 449-50. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446 (citation omitted).

As in *Romer,* where the Supreme Court concluded that the State's asserted interests were not rationally related to its discrimination against gay people, Kansas's discrimination against gay teenagers

> is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that [the discrimination] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. . . . We must conclude that [the law] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This [the State] cannot do.

Id. at 635. In short, Kansas's discrimination against gay teenagers is so unrelated to its goal of protecting children that the justification cannot be credited. *See Romer,* 517 U.S. at 634.

Moreover, any argument that a teenaged boy does more harm when he engages in consensual sodomy with another boy than when he engages in consensual sodomy with a girl is simply another way of describing Kansas's desire to enforce its moral disapproval of homosexuality through the criminal laws. The majority opinion in *Lawrence* establishes that Kansas's view that same-sex sexual activity is immoral cannot justify a law prohibiting the practice. 123 S. Ct. at 2483. Justice O'Connor reached the same conclusion in her concurrence: "The State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted interest for the law.") *Id*. at 2486 (O'Connor, J., concurring); *see also supra* at I(C)(1).

Just as the State may not discriminate against gay teenagers in order to express its own moral disapproval of homosexuality, it may not discriminate against gay teenagers in order to protect children from moral disapproval or stigma that society may attach to

being gay or to engaging in same-sex sexual activity. As the Supreme Court explained in *Cleburne,*

> the electorate as a whole . . . could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

473 U.S. at 448 (quoting *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984)).

States may not discriminate in order to protect a child from stigma or opprobrium based on disability, *see id.* at 462-63 (Marshall, J., concurring) (rejecting false stereotypes suggesting "purported need to protect nonretarded children" from mentally retarded children), or race, s*ee Palmore*, 466 U.S. at 433 (holding stigma child would face as a result of mother's interracial relationship could not justify discrimination in custody order). By the same token, States may not discriminate in order to protect a child from stigma based on sexual orientation. *See Lawrence,* 123 S. Ct. at 2482 (explaining that stigma imposed by sodomy laws raises both equal protection and due process concerns because it encourages both public and private discrimination based on sexual orientation); *id*. at 2487 (O'Connor, J., concurring) (holding discriminatory sodomy laws "cannot be reconciled with the Equal Protection Clause" because they subject gay people to "a lifelong penalty and stigma") (quoting *Plyler v. Doe,* 457 U.S. 202, 238-39 (1982) (Powell, J., concurring)); *see also S.N.E. v. R.L.B.,* 699 P.2d 875, 879 (Alaska 1985) (holding stigma associated with having lesbian mother was impermissible consideration in custody decision).

While there is no reason to think that punishing gay teenagers more severely than their heterosexual peers who engage in the very same consensual sexual activities will protect children, there is every reason to think that it will harm children. The discrimination in the Romeo & Juliet law "in and of itself is an invitation to subject [gay children] to discrimination both in the public and in the private spheres," *Lawrence,* 123 S. Ct. at 2482; *id*. at 2487 (O'Connor, J., concurring), and stigmatizes them in a way that "threatens the creation of an underclass," *id*. at 2487 (O'Connor, J., concurring) (citing *Plyler v. Doe,* 457 U.S. at 239).

The social and psychological consequences of State-sponsored discrimination are more severe for children and teenagers than for adults. *See, e.g., Brown v. Bd. of Educ. of Topeka,* 347 U.S. 483, 493-94 (1954) (holding effects of discrimination "apply with added force to children in grade and high schools"). When the State singles out one group of children and punishes them because of who they are, it intensifies feelings of inferiority generated by private discrimination and compounds the psychological and social damage that result from harassment and violence based on sexual orientation. Gay teenagers are particularly vulnerable to the effects of such discrimination because they must often cope with both rejection at home and hate-based harassment at school.[6] Consequently, such discrimination by the State contributes to a social climate in which

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[6] Recent cases and social science literature reflect the sort of pervasive harassment and violence many gay teenagers suffer in school, at home and in their communities. *See, e.g., Boyd Cty. Gay-Straight Alliance v. Board of Education of Boyd Cty., Ky*., 258 F. Supp. 2d 667 (E.D. Ky. 2003); *Nabozny v. Podlesny,* 92 F.3d 446 (7th 1996); Human Rights Watch, *Hatred in the Hallways: Violence and Discrimination against Lesbian, Gay, Bisexual and Transgender Students in U.S. Schools* 3, 22-24, 37 (2001) at http://www.hrw.org/reports/2001/uslgbt/toc.htm.

gay teenagers are isolated in their communities, victimized by their peers, and deprived of a meaningful education. The State should not be in the business of promoting or legitimizing private prejudice. *See Lawrence,* 123 S. Ct. at 2482; *Cleburne,* 473 U.S. at 448 (quoting *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984)).

Excluding gay teenagers from the protections of the Romeo & Juliet law violates the Equal Protection Clause because it does not rationally advance any independent and legitimate governmental purpose.

II.

The Provision that Limits the Romeo & Juliet Law to Teenagers Who Are "Members of the Same Sex" Violates the Equal Protection Clause by Imposing Harsher Punishments and Consequences of Conviction Based on Sex

A. Standard of Review

"A challenge to the constitutionality of a statute is one of law," and this Court's review is "de novo and unlimited." *State v. Watson,* 273 Kan. 426, 364, 44 P.3d 357 (2002).

B. The Romeo & Juliet Law Classifies Teenagers Based on Their Sex

The provision limiting the Romeo & Juliet law to "members of the opposite sex" also violates the Equal Protection Clause by disadvantaging Matthew based on his sex. As this Court previously acknowledged, "had . . . Limon been a female engaging in consensual sexual activity with an adolescent boy in the group home . . . the sentence would have been a range of 13 to 15 months in prison." Opinion at 6. But because Matthew was a teenaged boy, he was sentenced under the criminal sodomy law to 17

years in prison and five years of supervised release and convicted under a law that requires him to register as a sex offender for ten years after he is released. This Court rejected Matthew's sex-discrimination argument because it concluded that *Bowers* was controlling. By overruling *Bowers, Lawrence* establishes a clean slate for consideration of Matthew's sex discrimination claim.

A legislative penalty that depends on the sex of two individuals prohibited from engaging in a particular activity creates a sex-based classification. That the classification "applies equally to both sexes" does not make it "gender neutral" for equal protection purposes. The Equal Protection Clause is

> concern[ed] with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual ... class."

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)) (internal marks omitted). As this Court previously recognized, under Kansas's statutory scheme an *individual's* punishment for engaging in a particular sexual activity depends on his or her sex and on the sex of the other party. Opinion at 6.

This same equal protection analysis is reflected in the Supreme Court's cases striking down the racial classification inherent in miscegenation laws. *See Loving v. Virgina*, 388 U.S. 1, 7-8 (1967) (rejecting Virginia's argument that the miscegenation law did not discriminate on the basis of race because it applied equally to blacks and whites).

"There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races." *Id.* at 11. By the same token, a statutory scheme that proscribes certain conduct because it is "engaged in by members of different [sexes]" – or by members of the same sex – identifies the criminal penalty based on "distinctions drawn according to [sex]." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down one-year prison sentence for each member of an interracial couple found to be living in adultery or fornication where penalty for fornication by a same-race couple was a maximum of 3 months in jail).

C. Kansas's Discrimination Based on a Teenager's Sex Is Not Substantially Related to an Exceedingly Persuasive Justification

A sex-based classification must be "substantially related" to an "exceedingly persuasive" justification. *See United States v. Virginia*, 518 U.S. 515, 553 (1996). "The burden of justification is demanding and it rests entirely on the State." *Id*. at 532. The challenged classification must serve an "important governmental objective," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives." *Id.* (internal marks omitted). In addition, the government's justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.*

Faced with an equal protection challenge to this sex-based classification, the State was required to establish that imposing harsher penalties based on the sex of two teenagers voluntarily engaged in particular sexual acts is substantially related to the

asserted goals of promoting morality and protecting children. It has not done so. The only moral view advanced by this sex-based classification is disapproval of gay teenagers – an impermissible "classification of persons undertaken for its own sake." *Romer*, 517 U.S. at 635.

Similarly, the State has failed to explain how a classification that punishes a teenage boy more than a teenage girl who engages in the very same physical act – performing oral sex on a teenaged boy – bears any relationship to the State's interest in protecting children. Without a showing that the sex-based classification is substantially related to an exceedingly persuasive justification, Kansas's statutory scheme cannot survive Matthew's equal protection challenge. *See Virginia*, 518 U.S. at 553. As Justice Stewart stated in his concurrence in *McLaughlin*:

> I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. . . . "[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of this kind is invidious per se.

Id. at 198. The same analysis applies here. Kansas has not established that punishing teenagers more harshly because of their sex substantially advances any important governmental objective. There is simply no conceivable reason to make the criminality of an act depend upon the sex of the actor. "Discrimination of this kind is invidious per se." *Id.* at 198.

III.

Reversal of Matthew's Conviction Is The Only Remedy That Will Adequately Protect Matthew's Equal Protection Rights

Once this Court concludes that the exclusionary language in the Romeo & Juliet law is unconstitutional, it must invalidate that portion of the Romeo & Juliet law. But this Court need not – and should not – strike the entire statute. The Kansas Legislature has passed a severability clause for sex offenses, directing that "[i]f any provision of this act [identifying sex offenses] is held to be invalid or unconstitutional, it shall be conclusively presumed that the legislature would have enacted the remainder of this act without such invalid or unconstitutional provision." K.S.A. § 21-3521; *see also State v. Kleypas*, 272 Kan. 894, 1018, 40 P.3d 139 (2001), *cert. den. sub nom. Kleypas v. Kansas*, 123 S. Ct. 144 (2002) (finding portion of death penalty statute unconstitutional, but invalidating only that portion and construing remaining statute so as to pass constitutional muster, in order to carry out legislature's intent to pass constitutional statute).

After the exclusionary language is stricken from the Romeo & Juliet law, this Court must decide how that statute applies to Matthew. As Matthew has previously argued, the State should have charged him under the specific Romeo & Juliet law rather than under the general criminal sodomy statute. *See State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992) (rejecting State's argument that it has discretion to make charging decision between general and specific criminal statutes, and holding that State was required to charge defendant under specific incest statute rather than under general indecent liberties statute). The only remedy that will adequately protect Matthew's equal

protection rights in this unique case is a reversal of Matthew's conviction and a dismissal of the criminal sodomy charge with instructions that the State recharge Matthew, if at all, under the Romeo & Juliet law.

As a result of his conviction in this case, Matthew not only was sentenced for criminal sodomy, but also became subject to the Kansas offender registration laws. A convicted offender subject to registration includes an offender convicted of criminal sodomy, but not an offender convicted of unlawful voluntary sexual relations. *See* K.S.A. § 22-4902 (defining "offender" by offenses of conviction, and omitting unlawful voluntary sexual relations from the list of sex offenses).[7] If Matthew's sentence is reversed but his conviction stands, he will be obligated by the State of Kansas to register and be publicly branded a sex predator for ten years following his release from prison. K.S.A. § 22-4904; K.S.A. § 22-4906. There are no exceptions to registration that may be invoked under the statute to relieve Matthew of this obligation. *See* K.S.A. § 22-4908

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[7] The legislature also included a "catch all" provision obligating offenders to register if their offenses were found to be "sexually motivated." K.S.A. § 22-4902(c)(14). But the legislature's omission of the Romeo & Juliet law from its list of specified offenses indicates its intent that offenders convicted under that law should not be obligated to register, given that such offenses are all, by definition, sexually motivated. This intent is reflected in the legislative history of the Romeo & Juliet law, which describes the purpose and intended impact of the law as follows: "Numerous concerns have been raised by judges on the sentencing when the parties are in a mutual relationship and the parents or other parties initiate prosecution. This would allow for the sanctioning of the activity as a person felony, but would designate a presumptive nonprison sentence. *In addition, a conviction under this new section would not require the offender to register as a sex offender, which may result in long term consequences*." Testimony on Senate Bill 131, Senate Judiciary Committee (Feb. 11, 1999) (emphasis supplied), attached as Exhibit B, p. 1-4, of original Brief of Amicus Curiae the DKT Liberty Project in Support of Appellant.

(directing that "[n]o person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act").[8]

In overruling *Bowers*, the *Lawrence* majority noted that "the stigma this criminal statute [outlawing consensual same-sex sodomy] imposes . . . is not trivial," and emphasized that in addition to the criminal penalty, defendants convicted under the Texas sodomy statute would be subject to offender registration, a consequence "underscor[ing] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition." *Lawrence*, 123 S. Ct. 2482; *see also id.* at 2487 (O'Connor, J., concurring) (holding Texas sodomy statute violated equal protection and emphasizing that it subjected gay people to "a lifelong penalty and stigma"). The United States Supreme Court's concern about the inequality posed when States require homosexuals to register publicly as sex offenders simply because they engaged in consensual acts that heterosexuals are allowed to engage in without such dire consequences weighs strongly in favor of imposing the remedy of a complete reversal in Matthew's case. Reversing Matthew's sentence alone will not provide him with equal protection of the laws so long as he remains subject to registration – a "state-sponsored condemnation" not suffered by heterosexuals convicted under the Romeo & Juliet Law.

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[8] Any obligation that Matthew might have had to register on account of his 1997 juvenile adjudications expired last year. *See* K.S.A. § 22-4906(g) (directing that juvenile registration obligations expire after juvenile turns eighteen, or five years after adjudication, whichever occurs later).

The Kansas Supreme Court has previously held that the proper remedy if a defendant is improperly charged, convicted, and sentenced under a general statute is to resentence the defendant under the proper, specific statute. *Carmichael v. State*, 255 Kan. 10, 19, 872 P.2d 240 (1994); *see also State v. Cooper*, ___ Kan. ___, 69 P.3d 559 (2003) (holding that *Carmichael* remedy does not violate due process). When this remedy is applied, the defendant remains convicted of the original, general charge. *Cooper*, 69 P.3d at 560-62. But neither *Carmichael* nor its progeny addressed the question of what remedy is appropriate if the general crime of conviction carries with it a consequence not attending the specific crime with which the defendant should have been charged. Matthew's criminal sodomy conviction carries with it a severe consequence (the state-imposed duty to register) that would not arise if he had been convicted under the Romeo & Juliet law. Matthew's exposure to this state-sponsored condemnation violates his equal protection rights just as surely as does his lengthy imprisonment for criminal sodomy. The equal protection problem posed by the state-imposed duty to register necessitates a broader remedy here than *Carmichael* provides.

For these reasons, the appropriate remedy in this unique case is a reversal of Matthew's conviction, with directions that the criminal sodomy charge be dismissed and that he be released from further obligation unless the State charges him with unlawful voluntary sexual relations within thirty days of the return of the mandate. *See Application of Simpson*, 2 Kan. App. 2d 713, 716, 586 P.2d 1389 (1978) (granting habeas relief in extradition proceeding, and ordering prisoner released if state did not take specific action within thirty days of opinion); *Hollon v. Tinsley*, 334 F.2d 762, 763 (10th Cir. 1964)

(granting habeas relief and reversing sentence; discharging prisoner, but giving state thirty days to bring petitioner to court for valid sentence).

CONCLUSION

In light of the Supreme Court's decision in *Lawrence v. Texas,* appellant Matthew Limon respectfully urges this Court to strike the unconstitutional provision that limits application of the Romeo & Juliet law to "members of the opposite sex," to reverse his conviction because it resulted from the unconstitutional application of the exclusion in the Romeo & Juliet law, and to order him released from further obligation unless the State charges him under the Romeo & Juliet law within thirty days of the return of the mandate.

Respectfully submitted,

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Certificate of Service

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APPENDIX