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 RESPONSE TO *AMICUS CURIAE* BRIEF OF KANSAS LEGISLATORS

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

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RESPONSE TO *AMICUS CURIAE* BRIEF OF KANSAS LEGISLATORS

Appellant Matthew Limon hereby reasserts all arguments and authorities in his prior briefs and submits this response to address issues raised in the *amicus curiae* brief submitted by a group of Kansas legislators:

I.

This Case Is About Whether It Is Rational To Punish Gay Teenagers More Severely than Heterosexual Teenagers When They Engage in the Same Criminal Acts

The legislators are correct that this case "is about the law and how that law should be applied." Legislators' Brief at 5. The law to be applied is the Equal Protection Clause, and the question is whether it is rational to make the criminal consequences of engaging in consensual oral sex depend on whether the two teenagers involved are "members of the opposite sex." The legislators proffer no reason for that discrimination other than the justifications already asserted by the State, *id*. at 8, and addressed in Matthew's reply. Appellant's Reply Brief on Rehearing at 11-14.

Contrary to the legislators' assertion, the question in this case is not "whether the Kansas Legislature has a rational basis to penalize an adult for sodomizing a minor." Legislators' Brief at 3. Matthew agrees that it is rational to penalize adults who have sex with minors because such punishment rationally advances the legislature's goal of protecting children. He does not challenge the constitutionality of the criminal sodomy law (K.S.A. 21-3505), nor does he argue that the Romeo & Juliet law (K.S.A. 21-3522) is unconstitutional in its entirety. To the contrary, he argues that he should have been *charged* under the Romeo & Juliet law and that the only part of the law that violates the constitution is the language that limits its application to members of the opposite sex.

II.

This Court's Prior Decision Was Based on *Bowers,* Not on Application of the Rational-Basis Test to the Discriminatory Language in the Romeo & Juliet Law

The legislators contend that this Court applied the rational basis test in its original opinion and implicitly held that "K.S.A. § 21-3522 bears a rational relationship to a valid legislative goal." Legislators' Brief at 8. However, this Court never applied the rational basis test in its first opinion; instead, the Court concluded that *any* equal protection analysis was foreclosed by *Bowers v. Hardwick*, 478 U.S. 186 (1986). Opinion at 11-12 (holding that under *Bowers*, "there is no denial of equal protection when [homosexual] behavior is criminalized or treated differently, at least under an equal protection analysis"). The legislators' suggestion that this Court should adhere to a decision it never made should be rejected.

The legislators rely on the morality argument that carried the day in *Bowers* and that Justice Scalia advances in his dissent in *Lawrence v. Texas,* 123 S. Ct. 2472 (2003), *see* Legislators' Brief at 9 (arguing limiting protections of Romeo & Juliet law to "heterosexual sexual conduct is based on, and enforces, Kansans' traditional notions of sexual morality"), but that argument was expressly rejected in both the majority and the concurring decisions in *Lawrence*. *See Lawrence,* 123 S. Ct. at 2483; *id*. at 2486 (O'Connor, J., concurring). In overruling *Bowers,* the majority in *Lawrence* sets forth what is now the law:

> It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. . . . These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. . . .

> [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]

Lawrence, 123 S. Ct. at 2480, 2483.

The legislators' extensive reliance on *Bowers* and on the dissenting opinions in *Lawrence,* combined with their failure to address *Romer v. Evans,* 517 U.S. 620 (1996), confirms that their legal analysis is based on wishful thinking rather than on the Supreme Court's controlling interpretation of the constitution. Legislators' Brief at 5, 9, 10. After *Lawrence,* moral disapproval of homosexuality can no longer justify criminal penalties for sexual activity between members of the same sex that is not imposed equally for sexual activity between members of the opposite sex. Appellant's Opening Brief at 22-24; *see also* Appellant's Reply at 5.

III.

Matthew May Challenge the Unconstitutional Exclusion in the *Specific* Statute Because It Resulted In His Conviction Under the *General* Statute

The legislators imply that Matthew does not have standing to challenge the constitutionality of the Romeo & Juliet law exclusion because he was convicted under the criminal sodomy law. Legislators' Brief at 2 (declaring that "most importantly" Matthew was not convicted under the Romeo & Juliet law, and "his conviction would not change" if he "were to win this case"), 14 (arguing in conclusion that "[t]he defendant was not cited or convicted under K.S.A. § 21-3522"). As Matthew has previously explained, the State would have had no discretion to charge him under the general criminal sodomy statute if the more specific Romeo & Juliet law had applied, and the only thing preventing application of the Romeo & Juliet law was the unconstitutional language limiting it to members of the opposite sex. *See* Appellant's Brief at 6, 33-37. Matthew has standing to

challenge the unconstitutional exclusion of gay teenagers from the Romeo & Juliet law because prosecutors must charge a defendant under the more specific statute whenever both specific and general criminal statutes apply. *See State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992). That rule is designed to prevent prosecutors from encroaching on the legislature's prerogative to pass specific criminal statutes - statutes which would otherwise be rendered meaningless whenever both specific and general criminal statutes applied. *Id.* The legislators' suggestion that Matthew's claim is without consequence in his own case should be rejected.

IV.

This Court Has Both the Authority and the Obligation To "Second Guess" Unconstitutional Statutes

Matthew does not ask this Court to judge the wisdom of the legislature's decision to limit the Romeo & Juliet law to members of the opposite sex. Legislators' Brief at 10. For it is the constitutionality of that decision, rather than its wisdom, that determines the outcome of this case.

The legislators claim that "[t]his Court is without precedent or legal authority to second guess the Kansas Legislature's decision in how to criminalize the conduct of an adult sodomizing a minor." Legislators' Brief at 9. Although the legislators purport to rely on the separation of powers doctrine, their argument directly contradicts a core component of that doctrine: "It is emphatically the province and duty of the judicial department to say what the law is. . . . This is of the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803). Just as the legislature has the authority and the duty "to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions," *see* Legislators' Brief at 11 (quoting

Griswold v. Connecticut, 381 U.S. 479, 482 (1965)), this Court has both the authority and the duty to say what the law is – to "second guess" the legislature's decision to discriminate based on sex and sexual orientation because that discrimination is inconsistent with the state and federal constitutions.

The Kansas Courts have long recognized that "[i]t is fundamental that the written constitution is paramount law since it emanates direct from the people." *Wall v. Harrison*, 201 Kan. 598, 603, 443 P.2d 266, 270 (1968) (invalidating term-of-office provision in election statute; striking offending language but leaving balance of act in place). Since the constitution emanates directly from the people, the legislature's decisions may not contravene the constitution, and it is the Court's duty to ensure that they do not:

> [C]onstitutions are the work, not of legislatures or of courts but of the people, and when, in its calm and deliberate judgment, free from the influences frequently responsible for legislative enactments, [this Court] determines rights guaranteed by [the constitution's] provisions have been encroached upon it has, with equal consistency, recognized its duty and obligation to declare those enactments in contravention of constitutional provisions.

Berentz v. Board of Com'rs v. City of Coffeyville, 159 Kan. 58, 152 P.2d 53, 56 (1944).

This duty, and the historical precedent and legal authority defining it, were discussed at great length by the Kansas Supreme Court in *Atkinson v. Woodmansee*, 68 Kan. 71, 74 P. 640 (1903). In *Atkinson*, the Court considered an equal-protection challenge to a state statute authorizing attorney's fees in lien actions, but only for one category of property owners, "as if they possessed some distinctive attribute calling for the imposition of special legislative penalties." 74 P. at 641. Noting the legislature's

"wide discretion" in "classify[ing] objects of legislation," the Court nonetheless held that such discriminating classifications must be justified to pass constitutional muster:

> Under the Constitution of the state of Kansas, artisan and owner, contractor and laborer, are each one possessed of equal and inalienable rights to life, liberty, and the pursuit of happiness. They all live under the same undiscriminating sunshine, breathe the same free air, venerate the same historical past, are imbued with the same patriotic ideals, and look forward to equal shares in the common blessings of a higher civilization in a brighter future. The burden of the law upon them should be as equal and impartial as the law of gravitation, and yet, in the baldest and most arbitrary manner imaginable, this act "singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others . . . ."

Id. at 641-42 (internal citation omitted). The Romeo & Juliet law should likewise be "equal and impartial . . . yet, in the baldest and most arbitrary manner imaginable, this act 'singles out a certain class of [teenagers] and punishes them [harshly], when for like delinquencies it punishes no others [so severely]."

The *Atkinson* Court concluded that it had a duty to grant relief to the complaining party, notwithstanding legislative discretion, because the law was unconstitutional:

> There is, therefore, a perfectly manifest and utterly irreconcilable conflict between the statute and the Constitution. The Constitution is the direct mandate of the people themselves. The statute is an expression of the will of the Legislature. Which shall this court obey?
>
> In the first case . . . by this court, it was assumed that a statute which clearly and beyond any substantial doubt infringes the supreme law should be declared unconstitutional. The power to do so has since been exercised many times. There is no lawful or conscientious escape from its exercise in this case, and the statute in question is declared to be unconstitutional[.]

Id. at 642. Nor is there any lawful or conscientious escape for the exercise of that principle in this case. The legislators' claim that this Court has no authority to "second guess" legislation is boldly contrary to a line of authority as old and venerable as the United States Constitution itself. Under the separation of powers doctrine, this Court is

charged with both the authority and the duty to determine whether excluding gay teenagers from the Romeo & Juliet law violates the state or federal constitutions and to grant Matthew the relief to which he is due. That duty may not be delegated to the legislature, for the legislature has no authority to interpret the constitution; only the courts are empowered to "say what the law is." *Marbury,* 5 U.S. at 177-78.

V.

The Kansas Legislature Acknowledges This Court's Power To Review the Constitutionality of Legislative Decisions About Sex Crimes

The arguments advanced in the legislators' brief are made not by the legislature but by the individual legislators listed on the brief. In sharp contrast to the separation of powers argument asserted by *amici,* the legislature as a whole has acknowledged this Court's power to "second guess" its decisions about criminalizing certain sex acts. It did so by passing a severability clause for sex offenses, which directs 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. That same provision authorizes this Court to strike the discriminatory language in the Romeo & Juliet law while preserving the remainder of the statute, thereby advancing the legislature's 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.

VI.

Conclusion

The legislators' brief advances no constitutional arguments beyond those that were raised by the State, and the suggestion that this Court has no authority to review the constitutionality of a criminal law can only be described as frivolous.

Respectfully submitted,

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