No. 00-85898-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS, Plaintiff-Appellee, v. MATTHEW R. LIMON, Defendant-Appellant.	))))))))))	No. 00-85898-S

BRIEF OF AMICI CURIAE

KANSAS PUBLIC HEALTH ASSOCIATION
AMERICAN PUBLIC HEALTH ASSOCIATION
AMERICAN ACADEMY OF HIV MEDICINE
AMERICAN FOUNDATION FOR AIDS RESEARCH
HIV MEDICINE ASSOCIATION
INTERNATIONAL ASSOCIATION OF PHYSICIANS IN AIDS CARE
NATIONAL ALLIANCE OF STATE AND TERRITORIAL AIDS DIRECTORS
NATIONAL MINORITY AIDS COUNCIL

Eric D. Barton KS Bar # 16503
WAGSTAFF & CARTMELL LLP
4740 Grand Avenue, Suite 300
Kansas City, Missouri 64112
(816) 701-1100
Fax: (816) 531-2372

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

INTERESTS OF AMICI CURIAE

Amici are organizations dedicated to public health and to supporting scientifically valid health research. Several have a particular focus on reducing the incidence of HIV infection through prevention and education efforts. Amici, based on their expertise, each reject the notion that criminalization of consensual sexual activity between teenagers of the same sex to a greater extent than criminalization of the same consensual sexual activity between teenagers of the opposite sex benefits public health. Amici submit this brief to refute the "public health" assertions hypothesized after the fact by the State's attorney and to provide the Court with accurate scientific information concerning the purported public health implications of excluding gay teenagers from Kan. Stat. Ann. § 21-3522, the "Romeo and Juliet law."

The Kansas Public Health Association ("KPHA") is a non-profit membership organization dedicated to promoting sound public health programs and policies in Kansas. KPHA is an affiliate of the American Public Health Association.

The American Public Health Association ("APHA") is devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is the world's largest health organization, with over 50,000 affiliated members from all disciplines and specialties in public health.

The American Academy of HIV Medicine ("Academy") is dedicated to promoting excellence in HIV/AIDS care. Through advocacy and education, the Academy is committed to supporting health care providers in HIV medicine and to ensuring better care for those living with AIDS and HIV disease.

The American Foundation for AIDS Research ("amfAR") is the leading U.S. nonprofit organization dedicated to the support of AIDS research, AIDS prevention,

treatment education, and the advocacy of sound AIDS-related public policy. Since 1985, amfAR has invested over $220 million in its programs and has awarded grants to more than 2,000 research teams worldwide.

The HIV Medicine Association (“HIVMA”) represents more than 2,600 physicians and other health care providers who practice HIV medicine in 49 states, the District of Columbia, Puerto Rico, the Virgin Islands, and 36 countries outside of the United States. As an organization that represents researchers and clinicians who devote a majority of their time to preventing, treating and eventually eradicating HIV disease, HIVMA has a strong interest in the promotion of sound public health policies that are grounded in science.

The International Association of Physicians in AIDS Care is a not-for-profit organization representing 12,000-plus physicians and allied healthcare professionals in over 100 countries, dedicated to crafting and implementing global educational, advocacy, and healthcare strategies to improve the quality of care provided to all people living with HIV/AIDS.

The National Alliance of State and Territorial AIDS Directors ("NASTAD") is a nonprofit national association of state health department directors with responsibility for administering government-funded HIV/AIDS health care, prevention, education, and supportive services. Founded in 1992, NASTAD is dedicated to reducing the incidence of HIV infection in the United States and its territories; providing comprehensive, compassionate, and quality care to all persons living with HIV/AIDS; and the development of responsible and compassionate public AIDS policies.

The National Minority AIDS Council, established in 1987, is the premier national organization dedicated to developing leadership within communities of color to address the challenges of HIV/AIDS and promoting sound national HIV/AIDS, health, and social

policies that are responsive to the needs of the diverse communities of color affected by HIV/AIDS.

SUMMARY OF THE ARGUMENT

This Court should not entertain a public health rationale as a basis for excluding same-sex consensual sexual activity from the reach of Kan. Stat. Ann. § 21-3522, the "Romeo and Juliet law." An objective evaluation of medical science concerning the transmission of sexually transmitted diseases (STDs), particularly the human immunodeficiency virus (HIV), vitiates any argument that the Romeo and Juliet law, itself, or the distinction confining its reach to "opposite sex" partners, is rationally related to preventing disease. The restriction/exclusion is both so over- and under-inclusive as a means of preventing the spread of HIV, and is so far removed from any purported public health objective, that it would be impossible to credit HIV prevention – or prevention of any other STDs – as its legitimate legislative purpose. The Romeo and Juliet law exempts from heightened penalty a wide range of high-risk sexual activity between members of the "opposite sexes" while allowing larger penalties for behaviors that present virtually no risk of HIV transmission. The State suggests no rational connection between its public health goals and the law itself, and the legislature did not even consider the State's purported rationale when it passed the law. In sum, the disparity between the law's scope and the medical science regarding the way in which HIV and other STDs actually are transmitted renders the law irrational as a means of serving a public health goal.

ARGUMENT

LIMITING THE 'ROMEO AND JULIET' LAW TO HETEROSEXUAL PARTNERS BEARS NO RATIONAL RELATIONSHIP TO ANY PUBLIC HEALTH PURPOSE.

To support the constitutionality of the sentence in the instant case, the State's

attorney hypothesizes that a public health rationale can support a greatly reduced penalty for heterosexual sexual partners, as compared with homosexual sexual partners. Without any supporting sources, the State asserts that gay sex poses an extraordinary public health danger, such that "[t]he contemporary plague of AIDS alone" (Appellee's Supplemental Brief at 13) renders the law constitutional. In crediting this suggestion, the court below similarly cited no support, and erred. Judge Pierron, in dissent, found the law motivated sheerly by anti-gay animus. State v. Limon, 32 Kan. App. 2d 369, 400, 83 P.3d 229, 249 (Kan. Ct. App. 2004), rev. granted (May 25, 2004)("The purpose of the law is not to accomplish any of the stated aims other than to punish homosexuals more severely than heterosexuals for doing the same admittedly criminal acts."). As Judge Pierron recognized, the Romeo and Juliet law's harsh treatment of same-sex sexual partners lacks any rational relationship to the State's purported public health goals of decreasing HIV incidence. For this reason, even under the least exacting equal protection analysis, the law cannot stand.

A. A Medically Reasonable and Rational Relationship Must Exist Between a Law and Its Purported Public Health Objective.

The Supreme Court long ago held that intrusive legislation serving public health objectives is constitutionally permissible only if it bears a "real or substantial relation to the protection of the public health." Jacobson v. Massachusetts, 197 U.S. 11, 28, 31 (1905). Where a public health measure is applied "in reference to particular persons in [] an arbitrary, unreasonable manner," that situation may "compel the courts to interfere for the protection of such persons." Id. at 28. Although Jacobson predated modern equal protection jurisprudence, its core principle remains the model in public health cases. See Scott Burris, Rationality Review and the Politics of Public Health, 34 Vill. L. Rev. 933,

966 (1989) ("Jacobson's approach has continued to be the model for health cases.") (citing cases).

Even under the least demanding test applied to assess the constitutionality of legislative action, a rational relationship must exist between a law and its purported public health objective. See Craigmiles v. Giles, 312 F.3d 220, 226 (6th Cir. 2002). And as a general matter, finding the connection between "the classification adopted and the object to be attained" is what "gives substance to the Equal Protection Clause." Romer v. Evans, 517 U.S. 620, 632 (1996). The rationality of the connection must be assessed in light of the factual context as it actually exists, rather than as it might be imagined. Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336, 343 (1989) (rational relationship must exist in reality not just in theory; striking down property valuation system that "theoretically" might be equitable, but that in fact resulted in widespread disparity); Heller v. Doe, 509 U.S. 312, 321 (1993) ("even the standard of rationality as we so often have defined it must find some footing in the realities of the subject matter addressed by the legislation").

Because the law in this case targets same-sex partners, there must be, at the very least, a medically rational fit between that class-based distinction and the purported public health objective. Where a law targets a specific class of citizens in the name of public health, the Equal Protection Clause requires some fit between that classification and the law's purported objective. "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." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985). In particular, where a law's "sheer breadth is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus toward the class it affects[,] it

lacks a rational relationship to legitimate state interests." Romer v. Evans, 517 U.S. 620, 632 (1996).

In assessing whether a rational relationship exists between a law and a professed public health objective, the medical grounding of the legislature's judgment is a critical consideration. For example, a "statute's superficial earmarks as a health measure" will not satisfy "rational basis" review if it is so overly broad as to proscribe conduct wholly unrelated to the purported public health purpose. See Eisenstadt v. Baird, 405 U.S. 438, 450-52 (1972) (statute prohibiting distribution of all contraceptives to unmarried persons had "no public health purpose" to support a rational basis for drawing that distinction, in part because "certain contraceptive medication and devices constitute no hazard to health, in which event ... the statute swept too broadly in its prohibition.") (citation omitted). Under-inclusiveness of such a health-based statute is similarly "invidious." Id. at 454.

B. Because the Romeo and Juliet Law Is at Once Grossly Over- and Under-Inclusive as a Means of Preventing HIV, It Does Not Rationally Further Any Legitimate Public Health Interest.

The lack of any legitimate public health rationale for the exclusion in the Romeo and Juliet law is immediately apparent based on the utter lack of connection between its classification and the principal health problem that the state suggests it might address -- the transmission of HIV or other STDs. A law designed to avoid transmissions of STDs would focus on the risk involved in the acts designated, the use of safer sex practices, and whether the individuals involved were infected; yet the exclusion at issue here focuses on the sex of the individuals, rather than on any of these public health factors, allowing a reduced penalty in cases involving sexual activity between a teenagers only if they are of "opposite" sexes, Kan. Stat. Ann. § 21-3522, and is thus "at once too narrow and too broad" as a means of preventing HIV, belying any "rational relationship to [that] independent and legitimate

legislative end." Romer, 517 U.S. at 633.

> As Judge Pierron wrote in dissent in the Court of Appeals, while there is a
>
> facial connection between penalizing consensual criminal sexual relations with a minor and concerns about venereal diseases…there is no reasonable support presented for much greater criminal punishments for any homosexual acts than for any heterosexual acts.

Limon, 32 Kan. App. 2d at 397, 83 P.3d at 247. In this vein, the Romeo and Juliet law is strikingly over- and under-inclusive in several specific ways.

1. **The Law's Focus on the Identity of Sexual Partners, Rather Than the Nature of the Sexual Activity, Renders It Impermissibly Under-inclusive as a Public Health Measure, as It Lowers the Penalty for Heterosexuals' Engaging in Common High-Risk Activities and Fails to Proscribe Heterosexuals' Engaging in Other Common High-Risk Sexual Activities.**

First, the law is under-inclusive in that it decreases the penalty for heterosexual vaginal intercourse, an increasingly common means of HIV transmission in the United States. Worldwide, vaginal intercourse is the leading route of HIV transmission. See CDC, Can I Get HIV from Having Vaginal Sex?, at http://www.cdc.gov/hiv/pubs/faq/faq21.htm_ (last updated Dec. 15, 2003); Thomas C. Quinn, Viral Load, Circumcision, and Heterosexual Transmission, 12 The Hopkins HIV Report 1, 5 (2000), available at http://hopkins-aids.edu/publications /report/may00_ 1.html ("Heterosexual transmission remains the most common mode of transmission of HIV throughout the world. Over 85% of new infections are acquired heterosexually....").

The State and the court below ignored this fact, instead simply stressing that the homosexual male population experiences a higher incidence of HIV. The State's singular reliance on one broad fact misses the point entirely. Indeed, among the population of HIV-positive young people ages 13-19, which includes the age range at issue in the Romeo and Juliet law, nearly two-thirds (61%) are female. See United States Centers for Disease Control

and Prevention (CDC), Basic Statistics, at http://www.cdc.gov/hiv/pubs/facts/youth.htm (last updated Mar. 11, 2002). A study of a similar age range (13-24 years) revealed that 45% of cases of Acquired Immune Deficiency Syndrome (AIDS) among young women resulted from HIV infection through heterosexual sex (with 11% caused by intravenous drug use and 43% of cases with an unknown route of infection). Id. Worldwide, women now account for half of all reported cases of adult HIV infection. See CDC, Basic Statistics, at http://www.cdc.gov/hiv/stats.htm (last revised July 6, 2004).

Moreover, although the aggregate number of U.S. AIDS cases is currently higher for men having sex with men than for heterosexuals, the CDC reports that from 1996 through 2001, "[b]y risk, AIDS incidence declined sharply and then leveled among men who have sex with men." CDC, 13 HIV/AIDS Surveillance Report 1, 5 (2001). In contrast, "[a]mong persons exposed through heterosexual contact, incidence declined slowly from 1996 through 1998 but seems to have increased through 2001. Id. Heterosexual activity poses a particularly grave risk of HIV transmission for women. In a 2000 survey, 38% of women reported with HIV had been infected through heterosexual exposure. See CDC, HIV/AIDS Among US Women: Minority and Young Women at Continuing Risk, at http://www.cdc.gov/hiv/pubs/facts/women.htm (last updated Mar. 27, 2003).[1] As the CDC headlined the study, "Heterosexual Contact Now Is Greatest Risk for Women." Id. Although the State suggests that the purpose of the Romeo and Juliet law was to prevent HIV transmission, the statute's scope ignores the tragic realities of HIV transmission among heterosexuals, particularly women.

Additionally, the law's grant of lesser penalties for heterosexual anal sex is similarly

[1] Injection drug use ("IDU") was the infection route for another 25% of women, and receipt of blood transfusions, blood components, or tissue accounted for 1%. Id. Although the risk exposure for the

under-inclusive. The risk of HIV transmission during anal sex with an infected partner is the same for heterosexuals and homosexuals. Yet the statute reduces the penaltyfor this activity only for mixed-sex couples. Given that many studies demonstrate that heterosexuals regularly engage in this sexual activity, there is no public health support for the distinction. See Janice I. Baldwin & John D. Baldwin, Heterosexual Anal Intercourse: An Understudied, High-Risk Sexual Behavior, 29 Archives of Sexual Behavior 357, 362 (Aug. 2000) (nearly 23% of surveyed sexually active heterosexual college students engaged in anal intercourse; condoms were used only 20.9% of time); Gary J. Gates & Freya L. Sonenstein, Heterosexual Genital Sexual Activity Among Adolescent Males: 1988 and 1995, 32 Family Plan. Persp. 295, 296 (Nov./Dec. 2000) (11% of surveyed heterosexual adolescent males had engaged in anal sex with females). Indeed, "the sheer number of heterosexual couples engaging in [anal intercourse] far outnumber the total population of men who have sex with men." See Pamela Bean, Containing the Spread of HIV Infection Among High-Risk Groups, 21 Am. Clinical Laboratory 19, 19 (June 2002). Because it increases the penalty only for anal sex between men, the Romeo and Juliet law acts arbitrarily from a public health standpoint.

2. The Romeo and Juliet Law Is Unacceptably Over-inclusive as a Public Health Measure, As It Allows Increased Penalties for Practices Where Participants Are Unlikely – and in Some Cases Incapable – of Transmitting HIV or Other STDs.

The Romeo and Juliet law is over-inclusive in that it allows heightened penalties for sexual practices unlikely to transmit HIV. For example, the law allows a heightened penalty for oral sex involving two males, even though the risk of a male acquiring HIV through unprotected oral sex with another male--precisely the activity that occurred in this case--is extremely low, with a near-zero chance of infection. Kimberly Page-Shafer et al., Risk of

---

remaining 36% of AIDS cases among women was deemed "not reported or identified," the CDC noted that "most will be reclassified as heterosexual or IDU after follow-up investigations are complete." Id.

HIV Infection Attributable to Oral Sex Among Men Who Have Sex With Men and in the Population of Men Who Have Sex With Men, 16 AIDS 2350, 2350-51 (2002). Another recent study likewise showed that frequent unprotected oral sex carries a low risk of infection. CDC, Primary HIV Infection Associated With Oral Transmission, at http://www.cdc.gov/hiv/pubs/facts/oralsexqa.htm (last updated Apr. 2003). Similarly, the risk of HIV transmission through cunnilingus -- which is penalized more severely between same-sex, but not mixed-sex partners -- is virtually nil compared to anal and vaginal intercourse. CDC, HIV/AIDS Update, Preventing the Sexual Transmission of HIV, the Virus That Causes AIDS: What You Should Know About Oral Sex, at http://www.thebody.com/cdc/pdfs/oralsex.pdf (Dec. 2000). Nonetheless, the exclusion in the Romeo and Juliet law allows higher penalties where same-sex parties engage in oral sex.

In addition, the exclusion in the Romeo and Juliet law heightens penalties where two females engage in sexual activity, even though studies consistently show that the risk of HIV transmission between female partners is negligible. See CDC, HIV/AIDS & U.S. Women Who Have Sex with Women (WSW), at http://www.cdc.gov/hiv/pubs/facts/wsw.htm (last updated July 2003); Rimi Shah & Caroline Bradbeer, Women and HIV - Revisited Ten Years On, 11 Int. J, STD & AIDS 277, 278 (May 2000); Vickie M. Mays et al., The Risk of HIV Infection for Lesbians and Other Women Who Have Sex with Women: Implications for HIV Research, Prevention, Policy, and Services, 2 Women's Health: Res. on Gender, Behav. & Pol'y 119, 125 (1996). Of the 886,575 AIDS diagnoses recorded in the United States by the CDC through 2002, not a single HIV infection was confirmed in a woman whose sole route of HIV exposure was sexual activity with other women. CDC, Divisions of HIV/AIDS Prevention, Basic Statistics, at http://www.cdc.gov/hiv/stats.htm (last revised July 6, 2004); CDC, HIV/AIDS Update, Preventing the Sexual Transmission of HIV, the Virus That Causes

AIDS: What You Should Know About Oral Sex, at http://www.thebody.com/cdc/pdfs/oralsex.pdf (Dec. 2000). As Judge Pierron noted below, "[w]e must . . . recognize the inapplicability of much of this [public health] rationale as it applies to female-with-female sex, which usually has an extremely low potential for spreading venereal disease but receives the higher penalty." Limon, 32 Kan. App. 2d at 397; 83 P.3d at 247. In sum, imposing higher penalties for all homosexual sexual activity, whether between two males or two females, is not rationally related to controlling the spread of HIV.

Furthermore, the law sweeps too broadly by failing to distinguish between safe and unsafe sexual practices. Rather than tailoring the law to address only high-risk sexual activities, the legislature increased the penalties for all same-sex couples regardless of actual HIV risk. For example, the law fails to differentiate unprotected sexual activity from that performed with a condom. The CDC has noted that the transmission risk of any sexual act increases approximately twenty-fold if the participants do not use condoms. CDC, Incorporating HIV Prevention into the Medical Care of Persons Living with HIV: Recommendations of CDC, the Health Resources and Services Administration, the National Institutes of Health, and the HIV Medicine Association of the Infectious Diseases Society of America, Morbidity and Mortality Weekly Report 2003; 52 (No. RR-12): 9. In studies of uninfected people who were involved in sexual relationships with HIV-positive partners, 98-100% of those people who used latex condoms correctly and consistently did not become infected, even with repeated sexual contact. CDC, How Effective Are Latex Condoms in Preventing HIV?, at http://www.cdc.gov/hiv/pubs/faq/faq23.htm (last updated Dec. 15, 2003). See also Thomas C. Quinn, Viral Load, Circumcision, and Heterosexual Transmission, 12 The Hopkins HIV Report 1, 5 (2000), available at http://hopkins-aids.edu/publications/report/may00_ 1.html ("consistent condom use is the most important

measure for preventing HIV transmission"). However, despite the State's purported public health justifications, the Romeo and Juliet law treats safer sexual acts in the same manner as relatively unsafe acts.

Finally, the Romeo and Juliet law does not account in any manner for the HIV status of sex partners. Obviously, there is no risk of HIV transmission in any case where both partners are free of the virus. Particularly in the case of a monogamous relationship between uninfected partners, an additional penalty for sexual activity is utterly irrational as a public health measure. As Justice Pierron noted,

> [T]here is no difference in the penalties imposed under the Kansas law based on whether the defendant actually does or does not have a venereal disease. This is a very important omission if the law was truly concerned about venereal disease. Perhaps even more unusual is that under the law a female infected with every venereal disease yet identified, and engaging in acts quite likely to infect or actually infecting a male minor, will receive a much lighter sentence. A disease-free male engaging in sex with another male in a manner not likely to spread disease if it was present will receive a much heavier sentence. Perversely, under the law, a male with a venereal disease who infects and impregnates an underage female will also receive a much lighter sentence.

Limon, id.

C. In Addition to Lacking a Rational Connection in Theory, the State's Hypothetical "Public Health" Rationale for the Romeo and Juliet Law Is Entirely Invisible in the Legislative History.

Given the complete lack of fit between the Romeo and Juliet law's differential treatment of same-sex activities and the State's purported public health justification for the law, it is hardly surprising that the legislature did not even contemplate this rationale when it debated the legislation. There is neither statutory language nor legislative history to support the State's *post hoc* purported public health justification for the relevant provisions of the Romeo and Juliet law. In equal protection cases, courts need not "accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its

history demonstrates that the asserted purpose could not have been a goal of the legislation." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975). Thus, this Court should not consider, much less accept, the State's purported public health rationale.

No legislative history supports the State's suggestion that any part of the Romeo and Juliet law, including its heterosexual limitation, was based on any public health interest. In fact, legislative history suggests the opposite. Proponents of amending Kansas' Unlawful Sexual Relations law invoked no public health concerns whatsoever, focusing instead on the benefits of abating prosecutions and dropping sex offender registration requirements when two young people "are in a mutual relationship and the parents or other parties initiate prosecution." See House Judiciary 3-16-99 Attachment 1, Kansas Sentencing Commission Testimony on Senate Bill 131 at 4. In contrast, opponents—not supporters—of the law raised public health concerns prior to the law's passage. Opponents suggested that the Romeo and Juliet law, in failing to distinguish between sexual intercourse and other sexual activities, would facilitate heterosexual teen pregnancy and sexually transmitted diseases. See House Judiciary 3-16-99 Attachment 5, Memorandum of Kansas County & District Attorneys Association. Notably, these opponents' concerns focused on the health of heterosexual youth; the supposed concerns about HIV transmission via same-sex conduct do not even appear in the underlying legislative documentation. In light of this history, the Court should not credit the State's reliance on a *post hoc* public health justification that lacks any basis in reliable science and was not even considered by the legislature.

D. Because the State's Purported Public Health Justification Lacks Support in Both Reason and History, the Court Should Follow the Persuasive Authority of Other Courts That Have Rejected Similarly Specious Arguments.

The complete lack of fit between the classifications drawn by the Romeo and Juliet law and the actual science of HIV transmission belies the public health rationale suggested

by the State and the court below. Indeed, as Judge Pierron noted in dissent in the Court of Appeals, the purported public health rationale advanced by the State in this case makes

> no attempt . . . to draw a connection between punishing any particular individual and the likelihood of that person spreading a disease. Group guilt is not a favored concept in American law. What is the rationality of a law that would punish persons 15 times longer because they may belong to a group that has a higher incidence of AIDS, notwithstanding the fact that there is no evidence the defendant had AIDS or any other disease? This is especially puzzling when…a person who actually has AIDS and engages in sex with a minor will receive a much lighter sentence if the defendant is of the opposite sex from the minor.

Limon, 32 Kan. App. 2d at 398, 83 P.3d at 247.

Under the Romeo and Juliet law, a gay man or lesbian who is uninfected with HIV or any other STD and engages in protected monogamous sexual relations is branded a far more dangerous criminal than an infected heterosexual who engages in unprotected intercourse with multiple partners. This result is clearly irrational if the true purpose of the law is to stop the spread of HIV. Simply calling the Romeo and Juliet law a "public health measure" does not make it one in the absence of a rational basis for the law's distinction between same-sex and opposite-sex partners. The State's suggestion to this Court appears to be ungrounded in science and more likely bound up in moral judgment of gay people -- illegitimate bases for government discrimination even under rational basis review. Romer, 517 U.S. at 633-35; see also Lawrence v. Texas, 123 S. Ct. 2472, 2483 (2003).

Not surprisingly, prior to the Supreme Court's invalidation of all remaining sodomy laws, including same-sex sodomy laws, Lawrence, 123 S. Ct. at 2484, courts around the country had rejected similarly flawed "public health" justifications for same-sex sodomy laws and other laws that distinguish between heterosexual and homosexual couples. Gryczan v. State, 942 P.2d 112, 124 (Mont. 1997) ("[T]he inclusion of behavior not associated with the spread of AIDS and HIV and the exclusion of high-risk behavior among

those other than homosexuals indicate the absence of any clear relationship between the statute and any public health goals."); Commonwealth v. Wasson, 842 S.W.2d 487, 501 (Ky. 1992) ("The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS."); see also Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 968 (Mass. 2003) (invalidating limitation of marriage licenses to heterosexuals absent "reasonable relationship" to protection of public health). This Court should follow these well-reasoned opinions and reject the State's unsupported suggestion that the Romeo and Juliet law is rationally related to advancing legitimate public health goals.

CONCLUSION

The Romeo and Juliet law's reach and the exclusion contained within it do not comport with goals of preventing disease transmission, particularly in the case of HIV. In the absence of a public health basis in medicine, science, or history to support Kan. Stat. Ann. § 21-3522, the Court cannot rationally rely upon health concerns to sustain the law's constitutionality.

Respectfully submitted,

_____

Eric D. Barton KS #16503
WAGSTAFF & CARTMELL LLP
4740 Grand Avenue, Suite 300
Kansas City, MO 64112
(816) 701-1100 (telephone)
(816) 531-2372 (fax)

_____

Hayley Gorenberg
Deputy Legal Director, Lambda Legal
120 Wall St., Suite 1500
New York, NY 10005
(212) 809-8585 (telephone)
(212) 809-0055 (fax)

Attorneys for Amici Curiae Kansas Public Health Association, American Public Health Association, American Academy of HIV Medicine, American Foundation for AIDS Research, HIV Medicine Association, International Association of Physicians in AIDS Care, National Alliance of State and Territorial AIDS Directors, and National Minority AIDS Council

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of *Amici Curiae* was served by first class U.S. mail, postage prepaid, this _____ day of July 2004, to each of the following:

Phillip D. Kline
Kansas Attorney General
Kansas Judicial Center
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597

Jared Maag, Esq.
Assistant Attorney General
Kansas Judicial Center
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597

County Attorney – Miami County
Miami County Courthouse
120 S. Pearl, Room 300
Paola, KS 66071

Paige A. Nichols, Esq.
P.O. Box 582
Lawrence, Kansas 66044

Julie M. Carpenter
Jenner & Block, LLC
601 Thirteenth St. N.W. Ste.1200
Washington D.C. 20005

James C. Spencer
Spencer & Spencer, P.A.
P.O. Box 247
Oakley, KS 67748-0247

Tamara Lange
ACLU Foundation
1663 Mission Street - STE 460
San Francisco, California 94103

James Esseks
ACLU Foundation
125 Broad Street, 18th Floor
New York, New York 10004

Timothy M. O'Brien
Shook Hardy & Bacon, LLP
84 Corporate Woods
10801 Mastin Ste. 1000
Overland Park, KS 66210-1671

Kevin H. Therriot
Alliance Defense Fund
15660 W. 135th St.
Olathe, KS 66062

Matthew Staver
Liberty Counsel
210 East Palmetto Ave.
Longwood, FL 32750

Eric D. Barton, KS Bar # 16503