

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

**BRIEF OF *AMICI CURIAE* ACLU OF KANSAS & WESTERN MISSOURI
AND AMERICAN CIVIL LIBERTIES UNION**

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

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Interest of Amici

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has appeared as counsel or *amicus curiae* in numerous federal and state court cases involving the legal status of lesbians and gay men. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (holding that Colorado's ban on laws protecting lesbians, gay men and bisexuals from discrimination violated the federal Equal Protection Clause). This experience provides the ACLU with a nuanced understanding of the role of the Equal Protection Clause in protecting all citizens from illegitimate discrimination. On August 22, 2001, this Court granted the ACLU leave to proceed as *amici curiae*.

Introduction

Appellant Matthew Limon was sentenced to 17 years in prison – instead of 15 months – not because of the nature or quality of his criminal conduct but because of legislative discrimination based on sexual orientation. This case requires the Court to determine whether imposing a harsher criminal penalty based on a defendant's sexual orientation violates the United States and Kansas Constitutions. The American Civil Liberties Union and the American Civil Liberties Union of Kansas and Western Missouri (collectively “ACLU”) submit this brief as *amici curiae* in support of Appellant's challenge to the unconstitutional classification established by K.S.A. 21-3505 and 21-3522.

Nature of the Case

This is a direct appeal from Matthew Limon's conviction for one count of criminal sodomy, in violation of K.S.A. 21-3505. Matthew is a developmentally disabled young man who

had just turned 18 when he performed consensual oral sex on M.A.R., another boy who lived with Matthew at a residential school for developmentally disabled youth. (R. I, 16; R. VI, 4-6).¹ M.A.R. was nearly 15 years old – three years, 1 month and a few days younger than Matthew. (R. VI, 4).

Under Kansas law, oral sex is included within the definition of sodomy, K.S.A. 21-3501, and sodomy with a 14 or 15 year old is criminalized under two different statutes. Section 21-3505 – Kansas’s criminal sodomy statute – makes oral sex with a teenager between the ages of 14 and 16 a severity level 3, person felony. Section 21-3522 – known as a “Romeo and Juliet” law – creates a more specific crime of unlawful voluntary sexual relations, a severity level 9, person felony with comparatively mild penalties. Kansas’s Romeo and Juliet law applies when (1) two teenagers engage in voluntary sodomy, (2) the younger teenager is between 14 and 16 years old, (3) the older teenager is less than 19 years old, (4) the age difference is less than 4 years, (5) there are no third parties involved, and (6) the two teenagers “are members of the opposite sex.” The State concedes that in creating § 21-3522 it “carved out an exception to the crime of Criminal Sodomy.” Brief of Appellee at 7. Thus, under Kansas’s statutory scheme, if Romeo engages in consensual sexual activity with his 14-year-old girlfriend, Juliet, he receives a relatively mild penalty under § 21-3522. But if Romeo engages in the identical consensual sexual activity with his 14-year-old boyfriend, Mercutio, § 21-3522 is inapplicable and he is subjected to a lengthy prison term under § 21-3505. Unfortunately, the injustice wrought by Kansas’s sexual orientation-based classification is not literary fantasy; it is Matthew Limon’s reality.

¹Matthew stipulated that he had oral contact with the genitalia of M.A.R. and that M.A.R. consented to the oral contact. (R. IV, 4).

All of the requirements of § 21-3522 apply in Matthew's case, save one – because Matthew and M.A.R. were not “members of the opposite sex,” Matthew was charged and sentenced under the far more severe criminal sodomy statute. Instead of receiving a maximum sentence of *15 months* under § 21-3522, Matthew was charged under § 21-3505 and was sentenced to 206 months in prison and 60 months of post-release supervision - a total of over *17 years* in prison and five years of supervised release. By the time Matthew is released, barring parole, he will have spent half his life in jail; he will be 36 years old, and he will begin his adult life as a registered sex offender.

By restricting § 21-3522 to members of the opposite sex, Kansas discriminates based on sexual orientation, imposing harsh minimum prison terms on lesbian, gay and bisexual youth while subjecting heterosexual youth who engage in *identical* sexual acts to comparatively mild criminal penalties. Such a classification can advance no legitimate governmental purpose. The State's proffered reasons confirm that the classification is based on nothing more than false stereotypes and negative social attitudes about lesbians, gay men, and bisexuals. While furthering morality and protecting children are legitimate legislative goals, invoking a legitimate goal is not enough to circumvent the Equal Protection Clause, which prohibits the government from discriminating against a group of people because it disapproves of them. Even under the most lenient equal protection review, there must be a rational link between the challenged classification and the asserted legislative purpose and the purpose served must be legitimate. Neither requirement is satisfied here. The provision limiting § 21-3522 to situations in which the sexually active teenagers “are members of the opposite sex” must be stricken in order to render § 21-3522 constitutional. Accordingly, the trial court erred in denying Matthew's motion to dismiss the charge under § 21-3505.

Statement of Issues

Although other issues are presented on appeal, the ACLU will address only one issue:

Whether a statutory classification that imposes harsher criminal penalties based on the sexual orientation of the defendant rather than on the nature of the criminal acts violates the Equal Protection Clause of the United States Constitution.

Arguments and Authorities

I. Kansas Applies Different Laws Based on a Defendant's Sexual Orientation

The State of Kansas criminalizes consensual sodomy with a 14 or 15 year old under two very different statutes, creating an impermissible classification based on sexual orientation.

Under K.S.A. 21-3505(a)(2) and (b), an adult of any age who engages in oral or anal sex with a teenager between 14 and 16 years old to whom the adult is not married is guilty of criminal sodomy, a severity level 3, person felony. Section 21-3522 – Kansas's "Romeo and Juliet" law – defines the more specific offense of unlawful voluntary sexual relations as

engaging in *voluntary* (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved *and are members of the opposite sex*. (Emphasis added.)

By limiting application of § 21-3522 to "members of the opposite sex," the legislature took a more specific offense that would otherwise control and made it unavailable to one class of people: lesbian, gay and bisexual youth. The physical acts that trigger application of § 21-3522 are precisely the same regardless of the sex of the participants: sodomy is oral contact with *any other person's* genitalia or anal penetration of *any person* by any body part or object. K.S.A. 21-3501. As the sexual acts at issue are identical, it is only the statutory language "and are members of the opposite sex" that makes § 21-3522 inapplicable to lesbian, gay and bisexual youth. The

resulting classification subjects similarly situated teenagers who have engaged in identical sexual acts to two different laws with very different criminal penalties. The guaranty of “equal protection of the laws is a pledge of the protection of equal laws.” *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The State has violated that pledge by establishing different and unequal laws that irrationally discriminate against lesbian, gay and bisexual teenagers.

II. The Court Need Not Determine the Appropriate Level of Equal Protection Scrutiny

An equal protection challenge typically requires courts to identify a legitimate purpose for the challenged classification and to determine “the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 U.S. 620, 632 (1996). However, when a classification is created for the very purpose of disadvantaging the burdened group, it cannot possibly be rationally related to a legitimate purpose, and it becomes unnecessary to determine the appropriate level of scrutiny. *Id.* at 632, 635.² Here, the State has created two different sets

²Equal protection analysis often begins with a determination regarding the appropriate “level of scrutiny” for the type of discrimination involved. However, where, as here, the proper level of scrutiny for the classification at issue is an open question and the government action will not survive even the most basic equal protection review, the appropriate course is to resolve the case without deciding whether heightened scrutiny is appropriate. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985). The United States Supreme Court has never analyzed whether sexual orientation should be treated as a suspect or quasi-suspect classification for purposes of federal equal protection analysis. *See Romer*, 517 U.S. at 627 (listing classifications that have “so far been given the protection of heightened equal protection scrutiny” and holding discriminatory initiative invalid even under “the most deferential of standards” without discussing generally applicable standard for reviewing classifications based on sexual orientation). Putting aside the military context where extraordinary deference is applied, *see, e.g., Philips v. Perry*, 106 F.3d 1420, 1430 (9th Cir. 1997) (Noonan, concurring); *Brown v. Glines*, 444 U.S. 348 (1980), courts are divided on the applicable standard of review for sexual orientation classifications. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (“In this case we need not consider whether homosexuals are a suspect or quasi-suspect class, which would subject the defendants’ conduct to either strict or heightened scrutiny. . . . The rational basis standard is sufficient for our purposes herein.”); *Tanner v. Oregon Health Sciences Univ.*, 157 Or. App. 502, 524 (1998) (applying heightened scrutiny to classification based on sexual orientation). This case can and should be resolved without recourse to heightened scrutiny. Should the Court wish to address the more general question, however, *amici* will be

of punishments for the same criminal acts based on the sexual orientation of the person who commits the crime. This type of classification violates the core principles underlying the promise of equal protection. *Id.* at 635. As in *Romer*, the classification in this case is such a fundamental violation of equal protection that the suspect nature of the classification is unnecessary to the analysis, and the Court need not decide whether all classifications based on sexual orientation are suspect.³

III. The Equal Protection Clause Prohibits Classifications Intended to Express or to Give Effect to Negative Social Attitudes toward the Disadvantaged Group.

happy to provide more extensive treatment of the issue.

³Were the Court to conclude that the challenged classification survives rational basis scrutiny, *amici* would maintain that classifications that disadvantage lesbians, gay men and bisexuals are inherently suspect because lesbians, gay men and bisexuals are a discrete and insular minority and because, unlike many other groups, they are sufficiently isolated due to prejudice that they are unable to protect their interests in the ordinary political process. *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938). In other words, classifications based on sexual orientation should be subjected to strict scrutiny because lesbians, gay men and bisexuals have many, if not all, of the “traditional indicia of suspectness,” *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973): (1) classifications based on sexual orientation historically have been used to subject lesbians, gay men and bisexuals to “purposeful unequal treatment,” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985); (2) there is no relationship between sexual orientation and the “ability to participate in and contribute to society,” *Matthews v. Lucas*, 427 U.S. 495, 505 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); (3) lesbians, gay men and bisexuals are in a position of relative powerlessness within the majoritarian, legislative political sphere, *cf. Rodriguez*, 411 U.S. at 28; and (4) while there is no consensus in the scientific community about whether sexual orientation is determined by biology, environment or some combination of factors, only a small minority disputes the accepted scientific view that neither gays and lesbians nor heterosexuals can change their sexual orientation. *See, e.g., Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J. concurring); American Psychiatric Ass’n, *APA Position Statement on Psychiatric Treatment and Sexual Orientation* (Dec. 11, 1998) (opposing psychiatric treatment based on assumptions that patients should change sexual orientation); American Psychiatric Ass’n, *COPP Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (May 2000) (noting absence of scientific evidence of success in altering sexual orientation and recommending “ethical practitioners refrain from attempts to change individuals’ sexual orientation, keeping in mind the dictum to first, do no harm”) (http://www.psych.org/pract_of_psych/copptherapyaddendum83100.cfm) (visited Sept. 23, 2001). Moreover, while the Supreme Court has referred to immutability as a consideration in some cases, as with other considerations, immutability alone is neither necessary nor sufficient to establish that strict scrutiny should apply. *See Cleburne*, 473 U.S. at 442 & n.10.

The Fourteenth Amendment guarantees that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amend. XIV. At its most basic level, the Equal Protection Clause means that a state may not establish a classification in order to harm or to express disapproval of the group burdened by the law. *Romer*, 517 U.S. at 633; *United States Dep’t of Agric. v. Moreno*, 413 U.S. 529, 537-38 (1973); *Yick Wo*, 118 U.S. at 373. The same principle prohibits a state from passing discriminatory laws that give legal effect to society’s irrational fears and prejudices. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

In *Romer*, the Supreme Court invalidated “Amendment 2,” a state constitutional initiative that prohibited the passage of civil rights laws protecting lesbians, gay men and bisexuals from discrimination on the job, in housing, and in public accommodations. *Romer*, 517 U.S. at 623. The interests the State offered in support of the classification – respect for the freedom of association of other citizens and conserving resources to fight race and sex discrimination – were unquestionably legitimate. *Id.* at 635. Indeed, the first represents a value enshrined in the Constitution itself, and the second has long been acknowledged to be a legitimate state interest. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 82 (1988).

Nevertheless, the Court held Amendment 2 invalid for two reasons. First, the Court said, Amendment 2 was a “literal” denial of equal protection because it “impose[d] a broad and undifferentiated disability on a single named group.” *Romer*, 517 U.S. at 620, 632. Second, the classification was so substantially unrelated to the stated purposes that the court found it “impossible to credit them.” *Id.* at 635. Being unable to credit those purposes, the Court could only conclude that Amendment 2 drew its classification in order to make lesbians and gay men “unequal,” a purpose inherently forbidden by the Equal Protection Clause. *Id.* at 635-36.

As in *Romer*, the discriminatory classification in this case imposes a broad disability on a single identifiable group – lesbian, gay and bisexual teenagers – singling them out for criminal treatment far harsher than that suffered by similarly situated heterosexual teenagers who engage in the *very same* consensual sexual acts with younger teenagers. In addition, as *amici* discuss at length below, the classification in this case is so discontinuous with the State’s asserted purposes that the only conceivable purpose for the classification is to penalize lesbian, gay and bisexual teenagers for being lesbian, gay or bisexual. Such discrimination for its own sake is patently impermissible. *Id.* at 635.

Rather than attempting the impossible feat of distinguishing *Romer*, the State profoundly misreads the opinion, asserting that the Court struck down Amendment 2 because it created a barrier to participation in the political process, which is a fundamental right. Brief of Appellee at 5. While it is true that the Colorado Supreme Court based its decision on that fundamental right, 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. The State has it exactly backward: the Court struck down Amendment 2 not because it interfered with a fundamental right but because it was a classification targeted at lesbians, gay men and bisexuals for the very purpose of saddling them with additional burdens. *Id.* at 632; *compare* Brief of Appellee at 5.

The State also misstates the holding and import of the Supreme Court’s decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Brief of Appellee at 5. No equal protection claim was asserted or considered in *Bowers*. *Id.* at 196 n.8. In fact, there was no statutory basis for such a claim because the Georgia sodomy law applied equally to same-sex and opposite-sex couples. To the extent *Bowers* ever had any bearing in cases brought under the Equal Protection Clause, a dubitable proposition at best, the decision has been called into doubt by the reasoning of the majority in *Romer*. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (arguing that it should

be constitutionally permissible to disfavor homosexual conduct if it is permissible to criminalize homosexual conduct). In any event, the holding in *Bowers* does not and cannot support an argument that the classification in this case bears even a rational relationship to a legitimate governmental purpose. *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997).

The State has asserted two interests it contends are advanced by K.S.A. 21-3522 and 21-3505: promoting morality and protecting children. Brief of Appellee at 6. In discussing these two goals, however, the State never explains how imposing more severe criminal penalties based on the sexual orientation of the offender promotes morality or protects children. In the absence of any intelligible connection to a legitimate state interest, the only credible purpose of the State's discriminatory classification is an illegitimate desire to punish lesbian, gay and bisexual youth because of their sexual orientation.

A. The State Has Failed to Explain The Purpose of Its Classification

Even under the most lenient standards of equal protection review, legislation will survive only "if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440 (citations omitted). "The search for the link between classification and objective gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. Thus, the fact that legislation *as a whole* relates to some legitimate purpose is immaterial; the *discriminatory classification* must itself advance the legitimate aim of the legislature. *Id.* at 631; *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 449.

In this case, the State has asserted two interests that support its decision to criminalize consensual sexual activity between older and younger teenagers, but it has failed to explain how limiting application of § 21-3522 to "members of the opposite sex" promotes either those asserted interests or any other legitimate interest. The question here is not whether the State may criminalize consensual sex between older and younger teenagers in order to promote morality

and to protect children, but whether *the statutory discrimination* against lesbian, gay and bisexual teenagers can rationally be said to promote morality or to protect children. The State never addresses this critical question, articulating no relationship whatsoever between the challenged classification and the State's asserted interests in promoting morality and protecting children. Nor is it possible to discern any rational relationship between the classification and the asserted purposes. Any attempt to describe a relationship between the challenged classification and the state interests of promoting morality and protecting children reveals that the classification rests either on the State's own disapproval of lesbians, gay men and bisexuals or on the State's illegitimate acquiescence in public animosity toward lesbians, gay men and bisexuals. In the absence of any legitimate reason for the classification, the classification is at best arbitrary and irrational, *Cleburne*, 473 U.S. at 446, and at worst constitutes discrimination for the very purpose of disadvantaging the burdened class. *Romer*, 517 U.S. at 633. In either case, the classification violates the promise of equal protection.

B. Disapproval Is Not a Permissible Basis for Discriminatory Legislation Even When Such Disapproval Is Based in Morality

The first purpose asserted by the State – promoting morality – is plainly invalid as a justification for the challenged discrimination. It is undoubtedly correct as a general proposition that a state can pass *even-handed* laws designed to achieve ends it thinks are morally good. *See Berman v. Parker*, 348 U.S. 26 (1954). But enacting a discriminatory law to express society's disapproval of the group burdened by the law is precisely what the Equal Protection Clause prohibits. *Romer*, 517 U.S. at 633; *Moreno*, 413 U.S. at 537-38. Thus, although states have wide latitude in regulating land use, *see Berman*, 348 U.S. at 32, they may not create two different sets of requirements for group living based on societal fear or disapproval of developmentally disabled people. *See Cleburne*, 473 U.S. at 449-50. Likewise, although states are free to legislate to promote morality, they may not create two different sets of criminal

penalties for the same acts based on fear or disapproval of lesbians, gay men and bisexuals. *See id.*; *Romer*, 517 U.S. at 634. Saying that such disapproval is based in morality does not suddenly cure the equal protection violation.

The fundamental equal protection requirement that a classification bear a rational relationship to “an independent and legitimate” end ensures that state actors cannot circumvent the Equal Protection Clause by establishing classifications intended to burden a particular group. *Romer*, 517 U.S. at 633; *see also Moreno*, 413 U.S. at 537-38. When a classification is drawn in order to disadvantage a particular group rather than to advance some rational purpose independent of the effect of the classification, moral disapproval is no more legitimate a source of authority than hatred, fear or disgust. This premise is at the core of equal protection jurisprudence. Discriminatory state action is never legitimate when it is based on “fear,” *see Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989), “unease,” *see O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), “suspicion,” *see Guitterez v. Municipal Court*, 838 F.2d 1031, 1042-43 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989), “bias,” *see Palmore*, 466 U.S. at 433, “animus,” *Romer*, 517 U.S. at 632, or “negative attitudes.” *See Cleburne*, 473 U.S. at 448. A classification based on social disapprobation for the group harmed by the law constitutes an impermissible “classification of persons undertaken for its own sake.” *Romer*, 517 U.S. at 635.

The government has frequently invoked social disapproval in support of discriminatory classifications, saying in each instance that the disapproval was grounded in morality. Such appeals to morality typically confirm the censorious purpose of the challenged classification, and the Supreme Court has consistently rejected animus masquerading as morality as a basis for discriminatory legislation. For example, the Supreme Court has rejected arguments that discrimination against disabled people can be justified by public sentiment, holding that

legislation intended to express or to give effect to irrational prejudice or animosity toward a particular group is illegitimate. See *Cleburne*, 473 U.S. at 448; see also 473 U.S. at 462-63 (Marshall, J., concurring) (noting history of moral justifications for discrimination against mentally retarded). Similarly, the Court has held that discriminatory classifications affecting women or interracial couples may not be justified by appeals to traditional views. See *United States v. Virginia Military Inst.*, 518 U.S. 515, 550 (1996); *Loving v. Virginia*, 388 U.S. 1, 2 (1967); *Palmore*, 466 U.S. at 431-32. The Supreme Court has also rejected the argument that legislation barring unrelated individuals from living together is justifiable because it promotes morality, holding that “if the constitutional concept 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.” *Moreno*, 413 U.S. at 534-35; compare *Moreno v. United States Dep’t of Agric.*, 345 F.Supp. 310, 314 (D.D.C. 1972).

In this case, any attempt to argue that the challenged classification may be justified in the name of morality necessarily fails because the State’s desire to promote morality is indistinguishable from a desire to censure lesbians, gay men and bisexuals. While even-handedly criminalizing sexual activities between older and younger teenagers may be said to promote morality by discouraging sex among teenagers, the State simply does not explain how imposing harsher criminal penalties on lesbian, gay and bisexual youth for the same criminal acts promotes morality. The only moral view promoted by such a classification is disapproval of lesbians, gay men and bisexuals. Of course, a classification created for its own sake in order to express disapproval of the disadvantaged class is a patent violation of equal protection. *Romer*, 517 U.S. at 635. The government may not single out one group of citizens for discriminatory treatment simply because it disapproves of them and evade the Equal Protection Clause by saying that its disapproval is based in morality. An appeal to morality simply provides no haven from the Equal

Protection Clause where, as here, a discriminatory classification is “drawn for the very purpose of disadvantaging the group burdened by the law.” *Id.* at 633.

C. Kansas’s Discriminatory Classification Based on Sexual Orientation Is Not Rationally Related to the Asserted Purpose of Protecting Children

The State’s second asserted purpose – protecting children -- is so unrelated to the sexual orientation-based classification that it cannot be credited. The Supreme Court’s decision in *Cleburne* is instructive in this regard. In *Cleburne*, the Supreme Court struck down a zoning ordinance that required anyone desiring to open a group home for developmentally disabled people to obtain a special use permit from the City Council but imposed no such requirement on anyone wishing to maintain an apartment building, boarding house, fraternity, dormitory, hotel, hospital, or nursing home. *Id.*, 473 U.S. at 449. In concluding that the challenged ordinance was based on irrational prejudice, the Court stressed that the City Council had failed to explain how a classification that singled out developmentally disabled people for discriminatory treatment bore any relationship to the government’s asserted concerns about the location of a facility on a flood plain, large numbers of people residing in a single residence, and congestion in the streets. *Id.* at 449-50.

Similarly, the State has failed in this case to explain how a classification that singles out lesbian, gay and bisexual teenagers for criminal treatment far harsher than that suffered by similarly situated heterosexual teenagers who engage in the *very same* consensual sexual acts bears any relationship to the State’s asserted interest in protecting children. The State

acknowledges that *both* K.S.A. 21-3522 and 21-3505 “prohibit and punish engaging in

immoral and harmful acts with a minor.” Brief of Appellee at 6.⁴ What the State does not explain is how children are protected by the State’s decision to make the less severe penalties in § 21-3522 unavailable to lesbian, gay and bisexual teenagers. To paraphrase the Supreme Court in *Cleburne*: the question is whether it is rational to treat lesbian, gay and bisexual 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. *Id.* at 449-50.

Nor does conjecture about other possible purposes behind the classification provide the Court with any assistance.⁵ It is well-established that a State may not discriminate in order to protect children from social stigma or opprobrium. *See Palmore*, 466 U.S. at 433; *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (holding real or imagined stigma associated with having lesbian mother was impermissible consideration in custody decision); *see also Cleburne*, 473 U.S. at 462-63 (Marshall, J., concurring) (rejecting false stereotypes suggesting “purported need to protect nonretarded children” from mentally retarded children). Likewise, if the purpose of punishing consensual sexual behavior between members of the same sex more severely than the identical behavior between “members of the opposite sex” was to promote heterosexuality and to discourage sexual relationships between teenagers of the same sex, then the purpose of the

⁴Both statutes protect younger teenagers from harm by discouraging consensual sexual activity, but K.S.A. 21-3522 also protects older teenagers from harsh criminal sentences by recognizing that severe punishment of the older teenager is unwarranted when teenagers who are close in age engage in consensual sexual activity. By limiting the protection of K.S.A 21-3522 to teenagers who engage in opposite-sex consensual activity, the State has undercut the asserted purpose of the statute by depriving lesbian, gay and bisexual teenagers of the protections made available to heterosexual teenagers.

⁵ No legislative purpose for the challenged classification is discernible from the legislative history. The language “and are members of the opposite sex” appears to have been added in by Conference Committee, *Report of Conference Committee on Senate Bill 149, March 28, 1999*; and the purpose of that discriminatory language was not discussed on the floor of either the House or the Senate prior to passage of Senate Bill 149. *Journal of the Senate, March 28, 1999, through Final Adjournment, 1999.*

classification is not to protect children at all but to express disapproval of lesbian, gay and bisexual youth and enforce majoritarian animosity toward lesbians, gay men and bisexuals. These purposes are illegitimate. *Romer*, 517 U.S. at 633-34; *Cleburne*, 473 U.S. at 448; *Stemler*, 126 F.3d at 873-74 (desire to effectuate animus against homosexuals can never be legitimate purpose).

The statutory classification in this case is doomed by the State's inability to explain how imposing drastically different penalties for the same consensual sexual activities can be based on anything other than irrational prejudice against lesbian, gay and bisexual teenagers. *See Cleburne*, 473 U.S. at 450. "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). Laws of this type "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. Where a discriminatory classification cannot "be explained by reference to legitimate public policies," the classification cannot stand. *Id.* at 635.

IV. Matthew's Conviction Should Be Reversed

Matthew was convicted and sentenced under § 21-3505 because the restrictive language in § 21-3522 made the more specific criminal charge inapplicable to consensual sexual activity with a younger teenager of the same sex. The language limiting application of § 21-3522 to members of the opposite sex violates the Equal Protection Clause of the United States Constitution. That language should be stricken from the statute, Matthew's conviction under § 21-3505 should be reversed, and his sentence should be vacated.⁶

⁶While the issue is not presented on this appeal, it is worth noting for the benefit of the trial court that in the event the State elects to seek a conviction under § 21-3522, any sentencing enhancement based on a juvenile conviction under section 21-3505 would likewise be unconstitutional if a charge under section 21-3522 was originally unavailable because of the unconstitutional language limiting that section's applicability to members of the opposite sex.

Conclusion

Based on the foregoing arguments and authorities, *amici* pray that the Court reverse the conviction, vacate the sentence, and declare unconstitutional the severable language limiting application of § 21-3522 to “members of the opposite sex.”

Dated: September 26, 2001

Respectfully submitted,

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