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**Testimony in Support of Senate Bill 265
Amending the Crime of Incest**

**Presented to the Senate Judiciary Committee
By Assistant Solicitor General Natalie Chalmers**

January 23, 2018

Chairman Wilborn and Members of the Committee:

Thank you for the opportunity to testify on behalf of Attorney General Derek Schmidt in support of Senate Bill 265. This bill is a response to a Court of Appeals' decision in *State v. Toothman*.¹ It clarifies that unlawful sexual actions, such as rape or aggravated sodomy committed by force or fear, are not included within the criminal acts covered by the incest statute.

In *Toothman*, the Kansas Court of Appeals effectively reduced the sentences of a defendant who had repeatedly raped and sodomized his niece, who was born with cerebral palsy. The court did so by deciding that aggravated incest was more specific than the crimes of aggravated sodomy and rape. In doing so, the court overlooked the crucial fact that such sexual acts are not "other lawful sexual" acts included within the incest statute.

It is the Office of the Attorney General's belief that the Legislature did not intend to permit reduced sentences for the rape and aggravated sodomy committed by Toothman. Thus, the Legislature used the term "otherwise lawful sexual intercourse or sodomy" when defining the types of acts criminalized under the incest statute.² To the extent this language can somehow be read to include unlawful acts such as rape and aggravated criminal sodomy, this bill specifically states that such crimes are not considered lawful sexual intercourse or sodomy. Thus, this bill clarifies any possible confusion and ensures that unlawful sexual acts will be prosecuted and punished as rape or aggravated sodomy, rather than receiving a lesser sentence under the incest statute.

Because there should not be a lesser penalty for relatives who rape and sodomize members of their own family, the Office of the Attorney General encourages adopting the proposed bill to ensure the intent of the Legislature is unquestionably clear. Thank you for your time.

¹ 2017 WL 2494953, 396 P.3d 735 (Kan. App. 2017) (unpublished opinion No. 114,944).

² K.S.A. 21-5604.