SUPREME COURT COPY

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Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *James Richard Johnson v. California Department of Justice*
Case No. S209167
Court of Appeal Case No. E055194

To the Honorable Chief Justice Tani Cantil-Sakauye, and the Honorable Associate Justices of the California Supreme Court:

Pursuant to this Court's letter of December 18, 2013, Petitioner and Appellant, James Johnson (hereinafter "appellant"), submits the following letter brief, replying to respondent's supplemental letter brief (hereinafter "RSLB").

Respondent contends: (1) the deferential rational basis test should be used (RSLB at p. 3); (2) there are practical difficulties applying *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*) in the trial and appellate courts (RSLB at pp. 3-5); (3) *Hofsheier* has been extended beyond sex offender registration (RSLB at pp. 5-7); (4) application of *Hofsheier* should be constrained by its facts and by established equal protection principles (RSLB at pp. 7-9); (5) *Hofsheier's* equal protection analysis should not be extended beyond sex offender registration (RSLB at pp. 9-11); and (6) if *Hofsheier* is overruled, the decision should apply retroactively (RSLB at pp. 12-13). Finally, respondent offers reasons to consider overruling *Hofsheier*. (RSLB at pp. 13-16.) Appellant will address each of respondent's arguments, in turn, below.

1. Appellant Agrees That The Rational Basis Test Should Be Used

Respondent first contends that the rational basis test should be used. (RSLB at p. 3.) For the reasons discussed in appellant's letter brief, appellant agrees that rational basis scrutiny applies. However, appellant maintains that there is no rational relationship between the disparity in treatment of similar aged defendants convicted of oral copulation versus sexual intercourse with similar aged minors and some legitimate government purpose. Respondent does not offer any explanation whatsoever that could provide a rational basis for the classification. Instead, respondent argues that the "more problematic issue" is determining whether two groups are similarly situated and, if so, whether there is a rational basis for distinguishing between them. (RSLB at p. 3.)

Appellant disagrees that determining whether the two groups are similarly situated is problematic. On the contrary, appellant believes the determination of whether the two groups are similarly situated is relatively straightforward. In *Cooley v. Superior* Court (2002) 29 Cal.4th 228, 253, this Court, quoting *People v. Gibson* (1988) 204 Cal.App.3d 1425, 1438, held that "[u]nder the equal protection clause, we do not inquire 'whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" In the instant case, a person convicted of Penal Code section 288a, subdivision (b)(2), is similarly situated to persons convicted of Penal Code section 261.5, subdivision (d). The only difference is the prohibited sexual act. The next step is to look at the rationality in the nature of the class singled out. (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 308–309 [86 S.Ct. 1497, 16 L.Ed.2d 577].) Appellant maintains that there is no rational basis for requiring mandatory sex offender registration for a defendant convicted of oral copulation, but not for a defendant convicted of sexual intercourse because there is no basis for the distinction which requires registration for what is obviously a lesser offense. Moreover, respondent has not offered any conceivable basis for this distinction.

2. Respondent's Contention That "Serious Substantive Issues" Remain in The Application of *Hofsheier* Lacks Merit

Respondent contends that the two-step analysis to determine whether there are similarly situated classes is "deceptively simple" and is not so simple in practice. (RSLB at p. 3.) First, respondent cites to three cases and states that the first problem is what "criteria should be used to determine the contours of any similarly situated classes."

Respondent contends that in *People v. Manchel* (2008) 163 Cal.App.4th 1108, 1113, the court determined that the defendant was not similarly situated because he could have been prosecuted under Penal Code section 288, subdivision (c)(1). (RSLB at p. 4.) Appellant maintains that *Manchel* was wrongly decided. A person convicted of a violation of Penal Code section 288a, subdivision (b)(2) is not similarly situated with a person convicted of a violation of Penal Code section 288, subdivision (c)(1), as there are different intent requirements, as well as differing age requirements.

Respondent notes, without any argument, that in *People v. Ranscht* (2009) 173 Cal.App.4th 1369, the court found that persons convicted of sexual penetration of a minor in violation of Penal Code section 289, subdivision (h) "could only be compared" with persons convicted of unlawful sexual intercourse in violation of Penal Code section 261.5, even though the victim was under 14 years old. (RSLB at p. 4.) However, again, the court explained that they did not agree with *Manchel's* approach of using Penal Code section 288 as a comparison, as it rested "on the erroneous proposition that a person who engages in unlawful sexual intercourse with a minor under section 261.5 necessarily violates section 288, subdivision (a) or subdivision (c)(1) if the minor is less than 14 years old or if the minor is 14 or 15 years old and the offender is at least 10 years older, respectively" because it overlooked the intent requirement. In *Ranscht*, the defendant was 18 years old when he digitally penetrated the 12 or 13 year old minor he was romantically involved with. (*People v. Ranscht*, *supra*, at p. 1371.) Penal code section 289, subdivision (h), states: "Except as provided in Section 288, any person who participates in an act of sexual penetration with another person who is under 18 years of age shall be punished by imprisonment in the state prison or in a county jail for a period of not more than one year." Penal Code section 261.5, subdivision (c) provides: "Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170." Penal Code section 289, subdivision (h) and Penal Code section 261.5, subdivision (c) do not have any express specific intent requirements. In contrast, Penal Code 288, subdivision (a) provides: "(a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, *with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child*, is guilty of a felony and shall be punished by

imprisonment in the state prison for three, six, or eight years." Therefore, the *Ranscht* court was not incorrect in finding the defendant similarly situated with a person convicted of a violation of Penal Code section 261.5, rather than a violation of Penal Code section 288.

Finally, respondent states that "[e]ven further afield" was the determination in *People v. Ruffin* (2011) 200 Cal.App.4th 669, that inmates who commit oral copulation in prison are similarly situated with guards who commit oral copulation with inmates. (RSLB at p. 4.) Respondent does not explain why this is "afield." In *Ruffin*, the defendant, a prison inmate, pled no contest to oral copulation while confined in state prison, in violation of Penal Code section 288a, subdivision (e), which states: "Any person who participates in an act of oral copulation while confined in any state prison, as defined in Section 4504 or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year." (Pen. Code, § 288a, subd. (e).) The defendant was required to register as a sex offender and argued it violated equal protection as guards convicted of the same act under Penal Code section 289.6, subdivision (a)(2) were not required to register. (*People v. Ruffin, supra*, at p. 673.) The Court cited to equal protection principles laid out in *Hofsheier* and concluded: "Since section 288a, subdivision (e) and section 289.6, subdivision (a)(2) both criminalize acts of oral copulation with consenting adults in prison, the two groups—prison inmates who commit acts of oral copulation with any consenting adults and prison guards who commit acts of oral copulation with consenting adults who are prison inmates—"are sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.'" (*People v. Ruffin, supra*, at p. 673, quoting *People v. Hofsheier, supra*, 37 Cal.4th at p. 1200.) Appellant fails to see how this represents a problem in determining what constitutes a class. In *Ruffin*, the act was what made the class similarly situated and the disparity without any rational basis was requiring inmates to register as sex offenders for that act, while guards were exempt from that same requirement. In the instant case, the age of the defendant, age of the minor, voluntary nature of the acts, and intent required, make the class similarly situated and the disparity without a rational basis is the differing acts. However, as discussed above, under equal protection analysis we look to whether the individuals are similarly situated for the purposes of the law challenged. Therefore, there are no, nor should there be, any bright line rules for determining whether a class is similarly situated. Rather, it must be done on a case by

case basis, given the specific facts of the case and the law in question.

Next, respondent states that whether any disparity in treatment is justified was not argued by respondent in this case because *Hofsheier* had already decided that no such justification existed for oral copulation offenses. (RSLB at pp. 4-5.) It appears that respondent is conceding that there is no rational basis for the disparity in treatment between oral copulation and sexual intercourse. Again, as noted above, respondent has not offered any conceivable basis for the disparity.

Respondent contends that in *People v. Ranscht*, *supra* 173 Cal.App.4th 1369, the court assumed that *Hofsheier* would apply to sexual penetration offenses and did not examine whether there might be a rational basis for disparate treatment. (RSLB at p. 5.) However, an assumption that there would not be a rational basis for the disparate treatment between digital penetration and sexual intercourse, as there had been one between oral copulation and sexual intercourse, is not far fetched. Moreover, respondent does not offer any reason why that conclusion was incorrect.

Respondent cites to *People v. Valdez* (2009) 174 Cal.App.4th 1528, presumably as an example of a case in which the court found there was a rational basis for disparate treatment, where probation was prohibited for spousal rape with a foreign object, but not spousal rape. (RSLB at p. 5.) In *Valdez*, the defendant was convicted, in part, of raping his spouse with a foreign object, in violation of Penal Code section 289, subdivision (a)(1). The defendant argued that the distinction between penetrating one's spouse with a penis, for which probation is available, and penetration with any other item, for which probation is not, violated the equal protection clause. (*Id.* at p. 1531.) The court found the two groups sufficiently similar, but concluded that there was a rational basis for the distinction as the rape could result in the birth of a legitimate child of marriage and prohibiting probation to the parent of a child conceived during marriage was counterproductive to a number of legitimate societal goals. (*Id.* at pp. 1531-1532.) In addition, the court noted that another conceivable rational was that "although some acts of rape with a foreign object are accomplished with instruments smaller than a penis, others are not and, thus, the potential for greater violence and injury to the victim rests with that offense." (*Id.* at p. 1532.) While respondent cites to *Valdez*, respondent has not alleged that the possibility of pregnancy distinguishes voluntary sexual intercourse from voluntary oral copulation, nor does respondent allege a potential for greater violence and injury through oral copulation versus sexual intercourse.

Moreover, in *Hofsheier*, the Attorney General acknowledged and this Court seemingly agreed, that "persons who engage in sexual intercourse often also engage in oral copulation." (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1205.) Therefore, this Court noted that the "effect of the father's mandatory registration on the mother and child does not depend on whether the registration is imposed for the act of sexual intercourse or the act of oral copulation." Therefore, this Court concluded that the argument offered a reason why mandatory registration should not apply to either offense, rather than a reason why it should only apply to oral copulation. (*Ibid.*)

3. Respondent Fails To Support The Argument That *Hofsheier* Has Been Extended Beyond Sex Offender Registration

Respondent first cites to *People v. Valdez*, *supra*, 174 Cal.App.4th 1538, as "one of several attempts to expand *Hofsheier* beyond sex offender registration." (RSLB at pp. 5-6.) However, as discussed above, the court found there was no equal protection violation as there was a rational basis for the disparity in that case. Hence, *Hofsheier* was not extended.

Respondent next cites to *People v. Turnage* (2012) 55 Cal.4th 62. In citing to *Turnage*, respondent contends that "this Court addressed a different case where *Hofsheier* had been extended in unexpected ways." (RSLB at p. 6.) However, while the lower court had analyzed the case based on the equal protection principles in *Hofsheier*, this Court did not even mention *Hofsheier* in it's opinion. In *Turnage*, the defendant planted an object resembling a bomb, but having no explosive content, near a government building, causing fear and disruption when it was discovered. The defendant was convicted of violation Penal Code section 148.1, subdivision (d), which allows felony or misdemeanor punishment for anyone who maliciously places a false bomb with the intent to cause another person fear. (*Id.* at p. 68.) On appeal, the defendant argued that his felony conviction denied him equal protection, as a person convicted of placing a weapon of mass destruction with the intent to cause fear, under Penal Code section 11418.1, was only guilty of a misdemeanor and could be punished with a felony only if the conduct caused another person to be in sustained fear. The Third Appellate District agreed with the defendant's argument and found there was no rational basis for the distinction between the two crimes. (*Ibid.*) The Attorney General sought review and this Court concluded that no equal protection violation occurred as there was a rational basis for the

distinction. This Court found that the Legislature could have reasonably assumed that the public is familiar and afraid of the explosive properties of bombs, and thus, their mere observation or awareness of an object that looks like a bomb was meant to instill fear and was certain to cause alarm and disorder associated with sustained fear. (*Ibid.*) The court found that the same reasoning does not apply to weapons of mass destruction because weapons of mass destruction would not necessarily be recognized or cause fear given the breadth and novelty of weapons of mass destruction. Therefore, this Court found that requiring sustained fear for weapons of mass destruction, but not false bombs, promoted a valid state interest in deterring and punishing societal harm. (*Id.* at p. 69.) Thus, this Court did not extend *Hofsheier*, nor did it find *Hofsheier* crucial or necessary in analyzing an equal protection issue that compared two different statutes.

Next, respondent cites to *People v. Doyle* (2013) 220 Cal.App.4th 1251. In *Doyle*, the defendant was convicted of driving under the influence (DUI) and the conviction was elevated from a misdemeanor to a felony because he had previously been convicted of gross vehicular manslaughter while intoxicated (DUI manslaughter). (*Id.* at p. 1255.) The defendant was sentenced under the Three Strikes Law, with the prior DUI manslaughter as one of his strikes. On appeal, he argued that allowing the prior DUI manslaughter to elevate his current DUI to a felony and serve as a strike, violated equal protection because a person with a prior conviction for second degree murder while driving intoxicated (*Watson*[1] murder) did not require that a current DUI be elevated to a felony. (*Ibid.*) The court disagreed, finding that persons with prior DUI manslaughter convictions and persons with prior second degree murder convictions were not similarly situated to require similar treatment. (*Ibid.*) The court noted a DUI manslaughter is committed without malice, while a *Watson* murder required implied malice. (*Id.* at p. 1267.) Therefore, the court found that the "critical difference between a DUI manslaughter and a *Watson* murder is the mental component: malice or conscious disregard for the life of another. A *Watson* murder, therefore, is more morally blameworthy than DUI manslaughter." (*Ibid.*) Thus, the court concluded that because a DUI manslaughter and *Watson* murder were different in culpability, the difference in treatment was permissible. (*Ibid.*) This case highlights why the holding in *People v. Manchel*, *supra*, 163 Cal.App.4th 1108, the case respondent primarily relies on, is incorrect. A person convicted of violating Penal Code section 288a, subdivision (b)(2) is

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[1] *People v. Watson* (1981) 30 Cal.3d 290.

not similarly situated with a person convicted of violating Penal Code section 288, subdivision (c)(1), because of the differing mental components required. Specifically, a violation of Penal Code section 288, subdivision (c) requires "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child," whereas Penal Code sections 288a, subdivision (b)(2) has no such requirement. Hence, again, here, the court did not extend *Hofsheier*.

Respondent also cites to *People v. Schoop* (2012) 212 Cal.App.4th 457. In *Schoop*, the defendant was ordered to register as a sex offender after he pled to a violation of possession of pornography, in violation of Penal Code section 311.11. He later sought a certificate of rehabilitation so he could be relieved of the registration requirement. However, an amendment after his conviction lengthened the time period he had to wait before seeking a certificate, and he argued the longer rehabilitation procedure denied him equal protection. (*Id.* at p. 463.) The defendant noted that Penal Code section 311.1 was similar to other offenses that were listed as exceptions to the longer rehabilitation period. (*Id.* at pp. 468-469.) The court agreed the offenses were similar and found there was no rational basis for the longer rehabilitation period. In doing so, the court cited to *Hofsheier* for its general equal protection principles. (*Id.* at pp. 469-474.) Thus, the court did not extend *Hofsheier*.

Finally, respondent cites to *People v. Tirey* (2013) 221 Cal.App.4th 549.[2] In *Tirey*, the defendant filed a certificate of rehabilitation under Penal Code section Penal Code section 4852.01, to be relieved of sex offender registration. The defendant pled guilty to six counts of Penal Code section 288, subdivision (a), which provides, in part, "any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child,

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[2] A Petition for Rehearing has been granted on the following issue: "Are persons convicted of violating Penal Code section 288.7 alone subject to lifetime parole under Penal Code section 3000.1, subdivision (a)(2) (§ 3000.1 (a)(2))? The analysis of this issue shall include, but need not be limited to, whether: (1) the use of the word "and" between the references to Penal Code section 269 and Penal Code section 288.7 in § 3000.1 (a)(2) means "or" as argued by the Attorney General in the petition for rehearing; or (2) that use of the word "and" in § 3000.1 (a)(2) means "and" as discussed in *People v. Tuck* (2012) 204 Cal.App.4th 724, 740, fn.4 (conc. opn. of Pollak, J.)."

is guilty of a felony." (*Id.* at p. 552.) He argued that he should be eligible to obtain a certificate of rehabilitation because offenders convicted of Penal Code section 288.7 were eligible and similarly situated. (*Ibid.*) Penal Code section 288.7 provides: "(a) Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life. (b) Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life." The Attorney General argued Penal Code section 288, subdivision (a) offenders and Penal Code section 288.7 offenders *are not* similarly situated because the two crimes involve different victim age ranges and include different intent elements. (*Id.* at p. 554.)

The court found that the differing age range could not justify more severe treatment for Penal Code section 288, subdivision (a) offenders because it was a lesser offense than Penal Code section 288.7. (*People v. Tirey*, *supra*, 221 Cal.App.4th at p. 554.) The court also concluded that the different intent elements could not justify more severe treatment as one could see the reasoning behind the specific intent requirement in Penal Code section 288, subdivision (a), which had less overtly sexual conduct (touching on bare skin or through clothes versus sexual intercourse, sodomy, oral copulation or sexual penetration), which might not be sexual at all, absent the specific intent. (*Ibid.*) The court distinguished *People v. Alvarado* (2010) 187 Cal.App.4th 72 and *People v. Cavallaro* (2009) 178 Cal.App.4th 103 finding that both cases held Penal Code section 288 offenders are not similarly situated to Penal Code section 261.5, subdivision (d) offenders, largely due to the statutory age disparities between the offenders and their victims, which was not a factor in *Tirey*. (*People v. Tirey, supra*, 221 Cal.App.4th at p. 554.) The *Tirey* court further noted that *Alvarado* and *Cavallaro* also concluded persons convicted of violating Penal Code section 288 for conduct which is involuntary on the part of the victims, are not similarly situated to persons convicted of violating Penal Code section 261.5, subdivision (d) for conduct which is voluntary on the part of the victims. (*Id.* at pp. 254-255.) In addition, the court noted that persons convicted of violating Penal Code sections 288, subdivision (a) and 288.7 were both subject to mandatory registration. (*Id.* at p. 255.) Therefore, the court concluded that excluding persons convicted of violating Penal Code section 288, subdivision (a) from obtaining a certificate of rehabilitation violated equal protection as it resulted in a "'rather startling statutory

preferential treatment'" for persons convicted of a more serious crime. (*Ibid.*) Similarly, in the instant case, requiring registration for oral sex, but not sexual intercourse, appears ti result in preferential treatment for a more serious crime. Moreover, Respondent fails to explain how *Tirey* has expanded *Hofsheier*.

In examining the cases cited by respondent, it is clear that while *Hofsheier* has been cited for its equal protection principles, it has not lead to any extension beyond sex offender registration. Instead, courts are simply using the general equal protection principles laid out in *Hofsheier* in analyzing whether groups are similarly situated and whether there is a rational basis for the disparity argued in each case. Respondent has failed to explain, how *Hofsheier* has gone beyond established equal protection principles in cases beyond sex offender registration.

4. Respondent Fails To Explain Which Facts The Application of *Hofsheier* Should Be Constrained By And Hence Its Contention Should be Rejected.

Respondent notes that in *People v. Manchel, supra*, 163 Cal.App.4th 1108, the court held that *Hofsheier* was limited by its own language, which limited cases where registration would be required regardless of the sexual act. Respondent argues that despite this, *Hosheier* has been extended beyond sex offender registration, and should be limited, otherwise it will apply to more criminal statutes. (RSLB at p. 7.) Respondent contends that if, "left unchecked," *Hofsheier* will oblige the courts to weigh many parts of California's criminal law against each other, looking for variances and disparities, and "every quirk" will be challenged as an equal protection violation. (RSLB at pp. 7-8.) Respondent is mistaken. Similarly situated and rational basis requirements of the equal protection analysis are sufficient gatekeepers to prevent a flood of cases. Moreover, respondent has done nothing to show that since *Hofsheier* there has been an increased number of equal protection challenges or that any such challenges have been frivolous.

Respondent states that the same criminal conduct is often covered by more than one statute, but that does not violate the equal protection guarantee. (RSLB at p. 8, citing *United States v. Batchelder* (1979) 442 U.S. 114, 123-125 [9 S.Ct. 2198, 60 L.Ed.2d 755]; *People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Appellant does not disagree with this assertion. However, respondent ignores the fact that while the same conduct may be covered by more than one statute, obtaining a conviction under one statute versus another, will undoubtably require proving different elements. Moreover, when an act violates

more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. (See *United States v. Beacon Brass Co.* (1952) 344 U.S. 43, 45-46 [73 S.Ct. 77, 97 L.Ed. 61].)

5. Respondent Fails To Show How *Hofsheier*'s Equal Protection Analysis Has Supplanted Traditional Equal Protection Analysis

Respondent contends that there is a danger that courts may consider *Hofsheier* "to have supplanted traditional equal protection analysis. (RSLB at p. 9.) However, respondent does not explain how *Hofsheier* has supplanted the traditional equal protection analysis. Respondent notes that in *Hofsheier* the court found there was no rational basis for requiring sex offender registration for oral copulation with a 16 or 17 year old, when intercourse with a minor the same age would not require registration. (RSLB at p. 9.) Respondent then cites to several cases, as discussed below, however, respondent does not explain why it is discussing these cases and the relevance of the cases to respondent's claim is unclear.

Respondent first states that in *People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1375, the court did not attempt to determine whether there was a rational basis between sexual penetration and sexual intercourse. Respondent then argues that in *People v. Valdez*, *supra*, 174 Cal.App.4th 1528, however, the court found there was a rational basis for treating the two sexual acts differently. (RSLB at p. 10.) Respondent ignores the fact that *Ranscht*, involved voluntary digital penetration (Pen. Code, § 289, subd. (h)), where as *Valdez*, involved sexual penetration with a foreign object when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim (Pen. Code, § 289, subd. (a)(1)). Moreover, in *Ranscht* the comparison was being made between voluntary sexual penetration (Pen. Code, § 289, subd. (h)) and voluntary sexual intercourse (Pen. Code, § 261.5), whereas in *Valdez* a comparison was being made between spousal rape (Pen. Code, § 262, subd. (a)(1)) and rape with a foreign object (Pen. Code, § 289, subd. (a)(1)). Respondent also cites to *People v. Zavala* (2008) 168 Cal.App.4th 772, a case in which the victim was involuntarily sodomized with a hand tool (Pen. Code, § 289, subd. (a)(1)). While respondent notes that while the defendant was acquitted of the sexual penetration charge, the case illustrates another cause for Legislature concern in distinguishing sexual penetration–namely, the possibility of sexual penetration by items such as "handles of

tools or brooms, pipes, etc." (RSLB at p. 10.) In addition, respondent cites to *People v. Morgan* (2007) 42 Cal.4th 593, "where the murder victim was sexual penetrated with a sharp, serrated object, possibly a knife or rebar." Respondent contends that emergency rooms have also seen cases of foreign objects inserted in rectums and patients are often loath to explain how they came to be in that location and thus, the Legislature could have reasonably determined that sexual penetration of a minor is dangerous in ways intercourse is not. Respondent argues that *Ranscht* did not consider these possibilities and "presumably" "felt that *Hofsheier* had already made the determination that all sex acts are essentially the same for equal protection purposes and that there cannot be a rational basis for distinguishing between them." (RSLB at p. 11.) Appellant disagrees that the *Ranscht* court believed that *Hofsheier* determined that all sex acts are the same for equal protection purposes. Rather, it appears the *Ranscht* court reasonably concluded that there was no rational basis to require a defendant convicted of consensual digital penetration to register as a sex offender, where had the same person engaged in consensual intercourse with the same person, they would not have been required to register. Appellant does not contend, nor has any court concluded that *Hofsheier* held that the Legislature could never validly distinguish between different sex acts. Moreover, appellant fails to see the relevance of this discussion or how it supports respondent's contention that *Hofsheier* should not be extended beyond sex offender registration.

6. If *Hofsheier* is Overruled, The Decision Should Not Apply Retroactively

Respondent contends that *Hofsheier* should apply retroactively because (1) it is not punishment, and (2) it would restore the registration statute to its original state. (RSLB at p. 12.) Appellant acknowledges that this Court has held that sex offender registration is not a punishment (*In re Alva* (2004) 33 Cal.4th 254) and that the requirement that a person register as a sex offender does not constitute punishment for purposes of ex post facto analysis (*People v. Castellanos* (1999) 21 Cal.4th 785.) However, respondent ignores considerations of fairness, public policy, and effective administration of justice, in determining whether overruling *Hofsheier* should apply retroactively. This court has held: " ' "The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." ' " (*In re Alva, supra*, 33 Cal.4th at p. 264.) However, since *Hofsheier* was decided in 2006, courts have undoubtedly exercised discretion under *Hofsheier* in finding that registration was not required, because it deemed the defendant unlikely to commit similar offenses in the

future. Similarly, prosecutors have undoubtedly also exercised discretion in accepting pleas in appropriate cases to charges that do not require registration. Therefore, the purpose of Penal Code section 290 would not be served by now requiring mandatory registration of these defendants. Moreover, as discussed in appellant's letter brief, a retroactive decision overruling *Hofsheier* would undoubtedly have a drastic effect on both the administration of justice, as well as individual defendants, as it would require reopening numerous cases to impose mandatory registration, invalidate numerous settlements where pleas were in good faith negotiated to charges that did not involve mandatory registration, and many of such cases would likely have to proceed to trial. For example, defendants would have grounds to withdraw their pleas if, in making their pleas, they relied on the fact that they would not be facing mandatory registration. Therefore, appellant maintains that based on considerations of fairness, public policy, and administration, if *Hofsheier* is overruled, the decision should not apply retroactively.

7. Respondent Does Not Offer Any Compelling Reasons For Overruling *Hofsheier*

Respondent states that this Court should reevaluate *Hofsheier* and consider whether it should be clarified and limited, or overruled entirely. Respondent contends that *Hofsheier* has "muddied the waters" regarding the equal protection analysis and it has spread to other areas of criminal law. (RSLB at p. 13.) Respondent further states that the Court may wish to reconsider the determination that requiring registration for voluntary oral copulation with a minor but not for unlawful sexual intercourse, violates equal protection. Respondent notes that "[i]f there is a conceivable, rational reason for the distinction between classes, the law must be upheld." (RSLB at p. 13.) However, again, respondent fails to offer any rational reason for the distinction.

For the first time, respondent then asserts, that in *Hofsheier*, the Court declined to apply the "traditional rule" that persons convicted of different crimes are not similarly situated. (RSLB at p. 13.) However, appellant submits that this Court's conclusion that "there is not and cannot be an absolute rule to this effect, because the decision of the Legislature to distinguish between similar criminal acts is itself a decision subject to equal protection scrutiny" was correctly decided. In *Hofsheier*, this Court noted:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. [Citation.] It also imposes a requirement of some rationality in the nature of the class

> singled out. (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 308–309 [16 L. Ed. 2d 577, 86 S. Ct. 1497]; see *People v. Nguyen* (1997) 54 Cal.App.4th 705, 714 [63 Cal. Rptr. 2d 173].) Otherwise, the state could arbitrarily discriminate between similarly situated persons simply by classifying their conduct under different criminal statutes. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 582 [156 L. Ed. 2d 508, 123 S. Ct. 2472] (conc. opn. of O'Connor, J.).)

(*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1199, internal quotes omitted.)

Finally, while respondent failed to argue a rational basis and seemingly conceded that a rational basis existed earlier in his letter brief at pages 4-5, on page 16 of the supplemental letter brief, respondent contends, for the first time, "[t]he Legislature could rationally have believed that because minors tend to underestimate the potential consequences of oral copulation, and are therefore more willing to engage in it, those who engaged in oral copulation with minors should register as sex offenders." (RSLB at p. 16.) To support this contention, respondent argues that "research has shown that adolescents do not appreciate the risks of oral sex and are consequently more willing to engage in it." (RSLB at p. 15.)

First, respondent cites to a study of 580 ninth graders at two California high schools, self-reporting about their sexual experiences and attitudes regarding oral versus vaginal sex. (Harlpern-Felsher, et al., *Oral Versus Vaginal Sex Among Adolescents: Perceptions, Attitudes, and Behavior* (April 2005) Pediatric, Vol. 115, No. 4.) Respondent states that the survey found that adolescents viewed oral sex as being safer and carrying less risks and were more willing to engage in it. (RSLB at p. 15.) Respondent also cites to a second study of California high school students analyzing the self-reported surveys of 275 adolescents who reported in engaging in oral and/or vaginal sex. (Brady & Halpernn-Felserh, *Adolescent's Reported Consequences of Having Oral Sex Versus Vaginal Sex* (Feb. 2007) Pediatrics, Vol. 119, No. 2.) Citing to the study, respondent notes that, "[o]n its own, oral sex presents a smaller degree of risk to children: pregnancy is impossible as a practical matter, and the rate of transmission of sexually-transmitted infections is low. Yet when children engaged in both vaginal and oral sex, the rate of pregnancy increases notably, and sexually transmitted infections more than double." (RSLB at p. 16.)

In *Hofsheier*, the Attorney General pointed to various medical reports of increasing oral copulation between adolescents because of the lack of risk of pregnancy and lesser

risk of transmitting HIV. This Court noted, that the accounts cited by the Attorney General, "however, discuss sexual conduct between adolescents, not conduct between adolescents and adults, as in this case. The frequency of voluntary oral copulation or voluntary intercourse between adolescents has little relevance to the issue here." (*People v. Hofsheier*, *supra*, 37 Cal.4th at pp. 1202-1203.) Similarly, the self-administered surveys filled out by a few hundred adolescents about their experiences and perceptions regarding sexual conduct between adolescents has little relevance here.

Respondent notes that the state "has a strong interest in protecting minors from adults who might take advantage of them sexually." (RSLB at p. 17.) However, respondent does not explain or provide any evidence of a connection between minors' underestimation of potential consequences of oral copulation and adults engaging in oral copulation with minors. For example, there is no evidence that adults are using this underestimation to their advantage to entice minors into engaging in oral sex with them. In addition, respondent does not offer any explanation as to why discretionary registration is insufficient to protect societal interests from defendants whom a judge and/or a prosecutor deems likely to re-offend.

For the foregoing reasons, as well as the reasons in Appellant's Answering Brief on the Merits and Supplemental Letter Brief, appellant asks this Court to affirm the decision of the Fourth Appellate District, Division Two, reversing the trial court's order denying appellant's writ of mandate.

Respectfully submitted,

Marilee Marshall

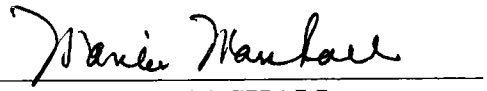
MARILEE MARSHALL
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

This brief consists of 6,166 words in 13 point font as counted by the word processing program used to generate it.

Dated: January 16, 2014

Respectfully submitted,



MARILEE MARSHALL

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE

I, the undersigned, declare:

I am over eighteen (18) years of age, and not a party to the within cause; my business address is 523 West Sixth Street, Suite 1109, Los Angeles, CA 90014; that on January 16, 2014, I served a copy of the within:

APPELLANT'S LETTER BRIEF REPLY

on the interested parties by placing them in an envelope (or envelopes) addressed respectively as follows:

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Each said envelope was then, on January 16, 2014, sealed and deposited in the United States mail at Los Angeles, California, the county in which I maintain my office, with postage fully prepaid.

I, further declare that I electronically served a copy of the same above document from electronic notification address (marshall101046@gmail.com) on January 16, 2014 to the following entities electronic notification addresses:
Appellate Defenders Inc., eservice-criminal@adi-sandiego.com
Attorney General, adieservice@doj.ca.gov

I additionally declare that I electronically submitted a copy of this document to the Supreme Court on its website at www.courts.ca.gov in compliance with the court's Terms of Use, as shown on the website.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2014, at Los Angeles, California.

LESLIE AMAYA