IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JAMES RICHARD JOHNSON,	)	Case No. S209167
Petitioner and Appellant,	)	
v.	)	Court of Appeal No. E055194
SUPERIOR COURT OF SAN BERNARDINO	)	
Respondent;	)	Superior Court No. CIVDS1105422
PEOPLE OF THE STATE OF CALIFORNIA,	)	
Real Party in Interest and Respondent.	)	

After a Decision By The Court of Appeal, Fourth Appellate District, Division Two

On Appeal from the Superior Court of San Bernardino County,
The Honorable David Cohn, Judge Presiding

APPELLANT'S ANSWERING BRIEF ON THE MERITS

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ISSUE PRESENTED

Do the equal protection principles of *People v. Hofsheier* (2006) 37 Cal.4th 1185 bar mandatory sex offender registration for a defendant convicted of oral copulation between a "person over the age of 21 years" and a "person who is under 16 years of age" (Pen. Code, § 288a, subd. (b)(2))?

INTRODUCTION

In 1990, appellant pled guilty to one count of Penal Code section 288a, subdivision (b)(2), oral copulation of a person under 16 years of age by a person over the age of 21, committed on and between September 1, 1988 and December 31, 1988. In 2006, in *People v. Hofsheier*, *supra*, 37

Cal.4th 1185 ("*Hofsheier*"), this Court held that requiring a defendant guilty of voluntary oral copulation with a 16 year old, in violation of Penal Code section 288a, subdivision (b)(1), to register as a sex offender denied him equal protection because a person convicted of voluntary sexual intercourse under section Penal Code 261.5, subdivision (c) with a minor of the same age would not face mandatory sex offender registration. In 2011, appellant filed a petition under *People v. Hofsheier*, *supra*, 37 Cal.4th 1185, arguing that mandatory registration for a Penal Code section 288a, subdivision (b)(2) conviction violates equal protection. The trial court noted that there was a conflict in the Courts of Appeal regarding whether *Hofsheier* applied to Penal Code section 288a, subdivision (b)(2). Believing the decision in *People v. Manchel* (2008) 163 Cal.App.4th 1108 ("*Manchel*") was controlling, the trial court denied appellant's petition for mandate. In *Manchel*, the Second Appellate District, Division Seven, declined to apply *Hofsheier*'s holding to a defendant convicted of voluntary oral copulation of a 15-year-old minor more than 10 years the defendant's junior, in violation of Penal Code section 288a, subdivision (b)(2), concluding that the defendant could have been convicted of lewd and lascivious acts on a child under Penal Code section 288, subdivision (c)(1) if he had engaged in sexual intercourse with his victim, thus subjecting him to mandatory registration.

In the instant case, the Fourth Appellate District, Division Two, rejected the reasoning in *Manchel* that courts should look at the crimes a defendant could have been convicted based on his conduct, rather than the crimes for which a defendant was actually convicted. The Court of Appeal, citing to *People v. Ranscht* (2009) 173 Cal.App.4th 1369 ("*Ranscht*"), concluded that consistent with *Hofsheier*'s plain language, the more appropriate course is to focus on the offense of which the defendant was *convicted*, as opposed to a hypothetical offense of which the defendant *could have been convicted.*

Respondent contends that *Manchel* should be followed. Respondent argues that had appellant engaged in sexual intercourse, he could have been prosecuted under Penal Code section 288, subdivision (c)(1), a mandatory registration offense, and therefore, he suffers no unequal treatment. (AOB at 12.) Appellant disagrees and maintains that *Manchel* was wrongly decided as it incorrectly assumes that every conviction of Penal Code section 261.5 could also be a conviction under Penal Code section 288. However, unlike Penal Code section 288, subdivision (c)(1), which contains specific intent and threshold age requirements, Penal Code section 288a, subdivision (b)(2) and Penal Code section 261.5, subdivision (d) are general intent crimes and have identical elements except that one prohibits oral copulation and the other prohibits sexual intercourse. Because Penal Code

section 290 requires sex offender registration for a Penal Code section 288a, subdivision (b)(2) conviction, but does not for a Penal Code section 261.5, subdivision (d) conviction, the equal protection principles of *People v. Hofsheier, supra*, 37 Cal.4th 1185, bar mandatory sex offender registration for a defendant convicted of violating Penal Code section 288a, subdivision (b)(2).

Finally, Respondent's contention that appellant could have been prosecuted under Penal Code section 288, subdivision (c)(1) fails and even if this Court were to apply the *Manchel* court's analysis, it would not change the conclusion, because at the time of appellant's offense, in 1988, his conduct did not come within Penal Code section 288 because, at that time, that section only punished lewd conduct with minors under the age of 14. (Stats. 1987, ch. 1068, § 3.) The current prohibition on lewd conduct on a child of 14 or 15 was not enacted until 1988 and did not take effect until 1989. (Stats. 1988, ch. 1398, § 1.) Therefore, the Court of Appeal's decision reversing the trial court's order denying appellant's writ of mandate should be affirmed.

STATEMENT OF THE CASE

On March 16, 1990, a five count felony complaint was filed against appellant, alleging in Counts I and II respectively, that on or about June 1, 1988 and September 24, 1988, appellant committed lewd acts upon a child

in violation of Penal Code section 288, subdivision (a). (1 C.T. 8-9.) In Count III, it was alleged that, on or between September 1, 1988 and December 31, 1988, appellant committed sodomy on a person under 16, in violation of Penal Code section 286, subdivision (b)(2). (1 C.T. 9.) In Counts IV and V, it was alleged that between the same dates, appellant committed oral copulation of a person under 16, in violation of Penal Code section 288a, subdivision (b)(2). (1 C.T. 10.) On May 4, 1990, appellant pled guilty to Count IV and was sentenced to the mid-term of two years in state prison. Petitioner was required to register as a sex offender per the mandatory registration provision of Penal Code section 290, subdivision (a)(1)(A). (1 C.T. 22-23.)

On April 11, 2011, appellant filed a verified petition for writ of mandate in San Bernardino Superior Court under *Hofsheier*. (1 C.T. 1-19.) On December 7, 2011, a hearing on the petition was held. (1 R.T. 30-36.) After reviewing *Ranscht*, *People v. Luansing* (2009) 176 Cal.App.4th 676 ("*Luansing*"), *People v. Alvarado* (2010) 187 Cal.App.4th 72 ("*Alvarado*"), and *Manchel*, and the trial court stated, ". . . this is a very interesting problem, especially when you get in to the general intent versus specific intent. And it may be that *Manchel* is on its way out, but it's still good law and I'm going to follow it. " The court denied the petition. (1 R.T. 36.)

On December 12, 2011, appellant filed a notice of appeal. (1 C.T.

90.) On January 31, 2013, the Fourth Appellate District, Division Two, issued an unpublished opinion agreeing that the trial court erred in denying appellant's petition for writ of mandate, reversing the judgment, and directing the trial court to conduct a new hearing to determine whether the discretional registration requirement should be applied to him. On March 11, 2013, respondent filed a Petition for Review. This Court granted review on May 1, 2013.

ARGUMENT

THE EQUAL PROTECTION PRINCIPLES OF *HOFSHEIER* BAR MANDATORY SEX OFFENDER REGISTRATION FOR A DEFENDANT CONVICTED OF PENAL CODE SECTION 288a, SUBDIVISION (b)(2)

A. Introduction

Respondent contends: (1) appellant's offense is a mandatory registration offense under the sex offender registration act; (2) *Hofsheier's* equal protection analysis is based on sexual conduct and considers the victim's age; (3) *Hofsheier's* equal protection analysis requires consideration of the defendant's age; (4) the *Hofsheier's* equal protection analysis supports the trial court's ruling requiring mandatory registration, because there was no unequal treatment; and (5) *Manchel* better preserves the Legislature's intent.

Appellant agrees that, under Penal Code section 290, subdivision (c), sex offender registration is mandatory for all violations of Penal Code

section 288a. Appellant also agrees that age is a consideration that must be taken into account when analyzing whether an equal protection violation has occurred under *Hofsheier*. However, appellant disagrees that under *Hofsheier* he suffers no unequal treatment because he could have been prosecuted under Penal Code section 288, subdivision (c)(1). (AOB at 12.) Appellant disagrees with *Manchel*'s analysis focusing on all the crimes a defendant could have been convicted of based on his conduct rather than what the defendant was actually convicted of. Instead, appellant agrees with the conclusion in *Ranscht*, that *Manchel's* holding is based on the erroneous assumption that a person who engages in unlawful sexual intercourse with a minor under Penal Code section 261.5 necessarily violates Penal Code section 288. The equal protection principles of *Hofsheier* apply because the similarly situated classes of persons compared under the *Hofsheier* analysis are persons convicted of Penal Code section 288a, subdivision (b)(2) and persons convicted of Penal Code section 261.5, subdivision (d).

Penal Code section 290 provides, that every person described in paragraph (c), shall be required to register for the rest of his or her life while residing in California. Paragraph (c) lists several sections and subdivisions of the Penal Code, including section 288a, oral copulation with a minor, but does not list Penal Code section 261.5, unlawful intercourse

with a minor. Requiring those who engage in oral copulation with minors under 16 years of age to register as sex offenders, without such a requirement for those who engage in sexual intercourse with a minor under 16, is a distinction without any rational support which does not withstand equal protection scrutiny.

Disparate treatment of similarly situated defendants, which infringes a fundamental right to liberty and implicates a suspect classification, violates the equal protection guarantee of the United States Constitution. Equal protection of the law is required by the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution. "The first prerequisite to a meritorious claim under the equal protection cause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530; *Cooley v. Superior Court* (2000) 29 Cal.4th 228, 253.) "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 [86 S. Ct. 1497, 16 L. Ed. 2d 577]; see *People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.) A litigant challenging a statute on equal protection grounds bears the threshold burden of showing "that the state has adopted a

classification that affects two or more similarly situated groups in an unequal manner." (*People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1372, quoting *In re Eric J.*, *supra*, 25 Cal.3d 522, 530.) Even if the challenger can show that the classification differently affects similarly situated groups, "[i]n ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest," the classification is upheld unless it bears no rational relationship to a legitimate state purpose. (*Weber v. City Council* (1973) 9 Cal.3d 950, 958–959.)

B. The Conflict in the Courts of Appeal

In *People v. Hofsheier*, *supra*, 37 Cal.4th 1185, the defendant pled guilty to oral copulation with a 16-year-old girl, in violation of Penal Code section 288a, subdivision (b)(1) and was ordered to register as a sex offender. The defendant appealed and contended that he was denied the constitutionally guaranteed equal protection of the law because a person convicted of unlawful sexual intercourse with a minor, in violation of Penal Code section 261.5, under the same circumstances, would not be subject to mandatory registration. (*Id.* at p. 1193.) This Court invalidated mandatory sex registration for persons convicted of Penal Code section 288a, subdivision (b), concluding that requiring mandatory lifetime registration for persons convicted of voluntary oral copulation with a minor of the age 16 or 17, but not for someone convicted of voluntary sexual intercourse

with a minor of the same age, violates the equal protection clause of the federal and state constitutions. (*Id.* at pp. 1193, 1198-1207.) The equal protection clause is violated when "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*Id.* at p. 1199.) This Court found that the Legislature would probably find elimination of the mandatory registration requirement for persons convicted under Penal Code section 288a, subdivision (b), the preferable remedy, as opposed to adding a registration requirement for persons convicted of Penal Code section 261.5. (*Id.* at pp. 1206-1207.)

In *People v. Garcia* (2008) 161 Cal.App.4th 475, the Second Appellate District, Division One, extended the holding of *Hofsheier* to section 288a, subdivision (b)(2), the same offense for which appellant is convicted, which provides,

> Except as provided in Section 288, any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony.

The *Garcia* court concluded that mandatory lifetime registration for violation of Penal Code section 288a, subdivision (b)(2), like subdivision (b)(1), violates equal protection. (*Id.* at p. 478-479.) The court concluded that "'[i]f there is no rational reason for this disparate treatment [between oral copulation and sexual intercourse] when the victim is 16 years old [as concluded by *Hofsheier*], there can be no rational reason for the disparate

treatment when the victim is even younger, 14 years old. Accordingly, *Hofsheier* applies whether the conviction is under subdivision (b)(2) or (b)(1) of section 288a,'" and former Penal Code section 290, subdivision (a)(1)(A) cannot be constitutionally applied to convictions of Penal Code section 288a, subdivision (b)(2). (*People v. Luansing*, *supra*, 176 Cal.App.4th at p. 682, citing *People v. Garcia*, *supra*, 161 Cal.App.4th at p. 482.)

In *People v. Manchel, supra*, 163 Cal.App.4th 1108, 1111, the Court of Appeal, Second Appellate District, Division Seven, declined to extend *Hofsheier's* analysis to apply to those convicted of violating Penal Code section 288a, subdivision (b)(2). The court reasoned that because the defendant was more than 10 years older than his 15-year-old victim, his actions also constituted lewd conduct under Penal Code section 288, subdivision (c)(1). (*Id.* at p. 1114.) The court further noted that sexual intercourse with the victim would have violated both Penal Code section 261.5, subdivision (b) and Penal Code section 288, subdivision (c)(1), and, because the latter offense provides for mandatory registration regardless of the sexual act, there is no equal protection violation. (*Id.* at p. 1115.) The court found that the defendant in *Manchel* fell "within statutes that provide for mandatory registration regardless of whether he engaged in intercourse or oral copulation, [and he] cannot establish that he is similarly situated to

another group of offenders who are not subject to mandatory sex offender registration." (*People v. Luansing*, *supra*, 176 Cal.App.4th at p. 684, quoting *People v. Manchel, supra*, 163 Cal.App.4th at p. 1115.) The "nature of the sexual act was not determinative of whether [the defendant in] *Manchel* was subject to mandatory registration: whether sexual intercourse or oral copulation took place, his conduct subjected him to mandatory registration under [section 288 of] the Penal Code." (*People v. Luansing*, *supra*, 176 Cal.App.4th at p. 684, quoting *People v. Manchel, supra*, 163 Cal.App.4th at p. 1114.)

In *People v. Hernandez* (2008) 166 Cal.App.4th 641, 650, the Second Appellate District, Division Two, agreed with *Garcia* court's analysis and extension of *Hofsheier* to Penal Code section 288a, subdivision (b)(2), and concluded that subjecting the defendant to mandatory sex offender registration violated equal protection.

In *People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1373, the Fourth Appellate District, Division One, found that "*Manchel's* holding rests 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." The court further held that, "Ultimately, the *Manchel*

court's logic eludes us. It would have us completely ignore the crime of which a defendant is convicted and look instead to all of the crimes of which a defendant could have been convicted based on his conduct. This holding overlooks *Hofsheier's* plain language, which focused on 'persons who are convicted of voluntary oral copulation ... , as opposed to those who are convicted of voluntary intercourse with adolescents in [the] same age group.'[Citation.]" (*Ibid.* at 1374.) Therefore, the *Ranscht* court held that the "more appropriate course is to focus on the offense of which the defendant was convicted, as opposed to a hypothetical offense of which the defendant could have been convicted based on the conduct underlying the charge." (*Id.* at p. 1375.)

In *People v. Luansing*, *supra*, 176 Cal.App.4th at p. 679, the defendant was convicted of oral copulation with a person under the age of 16 in violation of Penal Code section 288a, subdivision (b)(2) and was ordered to register as a sex offender. The Court of Appeal, Second Appellate District, Division Two, disagreed with the *Manchel* court's analysis and held that similarly situated groups are identified not by some hypothetical, wide-ranging analysis of all the potential convictions a petitioner could have suffered based on his conduct, but rather through a simple, predictable comparison of persons convicted of different code sections. (*Id.* at p. 684.) The court found that those convicted under Penal

Code section 288, subdivision (b)(2) and Penal Code section 261.5, subdivision (c) were similarly situated groups and since there was no rational basis to differentiate the two groups, the equal protection clause is violated by the mandatory registration requirement. (*Ibid.*)

In *People v. Cavallaro* (2009) 178 Cal.App.4th 103, the defendant pleaded no contest to six counts of lewd and lascivious acts involving 14- and 15-year-old victims at least 10 years younger than he, in violation of Penal Code section 288, subdivision (c)(1). In the trial court, he successfully argued that the imposition of mandatory sex offender registration under Penal Code section 290 was prohibited under *Hofsheier*. The defendant contended a person convicted under Penal Code section 288, subdivision (c)(1) is similarly situated with persons of the same age convicted of unlawful, nonforcible sexual intercourse with a 14 or 15 year old under Penal Code section 261.5, subdivision (d). (*People v. Cavallaro*, *supra*, 178 Cal.App.4th at pp. 113-114.) The prosecution appealed and the Sixth Appellate District reversed, concluding that the defendant was not similarly situated with another group of convicted persons who receive different treatment under the sex offender registration statute. (*People v. Cavallaro*, *supra*, 178 Cal.App.4th at p. 114.) First, the court noted that Penal Code section 288, subdivision (c)(1) includes a specific intent requirement, whereas no such specific intent element is present for the

offense of unlawful sexual intercourse under Penal Code section 261.5, subdivision (d). The court concluded, "[t]he higher mental state required for a conviction under section 288 is a distinction that is meaningful in deciding whether a person convicted under that statute is similarly situated with one convicted under section 261.5." (*Ibid.*) Second, the court noted the difference in the age requirements. Under Penal Code section 288, subdivision (c)(1), there is threshold age requirement that the defendant must be at least 10 years older than the minor victim. However, the age prerequisite under Penal Code section 288, subdivision (c)(1) is not present under Penal Code section 261.5, subdivision (d), where the defendant need only be 21 years of age. Therefore, the court concluded that,

> The Legislature could have properly concluded that it was necessary to specifically prohibit sexual conduct between a 14 or 15 year old and an adult at least 10 years older and to include mandatory sex offender registration based upon a conviction for the offense, because of the potential for predatory behavior resulting from the significant age difference between the adult and the minor.

(*Ibid.*)

Third, the court noted that the victims 14 and 15 years old are different from the 16 year old victim in *Hofsheier*. The court found that the age difference of the minor, in addition to the age span between the minor and the defendant, is of significance in determining whether *Hofsheier* is applicable to the equal protection challenge here. (*People v. Cavallaro*,

supra, 178 Cal.App.4th at p. 114.) Finally, the court noted that a person who engages in sexual intercourse with a 14 or 15 year old and who is also at least 10 years older than the minor may be convicted of a lewd or lascivious act under Penal Code section 288, subdivision (c)(1). Therefore, the court found that, contrary to defendant's position, he, as a person convicted under Penal Code section 288, subdivision (c)(1), is not similarly situated with a group of persons who are not subject to mandatory registration for the commission of sexual acts with minors of the same age as the victims here. The court concluded that the fact he could have been charged under Penal Code section 261.5, subdivision (d), rather than under Penal Code section 288, subdivision (c)(1) had he engaged in sexual intercourse, does not suggest that mandatory registration based on his convictions under Penal Code section 288, subdivision (c)(1) constituted a violation of equal protection. The court stated that in *Hofsheier*, the equal protection analysis hinged on the fact that the defendant, had he engaged in intercourse with the 16-year-old girl instead of oral copulation, would have under no circumstances been subject to mandatory registration. (*People v. Cavallaro*, *supra*, 178 Cal.App.4th at p. 115.) In addition, the *Cavallaro* court rejected the defendant's claim that *Garcia* applied, noting that the defendant "was convicted under an entirely different statute, section 288(c)(1), that has a specific intent requirement not present under section

288a, subdivision (b)(2)." (*People v. Cavallaro*, *supra*, 178 Cal.App.4th at p. 117.) In addition, the court noted that, unlike in *Garcia*, Penal Code section 288, subdivision (c)(1), which the defendant was convicted of, "contained as a distinct element that the offender be at least 10 years older than the 14- or 15-year-old minor victim." (*Id.* at pp. 117-118.)

In *People v. Alvarado, supra*, 187 Cal.App.4th 72, the defendant was convicted, among other counts, of an attempted lewd act on a child under 14 years old in violation of Penal Code sections 664/288, subdivision (a). The Fourth Appellate District, Division Two, found reliance on *Hofsheier* and *Luansing* was misplaced since the defendants in those cases were convicted of violating Penal Code section 288a, subdivision (b)(1), rather than Penal Code section 288, subdivision (a). (*Id.* at p. 76.) In *Alvarado*, the court found that the "defendant was actually convicted of a section 288(a) crime, which is essentially the same as a section 288, subdivision (c) offense, with the exception that a section 288, subdivision (c) conviction requires that the victim be between 14 and 15 years old and at least 10 years younger than the defendant, whereas the victim in a section 288(a) crime must be under 14 years old." Thus, the court concluded that the holding and underlying reasoning in *Manchel* was well founded as applied to the defendant in *Alvarado*. (*Id.* at p. 78.)

Finally, in *People v. Singh* (2011) 198 Cal.App 4th 364, the Fourth

Appellate District, Division One, concluded that mandatory registration for a violation of Penal Code section 288, subdivision (a) does not violate equal protection because offenders convicted under Penal Code section 288, subdivision (a) are not similarly situated to persons convicted of offenses under Penal Code section 261.5, Penal Code section 288a, subdivision (b)(1), or Penal Code section 289, subdivision (h). Without any reference to *Manchel*, the court concluded that Penal Code section 288, subdivision (a) affords a specific protection to minors under the age of 14 and is a specific intent offense whereas Penal Code sections 261.5, 288a, and 289 involve general intent offenses against minors under the age of 18. (*People v. Singh*, *supra*, 198 Cal.App.4th at pp. 366-367.)

C. *Manchel* Was Wrongly Decided

It is apparent from the cases discussed above that there is conflicting authority from the Courts of Appeal. Respondent contends that the reasoning in *Manchel* should be followed and that *Ranscht* and the cases that follow it erred. (AOB at 13-17.) Respondent is mistaken *Manchel* should not be followed because it incorrectly used Penal Code section 288 as a comparison and focused on what the defendant *could have* been convicted of rather than on what he was actually convicted. In addition, to the extent that *Alvarado* and *Cavallaro* partially agreed with *Manchel's* reasoning, they are distinguishable from the instant case as both defendants

were convicted of Penal Code section 288 offenses and failed to establish any similar crime in which mandatory registration is not required. (*People v. Alvarado*, *supra*, 187 Cal.App.4th 72; *People v. Cavallaro*, *supra*, 178 Cal.App.4th 103.) Notably, in *Cavallaro*, the court rejected the argument that the defendant *could have* been charged under Penal Code section 261.5, subdivision (d), rather than under Penal Code section 288, subdivision (c)(1). (*People v. Cavallaro*, *supra*, 178 Cal.App.4th at p. 115.) However, appellant disagrees with *Cavallaro*'s statement that, in *Hofsheier*, the equal protection analysis hinged on the fact that the defendant would have "under no circumstances" been subject to mandatory registration. Rather, *Hofsheier* hinged on the fact that, as here, persons convicted of oral copulation with minors under Penal Code section 288a and persons convicted of sexual intercourse with minors under Penal Code section 261.5, constitute similarly situated classes of persons and there is no rational basis for treating them unequally. (*People v. Hofsheier*, *supra*, 37 Cal.4th at pp. 1206-1207.)

"*Manchel's* holding rests 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." (*People v.*

Ranscht, supra, 173 Cal.App.4th at p. 1373.) Using Penal Code section 288 as a comparison, however, is inappropriate. Unlike Penal Code sections 288a, subdivision (b)(2) and 261.5, subdivision (d), Penal Code section 288, subdivision (c)(1) contains both an element of intent and a threshold age requirement. Penal Code section 288, provides, in part:

> (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. . . .
>
> (c)(1) Any person who commits an act described in subdivision (a) *with the intent* described in that subdivision, and the *victim is a child of 14 or 15 years, and that person is at least 10 years older* than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child.

(Italics added.) Penal Code sections 288a, subdivision (b)(2), and 261.5, subdivision (d) do not contain the element of intent or the 10 year age threshold and are identical except that one prohibits oral copulation and the other prohibits sexual intercourse. Penal Code section 288a, subdivision (b)(2) provides:

> Except as provided in Section 288, any person over the age of

> 21 years who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony.

Penal Code section 261.5, subdivision (d) provides:

> Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age 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 for two, three, or four years.[1]

Respondent contends that in *Ranscht*, the court did not appreciate the importance of conduct in differentiating statutes. (AOB at 15.) Respondent notes that, in *Hofsheier*, this Court rejected the prosecution's argument that persons convicted of violating Penal Code section 288a, subdivision (b)(1) and Penal Code section 261.5 were not similarly situated because the two groups were convicted of different crimes, and held the decision to distinguish between similar criminal acts is subject to equal protection scrutiny. (AOB at 15, citing *People v. Hofsheier*, *supra*, 37 Cal.4th at p.

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"Notably, the oral copulation here at issue (§ 288a, subd. (b)(2)) is a felony whereas the comparable sexual intercourse (§ 261.5, subd. (d)) may be treated as a misdemeanor. This distinction appears to be based on an historical but outdated aversion to oral copulation. As the *Hofsheir* court noted, "[I]n 1947, when the Legislature enacted section 290, voluntary oral copulation between adults was criminal although voluntary adult intercourse was not. Today, however, statutes treat oral copulation and intercourse similarly.... Mandatory lifetime registration of all persons convicted of voluntary oral copulation in violation of section 288a(b)(1) stands out as an exception to the legislative scheme, a historical atavism dating back to a law repealed over 30 years ago that treated all oral copulation as criminal regardless of age or consent." (*Id* at 1206 .)

1199.) Respondent further notes that, turning to Penal Code sections 288, subdivision (b)(1) and 261.5, this Court explained that the only difference between the two offenses was "the nature of the sexual act." (AOB at 15, citing *People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1200.) Just as in *Hofsheier*, here, the only difference between the offenses in Penal Code section 288, subdivision (b)(2) and Penal Code section 261.5, subdivision (c) is the "nature of the sexual act." Respondent does not, and cannot, contend that there are differences other than the nature of the sexual act in Penal Code sections 288, subdivision (b)(2) and 261.5, subdivision (d).

Rather, respondent argues that *"Ranscht* did not consider whether an act of intercourse on a thirteen year old could also be prosecuted under section 288, subdivision (a)." (AOB at 16.) However, the *Ranscht* court did consider prosecution under Penal Code section 288 and fully explained why using it as a comparison was problematic. As noted above, in analyzing *Manchel*'s use of Penal Code section 288 as a comparison offense, the *Ranscht* court held that the *Manchel* court wrongly assumed that a violation of Penal Code section 261.5 is automatically a violation of Penal Code section 288 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. (*People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1373.) The court held that the assumption was wrong because it overlooked the fact that Penal Code

section 261.5 is a general intent offense, whereas Penal Code section 288 requires the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the offender or the child. (*People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1373.) The court noted that this Court pointed out that an offender could commit the general intent offense of sodomy without simultaneously violating Penal Code section 288. (*People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1373, citing to *People v. Pearson* (1986) 42 Cal.3d 351.) In *Pearson*, the defendant argued that "it is inconceivable that a person can engage in sodomy on a child without at the same time committing a lewd and lascivious act on that child." (*People v. Pearson*, *supra*, 42 Cal.3d at p. 356.) This court held that,

> Although this may be accurate in a moral sense, it is not true that every such act is committed with the specific intent required in section 288. For example, an act of sodomy can be committed for wholly sadistic purposes, or by an individual who lacks the capacity to form the required specific intent.

(*Ibid.*)

Respondent contends that *Hofsheier* does not support *Ranchst's* distinction between specific and general intent sex crimes as it made no mention of intent. (AOB at 16.) However, the fact that *Hofsheier* did not discuss intent does not mean that the intent distinction is not important in the instant case, where respondent is contending that the better comparison is to Penal Code section 288. "The higher mental state required for a

conviction under section 288 is a distinction that is meaningful in deciding whether a person convicted under that statute is similarly situated with one convicted under section 261.5." (*People v. Cavallaro*, *supra*, 178 Cal.App.4th at p. 114.) As discussed above, Penal Code section 288 requires that the offense be committed with "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 and 261.5 contain no such intent requirement. Therefore, a defendant convicted under Penal Code section 288 is not similarly situated with one convicted under Penal Code section 261.5. Respondent notes that rather than mentioning intent, *Hofsheier* explained that certain offenses, including Penal Code sections 288a, subdivisions (c)(1) and (c)(2), were excluded from its holding because registration was required regardless of the sexual act, due to the victims being under the age of 14 and the use of force. (AOB at 16-17.) However, respondent offers no possible reasons why Penal Code section 288a, subdivision (b)(1) was not excluded from this Court's holding or why it should be.

Respondent argues that "*Ranscht's* reasoning is problematic because it implicitly assumes that the comparison offense must be section 261.5. Yet if that were the case, no sex offense against a child would ever require mandatory registration." (AOB at 16.) Respondent is wrong. As discussed

above, Penal Code section 261.5, subdivision (d) is the better comparison offense as it is identical to Penal Code section 288a, subdivision (b)(1); they are identical except for the sexual act. Moreover, nothing precludes the prosecution from seeking mandatory registration if, after proving specific intent, they can obtain a conviction under Penal Code section 288, which requires registration under Penal Code section 290. Therefore, contrary to respondent's suggestion, rejecting *Manchel* does not contradict any Legislative intent to protect 14 and 15 year old victims. (AOB at 13-14, 17.) In addition, respondent, like the *Manchel* court,

> ignores the possibility that the district attorney might offer, and an offender might accept, a plea to violating section 261.5 specifically to avoid the threat of mandatory sex offender registration. Thus, an offender who engages in unlawful sexual intercourse with a minor within section 288's age limits does not necessarily face mandatory sex offender registration as *Manchel* suggests.

(*People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1374.)

Finally, as the *Rancht* court noted, *Manchel* overlooks *Hofsheier's* plain language, which focused on "persons who are *convicted* of voluntary oral copulation … , as opposed to those who are *convicted* of voluntary intercourse with adolescents in [the] same age group." (*People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1374, citing *People v. Hofsheier*, *supra*, 37 Cal.4th at pp. 1206–1207, italics added.) Instead, *Manchel*, "completely ignore[s] the crime of which a defendant is convicted and looks instead to

all of the crimes of which a defendant *could have* been convicted based on his conduct." (*People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1374.) "This approach jibes with the mandatory registration statutes themselves, which are triggered by certain convictions ... , and not by the underlying conduct of those offenses per se." (*In re J.P.* (2009) 170 Cal.App.4th 1292, 1299.) In addition, the *Manchel* approach also incorrectly assumes that the prosecution will be able to prove the specific intent element and sustain a conviction under Penal Code section 288 in every case.

This Court should conclude, as the *Ranscht* court did that, consistent with *Hofsheier*, "the more appropriate course is to focus on the offense of which the defendant was *convicted*, as opposed to a hypothetical offense of which the defendant *could have* been convicted based on the conduct underlying the charge." (*People v. Ranscht*, *supra*, 173 Cal.App.4th at p. 1375.) Penal Code section 288a, subdivision (b)(2) and Penal Code section 261.5, subdivision (d) contain identical elements except that one prohibits oral copulation and the other sexual intercourse. However, a violation of Penal Code section 288a, subdivision (b)(2), oral copulation, requires sex offender registration and a violation of section 261.5, subdivision (d), sexual intercourse, does not. The two groups of violators are sufficiently similar to merit some level of scrutiny in order to determine whether registration is justified for one group, but not the other. Requiring those

who engage in oral copulation with minors under 16 to register as sex offenders, but making no such requirement for those who engage in sexual intercourse with minors under 16 is a distinction without any rational support. As the classification does not withstand equal protection scrutiny, appellant's mandatory registration requirement must be reversed.

D. Penal Code Section 288 Did Not Have a Section Prohibiting Lewd Conduct on a Child of 14 or 15 at The Time of Appellant's Offense In 1988.

Even assuming that this Court finds that *Manchel* was correctly decided and that the comparison should be between Penal Code section 288a, subdivision (b)(2) and Penal Code section 288, subdivision (c)(1), rather than Penal Code section 261.5, subdivision (d), it would not change the outcome because Penal Code section 288, subdivision (c)(1) did not exist at the time of appellant's offense. Appellant pled guilty to Count IV, which was alleged to have occurred on and between September 1, 1988 and December 31, 1988 and concerned a victim under the age of 16.[2] Effective January 1, 1988, the year appellant committed his offense, Penal Code section 288 provided:

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[2] The felony complaint provides contradictory information about the victim's age as appellant was charged with lewd acts on a child under the age of 14 and oral copulation and sodomy of a person under 16, with the same victim alleged in each count, all allegedly occurring in 1988. (1 C.T. 8-11.) However, appellant pled guilty to Penal Code section 288a, subdivision (b)(2), which applies where the victim is 14 or 15 years old.

> (a) Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child **under the age of 14 years**, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years....

(Stats. 1987, ch. 1068, § 3.) Thus, contrary to respondent's repeated assertion (AOB at 12, 17), appellant could not have been prosecuted under Penal Code section 288, subdivision (c)(1), as that section did not exist at the time of appellant's offense. It was not until January 1, 1989, that Penal Code section 288, subdivision (c) was added to provide:

> Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and the defendant is at least 10 years older than the child, shall be guilty of a public offense and shall be imprisoned in the state prison for one, two, or three years, or by imprisonment in the county jail for not more than one year.

(Stats. 1988, ch. 1398, § 1.) Therefore, even if this Court were to apply the *Manchel* court's analysis, it would not change the outcome, since in 1988 that section only punished lewd conduct with minors under the age of 14.

CONCLUSION

For the reasons stated above, 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.

Dated: June 24, 2013

Respectfully submitted,

MARILEE MARSHALL
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

This brief consists of 6,952 words in 13 point font as counted by the word processing program used to generate it.

Dated: June 24, 2013

Respectfully submitted,

MARILEE MARSHALL
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

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 June 24, 2013, I served a copy of the within:

APPELLANT'S ANSWERING BRIEF ON THE MERITS

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 June 24, 2013, 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 declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24, 2013, at Los Angeles, California.

LESLIE AMAYA