"Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California. Decisions of **every division of the District Courts of Appeal are binding** upon all the justice and municipal courts and upon all superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [emphasis added].) This Court is bound by *Iskanian* and the numerous appellate cases after which have affirmed that Epic Systems did not overrule *Iskanian*, even if those appellate cases were not in the Third District.

The Court is also not persuaded by Defendant's argument that contract law principles require individual arbitration of PAGA, based on the reasoning provided above. Requiring Plaintiff to bring a PAGA claim in his individual capacity rather than in a representative capacity would undermine the purposes of the PAGA state. (See *Iskanian*, 59 Cal.4th at 383-384.)

As a result, the motion is denied in its entirety.

This minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 11 **2021-00294685-CU-MC**

John Doe vs. California Department of Justice

Nature of Proceeding: Hearing on Demurrer

Filed By: Richards, Megan

Defendants California Department of Justice and Matthew Rodriguez demur to Plaintiff John Doe's complaint on grounds that Plaintiff fails to state facts sufficient to constitute a valid cause of action and Plaintiff fails to show that the Tiered Registry Law, found at Penal Code sections 290(d) and 290.5 treat him different than any similarly situated group, and Plaintiff fails to show that any classification adopted by the Tiered Registry Law is not rationally related to any conceivable state objective. The demurrer is ruled on as follows.

The notice of motion does not provide notice of the Court's tentative ruling system, as required by Local Rule 1.06(D). Counsel for moving party is directed to contact opposing party forthwith and advise counsel of Local Rule 1.06 and the Court's tentative ruling procedure. If counsel for moving party is unable to contact opposing party prior to the hearing, counsel for moving party shall be available at the hearing, via Zoom video or audio, in the event opposing party appears without following the procedure set forth in Local Rule 1.06(B).

Plaintiff's request for judicial notice is granted.

Legal Standard

The function of a demurrer is to test the sufficiency of the pleading it challenges by

raising questions of law. (*Salimi v. State Comp. Ins. Fund* (1997) 54 Cal.App.4th 216, 219; *Nordlinger v. Lynch* (1990) 225 Cal.App.3d 1259, 1271.)

A demurrer "tests the pleadings alone and not the evidence or other extrinsic matters." (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905.) The purpose of a demurrer is to test the legal sufficiency of a claim. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal. App. 4th 968, 994.) For the purpose of determining the effect of a complaint, its allegations are liberally construed, with a view toward substantial justice. (Code Civ.Proc. § 452; *Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140-141; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 43, fn. 7.) In this respect, the Court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law, and considers matters which may be judicially noticed. (*Blank v. Kirwan* 1985) 39 Cal.3d 311, 318; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1111-1112.) A general demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the complaint; facts impossible in law; or allegations contrary to facts of which a court may take judicial notice. (Blank, 39 Cal. 3d at 318; *William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1616, fn.2.) Extrinsic evidence may not properly be considered on demurrer. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal. App. 3d 868, 881; *Hibernia Savings & Loan Soc. v. Thornton* (1897) 117 C. 481, 482.)

A demurrer may be sustained only if the complaint lacks any sufficient allegations to entitle the plaintiff to relief. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal. App. 3d 764, 778.) "Plaintiff need only plead facts showing that he may be entitled to some relief . . . , we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint." (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 696-697.) "[Courts] are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded." (*Picton v. Anderson Union High School Dist*. (1996) 50 Cal.App.4th 726, 733, citation omitted.) A demurrer admits the truth of all material facts properly pled and the sole issue raised by a general demurrer is whether the facts pled state a valid cause of action - not whether they are true. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

Background

Plaintiff was convicted of committing a lewd and lascivious act with a victim 14 or 15 years old, when he was 10 years older than the victim, and must register as a sex offender as a result. (Compl. ¶ 8.) Plaintiff is now 79 years old, and was convicted in 1998. (*Id.*) Plaintiff's conviction was for violation of Penal Code section 288(c), currently codified as section 288(c)(1). (*Id.*)

California maintains a registry of those convicted of sex offenses. Until 2017, most convicted of a sex offense were subject to lifetime registration requirements. That year, approximately 70 years after California enacted its sex offender registry, the Legislature passed Senate Bill No. 384, creating a tiered sex offender registry ("Tiered Registry Law"). (Sen. Bill No. 384 (2017-2018 Reg. Sess.) The law took effect on January 1, 2021. Now, rather than requiring all sex offenders to register for life, the Tiered Registry Law classifies adult offenders into three tiers. (The Tiered Registry Law also includes two tiers for those adjudicated a ward of the court after being convicted of a specific sex offense as a minor. (See Pen. Code § 290.008.)) The

appropriate tier is determined in part based on the offense for which the individual was convicted. Tiers 1 and 2 provide for 10 and 20 years of mandatory registration, respectively; Tier 3 provides for lifetime mandatory registration.

Plaintiff filed his complaint on February 17, 2021, alleging the Tiered Registry Law is a violation of the Equal Protection guarantee of the California Constitution and asking for declaratory and injunctive relief. (See ROA 1.) Plaintiff contends that the Tiered Registry Law makes arbitrary, illogical, and irreconcilable distinctions between sex offender registrants, and the law is unconstitutional, both facially and as applied to him. (Compl. ¶¶ 2-3.) Specifically, Plaintiff alleges the law violates the rights of persons convicted of Penal Code section 288(c)(1) to equal protection of the law because it assigns them to Tier 3 while assigning similarly situated persons to Tiers 1 or 2, allowing them to petition for terminating registration requirements in as few as ten years. (Compl. ¶ 3.) Plaintiff requests a declaration that the Tiered Registry Law violates the equal protection guarantee of the California Constitution and an injunction preventing Defendants from assigning persons convicted of section 288(c)(1) to Tier 3. Plaintiff also requests attorney's fees. (Compl., p.16.)

Defendants argue Plaintiff fails to state a claim for two reasons: (1) Plaintiff fails to show any similarly situated group treated differently by Tiered Registry Law. (2) Plaintiff fails to show that the Law's differentiation between sex offenders is not rationally related to any legitimate purpose. Defendants claim the Legislature could have enacted the Tiered Registry Law to protect children from predatory adults, maintain the database as a crime-fighting tool, and mitigate the discriminatory effects of certain previous sex crimes prosecutions. Defendants argue that drawing distinctions between which offenders must register is rationally related to those purposes.

Plaintiff opposes the motion, arguing section Penal Code section 288(a) is categorically less severe than section 288(c)(1) despite identical conduct and the age difference codified in section 288(c)(1), and the Legislature granted persons convicted of section 288(c)(1) but not section 288(a) the opportunity to demonstrate rehabilitation. Plaintiff argues he has plausibly pled that persons convicted of section 288(a) and 288(c)(1) are similarly situated because their underlying conduct is identical; and Plaintiff plausibly alleges no rational basis for prohibiting section 288(c)(1) offenders from petitioning for removal because the Legislature has deemed them capable of demonstrating rehabilitation.

On reply, Defendant argues Plaintiff's equal protection claim fails because he is not similarly situated to any group treated in an equal manner, and there is a rational basis for allowing section 288(a) offenders to have an opportunity to be removed from the registry while not affording section 288(c)(1) offenders the same opportunity.

Analysis

"In order to decide whether a statutory distinction is so devoid of even minimal rationality that it is unconstitutional as a matter of equal protection, we typically ask two questions. We first ask whether the state adopted a classification affecting two or more groups that are similarly situated in an unequal manner. [*People v. McKee* (2010) 47 Cal.4th 1172, 1202, superseded on other grounds by section 6608 as stated in *People v. McCloud* (2021) 63 Cal.App.5th 1, 14-15.] If we deem the groups at issue similarly situated in all material respects, we consider whether the challenged classification

ultimately bears a rational relationship to a legitimate state purpose. [*Johnson v. Dept. of Justice* (2015) 60 Cal.4th 871, 881.] A classification in a statute is presumed rational until the challenger shows that no rational basis for the unequal treatment is reasonably conceivable. [*Id.*; *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1140 (holding that "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification").] The underlying rationale for a statutory classification need not have been "ever actually articulated" by lawmakers, and it does not need to "be empirically substantiated." [*Johnson*, 60 Cal.4th at 881.] Nor does the logic behind a potential justification need to be persuasive or sensible-rather than simply rational. [See *id.*]" (*People v. Chatman* (2018) 4 Cal.5th 277, 289.)

"Rational basis scrutiny is 'exceedingly deferential: A law will be upheld as long as a court can "speculat[e]" any rational reason for the resulting differential treatment, regardless of whether the "speculation has 'a foundation in the record,'" regardless of whether it can be "'empirically substantiated,'" and regardless of whether the Legislature ever "articulated" that reason when enacting the law.' (*People v. Nolasco* (2021) 67 Cal.App.5th 209, 220-221, quoting *People v. Love* (2020) 55 Cal.App.5th 273, 287, quoting *People v. Turnage* (2012) 55 Cal.4th 62, 74-75.)

Whether the Tiered Registry Law Treats Similarly Situated Groups Dissimilarly

Defendants allege Plaintiff's equal protection claim fails because he and other section 288(c)(1) offenders are not similarly situated to any other group that the Tiered Registry Law subjects to shorter mandatory registration periods.

Defendants claim that, while courts have not yet reviewed the current Tiered Registry Law in an unequal protection challenge, courts have reviewed similar challenges to legislative line-drawing in prior versions of the Act. Defendants cite to *People v. Cavallaro* (2009) 178 Cal.App.4th 103, arguing the court held that offenders convicted of section 288(c)(1) were not similarly situated to people convicted of section 261.5(d). (*Id.* at 113-114.) Both statutes criminalize sex acts committed against children aged 14 or 15, and Cavallaro argued that section 290 violated his equal protection rights because it made registration mandatory for section 288(c)(1) offenders but discretionary for section 261.5(d) offenders. (*Id.*) The elements of section 288(c)(1), related to lewd and lascivious acts, are: (1) touching either of the child or the defendant; (2) with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desire of the defendant or the child; (3) when the child was 14 or 15 years old; and (4) when the child was at least 10 years younger than the defendant. (See Judicial Council of California Criminal Jury Instructions (2021 edition); CALCRIM No. 1112.) The *Cavallaro* Court held that people convicted of the two offenses were not similarly situated because section 288(c)(1) had a specific intent requirement. (*Cavallaro*, 178 Cal.App.4th at 114.) Second, the statutes had different threshold age requirements for the offender, with only section 288(c)(1) requiring that the offender be at least ten years older than the victim. (*Id.*) Third, "a person who engages in sexual intercourse with a 14- and 15-year-old and who is also at least 10 years older than the minor may be convicted of a lewd and lascivious act under section 288(c)(1)." (*Id.* at 115, citing *People v. Fox* (2001) 93 Cal.App.4th 394, 399 (sexual intercourse is lewd act under section 288).

The Court also distinguished the offenses based on the ages of the victims being 14 or 15, rather than 16, as was the case in *People v. Hofsheier* (2006) 37 Cal.4th 1184. (*Id.*) *Hofsheier* has been overruled. Defendants do not rely on that distinction here.

Defendants claim the first three distinctions from *Cavallaro* apply here. Offenders convicted of section 288(a) are not similarly situated to offenders convicted to section 288(c)(1) because only subdivision (c)(1) contains a 10-year age differential requirement. Section 288(a) prevents lewd and lascivious acts with a child under age 14. Section 288(c)(1) prohibits the same acts against a victim aged 14 or 15 by a perpetrator who is at least 10 years older than the victim. The additional age requirement in section 288(c) is significant because it means the class of offenders convicted of section 288(c) will be comprised of people who committed the crime at the age of at least 24 (well into adulthood) and against a victim who is much younger. Defendants argue a key purpose of the Tiered Registry Law is to differentiate between persons whose continued inclusion on the registry is necessary for public safety, and persons who no longer need monitoring. For this purpose, section 288(c) offenders are, as a collective, susceptible to the Legislature's inclusion in the most stringent sex registry tier because of both the age difference between them and their victims, indicative of a predatory relationship, and the fact that their crimes were committed well into adulthood, suggesting less potential for rehabilitation. By contrast, the class of offenders convicted of section 288(a) may include persons who committed their crimes as young adults or even as minors themselves. (See, e.g., *People v. Cole* (2007) 152 Cal.App.4th 230 (16 year-old offender tried in adult court for conduct with a 13 year-old victim).)

Defendants claim the Legislature may have rationally determined that offenders convicted of sex crimes as minors or young adults are more susceptible to rehabilitation than offenders who committed crimes later in adulthood. The Legislature and courts have recognized that young adults may be more likely to be rehabilitated compared to mature adults, such that they should be treated differently under the law. (See, e.g., *In Re Williams* (2020) 57 Cal.App.5th 427, 456-457 (discussing Youth Offender Parole Hearings).) Because section 288(c)(1) applies only to mature adults who engaged in lewd and lascivious acts with victims over 10 years younger whereas subsection (a) may apply to persons who committed their offense as young adults and against victims close in age, the two groups present different risks to minors and the likelihood of rehabilitation makes it so the groups are not similarly situated.

Defendants also discuss comparisons to other statutes, but since those are not challenged by Plaintiff on demurrer, the Court does not discuss them here.

In opposition, Plaintiff alleges that section 288(a) applies to offenses involving a victim under age 14, whereas section 288(c)(1) applies to offenses involving a victim age 14 or 15, and when the defendant is at least 10 years older than the victim. Plaintiff argues that the Legislature has, in every way, manifested an intent that a violation of subsection (c)(1) be treated less severely than a violation of subsection (a). (See, e.g., *People v. Olsen* (1984) 36 Cal.3d 638, 648 ("The Legislature has [ ] determined that persons who commit sexual offenses on children under the age of 14 should be punished more severely than those who commit such offenses on children under the age of 18.").) Section 288(a) is a felony, but subsection (c)(1) may be charged or sentenced as a misdemeanor, and felony subsection(c)(1) has a determinate sentencing range two-thirds shorter than subsection (a). The Legislature has determined a defendant convicted of subsection (c)(1) is capable of earning reduced

penalties through rehabilitation, whereas subsection (a) is not. (See Pen. Code § 17 (b).)

Despite this, the Tiered Registry Law permits a person convicted under section 288(a) to petition for removal from the registry, while depriving someone convicted of section 288(c)(1) that same opportunity. Plaintiff claims this is unequal treatment of similar offenses and produces the arbitrary and perverse result that committing the same offense against a younger and more vulnerable victim preserves an individual's opportunity for removal from the registry. (See *People v. Schoop* (2012) 212 Cal.App.4th 457, 473 (dissimilar treatment of offenses leading to "perverse results" violates the Equal Protection Clause).)

Plaintiff argues the age gap requirement of section 288(c)(1) cannot provide a rational basis for depriving convicted persons to demonstrate rehabilitation because: (1) the Legislature has already determined that persons convicted under subsection (c)(1) should have that opportunity, and (2) section 288(c)(1) is a categorically less severe offense than section 288(a) and thus cannot be subjected to harsher treatment. (See *Schoop*, 212 Cal.App.4th at 472; *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711-712.)

Plaintiff argues that the Legislature must provide an "identification of the purpose of" the challenged statute, as revealed by legislative history. (See, e.g., *Newland*, 19 Cal.3d at 711.) The Court then must determine whether the specific instance of unequal treatment at issue "rationally relates to that purpose," not to any conceivable purpose. (*Id.*) Plaintiff argues that *Cavallaro* and *Johnson*, cited by Defendants, are inapposite because they analyzed equal protection claims in the context of California's former registry law which required lifetime registration for almost all persons convicted of a sex offense.

Plaintiff claims he has plausibly pled that persons convicted of section 288(a) and 288 (c)(1) are similarly situated because their underlying conduct is identical. Plaintiff argues the absence of an age gap requirement in subdivision (a) does not render those offenses dissimilar. Plaintiff cites to *People v. Nguyen* (1997) 54 Cal.App.4th 705, wherein the plaintiff brought an equal protection challenge to a series of laws governing sentencing of theft convictions. (*Id.* at 701, 713.) Sentencing requirements held that it was a misdemeanor if the defendant had two prior serious felony convictions but no prior theft conviction, but defendants received felony punishment for the same convictions if they had two prior serious felony convictions and a prior theft conviction. (*Id.*) The *Nguyen* Court found the two groups "are sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment." (*Id.* at 715.) The court rejected the argument that the groups were dissimilar because of a criminal history involving theft convictions because "it is this distinction which is challenged as not justified by the purpose of [the sentencing law]." (*Id.*) Plaintiff claims that distinguishing subsection (a) and (c)(1) offenders on the basis of an age gap requirement is "simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic." (See *id.* at 714.)

Plaintiff argues the purpose of the Tiered Registry Law is to increase the effectiveness of the registry and reduce "bloat" by allowing rehabilitated persons a chance to demonstrate their rehabilitation. (RJN, Exh. A, p. 12.) Plaintiff claims he has plausibly alleged that section 288(c)(1) offenders are similarly situated to section 288(a)

offenders because they: (1) committed the same acts; (2) are convicted of categorically less severe offenses, even misdemeanor offenses; and (3) are capable of earning a reduction to a misdemeanor through demonstrated rehabilitation, which Plaintiff claims he has done.

Plaintiff claims Defendants erroneously imply that section 288(a) offenders are necessarily closer in age to their victims than section 288(c)(1) offenders, or they commonly are, but that, in actuality, the absence of an age gap requirement in section 288(a) does not mean that those defendants are categorically younger, or that they are less susceptible to rehabilitation. Plaintiff argues that those convicted under section 288(a) are routinely more than 10 years older than their victims.

Plaintiff claims *People v. Cavallaro* is inapposite because it did not involve statutes that were related to the same conduct, and addressed a different analysis since it pre-dated the Tiered Registry Law and was in the context of mandatory registration. It addressed whether the reasoning in *People v. Hofsheier* should be extended to section 288(c)(1) convictions.

On reply, Defendants claim Plaintiff is not similarly situated to any group treated in any unequal matter. Defendants argue section 288(a) and section 288(c)(1) offenders are different because section 288(c)(1) requires the offender be at least 25 years old at the commission of the sex crime against a 14 or 15 year-old victim. Defendants allege "[t] his means that section 288(c)(1) offenders are exclusively mature adults who have been convicted of abusing victims more than 10 years younger. Accordingly, the group of offenders convicted of 288(c)(1) will not include any person convicted of the sex crime as a young adult (or as a child charged as an adult). In contrast, section 288(a), because it has no requirement that the offender be over ten years older than a 14 or 15-year old victim, can and does include offenders convicted for crimes committed as minors or young adults." (Reply at 5-6.) Defendants argue that, with regard to the purpose of the Tiered Registry Law, a group that includes people convicted as children or young adults differs from a group including only mature adults because the Legislature has repeatedly recognized that young adults are more likely to be rehabilitated. Plaintiff argues the two groups are not similarly situated because he contends that section 288(a) is the more serious crime, evidenced by increased opportunities offered to section 288(c)(1) offenders and because it section 288(c)(1) is a wobbler. Defendants, however, argue that section 288(c)(1)'s lower imprisonment range is not helpful to Plaintiff because the potential sentencing range for a crime has limited relevance to whether the offender should be included on the sex offender registry. Inclusion on the registry implicates safety and rehabilitation concerns, not punishment. (*Smith v. Doe I* (2002) 538 U.S. 84). In contrast, criminal sentencing traditionally is related to other purposes such as deterrence and retribution. (See *In re A.G.* (2011) 193 Cal.App.4th 791, 804.) Defendants state the registry has different goals than adult sentencing so it does not follow that the registry needs to mirror criminal sentencing guidelines, and the cases cited by Plaintiff do not state to the contrary.

"To be similarly situated, the age groups that the Legislature treats differently need not -and, indeed, cannot-be 'identical.' (*People v. McKee*, 47 Cal.4th at 1202, 1203, superseded on other grounds by section 6608 as stated in *People v. McCloud* (2021) 63 Cal.App.5th 1, 14-15.) It is enough that the two groups have 'common features' that render them similar 'for [the] purposes of the law [being] challenged.' (*McKee*, 47 Cal.4th at 1202.)" (*Nolasco*, 67 Cal.App.5th at 221.)

Here, since the same conduct is at issue and there may be some overlap in the age of the defendants, the Court finds that the groups are sufficiently similarly situated for purposes of this challenge. Regardless, the Court must also find there is no rational basis for treating the two groups differently.

Whether the Legislature Has a Rational Basis for Differentiating Between Persons Convicted of Section 288(c) and 288(a) in Determining an Offender's Sex Registry Tier

Rational basis review applies here because Plaintiff's registry status does not implicate a suspect class such as race, national origin, gender, or a fundamental right such as the right to vote or marry. (See *Johnson v. Department of Justice* (2015) 60 Cal.4th 781, 881 (applying rational basis to equal protection challenge to sex offender registry statute); *People v. Jones* (2002) 101 Cal.App.4th 220, 230 (collecting cases where rational basis was applied to review of sex offender registration statutes).) Under rational basis review, even where two similar groups are treated differently, there is not a constitutional violation unless there is "no rational relationship between disparity of treatment and some legitimate government purpose." (*Heller v. Doe* (1993) 509 U.S. 312, 320.) This standard does not depend on whether the Legislature ever articulated the purpose sought to achieve. (*Johnson*, 60 Cal.4th at 881.) "To mount a successful rational basis challenge, a party must negate every conceivable basis that might support the disputed statutory disparity." (*Id.*)

Defendants claim the California Supreme Court has held that "under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644.) The United States Supreme Court has stated that "[d]efining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have almost equally strong claim to be favored treatment to be placed on different sides of the line and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial consideration." (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315-316, citations and internal quotations omitted.)

Defendants argue the Tiered Registry Law meets this standard because its classifications are rationally related to conceivable purposes, which include protecting the public, making the registry a more just and effective crime-fighting and crime-prevention tool, and mitigating prior discrimination. Defendants claim the Legislature had a rational basis for placing section 288(c) offenders into Tier 3 while placing section 288(a) offenders into Tier 2 because the Legislature may determine that subdivision (c) offenders are, as a class, more likely to be predatory against children because of the age difference required for their conviction and less susceptible to rehabilitation on account of their mature age at the time of the offense. This is a rational basis for differentiating between subsection (c) and subsection (c) offenders based on the purposes of the Tiered Registry Law, which includes removing offenders with a lower risk of recidivism from the registry while continuing to protect the public.

Plaintiff opposes this argument and claims he has plausibly alleged that there is no rational basis for prohibiting section 288(c)(1) offenders from petitioning for removal because the Legislature has deemed them capable of demonstrating rehabilitation.

Plaintiff claims that Defendants' claimed bases for the distinction (that section 288(c)(1) offenders are more likely to be predatory against children because of the age difference, and less susceptible to rehabilitation on account of mature age) "could not reasonably or conceivably have been within the contemplation of the Legislature because the Legislature's consistent treatment of Section 288(c)(1) offenders for more than three decades reveals the Legislature's belief that they are not more predatory and are not less susceptible to rehabilitation." (Oppo. at 10.)

Plaintiff argues that the rational basis for a law offered in defense of an equal protection claim requires that it "may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker" (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 11, 15), and the Court must "declin[e] to invent[] fictitious purposes that could not have been within the contemplation of the Legislature" (*Warden v. State Bar* (1999) 21 Cal.4th 628, 648.)

Plaintiff discusses *Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, wherein the Court stated that "statutory distinctions resting on 'speculative possibility' do not satisfy the requirements of equal protection." (*Id.* at 436.) In *People v. Schoop* (2012) 212 Cal.App.4th 457, the court rejected the government's proffered "speculative" reasoning because the government "d[id] not point [the] court to any factual support for this hypothesis, let alone anything to indicate that the theory was available to or under consideration by the Legislature when distinguishing rehabilitation periods." (*Id.* at 472-473.)

Plaintiff argues Defendants' reliance on the 10-year age gap requirement of section 288(c)(1) is a "fictitious purpose" because the Legislature placed two other offenses with the same age gap requirement in a lower tier, allowing those persons the opportunity to demonstrate rehabilitation. Specifically, section 286(c)(1) (sodomy with a person under age 14 and more than 10 years younger than the offender) was placed in Tier 2, and section 289(i) (sexual penetration by a person over 21 on a victim under age 15) was placed in Tier 1 and is automatically registrable only if the defendant is more than 10 years older than the victim. (See Pen. Code § 290(c)(2).)

Plaintiff argues Defendants "do[] not point . . . to any factual support for th[e] hypothesis" that the Legislature believed section 288(c)(1) offenders to be recidivist "let alone anything to indicate that the theory was available to or under consideration by the Legislature" in drafting the Tiered Registry Law. (See *Schoop*, 212 Cal.App.4th at 473.) Plaintiff claims, to the contrary, the Legislature has consistently treated section 288(c)(1) less severely than 288(a) defendants, confirming the Legislature's view that subsection (c)(1) defendants are more capable of rehabilitation. None of the opportunities for misdemeanor sentencing or reductions earned through demonstrated rehabilitation are available to subsection (a) offenders.

Plaintiff also argues he has plausibly alleged an equal protection violation on the ground that section 288(c)(1) is a less severe offense than section 288(a). (See *Newland v. Board of Governors* (1977) 19 Cal.3d 705 (finding no rational basis to treat felony convictions of a sex offense more preferably than those convicted as misdemeanors); *People v. Edwards* (2019) 34 Cal.App.5th 183 (considering an equal protection challeng to a statute granting youthful offenders the opportunity for early parole, including murder convictions, but carving out persons convicted of a violent sex offense); *People v. Schoop* (2012) 212 Cal.App.4th 457 (equal protection violation found and the court "consider[ed] it relevant" that section 111.1 is a wobbler, whereas

three other statutes aimed at sexual material [§§ 311.2(b) & (d), 311.10] are felonies, yet have a shorter period of rehabilitation," stating "[t]he length of the potential prison term presumably corresponds to the severity of the offense" and [i]t is irrational-indeed, perverse-and constitutionally impermissible to impose stricter registration requirements on those subject to a shorter prison term than those subject to a longer term").

Plaintiff claims depriving those convicted of section 288(c)(1) of an opportunity for removal from the registry while affording the opportunity to those convicted of even misdemeanor section 288(a) is similarly "perverse," since a person who committed the same unlawful acts against a younger victim receives an opportunity to demonstrate their rehabilitation while a person convicted of a less severe offense against an older victim cannot. Plaintiff states the Legislature has rejected Defendants' reliance on the age gap requirements of section 288(c)(1).

On reply, Defendants argue there is a rational basis for allowing section 288(a) offenders to have an opportunity to be removed from the registry while not affording section 288(c)(1) offenders the same opportunity. Defendant argues that, while Plaintiff argues Defendant's proffered reasons are "fictitious purposes," "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." (*Cal. Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 209, quoting *F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315.) Further, even if it were relevant, Defendants allege it is not true that perpetrator age difference cold never have been within the Legislature's contemplation. In 2017, the same Legislature extended the youthful offender statute, citing neurological studies about cognitive brain development and it continues well beyond age 18 in early adulthood. (See *In re Williams*, 57 Cal.App.5th at 430.) The bill's author stated: "Research has shown that the prefrontal cortex doesn't have nearly the functional capacity at age 18 as it does at 25. The prefrontal cortex is responsible for a variety of important functions of the brain. . . *These functions are highly relevant to criminal behavior and culpability*." (*Id.*, citing Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1308 (2017-2018 Reg. Sess..) as amended Mar. 30, 2017, p. 3, emphasis in original.)

Defendants argue that Plaintiff's attempts to distinguish *Cavallaro* and *Johnson* are not persuasive. Defendants claim it is irrelevant whether the Tiered Registry is different from the original registry because "what matters is that *Johnson* rejected *Hofsheier*'s mode of analysis and commanded courts to 'accept any gross generalizations and rough accommodations that the Legislature seems to have made.' (*Johnson*, 60 Cal.4th at 887.)" (Reply at 8.) Defendants claim "that required deference to the Legislature is fatal to Doe's claim." (*Id.*) Further, despite Plaintiff's representation, Defendants argue the Tiered Registry did not "fundamentally alter" the purpose of the registry because it "did not do away with registration of sex offenders, nor did it disavow the registry's original goals of preventing recidivism, facilitating surveillance, and ultimately, protecting victims who might be targets of future crimes." (*Id.*) Defendants argue the Tiered Registry has multiple purposes, some of which are the same as the original registry, and therefore *Johnson* and *Cavallaro* are therefore not inapposite.

Defendants claim Plaintiff "urges the Court to rely on outlier cases that do not abide by the Supreme Court's more recent admonitions regarding rational basis review." Defendants argue *Schoop* was decided before *Johnson* overruled *Hofsheier* and the *Schoop* decision relies on *Hofsheier* throughout. Defendants argue "[t]he decision

runds afoul of many of the Supreme Court's admonitions in *Johnson* regarding how to perform a rational basis review." (*Id.* at 9.) Plaintiff also cites to *People v. Edwards*, which was decided after *Johnson* and, Defendants allege, "deviates from accepted rational basis review principles." (*Id.*) Defendants allege *Edwards* relies heavily on jurisprudence regarding whether punishments for minors violate the Eighth Amendment's prohibition on cruel and unusual punishment rather than equal protection jurisprudence and is focused primarily on juveniles. (*Edwards*, 34 Cal.App.5th at 195.) As such, Defendants allege that *Edwards* is not controlling or persuasive.

The Court agrees with Defendants. Recent precedent confirms the standard required to meet "to decide whether a statutory distinction is so devoid of even minimal rationality that it is unconstitutional as a matter of equal protection." (See *People v. Chatman*, 4 Cal.5th at 289.) "[O]ur role in this case is to review the rationality of the statutes at issue, not measure their fairness or wisdom. The Legislature may ultimately revisit the statutory framework . . . . Yet even if the Legislature could have chosen to enact a more sensible or judicious statutory scheme than the one in place today," the Court's role is determine whether the Tiered Registry Law distinctions at issue "are constitutional because they rationally serve a legitimate government purpose." (*People v. Chatman*, 4 Cal.5th at 297-298.) "It is immaterial for rational basis review 'whether or not' any such speculation has 'a foundation in the record.'" (*Johnson*, 60 Cal.4th at 881, quoting *Turnage*, 55 Cal.4th at 74-75.)

Here, Defendants have provided legitimate rational bases for prohibiting section 288(c)(1) offenders from petitioning for removal from the Tiered Registry while section 288(a) offenders are permitted to do so. This is sufficient to survive rational basis review.

Conclusion

For the foregoing reasons, Defendants' demurrer to Plaintiff's complaint is SUSTAINED. Given that this is the first challenge to the complaint, the Court grant leaves to amend.

No later than September 13, 2021, Plaintiff may file an amended complaint. (Although not required by statute or court rule, Plaintiff is directed to present the clerk a copy of this ruling at the time of filing the amended complaint.)

Pursuant to CRC Rule 3.1312, Defendants shall lodge a judgment of dismissal.

Item 12 **2021-00302857-CU-PT**

In Re: Lunden Carter James

Nature of Proceeding: Petition for Change of Name

Filed By: James, Carolyn

The petition for change of name is granted.

Item 13 **2021-00302871-CU-PT**