

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	CASE NO. 2013-1619
Plaintiff-Appellant,	)	On Appeal from the
-vs-	)	Cuyahoga County Court of
MATTHEW MOLE,	)	Appeals, Eighth
Defendant-Appellee.	)	Appellate District
		Court of Appeals
		Case No. CA 98900

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MERIT BRIEF OF APPELLEE MATTHEW MOLE

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## STATEMENT OF THE CASE AND FACTS

Matthew Mole, known by his peers to be an “excellent” police officer, was drawn into this case when a 14-year-old male (J.S.) masqueraded as an adult homosexual on a gay mobile phone app called “Grindr.” (T.p. 65-66, 149-151) The two ultimately met at J.S.’s home, with the subsequent result being the indictment of Mr. Mole on third-degree felony charges of Unlawful Sexual Conduct with a Minor, in violation of R.C. 2907.04(A), and Sexual Battery, in violation of R.C. 2907.03(A)(13). Mr. Mole was charged with Sexual Battery simply because he was a police officer.

In order to use Grindr, J.S. created a profile where he lied about his age, indicating that he was eighteen. (T.p. 69, 71-72, 154) To appear older, J.S. also lied about his height and weight. (T.p. 72) He also posted a photo of himself with his shirt off. (T.p. 152) J.S. understood the primary purpose of Grindr was to be a conduit for adult gay males to meet and have sex. (T.p. 73) Through Grindr, he was able to have graphic conversations about homosexual sex with other males. (T.p. 75-76) J.S. was surreptitious in his use of Grindr and other mobile phone apps, typically deleting the information from his phone so that his mother would not discover it. (T.p. 67)

In the early morning hours of December 19, 2011, J.S. initiated a series of sex chats with several men on Grindr until he ultimately connected with Mr. Mole. (T.p. 87-88, 161, 169) The two discussed having sex, and J.S. twice told Mr. Mole he was 18. (T.p. 91, 181) J.S. invited Mr. Mole to come to his home to have sex, but warned him not to park in the driveway to avoid triggering motion-detecting lights. (T.p. 93-94, 157, 160, 174-176) J.S.’s mother, grandmother and brother were in the home but asleep at the time. (T.p. 82)

Mr. Mole parked on the street in front of the house and was greeted in the driveway by J.S., who led him to a darkened patio room in the back. (T.p. 104, 107, 158, 182) Following their sexual encounter, the two were discovered by J.S.'s mother, who called the police. (T.p. 109-116, 118-120) Mr. Mole never told J.S. he was a police officer and brought nothing into the home that would have identified himself as a police officer. No evidence was presented at trial to contradict the fact the J.S. never knew Mr. Mole was a police officer until after the arrest. The Unlawful Sexual Conduct with a Minor count was tried to a jury. However, the trial court declared a mistrial when the jury could not reach a unanimous verdict, splitting eight-to-four in favor of a not guilty verdict. (T.d. 2) The State did not retry Mr. Mole on this charge.

The Sexual Battery count was tried to the bench following the trial court's denial of a defense Motion to Dismiss the Sexual Battery count on Equal Protection and Due Process grounds. (T.d. 2, 4) After convicting Mr. Mole, the trial court sentenced him to two years in prison and labeled him a Tier III Sex Offender. (T.d. 1)

The Eighth District Court of Appeals reversed the trial court's decision on the motion to dismiss, finding that the Sexual Battery count as charged under R.C. 2907.03(A)(13) violated the Equal Protection Clauses of the United States and Ohio constitutions. *State v. Mole*, 8<sup>th</sup> Dist. Cuyahoga No. 98900, 2013-Ohio-3131.

**ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**Proposition of Law: R.C. 2907.03(A)(13), which penalizes peace officers who have sex with minors based on their status as peace officers alone, violates the Equal Protection and Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 16 of the Ohio Constitution.**

The subsection at issue under the Sexual Battery statute, R.C. 2907.03(A)(13), reads:

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

\*\*\*

(13) The other person is a minor, the offender is a peace officer, and the offender is more than two years older than the other person.

Mr. Mole asserts that R.C. 2907.03(A)(13) is unconstitutional on its face as there is no rational basis for punishing peace officers for engaging in sexual conduct with minors based solely upon the officers' status as peace officers. It is blatantly unfair and irrational to charge peace officers with sexual battery if they have sex with minors where they in no way make use of their authority or roles as peace officers to initiate sexual relations. It is unreasonable for peace officers to face this sort of criminal charge where there is no requirement that the officers know the others are minors or that the minors even know the offenders are peace officers. It is illogical that peace officers can be convicted of sexual crimes, sent to prison and labeled Tier III sex offenders for life when there is no connection between their occupation and their relationship with the minors. It is a violation of their equal protection and due process rights that peace officers, simply by virtue of being peace officers in Ohio, face criminal punishment for their sexual conduct with minors over the age of consent, where the same conduct for non-peace officers is not criminal.

## **I. Equal Protection and Facial Challenges**

The Fourteenth Amendment to the United States Constitution provides that no “State\*\*\*shall deny to any person within its jurisdiction the equal protection of the laws.” The Equal Protection Clause thus prevents states from treating people differently under their laws. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 681, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). This protection is echoed in the Ohio Constitution in Article I, Section 2 with “All political power is inherent in the people. Government is instituted for their equal protection and benefit\*\*\*.” *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 109, 2010-Ohio-4908, 936 N.E.2d 944, ¶16. The federal and Ohio equal-protection provisions are “functionally equivalent.” *State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶39 (citations omitted). They “are to be construed and analyzed identically.” *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 60, 717 N.E.2d 286 (1999).

All statutes enjoy a strong presumption of constitutionality. *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998). However, they may be constitutionally challenged on their face or as applied. *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, ¶12 (citation omitted). *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶37. Mr. Mole challenges the statutory subsection at issue “on its face.”

To prevail on a facial constitutional challenge to a statute, the challenger bears the burden of proving the statute unconstitutional beyond a reasonable doubt. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Ed.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶21 (citations omitted). A facial challenge alleges that a statute, ordinance, or administrative

rule, on its face and under all circumstances, has no rational relationship to a legitimate governmental purpose. *Jaylin Invests., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶11.

Facial challenges to the constitutionality of a statute are the most difficult to mount successfully since the challenger must establish that no set of circumstances exists under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The State misinterprets this burden. It incorrectly construes it as a requirement that the Eighth District Court of Appeals needed to make express findings that the statute was unconstitutional or invalid under all circumstances. State's Brief at 3, 5. But a review of pertinent case law squarely places the burden on the party raising a facial challenge to a statute and not on the reviewing court to make explicit findings. *See Salerno, supra; Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008); *United States v. Stevens*, 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010); *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶21, *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶26. Obviously, inherent in a party's successful challenge to the constitutionality of a statute is the fact that its arguments were accepted by the reviewing court as demonstrating that no set of circumstances existed to validate the act. The majority below clearly recognized the burden faced by the challenger and referenced it in its opinion with, "The party challenging the constitutionality of a law 'bears the burden to negate every conceivable basis that might support the legislation.'" *Mole*, at ¶12 (citations omitted).

Both the State and its *amicus curiae* also emphasize that facial challenges are generally disfavored. State's Brief at 9; *Amicus Curiae* Brief at 4-5. While that statement overall is true, it

does not mean of course that facial challenges cannot be successful. In addition, the reasoning behind judicial disfavor of facial challenges plays no role in the case at bar. As noted by the United States Supreme Court, facial challenges embrace concerns regarding the proper exercise of judicial restraint and the court's avoidance of speculation regarding hypothetical or imaginary cases. *Washington State Grange, supra*, at 449-50. "Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004).

The concerns regarding hypothetical or imaginary cases do not exist in the instant case as the subsection of the statute that is challenged is very specific – it addresses only the penalizing of peace officers who have sex with minors based upon their status alone. There is no need for any court to speculate regarding hypothetical or imaginary cases for there exists only one interpretation – that by virtue of simply being a peace officer in Ohio, peace officers face punishment for their sexual conduct with a minor.

Unlike the remainder of Ohio's Sexual Battery statute, the subsection at issue establishes minimal elements to convict a peace officer of criminal conduct. Thus, there is little need to extrapolate on imaginary cases. It clearly does not require that the peace officer have knowledge the other person is a minor. It does not require that the minor know the offender is a peace officer. It does not require that the peace officer in some way use his or her authority and status as a peace officer to effectuate the sexual conduct. It punishes peace officers for sexual conduct with minors who have reached sixteen, the age of consent in Ohio, while every other non-peace officer citizen would not face similar punishment for the exact same conduct. *See* R.C. 2907.04(A)(Unlawful Sexual Conduct with a Minor) regarding the age of consent [No person

who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard].

The State and its *amicus curiae* also emphasize that the challenger must prove the statute unconstitutional in all applications. State's Brief at 15-17; *Amicus Curiae* Brief at 4-6. However, at the same time, they are critical that Mr. Mole and the Eighth District Court of Appeals examined other possible scenarios. For example, *amicus curiae* argues that Judge Jones's application of the statute to all occupations that fall under the definition of "peace officer" "turns the facial challenge on its head." *Amicus Curiae* Brief at 5. Yet this argument is circular and illogical. The State and its *amicus curiae* stress that a challenge to the statute will only survive if it is found to be invalid under all applications; however, they then ask this Court to focus only on the facts of this case.

Mr. Mole asserts now, as he asserted below, that this law cannot survive a challenge on any set of facts because it will always violate the defendant peace officer's equal protection rights under the law. He asserts that it cannot be applied to any set of facts or circumstances because it violates the constitutional rights of peace officers by punishing conduct that is otherwise legal for other persons, without a rational basis to do so.

## **II. Rational Basis Review and R.C. 2907.03(A)(13)**

Because Mr. Mole does not assert that a suspect class or a fundamental right is involved, a rational basis test should be utilized in reviewing this issue. *Williams, supra*. The rational basis test is a two-step analysis under which the Court must first (1) identify a valid state interest and second (2) determine whether the method or means by which the State has chosen to advance that interest is rational. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839

N.E.2d 1, ¶9 (citations omitted). A statute will be upheld if it is rationally related to a legitimate government interest. *Id.*

Mr. Mole challenges subsection (A)(13) of R.C. 2907.03. This subsection was added to the Sexual Battery statute in 2009 and criminalizes sexual conduct between a peace officer and a minor, if the minor is not the spouse of the offender and if the officer is more than two years older than the minor. It does not include *mens rea* language nor require the existence of any connection or relationship between the peace officer and the minor as a result of the peace officer's occupation.

By contrast, previously existing subsections (A)(1) through (A)(4) address situations where sexual conduct occurs with another who is not the spouse of the offender and the offender knowingly coerces the other person to engage in sexual conduct or has knowledge that the other person is impaired, unaware the act is being committed or mistakenly believes the offender is his or her spouse. Subsection (A)(5) involves sexual conduct with an offender who is a parent, stepparent, guardian or custodian of the other person.

Subsections (A)(6) through (A)(12) all address situations where the offender by virtue of his or her occupation has some authority or connection to the other person. Thus, under subsection (A)(6), the offender has supervisory or disciplinary authority over the other person who is a hospital or institution patient or in the custody of law. In subsections (A)(7) through (A)(12), the offenders are connected to the other persons (who in some cases are minors) because they are their teachers, school administrators, athletic coaches, scout leaders, mental health professionals who falsely represent that sexual conduct is needed for treatment purposes, detention facility employees or clerics.

The following chart examines the various subsections of R.C. 2907.03(A) and their corresponding *mens rea* or occupational/relationship elements, as well as any requirements as to a connection between the offender's occupation or status and the other person. It demonstrates at a glance that the subsection related to peace officers contains no elements related to *mens rea* or a connectional requirement that would provide a rational basis for this law.

#### ANALYSIS OF R.C. 2907.03(A)

R.C. CITATION	OCCUPATION OR RELATIONSHIP BETWEEN OFFENDER AND OTHER PERSON	<i>MENS REA</i> LANGUAGE	CONNECTION REQUIRED BETWEEN OFFENDER'S OCCUPATION / STATUS AND OTHER PERSON
2907.03(A)(1)	No occupation or relationship indicated	"... <b>knowingly</b> coerces..."	None
2907.03(A)(2)	No occupation or relationship indicated	"... offender <b>knows</b> that the other person's ability..."	None
2907.03(A)(3)	No occupation or relationship indicated	"... offender <b>knows</b> that the other person submits..."	None
2907.03(A)(4)	No occupation or relationship indicated	"... the offender <b>knows</b> that the other person..."	None
2907.03(A)(5)	Natural or adoptive parent, stepparent, guardian, custodian, person in loco parentis	None	Yes
2907.03(A)(6)	Other person in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person.	None	Yes
2907.03(A)(7)	Teacher, administrator, coach, or other person in authority	None	Yes

R.C. CITATION	OCCUPATION OR RELATIONSHIP BETWEEN OFFENDER AND OTHER PERSON	<i>MENS REA</i> LANGUAGE	CONNECTION REQUIRED BETWEEN OFFENDER'S OCCUPATION / STATUS AND OTHER PERSON
	employed by or serving in a school		
2907.03(A)(8)	Teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education	None	Yes
2907.03(A)(9)	Athletic or other type of coach, instructor, leader of a scouting troop or a person with temporary or occasional disciplinary control over the other person	None	Yes
2907.03(A)(10)	Mental health professional	None	Yes
2907.03(A)(11)	The other person is confined in a detention facility, and the offender is an employee of that detention facility.	None	Yes
2907.03(A)(12)	Cleric	None	Yes
2907.03(A)(13)	The other person is a minor, the offender is a peace officer, and the offender is more than two years older than the other person.	<b><u>None</u></b>	<b><u>None</u></b>

It should be noted that in subsections (A)(7) through (A)(9) and (A)(12), the teacher, coach, scout leader, cleric, etc. is only prohibited from engaging in sexual activity with a student attending the same school or team coached or church attended but is not prohibited from engaging in sexual conduct with students, parishioners, or team members from different schools, parishes or other teams.

The preceding chart clearly illustrates that, prior to 2009 and the inclusion of the subsection at issue, the Sexual Battery statute was utilized in cases where (1) the offender, possessing the requisite *mens rea*, obtained consent for the sexual conduct through coercion, impairment or deceit or (2) where there existed a specific occupation and/or relationship connection between the offender and the other person that was manipulated by the offender in order to have sexual conduct. By virtue of the offender's coercion, deceit or occupation and special relationship with the other person, he or she was able to take an "unconscionable advantage" over the other person.

This "unconscionable advantage" is specifically what the Sexual Battery statute was designed to combat. Legislative Service Commission Comment to R.C. 2907.03 (1973); *State v. Shipley*, 9<sup>th</sup> Dist. Lorain App. No. 03CA008275, 2004-Ohio-434, ¶80; *State v. Tolliver*, 49 Ohio App.2d 258, 267, 360 N.E.2d 750 (1976). The court in *Shipley* specifically found that R.C. 2907.03(A)(7), which addresses the relationship between students and their school teachers, administrators and coaches, was rationally related to "its intended purpose of preventing teachers from taking unconscionable advantage of students by using their undue influence over the students in order to pursue sexual relationship." *Id.* at ¶81.

When the bill to amend the Sexual Battery statute to include a subsection related to peace officers was introduced at the House of Representatives, its sponsor, Representative Anthony Core, explained the impetus for the new subsection by reviewing a specific case arising out of Logan County. The Ohio Channel, House of Representatives, Video Archive (5/7/2008), <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=113127> at 14:36:34. The case he described involved a murder/attempted murder investigation in which one of the detectives assigned to the investigation developed a sexual relationship with a 15-year-old victim. *Id.*

Representative Core went on to reference other sections of the statute that relate to positions of trust, naming specifically teachers, coaches, psychologist and scout leaders, where the offenders could exercise their influence over a minor due to their occupations and their corresponding relationship with the minors. *Id.*

The Logan County case again was referenced when the bill was submitted to the Senate, where Senator Timothy Grendell said the amendment covered a “hole” that existed in the statute “that does not address the issue of a law enforcement officer abusing his authority in that way.” The Ohio Channel, Ohio Senate, Video Archive (12/16/08), <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=117520> at 14:30:23.

A court must look to the language and purpose of the statute in order to determine legislative intent. *Cook, supra*, at 409. Clearly, both the senator and representative who supported this law focused on the occupation of the Logan County detective and his connection to the minor due to his investigation of the homicide case. They were notably disturbed by the manner in which the detective took advantage of that relationship. However, the subsection as passed makes no reference to an occupational connection between the offender and the minor. It simply states that the offender is peace officer, and on that basis alone, imposes criminal liability.

With this distinction in mind, Mr. Mole asserts that the statute he was convicted of cannot pass a rational basis test. There is no rational basis to punish a peace officer for engaging in sexual conduct with someone who is at least sixteen years of age, the Ohio age of consent, where the statute does not require the officer to have used his or her position of authority to obtain consent or require that the alleged victim know the offender is a peace officer and thus in a position to assert “unconscionable advantage.” Without any relationship between the conduct

and the position of authority, there is no rational basis for this law. It simply punishes peace officers for being peace officers who are engaging in conduct that would otherwise be legal.

An amendment to the House Bill was added during committee review in the Senate. Senator Keith Faber told the Senate he had proposed the amendment to make the bill consistent with the other sections of the Sexual Battery statute which include that a “position of trust” exist between the offender and the other person. Ohio Senate Video Archive, *supra*. Thus, the amendment added an additional element that “the relationship between the police officer and the minor must have arisen while the officer was performing the officer’s official duties as a peace officer.” Synopsis of Committee Amendments, Sub. H.B. 209, Legislative Service Commission (12/10/08). However, Senator Faber said that the amendment was dropped from the final version because Prosecutors were concerned with their ability to prosecute the peace officer if it contained the additional language. Ohio Senate Video Archive, *supra*.

Senator Faber’s comments further demonstrate the irrational nature of this law. It is clear that the reason the legislature included a new subsection addressing peace officers was because of the concern that peace officers would take advantage of their status to have sex with minors with whom they had formed connections as a result of official duties. Thus, both the House and Senate were given the details of the Logan County case. Senator Faber recognized this important distinction and added an amendment to the bill to cover the occupational relationship connection. Yet, this key provision was dropped because of prosecutor’s fears of being unable to prove their cases.

Fundamental principles of due process require nothing less than that it be the prosecutor who bears the burden of proving criminal offenses. “The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a

Nation. The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt. *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970), citing C. McCormick, *Evidence*, Section 321, at 681-682 (1954).

As a result, in Ohio, R.C. 2901.05(A) requires that the prosecution prove every element of the offense beyond a reasonable doubt. "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *Winship* at 363.

The statutory subsection under which Mr. Mole was convicted is irrational as it was designed to protect against peace officers taking advantage of minors while performing their official duties, yet no requirement exists in the statute which connects the peace officer to the minor on the basis of the peace officer's job. In fact, the peace officer need not act under or reference in any way the auspices or authority of his position. Thus, the law bears no rational relationship to its intended goal.

The State and its *amicus curiae* argue that holding peace officers to a higher standard of conduct is a well-settled governmental policy interest. They then cite cases where they say police officers were held to higher standards of conduct. The cases cited involve employment-related issues or labor disputes. For example, in *City of Ironton v. Rist*, 4<sup>th</sup> Dist. Lawrence No. 10CA10, 2010-Ohio-5292, at ¶21, a police sergeant was discharged for filing a false report, and the

appellate court found Ohio has a public policy against reinstatement of an officer who falsifies a police report. Similarly, in *Jones v. Franklin Cty. Sheriff*, 52 Ohio St.3d 40, 555 N.E.2d 940 (1990), an off-duty deputy sheriff was discharged for involvement in vigilante activity to retrieve her sister's stolen purse. This Court noted vigilante activities brought disrepute to sheriff's department. *Id.* at 43. In *City of Warrensville Heights v. Jennings*, 58 Ohio St.3d 206, 569 N.E.2d 489 (1991), a police dispatcher challenged the denial of unemployment benefits after he resigned rather than being fired for refusing to take a polygraph test regarding potential drug use.

However, these employment and labor cases are clearly distinguishable from the current criminal case where a police officer was dealt much more severe and drastic consequences. The officers in these civil cases faced the loss of their jobs or the loss of unemployment benefits. Like Mr. Mole, they may have lost their present jobs and their entire future careers as police officers. But they did not confront, as Mr. Mole has, a criminal conviction and a prison sentence. They have not suffered a lifelong classification as a Tier III sex offender with all of its attendant restrictions, including limits as to where Mr. Mole can live, go to school, and work (if he can even obtain a job as a registered sex offender). Mr. Mole faces the burden of all of the above listed penalties and restrictions and none of it is because he in any way used his status as a police officer to break the law. What can be rational about that?

The State also stresses that the law represents a legitimate government interest in that it "protects children from peace officers who abuse their position of authority and position of public trust by engaging in sexual conduct with child." State's Merit Brief at p. 15. Yet the statute fails to include any elements requiring either that the minor had knowledge that the offender was a peace officer or that the peace officer abused his or her position of authority. The

statute fails to require a relationship between the occupation and the offense, yet this is the very thing the State asserts is being punished.

It is not rational to think that an individual, simply by virtue of being a peace officer, possesses undue influence over minors, particularly when the statute does not envision the officer acting under the auspices or authority of his position. How can a peace officer take “unconscionable advantage” when he or she does not use peace officer status to do so? As noted by the court in *Shiple*, *supra*, in the teacher-student context, the statute’s “intended purpose” was to prevent offenders from taking an “unconscionable advantage” over the other person by using “their undue influence\*\*\*to pursue sexual relationships.” *Id.* at ¶81. That purpose is defeated where it penalizes conduct by peace officers without creating the means by which the officer achieves “undue influence.”

Equal protection requires that reasonable grounds exist if there is a distinction to be made for those within and those without a designated class. *State v. Buckley*, 16 Ohio St.2d 128, 134, 243 N.E.2d 66 (1968). It is undeniable that peace officers who use their position of authority to coerce another to engage in sexual conduct should be criminally punished. Hence, that crime is separately punished under R.C. 2907(A)(6). The subsection at issue, however, punishes peace officers for engaging in behavior that would otherwise be legal in Ohio. In the Equal Protection analysis in the case at bar, peace officers must be compared to all Ohio citizens, and there exists no rational basis for punishing a peace officer for engaging in sexual conduct with anyone who is under the age of eighteen, when most other ordinary citizens of Ohio are permitted to have sexual relationship with any non-relative who is at least sixteen years of age, which is the age of consent in Ohio.

Even though the focus of the legislature was specifically on “police” officers who take unconscionable advantage of minors, the statute as passed addresses all “peace” officers. R.C. 2907.03(C)(4) indicates that “peace officer” has the same meaning as found in R.C. 2935.01, which encompasses a board range of public employees in Ohio and not just “police officers” as traditionally defined. The list of “peace officers” in R.C. 2935.01(B) includes, without limitation, a forest officer, wildlife preserve officer, park officer, state water craft officer, the house of representatives sergeant at arms and their assistant, state fire marshal, and department of taxation employees who have investigation powers.

Clearly, there are occupations included in this peace officer definition which arguably have little or no authority in the community when compared to police officers, such as state taxation investigators, natural resources law enforcement officer or a forest officer. Why should persons with those occupations be included in such a law? There simply is no rational basis for it. Persons in such positions have little legal authority over the average citizen, certainly not anywhere near the authority that would coerce or even persuade a minor into having sex with them merely because of their employment status. They are not in positions of public status or expected to be role models within the community in the manner of police officers. They are virtually invisible to most people, and even more invisible to minors.

The statute at issue also carves out an exception to the rule when it permits peace officers to engage in sexual conduct with minors if they are within two years of age of the minor. This exception was not included in the House bill and was later added at the Senate. Senator Faber addressed the reasoning behind this amendment, indicating that it applied to “high school sweethearts” and provided a “two-year safe harbor provision.” Ohio Senate Video Archive, *supra*. Thus, as a result, a 19-year-old peace officer can engage in sexual conduct with a 17-year-

old, but a 20-year-old peace officer who engages in the same conduct commits a third-degree felony. This two-year exclusion remains an arbitrary distinction, particularly when recognizing that “high school sweetheart” relationships can encompass more than a two-year age difference. It also is arbitrary as it would include within its two-year safe zone peace officers who engage in sexual conduct with minors with whom they were not previously “high school sweethearts,” thereby excluding from criminal punishment offenders the law intended to include. Consequently, if peace officers in general are to be held to higher standards in their sexual conduct based only upon their occupational status as peace officers, then the two-year age difference is irrelevant. This arbitrariness further defies a finding that the law has a rational basis.

### **III. The Eighth District Court of Appeals Analysis**

Mr. Mole provided several arguments in the court below, as he does here, to demonstrate why this statute must be found unconstitutional under a rational basis analysis. The majority and concurring judges in the Eighth District Court of Appeals agreed that this statute was unconstitutional on its face, albeit each focused on different aspects of Mr. Mole’s arguments.

Judge Jones, writing the majority opinion, first addressed whether there exists a legitimate state interest. *Mole* at ¶15. He cited opinions where this Court had noted that “police officers are held to a higher standard of conduct than the general public.” *Id.* at 16 (citations omitted). He thus agreed that a “[b]ecause a police officer may be held to a higher standard of conduct than an ordinary citizen, even when the police officer is off duty, prohibiting sexual relationships between police officers and minors may therefore rationally advance a legitimate state interest, we think, especially if the police officer uses his or her occupation to influence the minor in the relationship.” *Id.* at ¶17 (emphasis added). However, after reviewing the

classifications of who qualifies as “peace officers,” he questioned whether the state had a valid interest in prohibiting sexual conduct between many of those classifications – as opposed to a “traditionally-defined police officer.” *Id.* at ¶¶18-19. Nonetheless, he did not overturn the statute based upon this concern with the first prong of the rational basis test.

Instead, Judge Jones focused his findings on the second prong of the rational basis test – holding that the State’s method or means of achieving a legitimate interest was not rational. *Id.* at ¶¶20, 36. He noted that the very essence of what makes subsection (A)(13) unlike other subsections of the statute -- no *mens rea* and no relationship or occupations requirement between the offender and the minor -- is what causes the statute to fall under the second prong of the rational basis test as it is not a rational method or means of achieving the state’s interest. *Id.* at ¶¶21-26, 31, 34. “We agree with Mole that one’s occupation as a peace officer alone, without more, does not provide a person with an “unconscionable advantage” of a minor.” *Id.* at ¶34.

Judge Stewart concurred in finding that the statute violated the Equal Protection clauses, but based her decision upon other arguments articulated by Mr. Mole. *Id.* at ¶42. She agreed with Judge Jones that Mr. Mole was prosecuted “for conduct that the statute irrationally criminalizes.” *Id.* at ¶44. She then focused her analysis upon her finding that “the statute arbitrarily prohibits any form of sexual conduct between a police officer and a minor without regard to whether the offender’s position as a peace officer was a motivating factor for either the offender or the victim.” *Id.* After noting that the focus of the Sexual Battery statute was upon preventing individuals in certain occupations from abusing their authority in order to engage in sexual conduct, she found that the goal of the statute is not promoted when the minor whom the State is trying to protect is unaware the other person is a police officer. *Id.* at ¶¶45-46.

Judge Stewart also referenced Mr. Mole's argument regarding the arbitrariness of the statute's two-year exception, noting that "the statute rather contradictorily does not criminalize sexual conduct between a peace officer and a minor who is two years younger or less than the peace officer, even if the peace officer actually did intend to coerce the victim's capitulation through the authority of the office." *Id.* at ¶47.

The findings of both judges demonstrate the problem with the statute. They show that in every possible set of circumstances when prosecuting under R.C. 2907.03(A)(13), the State would never need to prove either (1) that the offender was a law enforcement officer, who has a special relationship with the public; (2) that the offender knew, or was reckless or even negligent in determining the age of the victim; (3) that the victim knew the offender was a peace officer or (4) that there was any connection between the offender's occupation and the offense. If the statute is designed to prevent offenders from taking "unconscionable advantage" over minors and from asserting "undue influence," then it is only rational that one, if not more, of the above factors be included as elements, just as they are included in some form in all of the other subsections of the statute.

The dissenter in this case, Judge Celebrezze, found that another purpose of subsection (A)(13) was to prohibit behavior by peace officers that would bring disrepute to their ranks. *Id.* at ¶52. He wrote that the subsection came about because of a sexual relationship between a minor and a police officer "that caused a loss of respect for the officer and his department among the local community." *Id.* Per his reasoning, the statute "furthers the goal of fostering a trusted and respected policing authority." *Id.* at ¶55. Thus, he continues, each of the officials listed under the definition of "peace officers" is appropriate to include in the statute, rather than limiting it to

police officers alone, because they are “granted a great deal of power and authority over the public in their respective bailiwicks.” *Id.* at ¶54.

In his comments on the bill before the House of Representatives, Representative Core quoted a law enforcement officer as saying, “Law enforcement must be beyond reproach. Even the possibility that a member of law enforcement might abuse the public’s trust by having sex with children cannot be tolerated.” House of Representatives Video Archives, *supra*. This same concept --- that the public’s trust not be abused – is inherent in the other subsections of the bill that reference other occupations and professions. Certainly those named in the other subsections who are in positions of authority – school administrators, teachers, mental health professionals, clergy – likewise should not abuse the public’s trust. That is the very reason they are included in the subsections. However, the difference between all the other subsections and the one that deals with peace officers is that the offender has a connection with the other person due to his or her occupation or profession, i.e. teacher-student, minister-congregation, mental health professional-client, jailer-inmate, etc. It is the very lack of this connection that sets subsection (A)(13) apart from the others in a rational basis analysis.

Regardless of their reasons, the judges in the Eighth District ultimately agreed that R.C. 2907.03(A)(13) is unconstitutional on its face in violation of Mr. Mole’s Equal Protection Rights under a rational basis analysis. As such, the charge should have been dismissed.

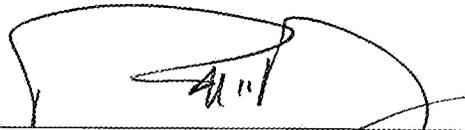
Unlike the other subsections of the Sexual Battery statute which contemplate some sort of “unconscionable advantage,” R.C. 2907.03(A)(13) does not require that the offender use his or her status as peace officer or position of authority over the other person to coerce or persuade the other person to engage in sexual conduct. It does not require the offender to be on duty, in the course and scope of employment or even in uniform or displaying badges. It does not even

require that the other person have knowledge that the offender is a peace officer, nor that the peace officer know the other person is a minor. There does not have to be any relationship between the conduct and the peace officer's position of authority. A violation of the statute occurs simply by virtue of the peace officer's status. This is in stark contrast to the other subsections of the statute that address knowledge and undue influence and that require some sort of connection or relationship between the offender and the other person. Without any relationship between the position of authority and the sexual conduct, there is no rational basis for this law.

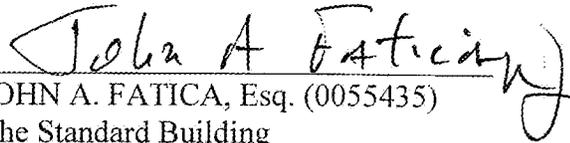
**CONCLUSION**

For the reasons discussed above, the Appellee respectfully request that this Court affirm the decision of the Eighth District Court of Appeals finding R.C. 2907.03(A)(13) unconstitutional and in violation of Mr. Mole's state and federal Equal Protection and Due Process rights.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Merit Brief of Appellee, Matthew T. Mole, is on this 9 day of  
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