IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	]	
	]	
Plaintiff and Respondent,	]	
	]	
v.	]	NO. S182598
	]	
BARRY ALLEN TURNAGE,	]	
	]	
Defendant and Appellant.	]	

AFTER A DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
CASE NO. C059887
HONORABLE THOMAS E. WARRINER

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

In this case, the issue is whether equal protection is violated by appellant's felony conviction for placing a false bomb because placing a false weapon of mass destruction ("WMD") under the same circumstances is punishable as a misdemeanor only. (Pen. Code, § 148.1(d); Pen. Code, § 11418.1.)

As described by this Court, the issues are: "Does Penal Code section 148.1, subdivision (d) violate equal protection principles because a violation is punishable as an alternative felony-misdemeanor without a finding that a person was placed in sustained fear. (See Pen. Code, § 11418.1.) If so, what is the proper remedy?" [1]

[1] All unspecified statutory references are to the Penal Code. For ease of reference, statutory subdivisions are abbreviated to section 148.1(d), section 11418.5(b), etc.

INTRODUCTION

Under the equal protection clause, the disparate treatment of similarly-situated persons is prohibited. Here, the Court of Appeal properly determined that section 148.1(d), placing a false bomb without "sustained fear," violated equal protection, because placing a false weapon of mass destruction ("WMD") without "sustained fear" is a misdemeanor only. In so deciding, the appellate court found section 11418.1's legislative history persuasive and extended to the false-bomb statute the benefit of section 11418.1's misdemeanor-only clause.

In its opening brief, respondent asserts that the Court of Appeal erred because false WMDs are less likely to be recognized than false bombs. Therefore, the assertion goes, treating false bombs more harshly than false WMDs has a rational basis. Not so. Similar to *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1205, the argument fails to distinguish between the crimes. An unrecognizable false WMD would not create fear and would not be characterized as an actual false WMD. Respondent also substitutes "disruptive reaction" for the statutorily-defined "sustained fear" and adopts the irreconcilable position that a false bomb is more likely to result in a "disruptive reaction" than a false WMD even though the false bomb statute requires neither a "disruptive reaction" nor "sustained fear."

Respondent also asks this Court to insert "sustained fear" into section 148.1(d) under its judicial reformation powers. But the remedy for the equal protection violation is (1) misdemeanor punishment; or (2) section 148.1(d)'s invalidation. Adding "sustained fear" into section 148.1(d) creates more problems than it solves. It would not treat false bombs and false WMDs equally, because placing a false bomb without "sustained fear" would not be punished at all. The plain wording of section 11418.5(b)'s "sustained fear" definition, section 11418.1's legislative history, and section 148.1's other subdivisions all signal that judicially reforming section 148.1(d) to add "sustained fear" is not feasible and not consistent with legislative intent.

Finally, respondent proposes appellant be retried for "sustained fear" but no California or other authority directly supports this assertion. Retrying appellant for "sustained fear" is barred because "sustained fear" was not proved. Retrial clashes with fundamental fairness, section 1023, the due process prohibition against ex post facto judicial decisions, and contravenes appellant's equal protection rights again.

The Court of Appeal's decision that appellant's equal protection rights were violated should be upheld. The remedy is misdemeanor punishment or section 148.1(d)'s invalidation and reversal and dismissal of appellant's conviction.

BACKGROUND

Appellant was charged with placing or possessing a false or facsimile bomb. (Pen. Code, § 148.1, subd. (d).) Pursuant to the Three Strikes law, two prior "strikes" were alleged. After a jury trial, appellant was convicted and the prior convictions found true. (1CT 206, 235-236)

For placing the false bomb, appellant was sentenced to 25-years-to-life. (3RT 818) A 5-year upper term for violating probation in Case 04-1665 was also imposed. (3RT 818)

Appellant adopts the Court of Appeal's Statement of Facts.[2] (*People v. Turnage* (C059887, opn. filed April 1, 2010), p. 3-7.)

In a partially published decision, the Court of Appeal decided appellant's equal protection rights were violated. (Typed opn., p. 14.) The Court extended the benefit of section 11418.1's misdemeanor-only clause to the false-bomb statute.[3] (*Ibid.*) The Court of Appeal denied respondent's petition for rehearing.

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[2] Appellant subsequently refers to the appellate court's decision as "Typed opn."

[3] An offense declared to be a misdemeanor is punished by up to six months in county jail, a fine not greater than $1,000, or both. (Pen. Code, § 19.) Thus, although extending the benefit of section 11418.1's misdemeanor-only clause is a proper remedy, it requires section 19's specified punishment rather than "no more than one year in county jail." (Typed opn., p. 15.)

RELEVANT STATUTORY PROVISIONS

Section 148.1, subdivision (d), regarding false or facsimile bombs, provides:

> (d) Any person who maliciously gives, mails, sends, or causes to be sent any false or facsimile bomb to another person, or places, causes to be placed, or maliciously possesses any false or facsimile bomb, with the intent to cause another to fear for his or her personal safety or the safety of others, is guilty of a crime punishable by imprisonment in the state prison, or imprisonment in the county jail not to exceed one year.

Section 11418.1, regarding false or facsimile WMDs, provides:

> Any person who gives, mails, sends, or causes to be sent any false or facsimile of a weapon of mass destruction to another person, or places, causes to be placed, or possesses any false or facsimile of a weapon of mass destruction, with the intent to cause another person to fear for his or her own safety, or for the personal safety of others, *is guilty of a misdemeanor*. If the person's conduct causes another person to be placed in sustained fear, the person shall be punished by imprisonment in a county jail for not more than one year or in the state prison for 16 months, or two or three years and by a fine of not more than two hundred fifty thousand dollars ($250,000). For purposes of this section, "sustained fear" has the same meaning as in Section 11418.5.

(Italics added.)

Section 11418.5(b) defines "sustained fear." It provides:

> (b) For the purposes of this section, "sustained fear" can be established by, but is not limited to, conduct such as evacuation of any building by any occupant, evacuation of any school by any employee or student, evacuation of any home by any resident or occupant, any isolation, quarantine, or decontamination effort.

In its other provisions, section 148.1 criminalizes false reports of bombs. (Pen. Code, § 148.1, subd. (a), (b), (c).) Section 148.1(a) provides:

> (a) Any person who reports to any peace officer listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, employee of a fire department or fire service, district attorney, newspaper, radio station, television station, deputy district attorney, employees of the Department of Justice, employees of an airline, employees of an airport, employees of a railroad or busline, an employee of a telephone company, occupants of a building or a news reporter in the employ of a newspaper or radio or television station, that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the report is false, is guilty of a crime punishable by imprisonment in the state prison, or imprisonment in the county jail not to exceed one year.

Section 148.1(b) also criminalizes "reports" of bombs while section 148.1(c) prohibits "inform[ing]" of bomb placement. [4]

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[4] Section 148.1(b) provides: "(b) Any person who reports to any other peace officer defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the report is false, is guilty of a crime punishable by imprisonment in the state prison or in the county jail not to exceed one year if (1) the false information is given while the peace officer is engaged in the performance of his or her duties as a peace officer and (2) the person providing the false information knows or should have known that the person receiving the information is a peace officer."

Section 148.1(c) provides: "(c) Any person who maliciously informs any other person that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the information is false, is guilty of a crime punishable by imprisonment in the state prison, or imprisonment in the county jail not to exceed one year."

Section 11418.5(a) proscribes threats involving the use of weapons of mass destruction.[5] (Pen. Code, § 11418.5, subd. (a).) Section 11417 defines "weapons of mass destruction."[6] Section 19 states that an offense declared to be a misdemeanor may be punished by no more than six months in county jail or a fine or both.[7]

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[5] Section 11418.5(a) provides: "Any person who knowingly threatens to use a weapon of mass destruction, with the specific intent that the statement as defined in Section 225 of the Evidence Code or a statement made by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety, or for his or her immediate family's safety shall be punished by imprisonment in a county jail for up to one year or in the state prison for 3, 4, or 6 years, and by a fine of not more than two hundred fifty thousand dollars ($250,000)."

[6] Section 11417 provides, in pertinent part: "(a) For the purposes of this article, the following terms have the following meanings: (1) 'Weapon of mass destruction' includes chemical warfare agents, weaponized biological or biologic warfare agents, restricted biological agents, nuclear agents, radiological agents, or the intentional release of industrial agents as a weapon, or an aircraft, vessel, or vehicle, as described in Section 34500 of the Vehicle Code, which is used as a destructive weapon." Section 11417's additional subdivisions define various terms set forth in subdivision (a), such as "chemical warfare agents," "weaponized biological or biologic warfare agents," and "nuclear or radiological agents."

[7] Section 19 provides: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both."

ARGUMENT

I.
THE DISTINCTION BETWEEN PLACING A FALSE WEAPON OF MASS DESTRUCTION WITHOUT "SUSTAINED FEAR" AND PLACING A FALSE BOMB WITHOUT "SUSTAINED FEAR" IS IRRATIONAL, THEREBY VIOLATING EQUAL PROTECTION

The legislative distinction between false bombs and false WMDs is not rationally-based. Placing a false bomb without "sustained fear" is a wobbler: a felony or misdemeanor. (Pen. Code, § 148.1, subd. (d).) But placing a false weapon of mass destruction (WMD) without "sustained fear" is a misdemeanor only, punished by no more than 6 months in county jail, a fine, or both. (Pen. Code, § 11418.1; Pen. Code, § 19.)

Had "Weapon of Mass Destruction," rather than "C-4," been written, then section 11418.1 would apply. The false WMD statute's misdemeanor-only clause would apply if an empty envelope was labeled "anthrax." Consistent with these examples, and the goals the Legislature articulated in enacting section 11418.1, there is no reasonably conceivable reason why placing a false bomb without "sustained fear" exposes the defendant to a felony but placing a false WMD without "sustained fear" exposes a defendant to a misdemeanor only. Thus, section 148.1(d) violates equal protection. (U.S. Const., 14th Amend.; Cal. Const. art. I, § 7; *People v. Hofsheier, supra,* 37 Cal.4th at p. 1207.)

A. To satisfy the rational relationship test, the distinction must be reasonably conceivable; It must not be a fictitious purpose

Under the rational basis test, the question is whether a distinction "bears a rational relationship to a legitimate state purpose." (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1200.) The basis for the distinction must be "reasonably conceivable" and "'plausible.'" (*Hofsheier, supra*, 37 Cal.4th at p. 1201, italics omitted.) The distinction's basis may not be premised upon a "'fictitious purpose.'" (*Ibid.*) Courts search for the link between the classification and the legislative objective. (*Ibid.*) "The search for the link between classification and objective gives substance to the Equal Protection Clause." (*Romer v. Evans* (1996) 517 U.S. 620, 632; see also *People v. Hofsheier, supra*, 37 Cal.4th at p. 1201.) While the burden of proving rational-basis invalidity is upon the party attacking the statute, "this is not an impossible task." (*Hofsheier, supra*, 37 Cal.4th at p. 1201.)

To withstand rational-basis review, it is not necessary to prove the Legislature was actually motivated by a reasonably conceivable basis for a distinction. (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315 ["Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"]; see also *Heller v. Doe* (1993) 509 U.S. 312, 320.)

On the other hand, when the Legislature *has* spoken, and articulated reasons for enacting laws, a court's task may be easier. When the Legislature has explained its reasoning, deducing that there is no reasonably conceivable basis for the unequal treatment may be less complicated. Surely, when the Legislature has spoken, courts should pay heed. As *Nordlinger v. Hahn* (1992) 505 U.S. 1 explained:

> To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification. (*United States Railroad Retirement Bd. v. Fritz*, 449 U.S. at 179. See also *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809, 22 L.Ed. 2d 739, 89 S.Ct. 1404 (1969) (legitimate state purpose may be ascertained even when the legislative or administrative history is silent). Nevertheless, this Court's review does require that a purpose may conceivably or "may reasonably have been the purpose and policy" of the relevant governmental decisionmaker. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-529, 3 L.Ed. 2d 480, 79 S.Ct. 437 (1959) See also *Schweiker v. Wilson*, 450 U.S. 221, 235, 67 L.Ed. 2d. 186, 101 S.Ct. 1074 (1981) (classificatory scheme must "rationally advance a reasonable and *identifiable* governmental objective" (emphasis added)).

(*Id.* at p. 15.)

Thus, legislative history is surely not "irrelevant" to the rational basis inquiry.[8] (See OBM, p. 14, 16.) Legislative history may be a particularly useful tool in ascertaining if a legislative distinction is irrational. This is unremarkable because rational-basis review's very

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8 "OBM" refers to respondent's opening brief on the merits.

purpose is to search for the link between the Legislature's statutory classification and the Legislature's goal. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1203.)

When there is an inadequate or a nonexistent connection between the legislative classification and government purpose, the rational relationship test is violated, and the United States Supreme Court has invalidated the classification. (See e.g. *Allegheny Pittsburgh Coal Co. v. Commission of Webster County* (1989) 488 U.S. 336, 344-345; *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 449; *Hooper v. Bernalillo County Assessor* (1985) 472 U.S. 612, 621-624; *Skinner v. Oklahoma ex rel. Williamson* (1942) 316 U.S. 535, 541-543.)

The fundamental constitutional guarantee of the right to equal protection under the laws has been confirmed in numerous recent decisions. (See, e.g., *People v. McKee* (2010) 47 Cal.4th 1172; *In re Marriage Cases* (2008) 43 Cal.4th 757; *People v. Hofsheier, supra,* 37 Cal.4th 1185; *Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424; see also *People v. McCann* (2006) 141 Cal.App.4th 347, 354-355.)

B. The legislative history shows the distinction between false bombs and false WMDs is not rationally-based

Consistent with the foregoing principles, there is no rational basis for the distinction here. Section 11418.1's legislative history demonstrates the absence of a rational basis.[9] It reveals that a very purpose of section 11418.1's misdemeanor-only clause was to avoid felony punishment in the absence of "sustained fear," which the Legislative believed equated to violent conduct, thereby avoiding automatic exposure to the Three Strikes law, which is the same adverse consequence suffered by appellant due to his felony false bomb conviction under section 148.1(d).

Section 11418.1 was modeled on section 148.1(d). (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 2, 3, 18, 19, as amended March 7, 2002.) The Legislature considered making section 11418.1 a wobbler, like section 148.1(d). (*Id.* at p. 18.) But there was concern this would expose all false WMD crimes to the Three Strikes law, enacted in 1994.[10] (*Id.* at 19.) This concern was reflected by a similar bill, S.B. 1287. S.B. 1287 was amended to provide that the false WMD crime be a wobbler only if there was sustained fear. "This provision in SB

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[9] Section 11418.1's legislative history is the subject of appellant's judicial notice request filed on November 8, 2010.

[10] Section 148.1(d), formerly 148.1(c), was enacted in 1972, well before the enactment of the Three Strikes law. (Stats. 1972 ch. 1142, § 1.)

1287 was amended to provide that the crime can be a wobbler where sustained fear, as defined, is produced by the crime. In other cases, the crime would be a misdemeanor. It is suggested that A.B. 1838 be amended to conform to SB 1287 in this regard." (*Id.* at p. 18; see also p. 2-3 ["Should the legislature create a new "wobbler" drawn from the crime of placing a facsimile bomb – for sending or placing a false or facsimile WMD that causes sustained fear, and should such a crime be a misdemeanor in the absence of sustained fear?"].)

The legislative analysis states: "The new felony for WMD hoaxes is drawn from a parallel crime covering bomb hoaxes. The creation of this new felony for WMD hoaxes, as is the case with any new felony, expands the reach of the Three Strikes law. Since the enactment of the Three Strikes law in 1994, a majority of the members of this Committee has been reluctant to create new felonies for *conduct that does not involve violence*." (*Id.* at p. 19, italics added.)

The legislative analysis also explains: "From discussions with the sponsor of AB 1838, it appears that the new WMD hoax crime was modeled on the bomb threats statute because police and prosecutors are familiar with the existing crime. Further, it was believed that since the conduct in both crimes is similar, the penalties should be similar." (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 18.)

Under section 11418.1's final form, if there is no "sustained fear," placing a false WMD may be punished as a misdemeanor only.[11] (See also Pen. Code, § 19.) If there is "sustained fear," then placing a false WMD is either a felony or misdemeanor. (Pen. Code, § 11418.1.)

This legislative history signals the rational relationship test was violated. The distinction between placing a false bomb without "sustained fear" and placing a false WMD without "sustained fear" is not rationally-based. As the Court of Appeal explained, "The fear of a false WMD, given the more far-reaching effects of such devices, would generally be more severe (even in the absence of sustained fear) than only an explosive device whose destructive effects could be more easily evaded, and yet the [false WMD] incurs the lesser punishment." (Typed opn., p. 12.) Stated another way, with a false bomb, a victim can run away. With a false WMD, a fearful victim may be unable to reach a place of safety due to the far-reaching effects of a weapon of mass destruction. The Court of Appeal was correct. The rational relationship test was violated.

Not only does the legislative history demonstrate that a purpose of the misdemeanor-only clause was to avoid the Three Strikes law, it also reveals the Legislature meant to expose a false WMD defendant to a felony

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[11] The statement that "the penalties are also similar; indeed they are the same" (OBM, p. 14) is incorrect. An offense declared to be a misdemeanor is punished under section 19 while section 148.1(d) refers to "imprisonment in the county jail not to exceed one year." (Pen. Code, § 148.1, subd. (d).)

only when there was proof of "sustained fear" under a "sustained fear" definition that the Legislature decided to narrow and tighten.

The Legislature believed "sustained fear" could equate to "violent conduct." The legislative history states: "Arguably, however, the fear from and response to a facsimile nuclear device, anthrax, ebola, etc., is equivalent to the harm from violent conduct. This may be particularly true in light of the terrorist attacks in September 2001. Persons exposed to facsimile WMDs often must undergo invasive medical care or prophylactic treatment with antibiotics such as CIPRO that cause harmful and debilitating side effects." (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 19-20.)

Consistent with this expression, the Legislature narrowed the "sustained fear" definition under 11418.5 by eliminating the prior overly-broad description, which had encompassed "or any other action taken in direct response to the threat to use a weapon of mass destruction."[12] In its place, the Legislature substituted the more restrictive: "any isolation, quarantine, or decontamination effort." (Sen. Com. on Pub. Safety,

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[12] Section 11418.5(b) previously provided: "For the purposes of this section, 'sustained fear' can be established by, but is not limited to, conduct such as evacuation of any building by any occupant, evacuation of any school by any employee or student, evacuation of any home by any resident or occupant, or any other action taken in direct response to the threat to use a weapon of mass destruction." (Stats. 1999 ch. 563, § 1 (AB 140).) Section 11418.5(a) previously included the words "isolation, quarantine or decontamination effort." (*Ibid.*)

Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 18.) "As proposed and suggested to be amended in Committee, the bill would be amended to remove an arguably overbroad reference to 'any other action taken in direct response to the threat...'" (*Ibid.*) And section 11418.1, as enacted with its requirement of "sustained fear," is still not automatically a felony. It is punishable as a felony *or* a misdemeanor. So even with the tightened "sustained fear" element, the Legislature remained reluctant to make the new false WMD crime automatically punishable as a felony only.

Despite this history and the narrowed definition of "sustained fear" under section 11418.5, respondent suggests "sustained fear" means a "disruptive reaction."[13] (OBM, p. 2, fn. 1.) No authority is cited for this proposition. There is no mention of "disruptive reaction" within section 11418.1's legislative history. When a statute defines a term, the definition must be followed, and "sustained fear" is defined under section 11418.5. (See, e.g., *Burgess* v. *United States* (2008) 553 U.S. 124, 130 [If a statute includes an express definition, the definition must be followed]; *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 63 [same]; *Bernard v. Foley* (2006) 39 Cal.4th 794, 808 [same].) Thus, there is no basis for replacing the statutory "sustained fear" definition with "disruptive reaction."

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[13] Respondent asserts: "Because the phrase 'sustained fear,' is a term of art that might be confused with the ordinary term 'fear' (see Pen. Code, § 148.1, subd. (d)), respondent in this brief generally refers to 'disruptive reaction' instead of 'sustained fear.'" (OBM, p. 2, fn. 1.)

A "disruptive reaction" does not equate to "sustained fear." A disruptive reaction could be a scream. (See *Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 144 ["willfully disrupted" overbroad and vague; "very sound of a voice can 'disrupt' the silence"].) It could be nothing more than a person's fainting. The Legislature equated "sustained fear" to violent conduct, not a disruptive reaction, and defined what "sustained fear" meant. (Pen. Code, § 11418.5, subd. (b).) It tightened the definition from "any other action taken in direct response to the threat to use a weapon of mass destruction," to the more restrictive "isolation, quarantine, or decontamination effort." (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 18.) Therefore, this Court should reject respondent's unsupported substitution of "disruptive reaction" for the statutorily-defined "sustained fear." [14]

It is illogical and inconsistent to argue that placing a false bomb is more likely to result in a "disruptive reaction" while simultaneously asserting that "sustained fear" equates to "disruptive reaction" when the false bomb statute, section 148.1(d), requires neither "sustained fear" nor a "disruptive reaction." The search for a rational link between a legislative

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[14] Respondent's Argument I heading is premised upon the assertion that placing a false bomb is more likely to result in a "disruptive reaction." (OBM, p. 5; see also OBM, p. 5 ["placement is more certain to lead to a disruptive reaction in the false bomb context than in the WMD context"]; ["Hence, it is rational to assume that a defendant who sets out to create fear, by means of placing a false bomb, will succeed in a great majority of cases in causing a disruptive reaction, e.g. evacuation, panic, isolation"].)

classification and the legislative goal does not authorize the wholesale disregard of the Legislature's statutory language, particularly when the proposed substituted words do not align with the explicit statutory wording. (See *Hofsheier, supra*, 37 Cal.4th at p. 1201 [courts must undertake "serious and genuine judicial inquiry" and not "invent fictitious purposes that could not have been within the contemplation of the Legislature..."], quoting *Warden v. State Bar* (1999) 21 Cal.4th 628, 648.) Because it is inconsistent with the statutory wording and section 11418.1's legislative history, the replacement of "sustained fear" with "disruptive reaction" fits squarely within the "fictitious purpose" category outside the Legislature's contemplation.

The Legislature's expressed desire was to not create a new crime exposing a defendant to the Three Strikes law, without something equating to violent conduct, such as "sustained fear." Accordingly, there is no reasonably conceivable reason why the Legislature would have believed placing a false bomb in the absence of "sustained fear" would equate to violent conduct, justifying a felony conviction, and Three Strikes law exposure, when placing a false WMD in the absence of "sustained fear" is punishable as a misdemeanor only.

C. Respondent's purported distinction -- that false WMDs are less recognizable than false bombs -- is meritless

Respondent's purported distinction – that false WMDs are less recognizable than false bombs – is meritless.[15] (OBM, p. 5, 12.) It is meritless because if a false WMD is not recognized, then a person experiences no fear at all, and the object would not be characterized as a false WMD given that it is unrecognizable. Similar to an argument rejected in *Hofsheier*, "It is not an argument that distinguishes between the two crimes." (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1205.)

It is not clear why a defendant who intends to cause fear would place an unrecognizable object as the way to achieve his goal. If the object is not recognizable as a WMD, then section 11418.1 is not violated because a person seeing it is not afraid.[16] Also, it is not clear why an unrecognizable object could fit within the category of a false bomb or false WMD. If a person seeing the object does not perceive it as a bomb or WMD, then it

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[15] The brief states: "A false bomb is more readily perceived as a dangerous object while a false WMD more likely may not be perceived as intended to be a dangerous object at all." (OBM, p. 5; see also OBM, p. 12 ["If the device is not recognized for what it is intended to represent, then it will not instill fear or cause a disruptive reaction"].)

[16] An unlabeled vial is not a false WMD. (OBM, p. 10.) For example, if a defendant places his shoe on the ground intending that the public believe it is a WMD, then the false WMD law is not violated because the shoe could not be characterized as a false WMD. If the shoe really *is* a WMD, then the law prohibiting real WMDs is implicated.

may fairly be assumed the object could not lawfully fit within the category of objects actually deemed to be false bombs or false WMDs, and there would be no prosecution under either statute.

The premise that false WMDs are less recognizable than false bombs conflates false WMDs and false bombs with real WMDs and real bombs. Any object could turn out to be a real WMD or a real bomb if the harm-causing agent is hidden inside.[17] Even though any object could turn out to be a real WMD or real bomb if the harm-causing agent (a bomb, a deadly virus, etc.) is hidden inside, what matters for purposes of the false WMD or false bomb statute, is whether the object is perceived as being a WMD or bomb.

Thus, the claim that false WMDs are less recognizable than false bombs is not a plausible or reasonably conceivable basis for the legislative distinction here. (See *People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1201.) The distinction offers a reason why victims of both real bombs and real WMDs might not perceive an object as being either a real bomb or a real WMD. But it does not offer a reason for distinguishing between false WMDs and false bombs because a fundamental requirement of both the false bomb and false WMD statutes is that the object actually constitute a false bomb or false WMD which necessarily means that it must be

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[17] On September 11, 2001, planes became weapons of mass destruction. At Columbine, duffel bags containing bombs were placed in the school cafeteria.

perceived as being a bomb or WMD. (See *People v. Hofsheier, supra*, 37 Cal.4th at p. 1205.)

The premise that some defendants may fail in creating objects that look like real WMDs is equally true of bombs.[18] Thus, some defendants may fail in creating objects that look like real bombs. Although that may be a reason for not prosecuting either defendant, or for limiting the prosecutions to the crime of attempt (Pen. Code, § 21a, § 664), it is not a reason for distinguishing between the punishment for false bombs and false WMDs.[19] (See e.g. *People v. Hofsheier, supra*, 37 Cal.4th at p. 1204.)

The 1972 and 1991 documents relating to the false bomb statute shed no light on the statutory distinction between false bombs and false WMDs.[20] The false WMD statute was not enacted until 2002. (Stats. 2002,

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[18] The premise that WMDs are "not so readily known" is also questionable given the events of September 11, 2001, the subsequent anthrax scare, and the color-coded terror alerts transmitted nationwide in response to the prospect of a WMD. (OBM, p. 10.) These events also suggest persons are *more* likely to perceive an object as being a WMD because, after September 11, persons are in a more vigilant state of alert.

[19] Under the WMD threats statute, the threat must cause the victim "reasonably to be in sustained fear..." (Pen. Code, § 11418.5, subd. (a).) The false WMD statute omits a "reasonableness" requirement which supports appellant's argument because requiring that the object *actually be* a false WMD necessarily means the object is perceived as a WMD, thereby ensuring the victim's fear is reasonable.

[20] These documents are simply attached to respondent's brief. For multiple reasons, this is improper. There is (1) no separate request for judicial notice (Cal. Rules of Court, rule 8.520, subdivision (g) ["To obtain

ch. 606, § 6 (A.B. 1838), effective September 17, 2002.) Real WMDs were not proscribed under California law until 1999. (Stats. 1999, ch. 563 (A.B. 140), § 1.) There is not anything within these documents to suggest that in 1972 or 1991 the Legislature considered WMDs, contemplated "sustained fear," or ever thought about a basis for punishing false bombs more harshly than false WMDs.

Section 148.1(d), first enacted in 1972 as 148.1(c), has not been modified since 1991, which was prior to the 1994 enactment of the Three Strikes law. (Stats. 1972, ch 1142, § 1; Stats. 1991, ch. 503, § 1 (SB 384).) While section 11418.5(a) tracks the language of the criminal-threats statute (§ 422), both of which require "sustained fear," section 148.1, in its other provisions, still refers to "reports" and "inform[ing]" of bombs. (Pen. Code, § 148.1, subds. (a)-(c).) And section 11418.5(a) punishes WMD threats more harshly than bomb "reports" under section 148.1's other subdivisions, which also undercuts the view the Legislature meant to treat bombs more harshly than WMDs. The lack of congruity between section 11418.5(a)

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judicial notice by the Supreme Court under Evidence Code section 459, a party must comply with rule 8.252(a)"]; rule 8.252, subdivision (a)(1) ["To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order"]); (2) no authority cited that each document is cognizable legislative history (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-38; see also *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 511, fn. 19) and (3) no authority cited that these documents fit within the category of documents that may be properly attached to a brief. (Cal. Rules of Court, rule 8.520, subdivision (h).)

and section 148.1, subdivisions (a), (b), and (c), flags section 148.1 as "an exception to the legislative scheme, a historical atavism..." (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1206.)

Contrary to respondent's position, section 148.1's staleness cannot be attributed to a deliberate legislative decision to punish false bombs more harshly than false WMDs. WMDs were not criminalized until long after the false bomb statute was enacted. And it surely cannot be true that section 148.1(d)'s mere unamended existence *ipso facto* demonstrates a rational basis for the Legislature's unequal false bomb and false WMD statutory classifications. (OBM, p. 15.) If that were so, then the simple fact two statutes remained on the books would automatically eliminate an equal protection claim. Section 11418.1's legislative history shows the Legislature was aware of the false bomb statute, and modeled the false WMD statute on it, yet there is nothing within that legislative history about false bombs being more recognizable than false WMDs. (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.).) As the appellate court correctly concluded, the Legislature just overlooked the disparate treatment between the two crimes. (Typed opn., p. 12.)

Respondent's other authorities do not give strength to its arguments. *People v. Wilkinson* (2004) 33 Cal.4th 821 presented an equal protection challenge which was rejected because statutes punishing *identical* crimes were involved. (*Id.* at p. 838.) But section 148.1(d) and section 11418.1 do

not describe identical crimes. Bombs are not listed under section 11417 and WMDs are not included within section 148.1(d).[21] (Pen. Code, § 11417; § 148.1, subd. (d).) In *Wilkinson*, the legislative history also disclosed a prior legislative rejection of an explicit request to eliminate the older statute, section 243, while also revealing a legislative desire to give prosecutors discretion to choose between the statutes punishing the *same* crime. (*Id.* at p. 833-834, discussing *In re Rochelle B.* (1996) 49 Cal.App.4th 1212 and *People v. Chenze* (2002) 97 Cal.App.4th 521.) In this case, however, section 11418.1's legislative history supports appellant's equal protection claim instead of undermining it. (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.), p. 18.)

Heller v. Doe, supra, 509 U.S. 312 entailed a distinction between mental retardation and mental illness which easily survived rational basis review. *Heller* stressed: (1) mental retardation is a developmental disability, begins in childhood and is easier to diagnose; (2) mental retardation is a permanent, relatively static condition; (3) mental illness

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[21] The legislative history also demonstrates WMDs were added to section 189, regarding first degree murder. (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 4.) This also demonstrates that section 148.1(d) and 11418.1 are not identical crimes because if they were, then there would have been no need to add WMDs to section 189 as it could have been already covered by "destructive device or explosive." (Pen. Code, § 189.)

treatment is generally more intrusive; and (4) the two conditions have historically been treated differently under Anglo-American Law. (*Id.* at p. 321-327.) Here, there is not an easy list of differences to justify the uneven treatment between false bombs and false WMDs. Respondent just asserts false WMDs sometimes might not appear dangerous.[22]

People v. Hofsheier, *supra*, 37 Cal.4th 1185 parallels this case. In *Hofsheier*, this Court decided section 288a(b)(1) violated equal protection and the rational relationship test. *Hofsheier* stressed an inability to discern any reason why the Legislature would perceive the aggrieved oral copulation group to be "a class of 'particularly incorrigible offenders...'" needing the harsher treatment. (*Id.* at p. 1207.) Likewise, in this case, there is no rational reason why persons placing a false bomb without "sustained fear" are a class of "particularly incorrigible offenders," warranting automatic exposure to a felony, distinct from false WMDs.

It is surely counterintuitive to believe the Legislature meant to treat false bombs more harshly than false WMDs. It is surely illogical to believe a defendant who creates a false bomb intends to instill *more* fear than a defendant who creates a false WMD. (OBM, p. 13.) As the Court of Appeal reasoned, WMDs, constituting weapons of mass destruction, are

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[22] The contention that false WMDs are less recognizable than false bombs was first raised in the rehearing petition, as respondent essentially conceded. (Resp. Pet for Rev., p. 9, fn. 3; see 9 Witkin, California Procedure (4th ed. 1997) Appeal, § 851, p. 886; *Wilson v. 21st. Century Ins. Co.* (2007) 42 Cal.4th 713, 726.)

naturally intended to, and do cause, greater fear and chaos because of the greater difficulty escaping them. Section 11416 is a deliberate Legislative declaration of this truism.[23] (Pen. Code, § 11416.)

In sum, respondent's distinction is not "'realistically conceivable.'" (*Hofsheier*, *supra*, 37 Cal.4th at p. 1201.) A claim false weapons of mass destruction are treated more leniently than false bombs because they are less recognizable fits within the realm of "fictitious purposes" and """could not have been within the contemplation of the Legislature..."""" (*Id.* at p. 1201.) Consistent with the Court of Appeal's conclusion, appellant's equal protection rights were violated and section 148.1(d) is unconstitutional.

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[23] Section 11416 states, in part: "The Legislature hereby finds and declares that the threat of terrorism involving weapons of mass destruction, including, but not limited to, chemical, biological, nuclear, or radiological agents, is a significant public safety concern. The Legislature also recognizes that terrorism involving weapons of mass destruction could result in an intentional disaster placing residents of California in great peril..." (Pen. Code, § 11416.)

II.
THE REMEDY FOR THE VIOLATION OF APPELLANT'S RIGHT TO EQUAL PROTECTION IS (1) MISDEMEANOR PUNISHMENT; OR (2) SECTION 148.1(D)'S INVALIDATION

Under the controlling authorities, when a statute violates the constitution, a court has a choice of remedies. In some circumstances, the unconstitutional statute may be invalidated. In others situations, the statute may be judicially reformed to cure the constitutional infirmity. To select a remedy, the legislature's preference is the primary consideration. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1207; see also *Levin v. Commerce Energy, Inc.* (2010) ___U.S.___ [130 S.Ct. 2323, 2333].)

A. The equal protection violation may be remedied by extending the benefit of section 11418.1's misdemeanor-only clause

For equal protection purposes, a statute's invidious discrimination might mean extending or retracting the statute so that its benefits or burdens are equally distributed. (See, e.g., *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 632-637 [discussing benefit-extending cases]; *Welsh v. United States* (1970) 398 U.S. 333, 361 (conc. opn. of Harlan, J.) [extending benefit]; *People v. Hofsheier, supra*, 37 Cal.4th at p. 1207 [removing mandatory registration burden; extending other statute's discretionary registration benefit]; *In re Kapperman* (1974) 11 Cal.3d 542, 550 [striking impermissible prospective-only limitation within statute

ameliorating punishment]; *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 224-225 [extending benefit of section 1203.2a to out-of-state prisoners]; *People v. Smith* (1971) 5 Cal.3d 313, 319 [extending benefit].)

In this case, at the time of appellant's prosecution for placing a false bomb, the State was, as required by the false WMD statute's misdemeanor-only clause, exempting from felony punishment individuals whose crime matched appellant's except for the type of false object placed: placing false WMDs without "sustained fear." (See *Welsh v. United States, supra,* 398 U.S. at p. 362 (conc. opn. of Harlan, J.).) This created a misdemeanor-only benefit not afforded to appellant. (*Ibid.*) In recognition of this inequality, the Court of Appeal cured the invidious discrimination. It did so by extending the benefit of the false WMD's misdemeanor-only clause to the false bomb statute.[24]

This remedy is consistent with the legislative intent as demonstrated by section 11418.1's legislative history. (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 18.) As the appellate court stressed, section 11418.1's legislative history is the most recent consideration of the punishment warranted. (Typed opn., p. 14.) It

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[24] "We therefore conclude that placing a false bomb within the meaning of section 148.1(d), which does not include the element of causing sustained fear as defined in section 11418.5, is only a misdemeanor." (Typed opn., p. 14.)

reflects the propriety of misdemeanor-only punishment for placing a false object without "sustained fear."

People v. Hofsheier, supra, 37 Cal.4th at p. 1207 presented parallel circumstances. When the *Hofsheier* defendant was prosecuted, the State was, as required by statute, exempting from mandatory registration persons whose crime matched the defendant's except for the type of sexual conduct prohibited. For the remedy, *Hofsheier* rejected the option of imposing mandatory registration upon the unlawful intercourse group. It also rejected invalidating section 290's entire mandatory registration scheme.[25] *Hofsheier's* remedy eliminated mandatory registration for the aggrieved oral-copulation group, so that the discretionary registration benefit was afforded to that group. (*Id.* at p. 1207-1208.)

Thus, eliminating the felony and extending to appellant the benefit of section 11418.1's misdemeanor-only clause is in perfect harmony with *Hofsheier*. And contrary to respondent's contention, *Hofsheier's* remand so that the benefit extended – discretionary registration – could actually be applied, in no way equates to the *retrying* appellant for "sustained fear." (OBM, p. 21.) To the contrary, in this case, the benefit extended --

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[25] The "out of hand" *Hofsheier* quote referred to invalidating the entire section 290 mandatory registration scheme. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1208.) Here, the misdemeanor remedy retains section 148.1(d) but makes it a misdemeanor. Thus, respondent's reliance upon this *Hofsheier* excerpt is misplaced. (OBM, p. 18.)

misdemeanor punishment -- requires no exercise of trial court discretion, unlike the discretionary *Hofsheier* registration requirement.

B. The equal protection violation may be remedied by invalidating section 148.1(d); The reasons for invalidation also show "sustained fear" may not be added to section 148.1(d)

There are also substantial reasons which could support choosing the alternative remedy for the equal protection violation -- invalidating section 148.1(d) in its entirety. Those reasons also demonstrate that "sustained fear" may not be engrafted onto section 148.1(d) under the rubric of judicial reformation.

The standards of judicial reformation are well-settled. *Kopp v. Fair Pol. Practices Com., supra,* 11 Cal.4th 607 describes them. Under *Kopp*:

> [A] court may reform -- i.e., 'rewrite'-- a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute.

(*Id.* at p. 660-661; see also *Woods v. Horton* (2008) 167 Cal.App.4th 658, 678-679.)

The judicial reformation power is limited and restricted. It is a "comparatively drastic alternative." (*Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 407.) Judicial policymaking "encroaches on the Legislature's function and violates the separation of powers doctrine."

(*Abbot Laboratories v. Franchise Tax Bd.* (2009) 175 Cal.App.4th 1346, 1361 [judicial reformation rejected]; *Ventas Finance I, LLC v. Franchise Tax Bd.* (2008) 165 Cal.App.4th 1207, 1235 [same]; *Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 943 [same].)

Consistent with these standards, judicially inserting section 11418.5's "sustained fear" requirement into the archaic false bomb statute creates more problems than it solves and violates the separation of powers doctrine.

First, adding "sustained fear" to section 148.1(d) does not treat false bombs and false WMDs equally. If "sustained fear" is added to section 148.1(d), then persons who place a false bomb without "sustained fear" under section 148.1(d) are not prosecuted at all. But persons who place a false WMD without "sustained fear" are subjected to a misdemeanor under section 11418.1's misdemeanor-only clause. (Pen. Code, § 19.) Therefore, respondent's proposed remedy does not cure the constitutional harm to the aggrieved party, appellant, and perpetuates unequal treatment rather than eliminating it.

Second, and applying section 11418.5(b)'s plain language, the legislatively-selected words "isolation, quarantine, or decontamination effort" do not apply to bombs. They do not apply because persons exposed to bombs are not "decontaminated, quarantined, or isolated." (Pen. Code, § 11418.5, subd. (b).) Contrary to respondent's claim, "isolation," given its

use in the WMD context, more naturally refers to exposure to contagious WMDs, such as biological warfare agents. (Pen. Code, § 11417, subd. (a)(3).) In the false WMD context, the Legislature was concerned with prophylactic treatment that might be needed before the WMD was determined to be false. (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 19-20.) Thus, 11418.5(b)'s plain words are not compatible in the false bomb context. Respondent's repeated reliance upon "disruptive reaction" is an implicit acknowledgement of that incompatibility.

Third, section 11418.5(b)'s express language also exposes a redundancy and ambiguity about "evacuations" which also undermines any effort to judicially insert section 11418.5's "sustained fear" definition into section 148.1(d). Specifically, it is unclear how "school" or "home" evacuations differ from "building" evacuations by "occupants." (Pen. Code, § 11418.5, subd. (b).) Thus, even as applied to false WMDs or WMD threats, section 11418.5's "sustained fear" description, as enacted, lacks a definition that is clean and is therefore better not perpetuated.

Not only do section 11418.5's explicit statutory words impose a roadblock to judicially inserting "sustained fear" into the false bomb statute, but section 11418.1's legislative history reveals the Legislature's most recent action was to tighten section 11418.5's "sustained fear" definition instead of expand it. The legislative narrowing cuts against the

requested judicial expansion of "sustained fear" here. It contradicts any assertion that "sustained fear" was meant to be defined "as inclusive as possible." (OBM, p. 19.) It demonstrates the statutory words "established by, but is not limited to" are *not* meant to automatically authorize "any other action" taken in response because the Legislature deliberately eliminated "any other action" as "arguably overbroad." (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 18.) Thus, the recent legislative tightening of section 11418.5's definition of "sustained fear" substantially undermines the effort to now expand it to false bombs under section 148.1(d).

Section 148.1's other subdivisions, referring generally to bomb "reports" and "inform[ing]" of bomb placement, also present a formidable obstacle to judicially reforming section 148.1(d) by adding "sustained fear." (Pen. Code, § 148.1, subd. (a), (b), (c).) Section 11418.5(a), which proscribes WMD threats, closely tracks section 422, the criminal threats statute, and includes a "sustained fear" requirement. (Pen. Code, § 11418.5, subd. (a).) Despite referring to "reports" and "inform[ing]" of bombs, section 148.1's other subdivisions, however, do not match-up with the WMD threats statute. (Pen. Code, § 148.1, subd. (a), (b), (c); Pen. Code, § 11418.5, subd. (a).) They are worded and punished quite differently. (Pen. Code, § 148.1, subds. (a), (b), (c) [wobbler]; Pen. Code, § 11418.5, subd. (a) ["county jail" or "3, 4, or 6 years"].) Therefore, adding "sustained fear"

to section 148.1(d) means "sustained fear" is required for placing a false bomb, false WMD, and for threats of WMDs, but not required for "reports" or "inform[ing]" of bombs or explosives. Judicially imposing "sustained fear" onto section 148.1(d) would therefore expose section 148.1(a), (b) and (c)'s incongruities with the WMD threats statute and 148.1(d) and render section 148.1's other subdivisions vulnerable. It would thus create more difficulty than it would solve, thereby demonstrating that reworking the archaic section 148.1 is a task best entrusted to the Legislature.

To avoid these basic problems with pasting "sustained fear" into section 148.1(d), respondent continues to mix-and-match "disruptive reaction" and "sustained fear." (OBM, p. 17, 20, 23, 25.) But again "disruptive reaction" is not the same as "sustained fear." (*Ante*, p. 16-18.) Section 11418.1's legislative history omits any mention of "disruptive reaction" and respondent appears to have just invented it. The fact that a "disruptive reaction" could be only a scream or fainting also signals that the *quality* of "isolation, decontaminate or quarantine" and "disruptive reaction" do not match. Thus, engrafting "disruptive reaction" onto 148.1(d) does not treat false bombs and false WMDs equally. The mixing of "sustained fear" with "disruptive reaction" is also countered by the legislative history equating "sustained fear" to "violent" conduct. (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg.

Sess.) p. 20.) There is not a reasoned analogy between the elastic phrase "disruptive reaction" and "violent" conduct.

Braxton v. Municipal Court, supra, 10 Cal.3d 138 also demonstrates "sustained fear" cannot be equated to "disruptive reaction" because "disruptive reaction" is unconstitutionally overbroad and vague. *Braxton* decided the phrase "willfully disrupted" was unconstitutionally overbroad and vague. It therefore interpreted "disrupt" in the section 626.4 campus context, as: "physical or forcible interference" that "constitute[s] 'a substantial and a material threat" to the campus's operations.[26] (*Id.* at p. 150.) Consistent with *Braxton*, "disruptive reaction" is likewise overbroad and vague and therefore it cannot constitutionally be added to 148.1(d).

Kopp rejected judicial reformation in its own context. "We also conclude, however, that reformation is inappropriate here, and cannot be accomplished consistently with the limitations placed on courts by the separation of powers doctrine." (*Kopp, supra*, 11 Cal.4th at p. 671.) Many cases have likewise declined to judicially reform statutes. (See, e.g., *Abbot Laboratories v. Franchise Tax Bd., supra,* 175 Cal.App.4th at p. 1361; *Ventas Finance I, LLC v. Franchise Tax Bd., supra,* 165 Cal.App.4th 1207; *Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 943.)

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[26] *Braxton* also stated it held "section 626.4 requires reasonable cause to believe the person excluded has incited or engaged in conduct causing a substantial and material physical disruption of an educational institution by the commission of unlawful acts." (*Braxton v. Municipal Court, supra,* 10 Cal.3d 138 at p. 153.)

In accord with these authorities and the arguments above, judicially reforming section 148.1(d) to add a new element of "sustained fear" falls too far outside the judicial reformation powers. It operates to create a new element of a crime, even though the power to create crimes is within the exclusive province of the Legislature (Pen. Code, § 6), and results in an out-of-kilter false bomb statute. Thus, the proposal should be rejected.

C. For this equal protection violation, adding "sustained fear" to section 148.1(d) is not part of the remedy-equation

Additionally, and contrary to respondent's claim, adding "sustained fear" to section 148.1(d) is not part of the remedy-equation for this particular equal protection violation. Here, the equal protection clash is shown by comparing: (1) the false WMD misdemeanor-only clause and (2) the false bomb statue. For this equal protection violation, the remedy is declaring section 148.1(d) *void ab initio* or extending the benefit of the false WMD misdemeanor-only clause. But there is no third option to reach out and rewrite the rest of section 148.1(d) by adding "sustained fear."

The third option's inapplicability is also demonstrated because it fails to cure the unequal treatment. As already noted, it eliminates the misdemeanor-only option that is available under the false WMD statute because persons who place a false bomb without "sustained fear" are not prosecuted rather than prosecuted for a misdemeanor only. Thus, the

constitutional harm to the aggrieved party, appellant, is not eliminated and the unequal treatment is perpetuated rather than resolved.

For similar fundamental reasons, the out-of-state criminal cases are significantly different and fail to support inserting "sustained fear" into section 148.1(d). (*People v. Liberta* (1984) 64 N.Y.2d 152; 163-164, 170-173; *Plas v. State* (Alaska 1979) 598 P.2d 966; *State v. Books* (Iowa 1975) 225 N.W.2d 322; see also *Kopp, supra*, 11 Cal.4th at p. 637, fn. 33; OBM, p. 21-22.) The unconstitutional statutes in the out-of-state cases were underinclusive.[27] (See also *Kopp, supra*, 11 Cal.4th at p. 637 ["Courts have similarly *extended* the reach of underinclusive criminal statutes in order to avoid invalidity under equal protection principles"], italics added.)

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[27] In *People v. Liberta, supra,* 64 N.Y.2d 152, a rape statute excluded married men from prosecution for raping their wives. Under the marriage definition, the defendant was not considered married. (*Id.* at p. 162.) *Liberta* decided the marriage-exclusion was unconstitutional, and extended the underinclusive criminal law to include married men who raped their wives. (*Id.* at p. 163-164, 171-172.) *Liberta* also decided the criminal statute was underinclusive because it excluded women from being prosecuted for raping men. So the statute was extended to cover women who raped men. (*Id.* at p. 169-170, 171-172.) In *Plas v. State, supra,* 598 P.2d 966, an underinclusive prostitution statute did not cover male prostitutes and was extended to cover them. (*Id.* at p. 967-969.) In *State v. Books, supra,* 225 N.W.2d 322, the underinclusive statute "punished as a crime certain conduct on the part of all public officials and employees except those who work for the State." (*Id.* at p. 324.) The statute was extended to cover state employees and officers by striking the amendment which had exempted them. (*Id.* at p. 325-326.)

But section 148.1(d) is overinclusive.[28] It includes too many persons because it exposes to a felony even persons who place false bombs without "sustained fear." Thus, consistent with these differences, the Court of Appeal's misdemeanor remedy properly constricted and retracted the overinclusive section 148.1(d) while in the out-of-state cases, the underinclusive criminal statutes were expanded.[29] As the Court of Appeal

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[28] As one commentator reasoned: "When the state action is burdensome, over-inclusion would seem to be less tolerable than under-inclusion, for while the latter fails to impose the burden on some who should logically bear it, the former actually does impose the burden on some who do not belong in the class." (Note, *Developments in the Law of Equal Protection* (1969) 82 Harv. L. Rev. 1065, 1086.)

[29] In *Welsh v. United States, supra*, 398 U.S. 333, Justice Harlan's concurring opinion, discussed in *Kopp,* reasoned that the defendant's conviction should be reversed unless he was to go "remediless." (*Id.* at p. 362 (conc. opn. of Harlan, J.).) The concurring opinion actually reflected a recognition of the constitutionally-proper remedy when the defendant is convicted under an *overinclusive* criminal statute. (*Id.* at p. 362 (conc. opn. of Harlan, J.).) The *Welsh* defendant was convicted under a criminal statute requiring military service induction but there was an exemption for conscientious objectors if the objection was based upon religious beliefs. (*Id.* at p. 335.) The "exemption" was underinclusive because conscientious objectors whose objections were based on nonreligious beliefs also should have been *exempted* from prosecution. But the criminal statute itself requiring military service induction was overinclusive because it exposed to prosecution even those objectors whose beliefs were identical to religious objectors except for the fact their objections were not religiously-based. Thus, the *Welsh* criminal statute was overinclusive because it included too many prosecution-subjected persons within its scope. The "extension" of the statute was an extension of the prosecution-exemption or extension of the "benefit" denied to the *Welsh* defendant and resulted in the scope of persons exposed to prosecution being retracted, consistent with the nation's long-standing conscientious objector policy. (*Id.* at p. 366-367 (conc. opn. of Harlan, J.).) Welsh's conviction was reversed. (*Id.* at p. 344.)

reasoned, the Legislature's most recent expression was enacting a misdemeanor-only clause for false objects without "sustained fear." (Typed opn., p. 14.)

These out-of-state cases also differ because they were firmly grounded in policy judgments about conduct being meant to be criminal. The Legislature's policy would not be, for example, that both men and women should *not* be prosecuted for rape, or that both male and female prostitutes should *not* be prosecuted for prostitution. (*People v. Liberta, supra*, 64 N.Y.2d at p. 171; *Plas v. State, supra*, 598 P.2d at p. 969.) The Legislature's major policy, that criminal conduct was statutorily-proscribed, prevailed. But the claim here is not that there was a group free from past prosecution. The Legislature's most recent policy in this case is misdemeanor-only treatment for placing a false object without "sustained fear." Consistent with *Welsh*, the Legislature's policy judgment here is *lenience* by virtue of a misdemeanor-only benefit. (*Welsh v. United States, supra*, 398 U.S. at p. 365-366 (conc. opn. of Harlan, J.).)

Respondent cites cases touching on miscellaneous aspects of various statutory unconstitutionalities but they offer no refuge. *People v. Roder* (1983) 33 Cal.3d 491 posed a jury-instruction question instead of an equal protection claim. *Roder* did not decide the defendant was convicted under an unconstitutional statute. *Roder* decided the jury instructions, which embodied former section 496's presumption of guilty knowledge, were

unconstitutional because they relieved the prosecution of its beyond-a-reasonable-doubt element-proving burden. (*Id.* at p. 504.) *Roder* concluded section 496 "should be construed" as allowing only a permissive inference instead of a mandatory presumption, and was guided by Evidence Code section 501 and legislative intent. (*Id.* at p. 505-507.) *Roder* reversed and provided the trial court with guidance about the way to fashion a correct instruction. (*Id.* at p. 507.) There was no mention of "judicial reformation" in *Roder*. *Roder* did not add a new element to a crime as respondent proposes here.

People v. Sandoval (2007) 41 Cal.4th 825 did not involve an equal protection claim and is unhelpful because the Legislature had already enacted the new determinate sentencing law (DSL), and it was therefore simple to determine legislative intent. (*Id.* at p. 848-852.) Here, unlike the newly-enacted DSL, section 148.1 has not been recently altered by the Legislature. *Sandoval* also stressed that its remedy avoided the practical problems that might ensue if the jury trial requirement was adopted. (*Id.* at p. 852-853.) By contrast, the proposed remedy of inserting "sustained fear" into section 148.1(d) would create more problems than it would solve, and fails to put the false WMD and false bomb statutes on equal footing.

Respondent weaves a theme of a legislative desire to make felony punishment available for placing a false bomb, the legislative expression within the Three Strikes law, and the fact that placing a false bomb, as originally enacted and under which appellant was prosecuted, allowed felony punishment because it was punishable as a wobbler.

These generalities, which are backward-looking, do not confront the precise question here: the remedy for the existing violation of appellant's equal protection rights. This question, which properly recognizes that if an equal protection violation exists, then a remedy for the aggrieved defendant is proper, does not in any way foreclose or prevent the Legislature from reworking section 148.1. (See *People v. Hofsheier, supra*, 37 Cal.4th at p. 1207 ["This conclusion does not preclude the Legislature from requiring lifetime registration both for persons convicted of voluntary oral copulation and for those convicted of voluntary sexual intercourse, thus treating both groups the same"].) If the Legislature wishes to alter section 148.1(d), they are free to do so. Under the separation of powers doctrine, that is in fact their job. (*Kopp, supra,* 11 Cal.4th at p. 671; Cal. Const., art. IV, § 1.)

But under the long-standing *Kopp* judicial reformation standards, it is not possible to say "with confidence" that inserting "sustained fear" into the false bomb statute "closely effectuate[s] policy judgments clearly articulated" by the Legislature and that the Legislature would have preferred the statutorily-defined term "sustained fear" with its many

wrinkles and WMD-specific meaning, to be transferred to false bombs. (*Kopp, supra,* 11 Cal.4th at p. 661.) In accord with the separation of powers doctrine, this Court should not wade into this thicket by inserting "sustained fear" into section 148.1(d).

In sum, to remedy the violation of appellant's equal protection rights, this Court may, consistent with the Court of Appeal's conclusion, decide that placing a false bomb without "sustained fear" under section 148.1(d) is punishable only as a misdemeanor. It may also choose to invalidate section 148.1(d) in its entirety and reverse appellant's conviction.

III.
IF SECTION 148.1(D) IS JUDICIALLY REFORMED TO INCLUDE "SUSTAINED FEAR," APPELLANT MAY NOT BE RETRIED

If section 148.1(d) is judicially reformed to add "sustained fear," appellant may not be retried for causing "sustained fear." Respondent cites no California or other authority directly supporting this proposed remedy. It is essentially a quest to convert the fact that appellant was convicted under an unconstitutional statute violating equal protection into a garden-variety trial error requiring retrial and should be rejected.

A. The proposed remedy fails; "Sustained fear" was not proved

"Sustained fear" was not proved at appellant's trial. The YCCC was not evacuated.[30] (Typed opn., p. 4.) Section 11418.5(b) requires "conduct" and the YCCC-evacuation assertion is the lone reference to "conduct" under the statutorily-required "sustained fear" definition. (OBM, p. 19.) The reference to the bomb expert being "wary" is not "conduct." (OBM, p. 25.) It is not even fear, much less "sustained fear" under section

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[30]The appellate opinion states: "She [the dispatcher] was scared, because she knew C-4 was an explosive and thought that this might be a bomb, even though it did not have any external indications of a fuse. She parked in her spot on the other side of the building. When she entered the YCCC, she announced to the others in the room that there was a bomb threat, and she placed a telephone call to the police instead of using the radio because the latter could trigger some types of bombs. The employees waited inside for the police to arrive, which took about 15 minutes. By this time, her shift had ended and she walked outside to meet the police. *No one else left the building, and as far as the dispatcher could recall the YCCC operations were not interrupted.*" (Typed opn., p. 4.)

11418.5(b). The summoning of the "bomb squad" is not the same as the legislatively-enacted and WMD-specific words "any isolation, quarantine, or decontamination effort."[31] (OBM, p. 19.) Thus, respondent's proposed remedy fails. (See, e.g., *Skilling v. United States* (2010) ___U.S.___ [130 S.Ct. 2896, 2934 ["It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud"].)

Respondent's argument that the YCCC was evacuated is also forfeited. (OBM, p. 19.) Respondent failed to challenge the Court of Appeal's factual statement below. In the rehearing petition, it was only asserted: "In addition, the dispatch center was evacuated." (Pet for Rehearing, p. 12.) Respondent did not claim the Court of Appeal's statement of facts was wrong or ask that the factual statement be altered in any way.[32] There was no assertion of any "omission" or "misstatement."[33]

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[31] "Isolate," from which "isolation" is drawn, is defined as "to set apart from others." (Webster's 9th New Collegiate Dict. (1988) p. 641.) "Quarantine" has a definition of "a restraint upon the activities or communication of persons or the transport of goods designed to prevent the spread of disease or pests." (*Id.* at p. 964.) "Decontaminate," from which "decontamination" is drawn, is defined as "to rid of contamination (as with radioactive material)." (*Id.* at p. 331.) The Legislature did not have bombs in mind when they used these words; these definitions are consistent with that because they do not carry over to bombs.

[32] In appellant's reply brief, appellant challenged the YCCC-evacuation assertion. (Reply Brief, p. 10-11; 1RT 58-60.) Confronted with these arguments, the opinion's factual statement demonstrates rejection of the YCCC-evacuation assertion.

(Cal. Rules of Court, rule 8.500, subd. (c)(2).) Thus, this Court must accept the Court of Appeal's factual statement. (*Ibid.*; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 283, fn. 3 ["Indeed, the Court of Appeal reached a similar conclusion concerning the undisputed nature of Hitchcock's testimony about the 'recording and/or viewing' of plaintiffs. Plaintiffs did not seek rehearing or modification on this or any other factual point, and are barred from complaining about it now. (See Cal. Rules of Court, rule 8.500(c)(2) [Court of Appeal's statement of facts is accepted on review absent rehearing petition challenging alleged misstatements].)"].)

Besides the fact "sustained fear" was not proved, "sustained fear" was not alleged below, the jury was not instructed on "sustained fear," and the prosecutor's relevance objections to defense counsel's questions about the circumstances inside the YCCC after the small box was discovered, were upheld, thereby halting defense counsel's pursuit of this area. (1RT 56-57) And even with these fundamental flaws, respondent does not attempt to satisfy a burden of proving that omitting "sustained fear" below is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386

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[33] Rule 8.500 (c)(2) provides: "A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing."

U.S. 18, 24.) Respondent instead skips from a violation of appellant's equal protection rights to a retrial on "sustained fear."

But if the equal protection violation exists, then the aggrieved defendant should have a remedy which does not ignore the fact that his conviction was obtained under an unconstitutional statute. "'An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.'" (*Ex Parte Siebold* (1880) 100 U.S. 371, 376-378; see also *Norton v. Shelby County* (1886) 118 U.S. 425, 442; *Reynoldsville Casket Co. v. Hyde* (1995) 514 U.S. 749, 759-760 (dis. opn. of Scalia, J.) ["law repugnant to the Constitution 'is void, and is as no law'"].) Although a court may judicially reform an unconstitutional statute to preserve it, the aggrieved defendant's remedy should be tied to that unconstitutionality and he should not be permitted to go remediless. (See e.g. *Welsh v. United States, supra*, 398 U.S. at p. 362 (conc. opn. of Harlan, J.)) [clear defendant's conviction must be reversed unless he is to be left "remediless"]; see also *Skinner v. Oklahoma ex rel. Williamson, supra,* 316 U.S. at p. 543 [finding equal protection violation but leaving any reformation to State]; *Skinner v. State* (Okla. 1945) 155 P.2d 715 [conviction reversed and dismissed because court could not rewrite statute]; See Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation* (1979) 28 Clev. St. L.Rev. 301, 322

[government bears cost of adjustment when government responsible for uneven treatment].) Thus, the proposed remedy fails.

B. The remedy violates section 1023

Section 1023 would also impose a bar to retrial of a greater offense after a defendant is convicted of the lesser offense. (Pen. Code, § 1023; see also *People v. Anderson* (2009) 47 Cal.4th 92, 113-114.) Here, if the new element of "sustained fear" is created, then appellant's conviction is a lesser included offense of the new false bomb crime because it contains all the elements except for "sustained fear."[34] (See *People v. Lopez* (1998) 19 Cal.4th 282, 288.)

This Court has consistently expressed concern about retrying a defendant for a greater offense after a lesser-included conviction. "Nearly 50 years before *Fields*, we interpreted section 1023 to mean that a conviction for a lesser included offense bars a later prosecution for the greater offense." (*People v. Anderson, supra*, 47 Cal.4th at p. 113.) "We adhered to this interpretation in *Fields*, holding that section 1023 prohibits the retrial of a greater offense after a defendant's conviction of a lesser

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[34] Penal Code section 1023 provides: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

included offense even where there has been no express or implied acquittal of the greater offense."[35] (*People v. Anderson, supra*, 47 Cal.4th at p. 113, citing *People v. Fields* (1996) 13 Cal.4th 289, 307.) If this were not the rule, then section 1023 could be avoided "'by the simple device of beginning with the prosecution of the lesser offense and proceeding up the scale.'" (*People v. Fields, supra*, 13 Cal.4th at p. 307, quoting *People v. Greer* (1947) 30 Cal.2d 589, 597.) "Thus, a conviction of a lesser included offense bars subsequent prosecution of the greater offense." (*People v. Bright* (1995) 12 Cal.4th 652, 661, disapproved on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 542.)

This Court has also recognized that retrial of a greater offense after conviction of a lesser included offense could pose numerous practical difficulties. (See *People v. Fields, supra*, 13 Cal.4th at p. 307, fn. 5; see also *People v. Anderson, supra*, 47 Cal.4th at p. 113.) Respondent's proposal limited to a "sustained fear" retrial is an implicit recognition of the difficulties. If appellant was retried for causing "sustained fear," many questions arise. These include whether the jury is instructed on a lesser-included misdemeanor offense of placing a false bomb without "sustained fear," whether the jury is told of the prior conviction, and why double

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[35] *Anderson* traced the genesis of the *Fields* rule from the "acquittal first" rule and resulting "irregular verdict" and "mistake in the law" when the jury is not advised of its duty to render a verdict on the greater offense first. (*People v. Anderson, supra*, 47 Cal.4th at p. 114.)

jeopardy would not prohibit retrial of the original offense, but then confront the jury with an impermissible "all or nothing" choice. (*People v. Fields, supra*, 13 Cal.4th at p. 307, fn. 5.)

More complications arise because it is unclear if the jury would be instructed that the small box, without any external indications of a fuse, and despite questions about the meaningfulness of a C-4 writing, must just be assumed to be a false bomb. (See *People v. Anderson, supra*, 47 Cal.4th at p. 124 (conc. opn. of Moreno, J.) [potential for erosion of presumption of innocence].) Also, this Court has previously expressed doubts about the fundamental fairness problems that might arise from "piecemeal jury litigation." (*People v. Najera* (1972) 8 Cal.3d 504, 511-512; see also *People v. Batts* (2003) 30 Cal.4th 660, 679; *People v. Anderson, supra*, 47 Cal.4th at p. 121-122.) There are like doubts about the fundamental fairness of respondent's proposal.

Therefore, under these circumstances, including (1) appellant suffered an equal protection violation; (2) "sustained fear" was not alleged below; (3) the jury was never instructed on "sustained fear"; (4) the People's objections halted more inquiry into fear; (5) the fundamental fairness problems arising from "piecemeal jury litigation" and (6) the difficulties deciding how to implement this procedure, the consequences of the unconstitutional law must be "borne by the People" and retrial for "sustained fear" should be barred. (*People v. Anderson, supra*, 47 Cal.4th

at p. 114, citing *People v. Fields, supra*, 13 Cal.4th at p. 311; *People v. Nareja, supra*, 8 Cal.3d at p. 511-512.) Appellant should not bear the consequences of his equal protection violation. (See Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, supra,* 28 Clev. St. L.Rev. at p. 322 [government bears cost of adjustment when government responsible for uneven treatment].)

C. The remedy violates due process limits on judicial decisionmaking

Given these unique circumstances, a retrial on "sustained fear" would violate the "limitations on *ex post facto* judicial decisionmaking [which] are inherent in the notion of due process,..." (*Rogers v. Tennessee* (2001) 532 U.S. 451, 456; see also *Marks v. United States* (1977) 430 U.S. 188, 191; see also *Bouie v. Columbia* (1964) 378 U.S. 347 [applying to prior conduct a new and unexpected judicial construction of a penal statute violates due process]; see also *People v. Martinez* (1999) 20 Cal.4th 225, 238.)

In this case, if a remedy for the equal protection violation is required, then there must be a point in time when section 148.1(d) is unconstitutional. "'An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.'" (*Ex Parte Siebold, supra,* 100 U.S. at p. 376-378; see also

Norton v. Shelby County, supra, 118 U.S. at p. 442; *Reynoldsville Casket Co. v. Hyde, supra,* 514 U.S. at p. 759-760 (dis. opn. of Scalia, J.) ["law repugnant to the Constitution 'is void, and is as no law'"].) As explained, the remedy for this equal protection violation is declaring section 148.1(d) *void ab initio* or extending the benefit of the misdemeanor-only clause. But retrying appellant for "sustained fear" would "revive" felony section 148.1(d), eliminate the constitutionally-proper remedy of the aggrieved party for this equal protection violation and expose him to trial for a felony again. Thus, the bar against retroactive criminal prohibitions emanating from courts is violated.

Moreover, under section 3, it is generally presumed that criminal laws operate prospectively.[36] (*People v. Alford* (2007) 42 Cal.4th 749, 753; *People v. Teron* (1979) 23 Cal.3d 103, 116-117.) "Amendments to the Penal Code 'which change the legal consequences of criminal behavior to the detriment of defendants, cannot be applied to crimes committed before the measure's effective date.'" (*People v. Adames* (1997) 54 Cal.App.4th 198, 214, quoting *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 297.) If section 148.1(d) was either judicially invalidated or judicially retracted to punish placing a false bomb as a misdemeanor only, and the Legislature subsequently decided to add "sustained fear" to section 148.1(d), then

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[36] Section 3 provides: "No part of it is retroactive, unless expressly so declared."

appellant could not be retried under the new false bomb statute because his conduct would have occurred before the new statute was enacted. (Pen. Code, § 3; see also *People v. Sandoval, supra*, 41 Cal.4th at p. 845 [substantive criminal law change is retroactive when applied to criminal conduct occurring before its enactment]; *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1167.) By parity of reasoning, "sustained fear" may not be added to 148.1(d) and retroactively applied to appellant via a "sustained fear" retrial.

D. The remedy violates equal protection again

A "sustained fear" retrial would violate appellant's equal protection rights again.[37] To retry appellant for "sustained fear" would mean appellant's remedy was dependent upon a mere fortuity of whether the unconstitutional statute under which he was convicted and aggrieved could be judicially reformed.

The federal and state equal protection guarantees are "essentially a direction that all persons similarly situated should be treated alike." (*Cleburne v. Cleburne Living Center, Inc., supra*, 473 U.S. 432, 439; *Hofsheier, supra*, 37 Cal.4th at p. 1199.) Here, appellant is similarly situated to defendants convicted under a statute found by a Court to violate equal protection and who are aggrieved by the unconstitutionality. The

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[37] Respondent does not address this argument.

only difference is the particular statute found to violate equal protection. (See *People v. Hofsheier, supra,* 37 Cal.4th at p. 1199.)

Under the rational relationship test, "most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose." (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1200.) Thus, by parity of reasoning, the question is whether there is a legitimate purpose for judicially reforming a statute to create a new element of "sustained fear" and then allowing retrial as to "sustained fear" for one defendant but leaving the task to the Legislature (due to the inability to satisfy *Kopp*'s judicial reformation prerequisites) so that there is no retrial as to another defendant who is also convicted under a statute determined to violate equal protection. (See *Shelley v. Kraemer* (1948) 334 U.S. 1, 17-18.)

There is no legitimate purpose or plausible basis for the remedy-distinction. It is the Legislature's function to create crimes and amend statutes, rather than the duty of the judiciary, as well established under the separation of powers doctrine. (Cal. Const., Art. IV, § 1; Pen. Code, § 6.) Thus, if the Legislature subsequently added "sustained fear" to section 148.1(d), then appellant could not be retried under the new false bomb statute because his conduct would have occurred before the new statute was enacted. (Pen. Code, § 3.) Yet if the statute is judicially reformed, the proposal goes, the defendant may then be retried. Thus, the distinction

between defendants who are retried and defendants who are not retried, is not rationally-based.

People v. Liberta, supra, 64 N.Y.2d 152 rejected the defendant's equal protection challenge to the judicially-selected remedy of conviction affirmance. (*Id.* at p. 173.) But the *Liberta* criminal statute was underinclusive, the statutes were expanded, and the defendant was not aggrieved because he was always within the constitutional part of the statute. But section 148.1(d) is overinclusive, and appellant here is aggrieved.

By way of comparison, in *United States v. Stevens* (2010) ___U.S.___ [130 S.Ct. 1577], the United States Supreme Court determined a statute was unconstitutionally overbroad and could not be judicially rewritten. *Stevens* affirmed the lower court's remedy: vacating the defendant's conviction. (*Id.* at p. 1592; see also *Skinner v. Oklahoma, supra,* 316 U.S. at p. 543 [equal protection violation but any reformation left to State]; *Skinner v. State* (Okl. 1945) 155 P.2d 715 [conviction reversed and dismissed because Court could not rewrite statute].) By contrast, in *Skilling v. United States, supra,* ___U.S.___ 130 S.Ct. 2896, the Court judicially reformed the "honest services" statute. But it was not concluded that the defendant should just be retried under the "honest services" statute's reformed version. (*Id.* at p. 2934-2935.) *Skilling* remanded for harmless-error analysis by the lower court only because there

were two other objects of the conspiracy besides the legally flawed honest services theory, and the verdict might have rested upon one of those valid theories rather than only the invalid honest services theory. (*Skilling v. United States, supra,* ___U.S.___ [130 S.Ct. 2896, 2934, fn. 36], citing *Yates v. United States* (1957) 354 U.S. 298; *Hedgpeth v. Pulido* (2008) 555 U.S. __ [129 S.Ct. 24] (per curiam).) Consistent with these authorities, a "sustained fear" retrial would violate appellant's equal protection rights again.

E. Respondent's miscellaneous other points are meritless

By repeatedly looking backward, respondent's contrary arguments skip the fundamental step that section 148.1(d), the statute under which appellant was convicted, is unconstitutional. (OBM, p. 23 [appellant "already stands convicted of the offense enacted by the Legislature and already faces the punishment which the Legislature itself authorized as sanction for the offense as written"], italics omitted; see also OBM, p. 23 ["Rather, even if this Court were to find an equal protection violation, the remainder of this case would concern only whether the punishment prescribed by the Legislature for the offense enacted by the Legislature can be obtained, consistent with the Constitution, only if there is proof of a disruptive reaction from appellant's offense"].)

The assertion that adding "sustained fear" means "there is no need to *extend* the reach of section 148.1(d) to permit felony punishment for placing a false bomb" also ignores the unconstitutionality step and fails to recognize section 148.1(d)'s overinclusiveness and that this overinclusiveness is precisely why the appellate court's misdemeanor remedy retracted section 148.1(d). (OBM, p. 22, italics in original.)

Cunningham v. California (2007) 549 U.S. 270, 286, 294 did not involve a defendant convicted under a statute that violated equal protection. It presented a Sixth Amendment right to a jury trial violation. (OBM, p. 24.) The Sixth Amendment jury trial right was violated because California's determinate sentencing law ("DSL") authorized the trial court, rather than a jury, to engage in sentence-elevating factfinding.[38] The archaic false bomb statute is a far cry from the unconstitutionality of California's determinate sentencing scheme. Also, adding "sustained fear" to section 148.1(d) creates a new element of a criminal offense and is

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[38] To the extent respondent seeks to transform engrafting a new "sustained fear" element onto section 148.1(d) into an aggravating sentencing factor instead, then the judicial reformation remedy rises to an entirely new level, unsupported by any authority, fails to jive with the false WMD statute and does not result in equal treatment between false WMDs and false bombs because, among other things, the false WMD statute does not identify "sustained fear" as an aggravating factor. (See OBM, p. 24 ["To the contrary, in the event some additional matter must be proven for the Constitution to permit an in-place legislative sanction to apply based on proof of elements already prescribed by that legislative body, there is no legitimate argument against permitting such additional matter to be proven"].)

therefore not parallel to *Cunningham's* sentencing issues. *In re Kay* (1970) 1 Cal.3d 930 offers no shelter. It construed the statute without deciding it was void for vagueness, ultimately decided the statute could not be applied to the petitioners' case, and set aside the judgment against them. (*Id.* at p. 946-947.) As explained, *People v. Roder, supra*, 33 Cal.3d 491 is unhelpful and did not create a new element of a crime.

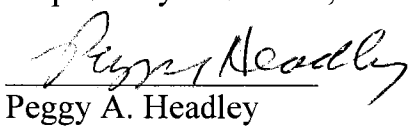
Contrary to respondent's claim, the issue is not the People's right to due process of law in a criminal case. The stray citations to nongermane authorities are unhelpful. (OBM, p. 24-25.) The question is the remedy for the person aggrieved by the equal protection violation, appellant. The question does not in any way prevent the Legislature from reworking section 148.1. (See e.g. *Hofsheier, supra*, 37 Cal.4th at p. 1207 ["This conclusion does not preclude the Legislature from requiring lifetime registration both for persons convicted of voluntary oral copulation and for those convicted of voluntary sexual intercourse, thus treating both groups the same"].)

Because retrial on "sustained fear" is prohibited, this Court should reject respondent's proposal to retry appellant for "sustained fear."

CONCLUSION

For the reasons stated herein, appellant's equal protection rights were violated and the remedy is misdemeanor punishment or section 148.1(d)'s invalidation, reversal and dismissal of appellant's conviction.

DATED: JANUARY 13, 2011 Respectfully Submitted,



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CERTIFICATION OF WORD COUNT

I, Peggy A. Headley, appointed counsel for appellant TURNAGE, certify that the word processing software word count function shows that this document, excluding the tables under rule 8.204(a)(1), the cover information, this certificate, the signature block, and the quotation of issues, contains 13,787 words, which is within the authorized maximum of 14,000 words. (Cal. Rules of Court, Rule 8.520, subd. (c)(1), (c)(3).)

DATED: January 13, 2011

Peggy Headley

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PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, a resident of Nevada County, over the age of 18 years of age, and not a party to the within action. My business address is Law Office of Peggy A. Headley, # 180, 11448 Deerfield Drive, Suite 2, Truckee, California, 96161. On January 13, 2011, I served the attached

Appellant's Answer Brief on the Merits

By placing a true copy in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelope in the United States mail at Truckee, California, with postage thereon fully prepaid. There is delivery service by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 13, 2011 at Truckee, California.

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