SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. [redacted] Defendant and Appellant.	APPELLATE CASE NO. [redacted] SUPERIOR COURT CASE NO. [redacted]

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable David G. Downing, Judge

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF DEFENDANT AND APPELLANT

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Application for Leave to File *Amicus Curiae* Brief

TO THE HONORABLE MICHELE D. LEVINE, PRESIDING JUDGE:

Pursuant to California Rule of Court 8.882(d), *amicus curiae* Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") hereby requests permission of the Presiding Judge to file an *amicus curiae* brief. The proposed brief appears immediately following this application.

I. Interest of Amicus Curiae

Lambda Legal is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people, and people living with HIV. Lambda Legal has been involved for decades in challenges to the discriminatory enforcement of criminal laws against LGBT people, including as counsel for the petitioners in *Lawrence v. Texas* (2003) 539 U.S. 558, which struck down all remaining sodomy laws. Lambda Legal was also co-counsel in *In re Marriage Cases* (2008) 43 Cal.4th 757, which held that strict scrutiny is required under the California Constitution for government classifications based on sexual orientation and which is highly significant to this appeal. Based on this extensive work, Lambda Legal is uniquely qualified to assist the Court here.

II. Proposed Amicus Brief

The proposed amicus brief will aid the Court's resolution of the four pending related appeals because it discusses issues that have not been the focus of prior briefing by the parties. These issues include the application of strict scrutiny to the actions taken by police to target gay men; an analysis of whether police employed comparable investigatory tools to detect lewd conduct involving different-sex couples as compared to same-sex couples; and the permissibility of a law enforcement scheme dependent upon a discriminatory pattern of complaints.

III. Compliance with California Rule of Court 8.882(d)

No party and no counsel for any party authored the proposed amicus brief, in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. In addition, no person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than amicus curiae, its members, or its counsel in the pending appeal.

Based on the foregoing, Lambda Legal respectfully requests that the Court grant its application for leave to file an *amicus curiae* brief.

DATED: April 19, 2012

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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Summary of Argument

Amicus curiae Lambda Legal Defense and Education Fund, Inc. submits this brief to highlight four points directly bearing on the issues before the Court but that have not been the focus of prior briefing by the parties.

1. Because the sting operation at issue in the four appeals being considered together by the Court targeted only gay men or men perceived as gay, the sting and subsequent prosecutions necessarily involved a sexual orientation-based government classification. As such, and in order to survive the strict scrutiny required under the California Constitution's Equal Protection Clause, the actions of the police must have been necessary to advance a compelling government interest and not merely rationally related to a legitimate government interest.

2. The sting operation was not, in fact, narrowly tailored to achieving its ostensible objective of deterring lewd conduct. To the contrary, from start to finish, the preparation, manpower, and sheer aggressiveness of the sting operation was wholly discontinuous with the supposed problem of lewd conduct between men, and it was also unparalleled to any comparable law enforcement action against different-sex couples. It was thus both overinclusive and underinclusive in its reach. It was overinclusive by attempting to generate arrests for indecent exposure, even though the alleged problem was lewd conduct, purely so that defendants could be punished with the most draconian of sanctions—lifelong sex offender registration. And it was underinclusive by allowing different-sex couples to escape punishment entirely despite likewise engaging in lewd conduct.

3. Multiple witnesses testified that lewd conduct between different-sex couples was a common occurrence in Palm Springs. Indeed, the police were aware of lewd conduct involving different-sex couples at specific locations, including at a water park, where children were far more likely to be present than in a neighborhood populated by gay resorts at nighttime. However, the police did not investigate those incidents using covert surveillance, which it had employed

during a two-week investigation into Warm Sands and which led to the sting operation. Instead, police only used overt surveillance (e.g., officers in full uniform on patrol) of the locations where public heterosexual sexual conduct was taking place, which, predictably, failed to uncover lewd conduct.

4. The People have relied almost exclusively on the existence of private complaints to justify its one-sided focus on targeting lewd conduct between men rather than between different-sex couples. But where, as here, the public is aware of both different-sex and same-sex public sexual activity, and yet only makes complaints about the latter, the government cannot rely on complaints to excuse its discriminatory enforcement of the law.

I. Statement of Facts

A. Background

i. Arrests Prior to the Sting Operation

In the two years prior to the June 2009 sting operation in the Warm Sands neighborhood of Palm Springs that gave rise to the arrests that are the subject of the four appeals now before the Court, the overwhelming majority of arrests for lewd conduct or indecent exposure arose from instances of "flashing," where a man intentionally exposed himself to women or children. (Def. Ex. B, Decl. of T.J. Johnson.) There were no arrests for consensual public sexual conduct between a man and a woman, even though the police and the general public came across such conduct frequently. (Jan. 20, 2011 Tr. at 126[1]; *see infra*, I.D.) There were three incidents leading to arrest for consensual public sexual conduct between same-sex couples. In two of these incidents, the police initiated independent action without a private complainant. (Def. Ex. B, Decl. of T.J. Johnson (describing one incident in 2007 where a police officer traveled to Warm

[1] Because this amicus brief is being filed in four separate (although related) appeals that have separate records, the citations in this brief refer, where appropriate, to the date of testimony and the pagination on transcripts originally prepared by court reporters, which are part of the record of all four appeals, rather than the record pages in any one of the appeals.

Sands looking for public sex and another incident in 2008 where a police officer arrested two men who were inside a truck).) The other incident was brought to the attention of the police by a janitor, who came across two men in a bathroom stall. (*Id.*)

ii. Complaints Prior to the Sting Operation

The genesis of the sting operation was a June 2, 2009 email from a member of the Warm Sands neighborhood association to a city councilmember responding that illegal drugs and prostitution were again present in the neighborhood, in response to the councilmember's earlier inquiry regarding those issues. (Jan. 20, 2011 Tr. 60-61.) The email stated that there was "sex trade" in Warm Sands, and the neighborhood association member testified that he was indeed referring to prostitution, not non-commercial sexual acts. (Jan. 20, 2011 Tr. 94, 105 ("I am just so pissed off how that [email] was so misinterpreted, so twisted. And how could you get a sting put together in two weeks through an e-mail. They were looking for a scapegoat.").)

On June 3, 2009, the email was relayed to Lieutenant Dennis Graham, who testified that he interpreted "sex trade" as referring to consensual public sexual conduct between men (Jan. 21, 2011 Tr. 197), even though police officers regularly use the term "sex trade" to refer to prostitution. (*See, e.g.*, Tetreault, *Las Vegas Officer Testifies on Efforts to Help Sex Trade Victims*, Las Vegas Review-Journal (April 14, 2012) available at http://www.lvrj.com/news/las-vegas-officer-testifies-on-efforts-to-help-sex-trade-victims-147424045.html?ref=045.) Lt. Graham did not speak to the neighborhood association member regarding the email, even though the lieutenant knew the association member and even though the association had never previously complained to Lt. Graham or any other police officer regarding same-sex lewd conduct during the preceding two years. (Jan. 21, 2011 Tr. 225.) Ultimately, the trial court concluded that the email "probably really wasn't" a complaint regarding consensual public sexual conduct between men in Warm Sands. (Feb. 2, 2011 Tr. 113.)

Apart from the email, Lt. Graham testified that he had only received two other complaints, both verbal, regarding public sexual conduct in Warm Sands. One was a phone call from a woman who said that she was walking her dog and saw a male couple engaged in public sexual conduct. (Jan. 21, 2011 Tr. 213-214.) The other was made by a man after a community meeting for the Baristo neighborhood. (Jan. 21, 2011 Tr. 210.) However, the email regarding "sex trade" was what prompted Lt. Graham to take action with respect to Warm Sands. (Jan. 21, 2011 Tr. 243.)

B. The Sting Operation

i. Preparation for the Operation

After receiving the email regarding "sex trade," Lt. Graham began conducting internet research about gay men engaged in public sexual conduct in Warm Sands. (Jan. 21, 2011 Tr. 233-234.) He had never conducted internet research on where heterosexuals might have had public sex in Palm Springs, nor had he ever heard of any other police officer conducting such research directed toward heterosexuals. (Jan. 21, 2011 Tr. 234.)

Sergeant Bryan Anderson, who was working with Lt. Graham, launched an investigation into Warm Sands within days. (Jan. 26, 2011 Tr. 85-86.) For approximately two weeks, Sgt. Anderson conducted nighttime surveillance of the Warm Sands neighborhood. (Jan. 24, 2011 Tr. 302; Jan. 26, 2011 Tr. 93.) On each night of his investigation, he would conduct surveillance, leave for a meal break, and then return to the neighborhood for additional surveillance. (Jan. 26, 2011 Tr. 93.)

Sgt. Anderson knew that he wanted to conduct an undercover sting operation using decoys as soon as the Warm Sands assignment came to him, and he had previously worked as an undercover police officer for approximately a decade. (Jan. 26, 2011 Tr. 77, 168.) Even though it was nighttime, he used an unmarked car on multiple occasions and wore plainclothes in order to ensure that he would go detected during the investigation. (Jan. 26, 2011 Tr. 92-93.)

Although he observed men engaged in public sexual conduct, he did not make any arrests at the time because he feared that doing so would deter future public sexual conduct and therefore reduce the impact of a subsequent sting operation. (Jan. 26, 2011 Tr. 90.) He felt that there would be greater deterrent value generated by publicity from a press conference following a sting operation. (Jan. 27, 2011 Tr. 196.)

Lt. Graham also initially testified that he believed the sting was necessary to deter public sexual conduct because prior arrests had failed to deter the conduct at issue; but he later admitted that his understanding of those prior arrests was not born out in police records of the two years that preceded the sting operation. (Jan. 24, 2011 Tr. 317.) Indeed, the police had previously established a policy that, prior to commencing a sting operation, it would give notice to nearby hotel owners, so that they could attempt to help curb any public sexual conduct without the necessity of resorting to a sting operation. (Jan. 26, 2011 Tr. 11-12, 15.) That policy was not followed here. (Jan. 26, 2011 Tr. 25.)

ii. Execution of the Operation

A total of 15 officers, including the chief of police, participated in the Warm Sands sting operation across four nights in June 2009. (Feb. 2, 2011 Tr. 74.) The sting operation targeted "either gay men or men who would be perceived to be gay" on a block populated with gay resorts, (Jan. 21, 2011 Tr. 207), and resulted in the arrest of 19 men for lewd conduct and indecent exposure, (Def. Ex. B, Decl. of T.J. Johnson.). These men were approached by male decoy officers on a walkway from private resorts to parking spaces. The police were able to observe the conduct using night vision video recording equipment from a nearby vehicle. (Jan. 25, 2011 Tr. 428; Feb. 2, 2011 Tr. 6.) The operation cost the city thousands of dollars per day. Jan. 26, 2011 Tr. 51. Given the location and time of day, there were no women or children present. (Jan. 25, 2011 Tr. 420, 527-28.)

A typical interaction during the sting would involve male decoy officers conversing with men whom they encountered and making statements such as

"show me what you got." (Jan. 26, 2011 Tr. 126-27.) At one point, Sgt. Anderson acted as a decoy and took off his shirt. (Jan. 25, 2011 Tr. 125.) The decoy officers allowed the suspects to touch the officers' bodies, including their genitals over clothing. (Jan. 25, 2011 Tr. 486.) One decoy officer also simulated masturbation. (Jan. 25, 2011 Tr. 509-510.)

The police decoys, however were instructed not to terminate their engagement of suspects even after the elements of a lewd conduct violation had been satisfied; instead, they were instructed to continue engaging suspects until they believed the elements of indecent exposure, an offense for which lifelong sex offender registration could be ordered, were satisfied. (Jan. 25, 2011 Tr. 422; Jan. 27, 2011 Tr. 218.) An expert for the defendants testified that the police officers' continued goading of suspects to commit indecent exposure, even after acts of lewd conduct had occurred, "showed a mindset of clear animus that [he had] seen nowhere in the state of California in 30 years." (Jan. 20, 2011 Tr. 127.)

While inside the police vehicle recording the sting operation, Sgt. Anderson asked, "Are you a cocksucker?" and then answered, "Yes sir I am." (Jan. 21, 2011 Tr. 290-291.) Multiple officers laughed at the remarks. (Jan. 26, 2011 Tr. 137-138.) Sgt. Anderson testified that he made the remark because he thought it was funny. (Jan. 26, 2011 Tr. 161.) He did not believe that it was derogatory. (*Id.*) Indeed, he also did not believe it was even unprofessional. (Jan. 26, 2011 Tr. 139.) Another officer felt that the use of "cocksucker" was merely "lockerroom talking" and disagreed that it was a "gay slur." (Jan. 25, 2011 Tr. at 468, 472.) However, the officer who had caught the sergeant's comments on tape then turned off his camera and asked the sergeant if he would like for his comments to be erased. (Jan. 26, 2011 Tr. 40; Feb. 2, 2011 Tr. 21 (confirming that his "intent when [he] said, dub over, tape over, was to get rid of it so you couldn't hear it on the tape").)

On one evening, the chief of police joined the sting operation. After observing the suspects, the police chief stated that "these are some filthy

motherfuckers." (Jan. 25, 2011 Tr. 515.) He later explained: "I felt dirty, and I said these guys are filthy." (Jan. 27, 2011 Tr. 320.) Although he had previously seen murderers, rapists, drug addicts, and prostitutes during his career, "nothing else in 31 years shocked [him] to the point of making a [similar] comment." (Jan. 28, 2011 Tr. 370-371.)

C. Prosecution

After the sting operation, Lt. Graham and Sgt. Anderson met with the deputy district attorney "to insure that the suspects . . . be required to register as sex offenders; the one penalty that seems to have a lasting impact on this type of criminal behavior." (People's Opp. to Vanderlinden Mot. to Compel, Graham Decl., Ex 3 (filed Jun. 8, 2010) (email from Graham to Dominguez).) Sgt. Anderson was confident that the only way to deter similar future conduct was to have the men register as lifelong sex offenders, and that would only happen if they were convicted for indecent exposure. In his words, "I knew how to stop it." (Jan. 26, 2011 Tr. 106.) He wanted to ensure that the charges would not be pled down to lesser charges, because he did not want to continue working as a decoy attracting other men, even though he had also previously worked as a "John" in prostitution stings. (Jan. 26, 2011 Tr. 136 (explaining that he had an "uncomfortable feeling" participating in the operation); Jan. 26, 2011 Tr. 169 (explaining that he did not want charges pled down because "I do care when I'll have to be doing it again next month or next year").)

D. Public Sexual Conduct by Different-Sex Couples

Sgt. Anderson understood that "People say, 'Hey there [are] heterosexuals having sex out there all the time.'" (Jan. 26, 2011 Tr. 177.) But, as a heterosexual, he disagreed with that accusation: "No we don't." (*Id.*)

In fact, however, there were several reports of different-sex couples engaged in lewd conduct, including from testifying officers. One officer testified that he had seen public heterosexual sex so many times that he "wouldn't be able to tell you a limit to it" and that he had seen it a minimum of 10 times in his four

and a half years at the police department. (Jan. 25, 2011 Tr. 481.) Other officers had similarly seen public sexual activity between different-sex couples. (Jan. 25, 2011 Tr. 408 (officer had seen different-sex couples having sex in a car or other public location); Jan. 25, 2011 Tr. 508 (officer had seen male-female couples having sex or having just finished having sex in public locations).)

There were also specific public locations that attracted sexual activity between different-sex couples. A security guard who worked at a local water park observed daily instances of different-sex couples fondling and groping each other's private parts in public and 15-20 instances of couples having sex in public in only two months. (Smith Decl. ¶ 5.) She also observed two occasions where different-sex couples were engaged in sexual intercourse in the wading pool, which was only an inch or two in depth. (*Id.* ¶ 4.) A security guard at a local parking garage also testified that, although he had only worked at the garage for ten months, he witnessed over 100 instances of different-sex couples engaged in public sexual conduct. (Jan. 20, 2011 Tr. 159.) In addition, the city had previously received complaints about different-sex couples in bathrooms at Brute Hardy Park. (Jan. 26, 2011 Tr. 39.)

The police were aware of the situation at the water park and parking garage at least as of June 2010, when media began reporting on it. (Jan. 21, 2011 Tr. 237.) Lt. Graham sent officers in uniform to the water park to observe whether different-sex couples were engaged in lewd conduct, but they did not find any such activity. (Jan. 24, 2011 Tr. 313-314.) Similarly, he sent uniformed officers in marked cars to the parking garage to observe whether different-sex couples were engaged in lewd conduct, but they did not find any such activity. (*Id.*)

Apart from prostitution, the police have never conducted a sting operation against heterosexuals for engaging in public sexual conduct—whether merely using covert surveillance or using police officer decoys. (Jan. 21, 2011 Tr. 181.) The People agree, however, that a sting operation using female decoys could be

used to entice heterosexual men into lewd conduct. (Feb. 2, 2011 Tr. 109-110 ("certainly they could talk somebody into doing that").)

II. Legal Standard for Discriminatory Enforcement

Like the U.S. Constitution, the California Constitution safeguards to all individuals the right to equal protection of the laws. Equal protection protects "individuals from 'intentional and purposeful' invidious discrimination in the enforcement of all laws, including penal statutes and [permits] a defendant . . . [to] raise such a claim of discrimination as a ground for dismissal of a criminal prosecution." (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 293.) "Neither the federal nor state Constitution countenances the singling out of an invidiously selected class for special prosecutorial treatment." (*Id.* at p. 290.) Discriminatory enforcement need not originate from a "specific intent to punish the defendants for their membership in a particular classification." (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 831.) Rather, a defendant must merely show that he was selected for prosecution on the basis of an invidious criterion and that the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities. (*Id.* at p. 832.) If those circumstances exist, "a basic constitutional principle has been violated, and such prosecution must collapse upon the sands of prejudice." (*Murgia*, 15 Cal.3d at p. 290.)

A defendant need not be innocent of the crime charged to obtain dismissal on these grounds. The guarantee of equal protection forbids the government from enforcing the penal code against even those who have violated the law if they were selected for prosecution on invidious grounds. (*Id.* at pp. 295-296.) If the law has not been enforced in an even-handed manner, the constitutional command for equal protection outweighs the consequences of dismissing what may be provable charges.

III. Argument

A. The Sting Operation Targeted Gay Men and Therefore Must Survive Strict Scrutiny, Not Mere Rational Basis Review, Under the California Equal Protection Clause.

Under the California Constitution, all government action that treats individuals differently on the basis of their sexual orientation must be able to survive strict judicial scrutiny. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 784.) "Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute [or other government conduct] that embodies such a classification." (*Id.* at p. 844.) That is especially true in the context of lewd conduct laws, which California courts have tended to view with suspicion due to their checkered history of descent from "archaic vagrancy statutes which were designedly drafted to grant police and prosecutors a vague and standardless discretion." (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 248.) The California Supreme Court has expressly acknowledged that there is a pronounced "potential for discriminatory enforcement" of lewd conduct laws, which "may serve as a vehicle for harassment of citizens based on their . . . sexual orientation." (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 401.)

There can be no question that the law enforcement operation here targeted gay men, or men perceived as such, given that the police used male police officer decoys to entice exclusively male suspects and carried out the sting operation in a location near gay resorts that they believed would attract gay men. The People assert that "illegal behavior [was] what was targeted; not homosexual men per se." Respondent's Br. 8. But the "illegal behavior" targeted was only "illegal behavior" involving men with men, while "illegal behavior" between men and women was not targeted. The U.S. Supreme Court has rejected the fiction that

targeting sexual conduct between men is any different than targeting gay men. (*Christian Legal Soc'y v. Martinez* (2010) 561 U.S. --, 130 S.Ct. 2971, 2990 (finding no difference between policy of discriminating against lesbian and gay individuals versus individuals engaged in "unrepentant homosexual conduct" and explaining that the Court has refused "to distinguish between status and conduct in this context").) The California Supreme Court in *In re Marriage Cases* likewise recognized that when the government targets same-sex conduct such as marriage of same-sex couples, it targets gay people. (43 Cal.4th at p. 839.) When the People similarly argued below, as they do here, that "the sting wasn't directed to homosexuals, per se, [it] was directed toward certain acts which happened to be involved with homosexuals," the trial court correctly rejected that argument as "[a] distinction without a difference." (Jan. 21, 2011 Tr. 191.)

To survive strict scrutiny, the government must (1) articulate a compelling state interest in order to justify differential treatment on the basis of sexual orientation and (2) demonstrate that its differential treatment is necessary to advance that interest. (*In re Marriage Cases*, 43 Cal.4th at 784.) This applies both to laws that discriminate on their face and to the unequal enforcement of facially neutral laws. (*See Yick Wo v. Hopkins,* (1886) 118 U.S. 356, 373-374 ("Though the law itself be fair and impartial on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal protection is still within the prohibition of the Constitution."); *Bowers v. Hardwick* (1986) 478 U.S. 186, 202 n.2 (Blackmun, J., dissenting) (noting that the People's "interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement").)

In *Baluyut*, which preceded the California Supreme Court's recognition that strict scrutiny is required for sexual orientation-based classifications, the Court

found that the sting operation "designed to ferret out homosexuals or those who were likely to engage in homosexual acts . . . did so *without any relationship* to the alleged problems." (*Baluyut*, 12 Cal.4th at p. 830-831 (emphasis added).) In other words, the police conduct in *Baluyut* failed even rational basis review under the Equal Protection Clause. The trial court applied this same standard here in finding that the law enforcement operation "did have a, quote, rational relationship to a legitimate law enforcement interest, unquote." (Feb. 2, 2011 Tr. 122.) Given the California Supreme Court's ruling in *In re Marriage Cases*, however, it is now clear that government action differentiating on the basis of sexual orientation must do more than bear "any relationship" to the state's interest; it must be narrowly tailored to achieve that interest and employ no more differential treatment than absolutely necessary to achieve that interest.

Because the trial court failed to apply to proper legal standard, this Court's duty is to undertake an independent review of the trial court's decision and apply the correct legal standard of strict judicial scrutiny. *See People v. Bonilla* (2007) 41 Cal.4th 313, 342 (holding that independent appellate review is appropriate to "apply the high court's standard and resolve the *legal* question [of] whether the record supports [discrimination]") (internal quotation marks omitted and emphasis in original); *People v. Brunette* (2011) 194 Cal.App.4th 268, 276 (holding that whether "the lower court applied an incorrect legal standard is tantamount to independent or de novo review"); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal.App.4th 734, 745 ("To the extent the trial court's ruling is based on assertedly improper criteria or incorrect legal assumptions, we review those questions de novo.") (internal quotation marks omitted).

B. The Sting Operation Targeted Only Gay Men With the Purpose of Securing Sex Offender Registration For Indecent Exposure And Was Not Narrowly Tailored to Address the Alleged Problem of Lewd Conduct.

While the People may possess a compelling interest in stemming lewd conduct, it is not necessary or even rational to wield law enforcement tools against

only gay men in order to address conduct in which *both* different-sex and same-sex couples are engaged and to seek a punishment—lifelong sex offender registration—that can only be attached to the greater offense of indecent exposure, which was not even the problem purportedly at issue. The police department's failure to take comparable action against different-sex couples renders its law enforcement actions unacceptably underinclusive of the alleged problem of lewd conduct that it sought to address. There was no requisite narrow tailoring between, on the one hand, the law enforcement operation employed by the police and, on the other hand, the ends it allegedly sought to achieve. Indeed, the very document that gave impetus for the entire sting operation—an email complaining of "sex trade"—did not even reference lewd conduct at all but was instead referring to prostitution. (Feb. 2, 2011 Tr. 113.)

"[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer v. Evans* (1996) 517 U.S. 620, 633 (internal quotation marks omitted). For example, the "imposition of especially harsh and atypical" punishment, the use of "slurs . . . by law enforcement officials," and "incidents of intrusive surveillance," taken together, indicate the presence of discriminatory intent. (*Murgia,* 15 Cal.3d at p. 292. *See also Pryor*, 25 Cal.3d at 252) (noting that police have historically selected "techniques and locations of enforcement designed to detect a disproportionate number of male homosexuals"); *In re M.S.* (1995) 10 Cal.4th 698, 708, 728 (use of anti-gay epithets established "prohibited bias motivation").)

Multiple indicia of discriminatory intent were present here. The *raison d`etre* for the sting was to generate offenses for which gay defendants would be forced to register as a lifelong sex offenders and to garner the greatest possible media attention so the gay men who were arrested would serve as public examples to others. (Jan. 26, 2011 Tr. 106.) (Sgt. Anderson: "I knew how to stop it."). The decoy officers were instructed not to terminate their engagement of suspects, even

when the elements of lewd conduct had been satisfied, because only an indecent exposure charge would lead to lifelong sex offender registration. This practice, according to defendants' expert, "showed a mindset of clear animus that [he had] seen nowhere in the state of California in 30 years," (Jan. 20, 2011 Tr. 127.), and it was one that police had never directed toward heterosexual men, even though they could have done so (Jan. 26, 2011 Tr. 210-211). The officers who conceived and executed the sting operation also did everything in their power to ensure that the gay men arrested would not be shown leniency, including by requesting special meetings with prosecutors. (Jan. 26, 2011 Tr. 106.)

The police department went to extraordinary lengths in carrying out the sting operation, in sharp contrast to the steps it took to address the problem of lewd conduct between different-sex couples (*see infra* III.C). Within days of receiving the email regarding "sex trade," Sgt. Anderson embarked upon an intensive two-week investigation in Warm Sands. (Jan. 24, 2011 Tr. 302.) A substantial portion of the entire police force—15 officers, including the chief of police—then participated in a sting operation that spanned four nights, consumed thousands of dollars, and required the use of night vision video recording equipment. (Jan. 20, 2011 Tr. 15) (defense counsel noting testimony from 15-20 percent of the Palm Springs Police Department).

The police officers insisted that the sting operation was an option of "last resort" because other options had failed. But, in fact, other options had not even been attempted in the two years that preceded the sting operation. Indeed, immediately before the sting operation, Sgt. Anderson declined to arrest men that he observed engaging in lewd conduct even though he recognized that would have a deterrent effect, because he preferred instead to bundle multiple arrests together through the sting operation and maximize publicity. (Jan. 27, 2011 Tr. 196.) Likewise, although the police department had instituted a policy of giving local hoteliers notice of potential sting operations so that they could help to curb any public sexual conduct, the police failed to follow that here. (Jan. 26, 2011 Tr. 25.)

Furthermore, as captured by on tape, multiple police officers used anti-gay language. Sgt. Anderson, for example, used "cocksuckers" to elicit laughter from his colleagues, and he would not even agree that his use of the word was unprofessional, let alone derogatory. (Jan. 26, 2011 Tr. 139.) In that sense, he was following the lead of his police chief, who referred to the gay men arrested as "filthy motherfuckers." (Jan. 25, 2011 Tr. 515; Feb. 2, 2011 Tr. 116 (Judge Downing: "[t]he chief sets the tone of the organization.")) In short, there was substantial evidence of a discriminatory law enforcement response targeting gay men.

C. The Police Largely Ignored Rampant Lewd Conduct Between Different-Sex Couples, In Contrast to Their Aggressive Response to Alleged Lewd Conduct Involving Gay Men.

The tactics employed by the police during the Warm Sands sting operation—including the deployment of a large fraction of the police force costing thousands of tax payer dollars, the use of night vision recording equipment, a police chief ride-along, and special entreaties to prosecutors for lifetime sex offender registration—are particularly suspect, because gay men—the only ones targeted and arrested—were not the only individuals engaged in lewd conduct in Palm Springs. There was substantial, uncontroverted evidence from police officers themselves of abundant lewd conduct between different-sex couples in the city. One officer had seen it so many times that he "wouldn't be able to tell you a limit to it" (Jan. 25, 2011 Tr. 481); an employee at the parking garage had seen at least 100 instances of such different-sex conduct, including in the wading pool (Jan. 20, 2011 Tr. 159.); and another employee at the water park saw daily instances of different-sex lewd conduct (Smith Decl. ¶¶ 4-5).

The police did not arrest any of the different-sex couples engaged in lewd conduct in the two years that preceded the Warm Sands operation, although they did occasionally arrest similarly situated same-sex couples. (*See, e.g.*, Def. Ex. B, Decl. of T.J. Johnson.) Indeed, Sgt. Anderson reported that in his 26 years of

experience, he had never once heard of a lewd conduct arrest involving a different-sex couple. (Jan. 27, 2011 Tr. 203.)

This was not mere "laxity of enforcement." (Respondent's Br. 8 (citing *Baluyut*, 12 Cal.4th at p. 832).) Instead, police made a conscious choice to devote substantial law enforcement resources to tackle the supposed problem of gay men engaged in lewd conduct at a particular location (Warm Sands) based on an irrelevant email regarding "sex trade;" but they affirmatively chose not to devote similar resources to tackle the problem of heterosexual couples engaged in lewd conduct at particular locations (the water park and parking garage) despite eyewitness testimony from individuals regularly employed at those locations. Indeed, given the substantially greater likelihood that children might witness different-sex couples engaged in lewd conduct at a water park in the daytime, as opposed to in a neighborhood populated with gay resorts late at night, the police department's focus on Warm Sands suggests a discriminatory design in the enforcement of lewd conduct. Nineteen arrests of gay men or men perceived as such—versus zero corresponding arrests of heterosexuals—do not occur by happenstance.

Although police officers patrolled the water park and parking garage in response to media reports that surfaced after the Warm Sands sting regarding different-sex lewd conduct at those locations, the police response was fundamentally different than that in Warm Sands. With respect to the water park and parking garage, the police department only ever used overt surveillance—that is, where police officers in full uniform would patrol either in marked cars or on foot looking for lewd conduct. (Jan. 24, 2011 Tr. 313-314.) It is unsurprising that the visible presence of a uniformed police officer in the middle of a water park (where most customers are presumably dressed in bathing suits) would likely deter illegal conduct in the first instance. (*See* Fishman, *Electronic Tracking Devices and the Fourth Amendment: Knotts, Karo, and The Questions Still Unanswered* (1985) 34 Cath. U. L.Rev. 277, 279. ("[S]urveillance has two basic forms: overt

and covert. Overt surveillance has its uses. The visible presence of a uniformed police officer, for example, usually deters the would-be criminal, if only temporarily. Covert visual surveillance, on the other hand, . . . enables the investigator to catch the perpetrator in the act of committing a crime").)

In contrast, however, for at least some portion of his investigation of Warm Sands, Sgt. Anderson used covert surveillance by driving an unmarked car and dressing in plainclothes. (Jan. 25, 2011 Tr. 92-93.) Likewise, whereas Lt. Graham merely sent patrols to the water park and parking garage, he took it upon himself to conduct internet research on Warm Sands, and Sgt. Anderson undertook a two-week, full-time, nighttime stakeout of Warm Sands. Thus, while the police seized at the first chance to launch a resource-intensive sting operation against lewd conduct involving men, they refused to take action of any comparable scope or nature against lewd conduct involving different-sex couples.

D. The Police May Not Give Effect to Private Bias By Basing Law Enforcement Responses on Private Complaints Made in a Discriminatory Manner.

The crux of the People's response to the charge of discriminatory enforcement is that the police were merely acting in response to private citizen complaints of consensual public conduct between men.[2] The district attorney explained to the trial court that "it does seem that everyone gets a free pass to play in Palm Springs. Unless there are some complaints. And when there are complaints, everyone is treated the same way." (Feb. 2, 2011 Tr. 110.)

However, where private citizens complain of lewd conduct between same-sex couples, and not of lewd conduct between different-sex couples, even though both occur, the state becomes an agent of private bias in violation of equal protection, if it acts upon such unequal complaints. (*See People of the State of*

[2] Complaints, of course, are only one way in which police may acquire knowledge of the potential existence of unlawful conduct. The police were also aware of different-sex lewd conduct at the water park and parking garage through the sworn testimony of employees at those locations and corresponding media reports.

New York v. Acme Markets, Inc. (N.Y. Ct. of App. 1975) 37 N.Y.2d 326, 330-331 (holding that a police policy of responding to complaints "invit[ed] discrimination . . . of one group by another" and violated the federal and state equal protection clauses where complaints were not made equally about individuals in other groups violating the law); *People of the State of New York v. Fay's Drug Co.* (Justice Ct. of N.Y. 1971) 68 Misc.2d 143, 147 (holding that the "wide-spread violation of th[e] statute" coupled with the prosecution of only one group because of private complaints "indicates the clearest possible case of discriminatory enforcement"). *See also Simonetti v Birmingham* (Ala. Ct. of Crim. App. 1975) 55 Ala.App. 163, 175 (holding that where the police "adopt a policy of acting *only on complaints* . . . the police officers unwittingly become the 'agents' of anonymous callers in making investigations and arrests in a discriminatory, shocking and appalling manner"); *People of the State of New York v. Tornatore* (City Ct. of N.Y. 1965) 261 N.Y.S.2d 474, 478 (holding that where a defendant is prosecuted based on a private complaint and other individuals are left unprosecuted because no complaints are made against them, the state "place[s] its power, property and prestige behind the discriminatory enforcement of the statute in question").)

California courts have expressly recognized that one actor may convert another actor into a "cat's paw" for discrimination. *Reeves v. Safeway Stores* (2004) 121 Cal.App.4th 95, 113-116 (noting, in the context of employment discrimination, that "it is not enough to show that one actor acted for lawful reasons when that actor may be found to have operated as a mere instrumentality or conduit for others who acted out of discriminatory or retaliatory animus."); *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551-552 (holding that discrimination may not be conceived of as existing in a "watertight compartment, with discriminatory statements in the course of one decision somehow sealed off from . . . every other decision"). The U.S. Supreme Court has likewise explained that, while the Constitution cannot control private prejudice, "neither can it tolerate them. Private biases may be outside the reach of the law, but the law

cannot, directly or indirectly, give them effect." *Palmore v. Sidoti* (1983) 466 U.S. 429, 433.

Here, the general public did not complain to the police about consensual sexual conduct between different-sex couples, despite uncontroverted testimony that such activity is rampant, open, and notorious. (Jan. 20, 2011 Tr. 159; Jan. 25, 2011 Tr. 480-481; Smith Decl. ¶¶ 4-5.) The general public's reaction mirrors that of the police, who invariably turned a blind eye when they came upon lewd conduct involving different-sex couples. (*Id.*) It was immaterial where the conduct occurred—in broad daylight with children abound at a water park, in a parking garage surrounded by other cars and passersby, or in a public restroom at a public park. It was also immaterial who witnessed the conduct—security guards, police officers, or members of the public who read about such conduct in the newspaper. The response to consensual heterosexual conduct was always one of deafening silence, as evidenced by the number of corresponding arrests for such conduct: zero.

In contrast, however, there were members of the public willing to make complaints about consensual same-sex conduct, as well as members of the police department willing to interpret complaints as addressing such conduct, even when they did not. Thus, while the security guard at the water park observed *daily* instances of other lewd conduct between different-sex couples, not a single person contacted police on any of those occasions; by contrast, the woman walking her dog who once saw a gay male couple in Warm Sands made sure that her complaint reached the lieutenant on duty. (Jan. 21, 2011 Tr. 213-214.) The system adopted by police that "everyone gets a free pass to play in Palm Springs"—except for those who are the subject of complaints—yields unconstitutional results where, as here, it has been coupled with a discriminatory pattern of complaints. Pursuant to that system, "the public authorities [may have] had no choice but to make the arrest and prosecute this action, yet, nevertheless, by such an action, the State was placed in a position of a joint participant" in the discriminatory conduct.

Tornatore, 261 N.Y.S.2d at p. 478. Because the police launched the Warm Sands investigation and sting operation based on wholly lopsided complaints against only gay men, any subsequent evidence or arrests attained from the operation are the products of discriminatory conduct and must be set aside.

IV. Conclusion

For the reasons set forth above, *amicus curiae* respectfully urges this Court to find that the sting operation convictions at issue in this appeal and the ensuing arrests were the result of discriminatory prosecution, and reverse the convictions for the defendants whose appeals are presently before the Court.

DATED: April 19, 2012

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Cal. Rules of Court, rule 8.883(b)(1) because it contains 6,739 words, excluding the parts of the brief exempted by Cal. Rules of Court, rule 8.883(b)(3), and the application.

2. This brief complies with the typeface requirements of Cal. Rules of Court, rule 8.883(c)(2) and the type style requirements of Cal. Rules of Court, rule 8.883(c)(3) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 13-point Times New Roman type style.

DATED: April 19, 2012

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