

No. A154612

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

JAY BROME,

Plaintiff-Appellant,

vs.

CALIFORNIA HIGHWAY PATROL,

Defendant-Respondent.

Appeal from the Superior Court of the State of California,
County of Solano, Case No. FCS047706, Hon. Michael Mattice

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND
PROPOSED BRIEF OF AMICI CURIAE NATIONAL CENTER FOR
LESBIAN RIGHTS ET AL. IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208(d), the National Center for Lesbian Rights and all amici curiae certify that there are no interested entities or persons that must be listed under Rule 8.208(e).

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APPLICATION TO FILE AMICI CURIAE BRIEF

TO THE HON. BARBARA J.R. JONES, PRESIDING JUSTICE OF
DIVISION FIVE OF THE FIRST DISTRICT COURT OF APPEAL:

Pursuant to California Rules of Court, Rule 8.200(c), proposed amici curiae National Center for Lesbian Rights, Equality California, GLBTQ Advocates & Defenders, Lambda Legal Defense and Education Fund, Inc., National Center for Transgender Equality, and the San Francisco LGBT Center respectfully request leave to file the accompanying amicus curiae brief in support of Appellant Jay Brome.

Amici are nonprofit legal organizations dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people in California and nationwide. The proposed brief will assist the Court in its consideration of this case by providing additional context on the issues in this case, including the history of homophobia and anti-LGBT bias in law enforcement, the resulting effects on LGBT officers, and the implications for public safety.

In accordance with California Rules of Court, Rule 8.200(c)(3), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief's preparation or submission. No person or entity other than counsel for the proposed amici

made a monetary contribution intended to fund the preparation or submission of this brief.

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INTERESTS OF PROPOSED AMICI CURIAE

The **National Center for Lesbian Rights (NCLR)** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in eradicating discrimination against LGBT people in law enforcement—in the context of employment and police practices—and represents LGBT people in cases relating to employment discrimination and challenging discriminatory conduct by governmental entities in courts throughout the country.

Equality California (EQCA) is the nation's largest statewide lesbian, gay, bisexual, transgender and queer (LGBTQ) civil rights organization. Equality California brings the voices of LGBTQ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. The organization advances civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those it serves. Equality California frequently participates in litigation in support of the rights of LGBTQ people.

Through litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders (GLAD)** seeks to promote a just society and to eradicate discrimination based on gender identity and expression, HIV status, and sexual orientation in New England and nationally. Since 1978, GLAD has litigated widely on discrimination against LGBT people including in law enforcement, policing, and prisons, as well as in employment and school contexts, in state and federal courts and at administrative agencies. GLAD also provides information and resources to the LGBT community about their legal rights when interacting with law enforcement and corrections.

Lambda Legal Defense and Education Fund, Inc. 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 people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal actively litigates and advocates for fair and equal treatment of LGBT people and people living with HIV by law enforcement and in prison. (*See, e.g., Lawrence v. Texas* (2003) 539 U.S. 558; *Hamm v. City of New York* (S.D.N.Y., 2015, Case No. 1:15-cv-06238).) Additionally, Lambda published *Protected and Served?*, a report detailing the findings of its national survey about discrimination and mistreatment of LGBT people by law enforcement as well as other governmental entities, including schools and prisons.

The **National Center for Transgender Equality (NCTE)**, founded 2003, works to improve the lives of transgender people and their loved ones through public policy, public education, and groundbreaking research. In 2015, NCTE conducted the U.S. Transgender Survey, the largest survey of transgender Americans to date.

The **San Francisco LGBT Center (Center)** connects San Francisco's diverse LGBT community to opportunities, resources and each other to achieve our vision of a stronger, healthier, and more equitable world for LGBT people and our allies. The Center provides free services to community members as well opportunities for LGBT people to connect and organize to secure equal rights for LGBT people.

BRIEF OF AMICI CURIAE

INTRODUCTION

Decades before the police raid that sparked the Stonewall Riots in the summer of 1969 and the modern-day LGBT-rights movement, politicians across the United States began empowering police officers to “save” society from the presumed social ills associated with “homosexuality.” States and localities enacted anti-LGBT laws around the country to target gay men and lesbians with the harshest of penalties—arrest, prosecution, and convictions for simply being who they are. From repression to extortion, police officers used—and abused—these laws in an effort to banish gay men and lesbians from public life, only to then punish them for gathering behind closed doors. The homophobic rhetoric behind those laws embedded itself deep into the culture of law-enforcement agencies, including in the Bay Area and throughout California. Despite the growing acceptance of lesbian, gay, bisexual, and transgender (LGBT) people and strong formal antidiscrimination protections, anti-LGBT bias nonetheless remains a pervasive problem in law-enforcement agencies and among individual officers.

Jay Brome’s account of his twenty-year career mirrors that of other LGBT law enforcement officers in California. Verbal insults, refusals to provide back-up, denials of career opportunities, and other forms of discrimination have plagued LGBT law enforcement officers for decades.

And the anti-LGBT bias within these agencies affects public trust and safety as well. The attitudes that breed anti-LGBT comments and jokes heard throughout the police station follow those officers out into the community. As a result, LGBT community members report remarkably high levels of mistreatment and abuse by police officers, from verbal harassment to discrimination and excessive force. Because of this mistreatment, and the history of discriminatory policing practices, more than half of LGBT people do not trust the police. That lack of trust places the wellbeing of the LGBT community in a precarious situation: despite being the victims of a disproportionate percentage of crimes, LGBT people refuse to report those crimes to the police.

The robust enforcement of California’s anti-discrimination laws—through legal claims like those brought by Mr. Brome—is critical to eradicating unlawful anti-LGBT bias in law enforcement. Access to the courts is essential to creating a better work environment for LGBT officers and improving the relationship between law enforcement and the LGBT community, which also bolsters public safety.

Amici agree with Mr. Brome that the trial court erred in finding Mr. Brome’s claims untimely. Mr. Brome presented sufficient evidence to raise a fact issue as to whether the incidents of discriminatory conduct during the limitations period were “sufficiently similar” to the conduct outside the limitations period. (*Dominguez v. Wash. Mutual Bank* (2008) 168

Cal.App.4th 714, 723-724; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823; *Birschtein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4th 994, 1002; CACI No. 2508.) Amici do not repeat those arguments, but write separately to highlight the history of homophobia and anti-LGBT bias in law enforcement and the critical role the courts play in addressing and eradicating that discrimination.

ARGUMENT

I. Homophobia and anti-LGBT bias in law enforcement have deep, historical roots.

The homophobia and discrimination Mr. Brome experienced throughout his long career with the California Highway Patrol was not a new phenomenon. As discussed below, anti-LGBT bias has a deep history in law enforcement, and in the decades following World War II, many LGBT people were targeted by law enforcement for state-sanctioned discrimination and violence.

LGBT people, particularly gay men, were considered anathema to American society in the decades following World War II.¹ “Politicians associated gay men with poor morals and weak wills,”² ushering in an era of

¹ Agee, *The Streets of San Francisco: Policing and the Creation of a Cosmopolitan Liberal Politics, 1950-1972* (2014) page 74.

² *Ibid.*

increased state regulation—particularly, criminalization—of same-sex attraction. Although this trend began in the 1920s and 1930s, it became a systematic, government-led campaign of discrimination after World War II.³ State and local governments enacted a wide range of laws designed to achieve this goal: sodomy laws targeting same-sex sexual conduct, civil commitment for “sexual deviants,”⁴ alcohol-licensing regulations that prohibited gay men and lesbians from congregating in bars, and many others.⁵ Contrary to its current reputation, California was one of the most repressive, anti-LGBT jurisdictions in the United States.⁶

As legislators enacted laws targeting LGBT people, police departments and other law enforcement agencies built up the infrastructure to enforce those laws. In San Francisco during the 1950s, for example, the

³ Brief of Professors of History as Amici Curiae in Support of Petitioners, *Lawrence v. Texas* (2003, No. 02-102) 539 U.S. 558, 2003 WL 152350 at page *10.

⁴ The American Psychiatric Association officially categorized “homosexuality” as a mental disorder in 1952. Drescher, *Out of DSM: Depathologizing Homosexuality* (2015) 5 BEHAVIORAL SCIENCES 565, 569. But mental health clinicians had subjected LGBT people to dangerous conversion therapy practices for decades—practices that continue to the present day. Mallory et al., *Conversion Therapy and LGBT Youth* (Jan. 2018) pages 1-2 <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf>> (as of Aug. 2, 2019).

⁵ Brief of Professors of History, *supra*, at page *10.

⁶ Agee, *supra*, at page 76.

San Francisco Police Department’s Bureau of Special Services—the unit tasked with addressing the city’s “homosexual problem”⁷—expanded from five to twenty-four officers.⁸ Like similar units in other metropolitan areas, the Bureau of Special Services exploited the vague language of misdemeanors to entrap LGBT people.⁹ Officers and prosecutors pursued misdemeanor charges—such as disorderly conduct, vagrancy, lewdness, and loitering—to embarrass and intimidate LGBT people, and because such charges failed to trigger basic protections typically afforded criminal defendants, such as court-appointed defense attorneys.¹⁰ Police in New York City arrested more than 50,000 men for disorderly conduct between 1923 and 1967 before the Mayor ordered police to cease using this tactic as a way to entrap gay men.¹¹ Other jurisdictions similarly arrested large numbers of LGBT people: the District of Columbia averaged 1,000 arrests of gay men and lesbians per year and Philadelphia reached 1,200 arrests per year.¹²

⁷ Agee, *supra*, at page 98.

⁸ *Id.* at page 76.

⁹ *Id.* at page 76, 79.

¹⁰ Brief of Professors of History, *supra*, at page *13.

¹¹ *Id.* at page *14.

¹² *Id.* at page *19.

The threat of police harassment psychologically terrorized LGBT people in cities across the country, including San Francisco.¹³ Many LGBT people responded by seeking refuge in gay bars tucked into alleyways, basements, and other inconspicuous locations.¹⁴ But the haven created by gay bars was often short-lived. Either the police or the general public would eventually find these bars, which often resulted in trouble for patrons and bar owners alike.¹⁵ Some officers utilized more passive tactics, such as stationing themselves outside of bars in the hope of intimidating LGBT people from even entering.¹⁶ Other officers arrested anyone leaving the bar for any number of misdemeanors, from public drunkenness to disturbing the peace.¹⁷ The San Francisco Police Department, like many other police departments, forwarded the names and occupations of the arrestees to the local paper.¹⁸ In some cases, the arresting officer would directly inform the person's employer

¹³ Agree, *supra*, at page 76.

¹⁴ *Id.* at page 77.

¹⁵ *Id.* at pages 78-80.

¹⁶ *Id.* at page 79.

¹⁷ *Ibid.*

¹⁸ *Id.* at pages 79-80.

of the arrest.¹⁹ As a result, many gay people lost their jobs, were subjected to public shaming, and had a difficult time securing future employment.²⁰

Police also routinely ignored calls from gay bars because, as one SFPD Sergeant recounted, “the police didn’t want to go near [gay people], anyway.”²¹ This left LGBT people further prone to violence and harassment—particularly at lesbian bars, which men frequently targeted to intimidate and attack lesbians.²²

Police raids on gay and lesbian bars in San Francisco continued steadily into the 1960s. In a period of eighteen months, for example, twenty-four of San Francisco’s thirty gay and lesbian bars were forced to close, including all bars that had been involved in a prior sting operation to catch corrupt police officers.²³ Although police raids became less frequent in the mid-1960s, police responded to the increasing momentum of the LGBT-rights movement in the same way they responded to the larger Civil Rights movement: with force, violence, and repression.²⁴ LGBT people continued

¹⁹ *Id.* at page 80.

²⁰ *Ibid.*

²¹ Agee, *supra*, at page 79.

²² *Ibid.*

²³ Agee, *supra*, at page 99.

²⁴ *See, e.g.*, Agee, *supra*, at pages 103-104 (discussing SFPD’s response to the New Year’s Day Ball, a public event hosted by an LGBT organization);

to clash with police in San Francisco and cities around the United States throughout the 1960s and 1970s.²⁵

Given the history detailed above, it is not surprising that two watershed moments in the LGBT civil rights movement involved law enforcement agencies—the Stonewall Riots and the U.S. Supreme Court’s ruling in *Bowers v. Hardwick*. Whereas the former ushered in the modern-day LGBT movement, the latter marked a resurgence of government-sanctioned oppression and discrimination against LGBT people. The role of state and federal courts also changed drastically between the 1960s and 2000s—first by sanctioning discrimination and mistreatment of LGBT people and later by upholding statutory and constitutional protections for LGBT people and their families. California courts in particular have a long history of recognizing and protecting the rights of LGBT people to be free from discrimination.

Niekerken, *SF’s White Night riots’ 40th anniversary: Long-buried photos show a city torn apart*, SF Chronicle (May 22, 2019) <https://www.sfchronicle.com/chronicle_vault/article/SF-s-White-Night-riots-40th-anniversary-13865164.php?psid=fHGdX> (as of Aug. 11, 2019).

²⁵ Broverman, *Don’t Let History Forget Compton’s Cafeteria Riot* (Aug. 2, 2018) The Advocate <<https://www.advocate.com/transgender/2018/8/02/dont-let-history-forget-about-comptons-cafeteria-riot>> (as of Aug. 11, 2019); Grinberg, *How the Stonewall riots inspired today’s Pride celebrations* (Jun. 28, 2019) CNN <<https://www.cnn.com/2019/06/28/us/1969-stonewall-riots-history/index.html>> (as of Aug. 11, 2019).

After the Stonewall Riots—a 1969 police raid on a gay bar in New York City that turned into a two-day riot against police harassment—mistreatment by the police became a rallying cry for the LGBT-rights movement.²⁶ During the 1970s, LGBT people were more visible than ever before—the first television show and a Broadway musical positively portrayed gay people²⁷ and the American Psychiatric Association removed “homosexuality” as a mental illness from the Diagnostic and Statistical Manual of Mental Disorders.²⁸ But that progress was soon eviscerated when, in *Bowers v. Hardwick*, the United States Supreme Court upheld the constitutionality of state sodomy laws targeting same-sex conduct. (*Bowers v. Hardwick* (1986) 478 U.S. 186, 196.)

In 1982, a police officer in Georgia cited Michael Hardwick for “public drinking” when he threw away a beer bottle outside the gay bar where he worked.²⁹ A short time later, the same officer went to Mr. Hardwick’s

²⁶ Rosen, *A Glimpse Into 1970s Gay Activism* (Feb. 26, 1994) The Atlantic <<https://www.theatlantic.com/politics/archive/2014/02/a-glimpse-into-1970s-gay-activism/284077/>> (as of Aug. 11, 2019).

²⁷ *Ibid.*

²⁸ Drescher, *supra*, at pages 570-571.

²⁹ Bazelon, *Why Advancing Gay Rights is All About Good Timing: Lessons for same-sex marriage from the Supreme Court’s terrible decision in Bowers v. Hardwick* (Oct. 19, 2012) Slate Magazine <<https://slate.com/news-and-politics/2012/10/the-supreme-courts-terrible-decision-in-bowers-v-hardwick-was-a-product-of-bad-timing.html>> (as of Aug. 11, 2019).

apartment to execute a warrant related to Mr. Hardwick’s failure to appear for his court date.³⁰ The officer searched the apartment and found Hardwick having sex with another man.³¹ The officer arrested both men for violating the state’s sodomy law.³² After the District Attorney decided not to bring the charges before a grand jury, Mr. Hardwick filed a civil suit challenging the constitutionality of the sodomy statute. (*Bowers*, 478 U.S. at p. 188.) In a 5-4 decision, the U.S. Supreme Court rejected Mr. Hardwick’s constitutional challenge, framing the issue as whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” (*Id.* at p. 190.) Justice Blackmun’s dissent urged the Court to quickly “reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.” (*Id.* at 214.) Instead, *Bowers* ushered in a nearly twenty-year period criminalizing and demeaning gay people and their families.

While the immediate effect of *Bowers* was to sanction state sodomy laws and police harassment of gay people, federal and state courts used

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

Bowers to justify discrimination against LGBT people and their families in a variety of ways. The D.C. Court of Appeals upheld the dismissal of a claim brought by a lesbian who the FBI refused to hire because of her sexual orientation, noting: “If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.” (*Padula v. Webster* (D.C. Cir. 1987) 822 F. 2d 97, 103.) State courts also relied on *Bowers* to deny LGBT parents custody of their children, to prohibit LGBT people from becoming foster parents, and to permit harassment and abuse of LGBT people in the workplace. (*See, e.g., Truesdale v. Univ. of N.C.* (N.C. Ct. App. 1988) 371 S.E.2d 503, 509 [upholding right of public employers to question employees about “homosexual activity” as a condition of employment]; *S.E.G. v. R.A.G.* (Mo. Ct. App. 1987) 735 S.W.2d 164, 166 [upholding denial of custody because of mother’s relationship with another woman would negatively affect “the moral growth and the best interests of the minor children”]; *Thigpen v. Carpenter* (Ark. Ct. App. 1987) 730 S.W.2d 510, 513 [upholding denial of custody to lesbian mother]; *Matter of Appeal in Pima County Juvenile Action B-10489* (Ariz. Ct. App. 1986) 727 P.2d 830, 835 [upholding denial of foster-parent certification to bisexual parent because of his “homosexual predisposition.”]; *Opinion of the Justices* (N.H. 1987) 530 A.2d 21, 24-25

[holding legislative prohibition on gay men and lesbians serving as foster parents would not violate state or federal constitution].)

It took the U.S. Supreme Court nearly twenty years before revisiting *Bowers* and reckoning with the harms it inflicted on gay people and their families. (*Lawrence v. Texas* (2003) 539 U.S. 558, 566-567.) The Court held that the right to liberty under the Due Process Clause prohibits governmental entities from demeaning the existence of LGBT people by criminalizing them. (*Id.* at 567.) The Court further recognized that the stigma caused by laws that criminalize LGBT people “is not trivial” and “is an invitation to subject [LGBT] persons to discrimination both in the public and in the private spheres.” (*Id.* at 575.) With respect to *Bowers*, the Court held it “was not correct when it was decided, and it is not correct today.” (*Id.* at 578.)

II. Access to the courts remains essential to address the pervasive anti-LGBT bias that still exists in law enforcement.

Although *Lawrence* addressed one aspect of the homophobia embedded within law enforcement, anti-LGBT bias in law enforcement remains a pervasive problem in California and around the country. Courts play an integral role in addressing that bias and discrimination.

Significant numbers of LGBT officers experience discrimination at work. In a 2009 survey, more than twenty percent of LGBT officers reported

discrimination in the context of promotions.³³ A 2009 report found that more than 40 percent of recent, reported cases of employment discrimination across the country involved law enforcement or corrections personnel.³⁴ Numerous LGBT officers have also sued their respective police departments for firing them for being LGBT,³⁵ while others were denied jobs in the first instance or targeted during police academy training for being gay. (*See, e.g., Skorzewski v. Town of Guilford* (Conn. Sup. Ct., Sept. 7, 2011, No. CV054012161S) 2011 WL 4447273 [police department revoked job offer after discovering that female applicant was in a romantic relationship with a woman]; *Hoey-Custock v. City of Oakland*, (Sup. Ct. Alameda County, 2002, No. A094881) 2002 WL 1875099 [upholding jury verdict in favor of gay cadet assaulted by instructor during a practice demonstration because the cadet is gay].)³⁶

³³Mallory et al., *Discrimination against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Identity: 2003-2013* (2013) page 5.

³⁴ *Id.* at page 1.

³⁵ *See generally*, Mallory et al., *Discrimination against Law Enforcement Officers*, *supra*.

³⁶ In accordance with Cal. Rules of Court, rule 8.1115, *amici* cite this unpublished case for its factual history and not its legal precedent. (*Pacific Gas & Electric Co. v. City and County of San Francisco* (2012) 206 Cal.App.4th 897, 907, footnote 10; *K.G. v. Meredith* (2012) 204 Cal.App.4th 164, 172, footnote 9.)

Indeed, many police departments historically had policies stating that being gay or lesbian is “conduct unbecoming an officer,”³⁷ preventing LGB officers from being hired or forcing them to hide core aspects of their lives and families. Once hired, simply disclosing their LGBT status at work can have severe consequences, including intimidation, harassment, and termination. (See, e.g., *Smith v. City of Salem* (6th Cir. 2004) 378 F.3d 566, 572 [fire department attempted to intimidate transgender lieutenant to resign]; Mallory et al., *Discrimination Against Law Enforcement Officers*, *supra*, p. 38 [Police sergeant in New Jersey was harassed and suffered discrimination after his coworkers learned he is gay]; *id.* at p. 7 [UC Davis police officer subjected to repeated homophobic slurs and a death threat after his colleagues learned that he is gay].) It is thus unsurprising that many LGBT officers do not disclose their LGBT status at work³⁸ and fear dire consequences if they do.

LGBT officers also experience other forms of mistreatment on the job, many of which track Mr. Brome’s experiences. More than fifty percent of LGBT officers reported being treated as outsiders by colleagues, and forty-

³⁷ Doss, *Police management: Sexual misconduct and the right to privacy* (1990) 17 J. OF POLICE SCIENCE & ADMIN. 194.

³⁸ See Hassell & Brandl, *An Examination of the Workplace Experiences of Police Patrol Officers: The Role of Race, Sex, and Sexual Orientation* (2009) 12 POLICE Q. 408, 412 (collection of citations).

eight percent reported social isolation at work.³⁹ Numerous LGBT officers also reported that their fellow officers regularly failed to respond to calls or refused to provide backup, placing the officers in potentially life-threatening circumstances.⁴⁰ In one case, a former police officer called for backup after a suspect bit the officer's finger to the bone, yet no one came to the officer's aid.⁴¹ In another case, fellow officers refused to provide backup to a Miami Beach, Florida officer on five separate occasions because he was gay.⁴² Law enforcement officers must be able to rely on fellow officers when they need help or their lives are placed in danger. As the Miami Beach officer stated, "Every policeman in the city is supposed to drop whatever they're doing and

³⁹ Colvin, *Shared Perceptions Among Lesbian and Gay Police Officers: Barriers and Opportunities in the Law Enforcement Work Environment* (2009) 12 POLICE Q. 86, 96.

⁴⁰ Mallory et al., *Discrimination Against Law Enforcement Officers*, *supra*, at page 24 (citing Complaint, *Nardi v. Cook County Sheriff's Dept.* (Ill. Cir. Ct., Sept. 24, 2012, No. 2012-L-010820)); *Id.* at page 32 (citing Complaint, *Colle v. City of Millville* (N.J. Super. Ct. Law Div., Oct. 11, 2007, No. CUM L 001063 07)). *See also*, Bernstein & Kostelac, *Lavender and Blue: Attitudes About Homosexuality and Behavior Toward Lesbians and Gay Men Among Police Officers* (2002) 18 J. OF CONTEMPORARY CRIM. J. 302, 304 (citing studies noting backup calls from LGBT officers were often ignored).

⁴¹ Mallory et al., *Discrimination Against Law Enforcement Officers*, *supra*, at page 32 (citing Complaint, *Colle v. City of Millville*, *supra*).

⁴² Meers, *Good Cop, Gay Cop* (Mar. 3, 1998) *The Advocate*, page 30 <<https://bit.ly/2MLJIQO>> (as of Aug. 11, 2019).

get over there if an officer needs emergency assistance. . . . I was scared to death.”⁴³

Like Mr. Brome, many LGBT law enforcement officers also regularly observe explicit, homophobic conduct and comments on the job. In a recent survey of LGB officers, more than two-thirds of the respondents heard homophobic comments at work.⁴⁴ These include statements, for instance, that all LGBT people are pedophiles and HIV-positive, that lesbians would not be promoted, that an officer was a “fucking fag,” and that gay officers should not be “around children.”⁴⁵ In some cases, homophobic messages were scrawled on defaced lockers,⁴⁶ office bulletin boards,⁴⁷ or posted on a workplace blog.⁴⁸ LGBT officers also reported inappropriate and unwelcome

⁴³ *Ibid.*

⁴⁴ Colvin, *supra*, 12 POLICE Q. at page 95.

⁴⁵ Mallory et al., Discrimination Against Law Enforcement Officers, *supra*, at pages 6-8.

⁴⁶ See, e.g., Complaint, *Tasca v. Borough of Bogota* (D.N.J., May 4, 2012, No. 2:12-cv-02687-CCC-MF); Martinez, *Gay cop says NYPD made his life a living hell, now he's going to 'punch back' with lawsuit*, Daily News (Oct. 27, 2010) <<https://www.nydailynews.com/new-york/gay-nypd-made-life-living-hell-punch-back-lawsuit-article-1.190071>> (as of Aug. 11, 2019).

⁴⁷ *Shankle v. Village of Melrose Park* (N.D. Ill., Apr. 30, 2013, Case No. 12 C 6923) 2013 WL 1828929 at page *2.

⁴⁸ *Kretzman v. Erie County* (W.D.N.Y., Feb. 20, 2013, No. 1:11-CV-0704) 2013 WL 636545 at page *1

physical contact, ranging from sexual advances to assault. For example, a gay officer in Huntington Beach, California experienced persistent anti-LGBT harassment, which included an incident of fellow officers “simulating anal sex on him during a training class.”⁴⁹ Two lesbian officers in Los Angeles were subjected to repeated vulgar comments from a supervisor about his desire to have sex with them.⁵⁰ In 2015 and 2016, internal investigations of San Francisco police officers found that approximately twenty officers had texted one another virulently racist and homophobic comments.⁵¹

Surveys of police department employees confirm these pervasive, anti-LGBT attitudes in law enforcement. In a 2008 study of police chiefs in Texas, more than 25 percent said “they would have difficulty working with a gay man,” 50 percent said the same with respect to lesbian officers, 56

⁴⁹ Mallory et al., *Discrimination Against Law Enforcement Officers*, *supra*, at page 32 (citing Settlement, *Bereki v. Huntington Beach Police Dept.* (Sup. Ct. Orange County, Apr. 29, 2008, No. 07CC09351)).

⁵⁰ Complaint, *Gotham v. L.A. Police Dept.* (Sup. Ct. L.A. County, Jul. 18, 2011, No. BC465451) 2011 WL 6481849.

⁵¹ Egelko, *SFPD’s texting scandal: Court rules officers can be disciplined for racist messages*, SF Chronicle (May 30, 2018) <<https://www.sfchronicle.com/bayarea/article/SFPD-s-texting-scandal-Court-rules-officers-12955853.php?psid=fHGdX>> (as of Aug. 11, 2019); Glover & Simon, *‘Wild animals’: Racist texts sent by San Francisco police officer, documents show* (Apr. 26, 2016) CNN <<https://www.cnn.com/2016/04/26/us/racist-texts-san-francisco-police-officer/index.html>> (as of Aug. 2, 2019).

percent said they viewed same-sex attraction as a “perversion,” and 62 percent of the police chiefs believed that same-sex attractions constitute “moral turpitude.”⁵²

These surveys and experiences of LGBT officers highlight an important issue about anti-LGBT bias and Mr. Brome’s case in particular—that discrimination happens in both explicit and more subtle ways, both of which are illegal. The Superior Court failed to recognize this when it found that Mr. Brome “does not allege or produce any evidence that anyone made derogatory comments to him or regarding gay men during the limitations period.” (3 AA0690.) While express anti-gay comments frequently do occur in the workplace—and did in fact occur throughout Mr. Brome’s employment with the CHP—such direct evidence of LGBT animus is not required under the law. Discrimination often takes more subtle forms and Mr. Brome should have a chance to prove that those actions—an officer’s failure to provide back-up, Mr. Brome’s exclusion from a blood drive, his exclusion from a Court officer position, and the department’s failure to display his, and only his, Officer of the Year photograph—are unlawful and

⁵² Mallory et al., *Discrimination Against Law Enforcement Officers*, *supra*, at page 5 (citing Lyons, Jr. et al., *Texas Police Chiefs' Attitudes Toward Gay and Lesbian Police Officers* (2008) 11 POLICE Q. 102, 110); *see also* Lyons, Jr. et al., *Police Judgments of Culpability and Homophobia* (2005) 1 APPLIED PSYCHOLOGY IN CRIM. J. 1, 9 (32% of officers believe gay men are “disgusting”).

sufficiently similar to the other acts of discrimination Mr. Brome experienced. (*Ibid.*)

Anti-LGBT biases and attitudes among law enforcement officers also have devastating effects on LGBT community members. LGBT people, and particularly LGBT people who have disabilities, who are immigrants, who are poor, or who are people of color, frequently experience negative contacts with the police, including hostility, verbal harassment, and excessive force.⁵³ Police departments also still exploit vague, low-level misdemeanors, such as public lewdness and disorderly conduct, to harass and over-police LGBT people. (*See, e.g., People v. Moroney* (Sup. Ct. L.A. County, Apr. 29, 2016, No. 4LG03026) [police “intentionally targeted” gay men even though there was “lewd conduct involv[ing] both heterosexual and homosexual activity”].)⁵⁴ These practices also target youth. For example, one study found that LGBT youth—particularly LGBT young women—are significantly more likely than their heterosexual peers to be stopped by the police, be

⁵³ Center for Constitutional Rights, *Stop and Frisk: The Human Impact* (2012) pages 11-13 <<https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>> (as of Aug. 11, 2019); Lambda Legal, *Protected and Served?* <<https://www.lambdalegal.org/protected-and-served/police>> (as of Aug. 11, 2019).

⁵⁴ *See also*, Amnesty International, *Stonewalled: Police abuse and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005) page 23 <<https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf>> (as of Aug. 11, 2019).

arrested, and have a juvenile record.⁵⁵ Police also regularly stop transgender women on the assumption that they are engaging in sex work.⁵⁶ As a result, LGBT people fear seeking assistance from the police,⁵⁷ leading to underreporting of crimes and jeopardizing public safety.⁵⁸ Of course, having LGBT officers like Mr. Brome could protect against these serious problems, but those officers are subjected to the same homophobic attitudes.

Indeed, to address the pervasive anti-LGBT attitudes that still exist in law enforcement, the California Legislature passed a bill in 2019 mandating that the basic training curriculum for all law enforcement officers and dispatchers include a training module about workplace issues faced by LGBT employees. (Stats. 2018, c. 969 (A.B. 2504), § 1, eff. Jan. 1, 2019.) As noted by the author, the law will “better prepare peace officers in their response to

⁵⁵ Himmelstein & Bruckner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study* (2011) 127 PEDIATRICS 49, 50.

⁵⁶ James et al., *The Report of the 2015 U.S. Transgender Survey* (2016) page 187 <<https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>> (as of Aug. 11, 2019).

⁵⁷ *Id.* at page 188 (nearly sixty percent of transgender people reported feeling uncomfortable asking the police for assistance.); *see also*, Amnesty International, *supra*, at page 99. When interacting with the police LGBT people are also reluctant to disclose their sexual orientation or gender identity, not only to avoid verbal harassment, but also out of a concern that the police will disclose the person’s LGBT status to a family member, employer, and others. Amnesty International, *supra*, at page 99.

⁵⁸ *See* Amnesty International, *supra*, at page 99-100.

incidents that involve LGBT individuals, and help foster a workplace for law enforcement in which LGBT individuals feel comfortable and valued.”⁵⁹ In an analysis of the bill, the Senate Committee on Public Safety reported that “discrimination and harassment are still ongoing and pervasive issues”⁶⁰ with respect to law enforcement’s relationship with the LGBT community in California and that training is needed “because not only do officers frequently interact with this population, but LGBT[] individuals may be officers themselves.”⁶¹ Because the law went into effect on January 1, 2019, however, (*see* Cal. Pen. Code § 13519.41) it will not help Mr. Brome, whose only recourse remains with the courts.

The deep roots of homophobia in law enforcement and the pervasive anti-LGBT attitudes that remain prevalent today provide important context for Mr. Brome’s case. California law requires that FEHA’s statute of limitations “be liberally construed to safeguard the employee’s right to hold employment without experiencing discrimination.” (*Richards, supra*, 26 Cal.4th at 821 (internal quotations omitted).) And FEHA itself articulates California’s strong public policy to “protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without

⁵⁹ Sen. Com. On Public Safety, Analysis of Assem. Bill No. 2504 (2017-2018 Reg. Sess.) page 3.

⁶⁰ *Id.* at page 4.

⁶¹ *Id.* at page 6.

discrimination” and “to provide effective remedies that will eliminate [] discriminatory practices.” Cal. Gov. Code § 12920. Accordingly, the lower court erred in granting summary judgment on Mr. Brome’s claims on statute of limitations grounds.

CONCLUSION

For the reasons above and in Mr. Brome’s briefs, Amici respectfully request that the Court reverse the trial court’s grant of summary judgment to Defendants and remand for a trial on the merits.

DATED: August 12, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The undersigned certifies that, pursuant to the word count feature of the word processing program used to prepare this brief, it contains 4,661 words, exclusive of matters that may be omitted under California Rules of Court, Rule 8.520(c)(3).

DATED: August 12, 2019

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 870 Market Street, Suite 370, San Francisco, CA 94102.

On August 12, 2019, I served true copies of the following documents described as:

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
AND PROPOSED BRIEF OF AMICI CURIAE NATIONAL
CENTER FOR LESBIAN RIGHTS ET AL., IN SUPPORT OF
APPELLANT**

On that date, I transmitted a true copy of the enclosed documents via the Court’s TrueFiling system. Because one or more of the participants in this case have not registered with the Court’s TrueFiling system or are unable to receive electronic correspondence, on August 12, 2019, I also placed a true copy of the enclosed documents in a sealed envelope or package addressed to the persons at the addresses listed in the Service List as follows:

Clerk of the Court
Solano County Superior Court
580 Texas Street
Fairfield, CA 94533

I placed the sealed, addressed envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of the National Center for Lesbian Rights for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 12, 2019, at San Francisco, California.

/s/Lia Dun
Lia Dun

Document received by the CA 1st District Court of Appeal.