In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JEFFREY MICHAEL MORAN,

Defendant and Appellant.

Case No. S215914

Sixth Appellate District, Case No. H039330
Santa Clara County Superior Court, Case No. C1243366
The Honorable Ron Del Pozzo, Judge

REPLY BRIEF

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I. APPELLANT'S CLAIMED INFRINGEMENT OF HIS RIGHT TO TRAVEL DOES NOT WARRANT OVERBREADTH REVIEW

Appellant treats this court to a veritable smorgasbord of claims and assertions in his answer brief. These include: (1) felons enjoy constitutional protection from probation conditions equivalent to the rights of persons subjected to statutes impinging civil liberties (Ans. Br. on the Merits ("ABM" 9-12); (2) there is a doctrine, which appellant chooses to call "ordinary overbreadth," separate and apart from the overbreadth doctrine the United States Supreme Court has applied in the First Amendment context (ABM 28); (3) courts should employ a "least restrictive means" test for any probation condition purportedly touching on a constitutional right (ABM 10-11); (4) stay-away orders should target cases involving vulnerable individuals and mentally-ill defendants (ABM 23); (5) corporate entities like Home Depot do not suffer a harm from commercial burglary that justifies the protections given to other victims of crime (ABM 45); and (6) the condition at issue bars appellant from "entering large areas of the state" (ABM 1). These assertions not only lack legal or factual support, they also reveal the danger of applying heightened review outside the narrow, clearly-defined scope of First Amendment claims.

A. The Nature of Appellant's Challenge Is Unclear

Appellant complains that we have confused the nature of his challenge to the probation condition ordering him to stay away from his burglary victim, Home Depot. (ABM 28.) But any confusion arises not from respondent's characterization of the claim, but from the inconsistent nature of appellant's assertions throughout these proceedings. To begin, appellant failed to object to the probation condition before the trial court, so there is no record of the legal basis or rationale for appellant's claim.

Second, as appellant concedes in his answer brief, he is inventing a new doctrine in an attempt to avail himself of a higher degree of scrutiny. (ABM 28 ["Appellant will call them facial overbreadth and ordinary overbreadth"].)[1] Given that appellant labeled his claim an "overbreadth" challenge in the Court of Appeal briefing and imported the analysis applied to First Amendment challenges (e.g., "least restrictive means"), it was reasonable to analyze his claim based on that legal framework. But to the extent appellant is making an as-applied challenge to the condition, his claim is amenable to analysis under the rubric of *People v. Lent* (1975) 15 Cal.3d 481. In fact, appellant's own briefing confesses as much, given the constant intertwining of the overbreadth and reasonableness analyses throughout his answer. This constant recasting of the legal challenge at each level of review in an attempt to find some constitutional ticket to heightened scrutiny amounts to a preview of virtually every future appeal of probation orders should the court embrace appellant's position.

B. Appellant's Argument Starts from the Flawed Premise that He Is Entitled to the Same Rights as a Nonconvicted Person

In claiming that his stay-away order should be analyzed under the "strict scrutiny" rubric applied to criminal statutes that impinge free citizens' associational and speech rights, appellant is implicitly making two claims: (1) probationers are on equal footing with people not convicted of a crime; and (2) challenges to a probation condition based on the right to travel should be analyzed the same as generally-applicable criminal statutes that touch on associational or speech-related freedoms. (ABM 9-11.) Neither claim holds water.

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[1] An online search for the term "ordinary overbreadth" indicates that it has never appeared in a published state or federal case anywhere in the country.

First, this court has long held that "[p]robation is not a right, but a privilege," and "[i]f the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." (*People v. Bravo* (1987) 43 Cal.3d 600, 608.) Accordingly, in the Fourth Amendment context, this court has upheld conditions requiring probationers to waive their constitutional rights and consent to suspicionless searches to avoid serving a state prison term, so long as the searches are not undertaken for harassment or arbitrary or capricious reasons. (*Ibid.*; see also *Samson v. California* (2006) 547 U.S. 843, 857 [same for parolees].) These warrantless searches of probationers are justified because probationers have a significantly diminished expectation of privacy, and because the searches aid in deterring further offenses and in monitoring compliance with the terms of probation. (*United States v. Knights* (2001) 534 U.S. 112, 121; *People v. Mason* (1971) 5 Cal.3d 759, 763-764.) At no point in *Knights* or in *Mason*'s majority opinion, did either court mention the possible "overbreadth" of the condition or engage in a "least restrictive means" analysis, despite the obvious constitutional interests at play. Given this line of cases, any claim that appellant—who has now been convicted of *two* theft-related felonies in the last four years and who would currently be serving a sentence of two years four months to four years but for the judicial grace of probation—is on equal footing with nonconvicted persons must be rejected out of hand. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 624 [upholding a condition prohibiting association with known gang members because "a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens'"].)

Second, as explained in the opening brief, there are unique considerations in the First Amendment context that support special

protections not extended to other constitutional rights. First Amendment associational and speech rights are frequently interwoven with political activity and expression so central to our core as free citizens that doctrines such as the prohibition against "prior restraints" have emerged for First Amendment rights that do not apply to other constitutional rights. As the Supreme Court noted in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson* (1986) 475 U.S. 292, 303, footnote 12: "[P]rocedural safeguards often have a special bite in the First Amendment context . . . to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." (Citing G. Gunther, Cases and Materials on Constitutional Law 1373 (10th ed. 1980); see also *New York v. Farber* (1982) 458 U.S. 747, 767-769 ["facial" overbreadth doctrine for standing applicable to First Amendment claims but not other constitutional challenges].) Neither this court nor the Supreme Court has ever recognized the right to travel as deserving of such special treatment.

Given that appellant enjoys fewer constitutional protections than a nonconvicted person, and his asserted constitutional right does not merit special treatment, it is illogical to apply the highest form of scrutiny to his claim. Under the circumstances, the three-factor *Lent* test, applied and refined by California courts over the last 40 years, provides appellant with all the necessary protection. In fact, the *Lent* test has an added advantage: as a test derived from the statutory scheme governing probation (§ 1203.1, subd. (j)), it can be fine-tuned and amended by the Legislature (with uniform application across the state) should modifications become necessary in the future. Intrusion into this legislative domain is discouraged in all cases, but it is particularly uncalled for here. (See *Horeczko v. State Bd. of Registration* (1991) 232 Cal.App.3d 1352, 1358-1359 [the determination "resides in the legislative domain, and the judiciary

will not intrude unless the classes created for separate treatment represent invidious discrimination"].)

C. Appellant's Attempt to "Constitutionalize" the Interests at Play Should Be Rejected

In *People v. Olguin* (2008) 45 Cal.4th 375, 384, this court rejected the defendant's attempt to "constitutionalize" the asserted right to own a pet. The court should similarly reject appellant's claimed constitutional right to shop at Home Depot. The condition does not limit his ability to travel through any municipality or region of the state, and there are countless other stores where he can purchase goods equal to those sold at Home Depot. Even if appellant's brand loyalty is so strong that no other company's products will suffice, appellant has never explained why ordering goods online or over the phone is inadequate to meet any legitimate business needs.

Appellant's suggestion that somehow the condition touches on First Amendment interests is similarly unavailing. (ABM 32, 34.) Appellant never specifies what type of associational or speech-related rights are being limited by this condition, which in no way limits his access to government buildings, courthouses, or other areas traditionally associated with political expression and civic activity. If appellant is concerned about his ability to talk to or associate with other craftspeople, nothing prevents him from visiting Lowe's or Ace Hardware, calling Home Depot and speaking with an employee, or participating in a community club devoted to such topics. If *this* condition "touches on" First Amendment rights, then it is hard to imagine one that would not.

D. The Court of Appeal Decisions Cited by Appellant Are Unavailing

In the absence of high court authority extending strict scrutiny to stay-away orders, appellant relies on Court of Appeal decisions purporting

to apply overbreadth review to probation conditions. However, some of these cases to do not stand for the cited proposition. Still others were wrongly decided when issued and have grown increasingly so as this court's probation jurisprudence has developed.

For example, appellant cites *People v. Burden* (1988) 205 Cal.App.3d 1277 as holding that the defendant had a constitutional right to employment and, on that basis, striking a probation condition barring him from "working in a position of outside or commissioned sales." (ABM 11-12.) But the Court of Appeal actually resolved the case by applying the *Lent* test and struck the condition because the condition prohibited lawful conduct, was not related to future criminality, and had no relationship to the crime of writing bad checks. (*Burden, supra*, 205 Cal.App.3d at p. 1280.) The court did not, in fact, apply the overbreadth test to the probation condition, and instead found that application of the *Lent* test adequately protected the defendant's rights. The same is true for appellant's case.

Appellant also claims support in *People v. Moses* (2011) 199 Cal.App.4th 374 and *People v. Pointer* (1984) 151 Cal.App.3d 1128. But those cases either ignored *Lent* or applied a flawed interpretation of *Lent* in their rush to apply heightened review. In *Moses*, the defendant challenged as overbroad a probation condition imposed after he was convicted of committing a lewd act on a child. (199 Cal.App.4th at p. 378.) The challenged condition stated: "Do not date or marry anyone who has children under the age of eighteen, unless approved in advance and in writing by the probation officer." (*Ibid.*) Without even citing *Lent*, the Court of Appeal struck the "or marry" language from the condition as violative of the defendant's constitutional right to marry. (*Id.* at pp. 378-379.) Similarly, in *Pointer*, the defendant challenged a condition prohibiting her from conceiving a child after she was convicted of felony child endangerment of her two children. (151 Cal.App.4th at p. 1133.) The

Court of Appeal initially applied *Lent* but concluded that the condition was reasonable under that test, before applying heightened review to find the condition unconstitutionally overbroad. (*Id.* at pp. 1138-1139.)

Both courts erred in their application of *Lent*. The *Moses* court did not even bother to cite or apply *Lent*, and the *Pointer* court applied a toothless version of the test in its hurry to recognize a new level of heightened review. In reality, neither the *Moses* nor the *Pointer* condition should have passed muster under *Lent*. For example, in *Pointer*, the prohibition: (1) concerned pregnancy, not the defendant's treatment of her children, the latter of which was the basis for her conviction; (2) the conduct was lawful; and (3) the connection between becoming pregnant and endangering any future children was tenuous at best. Thus, the condition should have been invalidated under *Lent*, rendering any further analysis unnecessary. Because *Lent* itself provides adequate protection for probationers, and widespread adoption of the methodology from *Moses* and *Pointer* would create uncertainty and inconsistency in the law, this court should limit appellate review of probation conditions to the well-defined *Lent* analysis, except where First Amendment rights are directly implicated.

II. THE STAY-AWAY CONDITION IS NEITHER OVERBROAD NOR UNREASONABLE

For the reasons expressed in the opening brief and above, this court should not extend the overbreadth analysis for probation conditions beyond cases directly impacting First Amendment rights. Nonetheless, applying either an overbreadth analysis or *Lent*'s reasonableness test, the stay-away condition should be upheld.

A. Appellant's Claim that He Will Be Prohibited from All Stores in All Malls Containing a Home Depot Shows His Reading of the Probation Condition, Not the Condition Itself, Is Overbroad

This court and the United States Supreme Court have frequently held that where "the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." (*San Francisco Unified School District v. Johnson* (1971) 3 Cal.3d 937, 948; *United States ex rel. Atty. Gen. v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 407-408 ["where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"].) The same logic should apply to probation conditions because trial courts are just as entitled as legislatures to the presumption that they did not intend to impose unconstitutional burdens on defendants.

Here, appellant claims that the stay-away condition bars him not just from Home Depot and any portion of a parking lot directly adjacent to the store, but it also prohibits him from working or shopping at *all* stores in *all* malls containing a Home Depot. (ABM 24) Not so. The stay-away condition bars appellant from entering a parking lot "adjacent" to a Home Depot store. "Adjacent" is defined variably as: (1) "abutting or touching" (Webster's 3d New Internat. Dict. (1996) p. 26); (2) "next to, adjoining," (American Heritage Dict. (New college ed. 1980) p. 16); and (3) "having a common endpoint or border" (Webster's Ninth New Collegiate Dict. (1987) p. 56). A reasonable interpretation of the condition, in light of these definitions, would limit the condition to any section of a parking lot directly in front of a Home Depot store. Under this reading, the prohibition would not extend to segmented portions of the parking lot in front of *other* stores

in the same shopping center, and would not apply to the raised, private walkways in front of those stores. Such an interpretation—just as reasonable (if not more so) than appellant's—eliminates (or at least greatly reduces) any claimed limitation on appellant's right to travel because it allows him to access *any* other store in a shopping center or mall other than Home Depot. (See *People v. Chandler* (Aug. 28, 2014, S207542) ___ Cal.4th ___ [2014 WL 4236201 at *13] ["a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question"].)[2]

B. Any Limits on Appellant's Movements Are De Minimis

Properly interpreted, the stay-away condition bars appellant only from the Home Depot stores and any area of the parking lot directly in front of those stores. Nonetheless, appellant claims that "the condition precludes [him] from entering large areas of the state" (ABM 1), and he provides a link to a map of the Plant Shopping Center in San Jose to prove his point (ABM 24, fn. 6). Even a cursory examination of that map refutes appellant's claim. The map shows:

- The Home Depot store that appellant burglarized is at the west-end of the mall, surrounded on two sides by public streets (where appellant could park) and sharing only one wall with another store.
- There are segmented parking lots (separated by multi-lane driveways) serving *all* of the other stores in the Plant Shopping Center.

[2] Even applying appellant's overbroad reading of the condition, appellant could *still* enter any other store in the shopping center, by parking on a public street, entering the shopping area from the street, and proceeding on the private (covered) walkway that typically runs between stores and the parking lot to his destination of choice. Neither appellant nor the Court of Appeal provided a rational explanation for why this is not feasible.

- There is a private walkway running the entire length of the mall that allows entry into any store without walking through the parking lot in front of Home Depot.
- The total area of the Home Depot store (including the Garden Center) and parking lot adjacent to the store is approximately 9 acres. Assuming this store is representative of the 232 Home Depot locations across the state, appellant would be barred from only 2,088 acres out of California's total area of 104,765,440 acres: the "large areas of the state" from which appellant is barred amount to less than .002% of the state.

Thus, even applying appellant's methodology, any claimed hardship is illusory. He will not, in fact, be precluded from visiting any other store in a shopping complex containing a Home Depot. He can park in segmented portions of the parking lot or on a public street, and he can use the walkways in front of the stores to bypass any parking lot in front of Home Depot. Moreover, many Home Depot stores are located at one end of the shopping center to allow for the loading of trucks and delivery vehicles. This further limits any collateral restriction on appellant's ability to shop and work at other stores. Finally, even accounting for all the Home Depot stores and adjacent parking space across the state, the total prohibited area is miniscule, as is the impact on his ability to shop or seek employment with other retail establishments in his community, let alone in the state. Thus, there is no real impact on appellant's right to travel or to conduct legitimate business with other commercial enterprises. (See *In re Michael D.* (1989) 214 Cal.App.3d 1610, 1617 [probation condition barring minor from "gang gathering areas" in his neighborhood was "neither unreasonably vague nor unconstitutional"]; *In re Ramon M.* (2009) 178 Cal.App.4th 665, 678 [same].)

This is not a case like *People v. White* (1979) 97 Cal.App.3d 141, where the defendant was barred from broad swaths of the city and from many different *types* of establishments where she might sleep, eat, socialize, or find entertainment. In fact, in instructing the trial court how it

might modify the condition on remand, the *White* court suggested "setting out a specific list of particular places [] from which the probationer may be specifically prohibited from entering." (*Id.* at p. 151.) That is precisely what the trial court did here. Nor does the condition bear any resemblance to the limitation in *People v. Smith* (2007) 152 Cal.App.4th 1245. In fact, the condition in *Smith*—which prevented the probationer from leaving Los Angeles County without his probation officer's permission—provides a useful example of a *real* restriction on the right to travel around the state. Instead, the condition here is a reasonable, targeted condition which orders appellant to stay away from the victim of his crime but allows him to travel unabated throughout the rest of the state and country.

C. The Parking Lot Restriction Is Reasonable

Appellant also claims that the parking lot prohibition serves no purpose, and that the standard "obey all laws" condition will adequately protect Home Depot. (ABM 26.) But that ignores the facts of this case. When detained, appellant admitted that he and a confederate had conspired to steal batteries from Home Depot and sell them for cash. It is reasonable to assume that appellant's confederate approached him in the parking lot to make this arrangement and was waiting for him in the parking lot when he left the store. The parking lot therefore not only played a role in appellant's crime but could also serve as a place of temptation where appellant might offer his services or be approached again and asked to steal. By barring appellant from standing in the Home Depot parking lot—where he could engage in criminal activity (standing in a group of people and planning a burglary) not readily apparent to security guards or police as illegal—the probation condition helps insulate appellant from criminal temptation and assists in his rehabilitation. Moreover, at the time of the offense, appellant was on felony probation for possession of a stolen vehicle in Santa Clara County, providing all the more reason for the trial court to be concerned

about his presence in a parking lot. (CT 2; Supp. CT 6.) For these reasons, the trial court reasonably concluded that there was legitimate deterrent value in keeping appellant away from the parking lot areas outside Home Depot.

D. Stay-Away Orders Are Not Limited to Cases Involving Violent or Mentally-Ill Defendants

By way of distinguishing caselaw, appellant appears to suggest that stay-away orders should be limited to cases involving violent or mentally-ill defendants who repeatedly visit their victims after the crime. (See ABM 18-23.) Appellant first claims that a stay-away order is unwarranted unless his presence in a Home Depot would force a particular store employee to "re-experience the psychological trauma that the original crime engendered." (ABM 2.) However, in a commercial burglary case, the victim is not a given employee but the corporate entity itself. Moreover, if a stay-away order must be based on a particular person "re-experiencing" the psychological trauma of the original crime, then a court would be prevented from imposing a stay-away order on a defendant who committed a residential burglary while the occupants were asleep or on vacation (and thus, did not experience any trauma during the crime). Such a position is absurd.

Appellant also distinguishes himself from the defendant in *People v. Petty* (2013) 213 Cal.App.4th 1410, claiming that his stay-away condition should be modified because, in the absence of a documented mental illness, there is "nothing indicating [he is] an unstable person who might not be able to control his actions." (ABM 20-21.) This assertion profoundly misunderstands the point of probation. Having been convicted of two theft-related felonies in the past four years, appellant has proven that he does not control his actions and abide by the law. Hence, restrictions are placed on his conditional freedom to protect society and to insulate him from

tempting situations which might bait him into crime. To say that a defendant must be *particularly* prone to bad decisionmaking due to mental illness—above and beyond his felony convictions—is to misstate the law and misunderstand the logic underlying our probation system.

Implicit in appellant's argument is the idea that he is not a "real" threat to Home Depot or to society. But that trivializes appellant's crime.[3] Appellant is not, as he suggests, simply a "garden-variety shoplifter who stole merchandise that had little value." (ABM 43.) Appellant was on felony probation for another theft-related offense when he was arrested for the instant crime. (CT 2; Supp. CT 6.) He was not convicted of misdemeanor petty theft; he was convicted of felony commercial burglary of almost $130 worth of merchandise from Home Depot. And he did not spontaneously decide to steal once he was already in the store; appellant admitted to officers that he had conspired with another man to enter the store, steal the products, and then exchange them for cash. Appellant might not be John Dillinger, but he is no casual shoplifter either.

Nor should Home Depot's interest in preventing future victimization be minimized. According to the National Association for Shoplifting Prevention, "more than $13 billion worth of goods are stolen from retailers each year" in the United States, or "more than $35 million per day." (*Shoplifting Statistics*, at <https://www.shopliftingprevention.org/whatnaspoffers/NRC/PublicEducStats.htm> [as of Sept. 17, 2014].) This theft not only overburdens law enforcement and the courts, but it also "adds to a store's security expenses, costs consumers more for goods, costs

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[3] Appellant's trivialization of Home Depot's interest in preventing product theft is most apparent when he argues that even a narrow probation condition barring appellant from the *actual* scene of the crime (the store at the Plant Shopping Center in San Jose) would be unconstitutionally overbroad. (ABM 22.)

communities lost dollars in sales taxes and hurts children and families." (*Ibid.*) Perhaps most troubling, those who steal from stores like Home Depot are "caught an average of only once in every 48 times they steal [and] are turned over to the police 50 percent of the time." (*Ibid.*) Even among those caught, prosecuted, and incarcerated for second degree (commercial) burglary, data shows that 67.8 percent of inmates incarcerated for that crime return to prison within three years—one of the highest recidivism rates among the 35 offenses studied. (California Department of Corrections and Rehabilitation, *2012 Outcome Evaluation Report, Fig. 8: Three-Year Recidivism Rates by Commitment Offense*, p. 25, at <http://www.cdcr.ca.gov/Adult_Research_Branch/index.html> [as of Sept. 17, 2014].) Thus, without the restriction of the stay-away condition, appellant might commit up to 48 more thefts (totaling over $5,000) before being caught again—perhaps even more given that appellant may have developed knowledge about Home Depot's store layout and security practices that will allow him to evade detection in the future. If anything is unreasonable here, it is appellant's suggestion that a victim of crime should be exposed to that type of abuse before the legal system provides additional protection.

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be reversed.

Dated: September 19, 2014

Respectfully submitted,

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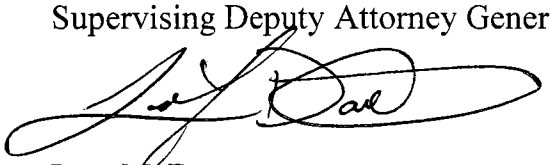

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 4,090 words.

Dated: September 19, 2014

KAMALA D. HARRIS
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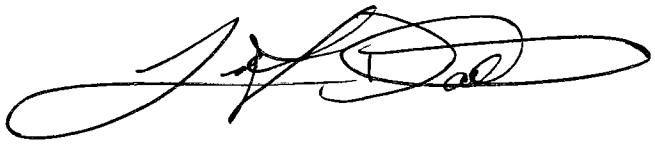

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S215914**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 19, 2014, I served the attached **REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 19, 2014, at San Francisco, California.

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