In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BRANDON LANCE RINEHART,

Defendant and Appellant.

Case No. S222620

SUPREME COURT
FILED

DEC 18 2014

Frank A. McGuire Clerk

Deputy

Third Appellate District, Case No. C074662
Plumas County Superior Court, Case No. M1200659
The Honorable Ira Kaufman, Judge

REPLY TO ANSWER TO THE PETITION FOR REVIEW

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INTRODUCTION

As explained in the People's Petition for Review, the Court of Appeal's decision in this case announced a new rule of law with important and potentially wide-ranging effects. Appellant Brandon Lance Rinehart, in his answer, attempts to portray the Court of Appeal's decision as limited to the suction dredge mining moratorium. However, the Court of Appeal in fact stated its new rule of preemption in general terms with potentially broad effect: in future cases, miners and others seeking to conduct activities on federal land without submitting to state regulation will undoubtedly claim that state law is preempted if it renders their activity "commercially impracticable." Since almost one-half of California's land mass is federal land, and there are thousands of miners, this case presents an important legal issue that merits the Court's review.

As explained in the People's Petition for Review, the Court of Appeal neglected to consider the United States Supreme Court's presumption against preemption, and failed to consider federal regulations that approve of the kind of state regulation at issue here. These omissions do more than show that the decision below was erroneous. They also show why the decision below should not stand without further review. At the very least, before applying a novel theory of preemption, California's courts should consider the views of the relevant federal agencies, and key United States Supreme Court doctrine.

Although Rinehart tries to defend the Court of Appeal's reasoning, the Court of Appeal's reading of the leading case, *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572, ignored the key part of that decision: the part finding no congressional intent for federal mining law to preempt state environmental regulation. Finally, the Court should reject Rinehart's unsupportable attempt to expand his relief by having this Court order judgment as a matter of law in his favor.

ARGUMENT

I. RINEHART'S SUBMISSION DOES NOTHING TO DISPROVE THAT THIS CASE POSES AN IMPORTANT ISSUE OF LAW WITH THE POTENTIAL TO AFFECT WIDE CATEGORIES OF ENVIRONMENTAL AND OTHER LAWS

As previously explained, the Court of Appeal's reasoning in this case – if allowed to remain binding precedent – could affect the viability of countless California laws. (Petition, pp. 6-12.)

Rinehart asserts only that this case is not worthy of review because it involves a "fact-specific issue" in that Fish and Game Code section 5653.1 is "a highly unusual statute." (Answer, pp. 11-12.) But this case involves more. Although the starting point for the Court of Appeal's opinion was the statutes in this case, the ending point was a legal proposition that litigants will seize on more generally. The Court of Appeal announced its rule by saying: "Put differently, and in the language of the hypothetical used by the Court in *Granite Rock*, if sections 5653 and 5653.1 are environmental regulations that are 'so severe that *a* particular land use [*in this case* mining] . . . becomes commercially impracticable,' then they have become de facto land use planning measures that frustrate rights granted by the federal mining laws and, thus, have become obstacles to the realization of Congress' intent in enacting those laws." (Slip Op., p. 19 [emphasis added; alteration and omission in original].) By stating its rule as encompassing any environmental regulations burdening "*a* particular land use," and by using mining as an example ("in this case mining") rather than a limitation, the Court of Appeal has stated its rule in terms that are at least arguably general enough to affect more state environmental regulations than just the cited Fish and Game Code provisions. If the Court of Appeal's general rule cannot be distinguished from future cases involving additional state statutes and regulations, then Superior Courts throughout

the state will be required to follow it. (See *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455 ["all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction" and "must accept the law declared by courts of superior jurisdiction"]; cf. *Loshonkohl v. Kinder* (2003) 109 Cal.App.4th 510, 517 ["As an intermediate appellate court we are bound by decisions of our Supreme Court *and we must follow the reasoning found therein.*" (emphasis added)].) A rule with such broad potential consequences should not be allowed to stand without careful review by this Court.

A variety of state environmental laws may increase costs or reduce mining recoveries – for instance, by limiting equipment or chemicals that can be used. Because the opinion below requires a remand for a factual inquiry to assess "commercial impracticability," which would be applied on a claim-by-claim basis, suction-dredge and other miners can attempt to apply this holding to challenge a variety of state environmental laws and regulations on the theory that those requirements make it "commercially impracticable" to mine a given claim. This renders uncertain the application of a whole range of state laws, as detailed in the petition for review, including nuisance law and state mining laws.[1] Even with respect to the suction dredge mining regulations alone, the issue is important not just to the miners (as, indeed, Rinehart and other miners have asserted in requesting publication) but to all Californians. It involves the State's ability to enforce a law that the Legislature, after weighing costs and

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[1] Rinehart relies on *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 280-82 for the proposition that enforceability of California's Surface Mining and Reclamation Act is not placed at risk by the Court of Appeal's decision here. But in *Nelson* there was "no preemption claim." (190 Cal.App.4th at p. 281.) In a future case arising on federal property in California, miners would almost certainly bring such a preemption claim based on the decision here.

benefits, believed necessary and enacted under its police power. Moreover, the federal regulations permitting this sort of state environmental regulation reflect a substantial federal interest in favor of California's law, which the Court of Appeal's opinion did not address. (*See* pages 4-5, *infra.*)

II. THIS CASE REQUIRES REVIEW BECAUSE THE COURT OF APPEAL DID NOT CONSIDER THE VIEWS OF THE RELEVANT FEDERAL AGENCIES OR THE U.S. SUPREME COURT'S PRESUMPTION AGAINST PREEMPTION

The Court of Appeal found that the Legislature's enactment could be preempted without addressing two crucial points: the views of the relevant federal agencies; and the U.S. Supreme Court's presumption against preemption. Nor did the case it relied on, *South Dakota Mining Association v. Lawrence County* (8th Cir. 1998) 155 F.3d 1005, consider either of these issues. Because of these omissions, the Court of Appeal's consideration of the issue cannot be considered complete, and should not stand without further review.

1. As earlier explained, both the U.S. Bureau of Land Management (BLM) and the U.S. Forest Service (USFS) have enacted regulations allowing concurrent state environmental regulation of mining on federal land. (Petition, pp. 17-19.) The BLM regulation specifically states that "there is no conflict if the State law or regulation requires a higher standard of protection for public lands than [BLM regulations]." (43 C.F.R. § 3809.3.) Neither the Court of Appeal decision under review, nor the *South Dakota Mining* decision on which it relied, considered the BLM regulation. This was a serious omission.

Rinehart's response is to assert that the BLM regulation is "bad law." (Answer, p. 25.) But *Granite Rock* recognized agencies' ability to affect the scope of preemption when it directed agencies to state their positions on preemption. (480 U.S. at p. 583.) More generally, the U.S. Supreme Court has explained that federal agencies "have a unique understanding of the

statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Wyeth v. Levine* (2009) 555 U.S. 555, 557.) BLM's interpretation should control unless it is *unreasonable* to interpret the federal mining laws as BLM has. (E.g., *RCJ Medical Servs., Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1004-05.) At a minimum, *some* California court should consider the relevant federal agency's view before striking down the state statute at issue. For this reason, the BLM regulations support review by this Court.[2]

2. The Court of Appeal likewise failed to discuss the U.S. Supreme Court's presumption against preemption. (Petition, pp. 19-23.)

Rinehart argues that the presumption does not apply here "[g]iven the Property Clause and the history of Federal mining law." (Answer, p. 25.) But the presumption does apply on lands that are federal property. (See, e.g., *Wyoming v. United States* (10th Cir. 2002) 279 F.3d 1214, 1230-31; *United States v. Calif. State Wat. Res. Control Bd.* (9th Cir. 1982) 694 F.2d 1171, 1176; see also *Kleppe v. New Mexico* (1976) 426 U.S. 529, 543, 545 ("State[s] undoubtedly retain[] jurisdiction over federal lands within its territory" and states have "broad" police powers even on federal land.) Although Rinehart, quoting *United States v. Locke* (2000) 529 U.S. 89, 108, claims that the presumption is "'not triggered when the State regulates in an

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[2] Rinehart says "it is worth noting that defendant's claim is on Forest Service land, not BLM land" (Answer, p. 27), without explaining why that matters. Both BLM and USFS "administer" the federal mining laws and thus both are entitled to deference. (*RCJ, supra*, 91 Cal.App.4th at p. 1005.) Moreover, the USFS regulations also explicitly require compliance with a wide variety of state laws. (36 C.F.R. §§ 228.5, 228.8 [discussed in *Granite Rock, supra*, 480 U.S. at pp. 583-84]; 70 Fed. Reg. 32713, 32722 (June 6, 2005).)

areas where there has been a history of significant federal presence'" (Answer, p. 25), that view does not reflect the current state of the law. The U.S. Supreme Court has more recently held that the applicability of the presumption depends not on the "absence of federal regulation," but rather on the "historic presence of state law." (*Wyeth*, *supra*, 555 U.S. at p. 565 fn. 3.) As a result, courts now apply the presumption against preemption in a wide range of scenarios where there is a heavy history of federal regulation. (See *McDaniel v. Wells Fargo Investments*, LLC (9th Cir. 2013) 717 F.3d 668, 675 [applying presumption when California labor law affected securities operations]; *Pac. Merch. Shipping Assn. v. Goldstene* (9th Cir. 2011) 639 F.3d 1154, 1166-67 [applying presumption when California air quality regulations affected marine commerce]; see generally *In re Countrywide Financial Corp. Mortgage-Backed Securities Litigation* (C.D. Cal. 2013) 966 F.Supp.2d 1018, 1025 fn. 5 [explaining that *Wyeth* "clarified" *Locke*].) Contrary to Rinehart's assertion, in the immigration case *Arizona v. United States* (2012) 132 S. Ct. 2492, the Court *did* recite the presumption against preemption: "In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress." (132 S. Ct. at p. 2501, quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 and citing, inter alia, *Wyeth*, *supra*, 555 U.S. at p. 565.)[3]

[3] That *Arizona* found the state statute at issue preempted does nothing to help Rinehart's case here. Unlike environmental law, immigration is not a traditional focus of state police power. For immigration, "Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders" (132 S. Ct., at p. 2502), whereas environmental regulation features overlapping state and federal responsibilities.

Once again, at the very least, the U.S. Supreme Court's views on the presumption against preemption deserve consideration before California's judicial system not only strikes down this particular law, but announces a potentially broad rule affecting many other laws. The Court of Appeal's failure to consider the presumption reinforces the need for review.

III. THE COURT OF APPEAL'S DECISION WAS WRONG IN OTHER WAYS AS WELL

Rinehart's attempts to buttress the Court of Appeal's reasoning fail on other fronts as well.

1. The Petition for Review explained that the Supreme Court's decision in *Granite Rock* found no preemption by the federal mining laws in part because "the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." (480 U.S. at p. 582.) Rinehart focuses on *Granite Rock*'s discussion of preemption under federal *land use* statutes – the context in which *Granite Rock* brought up the hypothetical question of a regulation making a federally sanctioned activity "commercial impracticable." (*Id.* at pp. 584-89.) But the statutes at issue here are not land use statutes because they do not prohibit any use of the land. They permit mining – they just require it to be done in an environmentally sensitive manner. (Petition, pp. 24-25.)

Most importantly, while he seeks support from *Granite Rock*, Rinehart ignores the opinion's most apposite point: its extended discussion of preemption under federal mining laws, including 30 U.S.C. §§ 22, 612(b). (480 U.S. at pp. 582-84.) In that section of *Granite Rock*, the U.S. Supreme Court held that the preemption issue depends on federal regulations and those "not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations [to mine on federal land] will comply with state laws." (*Id.* at

p. 583.) This discussion is not addressed by Rinehart, the Court of Appeal here, or *South Dakota Mining*.

Rinehart instead asserts that *Granite Rock* lacks persuasive authority because "[i]t appears the Supreme Court was not fully informed concerning mining law." (Answer, p. 21 fn. 11.) That contention is factually wrong[4] and legally irrelevant. *Granite Rock* (unlike *South Dakota Mining*) is binding authority and must be followed.

2. Like the Court of Appeal, Rinehart relies heavily on the Eighth Circuit's opinion in *South Dakota Mining*. (Answer, pp. 20-21). But that case relied on the same misinterpretations of *Granite Rock* explained above. (See also Petition, pp. 12-23.)

Rinehart also cites to three non-binding cases consistent with *South Dakota Mining*. (Answer, pp. 20-21, citing *Brubaker v. Bd. of County Comrs.* (Colo. 1982) 652 P.2d 1050; *Eliott v. Oregon Intern. Min. Co.* (Or. App. 1982) 654 P.2d 663; *Ventura County v. Gulf Oil Corp.* (9th Cir. 1979) 601 F.2d 1080.) But these three cases were decided before *Granite Rock*; like *South Dakota Mining*, they are inconsistent with its reasoning. Among other things, they rely on the simplistic belief that the congressional encouragement of mining amounts to a decision to encourage mining at the expense of everything else. Such reasoning as a basis for preemption has been disapproved of by the Supreme Court in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Com.* (1983) 461 U.S. 190, 221-23 and *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 633-34 – cases which Rinehart's answer does not address.

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[4] See, e.g., Brief for the United States as Amicus Curiae Supporting Appellee, *Granite Rock*, 1986 WL 727647. *4 fn. 3, *5 fn. 4, *16, *25-*30 [unsuccessfully arguing in favor of preemption and comprehensively discussing the federal mining laws]; Reply Brief for Appellants, *Granite Rock*, 1986 WL 727649, *8-*14 [rebutting preemption arguments].

Rinehart's reliance on *Ventura County* is especially telling. The Ninth Circuit later "applied [*Ventura County*'s] reasoning" when it found preemption in *Granite Rock Company v. California Coastal Commission* (9th Cir. 1985) 768 F.2d 1077, 1082. But the U.S. Supreme Court reversed in *Granite Rock* and held there was *no* preemption. (480 U.S. 572.) That Rinehart relies on reasoning the Supreme Court later (by extension) reversed speaks volumes about the tenuousness of his position.

3. Rinehart portrays various federal laws as evincing a purpose to promote mining, with only a limited role for state law.

For instance, Rinehart says that "Congress considered a role for state law," only to the extent expressed in 30 U.S.C. § 51 – a limited provision dealing with ditches and water use. (Answer, p. 16; see also *id.* at pp. 14-15.) But the contention that § 51 represents a rejection of state environmental regulation is unsupportable. As *Granite Rock* explained, "the Mining Act of 1872, as originally passed, expressed no legislative intent on as yet rarely contemplated subject of environmental regulation." (480 U.S. at p. 582.)

Rinehart argues that 30 U.S.C. § 22 does not contemplate state regulation because the phrase "regulations prescribed by law" in that section does not explicitly mention *state* law. (Answer, p. 16.) But neither does the statute explicitly limit itself to *federal* law. Rather, the statute uses a general term ("regulations prescribed by law") that is capacious enough to include state law. The statutory ambiguity, combined with the federal regulations and the presumption against preemption, counsel in favor of recognizing the continuing role of state law. (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1064, citing *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449); see also pages 5-7, *supra*.) At the very least, the ambiguity requires that, before setting a statewide policy of potential preemption, state

court review should take into account the federal presumption and regulations, which the Court of Appeal failed to do.

Rinehart argues at length about 30 U.S.C. § 612(b), a provision that sets a standard for resolving conflicts between miners' and the federal government's use of surface resources. (Answer, pp. 16-19.) Although Rinehart has said that § 612(b) is "at the core of Appellant's federal preemption claim" (Ltr. Opposing Depublication, p. 7), the Court of Appeal decision here did not mention or rely on § 612(b). Nor did *South Dakota Mining. Granite Rock*'s discussion of § 612(b) led the Supreme Court to look at the relevant agency regulations, finding them "devoid of any expression of intent to preempt state law." (480 U.S. at p. 582.) If such reasoning led to no preemption in *Granite Rock*, then *a fortiori* there is no preemption here, where the federal regulations at issue specifically countenance state regulation.[5]

Rinehart also argues that 30 U.S.C. § 28 creates a "duty" to mine, such that the state law makes it impossible to comply with federal requirements. (Answer p. 26 fn. 13.) But § 28 does not require miners to mine (and certainly not to mine using a suction dredge). Rather, § 28 only

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[5] That Rinehart cites no case holding that 30 U.S.C. § 612(b) preempts state law is not surprising. Section 612(b) is focused on the relationship between miners and the federal government, speaking to the "right of the United States" and "any use of the surface of any such mining claim by the United States, its permittees or licensees." (See also, e.g., H. Rept. No. 730, pp. 3, 6, 10 (June 6, 1955), *as reprinted in* 1955 U.S.C.C.A.N. 2474.) Section 612(b) does not seek to resolve differences between miners and state governments. This is most obvious when one looks to the next section, § 613, the provision that implements § 612(b) and explains how the process for resolving those conflicts. Section 613 only speaks to federal agencies; there is no mention of state or local governments or anyone else. Section 612(b) does not reflect "clear and manifest" intent to preempt state laws that affect the use of surface resources.

requires miners to expend "$100 worth of labor," which can include any work relating to the claim. (See, e.g., *U.S. v. 9,947.71 Acres of Land* (D. Nev. 1963) 220 F.Supp. 328, 332; 43 C.F.R. § 3836.12 [listing examples of qualifying assessment work].) Miners may also pay a small fee in lieu of performing that labor. (See 30 U.S.C. § 28f(a) ["Such claim maintenance fee shall be in lieu of the assessment work requirement contained in the Mining Law of 1872 (30 U.S.C. 28 to 28e)"]; 43 C.F.R. § 3834.11(a) [same].) Thus, there is no duty to mine, and no conflict between the state laws at issue here and federal law.

4. Rinehart spends much of his time arguing factual issues, such as whether suction dredge mining in fact harms the environment. But the Legislature's explicit finding on the matter controls, and, in any event, accords with common sense and the extensive scientific report which is part of the record below.[6] Although Rinehart claims that the suction dredge mining moratorium is effectively permanent, the statute explicitly makes the ban temporary, and the Department and Legislature continue to move forward in establishing a regime to allow such mining while addressing crucial environment needs.[7]

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[6] See Stats.2009, ch. 62, § 2 ["The Legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state"]; https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=63843&inline=1 [report to the Legislature] (last visited December 17, 2014).

[7] Rinehart makes much of the fact that the Department did not believe it had legal authority to address some of the significant environmental effects. But moratoria often are established by a legislative body pending a report by an administrative agency as to what changes in law are necessary to address the issues, and the legislative body then makes those changes in due course. (E.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 337-38 & fns. 31-34.) Here, in further revising this moratorium in 2012 – after the

(continued...)

IV. THIS COURT SHOULD NOT EXPAND RINEHART'S RELIEF BY ORDERING JUDGMENT AS A MATTER OF LAW

Rinehart finally asserts that this Court should summarily expand the relief granted by the Court of Appeal by "ordering review and then retransfering to the Court of Appeals with instructions that § 5653.1 is declared to be unconstitutional as a matter of law, and defendant's conviction is vacated." (Answer, p. 31.)

Rinehart's cursory briefing on the issue is insufficient to establish that the Legislature's temporary moratorium of suction dredge mining is facially preempted. (See, e.g., *U.S. v. Salerno* (1987) 481 U.S. 739, 745 [a facial challenge to a legislative act is "the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists* under which the Act would be valid" (emphasis added)].) The only judicial analysis Rinehart points to in support of his argument – what Rinehart terms "the trial court's commonsense reaction, regrettably not embodied in his formal ruling, that the State needs to regulate suction dredging 'in an appropriate manner'" (Answer, p. 31) – is neither a considered judicial view, nor any finding relevant to preemption. In any event, Rinehart's assertions regarding the viability of non-suction-dredge mining on his claim have not been factually established; all he has

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(...continued)
Department had issued its final environmental impact report with findings of unmitigated significant environmental effects – the Legislature understood that it needed to take action to lift the moratorium. (See Stats.2012, ch. 39, § 7, adding Fish & G. Code, § 5653.1, subd. (c)(1) [requiring report to Legislature "with recommendations on statutory changes or authorizations" as to significant environmental effects].) Since then the Legislature has authorized the Department to revise permit fees. (See Stats.2012, ch. 565, § 5, amending Fish & G. Code, § 1050.) That the Legislature has not yet acted on the more difficult issues related to water quality, cultural resources, birds, and noise in the year-and-a-half since the Department submitted its legislative report is unremarkable.

made is a proffer. It is quite an overreach for Rinehart to advocate that federal law preempts state regulation not only if the regulation makes mining commercially impracticable for him, but even if the regulation does not affect practicability at all.[8]

CONCLUSION

For these reasons, the People respectfully request that the Court grant the petition for review or, alternatively, order that the Court of Appeal's opinion be depublished.

Dated: December 18, 2014 Respectfully submitted,

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[8] Suction dredge mining is not the only way to mine a federal unpatented mining claim. Other ways include panning, shoveling, and sluicing in the water, as well as using heavy equipment outside the water. In any case, according to a survey conducted for the Department by a well-respected economist, over 80% of all suction dredge miners are recreational in nature, and do not obtain a profit even when using suction dredge mining equipment. (See https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27421&inline=1 [socioeconomic report on suction dredge mining regulatory amendments, developed during the environmental review].)

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY TO ANSWER TO THE PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,983 words.

Dated: December 18, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rinehart**

No.: **S222620**

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; my business address is 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On December 18, 2014, I served the attached **Reply to Answer to the Petition for Review** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, 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 December 18, 2014, at Oakland, California.

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Declarant

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