# IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ERIC HUNG LE, et al.,

Defendants and Appellants.

**No. S202921**

Court of Appeal No. D057392

Superior Court No. SCD212126



## APPELLANT'S REPLY BRIEF ON THE MERITS

## [PEOPLE'S CROSS-APPEAL REGARDING CODEFENDANT DOWN GEORGE YANG]

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## TABLE OF CONTENTS

PAGE

## TABLE OF AUTHORITIES

PAGE

### CASES

## TABLE OF AUTHORITIES

PAGE

### STATUTES

**Penal Code**

## TABLE OF AUTHORITIES



## OTHER AUTHORITIES

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**APPELLANT'S REPLY BRIEF ON THE MERITS**

**[People's Cross-Appeal Regarding Codefendant Down George Yang]**

## ISSUES PRESENTED

Does Penal Code section 1170.1, subdivision (f), as interpreted by this Court in *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), preclude a trial court from imposing both a firearm enhancement under Penal Code section 12022.5, subdivision (a)(1), and a gang enhancement under Penal Code section 186.22, subdivision (b)(1)(B), when the offense is a serious felony as a matter of law? [1]

## INTRODUCTION

As demonstrated in the People's Brief on the Merits, the correct resolution of the question presented is that section 1170.1, subdivision (f), as interpreted by this Court in *Rodriguez*, does not preclude the sentencing judge from imposing both a firearm enhancement under section 12022.5, subdivision (a)(1), and a gang enhancement under section 186.22,

[1] All statutory references are to the Penal Code unless otherwise specified.

subdivision (b)(1)(B), when the underlying felony offense is a serious felony as a matter of law.

In the instant Reply Brief, the People respond to Appellant Down George Yang's contention that the *Rodriguez* decision precludes imposition of sentence for both a firearm allegation and a gang enhancement when the underlying felony offense is a serious felony as a matter of law. The People contend the defense misinterprets the *Rodriguez* decision and unnecessarily limits the choices available to the sentencing court. Under the *Rodriguez* decision, the statutory bar under section 1170.1, subdivision (f), in this case only prevents imposing the gang enhancement under subdivision (b)(1)(C) of section 186.22, because this violent felony provision is triggered by same firearm use supporting the section 12022.5, subdivision (a)(1), enhancement. There is no statutory bar, however, to imposing both the firearm use enhancement under section 12022.5, subdivision (a)(1), and the gang use enhancement under (b)(1)(B) of section 186.22, even though the underlying offense is the serious felony of assault with a semiautomatic firearm under section 245, subdivision (b).

## ARGUMENT

### I

### PENAL CODE SECTION 1170.1, SUBDIVISION (f), AS INTERPRETED BY THIS COURT IN *RODRIGUEZ*, DOES NOT PRECLUDE THE TRIAL COURT FROM IMPOSING BOTH A FIREARM ENHANCEMENT UNDER PENAL CODE SECTION 12022.5, SUBDIVISION (a)(1), AND A GANG ENHANCEMENT UNDER PENAL CODE SECTION 186.22, SUBDIVISION (b)(1)(B).

There is no dispute that this Court's holding in the *Rodriguez* case precludes increasing defendant Yang's sentence on count 4 with both the firearm enhancement under section 12022.5, subdivision (a)(1), and the gang enhancement under section 186.22, subdivision (b)(1)(C), as the latter only qualifies as a violent felony because of the same firearm use which supports the firearm enhancement. "Here, defendant became eligible for this 10-year punishment [for a violent felony under subdivision (b)(1)(C)] *only* because he 'use[d] a firearm which use [was] charged and proved as provided in ... Section 12022.5.' (§ 667.5, subd. (c)(8).)" (*Rodriguez*, supra, 47 Cal.4th at p. 509, italics in original.)

Defendant Yang argues that because the verdicts on count 4 and its accompanying sentencing allegations established that the underlying offense was a violent felony under section 667.5, subdivision (c)(8), the only punishment provision that could be imposed for the gang enhancement was the violent felony allegation under subdivision (b)(1)(C). Yang concludes, however, that since *Rodriguez* precludes imposing the gang enhancement under subdivision (b)(1)(C), no punishment at all can be added for the section 186.22, subdivision (b)(1), gang enhancement found true by the jury.

Yang cites *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*) in support of his argument. *Lopez* is easily distinguishable. In *Lopez*, the

defendant committed first degree murder for the benefit of a street gang. This Court held that the gang enhancement must be punished under section 182.22, subdivision (b)(5), which applies when the underlying crime is a "felony punishable by imprisonment in state prison for life." Utilizing various rules of statutory construction, including examining legislative history, the Court concluded subdivision (b)(5) of section 186.22, rather than the violent felony provision of subdivision (b)(1)(C), applied when the crime was first degree murder. The phrase "felony punishable by imprisonment in state prison for life" from subdivision (b)(5) was described by the Court as an "excepting clause" to the punishment scheme in subdivision (b)(1). (*Id.* at p. 1006.)

The holding in *Lopez* does not apply here because Yang was not convicted of a life top offense. Instead, Yang was convicted in count 4 of the determinate term crime of assault with a semiautomatic weapon in violation of section 245, subdivision (b). Nothing in the *Lopez* opinion discusses a sentencing court's options when, as here, the gang enhancement is punishable only under subdivision (b)(1).

Yang also argues the use of the term "shall" in subdivision (b)(1)(C) of section 186.22 creates an all or nothing choice for the sentencing court when the underlying crime qualifies as a violent felony under section 667.5, subdivision (c). Yang's reasoning is flawed. Each of the three sentencing choices in subdivision (b)(1) uses the term "shall." The term "shall" as used in each subpart places a mandatory requirement upon the sentencing court to impose the listed punishment should the gang enhancement be found true (subject to the discretionary power to strike such under subdivision (g) of section 186.22). Nothing in the use of the term "shall" within subdivision (b)(1) precludes, as Yang claims, imposing sentencing under subdivision (b)(1)(B) when, as here, sentencing under subdivision (b)(1)(C) is precluded under the *Rodriguez* decision. Indeed, the only

rational way to harmonize the statutory scheme is to permit the court to impose sentence under the lesser punishment provision for a serious felony (subd. (b)(1)(B)), when sentencing under the greater violent felony provision (subd. (b)(1)(C)) cannot be imposed because of the holding in *Rodriguez*.

The jury's findings on count 4 established that Yang committed the felony of assault with a semiautomatic firearm (section 245, subd. (b)), that he personally used that firearm in the commission of this crime (section 12022.5, subd. (a)(1)), and that he committed the crime for the benefit of a street gang (section 186.22, subd. (b)(1)). There is no inherent overlap of the facts supporting each of the enhancement allegations. Each describes a distinct aggravating factor related to the underlying crime. Nor is there any statutory bar to imposing both a firearm enhancement and a gang enhancement, as is evident from the second sentence of section 1170.1:

> When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. *This subdivision shall not limit the imposition of any other enhancements applicable to that offense,* including an enhancement for the infliction of great bodily injury.

(Italics added.)

In addition, there is statutory language in both the firearm enhancement and gang enhancement provision indicating a legislative intent that the sentencing judge should impose additional punishment for each of these aggravating factors. A sentencing court is absolutely prohibited from striking under section 1385 a gun use allegation under section 12022.5. (*People v. Thomas* (1992) 4 Cal.4th 206; *People v. Herrera* (1998) 67 Cal.App.4th 987.) In addition, according to section 186.22, subdivision (b)(1):

> [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, *shall*, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:
>
> (A) Except as provided in subparagraphs (B) and (C), the person *shall* be punished by an additional term of two, three, or four years at the court's discretion.
>
> (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person *shall* be punished by an additional term of five years.
>
> (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person *shall* be punished by an additional term of 10 years.

(Italics added.) The court's power to strike the additional punishment mandated by section 186.22 is limited. (§ 186.22, subd. (g).)

Under Yang's argument the sentencing judge would be forced to choose between imposing sentence for the firearm use allegation or the gang enhancement, but not both. This is contrary to the basic rules of statutory construction.

" 'The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.]' (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)" (*People v. Zambia* (2011) 51 Cal.4th 965, 976-977.) The courts do not "construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 899.)

This goal is reached if the trial court is permitted to impose sentence on a section 12022.5, subdivision (a)(1), firearm enhancement and a street gang allegation under section 186.22, subdivision (b)(1), at a level that does not violate subdivision (f) of section 1170.1 as interpreted by the *Rodriguez* decision.

Defendant Yang's approach also violates the principle of statutory construction that the "principal task is to ascertain the intent of the Legislature." (*People v. Broussard* (1993) 5 Cal.4th 1067, 1071.)

> Underlying the enactment of this statutory scheme [§ 186.20 et seq.] was a legislative finding declaring that "California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (§ 186.21.) To combat the problem, the Legislature declared its intent "to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs." (*Ibid.*)

(*People v. Gardeley* (1996) 14 Cal.4th 606, 615.)

In the related context of section 12022.53, the Court has recognized that the presence or absence of a gang-related motive is critical to the sentencing scheme under section 186.22.

> The first group consists of those offenders who personally used or discharged a firearm in committing a gang-related offense that is specified in section 12022.53. These defendants are subject to *both* the harsh enhancement provisions of 12022.53 *and* the gang-related sentence increases of section 186.22. ... The third group consists of those who personally used or discharged a firearm during an offense that is specified in section 12022.53 but is not *gang relate*d. They are subject to additional punishment under section 12022.53, but because the crime is not gang related, the gang-related sentence increases of section 186.22 do not apply.

(*People v. Brookfield* (2009) 47 Cal.4th 583, 593-594, italics in original.)

Under the defense argument, Yang could be punished to a maximum of 10 years either for the gun use allegation under section

12022.5, subdivision (a)(1), or for gang enhancement under section 186.22, subdivision (b)(1)(C). His maximum potential sentence, therefore, would be no greater than for another defendant who did not harbor a gang-related motive. This violates the intent of the voters in enacting the increased punishment levels for violent and serious gang-related felonies as part of Proposition 21. "Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties." (Prop. 21, "Gang Violence and Juvenile Crime Prevention Act of 1998," Primary Elec. (Mar. 7, 2000), § 2, subd. (h).) The legislative intent behind section 186.22 is that the presence of a gang-related motive is a crucial additional aggravating factor which must be factored into Yang's overall culpability and potential punishment.

## II

## THAT THE UNDERLYING OFFENSE IN COUNT 4 IS A SERIOUS FELONY AS A MATTER OF LAW DOES NOT PRECLUDE THE TRIAL COURT FROM IMPOSING BOTH A FIREARM ENHANCEMENT UNDER PENAL CODE SECTION 12022.5, SUBDIVISION (a)(1), AND A GANG ENHANCEMENT UNDER PENAL CODE SECTION 186.22, SUBDIVISION (b)(1)(B).

As an alternative argument, Yang argues that section 1170.1, subdivision (f) and the *Rodriguez* holding preclude imposing both the firearm enhancement under section 12022.5, subdivision (a)(1), and the gang enhancement punishment at the serious felony level under section 186.22, subdivision (b)(1)(B), because both enhancements involve the use of a firearm. This was the basis for the appellate court's decisions below. As discussed in the People's Opening Brief on the Merits, however, this is an inaccurate extension of the holding in *Rodriguez*.

That the underlying offense comes within the definition of a serious felony under subdivision (c) of section 1192.7, because it involves the use of a firearm does not implicate the prohibition of section 1170.1, subdivision (f). The plain language of subdivision (f) of section 1170.1 states that its dual use prohibition only applies to factually overlapping "enhancements." It does not apply when the nature of the underlying felony defines the applicability and amount of the punishment for a statutory enhancement.

As reflected in the information (1 C.T. p. 17) and the jury verdict (2 C.T. 307), defendant Yang committed the crime charged in count 4, assault with a semiautomatic weapon in violation in section 245, subdivision (b), for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). "[T]he standard additional punishment for committing a felony to benefit a criminal street gang is two,

three, or four years' imprisonment" as set forth in subdivision (b)(1)(A). (*Rodriguez*, *supra*, 47 Cal.4th at p. 509.) In this case, however, the gang enhancement is also punishable at the five-year level under subdivision (b)(1)(B) because the underlying felony qualifies as a serious felony under section 1192.7. Three subdivisions of section 1192.7 make the underlying crime a serious felony: Subdivision (c)(8) applies to those who personally use a firearm in the commission of the crime, subdivision (c)(23) applies to those who personally use a dangerous or deadly weapon in the commission of the crime, and subdivision (c)(31) applies when the underlying crime is assault with a firearm, including a semiautomatic firearm. Finally, the gang enhancement in this case is also potentially punishable by 10 years under subdivision (b)(1)(C) of section 186.22 as the underlying felony qualifies as a violent felony under section 667.5, subdivision (c)(8) because Yang used a firearm as "charged and proved" under section 12022.5, subdivision (a)(1).

Again, there is no dispute that the *Rodriguez* holding precludes imposing punishment on count 4 for both the firearm use "charged and proved" under section 12022.5, subdivision (a)(1), and the gang enhancement at the violent felony level under subdivision (b)(1)(C) of section 186.22. This is because only the greatest punishment applicable to one of those enhancements can be imposed under the express language of section 1170.1, subdivision (f).

There is also no dispute that the gang enhancement cannot be punished at the serious felony level under subdivision (b)(1)(B) of section 186.22 using either subdivisions (c)(8) or (c)(23) of section 1192.7, because these provisions cover the exact same conduct as the firearm use enhancement under section 12022.5, subdivision (a)(1). But the gang enhancement can be elevated to the serious felony level because the underlying crime is listed in subdivision (c)(31) of section 1192.7. Yang

argues, however, that since the underlying crime is a serious felony under subdivision (c)(31) only because it involves assault with a semiautomatic firearm, any attempt to elevate the gang enhancement to the serious felony level under subdivision (b)(1)(B) would overlap with the same conduct supporting the section 12022.5, subdivision (a)(1), firearm use allegation. Thus, according to Yang and the Court of Appeal, imposition of punishment under section 12022.5, subdivision (a)(1), and section 186.22, subdivision (b)(1)(B), would violate section 1170.1, subdivision (f).

As set forth in our Opening Brief on the Merits, the prohibition against imposing two or more enhancements for being armed with or using a deadly weapon or firearm in subdivision (f) of section 1170.1, does not apply in this scenario. The enhancement in section 186.22, subdivision (b)(1), focuses on a defendant who commits a felony for the benefit of a street gang. If the gang enhancement qualifies the punishment at the serious felony level based upon the nature of the underlying crime, section 1170.1, subdivision (f), is not implicated. It is only when, as in *Rodriguez*, the firearm use enhancement is charged and proved under subdivision (a)(1) of section 12022.5 is also being used to elevate the gang allegation punishment to the violent felony level, that section 1170.1, subdivision (f)'s prohibition against dual punishment of the enhancements is operative.

As this Court recently noted, the "gang enhancement provision [§ 182.22, subd. (b)] ... shows that the Legislature knows how to—and did—make the fact of gang participation separately punishable from an underlying offense." (*People v. Mesa* (2012) 54 Cal.4th 191, 198.)

> When a defendant commits a crime for the benefit of a criminal street gang, he or she may have two independent but simultaneous objectives—to commit the underlying crime and to benefit the gang. [Citations.] Thus, section 654 does not prohibit punishing a defendant both for violating section 186.22, subdivision (a) and for the underlying crime committed for the benefit of the gang when the two offenses involve different objectives. [Citations.] [¶]

> That is the case here. The evidence shows defendant knew he was in possession of a firearm in public, and intended to commit that crime to promote or assist the gang. While he might have pursued these objectives simultaneously, they were independent of each other. There is no violation of section 654.

(*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1514.)

While not a section 654 issue, the same rationale should apply when the gang enhancement (subd. (b)(1)) rather than the gang-related crime (subd. (a)) under section 186.22 is combined with a firearm related crime. In this case, Yang used a semi-automatic gun to commit a felony assault and did so with the intent to benefit his gang. "While he might have pursued these objectives simultaneously, they were independent of each other." (*Garcia*, *supra*, 153 Cal.App.4th at p. 1514.)

Finally, even assuming Yang is correct that the gang enhancement could not be punished at the serious felony level because the underlying conduct making it so pertains to the same firearm use supporting the firearm use allegation under subdivision (a)(1) of section 12022.5, Yang's proposed remedy is that the sentencing court must stay punishment completely on one of these enhancements. As noted above, this means one component which makes Yang's crime particularly egregious, either that he personally used a firearm or that he committed the crime for the benefit of a street gang, must go unpunished. Again, this could not be the intent of the Legislature or the voters when these provisions were enacted. To properly harmonize the statutory scheme, the sentencing court should have more options.

It is unclear why the sentencing judge in this case felt compelled to impose the gang enhancement at the violent felony level first, which then necessitated staying the gun use enhancement under section 12022.5, subdivision (a)(1). The better approach would seem to be to impose sentence of the gun use enhancement under subdivision (a)(1) of section

12022.5, and then address which punishment level could be legally imposed for the gang allegation under subdivision (b)(1) of section 186.22. Since the holding in *Rodriguez* precludes using the violent felony punishment in this case, the sentencing judge should then drop down to the next greatest applicable punishment level for the gang enhancement. Here, as we argue, that would be serious felony level under subdivision (b)(1)(B). Even if the Court agrees with Yang that the serious felony level of punishment is precluded by the firearm use component of the underlying crime, there is no reason why the court should not be allowed to impose the base level punishment for the gang enhancement under subdivision (b)(1)(A).

Depriving the judge of the power to impose a gang enhancement under section 186.22, subdivision (b)(1)(A), upon a defendant convicted of assault with a firearm with a personal use allegation under subdivision (a)(1) of section 12022.5 would lead to absurd results that the Legislature could not have intended.

For example, assume a defendant assaults someone with an ordinary firearm in violation of section 245, subdivision (a)(1). Assume also that the defendant committed this crime for the benefit of a street gang under section 186.22, subdivision (b)(1), and personally used the firearm under section 12022.5, subdivision (a)(1). Under Yang's argument, and the reasoning of the Court of Appeal below in this case, a trial court could only impose a maximum sentence of 14 years in prison, consisting of the upper term of four years for the assault and the upper term of 10 years for the personal use allegation. The judge would be compelled to stay the gang allegation entirely under section 1170.1, subdivision (f), because the underlying crime necessarily involved the use of a firearm, as did the gun use enhancement.

Now assume the same defendant, with the same gun and for the same gang motive, only displays the gun and makes a terrorist threat in violation of section 422, without actually assaulting the victim. The upper base term for this crime is three years in prison. Yet, since the crime does not include as an element the use of a firearm, the sentencing judge could impose both the upper term of 10 years for the personal use allegation under section 12022.5, subdivision (a)(1), and the upper term of four years for the gang enhancement under section 186.22, subdivision (b)(1)(A), for a total of 17 years. The Legislature could not have intended that a defendant who threatens to assault someone with a gun would face a greater punishment than a defendant who actually assaults someone with a gun. The People's approach harmonizes all the relevant statutes and avoids such absurd results.

## III

## ON REMAND THE TRIAL COURT SHOULD HAVE ALL APPROPRIATE SENTENCING OPTIONS.

In our Brief on the Merits we explain why the purpose of remand is for the trial judge to confirm his expressed desire to impose the upper term of ten years for the gun-use enhancement under section 12022.5, subdivision (a)(1): "If the Court were to impose or to be called upon to impose a term under the 12022.5 allegation, the Court would and hereby does find that the upper term would be appropriate." (18 R.T. p. 3464, lines 15-18.) We also contend that if the judge maintains this opinion, then the People's proposed sentencing scheme would be mandatory. A violation of section 245, subdivision (b), is a serious felony as a matter of law pursuant to section 1192.7, subdivision (c)(31). And under subdivision (b)(1)(B) of section 186.22, "[i]f the [underlying] felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person *shall* be punished by an additional term of five years." (Italics added.) Use of the word "shall" ordinarily connotes that the statutory requirement is mandatory. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634; *Cole v. Antelope Valley Union High Sch. Dist.* (1996) 47 Cal.App.4th 1505, 1512; *People v. Heisler* (1987) 192 Cal.App.3d 504, 506-507.)

Remand would also be appropriate if the Court agrees with Yang's argument, mirroring the holding of the Court of Appeal below, that section 1170.1, subdivision (f), as interpreted by the *Rodriguez* decision, precludes imposing sentencing for the gang enhancement at the serious felony level under subdivision (b)(1)(B) of section 186.22. The sentencing court would have the option to impose the upper term of 10 years for the firearm use allegation under subdivision (a)(1) of section 12022.5 and the standard level punishment of two, three or four years for the gang allegation under subdivision (b)(1)(A) of section 186.22.

## CONCLUSION

The People of the State of California respectfully request that the Court remand this matter to the trial court with directions to resentence defendant Yang on count 4.

Dated: December 20, 2012

Respectfully submitted,

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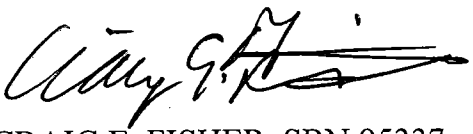
By: 

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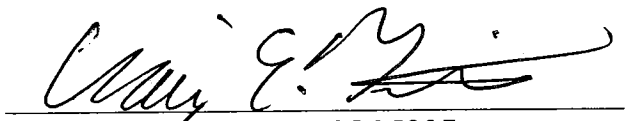
## CERTIFICATE OF WORD COUNT

I certify that this **Appellant's Reply Brief on the Merits**, including footnotes, and excluding tables and this certificate, contains 4,064 words according to the computer program used to prepare it.



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| Supreme Court | Court of Appeal | Superior Court No. |
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## PROOF OF SERVICE

I am a citizen of the United States and a resident of San Diego County. I am over 18 years and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On December 20, 2012, a member of our office caused to be delivered **via Federal Express overnight delivery** the original and 13 copies of the attached **APPELLANT'S REPLY BRIEF ON THE MERITS** for filing with the Supreme Court of the State of California at:

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and I placed a true and correct copy thereof in the U.S. Mail to:

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

Executed on December 20, 2012, at San Diego, California.

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