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March 9, 2018

Honorable Chief Justice Tani G. Cantil-Sakauye
and Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: **Request for Depublication or Partial Depublication (Rules of Court, Rule 8.1125)**

People v. Arnulfo R. Landaverde, 20 Cal.App.5th 287, 228 Cal.Rptr.3d 862 (Ct.App.2d February 7, 2018)

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

The undersigned criminal and immigration rights organizations and individuals strongly urge this Court to depublish this decision, or, at least to depublish the holding on ineffective assistance of counsel set forth at 228 Cal.Rptr.3d 863,*865-*869.

In *People v. Landaverde*, an unprecedented opinion, the Court of Appeals held that, prior to *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*), defense attorneys in California had no affirmative obligation to provide competent advice to noncitizen defendants about immigration consequences unless “asked” by a criminal defendant. *People v. Landaverde*, 20 Cal. App.5th 287, 228 Cal. Rptr.3d 862, 869 (Ct. App. 2018), reh'g denied (Feb. 22, 2018).

The *Landaverde* decision is legally and factually incorrect, contradicting a long line of established court precedent and secondary authority which clearly established defense counsel’s pre-*Padilla* duty to investigate and advise noncitizen defendants about the immigration consequences of a conviction. The signatories to this request to depublish—a large assortment of chief public defenders, criminal defense attorneys, and experts in the intersection of criminal and immigration laws—all recognize that, at least since the publication of *People v. Soriano*, (1987) 194 Cal.App.3d 1470, criminal defense attorneys in this state have understood and accepted as one of their core constitutional obligations the affirmative duty to advise noncitizen clients about adverse immigration consequences.

Landaverde misstates the holdings of pre-*Padilla* California case law, dramatically narrowing defense counsel’s pre-*Padilla* obligations to noncitizen defendants. This is not surprising, because pre-*Padilla* California case law, including the case of *Soriano*, was not raised, briefed, or decided upon in the trial court. Additionally, *Landaverde* conflicts with the Legislature’s understanding of relevant pre-*Padilla* California case law as set forth in Penal Code section 1016.2(a) which

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recognized that long before *Padilla*, California case law obligated counsel to provide affirmative advice to noncitizen clients about immigration consequences. *Landaverde* also fails to recognize that *Soriano* was not only based on the Sixth Amendment but independent state grounds.

Importantly, the sweeping holding in this case was totally unnecessary. The Court of Appeal could have easily reached the same conclusion and denied the motion to vacate based on its finding that the appellant failed to demonstrate prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 (“[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”).)

If this case is not depublished on the issue of ineffective assistance of counsel, it will upend existing case law, contradict laws passed by our state legislature, and could adversely affect many noncitizens who pleaded guilty or no contest during the 23 years from the decision in *People v. Soriano* (1987) 194 Cal.App.3d 1470 until the *Padilla* case was decided in 2010. The decision in this case will curtail the new remedy of section 1473.7(a)(1) which was enacted by the Legislature to prevent the separation of families caused by prejudicial error affecting a person’s ability to meaningfully understand, defend against, or knowingly accept the actual and potential adverse immigration consequences of a conviction.

Public Defenders, Organizations, Law School Professors Signing this Letter

Public Defender Chiefs for the following counties: Alameda (Brendon Woods); Fresno (Elizabeth Diaz); Marin (Jose Varela); Monterey (Susan Chapman); Orange County Alternative Public Defender (Frank S. Davis); San Diego County (Randy Mize); San Bernardino (Phyllis Morris); San Francisco (Jeff Adachi); Santa Clara County (Molly O’Neal); Santa Cruz (Biggam, Christensen, Minsloff); Solano (Elena D’Agustino); Sonoma (Kathleen Pozzi); Yolo (Tracie Olson)

Organizations: National Association of Criminal Defense Lawyers; California Attorneys for Criminal Justice; Immigrant Legal Resource Center; East Bay Community Law Center Clean State Clinic; East Bay Community Law Center Immigration Clinic; Community Legal Services of East Palo Alto; Asian Law Alliance; Pangea Legal Services.

Criminal and Immigration Law School Clinics and Professors: UCLA Criminal Defense Clinic; Ronald Tyler, Associate Professor of Law, Director, Criminal Defense Clinic, Stanford Law School; Suzanne A. Luban, Clinical Supervising Attorney and Lecturer in Law Stanford Law School; Jayashri Srikantiah, Professor of Law and Director, Immigrant Rights Clinic, Stanford Law School*(affiliation provided for identification purposes only)*; Jennifer Lee Koh, Professor of Law, Western State College of Law Immigration Clinic; Andrew Michael Knapp, Adjunct Professor, Southwestern Law School, Immigration Clinic; Katie Tinto, Assistant Clinical Professor of Law, Director, Criminal Justice Clinic, UC Irvine School of Law; Annie Lai, UC Irvine School of Law Immigrant Rights Clinic; UC Davis Immigration Law Clinic.

Facts of Case

In 1998, Mr. Landaverde pled guilty to one count of committing a lewd act on a minor, was admitted to probation for five years and ordered to serve six days in jail as a condition of probation among other conditions. (*People v. Landaverde* (2018) 20 Cal. App. 5th 287, 228 Cal.Rptr.3d 862.) In February 2017, he filed a motion to vacate under section 1473.7(a)(1) alleging his prior attorney violated his Sixth Amendment rights by failing to advise him of the immigration consequences of the plea. *Id.* at *864.¹ Mr. Landaverde asserted in a declaration in support of the motion that “[n]either the Court nor my attorney advised me that by pleading guilty, I would or could be removed from the county and/or lose my ability to fight for my legal residence.” *Id.* at * 865. Mr. Landaverde also asserted that he would not have pleaded guilty had he known the immigration consequences and would have insisted on taking the case to trial. *Id.* at *865. Although the record was “equivocal” on whether appellant’s trial counsel advised him of the immigration consequences, the Court of Appeals stated it would assume for purposes of the appeal that counsel did not advise him of the immigration consequences of his plea. *Id.* *1, n 2.

Holding of the Trial and Appellate Court

The trial court denied Mr. Landaverde’s section 1473.7(a)(1) motion based solely on the fact that the defendant had received the section 1016.5 advisement. (RT at B6-B7.)² The trial court’s ruling was clearly contrary to the decision in *People v. Patterson*, 2 Cal.5th 885 (holding that a section 1016.5(a) advisement does not bar section 1018 relief because, unlike defense counsel’s duties, it does not inform the defendant of the *actual* immigration consequences which may be a material matter in deciding whether a noncitizen will plead guilty.)

Instead of remanding the case to the trial court to decide in the first instance whether under section 1473.7(a)(1) there was “prejudicial error affecting appellant’s ability to meaningfully understand, defend against or knowingly accept the actual or potential immigration consequences of the plea,” the Appellate Court denied the motion on new grounds. The Court held that there was no prejudice because the victim was credible and the appellant received significant benefits from his plea agreement (since he was granted probation with only six days of local custody and was spared what could have been a mandatory state prison term ranging from three to eight years). *Landaverde* at *870. The Court found that there was no evidence that the appellant demonstrated that immigration consequences were of primary importance to him at the time of the plea. *Id.* *870. The above reasons alone were sufficient to deny the motion. However, even though the issue was not raised in the trial court or on appeal, the Appellate Court went on to rule that defense counsel could not have rendered ineffective assistance here because there was no pre-*Padilla* obligation for criminal defense attorneys to advise their clients about adverse immigration consequences unless the defense counsel “asked” *id.* at *869. It is this more narrow holding that we seek to depublish.

ARGUMENT

¹ All references to page numbers in *Landaverde* are to the Cal.Rptr. page numbers.

² References to the actual trial record are made pursuant to California Rules of Court, Rule 8.500(c) which allows references to the actual record where a petition for rehearing has been made, as in this case, although the petition was denied.

I. The Holding in *Landaverde* is an Incorrect Interpretation of Pre-*Padilla* California Case Law

In *Chaidez v. United States* (2013) 568 U.S. 342, 352, the United States Supreme Court ruled that, in jurisdictions that did not already require defense counsel to investigate and advise about immigration consequences, *Padilla* created a “new rule” under the Sixth Amendment and was not retroactive. However, courts had long assumed that California was one of those jurisdictions that was unaffected by *Padilla* and *Chaidez*. That is because, 23 years before the *Padilla* decision, the Court of Appeals in *People v. Soriano* reached the same conclusion as the Supreme Court did in *Padilla*: a criminal defense attorney has an affirmative obligation to advise a client about adverse immigration consequences. *Soriano*, 194 Cal. App.3d at 1478-79. Importantly, the *Soriano* decision was based not only on the Sixth Amendment, but also Art. I, §15 of the California Constitution.

States are, of course, free to adopt greater protections for federal constitutional rights than the United States Constitution. *Reynolds v. Superior Court* (1974) 12 Cal.3d 834, 842. The most that can be said about *Soriano* is that it reached the correct federal constitutional conclusion 23 years earlier than the United States Supreme Court and that it also reached the correct conclusion based on independent state grounds.

A. *Landaverde* Misstates the Holding of *Soriano*

Landaverde strains to narrowly construe *Soriano*: “*Soriano* does not stand for the proposition that, in the absence of *inquiry* from the defendant, defense counsel had an affirmative obligation to research and advise the defendant of his immigration consequences.” *Landaverde* at *869. [Italics added for emphasis.] But, in *Soriano* the Court framed the question this way:

This habeas corpus petition presents the interesting, and apparently novel, question in California of whether counsel for a criminal defendant who is an immigrant renders ineffective assistance by failing to adequately research the immigration consequences of a guilty plea by defendant. . . . Unlike the common case of a defendant who contends his counsel was ineffective for failing to investigate witnesses or evidence relating to a possible defense, defendant here maintains his counsel failed to investigate the law of immigration.

Soriano, 194 Cal.App.3d at 1478, 1480. The *Soriano* Court answered the question by holding that a pro forma advisement about potential immigration consequences, such as that provided in section 1016.5, does not satisfy defense counsel’s duty to investigate or advise. *Id.* at 1482. “Is such a formulaic warning from his own attorney an adequate effort to advise a criminal defendant of the possible consequences of his plea? We think not.” *Id.* at 1480. Notably, the *Soriano* court never suggests that the duty to research immigration law and provide accurate advice about immigration consequences is triggered only if or when the defendant asks for such advice.

Soriano made clear the standard for effective representation in California: it was not enough for a criminal defense attorney to merely parrot back a court’s 1016.5 advisement to her client. An attorney must research the immigration consequences of a plea and advise the client accordingly. *Soriano*, 194 Cal.App.3d at 1482.

The *Soriano* court said it was “uncontested that counsel, knowing defendant was an alien, resident in this country less than five years at the time he committed the crime, did not make it her business to discover what impact his negotiated sentence would have on his deportability.” *Id.* at 1480. The Court in *Padilla* came to the same conclusion years later: “Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement’ [citation omitted]. When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.” *Padilla*, 559 U.S. at 369.

Soriano has never been as narrowly construed or distinguished as it was in *Landaverde*. Every case interpreting *Soriano* has correctly held that it requires defense counsel to investigate and advise about the actual, as opposed to merely potential, immigration consequences of a disposition, with or without the defendant inquiring about those consequences. No case has ever suggested that the *Soriano* duty arose only because the defendant asked about immigration consequences.

For example, in *People v. Barocio*, 216 Cal.App.3d 99, 107 (1989), the court noted that “In effect the [*Soriano*] court concluded, counsel could not merely advise defendant in the language of section 1016.5 that deportation *could* result when research of the applicable law would have indicated that deportation *would* result unless the sentencing court recommended otherwise.” Similarly, in *People v. Makabali* (1993) 14 Cal.App.4th 847, 852, the court stated about *Soriano* and *Barocio*: “Generally, those cases hold defense counsel must do more than give a pro forma warning to his or her client that a plea may have an effect on immigration status. Instead, defense counsel has a duty to investigate the specific immigration consequences of a plea and to advise the client accordingly.” In *People v. Huynh* (1991) 229 Cal.App.3d 1067, 1083, the court interpreted *Soriano* as a case where “defense counsel was found to have rendered ineffective assistance by not going beyond a general warning to her client that his guilty plea might have immigration consequences.” In *People v. Chien* (2008) 159 Cal.App.4th 1283, 1290 the court interpreted the holding of *Soriano* to be that the writ of habeas corpus was granted “based on attorney’s failure to adequately advise the defendant of the immigration consequences of his plea.”

Other state and federal cases have similarly construed *Soriano*’s holding as requiring a duty to investigate and advise, without mentioning that duty was only triggered if the defendant had asked about immigration consequences. In *People v. Pozo* (1987) 746 P.2d 523, 528 the Colorado Supreme Court interpreted *Soriano* as a case where, knowing that the defendant was a noncitizen, the defense counsel did not adequately investigate federal immigration law. In *Wallace v. Reno* (1998) 24 F.Supp.2d 104, 110 the Court stated that in some states “it was widely recognized as a violation of an attorney’s professional duty to her client not to advise her of the immigration consequences of a plea or conviction” and, citing *Soriano*, the court stated “in some states, failure to do so was considered ineffective assistance of counsel.”

In addition to contradicting a long line of established case law, the *Landaverde* decision is also at odds with the California Legislature’s own findings about the requirements of *People v. Soriano*:

California courts also have held that *defense counsel must investigate and advise regarding the immigration consequences of the available dispositions*, and should, when consistent with the goals of an informed consent of the defendant, and as consistent with professional standards, defend against adverse immigration consequences (*People v. Soriano*, 194 Cal.App.3d 1470 (1987), *People v. Barocio*, 216 Cal.App.3d 99 (1989), *People v. Bautista*, 115 Cal.App.4th 229 (2004)).” [Italics added for emphasis]

Penal Code § 1016.2(a). Section 1016.2(h) also states that “[i]t is the intent of the Legislature to codify *Padilla v. Kentucky* and related California case law and encourage the growth of such case law in furtherance of justice and the findings and declarations of this section.” Section 1016.2 does not once mention a defendant’s inquiry.

Landaverde is the first and only instance in which a court has held that the *Soriano* duty arises only when the defendant inquires about immigration consequences and it reached this holding without ever having the issue briefed or presented by the parties or the trial court.

B. The Opinion in *Landaverde* Misstates the Holding of *In re Resendiz*

Landaverde asserts incorrectly that *In re Resendiz* (2001) 25 Cal.4th 230 “retained the traditional rule that failure to advise at all did not fall below the standard [of ineffective assistance of counsel].” *Landaverde*, at *868, n. 4. But, *Resendiz* did not reach that holding and explicitly left undisturbed the Court of Appeal’s ruling in *People v. Soriano*: “Petitioner in this case does not allege a mere failure to investigate, so the question is not squarely presented. [Footnote omitted.]” *In re Resendiz*, 25 Cal.4th at 250. Thus, while *Resendiz* stated in *dictum* that it was as yet “unpersuaded” as to whether a failure to research and advise about immigration consequences constituted ineffective assistance of counsel, the Court recognized that the only issue before it was whether *misadvice* about immigration consequences constituted ineffective assistance of counsel. *In re Resendiz*, 25 Cal.4th at 249-250. The *Resendiz* Court did not overrule the *Soriano* decision, and California defense counsel continued to be bound by the duty to investigate and advise. Additionally, post-*Resendiz*, effective criminal counsel did not interpret their duties differently merely because the Court did not “squarely” address whether there was a duty to affirmatively advise: effective counsel continued to affirmatively advise about immigration consequences and defend against them as they had since at least *Soriano*.

C. The Opinion in *Landaverde* is Internally Inconsistent about *People v. Bautista*

Landaverde also strains to narrowly distinguish *People v. Bautista*, 115 Cal.App.4th 229 (2004) as a case where “expert testimony established that defense counsel’s admitted failure to investigate such an ‘immigration neutral’ disposition fell below the reasonable standard of practice.” *Landaverde*, at *869. But, how can the failure to investigate an immigration neutral disposition fall below the reasonable standard of practice if there is no affirmative duty to research the consequences of the conviction in the first place? *Landaverde* in effect concedes that there existed a pre-2010 duty to investigate immigration consequences. The only way to make sense of *Bautista* is to acknowledge, as the court of appeals did in that case, that in 2004 there was a duty to research and advise about immigration consequences, and then additionally to defend against adverse immigration consequences.

II. The Holding in *Landaverde* Ignored the Governing Professional Standards

When courts venture an assessment about the requirements for effective assistance of counsel, they typically turn to the governing manuals, advisories, treatises, and professional norms. *See Padilla v. Kentucky*, 559 U.S. at 367-368 (citing numerous standards, performance guides, resources, articles, and practice manuals in support of its holding that professional norms required that a defense attorney advise his client regarding immigration consequences). Perhaps unsurprisingly because the issue was not even briefed, *Landaverde* engaged in no such analysis. If it had, the *Landaverde* court would have found that its holding, narrowly construing defense counsel’s pre-*Padilla* obligations, stands in sharp contrast to every treatise about the subject that has ever been published.

The Supreme Court in *Padilla* stated, with regard to the *Strickland v. Washington* analysis of ineffective assistance of counsel, that “[t]he first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla* at 367. [Internal citation and quotation marks omitted.] But, the Court in *Landaverde* did not examine professional norms in California pre-*Padilla*. If the Court had examined “the practice and expectations of the legal community” in California in light of pre-*Padilla* case law, the Court of Appeals would have found that *Padilla* was hardly a bolt from the blue. *Padilla* merely recognized and adopted the prevailing practice among the California defense bar. Criminal defense attorneys in this state have long understood and accepted *Padilla*’s command as one of the core obligation they owe their clients at least since *Soriano* in 1987. In fact, the San Francisco Public Defender’s Office even penned an amicus brief in *Soriano*, assuring the court that “the public defender’s office imposes on its staff attorneys, under its ‘Minimum Standards of Representation,’ the duty to ascertain ‘what the impact of the case may have on [the client’s] immigration status in this country.’” *Soriano*, 194 Cal.App.3d at 1481.

1. Professional Standards at Time of *Landaverde*’s Plea

In 1988, more than ten years before the plea by Mr. Landaverde, the Immigrant Legal Resource Center published the widely disseminated “Public Defenders’ Handbook on Immigration Law.” It interpreted *Soriano* as follows: “a public defender provided ineffective assistance of counsel by failing to adequately research the immigration consequences of an otherwise competently negotiated guilty plea.” *Id.* at 1. “[I]n order to determine goals in the criminal defense of a non-citizen, counsel must consider the defendant’s immigration status. . . . To provide competent representation, defense counsel must be familiar with at least the basic points contained in each of the following chapters.” *Id.* at 3.

The same year a leading treatise in California criminal defense stated that “[t]he possible consequences of a conviction require research in each case concerning: . . . Liability to deportation if the defendant is an alien. . . .” AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988), § 204, pp. 344-346.

Since the 1970s, the CEB book *California Criminal Law Procedure and Practice* (the “Bible” among criminal attorneys) has had a chapter devoted entirely to defense counsel’s duties in representing a noncitizen criminal defendant in California criminal proceedings. The 1986 version stated that “[t]he intake interview of any new client in a criminal case should include questions regarding immigration status.” *Id.* at §48.2. “Once it is determined that a defendant is not a citizen, special cognizance must be taken of the fact in ...plea negotiations....” *Id.*

The first paragraph of the August 1988 *Supplement to California Criminal Law Procedure and Practice* (CEB 1988) states: “Defense counsel may be found to have provided ineffective representation for failing to adequately warn a defendant of the possible effects of a guilty plea on his or her immigration status. *People v. Soriano* (1987) 194 CA3d 1470, 240 CR 328 (defendant entitled to withdraw guilty plea; defense counsel unfamiliar with immigration law did not adequately inform defendant of consequences of guilty plea or try to seek disposition more favorable to defendants’ immigration status).” *Id.* at §48.1.

Similarly, in 1992, the introduction to *California Criminal Law Procedure and Practice* stated as follows:

Defense counsel who fail to investigate and advise a noncitizen defendant of the *specific* immigration consequences of a guilty plea may be found to have provided ineffective assistance of counsel. The court must advise a defendant ...[pursuant to section 1016.5]. A similar general warning, however, is not sufficient advice by counsel. *Defense counsel are also required to advise their clients concerning the specific immigration consequences in the defendant’s own case.* [citing *Soriano* and *Barocio*.]

Id. at §48.1. [Italics added]

If *Landaverde’s* interpretation of *Soriano* is correct—that a defendant would have to “ask” about immigration consequences before an attorney had an obligation to advise—one would have expected such a distinction to have been noted in at least one of the treatises. But notably *no* treatise ever distinguished *Soriano* as so limited until *Landaverde* did so for the first time—30 years later.

2. Professional Standards Cited in *People v. Soriano*

The 1980 ABA Standards cited in *Soriano* emphasized the duty of attorneys to advise about “considerations deemed important by defense counsel or the defendant” including consequences such as deportation (3 ABA Standards for Criminal Justice, std. 14-3.2 (2d ed. 1980) p. 73), cited in *Soriano*, 149 Cal.App.3d at 1481. But, *Soriano* also emphasized that in addition to ABA Standards, the enactment in California of section 1016.5 imposed new duties on counsel. *Id.* *Soriano* equated section 1016.5 with a rights advisement and cited and quoted the commentary to American Bar Association’s Standards for Criminal Justice standard 14-3.2: “[T]he court must inquire into the defendant’s understanding of the possible consequences at the time the plea is received ... , this is not a substitute for advice by counsel. The court’s warning, coming as it does just before the plea is taken, may not afford time for mature reflection.” (3 ABA Standards for Criminal Justice, std. 14-3.2, *supra*, at p. 74.) *Id.* *Soriano* concluded that “[b]oth commentary and statute are concerned with the self-evident proposition that a defendant’s

in-court responses to rights advisements should not be made ‘off the cuff.’ Instead, they should reflect informed decisions he has reached after meaningful consultation with his attorney.” *Id.*

Penal Code § 1016.2(a) codifies the Legislature’s understanding of the professional standards in California since *Soriano* was decided in 1987: “*defense counsel must investigate and advise regarding the immigration consequences of the available dispositions*, and should, when consistent with the goals of an informed consent of the defendant, and as consistent with professional standards, defend against adverse immigration consequences.” (Section 1016.2(a), citing *Soriano*, *Barocio* and *Bautista*.) [Italics added for emphasis.] The importance of section 1016.2(a) is not that it attempts to operate retroactively, but rather is a codification of the Legislature’s understanding of the precedent at the time (section 1016.2(h)), and the Legislature’s understanding of the holding of these cases matches the interpretation of these cases both in the secondary literature and other case law citing and explaining the holding of these cases. *See supra*, at pp. 4-5 and p. 6.

CONCLUSION

We urge this Court to depublish *Landaverde*, or, at the very least, depublish the portion of the decision on ineffective assistance of counsel, as is appropriate under *Strickland v. Washington* (1984) 466 U.S. 668, 697.

Dated: March 9, 2018

Respectfully submitted,

/s/ Michael K. Mehr
Of Counsel

/s/ Rose Cahn
Criminal and Immigrant Justice Attorney

CERTIFICATE OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 Doyle St., Suite A, Santa Cruz, California 95062. On March 9, 2018, I served the within Request for Depublication or Partial Depublication to the following parties hereinafter named by:

X BY ELECTRONIC TRANSMISSION - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

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X BY MAIL - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct.
Executed this 9th day of March 2018, at Santa Cruz, California.

/s/ Alexia Figueroa