

S266003

**IN THE
SUPREME COURT OF CALIFORNIA**

MIKAYLA HOFFMANN, a Minor, etc.,
Plaintiff and Appellant,

v.

CHRISTINA M. YOUNG et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX
CASE NO. B292539

**MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF
POINTS AND AUTHORITIES; DECLARATIONS OF
CHRISTOPHER D. HU AND DAVID S. ETTINGER;
[PROPOSED] ORDER**

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ATTORNEYS FOR DEFENDANTS AND RESPONDENTS
**CHRISTINA M. YOUNG, DONALD G. YOUNG, JR., GUNNER YOUNG, AND
DILLON YOUNG**

MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452, 453, and 459, and rule 8.252(a) of the California Rules of Court, defendants Christina M. Young, Donald G. Young, Jr., Gunner Young, and Dillon Young request that this Court take judicial notice of the initial version of Senate Bill No. 639 (1963 Reg. Sess.), as introduced by Senator Teale on February 7, 1963. This bill was later amended, then enacted and codified as Civil Code section 846 (section 846), the recreational use immunity statute at issue in this appeal. A copy of the bill's text is attached as exhibit A to the declaration of David S. Ettinger.

This legislative history may be relevant to the issue presented for review because it addresses an argument that plaintiff Mikayla Hoffmann raised for the first time in her answer brief on the merits—i.e., that the term “landowner” as used in section 846, subdivision (d)(3) includes mere occupants of property. (ABOM 39.) This legislative history had no potential relevance in the litigation until plaintiff asserted this argument in her answer brief in this Court. For this reason, defendants did not introduce the legislative history materials in the trial court or in the Court of Appeal.

In defendants' view, the unambiguous language of the statute and plaintiff's failure to preserve this argument makes it unnecessary for this Court to consider legislative history. Moreover, the Court typically does not need to take judicial notice of the text of a legislative bill in order to consider it. Defendants are filing this motion in an abundance of caution, as well as for

the convenience of the Court and plaintiff's counsel, to ensure that all concerned have access to a copy of the bill's text.

This motion is being filed concurrently with the reply brief on the merits, and is supported by the attached memorandum of points and authorities, the attached declarations of Christopher D. Hu and David S. Ettinger, the appellate briefs, and the record on appeal.

July 29, 2021

HORVITZ & LEVY LLP
DEAN A. BOCHNER
CHRISTOPHER D. HU
HENDERSON & BORGESON
JAY M. BORGESON
ROYCE J. BORGESON

By: _____



Christopher D. Hu

Attorneys for Defendants and
Respondents

**CHRISTINA M. YOUNG, DONALD G.
YOUNG, JR., GUNNER YOUNG, and
DILLON YOUNG**

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This appeal concerns whether a non-landowner's invitation to enter private property, made without the landowner's knowledge or express approval, eliminates the landowner's recreational use immunity under section 846. In her answer brief on the merits, plaintiff suggests that defendant Gunner Young might be a "landowner" under section 846, subdivision (d)(3), even though he was only an occupant with no ownership interest in the property. (See ABOM 39.)

The plain language of the statute forecloses plaintiff's argument that a mere occupant could be a "landowner" under section 846, subdivision (d)(3). Moreover, plaintiff has forfeited this argument by failing to raise it until her answer brief in this Court. If, however, the Court decides that the language of the statute is ambiguous and that plaintiff's argument is not forfeited, defendants ask this Court to take judicial notice of the initial version of Senate Bill No. 639, which was later amended, enacted, and codified as Civil Code section 846. (See Stats. 1963, ch. 1759, § 1, p. 3511.) The initial version of the bill included a provision that underscores why the term "landowner" does not include mere occupants of property: The Legislature contemplated that persons other than the landowner could permit guests onto property, and it regarded property owners and occupants as separate entities with distinct legal duties.

Although it is unlikely that this Court must take judicial notice of the text of a legislative bill in order to consider it,

defendants are filing this motion in an abundance of caution and for the convenience of the Court and plaintiff's counsel.

LEGAL ARGUMENT

A. If the Court decides that legislative history is relevant to this appeal, it should take judicial notice of the initial version of Senate Bill No. 639, which was later enacted and codified as Civil Code section 846.

As explained in defendants' merits briefing, the plain language of section 846 resolves the issue presented for review and therefore renders unnecessary any consideration of legislative history or purpose. (OBOM 16–17, 35; RBOM 10, 16–17; see *Klein v. United States of America* (2010) 50 Cal.4th 68, 82–83.)

Moreover, plaintiff has forfeited any argument that Gunner is a “landowner” under section 846, subdivision (d)(3). The Court of Appeal expressly held that Gunner is *not* a “landowner.” (*Hoffmann v. Young* (2020) 56 Cal.App.5th 1021, 1026.) Plaintiff did not seek review of that issue or request that this Court consider the issue if it granted defendants' petition for review. Nor did she raise the issue in the trial court or the Court of Appeal. Accordingly, this Court should conclude that the argument is forfeited. (See RBOM 15–16; Cal. Rules of Court, rule 8.516(b)(1); *Nationwide Biweekly Administration, Inc. v. Superior Court* (2020) 9 Cal.5th 279, 334, fn. 25.)

If, however, the Court determines that the text of the statute is ambiguous *and* that plaintiff has preserved her argument that Gunner is a “landowner,” the Court may have

reason to decide whether a mere occupant of property can be deemed a “landowner” for purposes of section 846, subdivision (d)(3). Under these circumstances, the initial version of Senate Bill No. 639 may be relevant. As first introduced on February 7, 1963, Senate Bill No. 639 (1963 Reg. Sess.) would have established an exception to recreational use immunity “for injury caused by acts of persons to whom permission to take fish and game, camp, or sightsee was granted to third persons as to whom the person granting permission, or the owner, lessee, or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.” But this proposed exception was omitted from the final version of the bill.

This provision undercuts plaintiff’s argument in two ways. First, by referring in general terms to “the person granting permission,” the proposed exception shows that the Legislature contemplated that permission to enter property might be granted by persons other than the landowner—including, for example, an occupant of the premises. Second, the proposed exception shows that the Legislature understood owners, lessees, and occupants to be separate categories of persons with distinct legal duties. Thus, when the Legislature ultimately created an exception to recreational use immunity for “persons who are expressly invited . . . *by the landowner*” (§ 846, subd. (d)(3), emphasis added), it is implausible that the Legislature intended the term “landowner” to include mere occupants of the property.

B. This Court may take judicial notice of the text of a legislative bill, even though judicial notice is likely unnecessary.

A request for judicial notice of published legislative history materials is generally unnecessary, as “[c]itation to the material is sufficient.” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, fn. 9.) For example, in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553 (*Stop Youth Addiction*), this Court explained that there was no need to seek judicial notice of two recent legislative bills that were relevant to the issue presented in that case. (*Id.* at p. 571, fn. 9, superseded by statute on other grounds as stated in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 982–983; see *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 375, fn. 9 [“It is not clear that we must take judicial notice of these [legislative] materials in order to consider them”].)

Defendants are filing this motion in an abundance of caution—and for the convenience of the Court and plaintiff’s counsel—because the initial version of Senate Bill No. 639 does not appear to be readily available on Westlaw or any other commonly used online resource. (See *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064 (*Mangini*) [party did not need to seek judicial notice of “*readily available* published material” (emphasis added)], overruled on another ground by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.)

If this Court determines that it cannot consider the text of Senate Bill No. 639 without taking judicial notice of that bill, it has the authority to do so. Under Evidence Code section 452,

subdivision (c), judicial notice may be taken of legislative acts, and under section 452, subdivision (h), judicial notice may be taken of “[f]acts and propositions that are not reasonably subject to dispute.” (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279, fn. 9.) Appellate courts have the same right, power, and duty to take judicial notice as trial courts. (Evid. Code, § 459; see *Soukup*, at p. 279, fn. 9 [taking judicial notice of legislative history].) And this Court has taken judicial notice of legislative materials even while acknowledging that judicial notice was unnecessary. (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 571, fn. 9; *Mangini*, *supra*, 7 Cal.4th at p. 1064.)

Under Evidence Code section 453, the Court “shall take judicial notice” of a matter if “a party requests it and [¶] (a) [g]ives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and [¶] (b) [f]urnishes the court with sufficient information to enable it to take judicial notice of the matter.” By submitting this motion, declarations, and attached legislative materials, defendants have satisfied the requirements of Evidence Code section 453.

CONCLUSION

In sum, if this Court determines that the attached legislative history materials are relevant to the issue presented for review, the Court should take judicial notice of these materials.

July 29, 2021

HORVITZ & LEVY LLP
DEAN A. BOCHNER
CHRISTOPHER D. HU
HENDERSON & BORGESON
JAY M. BORGESON
ROYCE J. BORGESON

By: _____



Christopher D. Hu

Attorneys for Defendants and
Respondents

**CHRISTINA M. YOUNG, DONALD G.
YOUNG, JR., GUNNER YOUNG, and
DILLON YOUNG**

DECLARATION OF CHRISTOPHER D. HU

I, Christopher D. Hu, declare as follows:

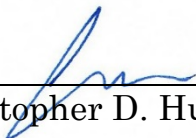
1. I am an attorney duly admitted to practice before this Court. I am an associate with Horvitz & Levy LLP, attorneys of record for defendants and respondents Christina M. Young, Donald G. Young, Jr., Gunner Young, and Dillon Young in this appeal. I am the attorney primarily responsible for preparing defendants' Supreme Court briefs. Unless otherwise stated, I have personal knowledge of the facts set forth herein. If called as a witness, I could and would competently testify to the matters stated herein.

2. Horvitz & Levy LLP maintains an electronic repository of legislative history research pertaining to various California statutes. In preparing the briefing in this Court, I searched this repository for legislative history materials relevant to Civil Code section 846, and found a PDF file that compiles the firm's past research on the statute. These research materials contain a published copy of Senate Bill No. 639 (1963 Reg. Sess.), as introduced by Senator Teale on February 7, 1963.

3. Based on the context in which it appears, the text of Senate Bill No. 639 (1963 Reg. Sess.), as introduced on February 7, 1963—which is attached as exhibit A to the declaration of David S. Ettinger—appears to have been part of a research file compiled by William Keller of the Legislative Intent Service in response to a request from Horvitz & Levy LLP in 1984.

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

Executed July 29, 2021, at San Francisco, California.



Christopher D. Hu

DECLARATION OF DAVID S. ETTINGER

I, David S. Ettinger, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am of counsel with Horvitz & Levy LLP. I have personal knowledge of the facts set forth herein. If called as a witness, I could and would competently testify to the matters stated herein.

2. In 1984, I asked William Keller of the Legislative Intent Service to compile legislative history materials concerning Civil Code section 846.

3. The document attached hereto as exhibit A was among the legislative history materials I received from the Legislative Intent Service in response to my request.

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

Executed July 29, 2021, at Oak Park, California.



David S. Ettinger

Exhibit A

1 reported to the governing board of the district at least once a
2 year at a regularly scheduled meeting.

3 SEC. 2. This act is an urgency measure necessary for the
4 immediate preservation of the public peace, health or safety
5 within the meaning of Article IV of the Constitution and shall
6 go into immediate effect. The facts constituting such neces-
7 sity are:

8 Under the existing law the results of the testing program
9 conducted by each school district must be made available to
10 the public by the district. While the State Department of Edu-
11 cation may make public the statewide results it may not under
12 existing law make public the district results which are reported
13 to it and which the district must make public. In order to make
14 the results for all districts available at a central location thus
15 avoiding the distortion of results for comparative purposes
16 which are of vital interest to the parents of school children
17 and to facilitate the use of the test results for purposes for
18 which they are intended, including the test results for the cur-
19 rent school year, it is necessary for this act to take effect imme-
20 diately.

SENATE BILL

No. 639

Introduced by Senator Teale

February 7, 1963



REFERRED TO COMMITTEE ON JUDICIARY

*An act to add Section 846 to the Civil Code, relating to obliga-
tions of an owner of an estate in real property.*

The people of the State of California do enact as follows:

1 SECTION 1. Section 846 is added to the Civil Code, to read:
2 846. An owner of any estate in real property owes no duty
3 of care to keep the premises safe for entry or use by others for
4 taking of fish and game, camping, water sports, hiking or
5 sightseeing, or to give any warning of hazardous conditions,
6 uses of, structures, or activities on such premises to persons
7 entering for such purposes, except as provided in this section.
8 . An owner of any estate in real property who gives permis-
9 sion to another to take fish and game, camp, hike or sightsee
10 upon the premises does not thereby (a) extend any assurance
11 that the premises are safe for such purpose, or (b) constitute
12 the person to whom permission has been granted the legal
13 status of an invitee or licensee to whom a duty of care is owed,
14 or (c) assume responsibility for or incur liability for any
15 injury to person or property caused by any act of such person
16 to whom permission has been granted except as provided in
17 this section.

18 This section does not limit the liability which otherwise
19 exists (a) for willful or malicious failure to guard or warn
20 against a dangerous condition, use, structure or activity; or
21 (b) for injury suffered in any case where permission to take
22 fish and game, camp, hike or sightsee was granted for a con-
23 sideration other than the consideration, if any, paid to said
24 landowner by the State; or (c) for injury caused by acts of

LEGISLATIVE COUNSEL'S DIGEST

S.B. 639, as introduced, Teale (Jud.). Obligations of property owners.

Adds Sec. 846, Civ.C.

Provides that an owner of an estate in real property is not liable for injuries to people who enter upon his land for various recreational purposes except that the act does not change the owner's liability in case of a willful or malicious failure to guard or warn against dangerous activities, or where compensation is paid for the use of

1 persons to whom permission to take fish and game, camp, hike
 2 or sightsee was granted to third persons as to whom the person
 3 granting permission, or the owner, lessee or occupant of the
 4 premises, owed a duty to keep the premises safe or to warn
 5 of danger.

6 Nothing in this section creates a duty of care or ground of
 7 liability for injury to person or property.

AMENDED IN ASSEMBLY MAY 24, 1963

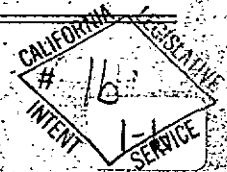
SENATE BILL

No. 639

Introduced by Senator Teale

February 7, 1963

REFERRED TO COMMITTEE ON JUDICIARY



An act to add Section 846 to the Civil Code, relating to obligations of an owner of an estate in real property.

The people of the State of California do enact as follows:

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 2 846. An owner of any estate in real property owes no duty
 3 of care to keep the premises safe for entry or use by others for
 4 taking of fish and game, camping, water sports, hiking or
 5 sightseeing, or to give any warning of hazardous conditions,
 6 uses of, structures, or activities on such premises to persons
 7 entering for such purposes, except as provided in this section.

8 An owner of any estate in real property who gives permis-
 9 sion to another to take fish and game, camp, hike or sightsee
 10 upon the premises does not thereby (a) extend any assurance
 11 that the premises are safe for such purpose, or (b) constitute
 12 the person to whom permission has been granted the legal
 13 status of an invitee or licensee to whom a duty of care is owed,
 14 or (c) assume responsibility for or incur liability for any
 15 injury to person or property caused by any act of such person
 16 to whom permission has been granted except as provided in
 17 this section.

18 This section does not limit the liability which otherwise
 19 exists, (a) for willful or malicious failure to guard or warn
 20 against a dangerous condition, use, structure or activity; or
 21 (b) for injury suffered in any case where permission to take
 22 fish and game, camp, hike or sightsee was granted for a con-
 23 sideration other than the consideration, if any, paid to said
 24 landowner by the State; or (c) for injury to third persons
 25 caused by acts of persons to whom such permission to take fish
 26 and game, camp, hike or sightsee was granted to third persons
 27 as to whom the person granting permission, or the owner,

- 1 lessee or occupant of the premises, owed a duty to keep the
- 2 premises safe or to warn of dangers, or sightsee was granted;
- 3 or (d) to any persons who are expressly invited rather than
- 4 merely permitted to come upon the premises by the landowner.
- 5 Nothing in this section creates a duty of care or ground of
- 6 liability for injury to person or property.

of (5) (4) AMENDED IN CONFERENCE JUNE 21, 1963

1963/06/21 5M AMENDED IN ASSEMBLY MAY 24, 1963

is known to use to visit a person's address and in private

SENATE BILL No. 639

Introduced by Senator Teale

February 7, 1963

REFERRED TO COMMITTEE ON JUDICIARY



An act to add Section 846 to the Civil Code, relating to obligations of an owner of an estate in real property.

The people of the State of California do enact as follows:

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- 2 846. An owner of any estate in real property owes no duty
- 3 of care to keep the premises safe for entry or use by others for
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- 5 sightseeing, or to give any warning of hazardous conditions,
- 6 uses of, structures, or activities on such premises to persons
- 7 entering for such purposes, except as provided in this section.
- 8 An owner of any estate in real property who gives permis-
- 9 sion to another to take fish and game, camp, hike or sightsee
- 10 upon the premises does not thereby (a) extend any assurance
- 11 that the premises are safe for such purpose, or (b) constitute
- 12 the person to whom permission has been granted the legal
- 13 status of an invitee or licensee to whom a duty of care is owed,
- 14 or (c) assume responsibility for or incur liability for any
- 15 injury to person or property caused by any act of such person
- 16 to whom permission has been granted except as provided in
- 17 this section.
- 18 This section does not limit the liability which otherwise
- 19 exists (a) for willful or malicious failure to guard or warn
- 20 against a dangerous condition, use, structure or activity; or
- 21 (b) for injury suffered in any case where permission to take
- 22 fish and game, camp, hike or sightsee was granted for a con-
- 23 sideration other than the consideration, if any, paid to said
- 24 landowner by the State; or (c) for injury to third persons
- 25 caused by acts of persons to whom such permission to take fish

- 1 and game, trap, high or sightsee was granted; or (d) (c) to
- 2 any persons who are expressly invited rather than merely per-
- 3 mitted to come upon the premises by the landowner.
- 4 Nothing in this section creates a duty of care or ground of
- 5 liability for injury to person or property.

Senate Bill No. 639

Passed the Senate June 14, 1963

Secretary of the Senate

Passed the Assembly June 21, 1963

Chief Clerk of the Assembly

This bill was received by the Governor this

day of _____, 1963, at _____ o'clock _____ M.

Private Secretary of the Governor

S266003

**IN THE
SUPREME COURT OF CALIFORNIA**

MIKAYLA HOFFMANN, a Minor, etc.,
Plaintiff and Appellant,

v.

CHRISTINA M. YOUNG et al.,
Defendants and Respondents.

[PROPOSED] ORDER

IT IS HEREBY ORDERED that, pursuant to Evidence Code sections 452, 453, and 459, and rule 8.252(a) of the California Rules of Court, the Court takes judicial notice of the legislative history materials relating to Civil Code section 846 that are attached as exhibit A to the declaration of David S. Ettinger.

Dated: _____

PROOF OF SERVICE

Hoffmann v. Young et al.

Case No. S266003

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On July 29, 2021, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF CHRISTOPHER D. HU AND DAVID S. ETTINGER; [PROPOSED] ORDER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST


BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION:

Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on July 29, 2021, at Valley Village, California.


Serena L. Steiner

SERVICE LIST
Hoffmann v. Young et al.
Case No. S266003

COUNSEL OF RECORD	PARTY REPRESENTED
Steven R. Andrade Andrade Law Offices, APC 211 Equestrian Avenue Santa Barbara, CA 93101-2013 (805) 962-4944 • Fax: (805) 962-4944 contact@andrade4law.com steve@andrade4law.com	Plaintiff and Appellant Mikayla Hoffmann <i>(Via TrueFiling)</i>
Jay M. Borgeson Royce J. Borgeson Henderson & Borgeson 801 Garden Street, Suite 100 Santa Barbara, CA 93101 (805) 963-0484 • Fax: (805) 962-7223 jay@hendersonborgeson.com royce@hendersonborgeson.com	Defendants and Respondents Christina M. Young, Donald G. Young, Jr., Gunner Young, and Dillon Young <i>(Via TrueFiling)</i>
Hon. Linda D. Hurst San Luis Obispo County Superior Court Paso Robles Branch 901 Park Street Paso Robles, CA 93446 (805) 706-3600	Trial Court Judge Case No. 16CVP0060 <i>(Via U.S. Mail)</i>
Office of the Clerk California Court of Appeal Second Appellate District, Division 6 Court Place 200 East Santa Clara Street Ventura, CA 93001 (805) 641-4700	Case No. B292539 <i>(Via TrueFiling)</i>

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **HOFFMANN v.
YOUNG**

Case Number: **S266003**

Lower Court Case Number: **B292539**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **chu@horvitzlevy.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S266003_RBM
REQUEST FOR JUDICIAL NOTICE	S266003_MJN

Service Recipients:

Person Served	Email Address	Type	Date / Time
Christopher Hu Horvitz & Levy LLP 176008	chu@horvitzlevy.com	e-Serve	7/29/2021 10:38:46 AM
Dean Bochner Horvitz & Levy LLP 172133	dbochner@horvitzlevy.com	e-Serve	7/29/2021 10:38:46 AM
Jay Borgeson Henderson & Borgeson	jay@hendersonborgeson.com	e-Serve	7/29/2021 10:38:46 AM
Steven Andrade Law Offices of Steven R. Andrade 079718	contact@andrade4law.com	e-Serve	7/29/2021 10:38:46 AM
Steven R. Andrade	steve@andrade4law.com	e-Serve	7/29/2021 10:38:46 AM
Royce J. Borgeson	royce@hendersonborgeson.com	e-Serve	7/29/2021 10:38:46 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

7/29/2021

Date

/s/Christopher Hu

Signature

Hu, Christopher (176008)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm