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

REPLY BRIEF ON THE MERITS

HORVITZ & LEVY LLP
*CHRISTOPHER D. HU (BAR NO. 293052)
SAN FRANCISCO OFFICE
DEAN A. BOCHNER (BAR NO. 172133)
BURBANK OFFICE
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
chu@horvitzlevy.com
dbochner@horvitzlevy.com

HENDERSON & BORGESON
JAY M. BORGESON (BAR NO. 128763)
ROYCE J. BORGESON (BAR NO. 295561)
801 GARDEN STREET, SUITE 100
SANTA BARBARA, CALIFORNIA 93101
(805) 963-0484 • FAX: (805) 962-7223
jay@hendersonborgeson.com
royce@hendersonborgeson.com

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

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REPLY BRIEF ON THE MERITS

INTRODUCTION

This Court granted review to decide 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 Civil Code section 846 (section 846). The statute's plain language supports only one reasonable answer: Because the guest is not "expressly invited . . . to come upon the premises by the landowner," the express invitation exception does not apply. (§ 846, subd. (d)(3).) Unless some other statutory exception applies, the landowner's recreational use immunity remains intact.

Rather than grapple with the statute's plain language, plaintiff Mikayla Hoffmann argues for a different standard. She urges the Court to hold that the express invitation exception covers *all* social guests, even when the landowner merely *permits* such guests onto the property. But that is not the standard the Legislature chose. The Legislature limited the exception to guests "expressly invited . . . by the landowner" and carved out from the exception any guests that the landowner "merely permit[s]" to come onto the property. (§ 846, subd. (d)(3).) Supplanting the statute's *express invitation* requirement with an *implied permission* standard would contravene the Legislature's chosen language.

Perhaps because section 846 forecloses her arguments, Mikayla invokes recreational use immunity statutes adopted by other states. But those dissimilar statutes undermine her point.

If anything, they illustrate the alternative approaches our Legislature could have taken but chose not to. The same goes for Mikayla's arguments about implied agency, ratification, and legislative acquiescence. None of these arguments establish that the Legislature intended something different from the statute's plain language.

The Court should hold that section 846, subdivision (d)(3) means precisely what it says: The exception requires that the plaintiff be "expressly invited . . . by the landowner." The landowner does not lose recreational use immunity merely because a non-landowner unilaterally invites someone to the property without the landowner's knowledge or involvement. The Court of Appeal's contrary decision should be reversed.[1]

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[1] This is the only issue properly before this Court. Although Mikayla now asks the Court to review the Court of Appeal's holding that a former version of CACI No. 1010 is erroneous (see ABOM 11, 43), no party sought review of that holding and neither side has fully briefed that issue in this Court (see Cal. Rules of Court, rule 8.504(c) [to raise additional issues for review, an answer to the petition for review "must contain a concise, nonargumentative statement of those issues"]). Review of that issue is also unnecessary because CACI No. 1010 has been amended to reflect the Court of Appeal's holding in this case. (See CACI No. 1010 (2021 rev.) (2017 ed.).)

LEGAL ARGUMENT

I. Mikayla cannot overcome the plain language of the express invitation exception.

A. The express invitation exception does not apply because Mikayla was not "expressly invited . . . to come upon the premises by the landowner." Her arguments to the contrary conflict with the statutory text.

Mikayla concedes "there was no evidence . . . that Gunner's parents, the titled property owners, had given him authority to invite guests onto the property." (ABOM 23, fn. omitted.) More to the point, Mikayla does not claim that Gunner's parents chose to invite Mikayla onto their property or asked Gunner to convey an invitation on their behalf. Indeed, as explained in the opening brief, Gunner's parents had never met or seen Mikayla before the day of the accident and were unaware that she might be visiting their property that day. (OBOM 11, 27, 31; 4 RT 956; 6 RT 1605; 7 RT 1903–1904; 8 RT 2138–2139.)[2]

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[2] Mikayla does not contest these facts, but she objects to the factual summary in the opening brief and claims that defendants did not challenge the statement of facts in the Court of Appeal's opinion. (ABOM 10.) She is wrong: Defendants sought rehearing on the ground that the Court of Appeal's decision omitted material facts. (PFRH 4–6.) Mikayla also fails to identify any purported factual misstatements in the opening brief. She notes that defendants *omitted* a detail about Mikayla's use of protective gear that belonged to Gunner's mother. (ABOM 23.) But the Court of Appeal's decision also omitted that detail, and properly so. The fact is irrelevant because it has no bearing on whether Gunner's parents expressly invited Mikayla to the property on the day of the accident. (See 8 RT 2181.)

Under these undisputed facts, the express invitation exception does not apply. The exception requires a plaintiff to show that she was "expressly invited . . . by the landowner" (§ 846, subd. (d)(3)), and Mikayla was not expressly invited by the landowners in this case—Gunner's parents. Rather than offer an alternative reading of the statutory text, Mikayla tries to import concepts that appear nowhere in the statute.

For example, Mikayla appears to contend that section 846, subdivision (d)(3) eliminates a landowner's immunity whenever the plaintiff is a social guest, whether or not the guest was invited by the landowner. (ABOM 19–23.) She asserts that the purpose of section 846 is to encourage property owners to open their land for recreation by the general public, so immunity should not extend to injuries suffered by social guests. This argument fails.

To begin with, the statute's plain text forecloses this argument. This Court will rely on the purpose of a statute only if the statutory text is ambiguous. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616–617; see *Klein v. United States of America* (2010) 50 Cal.4th 68, 82–83 (*Klein*) [because the language of section 846 resolved the issue presented, it was "not necessary to consider the statute's legislative history," and the Court's holding was "not based on public policy considerations"].) Here, the statute is unambiguous. The express invitation exception specifically addresses invited guests, and it distinguishes between those guests "who are expressly invited . . .

by the landowner" and those guests whom the landowner "merely permit[s] to come upon the premises." (§ 846, subd. (d)(3).)

That distinction makes sense. Landowners should not lose immunity under the express invitation exception unless they *choose* to expressly invite a particular guest onto their property. Recreational users may come onto property in other ways, but without an express invitation by the landowner, the landowner's immunity should remain intact. Put another way, for the landowner to lose immunity under the express invitation exception, the invitee must be the *landowner's* invited guest, not someone else's guest. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 32 (*Wang*) [the express invitation exception applies "to persons whom the landowner *personally selects* to come onto the property" (emphasis added)].)

Mikayla is also wrong about the statute's purpose. As the opening brief explained, *one* purpose of section 846 is to encourage property owners to open their land to the general public. But that is not the statute's only purpose. (See OBOM 35–38 & fn. 12.) The statute reflects "a broad legislative intent to encourage landowners to let their land be used for recreational purposes." (*Wang*, *supra*, 4 Cal.App.5th at p. 22; see *Klein*, *supra*, 50 Cal.4th at p. 82 [the Legislature sought to "prevent the closure of private lands to recreational users because of landowners' liability concerns"].) That purpose is advanced when landowners make their land available for recreation, even if they open it to only a subset of the general public. Mikayla's proposed "social guest" exception would threaten to eliminate

immunity for many of these landowners, which would dissuade them from permitting guests onto their property. Among other things, Mikayla's approach—like the Court of Appeal's—would encourage parents to prohibit their children from inviting friends to the family home. (See *Hoffmann v. Young* (2020) 56 Cal.App.5th 1021, 1024 (*Hoffmann*).)

Mikayla also suggests that Civil Code section 846 shares the same legislative purpose as statutes in other states that have adopted the model act on recreational use immunity. (ABOM 20–22.) Mikayla is mistaken. California's statutory scheme was enacted in 1963 and thus predates the model act. (See *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1100, fn. 3 (*Ornelas*).) Unlike many statutes based on the model act, Civil Code section 846 lacks a statement of legislative purpose. (See, e.g., Or. Rev. Stat., § 105.676 ["The Legislative Assembly hereby declares it is the public policy of the State of Oregon to encourage owners of land to make their land available to the public for recreational purposes"].) As this Court has recognized, that omission distinguishes Civil Code section 846 from other states' statutes and counsels against reading Civil Code section 846's purpose too narrowly. (*Ornelas*, at p. 1108, fn. 9 [noting that "although one purpose of section 846 is to encourage access to recreational lands, it is not expressly or necessarily limited to such property," as it is in other states].)[3]

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[3] As we explain below, courts that have created a "social guest" exception to recreational use immunity have done so in the context of statutory schemes that materially differ from section 846. (See part II.A, *post*.)

Mikayla also suggests that Gunner's invitation to Mikayla eliminated his parents' immunity because section 846 does not prohibit a landowner from delegating authority to invite guests. (See ABOM 23–29.) That may be true, but such a delegation never occurred here. As the opening brief explained, a landowner may convey an invitation through an intermediary. (See OBOM 9, 23, fn. 5.) Thus, if Gunner's parents had asked Gunner to invite Mikayla to the property on their behalf, that would be an "express[ ] invit[ation] . . . by the landowner." (§ 846, subd. (d)(3).) But merely permitting a non-landowner to invite guests on his own behalf is not an express invitation "by the landowner." (*Ibid.*)

For the express invitation exception to apply, the invitee must be a person "whom the landowner personally selects to come onto the property." (*Wang*, *supra*, 4 Cal.App.5th at p. 32; accord, *Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310, 317 (*Johnson*) [the express invitation exception requires "a direct, personal request" from the landowner to the invitee]; *Ravell v. U.S.* (9th Cir. 1994) 22 F.3d 960, 963, fn. 3 (*Ravell*) [exception did not apply without evidence that the non-landowner was "authorized to make express invitations *on behalf of the United States*" (emphasis added)].) Mikayla suggests that *implied* permission is enough, but the plain language of the statute forecloses that theory. Gunner's parents never asked him to invite Mikayla on their behalf, so Mikayla was at most "merely permitted to come upon the premises by the landowner," which

does not trigger the express invitation exception. (§ 846, subd. (d)(3).)

Mikayla argues that cases like *Johnson* and *Ravell*, which involved institutional landowners, could raise difficult questions about delegation of authority. (ABOM 23–28.) But neither *Johnson* nor *Ravell* expressed any trouble applying section 846 because there was no evidence in those cases that the landowner either expressly invited the plaintiff to its property or expressly authorized someone else to issue an invitation on the landowner's behalf. (See *Johnson*, *supra*, 21 Cal.App.4th at p. 317; *Ravell*, *supra*, 22 F.3d at p. 963, fn. 3.) The same is true here: The uncontroverted evidence shows that Gunner's parents did not invite Mikayla to their property—either by personally extending an invitation to Mikayla themselves or by asking Gunner to do so on their behalf.

At any rate, the landowners in this case are individuals—Donald and Christina Young—not a corporate or governmental entity. Therefore, the Court need not decide here whether, or under what circumstances, an invitation by an employee or member of an organization may be deemed an invitation made on the organization's behalf for purposes of section 846.[4]

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[4] Mikayla discusses an unpublished federal district court case that addressed this question. (See ABOM 25–27, discussing *H.S. by and through Parde v. United States* (S.D.Cal., Aug. 13, 2019, No. 3:17-cv-02418-BTM-KSC) 2019 WL 3803804 [nonpub. opn.].) But unlike *Ravell*, the plaintiff in *H.S.* offered evidence that the officer who issued the invitation "*was* authorized to extend an invitation on behalf of the United States." (*H.S.*, at p. *5.) Mikayla points to no comparable evidence here.

Finally, Mikayla argues that it is enough that Gunner's parents did not *prohibit* him from inviting her to their property. (ABOM 28–29.) But that is just another way of saying they (at most) "merely permitted" Mikayla to enter the property. (§ 846, subd. (d)(3).) It is not evidence that Mikayla was "personally select[ed]" by the landowner (*Wang*, *supra*, 4 Cal.App.5th at p. 32) or invited by a "direct, personal request" from the landowner (*Johnson*, *supra*, 21 Cal.App.4th at p. 317).[5]

B. Related statutory provisions reinforce the plain meaning of the express invitation exception.

Mikayla suggests that Gunner might be a "landowner" under section 846, subdivision (d)(3). (See ABOM 39.) But the Court of Appeal held directly to the contrary, and Mikayla did not seek review of that holding in her answer to the petition for review. (See *Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026 [recognizing that "the language chosen by the Legislature says that the exception applies only to persons 'expressly invited . . . by the landowner,' " and holding that "Gunner was not the landowner"].) Nor did Mikayla argue in either the trial court or

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[5] Whether Gunner had implied authority to summon emergency services or to consent to a search for Fourth Amendment purposes is beside the point. (See ABOM 28–29 & fn. 14.) Even if he had such authority, the statutory exception here requires an express invitation "by the landowner" to abrogate recreational use immunity. (§ 846, subd. (d)(3).) Whatever implied authority Gunner might have had to summon emergency services or consent to a search, his invitation to Mikayla without his parents' knowledge or express approval does not satisfy the requirements of the express invitation exception.

the Court of Appeal that Gunner is a "landowner." Her argument is thus beyond the scope of review and forfeited. (See Cal. Rules of Court, rule 8.516(b)(1) [this Court's review is typically limited to "issues that are raised or fairly included in the petition or answer"]; *Nationwide Biweekly Administration, Inc. v. Superior Court* (2020) 9 Cal.5th 279, 334, fn. 25 [declining to address issue raised for the first time in answer brief on the merits].)

Even if the argument had been preserved, it lacks merit. Although Mikayla correctly observes that the range of property owners protected by recreational use immunity is " 'exceptionally broad' " (ABOM 35, quoting *Ornelas*, *supra*, 4 Cal.4th at p. 1102), this aspect of section 846 supports defendants' position, not Mikayla's. As the opening brief explained, the broad definition of "owner" in section 846, subdivision (a) underscores why the term "landowner" in the express invitation exception has a narrower meaning. (OBOM 25–26.) The Legislature intended a broad grant of immunity, subject only to narrowly construed exceptions. (See *Johnson*, *supra*, 21 Cal.App.4th at p. 315.) Thus, while the term "owner" as used in subdivision (a)'s grant of immunity includes the holder "of any estate or any other interest in real property, whether possessory" (such as fee owners like Donald and Christina) or "nonpossessory" (such as easement or license holders) (§ 846, subd. (a)), courts have read the narrower term "landowner" as used in subdivision (d)(3) to refer only to fee

owners of the property (*Jackson v. Pacific Gas & Elec. Co.* (2001) 94 Cal.App.4th 1110, 1118 (*Jackson*)).[6]

In any event, Mikayla's point is irrelevant. Even if the term "landowner" in subdivision (d)(3) were as broad as the definition of "owner" in subdivision (a), neither term includes Gunner, who held no ownership interest of any sort in his parents' property. (See *Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026 ["Gunner was not the landowner"].) Mikayla's contrary suggestion that the statute applies to mere occupants who do not *own* any interest in the land conflicts with the statute's plain language. (See § 846, subd (a) [granting immunity to "*owner*[*s*] of any estate or any other interest in real property, whether possessory or nonpossessory" (emphasis added)].)

Mikayla cites *Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 (*Hubbard*), which held that holders of federal grazing permits enjoy immunity under section 846. (See ABOM 39.) But *Hubbard* is inapposite because the holder of a grazing permit owns an interest in the property (unlike Gunner in this case). (*Hubbard*, at pp. 195–197.) *Hubbard* simply illustrates that recreational use immunity extends to both landowners and owners of easements, licenses, and other nonpossessory

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[6] Mikayla cites *Johnston v. De La Guerra Properties* (1946) 28 Cal.2d 394, 399 as authority that invitees of a tenant could, in some circumstances, be deemed invitees of a landlord for purposes of premises liability law under the common law categories this Court abolished in *Rowland v. Christian* (1968) 69 Cal.2d 108. (ABOM 35–36.) But *Johnston* predates section 846 and was not interpreting a statute, let alone the phrase "expressly invited . . . by the landowner."

ownership interests. (*Id.* at pp. 193–195.) By contrast, setting aside unusual legal arrangements not present here, live-at-home children have no possessory or nonpossessory ownership interest in their parents' property. And all the more so, live-at-home children do not meet the narrower definition of "landowner" as used in section 846, subdivision (d)(3). (See *Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026; *Jackson*, *supra*, 94 Cal.App.4th at p. 1118.)

Moreover, *Hubbard* did not hold that the permit holder "could be considered a 'landowner' " under the express invitation exception, as Mikayla suggests. (ABOM 39.) Rather, this Court held that the permit holder in *Hubbard* was an "owner" under what is now section 846, subdivision (a). (*Hubbard*, *supra*, 50 Cal.3d at p. 197.) This Court's observations about broadly interpreting the statute concern the scope of immunity, not exceptions to that immunity. (*Id.* at pp. 193–195.)

Section 846's legislative history also underscores why the term "landowner" does not cover mere occupants of the property. The bill's initial version would have included an exception to recreational use immunity for injuries to third parties caused by persons permitted onto the property if "the person granting permission, or the owner, lessee or occupant of the premises" owed a duty to the third party. (Sen. Bill No. 639 (1963 Reg. Sess.) as introduced Feb. 7, 1963.)[7] That version of the bill did

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[7] This Court may consider published legislative history materials without formally taking judicial notice of them. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553,

not include an express invitation exception. (*Ibid.*) By the time the bill was enacted, however, the Legislature had removed the exception for injuries to third parties and added the express invitation exception, which has remained essentially unchanged ever since. (See Stats. 1963, ch. 1759, § 1, p. 3511.) As the Legislature appears to have recognized, persons other than the landowner—including mere occupants—may sometimes have authority to *permit* guests onto the land. But landowners and occupants are distinct categories with separate legal duties, and the express invitation exception applies only to "persons who are expressly invited . . . *by the landowner*." (§ 846, subd. (d)(3), emphasis added.)

Mikayla also argues "that the term 'landowner' should be more, rather than less[,] inclusive" (ABOM 41) because another statute, Civil Code section 846.2, grants immunity to an "owner, tenant, or lessee" who invites others to glean farm crops for charitable purposes.[8] Mikayla contends that the two provisions should be harmonized because they address similar topics. (ABOM 41–42.) But that canon of interpretation only applies

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571, fn. 9, superseded by statute on other grounds as stated in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 982–983.) Nonetheless, defendants are concurrently filing a motion seeking judicial notice of the initial text of Senate Bill No. 639, in part as a courtesy to provide the Court and Mikayla's counsel with a copy of these materials.

[8] That statute provides (subject to some exceptions) that "[n]o cause of action shall arise against the owner, tenant, or lessee of land or premises for injuries to any person who has been expressly invited on that land or premises to glean agricultural or farm products for charitable purposes." (Civ. Code, § 846.2.)

when the Legislature uses the *same* term, or at least a substantially similar term, in related statutes. (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 175–176.) The term "landowner" as used in section 846, subdivision (d)(3) is materially different from "owner, tenant, or lessee" as used in section 846.2, and Mikayla offers no evidence to suggest that the Legislature intended these differing phrases to have the same meaning. On the contrary, the Legislature's decision to use different language suggests it intended different meanings. (See *Rashidi v. Moser* (2014) 60 Cal.4th 718, 725.)

Furthermore, even if Mikayla's assertion were correct, it would be unavailing because Gunner was not an owner, tenant, or lessee of the property where Mikayla was injured. He was a mere occupant, not a "landowner." Thus, his unilateral invitation without his parents' knowledge or involvement is not an express invitation "by the landowner." (§ 846, subd. (d)(3).)

II. Mikayla's remaining arguments lack merit.

A. Other states' statutes with materially different language are not instructive.

Mikayla urges the Court to look beyond section 846 and to focus instead on recreational use immunity statutes in other states. (ABOM 12–13, 36–41.) As Mikayla recognizes, however, these statutes have language that materially differs from section 846. (ABOM 12, 41.)

Mikayla first relies on statutes from Hawai'i and Wisconsin providing that invitations by *occupants* can eliminate the landowner's recreational use immunity. (ABOM 12–13, 36–37.)

The Hawai'i statute withholds immunity "[f]or injuries suffered by a house guest while on the owner's premises." (Haw. Rev. Stat., § 520-5, subd. (3).) Hawai'i law defines " '[h]ouse guest' " to include "any person specifically invited by the owner *or a member of the owner's household*," and " '[o]wner' " to include "a tenant, lessee, *occupant*, or person in control of the premises." (*Id.*, § 520-2, emphasis added.)

Wisconsin law is similar. There, recreational use immunity does not apply if the "injury occurs on property owned by a private property owner to a social guest who has been expressly and individually invited by the private property owner." (Wis. Stat., § 895.52, subd. (6)(d).) But unlike California law, Wisconsin law defines the term "owner" to include any person "that owns, leases *or occupies* property." (*Id.*, § 895.52, subd. (1)(d)(1), emphasis added.) Civil Code section 846, by contrast, does not define the term "landowner," and therefore the term has been interpreted in its ordinary sense—meaning, one who owns the land. (See *Jackson*, *supra*, 94 Cal.App.4th at p. 1118 [" 'Landowner' is not defined in [Civil Code] section 846 or any other relevant provision of the Civil Code," but the term "logically refer[s] to the owner of the fee"].)

Given that difference in the statutory language, it is unsurprising that a live-at-home child's invitation was enough to eliminate her parents' recreational use immunity under Wisconsin law. (*Waters ex rel. Skow v. Pertzborn* (Wis. 2001) 627 N.W.2d 497, 508–509; see ABOM 36–37.) But unlike the Wisconsin statute, section 846's express invitation exception does

not extend to invitations by occupants. No matter how courts in other jurisdictions have interpreted their own state's statutes with dissimilar language, this "case must be governed by our own statutes as construed by this court." (*People v. Price* (1904) 143 Cal. 351, 353; see, e.g., *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92, fn. 9 [Massachusetts decision inapposite because it interpreted anti-SLAPP statute that materially differed from California's anti-SLAPP statute].)

Had our Legislature intended that invitations by mere occupants should trigger the express invitation exception, it could have adopted a statutory scheme like those enacted in Hawai'i and Wisconsin. But that is not the approach our Legislature chose. Section 846, subdivision (d)(3) applies only to persons "expressly invited . . . by the landowner," and no California decision of which we are aware (not even the Court of Appeal's decision below) has interpreted the term "landowner" to include mere occupants. On the contrary, "landowner" is limited to the fee simple owner. (See *Jackson*, *supra*, 94 Cal.App.4th at p. 1118.) Gunner was not the fee owner (or any other type of owner) of his parents' property.

Mikayla refers to several other state statutes (ABOM 38–40), but those statutes are even further afield. Texas law, for example, extends recreational use immunity to "an owner, lessee, *or occupant*" (Tex. Civ. Prac. & Rem. Code Ann., § 75.002, subds. (a)–(c), emphasis added), and Nebraska, Indiana, and Oregon law define the term "owner" to include an occupant (Neb. Rev. Stat., § 37-729, subd. (2); Ind. Code, § 14-22-10-2, subd. (c)(2); Or. Rev.

Stat., § 105.672, subd. (4)(a)).[9] But these statutes shed no light on the issue presented here because the quoted provisions define who is entitled to immunity in the first place—and, unlike Civil Code section 846, they extend immunity to mere occupants. None of these statutes provide that an invitation by an occupant abrogates the landowner's recreational use immunity. All but one have no express invitation exception, and none include an exception worded like Civil Code section 846, subdivision (d)(3).[10]

Mikayla also cites judicial decisions from Maryland, Oregon, and Texas interpreting those states' statutes to include an implicit exception for certain social guests. (See ABOM 38, 40–41, citing *Martinez v. Ross* (Md.Ct.Spec.App. 2020) 227 A.3d 667, 680, *Fagerhus v. Host Marriott Corp.* (Md.Ct.Spec.App. 2002) 795 A.2d 221, 232, *Conant v. Stroup* (Or.Ct.App. 2002) 51 P.3d 1263, 1266, and *McMillan v. Parker* (Tex.App. 1995) 910 S.W.2d 616, 619.) But those cases involved materially different statutes and are thus inapposite. As just explained, the Maryland, Oregon, and Texas statutes have no express invitation

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[9] Mikayla also quotes Maryland's definition of "owner," but that definition does not include mere occupants. (Md. Code Ann., Nat. Res., § 5-1101, subd. (f).)

[10] Indiana law contains an exception for "[i]nvited guests." (Ind. Code, § 14-22-10-2, subd. (f)(1)(B).) Mikayla does not identify any Indiana decision interpreting that exception to encompass guests invited by mere occupants without the landowner's knowledge or express authorization. Even if that were Indiana law, California's statute is different because it specifies that the plaintiff must be "expressly invited . . . by the landowner" in order to trigger the express invitation exception. (Civ. Code, § 846, subd.(d)(3).)

exception. Thus, a strict reading of those statutes would confer immunity even when a landowner personally invites a social guest onto the property, leading to results inconsistent with those statutes' express purpose of opening land for public recreational use. (See *Conant*, at p. 1267 ["Any time an individual is invited to use an owner's back yard for croquet, immunity would apply"].) To resolve that tension, courts in those states have *implied* an exception for certain social guests. (*Martinez*, at pp. 676–677; *Conant*, at p. 1268; *McMillan*, at p. 619.)

Unlike the statutes in Maryland, Oregon, and Texas, section 846 already addresses the circumstances under which immunity will be abrogated for invited guests. Section 846 strikes the balance by withholding immunity when guests are "expressly invited . . . by the landowner" but leaving immunity intact when guests are "merely permitted to come upon the premises by the landowner." (§ 846, subd. (d)(3); see *ante*, part I.A.) The Court should apply that clear statutory language.

B. Agency principles do not apply, but even if they did, Gunner was not acting as his parents' agent when he invited Mikayla onto their property.

The Court of Appeal majority relied on a theory of "implied agency" to conclude that the express invitation exception applied in this case. (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1029.) Mikayla tries to defend the Court of Appeal's agency rationale, but her analysis overlooks the plain language of section 846 and misapplies the law of agency.

To begin with, section 846 supplies no basis for importing general principles of agency, and Mikayla offers no direct response to the opening brief's argument on that point. (See OBOM 28–30.) She mentions that statutes should generally be harmonized (ABOM 34), but identifies no applicable provision of any agency statute that conflicts with section 846—let alone any provision that could override the plain language of the express invitation exception. Nor does she try to reconcile the Court of Appeal's holding that parents lose immunity if they "impliedly permit" their children to invite friends over (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026) with the statute's instruction that immunity remains intact for landowners who "merely permit[ ] [others] to come upon the premises" (§ 846, subd. (d)(3)).

Even if agency principles were grafted onto the statute, Mikayla's argument finds no support in the law of agency. She does not dispute that a child is not his parents' agent based solely on their familial relationship. (See OBOM 32–33, citing, e.g., *Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904–905.) Yet her reasoning, like the Court of Appeal's new presumption, would do precisely that. If allowing one's children to live at the family home is enough, on its own, to make children their parents' agent for the purpose of inviting guests to the home, all parents with children at home would be well advised to forbid their children from inviting friends over.

Further, Mikayla fails to rehabilitate the Court of Appeal's flawed "implied agency" theory. She quotes a treatise explaining that actual authority may be express or implied. (ABOM 32,

quoting 2B Cal.Jur.3d (2015) Agency, § 66.) But as that quotation shows, implication is merely a way to establish actual or ostensible agency; " 'implied agency' " is not a not a separate, freestanding type of agency that would offer a way around the well-settled requirements for proving actual or ostensible agency. (OBOM 30.)

Although Mikayla does not contend that Gunner was acting as his parents' actual agent when he invited Mikayla to the property, she argues that a principal may ratify an agent's act after the fact. (ABOM 31.) But even if the concept of ratification could be shoehorned into section 846's express invitation exception, she points to no evidence that Gunner's parents ratified Gunner's decision to invite Mikayla to the property on the day of the accident as an invitation on their behalf. On the contrary, Gunner's father, Donald, was shocked and upset when he discovered Gunner had invited her over. (7 RT 1910–1911 [Donald "never expected anybody to be on the track or even at the house"].)

Mikayla notes that she began regularly visiting Gunner's parents' home *after* the accident, when she was dating Gunner. (4 RT 1019.)[11] To prove ratification, however, a party asserting

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[11] These facts contrast with those in *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 111 (*Calhoon*), where the plaintiff visited defendants' home " 'on a daily basis' " *before* the accident. Although nothing in the statute supports equating a landowner *permitting* a non-landowner to repeatedly invite a guest with an express invitation "by the landowner," it is undisputed here that Gunner's parents had never met Mikayla and were not aware of

agency must show that the principal engaged in " '*unequivocal conduct* giving rise to a reasonable inference that he intended the conduct to amount to a ratification.' " (*Valentine v. Plum Healthcare Group, LLC* (2019) 37 Cal.App.5th 1076, 1090, emphasis added.) There is no such evidence here: Mikayla identifies no unequivocal conduct by Gunner's parents that shows they ratified Gunner's initial invitation to Mikayla as an invitation made on their behalf.

Mikayla also asserts in passing that Gunner was his parents' ostensible agent. (ABOM 33.) She overlooks, however, that ostensible agency requires statement or acts *by the principal*; conduct by the agent alone is insufficient. (See OBOM 31, citing *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 404; see also RB 42–43.) Mikayla identifies no conduct by Gunner's parents that could have created an ostensible agency.

C. The Legislature did not acquiesce to Mikayla's view of the law.

Mikayla next argues that the Legislature acquiesced to her view of the express invitation exception because it amended other provisions of section 846 without changing the express invitation exception. (ABOM 42–43.) In Mikayla's view, the Legislature's inaction shows that it implicitly agreed with *Calhoon*, 81

Gunner's invitation on the day of the accident. Thus, even if *Calhoon* could be justified under some kind of agency rationale, the facts here cannot support a finding that Gunner was inviting Mikayla at his parents' behest on the day of the accident.

Cal.App.4th at page 113, which treated an invitation by the landowners' son as an invitation by the landowners.[12]

Mikayla's argument proves the adage that legislative inaction is usually a "weak reed" on which to rest the construction of a statute. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 395, fn. 9; accord, *Scher v. Burke* (2017) 3 Cal.5th 136, 147 ["Arguments based on supposed legislative acquiescence rarely do much to persuade"]; *Ornelas*, *supra*, 4 Cal.4th at p. 1108 [" ' " 'something more than mere silence is required before . . . acquiescence is elevated into a species of implied legislation' " ' "].)

The argument for legislative acquiescence is especially weak here. *Calhoon* did not hold that an invitation made by a non-landowner without the landowner's knowledge or express approval eliminates the landowner's immunity. Because the landowner parents in *Calhoon* did not contest that issue, the Court of Appeal treated the son's invitation *as if* it were an invitation by his parents without addressing why (or whether) the statute permits that result. (See *Calhoon*, *supra*, 81 Cal.App.4th at p. 113; RB 37–38.) Indeed, Mikayla recognizes that "the *Calhoon* court did not say on what basis Wade Lewis [the son] had authority to invite his friend, Mr. Calhoon, onto the

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[12] Mikayla also refers to *Jackson*, *supra*, 94 Cal.App.4th at page 1116, which held that the invitation need not be for the specific purpose of recreation in order to trigger the exception. (ABOM 43.) As discussed above, however, that issue—relating to CACI No. 1010—is not properly before this Court. (See *ante*, fn. 1.)

property owned by Wade's parents." (ABOM 29.) In short, *Calhoon* does not stand for the proposition that an invitation by a non-landowner made without the landowner's knowledge or express approval abrogates the landowner's immunity because the court in *Calhoon* never considered that issue. (See *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1043 ["cases are not authority for propositions that are not considered"].)

At bottom, Mikayla points to nothing in section 846's text or legislative history to show the Legislature was aware of, let alone influenced by, *Calhoon*'s dicta. Nor is there any reason to believe the Legislature would have adopted *Calhoon*'s dicta over *Johnson*'s prior holding that only a "direct, personal" invitation by the landowner triggers the express invitation exception. (*Johnson*, *supra*, 21 Cal.App.4th p. 317; see *Ornelas*, *supra*, 4 Cal.4th at pp. 1103, 1107–1108 [rejecting legislative acquiescence argument where Court of Appeal decisions were in conflict].)

III. Mikayla is not entitled to a new trial.

Finally, Mikayla argues that even if this Court reverses, it should remand for a new trial so that she can try to show "that Gunner did have authority to invite specific people onto the Young property." (ABOM 23 & fn. 12; see ABOM 14–15 & fn. 8, 44.) The Court should reject this request for at least three reasons.

First, the evidence that Mikayla seeks to marshal is legally irrelevant. Even if Gunner had authority to invite *other* guests to the property, it would not establish that Gunner's parents

expressly invited Mikayla or expressly authorized Gunner to invite her on their behalf. The undisputed evidence already shows that Gunner's parents did not authorize Gunner to invite Mikayla to the property, did not know about the invitation before it was extended, and had never met or seen Mikayla before the day of the accident. (4 RT 956; 6 RT 1605; 7 RT 1903–1905, 1926, 1944; 8 RT 2138–2139, 2182.)

Second, Mikayla already had a chance to try to develop this evidence, and she came up short. She claims that a pretrial ruling prevented her from proving that Gunner had authority to invite friends onto his parents' property. (ABOM 15, fn. 8.) But the trial court's ruling barred only a specific piece of irrelevant evidence that defendants challenged through a meritorious motion in limine. (1 RT 39, 42, 51; see 1 CT 105–109; RB 28, fn. 6.) Nothing prevented Mikayla's counsel from trying to show through other evidence that Gunner's parents expressly authorized him to invite Mikayla (or other guests) on their behalf. (See RB 27–28.)

Third, Mikayla's new trial argument is forfeited. In the Court of Appeal, Mikayla contended that various evidentiary rulings violated her due process rights (AOB 41–43), but she failed to develop an argument to support this contention. Consequently, the Court of Appeal held that Mikayla "forfeited the new trial issue because she failed to make a cognizable argument explaining why the trial court abused its discretion and why the allegedly erroneous evidentiary rulings prejudiced her." (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1028.) Mikayla

did not challenge the Court of Appeal's forfeiture holding through a petition for rehearing or review, and her answer brief on the merits makes no attempt to show that the Court of Appeal erred in concluding that her evidentiary arguments were forfeited.

CONCLUSION

This Court should reverse the Court of Appeal's decision with instructions to affirm the judgment for defendants in its entirety.

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

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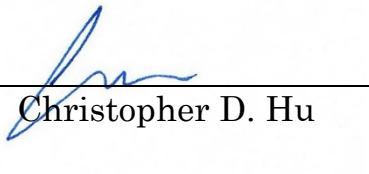

Christopher D. Hu

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Case No. S266003

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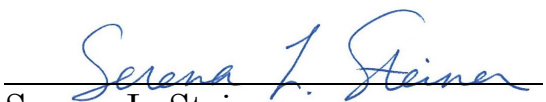

Serena L. Steiner

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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 *(Via TrueFiling)*
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 *(Via TrueFiling)*
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 *(Via U.S. Mail)*
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 *(Via TrueFiling)*

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