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

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Under Civil Code section 846, a landowner generally owes no duty of care to persons who enter or use the property for a recreational purpose. There is an exception, however, for "persons who are expressly invited rather than merely permitted to come upon the premises by the landowner." (Civ. Code, § 846, subd. (d)(3).) Can an invitation by a non-landowner, made without the landowner's knowledge or express approval, abrogate the landowner's recreational use immunity?

INTRODUCTION

California's recreational use immunity statute shields landowners from liability arising from the recreational use of their land, subject to only a few narrow exceptions. (Civ. Code, § 846 (§ 846).) This case concerns the statute's express invitation exception, which abrogates the landowner's immunity when the plaintiff was "expressly invited rather than merely permitted to come upon the premises by the landowner." (*Id.*, subd. (d)(3).) The issue presented is whether the phrase "expressly invited . . . by the landowner" includes invitations made by non-landowners without the landowner's knowledge or express approval.

The key facts are not in dispute. Plaintiff was injured while riding a motorcycle on property owned by Donald and Christina Young. She was invited to the property by the Youngs' 18-year-old son without his parents' knowledge. The parents did not authorize their son to invite plaintiff to their property. In

fact, the parents had never met or seen plaintiff before and had no idea their son had invited her over.

Under the statute's plain language, this is a simple case. Plaintiff was not "expressly invited . . . to come upon the premises by the landowner." (§ 846, subd. (d)(3).) The landowner parents had nothing to do with their son's invitation. At most, they "merely permitted" plaintiff "to come upon the premises." (*Ibid.*) On its face, the express invitation exception does not apply.

In holding to the contrary, the Court of Appeal majority did not dispute that the statute's text compels only one outcome here. Despite agreeing that the statute "only uses the word, 'landowner,' " the majority declined to apply the statute's literal meaning. (*Hoffmann v. Young* (2020) 56 Cal.App.5th 1021, 1029 (*Hoffmann*).) To sidestep the text of the statute, the majority theorized that the son was acting as his parents' "implied agent" when he invited plaintiff to their property. This implied agency theory not only conflicts with section 846's plain language but also finds no support in California agency law or the statutory purpose underlying recreational use immunity.

This is not to say a landowner must *personally deliver* the invitation to trigger the exception. If the landowner chooses to invite a guest but instructs someone else to convey the invitation, that is still an express invitation "by the landowner." (§ 846, subd. (d)(3).) But that is as far as the statute's text goes. The statute cannot be construed to eliminate a landowner's immunity based on an invitation he had no role in extending.

This case is best resolved as a straightforward exercise in applying statutory text. Applying the recreational use immunity statute as written realigns California agency law with prior precedents and produces a sensible outcome consistent with the statute's policy goals. The Court of Appeal's contrary decision should be reversed.

STATEMENT OF THE CASE

A. Gunner Young invites Mikayla Hoffmann to his parents' property without their knowledge or approval.

In late August 2014, 18-year-old Gunner Young visited a high school friend, 15-year-old Mikayla Hoffmann, at her mother's house. (4 RT 942–943, 949; 7 RT 1876.) Gunner and Mikayla both enjoyed riding motorcycles, and they discussed riding together the next day. (See 4 RT 942–946.) Gunner invited Mikayla to his parents' house the following day. (4 RT 944, 948.)[1]

At that time, Gunner lived with his parents, Donald and Christina Young, at their home in Paso Robles. (8 RT 2169, 2171.) Donald and Christina own the home and the surrounding

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[1] Gunner and Mikayla disagreed about whether Gunner invited her to his parents' house for the specific purpose of riding motorcycles on the property. (Compare 4 RT 948–949, 1020 with 8 RT 2179–2180.) Mikayla claimed that Gunner invited her to ride motorcycles on his parents' property, while Gunner claimed that they had only planned to stop briefly at the property to retrieve Gunner's motorcycle and then ride together to a local riverbed. (*Ibid.*) This appeal does not turn on the resolution of this factual dispute.

property. (6 RT 1604; 7 RT 1895–1896; 11 RT 3008.) The property has a motocross track, which Donald built when Gunner was about 10 years old. (7 RT 1896–1897; 8 RT 2172, 2218.) The track saw frequent use in the year or two after it was built. (7 RT 1902; 8 RT 2137–2138, 2172, 2219.) But by 2014, the family had largely stopped using the track, as Gunner and his brother Dillon had progressed to riding on more advanced tracks. (7 RT 1902–1903; 8 RT 2137–2138, 2172, 2219.) Neither of Gunner's parents remembered anyone using the track in the year before August 2014. (7 RT 1903; 8 RT 2138.) Gunner sometimes did test laps around the track, but even that "was a super rare occasion." (8 RT 2173–2174.)

Before the accident that prompted this lawsuit, Gunner's parents had never invited Mikayla to their property or authorized Gunner to do so on their behalf. (6 RT 1604–1605; 7 RT 1944; 8 RT 2139.) Indeed, before the accident, Gunner's parents had never even met or seen Mikayla (4 RT 956; 6 RT 1605; 7 RT 1903–1904; 8 RT 2138), and Mikayla had never been to the property (4 RT 956; see 5 RT 1362). Gunner did not ask his parents for permission to invite Mikayla to the property, and Gunner did not tell his parents he had invited Mikayla over that day. (8 RT 2182; see 7 RT 1905, 1926.) In short, Gunner's parents were unaware that Mikayla would be coming to their property on the day of the accident. (6 RT 1605; 7 RT 1903–1904; 8 RT 2138–2139.)

B. Mikayla is injured in a motorcycle accident.

The day after Gunner visited Mikayla at her mother's house, Gunner picked up Mikayla, loaded her motorcycle onto his pickup truck, and drove to his parents' house. (4 RT 952, 954; 8 RT 2180.) Once there, Gunner unloaded Mikayla's motorcycle and outfitted Mikayla with protective gear. (See 7 RT 1882–1883; 8 RT 2182.)

After taking Mikayla's motorcycle for a warm-up lap around the track, Gunner told Mikayla to drive up and down the driveway while he drove his own bike for a warm-up lap on the track. (4 RT 956–958; 8 RT 2182–2188.) Gunner never told Mikayla to enter the track. (4 RT 1024–1026; 8 RT 2187.) Mikayla nonetheless drove onto the track and started riding in the opposite direction as Gunner. (4 RT 962–963, 1026–1027, 1033.) Their bikes collided, and both Gunner and Mikayla were injured. (4 RT 963; 7 RT 1879; 8 RT 2191.)

Gunner's parents met Mikayla for the first time in the accident's immediate aftermath. (8 RT 2138; see 4 RT 956; 6 RT 1605; 7 RT 1903–1904.) While Gunner laid hurt on the ground, Mikayla ran inside the house to get help from Christina. (4 RT 965, 1039; 8 RT 2138–2139.) Meanwhile, Donald ran outside, where he found Gunner and escorted him toward the house. (7 RT 1905–1912.) Donald was upset and surprised because he expected no one to be on the track or even at the house at that time. (7 RT 1910–1911.)

Both Mikayla and Gunner were injured in the accident. Mikayla lost tissue from the tip of her pinky finger. (4 RT 963,

984–985.) Gunner broke his pelvic bone in two places and injured his knee. (7 RT 1879.) Gunner and Christina helped Mikayla get medical attention, and a doctor performed surgery on her finger later that day. (4 RT 967–968, 973, 975, 980, 1041, 1043; 8 RT 2154, 2193–2194.)

C. Mikayla sues Gunner, his brother, and his parents. Gunner's father, Donald Young, prevails at trial on his recreational use immunity defense.

Mikayla sued Gunner, his parents, and his brother Dillon, alleging negligent design of the motocross track and negligent provision of medical care. (See *Hoffmann*, *supra*, 56 Cal.App.5th at p. 1024; Appellant's Request to Augment Record on Appeal, exh. A, pp. 2–12.) Donald asserted a recreational use immunity defense to the negligent track-design claim. (2 CT 303–315; 3 CT 604; 10 RT 2720; see 1 RT 88; 3 RT 616–625; 6 RT 1535–1537.)[2]

Mikayla invoked the express invitation exception to recreational use immunity, citing *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108 (*Calhoon*). (10 RT 2721.) The trial court, however, suggested that the exception did not apply because there was "no evidence that there was an express[ ] invitation by either Christina Young or Donald Young to have Mikayla come to the property. . . . Mikayla did not know either Donald Young or

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[2] Although Mikayla also asserted a track-design claim against Christina, the trial court directed a verdict in Christina's favor on that claim because no evidence showed that Christina had any role in designing or maintaining the track. (11 RT 3008.) Mikayla did not challenge that ruling on appeal.

Christina Young before this accident, so they couldn't have been the people that had invited her." (10 RT 2720.) The trial court noted that the invitation came from Gunner, who was not the landowner. (10 RT 2719–2720.)

The jury returned a defense verdict on all claims. (3 CT 704–713.) On the negligent track-design claim, the jury found that Donald is entitled to recreational use immunity. (See 3 CT 705.) Having concluded that Donald and Christina did not invite Mikayla to the property (10 RT 2720), the trial court did not ask the jury to make any findings in the verdict form on the express invitation exception, effectively resolving that issue in Donald's favor (see 3 CT 705; *Hoffmann*, *supra*, 56 Cal.App.5th at pp. 1027–1028).

D. In a divided opinion, the Court of Appeal holds that Gunner's invitation to Mikayla abrogated Donald's immunity.

A divided panel of the Court of Appeal reversed and remanded for a new trial on the negligent track-design claim.[3] The majority acknowledged it was undisputed that Gunner—not his parents—invited Mikayla onto the property. (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1027.) But the majority held that "Gunner's express invitation of [Mikayla] stripped his parents of the immunity that would otherwise have been provided to them by section 846." (*Id.* at p. 1024.) The majority reasoned, based on

[3] The Court of Appeal affirmed the defense judgment on the claim for negligent provision of medical care. (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1029.) That claim is not at issue here.

"a modicum of common sense," that Gunner's parents had "impliedly permit[ted] him to invite friends to the property" by allowing Gunner to live with them. (*Id.* at p. 1026.) In the majority's view, this implied permission meant that Gunner was acting as his parents' agent when he invited Mikayla to the property, so his "invitation is deemed to have been expressly extended by his parents, the landowner[s]." (*Ibid.*) The majority found "persuasive" the Court of Appeal's decision in *Calhoon*, *supra*, 81 Cal.App.4th 108, which treated an invitation by the landowners' son as an invitation by the landowners. (*Hoffmann,* at p. 1025; see *id.* at p. 1029.)

The majority then restated its holding in broader terms "as a guidepost for the trial courts and the bar." (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1028.) "Where the landowner and the landowner's child are living together on the landowner's property with the landowner's consent, the child's express invitation of a person to come onto the property operates as an express invitation by the landowner within the meaning of section 846, subdivision (d)(3), unless the landowner has prohibited the child from extending the invitation." (*Ibid.*; see *id.* at p. 1026.)

Justice Perren dissented. He concluded that the "clear and specific" language of section 846's express invitation exception instructs that "only the landowner may issue the invitation unless the landowner expressly authorizes an agent to do so." (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1030 (dis. opn. of Perren, J.).) He cited a line of authority reiterating that the exception

requires a direct, personal invitation by the landowner. (*Id.* at pp. 1031–1032.)

Justice Perren lamented the majority's decision to create a new presumption that an invitation extended by a landowner's child is deemed an express invitation by the landowner. (*Hoffmann*, *supra*, 56 Cal.App.5th at pp. 1030–1031 (dis. opn. of Perren, J.).) In his view, the majority had improperly "rewritten the unambiguous language in the statute," judicially amending it to encompass " 'persons who are expressly [*or by implication*] invited rather than merely permitted to come upon the premises by the landowner.' " (*Id.* at p. 1031, quoting § 846, subd. (d)(3).)

After the Court of Appeal summarily denied defendants' petition for rehearing, defendants petitioned for review. This Court granted review.

LEGAL ARGUMENT

I. Civil Code section 846 is unambiguous: an invitation by a non-landowner without the landowner's knowledge or express approval does not strip the landowner of immunity.

A. Courts have consistently interpreted section 846 according to its plain language.

When interpreting the text of a statute, this Court " ' "first examine[s] the statutory language, giving it a plain and commonsense meaning." ' " (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616 (*City of San Jose*).) " ' "If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." ' " (*Ibid.*) Courts follow the plain

meaning of the statutory text because "the language of the statute itself is the most reliable guide to legislative intent." (*Klein v. United States* (2010) 50 Cal.4th 68, 83 (*Klein*).) This Court "construe[s] the words of a statute in context, and harmonize[s] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.)

Section 846 establishes an "extremely broad" rule of immunity. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105 (*Ornelas*).) Though often called an immunity statute, "[s]ection 846 does not merely eliminate a damage remedy for certain types of negligent conduct by a landowner." (*Klein*, *supra*, 50 Cal.4th at p. 78.) Rather, it eliminates the property owner's duty of care in the first instance. (*Ibid.*) And it "absolves California landowners of two separate and distinct duties: the duty to 'keep the premises safe' for recreational users, and the duty to warn such users of 'hazardous conditions, uses of, structures, or activities' on the premises." (*Ibid.*, quoting § 846, subd. (a).) The statute protects not only fee simple owners, but the "owner of any estate or any other interest in real property, whether possessory or nonpossessory." (§ 846, subd. (a).) And it encompasses a broad range of recreational activities that can occur on nearly any kind

of private or federal land. (*Id.*, subd. (b); *Klein*, at p. 85; *Ornelas*, at pp. 1105, 1100–1102.)[4]

This general rule of immunity is subject to three narrowly defined exceptions: willful or malicious conduct, entry for consideration, and express invitations. (§ 846, subd. (d).) "Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, [courts] may not imply additional exemptions unless there is a clear legislative intent to the contrary." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230; see *Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 636 ["We will not create an exception the Legislature did not enact"].) Thus, in keeping with section 846's broad purpose of encouraging landowners to permit recreational use of their property without fear of reprisal, courts "construe the exceptions for consideration and express invitees narrowly." (*Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310, 315 (*Johnson*).)

Courts have consistently applied section 846 according to its plain language. In *Ornelas*, this Court held that "assuming, as we must, that the Legislature chose its words carefully," there

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[4] Under the Federal Tort Claims Act, the federal government can be held liable for premises liability claims to the extent "a private person would be liable in the same circumstances under state law." (*Klein*, *supra*, 50 Cal.4th at p. 74.) As a result, federal courts often apply Civil Code section 846 in cases arising from injuries sustained on federal land. A different statute governs recreational use immunity for property owned by state and local public entities. (See *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 157 [discussing Government Code section 831.7].)

is no statutory basis to require that property must be " 'suitable' " for recreation to come within the scope of section 846. (*Ornelas*, *supra*, 4 Cal.4th at p. 1108.) More recently, in *Klein*, this Court held that section 846 does not confer immunity for vehicular negligence by the landowner's employee because the "plain language" of the statute shows immunity is limited to "property-based duties underlying premises liability, a liability category that does not include vehicular negligence." (*Klein*, *supra*, 50 Cal.4th at p. 72.) As this Court explained, "it would have been a simple matter" for the Legislature to draft different language, but it chose not to. (*Id.* at pp. 79–80; see *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17–18 (*Wang*) [plain language shows that immunity "applies to off-premises injury to persons not participating in recreational use of the land," and an alternative "construction would have us add language not placed there by the Legislature"].)

B. Recreational use immunity is abrogated only when the plaintiff is "expressly invited" to the property "by the landowner."

The plain language of section 846, subdivision (d)(3) resolves the issue presented here. To overcome recreational use immunity under the express invitation exception, a plaintiff must prove he or she was "expressly invited . . . to come upon the premises *by the landowner*." (§ 846, subd. (d)(3), emphasis added.) On its face, the express invitation exception applies only to invitations by landowners. And that is not all. The statute also provides that the exception is *not* triggered if the plaintiff

was "*merely permitted* to come upon the premises by the landowner." (*Ibid.*, emphasis added.) The statute thus draws a line between those guests the landowner singles out for an express invitation and those guests the landowner passively permits onto the property.

Courts have long interpreted this language to mean that the " 'express invitation' exception requires a direct, personal request from the landowner to the invitee to enter the property." (*Jackson v. Pacific Gas & Elec. Co.* (2001) 94 Cal.App.4th 1110, 1116 (*Jackson*); see *Wang*, *supra*, 4 Cal.App.5th at p. 32; *Calhoon*, *supra*, 81 Cal.App.4th at p. 113; *Johnson*, *supra*, 21 Cal.App.4th at p. 317; *Ravell v. U.S.* (9th Cir. 1994) 22 F.3d 960, 963 (*Ravell*).) Put another away, the exception applies only "to persons whom the landowner *personally selects* to come onto the property." (*Wang*, at p. 32, emphasis added; see *Calhoon*, at p. 113; *Phillips v. United States* (9th Cir. 1979) 590 F.2d 297, 299 (*Phillips*).) Because the exception is triggered only by an invitation to a guest the landowner personally selects, an invitation issued by a non-landowner without the landowner's knowledge or express approval cannot abrogate the landowner's immunity.

Johnson illustrates this straightforward reading of the statute. There, the defendant, Unocal, owned picnic grounds, which it made available for recreational use. (*Johnson*, *supra*, 21 Cal.App.4th at p. 312.) Plaintiff's employer, Abex, reserved the property for its annual company picnic. (*Ibid.*) There was no evidence that Unocal barred Abex from inviting its employees to the picnic; if anything, Unocal knew (or should have known) that

Abex would do so. (See *id.* at pp. 312, 324 [Unocal approved "a specific date for the picnic," and Unocal had a special consent form for group reservations like this one].) Abex employees "knew they could attend [the picnic] simply by purchasing a ticket" from Abex. (*Id.* at p. 313.) Plaintiff bought a ticket and attended the picnic, where he injured himself. (*Ibid.*) He then sued Unocal, asserting that the express invitation exception abrogated Unocal's recreational use immunity. (*Id.* at pp. 313, 317.) The Court of Appeal rejected plaintiff's contention because there was no evidence of "a direct, personal request *from Unocal to* [*plaintiff*] to attend this picnic." (*Id.* at p. 317, emphasis added.) This meant plaintiff was "not an express invitee of Unocal," and therefore he did "not fall within the exception to immunity established by section 846 for express invitees." (*Ibid.*)

Other decisions have expanded on *Johnson*, suggesting that the exception also may be triggered where a landowner directs a non-landowner to convey an invitation on the landowner's behalf. Such an invitation satisfies the statute's text: it is an "express[ ] invit[ation] . . . by the landowner." (§ 846, subd. (d)(3).) But it is not enough that the landowner passively permit a non-landowner to invite others onto the property, as Unocal did in *Johnson*. In that case, there was no invitation "by the landowner." Abex's guests were merely "*permitted* to come upon the premises by the landowner." (*Ibid.*, emphasis added.)

Ravell is instructive on this point. There, a servicemember stationed at a U.S. military base invited his mother to attend an air show at the base. (*Ravell*, *supra*, 22 F.3d at p. 961.) After she

tripped and fell at the air show, she sued the federal government. (*Ibid.*) Although her son had expressly invited her to the base, the Ninth Circuit held that the son's invitation did not trigger the express invitation exception because there was no evidence "to indicate that [the son] was, in any sense, authorized to make express invitations *on behalf of the United States*." (*Id.* at p. 963, fn. 3, emphasis added.) Thus, while the federal government could have authorized the son to invite his mother on the government's behalf, no evidence showed that it did so. As in *Johnson*, the federal government "merely permitted" the son to invite his mother to the base. (§ 846, subd. (d)(3).)

Likewise, the Court of Appeal in *Jackson* presumed that a landowner could expressly grant her daughter authority to extend an invitation on the landowner's behalf. (*Jackson*, *supra*, 94 Cal.App.4th at pp. 1116–1119.) *Jackson* did not hold or suggest, however, that the daughter enjoyed *implied* authority to issue an invitation simply because she was the landowner's daughter (or because she owned a neighboring property). Instead, *Jackson* assumed for the sake of argument that the daughter acted "under authority given to [her] by [the landowner]." (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1160, fn. 5 [describing landowner's delegation of authority in *Jackson*].)

Johnson, *Ravell*, and *Jackson* correctly applied the statute as written: a guest invited by a non-landowner without the landowner's knowledge or express approval is not "expressly invited . . . by the landowner." (§ 846, subd. (d)(3).) Although

that language can reasonably reach both invitations issued personally by the landowner and invitations issued by someone else at the landowner's direction, applying the exception to cover invitations by a non-landowner without the landowner's knowledge or express approval would stretch the words "expressly invited . . . by the landowner" past the breaking point.[5]

To conclude otherwise, this Court would have to decide that the Legislature did not intend the statute to be applied literally. Indeed, the Court of Appeal majority recognized as much: it dismissed the dissent as a "slave to literalism" and declined to "subscribe to the dictionary rule of jurisprudence" by applying the ordinary meaning of the word " 'landowner.' " (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1029.) But in California, courts " 'follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law.' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59.) Courts " ' "ha[ve] no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." ' " (*Ibid.*; see *Ornelas*, *supra*, 4 Cal.4th at p. 1110 (conc. opn. of George, J.) ["We may not rewrite the statute; that power is reserved to the Legislature"].)

Here, the Court of Appeal majority identified no textual basis for its holding. It relied on *Calhoon*, which treated an

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[5] Cases interpreting the express invitation exception refer to "a direct, personal request by the landowner." (*Wang*, *supra*, 4 Cal.App.5th at p. 32.) But the invitation need not always be "direct" in the sense of a face-to-face or telephone conversation between the landowner and the invitee. What matters is the landowner's overt, expressly communicated decision to invite a selected person onto the property. (See *ibid.*)

invitation by the landowners' son as an invitation by the landowners. (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1025, citing *Calhoon*, *supra*, 81 Cal.App.4th at p. 113.) But in *Calhoon*, the landowners did not dispute on appeal that their son's invitation should be attributed to them, so *Calhoon* did not address the issue presented here. (See *Calhoon*, at pp. 113–114; RB 37–38 & fn. 9.) The Court of Appeal majority in this case said that it found "*Calhoon*'s reasoning persuasive" (*Hoffmann*, at p. 1025), but no reasoning on this issue appears in *Calhoon*. "It is axiomatic that cases are not authority for propositions that are not considered." (*California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1043.)

Even if the words "by the landowner" do not settle the question, the rest of section 846, subdivision (d)(3) removes any doubt. The statute distinguishes between persons "expressly invited . . . by the landowner" and persons "*merely permitted* to come upon the premises by the landowner." (§ 846, subd. (d)(3), emphasis added.) There are many ways a landowner can permit persons onto the property, one of which is to implicitly allow non-landowners to invite guests. Because those guests are "merely permitted" to enter the property by the landowner, they are not entitled to the benefit of the express invitation exception. (*Ibid*.)

Past decisions illustrate this point. The landowner in *Johnson* implicitly allowed organizations that reserved the picnic area to invite their employees or members for events. (*Johnson*, *supra*, 21 Cal.App.4th at p. 312.) Likewise, the federal

government in *Ravell* implicitly allowed servicemembers to invite their families onto the military base. (*Ravell*, *supra*, 22 F.3d at p. 961.) But in neither case did the landowner *expressly* invite the plaintiff, so the statutory exception did not apply. (*Johnson*, at p. 317; *Ravell*, at p. 963.)[6]

The plain language of section 846, subdivision (d)(3) should resolve the issue presented. But two other aspects of the express invitation exception also show why an invitation by a non-landowner does not eliminate the landowner's immunity.

First, the Legislature's use of expansive language elsewhere in the statute demonstrates its intent that the term "landowner" be limited in scope. The statute's broad grant of immunity shields not just fee owners, but "[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory." (§ 846, subd. (a).)[7] By contrast, the express invitation exception eliminates immunity only for express

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[6] Similarly, a landowner's decision to advertise an event or attraction to the public is not an express invitation because it is not a personal request from the landowner to any particular person. (*Ravell*, *supra*, 22 F.3d at p. 963; *Phillips*, *supra*, 590 F.2d at p. 298; *Spence v. U.S.* (E.D.Cal. 2009) 629 F.Supp.2d 1068, 1088 (*Spence*).)

[7] In 1980, the Legislature amended section 846 to adopt this "exceptionally broad definition of the types of 'interest' in property which will trigger immunity." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 192, 194 (*Hubbard*).) Aside from a recent, nonsubstantive change to the structure of section 846, the express invitation exception has remained the same since the statute's enactment in 1963, referring only to express invitations "by the landowner." (See Stats. 1963, ch. 1759, § 1, p. 3511; Stats. 2018, ch. 92, § 33.)

invitations "by the landowner." (*Id.*, subd. (d)(3).) When the Legislature uses a word or phrase in one part of a statute that is different from language it uses in other sections, divergent meanings "must be presumed." (*Rashidi v. Moser* (2014) 60 Cal.4th 718, 725.) And it makes sense that the Legislature would draw this distinction. It shows the Legislature intended the grant of immunity to be broad and the exception for express invitations "by the landowner" to be narrow. (See *Jackson*, *supra*, 94 Cal.App.4th at p. 1118 [concluding it "is consistent with the Legislature's clear intent to immunize *all* holders of interests in real property" to interpret the narrower word " 'landowner' " in the express invitation exception as "only logically refer[ring] to the owner of the fee"]; *Johnson*, *supra*, 21 Cal.App.4th at p. 315 [exceptions to recreational use immunity should be narrowly construed].)

Second, when there are overlapping property interests, an express invitation by the landowner does not abrogate the immunity of other property owners who played no role in extending the invitation. (*Jackson*, *supra*, 94 Cal.App.4th at pp. 1118–1119 [express invitation by fee owner did not eliminate immunity of easement holder].) Here, of course, Gunner is not the landowner, and there was no express invitation by the fee owners (Donald and Christina). Yet *Jackson*'s holding reflects a broader principle: a property owner who would otherwise enjoy immunity under section 846 should not lose that immunity due to an invitation he or she did not extend.

C. Gunner's parents did not expressly invite Mikayla to their property.

Applying the statute's unambiguous language, the outcome of this case is clear. It is undisputed that the landowners in this case—Gunner's parents—neither invited Mikayla to the property nor expressly authorized Gunner to invite her on their behalf. (4 RT 956; 6 RT 1605; 7 RT 1903–1904; 8 RT 2138–2139, 2182.) Indeed, Gunner's parents had no inkling that Mikayla would come onto their property that day. (6 RT 1605; 7 RT 1903; 8 RT 2138–2139, 2182.) Given these facts, the evidence is clear Mikayla was not "expressly invited . . . by" Donald and Christina. (§ 846, subd. (d)(3).)

Even according to the Court of Appeal majority, Gunner's parents at most "impliedly *permit*[*ted*]" Gunner to invite friends onto the property. (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026, emphasis added.) But even if true, that should have ended the discussion. A finding of implied *permission* would just confirm that Gunner's parents "merely permitted" their son's friends to come to the property—precisely what the statute says is *not* enough to defeat immunity. (§ 846, subd. (d)(3).) Under the plain language of the statute, Gunner's invitation did not strip Donald of recreational use immunity.

II. There is no valid reason to depart from the statute's plain language.

A. Agency principles are unnecessary because the statute can—and should—be applied as written.

Although the Court of Appeal majority recognized that the "exception applies only to persons 'expressly invited . . . by the landowner,' " it held that Gunner's invitation abrogated his parents' immunity based on the theory that "Gunner was acting as his parents' agent when he expressly invited [Mikayla] onto the property." (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026.) The majority conceded that "there is no express agency," but concluded that "there is implied agency to let [the] son invite, and expressly consent, to allow a person to come onto his parents' land." (*Id.* at p. 1029.)

The majority's implied agency theory cannot override the plain language of the statute. Section 846 does not mention invitations by agents, nor does it reveal legislative intent to incorporate broader principles of agency. Intent to incorporate common law principles may be inferred, as when a statute features a word or phrase with a settled common law meaning. (See *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 501 [use of the word " 'employee' " in Public Employees' Retirement Law incorporated common law test of employment]; *People v. Tufunga* (1999) 21 Cal.4th 935, 946 [use of the term " 'felonious taking' " in criminal statute].) In section 846, however, there is no indication that the Legislature intended to incorporate agency principles. Rather, the statute requires an express invitation "by the landowner." (§ 846, subd. (d)(3).)

The Court of Appeal majority seems to have reasoned that the statute's reference to "the landowner" implicitly includes anyone who would be considered the landowner's common law agent. (See *Hoffmann*, *supra*, 56 Cal.App.5th at pp. 1026, 1029.) But if "landowner" includes the landowner's agents, that would mean agents must share in the landowner's immunity. That construction of the statute has properly been rejected as "patently unsound." (*Jenson v. Kenneth I. Mullen Inc.* (1989) 211 Cal.App.3d 653, 658.)

Granted, agency principles are not only the product of common law: they are codified as well. (See Civ. Code, § 2295 et seq.) But as this Court has explained, "the requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 956 (*State Dept. of Public Health*).) Harmonization is appropriate only when it is necessary to "choos[e] one plausible construction of a statute over another in order to avoid a conflict with a second statute." (*Ibid.*)

The majority below did not identify any agency-related statute it believed was in conflict with the requirement that a person invoking the express invitation exception prove he or she was "expressly invited . . . by the landowner." (§ 846, subd. (d)(3).) And even if such a statute existed, section 846 would prevail. When two statutes are in genuine conflict, "specific provisions take precedence over more general ones." (*State Dept. of Public Health*, *supra*, 60 Cal.4th at p. 960.)

Because the plain language of section 846, subdivision (d)(3) resolves the issue presented, there is no need to resort to general principles of agency.

B. Agency law does not support the Court of Appeal's decision.

1. California law recognizes two types of agents—actual and ostensible agents—and Gunner was neither.

The Court of Appeal's decision is also wrong as a matter of agency law. Gunner acted as neither an actual nor ostensible agent of his parents—the only two forms of agency recognized by California law.

The majority below relied on what it called "implied agency." (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1029.) But as noted, California law recognizes only two types of agency: "[a]n agency is either actual or ostensible." (Civ. Code, § 2298.) Of course, "[a]n agency relationship 'may be implied based on conduct and circumstances.' " (*Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1189.) But implication is merely a means for proving either actual or ostensible agency. "Implied agency" is not a freestanding type of agency that could support the majority's holding.

The majority made no claim that the record showed Gunner was his parents' *actual* agent. And rightly so. An agent has actual authority only "such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.) Gunner's parents never expressly made Gunner their

agent for purposes of inviting Mikayla on their behalf, and the Court of Appeal majority conceded as much—hence the majority's need for an "implied agency" theory. (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1029.) Thus, while a principal can delegate authority to an agent to act in the principal's place (*Channel Lumber Co., Inc. v. Porter Simon* (2000) 78 Cal.App.4th 1222, 1227), that delegation is precisely what was missing here.[8]

Nor did the majority find that Gunner was his parents' *ostensible* agent. That type of agency requires a showing that "the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.) "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists." (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 404.) Here, Gunner's parents did nothing that could have caused Mikayla to believe Gunner was acting their agent. The evidence was uncontroverted that Mikayla had never been to the property before the day of the accident and that Gunner's parents had never even met or seen Mikayla until after the accident occurred. (4 RT 956; 5 RT 1362; 6 RT 1605; 7 RT 1903–1904; 8 RT 2138.)

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[8] "An actual agency may [also] be created by ratification." (*UFCW & Employers Benefit Trust v. Sutter Health* (2015) 241 Cal.App.4th 909, 932.) But there is no evidence that Donald or Christina later ratified Gunner's invitation to Mikayla as an express invitation on their behalf. (See RB 43–44.)

Simply put, Gunner was neither actually nor ostensibly delegated authority to invite Mikayla to the property on his parents' behalf. To the contrary, it is undisputed that he invited Mikayla on his own behalf without his parents' knowledge. Thus, even if agency principles could theoretically override the statutory text, those principles would only confirm that no agency was created here.

2. The Court of Appeal's new presumption of "implied agency" conflicts with agency law and conflates agency with permission.

The majority reasoned that when landowner parents allow a child to live on their property, "a modicum of common sense" suggests that the parents "impliedly permit [the child] to invite friends to the property." (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026.) Under the majority's holding, this presumption of agency applies "[a]bsent very unusual circumstances, such as an express order not to bring a friend to the property." (*Ibid.*)

That holding—and the new presumption the majority created—would be an unwise aberration from settled agency law. As already discussed, California law does not recognize "implied agency" as a freestanding type of agency. It recognizes only actual and ostensible agency. The Court of Appeal's agency rationale can and should be rejected on that basis alone.

Moreover, contrary to the majority's holding, California courts have long recognized that a child is not his parents' agent just because of their familial relationship. (*Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904–905; *Casas v. Maulhardt*

Buick, Inc. (1968) 258 Cal.App.2d 692, 703; see *Angus v. London* (1949) 92 Cal.App.2d 282, 285 ["The relationship of father and child, standing alone, does not prove the agency of either"].) Those precedents track the basic rule that agency requires overt conduct by the principal. (*Lopez v. Bartlett Care Center, LLC* (2019) 39 Cal.App.5th 311, 318 [" '[A]n agency cannot be created by the conduct of the agent alone; rather, *conduct by the principal* is essential to create the agency' "].)

Contrary to that long line of cases, the majority below held that allowing one's children to live at home is enough to create agency. (See *Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026.) But that makes little real-world sense, especially for young children.[9] For most children, living with parents is—and should be—the norm. Under the majority's sweeping new rule, hundreds of thousands (if not millions) of live-at-home children throughout the state are now their parents' presumptive agents—with all the vicarious liability consequences that would entail.

What's more, the majority's implied agency rationale is illogical. Even if the majority is correct that "common sense" suggests a child has implied *permission* to invite friends (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026), simply giving *permission* does not create an agency relationship. People give others permission to do all sorts of things without making them their agents—like allowing groups to invite their employees to a

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[9] Although Gunner was 18 years old when the accident occurred, the Court of Appeal's presumption applies to children of any age.

picnic, or permitting servicemembers to invite their families to an air show at a military base. (See *Johnson*, *supra*, 21 Cal.App.4th at p. 312; *Ravell*, *supra*, 22 F.3d at p. 961.) To prove *agency*, California law requires facts establishing the elements of actual or ostensible agency. By conflating permission and agency, the majority created a presumption that has no basis in agency law.[10]

At bottom, the majority's holding is incompatible with the text of section 846. The majority's presumption rests on the notion that parents "impliedly permit" their children to invite friends. (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026.) But as the statute makes plain, recreational use immunity remains intact for landowners who "merely permit[ ] [others] to come upon the premises." (§ 846, subd. (d)(3).)

C. The statutory purpose reinforces the statute's plain meaning.

The Court of Appeal majority also relied on what it perceived to be the underlying purpose of section 846. According to the majority, the statute's purpose is to encourage landowners to make their property available for recreation by the "general public," and that purpose supports abrogating Donald's immunity

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[10] The Court of Appeal's presumption of agency also improperly places the burden on parents to *disprove* an agency relationship with their children. (See *Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026.) Under California law, the existence of an agency relationship is a question of fact that must be proven by the party alleging agency. (See *Harley-Davidson, Inc. v. Franchise Tax Bd.* (2015) 237 Cal.App.4th 193, 214; *Gates v. Bank of America Nat. Trust & Savings Ass'n* (1953) 120 Cal.App.2d 571, 576; *Burbank v. National Cas. Co.* (1941) 43 Cal.App.2d 773, 780–781.)

because Mikayla was "an expressly invited guest" rather than "a member of the general public." (*Hoffmann*, *supra*, 56 Cal.App.5th at p. 1026; see *id.* at p. 1029.)

To begin with, the majority's reasoning would impermissibly rewrite the statute. If encouraging recreation by the "general public" as opposed to specific invitees had been the Legislature's sole intent, it could have easily left out the words "by the landowner," thereby extending the exception to all express invitees. (§ 846, subd. (d)(3).) But it did not: the Legislature chose to eliminate immunity only when a guest is "expressly invited . . . by the landowner." (*Ibid.*) "If the text is unambiguous and provides a clear answer, [this Court] need go no further." (*Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 758; see *City of San Jose*, *supra*, 2 Cal.5th at pp. 616–617 [courts may consider a statute's purpose only " ' "[i]f the statutory language permits more than one reasonable interpretation" ' "].)[11]

Moreover, nothing in the statute as a whole suggests the Legislature was singularly concerned with encouraging recreational use by the general public. To the contrary, the statute has a broader purpose: it encourages landowners to

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[11] The majority below paraphrased Civil Code section 3510, which says that "[w]hen the reason of a rule ceases, so should the rule itself." (See *Hoffmann*, *supra*, 56 Cal.App.5th at p. 1029.) This maxim, however, provides no basis to disregard the statutory text. Like other maxims of jurisprudence, Civil Code section 3510 is an "interpretative canon for construing statutes, not a means for invalidating them." (*National Shooting Sports Foundation, Inc. v. State* (2018) 5 Cal.5th 428, 433.)

provide recreational access to their land in many ways and to any extent. Stripping landowners of immunity based on invitations by non-landowners would thwart that purpose.

To be sure, this Court has said at times that the statute was "enacted to encourage property owners to allow the *general public* to engage in recreational activities free of charge on privately owned property." (*Hubbard*, *supra*, 50 Cal.3d at p. 193, emphasis added; see *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 (*Delta Farms*).) But as the Ninth Circuit has explained, neither the text of the statute nor its legislative history supports the notion that section 846 is *only* intended to open land for use by the general public. The Ninth Circuit concluded "this aspect of recreational immunity seems to have arisen wholly from judicial speculation regarding legislative intent." (*Mansion v. U.S.* (9th Cir. 1991) 945 F.2d 1115, 1117.) Likely, it was an oversimplified description of the Legislature's intent passed down from one case to another in situations where the precise contours of that intent did not matter.[12] The Legislature no doubt sought to encourage permissive use by the general public, but its purpose was not limited to that objective.

More recently, this Court has recognized the statute's broader purpose. In *Klein*, the Court observed that the

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[12] The "general public" rationale seems to have originated in a Court of Appeal decision from the 1970s, which this Court quoted in *Delta Farms* and repeated in *Hubbard* without analysis. (See *Delta Farms*, *supra*, 33 Cal.3d at p. 707, quoting *Parish v. Lloyd* (1978) 82 Cal.App.3d 785, 787; see also *Hubbard*, *supra*, 50 Cal.3d at p. 193.)

Legislature's goal was to "prevent the closure of private lands to recreational users because of landowners' liability concerns," a problem section 846 addresses by "strik[ing] a fair balance between the interests of private landowners and those of recreational users." (*Klein*, *supra*, 50 Cal.4th at p. 82; see *ibid.* [discussing "legislative objective of balancing the respective interests of landowners and persons using their lands for recreation"]; accord, *Wang*, *supra*, 4 Cal.App.5th at p. 22 ["The legislative history of section 846 . . . reveals a broad legislative intent to encourage landowners to let their land be used for recreational purposes"].) The need to balance these interests is not limited to situations in which the land is opened for use by the general public.

This broad goal of encouraging recreational use is *advanced* when landowners allow their land to be used by any subset of the public. By contrast, the Court of Appeal's cramped view would inevitably have a chilling effect on landowners. Homeowners would have to decide whether to preemptively ban their children from inviting friends over. (See *Hoffmann*, *supra*, 56 Cal.App.5th at p. 1024 [child's invitation presumptively abrogates parents' immunity "unless the landowner has prohibited the child from extending the invitation"].) Landlords might do the same with tenants. (Cf. *Ravell*, *supra*, 22 F.3d at 961 [government allowed servicemembers living on base to invite their family members to air show].) Owners of parks and other scenic properties might decide that making their land available for group reservations is not worth the risk. (See *Johnson*, *supra*, 21 Cal.App.4th pp. 312–

313 [Unocal allowed group reservations at its picnic area].) Other landowners might stop allowing organized events to pass through their land, fearing that the organizer's invitations to participants will trigger liability for the landowner. (See, e.g., *Wang*, *supra*, 4 Cal.App.5th at pp. 6–7 [landowner allowed wagon train reenactors to camp on land every year]; *Spence*, *supra*, 629 F.Supp.2d at pp. 1072–1075 [federal government allowed annual cycling event to pass through military base].) Each of these outcomes would thwart the Legislature's purpose of promoting recreational use of property in California.

CONCLUSION

For all the foregoing reasons, the Court should reverse the decision of the Court of Appeal.

April 9, 2021

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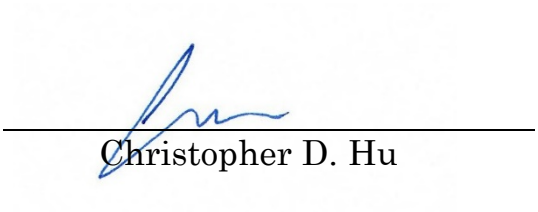

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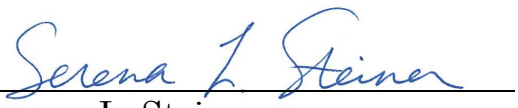

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