2d. Civ. No. B292539
San Luis Obispo No. 16CVP0060

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MIKAYLA HOFFMANN, by and through her Guardian ad Litem AMY JABCOBSEN, Plaintiff and Appellant, *vs.* CHRISTINA M. YOUNG, et al., Defendants and Respondents.	No. **S266003**

APPELLANT'S ANSWER BRIEF ON THE MERITS

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX, REPORTED AT 56 Cal.App.5th 1021

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Preliminary Statement

Appellant Mikayla Hoffmann respectfully submits that the Respondents' Opening Brief on the Merits fails to comport with California Rules of Court, rule 8.520, subdivision (b)(2), in that it does not set forth the "issues" raised in the Answer to the Petition for Review, but instead

only promotes as *the* "issue" their own misleading, generalized miscasting of the decision by the Court of Appeal that is the subject of this Court's review under Rule 8.500, subd. (a)(1), i.e., it is the "decision" that is reviewed.[1]

Moreover, Appellant submits, the "issue" that is set forth at page 8 of the Opening Brief on the Merits, as worded by Respondents, bears so little resemblance to the holding of the Court of Appeal that Respondents' argument runs afoul the axiom that "[a]n appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' (citations omitted.)." (*Santisas v. Goodin* (1998) 17 Cal. 4th 599, 620.) (Compare, Opening Brief on the Merits, p. 8, to Answer to Petition for Review, filed 12/28/2020. pp. 5 – 9.) (See, also, *Hoffmann v. Young* (2020) 56 Cal. App. 5th 1021, 1024, 271 Cal. Rptr. 3d 33, 36, reh'g denied (Nov. 18, 2020), review granted, 480 P.3d 550, 275 Cal.Rptr.3d 2 (Mem) (Feb. 10, 2021):

> We hold that where, as here, a child of the landowner is living with the landowner on the landowner's property and the landowner has consented to this living

[1] Appellant does not contend that this Court's broad discretion to determine the issues it will decide is limited, except by operation of Rule 8.516, and appreciates that "Rule 8.516(b)(1) of the California Rules of Court provides that, without permitting the parties to submit supplemental briefs, '[t]he Supreme Court may decide any issues that are raised or fairly included in the petition [for review] or answer.'" (*People v. Alice* (2007) 41 Cal. 4th 668, 677.)

> arrangement, 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. Thus, Gunner's express invitation of appellant stripped his parents of the immunity that would otherwise have been provided to them by section 846.

(*Id.*)[2]

Appellant further submits that Respondents' Merits Brief ("RMB") omits, or misstates facts set forth in the opinion of the Court of Appeal without first having challenged the Court's statements of fact in their Petition for Rehearing, filed in the court below on 11/13/2020, as required by Rule 8.500 (c)(2). (Compare, e.g., RMB, pp. 10 – 11, to *Hoffmann v. Young*, supra, 56 Cal. App. 5th 1021, 1024.):

> Appellant was a minor at the time of injury but is now an adult.
>
> The track and an adjacent residence were on property owned by Gunner's parents. Both Gunner and his parents lived there. Gunner not only invited appellant to come onto the property, he drove his truck to her house, loaded her motorcycle into the bed of the truck, and drove her to the property. There is no evidence that Gunner's parents prohibited him from inviting guests onto the property. There is some evidence that only

[2] This exception to recreational use immunity provides, in part, "[t]his section does not limit the liability which otherwise exists for… [a]ny persons who are expressly invited rather than merely permitted to come upon the premises by the landowner." (Civ. Code § 846, subd. (d)(3); underlining added.)

> family members were allowed to ride on the motocross track.

(*Id*; emphasis added.)

Introduction & Summary of Answer

Respondents do not appear to challenge that portion of the decision of the Court of Appeal holding that the subject "express invitation" need not be for a "recreational purpose," and that, therefore, the pattern jury instruction (CACI 1010) to the contrary is erroneous and should be amended.[3] (*Hoffmann,* supra, 56 Cal. App. 5th 1021, 1028, citing *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114; *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 588; *Jackson v. Pacific Gas & Electric Co.* (2001) 94 Cal.App.4th 1110, 1116.)

That "issue" was also set forth in Appellant's Answer to Petition for Review at pp. 14 – 16, but not mentioned in the RMB. Whatever issue, or issues the Court elects to decide, it is respectfully submitted that this should be one of them so as to resolve any dispute and remove any other doubts about the meaning of Civil Code section 846, subdivision (d)(3).[4]

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[3] That erroneous instruction was issued to the jury in this case. (See, *Hoffmann*, supra, p. 1028; 11 Tr. 3046; 3 CT 632.)

[4] Section 846 was amended effective January 1, 2019. At all times relevant to this case (Appellant's injury occurred in August, 2016), the "express invitation" exception was at the then-operative fourth paragraph of Section 846, subparagraph (c). (Compare **Exh. A**, pp. RJN0001 – 0003,

As to the authority-to-invite-and-thereby-implicate-the-"express-invitation"-exception-to-recreational-use-immunity issue, Respondents aver that "…this is a simple case." (RMB, p. 9.) It would be simpler if this case arose in Hawai'i, or Maryland, or Oregon, or Texas, or Wisconsin, or in any of several other sister-states whose courts have construed local iterations of the same model act, similar to Civil Code section 846, developed by the Council of State Governments in 1965. (*Ornelas v. Randolph* (1993) 4 Cal. 4th 1095, 1100, fns. 3 & 9; Michael S. Carroll, Dan Connaughton, J.O. Spengler, Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation, 17 J. Legal Aspects Sport 163 (2007)[5].)

Hawai'i's recreational use statutory scheme, for example, contains a stand-alone "Exceptions to limitations" statute that provides, in part, that "[n]othing in this chapter limits in any way any liability which otherwise exists:… (3) For injuries suffered by a house guest while on the owner's premises, even though the injuries were incurred by the house guest while engaged in one or more of the activities designated in section [520-2]." (Haw. Rev. Stat. Ann. § 520-5 (West).) (Emphasis added.) (See,

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with **Exh. B**, p. RJN0007, Exhibits in Support of Request for Judicial Notice.)

[5] Westlaw citation: 17 J. Legal Aspects Sport 163.

concurrently filed Request for Judicial Notice ("RJN")/Exhibits In Support ("ISO"), Exhibit C, RJN0012.)

In turn, that scheme also contains a stand-alone "Definitions" statute that provides, in part, "'House guest' means any person specifically invited by the owner or a member of the owner's household to visit at the owner's home whether for dinner, or to a party, for conversation or any other similar purposes including for recreation, and includes playmates of the owner's minor children." (Haw. Rev. Stat. Ann. § 520-2 (West); underlining added.) (RJN ISO, Exh. C, RJN0010.)

What Hawai'i's legislature has codified, in direct, plain language, is what the Fourth and Second District Courts of Appeal in *Calhoon v. Lewis*, supra, 81 Cal.App.4th at p. 113, and *Hoffman*, supra, 56 Cal.App.5th at p. 1026, reasoned that "commonsense,"[6] harmonized with the legislative intent behind the recreational use immunity statute, Civil Code section 846, dictates. But Respondents appear to argue that only when the titled landowner expressly authorizes a member of his, or her household to invite social guests onto the property will the "express invitation" exception to immunity be operative. (RMB, pp. 8 – 9; 22- 24.)[7]

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[6] "Common sense in an uncommon degree is what the world calls wisdom." — Samuel Taylor Coleridge, Literary Remains, Vol. 1.

[7] They do not say if this express authorization may be a blanket grant of authority to invite, or if it must be delegated on a case-by-case basis.

The Court of Appeal, on the other hand, held that only when the titled landowner expressly *prohibits* a member of his, or her household from inviting social guests onto the property will such an invitation *not* implicate that exception to immunity. (*Hoffmann*, supra, 56 Cal. App. 5th 1021, 1024.)

Inasmuch as there appears to be no dispute that Civil Code section 846 does not confer immunity from liability for injuries suffered by the landowners' "social guests," and there appears to be no dispute that Appellant was expressly, directly and personally invited onto the property by a member of the landowners' household (their adult son, Gunner), and there appears to be no dispute that the landowners may delegate his/her/their authority to invite "social guests" onto the property for any purpose, the *real* "issue" is whether that delegation of authority is <u>implicit</u> when the person who issues an express, personal invitation is a member of the landowners' household, or if such authority must be expressly delegated, and, if so, must that delegation of authority be expressed in such a way that the intended social guest (and any subsequent trier of fact) is able to discern a *bona fide* invitation from an unauthorized, ineffective one?

Yes, it is a simple case, but however this Court determines that *real*

"issue," remand to develop the factual predicates may be necessary.[8]

Statement of the Case

Appellant filed her Complaint for damages on March 4, 2016 in San Luis Obispo County Superior Court case number 16CVP0060. (Exhibit A, p. 002, Request to Augment Record on Appeal, granted 5/31/2019.) She alleged (1) general negligence; (2) premises liability; (3) motor vehicle negligence; and (4) negligent medical aid. (*Id.*)

The Complaint alleged Appellant suffered injury in a motorcycle collision with Gunner Young that occurred on a motocross track located on property owned by his parents, Christina and Donald. (*Id.*) The Youngs filed their Answer to the Complaint on May 23, 2016. (2 CT 305.)

Defendants and Respondents moved for summary judgment and/or adjudication on the ground, among others, that Appellant's claims were barred under the primary assumption of risk doctrine. The trial court granted the motion as to the first three causes of action, concluding the doctrine of primary assumption of risk barred recovery. (*Id.*)

The Court of Appeal, Second Appellate District, Division 6, after

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[8] In ruling on Appellant's *motions in limine* to admit evidence that other non-family members had been invited to social gatherings at the Respondents' residence by Gunner, including to ride motocross bikes, the trial court said, "If your (sic) talking about permission to use or not bringing other people there, I think that there is another motion that addresses that that I'm denying also." (1 Tr. 39.) (AOB, p. 41.)

allowing for appropriate briefing, issued its Order and Alternative Writ, filed 8/31/2017, case number B283700, holding that:

> Here, it is undisputed that the motocross track was designed to be safely ridden in one direction and that Christina and Donald failed to install directional and entry/exit signs on the track. [Appellant's] deposition testimony states that she did not know what direction to travel as she entered the track, and did not know what direction Gunner was travelling prior to her entry. Her expert witness testified the trace "was deficient and defective because there was no signage to indicate to any users of their track the safe direction of travel." This evidence creates a triable issue of material fact as to whether Christina and Donald increased the risk inherent in motocross, precluding a grant of summary adjudication as to the claims against them.

On September 14, 2017, the trial court, Hon. Donald G. Umhofer, Judge (Ret.), issued its order vacating and setting aside "that portion of the order of June 14, 2017, granting summary adjudication in favor of defendants Christina and Donald Young as to the first three causes of action alleged in [Mikayla's] complaint." (1 CT 1.)

On May 31, 2018, the trial court, Hon. Linda D. Hurst, Judge, conducted a readiness conference, ruling on several of the parties' motions in limine. (1 Tr. 5; 4 CT 967.) The Court indicated that it would allow Mikayla 14 hours to present her case, and the Youngs would have 12 hours. (1 Tr. 83; 4 CT 969.)

On June 4, 2018, Defendants filed their Motion to Amend Answer to

Conform to Proof to Add the Affirmative Defense of Civ. Code section 846…, etc. (2 CT 303; 4 CT 969.)

On June 5, 2018, a jury was empaneled and trial commenced. (4 CT 969.) On June 13, 2018, Appellant rested. (4 CT 986.)

On June 14, 2018, the court announced it was deferring ruling on the Motion to Amend Answer, but "[t]he Court's tentative is that it is inconsistent with Deft. D. Young's testimony. Counsel may file briefs if they wish to do so." (8 Tr. 2114 – 2118; 4 CT 987.)

On June 19, 2018, the court granted Defendant's Motion to Amend their Answer to Add as an affirmative defense recreational use immunity. (4 CT 994.) On June 19, 2018, the Defense rested. (4 CT 995)[9]

On June 20, 2018, the court instructed the jury. (11 Tr. 3038; 3 CT 632; 4 CT 996.) On June 21, 2018, counsel argued the case, the jury retired and returned its verdict. (12 Tr. 3400; 3 CT 704; 4 CT 998.)

On June 29, 2018, the court signed the First Amended Judgment on Special Verdict, and it was filed the same day. (3 CT 717.) Notice of Entry of Judgment was filed July 13, 2018. (3 CT 715.)

On July 27, 2018, Appellant filed her Notice of Intention to Move for

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[9] Obviously, the order granting the motion to amend the answer was issued 15 days after it was filed, 5 days after the court indicated that its tentative decision was to deny the motion, and 6 days after Appellant rested her case.

New Trial and Motion for New Trial. (3 CT 728.) On August 3, 2018, Appellant filed her Memorandum of Points & Authorities in Support of Motion for New Trial. (3 CT 738).

On September 4, 2018, the court denied Mikayla's motion for new trial. (4 CT 927.) On September 6, 2018, Mikayla filed her timely Notice of Appeal pursuant to California Rules of Court, Rule 8.108. (4 CT 931.)

As noted in her Request to Augment the Record on Appeal, on DeceRMBer 26, 2018, Defendant's filed a Second Amended Judgment on Special Verdict, signed by the court the same day. (Exh. B, p. 014 – 023, Request to Augment, granted 5/31/2019.) Notice of Entry of that judgment was filed January 2, 2019. (Exh. C, p. 026, Request to Augment, granted 5/31/2019.)

On October 30, 2020, the Court of Appeal, Second Appellate District, Division Six, filed its opinion reversing the Judgment as to the first and second causes of action. That 2-1 decision was certified for publication and published at 56 Cal.App.5th 1021; rehearing was denied on November 18, 2020, but review was granted by this Court on February 11, 2021.[10]

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[10] The entries in the final paragraph of this section of the Answer Brief on the Merits is drawn from the Court of Appeal's docket/Register of Actions as reflected on its official website: https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&do

Statement of Facts

The facts that are pertinent for the purposes of review by this Court are as set forth in the opinion of the Court of Appeal, *Hoffmann v. Young* (2020) 56 Cal. App. 5th 1021, 1024, 271 Cal. Rptr. 3d 33, 36, reh'g denied (Nov. 18, 2020), review granted, 480 P.3d 550, 275 Cal.Rptr.3d 2 (Mem) (Feb. 10, 2021). (See, Rule 8.500 (c)(2).) Where necessary to correct, or clarify a factual averment by Respondents, citations to the record will be included.

Legal Argument

I.

"SOCIAL GUESTS" ARE NOT RECREATIONAL USERS UNDER CIVIL CODE SECTION 846, SO LANDOWNER IMMUNITY FROM SUIT DOES NOT APPLY; THE STATUTE PROSCRIBES NEITHER EXPRESS, NOR IMPLIED DELEGATION OF A LANDOWNER'S AUTHORITY TO INVITE SOCIAL GUESTS ONTO HIS/HER/THEIR/ITS PROPERTY, NOR DOES IT DEROGATE THE LAW OF AGENCY.

A. Social Guest exception.

Civil Code section 846, by its own terms, does

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"…not limit the liability which otherwise exists for any of the following:

(1) Willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.

(2) Injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose.

(3) Any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

(*Id*; underlining added.)

Fairly recently, the First District, Division Two, examined the history of Section 846, and the similarity of purpose between it and the recreational use immunity statutes of sister-states whose legislation tracked the model act developed by the Council of State Governments in 1965. The court noted that all such statutes were a compact between private property owners and the state, whereby there was a "quid pro quo," or "trade-off," in that the landowner received immunity from lawsuits due to his negligence in return for opening his land to the public.

(*Pac. Gas & Elec. Co. v. Superior Ct*., supra, 10 Cal. App. 5th 563, 573–574.)[11]

The court reasoned, therefore, that the statutory exceptions to the immunity under Section 846 had to be understood in that context; that the exceptions reflect situations in which the Legislature did not think "governmental encouragement" in the form of immunity was necessary to achieve that purpose. Significantly, the court cited and quoted *Calhoon v. Lewis,* supra, 81 Cal.App.4th at p. 114, for the proposition that, "…exception for those who are personally invited reflects Legislature's understanding that '[p]roperty owners do not need governmental encouragement to permit personal guests to come onto their land.'" (*Pac. Gas & Elec. Co.,* supra, at p. 574.) (Emphasis added.)

As the authors of the treatise comparing state recreational use statutes succinctly expressed it:

> Finally, persons deemed to be social guests may not also be classified as recreational users, triggering the immunity offered by a statute. Hawaii and Wisconsin

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[11] The court did not mention the anomaly created by the wording, and interpretation, of Section 846 that this Court had earlier acknowledged: "Other states have relied on express statutory language, derived from the model act, limiting the reach of the statutory immunity to 'land ... available to the public for recreational purposes.' (citations omitted) As noted earlier, although one purpose of section 846 is to encourage access to recreational lands, *it is not expressly or necessarily limited to such property*." (*Ornelas v. Randolph*, supra, 4 Cal. 4th 1095, 1108, fn. 9; italics added.)

> hold exclusions for persons designated as a house or social guest (Hawaii Rev. Stat. § 520-2,; Wis. Stat. Ann. § 895.52,). In a Texas case, a woman was injured when she fell out of a tree after entering the defendant's property to view wild boars. The defendant argued that the plaintiff had been engaged in a recreational activity and that as a landowner he was therefore entitled to immunity under Texas' recreational user statute. The court disagreed, finding the recreational user statute to be inapplicable because the woman was deemed a social guest (McMillan v. Parker, 1995). Even though Texas statute, Tex. Civ. Prac. & Rem. Code Ann. § 75.001, does not specifically exclude social guests, the court reasoned that social guests were not the intended recipients of the statute and that application of the statute to *178 them would unfairly lower the standard of care owed to them (McMillan v. Parker, 1995).

(Carroll, et al.,Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation, supra, 17 J. Legal Aspects Sport 163, 177–78; emphasis added.)

Thus, whether it is asserted that recreational use immunity statutes do not apply in cases where the injured party is the landowners' "social guest," or instead stated that "social guests" are excepted from the landowners' invocation of statutory immunity, the effect is the same, and here, in the trial court, Respondents had represented that, "The fact of the matter is, it's an assumption of risk case. Track design. That's it. ¶ I'm not arguing status of the Plaintiff as a trespasser. That's not an issue in the case." (1 Tr. 77; AOB, 24.)

Even now, as part of a factual recital that violates Rule 8.500 (c)(2), Respondents concede that "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.)." (RMB, p. 12.) [**NB**. Respondents omit the indisputable fact, provided by Gunner himself, that the "protective gear" belonged to Gunner's mother, as did the boots with which he outfitted Appellant. (8 Tr. 2181; AOB 30.),].

Appellant was certainly a "social guest," but because there was no evidence (the trial court did not allow any)[12] that Gunner's parents, the titled property owners, had given him authority to invite guests onto the property, Respondents argue that Appellant does not qualify for the exception under Section 846 (d)(3).

B. Implied and Express Delegation of Authority to Invite.

Appellant and Respondents both have cited and discussed the cases involving corporations (Pacific Gas & Electric, Unocal, etc.) and governmental agencies, e.g., agencies of the U.S. government, including the military, who are the titled landowners of property on which some hapless person was injured and sued under some theory of negligence.

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[12] Appellant's assignment of error concerning the trial court's ruling denying a new trial because that court excluded evidence that Gunner did have authority to invite specific people onto the Young property is at AOB, pp. 14, 40 – 42,

Curiously, only a few of those cases involved claims by the nominal defendants that the person extending the invitation was not authorized to do so, but without explaining just who was, and how that authorization devolved.

As Appellant set forth in her Answer to the Petition for Review, it would be remarkably obtuse for Respondents to so promiscuously cite ("passim") *Ravell v. U.S.* (9th Cir. 1994) 22 F.3d 960, and then deny that the Ninth Circuit's decision turned on whether Ms. Ravell had been "expressly invited" to attend an air show at a U.S. military installation open to the general public, rather than on whether someone other than the Commander-in-Chief, the Secretary of Defense, the Secretary of the Air Force, etc., *personally* was authorized to issue that invitation. The presumption that such delegation of authority existed, and was cognizable under Civil Code section 846, is clear:

> Ravell's son's request that she come to the show does not advance her cause. She presented no facts to indicate that he was, in any sense, authorized to make express invitations **on behalf** of the United States which went beyond the advertised invitation to the general public. Liability cannot turn on such ephemera as a son's asking his mother to come to a public event.

(*Ravell v. United States*, 22 F.3d 960, 963, n. 3; emphasis added.)

Similarly unavailing was Respondents' attempt (at Pet., p. 15, *et seq*) to not only distance themselves from *Ravell's* footnote 3, but

to also create a conflict between that decision and a United States District Court's ruling that a subordinate officer *apparently* had authority to issue such an "express invitation" within the meaning of Civil Code section 846.

In their Merits Brief, however, Respondents avoid the conundrum by simply declining to even mention that case and the problem it presents for them.

As Appellant noted in her Reply Brief below, following the filing of the AOB, but prior to the filing of the RB, Honorable Barry Teb Moskowitz, United States District Judge, Southern District of California, had occasion to consider the *Ravell* decision in a context analogous to that presented here. (*H.S. by & through Parde v. United States*, No. 317-CV-02418-BTM (KSC), 2019 WL 3803804, (S.D. Cal. Aug. 13, 2019).)[13]

An extended recitation of the pertinent passages of the district court's ruling is appropriate, but apparently misunderstood by Respondents, who cited it at Pet., pp. 18 – 23, but omit if from their RMB:

> …as to the "express invitation" exception (*i.e.*, § 846(d)(3)), Plaintiff argues that H.S. was expressly invited to the Armory by way of Captain Rankin's statements in the Newsletters and/or by SSG Shears via the authority

[13] It does not appear that more recent authority has disturbed this Court's sense that unpublished federal cases may be cited in California courts without offending our rules. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18.) (See, also, *People v. Cage* (2007) 40 Cal.4th 965, 989, fn. 20 citing *Miller v. Fleming* (W.D.Wash. 2006) 2006 WL 435466.)

delegated to him by Captain Rankin via his statements in the Newsletters. In response, the United States argues that, because the Newsletters "did not specifically address particular family members by name, type of family member, or otherwise", it was not a direct and personal invitation and therefore insufficient to constitute an express invitation. (ECF No. 50, at 23-25.) It further argues that SSG Shears had "no authority to personally invite family members on behalf of the United States." (ECF No. 52, at 8 n.4.) Yet there is no support in the case law for the purported requirement that H.S. be personally-named in the Newsletters to constitute a "direct and personal" invitation. Rather, all that is required is that the invitation be direct, personal, and to a person personally selected by the landowner. *See Wang v. Nibbelink*, 4 Cal. App. 5th 1, 32 (2016) (" 'Express invitation' in section 846 refers to a direct, personal request by the landowner to persons whom the landowner personally selects to come onto the property") (citations omitted). Further, the parties do not cite, and the Court is unable to locate, prior decisions that directly define what constitutes a "direct, personal" request or what it means for a landowner to "personally select" a person to invite. Rather, these concepts have generally been defined by exclusion. *See Phillips v. United States*, 590 F.2d 297, 299 (9th Cir. 1979) ("[I]t seems evident to us that the Legislature did not intend to include within the concept of express invitation, used in section 846, any invitation to the general public."); *Calhoon v. Lewis*, 81 Cal. App. 4th 108, 115, 96 Cal. Rptr. 2d 394, 398 (2000) ("[P]ersons responding to advertisements, brochures, promotional materials, and other public offers **are not express invitees** under the [Recreational Use] statute."); *Johnson*, 21 Cal. App. 4th at 317 (employer's execution of a rental agreement with landowner in connection with use of premises for employer's company picnic did not constitute an express invitation from landowner to employer's employees).

… Moreover, the United States' reliance on a footnote in *Ravell* for the proposition that an invitation from a

> service member to his family members cannot constitute an express invitation from the United States **overstates the holding in *Ravell***. *Ravell*, 22 F.3d at 961, 963 n.3 (invitation by service member to his mother to attend "widely-attended" airshow advertised to the general public attended by over 300,000 people was insufficient to constitute express invitation where the mother "presented no facts to indicate that [service meRMBer] was, in any sense, authorized to make express invitations on behalf of the United States which went beyond the advertised invitation to the general public"). Unlike in *Ravell*, Plaintiff has presented facts indicating that SSG Shears *was* authorized to extend an invitation on behalf of the United States by Captain Rankin exhortations in the Newsletters
>
> Nevertheless, because genuine disputes of material fact exist as to whether Captain Rankin and/or SSG Shears had sufficient authority, whether through delegation or otherwise, to invite H.S. onto the Armory on behalf of the United States, and therefore whether the "express invitation" exception to the Recreational Use statute is triggered, summary judgment in favor of either party is inappropriate.

(*H.S. by & through Parde v. United States*, 2019 WL 3803804, at *5 – 6.) (Underlining added.)

The very pregnant question, of course, is by what authority, express or implied, was the aforesaid Captain Rankin himself delegated the authorization to expressly invite persons onto that military installation; why was it only the authority of Staff Sergeant Shears that was challenged? In any event, though, Judge Teb said it was an open question as to whether Captain Rankin had authority and, by and through him, if SSG Shears did.

Similarly, in *Johnson v. Unocal Corp*. (1993) 21 Cal.App.4th 310, the corporate defendant had granted plaintiff's employer access to the corporate property to hold the employer's company picnic. The employer's employee, who was injured, sued the corporation, but without saying who in the corporation was authorized, or delegated the authority to issue, the express invitation, the Court of Appeal held that because the invitation to the picnic came from the employer to the employee, and not directly from the corporation to the employee, the exception under Section 846(d)(3) was inapplicable because defendant did not extend a "direct, personal request" for plaintiff to attend picnic on the defendant's land.

In sum, there is nothing in Section 846 that precludes a landowner from delegating his/her/their/its authority to invite a social guest onto the landowner's property; subdivision (d)(3) does not say the invitation must be made "directly," or "personally" by the landowner to the social guest.

Here, the consistent, persistent argument of Respondents, prior to the decision by the court below, has been that Gunner did not have authority to invite Appellant *to ride on the Young's dirt-bike track*, NOT that he lacked authority to invite her onto the property for *any purpose.* Did the fact that Gunner lived in the house, on the property, with his parents imply that he had authority to summon emergency responders in the event of fire? Or that he had authority to summon a plumber if a pipe

burst? Or that if the police came knocking, he had authority to invite them in to search the common areas of the house?[14]

There is simply nothing in Section 846 that prohibits, or mitigates the effect of, the implied, or express delegation of authority by the landowner to a member of his/her/their/its household to issue an express invitation to a particular person, or anyone, to come onto the property for any purpose. (See, e.g., *People v. Jacobs* (1987) 43 Cal. 3d 472, 483 ["As a child advances in age she acquires greater discretion to admit visitors on her own authority."].)

C. The Law of Agency.

Although the *Calhoon* court did not say on what basis Wade Lewis had authority to invite his friend, Mr. Calhoon, onto the property owned by Wade's parents, the Court of Appeal in *Hoffmann* was direct and clear as to why Gunner's express invitation to Appellant was "tantamount to an express invitation by landowner..:" Gunner lived on the property, with his parents, the landowners, a circumstance that commonsense dictates implies authority to invite guests onto the property. The Court also said

---

[14] It would appear that this Court would answer the last query in the affirmative: "The mutual use of the property must be such 'that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' (*United States v. Matlock* (1974) 415 U.S. 164, 171, fn. 7, 94 S.Ct. 988." (*People v. Jacobs* (1987) 43 Cal. 3d 472, 481.)

that Gunner was his parents "agent," and had been delegated the authority to invite social guests. (*Id*, 56 Cal. App. 5th 1021, 1026.)

In the now twenty-one years since *Calhoon* was decided, not one court has controverted the reasoning that "…[Calhoon] produced facts showing [the Lewises' son] personally invited him to come onto the Lewises' property to pick him up. This would seem to easily bring this case into section 846, item (c)'s "'expressly invited"' exception." (*Calhoon v. Lewis*, supra, 81 Cal. App. 4th 108, 113; underlining added.)

On the other hand, Respondents are now claiming that the Court of Appeal's reliance on "commonsense" is nonsense; that 18 year old Gunner never had authority to invite any social guests onto the property for any purpose, even though the evidence fairly implies that the only arguable restriction on his authority was that only family members were allowed to use the motocross track. (In their Respondents' Brief below, they emphasized that, "Gunner's parents prohibited anyone other than family members *from using that track*. (7 RT 1901:13-27; 8 RT 2135:25-2137:9, 2172:26-2173:19.)." (RB 15.) (Emphasis added.).)

In her AOB, at p. 11, Appellant cited and quoted 32 Cal. Jur. 3d Family Law § 358:"The parent-child relation, taken in connection with other circumstances, may be entitled to considerable weight tending to establish the fact of agency. Also, as is true generally in the law of

agency, a child's unauthorized act can become binding on the parent through the latter's ratification."

While not controverting that unremarkable legal proposition, Respondents make the startling claim that, "…there is no evidence that Donald or Christina later ratified Gunner's invitation to [Appellant] as an express invitation on their behalf. (See RB 43-44.)." (RMB, p. 31, fn. 8.) The Court's attention is invited to the following excerpt from AOB, p. 21:

> In the months following the accident, [Appellant] was a frequent guest, "just about every day…they spent a lot of time together, her and Gunner," according to Christina, who offered that, "We did a lot of family things together…[w]e had a nice family time at Christmas." (8 Tr. 2150 – 2151.) At trial, Gunner said, "I live with my mom and my dad." (8 Tr. 2169.) He said, as to providing [Appellant] with proper attire, " I just figured I had extra gear. My mom's got like the female chest protectors and stuff, so I'd use that and her boots, and we had spare gear just from over the years." (8 Tr. 2181.)
>
> When asked, "Did you ask permission of your mom to use that gear that day," Gunner replied, "No, not at all." (8 Tr. 2181.)

While it may be argued that Appellant's after-accident visits to the Young property is not ratification by the landowners of Gunner's authority to issue the earlier express invitation to visit---even to wear his mother's gear, "In our view, if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck."(*People ex rel. Lockyer v. Pac. Gaming Tech.* (2000) 82 Cal.App.4th 699, 701.)

Certainly, the fact that it was the landowners' living-at-home 18-year old child who issued the "express invitation" supports the Court of Appeal's finding of "implied agency" in the case of a living-at-home adult child:

> Actual authority may be conferred either expressly or by necessary implication. Thus, in the law of agency, actual authority takes two forms: (1) express authority, and (2) authority that is implied or incidental to a grant of express authority.[1] Thus, actual authority may be implied by the words and conduct of the parties.[2] This principle finds recognition in the statute defining actual authority as including that which the principal intentionally, or by want of ordinary care, allows the agent to believe himself or herself to possess.[3] As indicated by this statute, no implied authority exists unless the agent believes that he or she has such authority,[4] and this belief must be reasonable.[5]

(2B Cal. Jur. 3d Agency § 66; emphasis added.) (See, also, *Hoffmann*, supra, 271 Cal.Rptr. 33, 37 – 38.)

As noted, Respondents acknowledge that Gunner invited to Appellant to come onto the Young's property---he even transported her

and her dirt-bike to the residence while his parents were at home. Presumably, then, Gunner believed that he was authorized to invite her, and under California law (Civ. C. § 2316), there cannot be "implied authority" unless the purported agent believes that he has such authority. (*Columbia Outfitting Co. v. Freeman* (1950) 36 Cal. 2d 216, 219.) Indeed, and as noted, Respondents have never, until now, denied that Gunner had authority to invite Appellant, or anyone, to come onto the property for any purpose other than to ride on the Young's track.

Similarly, Appellant, by accepting Gunner's invitation to visit the home he shared with his parents---the titled "landowners"---implicitly and reasonably believed that Gunner was authorized to issue that invitation. Under California law, " 'Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.' (Civ.Cide section 2317; see also Restatement, Agency §§ 8, 27.) 'A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.' (Civ.Code section 2334.)." (*Columbia Outfitting*, supra, 36 Cal. 2d 216, 219–20.)

The Court of Appeal's reliance on "common sense" is justified and beyond dispute because anyone receiving Gunner's invitation to visit his

home would unquestionably assume he was authorized to issue it. It was also an appropriate harmonization of Civ. C. §846(d)(3) with the statutory scheme that is the codification of the common law pertaining to "agency," Civ. C. § 2295, et seq. (See, e.g., *Younger v. Superior Court* (1978) 21 Cal.3d 102, 113, citations omitted ["It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."]; see, also, *People v. Pieters* (1991) 52 Cal. 3d 894, 898, citation omitted ["… we do not construe statutes in isolation, but rather read every statute "'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'"].)

The Court of Appeal squarely addressed Justice Perren's dissent and thereby exposed its infirmities:

> The statute does not even purport to deal with the law of agency, which is a staple of both common and statutory law. By the dissent theory, only a fee simple owner of property is a "landowner" and only he or she, personally, can give consent. We do not purport to confer principal-agent status to son for business or other purposes. We only hold that for purposes of section 846 immunity, the son of a "landowner" can invite, i.e., expressly consent, to bring a person onto the land. This eviscerates section 846 immunity and this is the fair import of *Calhoon*.
>
> Can a managing agent of real property, expressly employed for such purpose, expressly consent for a

> person to come upon his principal's land with the principal still enjoying section 846 immunity? No. Here, of course, there is no express agency. But, there is implied agency to let son invite, and expressly consent, to allow a person to come onto his parents' land. This eviscerates section 846 immunity.

(*Hoffmann v. Young*, supra, 271 Cal. Rptr. 3d 33, 40; emphasis added.),

II.

"OWNER" WITHIN THE MEANING OF CIVIL CODE SECTION 846 IS BROAD ENOUGH TO INCLUDE TENANT, LESSEE, AND/OR OCCUPANT SO THAT IT WOULD ALIGN WITH SECTION 846.2 WITH WHICH IT IS IN *PARI MATERIA*; IMMUNITY WOULD APPLY, EXCEPT, E.G., WHERE THAT TENANT, LESSEE, AND/OR OCCUPANT EXPRESSLY INVITES A SOCIAL GUEST TO THE PREMISES.

The "ownership requirement" of the statute is "exceptionally broad." (*Ornelas v. Randolph*, supra, 4 Cal.4th 1095, 1102.) The statute "articulates an 'exceptionally broad definition of the types of 'interest' in property which will trigger immunity.' [Citation.]" (*Id.* at p. 1103.) Even the holder of a permit to graze livestock on federal land is an "owner" of an "interests in real property" within the meaning of the statute. (*Ibid.*) (Cf. *Johnston v. De La Guerra Properties* (1946) 28 Cal. 2d 394, 399 [" 'Accordingly, invitees of the tenant are regarded as being invitees of the

owner while on passageways which invitees of the tenant have a right to use and which are under the owner's control.' (citation omitted.)."].)

A. Sister-state statutes under the model.

The legislatures of other states, while not as directly as Hawai'i, have acted to similar effect by simply broadening the definition of "landowner," or "owner," to provide, e.g., "…(d) '"Owner"' means either of the following:

1. A person, including a governmental body or nonprofit organization, that owns, leases or occupies property.

2. A governmental body or nonprofit organization that has a recreational agreement with another owner.

(e) '"Private property owner"' means any owner other than a governmental body or nonprofit organization."

(Wis. Stat. Ann. § 895.52 (West); underlining added.) (RJN ISO, Exh. D, RJN0015 – 0018.)

Thus, when the school-age daughter of a Wisconsin couple invited a neighbor boy to "go to my house," and he was injured when the sled he was on ran into an adjacent street and was struck by an automobile, the Supreme Court of that State easily resolved the assertion of recreational use immunity by the little girl's parents, the titled landowners:

Under the social guest exception, invited social guests,

unlike permitted entrants, may proceed against a landowner under certain circumstances when they are injured while engaged in a recreational activity. *See Ervin v. City of Kenosha,* 159 Wis.2d 464, 475, 464 N.W.2d 654 (1991) (drawing distinction between permitted entrants and invited social guests). The social guest exception is established by § 895.52(6)(d) and exists where there is an express and individual invitation made to the injured party by the private property "owner" for the specific occasion during which the injury occurs…

The Pertzborns contest the applicability of the social guest exception on several grounds. First, they maintain that Kathleen Pertzborn was without the legal authority to extend an invitation that would trigger the social guest exception. Second, the Pertzborns argue that there was no express and individual invitation to trigger the exception. Third, they also contend that even if such invitation existed, it had expired by the time Christopher was injured and Kathleen had gone inside for supper.

¶ 42 We turn first to Kathleen's authority to extend an invitation under § 895.52(6)(d). While the Pertzborns make much of the fact that neither [titled owners] Diane nor Kenneth Pertzborn invited Christopher to their home to sled, that fact is not controlling. The only alleged invitation to be found in the summary judgment materials arose from Kathleen. The Pertzborns maintain that Kathleen had no authority to invite Christopher and trigger the social guest exception because she was merely eleven years old. Their position is not supported by the statute. The statute requires only that an "owner" of the property invite the injured party. An "owner" under § 895.52(1)(d) 1 includes an "occupant." The statute contains no age limitation, and we will not read one into the statute.

(*Waters ex rel. Skow v. Pertzborn*, 2001 WI 62, ¶¶ 41-42, 243 Wis. 2d 703, 728–29, 627 N.W.2d 497, 509; emphasis added.)

However, even where the definition of "landowner" is not so broad, sister-state courts have nevertheless concluded that the term embraces, for example, the landowner's property manager, and that where social guests are invited by other social guests, who themselves were expressly invited by the landowner, " '…a property owner owes the same duty to the guest of an invitee as it owes to the invitee himself, ' " (See, Maryland Code, Natural Resources, §5-1101, defining "owner" as "the owner of any estate or other interest in real property, whether possessory or nonpossessory, including the grantee of an easement.") (RJN ISO, Exh. F, RJN0023 – 26.)(See, also, respectively, *Fagerhus v. Host Marriott Corp.*, 143 Md. App. 525, 544, 795 A.2d 221, 232 (2002); *Martinez v. Ross*, 245 Md. App. 581, 604, fn. 14, 227 A.3d 667, 680, cert. denied, 469 Md. 656, 232 A.3d 257 (2020).)

Further, since the recreation use immunity statutes of sister-states are founded on the same public policy rationale as California's, i.e., "…to encourage property owners to allow the general public to engage in recreational activities free of charge on privately owned property..,"'[15] the Court's determination of the issue(s) in this case might benefit from, or be

[15] *Hubbard v. Brown*, infra, 50 Cal. 3d 189, 193; emphasis added. See, also, Carroll, et al., supra, 17 J. Legal Aspects Sport 163, 170: "The basic intent behind these statutes is to limit liability when landowners allow others to use their land for recreational purposes."

informed by, pertinent statutory and case law from those other jurisdictions, particularly where it is in harmony with the common law. (Cf. *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal. 3d 287, 298 ["Although holdings from other states are not controlling, and we remain free to steer a contrary course, nonetheless the near unanimity of agreement by courts considering very similar statutes, all based on the same model act, indicates we should question the advisability of continued allegiance to our minority approach."].)

Given this Court's earlier conclusion that "[t]he phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846...," such that the holder of a federal grazing permit could be considered a "landowner," it would be remarkable if the Court did not also conclude that a lessee, a tenant, and/or an occupant[16] would similarly qualify for the immunity, and thus be subject to the exceptions. (*Hubbard v. Brown* (1990) 50 Cal. 3d 189, 196.)

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[16] As will be shown, several of California's sister-states include "tenant, lessee, occupant, or person in control of the premises," in their statutory definitions of "owner," as does, for example, do Nebraska (Neb. Rev. St. §37-729: "Owner includes tenant, lessee, occupant, or person in control of the premises.") (RJN ISO, Exh. G, RJN_0027 – 31.) and Hawai'i (HRS § 520-2; "'Owner' means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises.") (RJN ISO, Exh. C, RJN_0010.)

In addition to Hawai'i, Wisconsin, and Nebraska, the State of Indiana defines "owner" so as to include a person who "(1) has a fee interest in; (2) is a tenant, lessee, or an occupant of; or (3) is in control of; a tract of land." (IC 14-22-10-2(7)(c)) Indiana further provides that its recreational use immunity statute does not affect existing state law with respect to, inter alia, "invited guests." (IC 14-22-10-2(7)(f)). (RJN ISO, Exh. H, RJN_0032 – 35.)

Oregon also has an expansive definition of "owner," including "[t]he possessor of any interest in any land, including but not limited to the holder of any legal or equitable title, a tenant, a lessee, an occupant, the holder of an easement, the holder of a right of way, or a person in possession of the land." (O.R.S. § 105.672 (4)(a).) (RJN ISO, Exh. I, RJN_0036 -39.) While the Oregon statute does not expressly except from immunity liability injuries to a social guest, its courts have held that "it seems likely to us that the legislature intended the immunity to apply only when permission is granted to a person as a member of the public generally, not as a specific invitee." (*Conant v. Stroup*, 183 Or. App. 270, 276, 51 P.3d 1263, 1266 (2002).)

The Texas statute does not define "owner" specifically, but instead provides that the immunity extends to "an owner, lessee, or occupant…" (Civil Practice & Remedies Code §75.02(a),(b),(c.) (RJN ISO, Exh. E,

RJN_0019 – 22.) As noted in the Carroll treatise, there is no statutory provision excepting social guests from operation of the immunity statute, but, as with Oregon, the Texas courts have held that "application of the statute to social guests would unjustly result in a lower standard of care without providing any offsetting benefit. The statute does not give rise to an increased opportunity for social guests to legally enter the property owned by their host. Thus, because of their relationship with the property owner, social guests are clearly not the intended beneficiaries of the recreational-use statute." (*McMillan v. Parker*, 910 S.W.2d 616, 619 (Tex. App. 1995), writ denied (Mar. 7, 1996).)

Thus, either directly or indirectly, most states having a definition of "owner" more expansive than California's have also provided, legislatively or by judicial construction, that landowner immunity is not applicable in the case of injuries to a social guest. As noted, Hawai'i alone has both an expansive definition of "owner" and "house guest," to include one invited by a member of the landowner's household.

B. Section 846 in *pari materia* with Section 846.2.

Acknowledging that the term "landowner" should be more, rather than less inclusive is especially apt because Civil Code section 846 is in *pari materia* with Civil Code section 846.2, which provides 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, unless that person's injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. The immunity provided by this section does not apply if the owner, tenant, or lessee received any consideration for permitting the gleaning activity." (Emphasis added.)

This Court has recently confirmed that "[s]tatutes are considered to be in *pari materia* when they relate to the same person or thing, or class of persons or things, or have the same purpose or object. (Citation omitted.) Such statutes should "'be construed together so that all parts of the statutory scheme are given effect.' (Citation omitted.)." *(Kaanaana v. Barrett Bus. Servs., Inc.* (2021) 11 Cal. 5th 158, 276 Cal. Rptr.3d 417, 428, 483 P.3d 144, 154; underlining added.)

III.

THE LEGISLATURE HAS TWICE AMENDED SECTION 846 SINCE *CALHOON* AND *JACKSON* WERE PUBLISHED WITHOUT ATTEMPTING TO REPUDIATE, OR DILUTE THE COURTS' DECISIONS, INDICATING LEGISLATIVE ACQUIESCENCE.

As discussed earlier, in *Calhoon* the court said that the invitation by Wade Lewis, the living-at-home adult son of the landowners, satisfied

the "express invitation" predicate of Section 846(d)(3). Also noted, the court in *Jackson v. Pac. Gas & Elec. Co.* (2001) 94 Cal. App. 4th 1110, 1116, joined *Calhoon* in holding that "…**the invitation need not be for the specific purpose of engaging in recreation**."

In 2014 and again in 2018, the legislature amended Section 846, but in so doing made no effort to alter those decisions, or their effects. As Appellant argued at AOB, pp. 10 – 11, that acquiescence should not be seen as accidental, given the two opportunities four years apart to address any perceived errors. (See, e.g., *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 ["[i]t is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction."]

The Court should confirm the reasoning of those courts.

CONCLUSION

WHEREFORE, for all the reasons set forth above, the Court is asked to affirm the decision by the Court of Appeal by holding that (1) CACI 1010, as drafted, is an incorrect statement of the law, and as issued to the jury in this case prejudiced Appellant, and (2) the express invitation extended by Respondent landowners' adult son and household

member to Appellant operated to strip landowners of any immunity under Civil Code section 846 because (a) direct, express invitation by a member of a landowner's household is tantamount to such an invitation by the landowner, and/or (b) an adult member of a landowner's household has implicit authority to invite social guests onto the property unless expressly prohibited from doing so by the landowner, and/or (c) an adult member of a landowner's household is the landowner's actual agent with respect to inviting social guests to come onto the landowner's property.

Alternatively, and in the event the Court elects to reverse the decision by the Court of Appeal, the matter should be remanded with instructions to order a new trial so that Appellant will have a meaningful opportunity to develop the necessary factual predicates.

Dated: June 9, 2021.

Respectfully submitted,

/s/ Steven R. Andrade
Steven R. Andrade
Attorney for Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 8.74 (b), CALIFORNIA RULES OF COURT.

This is to certify that the within Answer to Petition for Review complies with the type-volume limitation contained in Rule 8.74 (b), California Rules of Court.

This brief contains 9,097 words as determined by the word processing system used to prepare the brief, and the font type and size is Century Schoolbook, 13 point.

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Dated: June 9, 2021.

Respectfully submitted,

/s/ Steven R. Andrade
Steven R. Andrade
Attorney for Appellant

PROOF OF SERVICE

Hoffmann v. Young et al.
Case No. S266003
Court of Appeal Case No. B292539

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

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/s/ Angelic Robinson

Angelic Robinson

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Case No. S266003
Court of Appeal Case No. B292539

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STATE OF CALIFORNIA
Supreme Court of California

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