NO. S165549

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAN RICHARD KLEIN and SHERYLL KLEIN,
PLAINTIFFS-APPELLANTS,
v.
UNITED STATES OF AMERICA, and DAVID ANDERBERG,
DEFENDANTS-APPELLEES.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NINTH CIRCUIT COURT OF APPEALS NO. 06-55510
UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA NO. CV05-5526 PA

APPELLEE UNITED STATES OF AMERICA'S ANSWERING BRIEF

THOMAS P. O'BRIEN
UNITED STATES ATTORNEY
LEON W. WEIDMAN
ASSISTANT UNITED STATES ATTORNEY
CHIEF, CIVIL DIVISION
JULIE ZATZ
ASSISTANT UNITED STATES ATTORNEY (CBN 155560)
JONATHAN B. KLINCK
ASSISTANT UNITED STATES ATTORNEY (CBN 119926)
ANOIEL KHORSHID
ASSISTANT UNITED STATES ATTORNEY (CBN 223912)
FEDERAL BUILDING, SUITE 7516
300 NORTH LOS ANGELES STREET
LOS ANGELES, CALIFORNIA 90012
TELEPHONE: (213) 894-7349; 8561; 6086
FACSIMILE: (213) 894-7819

ATTORNEYS FOR DEFENDANT-APPELLEE UNITED STATES OF AMERICA

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FACSIMILE: (213) 894-7819

ATTORNEYS FOR DEFENDANT-APPELLEE UNITED STATES OF AMERICA

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I. STATEMENT OF THE CASE

A. Nature of the Case

Pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2679(d) et seq. (hereinafter "FTCA"), Appellants Alan Richard Klein and Sheryll Klein brought an action for personal injury against the United States in connection with injuries suffered by Mr. Klein on August 29, 2004, while riding his bicycle on Bear Divide Road in the Angeles National Forest. (CR1; ER Tab 1; 6:10 – 16.)[1] Mr. Klein was struck by a vehicle driven by motorist David Anderberg. Mr. Anderberg was a part-time volunteer who observed California Condors for the United States Forest Service (hereinafter "USFS"). The United States maintained throughout the case below and on appeal that Mr. Anderberg, at the time of the accident, was not acting within the course and scope of his federal employment pursuant to 28 U.S.C.

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[1] The following abbreviations are used in this brief: Appellants' Opening Brief ("AOB"); District Court Clerk's Record ("CR"); Appellants' Excerpts of Record to the Ninth Circuit Court of Appeals ("ER"); the District Court's March 13, 2006 Order Granting Summary Judgment ("District Court Order"); and the Ninth Circuit Court of Appeals' July 30, 2008 Order Certifying the Question to the California Supreme Court, Klein v. United States, 537 F.3d 1027 (9th Cir. 2008) ("Cert. Order").

§ 2679(d)(1). (CR 9, 20; ER Tab 2, 3:25-28; ER Tab 3, 3:21-27.)[2]

B. Course of Proceedings Below

The Kleins filed their Complaint on July 29, 2005. (CR 1; ER Tab 1.) The Complaint alternatively alleged that Mr. Anderberg was and was not acting within the course and scope of his employment with the USFS at the time of the incidents alleged. (ER, Tab 1, 3:5-7; 4:16-18.) The United States denied that Mr. Anderberg was acting within the course and scope of his employment in the body of its Answer as well as in its affirmative defenses. (CR 9; ER Tab 2, 3:5, 25-28; 5:20-26; 6:12-16.) Neither the Kleins nor Mr. Anderberg challenged the refusal of the United States Attorney to certify that Mr. Anderberg was acting within the course and scope of his employment at the time of the

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[2] The United States can only be held liable for the acts or omissions of its employees where they are acting within the course and scope of their federal employment at the time of the incidents alleged. See 28 U.S.C. § 2679(d)(1). Therefore the status of Mr. Anderberg as a federal employee acting within the course and scope of his employment with the USFS at the time of the incidents alleged will have to be decided should this Court rule in Appellants' favor upon the certified question. The United States is not asking herein that this Court rule on the question of whether Mr. Anderberg was acting within the course and scope of his employment with the USFS at the time of the accident inasmuch as the record below may have to be more fully developed.

accident.[3]

The District Court entered summary judgment in favor of the United States on March 16, 2006. (CR 27; ER Tab 13.) In its Order, the District Court acknowledged that the Kleins had pled alternatively the issue of whether Mr. Anderberg was acting within the course and scope of federal employment at the time of the accident. (CR 26; ER Tab 11.) For purposes of its ruling, the District Court assumed that Mr. Anderberg was acting within the course and scope of his employment. (Id.) The District Court observed that the Kleins' expert accident reconstructionist maintained that "[]defendant Anderberg's negligence was the cause of the accident." (Id.) The District Court held that as a matter of California law, the United States as a recreational landowner and employer was immunized from suit under California Civil Code section 846 (hereinafter "Section 846"). (Id.)[4]

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[3] See 28 CFR § 15.4(a).

[4] The District Court cited the discussions of Section 846 set forth in Shipman v. Boething Treeland Farms, Inc., 77 Cal. App. 4th 1424, 92 Cal. Rptr. 2d 566 (2000), rev. denied, 22 Cal. 4th 4318 (2000), and Ornelas v. Randolph, 4 Cal. 4th 1095, 847 P.2d 560, 17 Cal. Rptr. 2d 594 (1993), in support of its decision.

The Kleins filed their appeal before the Court of Appeals for the Ninth Circuit on April 3, 2006. (CR 29; ER Tab 14.) Following full briefing and argument, the Court of Appeals certified the following question for consideration by this Court:

> Does California Civil Code § 846, California's recreational land use statute, immunize a landowner from liability for acts of vehicular negligence committed by the landowner's employee in the course and scope of his employment that cause personal injury to a recreational user of that land?

Klein, 537 F.3d at 1029.

C. Statement of the Facts

Mr. Klein was injured in a traffic accident on Bear Divide Road on August 29, 2004, when the bicycle he was riding collided with Anderberg's automobile. (ER Tab 7, 25:37 – 44.) Klein was traveling north, and Anderberg was driving south at the time of the accident. (Id.) Bear Divide Road is located in the Angeles National Forest which is owned by the United States. (ER Tab 4, 5:15 – 19.)

The California Highway Patrol Traffic Collision Report taken on the day of the accident stated that there were no defects in Bear Divide Road or visible obstructions present. (ER Tab 7, 21:15 – 21.) The Report did not reach a conclusion as to who was at fault for the accident

due to conflicting party statements, lack of independent witnesses, and lack of vehicle points of rest. (Id. at 26:12 – 13.) The Kleins' expert witness viewed the accident scene in October 2004, and concluded in his declaration that Anderberg's negligence was the cause of the accident. (ER Tab 7, 64: 24-26; 65: 4-7.)

II. SUMMARY OF ARGUMENT

The plain language and the legislative intent underlying Section 846 provide both broad encouragement and protection to recreational landowners in exchange for the opening of their lands to private recreational users. Private landowners permitting recreational use on their land were entitled to absolute immunity for injuries to recreational users of their property unless: (1) there had been a "willful and malicious failure to guard or warn against a dangerous use, structure or activity;" (2) permission to enter for recreational use had been "granted for consideration;" or (3) the recreational users had been "expressly invited rather than merely permitted to come upon the premises by the landowner." Cal. Civ. Code § 846. None of these exceptions apply

herein.[5]

The language and legislative history of Section 846 and ensuing California case law does not support Appellants' definition of "premises liability" as engendering the intent to immunize recreational landowners only for injuries arising out of a condition of their land. Rather, as long as injuries to the recreational user arise in the course of recreational activity and are not subject to the three statutory exceptions, the recreational landowner is immune for all injuries occurring on his land.

III. ARGUMENT

A. California's Recreational Use Statute Immunizes a Landowner from Liability for Acts of Vehicular Negligence That Cause Personal Injury to a Recreational User of That Land

1. Appellants' Tort Action Is Barred By The Plain Language of Section 846

Section 846 of the California Civil Code confers broad tort immunity upon landowners who allow the public access to their land for

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[5] The Complaint did not allege that Mr. Klein had been expressly invited by the United States onto Angeles National Forest, or charged any fee to enter its land, or that the United States or Mr. Anderberg had acted willfully or with malice in any way. (CR 1; ER Tab 1; see also District Court Order at n.2.)

recreational use. In relevant part, the statute provides:

> An owner of any estate or other interest in real property . . . owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in this section.

Cal. Civ. Code § 846. The statute further specifies that "[n]othing in this section creates a duty of care or ground of liability for injury to person or property." Id.

The statute makes three exceptions to its broad protection from liability. It does not limit liability "for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," for injuries suffered by recreational users who paid for access to the property, or to persons who were expressly invited onto the property. Id.

The statute defines "recreational purpose" very broadly, and extends its protection to owners who allow the public to use their property for activities including "[]animal riding, snowmobiling, and all other types of vehicular riding[.]" Id. The statute further provides that an owner who gives another permission to use his property for a

recreational purpose does not "assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section." Id.

Appellants' lawsuit falls within the plain scope of Section 846. There is no dispute in this litigation that Klein was engaged in a recreational use – bicycle riding – at the time of the accident on USFS property. Section 846, moreover, extends to all of a private landowner's properties opened to recreational use, including paved public roads. See Mattice v. United States, 969 F.2d 818, 821-22 (9th Cir. 1992); see also Delta Farms Reclamation Dist. v. Superior Court, 33 Cal. 3d 699, 706-07, 660 P.2d 1168, 190 Cal. Rptr. 494 (1983) (stating that Section 846 "obviously encompasses improved streets"). In addition, the asserted negligence of the Forest Service's volunteer in driving on the property, albeit not in the course and scope of his federal employment, is an activity on the property as to which Section 846 expressly states that the landowner had no duty to warn or to make safe.

There is likewise no dispute that the express exceptions to Section 846 are inapplicable. The parties agree that Klein was not invited on the

land and did not pay for entry or use of the property. Nor is there any claim that there was a "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity" here. Thus, under the plain language of the statute, the USFS, if a private landowner, would be protected from liability under Section 846.

2. Application of Section 846 in this Context is Consistent With Its Statutory Purpose

Under the FTCA, the United States is only liable "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission to act occurred." 28 U.S.C. § 1346(b); see also Termini v. United States, 963 F.2d 1264, 1265-66 (9th Cir. 1992). "That means that the United States must be treated as a private person for purposes of [the] analysis, even if a different rule would apply to California governmental entities." Ravell v. United States, 22 F.3d 960, 961 (9th Cir. 1994). The United States is immunized from civil liability by Section 846 under the same circumstances as any other private recreational landowner. See Mansion v. United States, 945 F.2d 1115, 1117 (9th Cir. 1991) (stating California's recreational use statute barred suit for injuries sustained during a picnic at naval air station).

"There are two elements as a precondition to [Section 846] immunity: (1) the defendant must be the owner of an 'estate or any other interest in real property, whether possessory or nonpossessory;' and (2) the plaintiff's injury must result from the 'entry or use [of the 'premises'] for any recreational purpose.'" Ornelas, 4 Cal. 4th at 1100.

Both its language and legislative history make clear that the purpose of Section 846 is to encourage landowners to make their land available to the general public for recreational purposes. See, e.g., Phillips v. United States, 590 F.2d 297, 299 (9th Cir. 1979) ("The purpose of section 846 was to encourage landowners to let members of the general public use their land for recreational purposes."). At the time of its enactment in 1963, the Legislature recognized the need for incentives to encourage landowners to open their lands to recreational use by shielding them from liability for all forms of simple negligence. Specifically, Senate Bill 639 provided landowners who permitted public recreational access to their property absolute immunity for negligently caused injury:

> [the] landowner is not liable for injuries to people who enter upon his land for various recreational purposes, however [the act] does not limit the owner's liability in

> case of willful or malicious failure to guard or warn against dangerous activities, or where compensation is paid for the use of land, to persons expressly invited rather than merely permitted on the land by the owner.

Jul.y6, 1963 Report on Senate Bill 639 by the Cal. Office of Legislative Counsel (attached as Exh. B to the Declaration of AUSA Anoiel Khorshid, at p. 14, filed in support of the United States' Motion for Judicial Notice (hereinafter "AUSA Khorshid Decl.")).

In recommending adoption of the proposed Bill that would become Section 846, the Governor's legislative staff identified the necessity for the broad immunity envisioned by the new legislation:

> Under the present law, land owners are reluctant to grant permission to trespass because of the incurred liability. Senate Bill No. 639 provides that a land owner would not be liable for injuries suffered by parties who enter upon his land for a recreational purpose. The owner's liability remains unchanged when a fee is charged or where an owner owes a duty to, or has granted the legal status of, an invitee.

July 16, 1963 Bill Memorandum from Legislative Sec'y Paul D. Ward to Governor Brown (attached as Exh. A to AUSA Khorshid Decl., at p. 17). In short, by enacting the new law, the Legislature made plain its intent to immunize landowners for any negligently caused injuries suffered by recreational users upon their land. Holding the statute

applicable in the factual context presented here is thus fully consistent with the statutory purpose.

Contrary to Appellants' claim that Section 846 immunity is limited to the conditions of the land itself, the legislative history of Section 846 supports its construction as affording broad immunity to recreational landowners for injuries occurring on land rather than only for injuries occurring because of a condition of that land. Although the Legislature was silent on the particular issue of whether recreational landowners were immune for injuries arising from the negligent driving of their employees, it specifically rejected arguments parallel to those asserted by Appellants: that a broad construction of statutory immunity posed a threat to public safety.

Following its enactment in 1963, Section 846 was amended in 1980 to immunize both possessory and nonpossessory interests in land. At the time, opponents to the amendment (Assembly Bill 1966) raised arguments similar to those of Appellants herein, that a broadening of statutory immunity ran contrary to the original intent of Section 846. Specifically, the amendment's detractors argued:

[t]o extend the immunity of Section 846 to persons who

> have no control over access [such as contractors or easement holders] would be of no benefit in encouraging such access, since the protected group has no power to grant access in any event. Unfortunately, such an extension will endanger the public by undermining the immunized persons' incentive to protect the public.
>
> * * *
>
> AB 1966 would completely immunize a contractor for his own negligence in creating an attractive nuisance, even if picnicking school children were injured or killed, so long as the negligence related to some activity permitted by the landowner. Examples might include construction of electrical or gas lines, and excavations for fill dirt or minerals[.] We believe that AB 1966 is contrary to the public interest and public safety[.]

Feb. 6, 1980 Letter from Cal. Trial Lawyers Ass'n to the Hon. Jack Fenton, Chairman of the Cal. Assembly Judiciary Comm. (attached as Exh. B to AUSA Khorshid Decl., at pp. 56-57).

The Legislature considered but ultimately rejected those arguments. Thus, in amending Section 846 to immunize nonpossessory interests and activities, the Legislature reiterated its intention that Section 846 be construed as a premises immunity statute. As such, Section 846 was designed to encourage recreational access to private land by insulating recreational landowners from suit for injuries suffered during the course of recreational activities on that land.

As did opponents to the 1980 amendment to Section 846, Appellants urge this Court to construe Section 846 as not authorizing "a blanket or absolute immunity for all injuries of any kind sustained by recreational users on the land of another, despite the nature of the negligent conduct causing the injury." (AOB at 5.) To do so, Appellants claim, "would lead to unacceptable policy results, including implicitly authorizing landowners and their employees to act irresponsibly, potentially causing unnecessary injuries to recreational users." (Id.) These arguments are virtually indistinguishable from the ones that the Legislature rejected in enacting and amending Section 846. There is no basis for the Court to narrow the scope of the statute when the Legislature has declined to do so.

Consequently, neither the language nor the legislative history of Section 846 and its amendments support the limitation of immunity of recreational landowners in the ways urged by Appellants herein. The statute does not limit immunity only to injuries arising from the condition of the land, but rather envisages protection from suit for injuries arising from any recreational use of the land. See Ornelas, 4 Cal. 4th at 1098 ("Section 846 establishes limited liability on the part of

a private landowner for injuries sustained by another from the recreational use of land."). Nor does the statute focus on the mechanism of injury. Id. So long as the injury arises from the recreational use of the land, the landowner's liability does not depend on whether the injury was self-inflicted or negligently caused by another individual or the landowner or his agents.[6] Nor does the landowner's liability depend on whether the injury would be actionable had it occurred on non-recreational land. The landowner is immunized from suit arising out of negligent acts or omissions.

3. Application of Section 846 in this Context Is Consistent With California Case Law

California case law supports the construction of Section 846 reflected in the language and legislative history of Section 846. The decision in Shipman, which held the protection of Section 846 extends to landowners where the recreational user is injured by a landowner's

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[6] Appellants' attempt to distinguish between the active or passive negligence of the landowner is not recognized in Section 846 or any of its jurisprudence or legislative history. (AOB at 4); see also Ornelas, 4 Cal. 4th at 1101-03 (abjuring any distinctions between active and passive negligence in holding that a child's uninvited entry onto landowner's property to recreate was immunized from suit).

employee driving a vehicle on the landowner's property, is instructive. In Shipman, the plaintiff drove his ATV onto defendant's tree farm to look at a pond. Shipman, 77 Cal. App. 4th at 1426. While going through an intersection, the plaintiff was struck and injured by the landowner's employee who was driving a station wagon. Id. Summary judgment was entered in favor of the landowner and his employee based on Section 846 immunity. Id.

On appeal, the Court reasoned that Section 846 was "not limited to the dangers presented by the premises per se; it also extend[ed] to dangers presented by drivers of vehicles." Id. at 1427. As long as the recreational user had not paid or been expressly invited to come onto the land, and the landowners conduct was not willful or malicious, then Section 846 barred suit.

Nor did the landowner owe a duty to protect the recreational user from injury arising out of his employees' negligence. Id. at 1429. Indeed, "[i]t would thwart the purpose of section 846 to permit suits invoking vicarious liability for the negligent acts of private landowners' employees where the landowner is absolved of liability under the statute." Id. at 1430. Specifically, the Court stated

> Even assuming that Martinez [the employee] was negligent, Shipman's suit is barred by section 846. "Negligence is insufficient to overcome Civil Code section 846 immunity." (Citation omitted.)
>
> * * *
>
> Assuming that Boething negligently permitted Martinez to drive, Boething is immune from Shipman's suit because Shipman was engaged in recreational activity expressly covered by section 846 when he was injured. It would thwart the purpose of section 846 to permit suits invoking vicarious liability for the negligent acts of the private landowner's employees where the landowner is absolved of liability under the statute. Because Boething is immune from liability here, Boething may not be held liable for the alleged negligent supervision of Martinez[.] Because we uphold the summary judgment granted to Boething and Martinez under section 846, we do not reach the issue of employment. Boething is immune from Shipman's suit and no issue arises regarding contribution or indemnity.

Id. at 1431.

Shipman is consistent with prior rulings of this Court. In 1993, the California Supreme Court ruled in Ornelas that the protection afforded landowners under Section 846 is "extremely broad," and that a landowner's duty to a non-paying recreational user is the same as that owed to a trespasser prior to Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561 (1968), 70 Cal. Rptr. 97. See Ornelas, 4 Cal. 4th at 1099-1100.

> On the contrary, assuming, as we must, that the Legislature chose its words carefully, the broad language of the statute

> suggests that the Legislature consciously eschewed any restrictions on the property subject to the statute in order to provide clear guidance to landowners, to encourage access to recreationists, and to fairly balance the interests of both.

Ornelas, 4 Cal. 4th at 1108.

In its Certification Order, the Ninth Circuit Panel opines that "Shipman did not state California law correctly, and there is 'convincing evidence' that . . . the California Supreme Court likely would not follow Shipman." Klein, 537 F.3d at 1032 (Cert. Order at 9652). The Ninth Circuit Panel's reasoning was that Shipman yields too harsh a result in the instant case because Klein's injuries are "so severe" and because "he would have been able to seek recovery for those injuries from Anderberg's employer, if that employer had been anyone but the federal government." Id. Appellees respectfully disagree with that premise for two reasons.

First, as a matter of law, the United States is no different than any other private landowner under California law. See 28 U.S.C. § 1346(b); Termini, 963 F.2d at 1265-66; Mansion, 945 F.2d at 1117. It is no different than Boething Treeland Farms which the Shipman court said was "absolved of liability under the statute." Shipman, 77 Cal. App. 4th

at 1431, cited in Klein, 537 F.3d at 1031-32 (Cert. Order at 9651-52). As in Shipman, Appellants herein sued both the individual driver (Anderberg) and the landowner (the United States). Consequently, the federal status of the United States is not relevant to Appellants' ability to recover or to not recover under the Shipman analysis of Section 846 immunity.[7]

Second, nowhere in the language or legislative history of Section 846 or its interpretative jurisprudence is immunity restricted to minor injuries. Indeed, the non-inclusive list of recreational activities to which the landowner's immunity applies contains sports which could result in devastating personal injury. See Ornelas, 4 Cal. 4th at 1101 ("The examples included in section 846 [] range from risky activities enjoyed

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[7] Nor as a matter of law should it matter that "the federal government owns millions of acres of National Park and National Forest land within the state of California." Klein, 537 F.3d at 1033 (Cert. Order at 9655). No such limitation on acreage is set forth in Section 846. See Ornelas, 4 Cal. 4th at 1101 ("Some [recreational activities] require a large tract of open space (e.g., hunting) while others can be performed in a more limited setting[.]") The Supreme Court's decision in the instant case will apply to all private recreational landowners regardless of land size or wealth.

by the hardy few (e.g., spelunking, sport parachuting, hang gliding) to more sedentary activities amenable to almost anyone (rock collecting, sightseeing, picnicking)."). It is undeniably regrettable that Appellants have suffered such grievous injuries. However, there is no "harsh result" exception to Section 846 that warrants overruling Shipman's application to the instant case as a matter of law.

The Certification Order's reliance upon the case of Avila v. Citrus Cmty. Coll. Dist., 38 Cal. 4th 148, 131 P.3d 383 (2006), for the proposition that Shipman was wrongly decided is also unfounded. See Klein, 537 F.3d at 1032-34 (Cert. Order at 9653-55). The issue in Avila was whether the immunity provided in California Government Code section 831.7 (hereinafter "Section 831.7") extended to bar suit against a school district for its alleged failure to supervise a hazardous recreational school activity. Section 831.7, in pertinent part, states: "Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity [] for any damage or injury to property or persons arising out of that hazardous recreational activity." See Avila, 38 Cal. 4th at 154. As such, Avila dealt with the nature and extent of governmental immunity for a public landowner's

failure to supervise recreational activity. This is a very different paradigm than that which applies to the United States in the instant case.

The United States is not subject to the same immunities or lack thereof as a public entity landowner. See 28 U.S.C. § 1346(b); see also United States v. Olson, 546 U.S. 43, 46, 126 S. Ct. 510, 512, 163 L. Ed. 2d 306 (2005); Termini, 963 F.2d at 1265-66; Mansion, 945 F.2d at 1117. Unlike public entities in California, the United States is considered to be a private recreational landowner, and thus is subject to exception from California Civil Code section 1714(a) under Section 846. See Ornelas, 4 Cal. App. 4th at 1100 ("The statute [Section 846] provides an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming onto the land.") (citation omitted).

Consequently, when this Court stated in Avila that "[n]othing in the history of [Section 831.7] indicates the statute was intended to limit a public entity's liability arising from other duties, such as any duty to supervise participation in particular activities," 38 Cal. 4th at 157-58, it was not speaking of any duties (or lack thereof) of private landowners. So too when this Court stated that Section 831.7 was modeled on

Section 846, see Avila, 38 Cal. 4th at 157, it was not altering the interpretation given to Section 846 in Shipman or Ornelas, or in the legislative history of Section 846.

More fundamentally, even with respect to Section 831.7, this Court in Avila did not reach the question presented here, i.e., whether the statute immunizes a landowner from tort claims resulting only from the condition of the premises: "[w]e need not decide whether the immunity created by section 831.7 extends only to premises liability claims." Avila, 38 Cal. 4th at 159. Appellants thus misrepresent this Court's statement in Avila when they assert that "[t]he legislative history of Government Code section 831.7, a statute modeled after Civil Code section 846, establishes 'an intent focused exclusively on premises liability claims.'" (AOB at 40.) This Court specifically declined to reach that issue. Thus Avila is of limited relevance even to the extent that Section 831.7 is persuasive as to the meaning of Section 846.

The two statutes – Section 831.7 and Section 846 – are simply not co-extensive. For example, California Government Code section 831.7 focuses on public landowners, does not immunize simple negligence, and speaks of liability for a failure to maintain structures, equipment or

machinery in connection with hazardous recreational activities. Cal. Gov. Code § 831.7(c)(3). On the other hand, Section 846 immunizes private landowners for simple negligence arising out of their negligent failure to guard or warn against a dangerous condition, use, structure or activity.

Similarly, Section 831.7(d) does not extend immunity to nonpossessory interests. See id. ("Nothing in this section shall limit the liability of an independent concessionaire, or any person or organization other than the public entity, whether or not the person or organization has a contractual relationship with the public entity to use the public property, for injuries or damages suffered in any case as a result of the operation of a hazardous recreational activity on public property by the concessionaire, person, or organization."). By contrast, Section 846 immunizes possessory and nonpossessory interests alike from suit. In so doing, the Legislature chose to insulate recreational landowners from suit for injuries occurring during the course of recreational activity, regardless of whether the tortfeasor was the actual landowner (i.e., possessory interest) or his contractor, employee or easement holder (i.e., nonpossessory interest).

Consequently, the United States respectfully submits that nothing in this Court's decision in Avila, and particularly its discussion in dicta of the relationship between California Government Code section 831.7 and California Civil Code section 846, serves to support the assumption (as suggested in the Certification Order) that there exist "[s]erious questions about Shipman's continuing vitality and validity." Klein, 537 F.3d 1032 (Cert. Order at 9653). Nothing in Avila calls Shipman into question.[8] Shipman is consistent with this Court's prior decisions and remains good law, properly reflecting the legislative intent underlying Section 846.

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[8] In fact, Shipman is cited authoritatively in Witkin, Summary of California Law (10th ed. 2005). See id. at Chapter IX, Torts, § 1103 ("[P]rotection afforded to private landowners by C.C. 846 is not limited to dangers presented by premises per se, but extends to dangers presented by drivers of vehicles."); see also 8 Miller & Starr, California Real Estate, § 22:58 (3d. ed. 2007) ("Absent willful or malicious conduct, a landowner is immune from liability for injuries caused by the ordinary negligence of the landowner or the landowner's employee."); Smith, Stratton & Trembath, California Civil Practice Real Property Litigation, § 26:14 (2007) ("Where an uninvited, nonpaying recreational user is injured on private land, the protection afforded private landowners by Civ. Code § 846, is not limited only to dangers presented by the premises per se; it also extends to dangers presented by drivers of vehicles.").

4. The Authorities From Other Jurisdictions Cited By Appellants Are Inapposite

In their efforts to discredit Shipman, Appellants cite several cases from other jurisdictions. These cases are inapposite. Some of these cases were discussed and distinguished in Shipman. See Shipman, 77 Cal. App. 4th at 1429-30 (discussing Scott v. Wright, 486 N.W.2d 40 (Iowa 1992) and Young v. Salt Lake City Corp., 876 P.2d 376 (Utah 1994), and stating that Iowa and Utah recreational use statutes did not include vehicle riding as a recreational activity).

Another non-California case cited by Appellants, Del Costello v. Hudson Ry. Co., Inc., 711 N.Y.S.2d 77, 80, 274 A.D.2d 19 (N.Y. App. Div. 2000), relies upon a distinction between active and passive negligence. The distinction between negligent acts of commission and those of omission was rejected in this Court's holding in Ornelas. See, e.g., Ornelas, 4 Cal. 4th at 1101-02. Furthermore, the holding in Bush v. Valley Snow Travelers of Lewis County, Inc., 7 Misc.3d 285, 289, 711 N.Y.S.2d 350, 354 (Sup. Ct. N.Y. 2004), cited by Appellants, ignores the fact that in California, duties elsewhere created do not obviate the immunities afforded by Section 846. (See supra at p. 15

n.6.)

This Court need not look beyond its own law and the legislative history of Section 846 to reach its conclusion on the question that has been certified for its consideration. Nothing in the out-of-state decisions cited by Appellants alters the line of California cases holding that Section 846 was intended to be a broad immunity statute which, in the instant case, immunizes the United States for the negligence alleged by Appellants.

5. The Question Of Whether The Driver In This Case Violated The Motor Vehicle Code Is Irrelevant To The Question Of Whether A Landowner Is Immune Under Section 846

Appellants claim further that the United States is not immune from suit for Mr. Klein's accident within the Angeles National Forest because pursuant to state[9] and federal[10] traffic regulations, "[t]here exists

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9 Specifically, California Vehicle Code sections 21651 and 21056.

10 Appellants erroneously claim that National Park Service ("NPS") regulations set forth at 16 U.S.C. § 3 apply herein. National Parks fall under the aegis of the Department of the Interior. Mr. Klein's accident occurred in the Angeles National Forest. The Angeles National Forest is part of the United States Forest Service of the Department of Agriculture to which NPS regulations do not apply.

no circumstance under which a vehicle operator is excused from the[] duties and responsibilities required under the Vehicle Code, and the corresponding civil duty of care derived from the[] rules of the road." (AOB at 22-26.) Appellants' argument is flawed.

Appellants confuse the issue of liability for the accident (which is not before this Court) with the issue of immunity from suit based on Section 846. In Section 846, the Legislature created an exception to California Civil Code section 1714(a) for recreational landowners.[11] Consequently, the fact that a negligent act or omission giving rise to the injury would not be immunized but for its occurrence on recreational land was a policy choice made by the Legislature at the time it enacted

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[11] Section 1714 provides that

> Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

Cal. Civ. Code § 1714(a); see also Ornelas, 4 Cal. App. 4th at 1100 ("The statute [Section 846] provides an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming onto the land.") (citation omitted).

Section 846. See also Mattice, 969 F.2d at 822 (recognizing the distinction between ordinary state highways and those running through recreational areas in applying the immunities of Section 846 to injuries occurring on a highway in Redwood National Park). Indeed, the argument that such a policy choice should be revisited was advanced and rejected by the Legislature during the 1980 amendment process of Section 846.[12]

IV. CONCLUSION

Based on the foregoing, the California Supreme Court is respectfully requested to hold that Section 846 immunizes a private recreational landowner from liability for negligent acts or omissions, including those of its employees, which result in injury to a non-paying,

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[12] During the 1980 amendment process, detractors argued that extending immunity to nonpossessory interest holders such as contractors would be contrary to the public interest. After all, such individuals would be accountable for their negligence at non-recreational job sites. Therefore, to confer immunity on these individuals for their negligence in injuring users of recreational land would "endanger the public by undermining the immunized persons' incentive to protect the public." Feb. 6, 1980 Letter from Cal. Trial Lawyers Ass'n to the Hon. Jack Fenton, Chairman of the Cal. Assembly Judiciary Comm. (attached as Exh. B to AUSA Khorshid Decl., at pp. 56-57). This argument was rejected by the Legislature.

uninvited recreational user of its land.

Dated: February 12, 2009

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

JULIE ZATZ
JONATHAN B. KLINCK
ANOIEL KHORSHID
Assistant United States Attorneys

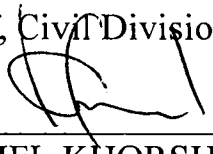
Attorneys for Defendant-Appellee
United States of America

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Appellee United States of America hereby certify that Appellee's Answering Brief consists of 6,620 words, as counted by the WordPerfect X3 word-processing program used to generate this Brief.

Dated: February 12, 2009

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division



ANOIEL KHORSHID
Assistant United States Attorney

Attorney for Defendant-Appellee
United States of America

NO. S165549

IN THE SUPREME COURT OF CALIFORNIA

ALAN RICHARD KLEIN, an individual; and CHERYL KLEIN, an individual, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA; DAVID ANDERBERG, an individual, Defendants-Appellees.	DECLARATION OF SERVICE BY MAIL

I am over the age of 18 and not a party to the within action. I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On February 13, 2009, I served **APPELLEE UNITED STATES OF AMERICA'S ANSWERING BRIEF** on persons or entities named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of mailing: February 13, 2009. Place of mailing: Los Angeles, California.

Person(s) and/or Entity(ies) to Whom Mailed:

David G. Jones, Esq.
Santiago, Rodnunsky & Jones
5959 Topanga Canyon Blvd., Ste. 220
Woodland Hills, CA 91367

Colette Maria Asel, Esq.
Craig Hartsuyker Law Offices
330 N. Brand Blvd., Ste. 950
Glendale, CA 91209-9082

On February 13, 2009, original and 13 copies of the above-referenced document were placed for collection and mailing via Federal Express in the same manner described above to the place shown below:

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: February 13, 2009 at Los Angeles, California.

ALLA KRISHTALL