No. A20-1318

STATE OF MINNESOTA
IN SUPREME COURT

Carter Justice,

Appellant/Cross-Respondent,

vs.

Marvel, LLC d/b/a Pump It Up Parties,

Respondent/Cross-Appellant.

BRIEF OF *AMICUS CURIAE* OF THE MINNESOTA SKI AREAS ASSOCIATION

SUBBARAMAN PLLC
Mahesha P. Subbaraman (#392486)
222 South 9th Street, Suite 1600
Minneapolis, MN 55402-3389

THRONDSET MICHENFELDER, LLC
Patrick W. Michenfelder (#24207X)
One Central Avenue West, Suite 101
St. Michael, MN 55376

Attorneys for Appellant Carter Justice

SCHWEBEL GOETZ & SIEBEN, P.A.
Matthew J. Barber (#0397240)
80 South 8th Street, Suite 5120
Minneapolis, MN 55402

Attorneys for Amici Curiae Minnesota Association for Justice and Public Justice

GREGERSON, ROSOW, JOHNSON & NILAN, LTD.
Joseph A. Nilan (#121277)
Daniel A Ellerbrock (#0392039)
Jacob T. Merkel (#0397211)
100 Washington Avenue South, Suite 1550
Minneapolis, MN 55401

Attorneys for Respondent Marvel, LLC

NILAN JOHNSON LEWIS PA
Brian N. Johnson (#132767)
Cortney G. Sylvester (#231514)
250 Marquette Avenue South, Suite 800
Minneapolis, Minnesota 55401

Attorneys for Amicus Curiae Applicants Minnesota Ski Areas Association and Supporting Organizations

MCCOLLUM CROWLEY, PA
Brian J. Kluk (#396320)
7900 Xerxes Avenue South, Suite 700
Minneapolis, MN 55431
Attorneys for Amicus Curiae Minnesota Defense Lawyers Association

CONLIN LAW FIRM, LLC
Taylor Brandt Cunningham (0400041)
600 Highway 169 South, Suite 1650
Minneapolis, MN 55426
Attorneys for Amicus Curiae Consumer Federation of America

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STATEMENT OF INTEREST

The Minnesota Ski Areas Association ("MnSAA"),[1] granted leave to participate as *amicus curiae* by this Court's November 3, 2021 Order, comprises ski areas from all parts of Minnesota, small and large, private and public, with some having more than 50 years in business. Minnesota's alpine ski facilities are critical to the state's winter tourism industry. Minnesota has 19 alpine ski and snowboard areas spread throughout the state.[2] These ski areas are key economic drivers for their communities and geographic areas. Many are second generation family businesses, subject to weather whims, and to business climate issues that small businesses face.

In the 2020-2021 season, Minnesota ski areas recorded 1,489,868 million alpine ski and snowboarding visits, a number which is reasonably consistent with other seasons.[3] The ski areas directly employ thousands of Minnesotans while total

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[1] The MnSAA hereby certifies that (1) this brief was not authored in whole or in part by any party's counsel, and (2) no person or entity other than the MnSAA and its members, and some of the sponsoring parties who have joined in this brief, has contributed money to the brief's preparation and submission. *See* Minn. R. Civ. App. P. 129.03.

[2] These are Afton Alps (Hastings), Andes Tower Hills (Kensington), Buck Hill (Burnsville), Buena Vista Ski Area (Bemidji), Chester Bowl (Duluth), Coffee Mill Ski Area (Wabasha), Detroit Mountain Recreation Area (Detroit Lakes), Elm Creek Winter Recreation Area (Maple Grove), Giants Ridge (Biwabik), Hyland Hills Ski Area (Bloomington), Loppet Foundation (Minneapolis), Lutsen Mountains (Tofte), Mount Itasca (Coleraine), Mount Kato (Mankato), Mount Ski Gull (Nisswa), Powder Ridge (Kimball), Spirit Mountain (Duluth), Welch Village (Welch) and Wild Mountain (Taylors Falls). *See* skiandboardmn.com/member-areas (last accessed January 12, 2022).

[3] 2020-21 Kottke End of Season and Demographic Report, National Ski Areas Association. *Amicus* Addendum at 3.

employment at both ski areas and other businesses benefitting from off-mountain expenditures accounts for several thousand more jobs.

Additional *amici* participating in this brief provide important physical recreation and educational opportunities for youth and adults in the state. For instance, Pacesetter Sports operates youth volleyball and basketball camps in Minnesota and surrounding states. Voyageur Outward Bound School offers wilderness and urban adventure programs such as canoeing, camping, rock climbing, skiing, and dog-sledding. Their clientele range from struggling teens and first generation urban youth, to adults in transition and veterans re-integrating to civilian life.

Other organizations supporting this *amicus* appearance also operate facilities and sponsor activities that contribute to a healthy entertainment and recreational environment in Minnesota. Several of these *amici* (e.g., Ogilvie Raceway, Deer Creek Speedway, Bemidji Speedway) are motorsports venues which are necessary to support a viable racing industry and culture. Others (e.g., Upper Midwest Sprint Car Series, WISSOTA Auto Racing, ProKart Indoors - Burnsville) operate a series of races and recreational racing venues, or represent the interests of those involved in the sport. *Amici* also include organizations that promote power sports and outdoor recreation and advocate for the interests of participants (Amateur Riders Motorcycle Association, AMA District 23, Twin Cities Trail Riders, All-Terrain Vehicles-Minnesota, Bicycle Alliance of Minnesota).

Amicus ALS Association provides support and advocacy for those with the ALS and those close to them. ALS Association conducts fundraising activities including the Walk to Defeat ALS.

Subsequent to the Court granting these *amici* leave to appear, several other organizations have declared their support for this *amicus* filing and have consented to be identified as supporting entities. Among them are the Midwest Ski Areas Association, the National Ski Areas Association, and the National Ski Patrol. These organizations have similar interests to those of MnSAA. In particular, they are acutely aware that ski patrols are integral to the safety of skiers and snowboarders. It is not uncommon for ski patrollers to be minors. It is also not uncommon for ski areas and ski patrols to enter into agreements governing patrol operations that may include limitations of liability, or for ski areas to require patrollers (or the parents of minor patrollers) to execute releases. In addition, the Mendota Heights Athletic Association provides organized youth sports activities and leagues. Similarly, Blizzards Ski and Snowboard School is a youth ski and snowboard organization that facilitates winter sports activities for Minnesota children. Also participating are US Ski & Snowboard Central Region 1, Ski Jammers Ski & Snowboard School, and G-Team Snowboard Team.

Hospitality Minnesota, which also supports this *amicus* appearance, is a multi-sector association of the state's hospitality business, including restaurants, resorts, campgrounds and lodging providers. This organization recognizes the significant contributions of the recreation industry to Minnesota's economy and culture. IHRSA, the Global Health & Fitness Association, represents the interests of health clubs and indoor

training facilities, which likewise understand the importance of this issue to the health of Minnesotans and Minnesota businesses. Several other supporting entities are individual commercial enterprises that both support and depend upon the availability of ample outdoor recreational activities in the state: Cal Surf Ski & Skate Shop, Damage Board Shop, Ely Outfitting Company, Hi Tempo Ski & Board Shop, and Pierce Skate & Ski. These entities all recognize the significant potential economic impact of any decision that would limit opportunities to contractually determine the allocation of risks inherent in sports and physical recreation.

Finally, this effort is also backed by the Sports and Fitness Industry Association. SFIA is the premier trade association for over 1,000 sporting goods and fitness brands, manufacturers, retailers, and marketers. It represents over 3,000 business locations that employ more than 375,000 people and generate over $150 billion in domestic wholesale revenue.

The validity of consensual releases of liability, the continued viability of youth recreational activities, and the preservation of parental rights to weigh the risks and benefits of participation in those activities are important issues of statewide concern in which the MnSAA and these other *amici* have strong and compelling interests.

ARGUMENT

I. INTRODUCTION

Minnesota has compelling public interests in promoting physically active recreation, especially for children. Those interests are accompanied, and indeed facilitated, by enormous respect and support for the freedom of parents to make decisions

for their children. This includes decisions about what types of recreation are appropriate for their individual family. Contrary to the views of Appellant and Appellant's *amici*, Minnesota's legislature has also reaffirmed that public policy favors contractual limitations of recreational operators' liability for ordinary negligence, including those executed on behalf of a minor. These policy interests should compel the Court to affirm this decision of the Court of Appeals.

II. MINNESOTA HAS LEGISLATIVELY EXPRESSED A PUBLIC POLICY IN FAVOR OF WAIVERS OF ORDINARY NEGLIGENCE BY OPERATORS OF RECREATIONAL FACILITIES, INCLUDING WHEN EXECUTED BY THE PARENT OF A MINOR.

In 2013, the Minnesota Legislature adopted Minn. Stat. § 604.055. The core effect of this statute was to limit the permitted scope of a contractual liability waiver. Specifically, it declared that a waiver "that purports to release, limit, or waive the liability of one party for damage, injuries, or death resulting from conduct that constitutes greater than ordinary negligence is against public policy and void and unenforceable." Minn. Stat. § 604.055, subd. 1. The final version of this statute as adopted differed significantly from the initial version introduced in the House of Representatives, and its evolution speaks to the Legislature's public policy priorities embodied in the Act.

As originally promulgated, H.F. No. 792 would have prohibited all waivers of liability arising from the operation, maintenance, or design of recreational premises:

> An agreement between parties that purports to release, limit, or waive the liability of one party for damage arising out of the negligent operation, maintenance, or design or that party's premises is against public policy and void and unenforceable. The agreement is severable from a waiver of liability for

> injuries resulting from the risk inherent in a particular activity.

H.F. No. 792 Introduction Version, posted Feb. 21, 2013. Following hearings, including public testimony both for and against the bill, it was amended on May 16, 2013. *See* Journal of the House, May 16, 2013, 4739-4741. That amendment substituted the language enacted as Minn. Stat. § 604.055. *Id.* As such, it eliminated the language quoted above, replacing it with the prohibition on waivers of liability arising from greater than ordinary negligence. In other words, the Legislature considered and rejected a ban on all waivers of liability arising from an operator's own conduct, choosing instead to prohibit only the release of greater than ordinary negligence. (That limitation, it should be noted, merely codified existing law. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982) (exculpatory clause unenforceable to release party from liability for intentional, willful, or wanton acts).)

At the same time, the Legislature preserved language in H.F. No. 792 that recognizes that a waiver may be agreed to by or on behalf of a minor. Both versions of the bill defined "parties" to include "a minor or another who is authorized to sign or accept the agreement on behalf of the minor." H.F. No. 792 Introduction Version; Journal of the House, May 16, 2013 at 4740 (codified as Minn. Stat. § 604.055, subd. 2). Minnesota's Legislature had the opportunity to reject or amend this statutory language. It did not, choosing instead to enact it into law.

The import of these actions is clear. Per the Legislature, contractual limitations of liability for ordinary negligence in recreational activities, including those that extend to

minor participants, do not as a class violate public policy.[4] Appellant's and their *amici*'s doublespeak interpretation of § 604.055 as somehow expressing the opposite intent cannot be squared with either the plain language or the drafting history of the statute.

III. FURTHER LIMITATIONS ON PARENTAL LIABILITY WAIVERS WOULD CONTRAVENE MINNESOTA'S POLICY INTERESTS FAVORING EXPANSIVE RECREATIONAL OPPORTUNITIES AND PARENTS' RIGHTS TO MAKE DECISIONS ABOUT PARTICIPATING IN THEM.

Minnesota has legislatively protected contractual limitations of liability for a number of reasons. In particular, in areas in which the present *amici* serve the public, the State has a strong interest in promoting access to a broad range of recreational opportunities that may carry inherent risks. This Court has itself recently recognized that liability waivers advance that goal. Moreover, Appellant's position is founded on a deep disregard for the role of parents in guiding a child's development, and specifically for their right to decide what recreational activities are appropriate for the family and under what circumstances a child may participate. The decision below provides the best balance of all of the relevant policy interests and this Court should affirm.

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[4] Subdivision 3's provision that the statute does not prevent a court from finding "that an agreement is void and unenforceable as against public policy on other grounds" does not authorize this Court to disregard the will of the Legislature. Because it refers to "an" agreement (in the singular), it is clearly referring to instances in which the particular waiver at issue in a case violates established public policy constraints or is otherwise unenforceable. Subdivision 3 simply means that the statute does not preclude a court from finding that, for instance, a specific waiver is unenforceable because it is ambiguous or there was a significant disparity of bargaining power between the parties. It does not give the courts an "out" to declare an entire class of waivers invalid.

A. This Court Should Respect Minnesota's Public Policy Interest in Promoting Access to Recreational Activities.

Minnesota has a long cultural heritage of physical activity and outdoor recreation. Outdoor activities are enshrined in the Minnesota Constitution as a critical element of our culture and heritage. Minn. Constitution, Art. XI, Sec. 15. Governors of both parties (including Governors Pawlenty and Dayton) have declared "Learn to Ski & Snowboard" months in the state. *See, e.g.*, Proclamation of Jan. 8, 2010, *Amicus* Addendum at 3. In 2013, the Minnesota Departments of Education and Health collaborated on their "Moving Matters" initiative, which expressed the importance of physical activity for children. *See* Moving Matters Initiative Brochure, *Amicus* Addendum at 3.

This public policy has recently been expressed in the context of the COVID-19 pandemic. After initially ordering most forms of recreation to cease, Governor Walz issued Executive Order 20-38 on April 17, 2020, which classified a host of outdoor facilities as "necessary . . . to ensure the health, safety, and security of all Minnesotans." EO 20-38 at 3. The Governor laid out the state's policy position:

> Healthy individuals foster healthy communities. The Centers for Disease Control and Prevention ("CDC") and the WHO both promote the importance of staying active. According to the CDC, physical activity fosters normal growth and development, improves overall health, reduces the risk of various chronic diseases, and makes people feel better, function better, and sleep better. The WHO recognizes that regular physical activity, including outdoor activities such as walking in parks, bicycle rides, and gardening can help with the adjustment to new routines and support social, mental, and physical wellbeing. Participating in outdoor activities is a good way to stay healthy, reduce stress, and enjoy time with family.

Id. at 2. On June 5, 2020, Executive Order 20-74 allowed remaining fitness, recreation, activity, and entertainment facilities to open (under appropriate COVID-19 safeguards), a timeline that underscores the importance of these opportunities in the eyes of the State.

This Court has recently acknowledged the significance of waivers to recreational operations. In *Soderberg v. Anderson*, 922 N.W.2d 200 (Minn. 2019), the Court decided against extending the doctrine of implied primary assumption of risk to downhill skiing and snowboarding. Because those activities involve inherent risks that cannot be entirely eliminated even by exercising greater than ordinary care, the Court considered the impact of its decision on ski area operators. The availability of express waivers to limit liability exposure was an important factor upon which the Court relied: "Spirit Mountain (like many ski operators) relies on the doctrine of *express* primary assumption of risk. It requires patrons to execute forms and wear lift tickets whereby patrons expressly assume all risk of injury and release their legal rights." 922 N.W.2d at 206 n.5.

Thus, the additional burden of limiting waivers beyond existing constraints would contradict public policy. Restricting them would deprive *amici* of an important tool for risk control, and likely would raise insurance premiums, adding financial strain. Appellant's *amicus* Minnesota Association for Justice asserts that this concern is unfounded because Kentucky's employment figures rose after it invalidated parental waivers. This argument is logically and statistically laughable. It is a paradigmatic example of the *post hoc ergo propter hoc* fallacy. Aggregate employment statistics for an entire statewide economy say nothing about impacts in individual market sectors. MAJ's "analysis" does not control for myriad possible confounding variables, such as the

impact of the pandemic on employment in general and recreational activity in particular. In fact, given the surge in recreational participation seen in many places over the last two years, Kentucky's meager aggregate employment growth is well below what would have been expected, even if it is representative of the recreational sector. If this statistic is relevant at all, it warrants affirmation.

B. This Court Should Respect the Rights of Parents to Decide When and Under What Conditions Their Children Participate in Recreational Activities.

Appellant's position in this matter exhibits a profound distrust of and disrespect for the role of parents in their children's lives. Indeed, Appellant seems to posit that a parent would automatically be acting contrary to the best interests of their child if they signed a waiver to allow the child to participate in a recreational activity. Not only does this disregard the benefits of childhood physical activity, it presumes that parents cannot competently assess the risks and benefits of participation under an operator's terms. This presumption is invalid and contrary to Minnesota policy which entrusts parents with primary authority to act on their child's behalf.

While not absolutely inviolable, "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 258 (1983). Minnesota has a compelling interest in promoting relationships among those in recognized family units, which extends to parents or those who stand *in loco parentis*. *SooHoo v. Johnson*, 731 N.W.2d 815, 822 (Minn. 2007), citing *London Guar. & Accid. Co. v. Smith*, 64 N.W.2d 781, 785 (Minn. 1954).

Minnesota law carries this policy interest forward in numerous ways. For instance, it is one of the fundamental ideological bases for the doctrine of intrafamily tort immunity. A child is generally not permitted to pursue a negligence claim against their parent, because the state should not second-guess a parent's judgments about how best to care for the child. *London Guar.*, 64 N.W.2d at 783-784. In the context of the present dispute, it is particularly noteworthy that intrafamily immunity still applies after the child reaches majority or becomes emancipated from the parents. *Miller v. Pelzer*, 199 N.W. 97, 97-98 (Minn. 1924). Therefore, the concept that a bar against a child's action might persist into adulthood is far from foreign to Minnesota law.

Colorado's legislature delineated the interaction between this policy interest and parental execution of liability waivers in 2003. Colo. Rev. Stat. § 13-22-107 legislatively overturned a prior decision of the Colorado Supreme Court that had invalidated a parental waiver. In adopting its statute that permits parents to executive a release on behalf of their children, lawmakers provided an explicit statement of the policy interests at stake:

> The general assembly hereby finds, determines, and declares it is the public policy of this state that:
>
> (I) Children of this state should have the maximum opportunity to participate in sporting, recreational, educational, and other activities where certain risks may exist;
>
> (II) Public, private, and non-profit entities providing these essential activities to children in Colorado need a measure of protection against lawsuits, and without the measure of protection these entities may be unwilling or unable to provide the activities;
>
> (III) Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their

children. The law has long presumed that parents act in the best interest of their children.

(IV) Parents make conscious choices every day on behalf of their children concerning the risks and benefits of participation in activities that may involve risk;

(V) These are proper parental choices on behalf of children that should not be ignored. So long as the decision is voluntary and informed, the decision should be given the same dignity as decisions regarding schooling, medical treatment, and religious education; and

(VI) It is the intent of the general assembly to encourage the affordability and availability of youth activities in this state by permitting a parent of a child to release a prospective negligence claim of the child against certain persons and entities involved in providing the opportunity to participate in the activities.

Colo. Rev. Stat. § 13-22-107(1)(a). The Colorado Supreme Court's decision in *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229 (2002), which held that parental waivers executed on behalf of children were contrary to Colorado public policy, was statutorily overruled and declared not to "reflect the intent of the general assembly or the public policy of this state." Colo. Rev. Stat. § 13-22-107(1)(b). Minnesota shares these public policy interests with Colorado, as our parents make the same kinds of decisions and have the same rights and responsibilities as parents in Colorado.

Giving parents the authority to make legally-binding decisions on behalf of their children is not only good policy, it is a practical necessity. Numerous potentially life-altering decisions must be made during a child's minority. Children cannot be left to make those decisions on their own. By virtue of being children, they lack the maturity, experience, and judgment necessary to act in their own best interest. For that reason, as

the Court of Appeals observed, state law empowers parents to bind children to decisions with long-range consequences in areas such as education and healthcare. Minn. Stat. §§ 120A.22, subds. 4-5, 8; 120A.38; 120B.07 (education); Minn. Stat. § 144.341, 144.344 (health services). If parents can be trusted to make those decisions for their children (and they must be), then they can be trusted to decide whether to agree to limit the liability of a recreational facility or operator.

IV. IF THIS COURT REACHES THE ISSUE OF WHETHER PUBLIC AMUSEMENT WAIVERS VIOLATE PUBLIC POLICY, IT SHOULD REAFFIRM EXISTING LAW FINDING THEM VALID.

Properly-crafted waivers are supported not only by Minnesota statutes but also by decisions of this Court and the Minnesota Court of Appeals. Contrary to Appellant's tortured reading of the decisional history, no Minnesota panel has ever declared that liability waivers in general, or "public amusement" waivers in particular, contravene public policy. To the contrary, the prevailing rule (here and elsewhere) is that releases of ordinary negligence are valid. This Court should not discard that rule.

In cases challenging the enforcement of a contractual liability waiver, this Court has started from the presumption that the agreement is valid. If relevant considerations are satisfied, such as a significant disparity of bargaining power between the parties and an essential service being involved, a particular exculpatory clause can be declared unenforceable. *Schlobohm*, 326 N.W.2d at 923.[5] The corollary has been that if those

[5] Respondent adequately addresses whether these factors apply and thus this group of *amici* will not discuss their application to the specific waiver at issue. However, *amici* do observe that in general these factors are unlikely to be present in most recreational situations. A parent and child voluntarily participating in these activities are fully

factors are not present, and if the waiver does not release greater than ordinary negligence, it may be enforced. *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827-828 (Minn. Ct. App. 2001, *review denied* (Minn. Feb. 28, 2002); *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 730 (Minn. Ct. App. 1986), *review denied* (Minn. Oct. 29, 1986).

Appellant's attempt to extract a contrary conclusion from the existing case law only serves to emphasize how desperately he lacks support. Appellant starts with *Yang v. Voyagaire Houseboats*, 701 N.W.2d 783 (Minn. 2005), which held that a houseboat rental is subject to the recognized rule that innkeepers may not contractually limit their liability. *Id.* at 791. Although Appellant extrapolates this ruling to a broad conclusion about those with "a public duty-of-care," in reality the case stands for a narrow and unremarkable proposition—that one who rents temporary accommodation to the general public constitutes an innkeeper for purposes of this doctrine. It does not, as Appellant asserts without support, hold that a public amusement cannot circumvent any of its duties via contractual waiver.

Attempting to salvage this analogy, Appellant argues that public amusements bear a heightened duty of care, specifically a duty of active vigilance against risks. *See* Appellant's Brief at 32-33, citing *Poppleston v. Pantages Minneapolis Theatre Co.*, 175

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capable of exercising their right to decline to participate. While providing recreational opportunities is an important state interest, the decision about whether to partake in each individual opportunity presented to a child is not an essential services decision (in contrast to decisions about, for instance, health care services). Thus recreational waivers as a class are not the classic "contract of adhesion" or otherwise contrary to public policy.

Minn. 153, 155 (1928). Appellant does not have any authority to support the conclusion that he draws from this alleged fact, namely that an amusement operator may not contract away any of its liability. In fact, Minn. Stat. § 604.055, subd. 1 specifically includes "recreational activity" among the "consumer service[s]" for which it defined the permissible scope of waivers.

Appellant analogizes to *Johnson v. Amphitheatre Corp.*, 206 Minn. 282, 283-284 (1939), which upheld a verdict finding a roller rink liable for negligence. That is not a waiver case. All *Johnson* establishes is that the elements of negligence include duty and breach of duty. There was no dispute that the roller rink bore a duty of due care. There was a dispute about whether it met that burden. The jury found that it did not, and this Court affirmed because reasonable minds could differ over whether the rink's actions were negligent. It did not matter whether the rink's duty was heightened because it was a "public" duty. Nor was there any consideration given to whether the rink could have limited its liability. Quite simply, there is nothing in this case that addresses the validity of waivers for "public amusements."

In reality, the only relevant expression of Minnesota public policy in this field is the Legislature's rejection of statutory language that would have adopted Appellant's position. This Court should not venture into the legislative realm to declare a policy that finds no expression elsewhere in Minnesota law.

CONCLUSION

Current Minnesota law provides a reasonable balance of policy interests. A recreational facility or operator cannot limit its liability for greater than ordinary

negligence. However, when done properly, participants and operators can agree to a release of ordinary negligence. Parents have the authority to sign otherwise-valid waivers on behalf of their children. Parents are the proper locus of decision-making about a child's recreational activities. The Minnesota Legislature has had the opportunity to clarify state law on this subject and rejected an attempt to impose greater limitations on liability waivers. Thus, the decision of the Court of Appeals is entirely consistent with Minnesota law and should be affirmed.

Respectfully submitted,

Dated: February 25, 2022

NILAN JOHNSON LEWIS PA

By: *s/Brian N. Johnson*
Brian N. Johnson – Reg. No. 132767

By: *s/Cortney G. Sylvester*
Cortney G. Sylvester – Reg. No. 231514
250 Marquette Avenue South, Suite 800
Minneapolis, MN 55401
Telephone: 612.305.7500
Facsimile: 612.305.7501
Email: bjohnson@nilanjohnson.com
csylvester@nilanjohnson.com

Attorneys for Amicus Curiae Applicants Minnesota Ski Areas Association, and Supporting Organizations

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced with a proportional font of Times New Rom, 13-point or larger and contains 4,195 words, exclusive of caption and signature block. This brief was prepared using Microsoft Word 365.

Dated: February 25, 2022

NILAN JOHNSON LEWIS PA

By: *s/Brian N. Johnson*
Brian N. Johnson – Reg. No. 132767

By: *s/Cortney G. Sylvester*
Cortney G. Sylvester – Reg. No. 231514
250 Marquette Avenue South, Suite 800
Minneapolis, MN 55401
Telephone: 612.305.7500
Facsimile: 612.305.7501
Email: bjohnson@nilanjohnson.com
csylvester@nilanjohnson.com

Attorneys for Amicus Curiae Applicants Minnesota Ski Areas Association, and Supporting Organizations