IN THE SUPREME COURT OF IOWA
No. 22–1419

KATHERINE AVENARIUS and PAUL AVENARIUS,

Plaintiffs–Appellees,

vs.

STATE OF IOWA,

Defendant–Appellant.

Appeal from the Iowa District Court for Polk County
Samantha J. Gronewald, District Judge

APPELLANT'S FINAL BRIEF

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ISSUE PRESENTED FOR REVIEW

I. Does the exculpatory language in a contract between the parties constitute a clear and unequivocal waiver of one party's ability to bring negligence claims against another?

Authorities:

Lukken v. Fleischer, 962 N.W.2d 71 (Iowa 2021)

Sweeney v. City of Bettendorf, 762 N.W.2d 873 (Iowa 2009)

Korsmo v. Waverly Ski Club, 435 N.W.2d 746 (Iowa Ct. App. 1988)

ROUTING STATEMENT

The Supreme Court should transfer this case to the Court of Appeals because it involves the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a). Specifically, this case turns on established principles of contract interpretation and whether the language of a contract the parties entered into constituted a valid waiver of a right to bring negligence claims.

STATEMENT OF THE CASE

This case is an interlocutory appeal of the district court's denial of the State of Iowa's Partial Motion for Summary Judgment on Appellees' negligence claims. In 2015, Appellee Katherine Avenarius ("Avenarius") participated in the Iowa Law Enforcement Academy ("ILEA") Firearms Instructor School. That school trains experienced firearms handlers on how to be firearms instructors. While training, Avenarius shot herself in the leg. That injury is the basis of her claims against the State of Iowa.

After shooting herself, Avenarius brought negligence claims against the State for her gun injury. *See generally* Pet., App. 4-9. The State moved for Partial Summary Judgment on her negligence claims because Avenarius released such claims by executing a waiver and release of liability ("Waiver") with the State prior to participating in the ILEA Firearms Instructor School. Def. Partial Motion for Summary Judgment (Apr. 27, 2022), App. 16. The Waiver's language notified Avenarius that she was waiving and releasing many potential claims—including the claims now alleged in her suit against the State.

Avenarius filed a timely resistance, and a hearing on the matter occurred on June 17, 2022. The district court denied the State's Partial Motion for Summary Judgment. Ruling on Def. Motion for Summary Judgment (Jul. 29, 2022), App. 41-50. The State then filed a timely application for interlocutory appeal of the district court's decision, which was granted. Def. Application for Interlocutory Appeal (Aug. 29, 2022), App. 51-58; Order Granting Def. Application for Interlocutory Appeal (Dec. 8, 2022), App. 59.

STATEMENT OF FACTS

On August 3, 2015, ILEA conducted a Firearms Instructor School at Camp Dodge in Johnston, Iowa. Def. Statement of Undisputed Material Facts ("SOUF") Exh. A-1, App. 29. ILEA is a division of the government of the State under Iowa Code chapter 80B.

Before August 3, 2015, Avenarius submitted a letter expressing interest in becoming a firearms instructor for the Dubuque Police Department and attending the ILEA Firearms Instructor School in August. SOUF Exh. B-1, App. 33. Prior to attending the ILEA Firearms Instructor School, Avenarius signed

the Waiver, which she submitted to ILEA, along with her registration. SOUF Exh. B-2, App. 34; SOUF Exh. C, App. 36-37. Avenarius's employer, the Dubuque Police Department, also signed the Waiver. SOUF Exh. C-2, App. 37.

The two-page Waiver contained multiple terms that preclude Avenarius's suit. First, the Waiver's all-capital, large-font heading read:

WAIVER
RELEASE FROM LIABILITY AND
ASSUMPTION OF RISK AGREEMENT
FOR NON-STATE EMPLOYED LAW ENFORCEMENT
OFFICERS

SOUF Exh. C-1, App. 36. The Waiver also explained that it pertained to the ILEA's Firearms Instructor School that would take place from August 3 through August 14, 2015. SOUF Exh. C-1, App. 36. Also relevantly, the Waiver stated:

> Intending this agreement to be legally binding on me, my heirs, administrators, executors, and assigns, **I hereby waive, release, and hold harmless the State of Iowa, the Iowa Law Enforcement Academy**, the Iowa Law Enforcement Academy Council **and all of their** agents, **employees**, council members,

> representatives, heirs, executors, administrators, successors, and assigns of and **from any and all claims, demands, rights, causes of action and judgments of whatsoever, kind and nature, arising for and by reason of any and all known and unknown, foreseen and unforeseen physical or mental injuries** and consequences thereof which may be suffered by me **during the above referenced Iowa Law Enforcement Academy training program** including physical fitness testing.

SOUF Exh. C-1, App. 36. (emphasis added).

Avenarius signed the Waiver on June 24, 2015, acknowledging that the agreement "constitutes a legal, valid and binding obligation upon itself in accordance with its terms." SOUF Exh. C-2, App. 37; SOUF Exh. B-2, App. 34.

On the first day of Firearms Instructor School at Camp Dodge, Avenarius was in a fire lane participating in a drill. SOUF Exh. A-3, App. 31. ILEA firearms instructor Molly Jansen positioned herself behind Avenarius for the drill. SOUF Exh. A-3, App. 31. When Avenarius's target presented itself, Avenarius drew her gun from her holster and shot herself in the leg. SOUF Exh. A-3, App. 31.

After shooting herself in the leg, Avenarius sued the State alleging that: Molly Jansen, a state employee, was negligent (Count I), ILEA was negligent (Count II), and respondeat superior liability as to ILEA (Count IV).[1] Pet. ¶¶ 23–27; 29–33, App. 6-8. Paul Avenarius, Avenarius's husband, also brought a claim for loss of consortium following Avenarius's self-inflicted gunshot injury (Count III).[2] Pet. ¶ 28, App. 7.

Pursuant to Iowa Code sections 669.5 and 669.16, the parties moved jointly to dismiss Molly Jansen and substitute the State on behalf of ILEA. Joint Motion to Dismiss and Substitute (Sept. 12, 2019), App. 10-13. The district court granted the motion, leaving the State as the only defendant in the case. Order Granting Motion (Sept. 12, 2019), App. 14-15.

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[1] Under Iowa Code chapter 669, Avenarius's claims under Counts I, II, and IV are all negligence claims against the State. Counts I and IV are the same claim against the State. *See* Iowa Code § 668.3(2)(b); *see also Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795, 799 (Iowa 1994) (holding that employer and its employee under doctrine of respondeat superior were properly treated as a single party.)

[2] The State did not move to dismiss Count III in its Motion for Partial Summary Judgment.

The State moved for summary judgment on Counts I, II, and IV. Def. Motion for Partial Summary Judgment (Apr. 27, 2022), App. 16-17. The State argued Avenarius signed a clear and unequivocal agreement waiving and releasing her right to bring the claims at issue in her lawsuit. *Id.*

The district court denied the State's Motion for Summary Judgment, finding that the terms of the Waiver were neither clear nor unequivocal as a waiver to alleged negligent acts of the State. Ruling on Def. Motion for Summary Judgment at 7-8 (Jul. 29, 2022), App. 47-48.

The State filed a timely application for interlocutory appeal of the district court's ruling, which was granted.

ARGUMENT

I. AVENARIUS'S NEGLIGENCE CLAIMS ARE BARRED BECAUSE SHE VOLUNTARILY SIGNED AN AGREEMENT WITH VALID EXCULPATORY LANGUAGE WAIVING HER CLAIMS AGAINST THE STATE.

A. Error Preservation

The district court denied the State's Motion for Partial Summary Judgment on July 29, 2022. The State filed a timely

Application for Interlocutory Appeal on August 29, 2022. On December 8, 2022, the Iowa Supreme Court granted the State's Application for Interlocutory Review. Error on this matter is, therefore, preserved.

B. Standard of Review

"The standard of review for district court rulings on summary judgment is for correction of errors of law." *Kunde v. Estate of Bowman*, 920 N.W.2d 803, 806 (Iowa 2018); *see also* Iowa R. App. P. 6.907. A court should grant summary judgment when there is an "absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017). "A fact is material when its determination might affect the outcome of a suit." *Id.* A genuine issue of material fact is disputed "when reasonable minds can differ as to how a factual question should be resolved." *Id.*

C. Argument

1. The Waiver is valid because it clearly and unequivocally alerts a casual reader that by signing it she agreed to waive all claims against the State, including negligence claims.

Avenarius's negligence claims under Counts I, II, and IV against the State fail as a matter of law because prior to starting the ILEA Firearms Instructor School training, Avenarius entered into an agreement waiving and releasing her claims against the State for any injury she might suffer during the training. SOUF Exh. B-2, App. 34; SOUF Exh. C, App. 36-37. The district court erred when it found to the contrary.

Iowa courts recognize waivers as contracts that are governed by the principles of contract law. *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993). The legal effect of a contract is established by determining the parties' intent when the agreement was formed. *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008).

"An enforceable waiver must contain clear and unequivocal language notifying a casual reader that by signing, she agrees to waive all claims for future acts or omissions of negligence." *Lukken v. Fleischer*, 962 N.W.2d 71, 79 (Iowa 2021) (cleaned up). Exculpatory clauses in waivers, sometimes referred to as "hold harmless" clauses, "relieve parties from responsibility for the consequences of their actions." *Id*. Iowa courts "have repeatedly

held that contracts exempting a party from its own negligence are enforceable and are not contrary to public policy." *See e.g. Huber*, 501 N.W.2d at 55; *Bashford v. Slater*, 96 N.W.2d 904, 909 (Iowa 1959).

A contract does not need to "expressly specify that it will operate for negligent acts if the clear intent of the language is to provide for such release." *Korsmo v. Waverly Ski Club*, 435 N.W.2d 746, 748 (Iowa Ct. App. 1988); *see also Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 879–80 (Iowa 2009); *Baker v. Stewarts' Inc.*, 433 N.W.2d 706, 709 (Iowa 1988).

The Waiver Avenarius signed clearly and unequivocally alerted her, or any casual reader, that she waived and released any and all claims against the State for an injury she might incur during her training, including claims for negligence. The Waiver's heading clearly stated for any casual reader:

WAIVER
RELEASE FROM LIABILITY AND
ASSUMPTION OF RISK AGREEMENT
FOR NON-STATE EMPLOYED LAW
ENFORCEMENT OFFICERS

SOUF Exh. C-1, App. 36. The waiver is a "RELEASE FROM LIABILITY." *Id.* That should explain that someone who is injured may not then later pursue a judicial remedy. Perhaps slightly more complicated is "ASSUMPTION OF RISK," yet that phrase on its own terms, even in a colloquial setting, conveys that the signer is taking the risk on herself.

Beyond the unambiguous title, the Waiver's substantive terms are similarly clear and unequivocal. It explains that the signer agrees to "waive, release, and hold harmless" the State

> [. . .] of any and all claims, demands, rights, causes of action and judgments of whatsoever, kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen physical or mental injuries and consequences thereof which may be suffered by me during the above referenced Iowa Law Enforcement Academy training program [.]

SOUF Exh. C-1, App. 36. That language appears again on the second page of the Waiver. SOUF Exh. C-2, App. 37. This two-page Waiver thus ensures that the important language appears on both of its pages. By signing the Waiver, Avenarius agreed to abide by its terms, waiving claims arising from physical or mental harm.

Such a waiver for a firearms training must include the potential for the signer getting shot.

The Waiver is nearly identical to other waivers upheld in Iowa courts. In *Korsmo*, the plaintiff was injured while participating in a water-skiing tournament. 435 N.W.2d at 747. Prior to participating in the tournament, the plaintiff signed an entry form releasing the defendants, the organizers of the tournament, from liability for injuries to participants. *Id*. Specifically, the entry form contained the following paragraph:

> In consideration of your accepting this entry, I hereby, for myself, my heirs, executors and administrators, and/or for the minor for whom I am signing:
>
> 1. Release and forever discharge the sponsoring club of the above named tournament, the American Water Ski Association and any television broadcasting or news gathering agency that may be assigned rights to cover the tournament, their agents, servants and all persons connected with these competitions, of and from any and all rights, claims, demands and actions of any and every nature whatsoever that I may have, for any and all loss, damage or injury sustained by me and my equipment, or by the minor for whom I am signing, or by his equipment before, during and after said competitions[.]

Id.

The Iowa Court of Appeals upheld that exculpatory language, finding there was "no question that the [defendants] intended to be

released from liability in exchange for allowing" the plaintiff to participate in the tournament. *Id.* at 748. The Court of Appeals continued:

> the release is not ambiguous by virtue of the fact the words "negligent acts" were not used. Under Iowa law, a contract need not expressly specify that it will operate for negligent acts if the clear intent of the language is to provide for such a release. The words "any and all rights, claims, demands and actions of any and every nature whatsoever . . . for any and all loss, damage or injury" is clearly intended to cover negligent acts. The trial court correctly found the provision to be unambiguous and therefore appropriate for summary judgment.

Id. (cleaned up).

More recently, the Iowa Court of Appeals upheld another agreement containing exculpatory language in a negligence case. In *Transgrud v. Leer*, the plaintiff, as a condition of being allowed to ride as a passenger in the defendant's semi-tractor, signed a document titled "PASSENGER AUTHORIZATION AND RELEASES OF LIABILITY." No. 19-0692, 2020 WL 5650734 at *6 (Iowa Ct. App. Sept 23, 2020). The document also included a section titled "RELEASES OF LIABILITY" which stated that the plaintiff released the defendant "'from any and all claims, liability, rights, actions, suits, and demands [.]'" *Id.* Again, the Court of Appeals

found the exculpatory language was unambiguous because the document was clearly labeled as a release and the language alerted the reader they were waiving and releasing "any and all claims," which include claims for negligence. *Id.* (citing *Cupps v. S & J Tube, Inc.*, No. 17-1922, 2019 WL 156583 at *5 (Iowa Ct. App. Jan. 9, 2019)).

One year prior to *Transgrud*, the Court of Appeals considered *Cupps v. S & J Tube, Inc.*, where a plaintiff-employee sued his employer for negligence in the maintenance of employer owned property that allegedly caused the employee to slip and fall. 2019 WL 156583 at *1. When applying for the job, the plaintiff in *Cupps* signed an employment application that stated he would not bring "any claim for damage" against the employer for any work-related injuries. *Id.* In considering whether the language in that clause waived negligence claims, the Court of Appeals upheld the waiver and found that the phrase "any claim for damage" was unambiguous. *Id.* at *5; *see also Hargrave v. Grain Processing Corp.*, No. 14-1197, 2015 WL 1331706 at *2–3 (Iowa Ct. App. Mar.

25, 2015) (upholding a similar waiver based on the language "any claim for damage").

Here, there are no disputed issues of material fact precluding a grant of summary judgment. It is undisputed that Avenarius signed the Waiver, and she understood it was a condition for her participation in ILEA's Firearms Instructor School. SOUF Exh. B-2, App. 34. "Construction of a contract is the process of determining its legal effect *and is always a question of law for the court.*" *Korsmo*, 435 N.W.2d at 748 (emphasis added). When there is no ambiguity in the language of a contract, the parties' intent comes from the language of the contract alone and is enforced as written. *Cupps*, 2019 WL 156583 at *4. Ambiguity does not exist just because parties might disagree on the meaning of a phrase. *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 108 (Iowa 1981).

Like the waivers cited above, this Waiver is clear and unequivocal, and it bars negligence claims. In signing the Waiver, Avenarius agreed to waive, release, and hold the State harmless from any and all claims, rights, demands, and causes of actions she

might wish to bring. SOUF Exh. C, App. 36-37. That includes the claims she now brings against the State.

2. *Poling*, *Baker*, and *Sweeney* are distinguishable from this case.

In denying summary judgment, the district court agreed that a valid exculpatory clause in a waiver does not need to specifically include the word "negligence." Ruling on Def. Motion for Summary Judgment at 6 (July 29, 2022), App. 46. Nonetheless, the district court went on to state that:

> [T]he issue in this case is not whether *any* negligent acts are apparent to the casual reader asked to sign this form as a condition but whether it was clear its effect was to anticipatorily release [the State] from liability based upon its *active* negligence – i.e., its own negligent acts or omissions.

Id.

Despite recognizing that negligence need not be explicitly written in the Waiver to avoid liability, the district court relied on *Sears, Roebuck & Co. v. Poling*, 81 N.W.2d 462 (Iowa 1957), to hold that the Waiver did not exculpate the State from "active negligence." *Id.* at 6–7, App. 46-47. But *Poling* should instead be distinguished.

Poling addressed exculpation in the terms of a lease, not in a waiver or release of liability. In that case, the property owners sued their commercial tenant for causing a fire. 81 N.W.2d at 463. The terms of the lease included that the "premises will be in substantially as good condition as received, loss by fire, tornado, earthquake or any unavoidable casualty and ordinary wear and tear excepted." *Id.* at 464. The tenant argued those terms of the lease barred the ability of the owners to claim that the tenant negligently caused a fire, destroying the building. *Id.* at 464. The Court found that those terms, and another related term, did not exculpate the tenant because the terms read in context of other natural disasters related to unavoidable accidents causing fire loss, not negligently or tortuously caused fires. *Id.* at 466.

The district court's reliance on *Poling* is misplaced. First, the form and structure of the lease and the Waiver differ. The lengthy lease buried the exculpatory language in several clauses related to the landlord's and tenant's duties. Finding those clauses would have required carefully navigating a complex contract with multiple aims—the primary aim of course being the terms of

leasing a property. Contrast that with the Waiver's one purpose: to waive and release liability against the State.

Rather than a lease, the Waiver is properly compared to the other cases where Iowa courts have upheld nearly identical waivers, including *Korsmo*, *Transgruud*, and *Cupps*. *See Korsmo*, 435 N.W.2d at 748; *Transgrud*, 2020 WL 5650734 at *6; *Cupps*, 2019 WL 156583 at *5. The district court's analysis that the Waiver does not cover the State's "active negligence" is hard to fit in the framework established by *Korsmo* and those other recent cases. Like the waiver at issue in *Korsmo*, the Waiver states that it applies to any and all claims, demands, rights, and causes of action for injuries that might occur during the ILEA training. SOUF, Exh. C-1, App. 36; *Korsmo*, 435 N.W.2d at 748 ("The words 'any and all rights, claims, demands and actions of any and every nature whatsoever . . . for any and all loss, damage or injury' is clearly intended to cover negligent acts.")

Korsmo's similar language and circumstance is a better benchmark for this Court's comparison than the inapposite lease in *Poling*. Like in *Korsmo*, the Waiver clearly and unequivocally

covers claims of negligence against the State. *Id.*; *see also Transgrud*, 2020 WL 5650734 at *6 (holding that by signing release the plaintiff acknowledged the defendant would not pay for any injuries she might incur, including ones arising from negligent conduct); *Cupps*, 2019 WL 156583 at *5 (holding the phrase "any claim for damage" is not ambiguous and includes negligence).

The district court also briefly cited some cases with spare waiver language that it chose to compare to the Waiver at issue here. Ruling of Def. Motion for Summary Judgment at 6 (July 29, 2022), App. 46. The first of those cases is *Baker v. Stewarts' Inc.*, 433 N.W.2d 706 (Iowa 1988), in which a plaintiff brought a negligence suit against a cosmetology school claiming a hair straightening treatment she received at the school caused her hair to fall out. 433 N.W.2d at 707. Prior to the service, the plaintiff signed a form with the following terms:

> I, Baker, Denise . . . do hereby acknowledge that this is a student training facility and thus there is a price consideration less than would be charged in a salon. Therefore, I will not hold the Stewart School, its management, owners, agents, or students liable for any damage or injury, should any result from this service.

Id. at 706–07. The Court held, based on that limited language, that it was not "apparent to the casual reader asked to sign this form as a condition for receiving cosmetology services that its effect was to absolve the establishment from liability based upon the acts or omissions of its professional staff. *Id.* at 709.

Another case with spare waiver language is *Sweeney v. City of Bettendorf*. 762 N.W.2d 873 (Iowa 2009). In *Sweeney*, the mother of a child participating in a city sponsored field trip signed a document titled "Permission Slip." 762 N.W.2d at 875. That slip's exculpatory language was one sentence: "I realize that [the defendant] is not responsible or liable for any accidents or injuries that may occur while on this special occasion." *Id*. The Iowa Supreme Court held that this exculpatory language was not clear and unequivocal because it referred only to "accidents" generally, and there was nothing else notifying a parent they were waiving potential claims for a city's negligence. *Id*. at 878.

Read together, *Poling*, *Baker*, and *Sweeney* demonstrate that vague or hidden language does not provide sufficient notice to preclude later claims arising from negligence. Indeed, those cases

show that courts will not find exculpatory clauses to cover negligence unless the intention to do so is clearly expressed. *Poling*, 81 N.W.2d at 465 (citations omitted); *Baker*, 433 N.W.2d at 709; *Sweeney*, 762 N.W. 2d at 878–79. Those cases do not require "magic words" such as negligence, omissions, or fault to preclude claims like those Avenarius raised here. *See Sweeney*, 762 N.W.2d at 879–80. Moreover, a valid waiver need not predict a specific type of injury or claim. *Grabill v. Adams Cnty. Fair & Racing Ass'n*, 666 N.W.2d 592, 596 (Iowa 2003) ("[A] releasing party does not need to have contemplated the precise occurrence that caused injury as long as the occurrence was within the broad range of events that might transpire with respect to the matter being undertaken.")

In contrast to the lease in *Poling*, the form in *Baker*, and the "Permission Slip" in *Sweeney*, the Waiver clearly and unambiguously alerted Avenarius, or any casual reader, that she waived and released any and all claims against the State for an injury she might incur during her training, including claims for negligence—starting with its large heading. SOUF, Exh. C-1, App. 36; *see also Transgrud*, 2020 WL 5650734 at *6 ("These provisions,

including multiple titles in all capital letters highlighting the document as a release, are clear and unequivocal and would be apparent to a casual reader, unlike the documents in *Baker* and *Sweeney*.")

The exculpatory language is also clear and unequivocal, going well beyond the language in the lease in *Poling*, the form in *Baker*, and the "Permission Slip" in *Sweeney*, stating the signer agrees to "waive, release, and hold harmless" the State "of any and all claims, demands, rights, causes of action and judgments of whatsoever, kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen physical or mental injuries and consequences thereof which may be suffered by me during the above referenced . . . training program [.]" SOUF, Exh. C-1, App. 36. The Waiver's terms also clearly identify the objects of Avenarius's release—the State of Iowa, ILEA, and its employees, which includes the firearms instructors. *Id.* If this Court finds that the Waiver does not apply to Avenarius's claims despite its clear language, it is hard to conceive of a claim at the ILEA training that the terms do cover.

This Court must reverse the district court and uphold the Waiver because the language clearly and unequivocally alerted Avenarius, and any casual reader, that by agreeing to it she waived and released all claims against the State for any injuries that might arise out of her participation in ILEA's training, including claims of negligence.

CONCLUSION

For those reasons, the State of Iowa respectfully requests this Court reverse the decision of the district court and remand with instructions to enter summary judgment for the State.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests to be heard in oral arguments on this appeal.

ATTORNEY'S COST CERTIFICATE

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/ Job Mukkada
JOB MUKKADA

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 4,163 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Job Mukkada
JOB MUKKADA

CERTIFICATE OF FILING AND SERVICE

I certify that on August 25, 2023, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ Job Mukkada
JOB MUKKADA