STAFFORD
HILLS CLUB

February 15, 2023

Senate Committee on Judiciary
900 Court Street NE
Salem, Oregon 97301

Re: SB 754 Liability Waivers

Re: Support for SB 754

Dear Chairman Prozanski, Vice-Chair Thatcher and Committee Members:

Thank you for your service to our state. On behalf of Stafford Hills Club, located in Tualatin, we offer our support for SB 754. This bill will return Oregon to a more balance and reasonable standard by enabling clubs like ours to enforce ordinary liability waivers that will reduce nuisance lawsuits.

As a civil attorney for over 43 years, I have litigated cases in state and federal courts throughout the Western U.S., including Oregon, California, Washington, and Nevada. My wife, Marla, and I founded Stafford Hills Club in 2012. We now support over 100 purposeful jobs for our exceptional team of employees.

Ours is a family-owned and operated small business that provides recreation and fitness facilities, equipment and programs for a broad spectrum of Oregonians. Our motto is *Achieving Wellness Together*, and we are a community devoted to help each other lead healthier and happier lives. For the six-year period following the 2014 *Bagley v. Mt. Batchelor* decision[1], our general liability insurance premiums increased at greater than twice the rate of inflation[2]. These increased costs required us to pass along these skyrocketing insurance costs to our members in the form of higher dues and program fees. We believe these increased insurance premiums are due, in large part, to the judicial nullification of liability waivers in Oregon - a policy decision we believe should be re-examined by this Legislature. Rightly or wrongly, *Bagley* has been interpreted by

[1] 356 Or.543, 340P.3d 27 (Or. 2014)
[2] Based on U.S. CPI 2014-2020

Oregon trial courts as nullifying waivers[3]. We believe as a matter of public policy and for the public good, these waivers should be enforceable in Oregon for the following reasons.

1. **Inherently Risky Activities Change the *Bagley* Calculus**. Courts and legislatures in other Western states recognize that when people choose to participate in recreational and fitness activities, those participants assume certain personal risks of injury relating to those activities. Pre-*Bagley*, Oregon aligned with the other Western states on this public policy. But since *Bagley*, Oregon law does not balance such risks between the consumer and the business. In Oregon, assumption of the risk in not a defense against claims for personal injury[4]. *Bagley* was decided largely on the premise that operators are in a better position to protect consumers than the consumers themselves[5]. That may be true in the typical commercial context such as a retail store, an apartment, or a gas station. But our patrons use our facilities in an entirely different and more risky manner. Because of this materially different use, our ability to protect patrons against every possible risk of injury is impossible. While we do our very best to ensure that our patrons do not hurt themselves, we cannot guaranty that overzealous or careless patrons may not injure themselves when infrequent accidents occur. This difference in use changes the inherent risk calculus, and therefore the foundation of the *Bagley* decision. How facilities are used by patrons should matter in deciding who shoulders the primary responsibility to insure against personal injuries.

2. ***Bagley* has Increased Nuisance Lawsuits.** As you know, some experts estimate that 97% of all civil cases never go to trial. Most personal injury claims against businesses are settled with insurance money. Those settlements cause higher insurance premiums for those businesses, resulting in higher costs for consumers. Even "nuisance" lawsuits are settled because the cost of going to trial far exceeds what insurance companies can pay to settle the case and avoid additional costs. I will share a couple of actual case examples.

[3] *Owens v. Mt. Hood Ski Bowl* (Multnomah Circuit Court, 2022)
[4] ORS 31.620
[5] 356 Or. 550. *Bagley* extensively examines procedural and substantive unconscionability and merges public policy in its analysis for convenience. At P. 563, the *Bagley* court gives substantial public policy weight to the common law of business premises liability, which presumes a landowner/operator is in the best position to protect invitees from harm.

Case No. 1 involves a patron who exercises regularly at their club facility. Unusually cold weather conditions caused icy conditions on the transition surface leading to the outdoor exercise area. Even though the operator properly removed snow and ice along the designated pathway, used ice melting chemicals correctly and posted large signs to warn of slippery conditions, the patron slipped on the concrete surface as they approached the exercise area and sued the operator. The patron had signed a conspicuous and separate Waiver as part of their membership contract. The operator never admitted negligence nor was any proven by the claimant. Nevertheless, the insurance company settled for $25,000 because the cost of defense alone would quickly exceed this amount. The insurance company believed that *Bagley* negated the waiver defense.

Case No. 2. A club member, who had signed a Waiver, routinely used an elevated stationary exercise bar upon which to attach straps to facilitate mobility, stretching and strengthening exercises, using her own body weight as resistance. The member wanted to increase the intensity of her routine and chose to use a short stackable platform designed for aerobic exercise, to elevate her stature so that she could reach the straps on the upper bar. Unfortunately, while she was standing on the platform and reaching for the upper straps, she slipped and landed on her arm causing personal injury. The claim was based on the premise, among other things, that there was no warning on the platform that it should not be used as a ladder. No negligence on the part of the operator or the manufacture of the platform was admitted or proven. Nevertheless, the insurance companies gladly settled for $30,000 to avoid further costs of suit. Again, *Bagley* was cited in the negotiations as barring use of the Waiver as a defense.

3. **SB 754 Will Still Allow Courts to Examine Unconscionability**. Nothing in SB 754 restricts or limits a court from examining the legal efficacy of a waiver under common law principles of procedural and substantive unconscionability. Oregon courts will still be able to review issues such as how the waiver was obtained, was it hidden or obscured or other specific circumstances relating to the formation of the contract that is the waiver. SB 754 expressly excludes any attempts to avoid gross negligence or intentional conduct, and any waiver that is broader than the express language contained in SB 754 will be construed to apply to only ordinary negligence.

An important fact that the *Bagley* court did not and could not have considered when analyzing substantive unconscionability, is the knowledge of the significant impact this ruling would have on the availability and cost of general liability coverage for recreation and fitness businesses. With the benefit of hindsight, we now know that because of *Bagley*, recreational businesses have been denied liability coverage and the increased insurance costs has made in infeasible for others to operate. When balancing the competing interests as the *Bagley* court does, this unintended consequence was not considered by the court. That new fact should be considered now by this Legislature.

In addition, footnote 21 of the *Bagley* decision offers no simple fix. The court implied that a two-tier or split fee system, where proprietor and customer negotiate the charge, may be one way of avoiding the result of waiver nullification. Unfortunately, such a negotiated split system ignores the impractical nature of the concept in the fast-paced digital commercial context. It simply does not work in practice.

Lastly, in its lengthy opinion, the *Bagley* court acknowledges that judicial decisions based on public policy concerns are often made when legislatures have not clearly spoken on the issue. Since the Oregon Legislature had not clearly articulated public policy concerning liability waivers, the *Bagley* court stepped forward and filled that void. Now is the opportunity, and I suggest the responsibility, of the Oregon Legislature to examine this issue and articulate a decisive public policy position. To do less would defer to the courts on an important public policy question that is certainly within the purview of this body, and one that has broad economic and lifestyle consequences.

Sincerely,

*Jim Zupancic*

Jim Zupancic
Chairman and General Counsel

Cc: Senate President Rob Wagner