February 17, 2023

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

Re: SB 754 Recreational Liability Reform

Chair Prozanski and Members of the Committee:

The National Ski Areas Association (NSAA) submits this letter in support of Senate Bill 754 to allow recreational businesses and organizations to utilize releases of liability to waive ordinary negligence. This proposed legislation is critical to ensure that Oregonians have access to indoor and outdoor recreation, and that recreational providers—including ski areas, outfitter guides, camps, rafting companies, marinas, trail builders, marathons, and more—have access to affordable insurance. As insurance companies pull out of Oregon in response to the Supreme Court's unprecedented ruling in Bagley vs. Mt. Bachelor eliminating the use of releases, recreational providers will have no insurance coverage, or pay skyrocketing premiums. Oregon is an outlier on this issue (all other Western states allow releases), leaving our recreational businesses at a stark disadvantage.

NSAA is the national trade association representing 320 ski areas in the United States, including 12 ski areas in Oregon. Like other recreational providers, ski areas are the economic engines in rural communities, providing more than 200,000 jobs in the 37 ski states and generating millions in local and state tax revenues from our resorts. Our resorts offer a wide variety of recreational activities for families, including skiing, snow tubing, snowmobiling, mountain biking, backcountry skiing, zip lining, and scenic chairlift rides, as well as various races, competitions, events, and festivals.

I testified in support of SB 754 at the Senate hearing on February 15, and would like to provide additional context to some of the points raised during the hearing.

This proposed bill is eminently reasonable and quite limited in its reach. SB 754 only allows recreational providers to have guests to waive *ordinary negligence*. This legislation does not create "blanket immunity" for recreational providers. Indeed, it is important to understand what this bill does NOT change under existing Oregon law:

- This bill does NOT limit a person's right to bring claims for *gross* negligence— the so-called "bad apples" can still be held to account for willful and wanton misconduct;

- This bill does NOT limit a minor's right to bring claims for *ordinary* negligence (California and Colorado have laws that allows parents to waive their minor child's negligence claims, but this bill does *not* limit the rights of minors to bring claims);

- This bill does NOT limit a person's right to seek punitive damages;

- This bill does NOT limit a person's right to obtain non-economic damages (e.g., pain and suffering); the Oregon Supreme Court in 2020 struck down a previous cap on non-economic damages; this bill does not affect non-economic damages);

- This bill does NOT limit a person's ability to challenge an underlying release of liability based on ambiguity, vagueness, conspicuousness, or other procedural grounds. Like in other western states that enforce releases, people are still able to challenge releases in court on a wide variety of procedural grounds;

- This bill does NOT limit a person's ability to bring negligence claims involving sexual abuse, molestation, criminal actions, or similar intentional conduct. Similarly, the Oregon Equine Act also prohibits equestrian providers from using releases to waive such intentional conduct, see ORS 30.691(2)(b)(B);

- Releases do NOT create "blanket immunity"—Oregon case law prior to Bagley vs. Mt. Bachelor stated that releases of liability are "disfavored" and that releases should be "construed against the drafter of the release," and this legislation does not change this pre-existing Oregon case law.

Furthermore, contrary to testimony at the Senate hearing, recreational providers will continue to have compelling incentives to maintain safety standards if releases are enforced in Oregon:

- Like automobile and home owners insurance, recreational providers will continue to have their liability insurance premiums measured by injury incidents and claims against them, which remains a strong incentive to adhere to safety protocols;

- Recreational providers also have strong incentives to keep worker compensation premiums low—because recreational providers are involved in risky activities, maintaining strict safety standards helps keep workers compensation premiums in check;

- With ski areas, all of our managers, supervisors, and front-line employees are key users of the services we offer—most employees receive complimentary passes for their families—our children, grandchildren, spouses, partners, and friends all ski the same terrain as our guests, use the same terrain park jumps as guests, and ride the same chairlifts as guests. This is an extremely strong incentive to provide a safe experience for our guests, employees, and our families;

- It is simply good business practice to maintain high safety standards—all recreational providers want their guests to come back for more mountain biking, skiing, rafting, horseback riding, or snowmobiling so they buy more lessons, more passes, more food and beverage, more gear, and more lodging;

- All recreational providers rely on strong word-of-mouth marketing, including ski areas—there is a strong incentive to protect our brands and our reputation, and to avoid incidents that may lead to negative media. This is especially true in this current age of immediate social media.

Opponents of this legislation assert that recreational providers will relax their safety practices if releases are allowed. There is no evidence to support this. All western states except Oregon enforce releases. Skiing is NOT less safe in California or Washington because releases are enforced. Rafting is not less safe in Colorado because outfitters can use releases. Mountain biking is not less safe in New Mexico because they use releases. Indeed, prior to Bagley, recreation was not less safe in Oregon when releases were enforced. Notably, when the Oregon legislature passed the Equine Act in 1995 authorizing releases under that statute, there is no evidence that horseback riding, rodeos, trail rides, or riding lessons became less safe after the legislature authorized releases for equestrian activities.

Indeed, safety standards for recreational providers remained just as high after Bagley as they were before the Supreme Court's ruling. There were other changes seen after the Bagley ruling: 1) the enormous size of damages sought in recreational lawsuits skyrocketed after Bagley (in the last two years, plaintiffs lawyers have brought lawsuits totaling more than $120 million against ski areas in Oregon; and 2) insurance companies are pulling out of the market for recreational providers as a direct result of the court's Bagley ruling. 3) Recreational opportunities are starting to go away for Oregonians, not just at the ski areas.

This is part of the unfortunate irony of the Supreme Court's ruling in Bagley. The Supreme Court reasoned that ski areas and other recreational providers were in a better position to spread the risk of these activities through insurance. However, the Court failed to realize that insurance companies will, and have, responded to the lack of releases of liability by pulling out of the market entirely, or dramatically raising premiums.

NSAA, and our 12 ski area members in Oregon, strongly encourage the Committee to adopt this legislation to protect Oregonians access to a rich variety of recreational activities.

Sincerely,

/ s / *Dave Byrd*

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