NO. A13-1028

State of Minnesota
In Supreme Court

Ethan Dean, Holly Richard,
Ted Dzierzbicki, and Lauren Dzierzbicki,

Appellants,

v.

City of Winona, a municipality,

Respondent.

BRIEF OF *AMICUS CURIAE* MINNESOTA VACATION RENTAL ASSOCIATION

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INTRODUCTION

The Minnesota Vacation Rental Association (MNVRA) urges this Court to reverse the Court of Appeal's decision and hold that the City of Winona's restriction on the number of rental licenses per block is an *ultra vires* act.

MNVRA is a nonprofit organization whose purpose is to protect the rights of Minnesota property owners to rent their dwellings as short-term vacation rentals. MNVRA believes all property owners have a fundamental right to rent their property, to make a living without arbitrary government interference, to freely contract with others, and to the quiet enjoyment of their property. MNVRA advocates on behalf of its approximately 150 members whose property rights and economic interests are directly implicated by the outcome of this case.[1]

This case is about the fundamental property rights of Minnesotans and municipal attempts to usurp them by exercising authority municipalities simply do not have—which the Minnesota Legislature has withheld for good reason. Despite the restriction's obvious nature and pedigree as a zoning ordinance, the city has successfully evaded the boundaries set by the Legislature. By deferring to the city, the lower courts ignored the commands of a co-equal branch of government. We urge this Court to confirm the Legislature's limit of municipal authority so that property owners throughout

[1] MNVRA certifies that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity contributed monetarily toward its preparation or submission.

Minnesota will remain secure from unreasonable municipal intermeddling with their fundamental rights of property ownership.

STATEMENT OF CASE AND FACTS

MNVRA adopts and incorporates Appellant's Statement of Case and Facts by reference.[2]

SUMMARY OF ARGUMENT

This Court should reverse the Court of Appeals and hold that section 33A.03(i) of the City of Winona Code ("the thirty-percent rule") is an *ultra vires* act beyond the scope of the city's authority. The thirty-percent rule is an improper exercise of the limited zoning power afforded to municipal governments as the Legislature intended:

1. The thirty-percent rule is a zoning ordinance because:
    a. it concerns the physical development of the city, as defined in Minn. Stat. § 462.352 subd. 15; and
    b. it has the characteristics of a zoning ordinance under this Court's precedents and accepted principles of zoning law.
2. The thirty-percent rule is an *ultra vires* act that exceeds the city's authority because the Legislature has:
    a. circumscribed municipal authority over the physical development of property by allowing regulation of uses but not users;

[2] *See* Appellant's Br. at 2-22.

b. expressly required that use restrictions must be uniform across each class or kind of building, structure, or land within a zoning district; and

c. withheld the authority to control physical development through restraints on alienation.

ARGUMENT

I. THE THIRTY-PERCENT RULE IS A ZONING ORDINANCE

The City of Winona's thirty-percent rule is a zoning ordinance because it (1) concerns the physical development of the city, (2) is administered by a planning commission and board of adjustments and appeals created by the Municipal Planning Act, chapter 462, Minnesota Statutes, and (3) bears the traditional characteristics of a zoning ordinance.

The Minnesota Legislature enacted the Municipal Planning Act, chapter 462, Minnesota Statutes, to provide municipalities a "single body of law, with the necessary powers and a uniform procedure" to effect municipal planning that promotes the public health, safety, and welfare, as well as a sound economical environment for both public and private activities.[3] Importantly, this statutory regime expressly limits the municipal police power with regard to zoning and other "official controls" of the physical development of land

[3] Minn. Stat. § 462.351.

within a city.[4] Thus, the Court of Appeals erred when it declined to address the zoning-power issue based upon a false assumption that the police power was an alternative source of authority to the zoning power for the challenged act.[5] The statutory limitations of the zoning power actually limit the police power for acts that are of a zoning nature.

The Municipal Planning Act also establishes the organizational structure for administering such a program by authorizing the creation of a "planning agency" to advise the city council on zoning matters and requiring the creation of a "board of adjustments and appeals" for any municipality with a zoning ordinance.[6]

The City of Winona's transparent attempt to masquerade the thirty-percent rule as anything but a zoning ordinance should not persuade this Court. The rule had its origins in the planning commission—organized, in fact, under the city's planning and zoning power[7]—and was codified in its zoning code from 2005 to 2012, right before the city council moved it to the rental code for strategic litigation reasons.[8] Like a typical zoning law, its

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[4] Minn. Stat. §§ 462.352 subd. 15, 462.357 subd. 1; *see also Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 172–73 (Minn. 2006). (defining a zoning ordinance as "official controls" regulating building development and uses of property) (citing *In re Denial of Eller Media Company's Applications*, 664 N.W.2d 1, 8 (Minn. 2003).

[5] *Dean et al. v. City of Winona*, No. A13-1028 at *11 (Minn. Ct. App. 2014) [hereinafter "Opinion below"].

[6] *See* Minn. Stat. § 462.354 subd. 1–2.

[7] *See* Minn. Stat. 462.354 subd. 1.

[8] Opinion below at *7.

purpose concerned physical development issues: "density, parking, and aesthetic[s] . . . within the 'area' of the university."[9] The rule applies only in districts zoned for low-density residential use.[10] And the board of adjustments and appeals—whose authority derives from the city's zoning power and is limited to determining zoning variances and hearing appeals—administers its enforcement.[11]

This Court has repeatedly stated that zoning statutes and ordinances regulate the development and uses of property or partition a city into zones or sections reserved for different purposes.[12] Our neighbor Supreme Court of Wisconsin has further explained that the nonexclusive characteristics of a zoning ordinance include the following: (1) division of geographic areas into multiple zones; (2) limitation of certain uses by property owners within particular zones; (3) directly controlling where a use takes place as opposed to how it takes place; (4) classification of uses in general terms to comprehensively address compatible uses in a zone; (5) legislative rather than quasi-judicial determinations; and (6) allowance of pre-existing

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[9] Opinion below at *3.
[10] Winona City Code § 33A.03. The thirty-percent rule applies only to R-R, R-S, R-1, R-1.5, and R-2 districts in Winona. *Id.*
[11] *See* Minn. Stat. § 462.354 subd. 2.
[12] *500 LLC v. City of Minneapolis*, 837 N.W.2d 287, 291 (Minn. 2013); *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 172 (Minn. 2006).

nonconforming uses.[13] The thirty-percent rule fits under each of these factors, except it improperly attempts to regulate users instead of uses.

Despite having the characteristics of a zoning ordinance under the statutory scheme, the decisions of this Court, and accepted principles of zoning law, the Court of Appeals upheld the thirty-percent rule under the "all powers" provision of the city's charter. But in detailing the scope of the municipal police power, the court ignored the operative language of its citation to a recent decision by this Court: "[I]n matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, *save as such power is expressly or impliedly withheld.*"[14] The zoning power is a subset of the police power that has been partially withheld by the Legislature.[15] In other words, the "all powers" provision of the city's charter cannot create general police power authority to do that which is specifically withheld. The Municipal Planning Act grants municipalities the authority for

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[13] *See Zwiefelhofer v. Town of Cooks Valley*, 809 N.W.2d 362, 338 (Wis. 2012).
[14] Opinion below at *9 (emphasis added) (quoting *Bolen v. Glass*, 755 N.W.2d 1, 5 (Minn. 2008)).
[15] *See Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 27 (Minn. 1981) ("In exercising the delegation of power, a municipality cannot exceed the limitations imposed by the enabling legislation."); *see also Zwiefelhofer*, 809 N.W.2d at 370 (Wis. 2012); *Roman Catholic Welfare Corp. of San Francisco v. City of Piedmont*, 289 P.2d 438, 439 (Cal. 1955) (zoning is an "exercise of police power").

planning and zoning, but limits the manner in which it may be used; the scope of municipal authority is that of the statute.[16]

II. THE THIRTY-PERCENT RULE IS *ULTRA VIRES*

Ultra vires acts are those that "lie outside the scope of authority of the governing body."[17] Minnesota municipalities do not possess the inherent power to enact zoning laws. Instead, section 462.357 permits a municipality to regulate only "the uses of buildings and structures for trade, industry, residence, recreation, public activities, or other purposes."[18] Thus, any zoning restriction based on considerations other than those embodied in Minn. Stat. § 462.357 is an *ultra vires* act. As this Court has reiterated, "a zoning statute or ordinance is one which, by definition, regulates the building development and uses of property."[19] Therefore, any zoning act that regulates more than the uses of property or does so in a manner that is not "uniform . . . for each class or kind of use" is an *ultra vires* act.[20]

Accordingly, this Court should strike down the thirty-percent rule as an *ultra vires* act that exceeds the city's authority because the Legislature has

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[16] *White v. City of Elk River*, 840 N.W.2d 43,49 (Minn. 2013); *Costly*, 313 N.W.2d at 27 (Minn. 1981) ("In Minnesota, . . . a municipality has no inherent power to enact zoning regulations. [It] receives power to zone only by legislative grant of authority by the state.") (citing Minn. Stat. § 462.357; *Denney v. City of Duluth*, 202 N.W.2d 892, 894 (Minn. 1974)).

[17] *Ketterer v. Indep. Sch. Dist. No. 1 of Chippewa Cnty*, 79 N.W. 2d 428, 436 (Minn. 1956).

[18] *Id.*

[19] *Mendota Golf, LLP*, 708 N.W.2d at 172 (citing *In re Denial of Eller Media Company's Applications*, 664 N.W.2d 1, 8 (Minn. 2003)).

limited the extent to which municipalities may affect property rights in pursuit of planning and zoning objectives. Municipal rental bans like Winona's are invalid for three reasons: (A) zoning regulations separate incompatible *uses* of property, not *users* of property; (B) zoning regulations must be uniform across each class or kind of building, structure, or land in a district under section 462.357, Minnesota Statutes; and (C) this is an unlawful restraint on alienation.

A. Zoning regulations separate incompatible *uses* of property, not *users* of property

An owner's *use* of his or her land relates to how the land is physically used. Valid zoning regulations include those that prescribe building size, setback, and appearance; the type of use; and density (*e.g.*, single-family residential, multi-family residential, high-density commercial).[21] The thirty-percent rule, however, does not regulate *how* property is used; it regulates *who* can use it. The thirty-percent rule thus goes beyond the statutory bounds of regulation of the physical development of land and is illegal. Allowing the city to expand its power beyond controlling *uses* to controlling *users* is to grant it the authority that Minnesota statutes simply do not provide—to make arbitrary zoning distinctions between occupants based on their status as owner or tenant.

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[20] Minn. Stat. § 462.357 subd. 1.

[21] 5 Rathkopf's The Law of Zoning and Planning § 81:3 (4th ed. 2011).

Zoning, by its very nature, has "reference to land rather than to owner."[22] It "deals basically with land use and not with the person who owns or occupies it."[23] Its purpose is to segregate "incompatible land uses, and to provide for an orderly and comprehensive scheme of land development within the community that facilitates the adequate provision of infrastructure resources and the overall comfort, convenience, and welfare of the community."[24]

The form of one's legal interest in property, however, has little to do with its use. Courts consistently interpret "residential use" as using the property for living purposes, as a dwelling, or as a place of abode.[25] The transitory or temporary nature of renting property for a term rather than owning it in fee simple does not defeat the residential use.[26] An "owner's receipt of rental income in no way detracts from the *use* of the properties as *residences* by the tenants."[27] Whether tenant-occupied or owner-occupied, a single-family

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[22] *FGL & L Prop. Corp. v. City of Rye*, 485 N.E.2d 986, 989 (N.Y. 1985)
[23] *Id.*
[24] 5 Rathkopf's The Law of Zoning and Planning § 1:12 (4th ed. 2011).
[25] *Lowden v. Bosley*, 909 A.2d 261, 267 (Md. 2006); *Slaby v. Mountain River Estates Residential Ass'n, Inc.*, 100 So. 3d 569, 579 (Ala. Civ. App. 2012), *cert denied* (Aug. 10, 2012) ("[S]o long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities, as the undisputed evidence indicates renters did in this case, they are using the cabin for residential purposes.").
[26] *See id.*; *Lowden*, 909 A.2d at 267.
[27] *Id.*

dwelling's status is the same because both use the property for the same purpose: eating, sleeping, and living.[28]

This Court has, indeed, held that the identity of the occupant is irrelevant to the property's use for the purposes of zoning. In *State v. Northwestern Preparatory School,* this Court invalidated a zoning ordinance that permitted public schools and churches but not private schools in a particular district because the ordinance was based on ownership rather than use.[29] The Court stated that the distinction is based solely upon ownership [and thus] bears no relation to the purposes of the ordinance, and for that reason is arbitrary."[30]

Other jurisdictions have also encountered zoning laws that improperly regulate *users* instead of *uses* of property. For example, New Jersey's appellate court has stated that "owner-occupation of a dwelling is [not] a different *use* of the property in a zoning sense from tenant-occupation, the actual occupancy of the residence in either case being by a single family."[31] Furthermore, "a mere change from tenant occupancy to owner occupancy [is not regarded] as an extension or alteration of the previous [] use of the dwellings."[32] North Carolina's courts have similarly invalidated zoning regulations premised on ownership, holding a municipality is only "entitled to

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[28] *Id.* at 268-69.
[29] 37 N.W.2d 370 (Minn. 1949).
[30] *Id.* at 371.
[31] *Beers v. Board of Adjustment of Wayne Twp.*, 183 A.2d 130, 136 (N.J. Super. Ct. App. Div. 1962) (emphasis added).
[32] *Id.*

regulate the *use* of [an owner's] single-family residence[], not the ownership."[33]

In sum, the Minnesota Legislature has promulgated a comprehensive scheme under which municipalities may regulate and plan for the physical development of the lands within their borders. The power to zone allows municipalities to do much to affect property rights, but only for legitimate zoning purposes. It is not a catch-all ad hominem privilege by which a city can do whatever it wants with others' property or control who gets to enjoy it.[34] We urge this Court to clarify that the municipal zoning power is limited in its means and its ends and that discriminating between classes of ownership are not among them.

B. Zoning regulations must be uniform across classes or kinds of property within a zoning district

The Minnesota Legislature has unambiguously limited the municipal zoning authority by requiring that all zoning regulations be "uniform for each class or kind of building, structures, or land and for each class or kind of use throughout such district."[35] The thirty-percent rule violates this provision in two distinct ways. First, it is not uniform for each class or kind of use because

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[33] *City of Wilmington v. Hill*, 657 S.E. 2d 670, 672 (N.C. Ct. App. 2008); *see also Vermont Baptist Convention v. Burlington Zoning Bd.*, 613 A.2d 710, 711 (Vt. 1992) (holding that regulation of property based on identity of user rather than use was outside municipal grant of authority under similar zoning enabling act).

[34] 5 Rathkopf's The Law of Zoning and Planning § 81:4 (4th ed. 2011).

[35] Minn. Stat. § 462.357 subd. 1.

it treats tenant-occupancy differently than owner-occupancy, despite the indistinguishable residential character of use for each type of user. Second, the thirty-percent rule arbitrarily restricts the rights of some property owners within a district by allowing some but not others to rent.

A zoning regulation based on who uses property, not on the uniformity of the use, is prohibited in Minnesota.[36] Where two parties intend to use the property in the same way, a "distinction based solely on ownership [status] bears no relation to the purpose of the ordinance, and for that reason is arbitrary."[37]

The thirty-percent rule is not uniform for each class or kind of use as required by Minnesota law. Rather than focus on the compatibility of different uses throughout the district, the city has instead concerned itself with the class of occupancy or type of ownership under one kind of use: as a residential home. Just as public schools and private schools cannot legitimately be distinguished in their use and impact on the surrounding

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[36] *State v. Northwestern Preparatory School*, 37 N.W.2d 370 (Minn. 1949); *see also City of Santa Barbara v. Adamson*, 610 P.2d 436, 442 (Cal. 1980) ("In general, zoning ordinances are much less suspect when they focus on the use than when they comand inquiry into who are the users."); *United Property Owners Ass'n of Belmar v. Borough of Belmar*, 447 A.2d 933, 936 (N.J. Super. App. Div. 1982) ("Zoning laws are designed to control types of uses in particular zones and are not ordinarily concerned with periods of occupancy or the property interest of the occupants.").

[37] *Northwestern Preparatory School*, 37 N.W.2d at 371.

neighborhood, owner and tenant occupancy cannot legitimately be distinguished in their use and impact on the surrounding neighborhood.[38]

The thirty-percent rule also breaches the statute's uniformity requirement because it restricts the rights of some property owners within a zoning district but not others. Winona's scheme creates a situation where some property owners—those who are unable to obtain a rental license—do "not enjoy the same rights to use [their] property as other property owners within [the same] district"—namely, those who were lucky enough to obtain a rental license.[39] This Court has held that this kind of "disparity appears to offend the spirit of the uniformity requirement" under similar, if not less egregious, circumstances.[40]

C. Longstanding public policy and fundamental principles of law require invalidation of rental bans

When the Minnesota Legislature enacted the Municipal Planning Act, it did so with the knowledge that it would affect fundamental property rights. The restrictions set forth in the chapter evince a legislative intent to provide municipalities only with the authority to promote the legitimate objectives of

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[38] *See id.* (calling a distinction between public and private schools "arbitrary" and outside the legitimate scope of a zoning ordinance). Likewise, the distinction the city makes is arbitrary and illegitimate. Assumptions about the behavior of renters versus owners are improper speculations unsupported by any actual facts. *See infra* notes 49–50.

[39] *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 173 (Minn. 2006).

zoning contemplated by the legislative purpose and to withhold the authority to regulate fundamental property rights in other ways. The Court of Appeals erred by ignoring that the zoning power is part of the police power[41] existing only at the leisure of the Legislature—and, along with any other municipal power, may be "expressly or impliedly withheld."[42]

This legislative approach to land-use planning is informed by longstanding principles of law and public policy. First, the act of leasing one's property is a *conveyance*.[43] Restrictions on the right to convey one's property are restraints on alienation, which are highly disfavored and presumed invalid because they derogate from the common law.[44] Corollary to this principle is the canon of construction presuming the Legislature has not

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[40] *Id.* The restriction at issue that applied only to one property owner—a golf course that sought to sell to a developer desiring to construct single-family residences on the property. *See id.* at 169–171.

[41] *See* opinion below at *9–11.

[42] *Bolen v. Glass*, 755 N.W.2d 1, 5 (Minn. 2008); *see State by Rochester Ass'n of Neighborhoods v. City of Rochester*, 268 N.W.2d 885, 888 (Minn. 1978) ("We have consistently held that 'when a municipality adopts or amends a zoning ordinance, it acts in a legislative capacity under its delegated police powers.' ") (quoting *Beck v. City of St. Paul*, 231 N.W.2d 919, 925 (Minn. 1975).

[43] *See State v. Bowman*, 279 N.W. 214, 215 (1938) ("A lease is a conveyance of lands or tenements, for a term less than the party conveying has in the premises . . . .").

[44] *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) (holding zoning ordinances should be construed strictly against municipalities); *Sanderson v. City of Willmar*, 162 N.W.2d 494, 497 (Minn. 1968) (holding municipal ordinance restraining alienation invalid and stating "the right to sell one's property to anyone at any time for any price is a property right.").

abrogated the common law except by expressed will.[45] Indeed, the Legislature omitted the power to regulate conveyances in enumerating the municipal zoning power.[46]

The conveyance of real property is fundamentally an issue of state law beyond the reach of municipal authority. The municipal police power is limited to "matters of municipal concern" by the Minnesota Constitution and this Court's rules of decision.[47] Though municipalities have an interest in regulating existing landlord-tenant relationships to promote the public health, safety, and welfare, real property interests and transfers thereof, by contrast, are governed by a uniform body of state law.[48]

Cities like Winona that perceive "density, parking, and aesthetic issues" within their borders have many tools at their disposal that do not implicate fundamental property rights, require a tortured interpretation of the Municipal Planning Act, or embody speculative, discriminatory assumptions

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[45] *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 873, 877 (Minn. 2002) ("We 'presume[ ] that statutes are consistent with the common law, and if a statute abrogates the common law, the abrogation must be by express wording or necessary implication.' ") (quoting *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000)).

[46] *See* Minn. Stat. § 462.357.

[47] *Bolen v. Glass*, 755 N.W.2d 1, 5 (Minn. 2008).

[48] *See, e.g.*, Minn. Stat. § 504B.185 (local authority to inspect). *Cf. State v. Hess*, 684 N.W.2d 414, 422 (Minn. 2004) (discussing the Marketable Title Act); *Bartels v. Blattner*, 595 N.W.2d 527, 529 (Minn. Ct. App. 1999) ("State law governs the definitions of property interests . . . .").

about a class of occupants in the code.[49] Recognizing the impropriety of discriminating against renters through zoning, one court noted that a city's similar parade of horribles could be more effectively and directly managed through other existing municipal powers:

> Population density can be regulated by reference to floor space and facilities. Noise and morality can be dealt with by enforcement of police power ordinances and criminal statutes. Traffic and parking can be handled by limitations on the number of cars (applied evenly to all households) and by off-street parking requirements. In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users.[50]

The City of Winona already requires two off-street parking spaces for each rental property.[51] The neighborhoods at issue here are already zoned low-density residential, and the city code already prohibits more than three unrelated individuals from living in a single-family dwelling.[52] As for aesthetic issues, "the power to regulate does not extend to . . . purely aesthetic considerations."[53]

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[49] *See* Appellants' Br. App'x A.179; A.181; *Local 563 AFL-CIO v. City of St. Paul*, 134 N.W.2d 26, 31 (Minn. 1965) ("It is well established that ordinances must not discriminate in favor of or against any class of persons or property . . . .").

[50] *City of Santa Barbara v. Adamson*, 610 P.2d 436, 441–42 (Cal. 1980); *see also Kirsch Holding Co. v. Borough of Manasquan*, 281 A.2d 513, 520 (N.J. 1971) (Unruly behavior by young adults "can best be dealt with officially by vigorous and persistent enforcement of general police power ordinances and criminal statutes . . . . Zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations.").

[51] CWC §§ 33A.10(d); 43.36.

[52] CWC § 43.01 (at definition of "family").

[53] *Olsen v. City of Minneapolis*, 115 N.W.2d 734, 742 (Minn. 1962).

CONCLUSION

The Minnesota Legislature limits the municipal police power to affect property rights through official controls over the physical development of land. Detailed Minnesota statutory law provides the acceptable means and ends of municipal land-use and zoning power. This Court should thus invalidate the City of Winona's thirty-percent rule as an *ultra vires* act exceeding municipal authority.

Respectfully submitted,

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Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **June 26, 2014**, he prepared the **Brief of *Amicus Curiae* Minnesota Vacation Rental Association,** case number **A13-1028**, and served **2** copies of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid.**

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