

State of Minnesota
In Court of Appeals

In the Matter of the Determination of the
Need for an Environmental Impact
Statement for the Nolte Family Irrigation
Project in the Township of North Germany,
Wadena County, Minnesota.

**BRIEF OF AMICI CURIAE
RYAN PESCH, LARRY HEITKAMP,
JANAKI FISHER-MERRIT and ZACHARY PAIGE**

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INTEREST OF AMICUS CURIAE

Ryan Pesch is from Lida Township, Minnesota near Pelican Rapids. He has operated a commercial vegetable farm using organic farming methods in Otter Tail County since 2004 and has been certified organic since 2015. He learned the craft of organic farming through a two-year apprenticeship at Foxtail Farm near Taylors Falls, Minnesota with Paul Burkhouse, PhD, a well-respected farmer and teacher in this field of work before he got his start in 2002 as a tenant farmer in Lake Elmo, Minnesota. Including his apprenticeship, training and efforts before moving to Otter Tail County, he has nearly 20 years of experience in the organic farm industry with first-hand knowledge of organic farm practices and certification requirements. In addition, he served as an Extension Educator for the University of Minnesota since 2004 in the area of community economic development. His primary research has been measuring the size and scope of the organic and sustainable food market. His research has included farm financial analysis of small-scale farms (less than 8 acres in production) that primarily direct market specialty crops, that is, vegetable crops sold directly to the end customer.

Larry Heitkamp is an organic farmer practicing agroecology - the application of ecological processes to agricultural production systems. He owns and operates the Yellow Rose Organic Farm outside of Sebeka, Minnesota that has diversified crops, beef, and chickens. He has grown over twenty-five varieties of organic potatoes in the Pineland Sand Aquifer area using no-till and cover crop methods developed in partnership with the

Sustainable Farming Association. Mr. Heitkamp sells his farm products in Brainerd Lakes, Fargo/Moorhead, Minneapolis and Saint Paul, Minnesota.

Petitioner Janaki Fisher-Merritt owns and operates the Food Farm, a certified organic farm located in Wrenshall, Minnesota. The farm offers summer, winter, preserving, and egg Community Supported Agriculture (CSA) shares, enabling its members to receive fresh local food most of the year. Food Farm delivers summer CSA shares to sixteen locations in Duluth, Superior, Cloquet, Esko, and Wrenshall, Minnesota. Food Farm's produce is also available at the Whole Foods Co-op, Duluth Grill, Chester Creek Cafe, Mount Royal Market, OMC Smokehouse, Spirit Creek Farm, and other outlets.

Zachary Paige has worked for White Earth Land Recovery Project since 2012 and is currently the Food Sovereignty Specialist for the White Earth Band of Minnesota Chippewa Tribe. Under Native leadership, he aided in the formation of the Upper Midwest Indigenous Seed Keeper Network involving over 15 tribes in the region. Paige holds a master's degree in plant breeding from Iowa State University where he studied carotenoid and protein content in open-pollinated maize adapted to the Northern climate. He is the owner of a farm business, North Circle Seeds, selling vegetable seeds to organic farmers and gardeners primarily in Minnesota. The farm is currently in transition to becoming certified organic. The Connell farm has grown organic seeds for North Circle Seeds for several years on the farm adjacent to the proposed Nolte project. Zachary is on

the State and Chapter Board for the Sustainable Farming Association of Minnesota as well as the local food co-operative, Manna Foods.

Petitioners assert a public interest. The Minnesota Environmental Policy Act (“MEPA”) at issue in this case requires comprehensive review of potentially significant environmental effects. These include potentially significant air, water and habitat impacts to the thirty-year old organic farmstead, which sits between the Nolte project and the Red Eye River. The Environmental Assessment Worksheet (“EAW”) at issue in this appeal makes no mention of the disruption that the Nolte project will have on organic and sustainable farming operations and soil health in the area surrounding the project site. Addressing potentially significant harms to the neighboring organic farm and mitigating the same is important for the case at issue and also has important implications for rural places across Minnesota and the U.S., where small sustainable farming operations are facing serious, potentially existential threats from rapidly expanding, chemically intensive industrial irrigated agriculture.

FACTS

A. Local, Organic, Sustainable Operation Adjacent to the Nolte Irrigated Agriculture Site

The farm labeled Steven and Kathleen Connell, shown below in Figure 1, has practiced organic farming techniques that build soil health and crop diversity, never using chemical fertilizers or pesticides, for over 24 years. The Connell farmstead is located

approximately 300 feet away from the northern irrigation well on the Nolte project site, within the quarter mile buffer surrounding the irrigated crop circle in Figure 1.

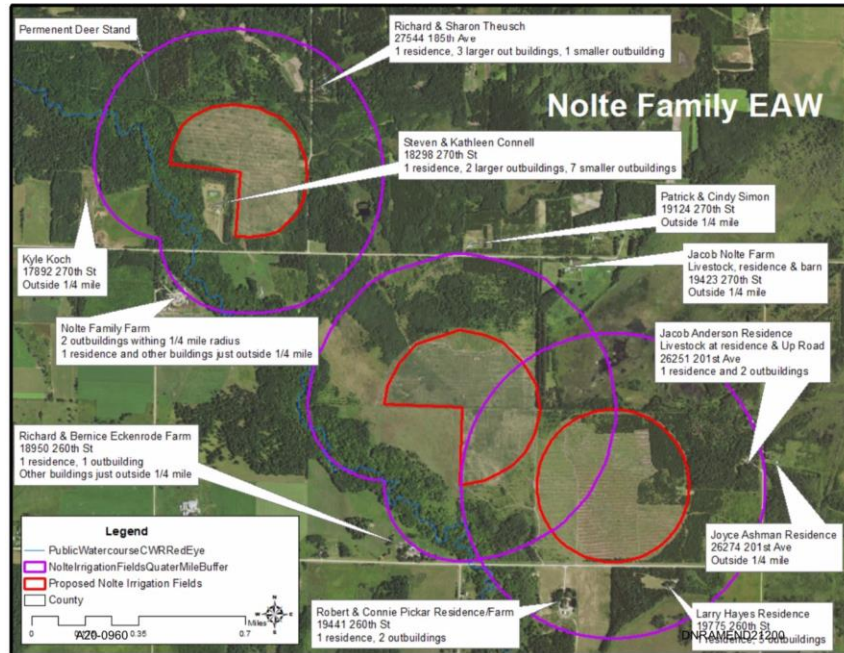


Figure 1: Map Showing Steven & Kathleen Connell Farm Within ¼ Mile Buffer Around Northern Irrigation Well on the Nolte Project Site. AR 657.

The Connell farm is located at 18298 270th Street in Sebeka, MN. It is immediately adjacent to the Redeye River and directly between the river and the proposed Nolte irrigated potato operation (see Figure 2). The farm is MN-360 in Minnesota’s searchable specialty crop registry (<https://mn.driftwatch.org/map>), which describes the Connell operation as using “organic growing practices to grow mixed vegetables, small fruits, tree fruits and melons.”

The Minnesota Department of Agriculture administers the DriftWatch registry with FieldWatch Inc. The registry allows specialty crop producers to communicate the

location of their pesticide sensitive sites to pesticide applicators. Specialty crop producers renew their locations annually and the Connell farm has been registered since 2013.



Figure 2: Connell Farm Location Next to Redeye River As Shown In Minnesota Specialty Crop Registry. <https://mn.driftwatch.org/map>.

B. History of Ms. Connell’s Contributions to Organic and Sustainable Farming Community

Kathy Connell has grown organic produce to sell at local markets for decades and also offered classes to educate future organic farmers and the public. She is an integral part of the sustainable farming community in Minnesota. She was an organic farm certifier in the region for a number of years, connecting and supporting the organic farming movement. She has also spoken and lead numerous workshops at conferences across Minnesota and is a staple at the annual Back-to-Basics conference held in the Pine

River-Backus school where hundreds attend (Figure 3). Kathy typically leads 1-2 workshops each year on farm practices and seed saving. Kathy has also taught at the New York Mills Cultural Center, KAXE local radio, and the Sustainable Farming Association Annual conference, reaching hundreds, but most-likely thousands of participants over her 24 years of farming and teaching in the Sebeka area. Kathy has additionally worked with the Wadena-Deer Creek School teaching students farm-to-table skills and was also hired as a garden consultant for the White Earth Tribal and Community College Extension garden, Mashkiikii Gitigan.

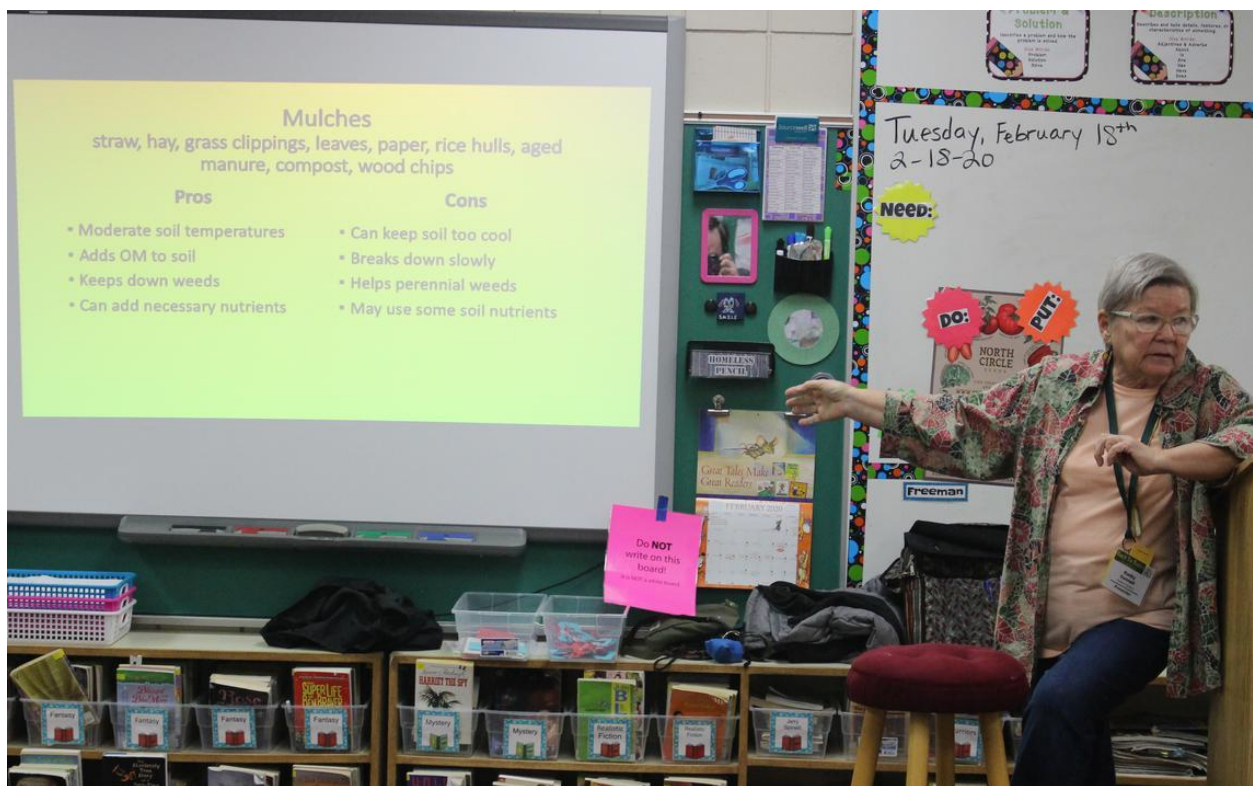


Figure 3: Kathy Connell of Redfern Gardens presented at the 2020 Back-to-Basics Event on Improving Garden Fertility (Travis Grimler, Echo Journal)

Kathy Connell is a humble champion and leader of the growing organic farming community and has provided fresh vegetables to local markets and taught hundreds of young and old farmers and gardeners the skills to produce food for themselves as well as their families and the local food economy. The Connell farm and Kathy Connell's efforts have been widely recognized. Josephine Marcotty, "Minnesota Struggles to Slow Deforestation, Protect Water," Star Tribune (Feb. 1, 2015) available at: <https://www.startribune.com/feb-1-forests-give-way-to-fields-part-of-high-stakes-transformation/290436161/>.

C. Potentially Significant Environmental Effects to the Connell Farm

The record includes substantial evidence of potential groundwater and pesticide drift effects that could harm the uniquely vulnerable neighboring organic farm.

i. Pesticide Drift:

Relators Toxic Taters and commenter Pesticide Action Network described how pesticide drift directly threatens neighbors and organic operations near pesticide application sites. AR 482 at DNR08321. Irrigated potato production presents a particularly serious threat because of the disproportionately heavy use of pesticides in potato production—fungicides are used on 97 percent of potato acres, herbicides on 94 percent and insecticides on 82 percent. AR 131 at 28.

Relators discussed Tupper et al. 2012, which evaluated drift by sampling air for pesticides at various locations and distances from application sites in North Central

Minnesota, including Wadena County. Tupper K.S., Jacobs N. et al., “Pesticide Drift Monitoring in Minnesota, June 13, 2006 – August 13, 2009,” (2012). Pesticide residues were found in 224 of 340 field samples taken at 19 locations in the Pineland Sands area, including 2 in Wadena County. Chlorothalonil was detected in 64 percent of the samples. In Wadena County, chlorothalonil was detected on 12 of 17 days of air sampling in 2006. In Becker County the pesticide was detected on 51 of 69 days of sampling in 2006. The record reflects that chlorothalonil is expected to be applied on the Nolte fields for potato production. AR 131 at 29, AR 484 at 47.

Moreover, a community health profile conducted by the Minnesota Department of Health in 2018 reported that the Central Sands Region had higher rates of pesticide poisoning emergency department visits compared to the statewide rates. Minnesota Department of Health, “Central Sands Community Health Profile, Minnesota Environmental Public Health Tracking and Biomonitoring Programs” (January 2018) available at:
<https://www.health.state.mn.us/communities/environment/biomonitoring/docs/centralsandsreport.pdf>.

Relators also discussed Lee et al. 2011, which published the results of a comprehensive review of pesticide drift incidents in 11-states. Lee S-J., Mehler L., Beckman J., et al., “Acute Pesticide Illnesses Associated With Off-target Pesticide Drift From Agricultural Applications: 11 States, 1998-2006,” *Environ Health Perspect*, 2011. The study found that 576 drift incidents occurred between 300 feet and 1 mile of the

application site; 152 occurred within 300 feet of application site. Moreover, 5 of the 10 largest drift incidents involved application of fumigants. Fully 606 of 738 incidents of fumigant drift occurred over ¼ mile from the application site. The fumigant Telone is expected to be used on the Nolte site. AR 131 at 28.

Relators comments add to detailed comments from the Minnesota Pollution Control Agency (“PCA”) in 2013 and PCA’s comments on the Nolte project EAW identifying the risk of pesticide drift and noting that a more thorough review of pesticide drift is needed. AR 484 at 47; AR 611. PCA’s comment on a 2013 EAW for a proposed irrigated potato project noted:

The EAW does not identify or discuss the use of pesticides or fungicides, or potential environmental effects resulting from pesticide or fungicide use, in potato production. In particular, the high likelihood of fungicide use for as long as this land is in potato production should be discussed at some level in several parts of this document in order for the EAW to be complete. The majority of all Minnesota potato farms use applications of fungicide and a high majority of these use chlorothalonil specifically. The application of chlorothalonil, presumably via crop dusting, should be a consideration when discussing, at a minimum, items 11, 17, 20, 23, or 30. Chlorothalonil is classified by the Environmental Protection Agency (EPA) as “very highly toxic” or “highly toxic” to aquatic invertebrates. The EPA Reregistration Eligibility Decision (RED) fact sheet also states that “Chlorothalonil can contaminate surface water via spray drift or through runoff and erosion. Chlorothalonil can be dissolved in runoff and adsorbed to sediment in the runoff.” As this proposed agricultural site has both wetlands and a stream that drains to the Crow Wing River, the potential for surface and groundwater contamination resulting from the use of pesticides and fungicides should be addressed in this environmental review.

AR 484 at 47.

ii. Soils with High Potential to Leach Nitrate to Groundwater and Flow Toward the Redeye River

The Environmental Assessment worksheet documents that 99.7 percent of the soils in the Nolte project site are loamy sands. AR 374 at 16. The EAW goes on to report that “the majority of the soils have high nitrate leaching potential if manure or commercial fertilizer is applied and from mineralization of soil organic matter.” AR 374 at 17. The record also reflects that groundwater occurs just 2 to 3 feet beneath the land surface and flows toward the Redeye River. AR 497 at 13; AR 486 at DNR08385; AR 374 at 42.

iii. Groundwater Contamination and Migration

Expert testimony by Dr. George Kraft, noted that the crop rotation proposed for the Nolte site would contaminate groundwater at levels 2 to 4 times the Safe Drinking Water Act limit of 10 mg/L even with strict adherence to University of Minnesota fertilizer recommendations. AR 486 at DNR08389.

Moreover, Minnesota geologist expert Jeff Broberg cited the Minnesota Department of Agriculture’s 2020 Bryon Township Study that found nitrate contamination in groundwater under a center pivot irrigation system was substantially above Safe Drinking Water Act Levels even under close crop supervision. He also noted that contaminated groundwater migrated offsite and that the study shows “nitrate migration in groundwater beneath a single center pivot field could be discharging hundreds to thousands of acre feet of nitrate contaminated groundwater into areas that are now free of nitrates.” AR 497 at 27.

iv. Risk of Well Interference and Contamination

In addition to potential well contamination with nitrates and pesticides, DNR acknowledged in its record of decision that all three Nolte project irrigation wells would draw water from leaky confined aquifers and several nearby domestic wells are at high risk for well interference. AR 711 at 5. Well interference occurs when pumping from high capacity wells, such as the irrigation wells on the Nolte project site, dewater the surrounding aquifer causing surrounding private wells to lose access to water as water levels recede below the pumps at affected wells. Minnesota Department of Natural Resources, “Well Interference Fact Sheet” (Oct. 2017) available at:

https://files.dnr.state.mn.us/waters/watermgmt_section/appropriations/well_interference_fact-sheet.pdf.

The record reflects there are 11 wells surrounding the Nolte project site about which DNR has no well interference information. AR 711 at 6. The wells on the Connell farm, the closest wells of any neighbors, are among the wells for which DNR has no information for evaluating well interference. AR 753 at 16. DNR also admitted that it has no way to evaluate potential contamination risk to surrounding private wells. AR 629 at DNRAMEND20223, cmt. 84d.

ARGUMENT

A. The Proposed Nolte Project Poses Potentially Significant Negative Environmental Harms to the Neighboring Organic Farm.

Minnesota Statute 116D.04, Subdivision 2a and Minnesota Rule 4410.1770, Subpart 1 require an EIS be ordered if a project has the potential for significant environmental effects. In assessing the potential for significant environmental effects, the EAW worksheet Section 9a specifically requires consideration of “existing land use of the site as well as areas adjacent to and near the site, including park, trails, prime or *unique farmlands*.” (emphasis added).

The Connell farmstead is clearly unique farmland registered and identified as such in the Minnesota Department of Agriculture (MDA) public database. Kathy Connell has practiced organic farming techniques that build soil health and crop diversity, never using chemical fertilizers or pesticides, for over 24 years on the neighboring farm. Moreover, the farmstead is only 300 feet away from the northern irrigation well on the Nolte project site.

As documented above, the record includes substantial evidence of potential environmental effects from pesticide drift, groundwater contamination and migration and well interference that could directly harm the uniquely vulnerable Connell organic farming operation. The Connell farm is only 300 feet from the irrigated cropland on the Nolte site which is well within the distance documented in studies above for substantial potential effects from pesticide drift and groundwater contamination. The Connell farm is also in the immediate pathway of the likely migration of contaminated groundwater from irrigated cropland on the Nolte project site to the Redeye River. Accordingly, pesticide drift and groundwater contamination threaten irreversible environmental and economic

harm to the Connell farm. In addition to air and groundwater contamination, DNR acknowledged in its record of decision the agency lacks the information needed to adequately assess the risk of well interference and contamination of neighboring domestic wells, including wells located on the Connell farmstead.

Despite these clear and well documented potentially serious environmental effects to the neighboring organic farmstead and the requirement to consider the same as part of the EAW, DNR issued a negative declaration on the need for an Environmental Impact Statement (EIS), without once evaluating the specific, unique and potentially irreversible effects to the adjacent organic farming operation.

B. The DNR failed to Adequately Consider Mitigation of Potentially Significant Negative Environmental Harms to the Neighboring Organic Farming Operation.

Minnesota Rule 4410.1700 Subpart 7 requires, as part of the EAW analysis, consideration of extent to which environmental effects are subject to “mitigation by ongoing public Regulatory authority.” Moreover, the Minnesota Supreme Court has held that mitigation measures considered as part of environmental review must be specific, targeted, and certain to be able to mitigate environmental effects. *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. Of Comm’rs*, 713 N.W.2d 817, 835 (Minn. 2006).

A recent case involving the Minnesota Public Utilities Commission (PUC) clearly establishes that mitigation measures for preventing or lessening harms to organic operations must specifically consider the unique threats to those operations and seek to

protect against the same. *See* Maccabee Goodman, Paula, “Pipelines, Powerlines and Organic Farms” Drake Journal of Agricultural Law (2009) available at: <https://atinadiffley.com/wp-content/uploads/Maccabee-Macro-FINAL2-1.pdf>. The Gardens of Eagan case concerned the proposed routing of a crude oil pipeline across an organic vegetable farm, and the PUC required specific mitigation measures aimed at protecting the potentially impacted organic farm. For example, the PUC required the project proposer works with an organic consultant to identify ways to minimize impacts to the organic farm and not apply prohibited substances to organic land. *Id.* at 33.

In this case, not only did DNR fail to evaluate the unique threats to the organic operation neighboring the Nolte project, the agency proposed no mitigation measures specific to the Connell Farm. Instead, DNR relied on a generic best management practices provided for under the Minnesota Agricultural Water Quality Certification Program and general soil health principles. AR 15, AR 374 at 18, 27, 28.

C. DNR is Required to Consider Economic, Employment and Sociological Factors Through an EIS.

Minnesota Statute 116D.04 Subd. 2a states that an “environmental impact statement must also analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented.”

The benefit that small, organic operations bring to local economies throughout Minnesota is not supposition. In greater North Central Minnesota, local economies receive significant support from small organic farms, like the Connell farm. In fact, small

local food farms—operations similar in size and scope to the 6.5-acre Connell farm—have an outsized impact on the local economy that is nearly twice the local economic impact of conventional agriculture. Pesch, R., Tuck, B., “Financial Benchmarks and Economic Impact of Local Food Operations,” University of Minnesota Extension (2015) available at: <http://hdl.handle.net/11299/179080>.

Tuck and Pesch 2015 included an in-depth farm financial study that measured the economic impact of local food farms and compared their impacts to conventional commodity agriculture in a 13-county area of Central Minnesota including Wadena County. Using an economic model called an input-output model, the study showed that 11 local food operations had an outsized positive impact on local economies because they had a greater proportion of their supply chain spending in the study area than the conventional commodity agriculture. Given these important economic realities, an EIS should be ordered so that environmental review of the Nolte project considers potentially significant harm to the local community economy that may result if the neighboring organic farm is unable to continue operations due to pesticide drift, water contamination or well interference.

CONCLUSION

Small organic and sustainable specialty farms like the food operation neighboring the Nolte project site benefit the environment and the economy. Consideration of potential harms to the Connell farm and accompanying negative ripple effects to ecosystems and local economies must be specifically considered through environmental review. Amici agree with Relators that DNR's failure to order an EIS constitutes legal error and is an arbitrary and capricious decision unsupported by substantial evidence. Because DNR failed to evaluate the potentially significant harms or adequately address specific mitigation measures to prevent or redress harms to the neighboring organic farm operation, Amici request this court reverse the DNR's Negative Declaration and order an EIS for the proposed Nolte project and the larger irrigated farming expansion action of which it is a part.

Dated: 20 November 2020

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the content of the accompanying paper brief and addendum or addenda, if applicable, is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alterations to a brief filed electronically must be separately served and filed in the form of an errata sheet.
2. I hereby certify that Amici Ryan Pesch, Larry Heitkamp, Janaki Fisher-Merrit, and Zachary Paige's foregoing brief conforms to the requirements of Minn. R. Civ. App. P. 128.02 and 132.01, Subds. 1 and 3(c) for a brief produced with a proportional font.
3. The length of Ryan Pesch, Larry Heitkamp, Janaki Fisher-Merrit, and Zachary Paige's brief is 3,325 words.
4. Amici Ryan Pesch, Larry Heitkamp, Janaki Fisher-Merrit, and Zachary Paige's brief was prepared using Microsoft Word 2016 in 13-point Times New Roman.

CERTIFICATION OF BRIEF LENGTH AND CONTENT

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3 for a brief produced with proportional font. The length of this brief is 6642 words. This brief was prepared using Corel Word Perfect for Windows, version 20.0.0.200.

I hereby certify that the content of the accompanying paper brief and addendum or addenda, if applicable is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alternations to a brief filed electronically must be separately served and filed in the form of an errata sheet.

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