OAH_____

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Swimply; Keith Hittner; Sheila Hittner; and Brandy Logan,

Petitioners,

v.

Minnesota Department of Health,

Respondent.

PETITION UNDER MINN. STAT. § 14.381

TO: The Office of Administrative Hearings, 600 Robert St. N., St. Paul, MN 55101; and Respondent Minnesota Department of Health, Orville L. Freeman Building, 625 Robert St. N, St. Paul, MN 55164:

The above-named petitioners hereby petition the Office of Administrative Hearings pursuant to Minn. Stat. § 14.381 for an order determining that Respondent Minnesota Department of Health is attempting to enforce a policy on "Residential Swimming Pool and Spa Rentals" as though it were a duly adopted rule. Because the policy is an unpromulgated rule, and is not duly adopted, Petitioners hereby petition and move the Court to declare MDH's actions an unpromulgated rule and invalid based on the following facts and law, and the attached affidavits.

To the extent applicable, Petitioners advise that if Respondent wishes to contest this Petition, it must file a written response with the judge of the OAH and serve copies on all parties, through the undersigned counsel, within ten (10) working days after this Petition is received. Minn. Stat. § 14.381, subd. 1(a); Minn. R. 1400.6600.

The Parties

1. Petitioner Swimply is an online marketplace for the hourly rental of pools, courts, entire homes, and other amenities. Homeowners use the Swimply website or app to list their tennis court, pool, or other amenity for hourly rental by guests. Guests then book and pay for their hourly rental on the Swimply platform. In return, Swimply collects a service fee from each rental. Swimply is a corporation which is incorporated in the State of Delaware and licensed to do business in the State of Minnesota, with the registered office address of 1209 Orange St., Wilmington, DE 19801.

2. Petitioners Keith and Sheila Hittner are individuals who own a home in Eagan, Minnesota. Their home in Eagan is their primary residence and contains an inground indoor pool, along with indoor event space and an outdoor patio. Starting in 2022, the Hittners listed their pool and event spaces for hourly rental on Swimply.

3. Petitioner Brandy Logan owns a home in Maple Grove, Minnesota with her husband. Her home is her primary residence and contains an outdoor pool. Starting in 2022, Logan listed her pool for hourly rental on Swimply.

4. Respondent Minnesota Department of Health ("MDE") is a statutory agency created pursuant to Minn. Stat. § 144.011 and tasked with the regulation of *public* pools pursuant to Minn. Stat. § 144.1222.

The Regulation of Public Pools in Minnesota

5. Minnesota has regulated public pools since 1995. *See* 1995 Minn. Laws, ch. 164, p. 506–07, H.F. 1037.

6. At that time, Minnesota laws merely authorized the Department of Health to adopt and enforce rules "for the operation, maintenance, design, installation, and construction of public pools and facilities related to them." *Id.* at 507. The statute did not specify which pools counted as public pools.

7. Under that statutory authority, the Department of Health issued regulations pertaining to public pools. *See* 19 S.R. 384-408, 1419-1422 (1994).

8. In those 1994 regulations, public pools were defined as

> any pool, other than a private residential pool, intended to be used collectively by numbers of persons, and operated by any person whether the person be an owner, lessee, operator, or concessionaire, and regardless of whether a fee for use is charged. A public pool includes, but is not limited to, pools operated by a person in a park, school, licensed child care facility, group home, motel, camp, resort, apartment building, club, condominium, hotel, manufactured home park, or political subdivision.

Id. at 1419.

9. And private residential pools were defined as "a pool connected with a single-family residence or owner-occupied duplex, located on private property under the control of the homeowner, the use of which is limited to family members or the family's invited guests. A private residential pool is not a pool used as part of a business." *Id.* at 386.

10. The Department of Health inspected and regulated some public pools directly, while others were regulated by local government under authority delegated by the Department of Health. *See* Minn. Stat. § 145A.07, subd. 1.

11. In 2008, a definition for "public pool" was added to Minnesota Law as part of the Abigail Taylor Pool Safety Act. 2008 Minn. Laws, ch. 328, § 6, p. 3. The legislation

also instructed that the old definition of public pool written by the Department of Health be replaced by the new statutory definition. *Id.* § 13, p. 8.

12. Minnesota Statutes now define a "public pool"

> as any pool other than a private residential pool, that is: (1) open to the public generally, whether for a fee or free of charge; (2) open exclusively to members of an organization and their guests; (3) open to residents of a multiunit apartment building, apartment complex, residential real estate development, or other multifamily residential area; (4) open to patrons of a hotel or lodging or other public accommodation facility; or (5) operated by a person in a park, school, licensed child care facility, group home, motel, camp, resort, club, condominium, manufactured home park, or political subdivision with the exception of swimming pools at family day care homes licensed under section 245A.14, subdivision 11, paragraph (a).

Minn. Stat. § 144.1222, subd. 4(d); *see also* Minn. R. 4717.0250, subp. 8.

13. The Act also added the requirement that an annual license is required for any person operating a public pool. 2008 Minn. Laws, ch. 328, § 8, p. 4–5; *see* Minn. Stat. § 157.16, subd. 1. Previously, licenses were only required for businesses engaged in food and beverage service or hotels with additional inspections required when the business had a public pool. *See* 1995 Minn. Laws., ch. 207, § 42, p. 1376; *id.* § 46, p. 1380.

14. The Abigail Taylor Pool Safety Act was passed in response to a tragedy that occurred at the Minneapolis Golf Club pool resulting in the death of six-year-old Abigail Taylor. Her death was caused by an open drain in the wading pool with heavy suction.

15. As explained by then-Representative Paul Thissen, the House author of the bill (H.F. 3812), the legislation was designed to respond to this tragedy in several ways. Health & Human Servs. Cmte., March 12, 2008, at 52:42-53:16, https://www.lrl.mn.gov/audio/house/2008/healthpol031208.mp3.

16. First, the legislation "expand[ed]" the definition of public pools to, as Representative Thissen explained, "all pools where the public has access." *Id.* at 53:17-46.

17. Next, the legislation required additional inspections before a new public pool was built. *Id.* at 53:47-54:16.

18. Third, the legislation would require specific drains on new public pools and upgrades on the drains in existing public pools. *Id.* at 54:17-55:36.

19. And finally, the legislation would require daily checks of public pool drain covers. *Id.* at 55:37-57.

20. At the same hearing, a representative from the Department of Health, the then-Director for Environmental Health, was asked by another Representative if the state knew "how many pools" and "where these pools are" that would be affected by the new legislation. *Id.* 56:19-30.

21. The Department of Health representative stated that "currently the Department of Health licenses about 1,000 public swimming pools in the state . . . the impact of this amendment in the law will draw in 700 additional we anticipate . . . those would be community pools, they might be health clubs, YMCAs, other facilities such as residential apartment complexes." *Id.* at 56:50-57:33. (cleaned up). In total, the Department of Health estimated that either the state or a local government unit would inspect and license 4,000 pools under the Abigail Taylor Pool Safety Act. *Id.* at 57:34-46.

22. Later in the hearing, the Department of Health representative was asked if the new legislation would "include things like hotel pools [and] the hospitality industry," to which he answered "yes." *Id.* at 1:01:20-:34.

23. On March 14, 2008, Representative Thissen presented the bill to the House Committee on Local Government and Metropolitan Affairs. *See* Local Gov. & Metro. Affairs Cmte., March 14, 2008, https://www.lrl.mn.gov/media/file?mtgid=1004645. He again stated that the bill would "expand[]" the definition of public pools to those pools where the public has access. *Id.* at 54:55-55:17.

24. When asked if he had a "rough idea of how many pools we may be talking about," Representative Thissen estimated that "700 new pools" would be within the ambit of state regulation under the new legislation. *Id.* at 58:08-:57.

25. At the Senate, the bill (S.F. 2833) was brought before the Health, Housing and Family Security Committee by Senator Geoff Michel. *See* Health, Hous. & Fam. Sec. Cmte., March 5, 2008, https://www.lrl.mn.gov/media/file?mtgid=850944.

26. Again, a representative for the Department of Health explained that the new legislation would affect public pools that are "used at residential apartment complexes, health centers, YMCAs, and other facilities of that type." *Id.* at 1:27:24-1:27:39 (cleaned up).

27. Much of the discussion at the Senate Health, Housing and Family Security Committee centered on the retrofitting requirements for drains on existing public pools and how drain covers would be inspected by staff. *Id.* at 1:25:00-1:37:00. One such discussion covered how "lifeguards" could get into the water and inspect the drains to ensure that drain covers are on right. *Id.* at 1:37:00-1:38:00.

28. Next, in a hearing at the Senate Finance Committee, Senator Ellen Anderson asked about "private swimming pools" and whether a "small home residential pool" would

have the same kinds of safety issues and be regulated. *See* Finance Cmte., April 18, 2008, at 25:55-26:09, https://www.lrl.mn.gov/media/file?mtgid=851129. A representative for the Department of Health said "no this bill does not apply to private residential swimming pools. The number of those pools in the State would be tens of times greater than the number of publicly available swimming pools. . . . Save for what would be included in this bill would be multifamily housing complexes so that apartment complexes, association types of pools that are managed by an association for a condominium or townhouse association will be subject to licensure and inspection under this bill." *Id.* at 26:10-27:01 (cleaned up).

29. There was also lengthy discussion about the "kiddie pools" available at parks in Minneapolis and other cities and how those local governments would pay for the installation of new drains. *See id.* at 9:00-13:00. In response, the Department of Health representative estimated that there were 61 wading pools in Minneapolis and three would require retrofitting of another drain. *Id.* at 12:06-12:24.

30. Upon information and belief, at the time, there were more than 61 *total* pools in Minneapolis with a depth of less than 24 inches. *See* Minn. R. 4717.0250, subp. 12. Also, according to PoolResearch.com, there are about 51,000 pools in Minnesota. *See* Michael Dean, *How Many Swimming Pools Are In the U.S.?*, Pool Research (Jan. 6, 2024), https://poolresearch.com/us-pool-data/. This number corresponds to the MDH representative's statement to legislators that the Abigail Taylor Act was not meant to apply to those pools, which would be "tens of times greater" in number than the number of pools available to the public *generally*.

31. The bill was subsequently passed by both the House and Senate in May 2008 after the House added an amendment tasking the Department of Health with completing an inventory of how many pools would fall under these new regulations and who owns them. Floor Session, 85th Legislature (Senate), May 12, 2008, at 3:20:05-20:46, https://www.lrl.mn.gov/media/file?mtgid=851229. The bill was signed into law by Governor Tim Pawlenty on May 16, 2008.

32. That inventory was completed on January 15, 2009. *See* Minnesota Department of Health, Abigail Taylor Pool Safety Act, Report to the Minnesota Legislature, https://www.health.state.mn.us/communities/environment/recreation/pools/docs/tayloractreptoleg.pdf.

33. The Department of Health determined that there were 3,439 public pools licensed in Minnesota at the time of the report and 308 additional pools were licensed after the Abigail Taylor Pool Safety Act was passed. *Id.* at 6.

34. Of those pools, the Department of Health identified the following types of owners and operators: (1) hotel, motel, resort, timeshare, or lodging facility; (2) apartment, condo, townhouse, homeowner's association, or other multi-family housing; (3) government (parks, recreation centers, etc.); (4) fitness center, health club, YMCA/YWCA, waterpark, or similar; (5) school; (6) recreational camping area; hospital, clinic, therapy center, or nursing home; (7) mobile home park; (8) youth camp; and (9) licensed child care. *Id.* at 6.

35. In sum, the Department of Health did not identify *any* single-family homes as potentially falling within the ambit of the State's regulatory authority after the passage of the Abigail Taylor Pool Safety Act.

36. This is despite VRBO and Airbnb already operating in the state at the time. VRBO, for example, was founded in 1995. *See About*, VRBO, https://www.vrbo.com/about/. And, upon information and belief, even before the internet, Minnesota was a popular vacation destination and homes were rented through realtors.

37. The MDH's failure to include *any* single-family homes as within the Act's ambit demonstrates that MDH knew, contemporaneous with the passage of the law, that private residential pools are not within the Act's regulatory ambit, even if a small fee is charged to sporadic guests at said pools.

38. Further, the MDH's reliance on the much smaller number of 3,439 pools, instead of the much larger number of private pools in the State, to fulfill its duties under the law in completing the survey, demonstrates that MDH knew when the Act was passed that Petitioners' pools would not be within its regulatory ambit.

39. Since then, the Department of Health has not undertaken any significant rulemaking regarding its regulation of public pools in Minnesota.

40. Notably, after the Abigail Taylor Pool Safety Act was passed, the Department of Health did not update or change its definition of "private residential pool." *See* Minn. R. 4717.0250, subp. 7.

41. The overwhelming legislative history evidence shows that the Abigail Taylor Act did not intend to include private residential pools in its regulatory ambit, and did not

authorize the MDH to regulate them, even if owners of private residential pools allow sporadic invitees to use these pools for a small fee. Likewise, the same history demonstrates that the legislature did not intend for MDH to require private single-family homeowners across the state to hire lifeguards, conduct physical inspections of their pools (especially not when out of town), or spend six-figures to gut and fully retrofit their pools.

42. A separate federal law (the Virginia Graeme Baker Pool Act) went into effect on December 19, 2007, requiring all pool drain covers manufactured or sold in the United States to conform to the entrapment protection standards set by the American National Standards Institute and published by the American Society of Mechanical Engineers. *See* 15 U.S.C. § 8003(b).

Respondent's Enforcement of its "Residential Swimming Pool and Spa Rentals" Unpromulgated Rule Against Petitioners

43. Swimply currently hosts its users' listings of pools, tennis courts, and other amenities for rent across the country. *See Swimply*, https://swimply.com/.

44. Swimply hosts began offering pools, event spaces, and other amenities for rent in the Minneapolis area in 2020.

45. There are currently about 4 pools available for hourly rent on the Swimply's platform in Minneapolis, and 46 pools in Minnesota that were available for rent on Swimply, but are not currently taking bookings.

46. The majority of Swimply's hosts offer hourly rental of the pool at their primary residence as a way to earn extra income when they are not using their pool.

47. On May 26, 2021, Josh Skaar, then listed as an Attorney with the Legal Unit of the Department of Health, sent a letter to Swimply declaring that "Minnesota statutes, section 157.16, subdivision 1, requires that a license be obtained before any person may engage in the business of operating a public pool. Swimply's website apparently allows users to rent public pools in Minnesota but does not indicate whether these pools are operated by a licensed person." Skaar asked Swimply to contact him to "discuss this matter further."

48. Likewise, on July 21, 2021, Skaar, now the Attorney and Department Rulemaking Coordinator of the Department of Health, sent an email to Swimply's co-founder and board member, Asher Weinberger. That email read:

> As you may know, Minnesota Statutes, section 157.16, subdivision 1, requires one to obtain a license to operate a public pool. The definition of a "public pool" is found at Minnesota Statutes, section 144.1222, subd. 4(d), and includes pools that are "open to the public generally, whether for a fee or free of charge." Swimply's website apparently allows users to rent their pools to members of the public, but it does not provide information that allows renters of the Minnesota Department of Health to verify compliance by pool owners with applicable laws.
>
> I ask that you contact me promptly to discuss this matter and how Swimply and MDH can work together to ensure compliance with Minnesota laws regarding the health and safety of public pool users. You may reach me by telephone at (651) 201-5923.

49. Notably, Swimply users retain the right to accept or decline any request to rent their pool. If a Swimply host does not want to rent their pool to a certain individual, they do not have to. Swimply hosts will often "chat" with a potential renter on the Swimply platform before deciding whether to invite them to use their property.

50. In response, Swimply reached out to Respondent and denied that there were any "public pools" available for rent on its platform, only private residential pools that are not open to the public generally and which Swimply users make temporarily and sporadically available to their paying guests.

51. On August 25, 2021, the Department of Health published a guidance document on its website titled "Residential Swimming Pool and Spa Rentals." *See* Minn. Dept. of Health, *Residential Swimming Pool and Spa Rentals*, Aug. 25, 2021, https://www.health.state.mn.us/communities/environment/recreation/pools/docs/residentialpoolfaqs.pdf.

52. In that document, Respondent declared as follows:

> Minnesota statutes and rules clearly define "public pool" and "private residential pool." A public pool means any pool other than a private residential pool that is available to the public under a variety of circumstances. A private residential pool does not include a pool used as part of a business.
>
> A homeowner that rents their pool to customers via a sharing economy app or other platform has effectively turned their pool into a public pool. Pools and spa pools available for use as part of a vacation home rental are also considered public pools.

Id. at 1.

53. Unlike previous letters sent to Swimply, this guidance document affirmatively declares that private residential pools rented out sporadically are "for a business," and therefore public pools, Minn. R. 4717.0250, subd. 7, and also open to "the public generally," and therefore a public pool, Minn. Stat. § 144.1222, subd. 4(d)(1).

54. Importantly, this is *not* what the Abigail Taylor Act says. The legislature defined public pools and left private residential pools out of that definition. *See* Minn. Stat. § 144.1222, subd. 4. Unless a pool falls under one of the legislature's defining characteristics for "public pool," it is not a public pool.

55. Being open to the public generally is different from what Swimply's users do, by sporadically allowing invitees to use their pools for a small fee. *See id.* subd. 4(d)(1) (defining public pools as those "open to the public generally, whether for a fee or free of charge"). All Minnesota-based Swimply users rent their pools connected to a single-family residence, located on private property, under the control of the homeowner, and only rent to approved guests.

56. Moreover, the guidance document expands the reach of Minn. R. 4717.0250, subp. 7, and conflicts with the Abigail Taylor Act by reversing the terms of the rule.

57. Courts do not allow administrative rules to *expand* substantive statutory provisions. *See Wallace v. Commissioner of Taxation*, 289 Minn. 220, 231 (1971) ("It is well established that the legislature may confer discretion on the commissioner in the execution or administration of the law. It may not give him authority to determine what the law shall be or to supply a substantive provision of the law which he thinks the legislature should have included in the first place."). When they do so, the rule is invalid and the statute controls. *See In re SIRS*, 994 N.W.2d 333, 341 n.8 (Minn. App. 2023).

58. The only way to avoid conflict here is to read Minn. R. 4717.0250, subp. 7 in a straightforward and logical way: "A pool used as part of a business is not a private residential pool" means that "private residential pools" are "not a pool used as part of a

business." This is consistent with the statutory catch-all definition of public pools as only those pools that are "open to the public generally" in Minn. Stat. § 144.1222, subd. 4(d)(1).

59. This is also consistent with how the Minnesota Supreme Court has treated other statutes. For example, Minn. Stat. § 13.65, subd. 1, states that "[t]he following data created, collected, and maintained by the Office of the Attorney General are private data on individuals," and then lists four subdivisions. Some of those subdivisions, "clearly do not have to be about individuals," but it did not matter. *Energy Pol'y Advocates v. Ellison*, 980 N.W.2d 146, 158 (Minn. 2022). "The statutory classification could not be clearer," so when a statute defines certain government data as "private data on individuals," that data is "private data on individuals," even where *no individual data subject can be found* within the data. *Id.*

60. The lesson from *Energy Policy Advocates* is that when the legislature defines a term, it is what the legislature says it is. This is especially true where, as here, this is the only reasonable interpretation of the statute and rule: a pool that is not open to the public *generally* is a private residential pool, which is not considered "used as part of a business" for purposes of the Act's regulatory scope.

61. Moreover, the legislature has been clear that it gets to define what a private residential pool is, not the MDH. In Minn. Stat. § 144.1222, subd. 2a, for example, the legislature simply declared that "portable wading pool[s]" which otherwise could fall into the definition of a "public pool" because of where they are located are, "for purposes of public swimming pool regulations under Minnesota Rules, chapter 4717," "defined as a private residential pool." A private residential pool is what the legislature says it is.

62. Consistent with *Energy Policy Advocates*, Minn. R. 4717.025, subp. 7 cannot be read to convert every private residential pool into a public pool if owners charge any "cover" for use.

63. The guidance document therefore expands the applicability of Minn. R. 4717.025, subp. 7, and, in doing so, conflicts with the statutory definition of "public pools."

64. The Department of Health has not undertaken *any* rulemaking related to the sharing economy or the temporary rental of private pools, but the guidance document is an "agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency." Minn. Stat. § 14.02.

65. This guidance document is part of MDH's unpromulgated rule applying and redefining the Abigail Taylor Act vis-à-vis private single-family residential homeowners.

66. This unpromulgated rulemaking has devastating consequences for Swimply and Swimply users like Petitioners.

67. First, the guidance document explains that "[a]ll public pools are inspected regularly by trained environmental health specialists who ensure that the requirements are being met and that the pool is safe to enjoy." *Residential Swimming Pool and Spa Rentals*, *supra* ¶ 51, at 2.

68. Further, the guidance document stated that public pools must comply with the requirements of the Abigail Taylor Act, *see id.* at 2–3, and must be constructed according to the pool construction code with "an approved shape, an appropriately sloped floor, and approved designs for side walls, corners, and ledges," *id.* at 3.

69. Additionally, public pools are required to have an installed water treatment system, as "[d]isinfectant chemicals" are "not allowed" to be added manually in public pools, like they oftentimes are in residential pools. *Id.* at 4. Public pools must also be operated by an individual "who has completed an approved training course," and must test the water chemistry daily "with an approved test kit" and maintain daily records. *Id.* The testing strips used by many residential pool owners "do not meet code requirements." *Id.*

70. The document concludes by explaining that public pools can only be licensed if the construction plan is reviewed and approved by the Department of Health. *Id.* at 5. "After construction is complete but prior to opening, an inspection is done to ensure that the pool has been constructed according to the plan." *Id.* If a residential pool owner has received an enforcement letter for renting their pool to others, the Department of Health stated that "pool owners must discontinue renting their pool to others until they meet all the construction requirements of a public pool and become licensed." *Id.* at 6.

71. Upon information and belief, requiring private residential pool owners to transition their pool to a public pool would require substantial construction, potentially totaling tens of thousands of dollars, and substantial daily maintenance and inspection that would be nearly impossible for homeowners.

72. Swimply responded in writing to Mr. Skaar at the Department of Health on May 16, 2022, through legal counsel.

73. In that letter, Swimply noted that under Minn. R. 4717.0250, subp. 7, a private residential pool is a "pool connected with a single-family residence . . . located on private property under the control of the homeowner, the use of which is limited to family

members or the family's invited guests. A private residential pool is not a pool used as part of a business."

74. However, as discussed above, the only way to read Minn. R. 4717.0250, subp. 7, as consistent with the statute is that a pool that is not open to the public *generally* is a private residential pool, which is not considered "used as part of a business" for purposes of the Act's regulatory scope.

75. As a result, the MDH has engaged in unpromulgated rulemaking by expanding the applicability of Minn. Stat. § 144.1222, via its new interpretation of Minn. R. 4717.02250, subdp. 7 in the guidance document.

76. Moreover, in the letter, Swimply explained that the Department of Health's August 25, 2021, guidance document declaring that a pool rented on the sharing economy is suddenly a "public pool" exceeds the Department of Health's statutory authority by redefining the statutory definition of a "public pool." The fact that a pool is used as part of a business is irrelevant to whether it is considered a "public pool."

77. Furthermore, the Department of Health is only empowered under Minn. Stat. § 144.1222, to adopt and enforce rules relating to the operation of "public pools," not to define *or redefine* what a public pool is.

78. Additionally, in the letter, Swimply explained that Minn. Stat. § 144.1222 "clearly and intentionally removes a private residential pool from the definition of public pool. The phrase 'public generally' from the subd. 4(d) test, while not defined, remains inapplicable because a Swimply Host may still regulate what guests are allowed to use their property and how."

79. Airbnb and the sharing economy existed prior to 2008, when the Abigail Taylor Pool Safety Act was passed, so the Minnesota legislature could have directly responded to the rental of private homes with pools if it determined it was necessary to do so.

80. Finally, the letter stated that the Department of Health's safety concerns did not justify the action it was taking. An invited guest using a private pool is at no less safety risk from the pool than a paying guest. Moreover, Swimply provides hosts with liability insurance coverage and allows users to provide feedback and ratings so any potentially unsafe listing could be removed.

81. Josh Skaar responded on May 23, 2022. That letter read:

> I write to respond to your letter dated May 16, 2022, regarding pool rentals in Minnesota reserved via the Swimply app. Therein, you express concerns with the department's Residential Swimming Pool and Spa Rentals, Frequently Asked Questions document (Pool FAQ).
>
> As a threshold matter, the Pool FAQ does not carry the force and effect of law. Instead, it provides basic information about the legal obligations Minnesota law places on individuals who engage in the business of allowing members of the public to rent their pools, directly or as part of a package that also allows customers to stay at the residence where the pool is located. In enforcement matters, the department applies the plain language of the applicable statutes and rules to the facts of each case.
>
> I also want to make clear that MDH neither intends to, nor argues that it could, enforce Minnesota's pool laws against Swimply. We do not wish to interfere with Swimply's operations in Minnesota or to prevent its users from lawfully renting their pools here. We only ask that all Minnesota pool operators follow applicable laws to protect the health and safety of the people enjoying their pools.
>
> Finally, you indicate that you would like Minnesota's pool laws to be amended in a way that you believe would be more business friendly. I encourage you to contact the Minnesota Legislature, which is empowered to

> make laws in this state. You can learn more about the legislature, what laws are currently under consideration, their status, and how to contact legislators at: https://www.leg.mn.gov/.

82. Despite claiming that its pool guidance document does not have the force of law, Respondent has continued to enforce it against Swimply users. Further, it meets exactly the definition of a rule under Minn. Stat. § 14.02.

83. Swimply has numerous users that have received enforcement letters from the Department of Health. Some of these letters threatened "further enforcement action" including an administrative penalty of up to $10,000.

84. As a result, many individuals in Minnesota have stopped listing their pools for rent on Swimply or advertised their pool less. Swimply has lost almost 100 listings since the MDH published their unpromulgated rule in 2021, leading to a loss in revenue in Minnesota. Swimply is harmed by the MDH's unlawful enforcement of an unpromulgated and invalid rule.

85. Petitioners Keith and Sheila Hittner received an enforcement letter directly from Peggy Spadafore at the Minnesota Department of Health on June 27, 2023. In part, that letter read:

> Minnesota Statute 144.1222 defines a public pool as such- "Public pool" means any pool other than a private residential pool, that is: (1) open to the public generally, whether for a fee or free of charge; (2) open exclusively to members of an organization and their guests; (3) open to residents of a multiunit apartment building, apartment complex, residential real estate development, or other multifamily residential area; (4) open to patrons of a hotel or lodging or other public accommodation facility; or (5) operated by a person in a park, school, licensed child care facility, group home, motel, camp, resort, club, condominium, manufactured home park, or political subdivision with the exception of swimming pools at family day care homes licensed under section 245A.14, subdivision 11, paragraph (a).

> Because you are advertising this pool for use by the public, we would not consider it a true private residential pool. Minnesota Statutes, section 157.16, subdivision 1, requires that a license be obtained before any person may engage in the business of operating a public pool.
>
> **You must respond to these alleged violations, IN WRITING, within ten (10) days after receipt of this letter.** Your response should indicate if compliance was achieved and any additional information we should know. We will consider your response in determining whether any further enforcement action is appropriate, including the assessment of an administrative penalty of up to $10,000.

(hyperlink removed).

86. In response, Petitioner Keith Hittner called the Department of Health that same day. During that phone call, he was told that the Swimply website was essentially a "hit list" for enforcement actions by Respondent. He was also told that when money is exchanged, pools will be treated as public pools, no matter what the other attributes of the pool are.

87. The Hittners were told there was a complaint about their pool but were not given any further information by the Department of Health. The Hittners live on a private street.

88. During that phone call, Petitioner Keith Hittner tried to figure out if there were some simple steps he could take to comply with what the Department of Health said the law required. He quickly realized that it would cost tens of thousands of dollars to turn his private residential pool into a public pool.

89. Petitioner Keith Hittner followed up with an email to Peggy Spadafore at the Department of Health on July 10, 2023 stating that the Hittners have removed their listing from Swimply and canceled upcoming bookings.

90. Later on August 16, 2023, Petitioner Keith Hittner emailed Ms. Spadafore again, asking "if something has changed? I was just on the swimply website and there are dozens of pools in Minnesota listed that are just like ours. Can we start offering our pool to swimmers again?"

91. Ms. Spadafore responded the next day stating that "nothing has changed with MDH regarding our regulation of swimming pools."

92. The Hittners now list their private pool as part of a "space" to host parties or events on Swimply, instead of as a swimming pool, for fear of enforcement actions by Respondent. The Hittners have suffered financially from this decision because their listing is displayed less prominently on the Swimply website.

93. The Hittners are always home when their space is being used by Swimply guests and they review the rules for using their home with their guests.

94. The Hittners miss being able to prominently advertise and rent their indoor pool on Swimply, as their space brought a lot of joy to their guests, especially in cold winter months.

95. Additionally, Swimply users have received enforcement letters from local government units which have delegated enforcement authority from the Department of Health. *See* Minn. Stat. § 145A.07, subd. 1; *see also Minnesota State and Local Food,*

Pools, and Lodging Contacts, Minn. Dept. of Health, https://www.health.state.mn.us/communities/environment/food/docs/license/locals.pdf.

96. Petitioner Logan received a letter from the City of Maple Grove on July 3, 2024. That letter stated that "[p]ools are not permitted to be rented in the city of Maple Grove. Renting of pools does not follow Maple Grove's Home Occupation Rules or rental ordinances."

97. Attached to the Maple Grove letter was Sec. 36-3 of the Maple Grove Code of Ordinances, which says nothing about the renting of pools.

98. Logan responded to the letter via email on July 9, 2023, writing that "I have reviewed the ordinance provided and do not once see the word pool stated anywhere or any direct language about pools." Logan asked for clarification so she could know what she has been accused of.

99. In response, on July 12, 2024, Ben Blauert, the Zoning Enforcement Officer for Maple Grove did not clarify how Logan's actions violated Maple Grove ordinances. Instead, he wrote: "It has been brought to my attention that pool rentals within the state of Minnesota is regulated by the Minnesota Department of Health. It does not appear that the pool rental at your property is following Minnesota state statutes and has been reported to the Minnesota Department of Health."

100. Logan then received a cease-and-desist letter from Hennepin County on July 31, 2024, the delegated enforcement authority for public pool licensing. *See Minnesota State and Local Food, Pools, and Lodging Contacts*, Minn. Dept. of Health, https://www.health.state.mn.us/communities/environment/food/docs/license/locals.pdf.

101. That letter stated that Logan had "been found to be operating your private outdoor swimming pool as a public swimming pool without a valid Hennepin County License." Additionally, the letter stated:

> Your pool is considered a "private residential pool" and does not meet the requirements of the State of Minnesota Department of Health Rules Chapter 4717. The definition of Private Residential Pool in the rule is: "Private Residential Pool" means a pool connected with a single-family residence or owner-occupied duplex, located on private property under the control of the homeowner, the use of which is limited to family members or the family's invited guests. A private residential pool is not a pool used as part of a business (see MN Rule 4717.0250 Subpart 7).
>
> Using your pool as "part of business" would mean that your pool is no longer a private residential pool. Therefore, your pool would be subject to comply with all the rules pertaining to public pools (chemical readings, fencing, signage, safety equipment, etc.). Should you move forward in obtaining a license for a public pool, your private pool must cease operation to the public until your pool planes have been approved for operations through Minnesota Department of Health. Additional pool plan information can be found at https://www.health.state.mn.us/communities/enviornment/recreation/pools/poolprinsp.html
>
> Failure to comply with the orders stated in this Notice to Cease and Desist may result in additional enforcement action. If you have any questions, please contact our main office at 612-543-5200.

102. As a result, Logan feels threatened by her state and local government and has decided to advertise her pool less prominently on the Swimply platform, which has resulted in less income for her and her family.

103. Logan only rents the pool located at her family residence to individuals she identifies as her "guests" and she has declined to rent her pool to some individuals who requested a rental on Swimply.

104. Logan only rents her pool when she is home to supervise her guests' use of her pool.

105. On August 6, 2024, Swimply sent a letter, through legal counsel, to Hennepin County that was substantially similar to the letter sent through legal counsel to the MDH on May 16, 2022.

106. Swimply did not receive a response to this letter or any indication that Hennepin County would cease enforcement action under its delegated authority from Respondent.

Respondent is Enforcing an Invalid Unpromulgated Rule

107. An administrative rule is "every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4; *see In re Shakopee Mdewakanton Sioux Cmty.*, 988 N.W.2d 135, 141 (Minn. App. 2023).

108. Rules that did not go through the Minnesota Administrative Procedure Act's notice-and-comment procedures are unpromulgated rules. *In re Shakopee Mdewakanton*, 988 N.W.2d at 141.

109. Respondent did not engage in notice-and-comment rulemaking when publishing its "Residential Swimming Pool and Spa Rentals" guidance document on August 25, 2021.

110. This document was a "statement of general applicability and future effect," meaning it qualifies as a rule under Minnesota Law. Minn. Stat. § 14.02, subd. 4.

111. It also "make[s] specific the law enforced or administered by the agency," meaning the Department of Health was required to "use MAPA's notice-and-comment procedures." *In re Shakopee Mdewakanton*, 988 N.W.2d at 143–44 (quoting *In re PERA Salary Determinations Affecting Retired & Active Emps.*, 820 N.W.2d 563, 570 (Minn. App. 2012)).

112. Specifically, the guidance document announces that "[a] homeowner that rents their pool to customers via a sharing economy app or other platform has effectively turned their pool into a public pool." Further, it announces that "[t]o avoid enforcement actions, pool owners must discontinue renting their pool to others until they meet all the construction requirements of a public pool and become licensed."

113. These requirements are not apparent in Minnesota law or Minnesota rules, both of which state that public pools are those "open to the public generally, whether for a fee or free of charge." Minn. Stat. § 144.1222, subd. 4(d); *see* Minn. R. 4717.0250, subp. 8.

114. Although an agency determination "is not considered an unadopted rule when the agency enforces a law or rule by applying the law or rule to specific facts on a case-by-case basis," Minn. Stat. § 14.381, Respondent's guidance document does not apply the law on a case-by-case basis but broadly announces that *all* pool owners must discontinue rentals of their private pools, *see In re Shakopee Mdewakanton*, 988 N.W.2d at 144 (explaining that an email "articulat[ing] a blanket policy for how the board would make approval decisions in the future" was a "statement of general applicability and future effect," and thus an unpromulgated rule (quoting Minn. Stat. § 14.01, subd. 4)).

115. Thus, the MDH's policy toward private residential pools sporadically rented out by single-family homeowners, including MDH's published "guidance" on the same, is an unpromulgated rule.

116. "In general, an unpromulgated interpretive rule is valid if: (1) 'the agency's interpretation of a [statute] corresponds with its plain meaning' or (2) 'the [statute] is ambiguous and the agency interpretation is a longstanding one.'" *see In re Shakopee Mdewakanton*, 988 N.W.2d at 145 (quoting *Cable Comms. Bd. v. Nor-West Cable Comms. P'ship*, 356 N.W.2d 658, 667 (Minn. 1984)).

The plain language of the statute shows that the MDH cannot regulate private pools.

117. Minn. Stat. § 144.1222, subd. 4(d) is unambiguous. It clearly removes a private residential pool from the definition of a public pool. A private homeowner renting their residential pool temporarily to invited guests does not convert it them into "a person in a park, school, licensed childcare facility, group home, motel, camp, resort, club, condominium, manufactured home park, or political subdivision." And private residential pools being rented temporarily are not "open to the public *generally*" (emphasis added), because homeowners control who has access to their pool at all times.

118. The word "generally" after "open to the public" conclusively shows that the Abigail Taylor Act was designed to regulate pools that are open to the public "as a rule." *Generally*, Merriam-Webster.com (definition b), https://www.merriam-webster.com/dictionary/generally (defining "generally" to mean "as a rule").

119. Private single-family homeowners, and Petitioners among them, do not open their homes to the public "as a rule." They open their homes to the public as an *exception*

to the rule of their private ownership. They do not have regular customers, they do not have staff to conduct inspections, and they do not have monthly dues or other obligations. Thus, they are different from the types of pools, privately owned, to which the Taylor Act *did* extend regulation: YMCAs, country clubs (like the Minneapolis Golf Club, the location of Abigail Taylor's injury), townhome associations, etc.

120. Likewise, as discussed above, even under Minn. R. 4717.0250, subp. 7, private residential pools are, by definition, "not a pool used as part of a business." They are unlike other private entities within the Act's regulatory ambit, such as country clubs and YMCAs, whose pools are intentionally, regularly, and generally used as "part of a business," for which they have paid staff working daily in their facilities.

121. The plain language of the Abigail Taylor Act thus exempts private single-family homeowners from the MDH's regulatory ambit, even if those private homeowners charge a small fee for use of their pool by others on a sporadic basis.

Even if the Abigail Taylor Act is ambiguous, the legislative history conclusively demonstrates that the MDH does not have the authority to regulate private pools under the Act.

122. Even if Minn. Stat. § 144.1222, subd. 4(d) is ambiguous, Respondent's interpretation is not longstanding. *See In re PERA*, 820 N.W.2d at 571 (explaining that an interpretation may be longstanding based on a number of factors including "the duration and the consistency of an agency's interpretation of a statute . . . the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

123. Although the Abigail Taylor Pool Safety Act was passed in 2008, Respondent did not publish its guidance document or contact Swimply until 2021.

124. Airbnb and other sharing economy platforms have facilitated the rental of private pools since at least 2008. Upon information and belief, VRBO has been renting private homes with pools on behalf of their owners since the mid-1990s, and private rental agreements have authorized vacation rentals in Minnesota even longer.

125. To Petitioners' knowledge, Respondent did not attempt to enforce Minn. Stat. § 144.1222, subd. 4(d) against any sharing-economy user until 2017, when the Department of Health visited and inspected a vacation rental which included a swimming pool and hot tub. *See* Order on Motion to Dismiss, *In re Administrative Penalty Order Issued to Kari and Joel Barrick*, OAH No. 8-0900-37111 (Jan. 26, 2021).

126. Additionally, Respondent's reasoning is invalid because, as Swimply has pointed out in its letters to Respondent, there is no safety justification to require licensure for the operation of a private pool with invited guests who are paying, but not to require it for invited guests that do not pay.

127. The legislative history of Minn. Stat. § 144.1222 discussed *supra* also supports Petitioners' view because there was clearly no legislative intent to apply the Abigail Taylor Pool Safety Act to private residential pools.

128. Further, the legislature "does not intend a result that is absurd…or unreasonable." Minn. Stat. § 645.17(1). Importing the MDH's language from Minn. R. 4717.0250, subpart 7 to give meaning to "private residential pool" in Minn. Stat. 144.1222, subd. 4(d), would be contrary to the Supreme Court's interpretive guidance from *Energy*

Policy Advocates and would be absurd. It would require one to construe the sentence, "[a] private residential pool is not a pool used as part of a business," to mean that when a 16-year-old high-schooler invites his or her friends to the parents' house for a pool party and charges a $5 "cover" for the costs of food and beverages, the high-schooler has suddenly converted the parents' pool into a "pool used as part of a business" and thus a "public pool." Yet that is the logical end of MDH's unpromulgated rule, which goes far beyond even the text of MDH's invalid Rule 4717.0250 subpart 7.

129. As a result, the Department of Health's "Residential Swimming Pool and Spa Rentals" guidance document is an invalid unpromulgated rule.

In the Alternative, Respondent's Enforcement Actions Have Exceeded its Statutory Authority

130. If the Department of Health is not enforcing an unpromulgated rule, it has exceeded its statutory authority.

131. Courts do not defer to agency interpretations of unambiguous rules and regulations. *See In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 744 (Minn. 2021).

132. Minn. Stat. § 144.1222, subd. 1 only authorizes the Department of Health to adopt and enforce rules related to public pools, not to define what a public pool is.

133. Minn. R. 4717.0250, subp. 7 defines a private residential pool in a manner that is inconsistent with Minn. Stat. § 144.1222 by stating that "[a] private residential pool is not a pool used as part of a business." The plain language of Minn. Stat. § 144.1222,

subd. 4(d) states that public pools are defined whether they are made available to the *public generally* "for a fee or free of charge."

134. Although "administrative agencies may adopt regulations to implement or make specific the language of a statute, they cannot adopt a conflicting rule." *Billion v. Comm'r of Revenue*, 827 N.W.2d 773, 781 (Minn. 2013) (quotation omitted).

135. Respondent did not update Minn. R. 144.0250, subp. 7 after the Abigail Taylor Pool Act was passed in 2008 and the definition of a public pool was changed.

136. Respondent has continued to enforce Minn. Stat. § 144.1222 and Minn. R. 144.0250 in a manner that is inconsistent with their statutory authority, by regulating pools that are not "public pools." Respondent has allowed entities exercising its delegated authority, like Hennepin County, to do so as well.

Prayer for Relief

A. Based on the foregoing allegations, the attached affidavits and declarations, any reply memorandum allowed by the Court, and any oral argument of counsel, Petitioners respectfully petition and move the Office of Administrative Hearings to declare that Respondent has been enforcing an invalid unpromulgated rule by broadly defining private pools owned by Minnesotans that are not generally open to the public (including Swimply users, and the individual Petitioners' pools) as "public pools," by instructing its delegees of that authority, and by enforcing or allowing enforcement of this unpromulgated rule by its delegees. Petitioners further respectfully request and move this Court to order Respondent and its delegees to cease and desist from any further such regulation.

B. To the extent this Court has jurisdiction to do so, Petitioners also request that the Court declare Minn. R. 4717.0250, subp. 7 an invalid rule insofar as it redefines certain private residential pools as public pools. If this Court does not have jurisdiction to do so, Petitioners preserve this issue and all others on which this Court passes judgment for appeal to the Minnesota Court of Appeals.

C. Petitioners also request any other or further relief that the Court deems just and equitable.

D. Petitioners respectfully request oral argument on this Petition, as allowed by Minn. Stat. § 14.381, subd. 1(a).

E. To the extent applicable, Petitioners again advise that if Respondent wishes to contest this Petition, it must file a written response with the judge of the OAH and serve copies on all parties, through the undersigned counsel, within ten (10) working days after this Petition is received. Minn. Stat. § 14.381, subd. 1(a); Minn. R. 1400.6600.

F. Petitioners move and request that the Court allow Petitioners a reply memorandum, not to exceed twenty-five pages, to be filed no later than fourteen (14) days after service of Respondent's written response to the Petition.

Respectfully submitted,

For Petitioners Swimply, Keith Hittner, Shiela Hittner, and Brandy Logan:

Dated: November 25, 2024

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