No. S-19-000729; No. S-19-000730

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SUPREME COURT OF NEBRASKA

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**GASPAR NOLASCO, ET AL.**

*Plaintiffs & Appellants*,

*v.*

**BRENNON MALCOM,**

*Defendants & Appellee*.

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Appeals from the District Court of Dawson County
Hon. James E. Doyle, Judge

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# Brief of Nebraska Association of Trial Attorneys as Amicus Curiae

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## INTEREST OF AMICUS CURIAE

The Nebraska Association of Trial Attorneys ("NATA") is a nonprofit, professional organization consisting of trial attorneys who practice in Nebraska. For over 50 years, NATA lawyers have vigorously sought redress for tort victims, including children. Because this Court's resolution of this case will have a direct impact on the tort victims that NATA lawyers represent, NATA sought to provide what it hopes will be meaningful guidance on the important issues presented by this case.

## STATEMENT OF FACTS

NATA incorporates by reference the Statement of Facts in Appellants' opening brief.

## SUMMARY OF ARGUMENT

Nebraska's parental-immunity doctrine is an antiquated rule based on 19th century case law and discredited rationales that have been rejected in all but a small number of jurisdictions. To the extent liability insurers have relied on it, this Court can accommodate their interests by making a decision to abrogate the doctrine *prospective only*. Even if Nebraska's existing parental-immunity doctrine is easier to apply than the alternatives, that benefit is outweighed by the unconstitutional discriminatory effect the doctrine has on a vulnerable class of tort victims.

This Court should therefore abrogate Nebraska's parental-immunity doctrine. Ideally, this Court would abrogate the doctrine as a general matter, leaving for subsequent case law to identify impermissible attempts to assign duties of care that might unduly infringe on parental discretion. To the extent this Court prefers a rule that expressly protects parental discretion, this Court should adopt section 859G of Restatement (Second) of Torts. Lastly, to the extent this Court prefers to create exceptions to parental immunity on a case-by-case basis, this Court should, at a minimum, join the 43 jurisdictions that expressly permit unemancipated minors to sue for injuries arising out of their parents' negligent operation of a motor vehicle.

## ARGUMENT

Before addressing the problems with the parental-immunity doctrine and the better alternatives, NATA pauses to address Defendant's claim that if Nebraska abrogates parental immunity "that change *should* come through *clear action* from the legislature." (Appellee Br. 9.)

Parental immunity is a judicially created, common-law doctrine. (Appellee Br. 1, 6, 9, 10.) And where an "immunity is a creation of the common law … it is [this Court's] duty to re-examine it and, if necessary to avoid continuing injustice, to change it." *Imig v. March*, 203 Neb. 537, 543, 279 N.W.2d 382, 386 (1979) (abrogating common-law inter-spousal immunity). Indeed, as this Court has observed: "We would be abdicating our own function … were we to insist on legislation and refuse to reconsider an old and unsatisfactory court-made rule." *Myers v. Drozda*, 180 Neb. 183, 186, 141 N.W.2d 852, 854 (1966) (internal quotation marks omitted) (quoting *Bing v. Thunig*, 143 N.E.2d 3, 9 (N.Y. 1957))).

Nor would this Court's decision to abrogate parental immunity deprive the Legislature of an opportunity to weigh in on the issue. Indeed, the Legislature would be free to reinstate the rule by statue if it so desires. Thus, rather than leave a flawed common-law rule intact in deference to the Legislature's potential preference for it, this Court's practice has been to abrogate flawed common-law rules, allowing the Legislature to reinstate those rules by statute if it so desires. *See Heckman v. Marchio*, 296 Neb. 458, 468, 894 N.W.2d 296, 303 (2017) (overruling *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), and noting that it would fall "upon the Legislature, exercising its proper constitutional authority, to determine whether the *Richardson* exception should be placed in our statutory law").

Ultimately, then, it is this Court's responsibility to address the continued viability of Nebraska's common-law parental-immunity doctrine.

## I. Stare decisis does not justify adherence to Nebraska's parental-immunity doctrine.

In deciding whether to abrogate a common-law rule, this Court is bound only by the principle of "stare decisis," the purpose of which is to promote stability in the law. *Cano v. Walker*, 297 Neb. 580, 593, 901 N.W.2d 251, 261 (2017). But while stability is important, this Court must also ensure Nebraska common law does not become "a petrifying rigidity." *Myers*, 180 Neb. at 186, 141 N.W.2d at 854 (internal quotation marks omitted) (quoting *Bing*, 143 N.E.2d at 9). Thus, while stare decisis is "entitled to great weight," *Cano*, 297 Neb. at 593, 901 N.W.2d at 261, it "does not require [this Court] to blindly perpetuate a prior interpretation of the law if [it] conclude[s] it was clearly incorrect." *Id.*

As discussed below, the parental-immunity doctrine is "neither an effective or suitable means for protecting" the "values the doctrine purports to foster," and "justice is more likely to be achieved without the doctrine than with it." *Turner v. Turner*, 304 N.W.2d 786, 788 (Iowa 1981). Accordingly, stare decisis does not justify Nebraska's continued adherence to parental immunity.

### A. Parental immunity is an antiquated rule that has been rejected by the majority of American jurisdictions.

A factor in whether to adhere to a rule under the principles of stare decisis is the "antiquity of the precedent" on which the rule is based. *Heckman*, 296 Neb. at 467, 894 N.W.2d at 302.

"The doctrine of general parental immunity from tort liability to unemancipated minor children" was "invented by the Mississippi Supreme Court" in 1891. *Winn v. Gilroy*, 681 P.2d 776, 778 (Or. 1984) (citing *Hewlett v. George*, 9 So. 885 (Miss. 1891)). Between 1891 and 1960, parental immunity spread across most of the United States. *Glaskox v. Glaskox*, 614 So. 2d 906, 909 (Miss. 1992). Nebraska also adopted the rule, as reflected in this Court's decision in *Pullen v. Novak*, 169 Neb. 211, 224, 99 N.W.2d 16, 25 (1959), which held that "an unemancipated minor cannot maintain an action against his parents … to recover damages for ordinary negligence."

Interestingly, *Pullen* reflects the high-water mark for parental immunity in America. Indeed, "[b]eginning in the early 1960s, the rule fell into disfavor in American courts." *Glaskox*, 614 So. 2d at 910. By 1971, parental immunity was regarded as an outstated rule "based on considerations which cannot stand logical scrutiny in modern life," *Falco v. Pados*, 282 A.2d 351, 355 (Pa. 1971). By 1979, "the case authority supporting" the parental-immunity doctrine "ha[d] been drastically eroded." *Black v. Solmitz*, 409 A.2d 634, 639 (Me. 1979). And by 1987, parental immunity was regarded as "an outdated notion based on faulty premises" and a "vestige of an era in which children were without legal protection from the wrongs of their parents, and married women were without legal rights, subordinate to their husbands, all in the name of family harmony." *Rousey v. Rousey*, 528 A.2d 416, 420 (D.C. 1987).

Today, **14** states do not recognize parental immunity *at all*. This includes **five** states that expressly rejected the doctrine in the first place: **Hawaii**, *Petersen v. City & County of Honolulu*, 462 P.2d 1007, 1009 (Haw. 1969); **Nevada**, *Rupert v. Stienne*, 528 P.2d 1013, 1018 (Nev. 1974); **North Dakota**, *Nuelle v. Wells*, 154 N.W.2d 364, 366 (N.D. 1967); **Utah**, *Elkington v. Foust*, 618 P.2d 37, 40 (Utah 1980); and **Vermont**, *Wood v. Wood*, 370 A.2d 191, 193 (Vt. 1977).

This also includes **nine** states that once recognized parental immunity, but have since abandoned it: **Arizona**, *Broadbent v. Broadbent*, 907 P.2d 43, 50 (Ariz. 1995); **California**, *Gibson v. Gibson*, 479 P.2d 648, 653 (Cal. 1971); **Minnesota**, *Anderson v. Stream*, 295 N.W.2d 595, 601 (Minn. 1980); **Missouri**, *Hartman v. Hartman*, 821 S.W.2d 852, 858 (Mo. 1991); **New Hampshire**, *Briere v. Briere*, 224 A.2d 588, 591 (N.H. 1966); **New Mexico**, *Guess v. Gulf Ins. Co.*, 627 P.2d 869, 871 (N.M. 1981); **Ohio**, *Kirchner v. Crystal*, 474 N.E.2d 275, 276 (Ohio 1984); **Pennsylvania**, *Falco v. Pados*, 282 A.2d 351, 353 (Pa. 1971); **South Carolina**, *Elam v. Elam*, 268 S.E.2d 109, 112 (S.C. 1980).

Another **13** jurisdictions have almost fully abrogated parental immunity—and thus permit unemancipated minors to sue parents for most personal injuries—but recognize a narrow exception for parental discretion in discipline, supervision, and care of their children. These jurisdictions include **Delaware**, *Schneider v. Coe*, 405 A.2d 682, 684 (Del. 1979); the **District of Columbia**, *Rousey v. Rousey*, 528 A.2d 416, 420 (D.C. 1987); **Idaho**, *Pedigo v. Rowley*, 610 P.2d 560, 564 (Idaho 1980); **Illinois,** *Cates v. Cates*, 619 N.E.2d 715, 728 (Ill. 1993); **Iowa**, *Turner v. Turner*, 304 N.W.2d 786, 789 (Iowa 1981); **Kentucky**, *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. 1971); **Maine**, *Black v. Solmitz*, 409 A.2d 634, 639–40 (Me. 1979); **Michigan**, *Plumley v. Klein*, 199 N.W.2d 169, 172–73 (Mich. 1972); **New York**, *Holodook v. Spencer*, 324 N.E.2d 338, 340 (N.Y. 1974); **Oregon**, *Winn v. Gilroy*, 681 P.2d 776, 785 (Or. 1984); **Tennessee**, *Broadwell v. Holmes*, 871 S.W.2d 471, 477 (Tenn. 1994); **Texas**, *Jilani v. Jilani*, 767 S.W.2d 671, 673 (Tex. 1989); and **Wisconsin**, *Goller v. White*, 122 N.W.2d 193, 198 (Wisc. 1963).

Another **16** jurisdictions—often expressing disapproval of the parental-immunity doctrine generally—expressly permit an unemancipated minor to sue a parent for injuries sustained in the operation of a motor vehicle: **Alaska**, *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967); **Connecticut**, Conn. Gen. Stat. § 52-572c (1993); **Kansas**, *Nocktonick v. Nocktonick*, 611 P.2d 135, 141 (Kan. 1980); **Maryland**, Md. Code Ann., Cts. & Jud. Proc. § 5-806 (2001); **Massachusetts**, *Sorensen v. Sorensen*, 339 N.E.2d 907, 916 (Mass. 1975); **Mississippi**, *Glaskox v. Glaskox*, 614 So. 2d 906, 911 (Miss. 1992), *overruling Hewlett*, 9 So. 885; **Montana**, *Transamerica Ins. Co. v. Royle*, 656 P.2d 820, 824 (Mont. 1983); **New Jersey**, *France v. A.P.A. Trans. Corp.*, 267 A.2d 490, 494 (N.J. 1970); **North Carolina**, N.C. Gen. Stat. § 1-539.21 (1975); **Rhode Island**, *Silva v. Silva*, 446 A.2d 1013, 1017 (R.I. 1982); **Virginia**, *Smith v. Kauffman*, 183 S.E.2d 190, 194 (Va. 1971); **Washington**, *Merrick v. Sutterlin*, 610 P.2d 891, 893 (Wash. 1980); **West Virginia**, *Lee v. Comer*,

224 S.E.2d 721, 724 (W. Va. 1976); and **Wyoming**, *Dellapenta v. Dellapenta*, 838 P.2d 1153, 1157 (Wyo. 1992). Also, **Oklahoma** and **Florida** permit unemancipated minors to sue parents for negligent operation of a motor vehicle up to the limits of the parent's liability insurance. *See Ard v. Ard*, 414 So. 2d 1066, 1070 (Fla. 1982); *Unah v. Martin*, 676 P.2d 1366, 1370 (Okla. 1984).

To summarize, **27** of 51 jurisdictions—or **53%**—have abrogated parental immunity with at most a narrow exception for parental discretion in discipline, supervision, and care. And **43** of 51 jurisdictions—or **84%**—permit unemancipated minors to sue parents for the negligent operation of a motor vehicle. (These figures do not include South Dakota, which has not commented on the rule. *See Warren v. Warren*, 650 A.2d 252, 257, n.3 (Md. 1994).)

By contrast, Nebraska is one of just **seven** jurisdictions that categorically bar unemancipated minors from suing their parents for injuries arising from ordinary negligence, a group that includes **Alabama**, *Hurst v. Capitell*, 539 So. 2d 264, 266 (Ala. 1989); **Arkansas**, *Rambo v. Rambo*, 114 S.W.2d 468, 469 (Ark. 1938); **Colorado**, *Schlessinger v. Schlessinger*, 796 P.2d 1385, 1390 (Colo. 1990); **Georgia**, *Blake v. Blake*, 508 S.E.2d 443, 444 (Ga. Ct. App. 1998); **Indiana**, *Vaughan v. Vaughan*, 316 N.E.2d 455, 456 (Ind. Ct. App. 1974); and **Louisiana**, La. Rev. Stat. Ann. § 571 (2016).

In short, Nebraska's parental-immunity doctrine is a product of 19th century case law that 84% of American jurisdictions largely abandoned decades ago. It is difficult to think of a more fitting description of "antiquated" authority than that.

**B. Parental immunity was not well reasoned.**

The next question in the stare-decisis analysis is whether parental immunity was "well reasoned," or has proven to have "shortcomings." *Heckman*, 296 Neb. at 467, 894 N.W.2d at 302. As discussed below, the parental-immunity doctrine was *not* well reasoned, as the four rationales traditionally used to justify the doctrine have all been thoroughly discredited.

**1. Parental immunity is not necessary to prevent "fraud."**

The first policy rationale offered to justify parental immunity is that personal-injury suits by unemancipated minors against their parents carry "[t]he danger of fraud and collusion between parent and child." *Nocktonick*, 611 P.2d at 137.

But this Court rejected this exact argument in *Imig*, 203 Neb. 537, 279 N.W.2d 382, which abrogated the analogous common-law rule of interspousal tort immunity. As this Court explained in *Imig*, the traditional fraud/collusion theory behind interspousal immunity—and by extension, parental immunity—suffers from two fundamental flaws:

**First**, this fear rests on the "blanket assumption that our court system is so ill-fitted to deal with such litigation that the only reasonable alternative to allowing husband–wife tort litigation is to summarily deny all relief to this Class of litigants." *Imig*, 203 Neb. at 541, 279 N.W.2d at 385. But this Court expressly rejected that assumption, noting that "[i]t is the regular business of the courts to find the truth." *Id.*

**Second**, this Court declined to "close the courthouse doors" to injured parties and "leave the injured to suffer his loss" based on the theoretical possibility that *some* litigants might seek to collude. *Imig*, 203 Neb. at 541, 279 N.W.2d at 385. Noting that it "is absolutely contrary to the spirit of our legal system" to deny "an injured party" the ability "to seek redress for his injuries in our courts," this Court recognized that "[w]e ought not deny what should be due the many for fear that the judicial process cannot weed out the spurious claims of a few." *Id.* (citing *Immer v. Risko*, 267 A.2d 481 (N.J. 1970)).

Of course, this logic applies with equal force in the context of suits between unemancipated minors and their parents. Indeed, "the policy reasons supporting spousal and parental immunity are indistinguishable." *Jerrels v. Jerrels*, 276 So. 3d 362, 367 (Fla. Dist. Ct. App. 2019); *see also Guess*, 627 P.2d at 871 ("There is no stronger public policy for barring intrafamily suits between

parents and children than existed for barring interspousal suits."). Thus, if the possibility a husband and wife might collude to pursue a false claim does not justify interspousal tort immunity, it should fare no better as a justification for parental immunity. And, indeed, courts rejecting the fraud/collusion justification behind parental immunity often echoed the same two rationales this Court identified when rejecting the fraud/collusion justification for interspousal immunity in *Imig*. *See, e.g.*, *Kirchner*, 474 N.E.2d at 278; *Falco*, 282 A.2d at 355–56.

**2. Parental immunity is not necessary to protect "family harmony."**

A second policy justification for parental immunity is the theory that permitting unemancipated minors to sue their parents for personal injuries would "[d]isturb[] … domestic harmony and tranquility." *Nocktonick*, 611 P.2d at 137. This argument has several flaws.

**First**, this argument ignores the modern reality that "the judgment recovered against the parent is more than likely, in the vast majority of cases, to be paid by an insurer." *Hebel*, 435 P.2d at 14. The availability of insurance "effectively removes the argument favoring continued family harmony as a basis for prohibiting this suit" because, in such situations, the litigation is effectively between the child and the parent's insurer. *Gelbman v. Gelbman*, 245 N.E.2d 192, 193–94 (N.Y. 1969). Indeed, where liability insurance exists and will satisfy the claim, prohibiting the unemancipated minor to sue her parent would actually be *most* disruptive to family harmony:

> If the crippled child may have the benefit of this insurance, a fund will be supplied the family to provide for him. If the fund is cut off, cripple as well as parent will have to stagger beneath the load. To tell them that the pains must be endured for the peace and welfare of the family is something of a mockery.

*Hebel*, 435 P.2d at 14. Thus, "[f]ar from being a potential source of disharmony," in such cases, "the action is more likely to preserve the family unit in pursuit of a common goal—the easing of family financial difficulties stemming from the child's injuries." *Sorensen*, 339 N.E.2d at 914.

**Second**, "more often than not, it is the injury, if anything, which disrupts the family." *Cates*, 619 N.E.2d at 727. Thus, the claim "family relationships will be weakened or destroyed by bringing a lawsuit is not persuasive" because "[t]he relationships will be affected to a much greater extent by the conduct ... that causes the lawsuit to be filed." *Guess*, 627 P.2d at 871.

Indeed, to the extent a child sues a parent despite the absence of liability insurance (or seeks damages in excess of the parent's insurance coverage), this would undoubtedly reflect the fact that there is no "family harmony" left to protect. *See Sorensen*, 339 N.E.2d at 913 ("In rare cases where the action is a true adversary one against a parent …, judicial formulation of an obstacle to the suit cannot contribute to family harmony or restore the proper relations among the members."). Of course, barring a lawsuit between a child and his or her parent "cannot preserve harmony which, apparently, does not exist." *Cates*, 619 N.E.2d at 727.

This Court reached this exact same conclusion in *Imig*, in which it rejected the argument "that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home," noting that it is unlikely "there is a state of peace and harmony left to be disturbed" where one spouse "is sufficiently injured or angry to sue" the other. *Imig*, 203 Neb. at 541, 279 N.W.2d at 384. That same logic applies here, not only because of the inherent parallels between interspousal immunity and parental immunity, but also because, as a practical matter, it is unlikely a minor could sue one parent without the other parent's endorsement.

**3. Parental immunity is not necessary to avoid "depleting familial resources."**

Another justification for parental immunity is the theory that permitting unemancipated minors to sue their parents for personal injuries would "[d]eplet[e] … family assets in favor of the claimant at the expense of other children in the family." *Nocktonick*, 611 P.2d at 137.

But again, where insurance is available, permitting a lawsuit by an unemancipated minor will actually *increase* family resources relative to leaving the injuries uncompensated. *See, e.g.*,

*Sorensen*, 339 N.E.2d at 914; *Hebel*, 435 P.2d at 14. In any event, tort suits between minors and their parents present no greater threat to family resources than suits between husband and wife, which this Court has long permitted. *See Imig*, 203 Neb. 537, 279 N.W.2d 382.

**4. Parental immunity is not necessary to avoid infringing upon "parental discretion."**

A final justification for parental immunity is the fear that permitting unemancipated minors to sue their parents for personal injuries would "[i]nterfere[] with parental care, discipline, and control." *Nocktonick*, 611 P.2d at 137.

But this fear is more imagined than real: Indeed, 15 states do not recognize parental immunity *at all*. And yet, there is no evidence tort litigation has infringed upon "parental discretion" in those jurisdictions, thus disproving the theory that parental immunity is necessary to protect parents' discretion in raising children. *Shearer v. Shearer*, 480 N.E.2d 388, 391 (Ohio 1985) ("If the elimination of parental immunity were a bad legal position, one would reasonably expect to find that those states were experiencing problems with the abrogation."). In any event, the concern that abrogating parental immunity might threaten parental discretion would, at most, warrant a rule immunizing *parental discretion*, not a blanket rule immunizing *every negligent act*.

**C. This Court can mitigate insurers' reliance on parental immunity.**

In assessing whether to retain an old common-law rule, this Court considers "the reliance interests" on that rule. *Heckman*, 296 Neb. at 467, 894 N.W.2d at 302. Defendant argues "insurers have a strong reliance interest in the continued judicial application of the parental immunity doctrine" because "premiums are determined[] based on *current* Nebraska law, which includes a robust parental-immunity doctrine." (Appellee Br. 14.) That argument has several flaws.

**First**, Defendant's conclusory assertion that parental immunity has influenced insurance premiums in Nebraska is questionable. *See Myers*, 180 Neb. at 188, 141 N.W.2d at 855 ("[O]rdinarily it is impossible to trace the impact of particular legal doctrine upon liability

insurance rates.") (internal quotation marks omitted) (quoting Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463, 493 (1962)).

**Second**, if insurers' reliance on precedent in setting rates was sufficient to justify stare decisis, then tort law could never evolve and would become the "petrifying rigidity" this Court feared in *Myers*. *See* Keeton, *supra*, 75 Harv. L. Rev. at 493 (noting that the argument that "overruling in tort cases is unfair … to the liability insurers whose rates have been set in reliance on precedent ... would in effect disable courts from creative decisions in accident law").

**Third**, abrogating parental immunity would expose insurers to, at most, a relatively brief period of "insufficient" premiums until those premiums could be adjusted. This Court can mitigate insurers' reliance interests in the intervening period by abrogating parental immunity *prospectively* outside of the instant case. *See, e.g.*, *Myers*, 180 Neb. at 188, 141 N.W.2d at 855; *accord Black*, 409 A.2d at 640; *Rigdon*, 465 S.W.2d at 932; *Goller*, 122 N.W.2d at 199. Indeed, this Court could even make abrogation broadly operative on a future date. *See, e.g.*, *Silva*, 446 A.2d at 1017 (abrogating parental immunity "as to the instant case and prospectively as to all other causes of action arising *thirty or more days after the filing of this opinion*" (emphasis added)).

**D. The "workability" of parental immunity does not justify its discriminatory effect.**

A final consideration in the stare-decisis analysis is the "workability" of the rule at issue. *Heckman*, 296 Neb. at 467, 894 N.W.2d at 302. Defendant contends Nebraska's parental-immunity doctrine is "far more workable than any proposed alternative that would leave parents with uncertainty about the areas where the protections of immunity apply." (Appellee Br. 13.) Again, there are several flaws with that argument.

**First**, Defendant overstates the "certainty" of Nebraska's parental-immunity doctrine. Indeed, *Pullen* could only say that "there *might* be recovery by a minor for such torts where the child is subjected to brutal, cruel, or inhumane treatment." *Pullen*, 169 Neb. at 223, 99 N.W.2d at

25 (emphasis added). Even then, "[i]t is a question of fact, to be determined by the jury, whether or not the punishment inflicted was, under all the circumstances and surroundings, reasonable or excessive." *Id.* (internal quotation marks omitted) (quoting *Clasen v. Pruhs*, 69 Neb. 278, 95 N.W. 640, 640 (1903)). This language is far from definite.

**Second**, Defendant is wrong that abrogating parental immunity necessarily entails "uncertainty" among parents regarding "the areas where the protections of immunity apply." (Appellee Br. 13.) Again, there is no evidence of any such "uncertainty" in jurisdictions that have abrogated parental immunity. Moreover, a rule that allowed unemancipated minors to sue parents for injuries sustained in the negligent operation of a vehicle could not be more "certain."

**Third**, even if parental immunity is a more "workable" standard than the alternatives, that workability comes at the expense of unconstitutional discrimination against unemancipated minors who are injured by their parents.

Article 1, section 13, of the Nebraska Constitution guarantees that "every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law." Thus, it "is absolutely contrary to the spirit of our legal system" to deny "an injured party" the ability "to seek redress for his injuries in our courts." *Imig*, 203 Neb. at 545, 279 N.W.2d at 386 (citing *Immer v. Risko*, 267 A.2d 481 (N.J. 1970)). And yet, if a father negligently crashes a car occupied by his wife, his son, and his son's friend, Nebraska law permits the wife and the son's friend to sue the father for any injuries, but denies that same right to the son. That inequality is reason enough to reject the parental-immunity doctrine. *See Heckman*, 296 Neb. at 466, 894 N.W.2d at 302 ("Respect for precedent should not prevent us from restoring our adherence to the Nebraska Constitution."); *Cano*, 297 Neb. at 593, 901 N.W.2d at 260–61 (observing that stare decisis is "grounded in the public policy that the law should … foster[] ... equality").

## II. This Court should generally abrogate the parental-immunity doctrine.

Ultimately, the question is not *whether* this Court should abrogate the doctrine, but *to what extent*. The alternatives to traditional parental immunity generally fall into three broad camps:

The **first** camp consists of the **14** jurisdictions that do not have parental immunity *at all*.

The **second** camp consists of the **13** jurisdictions that have generally abrogated parental immunity, but expressly recognize parental discretion in the discipline, instruction, and supervision of their children. Even within this camp there are distinct approaches:

Iowa and Maine recognize the need to protect parental "autonomy in carrying out their responsibilities for care and discipline of their children," *Black*, 409 A.2d at 639, but believe the contours of that "parental privilege or immunity" should be defined on a case-by-case basis. *Id.* at 639–40; *see also Turner*, 304 N.W.2d at 788–89.

Delaware, Idaho, and New York permit unemancipated minors to sue parents for ordinary negligence, but expressly prohibit claims for "negligent supervision." *Holodook*, 324 N.E.2d at 340; *Schneider*, 405 A.2d at 684; *Pedigo*, 610 P.2d at 564.

Illinois, Michigan, Tennessee, Texas, and Wisconsin abrogated parental immunity except "(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Goller*, 122 N.W.2d at 198; *Cates*, 619 N.E.2d at 728; *Plumley*, 199 N.W.2d at 172–73; *Broadwell*, 871 S.W.2d at 477; *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 929 (Tex. 1971).

The District of Columbia, Kentucky, and Oregon adopted section 895G of the Restatement (Second) of Torts, which abrogates parental immunity, but exempts parents from "liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious." This has been understood to mean that a parent does not bear liability to her child for an

act or omission that would not be tortious as between the parent and a member of the general public. *Winn*, 681 P.2d at 785; *Rousey*, 528 A.2d at 420; *Bentley*, 172 S.W.3d at 378.

The **third** camp consists of the **16** jurisdictions that abrogated parental immunity for claims arising out of negligent operation of an automobile.

Which of these approaches does NATA recommend? As in Iowa and Maine, this Court should generally abrogate parental immunity, reserving "the question [of] whether there are areas of parental authority and discretion where immunity should exist" for future cases. *Turner*, 304 N.W.2d at 788–89; *Black*, 409 A.2d at 639–40. NATA's rationale is three-fold:

First, even in the many states without parental immunity *at all*, there is no evidence tort litigation has infringed on parental discretion. There is thus no need for this Court to attempt to fashion a comprehensive standard that captures every conceivable exercise of parental discretion that should be immune from tort liability.

Second, defining immunity for parental discretion on a case-by-case basis is consistent with Nebraska law, which recognizes that "when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that a defendant has no duty or that the ordinary duty of reasonable care requires modification." *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 213, 784 N.W.2d 907, 915 (2010).

Third, with such a rule, Nebraska would join its Eighth Circuit neighbors in Iowa, Minnesota, Missouri, North Dakota, and South Dakota, none of which have a defined safe-harbor for parental discretion.

To the extent this Court prefers a rule that expressly defines the scope of immunity for parental discretion, NATA urges this Court to adopt section 895G of the Restatement (Second) of Torts. NATA's rationale is two-fold:

First, this Court already adopted section 895G for interspousal immunity. *See Imig*, 203 Neb. at 544, 279 N.W.2d at 386. Adopting section 895G here would thus harmonize Nebraska's approach to both interspousal immunity and parental immunity.

Second, this would give Nebraska courts the broadest reservoir of case law from which to draw, insofar as Nebraska courts could define the contours of the Restatement's rule by referencing jurisdictions that expressly prohibit child–parent tort suits in certain enumerated scenarios. *E.g.*, *Goller*, 122 N.W.2d at 198; *Holodook*, 324 N.E.2d at 340.

Finally, to the extent this Court prefers to make exceptions to parental immunity on a case-by-case basis, this Court should join the 43 jurisdictions that, at a minimum, expressly permit unemancipated minors to sue parents for injuries resulting from negligent operation of a motor vehicle. Those claims would not threaten "parental discretion" in any real sense, and—particularly in light of Nebraska's compulsory-insurance law—are most likely to entail liability insurance.

## CONCLUSION

Parental immunity is an antiquated, unpopular, and unconstitutional rule rooted in discredited theories. Accordingly, this Court should abrogate the parental-immunity doctrine, leaving it to future cases to define any areas of parental discretion where immunity should exist. To the extent this Court prefers a rule that expressly immunizes parental discretion, it should adopt section 859G of the Restatement (Second) of Torts. Finally, to the extent this Court prefers to create exceptions to parental immunity on a case-by-case basis, this Court should at least allow unemancipated minors to sue their parents for negligent operation of a motor vehicle.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that an electronic copy of the above brief was served via email on April 9, 2020, as follows:

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