Case No. A20-0427

STATE OF MINNESOTA
IN SUPREME COURT

In re Polaris, Inc., Petitioner,

Colby Thompson,

Respondent,

vs.

Polaris, Inc.,

Petitioner,

John Does I-X,

Defendants.

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER POLARIS, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF INTEREST

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the Nation. The Manufacturers' Center for Legal Action, the litigation arm of the NAM, is the voice of manufacturers in the courts, regularly filing *amicus curiae* briefs in cases of exceptional importance. Issues involving the conduct of internal investigations in relation to regulatory enforcement actions, and the application of the attorney-client privilege and work-product protections to communications and materials prepared for such investigations, are critically important. The NAM represents a public interest in the outcome of this case.[1]

INTRODUCTION

If left undisturbed, the Court of Appeals' novel approach to attorney-client privilege would chill "full and frank" communications between manufacturers and their counsel operating and litigating in Minnesota. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Manufacturers depend on such communications to ensure their products are safe and that their operations comply with the regulatory frameworks within which they operate. Manufacturing boards of directors likewise rely on such communications, and the ability to

[1] No counsel for any party authored this brief in whole or in part. No party except for the NAM made a monetary contribution to the preparation or submission of this brief.

assert the attorney-client privilege on the company's behalf, because of their unique role in managing risk, policing the performance of corporate officers, protecting the company's assets and reputation, and ensuring that the company operates legally. By leaving these critical communications exposed to post hoc review and divorcing them of their context, the Court of Appeals' opinion fundamentally upsets the role of the modern regulatory state and puts the interests of a handful of personal injury plaintiffs ahead of the benefit to the public as a whole.

The implications of the opinion below are profound, reaching far beyond the subject matter of this litigation. The Consumer Product Safety Commission ("CPSC") is just one of many federal regulatory agencies with which manufacturers may engage on a daily basis; similarly, the Consumer Product Safety Act ("CPSA") is just one of dozens of federal statutes regulating manufacturers' conduct. Federal laws frequently call for complex compliance frameworks that require the use of outside legal expertise to navigate. Those outside legal experts, in turn, undertake factual investigations, evaluate their findings, draw conclusions as to the propriety of a company's past actions, estimate the degree to which a company may be subject to liability, and make recommendations for changes to practice or culture that help a company better comply with the law and avoid civil enforcement or litigation.

This practice of corporate introspection is precisely what regulators intend. By narrowing the attorney-client privilege, however, the opinion below discourages manufacturers from making a searching inquiry into the root cause of a regulatory problem and makes regulatory relationships more adversarial and less effective. This result would

frustrate the purpose and effectiveness of nearly every regulatory framework. This Court should overturn the Court of Appeals' erroneous decision.

ARGUMENT

I. THE COURT OF APPEALS' UNDULY NARROW CONCEPT OF LEGAL ADVICE UNDERCUTS AN IMPORTANT PUBLIC POLICY PREFERENCE IN FAVOR OF PROMOTING COMPLIANCE.

The purpose of the attorney-client privilege "is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client." *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998) (quoting *National Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979)). The privilege recognizes that sound legal advice serves public ends and that such advice depends upon fully informed counsel. *See Upjohn*, 449 U.S. at 389; *see also In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390-91 (Fed. Cir. 1996) ("Persons seek legal advice and assistance in order to meet legal requirements and to plan their conduct; such steps serve the public interest in achieving compliance with law and facilitating the administration of justice, and indeed may avert litigation.") (citing *Upjohn*, 449 U.S. at 389). This rationale applies with even greater force in the modern regulatory state, where corporations, like Polaris, regularly seek candid legal advice to comply with regulations affecting public health and safety.

Here, the Court of Appeals concluded that a report prepared by Polaris's outside counsel ("the Report") "was primarily nonlegal in character," and therefore discoverable because it "focused on safety and operational issues" despite being prepared only after the CPSC notified the company that it was under investigation. (Polaris's Public Addendum

("Add.") 3). In characterizing the Report this way and affirming its production to plaintiffs, the Court of Appeals erred by disregarding both the nature of the work product at issue and the potential regulatory ramifications of the company's compliance culture.

A. Modern Manufacturers Operate Within Increasingly Complex Regulatory Regimes that Balance Costs and Public Benefits.

U.S. manufacturers operate within increasingly complex regulatory regimes in which enforcement bodies such as the CPSC retain significant discretion to sanction them based not only on their conduct but also on the likelihood that it may recur. Underlying these regimes is the expectation that companies will self-police and self-correct or face harsher treatment for failing to do so. *See* Robert J. Bush, *Stimulating Corporate Self-Regulation -- The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 Nw. U. L. Rev. 597, 630 (1993) ("Due to the extensive and variable morass of regulatory requirements that confronts contemporary corporate America, voluntary corporate compliance necessitates near constant investigation, evaluation, and correction.").

Conducting an internal investigation, like the one Polaris retained outside counsel to lead here, enables a corporation to act knowledgeably and proactively, identifying and implementing needed changes, which in turn may preempt a government enforcement action or mitigate a penalty if enforcement occurs. *See* Paul H. Dawes, *Corporate Investigations*, in SECURITIES LITIGATION 1994, at 491, 496 (PLI Litig. & Admin. Practice Course, Handbook Series No. H4-5196, 1994). For example, in determining the appropriate civil penalty for a violation of the CPSA, the CPSC "may consider," a company's "Safety/compliance program," including whether the company had an "effective program or system for collecting and analyzing information related to safety issues." 16 C.F.R. §

1119.4(b)(1). Moreover, internal investigations also expand the reach and effectiveness of regulatory programs overseen by agencies, like the CPSC here, that generally lack the manpower to watch over every company within their purview at all times.

Polaris's actions reflect the widely held understanding that effective self-policing, investigation, and correction, necessitates candid, robust legal counsel. "In light of the vast and complicated array of regulatory legislation confronting the modern corporation," corporations must "constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter." *Upjohn*, 449 U.S. at 392 (internal quotation marks and citations omitted).

Here, the Court of Appeals gave short shrift to the fact that Polaris, after being notified by the CPSC that it was the subject of a safety investigation and potential enforcement action, retained a former CPSC General Counsel with specialized expertise in CPSC compliance considerations to conduct an investigation and provide legal advice regarding the company's exposure to sanctions and risk of future compliance problems. *See* Opening Br. of Appellant Polaris Inc. at 2-3, 5-6. That act in and of itself should have carried significant weight in the Court of Appeals' analysis. "The very retention of outside counsel indicates that" Polaris "wanted someone who could collect and 'sift [] through the facts with an eye to the legally relevant . . . '" *Better Gov't Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 601 n.9 (4th Cir. 1997) (quoting *Upjohn*, 449 U.S. at 390-91); *see also Unitedhealth Grp. Inc. v. Columbia Cas. Co.*, No. 05-1289, 2010 U.S. Dist. LEXIS 153035, at *38 (D. Minn. Aug. 10, 2010) ("One may reasonably infer that the advice, evaluations and analyses sought by a client from a lawyer, or transmitted to a lawyer by a client, constitute legal advice.").

Instead, applying a remarkably superficial analysis, the Court of Appeals deemed the outside counsel's Report to Polaris's General Counsel and Board of Directors, the culmination of her firm's investigative efforts, "nonlegal" because it addressed "safety, engineering, design, and corporate practices." (Add. 2-3). The court's overly simplified view of legal advice runs roughshod over the fact-intensive nature of regulatory compliance and the special judgment and expertise that counsel brings to bear in evaluating those facts and rendering legal advice. "The ubiquitousness of the law has necessarily expanded the class of matters on which legal advice is appropriate and altered as well the nature and breadth of the professional advice that will be offered." Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 Geo. J. Legal Ethics 201, 231 (2010); *see also* 8 John H. Wigmore, WIGMORE ON EVIDENCE § 2290 (McNaughton rev. ed. 1961) ("Effective and efficient administration of justice requires that the legal advisor possess all relevant information in order to render informed legal advice.").

In the context of a CPSC investigation, like the one that prompted Polaris to seek legal advice here, "safety and operational issues" are inexorably intertwined with legal compliance issues. (*See* Add. 3.). Indeed, plaintiffs here have argued that those issues are relevant to determining if Polaris is to be held liable in this case. But contrary to the holding below, courts have routinely found that the attorney-client privilege is not defeated if the "advice of how to address a legal problem falls into the realm of business strategies or procedures," because "many of the best solutions to legal problems are nonlegal. Counsel who so advise clients are not outside the protected zone of the privilege so long as they are serving in the role of counsel." *Carlock v. Pillsbury Co.*, Nos. Civ. 4-87-517 & Civ. 4-87-586,

1988 U.S. Dist. LEXIS 18668, at *3-4 (D. Minn. Sept. 9, 1988); *see also Coleman v. Am. Broad. Cos., Inc.*, 106 F.R.D. 201, 206 (D.D.C. 1985) ("[L]egal and business considerations may frequently be inextricably intertwined. This is inevitable when legal advice is rendered . . . in the operations of a business in a corporate setting . . . . [and] does not vitiate the attorney-client privilege."); *Dunn v. State Farm Fire & Cas. Co.,* 927 F.2d 869, 875 (5th Cir. 1991) ("The privilege does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged.") (holding that investigative tasks that are related to rendering of legal services are privileged); *In re Bairnco Corp. Sec. Litig.*, 148 F.R.D. 91, 97 (S.D.N.Y. 1993) (noting that the distinction between legal and business concerns is "necessarily blurred" in a corporate context).

As one article explains:

> Just as the creation of railroads and a banking system in the nineteenth century was a legal as well as a business enterprise, legal risks in many of today's highly regulated industries like banking, insurance, airlines, and waste management have become business risks. Even apart from industry-specific regulation, regulation of almost every aspect of economic life such as the environment, health and safety, employment, and securities ensures that legal and business components of corporate decisions are often intertwined.

Sisk & Abbate, *supra*, at 231 (quoting Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. Cal. L. Rev. 507, 525 (1994)). In short, if factual components of a communication are intertwined with genuine and material requests for legal advice from counsel, whether in-house or outside, the privilege should attach. *See id.* at 231.

Under the Court of Appeals' approach, the contours of the attorney-client privilege are to be drawn narrowly, meaning "the lawyer and the client will be unduly constrained, not only in the practical integration of business factors with legal options, but also in engaging in moral deliberation about the right course to take." *Id.* at 232. Consequently, the Court of Appeals' order would not only stifle beneficial corporate self-regulatory conduct but also frustrate "the [very] purpose behind the attorney-client privilege," that is "to promote open and honest discussion between clients and their attorneys." *Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W.2d 305, 309 (Minn. 1981) (internal citation omitted); *see also In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997) ("[A]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.") (quoting *Upjohn*, 449 U.S. at 393).

B. Courts Across the Country Have Consistently Protected Attorney Communications Like the Report at Issue Here.

Courts across the country have consistently held that factual investigations undertaken by attorneys (and in some cases, consultants) to evaluate compliance with complex regulatory statutes and the work product generated by those investigations ***are*** protected by the attorney-client privilege.

1. *Graff v. Haverhill North Coke Co.*, No. 1:09-cv-670, 2012 U.S. Dist. LEXIS 162013 (S.D. Ohio Nov. 13, 2012).

In this case, the defendant, SunCoke, operated a coke processing plant for which the company received a Notice of Violation from the Ohio Environmental Protection Agency ("Ohio EPA"). SunCoke's President directed its general counsel to obtain a health, environmental, and safety audit of the plant to "assess its compliance with regulatory

requirements and company policies and to provide [the company] with legal advice based on such findings." *Id.* at *27. SunCoke's general counsel retained outside counsel, law firm Barnes & Thornburg, as well as a third-party consultant, URS, to assist in the matter. *Id.* at *6. Individuals residing near SunCoke's facility later sued the company and sought to discover the audit documents, as well as the retainer letter with URS, a SunCoke employee's notes from a post-audit debriefing, and a summary document prepared by the SunCoke's audit manager, arguing that "the attorney-client privilege does not extend to communications made to secure or provide environmental advice." *Id.* at *26 (internal citation and quotation omitted).

The court rejected this argument. Although the documents contained information of a "nonlegal character," (*see* Add. 2), the *Graff* court found it dispositive that the documents were created for "the express purpose of assisting . . . counsel in providing legal advice on environmental compliance matters." 2012 U.S. Dist. LEXIS 162013, at *30. Accordingly, documents containing information that could be characterized as "technical" or "business-related" were still protected from disclosure. *Id.* at *38-39. As the court reasoned, "[f]actual investigations undertaken by attorneys *as attorneys* for purposes of providing legal advice to a client are protected by the attorney-client privilege." *Id.* at *38 (emphasis in original).

The Report at issue here was likewise created for the express purpose of assisting outside counsel in providing legal advice on compliance matters. The Court of Appeals erred by ignoring this important context.

2. *In re LTV Sec. Litig.*, 89 F.R.D. 595 (N.D. Tex. 1981).

This case involved a company, LTD, that retained law firm Davis Polk to perform an investigation into the company's accounting practices after LTV became the target of a Securities and Exchange Commission (SEC) investigation. *See id.* at 598-99. When a securities fraud class action was later filed against LTV, the company refused to produce "reports and other communications" from its outside counsel to LTV's Board of Directors and Audit Committee, as well as communications from outside counsel to LTV's Vice President & Controller. *Id.* at 603.

The court ruled that "these communications constitute advice of counsel or an exchange of information necessary to formulate or evaluate legal advice, and are protected by the attorney-client privilege." *Id.* Like outside counsel retained here, "Davis Polk unquestionably conducted its investigation with the purpose of using the findings as a foundation from which to evaluate and draw conclusions as to the propriety of past actions and to make recommendations for possible future courses of action." *Id.* at 601 (internal citation and quotation omitted). Neither the disclosure of the communications to LTV's board of directors nor the participation of LTV's in-house counsel altered this result. "The privilege attaches equally to LTV's General Counsel . . . and his staff who were also performing services of a legal nature and furnishing legal advice" during the investigation. *Id.* at 601. Although, as plaintiffs had argued, "lay investigators could have been employed" to conduct the investigation, they would not "have brought to bear the same training, skills and background possessed by attorneys and necessary to make the professional independent analysis and legal recommendations sought by the LTV Board of Directors." *Id.*

The same rationale applies here. Even if a layperson could have investigated the "safety, engineering, design, and corporate practices," addressed in the outside counsel's Report, (*see* Add. 2), that person would not have brought to bear the training, skills, and background possessed by an attorney, especially not the training, skills, and background possessed by Ms. Falvey, a former CPSC General Counsel. *See* Opening Br. of Appellant Polaris Inc. at 5-6.

3. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014).

Yet another case arose from an internal investigation conducted by defense contractor KBR "to gather facts and ensure compliance with" Department of Defense regulations "after being informed of potential misconduct." *Id.* at 757. The investigation was conducted under the auspices of KBR's in-house legal department. *See id.* A KBR employee thereafter filed a False Claims Act complaint against KBR and sought documents related to the internal investigation. *See id.* at 756. The district court held that the documents were not protected by the attorney-client privilege because "the investigation was undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at 756 (internal citation and quotation omitted).

On a writ of mandamus, the D.C. Circuit Court of Appeals reversed the district court's "legally erroneous" holding. *Id.* at 757. The D.C. Circuit held that "KBR's assertion of the privilege" was "materially indistinguishable from Upjohn's assertion of the privilege in that case. *Id.* "As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct . . . . The same considerations that led the [Supreme] Court in *Upjohn* to uphold the corporation's privilege

claims apply here." *Id.* The court further explained that "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." *Id.* at 758-59. Like the Court of Appeals' opinion here, "the District Court's novel approach would [have] eradicated the attorney-client privilege for internal investigations," undertaken by a "significant swath of American industry," making businesses "less likely to disclose facts to their attorneys and to seek legal advice, which would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'" *Id.* at 759 (quoting *Upjohn*, 449 U.S. at 392).

In sum, compliance with the myriad regulations governing the conduct of U.S. businesses frequently requires the special expertise and judgment of legal counsel. As each of the cases above demonstrate, when counsel is called upon to "collect and sift" through the facts, be they environmental, health, safety, or accounting-related, "with an eye to the legally relevant," *Upjohn*, 449 U.S. at 391, their communications to their clients *are* protected from disclosure by the attorney-client privilege.

II. DISCLOSURE TO A COMPANY'S BOARD OF DIRECTORS DOES NOT DESTROY PRIVILEGE.

In addition to adopting an unduly narrow concept of legal advice, the Court of Appeals strayed from settled privilege law by using the Report's "consideration by [Polaris's] board of directors" as evidence of its discoverability, as though the Board of Directors was a third-party whose presence vitiated the privilege. In fact, directors perform both an advisory and an oversight role over a corporation, regularly relying on materials prepared by officers,

including legal advice, to manage risks, ensure the corporation is operating legally, and guide the company's overall strategy. But merely because some of their functions involve oversight of the corporation does *not* mean that the board is distinct from it. Accordingly, privileged communications that are selectively shared with a company's directors so that the corporation may be properly informed of a major corporate risk and act appropriately remain privileged. Indeed, Polaris's directors were well-situated to implement recommendations from the Report, especially if those recommendations involved significant new expenses, the conduct of corporate officers, or risk management. Contrary to the Court of Appeal's assertion, directors are uniquely justified in seeking and receiving legal advice pertaining to compliance matters. The same would be true of any corporation.

When it comes to the administration of the attorney-client privilege for corporations, "[t]here is but one client, and that client is the corporation." *Milroy v. Hanson*, 875 F. Supp. 646, 649 (D. Neb. 1995) (citing *Commodity Futures Trading Comm'n v Weintraub*, 471 U.S. 343, 348-49 (1985)). This is true despite the fact that a corporation can only act through human beings. *See id.*; *see also Weintraub*, 471 U.S. at 348 ("As an inanimate entity, a corporation must act through agents."). Accordingly, "documents subject to the privilege may be transmitted between non-attorneys (**especially individuals involved in corporate decision-making**) so that the corporation may be properly informed of legal advice and act appropriately." *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993) (emphasis added). "This follows from the recognition that since the decision-making power over the corporate client may be diffused," among several individuals, "the dissemination of confidential

communications to such persons does not defeat the privilege." *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D.N.Y. 1995).

In this case, the client was *Polaris*, not Polaris's general counsel, so "relaying [the Report] to the Board was merely making advice available to [the governing body of] this inanimate entity." *In re Grand Jury 90-1*, 758 F. Supp. 1411, 1413 (D. Colo. 1991) (attorney-client privilege applies to corporate President's letter to Board of Directors discussing legal advice given to President by attorney; corporation was client, and the President relayed the information to the board of directors as a means of making legal advice available to corporation); *see also Parneros v. Barnes & Noble, Inc.*, 332 F.R.D. 482, 499-500 (S.D.N.Y. 2019) (where company's general counsel engaged law firm to provide legal advice regarding employee's termination, law firm's memorandum, reviewed by general counsel and shared with Board of Directors, was privileged).

Moreover, the U.S. Supreme Court has made clear that "the authority to assert and waive the corporation's attorney-client privilege" rests with "management." *Weintraub*, 471 U.S. at 348-49; *see also Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 (8th Cir. 1981) ("[T]he power to assert or waive the privilege belongs to management, not the individual officers of the corporation."). State corporation laws, *including* Minnesota's, vest management authority in a corporation's board of directors. *See* Minn. Stat. Ann. § 302A.201 ("Board to manage. The business and affairs of a corporation shall be managed by or under the direction of a board . . . ."); *Erickson v. Hutchinson Tech., Inc.*, 158 F. Supp. 3d 751, 763 (D. Minn. 2016) ("Minnesota law puts the boards of directors . . . in charge of governing corporate affairs.").

In this case, Polaris was confronting a CPSC investigation and potential enforcement action, a corporate problem that very clearly implicates the Board of Director's duty to ensure that the company is operating legally. Indeed, the Board not only serves as the policer of corporate officer performance and protector of the company's assets and reputation, but also, through its audit committee function, ultimate manager of risk. Although Polaris ultimately settled with the CPSC, its general counsel reasonably shared outside counsel's candid legal advice regarding a significant corporate risk—a federal regulatory investigation—with the Board, so that the it could properly carry out its risk management duties. To deny privilege in this context would turn established U.S. Supreme Court and Minnesota precedent on its head and influence the decision of if and to what extent a business may choose to operate in Minnesota.

CONCLUSION

In view of the above, this Court should reverse the Court of Appeals, align Minnesota law with the law of privilege as it is uniformly understood nationwide, and hold that the Report is privileged.

Dated: November 20, 2020

Respectfully submitted,

/s/ Patrick Hedren

Patrick Hedren (#0391766)
Manufacturers' Center for Legal Action
733 10th Street NW, Suite 700
Washington, DC 20001
Phone: 202.637.3100
Email: PHedren@nam.org

Counsel for the National Association of Manufacturers

CERTIFICATION OF BRIEF LENGTH

I hereby certify that the foregoing brief complies with Minn. R. Civ. App. P. 132.01, subd. 3(c) because it contains 4,113 words, exclusive of the caption, table of contents, table of authorities, and signature block. This brief was prepared using Microsoft® Word for Office 365.

/s/ Patrick Hedren

Patrick Hedren (#0391766)
Manufacturers' Center for Legal Action
733 10th Street NW, Suite 700
Washington, DC 20001
Phone: 202.637.3100
Email: PHedren@nam.org