No. A20-1344

State of Minnesota
In Supreme Court

Energy Policy Advocates,

Appellee,

v.

Keith Ellison, in his official capacity as Attorney General
and Office of the Attorney General,

Appellants.

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

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 people, 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 and participating directly in litigation in jurisdictions around the country. Both the NAM and its members engage in legal advocacy, which frequently requires cooperating with parties who have shared legal interests. Issues involving the attorney-client privilege and the common-interest doctrine are critically important to the NAM and its members.

Although the question presented in this case relates to data requests of a public agency and its officials, the underlying legal issue—whether Minnesota recognizes the common-interest doctrine—has far-reaching ramifications for private manufacturers and for any business or individual that is regularly involved in litigation and wishes to coordinate with others sharing a common interest. Indeed, the Court of Appeals ruled without limitation that the common-interest doctrine "has not been recognized in Minnesota" and could not be invoked to protect otherwise privileged communications shared between parties with common legal interests. (Opinion at 26.)

The common-interest doctrine is essential for manufacturers and for associational groups like the NAM who operate or litigate in Minnesota. The NAM submits this brief in support of neither party but respectfully urges this Court to reaffirm the common-interest doctrine in Minnesota, just as it is in recognized in jurisdictions across the United States.

INTRODUCTION

The attorney-client privilege is an exception to the general rule that the court has a right to every person's evidence. The idea that a lawyer cannot be a witness in his client's case "is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. ed. 1961)). The privilege encourages full and frank communication between attorneys and clients, and hence advances the efficient administration of justice. *See Upjohn*, 449 U.S. at 389 (explaining that preserving the privilege "promote[s] broader public interests in the observance of law and administration of justice" because "sound legal advice or advocacy . . . depends upon the lawyer[] being fully informed by the client").

In Minnesota, the attorney-client privilege has been recognized since before Minnesota became a state, and is now formally codified in statute. *See* Minn. Stat. § 595.02 subd. 1(b). Minnesota courts agree that the "purpose of the 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." *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979).

Normally, revealing attorney-client communications to third parties waives the privilege. The common-interest doctrine serves as an important exception to that general rule, one that exists for the same fundamental reasons that attorney-client communications are exempted from normal discovery: to increase the free flow of

information and improve the administration of justice. Permitting parties who share legal interests to confidentially communicate with each other improves attorneys' ability to provide sound legal advice and effective advocacy.

For these reasons, this Court long ago recognized the common-interest doctrine as an exception to waiver of the attorney-client privilege. *See Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn. 1942), *overruled in part on other grounds by Leer v. Chi., Milwaukee, St. Paul & Pac. Ry. Co.*, 308 N.W.2d 305 (Minn. 1981) (an attorney disclosing a document with another party sharing a common interest "stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents"). Although another aspect of *Schmitt* was later overruled, the common-interest exception to waiver of the attorney-client privilege was not, and so Minnesota attorneys have justifiably relied on it for nearly 80 years.

Everyone ranging from individuals to small businesses to national associations to the government have come to depend upon the common-interest doctrine as articulated in *Schmitt* and in similar decisions across many other jurisdictions. In the modern legal marketplace, parties must increasingly coordinate legal efforts to address complex, novel legal matters. As such, virtually every jurisdiction recognizes some form of the common-interest doctrine. Given the new and unexpected uncertainty introduced by the Court of Appeals, this Court should take the opportunity presented by this case to reaffirm the common-interest doctrine in Minnesota.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THE COMMON INTEREST DOCTRINE IN MINNESOTA.

A. This Court Already Recognized The Common-Interest Doctrine.

This Court first recognized the common-interest doctrine just under 80 years ago in *Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn. 1942), *overruled in part on other grounds by Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Co.*, 308 N.W.2d 305 (Minn. 1981). For the persuasive reasons it did so then, the NAM supports reaffirming *Schmitt* again.

Schmitt was a case in which one plaintiff sued two defendants. An employee of Defendant #1 gave a statement that was (then) protected by the attorney-client privilege. *Id.* at 415. When Defendant #1 shared the witness's statement with Defendant #2, the question arose as to whether doing so waived the privileged status of the witness statement. *Id.* This Court squarely held that, ***no***, sharing the witness's statement between jointly aligned co-defendants did ***not*** waive the privilege:

> Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation, without an express understanding that the recipient shall not communicate the contents thereof to others, the communication is made not for the purpose of allowing unlimited publication and use, but in confidence, for the limited and restricted purpose to assist in asserting their common claims. The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he had no right, and cannot be compelled, to produce or disclose its contents.

Id. at 417. This Court later overruled a different aspect of *Schmitt*—that the *type of document* (a witness statement) was automatically privileged—but it has never overruled or even questioned the aspect of *Schmitt* establishing the common-interest exception to waiver of the attorney-client privilege.

The Court of Appeals' decision does not cite *Schmitt*. But *Schmitt* remains good law, and the Court should therefore reaffirm *Schmitt*.

B. The Common-Interest Doctrine Is Recognized In Virtually Every Jurisdiction.

In the years since *Schmitt* was decided, the prevailing view on the common-interest doctrine has been to recognize and expand it. Indeed, virtually every jurisdiction has adopted the common-interest doctrine to protect communications between parties with similar legal interests. This Court should too.

1. Most jurisdictions have adopted some version of the common-interest doctrine.

Beyond Minnesota, a vast majority of jurisdictions has adopted the common-interest doctrine in some form, whether by statute, rule, or common-law decision. *See* Nell Neary, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. KAN. L. REV. 795, 795-96 (2017) (explaining that, as of 2017, "ninety percent of jurisdictions recognize[d]" the common-interest doctrine and that "every federal circuit has recognized the doctrine, as well as an overwhelming majority of state jurisdictions"). As of 2017, only four jurisdictions did not recognize the doctrine in some form. *Id.* at 796 n.4.

There are two elements of the doctrine that are common across just about every jurisdiction: "(1) the parties [must] have a common legal, rather than commercial, interest; and (2) the disclosure [must have] occurred in the course of formulating a common legal strategy." *Khoday v. Symantec Corp.*, 2013 WL 12140484, at *2 (D. Minn. Sept. 24, 2013). Although shared business or commercial interests alone are insufficient to create a common interest, *e.g.*, *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995), most jurisdictions protect communications between those with joint interests if there are *overlapping* "legal" and "business" concerns. *See e.g.*, *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 & n.9 (Bankr. Del. 2010) ("The fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest.") (cleaned up).

Despite broad agreement on the basic elements of the doctrine, some jurisdictions apply the doctrine more narrowly, some apply it more broadly, and some apply it pragmatically, whenever the purposes of protecting a common-interest communication are served. On the narrower end of the spectrum, for example, some courts require entities' interests to be "identical," and not just "similar," in order to invoke the doctrine. *S'holder Representative Servs. LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2019 WL 4410039, at *2 (D.N.J. Sept. 16, 2019) (citing cases). Within shouting distance of this approach, some jurisdictions don't require precise identity of legal interests, but still require that putatively joint interests be "at least … *substantially*

similar." *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011) (quoting *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007)) (emphasis added).

On the other end of the spectrum, some decisions have broadly protected communications between joint parties, even if it was foreseeable that the parties could later be *adverse* to each other. *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 392 (S.D.N.Y. 1975) ("That a joint defense may be made by somewhat unsteady bedfellows does not in itself negate the existence or viability of the joint defense."); *see also Navigators Mgmt. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 WL 465588, at *4 (E.D. Mo. Feb. 24, 2009) (similar).

Different courts also apply (or limit) the common-interest doctrine to different contexts. In some places, the doctrine applies only when the co-parties are actually engaged in litigation. *See Boston Auction Co. v. W. Farm Credit Bank*, 925 F. Supp. 1478, 1482 (D. Haw. 1996) ("The so-called joint defense privilege, codified at Rule 503(b)(3), is available only in the context of a 'pending action and concerning a matter of common interest.'"). In others, active litigation is not required and the mere potential for litigation will suffice. *See, e.g.*, *Thompson v. Glenmede Trust Co.*, 1995 WL 752443, at *4 (E.D. Pa. Dec. 19, 1995) ("Parties with shared interests in actual or potential litigation against a common adversary may share privileged information without waiving their right to assert the privilege.") (cleaned up).

And even in jurisdictions where reasonably anticipated litigation triggers application of the doctrine, courts differ as to the standard for what is "reasonably anticipated." *Compare, e.g.*, *In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990) (applying the doctrine when litigation was "contemplated"), *with Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co.*, 142 F.R.D. 471, 479 (D. Colo. 1992) (applying the doctrine when there was a "strong possibility of future litigation"), *and In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710-12 (5th Cir. 2001) (applying the doctrine when a "threat" of litigation existed).

2. The Court should adopt a practical, middle-ground approach consistent with the Restatement and applied in the Eighth Circuit.

The NAM supports neither party in this dispute, but to the extent that the Court uses this case as a vehicle to clarify the boundaries of the common-interest doctrine in Minnesota, the NAM respectfully requests that the Court adopt an approach set forth in Restatement (Third) of the Law Governing Lawyers, Section 76 (June 2021 update), which has been regularly applied within the Eighth Circuit, where Minnesota's state-law rules are regularly applied.

Restatement Section 76(1) sets forth a widely accepted, commonsense, and practical common-interest standard. Under the Restatement, if two or more clients with a common legal interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, any otherwise privileged communication that relates to the matter "is privileged as against

third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication." *Id.*

The Eighth Circuit has applied a variant of this doctrine to co-defendants, *see John Morrell & Co. v. Local Union 304A of United Food & Com. Workers, AFL-CIO*, 913 F.2d 544, 556 (8th Cir. 1990) (citing cases), and has discussed even broader applications consistent with the Restatement's approach—to "a litigated or non-litigated matter"—under other circumstances. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (discussing the doctrine in the context of subpoena to Hillary Clinton in the Whitewater investigation, and favorably citing comments to the Restatement, but declining to apply it there for case-specific reasons).

Other circuits similarly apply the Restatement's approach and recognize the common-interest doctrine even when there is no actual litigation between or among parties with joint interests. *See, e.g.*, *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989) (it was "unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply"); *In re Teleglobe Comm'ns*, 493 F.3d at 364 ("[C]ommunity-of-interest privilege . . . applies in civil and criminal litigation, and even in purely transactional contexts."); *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996) ("But it is unnecessary that there be actual litigation in progress for this privilege to apply."); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007) ("[C]ommunications need not be made in anticipation of litigation to fall within the common interest doctrine."); *Cont'l Oil Co. v. United States*, 330 F.2d

347, 350 (9th Cir. 1964) (the doctrine applies "irrespective of litigation begun or contemplated"); *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1390-91 (Fed. Cir. 1996) (the doctrine "is not limited to actions taken and advice obtained in the shadow of litigation").

Consistent with these authorities, the NAM suggests that the Court recognize the formulation as articulated by the Restatement Section 76, and as practically applied in courts within the Eighth Circuit. *See, e.g.*, *Tekstar Commc'ns, Inc. v Sprint Commc'ns Co. L.P.*, 2009 WL 10711788, at *6 (D. Minn. May 14, 2009) (rejecting using "form over substance" when applying the common-interest doctrine).

The Restatement's formulation is sound because it recognizes the practical realities of the modern legal landscape. Parties have substantial interests in securing sound legal counsel on matters so as to *avoid* litigation, not just prepare for anticipated litigation. Protecting confidential communications between parties with shared legal interests in a transactional setting, as the Restatement suggests, does just that. In contrast, limiting the context in which the doctrine can be invoked to only situations in which the parties "anticipate" litigation introduces ambiguity and uncertainty into the decision-making process; courts may have to grapple with questions such as, under what conditions is the anticipation of litigation "reasonable" and not speculative? The Restatement rule sets a reasonable, clear, and practical standard courts and parties can sensibly follow.

C. Adopting The Restatement Approach Will Further Minnesota's Policies Underlying The Attorney-Client Privilege

1. The principles underlying the common-interest doctrine are consistent with the principles underlying the attorney-client privilege.

The Restatement approach to the common-interest doctrine is both pragmatic and consistent with the underlying purpose of the attorney-client privilege.

Distilled to its essence, the attorney-client privilege is grounded upon the efficient and effective administration of justice. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the "privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.").

Long ago, these values undergirding the privilege led courts across the country to protect communications made between co-defendants in criminal matters. *See, e.g.*, *Chahoon v. Commonwealth*, 62 Va. 822, 841–42 (1871); *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979) ("The common-defense rule. . . has been recognized in cases spanning more than a century."). In such cases, "communication among joint parties and their counsel about matters of common concern is often important to the protection of their interests" and is "necessary to a fair opportunity to defend." *McPartlin*, 595 F.2d at 1336.

Over time, the common-interest doctrine naturally evolved from protecting communications made by criminal co-defendants into protecting much broader categories of communications, including in civil cases. As the Fourth Circuit has said:

> Because the need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter, courts have extended the joint defense privilege to civil co-defendants, companies that had been individually summoned before a grand jury who shared information before any indictment was returned, potential co-parties to prospective litigation, plaintiffs who were pursuing separate actions in different states, and civil defendants who were sued in separate actions.

In re Grand Jury Subpoenas, 902 F.2d at 249 (citations omitted) (cleaned up); *see also Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987) (collecting similar examples and cases); *In re Teleglobe Commc'ns*, 493 F.3d at 364 & n.20 (citing the Restatement § 76). These cases recognize the common-interest doctrine because its purposes match the purposes behind the attorney-client privilege.

2. The NAM and its members routinely rely on the common-interest doctrine.

Re-affirming the common-interest doctrine in Minnesota (whether by reinvigorating *Schmitt*, further defining its contours, or adopting the Restatement approach) would likewise serve an important purpose: it would allow the NAM, its members, and other individuals, businesses, and parties to litigation to share legal advice and information with similarly situated parties sharing a common legal interest, thus serving several important objectives.

First, as explained above, reaffirming the common-interest doctrine would encourage the free flow of information between parties with the same legal interests, thus ensuring that attorneys are able to give the best-informed legal advice to their clients without fear of disclosure through civil discovery.

This benefit of the common-interest doctrine manifests itself every day in Minnesota. Manufacturers and other private parties frequently share legal interests, from coordinating a defense against similar lawsuits to investigating regulatory wrongdoing. For example, an improperly promulgated regulation is an Administrative Procedure Act ("APA") violation for one manufacturer just as much as it is for another, and both entities have identical legal interests in challenging it. The common-interest doctrine gives two entities considering an APA challenge the flexibility to each retain their own counsel while also gaining efficiencies from pooling their efforts, such as by filing a joint complaint or filing coordinated suits.

The NAM thus regularly coordinates with its members and other trade groups to, among other things (1) sue and intervene on behalf of federal and state agencies regarding procedural and substantive challenges to agency rulemaking; (2) sue federal or state executive officials or agencies for exceeding powers in issuance of executive orders; and (3) sue federal or state governments for exceeding their constitutional authority. In those situations and in others, manufacturers naturally benefit from sharing resources and information to increase both the quality and efficiency of their legal representation. They can coordinate on legal strategy, share expenses for costs of

litigation, write joint pleadings, motions, or expert reports, and organize more efficient discovery. *See* Neary, 65 U. KAN. L. REV. at 821. These efficiencies would not exist if the common-interest doctrine were not recognized in Minnesota.

Second, a common-interest doctrine as reflected in the Restatement's approach—which would protect communications even if they did not arise out of already-filed litigation—would encourage regulatory compliance. Upon issuance of a new regulation affecting product safety, for example, manufacturers may wish to pool resources to understand and comply with the new regulatory regime. If assured that their communications would be protected from future disclosure in civil litigation, manufacturers can be truly candid with other commonly aligned entities. Reaffirming the common-interest doctrine serves that laudable goal, encouraging parties with a shared legal interest to "meet legal requirements and to plan their conduct" accordingly. *See In re Regents of the Univ. of Cal.*, 101 F.3d at 1390–91. Such regulatory compliance and planning would obviously benefit the public by avoiding litigation and aligning conduct in the market with public policy goals. *Id.* at 1391. "Reason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication." *BDO Seidman, LLP*, 492 F.3d at 816.

Third, given the wide recognition of the common-interest doctrine across the country, re-affirming it in Minnesota avoids making Minnesota an unfortunate outlier, and the seriously negative consequences that would flow from outlier status. As one

example, if Minnesota were to reject the common-interest doctrine, it would become a magnet for litigation in which parties request communications that are shielded from disclosure in 90% of the country. If manufacturers cooperated in a common-interest arrangement in a foreign jurisdiction, an adverse party could file satellite litigation in Minnesota for the primary purpose of getting access to the contents of the common-interest communications through discovery in a Minnesota court. Even if ultimately unsuccessful, the resulting legal battles over standing, personal jurisdiction, principles of comity, and abstention doctrines could produce considerable, unnecessary strain on Minnesota's courts.

Fourth, by encouraging parties with shared legal interests to coordinate on issues of common interest, the common-interest doctrine reduces and streamlines litigation, reducing burdens on the judiciary. Permitting parties to share resources and discuss legal strategy helps the courts for much the same reason it benefits individual litigants: cooperation reduces discovery disputes, improves the quality of briefing, reduces the number of motions and other filings, and lowers the overall cost and burden of litigation. Conversely, failing to recognize the common-interest doctrine would deter cooperation, resulting in duplicative, more expensive, and protracted litigation.

CONCLUSION

The NAM respectfully asks this Court to reaffirm *Schmitt* and to clarify the common-interest doctrine in Minnesota by adopting the formulation of the doctrine set forth in Section 76 of the Restatement (Third) of The Law Governing Lawyers.

Date: September 8, 2021

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Certification of Document Length

I hereby certify that this petition conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3, regarding length and format for this brief. The length of this brief is 3,822 words. This petition was prepared using Microsoft Word 2016 software.

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