**No. A20-1344**

# State of Minnesota
# In Supreme Court

Energy Policy Advocates,

Respondent,

v.

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

Petitioners.

## REQUEST OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

Pursuant to Rule 129.01 of the Minnesota Rules of Civil Appellate Procedure, the National Association of Manufacturers ("NAM") respectfully requests leave to participate as amicus curiae and to file a brief in support of neither party but in recognition of the common-interest doctrine as an exception to waiver of the attorney-client privilege.[1]

[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.

## INTEREST OF *AMICUS CURIAE*

The 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. As such, issues involving the attorney-client privilege and the common-interest doctrine are critically important to the NAM and its members. The NAM represents a public interest in the outcome of this case.

Although the questions presented in this case are factually centered around government data requests of a public agency and its officials, the underlying legal issue has far-reaching ramifications for the NAM, for manufacturers nationwide, 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 information shared between parties with common legal interests. (Opinion at 26.)

The NAM respectfully requests that the voice of the broader manufacturing community be heard in this matter. If leave is granted, the NAM's *amicus* brief will suggest that this Court reverse the decision of the Court of Appeals with respect to its ruling on the availability of the common-interest doctrine under Minnesota law and confirm that the common-interest doctrine should be recognized in Minnesota as it is in so many other jurisdictions around the country.

## WHY AN *AMICUS* BRIEF IS DESIRABLE

The NAM's brief would provide the Court with factual background explaining how the common-interest doctrine is essential for manufacturers and for associational groups like the NAM who operate or litigate in Minnesota. Although the facts of the case involve a data practices request for communications between government attorneys working for public arms of the state, the underlying legal principle equally impacts all private parties and virtually anyone who litigates in Minnesota.

Private companies and other trade groups like the NAM use and rely upon the common-interest doctrine on an everyday basis. As this Court is no doubt aware, manufacturers and other private parties frequently find themselves in situations in which they have shared legal interests with each other, from coordinating a defense against copycat suits to investigating widespread wrongdoing that affects private actors both inside Minnesota and across state lines. In those situations, manufacturers

(and other private groups) naturally prefer to share resources and information in order to increase both the quality and efficiency of their legal representation. The NAM and other associational groups also rely on the common-interest doctrine in a variety of mundane situations, such as when they solicit bids from law firms for a common client group or coordinate a legal strategy with other groups on matters of shared interests. In such conversations manufacturers can only be truly candid with other commonly aligned parties if they can be sure their otherwise privileged communications are protected from future disclosure in civil litigation.

These sorts of communications are at the core of the common-interest doctrine. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 76 cmt. e illus. 1 (2000); *see also id.* cmt. c (explaining that "formality is not required" and that the common-interest doctrine can cover communication related to "litigation" or "other matters"). The Court should allow the NAM to participate as an *amicus* party and should grant review to recognize the common-interest doctrine and articulate its scope under Minnesota law. Doing so would advance the policies underlying the attorney-client privilege and bring Minnesota into alignment with the vast majority of jurisdictions around the country that already recognize the doctrine.

The common-interest doctrine is a natural outgrowth of the attorney-client privilege. Recognizing it would preserve and advance the same goals: ensuring that attorneys are able to give sound legal advice to their clients and that justice can be served fairly and efficiently. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389

(1981). With the benefit of the common-interest doctrine, the NAM and manufacturers can share legal advice and information with similarly situated parties sharing a common legal interest, enhancing the quality of legal counsel. Granting review and ultimately recognizing 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. In contrast, refusing to recognize the privilege would chill important conversations and deter parties from sharing information, reducing the quality of legal advice.

Further, permitting parties like the NAM and manufacturers to share privileged communications encourages cooperation and coordination, reduces litigation costs and improves the administration of justice. The NAM and its individual members regularly cooperate with other parties to bring coordinated lawsuits challenging, among other things, regulations that exceed a government agency's statutory authority. These efforts spread the costs of litigation across more parties, lowering the barriers for bringing important challenges to government overreach. At the same time, by assembling parties with shared legal interests into individual suits, such cooperation reduces and streamlines overall litigation in the courts. Recognizing the common-interest doctrine would give the NAM and other litigants assurances that their communications will be protected from disclosure as they work together to address pressing issues arising within the context of a common legal interest.

Conversely, refusing to recognize the common-interest doctrine would deter cooperation, requiring parties to individually shoulder the costs of litigation. That may freeze small private actors out of the court system while simultaneously resulting in duplicative and inefficient litigation from more well-heeled parties.

Finally, failing to recognize the common-interest doctrine would make Minnesota an outlier jurisdiction and a magnet for litigation requesting communications that are shielded from disclosure in 90% of the country. *See* Nell Neary, Comment, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. KAN. L. REV. 795 (2017) (explaining that, as of 2017, "ninety percent of jurisdictions recognize[d]" the common-interest doctrine). Should Minnesota refuse to recognize the common-interest doctrine, parties could gain evidence in Minnesota that they are barred from securing in virtually any other jurisdiction. Manufacturers might, for example, share confidential information in a jurisdiction that recognizes the doctrine, only to be haled into Minnesota courts and forced to reveal that information. Manufacturers may be reticent to expose themselves to jurisdiction in Minnesota if they cannot be certain that their sensitive communications will be privileged here. Such uncertainty in the law is a vice, not a virtue.

## CONCLUSION

In view of the above, the NAM requests that it be allowed to submit an *amicus* brief in this matter so it can provide the Court with its perspective on the importance of the common-interest doctrine in Minnesota.

Date: July 7, 2021

*/s/ Jeffrey P. Justman*

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## Certification of Document Length

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I hereby certify that this petition conforms to the requirements of Minn. R. Civ. App. P. 129.01(c), regarding length and format for a request for leave to participate. The length of this request is 1,290 words. This petition was prepared using Microsoft Word 2016 software.

Dated: July 7, 2021

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