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.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS

THE DISTRICT OF COLUMBIA'S REQUEST FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

TO: The Minnesota Supreme Court and to all counsel of record:

Pursuant to Minnesota Rule of Civil Appellate Procedure 129, Applicant the District of Columbia, on behalf of itself and other states to be later identified (together, "Prospective Amici"), requests leave to participate in this action as amicus curiae in support of petitioners, and, pursuant to Rule 117, requests that the Court grant the petition for review.

The petition presents the question of whether Minnesota courts recognize the common-interest doctrine. That doctrine is a well-recognized exception to the waiver of privilege that ordinarily results from the third-party disclosure of attorney-client and work-product information. State attorneys general, including Minnesota's and Applicant's, routinely coordinate with each other pursuant to common-interest agreements on multistate

enforcement actions, administrative petitions, and amicus briefs. These matters include critical public interest issues such as civil rights, consumer protection, antitrust, environmental law, and constitutional litigation. The decision below threatens to upend this entire system of multistate coordination by leaving communications and work product unprotected when those exchanges would be considered privileged in most, if not all, other jurisdictions that have considered the question. This motion describes the Prospective Amici's public interest in the matter, identifies why the Court may benefit from hearing their views, and sets forth reasons why this Court should grant review of the case.

I. Prospective Amici's Interest And Position.

Although this case concerns Minnesota law, Prospective Amici's interests are directly implicated. Prospective Amici have coordinated with Minnesota on numerous issues of great importance. For example, earlier this year, a coalition of 53 state and territory attorneys general, including both Applicant and Minnesota, announced a $573 million settlement against McKinsey & Company for its role in worsening the opioid crisis; the money will be used by states and territories to support opioid relief efforts. *See* Press Release, D.C. Off. of the Att'y Gen., *AG Racine Announces McKinsey & Company Will Pay $573 Million for its Role in Turbocharging the Opioid Crisis* (Feb. 4, 2021).[1] Also recently, in December 2020, a bipartisan coalition of 38 attorneys general filed suit against Google for anticompetitive conduct, seeking to protect internet users from Google's monopolistic activity. *See* Press Release, Colo. Off. of the Att'y Gen., *Colorado Attorney*

[1] *Available at* https://bit.ly/363Rk48.

General Phil Weiser Leads Multistate Lawsuit Seeking to End Google's Illegal Monopoly in Search Market (Dec. 17, 2020).[2] And, over 20 years ago, 52 state and territory attorneys general entered a massive settlement agreement with the largest cigarette manufacturers, securing billions of dollars to combat the negative effects of smoking. *See* Nat'l Ass'n of Att'ys Gen., *The Master Settlement Agreement*.[3] These lawsuits and resulting settlements are tremendously important and effective, and they rely on the candid sharing of information among numerous state attorneys general.

In these and many other multistate litigation efforts, each state can amplify its limited resources to represent its residents in matters of critical public interest. These cooperative efforts preserve not only state resources but also judicial resources by consolidating states' multiple actions into a single well-coordinated multistate case. And they rely on the common-interest doctrine to permit lawyers from different states to candidly trade ideas and feedback, without fear of public exposure.

Prospective Amici believe that the court of appeals erred in concluding that the "common-interest doctrine is not recognized in Minnesota." *Energy Policy Advocates v. Ellison*, No. A20-1344, 2021 WL 2200414, at *13 (Minn. App. June 1, 2021). That conclusion runs counter to this Court's treatment of litigants sharing a common interest, including co-defendants in civil cases. Indeed, Minnesota has historically been a leader in protecting the ability of co-litigants to cooperate. Although Virginia courts were the first

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2 *Available at* https://bit.ly/2SXLNt4.

3 *Available at* https://bit.ly/2UlhmNy (last visited July 2, 2021).

to recognize a joint-defense exception to waiver of the attorney-client privilege in the criminal context in 1871, *see Chahoon v. Commonwealth*, 62 Va. 822, 841-42 (1871), the Minnesota Supreme Court, in *Schmitt v. Emery*, was the first court in the United States to recognize that *civil* co-litigants, even when represented by different counsel, could share privileged communications or documents without waiving the privilege, 2 N.W.2d 413, 417 (Minn. 1942), *overruled on other grounds by Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W.2d 305 (Minn. 1981). In *Schmitt*, this Court reasoned that when attorneys for co-defendants in an automobile collision case exchanged privileged information, the privilege was not waived because the documents were shared with "an attorney who is engaged in maintaining substantially the same cause on behalf of other parties." 2 N.W.2d at 417.

The common-interest doctrine, which furthers the very goals identified in *Schmitt*, developed as a common-law feature of the attorney-client and work-product privileges. Like the joint-defense exception to third-party waiver rules, the common-interest exception furthers the purposes of those privileges: protecting the free flow of information from client to attorney and enhancing the quality of legal advice. *See United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007). Thus, contrary to the court of appeals's reasoning, this Court laid the groundwork for the modern common-interest doctrine as long ago as 1942.

In addition to ignoring this Court's own precedent and logic, the court of appeals's holding is out of step with most, if not all, other jurisdictions to consider the question. Following this Court's lead, many other jurisdictions have recognized that the common-interest doctrine is not "a separate privilege," but rather "an exception to ordinary waiver

rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other." *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012); *see Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002). For example, the Supreme Court of Washington has observed that "the 'common interest' doctrine is not an expansion of the [attorney-client] privilege at all; it is merely an exception to waiver." *Sanders v. State*, 240 P.3d 120, 134 (Wash. 2010) (en banc). As the Court of Appeals of Tennessee has explained, the exception "recognizes the advantages of, and even necessity for, an exchange or pooling of information among attorneys representing parties sharing a common legal interest in litigation." *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. 2002). Courts have concluded that the doctrine "applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine." *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990); *see United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980) (recognizing the common-interest doctrine as a logical addendum to the work-product privilege).

II. Why Participation Of Prospective Amici Curiae Is Desirable.

Prospective Amici's longstanding experience with the common-interest doctrine can help this Court in two primary ways. First, Prospective Amici can demonstrate the important role served by the common-interest doctrine in facilitating multistate efforts. Second, like Minnesota, Prospective Amici can illustrate how their jurisdictions have properly interpreted their attorney-client and work-product privileges to incorporate the common-interest doctrine even in the absence of express text.

III. Reasons For Granting Review.

The Minnesota Supreme Court should grant review of this case because, as petitioners ably argue in their petition for review, the case satisfies the criteria for discretionary review. Principally, the case presents a question of both state and national importance. *See* Minn. R. Civ. App. P. 117, subd. 2(a).

First, the court of appeals's decision is disrupting the ability of other state attorneys general to coordinate with Minnesota on legal matters of common interest, depriving other states of Minnesota's expertise. That could, in turn, hinder the Minnesota Attorney General's ability to work with other states in multistate litigation efforts to enforce consumer protection laws, pursue antitrust liability, or hold the federal government accountable.

Second, the ruling below threatens to unravel the larger tapestry of multistate coordination. Not only do Prospective Amici fear their past confidential communications and work product will now be subject to public disclosure in Minnesota, but the court of appeals's decision has injected tremendous uncertainty into further reliance on the common-interest doctrine as a basis to safeguard frank discussions concerning litigation strategy. And, as the United States Supreme Court has said, "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

For these reasons, Prospective Amici urge this Court to grant review and to carefully consider not only the Court's own history in the development of the common-interest doctrine, but also the policy ramifications of abolishing such a widely relied-on doctrine.

IV. Conclusion.

For the foregoing reasons, the District of Columbia, on behalf of itself and other states to be later identified, requests leave to participate as amicus curiae in support of petitioners in these proceedings.

Dated: July 7, 2021

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CERTIFICATE OF DOCUMENT LENGTH

This request complies with the word limitations of Minn. R. Civ. App. P. 129.01. The brief was prepared with proportional font, using Microsoft Word in Office 365, which reports that the request contains 1,457 words, exclusive of the caption and signature block.

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