A20-1344

STATE OF MINNESOTA

IN SUPREME COURT

Energy Policy Advocates,

Respondent,

vs.

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

Petitioners.

PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS AND ADDENDUM

Date of filing of Court of Appeals Decision:

June 1, 2021

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To: The Supreme Court of the State of Minnesota

Petitioners (the "OAG") seek review of the court of appeals decision (the "Decision"). The Decision renders Minnesota into a club of one: jurisdictions that have considered the common-interest doctrine and rejected it. It did so without analyzing the resulting policy or legal implications; simply holding that this Court has not yet decided whether it will recognize this well-established doctrine. The Decision also adopted novel interpretations of the attorney-client privilege and the Data Practices Act that have important ramifications and merit review. This Court should grant review.

STATEMENT OF LEGAL ISSUES

1. Does Minnesota recognize the common interest doctrine?

The Decision held that Minnesota has not yet recognized the common-interest doctrine and that the Court of Appeals lacks authority to recognize it.

2. Can internal communications among attorneys in public law agencies be covered by the attorney-client privilege?

The Decision held that purely internal communications among attorneys cannot be privileged because there is no client to the communication, ignoring that the client for purposes of a public law agency is often the agency itself.

3. Does Section 13.65 of the Data Practices Act, classifying inactive civil investigative data and data on administrative or policy matters as not generally available to the public nonetheless make all covered data that is not about individuals public?

The Decision held that Section 13.65 only protects data that is about individuals.

CRITERIA GOVERNING REVIEW

The Decision simultaneously destroys the existence of a privilege that Minnesota's public and private attorneys have relied upon for decades *and* forces the OAG to produce sensitive investigatory data and internal privileged communications to any member of the public who requests it.

The Court should review the Decision because it: (1) decided issues of importance to the State; (2) departed from the accepted and usual course of justice by constricting the scope of attorney-client privilege without considering the resulting legal or policy implications; (3) ruled on privilege issues that have little existing case law, and which require further development; and (4) ruled on issues with statewide impact that are likely to recur unless resolved by this Court. Minn. R. Civ. App. Proc. 117, subd. 2(a), (c), (d)(1-3).

STATEMENT OF THE CASE

The Minnesota Government Data Practices Act ("DPA") allows parties to obtain government data that is classified as public. To protect privileged and sensitive information of the OAG, the DPA exempts from disclosure data that is privileged, data related to civil investigations, and certain data on administrative and policy matters.

Respondent sought OAG data on environmental matters and communications with other attorneys general on environmental litigation. The OAG produced the public data but withheld not public data in three categories: (1) attorney-client privileged communications and work product; (2) data on policy matters; and (3) data on civil investigations. Respondent sued to obtain the withheld data. The district court held that

the AGO had properly classified all data. The Court of Appeals affirmed in part and reversed in part.

ARGUMENT

I. In Rejecting the Common-Interest Doctrine, the Decision Vitiates an Important and Widely Accepted Principle of Law, and Does So Without Any Meaningful Analysis.

Federal Courts, including the District of Minnesota and the Eighth Circuit recognize the common interest doctrine.[1] It is sufficiently well established to be included in *The Restatement of the Law Governing Lawyers*.[2] Every state that has decided the issue—except for the court of appeals here—recognizes the doctrine.[3] Accordingly, Minnesota trial courts have long assumed the common-interest doctrine would be recognized in Minnesota.[4] The court of appeals broke new ground by rejecting the doctrine, and did so without analyzing the policy implications of that rejection. (Add. 26.) This Court should accept review for several reasons.

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[1] *See*, *e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012).

[2] Restatement of the Law (Third) Governing Lawyers § 76 (2000).

[3] Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49, 65 (2005) (Noting that while not all courts have considered the issue, "[t]hose courts that have considered the issue have applied the valued principles of the attorney-client privilege to recognize the common interest doctrine.").

[4] *See*, *e.g.*, *Walmart Inc. v. Anoka Cty.*, No. A19-1926, 2020 WL 5507884 (Minn. Ct. App. Sept. 14, 2020), review denied (Nov. 25, 2020); *State of Minnesota v. Cash Call, Inc. et al.*, Hennepin County Case No. 27-CV-13-12740, Order on Discovery Motions, Dkt. 60 (July 29, 2016).

First, the Decision puts Minnesota in conflict with every other jurisdiction that has decided the issue.[5] Critically, this includes federal courts with jurisdiction over Minnesota,[6] creating situations where the forum may determine whether the common-interest doctrine applies. The Decision thus creates uncertainty for attorneys and their clients and incentivizes forum shopping.

Second, the Decision rejects the common-interest doctrine solely because this Court has not expressly recognized it. (Add. 26.) The Decision fails to analyze whether the doctrine *should* be recognized. (*Id.*) This creation of precedent through inertia does not serve the interests of justice.

Third, the common-interest doctrine furthers the same policy purposes as the underlying attorney-client privilege, improving the flow of information between clients and attorneys to facilitate effective legal representation.[7] Notably, this Court already recognizes the closely related joint defense privilege, allowing parties whose liability is intertwined to share privileged communications, and has held that attorneys sharing

[5] Schaffzin, *supra*.

[6] *See*, *e.g.*, *Shukh*, 872 F. Supp. 2d at 855.

[7] Schaffzin, *supra* at 51; *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989).

"common cause" should be able to share privileged communications.[8] The policies that underlie these privileges apply with equal force in the common-interest doctrine.[9]

Fourth, the common-interest doctrine is necessary for the efficient administration of multi-party and multi-jurisdiction litigation. Without it, parties aligned in the same suit or similar suits cannot coordinate effectively. This is an especially critical issue for state attorneys general which often coordinate both by choice and by compulsion. For example, in multiple lawsuits and investigations into drug manufacturers, distributors, and others related to the national opioid epidemic, state attorneys general were forced to coordinate on these matters because of multidistrict litigation and bankruptcy filings. Minnesota cannot participate meaningfully in such coordinated efforts unless this Court recognizes the common-interest doctrine.

II. The Decision Improperly Constricts the Attorney-Client Privilege for Public Agencies by Holding They Have No "Client."

Public law agencies stand in a unique position of both client and attorney when representing the public. In this situation, both client and counsel may be attorneys in the

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[8] *Schmitt v. Emery*, 211 Minn. 547, 552, 2 N.W.2d 413, 416 (Minn. 1942), overruled on other grounds by *Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W.2d 305 (Minn. 1981); *In re Lawrence*, 954 N.W.2d 597, 602–03 (Minn. Ct. App. 2020), review denied (Mar. 16, 2021).

[9] In dicta, the Decision also noted that if the common interest doctrine were recognized, it would only apply to analyses of attorney-client privilege, and that other standards would apply to waiver of work product. (Add. 27 (citing the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 76, 91).). The Restatement provision the court cited, however, supports the application of similar principles around the common interest doctrine to work product. *Supra.* § 91, cmt B. This is an example where, if the Court accepts review, it can further clarify the scope and applicability of the doctrine.

same office. Communications between these attorneys serve the same purpose as any other attorney-client communications, so should be protected as privileged.[10]

This Court has never needed to address how the attorney-client privilege applies to internal communications among attorneys in a public agency. Other courts that have considered this issue have recognized that the attorney-client privilege attaches to such communications.[11] With no meaningful explanation, however, the court of appeals held that "a communication between or among two or more attorneys in a law office, by itself, cannot satisfy the requirements stated above in the absence of a communication between one of the attorneys and a client." (Add. 23.) In a private law office that might be the case—because the client doesn't reside in the office. But for attorneys working in the OAG, the client is the State and the decisionmaker is often another attorney, especially when the OAG is acting in an enforcement capacity and without an external agency client. In such matters, internal communications are made for the purpose of seeking and obtaining legal advice. The Decision's holding—that the attorney-client privilege does not apply to such communications—has no precedent in Minnesota law.

The Decision failed to examine the legal or policy implications of constricting the attorney-client privilege, instead concentrating on the absence of an external client. This Court has warned against needlessly mechanical applications of attorney-client privilege.[12] Instead, courts must examine whether "the contested document embodies a communication

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[10] *See ACLU v. NSA*, 925 F.3d 576, 589 (2d Cir. 2019).

[11] *Id.*

[12] *Kobluk v. University of Minnesota*, 574 N.W.2d 436, 444 (Minn. 1998).

in which legal advice is sought or rendered."[13] This basic inquiry involves reviewing "the nature and form of the document and the circumstances of the exchange."[14] Here, the Decision's rigid search for an external client belies this principle. This Court should grant review and reverse.

III. The Decision Misconstrues the Plain Language of the DPA.

Section 13.65 is a provision of the DPA specific to the OAG. It strikes an important balance between public access to data and the OAG's need to maintain the confidentiality of sensitive information given its law enforcement mission. Section 13.65 does this by exempting certain data on policy, administrative matters, and civil investigations from general disclosure to the public, while making the data available to an individual who is the subject of the data. The Decision upends this careful balance, reading language into section 13.65 that does not exist and stripping away protections provided in section 13.65. This upending of the DPA is contrary to the plain text of section 13.65 and its purpose.

The DPA functions by classifying data into categories that define who, if anyone, can access that data. Section 13.65 classifies certain sensitive data at the OAG as "private data on individuals." The Legislature uses this designation when it wants to make not public data available to an individual who is the subject matter of the data, and no one else. *Nothing* in the DPA, however, requires not public data to be *about* an individual to be classified as private data on an individual. The Decision incorrectly adds this requirement to the statute.

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[13] *Id.*

[14] *Id.* (internal citation omitted).

Where the Legislature wants to limit the data classified by a provision of the DPA to only data *about* individuals, it does so expressly, and within that section of the DPA. For example, in section 13.46 concerning data on welfare recipients, the legislature provided:

> *Data on individuals* collected, maintained, used, or disseminated by the welfare system are *private data on individuals*, and shall not be disclosed except . . .

Minn. Stat. § 13.46, subd. 2(a). Section 13.65 contains no similar limiting language. If the Decision were correct, and data must be about an individual to be classified as "private data on individuals," there would have been no need for the Legislature to specify that only welfare "data on individuals" is protected as "private data on individuals." The Legislature's mere use of the subsequent term "private data on individuals" would have sufficed.[15]

The Decision errs in its interpretation of section 13.65, and this Court should grant review.

[15] *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) ("a statute is to be construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant").

CONCLUSION

The OAG respectfully requests that this Court grant review on these three legal issues.

Dated: June 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 117, SUBD. 3

The undersigned certifies that the Petition for Review submitted herein contains 1,986 words (exclusive of the caption, signature block, addendum and certificate) and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Petition for Review was prepared using a proportional spaced font size of 13 point. The word count is stated in reliance on Microsoft Word for 365, the word processing system used to prepare this Petition for Review.

/s/ Liz Kramer
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