NO. 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,

Appellants.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES

Eric J. Magnuson (MN #66412)
Rebecca Zadaka (MN #0401943)
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402–2015
Tel: 612–349–8500
emagnuson@robinskaplan.com
rzadaka@robinskaplan.com

Attorneys for Amicus Curiae The Chamber of Commerce of the United States

Table of Contents

Table of Authorities iii

Interest of Amicus Curiae 1

Argument 2

I. The court of appeals' opinion addressed the common interest privilege and rejected it on, among other grounds, the conclusion that the privilege is not recognized in Minnesota 3

II. Minnesota has recognized the joint defense doctrine, the predecessor to the common interest privilege, for over 80 years ... 6

A. The court of appeals and the parties overlooked controlling authority 6

B. Courts have an obligation to find and apply the correct law regardless of the oversights of the parties 8

III. The common interest privilege is nearly universally recognized and plays a vital role in modern litigation 10

A. Schmitt was a seminal decision recognizing the predecessor to the common interest privilege 10

B. Scholars support the recognition and application of the common interest privilege 13

C. Less than a handful of jurisdictions have failed to adopt the common interest privilege 16

D. Regardless of how the Court resolves this case, it should reaffirm that the common interest privilege applies to both attorney-client communications and work product, when litigation is contemplated and after it is concluded 19

1. The privilege protects both attorney-client confidences and work product 19

2. The privilege applies when litigation is contemplated and not merely after litigation is commenced 21

3. The privilege exists even in the absence of a formal agreement among the parties sharing privileged and confidential information....... 22

4. The privilege survives the end of litigation to the same extent as the attorney-client privilege and work product protection survive 23

Conclusion 24

Table of Authorities

Page(s)

Cases

Associated Wholesale Grocers, Inc. v. Americold Corp.,
975 P.2d 231 (Kan. 1999) 18

Cleveland Botanical Garden v. Drewien,
2020-Ohio-1278, 153 N.E.3d 700 16

Cont'l Oil Co. v. U.S.,
330 F.2d 347 (9th Cir. 1964) 11

Energy Policy Advocates v. Ellison, et al.,
No. 62-CV-19-5899, slip. op. (Minn. Ct. App. June 1, 2021) 5, 6, 19

Hanover Ins. Co. v. Rapo & Jepson Ins. Servs., Inc.,
870 N.E.2d 1105 (Mass. 2007) 12

Herrick v. Jackson Hole Airport Bd.,
2019 WY 118, 452 P.3d 1276 (2019) 17

Hoffman v. United Telecomms., Inc.,
No. 86–233–C2, 1982 WL 20514 (D. Kan. Mar. 11, 1982) 12, 20

Jerry Mathison Constr., Inc. v. Binsfield,
615 N.W.2d 378 (Minn. Ct. App. 2000) 9

Kirchner v. Smith,
58 S.E. 614 (W. Va. 1907) 17

Leer v. Chicago, M., St. P. & P. Ry. Co.,
308 N.W.2d 305 (Minn. 1981) 6, 7

Mays v. Dunaway,
2005-Ohio-1592, No. 20717, 2005 WL 742502 16

People v. Pennachio,
637 N.Y.S.2d 633 (Sup. Ct. 1995) 12

Razor Cap., LLC v. HP Debt Exch., LLC,
No. 13–cv–00272, 2014 WL 12599804 (D. Minn. Aug. 15, 2004) 11

Schmitt v. Emery,
2 N.W.2d 413 (Minn. 1942) ..... *passim*

Selby v. O'Dea,
2017 Ill App (1st) 151572, 90 N.E.3d 1144 12

State v. Hannuksela,
452 N.W.2d 668 (Minn. 1990) 9

State v. Maxwell,
691 P.2d 1316 (Kan. Ct. App. 1984) 17, 18

United States v. BDO Seidman, LLP,
492 F.3d 806 (7th Cir. 2007) 14

Williams v. Blount,
741 P.2d 595 (Wyo. 1987) 17

Statutes

K.S.A. 60–426 18

Other Authorities

Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 Fordham L. Rev. 871 (1996) 11, 14, 15

Jared S. Sunshine, *Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit*, 65 Cath. U. L. Rev. 833 (2016) 13, 22, 23

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 (2005) 13, 15, 16

Nell Neary, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. Kan. L. Rev. 795 (2017) ..... *passim*

Restatement (Third) of Governing Lawyers § 76 (2000) ..... *passim*

Restatement (Third) of Governing Lawyers § 91 (2000) 6, 20

Interest of Amicus Curiae[1]

The Chamber of Commerce of the United States ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members, and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases of vital concern to the nation's business community. The interest of the U.S. Chamber is public and not private, as the issue presented by this case impacts all litigants in the State of Minnesota, including many members of the U.S. Chamber.

---

[1] No counsel for any party authored this brief in whole or in part. No party, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Argument

The common interest privilege is an integral part of modern litigation. It allows parties whose positions are aligned to share strategies and confidential information in order to more efficiently and effectively present their cases to the courts. The privilege is recognized by all but a handful of jurisdictions across the country.

Minnesota has recognized the joint defense privilege, the predecessor to the common interest privilege, for decades. This Court has not had occasion to address the privilege since 1941, as it has not been seriously challenged until this case. And the challenge here is not to the merits of the privilege, but rather the mistaken conclusion that the privilege has not yet been adopted by this Court. In that regard, the court of appeals' decision was simply wrong, and this Court should say so.

Beyond that, comments made by the court of appeals in its opinion, although clearly dicta, reflect an inappropriately narrow view of the privilege as it might apply to both attorney-client confidences and work product.

This Court should reaffirm the existence of the common interest privilege in Minnesota, and clearly outline its scope. The U.S. Chamber urges the Court to hold that the privilege protects both attorney-client

confidences and work product, that it applies when litigation is contemplated and not merely after litigation is commenced, that the privilege exists even in the absence of a formal agreement among the parties sharing privileged and confidential information, and that it survives the end of litigation to the same extent as the attorney-client privilege and work product protection survive.

I. The court of appeals' opinion addressed the common interest privilege and rejected it on, among other grounds, the conclusion that the privilege is not recognized in Minnesota

In the district court and the court of appeals, this case primarily dealt with the interpretation and application of the Minnesota Government Data Practices Act ("MGDPA"). The court of appeals addressed the Act's application to several types of documents including communications between the Attorney General and lawyers for other states or government entities.

The Attorney General asserted that those communications involved privileged information protected by, among other things, the common interest doctrine. The documents included: (1) communications between the Attorney General's office and attorneys general from other states concerning proposed or existing multi-state litigation; (2) communications with the other state attorneys general involving a

potential joint amicus brief to the U.S. Supreme Court; and, (3) communications with other states relating to pending antitrust litigation.

The court of appeals observed that the district court did not expressly consider whether the identified categories of documents were protected by the attorney-client privilege, presumably because it had already determined that all such documents were protected by the work product doctrine.

The trial court agreed with the Attorney General that the documents at issue were protected by the common interest doctrine. But the court of appeals reversed, asserting that the common interest doctrine has not been recognized in Minnesota:

> Respondents may rely on the common-interest doctrine in response to a data practices request only to the extent that the application of the doctrine is authorized by section 13.393. That statute provides, in relevant part, that the data of "an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility." Minn. Stat. § 13.393. The attorney-client privilege is codified in a statute and is protected by a rule of court. See Minn. Stat. § 595.02, subd. 1(b); Minn. R. Civ. P. 26.02(d). But the common-interest doctrine is not embodied in a statute or a rule. The common-interest doctrine might be considered a "professional standard" if it were recognized by law, but—as [attorney general concedes]—it has not been recognized in Minnesota. The rules of professional conduct provide that "a lawyer shall not knowingly reveal information relating to the representation of a client," Minn.

> R. Prof. Conduct 1.6(a), except in eleven enumerated circumstances, but none of the enumerated exceptions incorporates the common-interest doctrine, see Minn. R. Prof. Conduct 1.6(b).
>
> Respondents urge this court to recognize the common-interest doctrine for the first time, but we decline the invitation to do so. As we have stated many times, "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." Tereault v. Palmer, 413 N.W.2d 283, 286 (Minn. App. 1987), review denied (Minn. Dec. 18, 1987). *Because the common-interest doctrine is not recognized in Minnesota, its application is not authorized by section 13.393. Accordingly, the common-interest doctrine is not an exception to the disclosure requirements of the MGDPA. Thus, the district court erred by applying the common-interest doctrine.*

Energy Policy Advocates v. Ellison, et al., No. 62-CV-19-5899, slip. op. at 25-26 (Minn. Ct. App. June 1, 2021). (emphasis added).

The court of appeals also stated its view that communications between or among attorneys in the same law office are not, by themselves, privileged, in the absence of the communication between one of the attorneys and the client. *Id.* at 23-24.

The court of appeals went on to say that even if the common interest doctrine were recognized in Minnesota, it only applied if there were pre-existing attorney-client communications, and communications between attorneys are brought within the protection of the attorney-client

privilege "only if the communication between or among attorneys reveals the prior attorney-client communication." *Id*. at 27.

In dicta, the court concluded that the district court "applied the common-interest doctrine too broadly" by applying it to both attorney-client privilege and work product protection. "To the extent that the common-interest doctrine is recognized, it applies only to the former and not the latter." Citing Restatement § 76, cmt. d; cf. § 91, cmt. b (2000). The court of appeals did recognize that under the Restatement, no formal agreement between sharing attorneys was necessary. *Energy Policy Advocates*, slip op. at 13.

II. Minnesota has recognized the joint defense doctrine, the predecessor to the common interest privilege, for over 80 years

A. The court of appeals and the parties overlooked controlling authority

In *Schmitt v. Emery*, 2 N.W.2d 413 (Minn. 1942), overruled in part on other grounds by *Leer v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 308 N.W.2d 305 (Minn. 1981), this Court said:

> 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 has no right, and cannot be compelled, to produce or disclose its contents.

2 N.W.2d at 417. A separate part of the *Schmitt* decision recognizing the initial privilege of the witness statement in question was later overruled in *Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W.2d 305, 309 (Minn. 1981) (holding that a statement by an employee who is a mere witness is not the statement of the client). But the recognition of the common interest privilege has never been questioned by the Minnesota courts until the court of appeals' decision in this case.[2]

It is safe to say that in the nearly 80 years since *Schmitt* was decided, litigants in every manner of civil case in Minnesota have relied upon the

---

[2] In *Sprader v. Mueller*, 121 N.W.2d 176, 179-80 (Minn. 1963), citing *Schmitt*, the Court said "there is no clear-cut authority in Minnesota dealing with the problem of a confidential communication divulged to a third person by an attorney who neither occupies the position of an adversary to the recipient nor has a concert of interest with him." The Court held the statement at issue was not privileged because it was divulged to a "stranger to the cause." *Id.* at 180. It seems clear there was no common interest since the court referred to the individual as a "stranger," as opposed to one with a "concert of interest."

existence of a common interest privilege in order to coordinate the efficient prosecution and defense of civil litigation. Its use has become ubiquitous. Indeed, the Restatement § 76 expressly embraces the privilege:

> If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68- 72 that relates to the matter is privileged as against third persons.

It is a principle that has been relied upon by lawyers for both plaintiffs and defendants in thousands of litigated cases. The declaration by the court of appeals that Minnesota does not recognize a common interest privilege was shocking both because of its incorrectness and because of the implications that flow from that holding.

B. Courts have an obligation to find and apply the correct law regardless of the oversights of the parties

Schmitt is found nowhere in the court of appeals' opinion, and apparently was not cited to the court by the parties. The fact that the parties fail to cite the controlling legal authority in a case is no excuse for a wrong decision.

The Minnesota Court of Appeals and this Court have both recognized the obligation of the appellate courts to correctly decide an

issue even if it is not adequately briefed by the parties. See *Jerry Mathison Constr., Inc. v. Binsfield*, 615 N.W.2d 378, 381 (Minn. Ct. App. 2000) (*citing State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). In *Binsfield*, the court of appeals observed that it had an obligation to decide cases in accordance with existing law regardless of counsels' oversights. 615 N.W.2d at 381.

And this Court said the same thing in *Hannuksela*: "[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be 'diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities.'" 452 N.W.2d 674 n.7 (quoting Tate, *Sua Sponte Consideration on Appeal,* in Appellate Judicial Opinions 128 (R. Leflar ed. 1974) (originally printed in 9 Trial Judges J. 68 (1970))).

It is particularly important in this case for the Court to remedy the apparent oversights of the litigants and the court of appeals and apply the correct law. The court of appeals designated its opinion as precedential. The merits of that designation are questionable, in light of the fact that the court of appeals essentially declared (incorrectly) that there was no law in Minnesota on the common interest privilege. The better course would have been for the court to refrain from the

precedential designation because by making the purported absence of law binding precedent, the court actually did what it said it could not – make the law for future cases.

In these circumstances, it is particularly important for this Court to exercise its supervisory powers and overrule the decision of the court of appeals regardless of the arguments advanced by the parties.

III. The common interest privilege is nearly universally recognized and plays a vital role in modern litigation

All litigants want a fair and efficient forum for resolution of their claims. If Minnesota truly is to be an outlier from virtually every other jurisdiction in refusing to recognize the common interest privilege, then businesses like the U.S. Chamber's members may be deterred from doing business in this state because of their inability to invoke the privilege and efficiently litigate claims that may arise here.

A. Schmitt was a seminal decision recognizing the predecessor to the common interest privilege

Commentators and treatise writers have recognized that this Court was one of the initial adapters of the concept that communications between parties with aligned interests in litigation are entitled to protection otherwise afforded to attorney-client privileged

communications. *See* Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 Fordham L. Rev. 871, 889 (1996) ("In matters of first impression, the Chahoon and Schmitt courts recognized the need to protect the confidentiality of client statements made in the course of a common defense, among separately retained lawyers for co-defendants in civil and criminal matters."); Nell Neary, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. Kan. L. Rev. 795, 802–03 (2017) ("The 1871 case, *Chahoon v. Commonwealth*, is recognized as the first case to apply the joint defense doctrine. . . . Almost seventy-five years passed before the Minnesota Supreme Court expanded the joint defense privilege from strictly criminal co-defendants to include civil co-defendants in *Schmitt v. Emery*. . . . *Schmitt* marked the first steps toward today's common interest doctrine." (internal citations omitted)).

Schmitt has been cited favorably by dozens of courts across the country as they address issues relating to the common interest privilege. *See, e.g., Cont'l Oil Co. v. U.S.*, 330 F.2d 347, 349–50 (9th Cir. 1964) (citing *Schmitt* as support for its finding that memoranda exchanged by attorneys did not result in a waiver of the attorney-client privilege); *Razor Cap., LLC v. HP Debt Exch., LLC*, No. 13–cv–00272 (MJD/JSM), 2014 WL 12599804, at *10 (D. Minn. Aug. 15, 2004) ("The Supreme Court of

Minnesota has held that the attorney-client privilege may extend to protect communications between attorneys and non-employee agents of a corporation under certain circumstances. *See Schmitt v. Emery* . . . . Likewise, the Eighth Circuit, applying the federal common law of attorney-client privilege, has also found that the privilege may extend to non-employee, non-clients of a corporation. *See In re Bieter Co.*, 16 F.3d 929, 937–38 (8th Cir. 1994)."); *Selby v. O'Dea*, 2017 Ill App (1st) 151572, ¶¶ 38, 62, 90 N.E.3d 1144, 1152, 1158 (citing *Schmitt* for the proposition that the common defense or joint defense rule "was recognized through the first half of the 1900s by a few courts, in different contexts, including civil cases, and involving work product as well as attorney-client communications," later concluding that Illinois recognizes the common interest exception to the waiver rule); *Hanover Ins. Co. v. Rapo & Jepson Ins. Servs., Inc.*, 870 N.E.2d 1105, 1110 (Mass. 2007) (citing *Schmitt* as part of its determination to adopt the common interest doctrine); *People v. Pennachio*, 637 N.Y.S.2d 633, 635 (Sup. Ct. 1995) (same); *Hoffman v. United Telecomms., Inc.*, No. 86–233–C2, 1982 WL 20514, at *9 (D. Kan. Mar. 11, 1982).

This Court's early adoption of the principles behind the common interest privilege has been a model for other jurisdictions.

B. Scholars support the recognition and application of the common interest privilege

Scholars have also voiced support for recognition of the common interest privilege. *See* Jared S. Sunshine, *Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit*, 65 Cath. U. L. Rev. 833 (2016) (arguing in support of broad recognition of the common interest privilege irrespective of a litigation requirement); Nell Neary, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. Kan. L. Rev. 795, 813, 819 (2017) (supporting recognition of the common interest privilege).

"The vast majority of the states, and every circuit court of appeals, have adopted some form of the joint defense or common interest privilege." Sunshine, *supra*, at 838 (internal citations omitted).

Recognition of the common interest privilege is necessary to best serve the purpose of the attorney-client privilege and promote efficiency while eliminating unnecessary costs. Neary, *supra,* at 820–21. The purpose of the attorney-client privilege is to encourage the "free flow of information" and to enhance the "effectiveness of counsel;" failure to recognize the common interest privilege makes it difficult for "attorneys to predict what communications will remain privileged if shared with a commonly interested third party." *Id.* at 820 (citing 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, 57 (2005)). Not only are the goals of the attorney-client privilege better served by recognizing the common interest privilege, but the judicial system and the parties also benefit when parties with a common interest are able to "to seek assistance, obtain sound legal advice, and plan their actions in order to comply with the law," thereby avoiding litigation in the first place. *Id.* at 821 (citing *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007)).

The benefits of the common interest privilege stem from the joint defense doctrine. The joint defense doctrine has many benefits in both criminal and civil settings. *See* Bartel, *supra*, at 880, where the author argues that in criminal cases in particular, "[g]iven the absence of formal discovery, the formation of joint defense groups to promote the voluntary exchange of information is neither surprising nor suspicious." *Id.* at 880. Coordinated strategy is also important for defendants who are tried together. *Id.* at 881. "Whether the case is civil or criminal, the balance necessary to the adversary system does not exist if one side has a coordinated strategy and access to information while the other side does not." *Id.* Other benefits of the joint defense privilege include efficient use

of judicial resources, as trial time may be shortened and streamlined. *Id.* at 882.

Critics of the common interest doctrine argue that the doctrine unnecessarily expands the attorney-client privilege. Neary, *supra*, at 820 citing Schaffzin, *supra*, at 68. They assert that "it broadens the attorney-client privilege, which is generally construed narrowly," in favor of "the over-arching search for [the] truth." *Id.* (citing Schaffzin, *supra*, at 55–56, 68). That premise is flawed, however, as the common interest doctrine does nothing to expand existing privilege —"the common interest doctrine attaches only to communications that would already be protected by attorney-client privilege. It does not broaden attorney-client privilege because careful parties arguably would not share those communications in the first place." *Id.* (citing Schaffzin, *supra*, at 55–56). Clear definition of the common interest privilege, however, allows "attorneys and courts to predict and respect attorney-client privilege," which aims to "'to encourage the free flow of information and to enhance the quality of legal advice'—especially when interests are aligned." *Id.* at 820–21 (citing Schaffzin, *supra*, at 51, 67–68).

C. Less than a handful of jurisdictions have failed to adopt the common interest privilege

"At this time, the only jurisdictions not to recognize even a limited version of the common interest doctrine are Kansas, Ohio, West Virginia and Wyoming." Neary, *supra*, at 795–96 n.4. It seems, however, that even that short list may be too expansive; Ohio appears to recognize the common interest doctrine, and in at least some of the other states, the issue appears simply not to have been squarely decided.[3]

---

[3] Ohio: While the Neary article included Ohio as a state that doesn't recognize common interest, it appears that it does, as two Ohio Court of Appeals decisions seem to conclude. *See Cleveland Botanical Garden v. Drewien*, 2020-Ohio-1278, ¶ 54–56, 153 N.E.3d 700, 713–14 (affirming that communications were protected by the common interest privilege); *see also Mays v. Dunaway*, 2005-Ohio-1592, ¶ 21, No. 20717, 2005 WL 742502, at *3 ("Therefore, the common interest exception to the attorney-client privilege applies to only those communications, advice or other information exchanged . . . .").

West Virginia: West Virginia appears to just not have had a chance to consider the common interest privilege. Neary mentions West Virginia in relation to the common interest/joint defense doctrines, but does not explain why West Virginia has not adopted the common interest doctrine. *See* Neary, *supra*, at 795–96 n.4. One article includes West Virginia among several states (Minnesota included) that have not applied the doctrine to their attorney-client privilege statute. *See* Schaffzin, *supra*, at 61–62 n.39 ("Those states are included in the above list, however, because the courts within those states have not yet applied those statutes to protect communications shared among plaintiffs or non-parties."). Searching in Westlaw for West Virginia state cases discussing either "common interest privilege," "common interest doctrine," or "joint defense," did not reveal anything relating to waiver of the attorney-client privilege due to communications with third parties. A West Virginia

Even in Kansas, the law is not clear. While Kansas courts seemed to recognize the joint defense doctrine in one criminal case[4], the Kansas

---

court did appear to recognize a form of the joint defense doctrine with shared counsel—that when two clients employ the same attorney for "the promotion of their common interests," the communications are not privileged between themselves "although it seems [communications] may [be privileged] in a litigation between them and a stranger." *Kirchner v. Smith*, 58 S.E. 614, 619–20 (W. Va. 1907) (citing *Hurlburt v. Hurlburt*, 28 N.E. 651, 652 (N.Y. 1891)). There does not appear to be any consideration of this situation with separate counsel.

Wyoming: Like West Virginia, it is not clear why Wyoming is included in Neary's list of states that have not adopted the privilege. Searching case law yields a case where there appears to be a "conditionally privileged communication" relating to slander/libel, but the attorney-client privilege is not mentioned. *See Williams v. Blount*, 741 P.2d 595, 596 (Wyo. 1987) ("The acceptance of a conditionally privileged communication was established nearly a half century ago: 'In those cases where one person has an interest in the subject matter of the communication and the person to whom the communication is made has a corresponding interest, every communication honestly made in order to protect such common interest is privileged by reason of the occasion.'" (quoting *Sylvester v. Armstrong*, 84 P.2d 729, 732 (Wyo. 1938)). Wyoming also noted that the attorney-client privilege is not waived when two clients are represented by the same attorney, but did not mention the waiver when there are separate attorneys. *See Herrick v. Jackson Hole Airport Bd.*, 2019 WY 118, ¶ 8 n. 4, 452 P.3d 1276, 1279 (2019) ("An exception to this [waiver of attorney-client privilege] rule arises when clients share information on a matter of common interest: 'When two or more persons, each having an interest in some problem, or situation, jointly consult an attorney, ...'") (quoting *Oil, Chem. & Atomic Workers Int'l Union v. Sinclair Oil Corp.*, 748 P.2d 283, 290 (Wyo. 1987)).

[4] The Kansas court of appeals referenced the joint defense doctrine in *State v. Maxwell*, 691 P.2d 1316, 1320 (Kan. Ct. App. 1984) (holding that the presence of another, "when all three persons were being represented by the same counsel, did not prevent the meeting from being confidential and thus did not waive the attorney-client privilege"). The court reasoned

Supreme Court has declined to extend the privilege to the civil context. Neary, *supra*, at 814–16. *See Associated Wholesale Grocers, Inc. v. Americold Corp.*, 975 P.2d 231, 238–39 (Kan. 1999) The court reasoned that "[w]ithout a credible argument for recognition of the joint defense doctrine based on the language of the attorney-client privilege statute itself [K.S.A. 60–426] proponents of the joint defense doctrine are vulnerable to attack." *Id.* at 239. The court declined to consider the joint defense doctrine. *Id.* ("The effect of K.S.A. 60–426 on joint representation agreements is reserved for another day when the issue and policy considerations have been fully briefed and placed squarely before us."). This is a far cry from a rejection on the merits.

On balance, the overwhelming majority of courts that have considered the issue have joined this Court's recognition of the need for and value of a privilege that protects communications between parties

---

that, "[w]here two or more persons employ an attorney as their common attorney, their communications to him in the presence of each other are regarded as confidential so far as strangers to the conference are concerned." *Id.* "These rules are based on a 'joint defense privilege' which extends the attorney-client privilege to communications made in the course of joint defense activities. Where two or more persons jointly consult an attorney concerning mutual concerns, their confidential communications with the attorney, although known to each other, will be privileged in controversies of either or both of the clients with the outside world." *Id.*

with aligned interests in litigation. There is no reason for this Court to turn its back on its own precedent.

D. Regardless of how the Court resolves this case, it should reaffirm that the common interest privilege applies to both attorney-client communications and work product, when litigation is contemplated and after it is concluded

The U.S. Chamber takes no position at this stage of the proceedings with respect to the application of the Minnesota Government Data Practices act to the dispute in this case. But it does urge the Court to reaffirm the common interest privilege, and its application to both attorney–client communications and work product materials before, during and after litigation, to the same extent that those protections are recognized in the absence of shared communications.

1. The privilege protects both attorney-client confidences and work product

Despite its previous determination that Minnesota does not recognize the common interest doctrine, the court of appeals also asserted, as pure dicta, that the common interest doctrine does not apply to work product. *Energy Policy Advocates*, slip op. at 27. But the authority relied upon by the court of appeals does not support its conclusion.

The Restatement of Governing Lawyers § 91 cmt. b expands "work product" to include disclosures to "associated lawyers and other professionals working for the client, or *persons similarly aligned on a matter of common interest*." (emphasis added). Even the notes following Section 91 appear to be in favor of applying the common interest rule to voluntary disclosures of work product in specific situations, stating that "[t]he 'common interest' test utilized by the courts is adopted from 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 210 (1970)." Restatement § 91 notes.

Additionally, many courts expand work product protection to others with a common interest. *See id.* (citing several cases explaining their parameters for applying the work product doctrine to those with common interests); *see also Hoffman v. United Telecomms., Inc.*, No. 86–233–C2, 1982 WL 20514, at *9 (D. Kan. Mar. 11, 1982) (citing *Schmitt*, among others, for the proposition that "[w]here there is a 'community of interest' as there is here, between counsel for plaintiff and counsel for plaintiff intervenor, the work product privilege is not destroyed by counsel sharing the information").

The better view is that the common interest doctrine encompasses work product in addition to the attorney-client privilege. Work product,

as opposed to confidential client communications, is more likely to be shared among lawyers to determine appropriate legal advice—lawyers often inform one another's opinions and legal analyses to develop a better understanding of the law. Lawyers often exchange the very items that the work product doctrine aims to protect: mental impressions, strategies, and thought processes when working collaboratively to prosecute or defend multi-party litigation. These discussions—which are assumed to be confidential when made—should be just as protected by the common interest doctrine when motivated by a common interest as a shared communication that would otherwise be protected by the attorney-client privilege.

This Court should not only recognize that the common interest doctrine applies in Minnesota to communications protected by the attorney-client privilege, but also that the disclosure of protected work product to parties with a common interest does not constitute a waiver of work product protections.

2. The privilege applies when litigation is contemplated and not merely after litigation is commenced

While the application of the common interest doctrine varies across jurisdictions, many hold that the common interest doctrine applies when

litigation is impending or pending. Sunshine, *supra*, at 844–45; *see also id.* at 853–54 (discussing how the New York Court of Appeals restricted application of the common interest doctrine to pending or anticipated litigation).

Federal case law "makes clear that the common interest doctrine applies even where there is no litigation in progress." *Id.* at 854–55. Indeed, the "First, Second, Third, Fourth, Seventh, Eighth, Ninth, and Federal Circuits" have all rejected a strict litigation requirement where neither pending nor even anticipated litigation is required for the doctrine to apply. *Id.* (citing several federal court decisions explaining their litigation requirements). Only the Fifth Circuit has embraced a strict litigation requirement to applying the common interest doctrine. *Id.* The better view is that parties can privily consult one another whenever they have an identity of interest. *Id.*

3. The privilege exists even in the absence of a formal agreement among the parties sharing privileged and confidential information

Restatement § 76 cmt. c reiterates that "[e]xchanging communications may be predicated on an express agreement, but formality is not required." While courts are split as to whether a written agreement is necessary to the common interest doctrine, "there is a

general consensus that an oral agreement may suffice for the privilege just as it would for any other contract." Sunshine, *supra*, at 870.

4. The privilege survives the end of litigation to the same extent as the attorney-client privilege and work product protection survive

The common interest doctrine is rooted in the attorney-client privilege—it is an extension of the privilege. Neary, *supra*, at 799–800. Indeed, the Restatement of the Law Governing Lawyers § 76(1) extends the attorney-client privilege to clients with a "common interest in a litigated or nonlitigated matter" even when "represented by separate lawyers." Because the common interest doctrine protections are an extension of the attorney-client privilege, the logical inference is that the protections from the common interest privilege generally survive, as do other protected communications.

And there is no reason for this Court to distinguish the application of the core holding of *Schmitt* in the context of work product. *Schmitt* was premised on the notion that there is no waiver of privilege when the information is shared with the expectation that it would remain confidential.

> 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 has no right, and cannot be compelled, to produce or disclose its contents.

2 N.W.2d at 417.

Viewed in this light, it is clear that the common interest doctrine is not so much a privilege as an exception to waiver, and there is no basis for distinguishing between attorney-client communications and work product, both of which are protected from compelled disclosure and in that sense privileged. Waiver of the protection simply does not occur when information is shared under the umbrella of a common interest. And the protection of that information is co-extensive with the protection afforded to both attorney-client communications and work product, protection that is robustly defined by this Court's jurisprudence, both as to when that protection arises, and how long it lasts. There is no need for the Court to restate those principles as long as it is clear that waiver does not occur when the common interest doctrine applies.

Conclusion

The Court should reaffirm its holding in *Schmitt*, and clearly say that what has been the law for 80 years remains the law – Minnesota recognizes a common interest protection for information – privileged and

work product – shared by parties and their lawyers in the common prosecution or defense of civil litigation. That protection exists in the overwhelming majority of jurisdictions, and while it is applied in slightly different ways, no jurisdiction has rejected the concept on the merits. It is a valuable and indeed essential aspect of modern litigation, enabling parties to more efficiently and effectively litigate their claims and defenses.

September 9, 2021

Respectfully submitted,

By: /s/ Eric J. Magnuson

Eric J. Magnuson (MN #66412)
Rebecca Zadaka (MN #0401943)
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402–2015
Tel: 612–349–8500
emagnuson@robinskaplan.com
rzadaka@robinskaplan.com

Attorneys for Amicus Curiae The Chamber of Commerce of the United States

Certificate of Compliance

The undersigned counsel for *Amicus Curiae* The Chamber of Commerce for the United States certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13–point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 5,538 Word Count words, including headings, footnotes, and quotations.

September 9, 2021

By: /s/ Eric J. Magnuson

Eric J. Magnuson (MN #66412)
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402–2015
Tel: 612–349–8500
emagnuson@robinskaplan.com

Attorneys for Amicus Curiae The Chamber of Commerce of the United States

91993848