

Case No. A20-1344

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State of Minnesota  
In Supreme Court

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Energy Policy Advocates,

Respondent,

v.

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

Petitioners.

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**REQUEST OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE***

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The Chamber of Commerce of the United States of America (“U.S. Chamber”) respectfully requests that the Minnesota Supreme Court grant it leave to participate in this case pursuant to Rule 129 of the Minnesota Rules of Civil Appellate Procedure as *amicus curiae*, in support of neither party, but in reaffirmation of the common interest doctrine as an exception to waiver of the attorney-client privilege and work product protections.

## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The 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.

### WHY AN *AMICUS* BRIEF IS DESIRABLE

This court has already received and granted a number of *amicus* requests in this significant case involving the common interest privilege. Those submissions underscore the need for thoughtful and thorough consideration by this Court of the decision of the court of appeals.

As the Court is now undoubtedly aware, both the parties and the court of appeals failed to consider this Court's decision recognizing the common interest

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<sup>1</sup> 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.

privilege in Minnesota, *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  
Ry. Co.*, 308 N.W.2d 305 (Minn. 1981). In *Schmitt*, the 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 (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.

It is safe to say that in the nearly 80 years since *Schmitt* was decided, litigants in every manner of civil case have relied upon the 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 (Third) of the Law Governing Lawyers § 76 (2000) 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.

That's the law that most practitioners in Minnesota thought applied to their cases. 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. 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<sup>2</sup>, 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.

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<sup>2</sup> "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." Nell Neary, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. Kan. L. Rev. 795, 795-96 (2017) at n.4. Kansas has yet to squarely address the question.

The U.S. Chamber and its members have broad experience in civil litigation across the country, including experience with common interest privilege agreements. As an amicus, the U.S. Chamber will share that experience and their perspectives on the significance of the common interest privilege with the Court, and the implications that would follow from affirmance of the court of appeals' decision. The Chamber will focus its brief on the fundamental importance of the common interest privilege, some contours of the privilege relevant to the private sector, and the salutary, perhaps even essential, aspects of the privilege to private businesses and associations.

### CONCLUSION

The U.S. Chamber respectfully requests that it be allowed to submit an amicus brief in this matter so that it can provide the Court with its perspective on the importance of the common interest privilege in Minnesota.

Respectfully submitted,

ROBINS KAPLAN LLP

Dated: August 23, 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. 129.01(c), regarding length and format for a request for leave to participate. The length of this request is 1,017 words, exclusive of the caption and signature block. This petition was prepared using Microsoft Word 2016 software.

Dated: August 23 , 2021

/s/ Eric J. Magnuson  
Eric J. Magnuson

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