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.

BRIEF OF AMICI CURIAE THE DISTRICT OF COLUMBIA AND THE STATES OF ALABAMA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA IN SUPPORT OF PETITIONERS

KATHERINE M. SWENSON
(No. 0389280)
AMRAN A. FARAH
(No. 0395354)
Greene Espel PLLP

222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
(612) 373-8389
kswenson@greeneespel.com
afarah@greeneespel.com

Attorneys for Amicus Curiae the District of Columbia

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Principal Deputy Solicitor General

ASHWIN P. PHATAK
Deputy Solicitor General

HARRISON M. STARK
SAMSON J. SCHATZ
Assistant Attorneys General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 727-6287
loren.alikhan@dc.gov

Jeffrey M. Markowitz
Arthur Chapman Kettering Smetak & Pikala, P.A.
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402

Amicus Minnesota Defense Lawyers Association

Jennifer A. Thomson
Thompson Tarasek Lee-O'Halloran PLLC
7101 York Avenue South, Suite 255
Edina, MN 55435

Erica A. Holzer
David Herr
Maslon LLC
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140

Alethea M. Huyser
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425

Amicus Minnesota State Bar Association

Eric J. Magnuson
Rebecca Zadaka
Robins Kaplan LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015

Amicus Chamber of Commerce of the United States of America

Susan L. Naughton
League of Minnesota Cities
145 University Avenue West
Saint Paul, MN 55103-2044

Amici League of Minnesota Cities, Association of Minnesota Counties, and Minnesota County Attorneys Association

Charles E. Lundberg
Lundberg Legal Ethics
750 Heinel Drive
Roseville, MN 55113

Kenneth L. Jorgensen
Dorsey & Whitney LLP
50 South Fifth Street, Suite 1500
Minneapolis, MN 55402

Charles E. Jones
Moss & Barnett
150 South Fifth Street, Suite 1200
Minneapolis, MN 55402

M. Gregory Simpson
Meagher & Geer
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402

Amicus Minnesota Firm Counsel Group

Mahesha P. Subbaraman
Subbaraman PLLC
222 South Ninth Street, Suite 1600
Minneapolis, MN 55402-3389

Amici Public Record Media, and Minnesota Coalition on Government Information

Jacob D. Campion
Cicely Miltich
Assistant Attorneys General
445 Minnesota Street, Suite 1400
Saint Paul, MN 55101-2131

Jennifer E. Olsen
Schwebel, Goetz & Sieben, P.A.
5120 IDS Center
Minneapolis, MN 55402-2246

Wilber W. Fluegel
Fluegel Law Office
100 South Fifth Street, Suite 1900
Minneapolis, MN 55402

Amici Governor Tim Walz, and 23 Cabinet Agencies

Amicus Minnesota Association for Justice

Jeffrey P. Justman
Thomas K. Pryor
Faegre Drinker Biddle & Reath LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Patrick D. Hedren
Manufacturers' Center for Legal Action
733 10th Street NW, Suite 700
Washington, D.C. 20001

Matthew D. Hardin
Hardin Law Office
1725 I Street NW, Suite 300
Washington, D.C. 20006

Douglas P. Seaton
James V.F. Dickey
Upper Midwest Law Center
8421 Wayzata Boulevard, Suite 105
Golden Valley, MN 55426

Amicus The National Association of Manufacturers

Respondent Energy Policy Advocates

Oliver J. Larson
Eizabeth C. Kramer
Adam H. Welle
Jennifer A. Kitchak
Office of the Attorney General
445 Minnesota Street, Suite 900
Saint Paul, MN 55101

Keith Ellison and Office of the Attorney General

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The District of Columbia and the States of Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and West Virginia ("Amici States") file this brief as amici curiae under Rule 129 of the Minnesota Rules of Civil Appellate Procedure in support of petitioners.[1] The Amici States routinely coordinate with each other and with Minnesota on multistate enforcement actions, amicus briefs, and public advocacy efforts. These multistate actions allow states to pool their resources to address critical public-interest issues that affect them all, such as civil rights, consumer protection, antitrust, environmental law, and constitutional litigation. Recently, for example, a coalition of 53 state and territory attorneys general announced a $573 million settlement against McKinsey & Company for its role in worsening the opioid crisis, the proceeds of which will support state 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).[2]

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[1] No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entities other than amici curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

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

This well-established system of multistate coordination in enforcement and litigation depends on the existence of the common-interest doctrine. That doctrine protects communications and work product shared between two or more parties with a common legal interest where they are represented by separate counsel and "agree to exchange information concerning the matter." Restatement (Third) of Law Governing Lawyers § 76(1) (Am. L. Inst. 2000). Rather than constituting a separate privilege per se, most courts have framed the common-interest doctrine as an exception to the waiver of privilege that ordinarily results from disclosure to third parties. *See, e.g.*, *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007). The doctrine recognizes that "joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication." *Id.* at 816.

The common-interest doctrine finds its origins in a 1942 decision of this Court, which for the first time recognized that civil co-defendants may share privileged communications without waiving the attorney-client privilege. *Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn. 1942), *overruled on other grounds by Leer v. Chi., Milwaukee, St. Paul & Pac. Ry. Co.*, 308 N.W.2d 305 (Minn. 1981). Unlike other forms of disclosure, this Court explained, communication between co-parties is not exchanged "for the purpose of allowing unlimited publication and use." *Id.* Rather, it is made "in confidence, for the limited and restricted purpose to assist [the clients] in asserting their common claims." *Id.*

From its roots in the Minnesota courts, the common-interest doctrine has become a nearly ubiquitous feature of American jurisprudence. At least 20 states have codified the doctrine in their statutory codes or rules of evidence, while over a dozen more have

recognized the doctrine as a common-law feature of the attorney-client privilege. *See, e.g.*, *Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526, 531 (S.C. 2010); *Estate of Nash by Nash v. City of Grand Haven*, 909 N.W.2d 862, 869-70 (Mich. Ct. App. 2017). Courts in nearly every federal circuit have joined the states in recognizing the doctrine. *See* William T. Barker, *The Attorney-Client Privilege, Common-Interest Arrangements, and Networks of Parties with Preexisting Obligations*, 53 Tort Trial & Ins. Prac. L.J. 1, 20 n.103 (2017). And courts have overwhelmingly applied the principles underlying the common-interest doctrine to preclude waiver of the work-product doctrine under similar circumstances. *See, e.g.*, *O'Boyle v. Borough of Longport*, 94 A.3d 299, 313 (N.J. 2014). In fact, before this case, "no jurisdiction . . . ha[d] *rejected* the [common-interest] principle when called upon to recognize it." *Selby v. O'Dea*, 90 N.E.3d 1144, 1154 (Ill. App. Ct. 2017).

Disregarding this unanimous consensus, the court of appeals refused to apply the common-interest doctrine, holding (without acknowledging *Schmitt*) that it "is not recognized in Minnesota." *Energy Pol'y Advocs. v. Ellison*, No. A20-1344, 2021 WL 2200414, at *13 (Minn. Ct. App. June 1, 2021). Affirming that decision would not only put Minnesota law at odds with every other jurisdiction to directly address the issue, but it would also threaten to upend the well-established system of multistate coordination that allows the Amici States to coordinate with Minnesota on enforcement actions, amicus briefs, and directed advocacy efforts. Multistate coalitions cannot leverage the full expertise of attorneys across states if they cannot discuss and debate legal strategies, interpretive and doctrinal questions, and state interests with full candor. And without the common-interest doctrine, the Amici States and Minnesota must fear public exposure of

past and future privileged communications and work product, carefully shared to advance their joint efforts and protect the interests of their residents.

Multiple state courts have explicitly adopted the modern common-interest doctrine to allow states and cities to share confidential communications and work product with each other. None has refused to apply it. Drawing on Minnesota's long history of protecting confidential communications between civil co-litigants, the Amici States urge this Court to recognize and to apply the common-interest doctrine.

ARGUMENT

I. The Common-Interest Doctrine Is A Widely Recognized Exception To The Rule That Privilege Is Waived When Information Is Disclosed To Third Parties.

A. This Court laid the foundation for the development of the modern common-interest doctrine.

The attorney-client privilege protects confidential communications between a client and her lawyer from unwilling disclosure. *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998). As the United States Supreme Court has explained, the privilege is designed to "encourage full and frank communication between attorneys and their clients," recognizing that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979). Generally speaking, the attorney-client privilege is waived when a confidential communication is disclosed to a third party—and thus no longer "confidential." *Kobluk*, 574 N.W.2d at 440; *see Schwartz v. Wenger*, 124 N.W.2d 489,

492 (Minn. 1963). But a long line of cases has firmly established an exception to this waiver rule that allows "persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers." Restatement (Third) of Law Governing Lawyers § 76 cmt. b.

Notably, this common-interest exception finds its roots in the decisions of this Court. To be sure, Virginia was the first state to apply the exception to *criminal* co-defendants, recognizing the right of "all the accused and their counsel[] to consult together about the case and the defence" without waiving the attorney-client privilege. *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822, 842 (Va. 1871). But this Court was the first to articulate that *civil* co-litigants could share privileged communications or documents without waiving the privilege. *See Schmitt*, 2 N.W.2d at 417. When an attorney shares a privileged document with a co-party, this Court explained, "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 [the clients'] common claims." *Id.* As a result, the parties "cannot be compelled[] to produce or disclose its contents." *Id.*

This Court's reasoning in *Schmitt* inspired courts around the country to recognize that co-plaintiffs and other parties with common interests "should [also] be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990). As a federal district court in California noted, the common-interest doctrine must be extended to cooperating plaintiffs just like it is to cooperating defendants; if not, "cooperating defendants would be situated better than their

plaintiff counterparts." *Sedlacek v. Morgan Whitney Trading Grp.*, 795 F. Supp. 329, 331 (C.D. Cal. 1992). As courts applied the common-interest doctrine to other analogous factual scenarios, they continued to cite *Schmitt* as the doctrinal and logical foundation of the exception. *See, e.g.*, *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 625-26 (2016) (describing *Schmitt* as an early source of the common-interest doctrine); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1110 (Mass. 2007) (same).

Respondents seek to distinguish the "joint-defense" doctrine of *Schmitt* from the so-called "common-interest extension," Energy Pol'y Advocs.' Resp. to Pet. for Review at 6, but the two concepts are so closely related that many courts use the terms interchangeably. *See, e.g.*, *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002); *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012); *UltiMed, Inc. v. Becton, Dickinson & Co.*, Civ. No. 06-2266, 2008 WL 4849034, at *3 (D. Minn. Nov. 6, 2008); *cf.* Susan V. Watson, *Ethical Implications of Joint Defense or Common Interest Doctrines*, 12 Antitrust 59, 59 (1998) ("The more inclusive terminology of 'common interest' more accurately describes what was originally purely a [criminal] joint defense concept."). That is understandable because the modern common-interest doctrine advances the same goals identified by this Court in *Schmitt* and those underlying the attorney-client privilege more generally. The doctrine shields from involuntary disclosure communications that are "made . . . in confidence, for the limited and restricted purpose to assist in asserting [the clients'] common claims." *Schmitt*, 2 N.W.2d at 417. For this reason, "[t]he need to protect free flow of information from client to attorney logically exists *whenever* multiple clients share

a common interest about a legal matter." *United States v. Schwimmer*, 892 F.2d 237, 234-44 (2d Cir. 1989) (emphasis added) (quoting Daniel J. Capra, *The Attorney-Client Privilege in Common Representations: Information-Pooling and Problems of Professional Responsibility*, 33 Trial Law. Q. 20, 21 (1989)). Whether it is applied to plaintiffs, defendants, or non-parties, the common-interest doctrine enhances the quality of legal advice and allows "joint venturers . . . to plan[] their activities" based on such advice. *BDO Seidman, LLP*, 492 F.3d at 816.

B. All jurisdictions to consider the question have recognized the common-interest doctrine as an exception to the waiver rules governing the attorney-client privilege.

By disavowing the common-interest doctrine entirely, the court of appeals' decision is out of step with every other jurisdiction to have considered the question. In fact, before the opinion below, multiple courts noted that "no jurisdiction . . . ha[d] *rejected* the [common-interest] principle when called upon to recognize it." *Selby*, 90 N.E.3d at 1152-53; *see State Farm Fire & Cas. Co. v. Admiral Ins. Co.*, 225 F. Supp. 3d 474, 481 (D.S.C. 2016) ("[T]he Court has found no example of a state completely rejecting the common interest doctrine."); *see also infra* n.3 & n.4. Although the precise scope of the doctrine varies between jurisdictions, the vast majority of state and federal courts to have considered the question recognize that the common-interest doctrine protects, at minimum, privileged communications between attorneys whose clients share a common legal interest in ongoing or pending litigation. *See Selby*, 90 N.E.3d at 1155.

To be sure, while at least 20 states have codified a version of the common-interest doctrine in their statutory codes or rules of evidence,[3] Minnesota has not. *See Energy Pol'y Advocs.*, 2021 WL 2200414, at *12 ("[T]he common-interest doctrine is not embodied in a [Minnesota] statute or a rule."). Yet even in states where the common-interest doctrine is not codified, state courts have applied it as a common-law feature of the attorney-client privilege.[4] For example, when a trial court in Washington declined to apply the common-interest doctrine because courts could not "fashion new exemptions" to the state's public records act, the state's highest court clarified that "the 'common interest' doctrine is not an expansion of the privilege at all; it is merely an exception to waiver." *Sanders v. State*, 240

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[3] *See, e.g.*, Ala. R. Evid. 502(b)(3); Alaska R. Evid. 503(b)(3); Ark. R. Evid. 502(b)(3); Del. R. Evid. 502(b)(3); Haw. R. Evid. 503(b)(3); Idaho R. Evid. 502(b)(3); Ky. R. Evid. 503(b)(3); La. Code Evid. Ann. art. 506 B(3); Me. R. Evid. 502(b)(3); Miss. R. Evid. 502(b)(3)(B); Neb. Rev. Stat. § 27-503(2)(c); N.H. R. Evid. 502(b)(3); N.M. R. Evid. 11-503(B)(3); N.D. R. Evid. 502(b)(3); Okla. Stat. tit. 12, § 2502(B)(3); Or. Rev. Stat. § 40.225(2)(c); S.D. Codified Laws § 19-19-502(b)(3); Tex. R. Evid. 503(b)(1)(C); Vt. R. Evid. 502(b)(3); Wis. Stat. § 905.03(2).

[4] *See, e.g.*, *Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1099-1100 (Ariz. Ct. App. 2003); *Oxy Res. Cal. LLC v. Super. Ct.*, 9 Cal. Rptr. 3d 621, 635 (Cal. Ct. App. 2004); *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 469 (Colo. App. 2003); *Keller v. Keller*, 63 Conn. L. Rptr. 474 (Conn. Super. Ct. 2016); *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987); *McKesson Corp. v. Green*, 597 S.E.2d 447, 452 n.8 (Ga. Ct. App. 2004); *Selby*, 90 N.E.3d at 1159-60; *Price v. Charles Brown Charitable Remainder Unitrust Tr.*, 27 N.E.3d 1168, 1173 (Ind. Ct. App. 2015); *Gallagher v. Off. of Att'y Gen.*, 787 A.2d 777, 784-85 (Md. Ct. Spec. App. 2001); *Hanover Ins. Co.*, 870 N.E.2d at 1109; *Estate of Nash by Nash*, 909 N.W.2d at 869; *Lipton Realty, Inc. v. St. Louis Hous. Auth.*, 705 S.W.2d 565, 570 (Mo. Ct. App. 1986); *In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procs.*, 2 P.3d 806, 821 (Mont. 2000); *O'Boyle*, 94 A.3d at 310; *Ambac Assur. Corp.*, 27 N.Y.3d at 626-27; *Sessions v. Sloane*, 789 S.E.2d 844, 855 (N.C. Ct. App. 2016); *In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750, 763 (Pa. 2018); *Tobaccoville USA, Inc.*, 692 S.E.2d at 531; *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213-14 (Tenn. Ct. App. 2002); *Sanders v. State*, 240 P.3d 120, 134 (Wash. 2010).

P.3d 120, 133-34 (Wash. 2010); *see Oxy Res. Cal. LLC v. Super. Ct.*, 9 Cal. Rptr. 3d. 621, 635 (Cal. Ct. App. 2004) (describing the common-interest doctrine as a "nonwaiver doctrine"). And although no Illinois court had addressed the issue before 2017, the Illinois Appellate Court concluded that "the overwhelming weight of authority and reason" counseled in favor of recognizing the "common-interest exception to the waiver rule." *Selby*, 90 N.E.3d at 1158. As the Tennessee Court of Appeals 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. Ct. App. 2002) (emphasis added).

Joining dozens of state legislatures and courts, federal courts in nearly every circuit have adopted the common-interest doctrine.[5] *See* Barker, *supra*, at 20 (noting the ubiquity of the doctrine across the federal courts). As the District Court for the District of Minnesota articulated, the common-interest doctrine is "an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) (quoting

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[5] *See Gonzalez*, 669 F.3d at 978; *BDO Seidman, LLP*, 492 F.3d at 815-816; *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *Cavallaro*, 284 F.3d at 249-50; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997); *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129*, 902 F.2d at 249; *Schwimmer*, 892 F.2d at 243-44; *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, 370 F. Supp. 3d 116, 133 (D.D.C. 2019); *United States v. Gumbaytay*, 276 F.R.D. 671, 673-74 (M.D. Ala. 2011); *Travelers Cas. & Sur. Co. v. Excess Ins. Co.*, 197 F.R.D. 601, 606-07 (S.D. Ohio 2000).

Cavallaro, 284 F.3d at 250); *see In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997). The Court of Appeals for the Seventh Circuit reiterated the policy rationales behind the doctrine: "Reason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication." *BDO Seidman, LLP*, 492 F.3d at 816.

C. The common-interest doctrine applies to preclude waiver of the work-product privilege.

The court below also concluded that "[t]o the extent that the common-interest doctrine is recognized" in Minnesota, it would not apply to preclude the waiver of the work-product privilege. *Energy Pol'y Advocs.*, 2021 WL 2200414, at *13 (citing Restatement (Third) of Law Governing Lawyers § 91 cmt. b (Am. L. Inst. 2000)). That too is incorrect. Courts have overwhelmingly applied the same principles underlying the common-interest doctrine to preclude waiver of the work-product privilege. *See O'Boyle*, 94 A.3d at 313. Indeed, the comments to the very same Restatement cited by the court below make explicit that "[w]ork product, including opinion work product, may generally be disclosed to . . . persons similarly aligned on a matter of common interest" without waiving the protection of the privilege. Restatement (Third) of Law Governing Lawyers § 91 cmt. b (citing *id.* § 76).

In defining the boundaries of the common-interest doctrine, numerous state and federal courts have explicitly endorsed its application to protect attorney work product.[6] For example, the Colorado Court of Appeals has held that the state's open records statute "incorporates common law concepts of privilege and waiver" and thus continues to shield attorney work product when it is shared with third parties having common legal interests in the matter. *Ritter v. Jones*, 207 P.3d 954, 960 (Colo. App. 2009). Applying this doctrine, that court concluded that sharing draft legislation between the state Office of Legislative Legal Services, a union attorney, and the Governor's legal counsel did not waive the work-product privilege. *Id.* at 961.

Indeed, courts have noted that the work-product privilege continues to apply in a number of circumstances where work product has been disclosed to third parties. Unlike the attorney-client privilege, which exists largely to protect client confidences, the work-product privilege "promote[s] the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the *opponent*." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (emphasis added); *see O'Boyle*, 94 A.3d at 313; *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 442 (Fla.

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[6] *See, e.g.*, *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d at 249; *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980); *United States v. Stewart*, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003); *Ariz. Indep. Redistricting Comm'n*, 75 P.3d at 1100; *Oxy Res. Cal. LLC*, 9 Cal. Rptr. 3d at 635; *Ritter v. Jones*, 207 P.3d 954, 960 (Colo. App. Ct. 2009); *Visual Scene, Inc.*, 508 So. 2d at 442; *Selby*, 90 N.E.3d at 1153; *D'Alessandro Contracting Grp., LLC v. Wright*, 862 N.W.2d 466, 474 (Mich. Ct. App. 2014); *Cotter v. Eighth Jud. Dist. Ct.*, 416 P.3d 228, 230 (Nev. 2018); *O'Boyle*, 94 A.3d at 313; *Tobaccoville USA, Inc.*, 692 S.E.2d at 531; *Kittitas County v. Allphin*, 416 P.3d 1232, 1242-43 (Wash. 2018).

Dist. Ct. App. 1987). Thus, "the privacy requirement for work-product material is in some situations less exacting than the corresponding requirement for the attorney-client privilege." Restatement (Third) of Law Governing Lawyers § 91 cmt. b. Even where work product is disclosed to a third party, the work-product protection generally continues to apply absent a "significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it." *Id.* § 91(4). Accordingly, the common-interest doctrine should apply with at least as much force to the work-product privilege as it does to the attorney-client privilege.

II. The Common-Interest Doctrine Is Vital To Preserving The System Of Multistate Coordination Between The Amici States And Minnesota.

The common-interest doctrine is not only ubiquitous across state and federal jurisdictions, but it is also critically important to the Amici States as they coordinate on enforcement actions, direct advocacy efforts, and amicus briefs. These multistate coalitions allow state attorneys general to preserve state resources, enforce state laws, and represent their residents on matters of important public interest. They also preserve judicial resources by consolidating the actions of multiple states into a single, well-coordinated multistate case. *Cf. Selby*, 90 N.E.3d at 1156 (noting, in adopting the common-interest doctrine, that cooperation and information-sharing between multiple parties to litigation can serve to "expedite the trial or . . . trial preparation" (quoting *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979)).

In the past year alone, the Amici States have coordinated with Minnesota on numerous multistate enforcement suits that allow them to pool their limited resources and

to represent their residents on matters of critical public interest. Recently, for example, a coalition of 53 state and territory attorneys general announced a $573 million settlement against McKinsey & Company for its role in worsening the opioid crisis. *See* Press Release, D.C. Off. of the Att'y Gen., *supra.* The money from this settlement will be used by states and territories to support opioid relief efforts. *Id.* Similarly, earlier this year, 48 states and the District of Columbia reached a $188.6 million settlement against Boston Scientific for its failure to disclose serious and life-altering risks of certain surgical mesh devices; the settlement agreement requires Boston Scientific to institute a series of reforms to its marketing, training, and clinical trial programs. Press Release, Minn. Off. of the Att'y Gen., *Attorney General Ellison Announces Nearly $190 Million Multistate Settlement with Boston Scientific* (Mar. 23, 2021).[7] And last December, 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 General Phil Weiser Leads Multistate Lawsuit Seeking to End Google's Illegal Monopoly in Search Market* (Dec. 17, 2020).[8]

The Amici States also rely on the common-interest doctrine to represent their residents' interests as amici and in public advocacy efforts. This summer, for example, Minnesota Attorney General Ellison led a bipartisan coalition of attorneys general in an amicus brief to the Eighth Circuit Court of Appeals supporting North Dakota's power to

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7 *Available at* https://bit.ly/2Yr5OKX.

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

regulate pharmacy benefit managers' abusive practices. *See* Press Release, Minn. Off. of the Att'y Gen., *Attorney General Ellison Leads Bipartisan Coalition in Support of Regulating Pharmacy Benefit Managers* (July 1, 2021).[9] By joining together on this issue, the Amici States and Minnesota shared with the court their shared interests in regulating abusive corporate practices and protecting their residents' access to healthcare. *Id.* Minnesota also recently joined a bipartisan coalition of attorneys general to support the renewable fuels and agricultural industries before the Supreme Court of the United States. *See* Press Release, Iowa Off. of the Att'y Gen., *Miller Fights for Iowa Renewable Fuel Industry in the U.S. Supreme Court* (Mar. 31, 2021).[10] And in April, 45 attorneys general publicly called on Twitter, eBay, and Shopify to prevent fraudulent COVID-19 vaccination cards from being sold on their platforms. *See* Press Release, N.C. Dep't of Justice, *Attorney General Josh Stein Leads Bipartisan Coalition Fighting Unlawful Online Sales of Fake Vaccination Cards* (Apr. 1, 2021).[11] As Attorney General Ellison highlighted, "[t]hese deceptive cards threaten the health of our communities [and] slow progress in getting people protected from the virus." Press Release, Minn. Off. of the Att'y Gen., *Attorney General Ellison Fights Sales of Fake Vaccination Cards* (Apr. 1, 2021).[12]

The continued ability of the Amici States to coordinate with Minnesota on these and other important issues depends integrally on the application of the common-interest

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9 *Available at* https://bit.ly/2WL0rpx.

10 *Available at* https://bit.ly/3lpc0Ln.

11 *Available at* https://bit.ly/3mVJWBA.

12 *Available at* https://bit.ly/3BFkRip.

doctrine. The doctrine allows states to debate legal strategies, to share drafts and memoranda with each other as they prepare for filing deadlines, and to discuss their respective state interests with full candor. *Cf. Visual Scene, Inc.*, 508 So. 2d at 440 (noting that the common-interest doctrine allows litigants to "adequately prepare their cases without losing the protection afforded by the privilege"). As the Illinois Appellate Court emphasized, "[u]ninhibited communication among joint parties and their counsel about matters of common concern is often important to the protection of their interests." *Selby*, 90 N.E.3d at 1155-56 (quoting *McPartlin*, 595 F.2d at 1336). If states have to fear disclosing privileged material to the public every time they coordinate with each other, many might opt to act alone instead. Some might even choose not to act at all, given the resources required to carry out complicated enforcement and litigation matters on their own.

Notably, several courts have recognized the value of interstate and intergovernmental information sharing in adopting and applying the common-interest doctrine. The Supreme Court of South Carolina, for example, recognized the common-interest doctrine as a matter of first impression to protect privileged communications and work product shared between various state attorneys general. *See Tobaccoville USA, Inc.*, 692 S.E.2d at 531. Because the South Carolina Attorney General had a "common interest with the other settling state attorneys general in matters relating to the [settlement agreement at issue] and tobacco regulation and litigation," the common-interest doctrine allowed him to share privileged information with other attorneys general and with the National Association of Attorneys General ("NAAG") as they worked together to adopt

uniform tobacco regulations and enforce the settlement agreement. *Id.* The Michigan Court of Appeals also applied the common-interest doctrine to allow a city attorney to communicate with the Michigan Attorney General in confidence about their common interest in reforming a park trust. *See Estate of Nash by Nash*, 909 N.W.2d at 872. And the United States District Court for the District of Columbia has confirmed that the doctrine allows federal government agencies to share privileged information and work product with each other when they "share a substantial identity of legal interest." *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, 370 F. Supp. 3d 116, 133 (D.D.C. 2019).

Finally, if Minnesota is the only jurisdiction to expressly disavow the common-interest doctrine, multistate coalitions hoping to coordinate with Minnesota in the future will face uncertainty about the confidentiality of their communications. Courts have long acknowledged the problems that arise when "privilege is upheld by one body of law, but denied by [another]." *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1369 (10th Cir. 1997); *see Upjohn, Co.*, 449 U.S. at 383 ("An uncertain privilege . . . is little better than no privilege at all."). If this Court rejects the common-interest doctrine, individual litigants can take advantage of Minnesota's participation in multistate coalitions to gain access to information that would be privileged in federal court and in the courts of most, if not all, other states. And to the extent that this uncertainty chills future multistate coordination, such a shift would harm both the Amici States and Minnesota: the Amici States would lose Minnesota's expertise in multistate coalitions and Minnesota would miss the opportunity to efficiently advance its residents' interests through multistate litigation and enforcement.

CONCLUSION

This Court should reverse and recognize and apply the common-interest doctrine.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Principal Deputy Solicitor General

ASHWIN P. PHATAK
Deputy Solicitor General

HARRISON M. STARK
SAMSON J. SCHATZ
Assistant Attorneys General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 727-6287
loren.alikhan@dc.gov

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/s/ Katherine M. Swenson
KATHERINE M. SWENSON
(No. 0389280)
AMRAN A. FARAH
(No. 0395354)
Greene Espel PLLP

222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
(612) 373-8389
kswenson@greeneespel.com
afarah@greeneespel.com

Attorneys for Amicus Curiae the District of Columbia

On behalf of:

STEVE MARSHALL
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130

MARK BRNOVICH
Attorney General
State of Arizona
2005 N. Central Avenue
Phoenix, AZ 85004

ROB BONTA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

PHILIP J. WEISER
Attorney General
State of Colorado
1300 Broadway, 10th Floor
Denver, CO 80203

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 North French Street
Wilmington, DE 19801

ASHLEY MOODY
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399

CHRISTOPHER M. CARR
Attorney General
State of Georgia
40 Capitol Square SW
Atlanta, GA 30334

CLARE E. CONNORS
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE D. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph St., 12th Floor
Chicago, IL 60601

THEODORE E. ROKITA
Attorney General
State of Indiana
200 West Washington St., Room 219
Indianapolis, IN 46204

THOMAS J. MILLER
Attorney General
State of Iowa
Hoover State Office Building
1305 East Walnut Street, 2nd Floor
Des Moines, IA 50319

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky
700 Capital Avenue, Suite 118
Frankfort, KY 40601

JEFF LANDRY
Attorney General
State of Louisiana
1885 N. Third Street
Baton Rouge, LA 70804

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

LYNN FITCH
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205

DOUG PETERSON
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

ANDREW J. BRUCK
Acting Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, NY 10005

JOSHUA H. STEIN
Attorney General
State of North Carolina
114 West Edenton Street
Raleigh, NC 27603

WAYNE STENEHJEM
Attorney General
State of North Dakota
600 E. Boulevard
Bismarck, ND 58501

DAVE YOST
Attorney General
State of Ohio
30 East Broad Street
Columbus, Ohio 43215

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

ALAN WILSON
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

JASON R. RAVNSBORG
Attorney General
State of South Dakota
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501

SEAN D. REYES
Attorney General
State of Utah
350 North State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington Street SE.
P.O. Box 40100
Olympia, WA 98504

PATRICK MORRISEY
Attorney General
State of West Virginia
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305

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/s/ Katherine M. Swenson
KATHERINE M. SWENSON