FILED
September 16, 2021
OFFICE OF
APPELLATE COURTS

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 GOVERNOR TIM WALZ AND 23 CABINET AGENCIES

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INTRODUCTION AND INTEREST OF AMICI CURIAE[1]

This brief is submitted on behalf of Governor Tim Walz, the Department of Administration, the Department of Agriculture, the Department of Commerce, the Department of Corrections, the Department of Education, the Department of Employment and Economic Development, the Department of Health, the Office of Higher Education, the Minnesota Housing Finance Agency, the Department of Human Rights, the Department of Human Services, the Department of Iron Range Resources and Rehabilitation, the Department of Labor and Industry, Minnesota Management and Budget, Minnesota Information Technology Services, the Bureau of Mediation Services, the Department of Military Affairs, the Department of Natural Resources, the Minnesota Pollution Control Agency, the Department of Public Safety, the Department of Revenue, the Department of Transportation, and the Department of Veterans Affairs.

Governor Walz and his 23 cabinet agencies serve the people of Minnesota. *See* Minn. Const. art. 1 § 1 (creating the Executive Branch for the "security, benefit and protection" of Minnesotans). Serving the public effectively and efficiently requires Amici's in-house counsel to coordinate on legal matters of common interest. Amici's in-house counsel rely on the common-interest doctrine to speak freely about the countless complex legal issues they face together. This open and candid communication enhances the quality and efficiency of the important work state agencies do on behalf of the public. The operations of the Executive Branch, and the services they provide to the public, would

[1] This brief was prepared independently from Appellants' counsel of record. *See* Minn. R. Civ. App. P. 129.03.

therefore be harmed if this Court removed common-interest protections from Minnesota law. This Court must reverse the Court of Appeals and reaffirm the existence of the common-interest doctrine in Minnesota.

ARGUMENT

I. THE COMMON-INTEREST DOCTRINE IS AN IMPORTANT EXCEPTION TO WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE.

When a client seeks legal advice from their attorney, the attorney-client privilege protects those communications from disclosure. *State v. Taylor*, 869 N.W.2d 1, 21 (Minn. 2015); *see also* Minn. Stat. § 595.02, subd. 1(b); Minn. R. Prof. Cond. 1.6. The work-product doctrine similarly prevents disclosure of documents "prepared in anticipation of litigation or for trial" and the "mental impressions, conclusions, opinions, or legal theories" of attorneys concerning litigation. Minn. R. Civ. P. 26.02(d); *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986). But these protections are generally waived if the information is disclosed to a third party.

The common-interest doctrine is an exception to this general rule. *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012). It provides that attorney-client and work-product protections are not waived when "two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997); Restatement (Third) of the Law Governing Lawyers § 91 cmt. b. The parties may have an express common-interest agreement, "but formality is not required." Restatement (Third) of the Law Governing Lawyers § 76 cmt. c.

The common-interest doctrine serves an important purpose, which is "entirely familiar and commonplace." *Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc.*, 870 N.E.2d 1105, 1110 (Mass. 2007). It "encourages parties working with a common purpose to benefit from the guidance of counsel, and thus avoid pitfalls that otherwise might impair their progress toward their shared objective." *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215, 220 (W.D. Ky. 2006). Indeed, "[r]eason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007). "This planning serves the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation." *Id.*

Countervailing interests certainly exist. The Court's discovery rules, for example, are "based on the proposition that the ends of justice will best be served by a system of liberal discovery" that (1) "gives both parties the maximum possible amount of information with which to prepare their cases"; (2) "reduces the possibility of surprise at trial"; and (3) "enhance[s] the search for truth." *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998). The Governor and his cabinet agencies are also subject to the Minnesota Government Data Practices Act, Minn. Stat. ch. 13, which recognizes the public's right to know what the government is doing. *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011).

But the important interests served by attorney-client, work-product, and common-interest protections significantly outweigh those concerns. As the Massachusetts Supreme

Judicial Court stated, "the social good derived from the proper performance of the functions of lawyers acting for their clients outweighs the harm that may come from the suppression of the evidence." *Hanover*, 870 N.E.2d at 1111. There is simply "no reason to treat confidential client communications differently when shared with an attorney representing a client having a common interest where the purpose for sharing is to provide a free flow of information essential to providing the best available legal services to the client." *Id.*; *see also, e.g.*, *O'Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014) (finding common-interest doctrine justified withholding documents in response to open records act request).

The Minnesota Legislature has similarly recognized that the public's right to know what the government is doing is not unlimited. When it comes to government attorney data, the public is subject to the same limitations on access as litigants. *See* Minn. Stat. § 13.393 (notwithstanding the provisions of the MGDPA, "the use, collection, storage, and dissemination of data by 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"). These limitations include the attorney-client privilege, and the work-product doctrine, as well as their related waiver rules and exceptions like the common-interest doctrine.

Contrary to the assertions of some amici, the common-interest doctrine does not enable government attorneys to "hide" data from the public. The common-interest doctrine, as an exception to the waiver rule, only protects communications and documents

that are already protected by the attorney-client privilege or work-product doctrine. *See Selby v. O'Dea*, 90 N.E.3d 1144, 1159 (Ill. Ct. App. 2017) ("The only thing the common-interest exception to the waiver rule adds to [the] construct [of attorney-client privilege] is that the lawyers and clients are together, communicating jointly. . . . So the fear that a broad new category of information will be withheld if we recognize the common-interest exception to waiver is, in our view, overblown."). The common-interest doctrine is therefore already encapsulated within the existing protections of this Court's discovery rules and the MGDPA. *See* Minn. R. Civ. P. 26.02; Minn. Stat. § 13.393. And, as discussed below, it is a critical tool for the Executive Branch to provide efficient and effective services to the public, and to perform its statutory obligations.

II. THE COMMON-INTEREST DOCTRINE IS CRITICAL TO THE IMPORTANT WORK STATE AGENCIES PERFORM ON BEHALF OF THE PUBLIC.

Minnesotans deserve the highest quality services from their government. To provide such services, state agencies need accurate, complete, and consistent legal advice. In a conglomerate like the Executive Branch, providing sound legal advice frequently requires in-house counsel for state agencies to coordinate with each other. Each agency's in-house counsel regularly relies on the common-interest doctrine to candidly and confidentially discuss legal issues with their counterparts at other agencies. Removing common-interest protections from Minnesota law will negatively affect the day-to-day work of state agencies, as well as larger initiatives. And because state agencies serve the public, it is the people of Minnesota who will ultimately be harmed.

To illustrate the importance of the common-interest doctrine to Executive Branch operations, Governor Walz and his cabinet agencies offer three practical examples where its protections resulted in better and more efficient services for Minnesotans: (1) their response to the COVID-19 pandemic; (2) their enforcement actions to remediate health and environmental hazards; and (3) their work with other States.

A. The Executive Branch's response to the COVID-19 pandemic.

The COVID-19 pandemic is a prime example of the importance of cross-agency legal coordination and the benefits the public receives from common-interest protection. COVID-19 has presented an unprecedented challenge to the State, touching nearly every aspect of people's lives. The State's response to this public health crisis has required the subject matter and legal expertise of almost every agency. Governor Walz and his administration have been working around the clock to protect Minnesotans from COVID-19 and maintain a functioning society. They have engaged in a comprehensive, coordinated plan that includes slowing the spread of the disease, protecting the capacity of the state's medical system, ensuring the continued operation of critical sectors to protect the public's access to necessary services and supplies, minimizing economic harm, and distributing billions of dollars in aid for individuals, businesses, and local governments.

The legal issues they must evaluate are wide-ranging and complex. The Department of Human Services ("DHS"), for example, provides services for over 1 million Minnesotans, including groups likely to be significantly impacted by COVID-19 such as older adults, individuals with disabilities, individuals with mental illness, children and families. In addition, the services DHS provides, such as health-care coverage, food,

housing, and economic support, are particularly important because of the significant economic distress caused by COVID-19 and the measures taken to stop its spread.

But strict compliance with the laws and regulations related to these programs during a public health emergency would have limited the availability of these essential services and increased the risk of spreading COVID-19. Emerg. Exec. Order 20-11, *Securing Federal Authority to Continue Human Services Programs During the COVID-19 Peacetime Emergency* (Mar. 20, 2020); Emerg. Exec. Order 20-12, *Preserving Access to Human Services Programs During the COVID-19 Peacetime Emergency* (Mar. 20, 2020).[2] In-house counsel for DHS therefore had to coordinate extensively with their counterparts in the Governor's Office, the Department of Health, and Minnesota Management and Budget to determine which requirements needed to be waived or modified, whether those requirements could legally be waived or modified, whether the requirements could be waived or modified safely, whether program changes would have any unintended consequences, and how those changes would impact the state budget.

This collaboration benefited tremendously from open discussions between agency counsel, and it resulted in important changes that ensured low-income Minnesotans would not lose their health insurance during the pandemic, ensured uninterrupted economic, food, and housing assistance, allowed people to receive services via telemedicine, and provided nursing homes, senior assisted living centers, adult day centers, mental health centers, homecare workers, foster care providers, and child-care providers with the flexibility they

[2] All of Minnesota's emergency executive orders regarding COVID-19 are available online at https://www.lrl.mn.gov/execorders/eoresults?gov=44 (last visited September 13, 2021).

needed to continue providing their critical services. Dep't of Human Servs., Waivers and modifications, https://mn.gov/dhs/waivers-and-modifications/ (last visited September 13, 2021). This collaboration continues today, as in-house counsel coordinate and evaluate how to lawfully respond to the Delta variant without peacetime emergency powers.

Another component of the Executive Branch's COVID-19 response was the distribution of billions of dollars in aid for individuals, businesses, and local governments. There are numerous logistical and legal issues involved in distributing billions of dollars and ensuring those funds are used for their intended purposes. And just like public health measures, speed and accuracy are essential to ensure the aid arrives at its proper destination before it is too late. Many state agencies were involved in this monumental task, but it has largely been led by Minnesota Management and Budget, the Department of Employment and Economic Development, and the Department of Revenue. These agencies relied on the common-interest doctrine to form working groups of in-house counsel, pool resources, and maximize their legal expertise and experience. Their joint efforts have ensured that COVID-19 relief funds are delivered promptly to the correct parties and spent lawfully.

B. The Executive Branch's enforcement actions to remediate health and environmental hazards.

State agencies have collaborated with each other and local governments on many other public health matters. For example, over the past 3 years, the Minnesota Pollution Control Agency ("MPCA"), the Department of Health ("MDH"), the Department of Labor and Industry ("DLI"), and Ramsey County Public Health have worked together to remediate multiple health and safety issues at a local facility that manufactures lead-based

products. Collaboration on legal issues was essential due to the unique nature of the contamination and the scope of each agency's expertise and legal authority.

The issues at this facility included dangerous working conditions that caused elevated blood lead levels in the company's employees, improper lead containment that resulted in lead dust being carried by employees to their cars and homes, elevated blood lead levels in children of employees due to this lead migration, improper hazardous waste disposal, and excessive emissions that polluted the air in the surrounding residential neighborhoods. *Leppink v. Water Gremlin Co.*, 944 N.W.2d 493 (Minn. Ct. App. 2020); Minn. Pollution Control Agency, *Water Gremlin references*, https://www.pca.state.mn.us/air/water-gremlin-references (last visited Sept. 12, 2021). All four entities, including their respective in-house counsel, had to work together to fully address these issues, and they had to act quickly.

The MPCA addressed the issues affecting the air, soil, and water. Following the MPCA's investigation, the company agreed to pay a civil penalty and make substantial changes to its operations to resolve the air quality violations and prevent further damage to the public.[3] The agreement between the MPCA and the company had a total value of over $7 million dollars, which is one of the largest settlements in the history of the MPCA. The

[3] Minn. Pollution Control Agency, *In re Water Gremlin Company*, Stipulation Agreement (Mar. 1, 2019), https://www.pca.state.mn.us/sites/default/files/aq-ei6-01b.pdf (last visited Sept. 12, 2021).

company subsequently agreed to pay an additional $325,000 and make further operational changes to correct the hazardous waste management violations.[4]

MDH, DLI, and Ramsey County Public Health jointly addressed the elevated blood lead levels and the working conditions that caused them. *Water Gremlin Co.*, 944 N.W.2d at 495–96. Coordination between the entities and their in-house counsel was crucial in identifying elevated blood levels in the community (MDH), tracing the source of the lead exposure to the facility (Ramsey County), identifying the conditions at the facility that allowed lead dust to be carried from the facility into the cars and homes of the workers (DLI), evaluating their respective statutory authorities to ensure prompt and complete relief (all), and helping the people who were being harmed (all). *Leppink v. Water Gremlin Co.*, No. 62-cv-19-7606, Doc. 2 (Minn. Dist. Ct. Oct. 28, 2019).

When the company failed to remediate the conditions quickly enough, DLI ordered the plant to shut down for three days. *Id.*, Ex. 1. DLI and MDH then jointly sought immediate relief in Ramsey County District Court. *Leppink v. Water Gremlin Co.*, No. 62-cv-19-7606, Doc. 2–4 (Minn. Dist. Ct. Oct. 28, 2019). Through this joint legal effort, MDH and DLI obtained an extensive remediation plan that included worksite modifications to reduce lead exposure and prevent lead migration, employee training, third-party monitoring to ensure effective workplace procedures, cleaning of employee vehicles, and residential testing and cleanup. *Water Gremlin Co.*, 944 N.W.2d at 496–97.

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[4] Minn. Pollution Control Agency, *In re Water Gremlin Company*, Stipulation Agreement (Apr. 13, 2021), https://www.pca.state.mn.us/sites/default/files/water-gremlin-stipulation-agreement-20210413.pdf (last visited Sept. 12, 2021).

In situations like this, the common-interest doctrine makes the government more efficient and effective. It allowed attorneys at MPCA, MDH, DLI, and Ramsey County to pool their resources and freely exchange information so they could advise their respective clients about how to best protect the public from these harmful acts and prevent any further harm.

C. The Executive Branch's work with other States.

State agencies also frequently collaborate with their counterparts in other States. For example, in 2018, the Minnesota Department of Human Services collaborated with the New York Department of Health when the federal government abruptly cut off more than $1 billion in annual funding impacting their respective Basic Health Programs. *New York et al. v. U.S. Dep't of Health and Human Servs. et al.*, No. 1:18-cv-00683, ECF Doc. 5 (S.D.N.Y. Jan. 26, 2018).[5]

Basic Health Programs are state-run health insurance programs that can be established under the Affordable Care Act. *Id.* ¶ 1. Minnesota's Basic Health Program is called MinnesotaCare. *Id.* ¶ 70. The program provides health insurance coverage to low- and moderate-income Minnesotans who are not eligible for Medicaid or other public programs, do not have employer-sponsored health insurance, and cannot afford private insurance coverage. *Id.* Federal funding results in premiums that are significantly less than what MinnesotaCare enrollees would pay for insurance through the Minnesota Health

[5] Available at https://ag.ny.gov/sites/default/files/bhp_complaint.pdf (last visited Sept. 11, 2021).

Insurance Marketplace (MNsure). *Id.* ¶ 74. At that time, approximately 87,000 Minnesotans were enrolled in MinnesotaCare. *Id.* ¶ 70.

New York is the only other state in the country that operates a Basic Health Program. *Id.* ¶ 62. When the federal government informed New York and Minnesota that it was substantially reducing the federal payments for Basic Health Programs, counsel for the two States worked closely together on evaluating the legality of the decision and their legal options to preserve critical healthcare funding for their citizens. Ultimately, the States sued the federal government. Through this joint legal effort, New York and Minnesota received $659 million for their Basic Health Programs in 2018 and ensured continued funding so that affordable health care would continue to be available to their low-income citizens. Press Release, New York Off. of the Att'y Gen., *A.G. Underwood Announces Restoration of $574 million to NY's Essential Plan, Following AG Lawsuit* (Aug. 29, 2018)[6]; Press Release, Minn. Dep't of Human Services, *Lawsuit restores $85 million in federal health care funding for MinnesotaCare* (Aug. 29, 2018).[7]

CONCLUSION

These examples are not outliers. The Executive Branch touches people's lives in many ways both big and small. In providing these wide-ranging services, state agencies encounter many legal issues that extend across multiple agencies. The common-interest

[6] Available at https://ag.ny.gov/press-release/2018/ag-underwood-announces-restoration-574-million-nys-essential-plan-following-ag (last visited Sept. 11, 2021).

[7] Available at https://mn.gov/dhs/media/news/#/detail/appId/1/id/350877 (last visited Sept. 11, 2021).

doctrine ensures that public resources are used efficiently, and each agency gets the best legal advice possible. Failing to recognize the common-interest doctrine would chill the coordination on legal issues that is vital to effective government. It would also create significant inefficiencies in the work the Executive Branch does for the people of Minnesota. Governor Walz and his 23 cabinet agencies respectfully request that this Court reverse the Court of Appeals and reaffirm the existence of the common-interest doctrine in Minnesota.

Dated: September 16, 2021

Respectfully submitted,

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