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.

RESPONDENT'S BRIEF

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STATEMENT OF LEGAL ISSUES

Consistent with the Court's grant of further review, the issues before the Court are:

1. **Does Section 13.65 of the Minnesota Government Data Practices Act protect data that is not on individuals?**

   Court of Appeals Decision: Section 13.65 of the Minnesota Government Data Practices Act ("MGDPA") unambiguously protects from disclosure data which is "on individuals," and does not protect data which is not on individuals. (Add. 11).

   Most Apposite Authorities:

   Minn. Stat. §13.65
   KSTP-TV v. Ramsey County, 806 N.W.2d 785 (Minn. 2011)
   Op. Minn. Dep't. of Admin., No. 94-047 (Oct. 29, 1994)
   Minn. Stat. §13.02

2. **Does Minnesota recognize the common-interest doctrine, and if so, what is it?**

   Court of Appeals Decision: Minnesota has yet to recognize the common-interest exception to privilege waiver. (Add. 26). Further, even if it were recognized, the AGO's document descriptions are too vague to evaluate whether it applies to this record, and the AGO failed to tender the documents *in camera* to the district court. (Add. 27).

   Most Apposite Authorities:

   Minn. Stat. §595.02, subd. 1(b)
   Minn. R. Evid. 502(e)(2)
   In re Dealer Mgmt. Sys. Antitrust Litig., 335 F.R.D. 510 (N.D. Ill. 2020)
   Walmart Inc. v. Anoka County, No. A19-1926, 2020 WL 5507884 (Minn. Ct. App. Sept. 14, 2020).

3. **Can purely internal communications within the AGO be protected under the attorney-client privilege?**

   Court of Appeals Decision: Purely internal communications are not attorney-client communications, and the AGO's document descriptions in the record indicate no attorney-client communications. (Add. 23-24).

   Most Apposite Authorities:

   Minn. Stat. §595.02, subd. 1(b)

Kobluk v. Univ. of Minn., 574 N.W.2d 436 (Minn. 1998)
City Pages v. State, 655 N.W.2d 839 (Minn. Ct. App. 2003)

STATEMENT OF THE CASE AND FACTS

I. Statement of the Case

Respondent Energy Policy Advocates sued the Attorney General ("AGO") in Ramsey County District Court because EPA objected to the AGO's over-withholding of documents in response to EPA's data requests. (Index #2). The parties cross-moved in a proceeding under Minn. Stat. §13.08 for a ruling on AGO's classification of data and withholding of that data in response to Respondent's data requests under the MGDPA. (Index #21, 33). EPA sought to compel production and enjoin AGO's classification method, and AGO sought an order that its classification was proper and dismissal of the Complaint. The district court issued an order and entered a subsequent judgment on October 5, 2020, holding that AGO had properly classified the withheld data, which adjudicated the issues presented in the Complaint. (Index #54). EPA timely appealed. (Index #58).

On appeal, the Court of Appeals reversed the district court's decision and remanded, directing the submission of allegedly privileged documents for *in camera* review and the creation of a privilege log, which the AGO had agreed to provide but did not. (Add. 29). The Court of Appeals held that Minn. Stat. §13.65 only applies to data on individuals, and Minnesota has not yet recognized the common-interest exception to privilege waiver. (Add. 11, 26-27). The Court of Appeals also held that, even if a common-interest exception to privilege waiver existed, the AGO's document descriptions are inadequate to substantiate

that privilege. (Add. 27). The AGO requested further review of that decision, and this Court granted review.

II. Relevant Facts.

In its Brief, the AGO failed to mention any of the background of the data requests at issue in this case, continuing its attempt to keep the discussion purely academic. But the data sought in this case is data related to important issues of public concern, and its content highlights the importance of the MGDPA's presumption of publicity.

A. The Data Requests at Issue Seek Information Related to the AGO's Involvement with the Bloomberg-Funded New York University Center Underwriting State Attorneys General Who Focus on Climate Change and Environmental Litigation.

In approximately 2017, "Bloomberg Philanthropies"—which is the colloquial name for Bloomberg Family Foundation, Inc., a charity organized by former Mayor of New York City and former 2020 candidate for the Democratic Party nomination for President, Michael Bloomberg—contributed $5.6 million to the New York University School of Law to create a State Energy & Environmental Impact Center ("SEEIC" or "Bloomberg NYU Program"). (Index #34, Pl.'s Mem. of Law on Data Classification and Supporting Mot. To Compel Production, Apr. 15, 2020, at 2) ("Pl.'s Mem."); http://www.nyu.edu/about/news-publications/news/2017/august/nyu-law-launches-new-center-to-support-state-attorneys-general-i.html (last visited November 1, 2021)).

The SEEIC was designed to provide legal support, public relations support, and privately-funded lawyers to state attorneys general offices for the purpose of advancing lawsuits related to environmental and climate-change litigation. *Id.* As reported by the New

York Post on February 18, 2020, the SEEIC had "embedded"[1] special assistant attorneys general (SAAGs) in Washington, D.C., Delaware, Connecticut, Illinois, Massachusetts, Maryland, Minnesota, New Mexico, New York, and Oregon. https://nypost.com/2020/02/18/bloomberg-program-reportedly-put-lawyers-in-ag-offices-to-advance-climate-change-agenda/ (last visited November 1, 2021).

According to one email obtained from the Michigan AGO, written to the Attorney General and passing along a discussion with SEEIC's Executive Director, which email uses the descriptor, "the IC" for the SEEIC:

- The IC funds the salaries of 17 Law Fellows who serve as SAAGs in their respective states. State AGs recruit and select their own Law Fellows. (Although the program is completely transparent and ethical, it may engender backlash).

- The IC has a pro bono program providing assistance to states on energy and environmental issues from the Impact Center's own staff of attorneys. The IC pays all costs associated with its services. Five states have a formal agreement (attached) with the Impact Center for pro bono services – NY, MA, MD, MN and WA.

- ***The IC serves as a clearinghouse for all AG actions*** including litigation, rule-making, federal notices, and notice and comment opportunities. The information posted on its website is always current.

- The IC assists in coordinating multi-state actions in concert with Mike Myers from the NY AGs [sic] office who hosts bi-weekly multi-state calls ([MI AGO's] Neil Gordon participates in the calls). It also sponsors periodic networking opportunities in D.C. for state AAGs and publishes a bi-weekly newsletter on energy and environmental issues.

(Index #34, Pl.'s Mem. of Law 2-3); (Index #37, Aff. of Christopher Horner, April 15, 2020, Ex. O (June 12, 2019 Email from Special Assistant Attorney General Skip Pruss

[1] (Index #2, p. 2 n.4).

to Attorney General Dana Nessel, Deputy Attorney General Kelly Keenan, Subject: NYU Law School State Energy and Environment Impact Center) (emphasis added)).

Minnesota's AGO applied for one or more such privately-hired attorneys on March 15, 2019, and asserted that it wished to do more in multi-state litigation, citing to its past "support [of] state-led efforts to investigate ExxonMobil" as something it could offer an expanded role in if only it was given outside attorneys offered by the donor for such purposes.[2]

B. Minnesota Has Accepted SEEIC Funding and Allowed the SEEIC to Embed Special Assistant Attorneys General Within the AGO, Which Raises State Employee Conflict of Interest Law Issues.

The SEEIC is currently paying the salaries of Pete Surdo and Leigh Currie to wield the AGO's powers in court against energy companies and other firms doing business in Minnesota. Keith Ellison, *Counterpoint from Keith Ellison: It's critics who are doing big money's bidding*, Star Tribune, Feb. 9, 2021, *available at* https://www.startribune.com/counterpoint-it-s-critics-who-are-doing-big-money-s-bidding/600021124/?refresh=true. While a SAAG, Surdo or Currie has appeared on behalf of Minnesota in at least the following cases:

- *State of Minnesota v. American Petroleum Institute*, No. 20-1636 (D. Minn.) (removed from Ramsey County District Court);
- *California v. Trump*, No. 19-960 (RDM), District of District of Columbia, *see* 2020 WL 1643858;

[2] Publicly available at https://climatelitigationwatch.org/wp-content/uploads/2019/09/MN-OAG-NYU-Application.pdf. See pp. 5-6.

- *California by and through Brown v. EPA*, No. 18-1114, District of District of Columbia, *see* 940 F.3d 1342;
- *New York v. Wheeler*, No. 20-1022, D. C. Cir. 2020;
- *California v. Wheeler*, No. 19-1239, D. C. Cir. 2019;
- *Leppink v. Water Gremlin Co.*, No. 62-CV-19-7606 (Ramsey County);
- *California v. Chao*, No. 19-CV-2826, D.D.C. 2019;
- *New York, et al. v. EPA*, D.C. Cir. No. 19-1165.[3]

(Index #34, Pl.'s Mem. of Law 3-4); (Index #35, Aff. of James V. F. Dickey, April 15, 2020, ¶2).

These cases, other than the *Water Gremlin* case, are either multistate challenges to administrative decisions by the federal executive branch related to climate change or environmental policies, or state-law "consumer fraud" type claims attacking energy companies. Surdo and Currie have been continually involved in these cases since they were "embedded" as SAAGs through the SEEIC. (Index #34, Pl.'s Mem. of Law 4).

Thus, the SEEIC is, right now, embedding privately-compensated attorneys in the Minnesota AGO as SAAGs to pursue climate-change and environmental litigation. This matter is therefore one of substantial and ongoing importance to Minnesotans, given Minnesota's ethics laws which appear to prohibit these arrangements. *E.g.,* Minn. Stat. §43A.38, Subd. 2 ("Employees in the executive branch…shall not directly or indirectly receive or agree to receive any payment of…compensation…from any source, except the

[3] Mr. Surdo appears to be Minnesota's *only* attorney of record in this case.

state for any activity related to the duties of the employee unless otherwise provided by law."); Minn. Stat. §43A.38, Subd. 5 ("The following actions by an employee in the executive branch shall be deemed a conflict of interest…(1) use or attempted use of the employee's official position to secure benefits, privileges, exemptions or advantages for…an organization with which the employee is associated which are different from those available to the general public; (2) acceptance of other employment or contractual relationship that will affect the employee's independence of judgment in the exercise of official duties.").

Given the structure of the SEEIC and Minnesota's statutory code of ethics, the Minnesota SAAG arrangement with the SEEIC raises a host of ethical issues. The public has a strong interest in seeing the records illuminating this relationship and the way AGO conducts its energy and environmental litigation using these attorneys' services.

C. The Data Requests at Issue Here and the AGO's Responses.

The requests at issue in this case relate to the problems raised by the AGO's involvement with the SEEIC.[4] They are simple keyword searches.

1. EPA's December 20, 2018 request to AGO.

On December 20, 2018, EPA requested that AGO provide copies of certain emails sent to or from former Deputy Attorney General Karen Olson. (Index #34, Pl.'s Mem. of Law 5-6); (Index #37, Horner Aff. Ex. A (EPA Dec. 20, 2018 MGDPA request)).

The request asks for:

[4] The reason EPA seeks public data is not relevant to the AGO's response, but it helps underscore the importance of the data at issue.

> [C]opies of all electronic or hard-copy correspondence as described below, and its *accompanying information,[] including also any attachments*:
>
> a) sent to or from **Karen Olson** (including also copying, whether as cc: or bcc:), which *also*
>
> b) contain any of the following, anywhere in the correspondence of which it is a part, whether in the To or From, cc: and/or bcc: fields, the Subject field, and/or the email body or body of the thread or in any attachment thereto: i) SherEdling, ii) Sher Edling, iii) DAGA, iv) @democraticags.org, v) alama@naag.org, and/or vi) Mike.Firestone@state.ma.us.

(Index #34, Pl.'s Mem. of Law 6); (Index #37, Horner Aff. Ex. A (emphasis in original)).

The keywords relate to (a) the lead plaintiffs' law firm recruiting litigants and attorneys general to litigate against or investigate energy companies related to climate change (Sher Edling); (b) a political trade group; and (c) an employee of the Massachusetts Attorney General's Office named Mike Firestone who, records show, was at the time coordinating recruitment of attorneys general offices to embed privately hired attorneys as "Special Assistant Attorneys General" to pursue these issues.

On January 4, 2019, AGO replied to that request, claiming that no described records exist containing certain terms directly related to the political trade group ("DAGA," "@democraticags.org," or "Alama@naag.org"), and the remainder of the requested data (related to Sher Edling or Mike Firestone) are exempt under "a number of legal privileges, including attorney work product, the attorney-client privilege, and the deliberative process privileges." (Index #34, Pl.'s Mem. of Law 6); (Index #37, Horner Aff. Ex. C (AGO Response to Dec. 20, 2018 Request)).

2. EPA's December 26, 2018 request to AGO.

On December 26, 2018, EPA also requested that AGO provide copies of certain Karen Olson correspondence. (Index #34, Pl.'s Mem. of Law 6; Index #37, Horner Aff. Ex. B (EPA Dec. 26, 2018 MGDPA request)).

The request specifically asks for:

> [C]opies of all electronic or hard-copy correspondence as described below, and its *accompanying information, including also any attachments*:
>
> a) sent to or from **Karen Olson** (including also copying, whether as cc: or bcc:), which *also*
>
> b) contain *any* of the following, anywhere in the correspondence of which it is a part, whether in the To or From, cc: and/or bcc: fields, the Subject field, and/or the email body or body of the thread or in any attachment thereto: i) @Googlegroups.com, ii) "Google doc" (including also in "Google Docs", iii) @ucsusa.org, iv) Dropbox, v) box.com (including as used in any url containing box.com), and/or vi) SharePoint.[5]

(Index #34, Pl.'s Mem. of Law 6-7); (Index #37, Horner Aff. Ex. B (emphasis in original)).

On January 4, 2019, AGO replied to this request asserting the same privileges as its other response. AGO stated that, based on its interpretation of EPA's request and *given AGO's review of EPA's website*, AGO had no responsive data, but if its interpretation regarding EPA's intent was incorrect, AGO nonetheless had no responsive data that it deems public information. (Index #34, Pl.'s Mem. of Law 7); (Index #37, Horner Aff. Ex. D (AGO Response to Dec. 26, 2018 Request)).

[5] Public records showed the use of such web tools by public employees and the Union of Concerned Scientists in recruiting attorneys general and collaborating to sue energy companies.

In addition, EPA and others have sent similar and sometimes the same public record requests to other states' attorneys general offices, which have disclosed substantially more than Minnesota's AGO. These states include Michigan, Illinois, Virginia, Maryland, New York, Oregon, Washington, Massachusetts, and Vermont. (Index #34, Pl.'s Mem. of Law 8); (Index #37, Horner Aff. ¶ 10). That other states disclose what Minnesota claims it must hide illustrates the weakness of Minnesota's privilege claims and a recognition that the public has the right to know about this information.

D. The AGO's Categorization of the Responsive Documents.

In the district court, the AGO categorized the responsive documents and provided vague descriptions of each document. (Index #23, Larson Decl.). The AGO notably failed to provide these descriptions to the Court. They are, briefly, as follows.[6]

1. Categories 3, 4, 7, 8, and 15.

Category 3 relates to a comment letter on the Paris Climate Accord. (Index #23, Larson Decl. ¶ 9). Category 4 relates to a comment letter opposing a federal legislative subpoena. *Id.* Category 7 relates to administrative practices for handling use of file sharing services. (Index #23, Larson Decl. ¶ 15). Category 8 relates to an energy independence executive order. *Id.* Category 15 relates to administrative practices related to file sharing. (Index #23, Larson Decl. ¶ 20). AGO claimed that Minn. Stat. §13.65, subd. 1(b) alone applies to this data, but AGO failed to identify any individual to which these categories relate. (Index #23, Larson Decl. Ex. 1). The Court of Appeals agreed with EPA that no

[6] Categories 1, 2, 9, and 18 are omitted here because they are not subject to appellate review.

individual was identified related to these documents for purpose of analysis under Section 13.65, subd. 1(b). (Add. 15).

2. Categories 6, 10-14, 16, and 17.

Category 6 relates to existing or proposed multi-state litigation challenging auto and ozone rules. (Index #23, Larson Decl. ¶ 11). Category 10 relates to a potential *amicus* brief in *Coachella Valley Water District, et al. v. Agua Caliente Band of Cahuilla Indians* which the AGO did not write. (Index #23, Larson Decl. ¶ 16). Category 11 relates to four documents about privilege review in a case about mental health. (Index #23, Larson Decl. ¶ 16). Category 12 relates to AGO's representation of the State in the *Cruz-Guzman* case. (Index #23, Larson Decl. ¶ 16). Category 13 relates to internal and multi-state communications related to the *In re DRAM Antitrust Litigation* application for attorney fees. (Index #23, Larson Decl. ¶ 16). Category 14 relates to the *In re TFT-LCD (Flat Panel) Antitrust Litigation* application for attorney fees. (Index #23, Larson Decl. ¶ 16). Category 16 relates to discovery in fraud investigations. (Index #23, Larson Decl. ¶ 20). Category 17 relates to discovery in civil antitrust, charities, or consumer fraud investigations. (Index #23, Larson Decl. ¶ 20).

The Court of Appeals agreed with EPA that no individual was identified related to these documents for purpose of analysis under Minn. Stat. §13.65, subd. 1(d). (Add. 16-17). The Court of Appeals also held that these descriptions did not state whether the alleged investigations were active pursuant to Section 13.39.[7] (Add. 18). Finally, the Court of

[7] AGO did not raise as an issue for review the Court of Appeals decision related to the AGO's substantiation of protections under Section 13.39.

Appeals held that the AGO's submissions to the district court failed to substantiate the AGO's privilege and work-product doctrine claims related to these documents. (Add. 21, 24). Thus, even if a common-interest doctrine *could* protect the AGO's data in this case, the AGO failed to satisfy the threshold requirement that it substantiate the underlying protection sought to be extended via the common-interest doctrine. (Add. 27).

ARGUMENT AND AUTHORITIES

I. Introduction.

The Court has the opportunity here to reaffirm the essential principle that Minnesotans are entitled to know what their Attorney General is doing with the powers afforded to him. The Legislature created the MGDPA with the strong presumption that what the AGO does is public data, subject to narrow exceptions. The district court's decision in this case would have inverted that presumption, shielding all AGO data from the public unless it specifically relates to an individual requesting it. The Court of Appeals righted that wrong and correctly demanded more evidentiary support from AGO for its claims of privilege or work product.

Under the AGO's version of the MGDPA and related privilege rules, the AGO can interact with other attorneys general, consultants, and "Special Assistant Attorneys General" paid for by outside special interest groups eager to impact Minnesota and national policy, without the public ever knowing what the AGO is doing. The AGO currently allows the placement of lawyers in its office paid for by an outside policy group, and it claims the public has no right of access to documents related to this employment relationship and how it works.

This Court's decision as to how the AGO's data is classified will have a lasting impact as to how state agencies and constitutional officers classify their interactions with outside parties. EPA asks this Court to hold in favor of government transparency, affirm the Court of Appeals, and remand to the district court to perform *in camera* review of the documents AGO failed to proffer, with a privilege log that allows for a meaningful analysis.

II. The AGO Again Fails to Substantiate the Existence of Privilege for Any Document at Issue, and the Court Can Affirm the Decision Below on That Ground.

Even where the Court adopts a new concept or doctrine related to court rules, it may determine that doctrine's inapplicability to the subject matter before it and affirm the Court of Appeals on that basis. *Oliver v. State Farm Fire & Cas. Ins. Co.*, 939 N.W.2d 749, 754 (Minn. 2020) ("We therefore affirm the court of appeals' decision, including its decision to remand to the district court, but we do so on different grounds."). If the Court can affirm the Court of Appeals on any grounds, it should. *Id.*

The Court of Appeals decision largely concerned the district court's incorrect methodology—its failure to perform *in camera* review and its unsupported assumptions about documents. (*E.g.,* Add. 15-16, 19, 21, 24). Thus, the Court of Appeals did not reverse for entry of judgment, but instead remanded for *in camera* review and the provision of a privilege log. The Court of Appeals correctly noted that, even if the common-interest doctrine *could* apply, the district court's failure to conduct *in camera* review and the lack of a privilege log require remand. (Add. 27) ("In this case, it is impossible to determine whether the [challenged-but-withheld documents] satisfy these requirements because the

descriptions…are very general and because the documents have not been submitted for *in camera* review.").

The AGO claims the Court of Appeals erred in three ways. First, the AGO claims that Minn. Stat. §13.65 applies to all data, regardless of whether an individual is the subject of that data, such that "the data is not publicly available to anyone, unless it concerns an individual, in which case that individual (and only that individual) can access the data." (Appellant's Br. 7). Second, even though the AGO previously conceded that whether the common-interest exception to privilege waiver applies is an "open" issue, the AGO now claims—for the first time in this Court—that *Schmitt v. Emery*, 2 N.W.2d 413 (Minn. 1942) recognized the common-interest exception to privilege waiver in Minnesota, and the Court of Appeals erred by not applying *Schmitt*. (Appellant's Br. 18-19). Third, the AGO claims that it can, in certain circumstances, be the "client" as well as the attorney for state agencies, and therefore the AGO must be able to apply privilege, as opposed to work-product protections, to purely internal communications. (Appellant's Br. 25-26). However, the AGO does not dispute that the documents in Categories 12-14 are purely internal.

Notably, however, the AGO fails to identify where in the record it has substantiated its privilege or work-product claims, and does not even *try* to apply the common-interest exception to its own submissions in the record. It only vaguely identifies the documents at issue as "confidential communications between the OAG and other state attorneys general." (Appellant's Br. 15). The AGO's failure to attempt an application of any common-interest doctrine to the record makes reversal impossible—even the adoption of the common-interest doctrine by this Court would require remand to determine whether

the AGO's documents satisfy underlying privilege or work-product standards, consistent with this Court's standard method of review. *Oliver*, 939 N.W.2d at 754.

The AGO appears to hope that this Court will reverse the Court of Appeals based purely on the adoption of new standards applicable to attorney general data. However, even if the Court adopts new doctrine, it should affirm the Court of Appeals and remand to the district court because the AGO failed to tender the documents at issue to the district court *in camera* or create a privilege log.

III. Section 13.65, Subdivision 1 of the Data Practices Act Does Not Permit Withholding of Data Where an Individual Has Not Been or Cannot Be Identified As the Subject of That Data.

The Court of Appeals, following established precedent, held that Minn. Stat. §13.65, subd. 1 only protects data where an individual is or can be identified as the subject of that data. (Add. 11-13). In *KSTP-TV*, this Court held that "all government data falls into one of two main categories...(1) data on individuals, or...(2) data not on individuals." *KSTP-TV v. Ramsey Cty.*, 806 N.W.2d 785, 789 (Minn. 2011). The Court of Appeals therefore properly interpreted the statute to require the AGO, as an MGDPA-responding agency, to identify which—if any—individuals were subjects of the data it chose to withhold. The AGO failed to do this, with limited exceptions noted by the Court of Appeals. (Add. 13-14) (related to Categories 1 & 2).

On appeal, the AGO argued that section 13.65 should be read as giving it a broad exemption from the language, rubrics, and obligations of the MGDPA. (AGO Br. Jan, 5, 2021, at 23) ("Similarly, Section 13.65, subd. 1(d) (applicable only to the AGO) further classifies even inactive civil investigative data held by AGO as not generally available to

the public"). The Court of Appeals rightly rejected this attempt to expand an exception to the presumption of publicity to swallow the presumption whole. The Court of Appeals properly noted that the AGO had the burden to substantiate "a statutory basis for a classification that negates the presumption that government data are generally accessible to the public at large. See Minn. Stat. §§ 13.01, subd. 3, .03, subd. 1." (Add. 9).

The AGO argues here that the language of Section 13.65 indicates a legislative "intent" to broadly shield from disclosure any data the AGO touches. (Appellant's Br. 7) ("data…is not publicly available to anyone, unless it concerns an individual, in which case that individual (and only that individual) can access the data."). The AGO's interpretation would only require it to disclose *any* data where the individual making the request is the "subject." *Id.*

Such a generous reading of Section 13.65 is convenient for the AGO, but it would shield an entire agency from public scrutiny in direct contravention of the language and purpose of the MGDPA. Tellingly, the AGO failed to even *mention* this Court's seminal case on the meaning of "data on individuals"—*KSTP-TV v. Ramsey County*—much less distinguish it. It is unfathomable that the Legislature would have intended to allow *all of the Attorney General's policy decisions* to be shielded from the public eye, in perpetuity.

A. Following Precedent and Plain Meaning, the Court of Appeals Correctly Applied Section 13.65, Subdivision 1 in This Case.

Because Minn. Stat. §13.65, subd. 1 only protects data on individuals, and not policy documents or investigative documents not on individuals, the Court of Appeals reversed the district court. (Add. 12). The Court of Appeals applied the plain meaning of the

contested phrase in the context of the overall MGDPA and rightly concluded, "there is no reasonable interpretation of the phrase 'private data on individuals' that could broaden the phrase 'data on individuals' so that it encompasses data in which no individual is the subject of the data." (Add. 11).

B. The Attorney General's Myopic Reading of the Statute Ignores This Court's Precedent Related to Reading Statutorily Defined Terms and Yields an Absurd Result.

Under the rules of statutory construction, courts must read and construe statutes as a whole. *Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Each section must be read "in light of the surrounding sections to avoid conflicting interpretations." *Id.* "We interpret statutory provisions in light of each other and presume that the legislature understood the effect of the statutory language." *Allison v. Sherburne Country Mobile Home Park*, 475 N.W.2d 501, 504 (Minn. Ct. App. 1991).

Courts commonly review different sections of the same statute together. Various sections of the same statute related to the same subject matter and to each other should, therefore, be construed together. *Chanhassen Ests. Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 339 (Minn. 1984). *See also Apple Valley Red-E-Mix, Inc. v. State by Dep't of Pub. Safety*, 352 N.W.2d 402, 404 (Minn. 1984) ("The general rule is that statutes *in pari materia* should be construed together. Statutes "*in pari materia*" are those relating to the same person or thing or having a common purpose.") (internal citations omitted).

Minnesota case law on the use of statutorily defined terms, such as those employed in the MGDPA, militates against the AGO's proposal, (Appellant's Br. 8-10), that the Court read Minn. Stat. §13.02, subd. 12 in isolation. *E.g., Walsh v. State*, 962 N.W.2d 201,

206 (Minn. Ct. App. 2021), *review granted* (July 20, 2021) (construing the statutory definitions for "employee of the state" and "state" together); *State v. Brown*, 801 N.W.2d 186, 188 (Minn. Ct. App. 2011) (reviewing multiple definitions in the same statute to determine that an individual operating a mobility scooter is not a driver of a motor vehicle for the purposes of the DWI statute). In *Brown*, the court reviewed the statute's definitions of "vehicle" and "motor vehicle", as well as "driver", "pedestrian", and "wheelchair", and determined that a person operating a mobility scooter is a "pedestrian" and not the "driver" of a "motor vehicle." 801 N.W.2d at 188. Multiple defined terms within a statute's "definitions" section should be read together "in a manner that avoids conflict and an absurd result." *Id.* at 189.

The AGO's broadening of "private data on individuals" to include data that is not "data on individuals" ignores the other definitions in the MGDPA's general "Definitions" section and leads to an absurd expansion of the term to include data not on individuals. Minn. Stat. § 13.02; *Am. Fam. Ins. Grp.*, 616 N.W.2d at 278 ("courts should construe a statute to avoid absurd results and unjust consequences"). Section 13.02 is like a narrowing funnel, as described by the 1980 Legislature amending the MGDPA.[8] First, section 13.02 defines broader terms used like "individual." Then, it uses those definitions to define other terms. Accordingly, "individual" is defined as "a natural person." Minn. Stat. §13.02, subd. 8. "Data on individuals" builds on this definition and "means all government data in which

[8] Office of Revisor of Statutes, *Actions of the 1980 Minnesota Legislature*, at 87, *available at* https://www.lrl.mn.gov/docs/pre2003/other/802161.pdf. (describing how "data on individuals" is classified).

any individual [replace with "natural person"] is or can be identified as the subject of that data…" *Id.*, subd. 5. It stands to reason, then, that "private data on individuals" incorporates these two defined terms to create a specific category made up of a smaller subset of data in which any natural person is or can be identified as the subject of that data. In *Brown*, again, the collection of statutory definitions together led to the result that a motorized scooter falls outside the definition of "motor vehicle" for enforcing the DUI laws. 801 N.W.2d at 188. Likewise here, by looking only at the definition of "private data on individuals," the AGO conveniently ignores the MGDPA's definitions of both "individual" and "data on individuals."

As the Court of Appeals observed in this case, section 13.65 bears the three subdivision headings also in section 13.02 which align with "private data on individuals": "private data," "confidential data;" and "public data." *Compare* Minn. Stat. §13.65 *and* Add. 12 *with Actions of the 1980 Minnesota Legislature*, at 87. These section 13.65 headings correspond exactly to the three possible classifications of data on individuals outlined by the 1980 revision to the MGDPA. *See* Minn. Stat. §13.02, subds. 9, 13, 14.

The AGO's reasoning ignores that the Legislature had an easy way to do what the AGO claims—were that what the Legislature intended. The MGDPA defines the term "protected nonpublic data" as "data not on individuals made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data." Minn. Stat. §13.02, subd. 13. This definition uses the same basic structure as the "private data on individuals" definition—but for data which is "not on individuals." Thus, if the Legislature intended the AGO's result, it would have used the term it created to cause that exact result.

It would not have intentionally used one term in place of another already-defined term. As this Court has held in interpreting other statutes, "the Legislature knows how to make that distinction clear," and here it has. *See City of Brainerd v. Brainerd Invs. P'ship*, 827 N.W.2d 752, 756 (Minn. 2013) (interpreting Minn. Stat. §435.19, subd. 2).

Furthermore, the MGDPA's defined terms related to "data not on individuals" do not correspond with the structure of Section 13.65. "Data not on individuals" was added to the MGDPA (but not to section 13.65) in 1980. H.F. No. 2040, Ch. 603, Laws of Minnesota for 1980. "Data not on individuals," the House summary notes, is a new category and consists of all data that is not data on individuals. *Actions of the 1980 Minnesota Legislature*, at 88. This data can be placed into three categories, too: public, non-public, or protected non-public. *Id.* These terms are absent from section 13.65.

Reading the MGDPA's defined terms together, in context, leads to the reasonable conclusion adopted by the Court of Appeals here. And although not binding on this Court, the 1994 Advisory Opinion referred to by the Court of Appeals is instructive. (Add. 12, n.1). The Commissioner of Administration's straightforward analysis reflects that section 13.65 unambiguously does not apply to protect AGO communications with corporations:

> Section 13.65, subdivision 1(b), does not state that communications that are received by the Attorney General that are data not on individuals are classified as anything other than public and, absent a specific classification for the data, the presumption of Minnesota Statutes Section 13.03, subdivision 1, operates to make communications received from corporations and other entities that are not individuals, public data.

Id. (emphasis added) (citing Op. Minn. Dep't. of Admin., No. 94-047 (Oct. 29, 1994)).

C. The AGO's Partial Comparison to Welfare Data and Other Provisions of the MGDPA Sheds No Different Light on Section 13.65.

The AGO's table comparing section 13.65 to certain other MGDPA sections is incomplete and misdirected. (Appellant's Br. 13). The examples chosen vary in language approach, governmental function, and scope of the data they cover. Throughout the MGDPA, the Legislature distinguishes between "private data on individuals" and "nonpublic data." Sometimes a particular section, addressing specific subjects, will contemplate more than one classification precisely because the records are likely to contain both individual and non-individual data that is subject to restrictions.

Consider first these examples of sections where the Legislature uses "private data on individuals" when only referring to data on individuals:[9]

- Section 13.32 ("Data concerning parents are private data on individuals" and "educational data is private data on individuals");
- Section 13.3805 ("Data on individuals. (1) Health data are private data on individuals");
- Section 13.386 ("Genetic information held by a government entity is private data on individuals");
- Section 13.384 ("After the person is released by termination of the person's legal commitment, the directory information is private data on individuals");
- Section 13.392 ("Data on an individual supplying information for an audit or investigation, that could reasonably be used to determine the individual's identity, are private data on individuals.");
- Section 13.40 ("the following data maintained by a library are private data on individuals");
- **Section 13.46 ("Data on individuals [possessed] by the welfare system are private data on individuals…");**

[9] The MGDPA sections appearing in Appellant's chart (p. 13) are **bolded** for reference.

- **Section 13.65 (AGO's restricted data is "Data on individuals" in several further delineated categories).**

Thus, if the MGDPA section deals solely with data on individuals, it will only use the restrictive term "private data on individuals," whether or not the protected data is described, as in the welfare data section, as "data on individuals." Further, it bears noting that these provisions all relate to data which inherently deal with individuals as their subject; the AGO cannot provide a single analog that would convert data not on individuals into "private data on individuals."

In contrast, if the MGDPA statute is meant to limit or restrict access for both data on individuals *and* data not on individuals,[10] the MGDPA itself affirms that the Legislature knows how to include definitional terms related to both types of data:

- Section 13.15 ("Electronic access data are private data on individuals or nonpublic data.");
- **Section 13.37 (Trade Secrets are either "private data on individuals" or "nonpublic data" if not on individuals);**
- **Section 13.39 (Active Civil Investigative Data is classified as "Confidential data on individuals" or if it is "data not on individuals," as "protected nonpublic" data);**
- Section 13.44 ("Appraised values of individual parcels of real property that are made by appraisers working for fee owners or contract purchasers who have received an offer to purchase their property from a government entity are classified as private data on individuals or nonpublic data.");
- Section 13.59 ("The following data that are submitted to a housing and redevelopment authority by persons who are requesting financial assistance are private data on individuals or nonpublic data.");
- Section 13.48 ("Financial data on business entities submitted to a government entity for the purpose of presenting awards to business entities

[10] As noted above, the MGDPA uses "nonpublic data" for "data not on individuals." Minn. Stat. §13.02, subds. 4, 9.

for achievements in business development or performance are private data on individuals or nonpublic data.");

- Section 13.681 ("Utility data on disconnections provided to cities under section 216B.0976 shall be treated as private data on individuals or nonpublic data.");
- Section 13.685 ("Data on customers of municipal electric utilities are private data on individuals or nonpublic data");
- Section 13.824 ("All data collected by an automated license plate reader are private data on individuals or nonpublic data");
- Section 13.825 ("Data collected by a portable recording system are private data on individuals or nonpublic data").

So, the MGDPA routinely and explicitly restricts both types of otherwise accessible data (on individuals and not on individuals) where it intends to prevent both categories from disclosure. As the Court of Appeals observed, the Legislature could have also done this in section 13.65, but it unambiguously chose not to. (Add. 11). This Court should affirm.

D. The AGO's Relative Convenience in Complying with MGDPA Requests Is No Reason to Mis-Apply an Unambiguous Statute.

The AGO's obligations in responding to MGDPA requests would be less burdensome if, as the AGO posits, all it must do to withhold requested data is to ask, "Is there any responsive data specific to the individual requesting the data?" (Appellant's Br. 14). "If not, the inquiry need not go any further." *Id*. At least three glaring problems arise from this overly-simplistic approach.

First, because the definition of "individual" is limited to a "natural person," no corporate entity, organization or group could ever obtain anything from the AGO under

Section 13.65, subdivision 1. *See* Minn. Stat. §13.02, subd. 8. Respondent, for example, is a non-profit corporation, and would not even be able to obtain data collected related to it.

Second, as EPA explained in the Court of Appeals, this approach leaves the AGO as sole arbiter of whether data is—or is not—on an individual.[11] Arguing that it is not always clear whether data is or is not "data on individuals," the AGO suggests that it would be better for its own purposes to ignore this clear line of demarcation. (Appellant's Br. 14). That data may have to be parsed to determine whether it falls into either category did not lead the Court in *Burks v. Metropolitan Council*, 884 N.W.2d 338, 341-42 (Minn. 2016), to find that no data was accessible. Instead, in the companion case, *KSTP-TV v. Metropolitan Council*, 884 N.W.2d 342 (Minn. 2016), faced with a parsing requirement, this Court remanded to the ALJ to resolve fact issues to resolve the data's classification. *Id.* at 350. The same result should obtain here: the Court should affirm the Court of Appeals and remand the matter to the district court for further proceedings, including *in camera* review. (Add. 14-15).

Third, the burden of compliance on the AGO is no greater than for any other state agency subject to the MGDPA. In unpublished decisions, the Court of Appeals has commented on, and expressly rejected, a "burdensomeness" objection to data requests. *See, e.g., Webster v. Hennepin Cty.*, No. A16-0736, 2017 WL 1316109, at *6 (Minn. Ct. App. Apr. 10, 2017) (noting that creating such an exception was the duty of the legislature), *aff'd*

[11] Such an approach, condoned by the district court here, vests too much self-interested discretion in the Attorney General. But the AGO is supposed to be the chief legal officer *for* the State of Minnesota and represent all state agencies, boards, and commissions—and most of all, its *people*. *Humphrey v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987).

in part, rev'd in part, dismissed in part, 910 N.W.2d 420 (Minn. 2018); *Rachuy v. Cty. of Chisago*, No. C0-94-1126, 1995 WL 81404, at *4 (Minn. Ct. App. Feb. 28, 1995) ("In order for the Act's legitimate purposes to be implemented, compliance with the Act is necessary even though it may impose a greater burden on government employees as they perform their duties.").

E. Any Broad Change in MGDPA Policy to More Broadly Exempt the AGO From the MGDPA Is the Work of the Legislature.

EPA agrees with the AGO that courts may not read words in—or write words into—an existing statute. *State v. Noggle,* 881 N.W.2d 545 (Minn. 2016); *Johnson v. Cook Cty.,* 786 N.W.2d 291, 295 (Minn. 2010) (A court "may not add words to a statute that the legislature has not supplied."). But it is the AGO, not the Court of Appeals, that seeks to re-write section 13.65 by inferring a "policy" without any legislative support. (Appellant's Br. 14-15).

The AGO posits, without citation, that section 13.65 "presumably reflects a policy decision" to shield all AGO communications except to an individual who is the subject of the communications. (Appellant's Br. 15). The purpose of the MGDPA, however, is "to balance the privacy rights of the data subjects with the public's right 'to know what the government is doing...within a context of effective government operation.'" *Westrom v. Minnesota Dep't of Lab. & Indus.*, 667 N.W.2d 148, 150 (Minn. Ct. App. 2003), *aff'd,* 686 N.W.2d 27 (Minn. 2004). The public has a strong interest in knowing what the AGO is using its powers to do, and as a state agency, the AGO itself cannot be the arbiter of the "sound reasons" of the Legislature for the language chosen.

In short, the unambiguous language of section 13.65, read in light of surrounding statutory provisions of the MGDPA and relevant precedent, makes clear that it applies only to "data on individuals," and cannot plausibly be extended to data "*not* on individuals." The AGO's proposed interpretation is wholly unsupported by the text and structure of the MGDPA, and this Court should affirm the Court of Appeals related to its decision on section 13.65.

IV. If the Court Recognizes the Common-Interest Exception to Privilege or Work-Product Waiver Here, It Should Comprehensively Define It in a Manner That Can Be Applied by the District Court.

The parties below agreed, and the Court of Appeals recognized, that neither this Court nor the Legislature has ever adopted the common-interest exception to privilege waiver (also described as the "common-interest doctrine"). (Add. 26); (AGO Br., Jan. 5, 2021, at 19). AGO claimed below that "no Minnesota case has explicitly adopted or rejected the common-interest doctrine, leaving the issue open" (Appellant's Br. 11), and the Court of Appeals relied on that concession in concluding that the common-interest doctrine had not been recognized in Minnesota. (Add. 26). At least two appellate decisions, including the decision below, have found that the common-interest doctrine has not been recognized in Minnesota. *See Energy Pol'y Advocs. v. Ellison*, 963 N.W.2d 485 (Minn. Ct. App. 2021); *Walmart, Inc. v. Anoka Cty.*, No. A19-1926, 2020 WL 5507884, at *2 (Minn. Ct. App. Sept. 14, 2020), *review denied* (Nov. 25, 2020) ("The common-interest doctrine is an exception to work-product waiver that has been adopted in some jurisdictions, but not expressly in Minnesota....").

The AGO has now reversed course from its original argument and adopted the position, also advanced by some *amici*, that the common-interest doctrine was recognized long ago, in *Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn. 1942). It was not. *Schmitt* expressly adopted a joint defense privilege—applicable when counsel for separate co-defendants combined their efforts in preparing their argument—not an all-encompassing common-interest exception to waiver, and certainly not an exception to the MGDPA (first enacted in 1974) which could apply here. *Id.* at 416-17. And further, the AGO's claim that *Schmitt v. Emery* is suddenly relevant is precluded by the "invited error" doctrine, where a party which fails to assert an argument below may not raise it for the first time in this Court. *In re Hibbing Taconite Mine & Stockpile Progression*, 888 N.W.2d 336, 344 (Minn. Ct. App. 2016) (quoting *Krenik v. Westerman*, 275 N.W. 849, 852 (Minn. 1937)) ("the doctrine of invited error...precludes a party from asserting error on appeal which he invited or could have prevented in the court below").

But whether *Schmitt* recognized the common-interest doctrine in 1942 is ultimately irrelevant, because even if it did, *Schmitt* did not sufficiently formulate any such doctrine to guide to the lower courts.

While the AGO now argues that the Court should "formally recognize the doctrine and provide clear instruction for the district court" (Appellant's Br. 16), it offers no formulation of the doctrine beyond the broad contours of Section 76 of the Restatement (Third) of the Law Governing Lawyers, which the Eighth Circuit has characterized as a "loose standard" for the common-interest doctrine. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997). In fact, work-product protections, which have

been raised by various *amici*, are not even mentioned in the Restatement's formulation of the common-interest doctrine. (Add. 27) ("To the extent that the common-interest doctrine is recognized, it applies only to the [attorney-client privilege] but not to the [work-product doctrine].") (citing Restatement (Third) of the Law Governing Lawyers §76 cmt. d; §91 cmt. b).

If, despite the AGO's waiver, this Court decides to formally recognize the common-interest doctrine here in a broader context than *Schmitt*'s narrow context that involved common defendants with a common defense in an active lawsuit, it should comprehensively define the doctrine to enable the litigants (and the public at large) to understand the state of the law. As discussed below, a survey of case law applying the common-interest doctrine supports a formulation in which a party invoking the common-interest exception to waiver must establish: (i) that the contested documents were subject to an ***underlying claim of privilege protection (or work-product protection)***; (ii) that the privilege can be extended only by the presence of a ***common legal interest***, rather than a commercial, political, or policy interest; and (iii) that the communications at issue were made ***in furtherance of*** that legal interest.

Additionally, if the Court adopts the common-interest exception to privilege waiver, it should not stop at mere recognition of the doctrine in Minnesota. Rather, to effectively resolve this dispute, the Court should create a practical test which would allow the district court, on remand, to apply the doctrine under the framework of the MGDPA and determine whether the people's law firm—the AGO—properly withheld documents from the

people.[12] Because the AGO did not substantiate how documents it withheld satisfied each of these elements of the common-interest doctrine, the district court abused its discretion when it sustained the AGO's claims with respect to those documents. The Court of Appeals properly corrected the district court's error and also properly held that, even if there were a common-interest doctrine to apply here, the AGO's barebones document descriptions and failure to tender documents *in camera* are fatal to its position at this juncture in the lawsuit. (Add. 27).

A. The Common-Interest Doctrine Requires an Underlying Claim of Attorney-Client Privilege or Work-Product Protection.

Evidentiary privileges are "barriers to the ascertainment of truth." *Larson v. Montpetit*, 147 N.W.2d 580, 586 (Minn. 1966). As such, privileges are "disfavored and *narrowly limited to their purposes*." *Id.* (emphasis added). Minnesota courts have thus long held that a represented party waives its privilege by sharing an otherwise privileged document with a third party. *E.g.*, *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) ("[T]he general rule [is] that the attorney-client privilege is waived when

[12] As discussed more below, remand will be appropriate under nearly any common-interest test adopted by the Court because of the poor record created by the AGO's vague document descriptions and decision not to submit *in camera* the documents for which privilege is claimed. Any test applicable to this case should examine whether the common-interest doctrine is limited by the MGDPA, or whether the Attorney General's claims of privilege do not facially substantiate privilege, or whether the common-interest doctrine is not broad enough to cover the Attorney General's vague descriptions of the communications at issue here. The Court should reach these issues, discussed below, to avoid deciding this case "merely to establish precedent." *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002).

privileged information is disclosed to a third party."); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 443 (Minn. 1998) (same).

The common-interest doctrine, as recognized in other jurisdictions, is an exception to the rule of waiver. Thus, courts uniformly recognize that the common-interest doctrine is *not* a standalone privilege. *E.g.*, *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) ("Rather than a separate privilege, the common-interest or joint-defense rule is an exception to ordinary waiver…."). Instead, a party invoking the common-interest doctrine must first establish that the documents or communications are subject to a valid and independent claim of attorney-client privilege or work-product protection. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (common-interest doctrine requires a communication that "otherwise qualifies as privileged") (quoting Restatement (Third) of the Law Governing Lawyers §76(1)).

To make such a showing, the proponent of the attorney-client privilege must establish that the communications: (1) were between a client and attorney in a professional attorney-client relationship; (2) were confidential and protected from disclosure; and (3) sought or provided legal advice pursuant to the attorney-client relationship. *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 895 (Minn. 1979); *see also* Minn. Stat. §595.02, subd. 1(b) (noting that, without the client's consent, an attorney cannot be examined about "any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty").

For the work-product doctrine to apply, the proponent must establish that (1) the matter sought is embodied in a document or other tangible thing; and (2) the material

sought must have been prepared in anticipation of litigation. Minn. R. Civ. P. 26.02(d); Minn. R. Evid. 502(e)(2); *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986); *Leininger v. Swadner*, 156 N.W.2d 254, 258 (Minn. 1968). Whether the materials were prepared in anticipation of litigation turns on whether they were prepared in the "usual course of business" or specifically in preparation for litigation. *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 702 (Minn. 1954); *see also City Pages v. State*, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003) (requiring consideration of "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.").[13]

Further, unlike the attorney-client privilege, the work-product doctrine is conditional and may be overcome by a showing that the party cannot, without undue hardship, obtain the materials' substantial equivalent by other means and that there is a substantial need for the materials. Minn. R. Civ. P. 26.02(d); *Hickman v. Taylor*, 329 U.S. 495, 513 (1947).

[13] As mentioned above, on pages 27 and 28, there is no mention of the work-product doctrine in Restatement Section 76. Whether the common-interest doctrine should apply to the work-product doctrine is another issue of first impression here. The work-product doctrine is limited, under Minnesota law, to "the protection that applicable law provides for tangible material (or its intangible equivalent) ***prepared in anticipation of litigation or for trial***." Minn. R. Evid. 502(e)(2) (emphasis added). This indicates that any common-interest protection afforded to work product must be coextensive with the requirement that work product be created "in anticipation of litigation or for trial."

B. The Common-Interest Doctrine Requires a Shared *Legal* Interest, Not a Mere Commercial, Political, or Policy Interest.

Courts applying the common-interest doctrine also require the party invoking the doctrine to establish that the shared interest is a *legal* interest. "The need to protect the 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, 243-44 (2d Cir. 1989) (emphasis added) (internal quotations and citations omitted); *see also In re Pac. Pictures Corp.*, 679 F.3d at 1129 (noting that the common-interest rule allows attorneys for different clients "pursuing a common legal strategy" to communicate with each other); *In re Grand Jury Subpoenas 89-3 and 89-4*, 902 F.2d 244, 249 (4th Cir. 1990); *United States ex rel. Landis v. Tailwind Sports Corp.*, 303 F.R.D. 419, 427 (D.D.C. 2014) ("For the [common-interest doctrine] to apply, however, the parties' shared interest must be both legal and ongoing."); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 37-38 (N.Y. 2016) ("[W]here two or more clients *separately* retain counsel to advise them on matters of common legal interest, the common-interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest.") (emphasis in original).

As a corollary to the requirement of a shared *legal* interest, courts have held that the common-interest doctrine does *not* extend to communications between parties that merely share a business, policy, or political (i.e., non-legal) interest. In *In re Dealer Mgmt. Sys. Antitrust Litig.*, 335 F.R.D. 510, 515 (N.D. Ill. 2020), for example, the trial court held that communications among a group with a shared interest in opposing unlawful business

practices did not come within the scope of the common-interest doctrine. While members of the group shared an interest in opposing the defendants' business practices under antitrust laws, "[t]hat shared business or commercial interest...does not amount to a joint effort or an identical legal interest for purposes of the common-interest doctrine." *Id.* The court required more than the "pursu[it of] a common goal" and a "general consensus" about how to approach the FTC to establish a common legal interest. *Id.* at 514; *see also Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (refusing to apply the common-interest doctrine to business or commercial interests); *Finjan, Inc. v. SonicWall, Inc*., 2020 WL 4192285, at *4-5 (N.D. Cal. July 21, 2020) (declining to apply the common-interest doctrine because the shared interest was financial rather than legal); *In re Hypnotic Taxi LLC*, 566 B.R. 305, 314-17 (Bankr. E.D.N.Y. 2017) (declining to apply the common-interest doctrine because the shared interest was a personal or business interest rather than a legal interest).

The same principle extends to shared policy or political interests, which are not sufficient to come within the scope of the common-interest doctrine. In *In re Grand Jury Subpoena Duces Tecum*, relied on by the AGO (Appellant's Br. 19), the Eighth Circuit addressed whether notes taken during meetings between Hillary Clinton, her personal counsel, and White House counsel, which were later sought by document subpoena, were protected from waiver by the common-interest doctrine. 112 F.3d at 914. The district court concluded that "because Mrs. Clinton and the White House had a genuine and reasonable (whether or not mistaken) belief that the conversations at issue were privileged, the attorney-client privilege applied." *Id.* (internal quotations omitted).

The Eighth Circuit reversed. It found that Mrs. Clinton's asserted interests—which included the need for a full and accurate understanding of the facts, ensuring there was no distortion of the events by political and legal adversaries, the need for allocation of responsibility between personal and public attorneys, and the desire to determine whether any White House policies needed to be altered—were political and policy interests rather than legal interests, and as such, were not sufficient to come within the common-interest doctrine. *Id.* at 922. Even assuming "that it is proper for the White House to press political concerns upon [a court]," the Eighth Circuit found that none "of these incidental effects on the White House are sufficient to place that governmental institution in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake." *Id.* at 923.

Thus, mere political or policy interests, such as those advanced by Mrs. Clinton and the White House in *In re Grand Jury Subpoena Duces Tecum*, fall outside the scope of a cognizable *legal* interest for purposes of the common-interest doctrine. *See also Mass. Mut. Life Ins. v. State*, No. CV054014549, 2005 WL 2277264, at *3 (Conn. Super. Ct. Aug. 15, 2005) (finding that typically "those cases recognizing the doctrine have been ones in which a party has established a common legal enterprise," but an asserted interest between the Connecticut Attorney General and a third party in "eliminating corporate scandal" is "too ephemeral to link the parties in a common legal enterprise").

Along the same lines, courts have held that merely having a "shared desire to see the same outcome in a legal matter" is not enough to constitute a common legal interest. *In re Pacific Pictures Corp.*, 679 F.3d at 1129. There, a crime victim shared privileged documents with the U.S. Attorney's Office to assist it in a potential prosecution, and later

argued that the common-interest doctrine shielded those documents from discovery. The Ninth Circuit disagreed:

> There is no evidence that Toberoff and the Office of the U.S. Attorney agreed before the disclosure jointly to pursue sanctions against Toberoff's former employee. Toberoff is not strategizing with the prosecution. He has no more of a common interest with the government than does any individual who wishes to see the law upheld.

Id. at 1129-30.

In short, courts routinely scrutinize an asserted common interest to confirm that the interest is in fact *legal*, as opposed to a political, policy, or commercial interest. This approach maintains Minnesota courts' historical approach to privileges, which, as "barriers to the ascertainment of truth," are "narrowly limited to their purposes." *Larson*, 147 N.W.2d at 586.

C. The Common-Interest Doctrine Requires That the Communication Be in Furtherance of the Common Legal Interest.

Finally, even if a party establishes an underlying claim of attorney-client privilege or work-product protection and a shared legal interest with third parties, the common-interest doctrine does not cover all such communications. Rather, in addition to establishing underlying privilege and the existence of a common legal interest, the party invoking the common-interest doctrine must also establish that any disclosure to a third party was ***in furtherance of*** the common legal interest. "The parties must make the communication in pursuit of" the common legal interest.[14] *See In re Pac. Pictures Corp.*,

[14] Most courts, consistent with the Court of Appeals here, have held that a written common-interest agreement is not required in order for the common-interest doctrine to apply. *See, e.g.*, *United States v. Zhu*, 77 F. Supp. 327, 330 (S.D.N.Y. 2014) ("A formal written

679 F.3d at 1129 (emphasizing that the participants must show that they furthered the alleged common interest); *see also Matter of Bevill, Bresler, & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); (requiring that the communications or documents "were designed to further" the alleged interest); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) (requiring that the participants intended to further the common interest through their communications via facilitating representation).

Courts have thus declined to protect communications under the common-interest doctrine where those communications were not *in furtherance of* the shared legal interest. *See, e.g.*, *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007) (holding that the common-interest doctrine did not apply to communications regarding the parties' distribution agreement because such communications were not in furtherance of the parties' joint defense effort); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 471 (S.D.N.Y. 2003) (refusing to apply the common-interest doctrine to participants' communications about a business strategy, even when they also shared concerns about litigation and were already involved in litigation); *In re Pac. Pictures Corp.*, 679 F.3d at 1125, 1129 (discussed *supra*).

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common-interest agreement is not necessary."); (Add. 27). Nonetheless, if parties claiming a common interest have such a written agreement, their own understanding of the purpose of their collaboration should be instructive as to whether their communications are really in furtherance of a common legal interest claimed, as opposed to a broad attempt to shield policy discussions from public view. *E.g., Competitive Enter. Inst. v. Att'y Gen. of New York*, 161 A.D.3d 1283, 1287, 76 N.Y.S.3d 640 (2018) ("the Common Interest Agreement reveals no such legal analysis…the document lists categories of environmental concern for which the signatories agreed to share information pertinent to any ensuing investigation or litigation.").

The above authorities make clear that, at a minimum, the common-interest exception to privilege waiver requires a showing of (1) an underlying claim of privilege or work-product protection; (2) a common legal interest, rather than a mere political, policy, or commercial interest; and (3) communications made in furtherance of that legal interest.

V. The MGDPA and the Work-Product Doctrines Limit the Application of the Common Interest Exception to Waiver Where Asserted by Public Attorneys Like the AGO in This Context.

If the Court adopts the common-interest doctrine here, that adoption begs the questions: how does that exception work (1) in the context of the MGDPA, and (2) in the context of a broad coalition with varying legal interests? The common-interest doctrine, even if adopted by this Court pursuant to the test described above, is a poor fit for government attorneys refusing to disclose their communications on policy matters from the public, and therefore should be interpreted more narrowly in this context.

First, this Court's precedent establishes that open-meeting and public-data laws curtail the scope of the attorney-client privilege for government employees. *Prior Lake American v. Mader*, 642 N.W.2d 729, 737 (Minn. 2002). Second, "the known presence of a stranger negates the privilege for communications made in the stranger's presence." *Walmart Inc. v. Anoka County*, 2020 WL 5507884 (Minn. Ct. App. Sept. 14, 2020); Restatement (Third) of the Law Governing Lawyers §76 (2000) cmt. d. Third, the work-product doctrine itself is conditional and can be overcome by a showing that the seeking party cannot, without undue hardship, obtain the materials' substantial equivalent by other means and that there is a substantial need for the materials. Minn. R. Civ. P. 26.02(d); *Hickman v. Taylor*, 329 U.S. 495, 513 (1947).

A. Any Common-Interest Doctrine Applied to the AGO Should be Narrowly Construed and Limited to Where the Balancing of Privilege and Open-Government Interests Dictate the Need for the AGO's Absolute Confidentiality.

Even if the Court adopts a common-interest test which can be applied to private interests, such as some of the interests advanced by *amici* here, government agencies and their attorneys subject to disclosure requirements by the MGDPA should not have as broad a common-interest exception as private litigants:

> A narrower privilege for governmental clients may be warranted by particular statutory formulations. Open-meeting and open-files statutes reflect a public policy against secrecy in many areas of governmental activity. Moreover, unlike persons in private life, a public agency or employee has no autonomous right of confidentiality in communications relating to governmental business.

Prior Lake American v. Mader, 642 N.W.2d 729, 737 (Minn. 2002) (quoting Rest. (3d) of the Law Governing Lawyers §74 cmt. b (1998)).

Put another way, government attorneys like the AGO enjoy privilege to the extent they have a statutory exception to the people's presumptive entitlement to their data. Any claim to protection from the MGDPA based on an exception to privilege waiver should face a steep uphill battle to overcome the presumption of publicity.

To illustrate, in *Prior Lake American*, this Court narrowly applied the attorney-client privilege in the face of the Open Meeting Law's requirement that meetings of government bodies must be public absent an exception. *Id*. at 737-38. In *Prior Lake American*, Ryan Contracting applied for a conditional use permit, and the Prior Lake Mayor and City Council closed their public meeting for the purpose of discussing a perceived

threat of litigation from Ryan. *Id.* at 731-34. The *Prior Lake American*, a newspaper, sued the City for closing the meeting, alleging that the Open Meeting Law overrode the specific interest in discussing the "threat of litigation" behind closed doors. *Id.* at 734-35.

This Court noted the narrower scope of privilege in the face of "[o]pen-meeting and open-files statutes," as quoted above, and held that the attorney-client privilege may only overcome the Open Meeting Law's publicity requirement where there is "active and immediate litigation" and "the balancing of [the need for privilege and the need for open government] dictates the need for absolute confidentiality." *Id.* at 736-37 (quoting *Minneapolis Star & Tribune Co. v. Housing and Redevelopment Authority*, 251 N.W.2d 620, 626 (Minn. 1976)). There is no reason to distinguish between the strong policy interest in publicity in both the Open Meeting Law, *see* Minn. Stat. §13D.01, subd. 1, and the MGDPA, *see* Minn. Stat. §13.03, subd. 1, discussed in the same breath by the *Prior Lake American* Court. Both the Open Meeting Law and the MGDPA allow for the assertion of privilege as an exception to a presumption of publicity,[15] and neither has language that justifies different treatment of their respective presumptions vis-à-vis privilege.

Therefore, if the Court is to adopt a common-interest exception to privilege waiver here, it should incorporate and reflect Minnesota's strong policy interest in "[o]pen-meeting and open-files" laws and apply to the MGDPA's section 13.393 the same test applicable to the Open Meeting Law's privilege exception: the AGO must show that it

[15] *Compare* Minn. Stat. §13.393 *with* Minn. Stat. §13D.05, subd. 3(b).

needs "absolute confidentiality" in order to assert the common-interest doctrine. *See Prior Lake American*, 642 N.W.2d at 737.

B. The "Presence of a Stranger" Destroys Privilege and Work-Product Protections Even Where a Common Interest Is Alleged to Exist.

In view of the foregoing discussion, even established claims of work product and attorney-client privilege can be destroyed by the sharing of information with third parties where there is a significant likelihood of sharing with non-members of the alleged common-interest enterprise. Sharing among the offices of dozens of state attorneys general in this context is one such scenario, given different states' varying legal interests and where the sharing is orchestrated by a clearinghouse operated by a law school's policy center, such as the Bloomberg NYU SEEIC. *See supra* pp. 4-5; (Index #34, Pl.'s Mem. of Law 2-3); (Index #37, Aff. of Christopher Horner, April 15, 2020, Ex. O (June 12, 2019 Email from Special Assistant Attorney General Skip Pruss to Attorney General Dana Nessel, Deputy Attorney General Kelly Keenan, Subject: NYU Law School State Energy and Environment Impact Center)).

As the Restatement notes, "the known presence of a stranger negates the privilege for communications made in the stranger's presence." Restatement (Third) of the Law Governing Lawyers §76 (2000) cmt. c. The Court of Appeals in *Walmart* likewise noted that, even if a common-interest exception to waiver could apply to work-product claims, it cannot "in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it." *Walmart Inc. v. Anoka Cty.*, No.

A19-1926, 2020 WL 5507884, at *2 (Minn. Ct. App. Sept. 14, 2020), *review denied* (Nov. 25, 2020).

That is the situation here. The AGO asserts entitlement to the creation of a privilege and work-product umbrella around an incredibly vague scope of policy discussions with other state AGOs. While coordination on actual—not merely hypothetical—litigation where several states are likely to remain parties throughout more reasonably supports an exception to privilege waiver, the Minnesota Legislature has chosen to prioritize the interest of the people in a transparent, honest, open government over the convenience of emailing about *amicus* briefs. Minn. Stat. §13.03.

Even those courts which have recognized the common-interest doctrine in the context of information shared between AGOs have done so "very narrow[ly]." *See, e.g.*, *Tobaccoville USA, Inc., v. McMaster*, 692 S.E.2d 526, 530-31 (S.C. 2010) (adopting the common interest doctrine only for a "very narrow factual scenario"); *Grand River Enter. Six Nations, Ltd. v. Pryor*, No. 02 CIV. 5068 (JFK), 2008 WL 1826490, at *3 (S.D.N.Y. Apr. 18, 2008) (same). In *Tobaccoville*, for example, the South Carolina Supreme Court held that the common-interest doctrine would only apply to sharing between attorneys general where "several states are parties to a settlement agreement, the state laws that regulate and enforce that settlement all have the same provisions, the attorneys general of those settling states are involved in coordinating regulation and enforcement, and the settling states have executed a common interest agreement." *Tobaccoville*, 692 S.E.2d at 531. These protections ensure that the common-interest doctrine will only be applied to

government attorneys where there really is a common *legal* interest in play, and not mere open-ended policy discussions.

In the context of this case related to climate-change litigation, the AGO has provided zero evidence that would meet the *Tobaccoville* test—there is no related settlement agreement with a concomitant legal interest in coordination—and EPA very much doubts that it could. Other state AGOs in the climate litigation realm have different laws to uphold, different interests, and different clients.[16] And where documents appear intended to be shared with a third party, like the New York University School of Law's faculty as a "clearinghouse,"[17] this is especially true.

C. Any Application of the Common-Interest Doctrine to Work-Product Claims Should Recognize That the Work-Product Doctrine Is Conditional.

As noted above, any claim of work product is conditional and can be overcome by a showing that the seeking party cannot, without undue hardship, obtain the materials' substantial equivalent by other means and that there is a substantial need for the materials. Minn. R. Civ. P. 26.02(d); *Hickman v. Taylor*, 329 U.S. 495, 513 (1947). The AGO has not substantiated its work-product claims at all and merely relied on its vague formulation of the common-interest doctrine in the district court.

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[16] As one brief example, former Wisconsin Attorney General Brad Schimel supported efforts to confine jurisdiction over climate cases to the federal court. *See, e.g.*, States of Wisconsin, et. al, as Amici Curiae, p. 14, *Exxon Mobil Corp. v. Schneiderman and Healey*, No. 1:17-cv-02301-VEC (S.D.N.Y. April 20, 2017). However, once Attorney General Josh Kaul was elected in 2018, he promptly started filing amicus briefs supporting the opposing position. *See, e.g.*, States of Wisconsin, et. al, as Amici Curiae, p. 34, *State of Minnesota v. American Petroleum Institute, et. al*, No. 21-1752 (8th Cir. August 25, 2021).

[17] *Supra* pp. 4-5.

Thus, if the Court recognizes the common-interest doctrine as applied to work-product, it should also hold that work-product claims in the face of the MGDPA may be overcome by a showing that the requesting party cannot, without undue hardship, obtain the materials' substantial equivalent by other means and that there is a substantial need for the materials.

Here, EPA's desire to inform the public about the Attorney General's renting out the powers of his office to special interests is certainly a "substantial need," heavily supported by the purposes of the MGDPA. And the AGO alone has possession of the records specific to its office—there is no other way to get them.

VI. The Court of Appeals Correctly Ruled That the Attorney General Did Not Carry Its Burden to Show That Its Data Are Protected From Disclosure Under the MGDPA.

The AGO has fully failed to justify a predicate privilege for the application of any common-interest doctrine to the facts of this case. This is partly because any test which could lead the AGO to victory would substantially undermine the MGDPA and the privilege waiver rule, writ large.[18]

[18] This also results from the AGO's failure to produce a privilege log in the district court action, which it agreed to do. (Index #16). The Court of Appeals therefore correctly required the AGO to produce a detailed privilege log to Respondent as part of its remand order. Only with the benefit of a detailed log will Respondent and the district court be able to fully assess whether withheld documents could satisfy any common-interest doctrine adopted here

A. The AGO Fails to Demonstrate Application of Its Proposed Common-Interest Test to the Documents at Issue.

The AGO fails to offer a practical application of the common-interest doctrine with the proper elements described herein because any such application would be fatal to the AGO's claims. Any construct of the common-interest doctrine which might meet the AGO's needs in the instant matter would be disastrous, so the AGO remains silent on application.

In this case, the AGO seeks to exempt from public disclosure correspondence with outside parties discussing broad subject matters about which they might or might not take (and have not yet taken) collective action, among two or some greater number of them, at some point in time, in an undisclosed forum (administrative, judicial, or otherwise). These communications are likely shared by Mike Firestone of the Massachusetts AGO and Michael Myers of the New York AGO with the SEEIC itself (see *supra* pp. 4-5). As a law school policy center that has not been a party in any of the actions partially identified by the AGO, the SEEIC cannot be a party to any common-interest agreement. Nor would emails or other communications regarding energy policy or climate change satisfy the requirement of a common *legal* interest among a group.[19] Furthermore, any common-interest doctrine which could possibly lead the AGO to prevail here would undermine the MGDPA's presumption of publicity as it relates to that office.

[19] The full details of the withheld documents are unknown to EPA because the AGO failed to produce an adequate description of why they are privileged and failed to tender them *in camera* to the district court. It is AGO's burden to show that these documents satisfy a common *legal* interest, not a policy or political interest.

Thus, the AGO keeps any proposed practical test to itself—a bold strategy at minimum when seeking approval of a new legal doctrine—much like it did the documents it was supposed to proffer *in camera* in the district court. And a review of what the AGO actually did provide the district court amply demonstrates the propriety of the Court of Appeals' remand.

B. The Court of Appeals Correctly Ordered Remand on This Fact Record.

The district court erred when it applied the common-interest doctrine based solely on the AGO's broad categorical descriptions of withheld documents—not an *in camera* review of the documents themselves, and without benefit of a privilege log detailing the nature of the communications at issue. *See* Minn. R. Civ. P. 26.02(f)(1) (a party making a claim of privilege "shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection"). The AGO vaguely asserted the common-interest doctrine as a basis to withhold documents under the MGDPA with respect to Categories 6, 10, 13, and 14:

> Category 6…five documents consisting of three privileged emails and their attachments…[which]…concern communications by other…attorney generals with the Office concerning existing or proposed multi-state litigation challenging rule changes on auto and ozone emissions. The Office shares a common interest with the other attorneys general[] in reviewing federal rule changes on these issues, and where appropriate, bringing litigation to challenge such rule changes.
>
> Category 10…sixteen documents relating to communications between this Office, the [DNR]…and other state attorneys general concerning a request for the Office to join an amicus brief…[to] the U.S.

> Supreme Court in…*Coachella Valley Water District, et al. v. Agua Caliente Band of Cahuilla Indians*. The Office did not join the brief.
>
> Category 13…seven documents relating to internal and multi-state communications concerning this Office's representation of the State in multijurisdictional *In re DRAM Antitrust Litigation*, N.D. Cal. C-06-6436….generally concern[ing] applications for attorneys' fees….
>
> Category 14…three documents relating to internal and multi-state communications concerning this Office's representation of the State in multijurisdictional *In re TFT-LCD (Flat Panel) Antitrust Litigation*, N.D. Cal. 07-MD-1827….generally concern[ing] applications for attorneys' fees….

(Add. 6-8.)

Recognizing a common-interest exception to privilege or work-product waiver that encompasses these vague assertions would be disastrous. As the Court of Appeals correctly determined, these vague categorical descriptions failed to provide the district court with the factual basis required to apply the common-interest doctrine. These descriptions raise more questions than answers. For example, who is the AGO's client (Category 6, 10)? Was litigation anticipated at the time of the communication (Category 6, 10)? Did the AGO share a common legal interest—as opposed to a policy or political interest—with other states concerning auto and ozone emissions (Category 6)? Were withheld emails made "in furtherance of" any common legal interest (Categories 6, 10)? What greenhouse gas rules are implicated by Category 6? Is there any Minnesota *legal* interest implicated by the *mere existence* of federal rules? If so, what? These remaining questions demonstrate that the AGO failed to satisfy, with appropriate evidence, any iteration of the common-interest doctrine, which the Court of Appeals correctly held. (Add. 27).

The AGO's vague, unsubstantiated claims of common interest are much like that rejected by the *Mass Mutual Life Insurance* court. *Mass. Mut. Life Ins. v. State*, No. CV054014549, 2005 WL 2277264 (Conn. Super. Ct. Aug. 15, 2005). In that case, a third party disclosed a report related to an internal investigation of scandal at Mass Mutual. *Id.* at *1. Then-Connecticut Attorney General Richard Blumenthal sought to disclose the report to a reporter for the *Hartford Courant*. *Id.* The Court held that Mass Mutual and the Attorney General's common interest in "eliminating corporate scandal" was insufficient to trigger any possible formulation of a "common legal interest" that would trigger the common-interest doctrine. *Id.* at *3 (typically "those cases recognizing the doctrine have been ones in which a party has established a common legal enterprise").

The AGO's vague claims of common interest also invoke the rejected theory from the Ninth Circuit's *In re Pacific Pictures Corp*: merely having a "shared desire to see the same outcome in a legal matter" is not enough to constitute a common legal interest. 679 F.3d at 1129. Likewise, in *In re Dealer Mgmt. Sys. Antitrust Litig.*, 335 F.R.D. 510, 515 (N.D. Ill. 2020), the trial court held that while members of the alleged common-interest group shared an interest in opposing the business practices of defendants under the antitrust laws, "[t]hat shared business or commercial interest...does not amount to a joint effort or an identical legal interest for purposes of the common-interest doctrine." *Id.*

The concept that maybe, someday, possibly, conceivably, the AGO might engage in a lawsuit about a vague interest like greenhouse gases is not enough to allow the AGO to withhold documents about policy matters from the public. The Court of Appeals was right when it held that "it is impossible to determine whether the documents in categories

6, 10, 13, and 14 satisfy [predicate privilege] requirements because the descriptions of those documents are very general and because the documents have not been submitted for *in camera* review." (Add. 27).

VII. The Attorney-Client Privilege Does Not Attach to Purely Internal Communications Among Lawyers, and Especially Not Internal Communications Among Lawyers Subject to the MGDPA.

Purely internal conversations among lawyers are not privileged communications. (Add. 23). In the record before the Court, the AGO described documents in Categories 12-14 as "internal communications." (Add. 23). Nowhere did the AGO indicate the existence of a client to whom these communications might have been delivered, or who asked for the advice in the communications.[20] *See id.*

Nonetheless, the AGO asks this Court to hold that *all* internal AGO communications are shielded from public view because they might, at some point, someday, involve a discussion with a client agency. (Appellant's Br. 24-26). Such a holding would expand the common-interest privilege for government lawyers—who are subject to the MGDPA—beyond the protections theoretically afforded to private attorneys. This Court has never countenanced the premise that government lawyers get special privileges because they discuss laws and potential actions with the effect of law as part of the process of *governing pursuant to laws*. In fact, this Court has authoritatively held that the opposite is true—

[20] Again, this dearth of support for the existence of privilege in the first place requires remand even if the Court disagrees with the Court of Appeals' interpretation of *Kobluk*. (Add. 23-24).

governments have limited privilege rights compared to private citizens and entities because of "open-meeting and open-files statutes." *Prior Lake American*, 642 N.W.2d at 737 (quoting Rest. (3d) of the Law Governing Lawyers §74 cmt. b (1998)). In practice, the holding pushed by the AGO would shield virtually all communications about policy issues that involve the legality of public actions from public view.[21] This would undermine the MGDPA's purpose of ensuring that people know what their government is doing and why.

The AGO cites to several foreign cases for the proposition that purely internal communications within the AGO should be considered privileged. (Appellant's Br. 25). These cases are inapposite. First, *ACLU v. NSA*, 925 F.3d 576 (2d Cir. 2019) identifies the attorney and the client as the Office of Legal Counsel "and, eventually, the President." *Id.*at 589-90 ("OLC 10 was prepared by an OLC attorney (Assistant Attorney General Goldsmith) for an Executive Branch client (the Attorney General, and eventually, the President."). This is consistent with the OLC's specific mission to "provide[] legal advice to the President and all executive branch agencies." https://www.justice.gov/olc. The same is true for *New York Times Co. v. U.S. Dep't of Justice*, 282 F. Supp. 3d 234, 238 (D.D.C. 2017) (OLC Memo). *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065 (N. D. Cal 2002) is likewise unhelpful because it deals with communications from an outside law

[21] The type of in-state, interagency communications described by *amici* Governor Walz and his cabinet agencies are not the kind of documents at issue in this case. If the Attorney General has another Department as a "client" and is discussing legal matters with that "client," that is a different situation than what the AGO described in Categories 12-14. (Add. 23-24).

firm to the client, which employs in-house counsel. *Id.*at 1073-74. These are unlike communications entirely within the AGO, with no client identified.

Moreover, this Court's decision in *Kobluk* supports the Court of Appeals' decision. Unlike the AGO's failure to substantiate privilege here, in *Kobluk*, the respondent agency offered evidence substantiating its privilege claims. The agency, the University of Minnesota, identified the attorney who provided the legal advice; the dean who requested and received the advice; the dates of each privileged communication; the document types; and the nature of the privilege. *Kobluk v. Univ. of Minn.*, 556 N.W.2d 573, 575 (Minn. App. 1996), *rev'd on other grounds*, 574 N.W.2d 436 (Minn. 1998). Moreover, the university tendered the two disputed drafts for *in camera* review. *Kobluk*, 574 N.W.2d at 442 (Supreme Court). Here, by contrast, AGO chose not to provide a sufficient factual foundation and not to submit the documents for review. AGO instead proffered a chart with no parties or dates and used boilerplate descriptions of whole categories of documents, such as: "privileged communications, internal…"; "privileged communications, internal and with other attorneys general...." (Index #23, Larson Decl.).

Categories 12-14 are not privileged documents. If the AGO seeks to invoke work-product protections for these documents, it must show that the communications were made in anticipation of litigation and involve attorney mental impressions or legal theories. Minn. R. Evid. 502(e)(2). The Court of Appeals correctly held that the AGO failed to establish work product. (Add. 24).

CONCLUSION

Respondent Energy Policy Advocates respectfully requests that this Court affirm the judgment of the Court of Appeals. The MGDPA, like the Open Meeting Law, is vital to the healthy functioning of Minnesota's government. This Court should uphold the presumption of publicity under the MGDPA and reject the AGO's attempts to shield all documents it touches from public view. If this Court recognizes the common-interest exception to privilege waiver, it should still affirm the Court of Appeals' remand of this case to the district court, and it should adopt EPA's proposed test, which is a practical one that the district court can apply on remand.

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Date: November 2, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document conforms to the requirements of Minn. R. Civ. App. P. 132.01, is produced with a proportional 13-point font, and the length of this document is 13,962 words. This Brief was prepared using Microsoft Word 365, Version 2105.

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