No. A20-1344

State of Minnesota

In Supreme Court

Energy Policy Advocates,

Respondent,

vs.

Keith Ellison, et al.,

Appellants.

BRIEF OF *AMICI CURIAE* PUBLIC RECORD MEDIA (PRM) & THE MINNESOTA COALITION ON GOVERNMENT INFORMATION (MNCOGI) IN SUPPORT OF RESPONDENT

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Amici Identity, Interest, & Authority to File[1]

A. The Amici's Identity

Public Record Media (PRM) is a non-partisan nonprofit dedicated to "the use, application, and enforcement of freedom of information laws."[2] PRM has used the Minnesota Government Data Practices Act, *see* Minn. Stat. §§13.01-13.99 (2021), to obtain, inspect, and publish government data on many subjects. These subjects include military use of the Twin Cities metro area for urban-warfare training;[3] state assets pledged to entice the NFL to host the 2018 Super Bowl game in Minnesota;[4] and government deployment of drone aircraft.[5] PRM also hosts public workshops to teach Minnesotans how to use the Data Practices Act,[6] and PRM participates in legal and administrative actions to enforce the Act.[7]

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1 The Amici certify under MRCAP 129.03 that: (1) no counsel for a party authored this brief in whole or in part; and (2) no person or entity has contributed money to the preparation or submission of this brief other than Amici, its members, and its counsel.

2 *About PRM,* PUBLIC RECORD MEDIA, https://bit.ly/2dwKOaS; *see also* Kevin Duchschere, *A Need to Know Drives St. Paul Nonprofit's Mission*, STAR TRIBUNE, July 23, 2015, http://strib.mn/1CTdnZN.

3 Jon Tevlin, *Tevlin: Big Negotiations Went Into Recent Military Training Exercises*, STAR TRIBUNE, Aug. 24, 2014, http://strib.mn/1trYh5I.

4 Doug Belden, *Super Bowl Documents Suggest What NFL Will Seek from Legislature*, PIONEER PRESS, Dec 8, 2014, https://bit.ly/2xnxRtR.

5 Brian Bakst, *Drone Debate Lands Before Minnesota Lawmakers*, PIONEER PRESS, Feb. 1, 2014, https://bit.ly/3kmDa4J.

6 *Education,* PUBLIC RECORD MEDIA, https://bit.ly/2XmCLGU.

7 *See, e.g.,* Minn. Dep't of Admin., Adv. Op. 14-011 (Sept. 17, 2014), https://bit.ly/3bvpWPa (PRM-requested advisory opinion).

The Minnesota Coalition on Government Information (MNCOGI) is a non-partisan nonprofit "dedicated to government transparency and public access to information."[8] MNCOGI board members often testify before the legislature on data-practices issues,[9] and MNCOGI has advised Minneapolis in its adoption of a municipal open-data policy.[10] MNCOGI board member and spokesperson Don Gemberling is Minnesota's leading authority on the Data Practices Act's proper operation, having overseen compliance with the Act at every level of state and local government for over thirty years as Director of the Information Policy Analysis Division at the Minnesota Department of Administration.[11]

B. The Amici's Interest in *Energy Policy Advocates*

Energy Policy Advocates concerns the proper interpretation of Data Practices Act provisions about attorney-general data and evidentiary privileges. As users and caretakers of the Act, the Amici seek to ensure these Act provisions—and the Act in general—are enforced consistent with the Act's purpose of enabling government transparency.

C. The Amici's Authority to File in *Energy Policy Advocates*

On August 26, 2021, the Court granted leave to file this amici brief.

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8 Letter from Gary Hill, Chair, MnCOGI, to Minneapolis City Council Member Andrew Johnson (July 14, 2014), https://bit.ly/2cV4fas.

9 *See, e.g., Overview of Health Plan Data Classification*, MNCOGI (Oct. 28, 2014), https://bit.ly/2dN6hQp.

10 Letter from Gary Hill, *supra* note 8.

11 Mike Mosedale, *Data Man*, CITY PAGES, Jan. 9, 2002.

Summary of Argument

The Attorney General wields remarkable power through his office, especially on matters of public policy. The people of Minnesota are then entitled as voters to decide whether the AG has exercised this power in a responsible manner. The Data Practices Act (DPA) protects this right, enabling the people to request 'Attorney General Data' and thereby see for themselves "what the[ir] government is doing." *Montgomery Ward & Co. v. Cnty. of Hennepin*, 450 N.W.2d 299, 307 (Minn. 1990).

In this case, the AG seeks to hide more data about his office's public-policy activities than ever before. The AG justifies this startling position by arguing the DPA does not really mean what it says. In particular, the AG maintains that his office may withhold data-not-on-individuals as if this data were data-on-individuals. The AG also maintains that his office may withhold data based on a common-law expansion of attorney-client privilege despite the DPA requiring codified authority—a statute, rule, or professional standard—to justify attorney-related data withholding.

The Court should reject the AG's anti-transparency reading of the DPA. The "persistent if unspoken message" of the AG's brief is that the Court "should be taken by the 'practical advantages' of ignoring the written law." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2474 (2020). But "to indulge that path" would be to follow "the rule of the strong, not the rule of law." *Id.* The rule of law demands enforcement of the DPA's plain text, which guarantees the essential right of every Minnesotan to know what the AG is doing with his broad power to make public policy.

Argument

I. The people depend on access to government data to hold the Attorney General (AG) and his office (OAG) accountable.

Two centuries ago, James Madison observed that liberty requires elected leaders to "be kept in dependence on the people."[12] Madison later observed that people cannot "be their own governors" unless they "arm themselves" with knowledge of their leaders' actions.[13] This led Madison to conclude: "[a] popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy."[14]

In Minnesota, the "attorney general" is "chosen by the electors of the state." Minn. Const. art. V, §1. The people are then the primary control on the AG, exercising this control at the ballot box. *See id.*, art. V, §4. But as Madison recognized, any real exercise of electoral control depends on the people's ability to look behind the government curtain—a reality made even more imperative here by the AG's broad powers.

A. The AG wields extraordinary public-policy power.

The AG is the "chief law officer." *Slezak v. Ousdigian*, 260 Minn. 303, 308 (1961). The AG may "institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws …, the preservation of order, and the protection of public rights." *Id.* The

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12 2 THE FEDERALIST No. 37, p.4 (J. & A. McLean eds. 1788).

13 Letter from James Madison to W.T. Barry (Aug. 4, 1822), *available at* LIBRARY OF CONGRESS, https://bit.ly/2LFhzE0.

14 *Id.*

AG's powers in this regard "are not limited to those granted by statute"; they also include "common-law powers inherent in his office." *Id.*

Such common-law powers derive from the fact that "[t]he office of attorney general has existed from an early period, both in England and in this country." *State ex rel. Young v. Robinson*, 101 Minn. 277, 288 (1907). Over this span of time, the common law has vested AGs with powers "so numerous and varied" that the "legislatures of the states" have generally avoided efforts to specifically itemize AG powers. *Id.*

Added to this power is broad discretion. As both "a constitutional officer" and "head of the state's legal department," the AG's "discretion … is plenary." *State ex rel. Peterson v. City of Fraser*, 191 Minn. 427, 432 (1934). And "[i]nasmuch as the Attorney General [has] in his discretion decided that he should proceed, there is nothing for any court to pass upon as to the necessity for or policy of proceeding." *Id.*

The AG's extraordinary powers and discretion also extend beyond his particular office. Under the Minnesota Constitution, the AG sits on the "board of pardons," exercising dispositive control over the "power to grant reprieves and pardons after conviction." Minn. Const. art. V, §7. The AG also sits on the Executive Council, assessing the Governor's use of emergency powers. *See* Minn. Stat. §§9.011, 9.061.

Finally, there is the AG's expansive bully pulpit. "[T]he attorney general … stands in a favored position in obtaining the opportunity to appear over radio and television or by making statements to the press

…." *In re Lord*, 255 Minn. 370, 381 (1959). And when the AG exercises this power, "much of the public is apt to believe" that the AG's comments are "true and accurate statements of both law and fact." *Id.*

The AG is then neither a ministerial official nor a mere handmaiden of "agencies, boards, and commissions in the prosecution and defense of various legal matters." OAG.Br.2. The AG "represents the sovereign state and the people," the people having "chosen" the AG "to perform the statutory and constitutional duties" of this most powerful office. *State ex rel. Cassill v. Peterson*, 194 Minn. 60, 65-66 (1935).

With the AG's "great power … come[s] great responsibility." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 465 (2015) (quoting S. LEE & S. DITKO, AMAZING FANTASY NO. 15: SPIDER-MAN, p. 13 (1962)). It falls to the people, in turn, to monitor the AG's activities and ensure that the AG remains "a responsible state officer who … act[s] in the public interest." *Longcor v. City of Red Wing*, 209 Minn. 627, 635 (1940).

B. The people of Minnesota, through the ballot box, are the principal check on the AG's public-policy activities.

The AG's extraordinary powers raise an ancient question: "[w]ho watches the watchers?" *Maze v. Ky. Court of Justice*, No. 3:19-cv-00018, 2019 U.S. Dist. LEXIS 216620, at *1 (E.D. Ky. Dec. 17, 2019) (quoting JUVENAL, THE SATIRES, Book 6, line 347: "*Quis custodiet ipsos custodes?*"). Close examination of Minnesota law reveals that the people of Minnesota are primarily responsible for watching the AG's policy-making powers—a role that no other branch of government is able to fill.

The courts afford no check on the AG's ability to pursue public-interest litigation. As this Court has explained, "the courts will not control the discretionary power of the attorney general in conducting litigation for the state." *Slezak*, 260 Minn. at 308. The AG instead holds nearly unfettered "authority to institute … a civil suit in the name of the state whenever the interests of the state so require." *Id.*

The Governor and the Executive Branch likewise afford no check on this authority. AG "discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state." *State ex rel. Peterson*, 191 Minn. at 432. The Governor also has no power to fire the AG or his staff, in stark contrast to the federal system in which the AG and his deputies are Presidential appointees.

The AG instead exercises complete control over his office. The Court has thus rejected the proposition that an AG may "be compelled to accept the employees of his predecessor in office." *State ex rel. Cassill*, 194 Minn. at 65. In the Court's view, the AG's "efficiency and independence" turns on "the power to appoint and remove" his office's employees at will and otherwise "exact loyal obedience" from these employees. *Id.*

Legislative oversight of the AG's office is also generally sparing. From time to time, the legislative auditor may conduct financial audits and program evaluations. *See* Minn. Stat. §3.971. But the auditor's role does not involve regular review of the AG's public-policy activities, and any such check could raise "separation of powers concerns." *Humphrey v. Shumaker*, 524 N.W.2d 303, 306–07 (Minn. App. 1994).

All that remains is the people. When an AG litigates public-policy matters, he does so because "the electors … determined" that this power "should be in his hands." *State ex rel. Cassill*, 194 Minn. at 65. The people may likewise hand this power to someone else. "Elections are the method the people use … to remove those people from office when they fail to be responsive to the people's will." *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 674 (Minn. 2012) (Page, J., dissenting).

The AG's duties as a "government attorney" do not change this. Just the opposite: "the attorney-client relationship is subtly different for the government attorney. **He or she has for a client the public**, a client that includes the general populace even though this client assumes its … identity through its various governmental agencies." *Humphrey v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987) (bold added).

As the AG's electors and clients, the people have a right to know what OAG is doing—not merely what OAG is willing to disclose. The people cannot otherwise effectively judge for themselves whether OAG has "taken positions with the common public good in mind." *Id.* History confirms this, demonstrating the many ways that access to OAG data has enabled the people to better gauge the AG's job performance.

C. Access to OAG data enables an informed electorate.

Attorney General Ellison puts it best. "It is important that people have confidence that accountability, no matter who you may be, is how

we live in Minnesota."[15] This is particularly true for government leaders, as AG Ellison has also recognized: "[e]lected officials are public servants who work for the people of Minnesota."[16] For that reason, "transparency and accessibility across state government" are essential.[17]

Consistent with these principles, Amicus PRM has time and again submitted data requests to render OAG's policy activities more accessible and transparent to the public. For example, PRM recently sought OAG data related to AG Ellison's new program to expunge convictions. OAG responded with over 300 pages of policy-related OAG data, including emails between OAG staff and Minnesota county attorneys and copies of proposed orders for prosecutor-initiated expungements.[18]

Another example is PRM's 2017 request for OAG data about AG Swanson's participation in Washington State's lawsuit against President Trump's travel ban. While OAG did withhold certain data as privileged, OAG nonetheless produced over 100 pages of responsive data. This data included policy-based emails between attorneys inside and outside OAG, and similar emails with the University of Minnesota.[19]

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15 Gov. Tim Walz, May 29, 2020 Press Conference, https://youtu.be/78cvykrlcnU?t=1102 (statement at 18:22 by AG Ellison).

16 Pat Doyle, *Government Accountability: More-Transparent Days Ahead in Minnesota?*, STAR TRIBUNE, Oct. 12, 2018, http://strib.mn/3q9pui6 (quoting then-AG-candidate Keith Ellison).

17 *Id.*

18 Mike Kaszuba, "*Help Seal My Record" Project Draws Interest, But Relatively Few Sealed Records*, PRM, Nov. 4, 2021, https://bit.ly/3CTesRO.

19 Letter from Benjamin Wogsland, Dir. of Gov't Affairs, OAG, to Matt Ehling, Exec. Dir., PRM (Mar. 5, 2018), https://bit.ly/3GRiyfC.

These disclosures honor Thomas Jefferson's wisdom that the way to achieve an informed electorate is by "giv[ing] them full information of their affairs through the channel of … public papers, and to contrive that these papers should penetrate the whole mass of the people."[20] Or, put another way, "[t]he basis of our government[] being the opinion of the people, the very first object should be to keep that right."[21]

That right now stands in direct jeopardy. In this case, OAG asks the Court to adopt new, aggressive views on the scope of OAG data available to the people about OAG's policy-making activities. If the Court accepts this invitation, the people's access to OAG communications (like the ones detailed above) stands to disappear. Amici thus urge the Court to follow the plain text, structure, history, and purpose of the Data Practices Act, all of which directly repudiate OAG's troubling position.

II. Under §13.65, subd. 1, the Data Practices Act (DPA) guarantees public access to OAG data about OAG's public-policy activities when no individual person is the subject of the data.

In December 2018, Respondent Energy Policy Advocates submitted data requests to OAG seeking emails and other correspondence related to public-policy efforts by OAG to address climate change. Resp.Br.7-10. OAG refused to produce any of the requested data on the ground that OAG did not consider this data to be "public" under the DPA. *See id.* at 9. OAG later justified this refusal by citing Minn. Stat. §13.65.

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[20] Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *available at* LIBRARY OF CONGRESS, https://bit.ly/2YiUG34.

[21] *Id.*

Part of the DPA, §13.65 safeguards the right of the people to obtain and review "Attorney General Data." Section 13.65 does this (as relevant here) by making OAG data on "administrative or policy matters" public unless the data involve both a non-final public action and an individual (natural person) subject. OAG now argues that §13.65 bars public access to policy-related OAG data involving no individual subject—a view that defies the DPA's plain text, structure, history, and purpose.

A. Plain text establishes that OAG data on policy matters is public when no data-on-individuals is involved.

"The object of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Cilek v. Office of Minn. Sec'y of State*, 941 N.W.2d 411, 415 (Minn. 2020) (some punctuation omitted). The Court applies statutes "according to [their] plain meaning" and will "not add words or phrases to unambiguous statutes or rules." *Id.*; *see also Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604 (Minn. 2014).

The DPA regulates "the collection, creation, storage, maintenance, dissemination, and access to government data." Minn. Stat. §13.01, subd. 3. To this end, the DPA expressly mandates that all government data is presumed "accessible by the public for both inspection and copying." *Id.*; *see id.* §13.03, subd. 1 ("All government data collected, created, received, maintained or disseminated by a government entity shall be public ….") This presumption of public access can be defeated only if a "federal law, a state statute, or a temporary classification of data" clearly provides that "certain data are not public." Minn. Stat. §13.01, subd. 3.

The DPA's presumption of public access is "the heart" of the DPA. *Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991). The Court has emphasized "the general presumption that data are public informs our interpretation of every [DPA] provision." *KSTP-TV v. Metro. Council,* 884 N.W.2d 342, 347 n.2 (Minn. 2016). Based on this principle, the Court has concluded the DPA does not support interpreting DPA "exception[s] to swallow" the DPA's "presumption" of public access. *Id.*

Of equal importance in DPA interpretation is the law's unique data-classification system. "[E]very government data must fit" into "one and only one" of "six discrete classifications."[22] Data that identifies a natural person are either: (1) "public data on individuals"; (2) "private data on individuals"; or (3) "confidential data on individuals." Minn. Stat. §13.02, subds. 3, 12, 15. For data with no identifiable natural-person subject, such data are either: (1) "public data not on individuals"; (2) "nonpublic data"; or (3) "protected nonpublic." *Id.* §13.02, subds. 4, 9, 13.

Through these categories, the DPA "removes virtually all discretion concerning [data] access from administrative agencies of state and local government."[23] Applying the DPA then requires careful observance of DPA terminology in classifying given data. Courts may not "effectively override the legislative determination" to classify data one way versus another. *State v. S.L.H.*, 755 N.W.2d 271, 279 (Minn. 2008).

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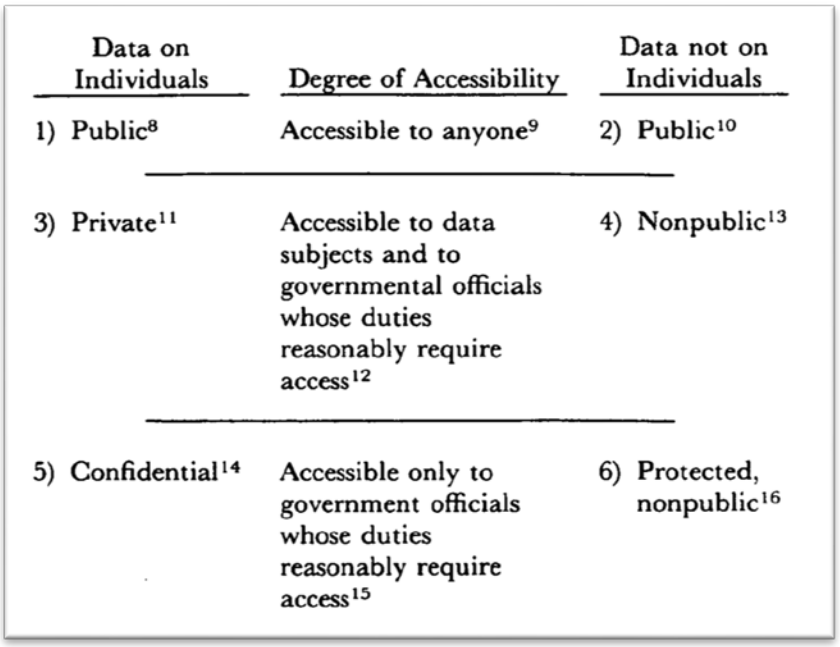
[22] Donald Gemberling & Gary Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act – From "A" to "Z,"* 8 WM. MITCHELL L. REV. 573, 595-96 (1982).

[23] *Id.* at 579.



Data on Individuals	Degree of Accessibility	Data not on Individuals
1) Public[8]	Accessible to anyone[9]	2) Public[10]
3) Private[11]	Accessible to data subjects and to governmental officials whose duties reasonably require access[12]	4) Nonpublic[13]
5) Confidential[14]	Accessible only to government officials whose duties reasonably require access[15]	6) Protected, nonpublic[16]

Law Review Chart of the DPA's Data-Classification System[24]

The DPA's presumption of public access and data-classification scheme crystallize the plain meaning of the DPA's attorney-general data provision. Section 13.65, subdivision 1, establishes that five subcategories of "data created, collected and maintained by the Office of the Attorney General are **private data on individuals**." One of the five subcategories is "communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions."

The DPA expressly defines "private data on individuals" as "data made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of those data." Minn. Stat. §13.02, subd. 12; *see also id.* §13.02, subd. 1 (establishing that the definitions in §13.02 control the entire DPA: "[a]s used in" the DPA "the terms defined in this section [i.e., §13.02] have the meanings given them").

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24 Gemberling & Weissman, *supra* note 22, at 579.

Read together, §13.65 and §13.02 provide that "communications and noninvestigative files regarding administrative or policy matters" are "private data on individuals" when the communications and files are both "(a) not public; and (b) accessible to the individual subject of those data." By extension, if such communications or files lack any individual subject able to access the data, then §13.65, subdivision 1 does not apply, leaving in place the DPA's presumption of public access.

Against this plain-text reading, OAG argues that under §13.65, subd. 1, OAG may withhold policy-related OAG data even when no "private data on individuals" is involved—i.e., the provision also covers "data **not** on individuals." OAG.Br.7-15. But this is not how the DPA works. Under the DPA's data-classification system, "private data can only be data on individuals" and the legislature uses "'private data on individuals' or its statutory numeric equivalent" as a careful, precise term to establish when data-on-individuals "are to be treated as 'private data.'"[25]

Had the legislature meant for §13.65, subdivision 1—expressly titled "private data"—to further cover data-not-on-individuals, the legislature would have said so. The DPA uses the classification of "**nonpublic data**" when the law intends to expose data-not-on-individuals to the same kind of access restrictions as "private data on individuals." The DPA defines nonpublic data as "data not on individuals made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data." Minn. Stat. §13.02, subd. 9.

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[25] Gemberling & Weissman, *supra* note 22, at 629.

If §13.65, subdivision 1 was meant to reach beyond "private data on individuals," the legislature would have declared the data regulated by subdivision 1 "are private data on individuals **or nonpublic data**." Many other DPA provisions bear witness to this reality. For example, the DPA provides that "[e]lectronic access data are private data on individuals or nonpublic data." Minn. Stat. §13.15, subd. 2; *see, e.g.,* Minn. Stat. §13.201 ("data … are classified as private … or nonpublic"); §13.44, subd. 3(b) ("private data on individuals or nonpublic data"); §13.591, subd. 1 ("data … are private or nonpublic data"); §13.64, subd. 3 ("data … are private data on individuals or nonpublic data"); §13.82, subd. 7 ("[i]mages and recordings … are classified as private or nonpublic data").

OAG thus asks the Court to add the words "or nonpublic data" to §13.65, subdivision 1—words the legislature did not use. But this Court "will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently." *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006); *see also, e.g., 328 Barry Ave., LLC v. Nolan Props. Grp., LLC*, 871 N.W.2d 745, 749–50 (Minn. 2015) ("[W]e cannot add words to an unambiguous statute under the guise of statutory interpretation."); *see id.* (refusing to add "substantial completion" to limitations provision when legislature used the phrase only in sister repose provision).

Perhaps recognizing this, OAG diverts the Court's attention to Minn. Stat. §13.46, which governs data related to Minnesota's welfare system. OAG.Br.11-13. OAG observes that §13.46, subdivision 2 classifies "data on individuals" as "private data on individuals." *Id.* OAG argues that if

"data must be *about* an individual in order to be classified as 'private data on individuals,' there would have been no need for the legislature to have specified that only welfare 'data on individuals' was protected as 'private data on individuals'" —i.e., "the legislature's mere use of the term 'private data on individuals' would have sufficed." OAG.Br.11.

OAG neglects that the DPA's data-classification system allows the legislature to restrict access to "data on individuals" in two ways—not just one. When the legislature classifies "data on individuals" as "private data on individuals," the legislature allows any individual subject of the data to see the data (while denying access to the general public). But the legislature may also classify "data on individuals" as "**confidential data on individuals**"—a classification that allows only government officials to access data-on-individuals, denying access to the general public and any individual subject of the data. Minn. Stat. §13.02, subd. 3.

Section 13.46, subdivision 2's classification of "data on individuals" as "private data on individuals" then makes perfect sense: it ensures that natural persons remain able to see most welfare data about them. In other instances, the legislature has classified government data-on-individuals as solely "confidential data on individuals." For example, "reports … by parole or probation officers … regarding an individual on probation are confidential data on individuals." Minn. Stat. §13.84, subd. 4. Such data classifications cement that §13.65, subdivision 1's use of "private data on individuals" means what it says: this provision governs only data that are about an "individual" (natural) person. *Id.* §13.02, subd. 12.

B. DPA history and structure confirm OAG may not hide data on policy matters involving no data-on-individuals.

Because the DPA's plain text and its application here are "free from all ambiguity," the Court may end its analysis of §13.65, subdivision 1 there. Minn. Stat. §645.16. Alternatively, any possible ambiguity is settled by "contemporaneous legislative history"; the "occasion and necessity" for §13.65; and the "circumstances under which" the legislature passed §13.65. *Id.* §§645.16(1), (2), (7). All of these sources confirm that §13.65, subdivision 1 does not allow OAG to withhold policy-related OAG data that entirely lacks an individual (natural person) subject.

During the 1970s, the legislature began enacting the laws that now comprise the DPA. The legislature started in 1975 with a data-privacy statute. *See* Act of June 5, 1975, ch. 401, 1975 Minn. Laws 1174, 1174–76. The statute's "primary emphasis" was to address the particular "effect of governmental data gathering and utilization on individuals who were the subject of information maintained by governmental agencies."[26]

The data-privacy statute ultimately "la[id] the cornerstone" for the DPA's "most unique feature": its "data classification system" (as noted above).[27] The statute achieved this "by defining the terms 'private data on individuals', 'confidential data on individuals' and 'public data on individuals'" (i.e., the terms on which this case turns).[28]

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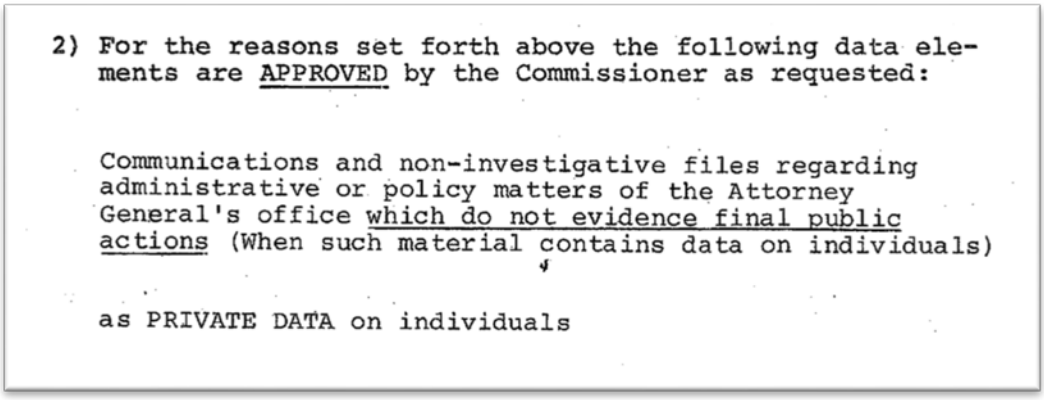
[26] Donald Gemberling, *Minnesota Government Data Practices Act: History & General Operation*, in GOV'T LIAB. 241, 243 (Minn. CLE ed., 1981).

[27] *Id.* at 250.

[28] *Id.* (some punctuation added for clarity).

The next year, the legislature authorized state agencies to "apply to the [C]ommissioner [of Administration] for permission to classify data … on an emergency basis until a proposed statute can be acted upon by the legislature." Act of April 13, 1976, ch. 283, 1976 Minn. Laws 1063, 1065. The modern DPA affords the same procedure (with certain added limits) in the form of "temporary classification[s]." Minn. Stat. §13.06.

In 1977, OAG sought emergency classification of "communications and noninvestigative files regarding administrative or policy matters of the [State] Attorney General's office which do not evidence final public actions."[29] The Commissioner granted OAG's application, but made clear in his grant of approval that the classification was limited to "PRIVATE DATA on individuals" and applied only **"[w]hen … material contained data on individuals"**—a condition that OAG accepted.[30]



2) For the reasons set forth above the following data elements are APPROVED by the Commissioner as requested:

Communications and non-investigative files regarding administrative or policy matters of the Attorney General's office which do not evidence final public actions (When such material contains data on individuals)

as PRIVATE DATA on individuals

Commissioner Grant of OAG Emergency Application

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[29] Memorandum from Richard Brubacher, Minn. Comm'r of Admin., to Byron Starns, Minn. Chief Deputy AG, on Minn. OAG Request for Emergency Classification of Data on Individuals as Non-Public Under §15.1642, at 1, 4 (Dec. 30, 1977), https://bit.ly/3nWDGbq.

[30] *Id.* at 4.

Four years later, in 1981, the legislature enacted the present text of §13.65 as part of an omnibus bill classifying a variety of government data. *See* Act of May 29, 1981, ch. 311, §35, 1981 Minn. Laws 1427, 1440–41. The bill applied the classification of "private" to OAG "[c]ommunications and non-investigative files regarding administrative or policy matters which do not evidence final public actions." *Id.* The legislature thus adopted the same text that the Commissioner of Administration approved in 1977—text that the Commissioner made clear applied to OAG data only to the extent "such material contained data on individuals."[31]

The 1981 data-classification bill's other data-classification sections reflect the legislature's careful, precise use of DPA data classifications to establish when a given DPA statutory provision governed both data-on-individuals and data-not-on-individuals. One significant example is data identifying stolen property, which the legislature declared was "either private or nonpublic depending on the content of the specific data." *See* 1981 Minn. Laws at 1433 (codifying then Minn. Stat. §15.1695, subd. 1(c)). Another example is certain real-estate sales data, which the legislature provided was "private … or nonpublic depending on the content of the specific data." *Id.* at 1438 (codifying §15.784, subd. 1).

By contrast, for OAG data, the legislature used classifications that govern solely data-on-individuals: "private" and "confidential." *Id.* at 1440–41. The legislature did the same for licensing data and health data. *Id.* at 1437–39 (codifying §15.781, subds. 2 & 3; §15.785, subds. 1 & 2). But

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[31] Brubacher Memorandum, *supra* note 29, at 1, 4.

when a data category called for restrictions on data-on-individuals and data-not-on-individuals, the legislature used separate subdivisions, as evinced by the "confidential" and "nonpublic" subdivisions for housing agency data. *Id.* at 1439 (codifying §15.786, subds. 2 & 4).

In sum: the history and circumstances of §13.65, subdivision 1's enactment confirm that this provision governs only data-on-individuals. That is how OAG first obtained the benefit of a specific classification for policy-related OAG data: by agreeing that this classification applied only "[w]hen … material contained data on individuals."[32] And that is how the legislature structured the classification in 1981: as one about "private" data alone, rather than as one reaching "private or nonpublic data."

C. Adopting OAG's view of §13.65 would harm the DPA.

To the extent that §13.65 remains ambiguous even after legislative history and structure have been examined, the Court may weigh "the consequences of … particular interpretation[s]." Minn. Stat. §645.16(6). This consideration then counsels rejection of any §13.65 interpretation that would harm the DPA overall, for "the legislature intends the entire statute to be effective and certain." Minn. Stat. §645.17(2).

OAG's reading of §13.65 risks such overall harm in three ways:

First, OAG's reading of §13.65 strikes at "the heart" of the DPA: its general presumption that government data are public. *Demers*, 468 N.W.2d at 73. This presumption has been part of the DPA since 1979,

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[32] Brubacher Memorandum, *supra* note 29, at 1, 4.

when the legislature established that: "[a]ll government data … **shall be public unless classified** … as nonpublic or protected nonpublic, or **with respect to data on individuals, as private or confidential**." Act of June 5, 1979, ch. 328, §7, 1979 Minn. Laws 910, 911.

The legislature found this presumption "attractive" because it "put most decisions about whether to open or close types of data in the hands of the state legislature."[33] In the end, "[t]he Senate agreed to accept the House's presumption of openness in governmental data handling" and "the House agreed to accept [Senate] provisions which classified a variety of data or types of data as either private or confidential."[34]

The presumption's plain text (now at Minn. Stat. §13.03, subd. 1) repudiates OAG's view that the classification of "private data" under §13.65, subdivision 1 equally applies to data-not-on-individuals. As the presumption dictates, data is public "unless classified … **with respect to data on individuals, as private**." Adopting OAG's view then means effectively handing the legislature's sole authority to classify data over to OAG—exactly what the presumption is meant to prevent.

Second, OAG's reading of §13.65 introduces chaos into the DPA's otherwise stable definition of data-on-individuals. The DPA takes care to distinguish between data-on-individuals and data-not-on-individuals for a reason. "Individual data subjects enjoy certain … rights not enjoyed by non-natural data subjects. Individuals have a right to know what kind of

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[33] Gemberling & Weissman, *supra* note 22, at 580.

[34] Gemberling, *supra* note 26, at 253-54.

data an agency maintains on them, a right to contest the accuracy of data, and a right to notice when an agency collects data."[35] Minn. Stat. §13.04, subd. 2 (right to notice or "Tennessen warning"), subd. 3 (right to know about data), & subd. 4 (right to contest accuracy of data).

If "private data on individuals" includes data-not-on-individuals—as OAG now urges—the non-natural subjects of data-not-on-individuals (e.g., corporations) may claim the same DPA rights as individuals. After all, OAG cannot claim that data-not-on-individuals are private data while denying the rights that go with this classification. Going forward, that would mean almost every time OAG solicits public-policy data from a business, OAG must issue a Tennessen warning and could face penalties unless it allows the business to access the data within ten days.

Third and finally, OAG's reading of §13.65 invites a new form of agency gamesmanship destructive of the DPA. In drafting the DPA, the legislature obtained the advice of "public administrators and academics who were data processing professionals."[36] These experts observed "the infinite variety of gamesmanship advantages … available to agencies" in answering data requests.[37] Government entities had "the advantage of knowing what types of [government] data are maintained, how they are maintained, and how the data can be made accessible."[38]

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35 Gemberling & Weissman, *supra* note 22, at 585.

36 Gemberling, *supra* note 26, at 257-58.

37 *Id*.

38 *Id.*

So the legislature drafted the DPA to neutralize these advantages and the possibility of agency gamesmanship in general.[39] For example, the DPA establishes that data seekers "upon request, shall be informed" of the "meaning" of data, preventing government entities from using jargon or computer symbols to hinder searches for responsive data. Minn. Stat. §13.03, subd. 3(a). The DPA also requires government entities to keep their data "in such an arrangement and condition as to make them easily accessible for convenient use." Minn. Stat. §13.03, subd. 1.

OAG's reading of §13.65 upsets this anti-gamesmanship framework. Under this reading, agencies may game data requests by asserting that DPA limits on data access actually reach far beyond their plain meaning (e.g., "private data on individuals" also covers data-not-on-individuals). OAG's reading also means turning OAG data long presumed public into not-public data. This reading's ultimate consequence, then, is the hiding of unprecedented amounts of data on OAG's public-policy activities—no matter how impactful these activities are—leaving the public in the dark. That is reason enough to reject OAG's reading of §13.65.

III. The DPA's attorney-data provision (§13.393) does not support OAG's invocation of the common-interest doctrine.

In resisting Respondent Energy Policy Advocates' data requests, OAG asserts not only §13.65's private-data subdivision but also Minn. Stat. §13.393—the DPA's attorney-data provision.[40] Coming into play

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[39] *See* Gemberling & Weissman, *supra* note 22, at 583-84.

[40] The legislature enacted the DPA's attorney-data provision in 1979 as Minn. Stat. §15.1694. *See* Act of June 5, 1979, ch. 328, §19, 1979 Minn. Laws

when an attorney is "acting in a professional capacity for a government entity," §13.393 dictates that "statutes, rules, and professional standards" shall control the "use, collection, storage, and dissemination of [attorney] data" rather than the DPA's data-classification system.

OAG argues that under §13.393, OAG may withhold data based on the "common-interest doctrine." OAG.Br.15-26. But no Minnesota statute, rule, or professional standard recognizes this doctrine. So OAG asks the Court to endorse the doctrine here or find that past Court decisions have already done this. *Id.* But §13.393 requires a statute, rule, or professional standard—common-law precedent by itself does not suffice.

If the Court is nevertheless willing to embrace the common-interest doctrine here, the Court should also recognize that the DPA, as an "open-files statute[]," requires a "narrower privilege for governmental clients." *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 737 (Minn. 2002). The doctrine otherwise risks swallowing the DPA's "rule of public access" and "policy against secrecy in many areas of governmental activity." *Id.*

A. Section 13.393's plain text bars application of uncodified principles like the common-interest doctrine, leaving no basis for the Court to address the doctrine here.

Section 13.393 provides that attorney data "shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional

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910, 921. The exemption was later renumbered Minn. Stat. §13.30 and renumbered again (in 2000) as Minn. Stat. §13.393.

responsibility." Section 13.393 therefore allows government entities to withhold attorney data only to the extent that a statute, a rule, or a professional standard supports such data-withholding.

"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). By enumerating three—and only three—sources of authority that will support a government entity's invocation of §13.393, the legislature eliminated any other source of authority from the realm of possibility. That includes common-law precedent.

The legislature could have written §13.393 other ways. For example, the legislature could have said attorney data shall be governed by any "privilege or exemption that exists at common law, by statute or rule, or otherwise." Minn. Stat. §80A.78(c). Or the legislature could have said attorney data shall be governed by any "provision of state or federal law, including common law." Minn. Stat. §§115B.12, 299J.17.

But the legislature did not write §13.393 like this. For good reason: the legislature sought to leave "no discretionary wiggle room" in the DPA "for governmental officials to assert that information … [is] not appropriate for public disclosure."[41] And this could only be achieved by enacting clear-cut rules for government entities—not administrative discretion resulting in delays and expensive lawsuits.[42]

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41 Donald Gemberling & Gary Weissman, *Data Practices at the Cusp of the Millennium*, 22 WM. MITCHELL L. REV. 767, 773 (1996).

42 *See id.*

So the legislature systematically "removed … discretion from government entities" in structuring the DPA. Minn. Dep't of Admin. Adv. Op. 94-057 (Dec. 28, 1994). Through the DPA's express presumption of public access, the legislature barred data-withholding unless allowed by codified law: "statute, or temporary classification pursuant to section 13.06, or federal law." Minn. Stat. §13.03, subd. 1. The legislature then did the same in §13.393, forbidding government withholding of attorney data unless allowed by "statutes, rules, and professional standards."

None of these authorities codifies the common-interest doctrine. OAG.Add.26. Minnesota statutes and rules addressing attorney-client privilege and attorney work-product protection are silent on the doctrine. *See, e.g.*, Minn. Stat. §595.02, subd. 1(b); MRCP 26.02. The "professional standards governing Minnesota lawyers are contained in [the] Minnesota Rules of Professional Conduct"—and no such rule mentions the doctrine. *In re Discipline of Johnson*, 414 N.W.2d 199, 200 n.2 (Minn. 1987).

The DPA then proscribes wedging the common-interest doctrine into §13.393—especially through the common law. Unlike the codified forms of authority that §13.393 lists, "[t]he common law is not composed of firmly fixed rules." *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998). Any extension of §13.393 to this context would thus create new discretionary wiggle room for agencies to evade data requests. Just consider OAG's assertion here that cases decided long before the DPA's passage may now afford fresh reasons to withhold data under the DPA. OAG.Br.18-19 (citing *Schmitt v. Emery*, 211 Minn. 547 (1942)).

These realities leave no basis for the Court to adopt the common-interest doctrine in this case. Such adoption would not afford OAG any relief because common-law precedent is not sufficient to satisfy §13.393. And if the Court is "unable to grant effectual relief" by recognizing the doctrine, the whole issue is "moot." *In re Matter of Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989). The Court does "not issue advisory opinions," nor does it "decide cases merely to establish precedent." *Id.*

B. The Court should not adopt the common-interest doctrine without clear limits to ensure the government may not use the doctrine to gut the DPA's rule of public access.

Despite the preceding argument, Amici recognize that the Court may still wish to settle Minnesota law on the common-interest doctrine. Amici therefore respectfully submit that any Court recognition of the doctrine in this case should come with clear-cut limits on the doctrine's application to data requests. Such limits matter because OAG and other government entities are bound to seize upon this doctrine as a new, non-legislatively-approved way to keep data from the public.

With this in mind, the Court should first consider the legislature's level of care in crafting §13.393 to ensure attorney-client privilege did not "swallow the rule of public access." *Prior Lake Am.*, 642 N.W.2d at 742. Section 13.393 applies only to data generated or held by attorneys while they are "acting in a professional capacity for a government entity"—the provision does not apply to data about an attorney's personal endeavors. *Id.* Section 13.393 also does not "relieve any responsible authority, other than the attorney" from the DPA's public-disclosure rules.

This "limiting language" establishes that the legislature "did not intend that any and all data used, collected, stored, or disseminated by a public attorney … be classified as not public." Minn. Dep't of Admin. Adv. Op. 95-049 (Nov. 29, 1995). Otherwise, "a government entity could effectively shield any [government] data [that] it did not wish to disclose" to the public simply by "turning the matter over to its attorney." Minn. Dep't of Admin. Adv. Op. 95-045 (Nov. 9, 1995).

Government assertions of §13.393 then require courts to "critically examine[]" the extent to which government entities may withhold data as either privileged or protected work-product. Minn. Dep't of Admin. Adv. Op. 96-038 (Aug. 14, 1996). "[I]ndividual data elements contained in a single [attorney-created] document, such as a legal services invoice, may be classified differently, depending on the content of the data." Minn. Dep't of Admin. Adv. Op. 98-036 (July 2, 1998); *see City Pages v. State,* 655 N.W.2d 839, 844 (Minn. App. 2003) (applying this rule)*; see generally KSTP-TV v. Ramsey Cnty.*, 806 N.W.2d 785, 789 (Minn. 2011) (explaining the DPA regulates "*data*, not *documents*" (italics-in-original)).

Given these principles, two important limits should accompany any recognition of the common-interest doctrine here. First, the doctrine does not apply just because government attorneys are talking to each other—they must be acting in a professional capacity in furtherance of current, ongoing litigation and meet all other privilege requirements. Second, any application of the doctrine to a document must happen on an element-by--element basis, ensuring public data elements remain public.

Conclusion

Minnesotans cannot hold their elected leaders accountable without access to government data. The Attorney General is no exception, which is why the Data Practices Act guarantees the public's right to inspect data on the AG's public-policy activities insofar as such data lacks a natural-person subject. The Court should uphold this plain-text reading of the DPA as well as the DPA's plain text on attorney data—text that precludes OAG's invocation of an uncodified common-interest doctrine.

Respectfully submitted,

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Certification of Brief Length

The undersigned counsel for Public Record Media (PRM) and the Minnesota Coalition on Government Information (MNCOGI) certifies that this amici brief meets the requirements of Minn. R. App. P. 132.01 in that it is printed using 13–point, proportionally-spaced fonts. The length of this document is 6,984 words (including headings, footnotes, and quotations) according to the Word Count feature of the word-processing software used to prepare this brief (Microsoft Word 2010).

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