STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

(Gadola, P.J., Servitto, and Redford, JJ.)

MICHIGAN FARM BUREAU, ET AL,

Plaintiffs-Appellees/Cross-Appellants,

v.

DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,
Defendant-Appellant/Cross-Appellee.

Supreme Court No. 165166

Court of Appeals No. 356088

Circuit Court Case No. 20-000148-MZ

JOINT AMICI CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AND MICHIGAN CHAMBER OF COMMERCE

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STATEMENTS OF INTEREST OF AMICI CURIAE[1]

The National Federation of Independent Business Small Business Legal Center, Inc. and Michigan Chamber of Commerce respectfully submit this proposed amici curiae brief in support of Plaintiff-Appellee Michigan Farm Bureau.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

NFIB Legal Center takes amicus curiae interest in this case because NFIB's membership is comprised of small businesses in every industry, including farming operations. NFIB's members have an interest in ensuring that the government follows the administrative rulemaking process and considers the vital input of those being regulated. When agencies neglect to promulgate rules intended to be binding

[1] Disclosure pursuant to MCR 7.312(H): No counsel for any party to this case authored this Brief in whole or in part and no counsel or party to the cases made a monetary contribution intended to fund its preparation or submission.

on the public, this harms businesses, depriving them of the benefit of various levels of review that can improve a rule, as well as the chance to provide comment.

If the Court of Appeals' decision is overturned, it is likely that small businesses in every industry within the State of Michigan will be negatively affected, as such a decision would open the door for every executive branch agency to regulate without having to go through the rulemaking process. This Court should affirm the Court of Appeals' decision that Defendant-Appellant EGLE's new standards are "rules" that must be promulgated by the APA processes.

Michigan Chamber of Commerce (the "MI Chamber"): The MI Chamber is the leading voice of business in Michigan. The MI Chamber advocates for job providers in the legislative and legal forums and represents approximately 5,000 employers, trade associations, and local chambers of commerce of all sizes and types in every county of the state. The MI Chamber's member firms employ over 1 million Michiganders. The MI Chamber and its members have a direct interest in ensuring government agencies follow the administrative rulemaking process outlined in Michigan's Administrative Procedures Act (APA). If agencies are allowed to exercise legislative power without following the APA and regulate without input or accountability, businesses across every industry of Michigan will be negatively affected.

INTRODUCTION

The Michigan Department of Environment, Great Lakes, & Energy (EGLE) seeks to redefine what constitutes a rule, skirting the plain meaning of the Administrative Procedures Act (APA),[2] avoiding legislative accountability, and defying reason.

Under the Clean Water Act, 33 U.S.C. § 1251 *et seq*, farmers need a permit to discharge pollution—in most cases, manure—from the physical locations housing livestock, called Concentrated Animal Feeding Operations ("CAFOs"). EGLE, which is responsible for administering the program, issued its 2020 CAFO General Permit, which changed the conditions for CAFO discharge permits without going through the rulemaking process. The new permitting conditions set forth in the General Permit affect nearly every aspect of a farm's operation, especially where and how a farmer can spread manure. Ultimately this determines how the land can—or, in this instance, can't—be farmed.

Despite the conditions' effect on the public, EGLE refuses to call them a rule. But permitting conditions, created to implement the Clean Water Act within the State, easily meet the definition of a rule. *See* MCL 24.207. The APA provides enumerated exceptions and exclusions under which an agency regulation, policy, standard, etc. would not be considered a rule, none of which apply to the permitting conditions here. *See* MCL 24.207(a)-(s); MCL 24.315. Yet EGLE insists that the conditions are exempt,

[2] For clarity, all subsequent references to the "APA" refer to the Michigan Administrative Procedures Act. MCL 24.201 *et. seq.* References to the federal Administrative Procedures Act, 5 U.S.C. § 551 *et seq*., will be noted with "federal APA."

through a confusing web of redefinitions, wherein the permitting conditions must be, and at the same time, not be, a rule.

EGLE's understanding of the term "rule," instead of providing more clarity, muddies the waters, relying on the rationale that if something isn't called a rule, it ceases to be one. This works to EGLE's benefit. The Legislature has effectively banned EGLE from promulgating new rules to comply with the Clean Water Act, except for permits, which the Legislature also refers to as rules. MCL 324.3103(2)-(3). Yet EGLE wants to exceed its allotted authority and impose a rule that goes beyond the federal standards—which it is also banned from doing by the APA. *See* MCL 24.232(8). So, if a "rule" is redefined, EGLE can do what it is otherwise expressly forbidden from doing.

Agencies cannot define a rule and determine what is subject to rulemaking, or else the APA becomes irrelevant, ceasing to be a guardrail for agency behavior. If this Court allows unpromulgated rules to operate as if promulgated, then separation of powers will be undermined and businesses will be harmed. Under such a ruling, government agencies in Michigan would be able to regulate without accountability. Such circumvention is a short road to government by executive fiat, in which individuals and businesses are subject to an ever-increasing list of new conditions for doing business, all without procedural safeguards required by the APA. Instead, this Court should uphold the lower court ruling and act as a bulwark against government encroachment on both the APA and the Michigan Constitution.

ARGUMENT

I. EGLE's Actions Violate the APA and Undermine the Separation of Powers.

The Framers saw fit to enshrine in our federal Constitution the principle of separation of powers by dividing authority between the legislative, executive, and judicial branches. This is primarily because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison) (Rossiter ed, 1961), p 301.

In the same vein, the State of Michigan enacted an express separation of powers provision in its own constitution. 1963 Const art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.") This Court has recognized that, "'[s]trictly speaking, there is *no* acceptable delegation of legislative power.'" *In re Certified Questions From United States Dist Ct, W Dist of Michigan, S Div*, 506 Mich 332, 358; 958 NW2d 1, 17 (2020) (quoting *Mistretta v United States*, 488 US 361, 419, 109 (1989) (Scalia, J., dissenting)). However, it has also considered rules to be "a reasonable exercise of legislatively delegated power, pursuant to proper procedure." *Michigan Farm Bureau v Bureau of Workmen's Comp, Dep't of Lab,* 408 Mich 141, 150, 289 NW2d 699, 702 (1980). Thus, proper procedure under the APA is all that

stands between a permissible use of lawmaking authority by the executive, and unconstitutional usurpation of that authority.

A. The APA Was Enacted to Prevent Government by Bureaucracy.

Prior to the passage of the federal Administrative Procedures Act (federal APA), 5 USC § 551 *et seq*., in 1946, the question of whether agencies had the authority to create law was largely unsettled. In the early United States, delegations of authority occurred only "in case of emergency when Congress was not in session or over matters that were sufficiently far from major public concerns[.]" Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 Geo Mason L Rev 683, 688 (2021). The scope was limited, focusing mostly on setting rates rather than making laws. *Id.* at 684.

The Supreme Court held a traditional, historical view of agency rulemaking through the 1930s, striking down sweeping agency programs without reservation. See, e.g., *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935) (holding that the National Industrial Recovery Act was unconstitutional); *United States v Butler*, 297 US 13, 78 (1936) (striking down the Agricultural Adjustment Act). But just a few years later, the Court began deferring to agencies. See, e.g., *Gray v Powell*, 314 US 402 (1941) (deferring to agency discretion in decisions related to the Bituminous Coal Act), and *NLRB. v Hearst Publications*, 322 US 111, 114 (1944), overruled in part by *Nationwide Mut Ins Co v Darden*, 503 US 318, 321-322 (1992) (deferring to the National Labor Relations Board on questions of fact).

What changed? A major expansion of executive authority in the 1930s, and changes to the composition of the Court as a result. Increasingly, executive agencies took up the task of creating programs for the public benefit, working under the theory that Congress moved too slowly to meet changing social conditions. But when public attitudes[3] changed regarding agency authority, Congress took up the task of trying to regulate agencies.

There were failed attempts to rein in agency overreach, including the Walter–Logan bill, passed in 1940 and promptly vetoed, but the first successful attempt at regulating agencies came with the federal APA in 1946. The federal APA was a compromise between proponents of executive authority, who wanted agencies to administer vast sweeping programs with little accountability, and its opponents who thought that the agencies had too much authority to make, enforce, and adjudicate the law. It thus "settled long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest." *Vermont Yankee Nuclear Power Corp v. Nat Res Def Council, Inc*, 435 US 519, 523 (1978) (internal citation omitted). The federal APA accomplished this by letting agencies

[3] In the late 1930s, Americans came to associate increased executive authority exercised by administrative agencies with authoritarian regimes. Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedures Act*, 28 Geo Mason L Rev 573, 585 (2021). Not only did public opinion change—that of both parties, *see id.* at 594—but also that of "[a]cademics previously sympathetic to the administrative state," who "began to voice concerns that agencies were overly bureaucratic, prone to prioritizing expertise over public participation, [and] captured by the industries they regulated." *Id.* at 594–95.

essentially legislate on behalf of Congress, while obeying a set of procedures that ensured Congress would have the last word.

The Michigan Legislature enacted its own version of the federal APA in 1969. MCL 24.201 *et. seq.* Like the federal APA, the Michigan APA was enacted "because . . . legislative bodies have delegated to administrative agencies increasing authority to make public policy and, consequently, have recognized a need to ensure that none of the essential functions of the legislative process are lost in the course of the performance by agencies of many law-making functions once performed by our legislatures." *Detroit Base Coal. for Hum Rts of Handicapped v Dep't of Soc Servs,* 431 Mich 172, 178, 428 NW2d 335, 338 (1988) (internal citation omitted). Both the federal and state APA allow agencies to make rules, provided they observe the statutory procedures, yet do not confer a blank check of legislative authority to the executive branch.

However, if EGLE's unpromulgated rule can step over the APA, then the powers of the legislative branch—despite the Michigan Constitution's assertions to the contrary, see 1963 Const art 4, § 1—are vested in the executive when it comes to rulemaking, without any procedural restrictions, not even the Legislature's express limitations on that authority. See MCL 324.3103(2)-(3). And if judges can't tell an agency when it has failed to abide by the APA's procedures, then the executive has likewise encroached on the authority of the judicial branch. Under such a theory, the executive can exercise legislative power over the Legislature's objections, and the

judiciary can serve as an enforcer against challenges to executive authority, but not correct it or interpret statutes.

This is far from a separation of powers. Rather than three powers reserved to three coequal branches, such an arrangement appears more like three powers in one branch—or one will, that of the executive, spread over three branches. Bureaucrats, rather than legislators or judges, would have the final say. The Michigan Legislature surely did not envision such a distortion of constitutional principles. To effectively ensure the separation of powers, the APA must be neither watered-down nor its definitions changed at will.

B. EGLE's Attempt to Redefine a "Rule" Reduces the APA to an Ink Blot.

The APA defines a rule as follows:

> an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.

MCL 24.207.

In other words, agency regulations, standards, or policies that seek to apply the law are rules. MCL 24.207. There are limited exclusions and enumerated exemptions to this, none of which include general permits, nor regulations, standards, or policies related to the Clean Water Act. *See* MCL 24.207(a)-(s); MCL 24.315. In addition,

permitting standards do not fit the criteria to be considered guidelines[4] exempt from rulemaking.

From the clear definitions set forth in the APA, the permitting conditions are a rule, and all rules apart from the very few exceptions enumerated in the statute must go through the rulemaking process, specifically review and public comment.

EGLE has effectively admitted that the permitting conditions are intended to be binding. See EGLE Appellee Brief in the Court of Appeals, July 14, 2021, at 23. But it contends that the general permit constitutes a "permissive statutory power" under MCL 24.207(j)—namely, the statutory authority of the Natural Resources and Environmental Protection Act, Part 31, MCL 324.3101 *et seq.*, which authorizes EGLE to—in its own words—"develop rules." See EGLE Appellee Brief, in the Court of Appeals, July 14, 2021, at 23. This argument is circular—EGLE cannot in one breath purport to develop a rule by statutory authority, and then in the next breath claim that it is not a rule *because* it is developed by statutory authority.

EGLE's argument also ignores the myriad of laws explicitly preventing EGLE from doing what it attempts to do here. The APA is clear that when the federal government makes Michigan promulgate rules—as is the case here—state agencies are prohibited from going further than the federal standard without first showing a

[4] A guideline under MCL 24.203(7) is defined as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." The permitting conditions at issue here are meant to be enforced not on the agency, but on permit applicants and permit holders, so they cannot be considered guidelines.

"clear and convincing need." *See* MCL 24.232(8).[5] The Legislature was likewise clear about the scope of EGLE's authority: it could issue rules to comply with the Clean Water Act, MCL 324.3103(3), which when read and understood harmoniously with the APA meant that it couldn't *exceed* compliance with the Clean Water Act. The only rules that could be promulgated after 2006 were permits—which it refers to as "rules authorized under section 3112(6)." MCL 324.3103(2). The Legislature has thus already said that permits are rules, and that state agencies cannot promulgate anything exceeding the federal standards. EGLE can't claim broad statutory authority to do what it is forbidden from doing by statute. It certainly can't get around this by refusing to call a rule a rule.

The remainder of EGLE's argument rests on the notion that Plaintiffs failed to observe the administrative procedure, and that somehow pointing out this alleged defect will encourage the Court to turn a blind eye to EGLE's APA violation.

EGLE's arguments in support of this premise are likewise contradictory and fall apart upon close inspection. Though Mich Admin Code, R 393.2196 which first set out the conditions for pollution discharge permits for CAFOs, had to go through the rulemaking process, EGLE claims that no process is necessary to alter the same conditions that had to be promulgated to have the force of law in the first place. EGLE also argues that Plaintiffs had to exhaust administrative remedies—a prerequisite for bringing a legal challenge to a rule—yet won't admit that the conditions are a

[5] 2023 PA 104 amends MCL 24.232 effective 91 days after adjournment of the 2023 regular legislative session, eliminating the requirement currently found in subsection (8).

rule. EGLE didn't follow the APA rulemaking procedures yet wants the APA to apply for purposes of administrative exhaustion. This position defies reason.

For EGLE to be correct, Mich Admin Code, R 393.2196—the original conditions for CAFO pollution discharge permits—would need to exempt amendments to its provisions from the rulemaking process, overriding the APA, and somehow, it would need to do this without saying a word about such an overriding mechanism.

Alternatively, the definitions stated in the APA would have to be entirely subject to agency interpretation. If an agency says that something isn't a rule, by EGLE's reasoning, a court must indulge their attempt to redefine it and defer to that redefinition despite the plain language of the statute. This would tie a judge's hands—he or she could defeat challenges for lack of exhaustion but can't correct the agency's blatant legal violations that give rise to the challenge in the first place.

This sort of contradictory reasoning is characteristic of a post hoc justification for agency wrongdoing, not a cogent legal theory about how Mich Admin Code, R 393.2196 and the APA should work. Instead, this Court should hold to a simpler, more cohesive view of rulemaking: if an agency policy or standard meets the definition of a rule under the APA, an agency must go through the rulemaking process. The Court of Appeals was correct to hold the same.

II. Small Businesses Will Suffer if Agencies Enact Rules Without Following APA Procedures.

Small businesses are only as successful as the economic and regulatory environments in which they operate. When the government conducts itself in a fair and predictable manner, then small businesses thrive—if not, they face difficulties. It is thus no surprise that small business owners rank "Unreasonable Government Regulations" and "Uncertainty Over Government Actions" among their top ten problems and priorities. NFIB Research Center, *2020 Small Business Problems & Priorities* at 9 (2020), https://tinyurl.com/mry3mwu5 (accessed September 12, 2023).

The permitting conditions at issue here are unreasonable, and they create uncertainty for small businesses. They are unnecessarily burdensome—affecting most of the state's livestock—and the method through which they were enacted leaves virtually every business in the state vulnerable to regulation by unpromulgated rule.

A. The Permitting Conditions are Excessive and Harm Businesses.

EGLE's general permit affects large as well as medium CAFOs—farms fall into the latter category when they have a certain number of animals, with the lowest metric being 200 dairy cows. Mich Admin Code, R 323.2103(m). The government has made the point that its rule encompasses large-scale industrial facilities, see EGLE Appellee Brief, in the Court of Appeals, July 14, 2021, at 6, the implication being that small operations won't be affected. But just because the rule targets large-scale operations, doesn't mean that small ones will escape the rule's broad scope.

According to the USDA's 2017 Census of Agriculture, the most current data available, 361,916 of 442,032 milk cows—over 81% of the milk cows in Michigan—are on farms with 200 or more cows. National Agricultural Statistics Service, *Milk Cow Herd Size by Inventory and Sales: 2017,* USDA.GOV, April 11, 2019.[6] The government may try to dismiss the effect of its permitting conditions with a hand-wave, but in truth, it imposed standards that affect four-fifths of the state's milk cows. Any regulation affecting such a large portion of the state's livestock will not occur in a vacuum.

And despite EGLE's assertions, large and medium CAFOs are not synonymous with big business. Even so-called "medium" CAFOs are challenging to operate—while running an operation with 5,000 or more cows may ensure higher profits, farms with fewer than 250—well within the regulatory window—"struggle to break even." Aidan Connolly, *The 2023 Zisk Report Illustrates Profitability for Dairy Producers,* FARM JOURNAL (Dec. 2, 2022). It is no surprise that dairy farmers are facing a "get big or get out" dilemma, often having to choose between selling to the large-scale industrial operations that EGLE claims to target, scaling up and getting punished with unconstitutional permitting conditions, or leaving the farming business behind. See Nina Lakhani, *US dairy policies drive small farms to 'get big or get out' as monopolies get rich,* THE GUARDIAN (Jan. 31, 2023).

[6] Table 17, Milk Cow Herd Size by Inventory and Sales: 2017, Milk cow herd, Cattle and calves inventory, Milk Cows, Number. https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Michigan/st26_1_0017_0019.pdf (accessed September 12, 2023).

And that's just milk cows—this Court shouldn't forget the various other CAFOs that are affected by EGLE's attempt to regulate without going through the APA process. It suffices to say that millions of animals will be regulated under the new permitting conditions.[7]

Small businesses fall squarely within the scope of the permitting conditions, and worse still, the conditions themselves hamper their growth. Through the permit, EGLE mandates permanent 35-foot vegetated buffer strips and a ban on manure application within 100 feet of every surface water, tileline intake, drain, or roadside ditch located anywhere the manure is applied, reducing acres of property to nonfarmable land. Most egregiously, the permitting conditions prohibit farmers from transferring manure to third parties.

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[7] The USDA data is less precise when it comes to other animals, but even so, it reveals the extensive scope of the regulation. USDA measures the number of farms that have "200-499 calves and cattle" instead of the 300-head threshold established by Mich Admin Code, R 323.2103(m)(ii)(B)-(C), so the number of affected calves/cattle may be somewhere between 684,236 (low end, only including farms with 500 heads and up) and 897,571 (high end, counting also farms with 200-499 calves), out of 1,201,383 total. National Agricultural Statistics Service, *Cattle and Calves - Inventory: 2017 and 2012,* USDA.GOV, April 11, 2019, Table 12, Cattle and Calves - Inventory: 2017 and 2012, Characteristics, Livestock inventory, Cattle and calves. https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Michigan/st26_1_0011_0012.pdf (accessed September 12, 2023).

In addition, though both calf and cattle operations are each considered medium CAFOs when they reach 300 heads, combining the two categories limits the accuracy of this measure. A similar limitation arises for swine—the data suggests that over one million pigs could be affected, see National Agricultural Statistics Service, *Hogs and Pigs Herd Size by Inventory and Sales: 2017*, April 11, 2019, Table 21, Hogs and Pigs Herd Size by Inventory and Sales: 2017, Herd Size, Hogs and pigs inventory, Number. https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Michigan/st26_1_0020_0023.pdf (accessed September 12, 2023). However, USDA data does not separate swine by weight as Mich Admin Code, R 323.2103(m)(ii)(D)-(E) does.

Not only do struggling farmers need to maintain permanent vegetative buffer strips—essentially making those strips of land useless—but also the prohibition on spreading manure anywhere near the strips negates their purpose in the first place. And if farmers decide that it's too much trouble, they can't even send their manure elsewhere to avoid the difficulty. EGLE has dictated to farmers who house the bulk of the state's livestock how they can use their land, what they can do with their manure, and the manure market, all with unvetted permitting conditions that amount to an unpromulgated rule.

B. The Scope of EGLE's Actions Will Expand and Create an Unpredictable Environment for Businesses.

Businesses expect government actions to be predictable, reasonable, and accountable to a democratic process. When agencies exercise legislative power without following the APA, the government's actions cease to be predictable, because they abandon well-established processes; they become less reasonable when designed within the echo chamber of an agency; and they lack democratic accountability, being imposed from on high by government bureaucrats. Under such conditions, the agency's actions become arbitrary, capricious, and oligarchical.

Though permitting conditions may seem to occupy a small, insulated corner of the law, the ripple effect of EGLE's actions, if given credence, may be felt throughout every agency in the executive branch, for the simple reason that this case is not solely about permitting conditions. It is about whether agencies can tell the Legislature and courts what a rule is, instead of the other way around. If so, today's permitting

conditions affecting livestock operations could be tomorrow's permitting conditions affecting agriculture operations generally, or certain classes of businesses in various industries, or all of them at once.

Such abuses of executive authority are far from theoretical. This Court dealt with such a situation as recently as 2020, see *In re Certified Questions,* 506 Mich at 332. During the COVID-19 pandemic, the Governor attempted to use the Emergency Powers of the Governor Act (EPGA) to order residents to stay home, imposing mask mandates, and most notably:

> *closing* restaurants, food courts, cafes, coffeehouses, bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, clubs, hookah bars, cigar bars, vaping lounges, barbershops, hair salons, nail salons, tanning salons, tattoo parlors, schools, churches, theaters, cinemas, libraries, museums, gymnasiums, fitness centers, public swimming pools, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, spas, casinos, and racetracks; *closing* places of public amusement, including arcades, bingo halls, bowling alleys, indoor climbing facilities, skating rinks, and trampoline parks; *prohibiting* nonessential travel, in-person work that is not necessary to sustain or protect life, and nonessential in-person business operations; *prohibiting* the sale of carpet, flooring, furniture, plants, and paint; [and] *prohibiting* advertisements for nonessential goods, nonessential medical and dental procedures, and nonessential veterinary services[.]

Id. at 364–65. This Court struck down the EPGA as an unconstitutional delegation of legislative authority, and a violation of separation of powers. *Id.* at 385.

The executive branch has proven that it has no compunctions about ignoring the Michigan Constitution "to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries." *Id.* at 365. Small businesses are rightly concerned that if EGLE can define a rule as

a non-rule, the executive will accomplish through rulemaking-without-promulgation what it accomplished previously through executive order.

CONCLUSION

For the reasons above, amici curiae National Federation of Independent Business Small Business Legal Center, Inc. and the Michigan Chamber of Commerce urge this Court to affirm the Court of Appeals' decision.

Respectfully Submitted,

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September 13, 2023

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STATE OF MICHIGAN

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PROOF OF SERVICE

Jordyn DuPuis hereby certifies that on September 13, 2023, she caused to be filed the foregoing ***Joint Motion and Brief of the National Federation of Independent Small Business Legal Center, Inc. and Michigan Chamber of Commerce, for Leave to File Amici Curiae Brief*** and this ***Proof of Service*** in the above Michigan Supreme Court docket using the Court's MiFile electronic filing system, which accomplishes electronic service and gives notice of filing to all counsel of record.

/s/ Jordyn DuPuis

Jordyn DuPuis