STATE OF MICHIGAN
IN THE SUPREME COURT

3M COMPANY,

Plaintiff-Appellee,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellant.

Michigan Supreme Court No. 166189

Court of Appeals No. 364067

Court of Claims No. 21-78-MZ

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

Christopher J. Walker (P86632)
Attorney for *Amici Curiae*
UNIVERSITY OF MICHIGAN
SCHOOL OF LAW
701 South State Street
Ann Arbor, MI 48109-3091
(734) 763-3812
chris.j.walker@umich.edu

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MICHIGAN CHAMBER OF COMMERCE AS *AMICI CURIAE* IN OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Amici Curiae, the Chamber of Commerce of the United States of America and the Michigan Chamber of Commerce, accept and adopt Plaintiff-Appellee's jurisdictional statement.

STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in holding that the Michigan Department of the Environment, Great Lakes, and Energy violated Section 45 of the Administrative Procedures Act of 1969, MCL 24.201 *et seq.*, by issuing new rules changing the permissible levels of per- and polyfluoroalkyl substances in drinking water without preparing a regulatory impact statement that included an "estimate of the actual statewide compliance costs of the proposed rule on businesses and other groups," MCL 24.245(3)(*l*)?

Appellant's answer: Yes.

Appellee's answer: No.

Court of Claims' answer: No.

Court of Appeals' answer: No.

Amici Curiae's answer: No.

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

A nonprofit corporation, the Michigan Chamber of Commerce (Michigan Chamber) is the leading voice of business in the State of Michigan. The Michigan 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 Michigan Chamber's member firms employ more than 1 million Michiganders. To further this objective, the Michigan Chamber frequently participates in litigation as both a party and *amicus curiae* to ensure that courts fully understand the impact of their decisions on policy in the State of Michigan.

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[1] Pursuant to MCR 7.312(H)(4), *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

This case presents the question whether the Michigan Department of the Environment, Great Lakes, and Energy (EGLE) must comply with the Michigan Administrative Procedures Act (APA) by creating and publicly releasing a regulatory impact statement that includes an "estimate of the actual statewide compliance costs of the proposed rule on businesses and other groups." MCL 24.245(3)(*l*).[2] In particular, the APA requires that the agency estimate—and publicly disclose in its regulatory impact statement—the proposed drinking-water rule's actual statewide compliance costs. EGLE does not dispute, and knew during the rulemaking, that the proposed rule, by operation of law, would have an immediate effect on groundwater cleanup compliance costs. Yet it chose not to even mention those compliance costs in its regulatory impact statement, much less attempt to estimate those costs. Both the Court of Claims and the Court of Appeals correctly held that the APA required EGLE to include a complete estimate of statewide compliance costs that included the costs of groundwater cleanup. This Court should either deny EGLE's application for leave to appeal or, alternatively, affirm the Court of Appeals on the merits. A contrary ruling would have significant implications for *amici*'s members and the business community more broadly.

In this brief, *amici* focus on three reasons for ruling against EGLE:

I. The Court of Appeals correctly held unlawful and set aside EGLE's rule for failure to comply with the procedural requirements of the APA. In particular, the

[2] At the time of EGLE's rulemaking, the APA requirement at issue was found in MCL 24.245(3)(n). Effective February 2024, the relevant APA requirement is now found in MCL 24.245(3)(*l*). *Amici* use the current statutory citation in this brief.

APA requires that the agency estimate—and publicly disclose in its regulatory impact statement—the proposed drinking-water rule's actual statewide compliance costs. Despite knowing that the proposed rule would automatically cause changes to the state's groundwater cleanup standards, EGLE chose not to even mention the increased groundwater cleanup compliance costs in its regulatory impact statement, much less attempt to estimate those costs. That is a clear APA violation, which does not merit the Court's review.

II. EGLE's failure to comply with the APA's procedural requirements is reason enough to decline review or, alternatively, to affirm on the merits. If the Court does reach the merits, it should also declare EGLE's final rule unlawful as arbitrary and capricious under the APA. In promulgating this rule, EGLE did not engage in reasoned decisionmaking. EGLE entirely failed to consider an important aspect of the problem—i.e., the groundwater cleanup compliance costs of the proposed rule. It chose not to provide notice of those costs to the public, thus preventing the legislature, regulated businesses, and the public more generally from commenting on those substantial costs during the rulemaking process. And once it got to court, EGLE tried to justify its failure to estimate and disclose those costs based on reasons not included in the administrative record. The U.S. Supreme Court has recognized all three of these errors as unlawful under the Federal Administrative Procedure Act or related administrative law doctrines. This Court should recognize these errors as arbitrary and capricious under the Michigan APA.

III. As this Court has repeatedly explained, the Michigan APA's procedural requirements are not mere technicalities. In enacting the APA, the Michigan Legislature intended to install important guardrails on state agencies' discretion to implement policy through regulation. The APA's procedural requirements advance core constitutional values, such as due process, limited delegation, and political accountability in regulatory lawmaking. They also enhance administrative law's important rule-of-law values, such as reasoned, expert-driven decisionmaking, public participation, and predictability and rationality in rulemaking. Ultimately, agencies' compliance with the APA's rulemaking requirements should lead to smarter, more effective regulations.

The business community has a particular interest in the interpretation and application of the rules governing the administrative process. Many businesses face an onslaught of state and federal regulations. They critically depend on the procedures and protections that the Michigan Legislature provided in the APA, and similar protections in other state and federal statutes, to ensure that regulations are not the result of arbitrary or otherwise unlawful agency action. Given the breadth of their membership and long history of challenging procedurally and substantively defective regulations, the U.S. Chamber and Michigan Chamber are uniquely positioned to speak to the administrative law principles implicated by this case as well as the consequences to the business community of arbitrary regulatory activities that interfere with their operations and investment decisions.

ARGUMENT

I. The Court of Appeals and Court of Claims Correctly Concluded that EGLE Violated the Procedural Requirements of the APA.

This is a garden variety administrative law case. The Court of Appeals—and the Court of Claims before it—correctly and easily decided the case. *See* COA Op. 3–4, 5–6. And the decision below does not meet this Court's standard for further appellate review. *See* MCR 7.305(B).

Under the APA's default standard of review, a court must "hold unlawful and set aside a decision or order of an agency" if, among other things, the agency action is "[i]n violation of the constitution or a statute," "[i]n excess of the statutory authority or jurisdiction of the agency," or "[a]rbitrary, capricious or clearly an abuse or unwarranted exercise of discretion." MCL 24.306(1)(a), (b), (e); *accord Clam Lake Twp. v. Dep't of Licensing & Regul. Affs./State Boundary Comm'n*, 500 Mich. 362, 372 (2017). As this Court has held, "[a] rule that does not comply with the procedural requirements of the APA is invalid under Michigan law." *Detroit Base Coal. for Hum. Rts. of Handicapped v. Dep't of Soc. Servs.*, 431 Mich. 172, 183 (1988).

Both the Court of Claims and then the Court of Appeals correctly held that EGLE violated the APA. Here, EGLE conducted a notice-and-comment rulemaking under the APA to change the permissible levels of per- and polyfluoroalkyl substances (PFAS) in drinking water. Among other things, the APA requires that an agency prepare and make public "a regulatory impact statement" as part of the rulemaking process. MCL 24.245(3). The Michigan Legislature, in enacting the APA, requires twenty-eight categories of information to be included in the regulatory impact

statement. *See id.* (3)(a)–(bb). As is relevant here, the agency must calculate and provide "[a]n estimate of the actual statewide compliance costs of the proposed rule on businesses and other groups." *Id.* (3)(*l*).

After Plaintiff-Appellee 3M Company sought judicial review of the regulation, the courts below concluded that EGLE had failed to comply with the APA by not including the statutorily required complete estimate of statewide compliance costs. As the Court of Appeals explained,

> EGLE promulgated ruleset 2019-35 EG, establishing new standards for PFAS in drinking water. As noted, however, under Part 201 of the NREPA, once new drinking water standards are promulgated under Section 5 of the SDWA, the cleanup criterion for hazardous substances in groundwater are also changed. MCL 324.20120a(5). In other words, the impact of Part 201 is that whenever EGLE sets drinking water standards, it is also setting groundwater cleanup criterion. Despite this, EGLE refrained from providing compliance cost estimates for the new groundwater cleanup criterion in the [regulatory impact statement] it prepared for the new drinking water standards . . . .

COA Op. 5. It is undisputed that EGLE did not provide compliance estimates for new groundwater cleanup, and the Court of Appeals rejected various arguments that the APA did not require EGLE to estimate these compliance costs. *Id.* at 5–6. Accordingly, the Court of Appeals, like the Court of Claims before it, held unlawful and set aside the rule for failure to comply with the procedural requirements of the APA. *Id.* at 5.

As Plaintiff-Appellee details, the plain text of the APA compels the Court of Appeals' conclusion, and none of EGLE's counterarguments are persuasive. *See* Plaintiff-Appellee 3M Company's Supplemental Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal 12–20 (Mich. S. Ct., filed Apr. 19, 2024)

(3M Supp. Opp. Br.). Here, *amici* focus on three fatal flaws in EGLE's statutory interpretation arguments.

1. It is a category error to argue, as EGLE and the dissent do, that the costs of compliance with changes in groundwater standards were mere "indirect" costs or "ripple effects" of the new drinking water regulation. *See* Defendant-Appellant EGLE Supplemental Brief in Support of its Application for Leave to Appeal 18–19 (Mich. S. Ct., filed Mar. 29, 2024) (EGLE Supp. Br.); COA Dissent 1 (Maldonado, J., dissenting). Even if the APA distinguished between direct and indirect costs—which it does not, *see* MCL 24.245(3)(*l*)—it is undisputed that the new drinking water rule automatically and directly changed the existing groundwater clean-up standards. *See* MCL 324.20120a(5); *accord* COA Op. 1–2. Indeed, in its press release on the new rule, EGLE explained to the public that "[t]he new drinking water standards also have *an immediate effect* on Michigan's existing groundwater clean-up criteria . . . ." EGLE, Press Release, Michigan Adopts Strict PFAS in Drinking Water Standards (June 22, 2020) (EGLE Press Release) (emphasis added), https://content.govdelivery.com/accounts/MIDEQ/bulletins/296ee62. In other words, "the proposed rule," once adopted as a final rule, *immediately* imposed "actual statewide compliance costs" for additional groundwater clean-up. *See* MCL 24.245(3)(*l*).

2. EGLE strains to read "the" in "actual statewide compliance costs of *the* proposed rule" to not include the immediate groundwater cleanup costs. *See* EGLE Supp. Br. 16–18. It is difficult to take this argument seriously when EGLE itself, in announcing the new rule to the public, proclaimed that the rule has "an immediate

effect on Michigan's existing groundwater clean-up criteria." EGLE Press Release, *supra*. In other words, by operation of law, the proposed rule imposes immediate groundwater cleanup compliance costs; those are automatic, actual statewide compliance costs of the proposed rule. *See* COA Op. 5 ("Although EGLE identified the estimated actual statewide compliance costs of the proposed drinking-water rule on business and groups, it did not estimate costs that these changes *automatically* imposed on groundwater cleanup.").

3. EGLE argues that a contrary reading would force the agency to "divine all other potential costs that individuals or businesses might incur because of . . . the 'ripple effect' of the proposed rule" and allow companies "to fight any new regulation by dreaming up costs not addressed by the agency during the rule-making process." EGLE Supp. Br. 18, 19. This slippery-slope argument is even more egregious than EGLE's strained textualist arguments, underscoring the arbitrary and capricious nature of EGLE's decision. After all, no divination or dreaming of compliance costs was required. As Plaintiff-Appellee details in its Counter-Statement of Facts, the groundwater cleanup compliance costs were raised multiple times during the rulemaking process, and EGLE recognized those comments but failed to disclose them in the regulatory impact statement. *See* 3M Supp. Opp. Br. 7–8. Indeed, EGLE's failure to disclose was not accidental. An earlier draft of the regulatory impact statement mentioned the automatic change to groundwater standards, but EGLE chose to remove that information from the final regulatory impact statement made available to the public for comment. *See id.* at 3. As a consequence, the public had

neither notice nor the opportunity to comment on how the proposed rule would increase the groundwater cleanup compliance costs.

II. EGLE's Final Rule Is Unlawful and Should Be Set Aside as Arbitrary and Capricious Under the APA.

The Court of Appeals' conclusion that EGLE violated the APA by not complying with its procedural requirements is sufficient reason to decline further review or, alternatively, to affirm on the merits. If this Court does reach the merits, it should affirm not only for failure to comply with MCL 24.245(3)(*l*), but for a second reason: EGLE's rule is "[a]rbitrary, capricious or clearly an abuse or unwarranted exercise of discretion" in violation of the APA. MCL 24.306(1)(e). Indeed, EGLE's final rule is arbitrary and capricious in at least three respects.

1. Under the analogous review standard of the Federal Administrative Procedure Act, the U.S. Supreme Court has held that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As detailed in Part I, EGLE's refusal to consider groundwater compliance costs is a textbook example of a failure to consider an important aspect of the problem.

2. Similarly, the U.S. Supreme Court has repeatedly held that "[a]n agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mort. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Indeed, the statutorily guaranteed "opportunity to comment is meaningless unless the agency responds to

significant points raised by the public." *Home Box Off. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (per curiam) (footnote omitted). By refusing to disclose the immediate groundwater cleanup costs from the proposed rule, EGLE deprived the public of the statutorily required notice and opportunity to comment. It also deprived itself of the opportunity to leverage the public's experience and expertise to better understand the scope of these compliance costs. Such arbitrary-and-capricious agency behavior should not be permissible under the APA.

3. While EGLE made no mention of groundwater compliance costs in its regulatory impact statement, it now offers in this litigation a post hoc rationalization that EGLE could not have provided an estimate of those compliance costs "because of endless variables that would come into play and a lack of information." EGLE Supp. Br. 20; *see also* 3M Supp. Opp. Br. 8–9 (further detailing EGLE's various justifications raised for the first time in the litigation). Such post hoc rationalizations should be deemed arbitrary and capricious or otherwise impermissible under the APA. Some eight decades ago, the U.S. Supreme Court recognized this bedrock principle of federal administrative law in its famous *Chenery* doctrine: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). *See generally* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952 (2007).

At all events, EGLE was able to similarly estimate the compliance costs regarding drinking water standards. The reality is that EGLE made a conscious

decision to not even try to calculate the proposed rule's direct groundwater cleanup compliance costs, in violation of the APA's procedural requirements. *See* Part I, *supra*. This is the definition of arbitrary and capricious agency action that violates the APA.

III. The APA's Requirements that Agencies Engage in Reasoned Decisionmaking and Assess Regulatory Costs Advance Good Administrative Governance.

The APA's requirements of notice-and-comment rulemaking, the creation of a regulatory impact statement that assesses compliance costs, and the command for agencies to avoid arbitrary and capricious actions are not mere technicalities. As this Court has explained, the Michigan Legislature enacted the APA because "the adoption of a rule by an agency has the force and effect of law and may have serious consequences of law for many people." *Detroit Base Coalition*, 431 Mich. at 177–78 (quoting Solomon Bienenfeld, *Michigan Administrative Law* 4–1 (1978)). As a result, the APA rulemaking "process requires public hearings, public participation, notice, approval by the joint committee on administrative rules, and preparation of statements, with intervals between each process." *Id.* at 178.

The Court has further explained that constitutional and good governance rationales motivated the Michigan Legislature to enact the APA more than a half-century ago:

> [L]egislative 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." Thus, the question whether the policy may be adopted without compliance with the APA is more than a question of notice and hearing

> requirements. It is a question of the allocation of decision-making authority.

Id. (quoting Bienenfeld, *supra*, § 1.1.1). Accordingly, the Court continued, the APA's requirements "are calculated to invite public participation in the rule-making process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons of the existence of the rules, and make the rules readily accessible after adoption." *Id.* at 189–90 (quoting Bienenfeld, *supra*, at 4–1). These procedural protections, the Court has further observed, "provide extensive due process safeguards to those persons affected by the agency's rule-making." *Westervelt v Natural Resources Comm.*, 402 Mich. 412, 448 (1978).

In discussing the analogous Federal Administrative Procedure Act, the U.S. Supreme Court has underscored that the statute's procedural requirements "serve[] important values of administrative law." *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). They promote "agency accountability" and "instill[] confidence" in administrative governance for the regulated and the public more generally. *Id.* (quoting *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986)). In prohibiting arbitrary and capricious agency action, the Federal Administrative Procedure Act also requires agencies to engage in "reasoned decisionmaking." *Allentown Mack Sales & Serv. v. NLRB,* 522 U.S. 359, 374 (1998) (quoting *State Farm*, 463 U.S. at 52). "Not only must an agency's decreed result be within the scope of its lawful authority," the U.S. Supreme Court has explained, "but the process by which it reaches that result must be logical and rational." *Id.*

Perhaps most importantly, the Michigan APA's procedural requirements are critical to producing higher-quality regulations. It is not difficult to appreciate how notice-and-comment rulemaking serves this purpose. After all, the APA requires that the agency release its proposed rule and regulatory impact statement to the public so that the legislature, industry, and other experts have the opportunity to review and comment on it, allowing the agency to leverage expertise outside the agency to make the final rule better. And in promulgating the final rule, the agency considers the significant public comments, revises the rule to address them where appropriate, and otherwise engages in reasoned decisionmaking.

Over the decades, *amici* and their members have experienced firsthand the critical importance of these administrative law requirements in implementing new regulations. The U.S. Chamber has also commissioned reports and studies at the federal level that explore how notice-and-comment rulemaking leads to higher-quality regulations. *See, e.g.*, Paul Rose & Christopher J. Walker, *Examining the SEC's Proxy Advisor Rule* (U.S. Chamber Report, 2020), https://ssrn.com/abstract=3728163. When agencies fully engage in notice-and-comment rulemaking and reasoned decisionmaking, agencies are more likely to carefully tailor their regulatory efforts to maximize benefits, minimize costs, and take into account unintended consequences and reliance interests.

This is even more true when, as the Michigan APA requires, agencies prepare and produce a regulatory impact statement that includes the relevant cost estimates, including "the actual statewide compliance costs of the proposed rule on businesses

and other groups." MCL 24.245(3)(*l*). As the U.S. Supreme Court has observed, "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate." *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015). That is because "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Id.* at 753. Such consideration of costs "also reflects the reality that 'too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.'" *Id.* (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part)). Requiring agencies to estimate and disclose compliance costs forces the agency to grapple with the real-world impact of its prospective regulatory activities. And it allows the legislature, the regulated community, and the public more generally to weigh in before a new regulation imposes tremendous costs that could be avoided by higher-quality regulation.

If allowed to stand, EGLE's procedurally defective and arbitrary and capricious rule would have real-world, substantial impacts on the business community and thus the economy. Businesses depend on clear, predictable rules—and fair and nonarbitrary administrative processes—when planning their operations and investing for their businesses. An agency's refusal to be constrained by administrative law's procedural protections creates destabilizing uncertainty for the individuals, businesses, and industries regulated by those laws. Such arbitrary bureaucratic behavior, moreover, can lead to lower-quality regulations and, in turn,

unnecessary and costly disruption to an industry's settled expectations and investments. The Court of Appeals and the Court of Claims before it were correct to set aside EGLE's final rule as procedurally defective under the APA. This Court should follow suit, either by denying further review or by affirming the Court of Appeals on the merits.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, this Court should either deny EGLE's application for leave to appeal or, alternatively, affirm the Court of Appeals on the merits.

Respectfully submitted,

Dated: May 3, 2024

By: /s/ Christopher J. Walker

Christopher J. Walker (P86632)
Attorney for *Amici Curiae*
UNIVERSITY OF MICHIGAN
SCHOOL OF LAW*
701 South State Street
Ann Arbor, MI 48109-3091
(734) 763-3812
chris.j.walker@umich.edu

* *Institutional affiliation is provided for identification purposes only. Professor Walker is Of Counsel and Consultant at the U.S. Chamber Litigation Center.*

Pursuant to MCR 7.212(B), *amici curiae*'s brief contains 4,430 countable words.