

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN ASSOCIATION OF HOME
BUILDERS,

Plaintiff/Appellee,

v

DAVID C. HOLLISTER, Director, Michigan
Department of Labor & Economic Growth, and
MICHIGAN DEPARTMENT OF LABOR &
ECONOMIC GROWTH,

Defendants/Appellants,

and

MICHIGAN COMMUNITY ACTION
AGENCY ASSOCIATION, the MICHIGAN
ENVIRONMENTAL COUNCIL, and
MIDWEST ENERGY EFFICIENCY
ALLIANCE,

Intervening Defendants/
Cross-Appellants.

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Supreme Court No. 135023

Court of Appeals Case No. 267376

Ingham County Circuit Court
Case No. 05-000149-CZ

**AMICUS CURIAE BRIEF OF THE
MICHIGAN MANUFACTURERS
ASSOCIATION IN SUPPORT OF THE
HOME BUILDERS' APPLICATION FOR
LEAVE TO APPEAL**

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BASIS OF JURISDICTION

The Home Builders seek leave to appeal from an Opinion of the Michigan Court of Appeals dated August 28, 2007, *Michigan Association of Home Builders v Director, Dep't of Labor & Economic Growth*, No. 267376. The Court has jurisdiction over this matter pursuant to MCR 7.301.

QUESTIONS PRESENTED FOR REVIEW

1. Whether an administrative agency in a rule promulgation challenge can defend a promulgated rule by self-selecting the administrative record against which a court will evaluate the agency's decision.

The Court of Appeals answered: Yes.

The trial court answered: No.

Amicus Curiae the Michigan Manufacturers Association answers: No.

2. Whether an arbitrary or capricious regulation is *per se* invalid, such that it cannot be remanded for supplementation of the administrative record.

The Court of Appeals answered: No.

The trial court answered: Yes.

Amicus Curiae the Michigan Manufacturers Association answers: Yes.

INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Michigan Manufacturers Association (“MMA”) is a business association composed of more than 3,000 Michigan businesses, organized and existing to study and promote the interests of Michigan businesses and of the public in the proper administration of laws relating to its members, and otherwise to promote the general business and economic welfare of Michigan. The MMA appears before the Court as a representative of business concerns employing over 90% of the industrial workforce in Michigan, all of whom are potentially affected by the issues currently before this Court.

An important aspect of the MMA’s activities is representing the interests of its member companies in matters of importance before state and federal courts, the United States Congress, the Michigan Legislature, and state agencies. Accordingly, the MMA regularly submits *amicus curiae* briefs to the Michigan Court of Appeals and the Michigan Supreme Court advocating the interests of its members.

The important issue presented in this case is whether an administrative agency in a rule promulgation challenge can defend a promulgated rule by self-selecting the administrative record against which a court will evaluate the agency’s decision. This is a completely different system than the one Congress has adopted; the federal system does not permit supplementation but contains detailed requirements regarding what must be included in the record. This is also a completely different system than the one the Michigan Legislature adopted; the Michigan system has much less detailed record-making requirements but does not prohibit litigants from supplementing that record in litigation. By judicially grafting the federal administrative standard of review on the Michigan system, the Michigan Court of Appeals has inadvertently empowered State agencies with the ability to confine judicial review to the record the agency self-selects.

The Court of Appeals exacerbated the problem by judicially grafting the federal administrative remand procedure on the Michigan system as well. In the federal courts, where an agency's record-making duties are elaborate, and judicial review is limited by statute, it is not uncommon for a court to remand to the agency to further supplement the record, if necessary. In contrast, the Court of Appeals proposes a system where an agency is allowed to self-select the administrative record, and then continue self-selecting record supplements until the record is arguably adequate to justify the promulgated rule. The situation is not unlike a teacher letting a student write and rewrite the answers to a test, rather than grading the test after the first try.

The result of these new, twin rules is less political accountability for Michigan's numerous administrative agencies at a time when reduced regulation is sorely needed to attract investment to Michigan's struggling economy. The danger is heightened where, as here, the Legislature has enacted very specific standards for the promulgation of a set of rules, yet the agency does not prepare an adequate record to demonstrate whether those standards were met. By doing so, the agency avoids judicial review of whether the agency had authority to promulgate such a rule in the first instance. The MMA respectfully requests that this Court grant the Home Builders' application for leave to appeal, and that the Court reverse the Court of Appeals' decision.

STATEMENT OF FACTS AND PROCEEDINGS

The facts relevant to the legal issues presented in this *amicus curiae* brief are as follows:

1. The Single State Construction Code Act requires the Director of the Michigan Department of Labor and Economic Growth to update the energy code component of the State Construction Code at least every three years. MCL 125.1504(5).

2. In 1995, the Director adopted the Council of American Building Officials' Model Energy Code. The Legislature responded by promptly repealing the Model Energy Code and mandating the creation of a "cost-effective" Michigan energy code. 1995 PA 270, MCL 125.1502, .1504.

3. To determine cost effectiveness, the Legislature prescribed five factors that the Director must consider, MCL 125.1502a(1)(n), including an agency finding to assure that the costs of "principal, interest, taxes, insurance, and utilities will not be greater after the inclusion of the proposed cost of the additional energy-saving construction features required by" any newly proposed energy efficiency rules, MCL 125.1502a(1)(n)(v) (emphasis added).

4. In 2004, the Department adopted portions of Chapter 11 of the International Residential Code to replace the existing Michigan energy code. 2004 AC, R 408.31059. According to the Home Builders, the rules are not cost-effective and would increase the cost of homes manufactured in Michigan, placing domestic manufacturers at an unfair disadvantage. The Home Builders' expert, analyzing the five legislative factors, concluded that the cost of a basic house (998 square feet, one-story ranch house) would increase as much as \$4,000 in southern lower Michigan. (Drumheller Aff ¶¶ 11, 12.) And the added cost would not be recouped

in energy savings for more than 17 years (*id.*), despite the statutory requirement that added costs be recouped in energy savings in no more than 7 years, MCL 125.1502a(1)(n)(ii).

5. In the limited administrative record that exists, the only document that purports to analyze the five legislative factors is a March 2004 report prepared by Patrick Hudson, one of the Director's staff members. After being provided with a copy of this report, the Home Builders retained an independent expert to determine whether the report showed directly that the proposed code met the cost-effectiveness criteria. The independent analysis concluded that the report did not disclose enough information to determine whether it was correct, or that the proposed code was cost-effective. The Home Builders delivered that analysis to the Department on July 1, 2004, the deadline for written public testimony to be part of the public hearing (Home Builders' Br on Appeal at 8, citing Schwartz Dep at 50, 56, 121, & 122), but the analysis did not change the result.

6. After the Director promulgated the new energy rule, the Director published a second report by Hudson that withdrew the first report, *Michigan Assoc of Home Builders v Director*, Slip Op at 3, thus removing the first report from the administrative record. The second report was filed after the rule promulgation, meaning it could not have been part of the record at the time of the final agency decision.¹

7. The Home Builders filed suit, seeking a declaration that the Department exceeded its authority and failed to comply with the Legislature's intent when the Director adopted portions of the International Residential Code as the energy portion of the Michigan Construction Code. In particular, the Home Builders state that they "proved at the preliminary injunction

¹ The parties have been unable to agree whether the withdrawn Hudson report or the post-rule-promulgation Hudson report are even part of the administrative record. As the Director states, "[n]either the APA nor the Act in question establishes what encompasses the administrative record." (Defs-Appellees' Br in Opp'n to App for Leave to Appeal at 10.)

stage, and are prepared to prove at an evidentiary hearing or trial, that the International Code does not, as a matter of objective fact, meet the Cost-Effectiveness Criteria” the Legislature expressly prescribed. (App for Leave to Appeal at 12.)

8. The trial court granted the Home Builders’ request for a preliminary injunction, and it later denied the Director’s motion to exclude all of the Home Builders’ non-administrative record evidence, including the expert testimony. *Michigan Assoc of Home Builders v Director*, Slip Op at 3. The Court of Appeals granted leave on an interlocutory basis and, relying almost exclusively on federal case law, reversed, holding that a court “must confine its review to the record on which the rulemaking decision was based.” *Id.* at 4. The Court of Appeals remanded to the trial court, directing that court to further remand to the agency if the administrative record was inadequate to justify the Director’s decision to promulgate the rule.

STANDARD OF REVIEW

The MMA agrees that “the standard and the scope of judicial review of a State agency rule” is a question of law that this Court reviews *de novo*. (Defs-Appellees’ Br in Opp’n to App for Leave to Appeal at 18, citing *Binsfeld v Dep’t of Nat Res*, 173 Mich App 779, 785; 434 NW2d 245 (1988), and *Cardinal Mooney High School v Mich High School Athletics Ass’n*, 437 Mich 75, 80; 467 NW2d 21 (1991).)

ARGUMENT

I. This Court should grant the Home Builders’ Application for Leave to Appeal, because the outcome of this litigation against a State agency will significantly affect every business subject to Michigan administrative regulation, and the litigation involves a legal principle of undeniable significance to the State’s jurisprudence.

A core ground for granting an Application for Leave to Appeal is if an issue “has significant public interest” and is “against the state.” MCR 7.302(B)(2). It is difficult to conceive of a case with more significant public interest than the present lawsuit against the State,

which involves the question of what a court is permitted to consider when reviewing the validity of an agency's rule, allegedly promulgated in excess of the agency's delegated authority.

This Court has held that the "Legislature's statutory delegation of authority to executive branch agencies to adopt rules and regulations consistent with the purpose of the statute does not violate the separation of powers provision." *Blank v Dep't of Corr*, 462 Mich 103, 113; 611 NW2d 530 (2000), citing *Coffman v State Bd of Exam'rs in Optometry*, 331 Mich 582; 50 NW2d 322 (1951), and *In re Quality of Serv Standards for Regulated Telecomm Servs*, 204 Mich App 607; 516 NW2d 142 (1994). It thus falls on the judicial branch to determine whether an agency's promulgated rule is "consistent with the purpose of the statute." In those instances where the Legislature has prescribed specific standards for rule promulgation, the judiciary must be able to fulfill its role to ensure compliance with the legislative mandate.

Here, the Home Builders have proffered expert evidence that the Director's energy rules for the Construction Code objectively fail to satisfy the cost-effectiveness requirements in the enabling statute. If the Home Builders are correct, the Director has exceeded the scope of his delegated authority. Yet the Court of Appeals has prohibited the Home Builders from introducing that expert testimony (or any other testimony, for that matter) at trial. The result is a sweeping and narrowing change in judicial review of agency actions, one that allows an agency to ignore statutory requirements entirely while precluding any meaningful judicial review. The result also grants Michigan administrative agencies authority to insulate any promulgated rule simply by picking and choosing the evidence that will comprise the administrative record.

Under such a cramped scope of judicial review, it will be difficult or impossible for a plaintiff to succeed in striking even those rules that, under any objective view, are most

offensive to the Legislature's intent. More important, without meaningful judicial review, any legislatively imposed restriction on rule promulgation becomes meaningless. Indeed, any question about this case's importance is answered by the fact that no less than four prominent organizations—the Michigan Community Action Agency Association, the Michigan Environmental Council, the Midwest Energy Efficiency Alliance, and now the MMA—have filed briefs with this Court to present their own views of the issues presented.

The Court of Appeals' decision also implicates a second core ground for granting an Application for Leave because the “issue involves legal principles of major significance to the state's jurisprudence.” MCR 7.302(B)(3). This Court has long noted the importance of a stringent factual review to determine whether an agency's rulemaking decision is within the power the Legislature has delegated to the agency. *Westervelt v Natural Res Comm'n*, 402 Mich 412, 450; 263 NW2d 564 (1978). The Court of Appeals has now eliminated the stringent nature of that review and replaced it with a regime that at best allows the agency to select the evidence against which a court will evaluate the agency's decision in a rule challenge proceeding. At worst, the change in law allows an agency to ignore statutory requirements and—because such avoidance creates no record on the issue—evade review entirely.

Courts are bound to uphold agency actions only on the bases articulated by the agency during the rulemaking process, not post hoc rationalizations of counsel. *Motor Vehicle Mfrs Ass'n v State Farm Mut Auto Ins Co*, 463 US 29, 50 (1983). The purpose of the administrative record is to provide a reviewing court with evidence that the agency engaged in the necessary rational process that the enabling legislation required. It is crucial that a litigant be permitted to show through evidence that the required process did not take place, particularly

where, as here, the agency's proposed rule has serious negative economic impacts on both businesses and consumers.

II. This Court should grant leave to appeal because the Court of Appeals' decision is clearly erroneous and will cause material injustice to the business community, further deterring the economic investment that Michigan's economy requires.

Another core ground for granting an application for leave is if a Court of Appeals' decision is clearly erroneous and will cause material injustice. MCR 7.302(B)(5). This is just such a case. The Court of Appeals concluded, in no uncertain terms, that the propriety of an agency's promulgated rule must be determined solely by reference to the record the agency self-selected to support the rule, *Michigan Assoc of Home Builders v Director*, Slip Op at 7, even in the face of expert evidence that the rule violates statutory requirements. That holding demonstrates a misconception about the differences between a contested case proceeding and a rule promulgation, as well as the difference between the Michigan Administrative Procedure Act ("MAPA") and the federal Administrative Procedures Act ("APA"). The Court of Appeals' error not only operates to harm home builders and their clients, but also stifles investment in a State already facing dire economic times that must now deal with the prospect of virtually unfettered agency authority to regulate. The Legislature has promulgated a predictable standard that businesses can rely on in making decisions. An agency should not be free to render that predictable standard illusory. The MAPA is rendered essentially moot when an agency, as a matter of objective fact, exceeds its delegated legislative authority, but the regulated community is blocked from challenging the promulgated rules.

A. The Court of Appeals wrongly concluded that judicial review of a rule promulgation is limited to the agency’s self-selected record.

1. The Court of Appeals failed to appreciate the difference between contested case proceedings (which involve the introduction of substantial evidence) and rulemaking proceedings (which do not).

By Michigan constitutional provision, statute, and court rule, a party may seek judicial review of an agency’s contested or quasi-judicial decision. Const 1963, art 6, § 28; MCL 24.301-306, MCR 7.104, .105. In rule challenge, such as this one, however, review is governed by the three-factor test this Court articulated in *Luttrell v Dep’t of Corr*, 421 Mich 93; 365 NW2d 74 (1984). Review of an administrative rule’s validity must ask whether the regulation is (1) within the scope or subject matter of the enabling statute, (2) complies with the Legislature’s intent, and (3) arbitrary or capricious. *Id.* at 100; 365 NW2d 74.

This Court articulated the need for a stringent factual review of a rulemaking proceeding in *Westervelt*. Justice Williams, writing for the Court, said that to properly resolve the issue of whether the agency’s rules were within the scope of the agency’s delegated authority, “this Court must be certain that on the record, (1) a state of facts exists that justifies regulation . . . ; and (2) that the regulations adopted” comply with the statutory standard the Legislature has prescribed. *Westervelt*, 402 Mich at 450; 263 NW2d 564 (emphasis added); *see also id.* at 459; 263 NW2d 564 (Ryan, J, concurring in the result) (“I agree with Justice Williams that the record before on this appeal is inadequate to determine whether the DNR was acting within the scope of its properly delegated authority”). Accordingly, if an agency does not prepare a sufficient record to meet the *Westervelt* test, there are two ways to provide a meaningful judicial role: allow a challenger to present additional evidence (as the trial court permitted the Home Builders to do in this instance), or simply overturn the rule due to lack of a sufficient record.

Although it is difficult to compare judicial decisions interpreting administrative schemes that vary widely from one jurisdiction to the next, the Missouri Supreme Court's recent analysis of the difference between contested and non-contested case proceedings in *Furlong Companies, Inc v City of Kansas City*, 189 SW3d 157 (2006), is instructive when considering the admissibility of extra-record evidence. In *Furlong*, a developer filed a mandamus action against Kansas City, seeking an order compelling the city to approve the developer's plat application. The Missouri Supreme Court began by distinguishing contested cases from non-contested cases under the Missouri Administrative Procedures Act. *Id.* at 165. The Court noted that contested cases provide the parties with "an opportunity for a formal hearing with the presentation of evidence, including sworn testimony of witnesses and cross-examination of witnesses, and require written findings of fact and conclusions of law." *Id.* (citation omitted). Accordingly, the trial court's review is "of the record created before the administrative body." *Id.* (citation omitted).

In contrast, "[n]on-contested cases do not require formal proceedings or hearings before the administrative body. As such, there is no record required for review." 189 SW3d at 165 (citations omitted). "In the review of a non-contested decision, the circuit court does not review the administrative record, but hears evidence, determines facts, and adjudges the validity of the agency decision." *Id.* (citation omitted). In sum:

[I]n a contested case the private litigant must try his or her case before the agency, and judicial review is on the record of that administrative trial, whereas in a non-contested case the private litigant tries his or her case to the court. Depending upon the circumstances, this difference may result in procedural advantages or disadvantages to the parties, but in either situation, the litigant is entitled to develop an evidentiary record in one forum or another.

* * *

The driving idea behind administrative law in Missouri is that the citizen is entitled to a fair opportunity to present the facts of his or her case. If this occurs

in the context of the procedural formality and protection of a “contested case” before the administrative agency, the review in the courts can be limited to the record. If the citizen is denied this opportunity before the agency [because the process involves a non-contested case proceeding], then he or she is entitled to present such evidence as is necessary before the courts to determine the controversy.

Id. at 165-167 (emphasis added).

This Court should likewise hold that a litigant in an analogous rule challenge is entitled to present “such evidence as is necessary” when challenging an agency’s rule promulgation. That rule is the only way to ensure agency accountability and provide a check on runaway agencies.

2. The Court of Appeals also failed to appreciate the difference between the MAPA and the Federal Administrative Procedure Act.

As the Home Builders argue persuasively in their Application for Leave, the Court of Appeals also erred in relying on federal case law that interprets the Federal Administrative Procedure Act to conclude that judicial review is limited to the record that was before the agency. *Michigan Assoc of Home Builders v Director*, Slip Op at 4-6. Of course, even federal courts will consider evidence outside the administrative record to ascertain “whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision.” *Id.* at 6, quoting *Norwich Eaton Pharmaceuticals, Inc v Bowen*, 808 F2d 486, 489 (CA 6, 1987). But the presumptive limits on supplementing a federal administrative record flow from the facts that Congress has statutorily defined what must be included in such a record, *see, e.g.*, 5 USC 553, 556, and 557, and statutorily mandated that review be made of that record, 5 USC 706. For example, a federal agency “is required to give reasoned responses to all significant comments in a rule making proceeding.” *PPG Indus v Costle*, 630 F2d 462, 466 (CA 6, 1980). And the agency’s failure to consider public comments that are sufficiently central to

the agency's decision is itself arbitrary and capricious. *Int'l Fabricare Inst v US Envtl Prot Agency*, 972 F2d 384, 389 (CA DC, 1992).

In stark contrast, the development of rules in Michigan "is not done on the basis of an evidentiary or fact-finding record," as the parties agree. (Application for Leave to Appeal at 18-19, citing Defs' Br on Appeal at 17, *Binsfeld v Dep't of Natural Res*, 173 Mich App 779, 783-785; 434 NW2d 245 (1988); LeDuc, Mich Admin law, § 4:35, p 223; accord Defs-Appellees' Br in Opp'n to App for Leave to Appeal at 37 ("APA provisions do not require an agency, while promulgating its rules, to create an evidentiary or formal fact finding record, similar to that required by the APA's contested hearing provisions.")). Nor is there is a statute linking judicial review of a rule promulgating proceeding to the administrative record. Particularly given the fact that the Legislature itself has no power to "supervise" agency decisions, *Blank, supra*, litigants must have the power to do so. The ability of the Legislature to participate in the rule promulgation process was limited by *Blank*. In response to that limitation, the Legislature chose to impose specific standards for rule promulgation. If the legislative limitations on rulemaking are to be given the judicial deference to which they are entitled, then a factual record is necessary for the court to fully adjudicate the issues.

The present case exemplifies the point. The Director's energy rules must meet the cost-effectiveness criteria the Legislature prescribed. MCL 125.1502a(1)(n). And if the Director's withdrawn report and post-decision report are not part of the administrative record, as the Home Builders contend, then the trial court is left with nothing to review save some public comments, a few notices, and agency correspondence, none of which will allow the court to fairly evaluate whether the agency's rules are within the authority the Legislature delegated.

To be clear, review of a complete evidentiary record does not mean that courts should abandon the deferential *Luttrell* style of review when evaluating an agency's decision. It means only that such review should take place based on consideration of all relevant scientific and other information. For example, under the Director's theory, he could promulgate a rule based on junk science, to the exclusion of scientifically accepted analysis, then insulate that decision by excluding from the administrative record any document except a report proclaiming the junk science. Alternatively, he could ignore the statutory command entirely, and since that act does not create a record, the agency's decision stands. Either way, this is an untenable result that has no basis in Michigan statutory or common law and violates the due process rights of those regulated.

B. The Court of Appeals also failed to consider whether the Director complied with even the minimal record-making requirements the MAPA prescribes.

There are two important facts that make the Court of Appeals' restrictions on the introduction of evidence even more unpalatable. First, the Director sought in the trial court to vindicate his decision by relying on the January 2005 Hudson report, a report issued a full month after the Director officially certified adoption of the International Code, and at least a week after the Director filed the adopted rule with the Secretary of State Office of the Great Seal. (Ironically, non-administrative record materials are required even to prove these procedural facts.) So the only "record" evidence on which the Director can rely is a first report that does not belong in the record because it was withdrawn, and a second report that cannot be in the record because it was created after the rule promulgation. The Director's reliance on withdrawn and post-decision reports is 180 degrees opposite of a "limited record" rule of administrative law.

The Intervening Defendants also take positions of convenience. In their brief opposing the Home Builders' application, the Intervening Defendants rely extensively on an

affidavit “submitted to the Circuit Court in connection with the Agency’s Opposition to the Home Builders’ Motion for a Preliminary Injunction.” (Response of the Intervening Defendants/Cross-Appellants to the App for Leave at 5-7 & n 1.) The affidavit apparently does not appear in the administrative record. The only conclusion that can be drawn from the Intervening Defendants’ heavy reliance on the affidavit is that Defendants’ position—confining judicial review to the administrative record—does not apply to agencies and their supporters, but rather only to ordinary citizens and businesses who challenge an administrative rule.

Second, the administrative record does not appear to comply with MCL 24.245(2). That statute directs agencies to prepare a report in which “the agency shall describe any changes in the proposed rules that were made by the agency after the public hearing.” The MMA is unaware that this summary had ever been prepared, either before or after the Director promulgated the energy rules. The agency’s failure to comply with the statute is *per se* arbitrary and capricious. Accordingly, this Court should direct that the energy rules be stricken for this independent reason as well.

C. The appropriate relief is either to strike the Department’s rule or to remand for a *de novo* evidentiary hearing or trial *de novo*, with evidence that, in the trial court’s discretion, is relevant and probative of whether the rule meets the statutory cost-effectiveness criteria.

The Court of Appeals concluded its Opinion by issuing a remand directive that included the possibility of a further remand to the Department:

[I]n the event that the [trial] court finds that the factual record does not support the Department’s action, or that the Department has not considered all relevant factors, or that the rules cannot be evaluated on the basis of the available record, the court should remand the matter to the Department for additional investigation or explanation.

Michigan Assoc of Home Builders v Director, Slip Op at 7. This directive has no basis anywhere in the MAPA, and for good reason. Allowing an agency to supplement an already self-serving

and self-selected record effectively cedes to the agency itself all review of the proffered regulation. The message to the agency is to keep adding to the record until the agency has created enough evidence to colorably support the challenged regulation.

After concluding the record was inadequate to determine the propriety of the promulgated regulation in *Westervelt*, this Court did not remand to the agency to create a better record. Quite the contrary, the Court remanded to the trial court for judicial findings that would aid in the determination of the rule's validity. 402 Mich at 452-453; 263 NW2d 564; *accord id.* at 459; 263 NW2d 564 (Kavanagh, J, and Coleman, J, concurring in the result reached by Justice Williams).

The “remand to the agency” remedy is, again, a creature of federal administrative procedure. *Florida Power & Light Co v Lorion*, 470 US 729, 744 (1985) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”). That is because the APA “specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred.” *Id.*, citing 5 USC 551(13), 704, and 706. Because the MAPA lacks both the safeguards and the standard of review that the APA contains, it is wholly inappropriate to judicially graft APA standards on the MAPA.

D. The Court of Appeals’ decision will act as a further deterrent against investment in Michigan’s struggling economy.

Two years ago, the Mackinac Center for Public Policy had already noted the State of Michigan’s “well-deserved reputation as a difficult regulatory state.” (Improving Michigan’s Regulatory Env’t, Sept 7, 2005, located at <http://www.mackinac.org/article.aspx?ID=7348>.) And

the Center’s observations in 2005 ring equally true today: “if business or consumers are forced to spend too much money to . . . carry out their business, it is the same as taxing their money away—and sometimes worse, since they lose time as well. A reasonable regulatory environment is critical to retaining and expanding jobs in Michigan.” (*Id.*)

Unfortunately, the Court of Appeals’ decision has gone in completely the opposite direction as the Center recommends, granting *carte blanche* authority to agencies in the rulemaking process. An agency’s ability to self-select the record against which its rules will be measured increases the likelihood that Michigan citizens and business will see the promulgation of even more rules, including rules—like the subject energy code—that will ultimately have a chilling effect on economic development, commerce, and future business investment in Michigan.

What rational company would start or expand operations in Michigan when the company is subject to the whims of regulatory bodies that can insulate their own decisions from meaningful judicial review? It makes far more sense for a company to locate in a nearby state where the regulatory environment is more friendly or, at a minimum, more predictable. If an agency is free to ignore legislative standards for administrative rules, it is free to fashion whatever standards it finds to its liking, regardless of the impact on business or consistency with state law. The Court of Appeals’ decision is therefore bad business and bad public policy. And the Court of Appeals’ conclusion does not even follow if the MAPA is properly understood as an administrative system quite different than that Congress has adopted for federal agencies, or even the system the Legislature has adopted for contested case proceedings. *Post-Blank*, the only reasonable restraint on State agency authority is private litigation, a restraint that will quickly lose all effectiveness if citizens and businesses are denied the opportunity to supplement the

administrative record self-selected by the regulating agency. This Court should grant leave and reverse.

CONCLUSION

The voluminous briefing that the parties have filed in this case demonstrates that there are serious differences of opinion regarding the appropriate scope of judicial review when evaluating an agency's action in a non-contested case proceeding, such as a rule promulgation. Most significant, however, is the fact that Defendants and the Intervening Defendants do not contest that the questions presented are of sufficient significance to the public and State jurisprudence to warrant further review and a merits resolution in this Court. For all of these reasons, the MMA respectfully requests that this Court grant the Home Builders' Application for Leave to Appeal.

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