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STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System, Permit No. MN0071013 for the Proposed NorthMet Project, St. Louis County, Hoyt Lakes, Babbitt, Minnesota.

BRIEF OF AMICUS CURIAE THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 704 SUPPORTING PETITIONERS

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The American Federation of Government Employees Local 704 files this brief as amicus curiae under Rule 129 of the Minnesota Rules of Civil Appellate Procedure in support of relators.[1]

The American Federation of Government Employees (AFGE) is the largest federal employee union in the United States. It represents 700,000 federal and D.C. government workers nationwide and overseas. AFGE provides legal representation, legislative advocacy, technical expertise, and informational services for federal workers in virtually all functions of government. AFGE Local 704 is a chapter of AFGE based in Chicago.

This case concerns a foundational tenet of administrative law. When the government acts, it must follow the law and satisfy basic procedural safeguards. To make sure this happens, the Minnesota Administrative Procedure Act—like its counterparts in other states—requires a basic measure of transparency. This transparency is critical. Simply put, when a government agency acts in secret—or deliberately obscures its motives or reasoning—it becomes difficult to tell whether the agency's actions were lawful or fair. When

[1] No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity other than amicus curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

the government hides the ball, it undermines the "public accountability of administrative agencies," diminishes "public access to governmental information," frustrates "public participation in the formulation of administrative rules," and inhibits "the process of judicial review." Minn. Stat. § 14.001.

In 2019, AFGE Local 704 learned from an anonymous whistleblower that the Minnesota Pollution Control Agency (MPCA) pressured the Environmental Protection Agency (EPA) to suppress comments from EPA staff raising concerns about the permit for the PolyMet mine. (Add.144-48.) District court proceedings in this case vindicated the whistleblower's account. (Add.119-24.) In a highly irregular arrangement, MPCA convinced EPA's political leaders to withhold public comments expressing grave concerns about the PolyMet mine. (Add.060, 62-64.) Instead, EPA's comments were delivered to MPCA over the phone—and off the public record. (Add.071.) Contemporaneous notes and files documenting these calls were then destroyed. (Add.072.) This arrangement shielded MPCA from public scrutiny and obscured the real basis of its decision, frustrating meaningful judicial review.

AFGE Local 704 has an interest in the "fundamental commitment to making the operations of our public institutions open to the public." *Prairie Island Indian Cmty. v. Minn. Dep't of Pub. Safety*, 658 N.W.2d 876, 883–84 (Minn. App. 2003). As the representative of many employees who shape

administrative law, AFGE Local 704 has a deep and abiding interest in upholding the values of "public accountability of administrative agencies" and "public access to governmental information." Minn. Stat. § 14.001.

AFGE Local 704 supports the position of relators. The Court of Appeals' decision established a far-reaching precedent about the role of transparency in administrative law, the nature of the administrative record, the scope of judicial review, and the import of demonstrating prejudice stemming from agency misconduct.

In AFGE Local 704's view, the Court of Appeals' opinion runs contrary to foundational principles of administrative law. "[A] court reviewing an agency's decision 'must judge the propriety of [the agency] action solely by the grounds invoked by the agency.'" *Delta Air Lines, Inc. v. Export–Import Bank of United States*, 85 F.Supp.3d 387, 402 (D.C. Cir. 2015) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). To accomplish this function, "the grounds reviewed [must] appear in the administrative record." *Id.* (citing *Cmty. for Creative Non–Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990)). These are "fundamental rule[s] of administrative law." *Id.* Courts—like interested parties and members of the public—cannot meaningfully evaluate agency decision-making when the agency manipulates the administrative record and obscures the true reasons for its actions. The foregoing principles of administrative law do not allow "agencies to contrive a record that suppresses

information actually considered by decision-makers . . . information that might undercut the claimed rationale for the [agency's] decision." *Regents of Univ. of Cal. v. United States Dep't of Homeland Sec.*, No. C 17-05211, 2017 WL 4642324 at *5 (N.D. Cal. Oct. 17, 2017).

MPCA did not abide by these principles. By pressuring EPA to keep its comments off the record, MPCA impermissibly obscured the public record and improperly shielded itself from judicial scrutiny. In so doing, it undermined any reasonable belief that the agency was acting lawfully, transparently, or fairly. For these reasons, AFGE Local 704 urges this Court to grant the relief requested by relators.

ARGUMENT

I. ADMINISTRATIVE LAW IS BUILT TO PROMOTE TRANSPARENCY, FAIRNESS TO REGULATED ENTITIES, EVENHANDED AND DELIBERATE GOVERNMENT ACTION, AND DEMOCRATIC LEGITIMACY.

"Agency transparency is a cornerstone of administrative law." *Slater Steels Corp. v. United States*, 279 F.Supp.2d 1370, 1379 (Ct. Int'l Trade 2003). Transparency supports "political accountability of agency policy decisions" and allows "all potentially affected members of the public an opportunity to participate in the process of determining the rules that affect them." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.8, at 369, 372 (4th ed. 2002); *see generally* 1 Charles H. Koch, Jr., *Administrative Law & Practice* § 2.12, at 53

(2d ed. 1997). An open and transparent process also ensures that agency decisions are "tested via exposure to diverse public comment," promotes "fairness to affected parties," and gives "affected parties an opportunity to develop evidence in the record to support their objections . . . and thereby enhance the quality of judicial review." *Int'l Union, UMWA v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). These principles reinforce "democratic accountability": agencies . . . have political accountability because they are subject to the supervision of the [chief executive], who in turn answers to the public." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019); *see generally* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2251–52 (2001) ("[A]ccountability" is one of the "principal values that all models of administration must attempt to further."). Transparency ensures that the public can appreciate the reasons for the government's decisions and respond accordingly. *Id.*

The Minnesota legislature understood the importance of these values when it framed the Minnesota Administrative Procedure Act (MAPA). MAPA—like its counterparts in other states—seeks to bring administrative decision-making out of the smoke-filled room and into the sunlight. The rules and procedures embraced by MAPA reinforce "public accountability of administrative agencies," "public access to governmental information," "public

participation in the formulation of administrative rules," and "the process of judicial review." Minn. Stat. § 14.001.

II. FEDERAL EMPLOYEES HAVE AN INTEREST IN UPHOLDING THE VALUES OF ADMINISTRATIVE LAW.

Public employees who engage in the administrative process—including AFGE Local 704's members—have a unique interest in vindicating these values. The effectiveness of their work depends in large measure on the public legitimacy of the administrative process. And that legitimacy depends on the public's perception that an agency's views are based on evidence and communicated publicly in the normal course of business. In cases like this one, EPA is no ordinary commenter. EPA staff have a deep understanding of environmental impacts and safety concerns. The assessments of EPA staff members—communicated through public comments—can (and do) affect the trajectory of environmental projects. They can also impact EPA's role and decision-making process in enforcing federal environmental laws—including the Clean Water Act.

Framed from the opposite vantage point, when government agencies do not follow legitimate procedures, it undermines the mission of the agency and the work of its staff. These irregular procedures frustrate the work of the agency, diminish the public's trust in the work of the agency's staff, prejudice

the parties affected by the agency's action, and undermine political accountability.

III. MPCA VIOLATED MAPA WHEN IT SOUGHT THE BENEFIT OF EPA'S OFF-THE-RECORD COMMENTS WHILE TRYING TO SHIELD THOSE COMMENTS, AND MPCA'S REACTION TO THOSE COMMENTS, FROM PUBLIC SCRUTINY.

AFGE Local 704 agrees with relators that they are entitled to relief under MAPA because MPCA violated several principles of administrative law and as a result of those violations "the substantial rights of the petitioners may have been prejudiced." Minn. Stat. § 14.69.

Contrary to the Court of Appeals' holding, MAPA requires only a showing that relators "may have been prejudiced." *Id.* This is not an onerous standard. And it is significant that Minnesota's "may have been prejudiced" standard stands in contrast to the standard employed in a handful of states whose administrative procedure acts require actual prejudice. *See, e.g.*, Ark. Code Ann. § 25-15-212(h) (a court "may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced").

In amicus' view, relators have met their burden to show that they may have been prejudiced by MPCA's conduct. MPCA effectively shielded EPA's concerns about the PolyMet project from public scrutiny. Equally important, MPCA obscured its responses to EPA's concerns from the public record. As relators explain in their briefs to this Court, MPCA's conduct caused

downstream affects that simply cannot be cured without engaging in a new notice-and-comment process free from irregularities. Parties affected by MPCA's decision have been effectively robbed of the opportunity to react to MPCA's decision in real time and challenge the agency's action in view of the complete record—including EPA's comments. That is prejudicial (to say nothing of maybe prejudicial). MPCA's argument is tantamount to claiming that a boxing match is fair if you tie your opponent's hand behind his back—so long as you admit to the deed after the fact. Or that insider trading is harmless as long as the inside information is eventually disclosed. That is not how it works in real life. MPCA sought and received the benefit of EPA's comments while effectively depriving anyone else from receiving the same benefit—until after the decision to approve the PolyMet mine had been made. For opponents of MPCA's decision, this conduct caused substantial prejudice and harm.

Relators have also met their burden in showing that MPCA's actions were arbitrary, capricious, and procedurally unlawful. To start, MPCA's decision to approve the PolyMet mine was "made upon unlawful procedure." Minn. Stat. § 14.69(c). MPCA's conduct violated MAPA's requirements that agencies engage in a fair notice-and-comment process, respond to and address those comments, and create a complete and accurate administrative record supporting the agency's decision. *Id.* § 14.101, subd. 1. MPCA's procedural contortions also ran afoul of federal law. Before beginning the permitting

process, the Clean Water Act required MPCA to demonstrate to EPA that it had a fair permit procedure with a rigorous public comment period. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.22(c). MPCA obtained the right to issue these permits in Minnesota by promising EPA that MPCA would be a faithful steward of the public trust by providing for fair notice and comment. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.22(c). MPCA failed to hold up its end of this bargain. MPCA, through its irregular procedures, also ran afoul of the Clean Water Act in other ways. *See* 33 U.S.C. § 1251(e) (requiring public participation in notice-and-comment procedures).

What's more, MPCA's off-the-books arrangement with EPA rendered MPCA's decision arbitrary and capricious. Minn. Stat. § 14.69(f). An agency acts arbitrarily and capriciously when it does not adequately "disclose the basis" of its action. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962). Courts often look for the telltale signs: perhaps "the Government had submitted an incomplete administrative record" or the rationale for the agency's decision appears to be pretextual. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019). Here, MPCA acted arbitrarily and capriciously by failing to explain why it suppressed EPA's comments, how it responded to EPA's informal comments, if at all, and why it deviated from the norm of soliciting EPA's comments for major projects.

While amicus does not claim any special expertise in interpreting Minnesota law, it can provide this Court with critical context to frame its decision. What occurred here between MPCA and EPA was extraordinarily unusual—a stark deviation from the rules, norms, and policies surrounding environmental review.

In 2021, EPA's Office of the Inspector General released a report analyzing EPA's handling of MPCA's PolyMet permit. U.S. Environmental Protection Agency, Office of the Inspector General, Report No. 21-P-0122, *Hotline Report: Ensuring Clean and Safe Water* (Apr. 21, 2021) (hereinafter Report), available at https://www.epa.gov/sites/default/files/2021-04/documents/_epaoig_20210421-21-p-0122.pdf. The report makes clear just how dramatically EPA and MPCA deviated from their mutual legal obligations and operational norms.

First, EPA "did not follow its standard operating procedure for [National Pollutant Discharge Elimination System] permit reviews or common EPA practice when it decided to not convey comments in writing regarding its review of the draft PolyMet . . . permit." Report at 19-20.

Second, EPA's oral comments to MPCA "identified numerous substantive issues in the draft permit." *Id.* at 20. MPCA's "draft permit d[id] not include water quality based effluent limitations . . . as required by CWA § 402(b); 33 U.S.C. § 1342(b); and 40 C.F.R. §§ 122.4(d), 122.44, and

123.44(c)(1), (8)-(9)." Report at 21. Nor did MPCA's draft permit include "a restriction on discharge volume that is . . . equivalent to the annual net precipitation for the site"—a requirement of 40 C.F.R. Part 440, Subparts G, J, and K. The draft permit also allowed "de facto permit modifications that, in some instances, [we]re likely to be major modifications subject to 'the public process' associated with 'permit modifications under' 40 C.F.R. § 122.62." Report at 21. And MPCA's draft permit contained "'operating limits' on an internal outfall that [we]re not clearly enforceable by the EPA or the [MPCA] and, thus, may be ineffective at protecting water quality, per 40 C.F.R. §§ 122.4(a) and (d)." Report at 21 (cleaned up).

Third, MPCA failed to adequately address EPA's concerns that were raised in the agency's oral comments. Report at 21-22. EPA identified a dozen concerns that MPCA failed to address. *Id.* But "[d]espite . . . senior management's knowledge of the unaddressed . . . permit concerns, [EPA] chose to not exercise its oversight authority to ensure that all deficiencies in the PolyMet . . . permit were addressed." *Id.* at 22. This choice had serious consequences. "Per the memorandum of agreement between Minnesota and the EPA, if the concerns raised by an EPA objection were not satisfied, the EPA would then have had 'exclusive authority' to issue the permit." *Id.* Instead, MPCA's ignored EPA's concerns and issued the permit.

Last, EPA repeatedly ignored The Fond du Lac Band's request to make a "determination regarding whether the discharge at issue may affect the waters of the downstream state." *Id.* at 23. EPA "never made the determination, thereby precluding the tribe from formally raising and pursuing a potential objection, pursuant to CWA § 401(a)(2)." Report at 23.

In sum, EPA "management did not ensure that its comments were conveyed to Minnesota in a transparent and timely manner per the [agency']'s standard operating procedure, and the permit issued by the State did not address all of the EPA's concerns." Report at 24.

None of this was normal, and this Court need not pretend otherwise. In deciding the legal issues in this case, this Court should look to a "sometimes-forgotten guide": "common sense." *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015) (en banc). EPA employees tried to raise concerns about MPCA's draft permit. They did so as they do in every case: guided by the science, their experience and expertise, and the law. But the intense pressure to achieve a particular political outcome in this case caused MPCA and EPA's leadership to attempt to shield their conduct from public scrutiny, paper over the problems with the draft permit, and present an incomplete and false record to the public and the courts. The rule of law demands better of our government. This Court should reaffirm as much.

CONCLUSION

For the foregoing reasons, AFGE Local 704 asks this Court to grant the relief requested by relators.

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Respectfully submitted,

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CERTIFICATE OF DOCUMENT LENGTH

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3-c(1). The brief was prepared with proportional font, using Microsoft Word in Office 365, which reports that the brief contains 2,676 words, exclusive of the caption and signature block.

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