

Michigan Supreme Court Oral Argument Delivered by Legal Center Expert



NFIB Legal Center Senior Attorney, Patrick Moran delivered an oral argument on January 11, 2024, in the case *Michigan Farm Bureau, et al. v. EGLE*. The lawsuit concerns Michigan's Administrative Procedures Act (APA) and how the Michigan Department of Environment, Great Lakes, and Energy (EGLE) defines a "rule."

In his oral argument, Moran said that "the agency had no authority to promulgate a rule that changes the way that farmers do business, so instead, it changed the conditions on a permit to accomplish those same goals." He continues that, "[p]ermits are not exempt from the APA's definition of a rule. If something fits that definition, it has to go through rule making, even if it's called a permit."

Moran's oral argument can be viewed [here](#) at the 44:55 minute mark.

NFIB's legal center filed an amicus brief in this case, which can be read [here](#), and highlights two main points:

1. EGLE's actions violate the APA and undermine the separation of powers; and
2. Small businesses will suffer if agencies enact rules without following APA procedures.

If allowed to continue, the agency's actions will affect an estimated 81% of milk cows in Michigan, including meat and other farm products, as well as the grocery stores, restaurants, and other businesses that depend on stable food prices. NFIB proudly stood up for the small business owners who oppose illegal back-door regulation and want a say in the rulemaking process.



Media Mentions

October 3, 2023

[Washington Examiner](#)

Washington Examiner quotes Executive Director, Beth Milito regarding the Supreme Court weighing in on the funding of the Consumer Financial Protection Bureau (CFPB). Milito states, "Currently the CFPB is funded without Congressional oversight through the appropriations process, which is unconstitutional and leads to the Bureau overstepping its bounds."

November 20, 2023

[The Center Square](#)

The Center Square reported on NFIB's amicus brief filing in the case *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*. This case concerns the Administrative Procedure Act and business owners' rights to challenge unlawful agency regulations.

November 30, 2023

[Oregon Business Report](#)

Oregon Business Report references the Legal Center's amicus brief in the case *Sheetz v. County of El Dorado*. The brief asks the court to "clarify that the unconstitutional doctrine protects citizens from uncompensated takings, regardless of what branch of government makes them."

January 10, 2024

[SHRM](#)

SHRM quotes Executive Director Beth Milito, while discussing the Department of Labor's (DOL) new independent contractor classification rule. Milito states, "[DOL] intends to further complicate an already-confusing classification process for small business owners" and that the multifactor test "will lead to more frequent worker misclassifications and frivolous lawsuits."

January 18, 2024

[Small Business Trends](#)

Small Business Trends also quotes Beth Milito regarding DOL's new independent contractor classification rule: "Changing yet again the standards that determine whether a worker is an independent contractor will result in the confusion and risk of misclassification that the DOL claims it is trying to alleviate."



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The NFIB Small Business Legal Center, a 501(c)(3) public interest law firm, protects the rights of America's small business owners by serving as the voice of small business in the courts and the legal resource for small business owners nationwide. It is not a legal defense fund for small business, but a legal tool to affect precedent-setting legal decisions that will influence small business' bottom line.



The Brief

Winter 2024



What's All the Fuss About Loper Bright?

Loper Bright Enterprises v. Gina Raimondo is perhaps the most discussed case before the U.S. Supreme Court this term. The case questions whether the Court should overturn *Chevron v. Natural Resources Defense Council*, a 1984 case requiring courts to defer to an executive agency's legal interpretation where a law is unclear or silent.

But why should small businesses care about how courts treat an agency's understanding of the law?

The facts of *Loper Bright* easily illustrate the problem. A federal law requires fishing boats to allow federal inspectors (called "monitors") onboard their vessels. However, an executive agency, the National Marine Fisheries Service (NMFS), created a rule that would force a fisherman to not only allow a monitor on his boat, but also to pay the monitor's salary. The law doesn't give the agency the authority to do this, but the agency decided to do it

anyway. If the Supreme Court followed *Chevron*, it would have to rubber-stamp the agency's decision—a decision that is unlawful and takes money from the pockets of small business owners.

The situation in this case is far from unique. *Chevron* has been cited in over 18,000 different court decisions—not to mention the tens of thousands of other documents and publications that refer to it. Agencies invoke *Chevron* constantly to avoid judicial oversight and to accomplish their policy goals.

Many of the nation's critical policy decisions are made by unelected bureaucrats in agencies, instead of our elected officials in Congress. This was the case long before *Chevron*, and it will remain a difficult problem to solve in the years to come. However, *Chevron* makes this arrangement even worse by tying judges' hands, preventing them from acting as a check on the executive branch. Instead of holding

agencies accountable, judges are forced to approve their unreasonable interpretations and illegal actions.

The harm to small businesses is immense. *Chevron* deference has allowed agencies to run roughshod over the Constitution, leaving small businesses that struggle under overbearing regulations to pick up the tab. But *Loper Bright* aims to retire *Chevron* and return balance to our government, as the Framers of the Constitution intended.

The NFIB Legal Center has been involved in *Loper Bright* since it first made its way to the Supreme Court, first filing an [amicus brief](#) asking the Court to take the case, and filing [another brief](#) last year after the Court decided to hear the case. A victory in *Loper Bright* would mean that judges can rein in executive agencies, protecting small business owners from half-baked legal arguments and bureaucratic government overreach.

Keep up with our work at: [NFIB.com/legal](#)
Don't forget to check out our Facebook page.

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Together We Brought the Voice of Small Business to Dozens of Courts and Expanded Member Support in 2023

Thanks to your generous support, the NFIB Small Business Legal Center can count 2023 as one of our most influential and busiest years. Our 44 cases included a new lawsuit brought on behalf of NFIB, 34 briefs filed in federal courts, and filings in over 10 state courts. Cases included: challenges to burdensome federal regulations, efforts to halt increased small business liability, a challenge to federal taxing authority, and lawsuits to protect small business' property rights.

In addition to our full caseload, I had the opportunity to testify twice before Congress. In a hearing before the U.S. House of Representatives Committee on Education and Workforce, I testified about the negative impact that the U.S. Department of Labor's regulations are having on small businesses. I also testified before the U.S. Senate Committee on Finance about the impact of paid leave mandates on small business. In both hearings I was able to highlight the Legal Center's 2023 scholarly paper [The Regulatory Flexibility Act: Turning a Turning a Paper Tiger into a Legitimate Constraint on Agency Rulemaking](#). The paper, authored by Legal Center attorney Rob Smith, calls attention to the fact that federal agencies fail to protect small businesses from one-size-fits-all regulations. The Legal Center's litigation demonstrates repeatedly that small businesses would benefit from congressional action to protect small business from overzealous regulators.

On the educational front, we launched a successful campaign to inform small business owners about the new Beneficial Ownership Information (BOI) Reporting Rule (you can read more about that rule on page 3). And we completed work on our latest compliance handbook, [NFIB's Credit Card Chargeback Guide](#), which adds to our library of helpful tools for small businesses. We also continued our monthly webinar series, and our Support Line handled over 800 small business inquiries.

Finally, the Legal Center appeared in media articles nationwide throughout the year.

Although we are proud of our accomplishments in 2023, we will intensify our fight for small business in 2024. Thanks to your contributions, we will be able to bring the voice of small business to even more courts. We will also be able to increase our small business "legal toolbox" so that you can spend more time running your business and less time worrying about costly regulations and unwarranted legal hassles.

Thank you again for your ongoing and generous support.

Elizabeth Milito
Executive Director, NFIB Small Business Legal Center

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New Labor Rules

Business owners should be aware of two recent labor rules that will alter the standard for businesses to be considered "joint employers," and that will change how businesses classify independent contractors.

The Joint Employer Rule

In November 2023, the National Labor Relations Board (NLRB) issued a [rule](#) that changes the standard for determining whether two businesses are "joint employers" under the National Labor Relations Act (NLRA). NFIB [filed comments](#) opposing the new rule.

The rule states that a business, other than the main employer, will be considered a joint employer if it has any authority to control the following employment terms:

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. The assignment of duties to be performed;
4. The supervision of the performance of duties;
5. Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
6. The tenure of employment, including hiring and discharge; and
7. Working conditions related to the safety and health of employees.

While the previous rule required the third party to directly exercise authority over these employment terms, all that's required to define a business as a joint employer under the new rule is to indirectly use or even just possess such authority.

If two businesses are joint employers, both must bargain with the union that represents the jointly employed workers, both are liable for unfair labor practices, and both are subject to union picketing during a labor dispute.

To learn more about the Joint Employer rule, visit NLRB's [site](#).

The Independent Contractor Rule

In January 2024, the Department of Labor (DOL) issued a [rule](#) that changes the way businesses classify independent contractors. NFIB [opposed](#) this rule, arguing that businesses need a straightforward standard for classifying workers that reduces the risk of misclassification.

DOL's previous rule gave businesses a simple test for distinguishing an independent contractor from an

employee—mostly hinging on the worker's degree of control over his or her work, and the worker's opportunity for profit or loss.

However, DOL chose to depart from this test, and will apply a "totality-of-the-circumstances" analysis instead. The new rule introduces six factors that are each weighed equally:

1. Opportunity for profit or loss depending on managerial skill;
2. Investments by the worker and the employer;
3. Permanence of the work relationship;
4. Nature and degree of control;
5. Whether the work performed is integral to the employer's business; and
6. Skill and initiative.

This test will make it significantly more difficult for businesses to distinguish an employee from an independent contractor. If workers who were classified as independent contractors under the previous rule are classified as employees under this rule, a small business owner will have to pay these workers minimum wage and overtime.

With these additional burdens goes an increased risk of legal liability for unpaid overtime and other damages.

To learn more about the Independent Contractor rule, review [DOL's Fact Sheet](#).

NFIB Can Help

If you have any questions about the new rules, please contact the Small Business Legal Center at info@nfib.org.

Beneficial Ownership Reporting - Free Webinar for Small Businesses

Did you know that as of January 1, 2024, more than 32 million businesses are now required to report information to a new federal database?

The rule issued by the Financial Crimes Enforcement Network (FinCEN) requires covered small businesses to report beneficial ownership information (BOI). This rule affects a broad spectrum of small businesses, which is why the Small Business Legal Center wants to make sure that you understand what the law means for covered small businesses.

NFIB hosted a free webinar on January 17, 2024, presented by Wolters Kluwer CT Corporation. The webinar is available [on demand](#). We encourage you to view the webinar and our BOI Fact Sheet.

NFIB members with BOI questions can also reach out to the Small Business Legal Center by emailing william.klepp@nfib.org or calling (800) 552-NFIB.