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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Michael J. Riordan, Stephen L. Borrello, Mark T. Boonstra

DANA NESSEL, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, *ex rel* The People of the State of Michigan,

Plaintiff-Appellant,

v

ELI LILLY AND COMPANY,

Defendant-Appellee.

Supreme Court No. 165961

Court of Appeals No. 362272

Ingham Circuit Court No. 2022-000058-CZ

BRIEF ON APPEAL OF APPELLANT ATTORNEY GENERAL

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STATEMENT OF JURISDICTION

In July 2022 the Ingham County Circuit Court issued a final order granting Defendant-Appellee Eli Lilly and Company's (Lilly) motion for summary disposition and dismissing the declaratory judgment action brought by Plaintiff-Appellant Dana Nessel as Attorney General for the People of the State of Michigan (Attorney General). Following a timely appeal, the Court of Appeals affirmed the Circuit Court's dismissal through an unpublished opinion issued on June 22, 2023. The Attorney General filed a timely application for leave with this Court. See MCR 7.305(C)(2). In an order dated April 4, 2025, this Court granted leave to appeal. This Court has jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

1. A plaintiff's complaint is sufficient to confer jurisdiction over a request for declaratory relief when the pleader establishes a controversy regarding the applicability of a statutory exemption from liability. Here, the Attorney General alleged she had filed a circuit court petition demonstrating sufficient probable cause to obtain authority to investigate Lilly, to which investigation the statutory exemption's validity was relevant. Was the Attorney General pleading sufficient to confer jurisdiction on the circuit court to adjudicate whether the statutory exemption applies—regardless of whether she alleged an MCPA violation?

   Appellant's answer: Yes

   Appellee's answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

2. Although one can imagine hypothetical scenarios in which a court cannot determine the applicability of § 4's exemption until the Attorney General conducts an investigation under § 7, the Attorney General concedes that, in this case, § 4—as presently construed—applies and precludes her from exercising her authority under the MCPA. A decision from this Court correcting its prior construction of the exemption will permit her to exercise that authority. As both parties agree the Attorney General's complaint invokes a live, actual controversy, was the Attorney General required to also plead an MCPA violation as a prerequisite to a court adjudicating that controversy?

   Appellant's answer: No.

   Appellee's answer: Probably yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

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3. The MCPA exempts only "[a] transaction or conduct *specifically authorized* under laws administered by a regulatory board or officer acting under statutory authority," the plain language of which applies only to a singular transaction or instance of conduct that enjoys distinct regulatory approval. But two of this Court's opinions rewrote the exemption to apply to "general" types of transactions that are "authorized" by, e.g., a licensing scheme—leaving the term "specifically" without meaning. Should this Court restore the statutory exemption to its proper, narrow meaning?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

4. A three-part balancing tests examines whether *stare decisis* justifies maintaining an erroneous decision, considering (1) whether the decision defies practical workability, (2) whether reliance interests would work an undue hardship if the decision were overturned, and (3) whether changes in the law or facts no longer justify the decision. Applied here, this balancing test shows that *stare decisis* should yield to an overwhelming need to correct the errors in this Court's decisions interpreting § 4(1)(a) of the MCPA. Should this Court reverse those decisions?

   Appellant's answer: Yes

   Appellee'ss' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

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STATUTES AND RULES INVOLVED

MCL 445.904(1)–(2) provides:

> (1) This act does not apply to either of the following:
>
> > (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.
> >
> > (b) An act done by the publisher, owner, agent, or employee of a newspaper, periodical, directory, radio or television station, or other communications medium in the publication or dissemination of an advertisement unless the publisher, owner, agent, or employee knows or, under the circumstances, reasonably should know of the false, misleading, or deceptive character of the advertisement or has a direct financial interest in the sale or distribution of the advertised goods, property, or service.
>
> (2) Except for the purposes of an action filed by a person under section 11, this act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by any of the following:
>
> > (a) The banking code of 1999, 1999 PA 276, MCL 487.11101 to 487.15105.
> >
> > (b) 1939 PA 3, MCL 460.1 to 460.11.
> >
> > (c) The motor carrier act, 1933 PA 254, MCL 475.1 to 479.43.
> >
> > (d) The savings bank act, 1996 PA 354, MCL 487.3101 to 487.3804.
> >
> > (e) The credit union act, 2003 PA 215, MCL 490.101 to 490.601.

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MCL 445.907(1) provides:

> (1) Upon the ex parte application of the attorney general to the circuit court in the county where the defendant is established or conducts business or, if the defendant is not established in this state, in Ingham county, the circuit court, if it finds probable cause to believe a person has engaged, is engaging, or is about to engage in a method, act, or practice which is unlawful under this act, may, after an ex parte hearing, issue a subpoena compelling a person to appear before the attorney general and answer under oath questions relating to an alleged violation of this act. A person served with a subpoena may be accompanied by counsel when he appears before the attorney general. The subpoena may compel a person to produce the books, records, papers, documents, or things relating to an alleged violation of this act. During the examination of documentary material under the subpoena, the court may require a person having knowledge of the documentary material or the matters contained therein to attend and give testimony under oath or acknowledgment with respect to the documentary material.

MCR 2.605 provides:

> (A) Power to Enter Declaratory Judgment.
>
>> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>>
>> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.
>
> (B) Procedure. The procedure for obtaining declaratory relief is in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in the constitution, statutes, and court rules of the State of Michigan.
>
> (C) Other Adequate Remedy. The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case.

(D) Hearing. The court may order a speedy hearing of an action for declaratory relief and may advance it on the calendar.

(E) Effect; Review. Declaratory judgments have the force and effect of, and are reviewable as, final judgments.

(F) Other Relief. Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment.

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INTRODUCTION

For twenty-three years, the Michigan Consumer Protection Act stood as a bulwark against unfair and deceptive business practices in nearly every field affecting Michigan consumers. Only transactions or conduct "specifically authorized" by law were exempt from MCPA liability. This reflected a principle of fundamental fairness: One whose conduct has been *specifically* sanctioned by the State should not need to worry about liability under a more *general* statute.

That changed when this Court issued *Smith v Globe Life Insurance Company*, 460 Mich 446 (1999), and *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007). In those cases, this Court broadened the MCPA's narrow exemption for "specifically authorized" transactions or conduct to permit the exemption to apply whenever the "*general* transaction" was "specifically authorized." This Court *explicitly* inserted the word "general" into the statute, and it implicitly deleted the word "specifically." Thus, for over two decades, a business's mere operation within a regulated field has been sufficient to trigger the exemption, neutering the MCPA and leaving countless consumers without recourse to the statute plainly intended to protect them.

It is high time to revisit and overrule *Smith* and *Liss*. And this case's procedural posture, which originates in a request for declaratory relief at the investigative stage, presents an appropriate controversy for doing so now. The Attorney General agrees that the exemption, if applied as misconstrued by *Smith* and *Liss*, would require dismissing the complaint, which therefore provides jurisdiction in the circuit court to adjudicate this live controversy. This Court should reverse and grant declaratory relief to the Attorney General.

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STATEMENT OF FACTS AND PROCEEDINGS

A. The Attorney General's Complaint and proposed investigation implicate diabetes and the insulin pricing problem.

According to the Centers for Disease Control, over 38 million Americans have diabetes and face its devastating consequences.[1] In Michigan, approximately 964,964 people have diabetes and over 2,701,000 are confronting prediabetes.[2] On January 25, 2022, the Attorney General made two separate but related filings in the Ingham County Circuit Court. The primary filing was a Petition for Civil Investigative Subpoenas. (App'x pp 003–035.) Through the Petition, the Attorney General presented evidence in support of a proposed investigation of Lilly under the Michigan Consumer Protection Act (MCPA.) Such filings are anticipated by MCL 445.907. The proposed investigation related to Lilly's sale and marketing of insulin medications, which are used to treat diabetes.

The other filing was the Attorney General's Complaint for Declaratory Judgment. (App'x pp 036–044.) Through the Complaint, the Attorney General sought a declaratory judgment that her investigation of Lilly may proceed and is not barred by the exemption applying to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). The

[1] Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *National Diabetes Statistics Report 2024* (May 15, 2024), https://www.cdc.gov/diabetes/php/data-research/index.html (accessed May 29, 2025).

[2] American Diabetes Association, The Burden of Diabetes in Michigan (March 2023), https://diabetes.org/sites/default/files/2023-09/ADV_2023_State_Fact_sheets_all_rev_Michigan.pdf (accessed May 29, 2025).

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Attorney General asserted this declaratory judgment is needed because two wrongly decided opinions of this Court have created a likelihood that Lilly would raise this exemption in any subsequent litigation arising from such investigation. (App'x p 042.)

Lilly is one of three pharmaceutical companies making up nearly the entire U.S. insulin market.[3] The insulin medications it manufactures include Basaglar, Humalog, and its authorized generic Lispro, which are insulin "analogs" that more closely replicate normal insulin patterns in the body and, due to their convenience, resulted in a great number of patients using these analogs.[4]

Unfortunately, cost is a significant barrier for patients to access these critical medications and, over the past two decades, the prices for analog insulin products in the United States have skyrocketed. According to a study from the RAND Corporation, insulin prices are more than eight times higher in the United States than in 32 high-income comparison nations combined.[5]

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[3] *Insulin Access and Affordability Working Group: Conclusions and Recommendations*, June 2018, https://care.diabetesjournals.org/content/41/6/1299 (accessed May 14, 2025).

[4] Johnson, *Insulin Products and the Cost of Diabetes Treatment*, Congressional Research Service (Nov 19, 2018), available at https://fas.org/sgp/crs/misc/IF11026.pdf (accessed May 14, 2025).

[5] Andrew W. Mulcahy, Daniel Schwam, & Nathaniel Edenfield, *Comparing Insulin Prices in the United States to Other Countries Results from a Price Index Analysis*, RAND Corporation (Nov 2020) available at https://www.rand.org/content/dam/rand/pubs/research_reports/RRA700/RRA788-1/RAND_RRA788-1.pdf> (accessed May 14, 2025).

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The skyrocketing prices have garnered the attention of federal lawmakers. In 2019, following its investigation of over 100,000 documents provided by the three major insulin manufacturers, the United States Senate Finance Committee issued a written report detailing the insulin pricing problem and factors contributing to it. While noting the role pharmacy benefit managers (PBMs) have played, the Committee concluded "pharmaceutical manufacturers have complete control over setting the list price (the Wholesale Acquisition cost) (WAC)) for their products."[6]

Thus, the prices Lilly charges for Humalog, Lispro, and Basaglar are determined by Lilly. So, too, are the representations Lilly makes about the reasons for the pricing and discounts it offers in connection with the sale of these medications. (App'x p 040.) As of the Petition filing date, the list prices for these medications in the United States were as follows:

a. Humalog U100 (5-pack of KwikPens): $530.40

b. Humalog U100 (10 mL vial): $274.70;

c. Humalog Mix 50/50 KwikPens: $568.00;

d. Insulin Lispro (5-pack of KwikPens): $159.12;

e. Insulin Lispro (10 mL vial): $82.41;

f. Basaglar (5-pack of KwikPens): $326.36.

[App'x pp 027–028.]

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[6] Charles E. Grassley & Ron Wyden, *Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug*, U.S. Senate Finance Comm. Staff Report (Jan. 2021), p 5, available at https://www.finance.senate.gov/download/grassley-wyden-insulin-report (accessed May 29, 2025).

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As the Attorney General was preparing her Application, Lilly announced that it would be lowering the list prices on some forms of Humalog and Basaglar, effective October 1, 2023, and a reduction in the list price for Lispro effective May 1, 2023. The list price for the ten-milliliter vial of Lispro has purportedly been reduced to $25.00.[7] However, a report issued by interested members of the United States Senate found that nearly half of the hundreds of pharmacies surveyed did not stock Lispro, but over 79% reported stocking the more expensive brand name Humalog.[8] The report further stated that the average Lispro price for uninsured patients was $97.51, nearly four times as high as the $25.00 price announced by Lilly.[9] Several pharmacies reported charging over $200.00 for Lispro.[10]

As acknowledged at a website Lilly uses to tell the public about Humalog pricing, determining how much an average diabetic will pay each month is difficult because "Insulin needs vary significantly from person to person, some take only 5

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[7] Eli Lilly, *Lilly Cuts Insulin Prices by 70% and Caps Patient Insulin Out-of-Pocket Costs at $35 Per Month* (March 1, 2023), available at https://investor.lilly.com/news-releases/news-release-details/lilly-cuts-insulin-prices-70-and-caps-patient-insulin-out-pocket (accessed May 14, 2025).

[8] Elizabeth Warren, Richard Blumenthal, & Raphael Warnock, *Unaffordable Insulin: Uninsured Americans Still Face High Costs at the Pharmacy Counter for Eli Lilly's Generic Insulin*, p 1 (2023), available at https://www.warren.senate.gov/imo/media/doc/Report%20on%20Insulin%20for%20Uninsured%20Patients%20-%2007.12.2023%20(updated)1.pdf (accessed May 14, 2025).

[9] *Id.*

[10] *Id.*

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units per meal while others take over 100 units per meal."[11] The website explains that the "list price of a 5-pack of 3 mL Humalog U-100 KwikPens (15 mL or 1,500 units) is $530.40." So, as an example (albeit one relating to a rare diabetic at the high end of Lilly's spectrum), a consumer using 100 units per meal will need 9000 units per month (300 units per day times thirty days). This would require purchase of six packages of the Humalog 5-packs.

Among the exhibits to the Petition, the Attorney General included an affidavit from an analyst describing two telephonic pricing surveys. In August 2019, the Attorney General conducted a telephone survey comparing the price of Lilly products Humalog and Basaglar offered at pharmacies, located within just a few miles of each other, at four different border crossing points between Michigan and the Canadian province of Ontario. (App'x 025–027.) The price differentials were significant. For example, Humalog was 855% more expensive to buy in Michigan than across the border. (*Id.*) Similarly, Basaglar, a long-acting insulin often used in conjunction with Humalog, was 471% more expensive to purchase in the American pharmacies than their Canadian counterparts. (*Id.*)

The Attorney General repeated the survey in February 2021, and found Michiganders continued to be charged grossly excessive prices compared to Canadian consumers. (Appx' p 026.)

[11] The Attorney General preserved this information and presented it to the Circuit Court through an affidavit attached to her reply in support of motion for summary disposition. (App'x pp 102–112.)

Through the Petition, the Attorney General asserted there is probable cause to believe Lilly has engaged—and continues to engage—in unfair trade practices related to its sales in Michigan of the insulin medications Humalog, Lispro, and Basaglar. (App'x pp 039–040.) Specifically, regarding all three medications, the Attorney General presented probable cause to believe Lilly has charged prices grossly in excess of the price at which similar medications have been, and are being, sold. See MCL 445.903(1)(z).

Besides the gross disparity between the Lilly prices for the same medications to Michigan and Canadian consumers, the Attorney General observed the gross disparity in the pricing for Humalog and Lispro, which are actually the same medication being sold under different names. (App'x p 028.) And, with respect to Lispro, the Attorney General presented probable cause to believe Lilly's representations about the reasons for offering this medication at a discounted price are misleading. (App'x p 040.) See MCL 445.903(1)(i). This latter contention was supported by the information contained in paragraphs 43–50 of the Petition, and it includes an observation in a bi-partisan report by United States Senators Elizabeth Warren and Blumenthal that (referring to Lilly's Lispro) "[i]ts authorized generic, rather than expanding access to low cost insulin, appears instead to be a public relations move intended to ease scrutiny on the rising price of insulin."[12]

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[12] See U.S. Senator Elizabeth Warren & U.S. Senator Richard Blumenthal, *Inaccessible Insulin: The Broken Promise of Eli Lilly's Authorized Generic*, p 6 (Dec 2019), available at https://www.warren.senate.gov/imo/media/doc/Inaccessible%20Insulin%20report.pdf (accessed May 29, 2025).

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B. Procedural History

On January 26, 2022, the Ingham County Circuit Court entered an order finding there is probable cause to believe Lilly is violating the MCPA, and authorizing the Attorney General to issues subpoenas in furtherance of the proposed investigation. (App'x pp 045–046.) In early March 2022, Lilly filed a motion to stay in the investigative case file. (App'x pp 171–195.) Through that motion, Lilly asserted that the Attorney General's investigation was ultra vires in light of the *Smith* and *Liss* decisions. Lilly explained that it would be pursuing clarity on this point as the sole and dispositive question through the declaratory judgment action response. And it asked the Circuit Court to "stay all proceedings in this action, including issuance of any subpoenas, until the dispositive legal question of the MCPA's scope is resolved in the Attorney General's pending declaratory judgment action. Doing so will help avoid duplicative proceedings; unnecessary burdens on the parties, third parties, and Court; and the potential need to litigate other defenses and objections." (App'x p 173.)

Following Lilly's filing of this motion, Lilly and the Attorney General stipulated to hold the issuance of subpoenas to Lilly in abeyance pending resolution of the *Smith* and *Liss* issue through the declaratory judgment action. (App'x pp 196–199.) By this time, subpoenas had already been issued to Express Scripts—a PBM highlighted in the Petition as having lauded Lilly's introduction of Lispro, only to later enter into an agreement with Lilly to exclude that drug from its formularies. So, the Attorney General entered into a stipulation for stay in which

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Express Scripts said that the *Smith* and *Liss* issue would be included among the bases on which it would seek to quash the subpoenas.

Meanwhile, Lilly moved for summary dismissal of the Complaint, raising as its principal defense that its transactions and conduct fall within the MCPA's exemption under the *Smith* and *Liss* decisions. The Attorney General filed a cross-motion for summary disposition, and on July 20, 2022, the Ingham County Circuit Court found in favor of Lilly, ruling that Lilly is exempt from the MCPA under *Smith* and *Liss* and dismissing the Attorney General's action. The Attorney General filed a bypass application to this Court while concurrently pursuing her appeal of right in the Court of Appeals. Although it denied the bypass application, this Court instructed the Court of Appeals to expedite its review. *Attorney General v Eli Lilly & Co*, 510 Mich 1121 (2022).

As it was required to do, the Court of Appeals affirmed the Circuit Court's grant of summary disposition. It did so by first acknowledging the rule flowing from *Smith* and *Liss*: "Simply put, the Court in Smith and Liss concluded that if a general category of conduct or a general transaction is specifically authorized by law, the § 4(1)(a) exemption applies, even if the granular transaction or conduct might otherwise be improper." (App'x p 144.)

From there, the Court of Appeals described the Circuit Court dismissal in a framing that illustrates how *Smith* and *Liss* have effectively re-written § 4(1)(a) to turn "specifically authorized" into just "authorized": "[D]efendant was authorized

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by law to manufacture and sell insulin. Thus, the trial court granted defendant's motion for summary disposition and dismissed the case." *Id.*

To the extent the Court of Appeals may have recognized the statutory re-write, it expressly declined the Attorney General's invitation to say so. It simply affirmed the dismissal, leaving the important work to this Court and noting, " 'It is the duty of the Supreme Court to overrule or modify [its] caselaw . . . , and the Court of Appeals and the lower courts are bound by the precedent established by the Supreme Court until it takes such action.' " *Id.*, quoting *People v Metamora Water Serv, Inc*, 276 Mich App 376, 387–388 (2007).

The Attorney General timely applied for leave to appeal on August 3, 2023. Oral argument on the application was held on October 10, 2024, and this Court ordered a round of supplemental briefing on January 24, 2025. This Court ultimately granted the Attorney General's application for leave to appeal on April 4, 2025. *Attorney General v Eli Lilly & Co*, 18 NW3d 513 (2025) (Mem.).

SUMMARY OF ARGUMENT

As framed by this Court, there are two related, threshold questions presented: "(1) whether the [Attorney General] adequately pled a claim that the defendant violated the [MCPA]"; and "(2) whether it is necessary for the plaintiff to adequately plead a violation of the MCPA for a court to determine whether MCL 445.904(1)(a), an exemption to the MCPA, applies." 18 NW3d 513.

For the reasons that follow, the answer to the first question remains as stated in the Attorney General's February 21, 2025, supplemental brief: The

Attorney General did not need to plead that the MCPA was "violated" to confer jurisdiction on the circuit court. The answer to the second question is no, but the Attorney General hastens to add that this does not mean a pleaded violation is necessary to apply the exemption in every case. Such evaluations must be done on a case-by-case basis. Although one can envision a case in which an investigation under § 7 of the MCPA is necessary to elucidate whether the exemption in § 4 applies (however it is construed), that is not true here. The Attorney General agrees that the exemption—as misconstrued in prior case law—does apply to these facts. The controversy here implicates only whether that exemption is a bar to further proceedings under a proper interpretation of the statutory exemption.

ARGUMENT

I. The Attorney General adequately and properly pleaded her claim for a declaratory judgment in connection with a violation of the MCPA.

The declaratory judgment rule requires a case of actual controversy, and not necessarily a companion claim alleging a violation of the MCPA or other law. Here, an actual controversy exists between the Attorney General and Lilly arising from the investigative proceeding still pending in the same circuit court in which the declaratory judgment action was filed as a companion case.

A. Standard of Review

The interpretation of statutes and court rules are questions of law this Court reviews de novo. *In re Sanders*, 495 Mich 394, 404 (2014). Whether the allegations in a complaint are sufficient to confer jurisdiction on a circuit court is likewise a

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question of law reviewed de novo. *Henry v Laborers' Local 1191*, 495 Mich 260, 273 (2014).

B. Analysis

This Court's April 4, 2025 Order asks first whether the Attorney General's action for declaratory relief adequately pleaded a violation of the MCPA as against Lilly. A court of record cannot apply § 4 without a pleading alleging, at a minimum, a "case or controversy" implicating Lilly's exposure to liability under the MCPA. But a plaintiff need not bring a freestanding claim concluding that a defendant violated the MCPA before jurisdiction can vest in a court to determine whether § 4's exemption applies. Rather, it is sufficient to plead facts that, if believed, would render a defendant subject to any part of the MCPA (but for the exemption). That occurred here, vesting jurisdiction in the circuit court.

1. The Attorney General's complaint was filed in an investigative context.

If the Attorney General has probable cause to believe an unfair trade practice has occurred, her decision to address a suspected violation can proceed in two sequential stages where, as here, she would benefit from additional information before proceeding to enforcement. (This benefits potential defendants, too, as their productions may be exculpatory and relieve them of the burden of defending against an enforcement action.) Pursuant to MCL 445.907, the Attorney General may file an *ex parte* application for investigative authority, which requires her to establish probable cause to believe a party has engaged in an act, method, or practice made

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unlawful by the MCPA. Upon such a showing, the circuit court authorizes the investigation, and the Attorney General may compel production of evidence "relating to an alleged violation" of the MCPA. MCL 445.907(1).

In other words, the plain language of § 7 does not require the Attorney General to bring an enforcement action, but instead allows the Attorney General to present evidence that a party has done something generally prohibited as a basis for exploring MCPA violations that may be pursued in a subsequent suit. Indeed, the statute explicitly distinguishes between "an investigation under this section," i.e., MCL 445.907, and a later-filed "enforcement action brought pursuant to [the MCPA]" under §§ 5 10, or 11. And when § 4's exemption applies, it applies to any of these proceedings. See MCL 445.904(1) ("*This act* does not apply to either of the following: . . ." (emphasis added).)

Here, the Attorney General filed the operative complaint contemporaneous with her application for authority to commence an investigation under MCL 445.907. (See Compl ¶ 12, Appellant's App'x p 039.) Consistent with the complaint's existence in the investigative context, the Attorney General presented probable cause to believe that Lilly had engaged in unfair trade practices identified within the MCPA. (*Id.* ¶¶ 13–14, Appellant's App'x pp 039–040.) And the Attorney General explained her order of operations in the complaint, stating that she "seeks a declaratory judgment that the MCPA applies to the conduct she seeks to explore in the Petition," and that, "[r]ather than have this Court authorize the issuance of subpoenas *ex parte* only to have Lilly then raise this issue through a motion to

quash, the Attorney General seeks to resolve this controversy at the inception of this investigation." (*Id.* ¶¶ 28, 24, Appellant's App'x p 043.) Validating the premise underlying the Attorney General's declaratory judgment action, Lilly then filed a motion in the investigative case file that remains held in abeyance pending this Court's resolution of the substantive question related to *Smith* and *Liss* raised by both parties below. (Appellant's App'x p 155.)

Thus, the controversy at bar comprises whether the Attorney General's *investigation* into Lilly for unfair trade practices—which the Legislature contemplated would occur separate from, and prior to, an enforcement action seeking relief from MCPA violations—would be productive or, instead, pointless. No alleged MCPA "violation" was required to bring this controversy to the fore; rather, it could readily have arisen in the investigative context, e.g., in a motion to quash subpoenas issued under MCL 445.907 or—as Lilly has actually done—through a motion to halt the Attorney General's investigation at the starting block as *ultra vires*.

It is irrelevant whether a controversy could also have arisen in a lawsuit alleging MCPA violations outright, because the declaratory judgment rule is designed as a tool to be used to efficiently resolve such actual controversies even before such claims are presented. And, notably, resolution of this controversy affects not only the Attorney General, but Lilly as an adverse party, as well as third parties obligated to respond to subpoenas issued under MCL 445.907.

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2. The declaratory-judgment standard contemplates jurisdiction in the circuit court based upon the underlying controversy, not the existence of a separately pleaded claim.

The declaratory judgment rule, MCR 2.605, permits a court of record to exercise jurisdiction over a request for declaratory relief when the subject matter of that controversy would be within the court's jurisdiction. This is true even when non-declaratory relief is unavailable. Indeed, if a plaintiff seeking declaratory relief needed to also plead a freestanding claim, declaratory relief's purpose in guiding parties' *future* conduct would be frustrated.

"[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010). Rule 2.605 states these requirements plainly: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). "[T]he essential requirement of the term 'actual controversy' under the rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing Sch Ed Ass'n*, 487 Mich at 372 n 20 (quotation and citations omitted).

The key allegation, therefore, comprises an actual controversy within the court's jurisdiction, the resolution of which would provide an identifiable benefit to the parties—regardless of whether the suit framing the request includes other claims that may be the basis for substantive relief.

"The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Shavers v Attorney General*, 402 Mich 554, 588 (1978). The rule enables parties "to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds[.]" *Van Buren Charter Twp v Visteon Corp*, 503 Mich 960, 923 NW2d 266, 269 (2019) (Mem.) (Viviano, J, dissenting), quoting *Merkel v Long*, 368 Mich 1, 13 (1962). Stated differently, an " 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers*, 402 Mich at 588 (1978). "[P]robably one of the most useful functions of the declaratory judgment in preventing litigation lies in the fact that it enables parties to obtain in case of doubt and in advance of the necessity of acting upon their own interpretation of their obligations, with the resulting invitation of a lawsuit, an authoritative judicial interpretation of their mutual rights, powers, duties, etc., under written instruments." *Van Buren Charter Twp*, 923 NW2d at 269 (Viviano, J, dissenting), quoting Borchard, *The Declaratory Judgment—A Needed Procedural Reform* (Washington, DC: United States Government Printing Office, 1919), p 45.

Thus, provided there is an actual controversy between adverse parties, whose substance falls within the circuit court's jurisdiction, an action for declaratory relief

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may proceed even where—or especially where—the parties' conduct has not yet given rise to the cause of action they seek to avoid.

These principles are reflected several times over in the text of the rule itself. Rule 2.605(A)(2) does not require a plaintiff to plead another claim; rather, a court has jurisdiction over a declaratory action whenever it "*would have* jurisdiction of *an action* on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." (Emphases added.) In reaching a conclusion that no freestanding substantive claim must be pleaded, three considerations aid in the interpretation of Rule 2.605(A)(2):

First, it uses the hypothetical "would have" to refer to courts' jurisdiction over the corollary claim. If the rule required a freestanding claim, such as an MCPA enforcement action founded upon a violation, the rule would explain that jurisdiction over an action for declaratory relief requires that a court "has" jurisdiction over the other claim.

Second, the phrase "would have" aligns with the rule's reference to "an action" using the indefinite "an." If the rule required a freestanding claim, such as an MCPA action, it would refer definitely to "*the* action."

And *third*, the rule's reference to "the same claim or claims in which the plaintiff sought relief other than a declaratory judgment" is informed by Rule 2.605(A)(1), which expressly does not require a plaintiff to seek other relief—or even to have been able to seek other relief. See MCR 2.605(A)(1) (establishing

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jurisdiction to hear claim for declaratory relief even when no other form of relief "could be" sought or granted).

In sum, an action for declaratory relief may proceed whenever the result the parties seek to avoid via declaratory judgment would itself fall within the court's jurisdiction. As explained below, that occurred here; the circuit court would have had jurisdiction to adjudicate either a motion quash or a motion for summary disposition raising *Smith* and *Liss*.

3. The requisite "case or actual controversy" is alleged in the Attorney General's complaint.

The foregoing analysis illustrates that, although a complaint for declaratory relief need not accompany a fully realized, freestanding claim, or a request for relief distinct from declaratory relief, the underlying case or controversy must be articulable as a claim within the circuit court's jurisdiction. See, e.g., *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 573 & n 9 (2002). The reason for permitting an action for declaratory relief—as opposed to forcing the parties to bring some other form of action, which might require one of them to run afoul of the law—lies in the rule's intended purpose "to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly." *Merkel*, 368 Mich at 13 (quotation omitted).

Here, there is an actual controversy over which the circuit court would have had jurisdiction if the Attorney General had not sought a declaratory judgment. Such jurisdiction could have been exercised when the Attorney General, having

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obtained authority to issue subpoenas pursuant to MCL 445.907, in fact issued those subpoenas—only to be confronted by a motion invoking *Smith* and *Liss*. Helpfully, Lilly crystalized that controversy by bringing a motion seeking to stay the investigation proceedings in light of *Smith* and *Liss* and the related declaratory judgment action. (Appellant's App'x pp 154–166.) Jurisdiction could also have been exercised if the Attorney General either completed or eschewed an investigation and brought an enforcement action under the MCPA. In either dynamic, there is jurisdiction in the circuit court to adjudicate the very dispute that animates the Attorney General's request for declaratory relief.

One case illustrates how to determine whether "a case or actual controversy" exists "within [a court's] jurisdiction," MCR 2.605(A)(1), albeit in the negative. In *Lapeer County Clerk*, the plaintiff clerk filed an original action in the Court of Appeals for a writ of superintending control, contesting the circuit court's decision to revoke her duties as clerk of the court's family division. Attempting to support its exercise of original jurisdiction, the Court of Appeals surmised that, had the plaintiff filed for declaratory relief in the circuit court, the circuit court would have had jurisdiction. *Lapeer Co Clerk,* 465 Mich at 573 n 9.

Relevant here, this Court in *Lapeer County Clerk* disagreed with the Court of Appeals' conclusion "that the plaintiffs could have sought a declaratory judgment in a circuit court action [as] both speculative and highly questionable." *Id.* This was because (1) the circuit court could not have entertained an action for superintending control over itself, and (2) "the county clerk could not have raised the question of the

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validity of [the order removing her as clerk of the family division] in a case [between third parties] pending in the family division because the clerk would not be an interested party in such a proceeding." *Id.* (emphasis omitted).

This analysis clarifies that, before exercising jurisdiction over a request for declaratory relief, a court must look past the "declaratory" label and determine whether, in theory, it could exercise jurisdiction over the subject matter of the controversy.

Here, in stark contrast to *Lapeer County Clerk*, all of the ways in which this controversy is certain to arise later in the proceedings—e.g., a motion to quash or a motion for summary disposition invoking *Smith* and *Liss*—properly fall within the circuit court's jurisdiction. This point is undisputed. And, as illustrated by the circuit court's decision to grant investigative authority to the Attorney General, as well as the voluminous evidence of probable cause laid out by the Attorney General in her petition, (Appellant's App'x pp 005–033), the legal question of *Liss* and *Smith*'s correctness is live and actually disputed by adverse parties.

For the same reason, the Attorney General has concretely established that a declaratory judgment is needed to guide her future conduct in conducting the authorized investigation.

At times, this Court has offered a roadmap regarding when a party sufficiently alleges a need for guidance. In *League of Women Voters of Michigan v Secretary of State*, for example, one group of plaintiffs had challenged the constitutionality of a law governing petition drives—but they cited only their

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abstract desire "to exercise their rights as Michigan registered voters to support placement of proposals on the general election ballot by signing petitions." 506 Mich 561, 585 (2020). This Court held that, without an allegation of at least a plan to sign a particular petition, the plaintiffs had alleged a mere "hypothetical or anticipated" controversy. *Id.* at 586–587. It contrasted the plaintiffs' insufficient allegations with a case in which "there was a candidate whom the plaintiffs claimed should be placed on the upcoming ballot," and another in which "there was an election that the plaintiffs claimed should be held." *Id.* at 587–588.

Here, by contrast, the need for a declaratory judgment has ripened. The circuit court issued an order authorizing issuance of civil investigative subpoenas under MCL 445.907, including subpoenas to Lilly, in particular. The Attorney General's decision whether to serve and enforce those investigative subpoenas—which she intends to do if *Smith* and *Liss* are overruled—requires the sharpening of the issue raised. The same would be true if she instead opted to file an MCPA enforcement action. Lilly, for its part, stands to benefit from a declaratory judgment, too; obtaining clarity on this question only after investigation begins in earnest, or after an enforcement action is filed, feasibly could impact its shareholders, its liability insurance, and so on.

At bottom, this Court's order correctly implies that a complaint for declaratory relief must include allegations that would be sufficient to grant a court of record jurisdiction over the controversy's subject matter, so long as the parties are adverse and declaratory relief is necessary to guide the plaintiff's future

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conduct. These prerequisites are satisfied here by the probable-cause allegations in the complaint, which are keyed to the Attorney General's investigative authority granted by the circuit court pursuant to MCL 445.907. See also MCR 2.113(C). An action alleging an MCPA violation would be premature. The function of the declaratory judgment is directly applicable here, as the Attorney General should not have to prejudice her investigation by bringing an enforcement action before her investigation can commence.

4. Lilly's merits-based arguments are premature.

Although the analysis above resolves the question this Court has posed, experience teaches that Lilly will construe it as an invitation to address other issues that have been subject to argument throughout these proceedings. Though it did not do so before the circuit court, Lilly's prior briefing in this Court has included sideways attacks on the circuit court's probable-cause finding, not by asserting an absence of such cause, but by presenting alternative facts to suggest it has somehow solved the insulin pricing problem. And it offered a series of contentions to the Attorney General's identification of the unfair trade practices in the Petition as though offering defenses to legal claims—claims that are not ripe for adjudication.

To the extent Lilly renews or elaborates on its merits-based defenses in response to this Court's recent order, this Court should recognize them as logically and procedurally downstream of the core issue of § 4(1)(a)'s proper construction. Fundamentally, these defenses assume the exemption's inapplicability, and they are especially inappropriate at the investigative stage.

These downstream merits arguments are not properly before this Court for several reasons. Again, Lilly did not raise them in the circuit court, and it raised only the Commerce Clause argument in the Court of Appeals. They are thus waived on appeal. *Walters v Nadell*, 481 Mich 377, 388 (2008) ("Michigan generally follows the 'raise or waive' rule of appellate review."). And, as of today, Lilly has never explicitly argued that probable cause for the investigation was lacking. Although Lilly did preserve its ability to challenge this determination later (i.e., at the procedurally appropriate time), its motion to stay proceedings in the investigation's docket accurately stated that "it makes far more sense . . . to resolve the controversy over th[e] pure legal question" at bar, in lieu of requiring the parties "to engage in ultimately pointless and wide-ranging . . . disputes piecemeal." (Appellant's App'x p 163 (cleaned up).)

Regardless of Lilly's explicit waiver of its intent to litigate this case on the basis of anything other than the validity of *Smith* and *Liss*, it is premature to adjudicate any merits claims now. The exemption from MCPA liability in § 4(1)(a) exempts certain conduct from the entirety of the act, rendering it an affirmative defense. See MCR 2.111(F)(3) (listing "immunity granted by law" among affirmative defenses). An affirmative defense does not address the merits of the plaintiff's claim; instead, it "seeks to foreclose the plaintiff from continuing a civil action for reasons unrelated to the plaintiff's prima facie case." *Campbell v St John Hosp*, 434 Mich 608, 615–616 (1990). See also *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312 (1993). The issue whether the exemption applies is

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distinct from whether the alleged conduct occurred, or whether it falls within the language of § 3(1).

The prematurity of these issues is amplified by this case's investigative posture. An investigation does not implicate adjudicative rights. *In re AG for Investigative Subpoenas*, 274 Mich App 696, 706 (2007). See also *Anonymous v Attorney Grievance Comm*, 430 Mich 241, 254 (1988) (distinguishing between attorney's obligation to comply with a misconduct subpoena and attorney's ability later to assert right against self-incrimination if grievance hearing occurs). Federal courts, too, have long recognized this dichotomy between investigations and subsequent substantive proceedings. In *Oklahoma Press Publishing Co v Walling*, 327 US 186 (1946), for example, the administrator of the Federal Trade Commission petitioned for an investigative subpoena against the defendant to investigate a suspected violation of the Fair Labor Standards Act (the Act). The defendant contested the subpoena, claiming that the Act did not apply to it and asserting that applicability must be decided before a subpoena could issue. The U.S. Supreme Court disagreed, holding that, in the investigatory context, the agency administrator was best positioned to "determine the question of coverage," and "in doing so to exercise his subpoena power for securing evidence upon that question . . . ." *Id.* at 214. It continued, "The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint" but to file one if the evidence justifies doing so. *Id.* at 201. See also *Endicott Johnson Corp v Perkins*, 317 US 501, 509 (1943)

(stating that "[t]he petitioner has advanced many matters that are entitled to [a] hearing and consideration in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the *subpoena*." (emphasis added)). This logic has prevailed in other efforts to derail consumer protection investigations by state Attorneys General. See, e.g., *Auto Equity Loans of Delaware, LLC v Shapiro*, No. 1:19-CV-1590, 2021 WL 2681972, at *3 (MD Pa, June 30, 2021) ("It would be improper for the court to usurp the Attorney General's investigatory authority with civil factfinding and injunctive relief at this stage, just as it would be premature for the court to weigh in on constitutional questions regarding the potential outcome of the investigation and theoretical enforcement of Pennsylvania usury law.").

Lilly cannot preempt an investigation with conclusory factual assertions or speculations about how different legal doctrines should be applied to such facts. Procedurally, it puts the cart before the horse to attempt to litigate the full merits of any hypothetical MCPA enforcement action; the Attorney General seeks only guidance on her authority to investigate Lilly based on probable cause shown. These other matters can and should be addressed later, if and when Lilly fails to convince this Court that the MCPA "does not apply to" its conduct, MCL 445.904(1).

To work its intended purposes of streamlining litigation and reducing the cost of mounting a meritorious defense, the proper meaning of § 4 must be resolved as a threshold matter. Each of Lilly's defenses—whether an attack on the Attorney General's application of the MCPA's list of proscribed conduct, see MCL 445.903(1),

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or constitutional defenses under the First Amendment and Commerce Clause—is logically and procedurally downstream of the issue at bar and should be disregarded as unripe.

II. Under the facts of this case, it was not necessary for the Attorney General to plead an MCPA violation in order to obtain a declaratory judgment about the applicability of the § 4 exemption.

This Court's second question asks "whether it is necessary for the plaintiff to adequately plead a violation of the MCPA for a court to determine whether MCL 445.904(1)(a), an exemption to the MCPA, applies." The instant facts present a situation where there is no such necessity. The Attorney General concedes that the exemption in § 4(1)(a)—which covers "[a] transaction or conduct *specifically authorized* under laws administered by a regulatory board or officer acting under statutory authority"—does apply here under current law, i.e., pursuant only to the misconstruction given to that statute in *Smith* and *Liss*.

To be sure, there are hypothetical cases in which an investigation under § 7 may be necessary to elucidate whether the exemption applies, even under the overbroad reading given to it in the case law challenged here. And these investigations might feasibly occur before the Attorney General could plausibly allege a concrete violation. For example, the Attorney General could need investigative authority to identify and learn about a fly-by-night plumbing company sufficient to determine whether the company is performing work through licensed plumbers. Or, in facts analogous to *Diamond Mortgage*, a company might be engaged in both licensed and unlicensed activity, requiring an investigation to

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understand how the suspected misconduct fits into that business model. If § 4's exemption is correctly construed narrowly, an investigation under § 7 might help the Attorney General to understand whether the suspected misconduct was specifically authorized by a regulator. Such utility would arise (and potentially implicate § 4) before a full-blown "violation" can plausibly be alleged.

Here, however, these hypothetical cases are just that—hypothetical. As set forth in Part I, *supra*, the Attorney General adequately pleaded her claim for declaratory relief and concedes that § 4 applies under *Smith* and *Liss*. To establish jurisdiction in a court of record to hear her *purely legal* claim that § 4 should not apply, the Attorney General needed to plead only a "case *or controversy*" rooted in the MCPA, the resolution of which has concrete, non-advisory implications.

III. The *Smith* and *Liss* decisions were wrongly decided.

Applying well-accepted rules of statutory construction, *Smith* and *Liss* were wrongly decided. As the instant dispute illustrates, those decisions change outcomes otherwise demanded by the MCPA's plain language. See also *Ameritech v PSC (In re MCI)*, 460 Mich 396, 413 (1999) (noting that issues of statutory interpretation are reviewed de novo) (citation omitted).

A. *Smith* and *Liss* contradict basic rules of statutory construction by effectively adding language to the MCPA, thus turning what the Legislature intended to be a narrow exemption into a blanket defense.

"[T]he purpose of statutory construction is to discern and give effect to the intent of the Legislature." *Bush v Shabahang*, 484 Mich 156, 166 (2009). The most

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reliable evidence of legislative intent is the plain language of the statute. *South Dearborn Env't Improvement Ass'n, Inc v Dep't of Env't Quality*, 502 Mich 349, 360–361 (2018). "As far as possible, effect should be given to every phrase, clause, and word in the statute." *Bush*, 484 Mich at 167 (citations omitted). Any interpretation rendering any part of the statute surplusage or nugatory must be avoided. *South Dearborn*, 502 Mich at 361. "Where the language of the statute is clear and unambiguous, the Court *must* follow it." *Robinson v City of Detroit*, 462 Mich 439, 459 (2000) (emphasis supplied; citation omitted). And "[w]hen the words of a statute are unambiguous, judicial inquiry is complete." *Walters v Nadell*, 481 Mich 377, 382 (2008).

1. The plain language of § 4(1)'s exemption does not apply in this context.

The *Smith* and *Liss* Courts violated the principles of statutory construction by re-writing the text of MCL 445.904(1) to accomplish something different than the legislative purpose. This is clear from a side-by-side reading of the statute's actual text and the construction the *Smith* and *Liss* Courts gave to it:

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The statute states: "This act does not apply to either of the following: (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States. [MCL 445.904(1)(a).]	But under *Smith* and *Liss*, "the relevant inquiry 'is whether the ***general*** transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.' " [*Liss*, 478 Mich at 206 (emphasis added), quoting *Smith*, 460 Mich at 465.]

The *Smith* and *Liss* Courts thus engrafted the word "general" into the statute to modify the kind of "transaction" the statute refers to. This judicial draftsmanship has a profoundly transformative effect on the reach and effectiveness of the MCPA.

Consider first the statute's plain language without the "general" modifier. To determine whether a "transaction" was "specifically authorized" by state or federal law, one ought to take a narrow approach to identifying the transaction by ensuring that it is specifically, rather than generally, authorized. Appending the modifier "general" to "transaction" is itself a curiosity. The plain understanding of the word "transaction" is that of a single instance, not a general class. Since the term "transaction" is not defined by the MCPA, reference to dictionaries is appropriate. See *People v Wood*, 506 Mich 114, 122 (2020). *Webster's New Collegiate Dictionary* (1973–76 ed) defines "transaction" as "an act, process or instance of transacting." Thus, appending the modifier "general" to the word "transaction"—a word whose

singular grammatical number connotes a single instance—makes little sense to begin with. Not only that, but imposing *any* modifier through a judicial opinion amounts to an act of legislation, not of interpretation. Any residual doubt about the Legislature's intent to speak to a singular transaction is resolved by observing that it used the phrase "a transaction."

This Court's decision in *People v Katt*, 468 Mich 272 (2003), is instructive. *Katt* interpreted the meaning of MRE 803(24)'s residual exception to the rule against hearsay, which exception is available only to statements "not specifically covered by any of the foregoing exceptions." *Katt* noted, "Differing interpretations of the words 'specifically covered' have sparked . . . debate over the admissibility of evidence that is factually similar to a categorical hearsay exception, but not admissible under it." 468 Mich at 281. On the one hand, "not specifically covered" could be read broadly, such that the residual exception is unavailable to any hearsay statement for which a particular exception is facially relevant, but the proponent of the evidence cannot meet all of its criteria.[13] On the other, "specifically covered" could be read narrowly, to mean only evidence not admissible under the various exceptions in Rule 803. This Court chose the latter interpretation, giving dispositive weight to the modifier "specifically." An

[13] For example, a record of a divorce invokes the subject matter of MRE 803(9), but that rule exempts only records of birth, death, or marriage. See also MRE 803(11) (listing both marriage and divorce). A broad reading of MRE 803(24)'s "not specifically covered" criterion would bar application of the residual exception, because public records of vital statistics *generally* are "specifically covered" by MRE 803(9).

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enumerated exception regarding the same subject matter could be said to "cover" statements that ultimately do not meet all of the exception's criteria. "However, the rule modifies the term 'covered' with the adjective 'specifically.' Hence, more than simple 'coverage' is required." *Katt*, 468 Mich at 287. This Court concluded that "a statement is only 'specifically covered' by a categorical exception when it is *conformable to all the requirements of that categorical exception*." *Id.* at 288.

Katt's sound analysis maps perfectly onto the instant case. A transaction in, or conduct relating to, pharmaceuticals may well be "authorized" by law at a general level; but § 4's exemption requires all relevant aspects of the transaction or conduct—including those aspects that violate the MCPA—to be "*specifically* authorized" before the exemption is triggered.

By turning the exemption's reference to "a transaction" into a "general transaction," the *Smith* and *Liss* Courts flipped its narrow scope into a broad range, reading in what is essentially the antonym of "specifically." Although both opinions recited the term "specifically authorized" in their re-framing to a "general transaction," the practical effect of the test announced was to render the word "specifically" surplusage.

In this case, that effect is observable in the Court of Appeals' succinct statement that "if a general category of conduct or a general transaction is specifically authorized by law, the § 4(1)(a) exemption applies, even if the granular transaction or conduct might otherwise be improper." (App'x p 144.) A determination that the "general transaction" is authorized by law has thus become

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sufficient to defeat an MCPA claim by construing transactions so broadly that other conduct, such as price-setting or pre-transaction representations and post-transaction mischief, are ensnared by the concept. This judicial change prevents lower courts from undertaking the legislatively intended test of determining whether particular transactions or conduct were specifically authorized by some other statute or regulatory scheme. There is a fundamental difference between a general transaction that has been authorized and a specifically authorized transaction.[14] In short, "general" is the opposite of "specific." Its insertion into the MCPA has frustrated its evident purposes.

2. The *Smith* and *Liss* decisions expanded § 4(1)(a)'s impact beyond what the Legislature plainly intended.

The statutory text at issue here serves an important purpose, but it is one that is both narrower and more coherent than the function *Smith* and *Liss* ascribe to it. Section 4(1)(a) guards against situations where a person engaged in trade or commerce must answer to the Attorney General or a private plaintiff while doing something that another governmental agency has specifically authorized. It is a

[14] In this regard, Lilly's general authority to sell insulin medications should be contrasted with, e.g., the specific authority the Michigan State Housing Development Authority (MSHDA) has over lease transactions involving a housing choice voucher. As this State's Public Housing Authority (PHA), MSHDA has an administrative plan confirming its compliance with 24 CFR 982.305, which requires PHAs to confirm eligibility of the housing unit, to inspect the premises in relation to quality standards, verify specified lease contents, and to ensure the rent to the owner is reasonable without exceeding 40% of the tenant family's adjusted gross income. See MSHDA's administrative plan at https://www.michigan.gov/mshda/-/media/Project/Websites/mshda/rental/assets/a-HCV-Administration-Plan/current/Chap_08_Admin_Plan.pdf (accessed May 14, 2025).

common-sense analog of the "public authority defense," which can, for example, immunize a confidential informant from the criminal consequences of purchasing drugs, when she did so only because police asked her to gather evidence on the drug dealer. *United States v Bear*, 439 F3d 565, 569 (CA 9, 2006).

This role of § 4(1) was well illustrated in *American Home Products Corporation v Johnson & Johnson*, 672 F Supp 135 (SD NY, 1987), which involved protracted litigation between what the district judge referred to as two titans in the pharmaceutical world—the manufacturer of Anacin (American Home Products) and the makers of Tylenol (Johnson & Johnson and McNeil Labs). *Id.* at 136. The latter had brought a counter-complaint alleging that the Anacin labels prior to 1986 were deficient because the dangers of Reye Syndrome were not adequately addressed, and that the label from 1986 forward was improper because it described the medication as safe, notwithstanding its inclusion of the FDA-required warning. *Id.* Construing the exemption provision in New York's unfair competition laws, which are analogous to MCL 445.904(1)(a), the district court rejected these claims, observing that American Home Products had complied with the FDA labeling requirements—a process that included FDA review of the labeling: "[W]hen the FDA inspected the Anacin package which carried the mandatory 1986 warning, as well as the phrase 'Safe, Fast Pain Relief,' the FDA report stated that AHP was in full compliance." *Id.* at 141. Thus, in asking the district court to apply New York's law against deceptive practices against American Home Products, McNeil was doing so despite the FDA's specific approval of the challenged label.

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In response, the district court observed that the Federal Trade Commission had already made clear that the FTC Act would not be applied against the conduct authorized by the FDA as it recognized the FDA "has primary jurisdiction over all matters related to the labeling of OTC drugs." *Id.* at 144, citing 36 Fed Reg 18,539 (1971). The district court went on to elaborate how consumer protection laws throughout the country (including Michigan's) contain similar exemptions. *Id.* It then observed "[t]he rationale underlying the exemptive provisions of all of these statutes is the need for uniformity in the regulation of advertising and labeling and a deference to the expertise of the responsible regulatory agency." *Id.*

This is how the Legislature intended § 4's exemption to operate. Section 4 creates space for experts at a regulatory agency to specifically authorize certain conduct; when such specific authorization occurs, § 4(1)(a) is triggered, avoiding the injustice that could arise if one with permission to engage in such conduct is later faced with an MCPA charge regarding the exact same specific activity. This correct reading of the law comprises a simple and functional device, which resolves only *actual conflicts* between multiple sources of law. Viewed differently, § 4(1)(a) was *not* intended to resolve a conflict where none exists, immunizing enormous swathes of the economy from liability under the MCPA—even where the regulatory scheme offers no specific defense. Yet that is what *Smith* and *Liss* do.

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3. The text of § 4(2) further supports a narrower construction of § 4(1)(a).

Further support for the narrower construction of § 4(1)(a) is found by looking at § 4 as a whole. See *Bush*, 484 Mich at 167 ("Individual words and phrases, while important, should be read in the context of the entire legislative scheme.") (citations omitted). A strange aspect of the *Smith* decision is that the Court considered both §§ 4(1) and (2) but construed them in such a way as to create a conflict between them.

The *Smith* Court began by advancing its broad construction of § 4(1)(a). 460 Mich at 464. By itself, this unduly broad interpretation would have led to a conclusion the claim in that case was barred because it determined that insurance transactions are specifically authorized. But then the *Smith* Court examined § 4(2) as somehow providing an exception to the exemption, which allowed the private action despite the specific authorization. The Court struggled to attach meaning to both provisions because it had to try to reconcile a conflict of its own creation. *Id.* at 467 ("Giving effect to both § 4(1) and § 4(2), we conclude that private actions are permitted against an insurer pursuant to § 11 of the MCPA regardless of whether the insurer's activities are 'specifically authorized.' "). The *Smith* Court's analysis leads to the conclusion that transactions or conduct affecting banks, credit unions, insurers, and motor carriers can be specifically authorized by a regulating agency and still be the basis for a private cause of action under the MCPA. Analogous to the dynamic of leaving a manufacturer of medications vulnerable to an MCPA suit prefaced on the content of a prescription label approved by the FDA, this is

precisely the kind of conflict the plain language of § 4(1)(a) had operated to avoid until this analytical miscue.

The *Smith* Court's construction invites the reader to imagine that § (2) begins with some formulation like "notwithstanding the limitations in subsection (1)." But no such clause actually exists, and giving § 4(1)(a) its appropriately narrow construction would have negated the conflict the Court was trying to resolve.

There is nothing in the plain language of these exemptions suggesting the interplay that *Smith*'s rationale suggests. Instead, these are distinct exemptions, set forth in distinct statutory subsections. The § 4(1)(a) exemption requires the court to first determine whether the transaction or conduct at issue is specifically authorized by laws administered by a state or federal agency. If so, then the exemption applies—regardless of whether the regulated entity is one of those administered under the various public acts identified in § 4(2). All specifically authorized transactions or conduct are thus given equal dignity under this exemption—or, at least they were until the *Smith* decision.

Subsection 4(2), then, harmonizes as a distinct, additional exemption. And it is not a complete exemption—it is instead a limitation on the Attorney General's ability to bring MCPA claims related to banks, credit unions, insurers, and motor carriers. MCPA claims can still be brought against such entities, but only by private plaintiffs under MCL 445.911. As Lilly acknowledges, the § 4(2) exemption simply prevents the Attorney General from applying the MCPA regarding conduct made unlawful under other laws in a handful of contexts. (BIO to App, pp 37–39.)

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Properly applied, this exemption thus does not shield entities from the consequences of wrong-doing; rather, it simply directs State officials as to how the Legislature wants the tools to address such wrong-doing to be used.

Further, the fact that private plaintiffs clearly can bring actions against some regulated entities under § 4(2) belies the logic from *Liss* that § 4(1)(a) was somehow intended to except regulated entities from the MCPA's sweep generally. And the reverse implication of the plain text of § 4(2) is that the Attorney General may bring actions against entities regulated under other statutes except as enumerated in that subsection, subject to the limitation in § 4(1).

4. A flawed premise in *Smith*, later adopted by *Liss*, led to a departure from this Court's pronouncements in *Dix*.

Remedial statutes call for courts to "liberally construe[ ]" them "to suppress the evil and advance the remedy." *Eide v Kelsey-Hayes Co*, 431 Mich 26, 35 (1988). The MCPA was enacted to prohibit unfair or deceptive practices in trade or commerce, and to "provide an enlarged remedy for consumers who are mulcted by deceptive business practices." *Dix v American Bankers Life Assurance Co*, 429 Mich 410, 417 (1987). It should be liberally construed to achieve that purpose. *Id.* at 417–418 ("[T]he [MCPA] should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons.").

Inexplicably, the *Smith* and *Liss* majorities never cited this principle, nor did they apply its interpretative direction to ensure the MCPA was wholly construed to

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preserve the Legislature's intent to protect consumers. It is axiomatic that fulfillment of this directive requires any exemption from the MCPA's application to be narrowly construed. Instead, *Smith* and *Liss* gave the exemption in § 4(1) a broad construction, and it did so contrary to the legislative purpose.

As the above de novo analysis of MCPA § 4 demonstrates, *Smith* and *Liss* were wrongly decided. The Court's erroneous analysis in these decisions warrants exploration to elucidate precisely how this Court went astray despite the rules of statutory construction demanding a different approach.

The *Smith* and *Liss* Courts' interpretations of MCPA § 4(1)(a) purport to build on this Court's construction of the same provision in *Diamond Mortgage*, 414 Mich 603. But *Smith* and *Liss* fundamentally misconstrued *Diamond Mortgage* and its simple, central premise: that licensure alone is not specific authority for all of a licensee's conduct and transactions under the MCPA. *Id.* at 617. Neither *Smith* and *Liss*'s interpretation of *Diamond Mortgage* nor those decisions' construction of the statute withstand scrutiny, and each severely restricts the MCPA's capacity to perform its most essential function—protecting consumers against unfair, deceptive, and unconscionable conduct. This contravened the principle that remedial statutes deserve liberal construction in support of their legislative goals.

In *Diamond Mortgage*—which remains good law—the defendant real estate broker (Diamond) argued that it was exempt from the MCPA because of its license to engage in real estate brokerage. *Id.* at 607–608.

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This Court correctly reversed the lower courts' agreement with Diamond's position. *Id.* at 617. The Attorney General had argued that "a license to engage in an activity is not a basis for concluding that one is '*specifically authorized*' to employ deceptive practices in that activity." *Id.* at 616. The Court agreed with the Attorney General's position:

> If every person or business which engages in an activity authorized by some statute or regulation were exempt from the Michigan Consumer Protection Act, pursuant to § 4(1), then the Michigan Consumer Protection Act, would be a cruel hoax on the many legislators . . . and others who sought to give Michigan consumers protection in the marketplace. [*Id.* at 616–617.]

Responding to Diamond's contention that such a construction would render the exemption meaningless, the Court held, "While the license *generally* authorizes Diamond to engage in the activities of a real estate broker, it does not *specifically authorize* the conduct that plaintiff alleges is violative of the [MCPA], nor transactions that result from that conduct." *Id.* at 617 (emphases added). Because "a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business," Diamond was not exempt from the MCPA. *Id.*

Smith and *Liss* each purported to be controlled by *Diamond Mortgage*, which remains good law. But neither opinion can be squared with this precedent.

In *Smith*, this Court characterized *Diamond Mortgage* as instructing "that the focus is on whether the transaction at issue, not the alleged misconduct, is

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'specifically authorized.' " *Id.*[15] Accordingly, *Smith* reasoned that Diamond had been exposed to MCPA liability only because its *brokerage* license did not authorize *mortgage writing*. 460 Mich at 464.

Liss doubled down on *Smith*'s erroneous reading of *Diamond Mortgage*, going so far as to claim that this Court "has not construed the meaning of 'specifically authorized' under the MCPA," *Liss*, 478 Mich at 212—notwithstanding *Diamond Mortgage*'s focus on this very term. As if to emphasize that it was engaging in judicial legislation, the *Liss* Court put the non-statutory phrase "general transaction" in quotes, stating, "[D]efendants' 'general transaction,' building a residential home, is 'specifically authorized' " under the Michigan Occupational Code. *Id.* at 215.

The theory of construction in *Liss* and *Smith* suffers from an internal contradiction: Those decisions cannot both be consistent with *Diamond Mortgage* and reach a different result. Had the *Diamond* Court applied *Smith*'s construction, the exemption would have covered the defendant's alleged conduct. In practice, the Court overruled *Diamond Mortgage* without saying so, based on a faulty understanding of both precedent and the statute.

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[15] From the outset, *Diamond Mortgage* had explained that the Attorney General's concerns related to confusing forms that blurred the brokerage and mortgage activities. 414 Mich at 607. And a real estate broker's license included the negotiation of mortgages within its scope. *Id.* at 616 ("One of the activities contemplated by the act was that licensees would negotiate the 'mortgage of real estate.' "), quoting MCL 451.202 (repealed by 1980 PA 299).

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Both *Smith* and *Liss* were wrongly decided, and each runs counter to the remedial interpretive canon articulated in *Dix*, 429 Mich at 417. This Court should right that wrong now, which will ensure that all consumers entitled to the protections of the MCPA can finally begin to receive them.

B. The present dispute illustrates how *Smith* and *Liss* misconstrued § 4 and thereby frustrated its purpose.

1. The sale of insulin is "trade or commerce" under the MCPA.

It would be unnecessary to determine whether Lilly's insulin sales fall within an express exemption from the MCPA without first evaluating whether such transactions generally fall within this law's scope. The MCPA makes unlawful any "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). The term "trade or commerce" as used in the Act is broadly defined in § 2 as encompassing "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes . . . ." MCL 445.902(1)(g). This definition includes a broad universe of the buying decisions consumers make every day. That Lilly is engaging in trade or commerce when it distributes the insulin medications implicated in this investigation is beyond dispute—for Michiganders, there is no purpose more personal than obtaining that which is needed to preserve one's survival and good health. Keeping in mind the interpretative obligation to apply the MCPA broadly to maximize the protection of consumers, a preliminary conclusion that the provision of pharmaceuticals falls within the sweep of MCPA § 2 is appropriate.

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The question then becomes whether Lilly may be using "unfair, unconscionable, or deceptive methods, acts, or practices" while engaging in its business of selling insulin medications to be used by Michiganders for personal purposes. MCL 445.903(1). Here, the Ingham County Circuit Court has already entered an order finding probable cause to believe Lilly is engaged in such misconduct. (App'x p 046.)

2. ***Smith*** **and** ***Liss*** **allow Lilly to use its licensure and FDA approval to sell insulin medication as a liability shield for any unfair, deceptive, or unconscionable conduct associated with the pricing of the medication, contrary to** ***Diamond Mortgage*** **and** ***Dix.***

Lilly relies on an exemption to the MCPA as its escape hatch. Lilly's premise is that the Michigan Board of Pharmacy licensure, and general FDA regulation of its manufacture and sale of insulin medications, operate to trigger the exemption under § 4(1)(a). But Lilly does not dispute that neither of these sources of authority purports to regulate the representations Lilly makes about its prices and any discounts it offers on them. (See BIO to App, p 48.) It is Lilly's position in this regard that brings the disconnect between the statutory language and the *Smith* and *Liss* decisions into sharp focus. As Lilly described the *Liss* decision to the circuit court, "the statutory inquiry 'do[es] not focus on the actor' itself, but rather asks whether the 'transaction or conduct' in question is authorized by law." (App'x p 084.) Thus, Lilly's statutory analysis purports to "compel[] the conclusion here that legal authorization for the 'transaction' in which the alleged wrongdoing occurs

is sufficient to invoke subsection 4(1)." (App'x p 086.) The Act's requirement for "specific" authorization is eliminated by *Liss*.

The beneficial impact from Lilly's perspective, then, is that it can charge whatever it wants for Humalog, even if that price is grossly excessive within the meaning of the MCPA, because the *Smith* and *Liss* Courts have said that all Lilly needs to show is general authorization to manufacture and sell Humalog. And, similarly, Lilly can take the position it is free under the MCPA to make any misrepresentations it wants about the reasons for the Lispro discount price, based only on its authorization to make and sell that drug.

So, when Lilly sells a Humalog pack to a Michigan pharmacy at its list price of $530.40, which will then be absorbed by the consumer purchasing it, the appropriate analysis is that Lilly was generally authorized to manufacture and sell Humalog, but nothing in the state or federal regulatory schemes specifically authorized *the pricing* attached to that transaction. And where a consumer does not enter into the transaction because of the high price (such as a consumer who needs, but cannot afford, six such packages each month), focus would turn to whether Lilly's pricing conduct is specifically authorized—which it is not. Similarly, with respect to the representations Lilly makes regarding the reasons for its pricing of Lispro at discounted prices, the appropriate conclusion would be that Lilly is generally authorized to sell Lispro, but no state or federal regulation specifically authorizes the statements it makes about that product's pricing.

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Throughout the instant litigation, Lilly has insisted that *Smith* and *Liss* are somehow consistent with *Diamond Mortgage*. They are not. Lilly argues that because it is authorized to sell its medications under state and federal law, it is necessarily exempt from the MCPA. Under the *Diamond Mortgage* Court's interpretation of MCPA § 4(1), Lilly would not be exempt from potential MCPA liability regarding its insulin pricing. The FDA's approval of such medications means they satisfy the regulatory criteria to be safely prescribed and sold to patients, but it does not specifically authorize the exorbitant price Lilly charges for them, or any representations made regarding pricing discounts. Similarly, the Michigan Board of Pharmacy's licensure of Lilly is aimed at assuring safe practices, but not at affecting prices. This is because the Michigan Board of Pharmacy and FDA do not regulate and so do not "specifically authorize" Lilly's mechanisms, methods, or formulas for determining its list prices for its insulin medications.

While the general transaction of selling insulin medications is generally authorized by federal law when the FDA approves a medication under its authority under the Food, Drug, and Cosmetics Act, no state or federal law "specifically authorizes" or regulates a drug manufacturer such as Lilly regarding the pricing of any FDA approved medications. Under the Court's interpretation in *Diamond Mortgage*, § 4(1) would not apply to Lilly's pricing of insulin because the conduct associated with pricing these medications is not "specifically authorized" under federal or Michigan law—a result that makes sense under the statute's plain language.

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And this is readily observable by contrasting opinions applying the MCPA before and after the *Smith* pivot. One example is *Price v Long Realty, Inc*, 199 Mich App 461 (1993). In that case, a licensed real estate broker allegedly misrepresented to a home buyer that a pole barn could be constructed on the property when that was impossible because of set-back restrictions. Relying on the *Diamond Mortgage* holding, the Court of Appeals focused on the specific conduct at issue, rather than the authorization to engage in the general transaction. The *Price* Court said, "[W]e find that the decision in *Diamond* is indistinguishable from the present case. Although real estate licensees who perpetrate fraud are subject to penalties prescribed in MCL 339.602 and MSA 18.425(602), the defendant's license does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act." *Id.* at 471 (quotation omitted). This analysis is at odds with *Smith* and *Liss*, which would have compelled a different outcome.

3. Lilly's application of the canons of construction does not withstand scrutiny.

Although the plain meaning of the § 4 exemption is clear, which typically completes the judicial inquiry, *Walters*, 481 Mich at 382, engaging with other canons of construction serves to address and correct the errors made by the *Smith* and *Liss* Courts. See, e.g., *Wis Pub Intervenor v Mortier*, 501 US 597, 611 n 4 (1991) ("[C]ommon sense suggests that inquiry benefits from reviewing additional

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information rather than ignoring it."). Doing so here is especially relevant because Lilly's reliance on the surplusage canon in the trial court is untenable.[16]

"As a general rule, '[the Court] must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.' " *People v Pinkney*, 501 Mich 259, 282 (2018), quoting *People v Miller*, 498 Mich 13, 25 (2015). Lilly argued in the trial court that the Attorney General's proposed interpretation "collapsed" the meaning of "transaction or conduct" into "an identical element." (App'x p 086.) On the contrary, Lilly's contention that "legal authorization for the 'transaction' in which the alleged wrongdoing occurs is sufficient to invoke subsection 4(1)" without regard for the legality of specific conduct related to an authorized transaction renders the term "conduct" surplusage.

The terms "conduct" and "transaction" must command different meanings; otherwise, the construction of the statute violates the rule against surplusage. *Pinkney*, 501 Mich at 282. *Smith* and *Liss* violated this rule by triggering a broad

[16] Throughout this matter, Lilly has attempted to overcome weaknesses in its plain-language argument with invitations to the courts to speculate upon why the Legislature has not modified § 4(1) in the wake of *Smith* and *Liss*. The Attorney General has pointed out that the doctrine of "legislative acquiescence has been repeatedly repudiated by this Court because it is an exceptionally poor indicator of legislative intent." *McCahan v Brennan*, 492 Mich 730, 749 (2012). Indeed, it is a "'highly disfavored doctrine of statutory construction.'" *Robinson*, 462 Mich at 465 n 25, quoting *Donajkowski v Alpena Power Co*, 460 Mich 243 (1999). In opposing the Attorney General's Application, Lilly attempted to distinguish these cases on the notion that "affirmatively re-enacting" the provision is different than acquiescence. (BIO to App, p 41). Such argument merely invokes the reenactment doctrine, which this Court has rejected for the same fundamental reason. *People v Hawkins*, 468 Mich 466, 508–510 (2003).

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exemption from the MCPA any time a species of transaction is subject to some general regulatory scheme, without regard for the manner by which that transaction is conducted or whether there is specific authorization in the regulatory scheme for the particular transaction or conduct at issue. On one hand, "transaction" is defined as "an act, process, or instance of transacting," and, on the other, "conduct" is defined as "the act, manner, or process of carrying on." *Webster's New Collegiate Dictionary* (1973–76 ed). A proper construction of the statute would acknowledge that although a particular transaction—the sale of insulin, for example—may be authorized by a regulatory scheme, the issue of how that transaction is conducted—e.g., by what means, at what price, or for what reason—is a separate one that may not find an answer in a broadly applicable regulatory scheme.

Of particular note, the MCPA also recognizes this very distinction, making unlawful any "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). It does not make unlawful any "unfair, unconscionable, or deceptive trade or commerce." Rather, it defines the different ways in which "the conduct of trade or commerce" may be unfair, unconscionable, or deceptive. By eliminating the MCPA's capacity to regulate conduct otherwise under its purview whenever a generally applicable regulatory scheme authorizes some transaction, *Smith* and *Liss* rendered § 4's use of the term "conduct" nugatory.

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By focusing on the so-called "general transaction," Lilly is able to assert that its other conduct need not even be considered. The broad concept of the "general transaction" from *Smith* and *Liss* carries with it far more danger of subsuming the "conduct" inquiry under § 4(1) than would exist if courts were to apply the proper narrow test to consider whether a transaction was specifically authorized, and then—if it were not—moving on to determine whether the alleged misconduct was nevertheless specifically authorized by law.

IV. The wrongly decided *Smith* and *Liss* opinions should be overruled because stare decisis does not mandate that harmful mistakes be ignored and perpetuated.

Smith and *Liss* were wrongly decided. Following the course charted in *Robinson*, this Court must next "apply a three-part test to determine whether the doctrine of stare decisis nonetheless supports upholding the previously decided case[s]. These include (1) whether the decision defies practical workability, (2) whether reliance interests would work an undue hardship if the decision were overturned, and (3) whether changes in the law or facts no longer justify the decision." *People v Feezel,* 486 Mich 184, 212–213 (2010), citing *Robinson*, 462 Mich 439. These three factors "balance the need to correct error against the desire for stability and reliability in the law." *Mich Educ Ass'n v Sec'y of State*, 489 Mich 194, 235 (2011) (Kelly, Mary Beth, J., concurring). When the need to correct error outweighs the desire for stability, the precedent should be overturned. See *Feezel*, 486 Mich at 212–213.

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To be sure, this Court has said that, before overruling a decision that it determines was wrongly decided, " 'it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it.' " *People v Graves*, 458 Mich 476, 481 (1999), quoting *McEvoy v City of Sault Ste Marie*, 136 Mich 172, 178 (1904). But giving weight to such considerations in the present case is not appropriate if this Court agrees with the Attorney General that *Smith* and *Liss* misapplied the MCPA's plain language. Under such circumstances, the *Robinson* Court counseled that this Court, "rather than holding to the distorted reading because of the doctrine of *stare decisis*, should overrule the earlier court's misconstruction." *Robinson*, 462 Mich at 467. The Court went on to explain this is necessary because the distorted reading is a form of "judicial usurpation" of the legislative directive, which the courts have "no legitimacy" to undertake in our constitutional system. *Id.*

This Court has thus used both the practical workability and reliance inquiries to reinforce the necessity to overrule precedent upon the acknowledgement of an error in construing a statute's plain language. Such will be shown in relation to these factors here. And there have been no changes in the law dictating a different outcome.

A. Practical workability would be restored by reversing *Smith* and *Liss*.

When determining whether a decision defies practical workability, the Court has considered whether the rule breeds "potential for arbitrary and discriminatory

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enforcement," *Feezel*, 486 Mich at 213, "misread[s] and misconstrue[s] the statute" in a manner that undermines "the entire legislative scheme," *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 215 (2007), and makes the law "more confusing and less decipherable to the ordinary citizen," *Paige v City of Sterling Heights*, 476 Mich 495, 511 (2006).[17] The rule supplied by *Smith* and extended by *Liss* is unworkable because it guts the MCPA's capacity to enforce the Legislature's declared policy of curtailing unfair, misleading, and deceitful business practices based on an unintuitive misreading of both the statute and case law.

In *Paige v City of Sterling Heights*, the Court overturned *Hagerman v Gencorp Automotive*, 457 Mich 720 (1998), which interpreted the phrase "the proximate cause" in the Worker's Disability Compensation Act, MCL 418.375(2), as " 'a proximate cause' that is a substantial factor in causing the event." 476 Mich at 499. Instead, the Court construed the phrase as meaning "the sole proximate cause," holding that *Hagerman* was wrongly decided because it departed from the plain meaning of the statute and, applying *Robinson*, should be overturned. *Id.* at 510. With regard to practical workability, the Court wrote:

> *Hagerman* defies practical workability because a person reading the statute surely would not know that he or she cannot rely on what the statute plainly says. That is, a reader and follower of the statute would, because of *Hagerman's* rewrite, not be behaving in accord with the law. Such a regime is unworkable in a rational polity. [*Id.* at 510.]

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[17] "[T]he near universal acceptance of this rule around the country is a strong indication of its workability." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 443 (2007) (Kelly, Marilyn, J., dissenting).

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The Court further noted that the "'practical workability' problem" was not simply a question of whether a court of law can "render some decision." *Id.* at 511. Indeed, "no opinion of this Court is 'unworkable' in that sense." *Id.* Rather, "the law is made a mockery" and "less workable" when "it is made more confusing and less decipherable to the ordinary citizen." *Id.*

Here, the rule from *Smith* and *Liss* is admittedly easy to apply: If § 4(1)(a) exempts from MCPA coverage any entity subject to a generally applicable regulatory scheme, and the entity at issue is subject to some generally applicable regulatory scheme, then the entity must be exempt from MCPA coverage. Certainly, this syllogistic reasoning has appeal for its simplicity; to apply the exemption, courts need only to look for the existence of some regulatory scheme, rather than to meticulously search for an authority that specifically authorizes certain transactions or conduct. But a misconceived legal rule such as this one should not be retained simply because it is easier for courts to apply. Indeed, through the eyes of an ordinary citizen lacking legal training, this legal syllogism is actually more confusing and less decipherable than the rule applied by *Diamond Mortgage*, which properly applies the § 4 exemption.

Consumers expect that the MCPA has the teeth to do as it says: protect consumers. Instead, *Smith* and *Liss* tell consumers that, due to a legal technicality, their government's hands are tied and left powerless because the regulatory scheme that permitted an entity to do business failed to specifically *prohibit* unfair, misleading, and deceitful business conduct—never mind whether such regulatory

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schemes specifically *permit* such conduct. This is precisely the reason that the Legislature designed certain statutes to be generally applicable. It would be cumbersome, and confusing, were the Legislature to undertake the construction of a separate telescope through which the conduct in each distinct galaxy of consumer transactions must be examined. The MCPA makes it unnecessary for the Legislature to include a consumer protection provision in each and every regulatory scheme it decides to enact. See *Dix*, 429 Mich at 417–418 ("[T]he Consumer Protection Act should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons."). Rather, it can look to the MCPA and decide as a policy matter whether exempting specific transactions and conduct is necessary for the industry to function.

The *Smith* and *Liss* decisions transformed the exemption provision, creating wide-ranging consequences beyond shielding the manufacturers and sellers of prescription medications from the MCPA. The weakened MCPA now ignores any context in which an entity is subject to a regulatory scheme that does not contain a consumer protection enforcement component. In such contexts, consumers that are harmed by specific misconduct occurring during authorized "general transactions" are unable to seek redress. This dynamic renders *Smith* and *Liss* practically unworkable because they undermine the entirety of the MCPA, arbitrarily exempting an industry from MCPA review any time the Legislature happens to

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regulate some aspect of that industry unrelated to consumer protection. See *Rowland*, 477 Mich at 215; *Feezel*, 486 Mich at 213.

The practical unworkability of this result was observed by Judge Goldsmith in a decision of the Eastern District of Michigan. Applying *Smith* and *Liss*, Judge Goldsmith declined to exercise supplemental jurisdiction over a consumer's MCPA claim against an auto dealership, stating, "Taking [the dealership]'s theory to its logical conclusion, any transaction that is in any way regulated by a governmental board or officer acting under statutory authority, even minimally, would be wholly exempt from the MCPA. Such a far reaching interpretation could, potentially, eviscerate the protections the statute was designed to provide." *Woodger v Taylor Chevrolet, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 25, 2015 (Case No. 14-cv-11810), pp 6–7. (App'x pp 147–154.) In so doing, Judge Goldsmith noted that the plaintiff had pointed to a pre-*Smith* decision applying the MCPA to an auto dealership. Ultimately, he concluded that the apparent disruption of the legislative design was best left to the Michigan courts.

So it is that the purchase of automobiles joined those of medical needs and home renovations by licensed builders among the galaxies of transactions no longer reachable by the MCPA. Another example of this effect appeared in the context of the Michigan Public Service Commission (MPSC). The MPSC is charged with regulating telecommunication providers. MCL 484.2201. But under the Michigan Telecommunications Act, MCL 484.2101 *et seq.*, the MPSC does not have regulatory

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authority over pricing and terms. When a telecommunication provider makes a deceptive offer to a consumer, and the consumer does not receive what is offered or is charged a higher price than what was offered, the MPSC does not have authority to prevent or punish this type of behavior. Yet because telecommunication providers operate within the MPSC's regulatory scheme, under *Smith* and *Liss*, they are engaged in "general transactions" that are "specifically authorized," and are therefore exempt from the MCPA. As such, consumers who are harmed when telecommunication providers make deceptive offers are left without sufficient legal recourse.

Smith and *Liss* also present a barrier to a consumer's ability to obtain relief when an agency charged with enforcing the regulatory scheme is unwilling or unable to do so, and the regulatory scheme does not otherwise provide for a private cause of action or Attorney General enforcement. Like the circumstance described above, when a regulated entity is engaging in general transactions that are authorized under the regulatory scheme, meaning it therefore would be exempted from the MCPA under *Smith* and *Liss*, the consumer is deprived of a remedy when the regulatory scheme is not enforced.

For instance, pet shops in Michigan are subject to Michigan Department of Agriculture and Rural Development (MDARD) regulation and licensing. Since 2009, however, MDARD has suspended the licensing of new pet shops, and the regulatory scheme does not provide a private cause of action besides. (App'x p 072.) Still, because the law exists, a pet shop could, e.g., lie about an animal's pedigree or

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refuse to honor a warranty, but defend against liability under the MCPA on the basis that it is engaged in general transactions that are specifically authorized under the MDARD regulatory and licensing scheme. Consequently, the pet shop may evade liability under both the regulatory scheme (through lack of any actionable violation) and under the MCPA (under *Smith* and *Liss*), and consumers are left helpless.

B. There are no legitimate reliance interests weighing in favor of preserving these incorrect precedents.

The Court weighs reliance interests most heavily when determining whether to overturn wrongly decided cases. *Robinson*, 462 Mich at 466. The Court considers whether overruling the prior decisions would work an undue hardship on reliance interests. *Id.* The Court asks whether the prior decisions had "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id.* In short, it asks whether "to overrule them, even if they were wrongfully decided, would produce chaos." *Id.* at 466 n 26. *Smith* and *Liss* are not so embedded, accepted, or fundamental to society's expectations that overruling them would produce significant dislocations, let alone chaos.

A measure of "practical real-world dislocations" is whether the rule caused anyone to "alter their conduct in any way." *People v Tanner*, 496 Mich 199, 252 (2013), quoting *People v Petit*, 466 Mich 624, 635 (2002). Indeed, reliance has been defined as the sort of knowledge "that causes a person or entity to attempt to

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conform his conduct to a certain norm before the triggering event." *Robinson*, 462 Mich at 467. In statutory law, a citizen's reliance interest is as strong as the words of the statute are clear. *Id.* When a court misreads or misconstrues a statute, it "confound[s] those legitimate citizen expectations" and "disrupt[s] the reliance interests." *Id.* This disruption is not resolved simply because "later courts repeat the error," and perpetuating a prior court's error does more harm to the integrity of the judicial process than overturning the decision. *Id.* at 467–468. Similarly, whether overturning a case would require lawyers to "relearn the law" has never raised "a 'reliance' interest sufficient to preclude a plainly flawed reading of the law from being corrected." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 760 (2002).

Smith and *Liss* are not so embedded, accepted, or fundamental to society's expectations that overruling them would produce significant dislocations, let alone chaos. This is true for at least three reasons.

First, *Smith* and *Liss*'s departure from the plain language of the MCPA has disrupted the citizens' reliance interest in having statutes that "mean what they say." See *Rowland*, 477 Mich at 217–219.

Second, looking to "practical consequences," *Smith* and *Liss* transformed a narrowly drawn exemption into a blanket shield from liability for any business engaging in a generally regulated industry. The Legislature did not intend to create this blanket shield, and overruling *Smith* and *Liss* would bring the law back into accord with the Legislature's intent. See *Dix*, 429 Mich at 417–418 (instructing

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that the MCPA be "construed liberally" not to protect industry, but "to broaden the consumers' remedy").

Third, an international corporation like Lilly, whose business practices are presumably optimized for national compliance, should not be relying on *Smith* and *Liss*, which render Michigan as one of only two states in the Union to construe its consumer protection act exemptions so broadly.[18] Nor is there evidence that Lilly conducts its business in Michigan differently because of *Smith* and *Liss*. See also *Hamed v Wayne Co*, 490 Mich 1, 27–30 (2011) (applying *Robertson* test in overruling *Champion v Nationwide Security*, 450 Mich 702, 704–705 (1996)).

Nevertheless, to whatever extent potential future defendants may have "altered their conduct" in reliance on *Smith*'s broad construction of § 4(1)(a)'s exemption, this Court has refused to recognize the reliance interests of those that "have been violating laws on the basis of the assumption that it could not be challenged." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 370 (2010). See also *People v Breidenbach*, 489 Mich 1, 16 (2011) ("Indeed, it cannot fairly be said that citizens contemplate criminal activity in reliance on the particular procedural rule implicated in this case.").

This logic thus applies with equal force to smaller businesses whose activities are confined to Michigan. Unscrupulous entrepreneurs can claim no legitimate

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[18] See National Consumer Law Center, *A 50-State Report of UDAP Statutes* (March 2018), pp 1, 17–18 (referring to Michigan and Rhode Island as the "Terrible Two" states whose statutes were "gutted" by court rulings, leaving them "applicable to almost no consumer transactions"), available at https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf (accessed May 8, 2025).

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right to engage in the unfair and deceptive practices made unlawful under MCPA § 3 based only on the notion *Smith* and *Liss* have led them to believe they can do so with impunity.

In short, there are no reliance interests that weigh in favor of keeping this ill-begotten construction of the MCPA. Citizens are presumed to rely on statutes, not conflicting case law, and to the extent businesses engage in deceptive or unfair business practices in reliance on *Smith* and *Liss*, courts do not recognize that as a valid reliance interest. Furthermore, the interests of society are better served by overturning *Smith* and *Liss* because, far from causing chaos, returning the MCPA to its pre-*Smith* scope would improve consumer welfare and social order by preventing a broader swath of the Michigan economy from engaging in unfair or deceptive practices.

The principle of *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson*, 462 Mich at 463. Here, overturning *Smith* and *Liss* does more to further the policy objectives of stare decisis than following the principle would as "an inexorable command." *Id.* This is because restoring the plain language of the MCPA to its appropriate construction is the outcome demanded by both *Dix* and *Diamond Mortgage*, which also stand as (long-ignored) precedent.

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C. Intervening changes in the law are not a prerequisite for reversal because *Smith* and *Liss* were never justified.

The final *Robinson* factor asks "whether changes in the law and facts no longer justify" the precedent at issue. *Paige*, 476 Mich at 513.[19] However, this Court need not consider this factor when the precedent at issue "was never justified." *Id*. Certainly, "it is, emphatically, the province and duty of the judicial department, to say what the law is." *Makowski v Governor*, 495 Mich 465, 471 (2014), quoting *Marbury v Madison*, 5 US 137, 177 (1803). But when the Court interprets a statute in a manner that fails to give effect to legislative intent, it has made changes to the law that it "had the power, but not the authority," to make. *Paige*, 476 Mich at 513. *Smith* and *Liss*, like the decision discussed in *Paige*, were "not justified from [their] inception." *Id.* Accordingly, *Smith* and *Liss* should be overturned so that the MCPA exemption analysis can be "return[ed] to the language of the statute." *Id.*

[19] This factor typically applies when significant changes in the law have occurred since the precedent at issue was decided—the adoption of the Michigan Rules of Evidence, for example. *Breidenbach*, 489 Mich at 17–18 ("[T]he policy justifications for *Helzer* are largely undercut by the application of the rules of evidence and various legal doctrines in a trial setting.").

CONCLUSION AND RELIEF REQUESTED

The Attorney General respectfully asks this court to overrule *Smith* and *Liss* as wrongly decided, reverse the lower courts, and remand for entry of a declaratory judgment in the Attorney General's favor.

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