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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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.

SC: 165961
COA: 362272
Ingham County CC: 2022-000058-CZ

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# DEFENDANT-APPELLEE'S BRIEF ON APPEAL

**ORAL ARGUMENT REQUESTED**

**KIRKLAND & ELLIS LLP**

John C. O'Quinn, P.C.
Matthew S. Owen, P.C.
One Freedom Plaza
1301 Pennsylvania Ave. NW
Washington, DC 20004
202-879-5000
john.oquinn@kirkland.com
matt.owen@kirkland.com

Diana M. Watral, P.C.
Philip M. Cooper
333 West Wolf Point Plaza
Chicago, IL 60654
312-862-2000
diana.watral@kirkland.com
philip.cooper@kirkland.com

**HONIGMAN LLP**

By: */s/ Matthew Schneider*

Matthew Schneider (P62190)
Benjamin J. VanderWerp (P84614)
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226
313-465-700
mschneider@honigman.com
bvanderwerp@honigman.com

*Attorneys for Defendant-Appellee*

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## STATEMENT OF JURISDICTION

Eli Lilly and Company ("Lilly") does not contest the factual background in the Statement of Jurisdiction in the Attorney General's Brief ("A.G.Br.").[1] However, this Court should not exercise review over a test case, as explained below. *Infra* 20-31.

[1] Lilly also does not contest the Attorney General's description of the standard of review. A.G.Br.11-12.

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Attorney General's reformulations of the Court's straightforward Questions Presented underscore the absence of any legally-viable claim against Lilly, the artificial test-case nature of this suit, the plain meaning of the Michigan Consumer Protection Act's (MCPA) disjunctive statutory exemption for "[a] transaction or conduct," and that *stare decisis* principles favor retaining this Court's settled interpretation of that language. The Questions Presented—as stated by this Court—are as follows:

1. Whether the plaintiff adequately pled a claim that the defendant violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.

   Appellant's Answer: Refuses to answer.

   Appellee's Answer: No.

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.

   Appellant's Answer: No.

   Appellee's Answer: Yes.

3. Whether this Court's decisions in *Smith v. Globe Life Ins. Co.*, 460 Mich. 446 (1999), and *Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203 (2007), correctly interpreted MCL 445.904(1)(a).

   Appellant's Answer: No.

   Appellee's Answer: Yes.

4. If they were incorrectly decided, whether they should nonetheless be retained under principles of stare decisis, *Robinson v. City of Detroit*, 462 Mich. 439, 463-468 (2000).

   Appellant's Answer: No.

   Appellee's Answer: Yes.

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## INTRODUCTION

The Attorney General seeks to overturn decades of precedent applying the MCPA's plain language. The MCPA exempts from any investigative or enforcement action "[a] transaction ***or*** conduct specifically authorized under law[.]" MCL 445.904(1)(a) (emphasis added). This Court has long interpreted that disjunctive language to mean what it says: if a law specifically authorizes a "transaction" in which alleged wrongdoing occurs (*e.g.*, the sale of a product), the exemption applies even if a plaintiff purports to sue over wrongdoing attached to the transaction (*e.g.*, the sale price) or alleges that the (mis)conduct itself is not authorized. It is uncontested that this settled interpretation is "easy to apply," A.G.Br.51, that there have been no contrary changes in the law, and that the Legislature has reaffirmed this interpretation when amending the MCPA.

Yet the Attorney General believes the MCPA's plain language is bad public policy. The Attorney General would prefer the exemption for authorized transactions to apply only if "experts at a regulatory agency [have] specifically authorize[d] ***certain conduct***." A.G.Br.34 (emphasis added). Under that conduct-focused rule, whether "a particular transaction … [is] authorized by a regulatory scheme" is irrelevant. A.G.Br.47. The Attorney General contends that a plaintiff should be free to sue over "how that transaction is conducted" unless "all relevant aspects of the transaction or conduct—including those aspects that violate the MCPA"—are "specifically authorized" by a regulatory body. A.G.Br.31, 47. Under that view, the legislative exemption for "[a] transaction" would be a nullity. MCL 445.904(1)(a).

Because this view would require rewriting the MCPA to eliminate the word "transaction," the Attorney General has pushed the Legislature to adopt "legislative fixes" to get "the right laws in place" to "say 'no,' very specifically," that "there is not a specific carveout" for "regulated

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industries and licensed individuals."[2] The Attorney General further urged the Legislature to amend the MCPA regardless of this litigation "because, as we know about the courts, one year they say one thing, another year they say something else." *Supra* n.2 1:01:27-32. To that end, the Senate recently passed a bill that would strike the word "transaction" and exempt only a "specific method, act, or practice that is expressly authorized." S.B. 134, §4(1)(a) (2025).[3] But the Attorney General does not fully trust the Legislature to change the text. This suit was filed with the hope that this Court will perform that task.

In every way, this litigation is an inappropriate artificial test case. Its sole purpose is to serve as a vehicle for the Attorney General's Department ("Department") to rewrite the statute under the guise of relitigating the "correctness" of two precedents addressing MCL 445.904(1)(a): *Smith v. Globe Life Ins. Co.*, 460 Mich. 446 (1999), and *Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203 (2007). A.G.Br.20. Tellingly, when this Court asked the Department ***twice*** to brief whether it "adequately pled a claim that [Lilly] violated the Michigan Consumer Protection Act," the Department ***refused*** to answer. That is because there is no cognizable violation by Lilly as a matter of law, and the Court's question undercuts the Department's objective of "teeing up" a judicial rewrite of the MCPA.[4]

In asking the Court to preempt the Legislature, the Department also asks the Court to bulldoze numerous other requirements of Michigan law that foreclose relief. Although the MCPA permits the Attorney General to investigate only upon "probable cause" of an "alleged violation"

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[2] Testimony of Attorney General, 1:01:24-50; 1:03:54-1:04:00, https://house.mi.gov/VideoPlayer?data=https://youtube.com/live/W3UMU_uGOx8?feature=share.

[3] https://www.legislature.mi.gov/documents/2025-2026/billengrossed/Senate/pdf/2025-SEBS-0134.pdf.

[4] Press Release (Jan. 26, 2022), https://biturl.top/iAfEj2.

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of the MCPA, *see* MCL 445.907(1), the Department asks this Court to hold that it can assert a freestanding claim for declaratory relief under the MCPA "regardless of whether [it] alleged an MCPA violation." A.G.Br.xi. The Department asks this Court to hold that a party's desire to secure a "proper interpretation of the statutory exemption" can establish a case or controversy, A.G.Br.11, even though this Court has long prohibited bringing cases to "obtain an interpretation of a statute." *Anway v. Grand Rapids Ry.*, 211 Mich. 592, 610 (1920). And the Department asks this Court to disregard its traditional *stare decisis* test in favor of an ad hoc approach which turns on whether a party claims an "overwhelming need to correct the errors in this Court's decisions." A.G.Br.xii.

There is no reason for the Court to contort itself, unsettling and unmaking multiple areas of law, in service of the Department's effort to rewrite a statute that the Legislature is closely considering. Indeed, the Court would need to bypass four obstacles to reach that outcome-oriented result.

First, this Court should not reach the question whether to reinterpret the MCPA's exemption because there is no legally-viable MCPA claim against Lilly in the Petition, which is the "primary filing." A.G.Br.2. Without an alleged violation in the first place, the exemption's interpretation for purposes of this case is academic. The Department's claims against Lilly must fail—with or without any exemption—and a decision from this Court reinterpreting the exemption would be advisory.

Tellingly, the Department refuses to answer the Court's directive to address whether the Petition alleged an MCPA violation against Lilly. That is because no violation is alleged. Despite referencing the MCPA's prohibition against "charging the consumer" grossly excessive prices or "making false or misleading statements of fact," MCL 445.903(1)(i), (z), the Petition does not

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allege that ***Lilly*** did any of that. Rather, the Petition's theories rest on prices charged by ***third-party*** entities (not Lilly), and on Lilly's purported nondisclosure of it ***subjective*** "motivation" (not false statements of fact). The Department's ongoing refusal to defend the facial viability of its theories speaks volumes.

Second, this lawsuit is the exact kind of "test case" that precludes judicial review because "it is apparent that the object of [the] case is not the vindication of a right, but a desire to obtain an interpretation of a statute." *Anway*, 211 Mich. at 610. There is no other way to describe the Department's efforts to use a violation-free lawsuit to overturn precedent so that it might later pursue unrelated MCPA claims against hypothetical violators ranging from "pet shops" to "telecommunication providers." A.G.Br.53-54. The "primary and real object of the proceeding" is, as the Attorney General told the Legislature, "whether or not the Michigan Consumer Protection Act could apply to regulated industries or to individuals who were otherwise licensed in some manner or another." *Anway*, 211 Mich. at 612; *supra* n.2 59:40-59:56. This Court has long rejected invitations to misuse the declaratory-judgment process to pronounce similar "abstract questions of law." *Anway*, 211 Mich. at 622. For good reason: there is no way to cabin the future consequences of breaking that practice for this case.

Third, even if this Court were to demolish those hurdles for the Attorney General (and future litigants) and reach the statutory-exemption issue, text and history require adhering to precedent. The MCPA exempts "[a] transaction ***or*** conduct," using disjunctive language that requires giving meaning to both terms. MCL 445.904(1)(a) (emphasis added). This Court's precedent respects that plain text by applying the exemption when the ***transaction*** is authorized, even if the ***conduct*** is not. Because the Department concedes that Lilly's "sale of insulin" is "a

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particular transaction … authorized by a regulatory scheme," that should be the end of the case. A.G.Br.47.

The Department, however, asks the Court to eliminate the word "transaction" from the statute, such that a transaction's authorization would be irrelevant unless "the issue of how that transaction ***is conducted***—e.g., by what means, at what price, or for what reason"—is ***also*** authorized with respect to that specific "conduct." A.G.Br.1, 34, 47 (emphasis added). The Legislature is free to erase the word "transaction," but this Court is not, as confirmed by this Court's recent unanimous decision in *Dine Brands Global v. Eubanks* giving full force to similar "disjunctive" language. ___ N.W.3d ___, 2025 WL 898837 at *9-12 (Mich. 2025) (Lilly.Appx.279b).

A judicial rewrite would be especially improper because the Legislature's actions confirm that this Court's precedent is correct. Immediately after *Smith*, the Legislature affirmed the scope of the transactional exemption while rebuking *Smith*'s efforts to limit it. More recently, the Legislature has debated striking the word "transaction" from the statute—at the Attorney General's request—including in currently-pending legislation. If anyone is to rewrite the statute, it should be the Legislature.

Fourth, departing from precedent would declare *stare decisis* a dead letter. The meaning of the MCPA has been settled for decades, is easy to apply, there are overwhelming reliance interests, and there have been no intervening changes warranting reconsideration. And the Department's rhetoric that precedent renders Michigan consumers helpless is belied by countless consumer-protection suits over the last twenty-five years, with the Department repeatedly touting its recovery of hundreds of millions of dollars by "enforc[ing] numerous state statutes that protect consumers and charities, including the Michigan Consumer Protection Act." Lilly.Appx.021b,

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.053b, .072b. In contrast, overturning *Smith* and *Liss*—even though none of this Court's *stare decisis* factors warrants it—would validate the Attorney General's view that "one year [courts] say one thing, [and] another year they say something else." *Supra* n.2 1:01:27-32.

For any of these independent reasons, the Court should reject this artificial test-case attempt to bypass the Legislature. The Court should either dismiss the appeal or affirm the judgment below.

## COUNTER-STATEMENT OF FACTS

### A. Statutory Background

The Michigan Legislature enacted the MCPA in 1976. In crafting the Act, the Legislature imposed several guardrails.

Most relevant here, the Act wholly exempts "[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). It also includes other exemptions with notably different language. In contrast with the broad "transaction or conduct" exemption, the Act elsewhere uses narrower language to exempt particular "***act***[***s***] done by the publisher, owner, agent, or employee" of media organizations. MCL 445.904(1)(b) (emphasis added). Another exemption narrowly prohibits the Attorney General (and sometimes consumers) from suing over "an unfair, unconscionable, or deceptive ***method, act, or practice*** that is made unlawful" by certain other statutes, such as the Motor Carrier Act. MCL 445.904(2), (3) (emphasis added).

The Legislature also restricted the Attorney General's threshold ability to launch investigations. Unlike the Legislature, which enjoys an inherent "power to investigate," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975), the Attorney General can investigate only "an alleged violation of this act" upon a showing of "probable cause." MCL 445.907(1). Thus,

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even preliminary proceedings under the MCPA must be supported by a legally-viable theory that the alleged activity violates the Act.

This Court has repeatedly encountered the MCPA over the past half-century, including in cases involving the "transaction or conduct" exemption. In 1982, the Court decided *Attorney General v. Diamond Mortgage Co.*, where the Department brought usury and consumer-protection claims against a mortgage company. 414 Mich. 603. That decision ***rejected*** the view that the exemption applies only if another regulatory authority "specifically authorize[d] misrepresentations or false promises." *Id.* at 617. The Court held that such a view would render the exemption a nullity because "no statute or regulatory agency specifically authorizes misrepresentations or false promises." *Id.* Instead, the Court concluded that the exemption will "apply where a p[laintiff] seeks to attach [] labels"—*i.e.*, labels of "misrepresentations or false promises"—"to a transaction or conduct specifically authorized under law[.]" *Id.*

In 1999, *Smith* reiterated that the exemption applies when a "general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." 460 Mich. at 465-66. There, a plaintiff sued an insurance company alleging misconduct in the issuance of a life-insurance policy, but this Court agreed with the defendant that the exemption facially applied because the overarching transaction of "the sale of credit life insurance[] was 'specifically authorized.'" *Id.* at 462-63, 465. In 2007, the Court reaffirmed in *Liss* that the transaction-or-conduct exemption applies if the at-issue transaction is authorized even if the complained-of conduct is not. *Liss* barred MCPA claims arising from the construction of a home because the defendant was specifically authorized to engage in the transaction of home-building. 478 Mich. at 206. *Liss* emphasized, however, that the exemption does ***not*** excuse every regulated business from liability in all cases. Rather, "the exception requires a general transaction

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that is 'explicitly sanctioned'" by law, and a license "is relevant only to the extent that [it] specifically authorizes [the defendant] to engage in a particular ***transaction***." *Id.* at 212-13 & n.34.

Michigan courts have readily followed the MCPA's text and this Court's precedents, sometimes allowing MCPA claims to proceed, and sometimes rejecting them.[5] For example, courts have rebuffed the exemption where the defendant's conduct or transaction was not "specifically authorized," *Pedinelli v. Turnberry Park*, 2016 WL 370043, at *6 (Mich. Ct. App. Jan. 28, 2016) (Lilly.Appx.298b), or when the at-issue "transaction" fell outside the defendant's "specific[] authoriz[ation]." *Brownlow v. McCall Enters.*, 2013 WL 514598, at *2-3 (Mich. Ct. App. Feb. 12, 2013) (Lilly.Appx.308b).

The Legislature has paid close attention to judicial interpretations of the MCPA and has swiftly acted when it disagrees. For example, the *Smith* decision—after construing the transactional exemption—ultimately ***allowed*** the claim against an insurance company to proceed. The Court reasoned that, although the transactional exemption applied, a different exemption impliedly made the transactional exemption inapplicable to private suits against specific enumerated industries like the insurance industry. 460 Mich. at 465-66. The Legislature thought *Smith* was wrong to backtrack on a broad reading of the transactional exemption. So, "[i]n response to the *Smith* decision," it amended MCL 445.904 to overturn that portion of the decision. House Fiscal Agency, *A Summary of House Bill 5558 as Enacted* at 2 (July 2, 2014) (Lilly.Appx.118b). Tellingly, that new law ***reenacted the same language*** for the transactional

[5] *E.g.*, *Am. Auto. Ass'n v. Advanced Am. Auto*, 2009 WL 3837234, at *6 (E.D. Mich. Nov. 16, 2009) (Lilly.Appx.314b); *Hinderer v. Snyder*, 2019 WL 360732, at *7-9 (Mich. App. Jan. 29, 2019) (Lilly.Appx.322b); *Rau v. Calvert Invs.*, 2019 WL 6339817, at *12 (E.D. Mich. Nov. 27, 2019) (Lilly.Appx.333b); *FOMCO v. Hearthside Grove*, 2021 WL 2659632, at *3 (W.D. Mich. June 29, 2021) (Lilly.Appx.347b); *Comer v. Roosen Varchetti & Olivier*, 2018 WL 5719793, at *5 (E.D. Mich. Nov. 1, 2018) (Lilly.Appx.352b).

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exemption (and thus *Smith*'s interpretation of that language), while changing other language to emphasize that the MCPA "does not apply" to certain insurance-related suits. Pub. Act No. 432, H.B. No. 5332 (2000). Likewise, when courts held that the Legislature's change lacked retroactive effect, the Legislature again amended the MCPA to mandate the opposite outcome, ***once more reenacting the same transactional-exemption text*** that *Smith* (and now *Liss*) had construed. House Fiscal Agency at 3; *see also* Pub. Act No. 251, H.B. No. 5558, Enacting §2 (2014).

More recently, the Legislature has considered changing the MCPA's transactional exemption to meet the objectives the Department presses here. Over the last few years, proposed legislation has sought to strike that exemption from the statute entirely, *e.g.*, House Bill 4867 (2023),[6] or replace the "transaction or conduct" phrase with narrower language requiring "express[] authoriz[ation]" for a "specific method, act or practice," *e.g.*, S.B. 1022 (2024).[7] The Legislature is currently considering Senate Bill 134, which would take the latter approach of striking and replacing the "transaction" language. S.B. 134 §4(1)(a).

Even without these amendments, and under this Court's precedent, consumers and the Department have no shortage of claims they can pursue for allegedly wrongful commercial conduct. The Department's recent presentations to the Legislature explain that consumer protection is alive and well under the "35 [Michigan] statutes that protect consumers" and that it produced ***$116.3 million*** in "[d]irect consumer and state recoveries … in 2022" alone. Lilly.Appx.021b. And the Department continues to file suits against other defendants pursuing antitrust, common-law, public-nuisance, and unjust-enrichment claims regarding allegedly "higher

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[6] https://www.legislature.mi.gov/documents/2023-2024/billintroduced/House/pdf/2023-HIB-4867.pdf.

[7] https://www.legislature.mi.gov/documents/2023-2024/billengrossed/Senate/pdf/2024-SEBS-1022.pdf.

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prices" for pharmaceuticals in Michigan. Lilly.Appx.137b, .154b. The availability of these other tools highlights the lack of merit to the cursory allegations against Lilly in this test-case suit, which the Department refuses to explain or defend.

### B. Factual and Procedural Background

In January 2022, the Department simultaneously filed an Investigative Petition and declaratory judgment action against Lilly. The Petition was "[t]he primary filing," A.G.Br.2, whereas the declaratory action sought to "tee[] up the Smith and *Liss* issue" on the basis of that filing. *Supra* n.4. The Petition offered three theories purportedly supporting an MCPA investigation.

First, the Petition asserted that the MCPA prohibits "[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold." A.G.Appx.24 (quoting MCL 445.903(1)(z)). But the Petition never alleged that ***Lilly*** charged any consumer anything. On the contrary, it claimed only that Lilly sets "list prices" for sales to commercial purchasers of medications (wholesalers), while independent pharmacies in Michigan, downstream from those wholesalers, have set higher retail prices than independent pharmacies in Canada. A.G.Appx.14-15, 25-26.

Second, the Petition claimed that Lilly launched Insulin Lispro—a nonbranded version of Lilly's Humalog—at a ***lower*** list price than Humalog. According to the Petition, "each Michigan consumer who paid a price for Humalog at or above its list price was paying a price grossly in excess of the price [of] … Lispro." A.G.Appx.28. In other words, the Petition faulted Lilly for introducing an alternative medication with a ***lower*** list price (Lispro) after complaining that the list price of Lilly's branded medicine (Humalog) was too high. The Petition does not explain how Lilly could control whether consumers buy Humalog or Lispro or the amount they pay out of pocket, and the Department has elsewhere conceded that third-party pharmacy benefit managers

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("PBMs") "maintain drug formularies []which dictate what drugs are covered by insurance and how much insureds are required to pay out of pocket[.]" Lilly.Appx.128b.

Third, the Petition invoked MCL 445.903(1)(i), which forbids "[m]aking false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions." The alleged justification for this theory was that Lilly generally stated it sought "to help make insulin medications more affordable" by introducing Lispro. A.G.Appx.28, 40. As the Petition conceded, however, that statement was "***tru*[*e*]." *Id.* at 28 (emphasis added). Nonetheless, the Petition speculated that this true statement might have been "misleading because it ***leaves unspoken*** Eli Lilly's [purported] ***motivation*** to keep intact a system from which it is deriving significant profit at the expense of consumers." A.G.Appx.28-29 (emphases added).

To avoid Lilly immediately moving to quash any subpoena—a motion that would have confirmed the legal defects in all three theories because none states a claim for violations of the MCPA—the Department agreed to stay the Petition action pending resolution of the declaratory action. A.G.Appx.196-99. The circuit court dismissed the declaratory judgment action, and the court of appeals affirmed.

The Department sought leave to appeal to this Court, and this Court held oral argument on the application on October 10, 2024. This Court next ordered supplemental briefing: "We DIRECT the parties to file supplemental briefs addressing whether the plaintiff adequately pled a claim that the defendant had violated the Michigan Consumer Protection Act, MCL 445.901 *et seq*." Order of Jan. 24, 2025. The Department "disagree[d] with the legal premise" of this Court's question and declined to answer. A.G.Supp.Br.v (Feb. 21, 2025).

This Court granted review on April 4, 2025, and directed the parties to brief several questions, including the one the Department previously declined—and still declines—to answer.

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## ARGUMENT

This Court should reject the Department's invitation to unsettle multiple areas of law, bypass the Legislature, and rewrite the MCPA. Each step the Department proposes is fundamentally flawed. First, this Court would need to accept the Department's unsound proposition that plaintiffs can proceed in an MCPA action that alleges no MCPA violation. Second, to permit the Department's "test case," this Court would need to reopen the ability for litigants—including future litigants—to bring "pro forma" lawsuits "to obtain an interpretation of a statute," a pathway to judicial review that this Court foreclosed a century ago. *Anway*, 211 Mich. at 610. Third, this Court would need to ignore the MCPA's explicit textual exemption for a "transaction," as well as four decades of precedent correctly interpreting this language and the Legislature's post-*Smith* choices to reenact that text while amending other passages. Fourth, the Court would need to disregard *stare decisis* principles, inviting future Courts to do the same whenever it suits them, rendering *stare decisis* a nullity. Each of these problems—and the future problems they invite—is grounds to dismiss this appeal or affirm the judgment below.

### I. THE DEPARTMENT FAILED TO PLEAD AN MCPA VIOLATION.

The Court's first question is whether the Department adequately pled a claim that Lilly violated the MCPA. It did not. This is undisputed. The Department refuses to answer this question as presented despite ***multiple*** directives to do so. That is because there is no defending the Petition's claims as a matter of law. And, to be clear, the problem is ***not*** that the Petition is wrong on the facts (although it is too).[8] For present purposes, the Court can accept every word alleged.

[8] Lilly will not recite the Petition's many inaccuracies here. Suffice to say, the Department has never responded to Lilly's explanations that Michigan consumers need not pay more than $35 out-of-pocket per month for their full monthly prescription of any Lilly insulin sold today, and that the average out-of-pocket cost for a monthly prescription of Lilly insulin was $21.80 when the Department sued and was $14.86 in 2024. The Department has repeatedly declined Lilly's

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The Petition simply fails to identify a legally-cognizable MCPA violation on any of its three theories.

### A. The Department Lacks a Viable Theory that Lilly Is Charging Michigan Consumers Grossly Excessive Prices as Compared to Canadian Consumers.

The Petition's lead argument is that Lilly is "[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold" because "Lilly has established list prices that grossly exceed the price at which the same medications are sold in other countries." A.G.Appx.25. That theory is deficient for several reasons.

First, the Petition never asserts that Lilly is "charging the consumer" any price. MCL 445.903(1)(z). Rather, the Petition admits that Lilly sells insulins to ***commercial buyers*** (wholesalers)—not consumers—at a "list price" known as the wholesale acquisition cost. A.G.Appx.12, 14, 42. Because it cannot provide examples of Lilly charging a consumer anything, the Petition instead relies on surveys and allegations about the "retail prices" that "pharmacies" in the United States and Canada quoted in response to a telephone survey. A.G.Appx.25-26. But an allegation that consumers may be charged prices by someone other than Lilly is not grounds for a claim under MCL 445.903(1)(z) against Lilly. All but conceding that Lilly is not the one "charging the consumer," the Petition relies on an amorphous allegation that "Lilly continues to propagate a system under which Michiganders are charged grossly excessive prices." A.G.Appx.26. "[P]ropagat[ing] a system" is not a basis for a claim under the MCPA.

Second, the Commerce Clause forecloses any MCPA claim that Michigan prices "grossly exceed the price at which the same medications are sold in other countries." A.G.Appx.25. Under binding U.S. Supreme Court precedent, Michigan law cannot require a business "to sell [its

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invitations to meet and discuss Lilly's affordability programs, instead opting to push forward with this test case.

products] at a price that is no higher than the lowest price the [business] charges" to out-of-state purchasers. *Brown-Forman Distillers v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575 (1986); *see also Healy v. Beer Inst.*, 491 U.S. 324, 326 (1989). Any attempt to use Michigan law to tie Michigan prices to out-of-state prices is unlawful, so this Court's "duty [is] to presume the constitutionality of [the MCPA]" by "constru[ing] it" to reach only in-state pricing. *People v. McLeod*, 407 Mich. 632, 657 (1980) (plur. op.); *accord Sullivan v. Mich. State Bd. of Dentistry*, 268 Mich. 427, 429 (1934).

The Petition's theory—that the Michigan Consumer Protection Act can prohibit selling insulin at a higher price in Michigan than in Canada—is especially untenable because it would functionally tie Michigan prices to ***foreign*** prices, not just out-of-state domestic prices. The application of state law to foreign commerce is subject to an even "more extensive constitutional inquiry." *Japan Line v. Cnty. of Los Angeles*, 441 U.S. 434, 446 (1979). Because binding precedent bars the Department from asserting that in-state prices are supposedly "higher than the prices being charged in [other] ***States***," the Department certainly cannot use the MCPA to attack in-state prices as "higher than the prices being charged" in other ***countries***. *Healy*, 491 U.S. at 335 (emphasis added); *Brown-Forman*, 476 U.S. at 582-84. Sure enough, the Department cites no case endorsing this long-foreclosed approach, much less using the MCPA in this fashion.

A claim based on comparing Michigan prices to foreign prices also makes no sense. The approval, regulation, and distribution of medicines is different in different countries. Courts have therefore squarely held that claims based on different prices cannot be actionable as a matter of law because the "absence of competition from Canadian sources in the domestic prescription drug market" is "caused by the federal statutory and regulatory scheme adopted by the United States government." *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 790-91 (8th Cir. 2006) (finding





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that the U.S. market is a "closed system" and rejecting claims that plaintiffs were "injured by increased prices for prescription drugs in the United States"). An apples-to-oranges comparison of alleged prices in dramatically different international regulatory systems cannot state a claim under settled law.

Third, the Petition's foreign-pricing theory would also interfere with commerce "among the several States" (in addition to international commerce), independently violating *Brown-Forman* and *Healy*'s prohibition on price tying. U.S. Const. art. 1, §8, cl. 3. If the MCPA allowed Michigan officials to demand that in-state prices match foreign prices, every other state could follow suit and "alter their own regulatory schemes" to require price-matching. *Brown-Forman*, 476 U.S. at 584. Interlocking state regulation based on out-of-state prices would result in "price gridlock" as each state demands that no other jurisdiction receive a better price. *Healy*, 491 U.S. at 340. The Commerce Clause prohibits that domino effect.

The Department lacks any argument that this theory is legally viable, and its repeated refusal to defend this theory should be dispositive.

### B. The Department Lacks a Viable Theory that Lilly Is Charging Michigan Consumers Grossly Excessive Prices for Branded Insulin.

The Petition's next theory is that Lilly is "charging the consumer a price that is grossly in excess of the price at which similar property or services are sold" because Lilly introduced nonbranded Lispro at a lower list price than branded Humalog. A.G.Appx.24, 28. The Petition posits that "each Michigan consumer who paid a price for Humalog at or above its list price was paying a price grossly in excess of the price at which Eli Lilly was selling the chemically identical drug Lispro." A.G.Appx.28. This theory fails for multiple reasons.

First, the Petition ***again*** fails to plead that Lilly is "charging the consumer" anything. MCL 445.903(1)(z). The Petition alleges Lilly set the "list price[s]" for Lispro and Humalog that are

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charged to wholesalers, not consumers. A.G.Appx.28. That is why the Petition vaguely frames its roundabout allegation in terms of "each Michigan consumer ***who paid a price*** for Humalog" without alleging that ***Lilly*** charged that price. A.G.Appx.28 (emphasis added).

Second, MCL 445.903(1)(z) only allows comparisons of "similar property or services," but branded and nonbranded goods are dissimilar as a matter of law for the MCPA's specific "trade or commerce" purposes. MCL 445.903(1), (1)(z). As a general matter, a brand name ***itself*** can add value to a product. *E.g.*, *Jarro v. U.S.*, 830 F. Supp. 606, 609 (S.D. Fla. 1993) ("Significant value can be placed on a corporate name or trademark…."); *Volkswagen v. iman365-usa*, 2020 WL 977969, at *6 (N.D. Ill. Feb. 28, 2020) (Lilly.Appx.360b) (noting that plaintiffs' "brand names were valued at $520 million"); *U.S. Auto Club, Inc. v. U.S. Motor Club Corp.*, 1979 WL 25082, at *3 (E.D. La. Apr. 2, 1979) (Lilly.Appx.369b) ("[P]laintiff's name and mark have become assets of substantial value[.]"); 26 C.F.R. §1.482-2A (IRS recognizing that "[t]rademarks, trade names, brand names, and other similar items" can have value); *cf.* 15 U.S.C. §1051 (trademark registration). Countless products have an array of branded and unbranded options—often manufactured and distributed by the same companies—that vary in price. Some purchasers ***prefer*** to buy branded goods, even at a higher cost, because of the perceived value of those goods, brand loyalty, and other factors. The premise underlying the Petition's theory—that every merchant selling branded and unbranded options of any product in Michigan violates the MCPA unless both goods are sold at similar prices—is breathtaking. The Department offers no support for that theory, because it is not defensible.

The Department's application of this theory to ***medications*** is particularly meritless given that its own Petition recognizes that the third parties that control patient access to medications treat branded and unbranded products differently. As alleged here, insurance payers and PBMs prefer

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branded medications with higher list prices, with "[o]ne of the largest PBMs" even "expressly stat[ing] that Lispro would not be covered by its plans." A.G.Appx.14-15, 31. The Petition cannot credibly plead that branded and nonbranded medications are "similar" as a matter of law for the "trade or commerce" purposes of the MCPA—as needed to state a claim—while simultaneously contending that branded and nonbranded medications are subject to different market forces from third parties unrelated to Lilly that impact what medications consumers select and how much they might pay out-of-pocket (if anything). MCL 445.903(1), (1)(z).

Third, federal law prohibits using the MCPA to control the relative pricing of branded and nonbranded medications. Federal law ***encourages*** the introduction of nonbranded medications at lower prices: a "brand-name manufacturer can market a competing generic … by essentially rebranding its brand-name drug ***and selling it at a lower price point***." *In re Zetia*, 7 F.4th 227, 233 (4th Cir. 2021) (emphasis added) (discussing federal statutory regime); *accord Mylan Pharms. v. U.S. FDA*, 454 F.3d 270, 273 (4th Cir. 2006) (explaining that an "authorized generic" "is sold at a lower price than the branded pioneer drug"); *Teva Pharm. Indus. v. Crawford*, 410 F.3d 51, 52 (D.C. Cir. 2005) (similar); *Sanofi-Aventis v. Apotex*, 659 F.3d 1171, 1174-75 (Fed. Cir. 2011) (similar). Because federal law seeks to create a robust lower-cost generic medication market, the U.S. Department of Health and Human Services has also long-recognized that "authorized generic drug[s]" are sold at lower prices than their "brand name" counterparts. 42 C.F.R. §447.506. This federal regime is incompatible with construing the MCPA to force price parity between branded and unbranded medications.

Fourth, this theory is irreconcilable with the rest of the Petition. In the same breath that the Department complains that the price of branded Humalog is too high, it would fault Lilly for introducing a nonbranded medication with a ***lower*** list price (Lispro). Under this rationale,

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lowering prices, or introducing lower-priced alternatives, would be actionable. That backwards theory has no grounding in law or logic, and the Department offers no defense of it.

### C. The Department Lacks a Viable Theory that Lilly Made False or Misleading Statements of Fact Regarding Lispro.

The Petition's final theory concerns the MCPA's prohibition on "[m]aking false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions." MCL 445.903(1)(i). The Petition alleges that, "[i]n announcing Lispro, Eli Lilly expressly said it was to help make insulin medications more affordable." A.G.Appx.28. Although the Petition "does not dispute some truth may underlie this statement," it nonetheless asserts that the statement is potentially "misleading because it leaves unspoken" Lilly's alleged (but unsubstantiated) "motivation to keep intact a system from which it is deriving significant profit at the expense of consumers." A.G.Appx.28-29. This theory also fails as a matter of law.

First, MCL 445.903(1)(i) concerns only "false or misleading statements of ***fact*** concerning the reasons for, existence of, or amounts of price reductions." (Emphasis added.) By its plain terms, this policing of "statements of fact," *id.*, has no application to an allegedly unspoken subjective "***motivation***." A.G.Appx.29 (emphases added). The Department's premise that MCPA plaintiffs can sue over the supposed purity of alleged corporate motivations or "unspoken" desires about "public relations" lacks any legal support—which is why no defense of this premise is offered. A.G.Resp.Br.7. The law covers only factually false statements, and none is pleaded. Could there be any doubt that subsection 1(i) concerns only misstatements of concrete facts—not quibbles about purported motivations that would become fertile ground for speculative suits—courts routinely recognize that the MCPA covers "statement[s] or representation[s] ***of fact***" while eschewing statements of desire or opinion. *E.g.*, *Collins v. A1 Motors*, 2017 WL 1190932, at *6 (Mich. App. Mar. 28, 2017) (Lilly.Appx.374b) (rejecting MCPA claim against dealer that

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represented a vehicle as "special"); *Viches v. MLT*, 124 F. Supp. 2d 1092, 1099 (E.D. Mich. 2000) ("Defendant['s] … brochure and its slogan of a 'worry-free' vacation is … mere puffing") (collecting cases); *cf. Gilpin v. Marcus*, 1999 WL 33437810, at *5 (Mich. App. Aug. 13, 1999) (Lilly.Appx.382b) (rejecting that physician's "alleged representations regarding her participation in 'numerous' surgeries was 'unfair, unconscionable,' or 'deceptive'").

Second, even if the Petition alleged facts instead of motivations, the allegation still would fail because the Petition's theory is one of omission, and subsection (1)(i) does not cover omissions. The Petition concedes there is "truth" to Lilly's alleged "statement," so it merely alleges an "***unspoken***" nondisclosure of Lilly's supposed motivations. A.G.App'x.28-29 (emphasis added). But subsection (1)(i) speaks only to "***[m]aking*** false or misleading ***statements*** of fact," and nothing that Lilly said was allegedly false or misleading—the Petition simply suggests that Lilly should have made self-effacing statements apologizing for its supposed motivations. MCL 445.903(1)(i) (emphasis added). The Petition's notion of a violation-by-nondisclosure is irreconcilable with the text and would invite countless speculative suits.

That subsection (1)(i) does not cover such omissions is reinforced by the fact that ***other*** MCPA sections contemplate certain omission-based violations in highly limited circumstances. *E.g.*, MCL 445.903(1)(s) ("Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer."). That difference in language confirms subsection (1)(i) does not permit omissions-based theories.

Moreover, even if the Act's text supported a nondisclosure theory, the Department's theory would still fail under the rule that, "to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made ***and*** that there was a legal or equitable duty of disclosure." *M&D, Inc. v. W.B. McConkey*, 231 Mich. App. 22, 32 (1998) (emphasis

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added); *accord Shain v. Advanced Techs.*, 2017 WL 768929, at *12 (E.D. Mich. Feb. 28, 2017) (Lilly.Appx.390b) ("the omission of facts does not constitute a violation of Michigan's consumer protection act absent a duty to disclose certain information"); *Hendricks v. DSW Shoe Warehouse*, 444 F. Supp. 2d 775, 782 (W.D. Mich. 2006) (dismissing MCPA claim "in the absence of a duty of disclosure"). The Department identifies no duty to disclose.

Third, even assuming the Petition's allegations could be viewed as somehow challenging statements by Lilly, such a challenge would violate the First Amendment. The Petition does not dispute the truth of any statements—only the purported motivation behind them—and truthful "[s]peech in aid of pharmaceutical marketing … is a form of expression protected by the Free Speech Clause of the First Amendment." *Sorrell v. IMS Health*, 564 U.S. 552, 557 (2011). To the extent the Department would target Lilly for either allegedly not believing in its view of the pharmaceutical "system" (A.G.Appx.28-29), or not confessing an (allegedly) differing perspective, the First Amendment forbids the Department from "alter[ing] the content" of Lilly's truthful speech by forcing it to append and vocalize hypothesized motives regarding Lispro. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018). There is no lawful basis for an MCPA theory that rests on true statements. Such an unprecedented theory is limitless, dangerous, and constitutionally impermissible.

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This Court was correct in twice asking whether the Department had pled a viable claim. The Department's continued refusal to answer should tell this Court all it needs to know.

## II. THE DEPARTMENT'S FAILURE TO IDENTIFY A LEGALLY-VIABLE MCPA THEORY DEFEATS REVIEW.

Rather than argue that its Petition pled a legitimate MCPA violation, the Department suggests that pleading a violation is irrelevant to this suit. The Department's own description of

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the case refutes that suggestion: "A court of record ***cannot apply §4*** [the MCPA exemption] without a pleading alleging, at a minimum, a 'case or controversy' ***implicating Lilly's exposure to liability*** under the MCPA." A.G.Br.12 (emphases added). In other words, the exemption comes into play only if a case involves a cognizable MCPA violation that might "expos[e]" a defendant to "liability." *Id.* Here, however, the Department refuses to explain how the Petition (the "primary filing") creates "exposure to liability." *Id.* at 2, 12. By the Department's own logic, the Court should not bypass the "liability" question and answer second-order questions about how the MCPA's exemption might "apply" to a hypothetical MCPA violation. *Id.* at 2.

Despite that concession, the Department maintains that it can pursue an MCPA case "regardless of whether [it] alleged an MCPA violation" and asserts that "[n]o alleged MCPA 'violation' was required to bring this controversy to the fore." A.G.Br.xi, 14. That is wrong under the MCPA's text, which permits an investigation only upon a showing of "an alleged violation of" the MCPA. MCL 445.907(1). It is also wrong under settled precedent regarding declaratory judgments because, without a cognizable alleged violation, there is no "controversy" that "necessitates" this Court's review. And it is wrong under this Court's precedents precluding "pro forma proceedings" brought for purposes of rewriting a statute. Finally, the Department's assertion that Lilly somehow waived these fundamental problems—ones that this Court has twice identified and directed the parties to address—is baseless.

### A. The Department Can Pursue Only a Legally-Viable MCPA Violation, Even In the Investigatory Context.

The Department argues that "[n]o alleged MCPA 'violation' was required" because it filed an "investigation … separate from, and prior to, an enforcement action." A.G.Br.14, 24 (alleging that discussion of a violation is "premature[]" given the "investigative posture"). That approach is foreclosed by the MCPA's text.

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An MCPA investigation requires "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***." MCL 445.907(1) (emphasis added). At that point, a court can "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***" or "may compel a person to produce the books, records, papers, documents, or things ***relating to an alleged violation of this act***." *Id.* (emphases added). An "alleged violation" is the predicate for an investigation, and without "probable cause" of a legally-cognizable violation there is no ability to investigate under the MCPA. *Id.* In other words, there must be both a ***legally-viable*** theory of wrongdoing under the MCPA ***and*** probable cause that such wrongdoing occurred.

The Department's assertion that it can nonetheless investigate without alleging a legally-cognizable MCPA violation is astounding in its implications and conflates the limited powers of the executive with the greater power of the Legislature. The Legislature possesses a broad "power to investigate" that is "inherent in the power to make laws because a legislative body cannot legislate wisely or effectively in the absence of information." *Eastland*, 421 U.S. at 504; *accord People v. Courser*, 326 Mich. App. 298, 308-09 (2018). The Attorney General, by contrast, is limited to powers conferred by statute—here, tied to a "method, act, or practice ***which is unlawful under this act***." MCL 445.907(1) (emphasis added). There is no plenary investigative power, and all investigations must rest on probable cause of a legally-cognizable violation. Were it otherwise, the implications for the rule of law would be sweeping—anyone could be investigated for anything, at any time.

Because the Department has not satisfied the MCPA's threshold requirement for launching an investigation—probable cause of a cognizable violation—it attempts to distract from that

problem by citing cases involving ***additional*** putative limitations on ***other*** types of investigations, and then claiming that such limitations are not barriers here. A.G.Br.24-25. Those citations have nothing to do with the Department's failure to meet the basic statutory prerequisites for unlocking its investigatory powers under the MCPA. Unlike the cited cases, Lilly is not opposing an otherwise-lawful investigation by asserting a right to "due process," *In re Petn. of Att'y Gen.*, 274 Mich. App. 696, 705-06 (2007), or against "self-incrimination," *Anonymous v. Att'y Grievance Comm'n*, 430 Mich. 241, 246, 254 (1988) (explaining that the "investigation … was well within the power granted by the Michigan Court Rules"). Lilly is asserting that this MCPA investigation is unlawful ab initio because the ***very statute*** that purports to authorize the investigation requires a legally-cognizable theory of a violation supported by probable cause.

For much the same reason, the Department cannot ignore the MCPA's requirements by citing out-of-jurisdiction cases involving investigations under statutes that—unlike the MCPA—purport to "delegate[]" to administrative agencies the power to self-regulate their investigations. *E.g.*, *Endicott Johnson v. Perkins*, 317 U.S. 501, 507, 509 (1943) (concluding that "the admitted facts left no doubt that under the statute determination of that issue was primarily the duty of the Secretary" and the judiciary was not "authorized to decide the question"); *Okla. Press Publ'g v. Walling*, 327 U.S. 186, 215-16 (1946) ("Congress has made no requirements in terms of any showing of 'probable cause.'"). The Legislature did not grant the Attorney General the same flexibility under the MCPA, but instead limited the Department's investigative power to legally-cognizable "alleged violation[s]" of the statute supported by probable cause.

Finally, this is not a case where Lilly is trying to "preempt an investigation with conclusory factual assertions or specifications about how different legal doctrines should be applied to such facts" or offering "alternative facts." A.G.Br.22, 25. The Court has ***twice*** instructed the





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Department to answer whether an alleged, cognizable violation has been asserted. Lilly has explained why the Petition, ***on its own terms and accepting the factual allegations as true***, is invalid as a matter of law.[9] If the Department believed otherwise, it could have made that argument. It did not. Instead, it asks this Court to grant it a legislatively-denied power to launch investigations "regardless of whether [it] alleged an MCPA violation." A.G.Br.xi. Neither the separation of powers nor the rule of law permits that approach.[10]

### B. Pursuing Declaratory Relief does not Eliminate the Need to Allege a Cognizable Violation.

Seeking to gloss over the absence of any alleged MCPA violation, the Department contends that judicial review is available because the Department has styled this portion of the lawsuit as a claim for declaratory relief stacked atop the "primary filing" of the Petition. A.G.Br.2, 15. That argument is backwards.

The Department's ability to seek declaratory relief depends on whether a legally-viable MCPA violation has been asserted in the first place. A declaratory action "may not be used for the determination of abstract questions or the rendering of advisory opinions." 26 C.J.S. Declaratory Judgments §32. Rather, as the Department concedes, "[t]he essential requirement of [an] 'actual controversy' … is that plaintiffs plead and prove facts which indicate an adverse interest ***necessitating*** the sharpening of the issues raised." A.G.Br.15 (quoting *Lansing Sch. Ed.*

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[9] The Department's passing suggestion that its theories might be viable because a circuit court immediately rubberstamped an *ex parte* Petition ***before*** Lilly appeared only underscores the Department's inability to articulate ***how*** these theories are viable. If an unreasoned, *ex parte* signature were dispositive, the MCPA would not allow targets to "set aside" erroneous *ex parte* issuances or quash unlawful subpoenas. MCL 445.907(5); *see also infra* 27 n.12 (discussing motions to quash).

[10] For the same reasons, the Department's hypothesizing that investigations in other cases might reveal "whether the exemption applies" is irrelevant. A.G.Br.26. Whatever the nature or object of an investigation, it in ***all*** instances must be supported by probable cause of "an alleged violation of this act." MCL 445.907(1). That support is absent here.

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*Ass'n v. Lansing Bd. of Ed.*, 487 Mich. 349, 372 n.20 (2010)) (emphasis added); *accord Shavers v. Kelley*, 402 Mich. 554, 588-89 (1978) ("necessary to guide a plaintiff's future conduct" and "necessitating the sharpening of the issues raised"); *Michigan Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 225 (2019) ("necessitating a judgment to preserve the plaintiff's legal rights"). Here, nothing "necessitat[es]" declaratory relief regarding a hypothetical MCPA claim against Lilly, especially when the Department fails to allege any viable MCPA violation to begin with.

Ample precedent, including that cited by the Department, underscores that a declaratory judgment is appropriate only when—unlike here—the parties are on a collision course involving a legitimate grievance that presents or threatens harm between the parties. For example, this Court has found controversies when a teacher sued a school board for its failure "to expel students that have allegedly physically assaulted those teachers," *Lansing Sch. Educ. Ass'n*, 487 Mich. at 352, 372-78, when a new law imposed allegedly-unlawful insurance requirements on drivers and insurers, *Shavers*, 402 Mich. at 588-92; *but see id.* at 592 & n.13 (declining to review several hypothetical issues), when builders and contractors sued over "present and future violations" regarding inspection fees, *Michigan Ass'n*, 504 Mich. at 208-09, and when businesses sought to prevent enforcement of a statute under which they had been audited, *Dine Brands*, 2025 WL 898837, at *4. Each case presented real, concrete disputes about "violations" and harms between the parties—*i.e.*, workplace violence, insurance-coverage obligations, and fees—even if the harms had not yet been fully realized. They stand in sharp contrast to the Department's demand for declaratory judgment of the "proper meaning" of an MCPA statutory exemption in this suit against Lilly "regardless" of whether there is a cognizable MCPA claim against Lilly. A.G.Br.xi, 25.

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The Department's reliance on *League of Women Voters v. Secretary of State* neatly illustrates that judicial intervention requires "a present legal controversy, not one that is merely hypothetical or anticipated in the future." 506 Mich. 561, 586 (2020). There, plaintiffs challenged election laws because they supposedly "wish[ed] to exercise their rights as Michigan registered voters to support placement of proposals on the general election ballot by signing petitions." *Id.* at 585. This Court declined to issue declaratory relief, explaining that "[p]laintiffs only ask for a declaratory judgment because it ***perhaps may be needed in the future*** should they decide to sign some initiative." *Id.* at 586 (emphasis added). So too here. There is no "present legal controversy" involving a legally-cognizable MCPA violation involving Lilly. *Id.* The Department simply wants to interpret the exemption to clear the way for other lawsuits "anticipated in the future." *Id.*

Faced with these settled principles limiting declaratory relief, the Department responds by rebutting arguments no one is raising. Lilly has never argued that the Attorney General needs to "bring[] an enforcement action before her investigation can commence" or file "companion claims" that seek other forms of "substantive relief" in addition to a request for declaratory relief. A.G.Br.11, 13-15. The key question is whether the Department can articulate "probable cause" that Lilly has committed a "method, act, or practice which is unlawful under this act," meaning it "relat[es] to an alleged ***violation*** of this act"—requiring a legally-viable theory of a violation. MCL 445.907(1). Only then can any MCPA proceeding—investigative or not—move forward. As the Department elsewhere concedes, a legally-cognizable MCPA violation is a prerequisite to invoking the MCPA, A.G.Br.12, and the Department's failure to plead or defend such a violation is what is dispositive here.

Also unavailing is the Department's argument that a dispute over the MCPA's exemption could have arisen through ***other*** mechanisms, such as if Lilly had filed a motion to quash or if the

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Department had filed a direct "enforcement action." A.G.Br.14, 17. None of that changes that ***this*** one-count declaratory judgment action can proceed under the plain text of the MCPA only if there is a viable "Petition" to pursue. A.G.App.43.

If anything, the Department's recognition that a dispute over the exemption's interpretation might have arisen in ***other*** postures confirms the problems with ***this*** declaratory action. Had the Department filed an enforcement action or served a subpoena, the substantive defects in the asserted MCPA theories would have been front and center. As the Department seemingly recognizes, Lilly's refutation of the Department's "prima facie case" on the merits would have been presented ***before*** the "affirmative defense" of the statutory exemption. A.G.Br.23. Consistent with the fact that the Department refuses to defend these theories, the circuit court would have promptly granted summary disposition in an enforcement action, MCR 2.116, or quashed or set aside a subpoena, MCL 445.907(5).[11] The Department did not pursue these routes because they would have frustrated its objective of "teeing up the *Smith* and *Liss* issue." *Supra* n.4. But that strategic choice does not make this request for declaratory relief regarding the MCPA—without an underlying violation of the MCPA in the "primary filing" of the Petition—any more proper. A.G.Br.2. To the contrary, it shows just how improper the Petition was, and thus the entire litigation that rests upon it.

### C. The Absence of a Legally-Viable MCPA Violation Defeats Judicial Review.

The Department's failure to defend whether it pled an MCPA violation confirms the completely artificial nature of this case. It also brings this case squarely within this Court's

[11] *See also In re Investigation of Mar. 1999 Riots in E. Lansing*, 463 Mich. 378, 379-80 (2000) (affirming order quashing subpoenas); *In re Pet. of Att'y Gen. for Investigative Subpoenas*, 282 Mich. App. 585, 586 (2009) (similar); *In re Investigation of Death of White*, 256 Mich. App. 39, 40 (2003) (reversing issuance of subpoena for investigative materials).

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century-old principle that judicial review is inappropriate "[w]here it is apparent that the object of a case is not the vindication of a right, but a desire to obtain an interpretation of a statute by a test case." *Anway*, 211 Mich. at 610.

The "object" of this suit plainly "is not the vindication of a right." *Id.* The Attorney General contends that she can bring this case "***regardless*** of whether she alleged an MCPA violation," A.G.Br.xi (emphasis added), illustrating there is no "right" under the MCPA she is trying to "vindicate" against Lilly. *Anway*, 211 Mich. at 610. Rather, the true "object" of this suit is to "fish in judicial ponds for legal advice" and "obtain an interpretation of [the exemption] statute" for hypothetical future actions against ***other*** entities. *Id.*; 26 C.J.S. Declaratory Judgments §32. As the Attorney General told the Legislature, this case "deal[s] with whether or not the Michigan Consumer Protection Act could apply to regulated industries or to individuals who were otherwise licensed in some manner or another." *Supra* n.2 59:40-59:56. The Department's brief is transparent that it wants to change the law to pursue future potential suits against "pet shops," "telecommunication providers," or "auto dealership[s]." A.G.Br.53-54.

But "[c]ourts cannot be used for the purpose of deciding even real questions in pro forma suits, ***especially when the object and purpose is to affect important litigation between other parties***." *Anway*, 211 Mich. at 612 (emphasis added). This Court should not endorse a desire "to affect third persons" as a basis for jurisdiction. *Id.* "The duty of this [C]ourt is limited to actual pending controversies. It should not pronounce judgment on abstract questions, even if its opinion might influence future action under like circumstances." *Id.* at 614. Doing so risks making mistakes about "complicated and difficult questions of law" that are best decided in concrete cases. *Id.* at 612.

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The Department's strategy of using a violation-free suit against Lilly as a springboard for remaking the law for use in other cases violates these settled principles. This Court should not open the floodgates to litigants "teeing up" artificial suits to overturn precedent—whether now, or in the future. *Supra* n.4.

**D. Lilly did not Waive the Deficiencies in the Department's Legal Theories.**

Although this Court directed that "[t]he parties ***shall address*** … whether the plaintiff adequately pled a claim that the defendant violated the M[CPA]," (emphasis added), the Department objects that "Lilly will construe [this directive] as an invitation" to address whether the Petition pled a claim. A.G.Br.22. In the Department's view, these Court-mandated "arguments" somehow are "are not properly before this Court" because "Lilly did not raise them in the circuit court," so they are "waived on appeal." A.G.Br.23. Alternatively, the Department claims that "Lilly has never explicitly argued that probable cause for the investigation was lacking." *Id.* (emphasis added). These efforts to dodge the Court's question are baseless.

First, Lilly waived nothing. "[W]aiver is the intentional relinquishment of a known right," *Sweebe v. Sweebe*, 474 Mich. 151, 156-57 (2006), and the Department cites no instance where Lilly foreswore its ability to contest the Petition's theories. This purported waiver argument merely rests on the principle that a losing party typically cannot inject new issues on appeal, A.G.Br.23 (citing *Walters v. Nadell*, 481 Mich. 377, 388 (2008)), but that principle is irrelevant because ***Lilly prevailed*** in the circuit court. That left Lilly free to seek "affirm[ance] for reasons other than those stated by the court below," especially given this Court's specific request for additional briefing. *Groves v. Dep't of Corr.*, 295 Mich. App. 1, 13 n.3 (2011); *accord Merlo Constr. v. Citizens Ins. Co. of Am.*, 2012 WL 4373294, at *3 (Mich. App. Sept. 25, 2012) (Lilly.Appx.403b) ("Although this argument was not raised or addressed below, an appellee can argue on appeal for alternative grounds of affirmance.").

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Moreover, Lilly's focus in the circuit court on the exemption, rather than the merits, is entirely a product of the artificial nature of this dispute. Rather than proceed in the Petition action and face a motion to quash those theories for their lack of merit, the Department tried to sidestep the merits by ***simultaneously*** filing a declaratory action purporting to address only the exemption issue in its sole count. A.G.Appx.43. Faced with a two-front war—and, given that the Department confessed that binding precedent required the circuit court to rule for Lilly in the declaratory action—Lilly naturally emphasized that undisputed ground in seeking summary disposition. *E.g.*, A.G.Br.26 ("conced[ing] that the exemption … does apply here under current law"). The Department cannot claim "waiver" after conceding that its suit was legally barred on other grounds.

Second, the Department is wrong that "Lilly has never explicitly argued that probable cause for the investigation was lacking." A.G.Br.23. Lilly has consistently argued that the Petition's theories are "untenable as a matter of law" such that "***the investigation*** still would fail as a matter of law." Lilly.MSC.First.Supp.Br.1; Lilly.COA.Appellee.Br.3 (emphasis added); *accord* Lilly.Bypass.Opp.15 ("[T]he investigation is invalid as a matter of law, for several independent reasons."). It is the Department, not Lilly, who wants to avoid inquiry into the validity of the investigation.

Third, any supposed waiver is immaterial given that this Court—which is a Court of ***discretionary*** review—is being asked to resolve an artificial dispute and end-run ongoing legislative deliberations. The Court is entitled to consider all the relevant circumstances, including whether the litigation is a mirage.

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This suit is nothing but a test case that seeks to "obtain an interpretation of a statute." *Anway*, 211 Mich. at 610. Whatever policy views the Department has about whether the MCPA exemption should apply in other contexts to other potential defendants, "the primary and real object of the proceeding" is not any MCPA violation by Lilly. *Id.* at 612-14. That makes this "pro forma proceeding" unworthy of judicial review. *Id.*

## III. PRECEDENT CORRECTLY INTERPRETS THE MCPA'S DISJUNCTIVE EXEMPTION FOR A TRANSACTION OR CONDUCT.

Even if the Court were willing to open the door to test cases like this one, the only outcome consistent with the MCPA's plain text, the Legislature's actions, and this Court's other precedents is affirmance. In service of the Department's public-policy objectives, the Department presents the Court with a sharp binary choice for interpreting the exemption: The Court can leave intact settled precedent that faithfully applies the exemption when there is specific authorization for a transaction, even if the supposed conduct attached to the transaction or particular aspects of the transaction did not receive their own independent authorization. Or the Court can adopt the Department's view that would apply the exemption only if "experts at a regulatory agency [have] specifically authorize[d] certain ***conduct***" within the transaction along with "all relevant aspects of the transaction or conduct—including those aspects that violate the MCPA." A.G.Br.31, 34 (emphasis added). Under that view, it will not matter whether "a particular transaction … [is] authorized by a regulatory scheme," because plaintiffs will be free to sue over "how that transaction is ***conducted***." A.G.Br.47 (emphasis added). In other words, the exemption for "[a] transaction ***or*** conduct" would apply only if the "conduct" is specifically authorized, thus eliminating any independent role for the word "transaction." MCL 445.904(1)(a) (emphasis added).

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That approach is untenable. Applying the same statutory construction approach this Court embraced just last term, the "disjunctive" and "alternative" text of the MCPA requires applying the exemption when the "broader" transaction is authorized, even if the specific conduct is not. *Dine Brands*, 2025 WL 898837, at *9-12. The text alone is dispositive, but any doubts are resolved by the Legislature's post-*Smith* affirmance of this interpretation, as well as the Legislature's more recent deliberations whether to reverse course and strike the word "transaction."

### A. The Plain Text Dictates this Court's Precedent.

#### 1. Specific Authorization for a Transaction Triggers the Exemption.

Under the MCPA's plain text, specific authorization for a ***transaction*** triggers the exemption, regardless of whether the particular ***conduct*** allegedly attached to the transaction is also specifically authorized. The statute covers "[a] transaction ***or*** conduct." MCL 445.904(1)(a) (emphasis added). Because "the Legislature used the word 'or' to separate" the two operative terms, it established them as "alternative[s]" such that a defendant "need only engage in one of the[m] … to satisfy the statutory … exception[.]" *Jesperson v. Auto Club*, 499 Mich. 29, 35 (2016). As this Court recently said, "[b]ecause the use of 'or' indicates an alternative, and because we have an obligation to give meaning to every word in a statute," there is no ignoring the word transaction and its "broader meaning." *Dine Brands*, 2025 WL 898837, at *12.

Here, it is beyond dispute that the word transaction is the "broader" term that covers the buying and selling of goods—including Lilly's alleged sales of insulin. *Id.* In fact, this broader meaning is the very premise of the litigation. The Department says that "Lilly's insulin sales" are the "transaction" that is the hook for the MCPA's application because "such transactions generally fall within this law's scope." A.G.Br.41. Using that hook, the Department would sue over the "conduct" that is allegedly attached to the "transaction of selling insulin medications"—*i.e.*, how Lilly sets and represents its prices. A.G.Br.44. And the Department's own dictionary definitions

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(and other definitions) confirm that the word "transaction" is broad enough to cover purchases and sales; indeed, to cover the entire "process or instance of transacting." A.G.Br.29 (citing *Webster's New Collegiate Dictionary*); *accord Webster's Third New International Dictionary*, 2425-26 (1976) ("a business deal").

The context of the transactional exemption within the MCPA underscores that the Legislature understood the word "transaction" to have a broader meaning than the particular conduct that occurs as a given transaction unfolds (*e.g.*, pricing, timing, negotiations). The Department suggests that the MCPA-exemption inquiry looks not to authorization for the broader alleged insulin "transactions," but rather more granularly to "whether Lilly may be using 'unfair, unconscionable, or deceptive ***methods, acts or practices***' while engaging in" these alleged "transactions," A.G.Br.41-42 (emphasis added)—but the reality is that ***different*** MCPA exemptions use that narrower language proposed by the Department. For example, MCL 445.904(1)(b) refers to "[a]n act done by [a] publisher." And subsection (2) discusses "an unfair, unconscionable, or deceptive method, act, or practice." It would have been easy for the Legislature to use similar language in subsection (1)(a). But for the at-issue exception, the Legislature opted for the broader term "transaction."

The Legislature's more recent activities confirm that "a transaction" refers to the larger exchange, and not the particulars of the deal. The two most recent MCPA bills that passed the Senate struck the word "transaction," replacing it with language exempting a "specific method, act, or practice that is expressly authorized under the law[.]" *E.g.*, SB 1022 §4(1)(a) (2024); SB 134 §4(1)(a) (2025). These bills would even specify that the exemption "does not" apply "solely because … [t]he method, act, or practice is part of a general transaction that is specifically authorized under the law[.]" *E.g.*, SB 1022 §4(1)(a) (2024); SB 134 §4(1)(a) (2025). Those

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proposals look more like the interpretation the Department offers here. But those proposals have not been enacted into law. They are just proposals, not the operative text.

Finally, a review of "other statutes" reveals that "the Legislature … actually knows" and intends that a transaction is a broad term covering the larger process of buying, selling, and dealing. *Robinson*, 462 Mich. at 460. For example, the Precious Metal and Gem Dealer Act describes "transactions" as the "buying or receiving [of] precious items." MCL 445.482(b). The Deferred Presentment Service Transactions Act discusses "a transaction between a licensee and a customer" involving the processing of funds. MCL 487.2122(1)(g). And the Commercial Code distinguishes a "transaction[]" from narrower "conduct" that might occur "in" the transaction. MCL 440.8503 cmt.3. Exempting "transaction[s]" that are "specifically authorized" by state or federal laws administered by regulatory bodies makes sense given the desire to avoid confusion by businesses who must comply with settled, complex regulatory obligations while simultaneously fending off unpredictable MCPA suits involving those same transactions.

**2. The Department Improperly Seeks to Eliminate the Word "Transaction."**

There is no denying that the word transaction has a "broader meaning" than conduct and refers to the larger process of buying and selling goods. *Dine Brands*, 2025 WL 898837, at *12. And, under this Court's precedents, the exemption's "disjunctive" language requires treating the term transaction as full-fledged "option[]" for triggering the exemption. *Id.* at *10, 12. Yet the Department's interpretation of the MCPA would effectively eliminate the word "transaction" from the phrase "transaction or conduct" by focusing exclusively on "conduct." The Department argues that the exemption is nothing more than a "conflict"-preemption provision that applies when "experts at a regulatory agency [] specifically authorize certain ***conduct***" and such "***conduct*** is later faced with an MCPA charge regarding the exact same specific ***activity***." A.G.Br.34

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(emphases added). Under that approach, authorization for the larger transaction is irrelevant because the exemption turns on whether the defendant's "***conduct*** has been specifically sanctioned." A.G.Br.1 (emphasis added).

The Department's theory of this very litigation confirms that the word "transaction" would be rendered meaningless. According to its brief, the "transaction[s]" at issue are "Lilly's insulin sales." A.G.Br.41.[12] And there is no disputing that Lilly's "sales" of insulin are specifically authorized. Federal law forbids any "person [from] introdu[cing] or deliver[ing] for introduction into interstate commerce any new drug, unless an ***approval*** of an application … is effective with respect to ***such drug***," 21 U.S.C. §355 (emphases added); *accord* 42 U.S.C. §262(a), and the Department admits that Lilly has fully obtained "the approvals anticipated by 21 USC 355." A.G.Appx.40-41. Federal authorization, which is required to sell a particular product that the defendant ***could not sell at all*** but for that very authorization for that very product, constitutes the specific authorization required under the MCPA. The Department does not argue otherwise, likely because federal rules "regulate[] almost every aspect of the pharmaceutical industry, from research to sales to labeling to advertising." *Yacoubian v. Ortho-McNeil Pharma.*, 2009 WL 3326632, at *5 (C.D. Cal. Feb. 6, 2009) (Lilly.Appx.408b). Even if federal law does not address every single

[12] The Department's core theory that Lilly's "transactions" are the hook for MCPA liability because they "fall within the law's scope," A.G.Br.41, renders irrelevant any suggestion that the transactional exemption might not apply to "pre-transaction representations and post-transaction mischief" or to cases where "a consumer does not enter into the transaction." A.G.Br.32, 43. ***This suit*** does not present questions about alleged misconduct detached from an authorized transaction; rather, the Department concedes the alleged conduct challenged here is part-and-parcel of an "authorized" "transaction [for] the sale of insulin." A.G.Br.47. Even assuming other cases could present more "complicated and difficult question[s]" whether particular conduct is sufficiently related to an authorized transaction, this "pro forma proceeding" is not the place to decide them. *Anway*, 211 Mich. at 610-12.

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aspect of a transaction it authorizes, the fact that it specifically authorizes transactions for a specific medicine in the first place rightly triggers the exemption.

Faced with authorization for Lilly's at-issue "transactions," *id.*, the Department's theory is that the transactional authorization simply does not matter. In the Department's view, what should matter instead is whether the FDA has ***also*** "regulate[d]" particular granular "conduct" within the authorized transactions—namely, what the Department dubs "Lilly's pricing conduct" and the alleged "representations Lilly makes about its prices and any discounts it offers on them." A.G.Br.42-43. Under that conduct-focused approach, "legal authorization for the 'transaction' in which the alleged wrongdoing occurs" is irrelevant, and the only inquiry is "how that transaction is ***conducted***." A.G.Br.42-43, 47 (emphasis added).

This Court has expressly and recently rejected this attempt to eliminate half of a disjunctive phrase—here, the word "transaction"—when interpreting parallel language in *Dine Brands*. The question in *Dine Brands* was whether the statutory phrase "'action or proceeding' includes an examination initiated by the Treasurer" under the Unclaimed Property Act. 2025 WL 898837, at *9. The party opposing enforcement argued that the phrase "refer[red] solely to a ***judicial*** dispute resolution process"—*i.e.*, a traditional legal "action," *id.*—much like the Department argues here that the exemption for "transaction or conduct" should just mean "conduct." This Court rejected that theory because it overlooked "the word 'proceeding' [which] is a broader term than 'action.'" *Id.* at 11. Had the Legislature wanted the phrase "'action or proceeding' to have a singular meaning as opposed to conveying two alternative options," it "could have used one word rather than two." *Id.* at *10. It did not, and "such an understanding would be grammatically inconsistent with the use of 'or' as a disjunctive connector" making clear that "***either*** … an action or [] a proceeding" sufficed. *Id.* (emphasis added). The Court thus gave full effect to the "broader meaning" of the

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word "proceeding" to conclude that the statute "encompasses a formal administrative proceeding or investigation as well as a formal legal action commenced in a court." *Id.* at *11-12. The same logic applies here. The MCPA's text requires "giv[ing] meaning" to the "broader" term transaction that is separated "by the disjunctive connector 'or,'" and that broader term must be treated as an "alternative option[]" for triggering the exemption. *Id.* at *10, 12.

*Dine Brands* thus forecloses the Department's refusal to "give meaning" to the word transaction. *Id.* Tellingly, although the Department's brief purports to address the word "transaction," it ***never*** explains what purpose the word actually serves. A.G.Br.46. That is because the Department's ultimate view is that the "transaction or conduct" exemption applies only if a law "specifically authorize[s] certain conduct" such that the defendant's "conduct has been specifically sanctioned by the State." A.G.Br.1, 34. Every one of the Department's arguments highlights this interpretive error.

First, the Department proposes definitions that would render the term "transaction" coterminous with "conduct." The Department defines "transaction" as "an act, process, or instance of transacting." A.G.Br.29, 47. It then defines "conduct" using mirror-image language: "the act, manner, or process of carrying on." A.G.Br.47. Nowhere does it explain how there is any substantive daylight between those terms.

The Department's invocation of *American Home Products Corp. v. Johnson & Johnson*—a product-labeling case decided under federal and New York law—underscores how the Department is attempting to conflate the terms "transaction" or "conduct" in support of its ultimate view that only authorization for conduct can trigger the exemption. A.G.Br.33-34 (discussing 672 F. Supp. 135 (S.D.N.Y. 1987)). The Department claims that *American Home* declined to invoke consumer-protection law "against the ***conduct*** authorized by the FDA." A.G.Br.33-34 (emphasis

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added). In the Department's view, that "conduct"-only analysis should inform this Court's interpretation of the MCPA—even though that analysis ignores that the MCPA's exemption can be triggered by a "transaction." MCL 445.904(1)(a).

Second, the Department attempts to justify its conflation of the words transaction and conduct by suggesting that the phrase "specifically authorized" requires taking "a narrow approach to identifying the transaction." A.G.Br.29. Yet again, the Department ***never*** explains how this "narrow approach" results in anything other than redefining transaction to mean the same thing as conduct, thus reading the word out of the statute. That alone is reason to reject it. *Dine Brands*, 2025 WL 898837, at *12.

Regardless, this argument that the phrase "specifically authorized" can "narrow" the word transaction completely inverts the statutory language by attaching the word "specific[]" to the word "transaction," instead of to the word "authorized." The exemption does not require "a specific transaction that is authorized"—or, in the Department's words, apply only to "specific transactions and conduct." A.G.Br.52. Instead, the text merely requires "***A*** transaction" that is "specifically authorized"—like the on-point federal authorization for Lilly to transact in very medications at issue here. MCL 445.904(1)(a) (emphasis added); *supra* 35-36. Because "the indefinite article 'a[]' means 'any,'" the textual language shows that ***any*** kind of transaction suffices as long as the transaction is specifically authorized. *Patterson v. Ga. Pac.*, 38 F.4th 1336, 1349 (11th Cir. 2022); *accord S. Dearborn Env't Improv. Ass'n v. Dep't of Env't Qual.*, 502 Mich. 349, 368-69 (2018) ("'A' is an indefinite article, which is often used to mean 'any'"); *Paige v. Sterling Heights*, 476 Mich. 495, 508 (2006) (discussing the "indefinite or generalizing force of the indefinite article a or an"). The Department cannot "narrow" the meaning of the word transaction to collapse it with conduct. A.G.Br.29.

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The Department's own caselaw underscores that the phrase "specifically authorized" does not restrict the meaning of the word transaction (and that Lilly's alleged insulin transactions are specifically authorized). It cites *People v. Katt*, where this Court reasoned that an evidentiary exemption "specifically cover[s]" testimony when the testimony "is conformable to all the requirements of that categorical exception." 468 Mich. 272, 287 (2003). That analysis confirms that Lilly's alleged insulin-sale "transactions," A.G.Br.41, are exempted. In particular, there is ***no dispute*** that these transactions "conform[] to all the requirements" that federal and state law establish for Lilly transacting in prescription medications; ***nowhere*** does the Department cite a single "requirement[]" that Lilly has missed. *Katt*, 662 N.W.2d at 287. To the contrary, the Department has long conceded that these transactions have "been done following the approvals anticipated by [federal law]." A.G.Appx.41. Thus, under *Katt*'s view that "conforma[nce] to all the requirements" is enough for "specific[] cover[age]," 468 Mich. at 287, Lilly's conceded conformance to "all" applicable laws must trigger the exemption.

Rather than follow *Katt*'s reasoning, the Department makes the very different argument that, although Lilly's insulin-sale transactions check all of the boxes for the necessary regulatory "approvals," A.G.App.41, those approvals ***still*** are not good enough because the laws granting approval supposedly do not ***also*** speak to the so-called "conduct" within the transactions like "price setting." A.G.Br.32, 43. But again, the MCPA does not require authorization of the transaction ***and*** the conduct. It uses "disjunctive" language—transaction or conduct—and Lilly's satisfaction of the "broader" transaction language is a sufficient "alternative option[.]" *Dine Brands*, 2025 WL 898837, at *10-12; *accord Jesperson*, 499 Mich. at 35. The Department concedes that all of the alleged conduct (namely, purported price-charging) involved in this suit occurs within Lilly's specifically-authorized insulin "transactions." A.G.Br.41-42 (claiming that

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"Lilly may be using 'unfair, unconscionable, or deceptive methods, acts of practices' ***while engaging in*** its business of selling insulin" (emphasis added)). Thus, the Department's suggestion that alleged "pricing conduct" within these authorized transactions can nonetheless sustain an MCPA suit is impossible to square with the text. A.G.Br.43.

Third, the Department is wrong to characterize this Court's precedent as "engraft[ing] the word 'general' into the statute to modify the kind of 'transaction' the statute refers to." A.G.Br.29. The word "general" simply clarifies that "A transaction" has a broader and different meaning than "conduct," lest litigants wrongly conflate those terms. That clarification is consistent with the ordinary meaning of the word transaction, the use of the indefinite article "A," and the Legislature's use of narrower language elsewhere in the MCPA and other statutes. *Supra* 32-38.

Fourth, the Department argues that a transaction-based exemption means that the statutory "term 'conduct' [is] surplusage." A.G.Br.46. That argument is meritless.

To begin, the conduct exemption retains force in cases where the transaction exemption does not apply. For example, in *Brownlow*, the court found that "the general transaction of cleaning a home is [not] specifically authorized by the statute governing [defendant's] licensure as a residential builder," but issued no ruling on whether the defendant could have tried to point to specific authorization for the ***conduct*** alleged to have been injurious—there, running "an ozone generator" as part of a clean-up process. 2013 WL 514598, at *1-3; *see also Rau*, 2019 WL 6339817, at *12 ("Calvert has not identified a single regulation or licensing requirement governing the transaction at issue here."). The dual exemptions for transactions and conduct makes complete sense given the host of federal and state laws that permit behavior through various means and in varying terms: Some laws specifically authorize certain types of transactions (like homebuilding) without discussing every possible detail about how to build a home. *E.g.*, *Liss*, 478 Mich. 203.

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And other laws specifically authorize certain types of conduct that might occur within a wide range of transactions without necessarily addressing the transaction in which the conduct occurs. *E.g.*, MCL 438.31 (purporting to set a default "[l]egal interest rate"). The disjunctive language of the exemption allows for its application in either circumstance.

To be sure, there will be cases in which both the transaction and conduct are authorized—meaning one term will do no work in that particular litigation—but "[l]anguage in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent." *U.S. v. Turkette*, 452 U.S. 576, 583 n.5 (1981). That is why this Court rejects surplusage arguments where redundancies do not render a provision "***completely*** 'surplusage' or devoid of meaning." *Jesperson*, 499 Mich. at 36 (emphasis added). Unlike the Department's interpretation, which would always eliminate the word transaction by limiting the inquiry to whether the "conduct" was specifically authorized, this Court's precedent allows both terms to function in appropriate cases. A.G.Br.1, 34, 47.

The *Dine Brands* decision illustrates the lack of a surplusage problem when a statute has a disjunctive "broader" term that does most (or even all) of the work. There, the phrase "an action or proceeding" consisted of the narrow term "action"—which covers "a lawsuit brought in court"—and the "broader" term "proceeding," which encompasses "a formal administrative proceeding as well as a ***formal legal action commenced in a court***." *Dine Brands*, 2025 WL 898837 at *12 (emphasis added). Given that construction, the term "proceeding" seemingly would occupy the field. Yet, the Court gave full effect to the "broader" term, rather than strain to narrow the meaning of the word "proceeding" or render it coterminous with "action." *Id.*

Finally, even if this Court's precedent created surplusage, that could not help the Department because its brief never applies the surplusage canon to its ***own*** interpretation that

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nullifies the word "transaction." That flaw precludes the Department from invoking the presumption against surplusage here, which "assists only where [the] competing interpretation gives effect to every clause and word of a statute." *People v. Pinkney*, 501 Mich. 259, 284 (2018). "There is no such competing interpretation offered" offered by the Department, which instead demands a conduct-only interpretation. *S. Dearborn*, 502 Mich. at 374.

Fifth, the Department abandons the text to invoke the "remedial" purpose of the MCPA. A.G.Br.37. But as its own authorities attest, this Court cannot "elevate[] the [statute's] general remedial purpose above its plain language," *Hamed v. Wayne Cnty.*, 490 Mich. 1, 23 (2011), because "reliance on the perceived purpose of the statute runs counter to the rule of statutory construction," *Pinkney*, 501 Mich. at 272. It may be that the current Legislature eventually agrees with the Department and eliminates the word "transaction." In fact, the pending amendment would add a requirement that the MCPA "be liberally construed to effectuate the act's purpose"—which the current text ***lacks***. S.B. 134 §4a (2025). But that is a Legislative task, and this Court is bound by the current language.

### B. Statutory History Compels Adherence to Precedent.

The history of MCL 445.904 independently bars the Department's effort to rewrite this section. The Department repeatedly emphasizes that "the Legislature's intent" is the paramount consideration in construing the exemption, *e.g.*, A.G.Br.27, 30, 38, 56, 59, yet ***ignores*** that the Legislature endorsed precedent in post-*Smith* legislation. Even before then, this Court's decision in *Diamond Mortgage* rejected the Department's position that the exemption is nothing more than a conflict-preemption provision and its argument that "all relevant aspects of the transaction or conduct—including those aspects that violate the MCPA" must be authorized for the exemption to apply. A.G.Br.31, 34. And today, the Legislature's current deliberations confirm that the Department's view would require a statutory rewrite.

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### 1. The Legislature has Endorsed Precedent.

Statutory history confirms that precedent correctly interprets the MCPA's text. A "well-established rule of statutory construction [is] that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation," *Ford Motor v. City of Woodhaven*, 475 Mich. 425, 439-40 (2006), and "[t]he Legislature's swift action … following [judicial decisions] reflect[s] an unequivocal desire to address" the law, *Robertson v. DaimlerChrysler*, 465 Mich. 732, 743 (2002). "[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Bush v. Shabahang*, 484 Mich. 156, 167 (2009). And when courts construe a statutory "definition," later versions of the statute "carr[y] with [them] the construction accorded." *People v. Hawkins*, 468 Mich. 488, 510 n.21 (2003); *accord Pinkney*, 501 Mich. at 282.

Here, the Legislature's "swift action … following [*Smith*]" confirms that MCL 445.904(1)(a) "carries with it the construction accorded" by prevailing precedent. *Robertson*, 465 Mich. at 743; *Hawkins*, 468 Mich. at 510. *Smith* construed two of the MCPA's exemptions in a lawsuit against an insurance company involving the sale of a life-insurance policy. One was subsection (1)(a)'s exemption for a transaction or conduct. The other was subsection (2), which prevents the Attorney General from suing over certain practices made unlawful by other regulatory schemes. MCL 445.904(2). *Smith* interpreted the first exemption to apply when "the general transaction is specifically authorized by law, ***regardless of whether the specific misconduct alleged is prohibited.***" 460 Mich. at 464-66 (emphasis added). Thus, subsection (1) facially barred the claim because "the sale of credit life insurance" was "specifically authorized under law[.]" *Id.* But *Smith* then turned to subsection (2), which exempts "an unfair, unconscionable, or deceptive method, act, or practice" under "the insurance code" ***except*** in suits brought by private parties. *Id.*

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at 466. In a desire to "[g]ive[] effect" to the latter provision, the Court "conclude[d] that private actions are permitted against an insurer … regardless of whether the insurer's activities are 'specifically authorized'" under the subsection (1)(a) exemption. *Id.*

The Legislature immediately made clear that it disagreed with *Smith*'s use of subsection (2) to undercut its broad reading of the "transaction or conduct" exemption in subsection (1)(a). The Legislature enacted a new version of MCL 445.904 that included ***the same language*** for subsection (1), but clarified that the MCPA "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 Chapter 20 of the Insurance Code." Pub. Act No. 432, H.B. No. 5332 (2000); House Fiscal Agency, at 2. When judicial decisions declined to give that change retroactive effect, the Legislature again amended the section to leave no doubt about its intentions. House Fiscal Agency at 3; Pub. Act No. 251, H.B. No. 5558, Enacting §2 (2014).

That is unambiguous evidence of legislative intent. The Legislature promptly responded to *Smith* by readopting the "transaction or conduct" exemption verbatim while adding new language to ensure that the exemption would carry full force. There is no better direct evidence of the Legislature's "desire to clarify the correct interpretation of the original statute" than promptly ratifying *Smith*'s interpretation of subsection (1)(a) while overturning a conflicting portion of the same opinion. *Bush*, 484 Mich. at 167.[13]

Significantly, the Department denies none of this history. Instead, it offers legal arguments that only underscore why this Court—decades after the fact—should not second-guess the Legislature's response to *Smith*.

[13] This history also stands in stark contrast to the Department's claims about "how the Legislature intended §4's exemption to operate," which cite nothing. A.G.Br.34.

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First, the Department offers attacks on *Smith*'s reasoning, but these merely show that the Legislature resolved any doubts about that reasoning in favor of a robust transaction-based exemption. According to the Department, *Smith* wrongly construed the transaction exemption in subsection (1) and the exemption for otherwise-prohibited actions in subsection (2) "in such a way as to create a conflict between them." A.G.Br.35. The Legislature obviously agreed that there was a "conflict," because it quickly stepped in. *Id.* But it resolved that conflict by ***reenacting the same "transaction or conduct" language*** of subsection (1) that *Smith* interpreted while simultaneously changing the law to ensure that subsection (2) would not undercut that interpretation. Any argument that *Smith* misunderstood the "transaction of conduct" language is untenable given that the Legislature had the last word on the subject.

Second, the Department claims in a footnote that the Legislature's active involvement is merely "legislative acquiescence," which purportedly is not a valid "indicator of legislative intent." A.G.Br.46 n.16. That dismissive description of the Legislature's choices is inaccurate. The affirmative acts of the Legislature here are the opposite of "acquiescence." *Black's Law Dictionary* (11th ed. 2019) (defining "acquiescence" as "tacit or passive acceptance").

Nor is the Legislature's reinstatement of the transactional exemption alongside other changes to MCL 445.904—in direct response to *Smith*—a bare "reenactment" that is supposedly a weak indicator of statutory meaning. A.G.Br.46 n.16. The Department cites *Hawkins* as supposedly "reject[ing]" the reenactment canon outright, but that is false. A.G.Br.46 n.16. *Hawkins* rejected a specific misapplication of the canon: its use to validate "the imposition of a judicially created remedy that is grounded ***nowhere*** in the text of the statute." 468 Mich. at 508, 510 n.21 (emphasis altered). However, the canon continues to "be a useful tool for determining legislative intent" and possesses "value as a statutory construction aid," especially when there is

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"a clear indication that the Legislature intended to either adopt or repudiate this Court's prior construction." *Id.* at 508-09 & n.20. Here, the plain "text" has always exempted transactions, and the Legislature responded to *Smith* by passing legislation that "adopt[ed]" its construction of the transactional exemption and "repudiated" *Smith*'s misreading of another exemption to undermine it. *Id.* Given that text and context, there is no denying the Legislature's intent.

**2. Pre-*Smith* Precedent Supports the Longstanding Rule.**

Given the Legislature's post-*Smith* activities, earlier MCPA history is irrelevant. But even if the Court looked back at prior decisions, they would foreclose the Department's view that the exemption "resolves only actual conflicts between multiple sources of law," requires "experts at a regulatory agency to specifically authorize certain conduct," and "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." A.G.Br.31, 34 (emphasis omitted). *Diamond Mortgage* squarely ***rejected*** that the exemption applies only if a "statute or regulatory agency specifically authorizes misrepresentations or false promises." 414 Mich. at 617. That is because "no statute or regulatory agency specifically authorizes misrepresentations or false promises," yet "the exemption will nevertheless apply where a party seeks to attach such labels to '[a] transaction or conduct specifically authorized under laws[.]'" *Id.* Likewise, the forty-year old decision of the court of appeals in *Kekel v. Allstate Ins.*, 144 Mich. App. 379 (1985)—which this Court discussed in *Smith*—held that the transaction exemption applied when a transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is purportedly prohibited.

The Department does not acknowledge *Kekel*, and its only response to *Diamond Mortgage*'s rejection of its conflict-preemption view is to distort precedent in the hopes of creating discord where none exists. The Department argues that "*Smith* and *Liss* fundamentally misconstrued *Diamond Mortgage* and its simple, central premise[] that licensure alone is not

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specific authority for ***all*** of a licensee's conduct and transactions." A.G.Br.38 (emphasis added). But *Smith* (which followed *Kekel*'s reading of *Diamond Mortgage*) and *Liss* do not hold that a license is blanket authorization for the licensee. *Liss* actually stressed that licensure "is relevant only to the extent that [it] specifically authorizes [the defendant] to engage in a ***particular*** transaction." 478 Mich. at 243 n.34 (emphasis altered). So, as *Smith* explained, the reason *Diamond Mortgage* came out the way it did was that, although the defendant had a certain type of license, "the transaction at issue, mortgage writing, was not 'specifically authorized' under" that particular license. *Smith*, 460 Mich. at 464; *accord Diamond Mortgage*, 414 Mich. at 603 (explaining that the license did not authorize "the conduct … ***nor transactions***" at issue (emphasis added)). Current caselaw reflects the same understanding that "licensure" is not carte blanche. *E.g.*, *Brownlow*, 2013 WL 514598, at *1-3.

### 3. The Legislature's Recent Deliberations Confirm that Precedent Reflects the Operative Text.

The Legislature's ongoing deliberations underscore that precedent rightly interprets the exemption to apply when there is authorization for the transaction alone—and that changing this rule would require changing the text. Recent bills, including those that have passed the Senate, would strike the word "transaction" and instead require a "specific method, act, or practice that is expressly authorized." *E.g.*, S.B. 134, §4(1)(a) (2025). That rewrite would be a marked departure from the existing text, and it can come from the Legislature alone.

* * *

The Department presents the Court with a binary choice: keep precedent or rewrite the MCPA to delete the word transaction and focus solely on "instance[s] of conduct that enjoy[] distinct regulatory approval." A.G.Br.xii, 1. Text and history foreclose the latter option. The

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Department is seeking "legislative fixes" to get "the right laws in place," and the Legislature is the only forum for that ask. *Supra* n.2 1:01:24-30; 1:03:50-1:04:00.

## IV. *STARE DECISIS* REQUIRES ADHERENCE TO PRECEDENT.

Even if precedent misinterpreted the MCPA, *stare decisis* would require adherence to precedent. Under *Robinson*, assuming a prior decision was "wrongly decided," this Court must consider (1) "whether the decision at issue defies 'practical workability'"; (2) "whether reliance interests would work an undue hardship"; and (3) "whether changes in the law or facts no longer justify the questioned decision." 462 Mich. at 464. The Department all but concedes the first factor, dismisses the third as irrelevant, and converts the second into policy arguments about "consumer welfare and social order." A.G.Br.58. Indeed, all of the Department's arguments reduce to the same assertion that precedent was "wrongly decided" and "never justified," and that this is enough to overturn it. A.G.Br.49, 55, 59. But *stare decisis* means much more, and each *Robinson* factor favors keeping precedent.

### A. Precedent Is Correct.

"The first [*stare decisis*] question, of course, should be whether the earlier decision was wrongly decided." *Robinson*, 462 Mich. at 464. For all the reasons above, precedent is correct. And the text is certainly incompatible with the Department's effort to eliminate the word "transaction."

Adherence to precedent is especially vital because this case involves statutory construction. "[*S*]*tare decisis* carries enhanced force when a [prior] decision … interprets a statute," because "critics of [the] ruling can take their objections across the street" to the Legislature, which "can correct any mistake it sees." *Kimble v. Marvel Ent.*, 576 U.S. 446, 456 (2015). That principle is reinforced by the Legislature's direct response to *Smith* by affirming the interpretation of the transactional exemption while "correct[ing]" a ***different*** "mistake" that undermined the breadth of

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the exemption. *Id.* And the Legislature is currently considering whether to replace the word "transaction" with narrower language. S.B. 134 §4(1)(a). The Department decries "judicial usurpation of the legislative directive," A.G.Br.49, but that very principle forbids this Court from furnishing the "legislative fixes" that the Department has demanded from the Legislature. *Supra* n.2 1:01:25-28; 1:03:55-1:04:00.

**B. Precedent Is Workable.**

The second *stare decisis* factor—the "practical workability" of precedent—also forecloses a judicial pivot. *Robinson*, 462 Mich. at 466. The Department admits that precedent is "easy to apply." A.G.Br.51. That should end the inquiry.

The Department nonetheless claims that practical workability is absent because, under the Department's telling, precedent "guts the MCPA[]" by "arbitrarily exempting an industry from MCPA review any time the Legislature happens to regulate some aspect of that industry," thus leaving consumers "helpless," "powerless," "without recourse," and "deprived of a remedy." A.G.Br.49-53. Those unsubstantiated assertions are wrong. In a March 7, 2023, discussion of "Consumer Protection," the Department stressed "[d]irect consumer and state recoveries total[ing] over **$116.3 million** in 2022" that were made possible by "enforce[ment of] more than 35 state statutes that protect consumers and charities." Lilly.Appx.021b. Just a few months ago, the Department boasted about "recoveries [of] over $16M[illion] in 2024." Lilly.Appx.072b. Moreover, the notion that *Smith* and *Liss* have eliminated MCPA litigation is belied by the many judicial decisions permitting those suits to proceed. *Supra* 8 & n.5. In fact, the Department's publications demonstrate that enforcement has only ***increased*** in the decades since *Smith*. According to its Biennial Reports, the average annual amount recovered in the ten years before *Smith* (1989-1998) was $1,466,207. But the average annual recovery amount for the twenty years after *Smith* (1999-2018) was $2,482,927—an increase of nearly 70%. Lilly.Appx.213b-.277b.

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That number has skyrocketed in recent years, with the Department recovering tens or hundreds of millions of dollars per year. *Supra* 49. And, of course, the Department has continued to bring claims under many other statutes, including against actors in the pharmaceutical industry. Lilly.Appx.123b-.211b. All of these facts refute the Department's unsupported assertions that the "government's hands are tied and left powerless." A.G.Br.51.

The experiences of other states confirm that Michigan's approach is not an unwieldy outlier, as the Department wrongly contends. A.G.Br.57 & n.18. States with similarly phrased exemptions hold that transaction-level authorization is sufficient to invoke their exemption. *E.g.*, *Connelly v. Housing Auth.*, 213 Conn. 354, 361, 365 (1990) (holding that because "[t]he ***transactions*** of th[e] defendant"—"leas[ing] subsidized rental units to low income tenants"—were authorized by law, plaintiffs could not sue over "the failure of the defendant to provide adequate and stable heat and hot water"); *Marques v. JP Morgan*, 370 Ga. App. 305, 306, 311 (2023) (holding that "because residential mortgage ***transactions*** are regulated by both state and federal law," Georgia's Consumer Protection Act did not apply to a broad array of "acts and practices") (emphasis added).

Moreover, when other states have charted different paths, they have done so by enacting ***different statutory language***. Those choices by other "state legislatures [to] enact[] such specific language" simply highlight the unavoidable nature of Michigan's current transaction-protecting language. *Dine Brands*, 2025 WL 898837, at *14. Nevada, for example, applies its exemption to "***[c]onduct*** in compliance with the orders or rules of, or a statute administered by, a federal, state or local governmental agency." Nev. Stat. §598.0955(1)(a) (emphasis added). And Virginia applies its exemption to "[a]ny ***aspect*** of a consumer transaction ***which aspect*** is authorized under law[]." Va. Stat. §59.1-199(1) (emphases added). Michigan, however, chose a different approach,

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and hundreds of millions of dollars in recent consumer-protection recoveries confirm that this approach is "easy to apply" and workable. A.G.Br.51.

Finally, the Department's suggestion that precedent renders the law "confusing" is backwards. A.G.Br.51. Section (1)(a) is an exemption. By definition, an exemption ***is*** a "liability shield." A.G.Br.42. Its purpose is to exempt certain practices from MCPA liability. Although the Department critiques the shield's "simplicity" and believes it is incorrect, there is nothing confusing about it: when a transaction is specifically authorized, a plaintiff cannot sue. A.G.Br.51. The only interpretation that would create confusion is the Department's atextual approach that ignores the disjunctive language and renders the word transaction meaningless, thus breeding the "potential for arbitrary and discriminatory enforcement" that *stare decisis* forbids. A.G.Br.49-50.

**C. Reliance Interests Support Precedent.**

"Reliance interest[s]" require keeping decades of legislatively ratified precedent. *Robinson*, 462 Mich. at 466. *Smith* and *Liss* are "embedded," "accepted," and "fundamental" in Michigan law. *Id.* Courts and litigants understand how these decisions work. So does the Legislature, which amended the law in response to *Smith*. It serves no one's reliance interests to accept the Department's invitation to overturn precedent here, fueling the public sentiment that "one year [courts] say one thing, another year they say something else." *Supra* n.2 1:01:27-35. Indeed, the Department all but concedes defeat in stressing "the citizens' reliance interest in having statutes that 'mean what they say.'" A.G.Br.56. Given that principle, it cannot be that *stare decisis* endorses an atextual construction on the strength of the Department's current policy view that "the interests of society are better served by overturning *Smith* and *Liss*." A.G.Br.58.

The Department's argument that Lilly, specifically, has no reliance interests as "an international corporation," only reinforces the artificiality of this test case. A.G.Br.57. The Department brought this pro forma lawsuit—which includes no alleged MCPA violation—in

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hopes of changing the law to enable future claims against hypothetical ***other*** companies ranging from "pet shops" to "auto dealership[s]." A.G.Br.53-54; *supra* n.2 59:40-59:56 (testifying that this case "deal[s] with whether or not the Michigan Consumer Protection Act could apply to regulated industries or to individuals who were otherwise licensed in some manner or another"). Regardless of whether Lilly has reliance interests (it does, as does every business that operates in Michigan), the countless Michigan-based businesses that are in the crosshairs of future litigation must be considered.

### D. Changes in the Law and Facts Justify Precedent.

The Department spends little time on the last *stare decisis* factor—"changes in the law and facts"—except to claim that precedent "was never justified." A.G.Br.59 (quoting *Paige*, 476 Mich. at 513). That cursory approach misunderstands this factor. Unlike *Paige*, where this Court lacked "authority" to render the at-issue precedent such that the precedent "was not justified from its inception," 476 Mich. at 513, here the Court has merely interpreted the plain-text exemption that includes the word "transaction." MCL 445.904(1)(a). And the only subsequent "changes in the law and facts" are the Legislature's post-*Smith* endorsement of that interpretation. A.G.Br.59.

## CONCLUSION

To reach the Department's desired policy outcome, the Court would need to hold that the Attorney General may bring an MCPA claim without alleging a legally-cognizable MCPA violation, assert a test case for purposes of overturning settled precedent, rewrite the plain text, disregard last term's decision interpreting similar language, ignore the Legislature's actions, and reduce *stare decisis* to whether a precedent seems correct to the current Court. The Court should do none of those things, let alone ***all*** of them. It should either dismiss the appeal or affirm the decision below.

Respectfully submitted,

Dated: August 7, 2025

**HONIGMAN LLP**

By: */s/ Matthew Schneider*
Matthew Schneider (P62190)
Benjamin J. VanderWerp (P84614)
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226
313-465-700
mschneider@honigman.com
bvanderwerp@honigman.com

**KIRKLAND & ELLIS LLP**

John C. O'Quinn, P.C.
Matthew S. Owen, P.C.
One Freedom Plaza
1301 Pennsylvania Ave. NW
Washington, DC 20004
202-879-5000
john.oquinn@kirkland.com
matt.owen@kirkland.com

Diana M. Watral, P.C.
Philip M. Cooper
333 West Wolf Point Plaza
Chicago, IL 60654
312-862-2000
diana.watral@kirkland.com
philip.cooper@kirkland.com

*Attorneys for Defendant-Appellee*

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Dated: August 7, 2025

*/s/ Matthew Schneider*
Matthew Schneider (P62190)

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 7, 2025, I electronically filed the foregoing using the TrueFiling/MiFile System, which will send notification of this filing to all registered counsel of record.

Date: August 7, 2025

Respectfully submitted,

**HONIGMAN LLP**

By: /s/ *Matthew Schneider*
Matthew Schneider (P62190)
222 N. Washington Sq., Ste. 400
Lansing, MI 48933
517-377-0735
mschneider@honigman.com

*Attorney for Defendant/Appellee*