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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. /	Supreme Court No. 165961 Court of Appeals No. 362272 Ingham County Circuit Court 2022-000058-CZ

SUPPLEMENTAL *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Attorney General was required to adequately plead a violation of the Michigan Consumer Protection Act (MCPA) for a court to determine whether MCL 445.904(1)(a), an MCPA exemption, applies?

The trial court did not answer.

The Court of Appeals did not answer.

Appellant answers: No.

Appellees answer: Yes.

Amicus Curiae answers: Yes.

2. 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), were correctly decided.

The trial court did not answer.

The Court of Appeals did not answer.

Appellant answers: No.

Appellees answer: Yes.

Amicus Curiae answers: Yes.

3. Whether, if those decisions were incorrectly decided, they should be retained nonetheless under principles of stare decisis.

The trial court did not answer.

The Court of Appeals did not answer.

Appellant answers: No.

Appellees answer: Yes.

Amicus Curiae answers: Yes.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts—both federal and state. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this, that raise issues of concern to the nation's business community.[1]

The Chamber, as the largest representative of American employers, has a vested interest in certainty, stability, and predictability in business regulation. This interest is particularly acute in industries that are highly regulated. In such industries, clear and consistently enforced regulations are essential to careful operational and financial planning. Businesses rely on certainty in regulation when providing goods and services that government has deemed complex or important enough to regulate.

Accordingly, legislative and agency regulatory processes must provide affected parties with fair notice and a meaningful opportunity to be heard before established regulatory frameworks may be upset. Unpredictable and sudden regulatory change causes deep disruption in highly regulated industries. And that disruption is most pronounced when it comes through regulation-by-litigation—that is, where private parties or state attorneys general use the courts to regulate business retroactively by

[1] *Amicus* affirms that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amicus*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

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lawsuit instead of working to convince legislatures or agencies to regulate business prospectively after thorough and public deliberation of *policy*.

As the present case is a textbook attempt at regulation-by-litigation, the Chamber, on behalf of its many members in highly regulated industries, has particular interest in this appeal. The courts are the proper bodies to address questions about the interpretation and application of legislation in specific cases. But courts are *not* the proper bodies to address questions and changes in the law in the *abstract* or on a general level. The Legislature makes the laws; the judiciary interprets them. The Attorney General's test case reverses that balance, seeking to legislate by litigation rather than asking the Legislature to clarify or amend the law going forward.

The Chamber, as a representative of all American business, also seeks to offer a national perspective to demonstrate how other states have approached similar issues and how best to enable businesses to support economic growth. To be sure, the Chamber believes that government has an important role in ensuring a well-regulated business environment with proper controls. But an expansive consumer protection regime that lacks limiting principles—which is exactly what the Attorney General proposes here—creates legal frictions that impede businesses from creating economic growth. Despite claims to the contrary, Michigan is not currently an outlier with respect to its consumer protection law: numerous other states have similarly chosen to protect businesses' investment in industry-specific compliance by enacting broad exemptions against *ad hoc* regulation-by-litigation in regulated industries. Not only would nullifying Michigan's transaction-based exemption undermine the Legislature's clear policy, but it would hamper businesses—especially large, high-impact businesses—from starting, expanding, and retaining economic contributions that counteract economy-harming trends such as Michigan's declining birth rate and exodus of younger citizens.

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INTRODUCTION

The Legislature makes the law and the courts interpret it. This bedrock separation of powers principle is part of the finely tuned balance established at the federal and state levels in the United States constitutional system. And that principle makes sense. The Legislature can account for trends and particularities, and it can make tradeoffs and large-scale normative judgments. A court, on the other hand, addresses only the particular case in front of it. Adversaries advocate for their preferred positions vis-à-vis a specific statute enacted by the Legislature, and the court determines which adversary has made the better argument based on the record before it.

The Attorney General's sweeping assertion that she need not adequately plead an actual violation of the MCPA before a court determines whether an exemption to the MCPA, MCL 445.904(1)(a), applies, turns all this on its head. The Attorney General effectively concedes that she does not need an actual case or controversy to litigate potentially extensive changes to the MCPA. The implications beyond this case are broad, and the Court should decline to accept the Attorney General's theory. This is particularly important with respect to legislation that touches on business and consumer transactions. In that space, a delicate balance must be struck between business interests and consumers, employers and employees. That delicate balance is by nature the province of the Legislature.

In interpreting the MCPA's exemption for regulated transactions and conduct, this Court's duty is to discern the Legislature's intent as that intent may reasonably be inferred from the statute's plain language. This Court must avoid readings that would negate parts of the statute. Yet, the reading the Attorney General asks this Court to adopt would violate these basic canons of statutory construction. It would require unreasonable inferences that render the exemption of already-regulated transactions nugatory.

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Moreover, the Attorney General's current interpretation would unsettle expectations upon which Michiganders and the businesses they own, operate, and work for have relied for decades. Stability and predictability are not simply aspirational goals of the law; they are its watchwords. And they are essential to securing a strong and vibrant business ecosystem, a project that Michigan has publicly set for itself in the face of challenging demographic headwinds. Businesses find it significantly more difficult to join in such a project to the extent that rule by legislative enactment and administrative regulation in Michigan is displaced by regulation-by-litigation. Such displacement is precisely what the Attorney General seeks, but this Court's response should be simple: keep the reasonable, plain language interpretation on which businesses have relied for over a generation unless and until Michigan's law-writing body—its Legislature—changes the statutory text.

The interpretation of the MCPA's exemption that this Court adopted in *Smith* and *Liss* is not the outlier the Attorney General claims. Rather, it is consistent with the practice of many other states with similar statutory language. Other states reflect different policies with different statutory language, but that is no reason for the court to rewrite the course charted by the Michigan Legislature. This Court should decline the Attorney General's invitation to depart from the MCPA's plain meaning and severely disrupt Michigan's legal regime.

ARGUMENT

I. A plaintiff must adequately plead a violation of the MCPA before a court can determine whether an exemption to the MCPA applies.

Michigan courts "may only exercise the authority granted to them by Article VI of the 1963 Constitution." *In re Smith*, 324 Mich App 28, 41; 919 NW2d 427 (2018). This means that "to warrant" a court's "review, the parties must present" the court

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"with a real controversy, rather than a hypothetical one." *Id.*; see also *Shavers v Kelley*, 402 Mich 554, 589; 267 NW2d 72 (1978) ("This requirement of an 'actual controversy' prevents a court from deciding hypothetical issues.") This "real-case-or-controversy requirement, prevents" the courts "from rendering advisory opinions." *In re Smith*, 324 Mich App at 41. In the declaratory judgment context, this Court has made clear that "the essential requirement of the term 'actual controversy' under the rule is that plaintiffs *plead* and prove *facts* which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 n 20 (2010) (emphasis added). This means that "before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads *facts* entitling him to the judgment he seeks and proves each *fact* alleged, i. e., a plaintiff must allege and prove an actual justiciable controversy." *Shavers*, 402 Mich at 589 (emphasis added).

The Attorney General hammers at this bedrock precedent and states that any plaintiff seeking a decision on whether the MCPA's exemption, MCL 445.904(1)(a), applies, need not plead facts alleging a violation of the MCPA. While she accuses others of putting "the cart before the horse," AG's Br. 25, her theory boils down to this: in a particular case, a plaintiff can ask Michigan courts to interpret whether an exemption to the MCPA applies before ever adequately pleading that the MCPA even applies to the particular defendant in the first place. That is the *definition* of putting the cart before the horse. And it is the very sort of hypothetical question that this Court eschews. Indeed, the Attorney General is candid that she "seeks only *guidance* on her authority to investigate Lilly." (Appellant's Br. 25 (emphasis added).) And she refuses to answer whether she has adequately pleaded *actual* violations on Lilly's part.

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While Lilly argues persuasively why the Attorney General is wrong with respect to the adequacy of her pleading, the Chamber wishes to address the larger implications of the Attorney General's theory that the courts may freely offer "guidance" on a statute's interpretation regardless of whether a plaintiff has adequately pleaded any particular claims implicating that statute.

As this Court stated 85 years ago:

> There is a distinction between legislative and judicial acts. The Legislature makes the law; courts apply it. To enact laws is an exercise of legislative power; to interpret them is an exercise of judicial power. To declare what the law shall be is legislative; to declare what it is or has been is judicial. The legislative power *prescribes rules of action*. The judicial power determines whether, *in a particular case*, such rules of action have been transgressed. The Legislature prescribes rules *for the future*. The judiciary ascertains *existing rights*.

In re Mfr's Freight Forwarding Co, 294 Mich 57, 63; 292 NW 678 (1940) (cleaned up) (emphasis added); see also *State Farm Fire & Cas Co v. Old Republic Ins Co*, 466 Mich 142, 149; 644 NW2d 715 (2002) ("It is not the role of the judiciary to second-guess the wisdom of a legislative policy choice; our constitutional obligation is to interpret—not to rewrite—the law."). The Attorney General's proposed answer to the question presented—that a plaintiff need not plead a violation of the MCPA before a court determines whether the MCPA's exemption applies—effaces these distinctions. The Legislature is the body that is charged with deciding such general questions and with addressing changes or providing clarification of the law in the abstract—not the judiciary.[2] The courts, on the other hand, exist to address concrete cases and contro-

[2] To be sure, the Legislature takes specific incidents and applications into account, but it takes a global view, synthesizing extensive data, to adopt policies that apply at a general level.

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versies, where the generalities of the law rub up against the particularities of a controversy between two parties. The Attorney General would flip this and asks the courts to answer questions properly for the Legislature. This Court should decline this invitation.

It is the Legislature that is best equipped properly to weigh various considerations and make general policy judgments with regard to hypothetical future cases. The Legislature can synthesize large sets of data. And the Legislature can make determinations on that data based on the tradeoffs and normative judgments that are the province of the people's representatives. See, *e.g.*, *Myers v City of Portage*, 304 Mich App 637, 644; 848 NW2d 200 (2014) (stating that "making public policy is the province of the Legislature, not the courts"); *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012) ("Our judicial role precludes imposing different policy choices than those selected by the Legislature.") (cleaned up). This is all the more true with respect to laws regulating sophisticated consumer, business, and employment transactions. These are areas of the law that require sustained study, careful balancing, and *political* considerations. In other words, all things that the Legislature is specially poised to do. Thus, if the Legislature concludes that MCL 445.904(1)(a), as interpreted by this Court in *Diamond Mortgage*, *Smith*, and *Liss* fails to reflect the optimal balance as a matter of general *policy*, it is the Legislature, not the judiciary, that is best suited to adjust that balance prospectively.

Courts, on the other hand, render decisions based on concrete facts presented to them. And this is exactly what this Court did in *Diamond Mortgage*, *Smith*, and *Liss*: it applied the statutory text to the concrete facts before the Court and reached different results in each case as to whether the alleged violations of the MCPA fell within the statutory exemption. As discussed below, the Chamber believes that these decisions correctly interpreted MCL 445.904(1)(a) and that the Court should not disturb an interpretation that businesses in Michigan have relied on to structure their

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regulatory affairs for decades. But even if this Court were inclined to depart from over a quarter-century of settled law, it should only do so when confronted with *actual* alleged violations of the MCPA—not a hypothetical test case devoid of any concrete facts or context to which to the exemption may or may not apply.

Several other factors should caution this Court against jumping headlong into a reevaluation of longstanding precedent without any actual alleged violations at stake. First, although the Attorney General asserts that this Court's decisions in *Smith* and *Liss* have "neuter[ed] the MCPA" and "[left] countless consumers without recourse," she points to no evidence to support this claim. Surely, if "countless consumers" are being harmed by unfair or deceptive acts or practices by regulated Michigan businesses without recourse, the Attorney General could have selected a test case in which she could allege *actual* violations of the MCPA. The fact that she has chosen a case *without* such alleged violations—and must argue that she need not even allege any violations—speaks volumes. Moreover, if the Attorney General is concerned about potential *future* unredressed violations of the MCPA, her recourse should be the Legislature, not the courts. Indeed, the very questions the Attorney General poses regarding the scope of the exemption in MCL 445.904(1)(a) have been—and continue to be—debated by the Legislature. See, *e.g.*, SB 134, § 4(1)(a) (2025) (replacing phrase "transaction or conduct specifically" authorized with "specific method, act, or practice that is expressly authorized" in MCPA). Without an actual controversy on which the interpretation of MCL 445.904(1)(a) depends, this Court should not rush in where the Legislature fears to tread.

Second, the Attorney General's request would have this Court decide an abstract question of law regarding the scope of the MCPA when the answer to that question will not have an effect on the actual dispute between the parties. In other words, the Attorney General seeks to overturn longstanding precedent without ade-

quately alleging actual, concrete violations of the MCPA. The parties agree that, under *Smith* and *Liss*, Lilly's sale of pharmaceuticals fall squarely within the statutory exemption, safely on one side of the existing line. But without adequate allegations that Lilly even violated the MCPA in the first place, this Court will be deciding a question that isn't even relevant to *this* case. That violates the "the essential requirement of the term 'actual controversy' under the [declaratory judgment] rule . . . that plaintiffs *plead* and prove *facts* which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing Sch Ed Ass'n*, 487 Mich at 372 (emphasis added). Moreover, as Lilly explains, the Attorney General's general theories under the MCPA in this case raise numerous thorny questions that implicate the Commerce Clause and the First Amendment of the Federal Constitution, as well as the labyrinthine federal regulation of pharmaceuticals. Lilly Br 13–15, 17, 20. All the more reason to avoid such an abstract question.

Finally, allowing the Attorney General to advance this case without actually pleading a violation of the MCPA will open the door to other such litigation in the absence of a real case or controversy. If the Attorney General can advance her test case despite not having adequately pleaded a violation of the MCPA, it will invite copycat litigation in Michigan and nationwide seeking such "advisory" opinions. Wherever it proliferates, that sort of litigation absent pleaded facts establishing a case or controversy stretches the judicial power beyond its breaking point to the detriment of American businesses *and* consumers. This Court should reject the invitation to be led down that primrose path.

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II. This Court should affirm *Smith* and *Liss* because they are consistent with the MCPA's plain language and have been widely relied upon for a generation.

A. *Smith and Liss applied a straightforward statutory construction to the MCPA.*

Without repeating the careful statutory analysis offered by Lilly in its brief, see Lilly Br 31–42, there is a straightforward reason that this Court's decisions in *Smith* and *Liss* should be reaffirmed: they provide a plain language interpretation of the MCPA's exemption, with a limiting principle and without rendering any text nugatory—just as this Court has repeatedly required. *Rouch World, LLC v Dept of Civil Rights*, 510 Mich 398, 410–11; 987 NW2d 501 (2022) ("This Court must attempt to avoid any construction that would render portions of a statute surplusage or nugatory."); *2 Crooked Creek, LLC v Cass Cnty Treasurer*, 507 Mich 1, 9; 967 NW2d 577 (2021) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.") (cleaned up); see also *id.* (stating that courts' "role in interpreting statutory language is to ascertain the legislative intent that *may reasonably be inferred* from the words in a statute") (cleaned up; emphasis added).

The MCPA does not apply to a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer under statutory authority of this state or the United States." MCL 445.904(1)(a). The statute does not exempt only a *specific* transaction or *specific* conduct, but *any* transaction or conduct, so long as the transaction or conduct is "specifically authorized" under a body of law. Accordingly, in construing the statute, this Court, following its prior decision in *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982), held that "the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is 'specifically authorized.' Rather, it is whether the general transaction is specifically

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authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Smith*, 460 Mich at 465. This holding followed *Diamond Mortgage*'s dictate that the exemption will apply even where a transaction includes what the Attorney General considers "misrepresentations or false promises," even though "no statute or regulatory agency specifically authorizes misrepresentations or false promises." 414 Mich at 617. Consistently again in *Liss*, this Court stated that the exemption "requires a general transaction that is 'explicitly sanctioned.'" 478 Mich at 213.

The Attorney General insists this must be wrong but provides no convincing reason why. First, she maintains that the statute requires that an exempted transaction or conduct be specifically authorized, but that is undisputed. The question at issue is whether the action specifically authorized must be an exhaustively particularized, utterly irreducible unit of behavior—or rather may be something more general. In urging the former, the Attorney General proposes that "[t]he plain understanding of the word 'transaction' is that of a single instance," but to the extent she means that definition to be exhaustive, she immediately contradicts her idiosyncratic definition with *Webster's New Collegiate Dictionary*. AG's Br 29. *Webster's* explicitly defines "transaction" to include, not only an "instance" of transacting, but the whole "process" of transacting. *Id.* In other words, the Attorney General's dictionary supports Lilly's position that, unadorned, "transaction" properly includes something more general than the thoroughly atomized definition the Attorney General wants to give it.

Moreover, interpreting the MCPA's exemption of a "transaction" to apply whenever the general type of transaction is exempt rescues that exemption from being nugatory. Without the reasonably inferred meaning of transactions employed by this Court in *Smith* and *Liss*, any plaintiff could get around the exemption by descending to a level of particularity that could not be anticipated by a regulatory regime. For example, a plaintiff could claim that *this* transaction (*e.g.*, executed on

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Wednesday, August 28, 2024, at 12:05 p.m., in the Boji Tower in Room W, between individuals X and Y, for precisely Z widgets, at a price of . . .) was not specifically authorized and thus the MCPA applies. But no law or regulatory regime can address *every* specific transaction. This is especially true in complex industries and businesses. Thus, to adopt the Attorney General's interpretation is to think that the Legislature intended the exemption to be meaningless. Such a reading is impermissible.

And it is all the more impermissible given the Legislature's position with respect to this exemption. To start, the Legislature has repeatedly *validated* this Court's commonsense reading of the MCPA's exemption, including by swiftly reenacting the same transaction-protecting language that *Smith* interpreted even while correcting other language in the exemption that the Legislature thought *Smith* misinterpreted. See Lilly Supp Br 42–48. The Attorney General tries to write such validations off, but there is no doubt that the Legislature knows and presumes this Court's interpretation in *Smith* and *Liss*. And even if it did not, it is precisely the *Legislature's* job to set and adjust statutory text, and it is the *Legislature's* function to determine how specific an authorization must be to exempt a transaction from the MCPA. The Attorney General would have this Court reevaluate the specificity required without any new text to guide this reevaluation. But that kind of unguided recalibration of legal rights and duties properly belongs to the Legislature, which has the benefit of broad and public inquiry into the many and multi-faceted policy considerations that go into such a project. By contrast, a court undertaking that broad, political project under the limited guidance of the Attorney General's confused and unnecessary litigation is an ill venture.

B. *Businesses have relied upon this commonsense reading of the MCPA's exemption for over a generation.*

For a generation—indeed longer because *Smith* and *Liss* simply applied *Diamond Mortgage*, despite the Attorney General's claims to the contrary—businesses,

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especially those in highly regulated industries, have been able to look to their industry-specific regulations and laws for proper guidance on how to do business in Michigan. They have known that if their particular category of transactions is authorized by laws administered by a regulatory agency, that *agency's* regulations are the polestar for their businesses' activities. Thus, the reliance interests at stake in this litigation go far beyond this Court's prior interpretation of the language of the MCPA to provide a clear and easy-to-apply test: *Smith* and *Liss* have allowed companies and individuals engaging in business in Michigan to rely on the myriad of specific state and federal laws and regulations administered by agencies with expertise in their specific industries. Disrupting this reliance significantly undermines the certainty and predictability of regulatory compliance efforts in Michigan, leading to increased costs of doing business in the state and, ultimately, higher prices and fewer opportunities for Michiganders.

It is axiomatic that businesses require a degree of predictability and uniformity to function and run efficiently. As one judge confirmed halfway through his second decade on the state business court he pioneered:

> Businesses require predictability in order to maintain efficient organization and operation of resources. This predictability is required not only in determining a business's own internal procedures, but also with respect to a business's relationship to, and rights under, the law so that it may plan and accurately assess the risk of future litigation or liability.

Benjamin F. Tennille, et al., *Getting to Yes in Specialized Courts: The Unique Role Of ADR in Business Court Cases*, 11 Pepp Disp Resol LJ 35, 41 (2010). This need for predictability is particularly acute in specialized industries such as Lilly's. See, *e.g.*, Gretchen Ann Bender, *Uncertainty and Unpredictability in Patent Litigation: The Time is Ripe for a Consistent Claim Construction Methodology*, 8 J Intell Prop L 175, 175 (2001) ("certainty and predictability" allow "corporations [and] in-house counsel . . . to develop products [and] businesses"). Doing (specialized) business in Michigan

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requires predictability as much as doing it elsewhere does. See, *e.g.*, Paul Vandevert, *To Go Forward, We Must Remember and Rely Upon Our Past*, 37 Can-USLJ 353, 360 (2012) (international trade attorney at Ford Motor Co. observing that "[a]ll legitimate businesses require certainty and predictability in their operations"). And this Court has recognized the need for this sort of predictability. See, *e.g.*, *Woodman ex rel Woodman v Kera LLC*, 486 Mich 228, 249 n 46; 785 NW2d 1 (2010) ("Fostering the stability of Michigan's businesses is also an important policy objective. In fact, given Michigan's persistently poorly performing economy, an argument could be made that fostering businesses that create more job opportunities is of primary social and economic importance to this state.") (opinion of Young, J.).

When the Legislature or a regulator creates specific rules authorizing transactions or conduct, it invites regulated parties to structure their conduct accordingly, and businesses invest significant resources in such compliance. Businesses rely not only on stable content of laws and regulations, but on the consistent and predictable enforcement of the rules by the specialized agencies tasked with oversight of particular industries. This is nowhere truer than in the pharmaceutical industry, where a rich web of federal regulations already governs manufacturers' transactions. Indeed, as one scholar has stated, the "pharmaceutical industry is one of the most highly regulated industries, with government interventions playing critical roles at every stage of pharmaceutical development and distribution." Liza Vertinsky, "Pharmaceutical (Re)Capture," 20 Yale J Health Pol'y, L & Ethics 146, 151 (2021); see also *New York ex rel Schneiderman v Actavis PLC*, 787 F3d 638, 643 (CA 2, 2015) (describing the "pharmaceutical industry" as "complex and highly-regulated"). If the MCPA allows the Attorney General or private plaintiffs to rely on general consumer protection principles to invalidate such carefully planned compliance with specific regulatory requirements in a particular case, it will create uncertainty and increase the cost of doing business across the board.

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The foreseeable result of undercutting this deep reliance will be to aggravate already existing challenges to starting a business in Michigan. In state and out, businesses cannot fail to notice demographic trends such as that Michigan's births "have declined by about 30 percent since 2000 and are projected to continue declining," Michigan Center for Data and Analytics, *Michigan's K-12 Population Decline Likely to Continue*,[3] and that, as a recent article put it, in "2023, there were more deaths than live births in Michigan for the fourth consecutive year, and the fewest babies born since the 1940s."[4] As one article described it, such developments "highlight[] concerns about the state's aging population and ability to attract young people and businesses that seek to employ them."[5] Such concerns are not alleviated by pulling the rug of predictability out from under Michigan business plans, as the Attorney General would do here.

Indeed, if the Attorney General succeeds in this unwarranted litigation, the likely effect will be to cancel out the efforts of other state officials, such as Governor Whitmer, who think Michiganders would benefit from focusing on economic growth. Probably mindful of the strain on public services, health care, transit, and more that economic stagnation ensures,[6] the Governor established the Growing Michigan Together Council in 2023 to "develop a statewide strategy aimed at making Michigan a

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[3] Available at https://www.michigan.gov/mcda/population/michigan-population-analysis/2025/07/23/k-12-population (last accessed on Aug. 27, 2025).

[4] Astrid Code, *Michigan Wants to Grow Its Population, But More Adults Say No Thanks to Kids*, Bridge Michigan (June 2, 2025), available https://bridgemi.com/children-families/michigan-wants-grow-its-population-more-adults-say-no-thanks-kids/ (last accessed on Aug. 27, 2025).

[5] Craig Mauger & Hayley Harding, *Michigan's Birth Total Has Reached a Level Not Seen Since 1940*, The Detroit News, 2023 WLNR 28254362 (Aug 17, 2023).

[6] See, *e.g.*, Hayley Harding, *Michigan's Aging Worries Experts as State is Among Nation's Oldest*, The Detroit News, 2023 WLNR 18108559 (May 25, 2023).

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place everyone wants to call home by attracting and retaining talent, improving education throughout the state, upgrading and modernizing our transportation and water infrastructure to meet 21st century needs, and continuing Michigan's economic momentum." Exec Off of the Gov'r, *Gov. Whitmer Establishes the 'Growing Michigan Together Council' to Focus on Population Growth, Building a Brighter Future for Michigan* (June 1, 2023).[7] Indeed, Michigan has tremendous appeal to businesses and, despite these demographic challenges, has recently been recognized as a top state for business—evidence of the very momentum the Governor seeks to maintain.[8] But such momentum requires a steady and predictable legal regime for businesses—not a regime of *ad hoc* and *ex post facto* regulation-by-litigation.

C. *Undermining longstanding and legitimate business reliance also disrupts employees, regulators, and consumers.*

Importantly, policymakers do not worry about the business climate for businesses' sake alone. They also recognize, for example, that where businesses fail, employees suffer. Employees depend on business success for paychecks, healthcare, and many other benefits, including on-the-job training that policymakers across the nation entrust to businesses. That is why the state has been "working" so hard through

[7] Available at https://www.michigan.gov/whitmer/news/press-releases/2023/06/01/whitmer-establishes-the-growing-michigan-together-council-to-focus-on-population-growth (last accessed Aug. 25, 2025).

[8] See *America's Top States for Business 2023: The full rankings*, CNBC.com (July 11, 2023), https://www.cnbc.com/2023/07/11/americas-top-states-for-business-2023-the-full-rankings.html (last accessed Aug. 25, 2025).

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programs like the Growing Michigan Together Council "to attract and retain residents through a statewide initiative."[9] Consistency in regulation is essential in sustaining a climate in which businesses can grow and create career opportunities for employees.

Furthermore, consistency in regulation also benefits *regulators*. Predictable policies help regulators to apply the rules, including because regulators tend to see more consistent rules as more legitimate. Nadine van Engen et al., *Do consistent government policies lead to greater meaningfulness and legitimacy on the front line?,* 97 Public Admin 907 (2019). Accordingly, it is well established that consistent policies tend to advance governmental interests better than *ad hoc* ones. Finn E. Kydland & Edward C. Prescott, *Rules rather than discretion: The inconsistency of optimal plans*, 85 J of Pol Econ 473 (1977); accord, *e.g.*, *Fed No 62* (In government, "a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success."); US Dep't of Health & Hum Servs, *Policy on Redundant, Overlapping, or Inconsistent Regulations & Request for Information* ("Redundant, overlapping, or inconsistent regulations undermine department goals by creating uncertainty and imposing costs and burdens with no public benefit.").[10]

But perhaps more so than policymakers, employees, or regulators, the harmful effects of inconsistent regulation impact the very consumers that consumer protection statutes aim to protect. First, inconsistent enforcement causes uncertainty regarding the myriad regulations governing every facet of business in a regulatory state leads

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[9] Christiana Ford, *Michigan Pushes to Grow Population as Projections Show Potential Decline*, ABC 7/WXYZ.com (Aug. 6, 2025), https://www.wxyz.com/news/voices/michigan-pushes-to-grow-population-as-projections-show-potential-decline (describing Council's efforts amidst "projections warn[ing] the state could lose around 700,000 people by 2050 if current trends continue") (last accessed Aug. 27, 2025).

[10] Available at https://www.hhs.gov/regulations/policy-on-redundant-overlapping-or-inconsistent-regulations-and-request-for-information/index.html.

businesses, even after consulting with experts, to "adopt a cautious stance" because "it is costly to make a . . . mistake." Steven J. Davis et al, Am Enter Inst, *Business Class Policy Uncertainty Is Choking Recovery* (Oct. 6, 2011). That in turn leads businesses to withhold capital that would otherwise go to beneficial investments. In addition, businesses may avoid otherwise profitable investments in Michigan based on uncertainty over whether their careful regulatory compliance efforts will be subject to, and potentially invalidated by, drive-by consumer protection litigation. Worse still, this may lead businesses to channel investments outside of Michigan altogether. Either way, "one cannot deny that compliance with regulations translates into higher costs for would-be entrants and/or incumbent businesses, which ultimately *increases prices for consumers*." See Dustin Chambers et al., *How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation*, 180 Pub Choice 57, 58 (July 2019) (emphasis added).

In sum, it is not just businesses who rely upon and benefit from Michigan's settled consumer protection regime. *All* Michiganders benefit from a stable, predictable MCPA, and a false dichotomy between businesses and consumers does not hold up. Not even the Attorney General has mustered any sort of industry running roughshod over consumers' rights on account of this Court's precedents. That is telling, and it confirms that this case is a solution in search of a problem.

III. Michigan is not an outlier with respect to its consumer protection act.

The Attorney General claims that Michigan is one of two states to "construe its consumer protection act exemptions so broadly." AG's Br 57. That is incorrect.

As Lilly notes, both Connecticut and Georgia maintain comparably broad exemptions. And, as even the Attorney General admits, Rhode Island joins those ranks. But there are more. Louisiana, for example, has held that "misrepresentation, false

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information and/or false advertising" claims related to insurance policies were "specifically exempted" from its consumer protection statute because they fell "within the jurisdiction of the Insurance Commissioner." *Taxicab Ins Store, LLC v Am Serv Ins Co, Inc*, 224 So 3d 451, 462 (La Ct App, 2017). Likewise, Nebraska determined that a plaintiff could not employ the consumer protection statute against a loan and investment company because its loans were "regulated by the Nebraska Department of Banking and Finance." *McCaul v Am Savings Co*, 331 NW2d 795 (Neb, 1983); see also *Kuntzelman v Avco Fin Servs of Neb, Inc*, 291 NW2d 705 (Neb, 1980) (holding that installment loan company not subject to consumer protection station because it was "strictly regulated by the Department of Banking and Finance under the terms of the installment loan act"). Still another example is Oklahoma, which dismissed a consumer protection claim involving representations about the services and level of care provided to nursing home residents because such actions and transactions were "regulated under laws administered by the Oklahoma Department of Health." *Estate of Hicks ex rel Summers v Urban E, Inc*, 92 P3d 88, 95 (Okla, 2004). Similarly, Utah's consumer protection act's exemption for "an act or practice required or specifically permitted by or under federal [or state] law" applies where the *general type of act or practice* is permitted, even if the federal or state law is silent on the more specific act at issue. See *Miller v Corinthian Colleges, Inc*, 769 F Supp 2d 1336, 1341 (D Utah, 2011) (deeming Utah's consumer protection act inapplicable to arbitration clause and class action waiver because "arbitration clauses are clearly permitted under federal law" and "it seems that [class action] waivers would be permitted under the FAA," although "the FAA does not specifically address [them]"). Like Michigan, each of these states exempts certain *general* actions and transactions from the scope of their consumer protection laws.

There are, of course, states that have enacted consumer protection statutes with narrower exemptions than Michigan. In our laboratories of democracy, it should

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be no surprise that states take different approaches to enforcing consumer protection. Some states include broad exemptions in their consumer protection statutes to keep regulatory authority concentrated in agencies that specialize in a particular regulatory field; other states opt for narrower exemptions that may allow the Attorney General to rove relatively unrestricted across many regulatory fields. While the latter approach is bad policy, it is some states' policy, and that policy decision is reflected in the particular language of those states' consumer protection statutes. For instance, Colorado's Consumer Protection Act only exempts "[c]onduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency." Colo Rev Stat Ann 6-1-106(1). The Colorado Supreme Court has interpreted this exemption narrowly. See *Showpiece Homes Corp v Assurance Co of Am*, 38 P3d 47, 56 (Colo, 2001), as mod on denial of reh (Jan. 11, 2002). The same is true of Florida, Hawaii, Minnesota, Oregon, and Wyoming.[11] But these states' adoption of dis-

[11] See *Montero v Duval Cnty. Sch Bd*, 153 So 3d 407, 412 (Fla Dist Ct App, 2014) ("The FDUTPA [Florida Deceptive and Unfair Trade Practices Act] does not apply to an 'act or practice required or specifically permitted by federal or state law' and assigning a matrix of services score is an act or practice required or specifically permitted by state law.") (cleaned up); *Aquilina v Certain Underwriters at Lloyd's Syndicate #2003*, 407 F Supp 3d 1051, 1078 (D Haw, 2019) (stating that under Hawaii Unfair and Deceptive Acts or Trade Practices Act, which only employs the term "conduct," "defendants' *specific conduct*—not just the general transaction—must be authorized, permitted, or required by law") (emphasis added); *Weller v Accredited Home Lenders, Inc*, No. CIV. 08-2798 JRTSRN, 2009 WL 928522, at *3 (D Minn, March 31, 2009) (holding that "mere fact that conduct falls within the regulatory province of a state agency is not enough for a defendant to invoke" Minnesota's consumer protection statute's exemption which applied only to *conduct*); *Hinds v Paul's Auto Werkstatt, Inc*, 810 P2d 874 (Ct App Or, 1991) (construing Oregon's exemption, which applies to "conduct," to "exempt only conduct that is mandated by other laws"); *WyoLaw, LLC v Office of Attorney Gen, Consumer Prot Unit*, 486 P3d 964, 976 (Wy, 2021) (holding that Wyoming consumer protection statute's exemption, Wyo Stat Ann 40-12-110(1) which applied to "[a]cts or practices required or permitted" by law, rule or regulation, did not "exclude from coverage every activity that is regulated by another statute or authority").

tinct statutory language does not make Michigan's statute an outlier. Indeed, a survey of consumer protection act exemptions for regulated, authorized, or mandated conduct shows no consensus regarding the proper approach and little to no uniformity in statutory language. Different language, reflecting different policy decisions, leads to different meanings.

The Michigan Legislature *could* have chosen narrower language, and it can amend the statute at any time if it shares the Attorney General's concerns about the policy implications of *Smith* and *Liss*. Other states have not found it difficult to unambiguously limit transaction-based exemptions. For example, Virginia's exemption applies only to "[a]ny aspect of a consumer transaction *which aspect* is authorized under laws or regulations . . . ." Va Code § 59.1-199(1) (emphasis added). Likewise, Texas's exemption is limited to acts or practices specifically authorized by the Federal Trade Commission and expressly provides that its consumer protection act applies "if no rule or regulation has been issued on the act or practice." Tex Bus & Com Code § 17.49(b).

The Attorney General essentially asks this Court to modify the MCPA to mirror the narrower exceptions enacted by legislatures in other states, but such policy decisions are the province of the *Legislature*, not the Court. And unless the Legislature chooses to change Michigan's course—and thus accept democratic responsibility for the potential consequences of that decision—this Court must respect the choice codified in MCL 445.904.

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CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, this Court should hold that a court cannot determine whether an exemption to the MCPA applies without a plaintiff adequately pleading an actual violation of the MCPA and, if it reaches the question, decline to overturn *Smith* and *Liss* and leave the decision below undisturbed.

Respectfully submitted,

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MCR 7.312(H)(2)(f) ATTESTATION

I hereby attest that the Chamber is a tax-exempt organization under 501(c)(6) of the Internal Revenue Code, 26 USC 501, and, thereby, permitted to file an *amicus curiae* brief without a motion, pursuant to MCR 7.312(H)(2)(f). In addition, this Court's order directing supplemental briefing invited parties who had already appeared in this case to submit supplemental briefs. The Chamber appeared previously in this case.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation pursuant to MCR 7.212(B). The Brief contains 6,546 words of Century Schoolbook 12-point proportional type and 24-point spacing. The word processing software used to prepare this brief was Microsoft 365.

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