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 Circuit Court No. 2022-000058-CZ

SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE, ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INSURANCE ALLIANCE OF MICHIGAN, MICHIGAN ASSOCIATION OF CERTIFIED PUBLIC ACCOUNTANTS, MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION, MICHIGAN FARM BUREAU, MICHIGAN GROUND WATER ASSOCIATION, MICHIGAN MANUFACTURERS ASSOCIATION, MICHIGAN RETAILERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., SMALL BUSINESS ASSOCIATION OF MICHIGAN, AMERICAN TORT REFORM ASSOCIATION, MICHIGAN BANKERS ASSOCIATION, AND MICHIGAN DENTAL ASSOCIATION

Miller, Canfield, Paddock and Stone, P.L.C.
Scott R. Eldridge (P66452)
Larry J. Saylor (P28165)
Caroline B. Giordano (P76658)
123 W. Allegan St., Suite 200
Lansing, Michigan 48933
Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Court Rules

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Michigan Chamber of Commerce (the "Chamber") is a nonprofit corporation representing approximately 5,000 member businesses of all sizes and types, which collectively employ over a million Michiganders in all 83 counties of the State. Founded in 1959, the Chamber has advocated for the continual development of law and public policy that will enhance Michigan's economic competitiveness and make Michigan the best state in the country in which to live, work, raise a family, or build a business.

Associated Builders and Contractors of Michigan ("ABC") is a statewide trade association representing the commercial and industrial construction industries. Dedicated to open competition, equal opportunity and accountability in construction, ABC promotes the development of businesses and tradespeople that work safely, ethically, profitably and for the betterment of the communities in which ABC and its members work.

The Michigan Automobile Dealers Association ("MADA") is a statewide non-profit trade association that represents the unique interests of the more than 600 franchised new-vehicle dealerships in the State. Founded in 1921, MADA works to protect dealers from unfair regulations and legislation on both the state and national levels.

The Insurance Alliance of Michigan ("IAM") is the principal state government-affairs and public-information association consisting of insurers, groups, and related organizations operating in Michigan. Its members include property/casualty insurers representing approximately 94% of the Michigan auto-insurance market, 90% of the Michigan home-insurance market, and 60% of the Michigan commercial-insurance market. Its purpose is to serve the industry and consumers by

[1] In accord with MCR 7.312(H)(5), Amici Curiae confirm that no counsel for any party authored this brief in whole or in part and that no party made a monetary contribution intended to fund the preparation or submission of this brief.

providing educational, media, legislative, and public information on significant issues affecting the insurance business in Michigan.

The Michigan Association of Certified Public Accountants ("MICPA"), founded over 120 years ago, serves more than 17,500 members statewide. Its mission is to serve its members, the CPA profession and the public through a variety of advocacy, education and outreach programs.

The Michigan Cable Telecommunications Association ("MCTA"), established in 1981, represents the cable television and telecommunications industry in the Michigan Legislature and Michigan Public Service Commission on issues affecting telecommunications businesses and customers, and fosters a positive image of the cable industry in Michigan. MCTA has been a major force in helping shape public policy in Michigan to allow new technologies to flourish.

Michigan Farm Bureau was founded in 1919 and represents farms of all sizes and varying styles of production throughout the State. Michigan Farm Bureau is the voice of Michigan agriculture, one of Michigan's primary economic drivers. Its mission is to represent, protect, and enhance the business, economic, social, and educational interests of its members.

Michigan Ground Water Association ("MGWA"), founded in 1928 as the Michigan Well Drillers Association, works to educate its members to provide, protect and promote groundwater as a safe and viable resource. MGWA has a diverse membership invested in this goal, including contractors, technicians, suppliers, and manufacturers throughout the State.

The Michigan Manufacturers Association ("MMA") is an association of approximately 1,800 private Michigan businesses that exists to promote the interests of Michigan businesses and the public in the proper administration of laws; study matters of general interest to its members; and otherwise, to promote the general business and economic climate of the State of Michigan.

Through effective representation of its membership on issues of importance to the manufacturing community, the MMA works to foster a strong and expanding manufacturing base in Michigan.

The Michigan Retailers Association ("MRA") is the nation's largest state retail association and is the unified voice of Michigan's retail industry, with 5,000 member businesses that manage 15,000 stores and websites across the State. Michigan retailers provide more than 870,000 jobs to Michigan workers and are responsible for 20% of Michigan's total economic activity.

National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Small Business Association of Michigan ("SBAM") is the only statewide and state-based association that focuses solely on serving the needs of Michigan's small business community. SBAM has served small businesses in all 83 counties of Michigan since 1969.

American Tort Reform Association ("ATRA") is the nation's first organization exclusively dedicated to reforming the civil justice system. ATRA is a nonprofit, non-partisan nationwide network of state-based legal reform coalition organizations backed by 142,000 grassroots supporters working to bring greater fairness, predictability, and efficiency to the civil justice system in the United States by advocating for tort reform and liability reform through public education and the enactment of legislation.

The Michigan Bankers Association ("MBA") is a trade association of Michigan financial institutions founded in 1887 which currently includes more than 2,300 branches located throughout the State. Its purpose is to advocate and support banking in the State and to empower the voice of banking through connections, growth, dreams and innovations for communities to thrive. The MBA acts as the official representative of member banks in matters of state legislation and regulation.

The Michigan Dental Association ("MDA"), founded in 1856, is the oldest professional association in Michigan and the oldest dental association in continuous existence in the United States. The MDA consists of 5,800 members, representing 70 percent of practicing dentists in Michigan. Its mission is to empower member dentists, advance the dental profession, advocate for the profession at the legislative level, and improve oral health.

The interests of Amici Curiae are coextensive with the interests of Michigan citizens. Amici Curiae represent a wide range of practitioners and small, medium, and large commercial enterprises that form the backbone of Michigan's economy. From manufacturing, to retail, to professional health and financial services, Amici Curiae represent industries crucial to ensuring a thriving and competitive economy in Michigan.

Many of Amici Curiae's members operate in industries already subject to extensive state and federal regulation, and they devote substantial resources to comply with those regulations. The Attorney General's case against Defendant-Appellee Eli Lilly and Company ("Lilly") aims to overturn this Court's decades-long application of the exemption under the Michigan Consumer Protection Act ("MCPA"), see MCL 445.904(1)(a), which covers the transactions and conduct of many of Amici Curiae's members and constituents. See *Smith v Globe Life Ins* Co, 460 Mich 446, 465; 597 NW2d 28 (1999); *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007).

As the diversity of Amici Curiae shows, the issues in this case do not simply affect one type of business or one area of the private sector. These issues are of critical concern for all participants in Michigan's economy. Amici Curiae have a clear and significant interest in seeing that this Court's sound precedent applying MCL 445.904(1)(a) remains good law. Exposure to additional liability under the MCPA for transactions or conduct that is already overseen by state and federal regulatory authorities would overburden many of Amici Curiae's members and disrupt their long-standing reliance on this Court's precedent.

INTRODUCTION

Nearly a quarter of a century ago, this Court held in *Smith* that the MCPA bars lawsuits against companies doing business in Michigan when they are already specifically regulated under other laws and regulations. For twenty-five years, the courts have capably and predictably followed this stable precedent. And for twenty-five years the Legislature has repeatedly *reenacted* MCL 445.904(1)(a) word-for-word, and has repeatedly rejected attempts to repeal it.

Nothing has changed. The Court of Appeals here had no trouble applying this Court's straightforward precedent in *Smith* and *Liss* to reject an MCPA claim against Lilly. The Court of Appeals left its decision unpublished since it broke no new ground, and no judge dissented.

Now, though, the Attorney General and several amicus parties have urged this Court to overrule its decades' old MCPA precedent. The Court should decline the invitation. As this Court has recognized, the MCPA exemption serves important policy aims. The idea is that when other laws and regulations on the books specifically regulate a business's transactions or conduct, consumers are already protected. Layering on another level of lawsuits does little to protect consumers and much to burden Michigan businesses—all while lining the pockets of lawyers on both sides of the dispute. Further, while this case involves a global pharmaceutical company, most of the businesses that would be affected by a decision overturning *Smith* and

Liss are not large multinational corporations. Like many of Amici Curiae's members, they are small-to-medium-sized businesses and individual practitioners who cannot afford to defend a wellspring of newly authorized consumer lawsuits. The MCPA exemption represents the Legislature's attempt to balance consumer protection with promotion of a healthy business climate in the State. This Court's decisions in *Smith* and *Liss* interpret the plain language of MCL 445.904(1)(a) to ensure that Michigan's courts uniformly apply the exemption in conformity with that legislative intent.

Michigan's businesses and professionals whose transactions or conduct are subject to substantial governmental regulations—including many of Amici Curiae's members—already invest heavily in the safety of their products and services. By exempting highly regulated businesses and industries from the MCPA where their transactions or conduct is already specifically authorized by law or regulation, the Legislature has ensured that consumers remain safe *and* that businesses can flourish in the Michigan economy. Amici Curiae respectfully request that the Court uphold its longstanding law and affirm the decision below.

ARGUMENT

I. This Court Correctly Decided *Smith* and *Liss*.

The MCPA does not apply to "a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under the statutory authority of this state or the United States." MCL 445.904(1)(a). This Court has twice explained that, to determine whether "a transaction or conduct" is "specifically authorized" under § 904(1)(a), courts must inquire "whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Smith v Globe Life Ins Co*, 460 Mich 446, 465; 597 NW2d 28 (1999); *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 206; 732 NW2d 514 (2007).

These decisions comport with the plain language of the MCPA, and the Court has no reason to overturn them.

In *Smith*, the plaintiff sued the defendant insurer under the MCPA, claiming that the insurer mispresented the terms of its insurance policy. 460 Mich at 451. But the *Smith* Court rejected the plaintiff's argument that her MCPA claim was not exempt because the insurance regulations did not "authorize . . . fraudulent insurance practices," and it held that her claim fell within the § 904(1)(a) exemption. *Id.* at 463, 468. Applying *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 617; 327 NW2d 805 (1982), this Court in *Smith* explained that the "focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.'" 460 Mich at 464. Further, the appropriate test under § 904(1)(a) asks "whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Id.* at 465. Eight years later in *Liss*, this Court reaffirmed *Smith*'s holding and concluded after close analysis of the statutory text that the phrase "specifically authorized" under the MCL 445.904(1)(a) exception "requires a general transaction that is 'explicitly sanctioned'" by law. 478 Mich at 212-13.

Smith's application of § 904(1)(a) has stood for over two decades—and for good reason. Lower courts have successfully applied *Smith*'s clear test to claims arising under the MCPA. See Lilly's Appellee Brief at 8, n5 (collecting cases where courts have applied the *Smith* test to claims under the MCPA). Contrary to the Attorney General's argument, *Smith* and *Liss* are based on the text of the MCPA, which exempts a "specifically authorized . . . transaction **or** conduct" from liability where that transaction or conduct is authorized by Michigan or federal regulatory law. MCL 445.904(1)(a) (emphasis added). The Attorney General's claim that this Court's use of the word "general" to parse the statutory text in *Smith* and *Liss* "guts" the statute's

protections is unfounded. This Court's use of the word "general" did not artificially broaden the exception's reach. Instead, it simply helped to make sense of the terms "transaction" and "conduct"—which the statute lists in the disjunctive ("transaction **or** conduct")—and to explain that even if no law permits the allegedly wrongful conduct, the exemption applies where the relevant transaction is specifically authorized by law.

As Lilly has pointed out, there is nothing unusual about this Court's use of descriptive words (here, "general") to explain its analysis of how the statutory language operates – e.g., the general transaction or conduct of selling insulin medication is specifically authorized by the applicable federal law. The Legislature did not require any more specificity than that to trigger the exemption, despite the Attorney General's insistence to the contrary. Rather, the Legislature has repeatedly confirmed the exemption, allowing both state and federal statutory and regulatory schemes to develop with varying levels of specificity in authorizing transactions and conduct. To accept the Attorney General's interpretation – that "specifically authorized" cannot mean *specifically authorized, albeit in general terms* – will lead to legal battles over whether state and federal oversight of industries is *specific enough* to trigger the exemption. As explained in more detail below, the Legislature's repeated validation of *Smith* and *Liss* cannot support that result.

This Court should reject the Attorney General's request to overrule its longstanding precedent. The *Smith* test is a sound application of the MCL 445.904(1)(a) exemption, and, for nearly a quarter of a century, courts have capably followed *Smith*—sometimes allowing an MCPA claim to proceed and other times concluding the claim fell within the exemption. This Court's application of *Smith* and *Liss* effectuates the Legislature's aim to exclude from liability transactions or conduct that are already subject to substantial regulation. As discussed below,

overruling precedent is serious business and the Attorney General has not met her considerable burden to show that it is appropriate here.

II. This Court Should Retain its *Smith* and *Liss* Decisions Under Principles of *Stare Decisis*.

Stare decisis requires rejection of the request to overrule the stable, longstanding precedent of *Smith* and *Liss*. This Court does not undertake a decision to overrule precedent "lightly," *People v Tanner*, 496 Mich 199, 250; 853 NW2d 653 (2014), and precedent should be upheld unless there is a "compelling justification . . . to overturn the precedent." *Petersen v Magna Corp*, 484 Mich 300, 315-17; 773 NW2d 564 (2009). The Attorney General fails to show that *Smith* and *Liss* were wrongly decided, and certainly cannot overcome important considerations of stare decisis, including "whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Robinson v City of Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000) (citation omitted).

Twenty-five years of case law applying *Smith* demonstrates that *Smith*'s test poses no workability issues and no practical hurdles.[2] Lower courts, both state and federal, have ably applied *Smith* to MCPA claims for years. And, contrary to claims from the Attorney General and her supporting amici, courts have routinely followed *Smith* to apply—and to decline to apply—the MCL 445.904(1)(a) exemption. Compare *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 542-43; 683 NW2d 200 (2004) (MCPA barred claims regarding slot machines because the

[2] Contrary to the Attorney General's suggestion, *Smith* and *Liss* are consistent with *Diamond Mortgage*. The *Smith* test, reaffirmed again in *Liss*, is clear: "whether the general transaction is specifically authorized by law." 460 Mich at 465. See *id*. at 463-64 ("*Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized'" and applying that ruling); see also *Liss*, 478 Mich at 208-15. The three cases are not inconsistent, and they certainly are not inconsistent to a degree that would merit overruling *Smith* and *Liss*.

operation of slot machines was regulated), and *Am Auto Ass'n, Inc v Advanced Am Auto Warranty Services, Inc*, No CIV A 09-CV-12351, 2009 WL 3837234, at *6 (ED Mich Nov 16, 2009)(Appx. Ex. 1)("[W]hile the MCPA does not apply to '[a] transaction or conduct specifically authorized under laws administered by a regulatory board,' the relevant 'transaction or conduct' in this case is the registration of business and domain names, not the sale of insurance and warranties" (quoting *Smith*, 460 Mich at 465), with *Brownlow v McCall Enterprises Inc*, unpublished opinion of the Court of Appeals, issued February 12, 2013 (No 306190), 2013 WL 514598, at **2-3 (Appx. Ex. 2) (MCPA claim related to cleaning air to remove smoke smell is not exempt because "general transaction" of cleaning a home was not "specifically authorized"). In short, *Smith*'s straightforward test applying the MCPA exemption is working as it should. Sometimes under the *Smith* test MCPA claims proceed; sometimes they do not.

Smith and *Liss* were correctly decided, as discussed above. But even if there was some question on this issue, the twenty-five years of reliance by regulated businesses in Michigan weigh strongly against overruling those established precedents. As this Court observed in *Robinson*:

> [T]he mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate. Rather, the Court must proceed on to examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance. * * * [T]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations.

462 Mich at 465-66.

Regulated businesses in Michigan, including many members of Amici Curiae, have relied on *Smith* and *Liss* for a quarter of a century in deciding to locate, invest, and grow in the State. *Smith* and *Liss* are "embedded," "accepted," and "fundamental" in Michigan law, and overruling them "would work an undue hardship because of that reliance." *Smith*, 462 Mich at 465-66. In

today's economy, litigation and avoidance of litigation risk represent significant business expenses. Regulatory/administrative oversight is not just an abstract concept. Practically speaking, it means being subjected to audit (including at random); administrative trials/hearings; and exposure to fines and penalties, including professional license suspension or revocation, as well as civil litigation. These regulations include—to list just a few examples affecting Amici Curiae here—the Michigan Occupational Code, MCL 339.101 *et seq.*, which strictly regulates at least fifteen different occupations including accountants, real estate brokers and salespersons, architects, engineers, and more, and provides an extensive scheme of penalties for non-compliance;[3] the Michigan Construction Code, MCL 125.1501 *et seq.*, which provides a detailed regulatory framework governing the construction of buildings and structures and, among other things, provides for the approval of permits for such building and imposes fines and penalties for violation of the statute; and the Michigan Vehicle Code MCL 257.201 *et seq.*, which governs the licensing, classification, and practice of auto dealers throughout the State and details remedies and sanctions for non-compliance (see especially MCL 257.248 – MCL 257.251e). By enacting these statutes, the Legislature has already provided consumers with protection for the transactions and conduct falling under the regulations' ambit, and has ensured that regulated individuals and entities will be held accountable if they fail to comply. For larger businesses, compliance with regulatory obligations often requires establishing and maintaining internal compliance departments. Regulatory oversight keeps businesses and professionals in check, but it also costs them a lot of money.

[3] See Amici Curiae Brief Submitted on Behalf of Home Builders Association of Michigan and Michigan Realtors in Support of Defendant-Appellee, at 13-22.

For instance, as discussed in the Amici Curiae Brief Submitted on Behalf of Home Builders Association of Michigan and Michigan Realtors in Support of Defendant-Appellee, the Michigan Occupational Code, MCL 339.101 *et seq*., codifies an extensive administrative scheme that already imposes significant and costly regulatory burdens on many different professional occupations throughout Michigan. That includes many of the occupations held by Amici Curiae's members. The Occupational Code includes a dozen categories of "prohibited conduct" that covered persons and entities must internally police and avoid, and it permits aggrieved persons or entities (or the Attorney General) to file a complaint with the Department of Licensing and Regulatory Affairs (LARA). See MCL 339.604(a)-(l); MCL 339.501. This complaint triggers an immediate investigation by LARA and the possibility of a formal administrative hearing under the Administrative Procedures Act. See MCL 339.502; MCL 339.511.

The Occupational Code also contains separate layers of regulation (and, therefore, compliance obligations) governing conduct and licensure requirements for specific occupations. See, e.g., MCL 339.2404 *et seq*. (licensure application for residential builders requiring submission of evidence of good moral character to LARA as well as passage of a residential builder's examination); MCL 339.725 (requirements for issuance of a certificate as a certified public accountant in Michigan including examination, education and experience acceptable to the state board of accountancy); MCL 339.734 (itemizing twelve categories of prohibited conduct for Michigan certified public accountants, including but not limited to violations of professional standards related to the issuance of reports on financial statements, violations of state-issued rules of professional conduct, and departure from standards of professional practice applicable to particular engagements); MCL 339.240(b) (requiring residential home builders to complete prelicensure competency coursework and continuing competency activities); MCL 339.2004

(licensure requirements for architects including good moral character, passage of an examination or submission of evidence of equivalent qualification acceptable to the department board of architects); MCL 339.2010 (administrative requirements for professional architecture firms). All such existing administrative requirements (and many, many more) already require covered individuals and entities like many of Amici Curiae's members to continually devote time, money, and attention to ensuring that they comply with applicable state laws and regulations to safeguard against potential complaints and/or penalties for violations.[4]

Regulated businesses of all shapes and sizes have relied on the settled state of the law under the MCPA in deciding to invest and grow in Michigan, under state laws that already subject these businesses to sizeable compliance costs. Overruling *Smith* and *Liss* at this late date "would produce not just readjustments, but practical real-world dislocations." *Id*.

Post-*Smith* legislative history also militates against overruling *Smith* and *Liss*. Since this Court's decision in *Smith*, the Legislature has amended MCL 445.904 three times, in 2000 PA

[4] Many of Amici Curiae's members must also comply with equally if not more extensive federal regulations in tandem with state administrative requirements. To take just one illustrative example, automobile dealers in Michigan are subject to federal laws and regulation including but not limited to the Gramm-Leach-Bliley Act, 15 USC 6801 *et seq.*, 16 CFR 313 (establishing dealers' responsibility to secure consumers' personal and financial information); the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*. (requiring auto dealers to offer complete information on warranty coverage); the FTC "Used Car Rule," 16 CFR 455 (containing requirements for representing the terms of warranties of used vehicles and for disclosing the mechanical condition of used vehicles); and the Equal Credit Opportunity Act, 15 USC 1691 *et seq*. (requiring auto dealerships extending financing to comply with regulations aimed at prohibiting discrimination in lending).

432;[5] 2003 PA 216;[6] and 2014 PA 251.[7] Each amendment *reenacted* MCL 445.904(1)(a) *verbatim*, leaving the exemption at issue in *Smith* and *Liss* unchanged and intact.

While this Court in *Robinson* noted that "legislative acquiescence" is a "disfavored doctrine of statutory construction," the Court defined "acquiescence" as mere "assent by silence." *Robinson*, 462 Mich at 466 (citation omitted). The Legislature's repeated reenactment of the precise language of MCL 445.904(1)(a) goes far beyond mere "assent by silence." It instead represents legislative *ratification* of the Court's interpretation of that language. "In passing . . . legislation, the legislature is presumed to have known of the judicial interpretation of this Court . . . and, also, to have known that when a statute, clause or provision thereof, has been construed by the court of last resort of this State and the same is substantially re-enacted the legislature adopts such construction." *Jeruzal v Herrick*, 350 Mich 527, 534; 87 NW2d 122 (1957). In accord are *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-40; 716 NW2d 247 (2006) (it is a "well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation"); and *Bush v Shabahang*,484 Mich 156, 167; 772 NW2d 272 (2009) ("[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.").

[5] 2000 PA 432 added a new MCL 445.904(3) which exempts from the MCPA "an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by Chapter 20 of the Insurance Code." See Appx. Ex. 3.

[6] 2003 PA 216 amended the exemptions in MCL 445.904(2)(e) by substituting the newly enacted Credit Union Act in place of a repealed statute that formerly regulated credit unions. See Appx. Ex. 4 and House Fiscal Analysis, Credit Union Act, Appx. Ex. 5.

[7] 2014 PA 251 added a new MCL 445.904(3)(b) which clarified the limitation period for suits under MCL 445.904(3). The amendment responded to this Court's decision in *Converse v Auto Club Group Ins Co*, 493 Mich 877; 821 NW 679 (2012). See Appx. Ex. 6, Enacting sec. 2.

As further evidence that *Smith*'s twenty-five-year-old interpretation works just fine, the Legislature itself has repeatedly rejected proposed amendments to MCL 445.904(1)(a) that would have eliminated or curtailed the exemption.[8] In other words, the Legislature is aware of the *Smith* test—and it has consistently rejected numerous calls to overrule it by statute. When "the Legislature has had opportunities to alter the . . . construction of [the law] and has chosen not to do so," this Court should not reverse course. *Luttrell v Department of Corrections,* 421 Mich 93, 106; 365 NW2d 74 (1984). The Legislature has sent a clear signal that *Smith* and *Liss* comport with the intended scope of the MCPA's exemption—and that any change in the law should come from the Legislature, not from this Court.

III. This Court's MCPA Precedent Strikes the Right Balance Between the Interests of Consumers and the Interests of Michigan's Regulated Businesses and Service Providers.

Smith's test under the MCL 445.904(1)(a) exemption effectively balances the interests of consumers with the interests of Michigan businesses and professional services providers, like many of Amici Curiae's members here. The MCPA provides consumers an avenue to redress injuries inflicted by "unfair, unconscionable, or deceptive methods, acts, or practices," MCL 445.903, but it recognizes that, in highly regulated industries, regulations already exist to serve as safeguards against that kind of deceptive conduct, MCL 445.904(1)(a). This Court should not alter this well-functioning and well-settled balance.

For the exemption to apply, *Smith* and *Liss* require that the "general transaction" that is the subject of an MCPA claim be "specifically authorized by law," see *Liss*, 478 Mich at 210—and there are plenty of circumstances where, even in a regulated industry, the "general transaction" at issue will fall outside what is "specifically authorized." Since *Smith*, courts have had no trouble

[8] See Supplemental Amici Curiae Brief Submitted on Behalf of Home Builders Association of Michigan and Michigan Realtors®, pp 14-16.

allowing an MCPA claim to proceed when the plaintiff's allegations were not aimed at a "general transaction specifically authorized by law." See, e.g., cases discussed at pp 9-10 above. So, contrary to the views of the Attorney General and her supporting amici, *Smith* and *Liss* do not leave Michigan consumers to the mercy of unscrupulous and dishonest businesses. The MCPA exempts from liability claims addressing specifically authorized transactions or conduct in regulated industries, and *Smith*'s test does not stand in the way when an MCPA plaintiff challenges a general transaction that is not specifically authorized by state or federal law. This leaves many commercial practices open to the consumer-driven oversight the MCPA provides.

Not only do would-be MCPA plaintiffs have, in any given case, other claims at their disposal, consumers are also protected in many cases by the very regulations that exempt business transactions from MCPA liability in the first place. See pp 10-12 above.

In short, the MCL 445.904(1)(a) exemption as properly interpreted by *Smith* does not leave consumers unprotected. Consumers may still—as they have been doing since *Smith*—bring claims under the MCPA when the general transaction at issue is unregulated. Outside of the MCPA, consumers have other claims and other tools at their disposal to challenge allegedly unfair or deceptive practices. Finally, consumers are protected by the regulations themselves, many of which are implemented to ensure the interests and well-being of consumers.

On the other side of the scale, the MCL 445.904(1)(a) exemption and this Court's decisions interpreting the exception in *Smith* and *Liss* preserve important protections for businesses and professionals in regulated industries represented by Amici Curiae. While this case nominally involves claims against Lilly—a large, multinational pharmaceutical company—the Attorney General's goal of overruling *Smith* and *Liss* would unfairly burden not only Lilly, but a far more diverse set of Michigan-centered businesses and licensed service providers, including Amici

Curiae's members. Most of the people and companies who would be affected by a decision overturning *Smith* and *Liss* are not large corporations with legal departments and substantial funds on hand to defend consumer lawsuits. They are primarily small businesses: "mom and pop" pet shops; independent retail boutiques; second- or third-generation farmers; local real estate agencies; small-town accountancy practices, and many more. All these businesses and professionals have chosen to come to, or stay in, Michigan to live and work. And all these businesses and professionals have already invested substantial time and resources to ensure that their products, practices, and services comply with extensive laws and regulations. The MCL 445.904(1)(a) exemption—and this Court's precedent explaining and upholding that exemption—ensures that stakeholders who are already subject to significant regulatory oversight are not unnecessarily overburdened by a flood of consumer-driven lawsuits filed under the MCPA. Indeed, for many small businesses, spending the money necessary to defend even one frivolous lawsuit could put them out of business for good. And there is no doubt that if the Court overturns *Smith* and *Liss*, the result will be an immediate uptick in litigation filed against large and small Michigan businesses alike.

Exempting claims involving already-specifically-regulated transactions or conduct from liability ensures that heavily regulated stakeholders are still able to flourish in the Michigan economy—while ensuring that consumers are sufficiently protected in other ways. The MCL 445.904(1)(a) exemption ensures that these highly regulated businesses are not overloaded by claims under the MCPA when their businesses and products are already subject to significant regulatory oversight. Relieving this burden fosters the smooth and safe functioning of Michigan business and industry. Of course, consumer protection is a critical part of a well-functioning consumer economy. But consumers are already covered in layers of protection when it comes to

claims aimed at businesses that operate in industries subject to extensive and extremely detailed regulations. Opening these businesses up to more MCPA claims would simply overburden them, likely to very little consumer benefit.

The decades-old standard in *Smith* and *Liss* ensures that a heavily regulated industry is not subject to a needlessly excessive burden under the MCPA. This was the Legislature's aim in enacting the exemption in MCL 445.904(1)(a), and this Court's longstanding precedent accords with the statute's text and aims. This Court should reject the Attorney General's request to overturn that sensible precedent.

CONCLUSION AND RELIEF REQUESTED

Amici Curiae ask the Court to affirm the decision of the Court of Appeals. The Attorney General's request that this Court overturn its established and well-reasoned precedent in *Smith* and *Liss* is unwarranted based on the text of the statute, the quarter century of application in lower courts, the practical effects of those cases, and the long-standing reliance by regulated businesses in Michigan. *Smith* competently effectuates the MCPA's exemptions and its straightforward test strikes the right balance between protecting consumers while avoiding unnecessary burdens to Michigan businesses. The Court should decline the invitation to overrule *Smith* and *Liss*.

Dated: August 28, 2025

Respectfully submitted,

MILLER, CANFIELD, PADDOCK, AND STONE, P.L.C.

By: */s/ Scott R. Eldridge*

Scott R. Eldridge (P66452)
Larry J. Saylor (P28165)
Caroline B. Giordano (P76658)
123 W. Allegan St., Suite 200
Lansing, Michigan 48933
Attorneys for Amici Curiae

WORD COUNT CERTIFICATION

Pursuant to MCR 7.212(B)(3), I hereby certify that this brief contains 5,443 "countable words" as defined under MCR 7.212(B). The undersigned relies on the word count function of counsel's word processing system, as permitted under MCR 7.212(B)(3).

By: */s/ Scott R. Eldridge*

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2025, I electronically filed the foregoing document with the Clerk of the Court using the electronic court filing system which will send notification of such filing to all counsel of record.

By: */s/ Scott R. Eldridge*