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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

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.

MSC No. 165961
COA No. 362272
Ingham CC No. 22-000058-CZ

AMICUS CURIAE BRIEF ON BEHALF OF THE WASHTENAW COUNTY PROSECUTOR'S OFFICE

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STATEMENT OF QUESTIONS PRESENTED

I. "[W]hether the plaintiff adequately pled a claim that the defendant violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*." Order Granting Leave to Appeal, MSC No. 165961, Apr. 4, 2025.

Prosecuting Attorney Amicus Curiae answers: "No."

Plaintiff-Appellant answers: "That it is not applicable."

Defendant-Appellee answers: "No."

II. "[W]hether 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." *Id*.

Prosecuting Attorney Amicus Curiae answer: "No."

Plaintiff-Appellant answers: "No."

Defendant-Appellee answers: "Yes."

III. "[W]hether 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)." *Id*.

Prosecuting Attorneys Amici Curiae answer: "No."

Plaintiff-Appellant answers: "No."

Defendant-Appellee answers: "Yes."

IV. "[I]f 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)." *Id*.

Prosecuting Attorneys Amici Curiae answer: "No."

Plaintiff-Appellant answers: "No."

Defendant-Appellee answers: "Yes."

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Amicus Curiae is the Washtenaw County Prosecutor's Office.[1] Prosecutors, by statute, are charged with appearing in "all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested." MCL 49.153. In addition, Michigan's Consumer Protection Act provides prosecuting attorneys, MCL 445.915, with a number of tools to root out consumer abuse, including the ability to issue subpoenas, MCL 445.907, enjoin violations, MCL 445.905, obtain damages, MCL 445.910, and enlist law enforcement to investigate violations of the Act. MCL 445.914. These powers mirror those granted to the Attorney General under the Act. MCL 445.915.

At the application stage, the Washtenaw County Prosecutor filed a supplemental amici curiae brief along with 16 other county prosecutors which contended that (1) 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 incorrectly decided; and (2) principles of stare decisis did not present an obstacle to formally overruling those decisions. As to these issues (here, Questions Presented III and IV), Amicus—the Washtenaw County Prosecutor's Office—continues to rely on the arguments made in that previous brief and incorporates same herein by reference. See Amici Curiae Supplemental Brief, Docket No. 116, May 1, 2024, attached as Exhibit A.

The Washtenaw County Prosecutor's Office, however, also maintains a dedicated Economic Justice Unit, which is charged (among other things) with civilly enforcing the Consumer Protection Act—including by conducting investigations and issuing civil subpoenas. Given its

[1] No party, nor counsel for a party, has authored this brief in whole or in part, and no one other than amici curiae, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

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experience and expertise in this area, Amicus thus submits this short brief explaining why the merits issues presented in this case are ripe for this Court's consideration (Questions Presented I and II).

This Court may and should provide clarity now as to the scope of the exemption in MCL 445.904(1)(a). And, for the reasons outlined in the Amici Prosecutors' prior briefing, this Court should overrule *Smith* and *Liss* to the extent they are inconsistent with the plain text of that Section 4(1)(a) exemption. See generally Amici Curiae Supplemental Brief, Docket No. 116, May 1, 2024, Ex. A

ARGUMENT

I. The Attorney General did not Plead a Claim, Adequate or Otherwise, that Eli Lilly Violated the Michigan Consumer Protection Act Because the Attorney General did not File a Complaint. However, the Attorney General did File a Petition to Authorize a Pre-litigation Investigation and Presented Sufficient and Reasonable Information to Support a Belief that a Violation of the MCPA Occurred.

The Attorney General did not and has not filed a complaint that pled a claim that Eli Lilly violated the Michigan Consumer Protection Act.

Instead, on January 25, 2022, the Attorney General filed a Petition for Civil Investigative Subpoenas, asking the Ingham County Circuit Court to authorize a pre-litigation investigation pursuant to MCL 445.907. Under the MCPA, the circuit court may authorize a civil investigation with subpoena powers if it finds "probable cause" of an MCPA violation. MCL 445.907.

The civil standard of probable cause is different from and requires less of a showing than the criminal standard of probable cause. "[T]he probable cause needed to support an investigative demand by the state attorney general is "relaxed" compared to what is required for a criminal case." Richard M. Alderman et al., *Consumer Protection and the Law* § 7:3 (2022-2023 ed.). Both the substantive requirements (lower burden of proof) and the procedural requirements (no affidavit

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necessary) are different for civil probable cause than they are for criminal probable cause. See, e.g., *Cavalry SPV I, LLC v Morrisey*, 232 W Va 325, 329; 752 SE2d 356 (2013).

Michigan is in a small minority of states that have a probable cause standard for consumer protection subpoena authority. *Consumer Protection and the Law* § 7:3 ("[a] few states"). Of the appellate courts within this small minority of states, Wyoming's and West Virginia's have further articulated this civil probable cause standard (with detailed and persuasive analysis). Examining the same civil probable cause standard in the Wyoming Consumer Protection Act, the Wyoming Supreme Court held that probable cause exists when there is "sufficient and reasonable information to support a belief that a violation of the WCPA has occurred or is occurring." *WyoLaw, LLC v Office of Attorney Gen, Consumer Prot Unit*, 486 P3d 964, 970 (Wy, 2021). The Supreme Court of Appeals of West Virginia likewise examined the probable cause standard for civil consumer protection investigatory subpoenas and found that the "Attorney General was not required to possess concrete proof of the specific alleged wrongdoing or to describe in detail the nature of the potentially nefarious misconduct at the time he issued his investigative subpoena." *Cavalry*, 232 W Va at 335.

This relaxed civil probable cause standard is supported by the nature of the authorization of a civil investigation: "[T]he purpose of an investigative subpoena is precisely as its name implies: to investigate. Such an investigation is designed to ascertain whether a violation of the Act has, in fact, occurred so as to permit the filing of an enforcement proceeding against the alleged offender." *Id*. (footnote omitted). "The United States Supreme Court has summarized such investigatory authority as 'the power to get information from those who best can give it and who are most interested in not doing so.'" *Id*. (citation omitted).

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Here, the Attorney General presented information showing that Eli Lilly charged consumers two times as much for Eli Lilly's name brand version of a drug than it did for Eli Lilly's own generic version of the same drug. Petition ¶ 42. The MPCA prohibits charging "a price that is grossly in excess of the price at which similar property or services are sold." MCL 445.903(1)(z). Even for purposes of summary disposition of a claim (to say nothing of a judge applying the civil probable cause standard to a petition for investigative subpoenas), a reasonable finder of fact may find that the generic drug is similar to the name brand drug, particularly as such generic drugs are required to be the same for medical purposes.

> FDA-approved generic medicines work in the same way and provide the same clinical benefit and risks as their brand-name counterparts. A generic medicine is required to be the same as a brand-name medicine in dosage, safety, effectiveness, strength, stability, and quality, as well as in the way it is taken. Generic medicines also have the same risks and benefits as their brand-name counterparts.

Generic Drug Facts, U.S. FOOD & DRUG ADMINISTRATION <https://www.fda.gov/drugs/generic-drugs/generic-drug-facts> (accessed Sept. 3, 2025); compare MCL 333.17755 (authorizing pharmacists with a prescription for a name brand drug to dispense generic drugs that are "equivalent"), with MCL 445.903(1)(z) (prohibiting price-gouging on "similar property or services"). Moreover, a reasonable finder of fact may find that charging 100% more is "grossly in excess." See, e.g., *Stalker v. MBS Direct, LLC*, No. 10-11355, 2011 WL 797981, at *6 (E.D. Mich. Mar. 1, 2011) (denying defendant's motion to dismiss because whether a 4-11% difference in price may be considered grossly excessive "raises a question of fact that may not be considered at this stage of the proceedings"). Accordingly, the Attorney General in this case presented "sufficient and reasonable information to support a belief that a violation" of the MCPA has occurred. *WyoLaw, LLC v Office of Attorney Gen, Consumer Prot Unit*, 486 P3d 964, 970 (Wy, 2021).

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To emphasize: that showing is different than what would be required to plead a claim. The Petition for Civil Investigative Subpoenas is not a pleading. The "Definition of Pleading," provides that "[t]he term 'pleading' includes only: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer. *No other form of pleading is allowed*." MCR 2.110(A) (emphasis added). Moreover, Attorney General's request for the court authorize subpoenas is not a statement of a claim. MCR 2.111(B) ("Statement of Claim . . . must contain . . . A demand for judgment for the relief that the pleader seeks."). And indeed, no Answer is required—no notice at all is required to be given to the Respondents because the Petition is an "ex parte application." MCL 445.907(1).

Therefore, while the Attorney General simply did not plead a claim of a violation of the Michigan Consumer Protection Act, the Attorney General did adequately show probable cause that a violation of the MCPA occurred.

II. Because the Attorney General Presented an Actual Controversy Sufficient for a Declaratory Judgment, a Court May Determine Whether the Section 4(1)(a) Exemption Applies.

Here, the Attorney General filed for a declaratory judgment, and a court has the "Power to Enter Declaratory Judgment" regarding whether and how the Section 4(1)(a) exemption applies. MCR 2.605(A)(1) ("In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.").

The Attorney General filed a Petition for Civil Investigative Subpoenas in the Ingham County Circuit Court alleging that there was probable cause to believe that Eli Lilly violated the Michigan Consumer Protection Act, and therefore a pre-litigation investigation was appropriate.

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See *supra* at I. This presents an actual controversy as to whether Eli Lilly is subject to the Michigan Consumer Protection Act. The Attorney General says Eli Lilly is; Eli Lilly says it is not. The proper interpretation and application of the law is at issue, with legal rights impacted on either side.

Here, too, the Attorney General is acting on behalf of the People of the State of Michigan, and accordingly has "sovereign and quasi-sovereign interest" at stake. See, e.g., *Nessel ex rel Michigan v AmeriGas Partners, LP*, 954 F3d 831, 835 (CA 6, 2020). Those sovereign and quasi-sovereign interests include "a concrete and distinct interest in the proper interpretation and application of" the Michigan Consumer Protection Act. *Glorycrest Carpenter Rd., Inc. v. Adams Outdoor Advert. Ltd. P'ship*, __ Mich App __, __; __ NW3d __ (2024) (Docket No. 366261), slip op at 5. Moreover, here, the Attorney General has identified an "actual controversy" regarding the Michigan Consumer Protection Act that impacts the "rights and other legal relations" of both the Attorney General and Eli Lilly. *Id.*; see *supra* at I (seeking pre-litigation subpoena authority).

There is also no question that the Attorney General has standing in this matter. In Michigan, a party has standing if the "statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 372, 792 N.W.2d 686, 699 (2010). Here, in addition to the Attorney General's "sovereign and quasi-sovereign interest" at stake, the Michigan Consumer Protection Act unambiguously provided the Attorney General standing because the statutory scheme provides the Attorney General with investigation authority and enforcement authority (which is exclusive to the Attorney General in one instance, MCL 445.903o(14)), and even authorizes the Attorney General to promulgate rules to implement the MCPA. MCL 445.903(2).

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The procedural path taken here—seeking a declaratory judgment for a court to determine whether Section 4(a)(1) applies—did not require the Attorney General to file a complaint that pled a violation of the Michigan Consumer Protection Act. Instead, the Attorney General filed a complaint for a declaratory judgment due to the actual controversy presented. MCR 2.605(A)(1). The pleading of a violation of the MCPA through the filing of a complaint was not required for a court to determine the applicability of Section 4(a)(1). MCR 2.605(A)(1) ("whether or not other relief is or could be sought or granted").

III. For the Reasons Given in the Amici Prosecutors' Prior Supplemental Brief, Incorporated Herein by Reference, *Smith* and *Liss* Were Wrongly Decided and Should be Overruled

Because this case presents an actual controversy, there are no procedural obstacles to this Court considering the merits. For the reasons given in the Prosecuting Attorneys' prior amici brief, see Amici Curiae Supplemental Brief, Docket No. 116, May 1, 2024, Ex. A, *Smith* and *Liss* departed from the plain text of the Section 4(1)(a) exemption. This Court's conflicting interpretation of the law has caused significant confusion in the lower courts. Stare decisis thus does not present an obstacle to overruling those case—and clarifying the state of the law. As explained in the Amici Prosecutors' prior briefing, "[w]hatever force stare decisis generally has, it is at its lowest ebb here, where confusion about the law has stemmed from the Court's inconsistent decisions." *Id.* at 24-25 (citing *Robinson v. City of Detroit*, 462 Mich 439, 467 (2000)).

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that the Court overrule *Smith* and *Liss* as inconsistent with the plain text of the Section 4(1)(a) exemption.

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Respectfully submitted,

/s/ Todd Ryan

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Dated: September 5, 2025

Statement of Compliance with Word Count Limitation

Pursuant to MCR 7.212(B)(3), this brief complies with the word count limitation because the number of countable words (words in the elements listed in 7.212(C)(6)-(8)) in this brief is 2,172 and in the Amici Prosecutors' previously submitted brief, attached as Exhibit A and incorporated herein by reference, 7,576, for a total of 9,748.

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PROOF OF SERVICE

I hereby certify that, on September 5, 2025, I filed the foregoing Amicus Curiae Brief on Behalf of the Prosecuting Attorney of Washtenaw County, with the Clerk of Court and used the electronic filing system to serve all parties of record.

/s/ Todd Ryan
Todd Ryan (P81848)

September 5, 2025