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

DANA NESSEL, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, *ex rel* The People of the State of Michigan,	Supreme Court No. 165961
Plaintiff-Appellant,	Court of Appeals No. 362272
v	Ingham Circuit Court No. 2022-000058-CZ
ELI LILLY AND COMPANY,	
Defendant-Appellee.	

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INTRODUCTION

Drifting freely between the Complaint and the Petition in a separate but related proceeding, Lilly accuses the Attorney General of ignoring a directive "to address whether the Petition alleged an MCPA violation against Lilly." (Appellee's Br in Opposition (BIO), p 3.) But this Court asked about the pleading *in this case*, prompting the parties to address "whether the [Attorney General] adequately pled a claim that the defendant violated the [MCPA]," and whether a court can apply the § 4 exemption regardless of such allegations. At no point did this Court ask about the Petition (which is not a pleading). The Attorney General answered this Court's first question with a nuanced "yes," and the second with a firm "no." (See Appellant's Br on Appeal (BOA), p 12.)

"Adequately" pleading an MCPA violation sufficient to obtain declaratory relief requires only allegations that the parties' postures necessitate a sharpening of the issues raised. The parties have demonstrated that the issue of § 4's plain meaning is ripe. That confers jurisdiction under MCR 2.605.

This Court therefore may decide whether its decisions in *Smith* and *Liss* were correct. And Lilly's arguments underscore that those decisions are incompatible with § 4's plain language. Lilly's interpretation of "transaction" as somehow broader than "conduct" is strained at best; and its proffered meaning of "specifically authorized" leaves the word "specifically" with no work to do. To restore the MCPA to what the Legislature intended, this Court should overrule *Smith* and *Liss*.

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ARGUMENT

I. Lilly confuses declaratory relief's "case or controversy" requirement with a non-existent pleading requirement prerequisite to investigative authority.

Although Lilly seizes on the Attorney General's reference to her Petition for Civil Investigative Subpoenas as the "primary filing," justiciability is determined by reference to the Complaint *in this case*. Lilly prefers to invoke the Petition, however, asserting that subpoenas cannot issue under § 7 of the MCPA unless the Petition pleaded "probable cause of a legally[ ]cognizable violation." (BIO, p 22. See also *id.* at 12–13 (referring to the instant case as "an MCPA action" and attributing pleading shortcomings to the Petition).)

As a matter of law, however, an ex parte petition *is not a pleading*. MCR 2.110(A)'s exclusive list of "pleadings" contains nothing that might include a petition filed under § 7. Such petitions are not subject to the rule that it state a claim, MCR 2.111(B)(1), nor are they amenable to attack for failing to state a claim, see MCR 2.116(C). This Court's order properly focuses on the Complaint for declaratory relief.

Similarly, Lilly alternates between arguments that (1) before obtaining investigative authority, the Attorney General needed to plead a "cognizable" MCPA claim in her petition and (2) she needed to plead a "viable" MCPA claim in the

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Petition. (E.g., BIO, p 22.) There is no requirement in the MCPA that investigative authority be premised on a "viable" claim.[1]

But that is not even the right question. As the Attorney General has explained, the requisite allegations did need to establish a controversy—as opposed to a violation—rooted in the MCPA. (E.g., BIO, p 12 (stating that courts "cannot apply [MCL 445.904] without a pleading alleging, at a minimum, a 'case or controversy' *implicating Lilly's exposure to liability under the MCPA*" (emphasis added)).) Stating a claim, however, does not require a full-throated, "viable" allegation that Lilly violated the MCPA. See MCR 2.605(A)(1) (stating that declaratory relief is available "whether or not other relief is *or could be* sought or granted" (emphasis added)).

The other problems with Lilly's flawed conception of pleading requirements are several and serious. Most important, Lilly continues to ignore the MCPA's bifurcated investigation-and-enforcement scheme. Although the particulars of the proscriptions in § 3 can be helpful to establishing probable cause at the outset of an

[1] Lilly's attacks on viability ignore cognizable claims arising from its conduct. The Petition explains how pharmacy prices for Lilly's medications are based on the prices Lilly establishes in agreements with Pharmacy Benefit Managers (PBMs), which operate pharmacies, e.g., *A.G. Nessel Joins Multistate Coalition Asking Congress to Prohibit PBMs from Owning or Operating Pharmacies* (April 15, 2025), https://www.michigan.gov/ag/news/press-releases/2025/04/15/attorney-general-nessel-joins-multistate-coalition. A claim that Lilly engaged in a civil conspiracy with PBMs to charge consumers grossly excessive prices is cognizable. Similarly, Lilly would be a proper party in an action against a pharmacy for charges to consumers consisting primarily of Lilly's wholesale price. MCR 2.205, 2.206. Relatedly, the plausibility of such an action against a pharmacy further illustrates the open-endedness of an investigation and distinguishes the same from a lawsuit.

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investigation, they do not etch in stone the theory of potential enforcement actions. Investigations are intended to explore and provide context for considering any subsequent claims. There is a difference between identifying potential violations on which an investigation is based and the manner in which pleaded allegations are considered in the context of a lawsuit.

The Legislature notably imposed this lower probable-cause standard, not on the Attorney General, but on the circuit court, which had discretion to hold an ex parte hearing. Thus, even assuming it is appropriate to cross-reference the Petition when evaluating jurisdiction over this declaratory action, the pleaded controversy is not rooted in whether the Petition stated a claim, but whether it presented sufficient evidence to support the circuit court's probable-cause finding.

Additionally, the plain language of the MCPA establishes that § 4's exemption should be evaluated as soon as it is invoked. See MCL 445.904(1)(a) ("*This act* does not apply to . . . [a] transaction or conduct specifically authorized . . . ."). The Legislature determined that entities suspected of MCPA violations are entitled to rely on § 4's protections, saving costs on legal fees without worrying about raise-or-waive rules applying to potential merits-based arguments. This Court should reject Lilly's claim that merits-based defenses should be considered first, lest that become the roadmap for the next hundred cases.

Indeed, in harmony with § 4's status as a threshold issue, Lilly waived its downstream arguments on the merits. In its motion to stay the investigation, Lilly agreed that § 4's applicability is the "critical issue," "dispositive for any subpoena,

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investigation, or lawsuit." (App'x p 173.) Lilly then stipulated to staying the investigation to resolve that dispute in particular, which it defined as its contention "that the Attorney General's investigation in the above-captioned matter is ultra vires in light of the decisions in [*Smith* and *Liss*]." (App'x p 197.)

Lilly thus agreed (1) that a "dispute" was "manifest," and (2) to circumscribe the issues to the correctness of *Smith* and *Liss*. In consideration, it received the Attorney General's agreement to stay her investigation, leaving undisturbed the January 26, 2022 order granting subpoena authority. Viewed in this contractual context, Lilly is not adding an alternative ground for affirmance; it is resurrecting a waived issue. See *VHS Huron Valley Sinai Hosp v Sentinel Ins Co*, 322 Mich App 707, 722 (2018) (Gleicher, J, dissenting) (opining that agreement in release to circumscribe future issues should be binding on parties); 2 Gillespie Mich Crim L & Proc § 21:15 (2d ed) ("[W]aiver is where the defendant affirmatively agrees with the course of action taken by the trial court."). Lilly, having bargained to table all issues besides the correctness of *Smith* and *Liss*, should not be permitted to renege.

Lilly's remaining arguments also lack merit. It characterizes the Attorney General's effort as a "test case," citing only its position that the Attorney General "fail[ed] to defend whether it pled an MCPA violation." (BIO, p 27.) As explained, Lilly invented this pleading requirement. Regardless, pleading deficiencies justify amendment of a complaint; they do not render lawsuits "test cases." Also unpersuasive is Lilly's claim that, a century ago, this Court precluded lawsuits motivated by "a desire to obtain interpretation of a statute." (BIO, pp 27–28, citing

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Anway v Grand Rapids Ry, 211 Mich 592, 610 (1920).) Whereas the *Anway* plaintiff was merely curious, the Attorney General here articulated an actual controversy—and Lilly, at one time, explicitly agreed. This Court acknowledged such a pathway to statutory interpretation by adopting MCR 2.605, which addresses cases like this one and sets the parameters for seeking such judgments. *Lansing Sch Educ Ass'n v Lansing Bd of Educ,* 487 Mich 349 (2010) (confirming that standing to seek such judgments is built into MCR 2.605).

II. *Smith* and *Liss* were wrongly decided.

Under *Smith* and *Liss*, entities obtaining any authorization to conduct business are exempt from the MCPA wholesale for any misconduct that bears even the slightest relationship to the authorization. But the Legislature exempted only the transactions or conduct themselves, and only to the extent of the authorization's specificity.

Lilly recognizes that the exemption attaches to only a specifically authorized transaction or conduct, not businesses. Its only defense is to stretch the term "transaction" past its breaking point. As an afterthought, Lilly says the phrase "specifically authorized" is not a limitation on "transaction[s] or conduct"; rather, the criterion is satisfied if the authorization bears any relationship to "transacting." But this does not just leave the word "specifically" with no meaning whatsoever—following *Smith*'s lead, Lilly's interpretation engrafts the antonym "generally" in its stead.

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A. "A transaction" cannot plausibly be read to include all of an entity's conduct in a regulated field.

Lilly posits that "[t]here is no denying that the word transaction has a 'broader meaning' than conduct[.]" (BIO, p 34, quoting *Dine Brands Global, Inc. v Rachel Eubanks*, ___ Mich ___ (2025), 2025 WL 898837, at *12.) According to Lilly, the Legislature contemplated that a regulator's broad approval of a type of conduct equates to specific authorization of *all* conduct bearing any relation to the entity's economic efforts, transaction-related or otherwise. For example, the grant of a license, whose only prerequisite might be the licensee's completion of a form or a training course, "triggers" the exemption—which immediately expands to cover everything the entity does under the auspices of that license. (BIO, p 32.)

This construction warps the statute to cloak an entity with immunity from the MCPA that extends far beyond the transaction or conduct that was specifically authorized. In contrast to Lilly's overly broad construction, the Legislature limited the exemption to *singular instances* of transactions or conduct. MCL 445.904(1)(a) ("This act does not apply to . . . [a] transaction or conduct specifically authorized . . ."). It did not say, "This act does not apply to persons who engage in transactions or conduct specifically authorized," nor did it say, "This act does not apply to authorized transactions or conduct."

Lilly offers only one theory for why the Legislature would carve a monumental share of Michigan's economy out from the remedial MCPA: The Legislature "desire[d] to avoid confusion by businesses who must comply with settled, complex regulatory obligations while simultaneously fending off

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unpredictable MCPA suits involving those same transactions." (BIO, p 34.) This is senseless and unrealistic. The MCPA proscribes unfair, unconscionable, and deceptive trade practices. If ever a "complex" regulatory scheme specifically authorizes an entity to do what might otherwise violate the MCPA, the defense can be raised then. When such a conflict is proved, the exemption is triggered, and justice is done.

In its attempt to buttress *Smith* and *Liss* by reference to the "highly regulated" automotive industry in *Cyr v Ford Motor Company*, the Court of Appeals confirmed Lilly's avoidance-of-confusion argument as unnecessary and unworkable. *Cyr v Ford Motor Company*, unpublished per curiam opinion of the Court of Appeals, issued December 26, 2019 (Docket No. 345751), p 5. (**Exhibit A**.) *Cyr* was a mass tort action alleging MCPA violations against Ford for selling vehicles with faulty transmissions. The panel cited the existence of "regulations on everything from fuel economy … to brake lights … to safety recalls," and statutes concerning express and implied warranties—neither of which involved "approv[als]" by a regulator. *Id.* at 5–6. Not once did that court identify anything that might be called a specific authorization to sell cars with faulty transmissions. *See id.* The court therefore injected specificity into its § 4(1) analysis only by invoking the complexity of auto-related regulations—all without identifying any link between the complained-of conduct and any particular authorization, and without any appreciation that, under *Smith* and *Liss*, the same result would obtain if the regulatory landscape was sparse.

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Turning to the text, Lilly argues that the term "transaction" takes primacy over "conduct," because a transaction can be dissected into pieces of conduct, e.g., offer, acceptance, payment, delivery, and so on. (See BIO, p 36.) According to Lilly, authorizing a transaction authorizes all related conduct, which Lilly calls "conduct attached to the transaction." (E.g., *id.* at 3, 31.) Only by arguing that a transaction is broader than conduct can Lilly maintain the cognitive dissonance required to assert that a limited, *specific* authorization includes a near-limitless suite of *implicit* authorizations.

Of course, the MCPA proscribes conduct that cannot reasonably be described as "attached to the transaction," such as disparaging the goods, services, business, or reputation of another, MCL 445.903(1)(f). Yet *Smith* and *Liss* permit licensed entities to engage in such conduct, while everyone else must comply with the MCPA—regardless of whether the "authorization" contemplated such conduct. (This would be a stretch even if authorizations did not need to be specific to trigger § 4; but the requirement of a specific authorization is fatal to this theory.) To date, Lilly has not explained how "conduct attached to a transaction" encompasses conduct that plainly does not require a transaction at all.

Lilly cites *Dine Brands* to argue that nonspecific, transaction-level authorization implies specific authorization for all "attached conduct." (BIO, pp 36–37.) But its reliance on that case is backwards. *Dine Brands* construed the phrase "action or proceeding," recognizing that "the word 'proceeding' is a broader term than 'action' when used for a technical or legal purpose," because all judicial actions

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are amenable to being called "proceedings." 2025 WL 898837, at *11. If *Dine Brands* applies at all here, the term "conduct" plays the role of a "proceeding," and the term "transaction"—which is a form of conduct, regardless of whether it can be further dissected—plays the role of an "action." Indeed, conduct can refer to a transaction writ large, or constituent parts of that transaction—*or acts that are outside the scope of a transaction altogether*, e.g., MCL 445.903(1)(f) (disparaging goods, services, business, or reputation of another), (*i*) (false or misleading statements of fact concerning price reductions). Thus, under § 5, the Attorney General can bring an action when an entity is "about to" engage in a deceptive sales campaign aimed at generating transactions. MCL 445.905(1). Under *Dine Brands*, then, "transaction" is narrower than "conduct"; this Court can interpret and harmonize the terms at face value, and it can disregard Lilly's strained attempt to expand the meaning of the specific term to swallow the general one.

To be clear, there is daylight between the meaning of the terms "transaction" and "conduct." Each adds something to the suite of specific authorizations sufficient to trigger the exemption. By exempting specifically authorized *conduct*, the Legislature recognized that instances of conduct might hold specific authorization, notwithstanding whether they comprise part of a transaction. E.g., *American Home Prods Corp v Johnson & Johnson*, 672 F Supp 135, 141 (SD NY, 1987) (applying analogous statutory exemption to product label that had been specifically reviewed and approved by FDA). By exempting a specifically authorized *transaction*, the Legislature similarly recognized that transactions are sometimes specifically

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authorized by regulators. (See, e.g., BOA, p 32 n 14 (describing Michigan State Housing Development Authority's transaction-specific process for reviewing and approving leases involving housing choice vouchers).) The Legislature likely added "transaction" alongside "conduct" in recognition of the fact that transactions can defy attribution to one party. A "transaction" must involve two or more parties; one cannot buy something if no one exists to sell it. See *Webster's New Collegiate Dictionary* (1973–76 ed) (defining "transaction" to include "an act, *process* or *instance* of transacting" (emphases added).) By adding the narrower term "transaction" alongside the more comprehensive (but less precise) term "conduct," the Legislature clarified that specific authorization for a multi-party transaction may provide an exemption. This clarity is useful when, for example, a regulator approves the terms of an executed contract reflecting a "meeting of the minds"; in such a case, it would be clumsy later to describe a term of that contract as one party's "conduct." Luckily for the signatories, however, they can point to the word "transaction" if ever a term of that contract is challenged under the MCPA.

B. *Smith*, *Liss*, and Lilly interpret "specifically authorized" without assigning any meaning to the term "specifically."

Section 4 is explicitly limited to transactions or conduct that are "specifically authorized." Defining "specifically authorized" is as important as drawing lines between a "transaction" and "conduct," because the proper interpretation of "specifically authorized" confirms that general authorization to transact in a

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market—e.g., a license—does not encompass all conduct "attached to the transaction" and then some.

Lilly says the Attorney General would "attach[] the word 'specific[]' to the word 'transaction,' instead of the word 'authorized.'" (BIO, p 38.) This is half true. "Specifically authorized" is a participle phrase that acts as a singular adjective, which modifies "transaction or conduct." Thus, grammatically, the word "specifically" is attached to "authorized"—but the phrase "specifically authorized" cannot be dissected or detached from "[a] transaction or conduct." In any event, Lilly offers no roadmap for how "specifically" should be read; if "specifically" was stricken from the law, courts would apply the exemption exactly as they do under *Smith* and *Liss*. And Lilly still can point to no opinion in the progeny of these decisions undertaking to distinguish a mere authorization from a specific one.

To be clear, the Attorney General is not arguing that one must identify authorization for a single, discrete transaction, as Lilly suggests. (BIO, p 38.) Instead, the exemption's scope is limited by how specific the authorization is. This is workable; as a matter of common sense, "specifically" connotes a measure of exactitude, precision, and definiteness. If *Smith* is overruled, courts could ask, simply, "Was the challenged transaction or conduct definitely, exactly, or precisely authorized?" Even as to an authorization that is not specific to a particular transaction, the answer can be yes.

For instance: If a regulator merely authorizes an entity to transact business in a market, the fact of the entity's various transactions in that market cannot, by

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itself, lead to MCPA liability, because that is as far as the authorization's specifics go. The entity was "definitely, exactly, or precisely" authorized to conduct transactions in that market. But that is all. Other conduct—such as gratuitous statements calculated to increase revenue or goodwill—did not appear in the authorization and therefore was never specifically authorized. In contrast, when an authorization includes additional specifics, like a lease term and price, MCPA challenges founded on those specifics would also be exempt. (E.g., BOA, p 32 n 14.)

CONCLUSION AND RELIEF REQUESTED

The Attorney General respectfully asks this Court to overrule *Smith* and *Liss*, reverse, and remand for entry of judgment in her favor.

Respectfully submitted,

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