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

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MOTION OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF IN SUPPORT OF DEFENDANT-APPELLEE ELI LILLY & CO.

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court under MCR 7.212(H) for leave to file a brief as *amicus curiae* in this Court, and states in support of its motion:

1. 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.

2. 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 that raise issues of concern to the nation's business community. This is one of those cases. American businesses, especially those in highly regulated industries, have a vested interest in certainty, stability, and predictability in business regulation. For decades, the Michigan Consumer Protection Act's regulated-transaction exemption has met that legitimate interest, but now the Attorney General seeks to upend that exemption through litigation rather than legislative change. That will significantly impede businesses from starting, expanding, and retaining operations in Michigan, to the detriment of business owners, employees, and consumers.

3. As friend of the Court, the Chamber seeks to present to the Court a different perspective regarding the issues in this case than those presented by the parties.

4. Michigan's judicial policy favors amicus filings. See *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921).

Accordingly, the Chamber respectfully requests that this Court enter an order granting this Motion for Leave to File Amicus Curiae Brief and accept for filing the Chamber's proposed *amicus curiae* brief, which is attached as Exhibit A.

Respectfully submitted,

Date: May 1, 2023

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EXHIBIT A

STATE OF MICHIGAN
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AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE ELI LILLY & CO.

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STATEMENT OF QUESTIONS PRESENTED

1. 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 answer: No.

Appellees answer: Yes.

Amicus Curiae answers: Yes.

2. 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 answer: No.

Appellees answer: Yes.

Amicus Curiae answers: Yes.

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, established regulations are the cornerstone of careful operational and financial planning that is necessary to provide the goods and services that government has deemed complex or important enough to regulate, which is why legislative and agency processes are intended to provide a meaningful opportunity for a wide array of affected parties to be heard. Unpredictable and sudden regulatory change causes deep disruption in these industries. And nowhere is that disruption more pronounced than when it comes through regulation-by-litigation—that is, where private parties or state attorneys general use the courts to regulate business retroactively by lawsuit instead of working to convince legislatures or agencies to regulate business prospec-

[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.

tively 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 Chamber, as a national organization, 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.

INTRODUCTION

In interpreting the Michigan Consumer Protection Act'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 MCPA'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.

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. 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 supplemental brief, see Lilly Supp Br 11–27, 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. 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 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 cannot be more than 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 Supp Br 16. *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 include exempting a whole process of transacting also 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 claiming that a defendant's particular transaction was not specific *enough*. By descending to a

level of particularity that could not be anticipated by a regulatory regime, a plaintiff could claim that *this* transaction (e.g., executed on Wednesday, May 8, 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 27–32. 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 a transaction it chooses to exempt from the MCPA. The Attorney General would have this Court reevaluate the specificity of the transaction that the Legislature exempted 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, 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 pathbreaking 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 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.

The foreseeable result of undercutting this deep reliance will be to aggravate already existing challenges to starting business in Michigan. In state and out, businesses cannot fail to notice demographic trends such as that "only 55.2% of voters aged 18-29 thought they would be living in Michigan in ten years," Detroit Regional Chamber, *Michigan Statewide Voter Survey: May 12, 2023*,[2] and that the "number of births recorded in Michigan [in 2022] is expected to be the lowest annual total since World War II," 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). This sort of development "highlights concerns about the state's aging population and ability to attract young people and businesses that seek to employ them." *Id.* 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,[3] the Governor recently established the Growing Michigan Together Council to "develop a statewide strategy aimed at making Michigan a

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[2] Available at https://www.detroitchamber.com/wp-content/uploads/2023/05/Final_Detroit-Regional-Chamber-Michigan-Voter-Poll_May-2023.pdf (last accessed on May 1, 2024).

[3] 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).

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).[4] 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.[5] 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, governors like Governor Whitmer 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 governors across the nation entrust to businesses. See, e.g., Mich Dep't of Labor & Econ. Opportunity, *Governor Whitmer Awards Funding to 800 Michigan Businesses to Help Train and Retain Current and Recently Hired Employees* (Dec. 13, 2023)[6] ("Today, Governor Gretchen Whitmer announced more than 800 Michigan businesses

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[4] 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 May 1, 2024).

[5] 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 May 1, 2024).

[6] Available at https://www.michigan.gov/leo/news/2023/12/13/gov-whitmer-awards-funding-to-800-michigan-businesses-to-help-train-and-retain-employees (last accessed May 1, 2024).

will receive around $54,000, on average, to help them train, develop and retain more than 28,000 current and newly hired employees."); Mass Exec Off of Labor & Workforce Dev., *Healey-Driscoll Administration Awards $19 Million to Upskill Current Workers and Increase Workforce Competitiveness* (Dec. 8, 2023)[7] (granting funds to 187 businesses for training employees). In turn, businesses such as Lilly constantly strive to support their employees. See, e.g., LinkedIn News, *LinkedIn Top Companies 2024: The 50 best large workplaces to grow your career in the U.S.* (Apr. 16, 2024); U.S. News & World Reports, *Best Companies to Work For 2023–2024* (Jan. 12, 2024) (both listing Lilly as a top workplace for employees). For companies like these, keeping regulation consistent tends to keep their employees' flourishing more consistent, too.

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,

[7] Available at https://www.mass.gov/news/healey-driscoll-administration-awards-19-million-to-upskill-current-workers-and-increase-workforce-competitiveness (last accessed May 1, 2024).

overlapping, or inconsistent regulations undermine department goals by creating uncertainty and imposing costs and burdens with no public benefit.").[8]

Ultimately, the harmful effects of inconsistent regulation hit 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 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.

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

II. 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 Supp Br 49. 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 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 has 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]"). In states like these, including Michigan, certain *general* actions or transactions are exempted from the scope of 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 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 it 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). Colorado's supreme court has interpreted its 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.[9] But that does not mean Michigan is an

[9] 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

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 interpretations.

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.

"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").

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the Court should decline to overturn *Smith* and *Liss* and should leave the decision below undisturbed.

Respectfully submitted,

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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 4,613 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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