STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

The Honorable Riordan, P.J., Borello, and Boonstra

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

SC: 165961
COA: 362272
Ingham County CC: 2022-000058-CZ

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

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QUESTIONS PRESENTED

Amicus Curiae notes the Questions Presented are contested and reproduce those filed by the Defendant-Appellee for reference purposes only.

1. Whether this Court's decision in *Smith v Globe Life Ins Co*, 460 Mich 446 (1999), and *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007) were correctly decided, given that the plain text of the MCPA exemption applies when either the transaction or conduct is specifically authorized; where the Attorney General's contrary reading nullifies the transaction exemption and brings the MCPA into conflict with federal and state laws; and where the Legislature has directly affirmed precedent.

Were *Smith* and *Liss* wrongly decided?

Appellant's answer: Yes

Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: Did not answer.

2. Whether *stare decisis* requires retaining *Smith* and *Liss*, given that the Attorney General has not articulated a theory of *stare decisis*, given that the current consumer-protection regime is workable, consistent with precedent, and tracks the approaches of other states, given this litigation is an unsupported test case, and given that the Legislature is best suited to make the normative tradeoffs inherent to balancing competing interests between MCPA litigation and regulatory enforcement.

Should *Smith* and *Liss* be overturned?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Did not answer.

Court of Appeals' answer: Did not answer.

STATEMENT OF INTEREST[1]

Members of the National Association of Manufacturers (NAM) operate under complex federal and state regulatory regimes. They are deeply concerned that if the Court overturns the ruling below, they will face increased litigation that, while in the name of consumer protection, are really matters of public policy based on the subjective policy preferences of an Attorney General, prosecutor, or other person authorized to bring a Michigan Consumer Protection Act (MCPA) claim. The public's interests in these transactions are already extensively governed by expert agencies, which is why the Michigan Legislature expressly exempted these transactions from the MCPA. This exemption, along with the Court's longstanding jurisprudence, has prevented the MCPA claims from interfering with these agency decisions.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.9 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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[1] Pursuant to Rule 7.312(H)(5), no party or party counsel authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this appeal, the Attorney General is asking this Court to grant her the power to investigate and litigate claims concerning business transactions that are already subject to extensive regulation by federal and state agencies. These other government agencies manage the public interests in these transactions, which include important public health and safety matters from prescription medicine to homeowners' insurance. Manufacturers and other businesses rely on these regulations when engaging in the covered transactions. For these reasons, the Michigan Legislature expressly exempted all "transactions or conduct" authorized by a government agency from the MCPA under § 4(1). MCL 445.904(1)(a). Indeed, each time the Legislature has amended the MCPA exemption, it has *expanded* the exemption and clarified that transactions such as the one at bar are exempt from the MCPA. Thus, by statute, the Michigan Attorney General lacks the authority she is seeking.

For more than two decades, this Court's jurisprudence has reinforced this broad understanding of the scope and impact of the MCPA § 4(1) exemption. It has held that this exemption applies to the entire transaction sanctioned by government agencies, regardless of whether the agency has issued regulations over the specific conduct or aspect of the transaction at issue. *See Liss v Lewiston-Richards, Inc*, 478 Mich 203, 213 (2007). In doing so, it has recognized the importance of deferring to agency experts to determine whether and how to regulate a transaction, which necessarily includes determining which parts of the transaction to regulate and not regulate. Expert agencies can weigh the public's interests, balance competing

concerns (including public health, utility of the product, and consumer harm), and subject the transaction to further regulation as it determines is warranted. As the Court has recognized, the MCPA's purpose is limited; it provides the Attorney General with an enforcement tool over *unregulated* trade or commerce. It is not a vehicle for interfering with the regulator-regulated relationship or making complex policy decisions, including over drug pricing in the transactions here.

Amicus curiae respectfully requests that this Court affirm the ruling below and not upset well-settled jurisprudence. The Attorney General has identified no viable rationale for overturning the plain meaning of the MCPA exemption, the clear intent of the Legislature that the exemption apply to all governed transactions, and this Court's longstanding precedent giving the exemption its proper effect. Disagreement with a law, along with a desire for a different policy outcome (here over prescription drug pricing), is not grounds for overturning precedent. Otherwise, *stare decisis* would be meaningless. If a change in law is desirable, the Court should defer to the Legislature to amend the statute. The Legislature, not this Court, is the proper body to determine whether the Attorney General should have the power she seeks.

ARGUMENT

I. The Court Should Reject this Attempt to Expand the MCPA's Reach Because the Legislature Expressly Exempted Transactions, Including Those Here, that Are Already Governed by Regulatory Regimes.

Over the past forty years, both the Michigan Legislature and this Court have consistently determined that when a transaction is governed by a federal or state regulatory regime, the entire transaction is exempted from the MCPA under § 4(1).

Att'y Gen v Diamond Mortg Co, 414 Mich 603, 617 (1982). This exemption promotes sound public policy; it allows expert agencies to develop regulatory regimes without being second-guessed by MCPA claims. Here, pharmaceutical sales are subject to extensive regulation by the U.S. Food and Drug Administration (FDA). Therefore, all aspects of these transaction are exempted from the MCPA. It is up to the FDA to determine which aspects of these transactions should be regulated, which should not be, and how extensive any regulations ought to be. *See Duronio v Merck & Co*, No. 267003, 2006 WL 1628516, at *6–7 (Mich. Ct. App. June 13, 2006). The Legislature expressly determined that such transactions should not be subject to MCPA review.

To be clear, the MCPA exemption the Attorney General seeks to overturn has been long settled, both under the plain meaning of the statute and this Court's jurisprudence. As the Court explained in *Smith v Gobe Life Ins Co*, "when the Legislature said that the transactions or conduct 'specifically authorized' by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute." 460 Mich 446, 465 (1999). "[T]he relevant inquiry [under § 4(1)] 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." *Id.* In *Smith*, the Court concluded that life insurance transactions met the criteria in this exemption because the *transaction* at issue was governed by a regulatory agency. *See id.*

The Court in *Smith* did allow the claim under a different section of the code—§ 4(2)—which is important here because the Legislature responded to *Smith* by

closing this loophole that *Smith* opened without touching § 4(1). *See* Pub Act No 432, HB No. 5332 (2000) (affirming § 4(1) and amending § 4(2)). In *Liss*, the Court reaffirmed the *Smith* test for § 4(1), and clarified that "specifically authorized" means that a transaction is exempt from MCPA scrutiny if the "general transaction" is "explicitly sanctioned." 478 Mich at 212-213. The Court then concluded that because the "general transaction at issue in [the] case, contracting to build a residential home is 'specifically authorized' by law," all aspects of that transaction are exempt from the MCPA. *Id.* at 213. The Court also noted with approval Court of Appeals cases applying the exemption to "other regulated industries." *Id.* at 210. For example, because the Michigan Gaming Control Board regulates the operation of slot machines, any claim over a slot machine transaction is exempted from the MCPA. *See id.* (citing *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534 (2004)).

The Attorney General attempts to create a conflict between *Smith* and *Liss* and its predecessor case *Diamond Mortgage*, but no such conflict exists. *Diamond Mortgage* considered whether awarding a real estate broker a license means that all mortgage transactions she engages in are exempt. The Court held it did not; it is not the entire industry, but the transaction that must be subject to regulation, and "a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business." 414 Mich at 617. Indeed, *Smith* and *Liss* both followed and built on *Diamond*. *See Smith*, 460 Mich at 464 ("*Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.'"); *Liss,* 478 Mich at 208-9 ("What emerges

from *Diamond Mortgage* and *Smith* 'is that the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific conduct alleged is prohibited.'"). Both the statute and this Court's rulings have been consistent: the exemption applies to regulated transactions. There is no conflicting precedent for this Court to resolve.

This deference to legislative agencies to govern complex regulatory regimes follows other long-standing aspects of Michigan law because it allows "for orderly and sensible coordination of the work of agencies and of courts." *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 70 (1997) (stating purpose of primary jurisdiction doctrine). It "promote[s] uniformity and take[s] advantage of the special powers and expertise the agency may have in dealing with the subject matter." *Cherry Growers, Inc v. Agric Mktg & Bargaining Bd*, 240 Mich App 153, 161 (2000). The statutory exemption reflects the understanding that regulating agencies weigh difficult and often competing factors that are within their subject matter expertise and the express intent of the Legislature to remove these transactions from the MCPA's reach.

Further, as Michigan courts have recognized, the "extensive and detailed" FDA regulatory regime for prescription drug sales makes the transactions at bar exempt from the MCPA. *Duronio*, 2006 WL 1628516, at *7. In *Duronio*, a plaintiff asserted an MCPA claim that a pharmaceutical company "disseminated information to the general public that concealed or downplayed potential cardiovascular risks" of a particular drug. *Id.* at *1. The Court of Appeals observed that the "regulations implementing the FDCA are extensive and detailed." *Id.* at *7. It then found that "the

general marketing and advertising activities underlying plaintiff's MCPA claim are authorized and regulated" under these laws. *Id.* Accordingly, plaintiff's MCPA claims were exempt. *Accord Peter v Stryker Orthopaedics, Inc*, 581 F Supp 2d 813, 816 (E.D. Mich. 2008) (similarly finding medical device transactions "are heavily regulated by the FDA" and, thus, exempt from the MCPA). The *Duronio* plaintiff, though, was not without a remedy; he was still allowed to pursue other, product-based claims.

This deference to regulatory regimes reflects the approach many other states have taken with their state consumer protection acts. Georgia is particularly instructive because its exemption to the Georgia Fair Business Practices Act (FBPA) tracks MCPA § 4(1). *See* Ga. Code Ann. § 10-1-396 (exempting "[a]ctions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States"). As in Michigan, Georgia courts have held that "[t]he General Assembly intended that the Georgia FBPA have a restricted application only to the unregulated consumer marketplace and that FBPA not apply in regulated areas of activity, because regulatory agencies provide protection or the ability to protect against the known evils in the area of the agency's expertise." *Baughman v Truist Bank*, No. 123CV03199JPBJKL, 2023 WL 6940698, at *3 (N.D. Ga. Sept. 19, 2023).

Overall, "the vast majority of state legislatures, approximately two-thirds, explicitly recognize the desirability of having congruence between [consumer protection acts] and government regulation." Victor E. Schwartz, et al., *"That's*

Unfair!" Says Who—The Government or Litigant?: Consumer Protection Claims Involving Regulated Conduct, 47 Wash LJ 93 (2007) (cataloguing cases).

These provisions reflect "a legislative policy of deference to the authority granted by Congress or a General Assembly to federal and state regulatory agencies and a recognition of the need for regulated actors to be able to rely on" the decisions, instructions, and guidance of those agencies. *Price v Philip Morris, Inc*, 848 NE2d 1, 38 (Ill. 2005). Further, in many states, violations of a consumer protection act (CPA) are subject to statutory minimums, increased damages and the awarding of attorneys' fees, making them ill-suited for these types of speculative actions. In Michigan, the Legislature made it clear that the MCPA can solely fill gaps for unregulated conduct and transactions. This Court has long given effect to this legislative judgment. It should not waver here. When an expert agency oversees the transaction, as in this case, all aspects of the transaction are exempt from the MCPA.

II. The MCPA Exemption Ensures Consumer Protection Claims Are Focused on Deceptive Trade Practices, Not Making Public Policy.

The Attorney General's attempt to use the MCPA to investigate and litigate prescription drug pricing epitomizes the reasons regulated transactions are excluded from the MCPA: the exemption guards against political or policy-driven claims. Consumer protection acts have a specific purpose: to provide safeguards, enforcement and remedies from unfair trade practices, such as gimmicks or scams, that trick people into transactions over products or services. *See, e.g.*, MCL 445.903(b-h) (targeting various representations), (x) (vulnerable consumer protections), (ff)

(consumer prize prohibitions), (hh) (Social Security number scams). It is not a policymaking tool. Otherwise, transactions that are already highly regulated by federal agencies, as here, would be subject to a patchwork of ad hoc state lawsuits.

Drug pricing, which is the subject of this MPCA claim, is highly complex. The system the Attorney General attacks involving list prices and rebates is not the doing of any individual company. This system, as Defendant points out, results from federal laws and business practices of companies, such as pharmacy benefit managers, that prescription drug manufactures do not control and have long sought to reform. Eli Lilly Supp Br at 6. The ultimate price a consumer pays for prescription drugs is generally the result of various factors, including a person's insurance deductibles and coinsurance along with how much of the manufacturers' rebates pharmacy benefit managers pass on to consumers. This system, as imperfect as it may be, does not fall on the shoulders of any manufacturer, cannot be compared to systems in other countries with other regulatory regimes, and is not grist for the blunt, heavy-handed tool of the MCPA, which is an enforcement tool against deception in sales.

The purpose of a consumer protection act is to provide the Attorney General, along with the public, the ability to protect consumers from unfair trade practices related to the goods and services they buy. *See Cap One Bank USA NA v. Ponte*, No. 307664, 2013 WL 6692511, at *4 (Mich. Ct. App. Dec. 19, 2013) (MCPA is "a remedial statute designed to protect consumers in the purchase of goods and services."). These laws, which have been adopted in every state and the District of Columbia, provide a means to stop practices that mislead consumers into purchasing products that are

different from or less valuable than promised, and to compensate those who have lost money as a result of these illicit practices. *See Dix v Am Bankers Life Assur Co of Fla*, 429 Mich 410, 417 (1987) (MCPA is designed to "provide an enlarged remedy for consumers who are mulcted by deceptive business practices."). By-and-large, the focus of CPA investigations and claims is the information companies give consumers about their goods and services. The enforcement actions look at representations made on a product label or advertisement, or are otherwise directed at consumers in a given jurisdiction. *See, e.g.*, MCL 445.903(ee) (addressing biodegradable product claims), MCL 445.903(o) (online marketing practices). In areas of the economy that are not regulated—which are many—these claims can provide valuable protections.

The MCPA exemption for regulated transactions reduces the risk that people, including elected officials, will misuse the statute as a political cudgel. *Amicus* and its members have observed that such efforts have been increasing in recent years. For example, just as drug pricing is a hot-button issue, so too is sustainability. In Washington, D.C., two lawsuits drawing widespread condemnation are seeking to drive energy use and recycling practices through the District's CPA. *See District of Columbia v ExxonMobil Corp*, -- F. Supp. 3d --, 2022 WL 16901988 (D.D.C. Nov. 12, 2022); *Earth Island Inst v The Coca-Cola Co*, 2022 WL 18492133 (D.C. Super. Nov. 10, 2022). In *ExxonMobil Corp*, the D.C. Attorney General asserts, among other things, it is "misleading" for any energy company to discuss its work to create a "sustainable" future, make energy "cleaner," and be "part of the solution to climate change," *because* its business involves selling products that contribute to climate

change. *See* Complaint at ¶¶ 104, 106. Similarly, the *Earth Island* plaintiff alleges a company can "never be truly 'sustainable'" unless it stops using plastic, so discussing sustainability goals is misleading. 2022 WL 18492133, at *2-3. As the DC trial court explained in dismissing this case, "[c]ourts have consistently rejected quarrels, such as Earth Island Institute's." *Id.*, at *4. These policy-driven claims are not about objective wrongdoing, but "vague, subjective, and undefinable" allegations. *Id.* at *5. In these cases, CPAs provide no principles for liability.[2]

If the Court rewrites the MCPA and allows the policy-driven claim here, it will open a new door for such wide-ranging litigation. Along with the Attorney General, any prosecutor could initiate such an investigation or bring such a claim. Prosecuting Attys' Amici Curiae Br, *Attorney General v Eli Lilly Co*, No. 362272 (Oct. 12, 2023) (stating their desire "to prioritize consumer protection" claims and "issue subpoenas" and "enlist law-enforcement to investigate violations" to further these efforts). Private litigants, who are wholly unaccountable to consumers in the state, could pursue claims over regulated transactions, seeking self-interested policy changes and financial settlements irrespective of objective wrongdoing. The MCPA should not be

[2] *See also* Michael Thrasher, *Tennessee Attorney General Sues BlackRock for 'Misleading' Investors on ESG Practices*, Institutional Investor (Dec. 18, 2023) ("The AG is seeking injunctive relief, civil penalties, disgorgement, restitution for consumers, and recoupment of the state's costs under the Tennessee Consumer Protection Act, a novel use of those laws."); Rebecca Kern, *Old Laws Open Up a New Legal Front Against Meta and Tiktok*, Politico (Oct. 27, 2023) (State Attorneys General are "using state consumer-protection laws to make the case…").

so unprincipled as to allow these types of claims. Because the MCPA is so broad and powerful, it must be applied only where the Legislature has authorized—and certainly not, as here, where the Legislature specifically prohibited such claims.

Years ago, Robert Reich, who served as Secretary of Labor under President Clinton, cautioned that a lawsuit seeking to regulate is "faux legislation" that "sacrifices democracy." Robert B. Reich, *Don't Democrats Believe in Democracy*, Wall St J, at A22 (Jan 12, 2000). Consumer protection laws were meant to fill a gap by protecting consumers where product safety was not already closely monitored and regulated by government agencies. The Court should affirm the ruling below and keep the MCPA focused on consumer transactions that meet the MCPA's criteria. Otherwise, the MCPA will be leveraged for public policy concerns by whichever political party happens to be in power at the time.

III. This Court Should Reaffirm Michigan's Longstanding Jurisprudence on the MCPA Exemption and Determine that Any Effort to Change Its Scope Should be Addressed by the Legislature.

Changing political dynamics also should not alter well-settled law. Here, the Attorney General is asking this Court to overturn clear statutory language that has been consistently applied by this Court for more than four decades. If the MCPA were to allow investigations into and lawsuits over regulated transactions, the Legislature could hold hearings and determine, if appropriate, how agencies and courts should weigh competing interests of public health, safety, and advertising practices. It is for the Legislature to address what boundaries should exist for any such new claims, and whether they should be allowed only by the State Attorney General or, as would occur

here, any person with standing to bring an MCPA claim. The Legislature made exactly this type of decision when it barred these claims under the MPCA and deferred to expert agency rulemaking to govern entire transactions.

The Court should not take the Attorney General's invitation to disregard settled jurisprudence. "[*S*]*tare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop in a principled and intelligible fashion." *Michigan v Bay Mills Indian Cmty*, 572 US 782, 798 (2014) (quotation omitted). It is "the idea that today's Court should stand by yesterday's decisions." *Kimble v Marvel Ent, LLC*, 576 US 446, 455 (2015). And, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *People v Graves*, 458 Mich 476, 480 (1998). *Stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson v City of Detroit*, 462 Mich 439, 463 (2000). This judicial policy has great force, particularly when adhering to statutory interpretations. *See Kyser v. Twp.,* 486 Mich 514, 534 n 15 (2010).

In *Robinson*, this Court set forth three factors it considers in determining whether to overturn precedent, and none of those factors weigh in favor of overturning *Smith* and *Liss*. 462 Mich at 464-65. Those factors are "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*, 462 Mich at 464. Because *stare decisis* is the

"preferred course," the party seeking to overrule precedent, here the Attorney General, has the burden of showing that these factors favor overturning precedent.

As to the "practical workability" factor, the Attorney General concedes the exemption as explained in *Smith* and *Liss* is "admittedly easy to apply." AG Supp Br 41. It also has been universally accepted by the courts. She points to no decisions in the lower courts expressing confusion or applying different rules. Indeed, Michigan courts and federal courts consistently apply the exemption using the same legal rule. *See, e.g., Matanky v Gen. Motors LLC*, 370 F Supp 3d 772, 800 (E.D. Mich. 2019) ("The general transaction in this case (i.e., the sale of a new car by a licensed dealer) is one specifically authorized and regulated by law; thus, it is exempt from the MCPA."); *Jimenez v Ford Motor Credit Co*, No. 322909, 2015 WL 9318913, at *7 (Mich. Ct. App. Dec. 22, 2015) ("The sale of the motor vehicle by a licensed dealer to [the purchaser] is thus a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."). The workability factor weighs in favor of affirmance.

Instead, the Attorney General claims the MCPA is "unworkable" based on hypothetical strawmen and the premise that the MCPA "arbitrarily exempt[s] *an industry* from MCPA review anytime the Legislature happens to regulate some aspect of that industry not related to consumer protection." AG Supp Br 43 (emphasis added). But, there is nothing arbitrary about regulatory regimes "administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). And, only transactions—not industries—are exempted

under the MCPA, as the Court held in *Diamond Mortgage*. The Attorney General, here, seeks to use the MCPA to second-guess other regulators' enforcement priorities. That is precisely the role the Legislature prohibited in MCPA § 4(1).

For the second *Robinson* factor, the Attorney General's claim that there is no reliance interest on this Court's precedent is simply wrong. As noted in *Liss*, courts and businesses have relied on this Court's long-standing determination that the MCPA exempts regulated transactions in a multitude of industries, from the operation of slot machines to banking activities to residential home building. 478 Mich at 210-12. Since then, courts have applied this rule to the sale of automobiles, *Jimenez*, 2015 WL 9318913, at *7, landlords leasing residential property, *Davis v Boydell Dev Co*, No. 344284, 2019 WL 2605789, at *3 (Mich. Ct. App. June 25, 2019), construction management services, *Pedinelli v Turnberry Park Ests Inc*, No. 324331, 2016 WL 370043, at *6 (Mich. Ct. App. Jan. 28, 2016), insurance, *Dell v Citizens Ins Co of Am*, 312 Mich App 734, 742 (2015), and more. Thus, this rule is "embedded," "accepted," and "fundamental" to state law. *Robinson*, 462 Mich. at 466.

As to the third *Robinson* factor, the Attorney General does not even attempt to argue that any change in law or facts no longer justify *Smith* and *Liss*. AG Supp Br 51-52. Instead, she asks the Court to use its power to declare "what the law is." *Id.* Here, though, the Court's precedent, the plain text of the statute, and the legislative history align against the Attorney General. Again, the Legislature amended § 445.904 to make clear that § 4(1) exempted any transaction authorized by law from the MCPA. *Dell*, 312 Mich App at 743-47. These amendments provide a clear "desire

to clarify" that the Court properly interpreted the exemption in *Smith* and *Liss*. *Bush v Shabahang*, 484 Mich 156, 167 (2009); *see also Jeruzal v Herrick*, 350 Mich 527, 534 (1957) (when the legislature amends the statute and the terms at issue are "substantially re-enacted the legislature adopts such construction"). In fact, the Legislature has never wavered or removed transactions from the § 4(1) exemption.

Put simply, if the Attorney General seeks to expand her authority and use the MCPA to make policy decisions over regulated transactions, she should seek a legislative amendment to the MCPA.

CONCLUSION

For the foregoing reasons, the NAM respectfully requests that the Court deny review or, alternatively, affirm the decision of the Court of Appeals.

Date: May 1, 2024

Respectfully submitted,

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/s/ Riley C. Mendoza

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2024, I electronically filed the foregoing (and accompanying the Motion for Leave to File a Brief for *Amicus Curiae* the National Association of Manufacturers) using the TrueFiling/MiFile System, which will send notification of this filing to all registered counsel of record.

/s/ Riley C. Mendoza