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

JORDAN CYR, et. al., Plaintiffs-Appellants,	Supreme Court No. 160927
v	Court of Appeals No. 345751
FORD MOTOR COMPANY, a Delaware corporation Defendant-Appellee.	Wayne Circuit Court No. 17-006058NZ

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PROPOSED BRIEF OF *AMICI CURIAE* ON BEHALF OF THE PROSECUTING ATTORNEYS OF WASHTENAW, ALGER, CHIPPEWA, GENESEE, INGHAM, AND MARQUETTE COUNTIES IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

In light of three conflicting decisions as to the scope of the "exemption" in the Michigan Consumer Protection Act, MCL 445.904(1)(a), should this Court grant leave to appeal to clarify the exemption's scope—thus providing certainty to prosecuting attorneys and consumers alike as to the reach of Michigan's consumer protection law?

Amici answers: "Yes."

Plaintiffs-Appellants answer: "Yes."

Defendant-Appellee answers: "No.

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici are the chief law-enforcement officers in a diverse set of counties from across the State of Michigan.[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. Prosecutors, moreover, are expressly granted the authority to "investigate" and "prosecute" violations of the Michigan Consumer Protection Act ("MCPA"). MCL 445.915.

The scope of the MCPA is thus of critical importance to *amici* Prosecuting Attorneys. *Amici* are committed to using every tool at their disposal to protect consumers in their respective communities. But uncertainty as to the scope of the MCPA—created by this Court's conflicting opinions in several cases—has made it difficult for the Prosecutors to do so. *Amici* Prosecuting Attorneys thus respectfully submit this brief to highlight the need for clarification of the MCPA, so that prosecutors can take appropriate action to protect consumers in their communities.

In recent months, communities across the state have experienced several high-profile instances of consumer abuse. In one instance in Washtenaw County, a senior living facility in Ann Arbor unilaterally imposed on its residents, without prior warning, a mandatory $900 "COVID-19 fee." Another case that occurred early during the COVID-19 crisis involved a Pittsfield Township cleaning service that drastically increased the sale price of its hand sanitizers, from $7.50 per bottle to $60 per bottle.[2] The egregiousness of these cases reflects a

[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.

[2] The egregiousness of these practices ultimately caught the attention of the Attorney General, who issued a cease-and-desist letter to the senior living facility and ordered it to repay its residents. The Attorney General ultimately negotiated a $4,500 settlement with the cleaning

more fundamental problem: businesses often believe that they have more to gain than to lose by engaging in underhanded practices.

It is impossible to know the full extent of the problem, but a database of self-reported consumer scams from the Better Business Bureau suggests that there remains a largely unaddressed array of consumer abuse in the counties *amici* serve.[3] Better Business Bureau, *BBB Scam Tracker* <https://www.bbb.org/scamtracker> (accessed February 3, 2021). And what is true in *amici*'s counties is undoubtedly true across the state.

The MCPA was enacted to remedy that state of affairs, and "to provide an enlarged remedy for consumers who are mulcted by deceptive business practices." *Dix v Am Bankers Life Assur Co of Florida*, 429 Mich 410, 417-18; 415 NW2d 206 (1987). To that end, the MCPA gives prosecuting attorneys a number of tools to root out consumer abuse, including the ability to issue subpoenas, enjoin violations, obtain damages, and enlist law enforcement to investigate violations of the Act. See MCL 445.915. These powers mirror those granted to the Attorney General under the Act. *Id.*

The MCPA's enforcement scheme makes sense. In cases where corporate wrongdoing affects multiple jurisdictions or raises issues of statewide concern, the state Attorney General can

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service. Press Release, Michigan Department of the Attorney General, *AG's Office Signs Agreement with Ann Arbor Company Following Alleged Violations of Consumer Protection Laws* (October 30, 2020), available at < https://www.michigan.gov/ag/ 0,4534,7-359-92297_47203-543774--,00.html> (accessed February 3, 2021). For every successful resolution in cases like these, there remain countless others that go unaddressed.

[3] Between 2019 and 2020, for example, the Better Business Bureau Scam Tracker published forty self-reported scam incidents in Washtenaw County related to online purchases, phishing, employment, fake checks and money orders, counterfeit products, COVID-19, and other deceptive practices. Some of these incidents resulted in consumer loss of over $4,400. Better Business Bureau, *BBB Scam Tracker* <https://www.bbb.org/scamtracker> (accessed February 3, 2021).

take action. But state-level resources are limited, and it may be difficult for the Attorney General to pursue every instance of local consumer abuse. That is where local prosecutors come in. In situations where the effects of consumer abuse are felt only at a local level, county prosecutors are often best situated to investigate and litigate consumer protection violations.

A series of conflicting decisions by this Court, however, has stymied local prosecutors' ability to act under the MCPA. Those decisions concern the scope of § 4(1)(a) of the MCPA, which exempts from the Act any "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." MCL 445.904(1)(a). In *Attorney General v Diamond Mortgage*, 414 Mich 603; 327 NW2d 805 (1982), this Court ruled that the § 4(1)(a) exemption applies only where state or federal law specifically authorizes "*conduct* that plaintiff alleges is violative of the Michigan Consumer Protection Act." *Id.* at 617 (emphasis added). In *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), however, the Court switched tracks, ruling that the § 4(1)(a) exemption applies wherever a "*general* transaction is specifically authorized by law." *Id.* at 465 (emphasis added). And in *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007), the Court went further still, suggesting that the § 4(1)(a) exception applies to any business that is "regulated" under state or federal law. *Id.* at 213.

Confusingly, none of these decisions purported to overrule the others—leaving the scope of the MCPA uncertain. Does the MCPA apply broadly, unless specific "conduct" is authorized by state or federal law (per *Diamond Mortgage*)? Does it apply narrowly, unless a "general transaction" is authorized (as *Smith* instructs)? Or does the MCPA apply more narrowly still, covering only businesses not otherwise "regulated" under state or federal law (as *Liss* suggests)?

Practically speaking, these conflicting cases have made it nearly impossible for the MCPA's substantive provisions to be enforced. And that difficulty is particularly pronounced for local prosecutors. Prosecutors have scarce resources and a heavy workload. Among other things, they are charged with the criminal prosecution of nearly every state-level crime that occurs in their jurisdiction. Prosecuting attorneys thus must make tough decisions about what cases and investigations to prioritize. At least some prosecutors—like *amici*—would like to prioritize consumer protection. But they are disincentivized from investigating allegations of consumer abuse when it is unclear when, and whether, the MCPA even applies.

Local prosecutors in other states have had more success building robust consumer protection units. For example, the City of Chicago's Business Affairs and Consumer Protection unit has successfully held 539 companies and individuals accountable for consumer fraud over the past three years. City of Chicago, *Businesses and Individuals Found Liable for Consumer Fraud in the Past 3 Years* <https://www.chicago.gov/content/dam/city/depts/bacp /disciplinaractions/ consumerfraud02012021.pdf> (accessed February 3, 2021). Part of Chicago's success stems from the State of Illinois's robust statutory framework, which—like Michigan's—empowers local jurisdictions to investigate and prosecute consumer abuse across multiple business sectors. But unlike in Michigan, Illinois's highest courts have unambiguously interpreted a nearly identical exemption provision in their consumer protection act to apply only where regulatory agencies have authorized a specific practice—not as a blanket exemption for regulated industries. *Price v Philip Morris, Inc*, 219 Ill2d 182; 848 NE2d 1 (2005); compare 815 Ill Comp Stat § 505/10b(1) (exempting, in Illinois, "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States"), with MCL 445.904(1)(a) (exempting, in Michigan,

any "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"). Without any such definitive holding as to the narrowness of the MCPA's § 4(1)(a) exception, prosecutors in Michigan are functionally unable to move forward to combat consumer abuse.

In short, as a result of this Court's conflicting decisions, prosecuting attorneys across the state are unable to fulfill the Act's original purpose: "to protect consumers in their purchase of goods" and "prohibit unfair practices in trade or commerce." *Zine v Chrysler Corp,* 236 Mich App 261, 271; 600 NW2d 384 (1999); *Forton v Laszar,* 239 Mich App 711, 715; 609 NW2d 850 (2000). Along with a concern over the rise in deceptive business practices during the COVID-19 crisis, *amici* urge this Court to grant leave to appeal and resolve, once and for all, the proper scope of the MCPA's § 4 exemptions.

ARGUMENT

I. The Michigan Consumer Protection Act Provides for Investigation and Enforcement by Prosecuting Attorneys.

A. The MCPA Was Meant to Provide Robust, Comprehensive Consumer Protection.

Before the MCPA's enactment in the late 1970s, Michigan's Attorney General and prosecuting attorneys struggled to combat consumer abuse. Edwin M. Bladen, *How and Why the Consumer Protection Act Came to Be* (2005), p 1, available at <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/3b217bd2-fb65-46ff-86c0-ea1a7b303b13/UploadedImages/pdfs/HowWhy.pdf> (accessed February 3, 2021). Edwin M. Bladen—the Michigan Assistant Attorney General who was primary author of the MCPA—described the genesis of the Act as arising from the inadequacy of common law tort and fraud actions to combat consumer abuse. *Id.* at 7. In the absence of a comprehensive consumer protection act, law enforcement officials were forced to litigate on behalf of consumers under a range of creative theories. See *Attorney General v Koscot Interplanetary, Inc*, 37 Mich App 477; 195 NW2d 43 (1972) (Attorney General could bring action against a business operating as a pyramid scheme because it was contrary to public policy); *Olesky v Sisters of Mercy of Lansing*, 74 Mich App 374, 379-380; 253 NW2d 772 (1977) (Attorney General has standing to bring a *quo warranto* action for abuse of corporate power). But those enforcement efforts proved inadequate to check widespread injury to consumers. *Id.* at 1. As a result, State officials began pushing for legislation that would empower prosecutors to investigate—and litigate—cases involving consumer abuse.

Over time, consumer advocates were successful in securing particularized regulatory statutes across various industries. See, e.g., MCL 256.1301 *et seq*. ("Motor Vehicle Service and Repair Act"); MCL 565.801 *et seq.* ("Michigan Land Sales Act"); MCL 445.1851 *et seq.*

("Retail Installment Sales Act"); MCL 445.1101 *et seq.* ("Home Improvement Finance Act"); MCL 445.111 *et seq.* ("Home Solicitation Sales Act"). But outside this piecemeal approach, Michigan still lacked an all-encompassing law that would prohibit deceptive, unfair, or unconscionable business practices. Bladen at 7.

In May 1973, Governor Milliken called on the Legislature to pass "strong legislation" to prevent unfair trade practices and corporate abuse by equipping the Attorney General and local prosecutors with broad authority to pursue consumer abuse. Journal of the House of Representatives of the State of Michigan, May 9, 1973 v.2, p 1042, available at <https://hdl.handle.net/2027/uc1.b2945771?urlappend=%3Bseq=204> (accessed February 3, 2021). Finally, in 1976, a conference committee of House and Senate delegates agreed on a comprehensive bill that achieved that goal. That bill was enacted into law as the Consumer Protection Act.

As enacted, Michigan's Consumer Protection Act was meant to be a robust, comprehensive law that provided significant protection to Michigan consumers. The Act was the "crown jewel of an aggressive legislative effort to expand consumers' rights and remedies." *Liss*, 478 Mich at 222-26 (2007) (KELLY, J., dissenting). As written, the MCPA prohibits a broad swath of conduct, including:

- Grossly overcharging consumers;
- Taking advantage of a consumer's disability, illiteracy, or inability;
- Causing a probability of confusion as to the source of goods;
- Misrepresenting that goods are new if they are deteriorated or used;
- Advertising goods with an intent not to supply reasonable expected public demand;
- Making false or misleading statements concerning the reasons for, existence of, or

amounts of price reductions;

- Disclaiming or limiting the implied warranty of merchantability and fitness for use;
- Failing to reveal a material fact if its omission of tends to mislead or deceive the consumer; and
- Engaging in coercion and duress as a result of the time and nature of a sales presentation. MCL 445.903(1)(a)-(ll).

The comprehensiveness of the MCPA was recognized in early decisions by this Court. In one of its first decisions to discuss the Act, this Court emphasized that the MCPA was "enacted to provide an enlarged remedy for consumers" injured by "deceptive business practices." *Dix*, 429 Mich at 417-18. As the Act is "remedial" in nature, the Court further held that its provisions "should be construed liberally to broaden the consumers' remedy." *Id.*

B. Prosecuting Attorneys Are an Integral Part of the MCPA Enforcement Scheme.

Reflecting its robust nature, the Act provides for enforcement not just via a private cause of action, but by the Attorney General *and* by prosecuting attorneys. Among other things, the Act provides the Attorney General the following powers:

- She may file suit to enjoin violations of the Act, and obtain civil penalties for such violations. MCL 445.905.
- She may subpoena persons or businesses to investigate violations of the Act. MCL 445.907.
- If a person "knowingly evades or prevents compliance with an injunction issued pursuant to" the Act, she may petition the circuit court for an order enjoining a person from doing business in the state. MCL 445.908.
- She may bring a class action on behalf of people injured by violations of the Consumer

Protection Act. MCL 445.910.

Crucially, the Act provides that locally elected prosecuting attorneys have the same authority as the Attorney General to investigate violations of the Act, and to institute and prosecute an action for violations of the Act. MCL 445.915 provides:

> A prosecuting attorney may conduct an investigation pursuant to this act and may institute and prosecute an action under this act *in the same manner as the attorney general*.

MCL 445.915 (emphasis added). What is more, the Act provides that both the Attorney General and a prosecuting attorney may enlist the aid of law enforcement to investigate alleged violations of the Act. Under the Act, upon request of "the attorney general *or a prosecuting attorney*," a "law enforcement officer in the state . . . *shall* aid and assist in an investigation of an alleged or actual violation of this act." MCL 445.914 (emphasis added).

The Consumer Protection Act thus sets up a tripartite scheme to protect Michigan consumers. *First*, private parties may file an action for damages, injunctive relief, or a declaratory judgment. MCL 445.911. *Second*, the Attorney General may investigate potential violations of the Act and may file a suit to enjoin violations or to obtain damages. See MCL 445.905, 445.907, 445.908, and 445.910. *Third*, locally elected prosecuting attorneys may enforce the Act in the exact same way as the Attorney General. MCL 445.915.

This tripartite enforcement scheme reflects the Legislature's desire to root out consumer abuse in Michigan, and to eliminate any avenues through which consumer abuse can continue undetected. In many cases (as in this one), private parties will have sufficient evidence—and sufficient monetary incentive—to file a lawsuit under the Act. Many, but not all. In some instances, private parties may not have enough evidence to file a lawsuit. In others, consumer abuse claims are small, making is economically infeasible for private attorneys to represent

clients. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 98-99; 537 NW2d 471 (1995). The Act thus provides for investigation and action by the Attorney General.

Recognizing, however, that many violations of the Consumer Protection Act may be local in nature, the Act also empowers prosecuting attorneys to act in the same way as the Attorney General. MCL 445.915. This final stopgap is a crucial one. In the real world, the Attorney General may not have the resources to investigate or enjoin consumer protection violations whose effects are felt only at a local level. The Act thus provides prosecuting attorneys the authority to investigate and litigate local violations of Michigan's Consumer Protection Act.

And crucially, both the Attorney General and prosecuting attorneys have investigative authority that is not enjoyed by private parties. Not only can they issue subpoenas under the Act, see MCL 445.907, they are also empowered to enlist law enforcement to investigate violations of the Act. In this way, the Act allows both the Attorney General and local prosecuting attorneys to identify and root out consumer abuse—even if there may not be sufficient evidence for a private party to file suit.

II. The *Smith* and *Liss* Decisions Conflict with This Court's Prior Ruling in *Diamond Mortgage* and Have Hampered Prosecutors' Ability to Combat Consumer Abuse.

The ability of prosecuting attorneys to act under the MCPA, however, has been hampered by a series of inconsistent opinions by this Court.

The relevant "exemption" clause, MCL 445.904(1)(a), provides that the Act does not apply to "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." MCL 445.904(1)(a). That statutory language has been interpreted by the Court in *Diamond Mortgage*, *Smith*, and *Liss* to produce three conflicting interpretations, all of which (formally)

remain good law. These conflicting and inconsistent opinions have rendered it difficult for consumers to vindicate their rights under the MCPA. Moreover—and of particular importance to *amici*—these conflicting decisions have stymied the ability of prosecuting attorneys to launch investigations or file lawsuits against businesses whose conduct violates the MCPA.

1. *Diamond Mortgage*: This Court first ruled on the scope of the exemption in the *Diamond Mortgage* case. There, the defendant mortgage company argued that its conduct—including misrepresentations and false promises—fell within the MCPA exemption because they had been granted a real estate broker's license by the state. *Diamond Mortgage*, 414 Mich at 617. The Court ruled that because the particular *conduct* at issue was not "specifically authorized," the § 4(1)(a) exemption did not apply. *Id.* Rejecting a broader reading of the exemption that would have immunized the broker from suit because they were "licensed," the Court held that "a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business." *Id.* The exemption, the Court ruled, applies only where the specific "*conduct*" at issue has been "specifically authorized," or where "transactions . . . result from that [specifically authorized] conduct." *Id.*

In short, *Diamond Mortgage* interpreted the § 4(1)(a) exemption to apply only where the *conduct* or transaction is "specifically authorized" by state or federal regulation. *Diamond Mortgage* thus hewed closely to the statutory language. See MCL 445.904(1)(a) (exempting "a transaction or conduct specifically authorized"). And in so doing, the Court allowed citizens and prosecutors alike to proceed under the Act in a broad swath of cases.

2. *Smith*: Nearly twenty years later, in *Smith*, the Court again interpreted MCL 445.904(1)(a). Departing from the prior standard articulated in *Diamond Mortgage*, the Court held that the exemption applies if the "*general* transaction is specifically authorized by law,

regardless of whether the specific misconduct alleged is prohibited." *Smith*, 460 Mich at 465 (emphasis added). The Court in *Smith* thus shifted focus from *Diamond Mortgage*'s statutorily grounded focus on "specific" misconduct, *Diamond Mortgage*, 414 Mich at 617, and instead engrafted a "general transaction" focus onto the statute. But though *Smith* departed from the standard that had previously been articulated in *Diamond Mortgage*, the Court declined to formally overrule that case.

3. *Liss*: In 2007, in *Liss v. Lewiston-Richards*, this Court issued yet another standard for the exemption in MCL 445.904(1)(a). Again (as in *Smith*), the Court atextually construed the "specifically authorized" language in the statute to mean "a *general* transaction that is 'explicitly sanctioned.'" *Liss*, 478 Mich at 213 (emphasis added). But the Court then went further. Applying that standard to the facts of the case, the Court determined that a licensed residential home builder was exempt from MCPA liability because the general business of "contracting to build a residential home" was licensed and regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board. *Id.* In short, then, *Liss* suggested that if an entity engages in a business for which it is "regulated," it is exempt from the MCPA. See *id.*

Despite the clearly inconsistent standards they set out, *Diamond Mortgage*, *Smith*, and *Liss* all remain valid precedent. The end result is a conflicting set of standards as to what business activity is still subject to the MCPA. As former Chief Justice Kelly noted in her dissent to *Liss*, "the decisions in *Diamond Mortgage* and *Smith* cannot be squared." *Liss*, 478 Mich at 220 (KELLY, C.J., dissenting). The current jurisprudence is thus unnavigable and leaves potential litigants uncertain of the Act's applicability to entire industries. Functionally, because nearly every industry is "regulated" in some way, the Court's latter decisions have undermined any real enforcement of the MCPA.

In turn, the Court's conflicting interpretations of § 4(1)(a) create significant uncertainty that—practically speaking—has precluded prosecuting attorneys from enforcing the Act. The Legislature provided prosecuting attorneys the authority to (1) enjoin violations of the Act; (2) subpoena persons or businesses involved in suspected violations of the Act; (3) bring a class action on behalf of people injured by violations of the Act; and (4) obtain the aid and assistance of a law enforcement officers to investigate violations. See MCL 445.905 to MCL 445.915. But crucially, these enforcement powers depend on the prosecuting attorney's ability to determine whether the misconduct alleged is a potential violation of the MCPA. To initiate an investigation into an alleged violation, or to subpoena persons or businesses, a prosecuting attorney needs *probable cause* to conclude that the MCPA was violated. See MCL 445.905 and 445.907. With *Diamond Mortgage*, *Smith*, and *Liss* each exempting a different scope of activity from the MCPA's reach, prosecuting attorneys are left without a clear sense of when there might be "probable cause" that the Act has been violated. Indeed, under the current state of the law, it is unclear what kinds of misconduct fall within the Act's ambit at all.

In light of these conflicting standards, prosecuting attorneys are unlikely to use government resources to file class action lawsuits—or to enlist law enforcement officers to dedicate time to investigations. Again: resources in prosecutor's offices are scarce. Prosecutors are unlikely to pursue an MCPA action against a business that may be exempt under one of the three interpretations of § 4(1)(a) that purportedly remain good law. The Court should therefore grant leave to appeal, and determine, once and for all, which of the three standards it has previously articulated (or a different standard) apply.

III. *Stare Decisis* Is Not an Obstacle in This Case, as Conflicting Precedent Creates Confusion Rather than Consistent and Predictable Principles of Law.

As Appellants point out, this case presents an opportunity to clarify irreconcilable differences between several published opinions of this Court. *Diamond Mortgage* has never been overruled, but this Court's opinions in *Smith* and *Liss* are impossible to reconcile with that decision. Where two or more decisions have resulted in a series of differing opinions, this Court has taken the opportunity to clarify unsettled law. In such circumstances, *stare decisis* is not an obstacle to clarification of the law. That is particularly true where, as here, the more recent decisions have departed dramatically from the statutory text.

The purpose of *stare decisis* is to "promote the evenhanded, predictable, and consistent development of legal principles, foster reliance on judicial decisions, and contribute to the actual and perceived integrity of the judicial process." *McCormick v Carrier*, 487 Mich 180, 210; 795 NW2d 517 (2010) (quoting *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991)). Yet this Court's conflicting decisions regarding the MCPA have not allowed for that outcome.

In *Diamond Mortgage*, the rule set out by this Court was that the § 4(1)(a) exemption applies only where a law or regulation "specifically authorize[s] the conduct that plaintiff alleges is violative of the [MCPA]," or "transactions that result from that conduct." *Diamond Mortgage*, 414 Mich at 617. In *Smith*, however, the Court issued a conflicting ruling—holding that the focal point is not the "conduct" at issue, but whether the "*general* transaction is specifically authorized by law, *regardless of whether the specific misconduct alleged is prohibited*." *Smith*, 460 Mich at 465 (emphasis added). And in *Liss*, the Court adopted a third standard still, indicating that an industry may be exempt from the MCPA if that industry "regulated." *Liss*, 478 Mich at 213.

These cases thus stand in serious tension (if not irreconcilable conflict) with one another.

See *id.* at 220 (KELLY, C.J., dissenting) ("[T]he decisions in *Diamond Mortgage* and *Smith* cannot be squared."). *Diamond Mortgage* focused on whether "conduct" at issue was "specifically authorized"; *Smith* focused on the "general transaction"; and *Liss* focused on the "regulation" of an industry. Importantly, this Court has never overruled *Diamond Mortgage*, so it remains (at least in theory) good law. The result is significant confusion as to how the MCPA actually operates.

In circumstances such as these, *stare decisis* should not—and has not—prevented this Court from granting leave to clarify issues "of major significance to the state's jurisprudence." MCR 7.305(B)(3). This Court's decision in *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), is instructive. In *Robinson,* this Court had issued three conflicting opinions which muddied a statutory standard regarding the duty that police have to third parties during a high-speed chase. *Robinson*, 462 Mich at 444-46, 450. The Court took the opportunity to reconcile the conflicting cases. See *id.* at 450. In the course of formally overruling three separate cases, the Court explained why *stare decisis* did not stand as an obstacle. See *id.* at 445-46,

"[W]hen dealing with an area of the law that is statutory," the Court explained, "it is to the words of the statute itself that a citizen first looks for guidance." *Id.* at 467. "[S]hould a court confound" the statutory language "by misreading or misconstruing a statute," the Court emphasized, "it is *that court itself* that has disrupted the reliance interest." *Id.* at 467 (emphasis added). "When that happens," the Court continued, "a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." *Id.* Quoting the United States Supreme Court, the Court emphasized that *stare decisis* is "not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Id.* at 463 (quoting *Helvering v Hallock*,

309 US 106, 119; 60 S Ct 444; 84 L Ed 604 (1940)).

These principles are fully applicable to this case. As in *Robinson,* the Court here is faced with three conflicting holdings which have caused significant uncertainty as to the scope of the MCPA. What is more, the latter two decisions—*Smith* and *Liss*—have departed from the "words of the statute." *Id.* at 467. Nothing in the statute's text suggests that a business is exempt from the MCPA if the "general" transaction is authorized by law. *Smith*, 460 Mich at 465-66. The phrase "general transaction" does not appear at all in the MCPA. See MCL 445.901 *et seq.* Similarly, nothing in the statute's text suggests that a business is exempt if it is otherwise "regulated." *Liss*, 478 Mich at 213. Accordingly, it is this Court's decisions themselves that have "distorted the reliance interest." *Robinson*, 462 Mich at 467. *Stare decisis*, therefore, should not preclude the Court from considering this case. See *id.*; see also *McCormick*, 487 Mich at 203-04 (*stare decisis* has less force where a court opinion has "deviated significantly from the statutory text").

This case, in short, presents one in which the formal law is tremendously confused—owing to (1) the conflicting decisions in *Diamond Mortgage*, *Smith*, and *Liss*; (2) this Court's decision not to formally overrule any of those three cases; and (3) this Court's departure, in *Smith* and *Liss*, from the statutory text. The conflicting rulings in these cases have undermined "predictability" and "consistency" in the law, which is precisely what *stare decisis* exists to protect. *McCormick*, 487 Mich at 210. Whatever 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.

This Court should grant the motion for leave to appeal to clarify, once for all, the scope of Michigan's Consumer Protection Act. If *Diamond Mortgage*'s focus on "conduct" is misplaced, the Court should formally overrule that case. If, on the other hand, the atextual focus on the "general transaction" in *Smith* and *Liss* were misplaced, the Court should formally overrule those

cases. Michiganders—and their elected prosecuting attorneys—are entitled to certainty as to the scope of the MCPA, as well as how it may be enforced.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court grant Plaintiff-Appellant's application for leave to appeal so that it may resolve, once and for all, the proper scope of the MCPA's § 4(1)(a) exemption.

Respectfully submitted,

/s/ Eli Savit

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