STATE OF MICHIGAN

IN THE SUPREME COURT

| | |
|---|---|
| TIMIKA RAYFORD,<br><br>Plaintiff-Appellant,<br><br>v<br><br>AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERIACN HOUSE EAST I, d/b/a, AMERICAN HOUSE,<br><br>Defendant-Appellee.<br>/ | Supreme Court No. 163989<br><br>Court of Appeals No. 355232<br><br>Macomb County Circuit Court No. 20-001548-CD<br><br>Hon. Michael E. Servitto |

Carla D. Aikens (P69530)
CARLA D. AIKENS, P.C.
615 Griswold St., Ste. 709
Detroit, MI 48226
(844) 835-2993
carla@aikenslawfirm.com

*Attorneys for Plaintiff-Appellant*

Joseph A. Starr (P47253)
William R. Thomas (P77760)
STARR, BUTLER, ALEXOPOULOS & STONER, PLLC
20700 Civic Center Dr., Ste. 290
Southfield, MI 48076
(248) 554-2700
jstarr@starrbutler.com
wthomas@starrbutler.com

*Attorneys for Defendant-Appellee*

Conor B. Dugan (P66901)
SOUTHBANK LEGAL
100 E. Wayne Street, Suite 300
South Bend, IN 46601
616.466.7629
cdugan@southbank.legal

*Attorneys for* Amici Curiae

# AMICUS CURIAE BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

# TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* ..... vi

INTRODUCTION ..... 1

ARGUMENT ..... 2

I. Contractual deadlines to sue do not violate public policy. ..... 3

A. Ascertaining Public Policy. ..... 3

B. The contractual litigation deadlines at issue here are consistent with public policy. ..... 4

II. Additional public-policy considerations support Michigan's long-standing rule allowing contractual deadlines to sue. ..... 11

CONCLUSION AND REQUESTED RELIEF ..... 15

CERTIFICATE OF COMPLIANCE ..... 17

# TABLE OF AUTHORITIES

Page(s)

## Cases

*Cherry Growers, Inc v Agric Mktg & Bargaining Bd*, 240 Mich App 153; 610 NW2d 613 (2000) ..... 12

*Creative Playthings Franchising, Corp v Reiser*, 463 Mass 758; 978 NE2d 765 (2012) ..... 8, 9

*Davies v Waterstone Capital Mgt, LP*, 856 NW2d 711 (Minn Ct App, 2014) ..... 9

*DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359; 817 NW2d 504 (2012) ..... 4

*Feldman v Stein Bldg & Lumber Co*, 6 Mich App 180; 148 NW2d 544 (1967) ..... 8

*Garg v Macomb Cnty Cmty Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005) ..... 6

*Gossman v Lambrecht*, 54 Mich App 641; 221 NW2d 424 (1974) ..... 8

*Hunt v Raymour & Flanigan*, 105 AD3d 1005; 963 NYS2d 722 (2013) ..... 9

*Morales v Fed Express Corp*, 610 F Supp 3d 317 (D Mass, 2022) ..... 9

*Muschany v United States*, 324 US 49 (1945) ..... 3, 4

*Myers v Western-Southern Life Ins Co*, 849 F2d 259 (CA 6, 1988) ..... 1, 5, 6

*Njang v Whitestone Group, Inc*, 187 F Supp 3d 172 (DDC, 2016) ..... 10, 11

*O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524; 273 NW2d 829 (1979) ..... 11

*People v Russo*, 439 Mich 584; 487 NW2d 698 (1992) ..... 6

*Riddlesbarger v Hartford Ins Co*, 74 US 386 (1868) ..... 12

*Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000) ..... 13

*Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343 (2016) ..... 9, 10

*Shallal v Catholic Soc Servs of Wayne Cnty*, 455 Mich 604; 566 NW2d 571 (1997) ..... 7

*Stevens v McLouth Steel Products Corp*, 433 Mich 365; 446 NW2d 95 (1989) ..... 10

*Taylor v Western and Southern Life Ins Co*, 966 F2d 1188 (CA 7, 1992) ..... 10

*Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002) ..... 3, 4, 8, 11

*Thurman v DaimlerChrysler, Inc*, 397 F3d 352 (CA 6, 2004) ..... 10

*Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234; 625 NW2d 101 (2001) ..... 5

*Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999) ..... 11

*Walters v Dept of Treasury*, 148 Mich App 809; 385 NW2d 695 (1986) ..... 10

*WR Grace & Co v Local Union 759*, 461 US 757 (1983) ..... 3, 4

## Statutes

29 U.S.C. § 160 ..... 6

42 USC 2000e-5 ..... 8

MCL 15.363 ..... 7

MCL 37.1607 ..... 10

MCL 423.16 ..... 7

MCL 500.4046 ..... 7

## Other Authorities

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 (2010) ..... 12

Craig Mauger and Hayley Harding, *Michigan's Birth Total Has Reached a Level Not Seen Since 1940*, The Detroit News, 2023 WLNR 28254362 (Aug 17, 2023) ..... 14

Detroit Regional Chamber, *Michigan Statewide Voter Survey: May 12, 2023* <https://www.detroitchamber.com/wp-content/uploads/2023/05/Final_Detroit-Regional-Chamber-Michigan-Voter-Poll_May-2023.pdf> (accessed Aug 31, 2023) ..... 14

Executive Office of the Governor, *Gov. Whitmer Establishes the 'Growing Michigan Together Council' to Focus on Population Growth, Building a Brighter Future for Michigan*, < https://www.michigan.gov/whitmer/news/press-releases/2023/06/01/whitmer-establishes-the-growing-michigan-together-council-to-focus-on-population-growth> (accessed Aug 31, 2023)..... 15

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 (2001) ..... 12

Hayley Harding, *Michigan's Aging Worries Experts as State is Among Nation's Oldest*, The Detroit News, 2023 WLNR 18108559 (May 25, 2023) ..... 14

Paul Vandevert, *To Go Forward, We Must Remember and Rely Upon Our Past*, 37 Can-USLJ 353 (2012)..... 12

## Regulations

AC R 37.4 ..... 7

## STATEMENT OF QUESTIONS PRESENTED

Whether contractual deadline-to-sue provisions, which shorten the limitations period in which to bring a claim arising out of an employment dispute, violate public policy.[1]

| | |
|---|---|
| The trial courts answered: | No. |
| The Court of Appeals answered: | No. |
| Appellants answer: | Yes. |
| Appellees answer: | No. |
| *Amici Curiae* answer: | No. |



[1] This Court asked for supplemental briefing on the question of whether contractual litigation deadline provisions restricting claims under the Michigan Worker's Disability Compensation Act, MCL 518.101 *et seq*. and civil rights claims, violate public policy in *Adilovic v Monroe*, LLC No. 164750 and *Rayford v American House Roseville I, LLC*, No. 163989, respectively. *Amici Curiae* frame the question more broadly because such provisions are not contrary to public policy more generally.

## INTEREST OF *AMICI CURIAE*

The Michigan Chamber of Commerce (the "Michigan Chamber") is the leading voice of business in Michigan. The Michigan Chamber advocates for job providers in the legislative and legal forums and represents approximately 5,000 employers, trade associations, and local chambers of commerce of all sizes and types in every county of the state. The Michigan Chamber's member firms employ over 1 million Michiganders.

The Chamber of Commerce of the United States of America (the "U.S. 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 U.S. 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 U.S. Chamber regularly files *amicus curiae* briefs in cases, like these, that raise issues of concern to the nation's business community.[2]

*Amici*, [3] as the largest representatives of Michigan and American employers, have a vested interest in ensuring that employment agreements are enforced as written. This is especially true of contractual deadline-to-sue provisions in employment agreements. These contractual limitations periods, which are ubiquitous, provide employers *and* employees

---

[2] *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[3] This Court invited the Michigan Chamber to file amicus briefs in both *Adilovic v Monroe*, LLC No. 164750 and *Rayford v American House Roseville I, LLC*, No. 163989 and the Clerk instructed counsel that the U.S. Chamber could file with the Michigan Chamber without filing a separate motion for leave to file an amicus brief.

certainty, uniformity, stability, and predictability. Members of the Michigan and U.S. Chambers routinely employ contractual deadline-to-sue provisions. These members utilize such provisions to ensure quick resolution of employment disputes, preservation of evidence, and to predict potential litigation budgets. And the certainty and predictability that these provisions bring are all the more important for states like Michigan that face a declining birth rate and an exodus of younger citizens. Businesses will invest where there is legal predictability. They will flee where the legal waters are uncertain and troubled.

## INTRODUCTION

In this case, Plaintiffs invite the Court to reverse over 35 years of precedent on the legality of provisions in employment contracts that limit the time period in which the employer and employee may pursue legal action against one another. Specifically, the Court granted mini oral argument ("MOAA") to address whether the use of such clauses in the civil-rights and workers'-disability contexts violate public policy. Businesses, employers, and employees consistently use such clauses to ensure that employment and discrimination claims are timely escalated to proper supervisors in their organizations and to offer predictability and certainty to the parties. Their use is not new, and their validity has long been settled law.

In 1988, the United States Circuit Court of Appeals for the Sixth Circuit rejected the position Plaintiffs here advocate in *Myers v Western-Southern Life Ins Co*, 849 F2d 259 (CA 6, 1988). In that case, Judge Damon Keith, writing for the court in a racial-discrimination case involving the same statute at issue in *Rayford*, held that a six-month contractual deadline to sue did not violate public policy. Since then, courts applying Michigan law have upheld such contractual provisions.

And this long-established principle makes sense. Contractual deadline-to-sue provisions are not contrary to Michigan public policy, nor to the public policy of other jurisdictions that have considered this question. Rather, they are consistent with public policy. To determine whether a contract provision or covenant violates public policy, Michigan courts examine objective legal sources. An evenhanded review of those objective legal sources demonstrates that contractual deadlines to sue—whether in the civil-rights or workers' disability context—are not contrary to public policy. Moreover, to the extent Michiganders believe that such provisions should not be allowed they have a straightforward solution: they can petition the Legislature to

enact a statute prohibiting such clauses. Indeed, the Legislature has explicitly barred these limitations in life-insurance policy contracts—and only life-insurance policy contracts. The Legislature's limited ban for one type of contract signals a lack of a public policy interest in extending it to other types of contracts.

To the extent this Court considers non-legal sources to ascertain public policy, those sources, far from undermining the use of contractual litigation deadlines, *support* their use. Such contractual provisions offer predictability and stability to employers and employees. And such provisions are particularly helpful to national and international businesses who seek uniformity in their policies and procedures. Where laws allow for uniform contracts, employers do not need to tailor each contract to the state or jurisdiction in which they do business. Where such barriers to market entry exist, businesses often think twice before investing or relocating operations to such a market. That sort of friction to doing business in Michigan is hardly what Michiganders need now to grow and strengthen their economy. Indeed, the current demographic trends in Michigan underscore the need to create a state that is business-friendly, attracting the sort of employers that retain and attract young people to Michigan.

For 35 years, courts applying Michigan law have held that contractual deadlines to sue are consistent with public policy. Judge Keith was right in 1988: there is nothing contrary to public policy in such a provision. And that decision remains correct today, consistent with similar decisions from across the country. This Court should deny leave to appeal and allow the holdings of the Courts of Appeals to stand.

## ARGUMENT

When faced with a question of whether a contract violates public policy, Michigan courts look to legal sources to determine *what* public policy is and is not. This is an objective analysis

that requires close scrutiny of caselaw, statutes, legal processes, and the Michigan and United States Constitutions. And the circumstances that justify voiding a contractual provision because it contradicts public policy are rare.

There is no established public policy barring contractual deadline-to-sue provisions, including in the civil-rights and workers'-disability contexts. If anything, there is a firmly established policy of *allowing* such provisions. That should be the beginning and the end of the matter. To the extent this Court looks beyond the conventional legal sources and examines larger policy concerns, those too support the allowance of such contractual deadlines. Thus, both for traditional public-policy reasons and for non-legal policy reasons, this Court should deny leave to appeal and allow the well-reasoned opinion of the Court of Appeals to stand.

## I. Contractual deadlines to sue do not violate public policy.

### A. Ascertaining Public Policy.

Over 20 years ago, this Court synthesized the principles courts should apply to determine whether a contractual provision or covenant violates public policy: "In identifying the boundaries of public policy . . . the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Terrien v Zwit*, 467 Mich 56, 66–67; 648 NW2d 602 (2002). This Court turned to several United States Supreme Court cases, including *WR Grace & Co v Local Union 759*, 461 US 757 (1983) and *Muschany v United States*, 324 US 49 (1945), as instructive regarding the proper approach to determine public policy. *Terrien*, 467 Mich at 67-68 (citing *WR Grace* and *Muschany*.) In *WR Grace*, the United States Supreme Court examined whether a collective bargaining agreement was void as contrary to public policy. The Court stated that if the contract "violates some *explicit* public policy, we

are obliged to refrain from enforcing it." *WR Grace*, 461 US at 766 (emphasis added). "Such a public policy, however, must be *well defined and dominant*, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* (cleaned up and emphasis added). In *Muschany*, issued nearly 80 years ago, the United States Supreme Court underscored these points:

> Public policy is to be ascertained by *reference to the laws and legal precedents* and not from general considerations of supposed public interests. As the term 'public policy' is vague, there must be found *definite indications* in the law . . . to justify the invalidation of a contract as contrary to that policy. [*Muschany*, 324 US at 66 (emphasis added).]

Relying on these precedents, in *Terrien*, this Court concluded that subdivision covenants barring family day care homes were *not* contrary to public policy. This Court explained that it had "found no 'definite indications in the law' of Michigan to justify the invalidation" of the covenant and that "nothing" in Michigan's "constitutions, statutes, or common law" supported the conclusion that the covenant at issue was contrary to "the public policy of Michigan." *Terrien*, 467 Mich at 68-69. *Terrien*, then, stands for the proposition that public policy, to the extent it may invalidate the terms of a contract, "must ultimately be *clearly rooted in the law*." 467 Mich at 67 (emphasis added). This means that the "circumstances under which a contract provision can be said to violate law or public policy are . . . narrow." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 372; 817 NW2d 504 (2012).

### B. The contractual litigation deadlines at issue here are consistent with public policy.

Contractual deadlines to sue do not violate the narrow restrictions of Michigan public policy. Undertaking the searching analysis articulated in *Terrien* demonstrates that such provisions do not offend any public policy clearly rooted *in law*. Indeed, an examination of

Michigan's legal processes, constitution, statutes, regulations, and common law, along with relevant decisions from other federal and state courts, compels the opposite conclusion that the law *supports* contractual litigation deadlines.

First, the enforceability of contractual deadlines to sue under Michigan law has an older pedigree than the Michigan Court of Appeals decision in *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234; 625 NW2d 101 (2001)—the precedent under review. Indeed, 35 years ago, Judge Damon Keith, writing for the Sixth Circuit, came to the same conclusion in a well-reasoned opinion in *Myers v Western-Southern Life Ins Co*, 849 F2d 259 (CA 6, 1988). The plaintiff in *Myers* brought claims against his employer under both the Elliott-Larsen Civil Rights Act, the same statute at issue in *Rayford*, and the Michigan Persons with Disabilities Civil Rights Act. The plaintiff's employment contract required him to bring any action or suit relating to his employment within six months of termination. *Id.* at 260. The plaintiff argued that this provision was "void as against public policy *when applied to his civil rights claims*." *Id.* (emphasis added).

The Sixth Circuit rejected that argument in a thorough opinion by Judge Keith. The Court looked to the "treatment that Michigan courts have given to administrative remedies, both state and federal, as they affect the codified statute of limitations for civil rights actions." *Id.* at 261. "Under Michigan law," the Court explained, "the pursuit of relief through an administrative proceeding does not toll the statute of limitations." *Id.* Because Michigan law did not permit tolling in those circumstances, the Sixth Circuit could not conclude that "under Michigan law, public policy dictates that a privately negotiated limitations be voided." *Id.* Nor was there anything "inherently unreasonable about a six-month limitations period." *Id.* at 262. Drawing a comparison to well-established limitations periods under federal law, the Sixth Circuit noted:

> For example, six months is the time limit within which claims must be brought for breach of the duty of fair representation under the Labor Management Relations Act. 29 U.S.C. § 160(b). We cannot say that the six-month limitation in this case is less reasonable than that applied to fair representation claims. [*Id.* at 262 (cleaned up).]

The Court of Appeals in *Timko*, in turn, relied on Judge Keith's persuasive reasoning in reaching its holding. But more pointedly, for over a *third of a century*, federal courts applying Michigan law have been bound to conclude that a six-month contractual limitations period for civil rights claims is consistent with public policy. In other words, since 1988, federal courts applying Michigan law have held that "contractual limitations clauses which restrict civil rights claims do not violate public policy," the very question presented to this Court in *Rayford*.

Further, Plaintiffs' public-policy arguments fail because the Michigan Legislature has never adopted an explicit statute of limitations for civil-rights claims. In other words, the Elliott-Larsen Act does not have its own statute of limitations; it employs the statute of limitations for tort actions in the Revised Judicature Act. See *Garg v Macomb Cnty Cmty Mental Health Servs*, 472 Mich 263, 284; 696 NW2d 646 (2005) (holding that person must file a claim under Elliott-Larsen within the three-year limit for tort actions under MCL 600.5805). This, combined with the fact that this Court has stated that "statutes of limitations are generally regarded as procedural and not substantive in nature," *People v Russo*, 439 Mich 584, 595; 487 NW2d 698 (1992), undermines any claim that a contractual litigation deadline provision violates substantive public policy.

Furthermore, the Michigan Legislature has not adopted any statute that explicitly or implicitly prohibits contractual deadlines to sue in civil-rights cases. And again, the Legislature knows how to do so if it wishes. It *has* adopted an explicit statute barring such contractual deadlines in the life-insurance context. An insurance company is *prohibited* from issuing a life insurance policy "limiting the time within which any action . . . may be commenced to less than

6 years after the cause of action shall accrue." MCL 500.4046(2). Finally, that the Legislature has never seen fit in the 35 years since the Sixth Circuit decided *Myers* or the 22 years since the Michigan Court of Appeals decided *Timko* to weigh in on the issue is a further strong indication that public policy does not prohibit contractual deadlines to sue.

Beyond this longstanding precedent and the Legislature's decision not to disrupt it, there are other strong supports in Michigan and federal law for the conclusion that contractual deadlines to sue do not violate public policy. Several Michigan statutes and administrative rules adopt similar six-month or *shorter* limitations periods. For instance, Michigan's Public Employment Relations Act prohibits a complaint from issuing if the "unfair labor practice occur[ed] more than 6 months prior to the filing of the charge." MCL 423.16(a). Michigan's Whistleblowers' Protection Act requires a person alleging a violation to bring a "*civil action* . . . within *90 days* after the occurrence of the alleged violation of the act." MCL 15.363(1) (emphasis added). And while unfair labor practices and whistleblower protections protect similar interests as civil-rights statutes,[4] Michigan has enacted shortened limitations periods even in the explicitly civil-rights context. For instance, the Michigan Civil Rights Commission requires a person "claiming to be aggrieved by unlawful discrimination" to file his or her complaint "within 180 days after the date of the alleged discrimination, or within 180 days after the date when the alleged discrimination was or should have been discovered." AC R 37.4. The same is true of a charge brought to the federal Equal Employment Opportunity Commission. See

[4] See, *e.g.*, *Shallal v Catholic Soc Servs of Wayne Cnty*, 455 Mich 604, 617; 566 NW2d 571 (1997) ("Whistleblower statutes are analogous to antiretaliation provisions of other employment discrimination statutes and therefore should receive treatment under the standards of proof of those analogous statutes. Courts agree that the policies underlying these similar statutes warrant parallel treatment here, and other courts faced with like issues have similarly responded.") (cleaned up).

42 USC 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."). The contractual provisions at issue in these cases are thus harmonious with well-established state and federal regulations.

The practices of other jurisdictions and lower federal courts further indicate that contractual deadlines to sue do not violate public policy. Michigan courts have long relied on such persuasive authority in examining public-policy arguments. See, *e.g.*, *Feldman v Stein Bldg & Lumber Co*, 6 Mich App 180, 184–86; 148 NW2d 544 (1967) (holding that an exculpatory or hold harmless clause was void as contrary to public policy and reviewing and relying upon the precedents of other states to reach that conclusion), overruled in part on other grounds *Gossman v Lambrecht*, 54 Mich App 641, 648–649; 221 NW2d 424 (1974); see also *Terrien*, 467 Mich at 67-68 (citing United States Supreme Court precedent in support of public-policy analysis). While the practices of other states and federal courts are not uniform, they strongly indicate that the contractual deadline at issue here is consistent with broad public policy. At the very least, they indicate that there is *no clearly rooted* public policy, see *Terrien*, 467 Mich at 67, in Michigan or elsewhere, against parties' contractual freedom to agree to such deadlines.

For instance, the Massachusetts Supreme Judicial Court held that a contractual litigation deadline in a franchise agreement was valid under state law and public policy. See *Creative Playthings Franchising, Corp v Reiser*, 463 Mass 758; 978 NE2d 765 (2012). That court found "no reason why Massachusetts contract law should differ from Federal law on this issue, or why limitations provisions should be singled out and subject to a blanket prohibition against the parties' agreement to any shortening of the statutorily prescribed maximum limitations period." *Id.* at 759. The court recognized that the question was more legislative than judicial: "Where public policy so requires, the Legislature may enact restriction on, or prohibit, contractually

shortened limitations periods." *Id.* at 763-64. And just last year, a federal court applied *Creative Playthings* to hold that a six-month deadline in a Massachusetts-law contract that time-barred a racial-discrimination claim under a federal civil-rights statute was valid, and not contrary to Massachusetts or federal public policy. *Morales v Fed Express Corp*, 610 F Supp 3d 317, 324 (D Mass, 2022). In particular, the *Morales* court noted that the Massachusetts legislature had not taken up the state court's *Creative Playthings* invitation to prohibit such contractual deadlines to sue "in the context of discrimination claims." *Id.* Accordingly, the court "decline[d] to legislate judicially." *Id.*

Likewise, the New York Supreme Court, Appellate Division upheld a six-month contractual litigation deadline in the context of a discrimination and retaliation claim. *Hunt v Raymour & Flanigan*, 105 AD3d 1005; 963 NYS2d 722 (2013). There, the court rejected the plaintiff's "contentions that the shortened limitations period set forth in the employment application was . . . unenforceable." *Id.* at 1006. Minnesota's Court of Appeals reached a similar conclusion. See *Davies v Waterstone Capital Mgt, LP*, 856 NW2d 711, 719 (Minn Ct App, 2014) (holding that contractual deadline requiring a party to seek to arbitrate any dispute arising out of employment agreement within 90 days was "not unreasonable").[5]

[5] Moreover, *Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343 (2016), cited in this Court's June 23, 2023 Order in *Rayford* is inapposite. See June 23, 2023 Order. As the New Jersey Supreme Court was at pains to explain, its decision was specific to New Jersey's Law Against Discrimination ("LAD"). "We note that the decision that we reach today is rooted in the unique importance of our LAD and the necessity for its effective enforcement. Other courts across the country have evaluated the enforceability of similar shortening of statute-of-limitations provisions as applied to their own state employment discrimination laws." *Id.* at 365 (cleaned up). The LAD differs in important respects from Michigan's civil rights laws. As the *Rodriguez* Court noted, the New Jersey Legislature "requires an election of remedy for an LAD action." *Id.* at 358. This means that "once a party files a Superior Court action, he or she may not file a complaint with" New Jersey's Division on Civil Rights ("DCR") "while that action is pending." *Id.* (cleaned up). And the "same is true if an aggrieved party first files with the DCR; during the

Federal courts have reached similar determinations in the context of civil-rights claims. For instance, in *Thurman v DaimlerChrysler, Inc*, 397 F3d 352 (CA 6, 2004), the Sixth Circuit examined a sex-discrimination claim under Elliott-Larsen, a racial-discrimination claim under 42 USC 1981, and a six-month contractual deadline to both claims. The court declined the plaintiffs' invitation to invalidate the contractual deadline, "conclud[ing] that the abbreviated limitations period contained in the employment application [was] reasonable." *Id.* at 358. Likewise, in *Taylor v Western and Southern Life Ins Co*, 966 F2d 1188 (CA 7, 1992), the Seventh Circuit analyzed whether a six-month contractual deadline was valid in the context of a Section 1981 racial discrimination claim. Applying Illinois law, the Seventh Circuit held that a "six-month limitations clause was reasonable" and that it was "not contrary to public policy." *Id.* at 1206. More recently, then-Judge and future United States Supreme Court Justice Ketanji Brown Jackson reached the same conclusion in a race-discrimination case brought under Section 1981. *Njang v Whitestone Group, Inc*, 187 F Supp 3d 172 (DDC, 2016) (K. Jackson, J.). While a "plaintiff would ordinarily have four years from the date of the allegedly discriminatory act to file a Section 1981 claim in the absence of any contractual limitations period," then-Judge Jackson held that a contractual six-month deadline was valid. *Id.* at 178. She concluded: "Consistent with the findings of other courts that have addressed the propriety of a six-month

---

pendency of the matter with the DCR, an aggrieved party cannot file with the Superior Court." *Id.*

The same is not true in Michigan. For instance, the Michigan Persons with Disabilities Civil Rights Act "does not require a plaintiff to exhaust administrative remedies before proceeding with a civil suit." *Stevens v McLouth Steel Products Corp*, 433 Mich 365, 375 n 5; 446 NW2d 95 (1989); see also MCL 37.1607. Likewise under Michigan's Elliott-Larsen Civil Rights Act an "individual may proceed simultaneously in both" the administrative and circuit court "forums" and "exhaustion of administrative remedies . . . is not a prerequisite to filing suit in circuit court." *Walters v Dept of Treasury*, 148 Mich App 809, 815–16; 385 NW2d 695 (1986) (cleaned up).

limitations period with respect to employment-related discrimination actions, this Court concludes that the six-month limitations period in Plaintiff's contract is reasonable as applied to Plaintiffs' Section 1981 claims." *Id.* at 179.

In short, the traditional indicia this Court employs to determine the contours of public policy demonstrate that that policy *favors* the validity of contractual deadlines to sue—including for civil-rights claims. If Michiganders, the Michigan Legislature, and Governor Whitmer disagree, they have legislative means to prohibit such provisions or require minimum time limits. And that is exactly the way this Court has said it should work. "As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another." *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999); see also *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979) ("The responsibility for drawing lines in a society as complex as ours of identifying priorities, weighing the relevant considerations and choosing between competing alternatives is the Legislature's, not the judiciary's"). Accordingly, this Court should conclude that the provisions in both cases do not violate public policy.

## II. Additional public-policy considerations support Michigan's long-standing rule allowing contractual deadlines to sue.

To the extent that the Court considers factors outside those "clearly rooted in the law," *Terrien*, 467 Mich at 67, in deciding whether contractual litigation deadlines violate public policy, there are several policy considerations that strongly favor such provisions.

It is axiomatic that businesses require a degree of predictability and uniformity to function and run efficiently. As one scholarly article puts it:

> 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).]

Indeed, "certainty and predictability" allow "corporations [and] in-house counsel . . . to develop products [and] businesses." 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); see also Paul Vandevert, *To Go Forward, We Must Remember and Rely Upon Our Past*, 37 Can-USLJ 353, 360 (2012) ("All legitimate businesses require certainty and predictability in their operations."). And Michigan courts have recognized the need for this sort of predictability. See, *e.g.*, *Cherry Growers, Inc v Agric Mktg & Bargaining Bd*, 240 Mich App 153, 164; 610 NW2d 613 (2000) (stating that the "need for consistency and uniformity applies equally to collective bargaining and labor practices in the agricultural industry").

For nearly four decades, businesses operating in Michigan and those seeking employment have operated with the understanding and expectation that that they can enter into employment agreements providing a deadline to bring employment-related claims. Such contractual clauses provide predictability and certainty. Businesses rely on their ability to agree with their employees on timely and efficient dispute resolution. By limiting the time in which claims can be brought, the parties gain all of the benefits of a typical statute of limitations, including "protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth," and "encourag[ing] promptitude in the prosecution of remedies." *Riddlesbarger v Hartford Ins Co*, 74 US 386, 390 (1868). This predictability and

certainty help businesses plan and operate smoothly and efficiently. That is a good in itself. Upending that predictability and certainty is not something courts should do lightly.[6]

The early notice of a litigation deadline and the predictability of employing uniform employment agreements are particularly important for large national and international businesses. For instance, early notice of employment-related claims is important to large employers so that they can intervene and eradicate bad behaviors. If employees are being harmed by the decisions of a mid-level manager, for example, responsible employers want to be notified as soon as possible so that they can quickly take any necessary corrective action. Likewise, large national or international employers often use uniform employment agreements across the country. The enforceability of these agreements, particularly with respect to federal claims—which a *state* decision about public-policy grounds for invalidating contractual litigation deadlines in employment-discrimination cases would affect[7]—should not vary from state to state. Such unpredictability and disharmony should be avoided. Indeed, large businesses are likely to consider the certainty of enforceability of such standard clauses when determining where to invest resources and create jobs.

This last point is particularly important for Michigan and its current demographic and economic situation. Hardly a week goes by without news of Michigan's declining birth rate.

---

[6] Indeed, that is why this Court, when discussing *stare decisis*, has underscored the importance of reliance interests. As this Court stated in *Robinson v City of Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000), before overruling precedents "the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations. It is in practice a prudential judgment for a court." "[T]o overrule [cases], even if they were wrongfully decided," could "produce chaos." *Id.* at 466 n 26.

[7] "When Congress fails to provide a statute of limitations for a statutory cause of action such as 42 U.S.C. § 1981, the ordinary procedure is that federal courts borrow the most closely analogous statute of limitations under state law." *Taylor*, 966 F2d at 1203.

The Detroit News just reported that the "number of births recorded in Michigan last year is expected to be the lowest annual total since World War II, a development that highlights concerns about the state's aging population and ability to attract young people and businesses that seek to employ them." Craig Mauger and Hayley Harding, *Michigan's Birth Total Has Reached a Level Not Seen Since 1940*, The Detroit News, 2023 WLNR 28254362 (Aug 17, 2023). Earlier in the year, the same paper sounded the alarm about Michigan's aging population:

> Michigan is aging more than most other states, jumping up 4.6 years since 2000. The median Michiganian is 40.1 years old, making the state the 13th oldest in the country and tying it with Wisconsin. If the state doesn't have a younger population to replace older people leaving the workforce, the next few decades are going to strain public services, health care, transit and more — nearly every part of life, experts said. [Hayley Harding, *Michigan's Aging Worries Experts as State is Among Nation's Oldest*, The Detroit News, 2023 WLNR 18108559 (May 25, 2023).]

These negative trends are compounded by the large percentage of young Michiganders who are either unsure whether they will be living in Michigan in 10 years or certain that they will live elsewhere. See Detroit Regional Chamber, *Michigan Statewide Voter Survey: May 12, 2023* <https://www.detroitchamber.com/wp-content/uploads/2023/05/Final_Detroit-Regional-Chamber-Michigan-Voter-Poll_May-2023.pdf> (accessed Aug 31, 2023) (showing that "only 55.2% of voters aged 18-29 thought they would be living in Michigan in ten years," "26.4% thought they would be living elsewhere," and "18.4 percent of younger voters were not sure").

These trends led Governor Whitmer to establish a Growing Michigan Together Council in June 2023. Governor Whitmer's aim with the Council is to "develop a statewide strategy aimed at making Michigan a 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." Executive Office of the Governor, *Gov. Whitmer Establishes the 'Growing*

*Michigan Together Council' to Focus on Population Growth, Building a Brighter Future for Michigan*, < https://www.michigan.gov/whitmer/news/press-releases/2023/06/01/whitmer-establishes-the-growing-michigan-together-council-to-focus-on-population-growth> (accessed Aug 31, 2023).

But Governor Whitmer's important goals cannot come to fruition if businesses are unwilling to move or more deeply invest in Michigan. To retain and attract new young people to Michigan, there must be viable economic opportunities. Such opportunities require a steady and predictable legal regime for businesses. The sorts of businesses necessary to achieve Governor Whitmer's goals will think twice about investing in Michigan or expanding their operations here if they can no longer count on the sorts of employment agreements that have been standard practice in Michigan for nearly four decades. While such concerns may not be "rooted in the law," to the extent non-legal considerations are taken into account when considering whether public policy bars contractual deadlines to sue, these interests should be given heavy weight. The future of Michigan is at stake.

## CONCLUSION AND REQUESTED RELIEF

These cases present the question whether public policy bars the use of contractual deadlines to bring civil-rights or workers'-disability claims. This Court has stated that public policy is discerned by examining legal processes, state and federal constitutions, statutes, and the common law. An objective analysis of those data supports the conclusion that public policy does *not* prohibit the use of such contractual deadlines. Additionally, turning to more general policy considerations, such provisions are supported by policies that incentivize businesses to invest and hire in the state of Michigan. Accordingly, this Court should deny leave to appeal and allow the well-reasoned opinions of the Court of Appeals to stand.

Respectfully submitted,

SOUTHBANK LEGAL

Dated: September 7, 2023

By */s/ Conor B. Dugan*

Conor B. Dugan (P66901)
SOUTHBANK LEGAL
100 E. Wayne Street, Suite 300
South Bend, IN 46601
616.466.7629
cdugan@southbank.legal

*Attorneys for* Amici Curiae

## 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 4,938 words of Times New Roman 12-point proportional type and 2.0 spacing. The word processing software used to prepare this brief was Microsoft 365.

Respectfully submitted,

SOUTHBANK LEGAL

Dated: September 7, 2023

By */s/ Conor B. Dugan*

Conor B. Dugan (P66901)
SOUTHBANK LEGAL
100 E. Wayne Street, Suite 300
South Bend, IN 46601
616.466.7629
cdugan@southbank.legal

*Attorneys for* Amici Curiae