STATE OF MICHIGAN

IN THE SUPREME COURT

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

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SUPPLEMENTAL *AMICI CURIAE* BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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STATEMENT OF QUESTIONS PRESENTED

1. 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.

The trial courts answered:	No.
The Court of Appeals answered:	No.
Appellant answers:	Yes.
Appellee answers:	No.
Amici Curiae answer:	No.

2. Whether *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005), properly applied the straightforward rule established in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), that unambiguous contracts are to be enforced unless they violate law or public policy.

The trial courts answered:	No.
The Court of Appeals answered:	No.
Appellant answers:	Yes.
Appellee answers:	No.
Amici Curiae answer:	No.

3. Whether the contract at issue was unconscionable.

The trial courts answered:	No.
The Court of Appeals answered:	No.
Appellant answers:	Yes.
Appellee answers:	No.
Amici Curiae answer:	No.

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 this, that raise issues of concern to the nation's business community.[1]

Amici, 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 certainty, uniformity, stability, and predictability. Members of the Michigan Chamber and U.S. Chamber

[1] *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. This Court invited *amici* who appeared at the application stage to file supplemental *amicus* briefs. *Amici* filed an *amicus* brief along with the Michigan Chamber of Commerce in both *Adilovic v Monroe, LLC*, No. 164750, and *Rayford v American House Roseville I, LLC*, No. 163989, at the application stage.

routinely employ contractual deadline-to-sue provisions. These members utilize such provisions to ensure quick resolution of employment disputes, to preserve 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

Plaintiff invites 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. Originally, 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. Now, after granting the application, the Court asks whether the Michigan Court of Appeals in *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005), improperly applied *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), which held that contractual deadline-to-sue provisions did not violate public policy, to employment contracts. Businesses, employers, and employees routinely 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.

Indeed, *Clark* was hardly a novel decision. In ***1988***, the United States Court of Appeals for the Sixth Circuit rejected the position Plaintiff here advocates in *Myers v Western-Southern Life Ins Co*, 849 F2d 259 (CA 6, 1988). Like Rayford, the *Myers* plaintiff sued his form employer under the Elliott-Larsen Civil Rights Act and argued that his employment contract's six-month contractual deadline violated public policy. Writing for the court, Judge Damon Keith rejected the plaintiff's arguments, holding that Michigan law requires enforcement of the contractual deadline as written. *Id.* at 261. Since then, courts applying Michigan law have consistently enforced such contractual provisions in employment contracts, including in the civil rights and workers' disability context. *Clark* is but one of those decisions.

This long-established principle makes sense. The enforcement of contractual deadlines to sue furthers numerous public policy interests, including predictability, finality, and uniformity of contractual enforcement. It also facilitates job growth by reducing barriers to entry into—and continued investment in—the Michigan economy. Where laws allow for uniform contracts, employers do not need to tailor each contract to the state or jurisdiction in which they do business. Contractual deadline-to-sue provisions thus do not contravene—but promote—the public interest, as this Court and courts in other jurisdictions have held.

Nor can *Clark* be cast as misapplication of settled contract interpretation principles. *Rory* stands for the unremarkable proposition that, "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory*, 473 Mich at 461. *Rory* applied that black letter rule to enforce a deadline-to-sue provision in an insurance contract. *Id.* *Clark* then applied the same rule to enforce a deadline-to-sue provision in an employment contract, holding that a six-month limitation accords with Michigan public policy. *Clark*, 268 Mich App at 142. In so doing, *Clark* reaffirmed existing Michigan precedent, from "before *Rory*," that "provisions within an employment contract providing for a shortened period of limitations . . . [are] reasonable and, therefore, valid and enforceable." *Id.*

For similar reasons, Plaintiff cannot plausibly argue that her contract's six-month deadline to sue is unconscionable. To prevail, she would have to prove, among other things, that "the inequity of the term is so extreme as to shock the conscience." *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009). The over three decades of precedent—extending before and after *Rory* and *Clark*—establishes that a six-month deadline to sue provision is not only reasonable, but routinely found in employment contracts and civil rights

statutes alike. In any case, the Michigan Legislature has had ample opportunity to amend the statutory code to abrogate *Myers*, *Rory*, *Clark*, and their progeny. That the Michigan Legislature has not underscores that the decisions neither violate public policy nor shock the conscience.

Finally, even if this Court is inclined to believe that *Rory* was incorrectly decided—which it was not—principles of *stare decisis* weigh heavily against overturning prior precedent. "Considerations in favor of stability are strongest in 'cases involving property and contract rights, where reliance interests are involved.'" *N Am Brokers, LLC v Howell Pub Sch*, 502 Mich 882, 913 NW2d 638 (2018) (McCormack, J., concurring) (quoting *Payne v Tennessee*, 501 US 808, 828 (1991)). For at least a generation, Michigan citizens have structured their private relations assuming that deadline-to-sue contract provisions will be enforced as written. Upending 20 years of consistent caselaw—over 35 years of caselaw, if one correctly pegs *Myers* as a starting point for the enforcement of such provisions—will work "practical real-world dislocations" on Michigan contract law in the employment context and beyond. *Robinson v City of Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000).

Ultimately, Plaintiff's appeal should be to the Michigan Legislature, which has not acted to limit or bar such deadline-to-sue provisions in employment contracts. This Court should affirm the holding of the Courts of Appeals.

ARGUMENT

I. *Clark* simply applied the clear rule established in *Rory*.

A. *Clark* properly applied the rule announced in *Rory* to employment contracts.

In *Rory*, this Court faced a deadline-to-sue provision in an insurance policy. The Court held that "insurance policies are subject to the same contract construction principles that apply to

any other species of contract." 473 Mich at 461. Under those generally applicable principles, "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Id.*; see also *id.* at 468 ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*."). The Court was at pains to "reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Id.* at 461. That includes "an unambiguous contractual provision providing for a shortened period of limitations," which "is to be enforced as written unless the provision would violate law or public policy." *Id.* at 470.

To be sure, when the *Rory* Court turned to the question of whether "the contractually shortened period of limitations violates law or public policy," *id.* at 471, its analysis focused more particularly (though not exclusively) on insurance contracts. This Court first noted that "Michigan has no general policy or statutory enactment which would prohibit private parties from contracting for shorter limitations periods than those specified by general statutes." *Id.* (cleaned up). Turning to Michigan's public policy with respect to deadline-to-sue provisions in the insurance context, the Court held that the "explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial branch of government." *Id.* at 475. Thus, the provision was not barred by public policy.

Clark, decided that same year, simply applied *Rory*'s straightforward principle that "an unambiguous contractual provision providing for a shortened period of limitations is to be

enforced as written unless the provision would violate law or public policy." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005) (quoting *Rory*, 473 Mich at 479). The Court of Appeals stated that, because the deadline-to-sue provision in the employment contract at issue was "not ambiguous," it was "compelled to enforce it as written unless it was contrary to law or public policy or is otherwise unenforceable under recognized contract defenses." 268 Mich App at 142. The Court of Appeals then determined that the limitations period did not violate law or public policy because "there are no statutes explicitly prohibiting the contractual modification of limitations periods in the employment context" and because "Michigan has no general policy or statutory enactment prohibiting the contractual modification of periods of limitations provided by statute." *Id.* Furthermore, the Court concluded that the provision was not unconscionable. *Id.* at 144.

B. Deadline-to-sue provisions in employment contracts do not violate public policy.

To the extent this Court questions whether *Clark* "properly extended" *Rory* because the Court of Appeals' discussion of public policy in *Clark* consisted of just a few lines, its lack of length does not undermine the Court of Appeals' application of *Rory* to the deadline-to-sue context. Indeed, a more thorough review of Michigan's public policy only underscores the correctness of the Court of Appeals' conclusion.

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), for guidance. *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*, the United States Supreme Court similarly 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). It follows 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).

Contractual deadlines to sue in employment agreements 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: the law *supports* enforcing contractual litigation deadlines.

First, the enforceability of contractual deadlines to sue in employment contracts under Michigan law has an older pedigree than *Clark* or the Michigan Court of Appeals decision four years prior in *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234; 625 NW2d 101 (2001). Over 35 years ago, Judge Damon Keith, writing for the United States Court of Appeals 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 here—and the Michigan Persons with Disabilities Civil Rights Act. And, like here, 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." *Id.*

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 Sixth Circuit 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. And, the Court of Appeals in *Clark* in turn relied upon *Timko* as supportive of its conclusion that a deadline-to-sue provision in an employment contract did not violate public policy. 268 Mich App at 142 (citing *Timko* as a reason it was "unable to conclude that the limitations period provided in the contract violates public policy"). Accordingly, *Clark* is just one in a line of Michigan decisions that, for over the last *third of a century*, have concluded that a six-month contractual limitations period for civil rights claims is consistent with public policy—the very question inherent in this Court's order granting the application and ordering supplemental briefing.

Further, Plaintiff's public-policy arguments fail because the Michigan Legislature has never adopted an explicit statute of limitations for employment contracts. Rather, an action for breach of an *employment* contract is governed by the default limit of six years established in MCL 600.5807(1) for general breach of contract actions. Nor has the Michigan Legislature adopted an explicit statute of limitations for civil rights actions. The Elliott-Larsen Civil Rights 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). These considerations, 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), undermine 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 either employment contract or civil rights cases. Yet 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 36 years since the Sixth Circuit decided *Myers*, the 22 years since the Michigan Court of Appeals decided *Timko*, or the nearly 20 years since *Rory* and *Clark* were decided to weigh in on the issue is a further strong indication that public policy does not prohibit deadline-to-sue provisions in employment contracts.

Beyond these longstanding precedents and the Legislature's decision not to disrupt them, 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[red] 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). Unfair labor practices and whistleblower protections protect employees, and legislative action with respect to them speaks to what the Legislature deems fair and important with respect to the employer-employee relationship.[2]

Michigan has enacted shortened limitations periods even in the explicitly civil rights context, which covers employment discrimination claims. 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 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 provision at issue in this case is thus harmonious with well-established state and federal regulations covering civil rights claims relating to employment.

The practices of other jurisdictions and lower federal courts further indicate that deadlines to sue in employment contracts 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

[2] 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).

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, 648-49; 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 in employment contracts.

For instance, the New York Supreme Court, Appellate Division, upheld a six-month litigation deadline provision in an employment contract in the context of a discrimination and retaliation claim. *Hunt v Raymour & Flanigan*, 105 AD3d 1005; 963 NYS2d 722 (NY App Div, 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").[3]

[3] Moreover, *Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343 (2016), cited in this Court's June 23, 2023 Order in this case and discussed in Plaintiff's supplemental brief (Pltf's Suppl Br 10-12) is inapposite. 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

Federal courts have reached similar determinations in the context of claims arising from employment contracts. 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 bring 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 deadline-to-sue provision in an employment contract 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 involving employment contracts with six-month deadline-to-sue provisions. *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

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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 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).

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

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 in employment contracts. 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.

C. 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. (See *infra* Section III.)

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 and 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[4]—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. Regularly, we hear news of Michigan's declining birth rate. Just last year, the Detroit News reported that the "number of births recorded in Michigan last year is expected

[4] "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.

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 last 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 Sep 9, 2024) (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 Sep 9, 2024).

But these important goals, shared by public servants and private industry, cannot come to fruition if businesses are unwilling to move to, or more deeply invest in, Michigan. To retain and attract new young people to the state, there must be viable economic opportunities. Such opportunities require a steady and predictable legal regime for businesses. The sorts of businesses necessary to achieve the goals Governor Whitmer set forth 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.

II. The contract at issue is not unconscionable.

As this Court made clear in *Rory*, an "'adhesion contract' is simply that: a *contract*," which "must be enforced according to its plain terms unless one of the traditional contract defenses applies." 473 Mich at 477. Here, this Court has asked whether the underlying contract is unconscionable. See May 23, 2024 Order. It isn't, and the prior discussion of public policy makes that clear.

While this Court has recognized the concepts of procedural and substantive unconscionability, see *Lichon v Morse*, 507 Mich 424; 968 NW2d 461 (2021) (recognizing but not reaching unconscionability question), the Michigan Court of Appeals has engaged in more

extensive discussion of the principles. "For a contract or a contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present." *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id.* (cleaned up). And "substantive unconscionability exists where the challenged term is not substantively reasonable." *Id.* (cleaned up). But "a contract or contract provision is not substantively unconscionable simply" if "it is foolish for one party or very advantageous to the other." *Id.* Rather, for a contract or provision to be "substantively unreasonable . . . the inequity of the term" must be "so extreme as to shock the conscience." *Id.* (cleaned up). And, over a century ago this Court set out the stringent parameters that render a contractual provision unconscionable:

> An unconscionable contract is said to be one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other. . . . It has been said that there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. . . . It is also said that a contract will be regarded as unconscionable if the inadequacy is so gross as to shock the conscience. The fact that the contract is a foolish one for one of the parties, and a very advantageous one for the other, does not of itself establish the fact that it was unconscionable. [*Gillam v Michigan Mortg Inv Corp*, 224 Mich 405, 409; 194 NW 981 (1923) (cleaned up).]

Here, even assuming Plaintiff can establish procedural unconscionability—a dubious proposition given that she must show that she could not have obtained employment elsewhere, c.f. *Liparoto*, 284 Mich App at 31—she certainly cannot establish substantive unconscionability. Indeed, it is axiomatic that "[t]hat which the law itself specifically permits cannot be unconscionable." *William J Cooney, PC v Rowland*, 240 Ga App 703, 704; 524 SE2d 730 (1999). The discussion above about the Michigan and national public policy that permits and

even affirms deadline-to-sue provisions in employment contracts means by definition and logic that the six-month deadline-to-sue provision in *this* contract cannot be substantively unreasonable. At the very least, it cannot be said that no one, anywhere, would refuse to accept such a provision because it *shocks* the conscience. Indeed, it would be a bizarre legal world where a contractual provision could be consonant with public policy and, yet, so conscience-shocking as to be unenforceable. Accordingly, the provision at issue here is not unconscionable.

III. *Stare Decisis* requires adherence to *Rory*.

Stare decisis, the principle that courts, should "abide by, or adhere to, decided cases," *Robinson v City of Detroit*, 462 Mich 439, 463 n 21; 613 NW2d 307 (2000) (quoting Black's Law Dictionary (rev. 4th ed.), p. 1577), while not an "inexorable command," *id.* at 464 (cleaned up), strongly supports continuing to follow *Rory*. As this Court articulated in *Robinson*, *stare decisis* "is generally 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." *Id.* at 463. In *Robinson*, this Court set out considerations for whether to follow *stare decisis*: "Courts should . . . review 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." *Id.* at 464. Here, each of these factors points to maintaining the status quo.

First, this is not a case where *Rory* has been found either "unworkable" or "badly reasoned." *Id.* 464. Indeed, the rule in *Rory* is elegant, simple, and easily applied. It is not a decision that "defies practical workability." *Id.* And its central principle, that unambiguous contracts should be enforced as written, is one repeatedly reaffirmed by this Court. Just three years ago, this Court again underscored that "the general rule of contract is that a competent

persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made *shall* be valid and enforced in the courts." *Bronner*, 507 Mich at 165-66 (emphasis added) (cleaned up).

Second, reliance interests squarely support continuing to follow *Rory*. As demonstrated *supra*, *Rory* was anticipated 36 years ago by the Sixth Circuit in *Myers*. The *Rory* rule "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." *Robinson*, 462 Mich at 466. For at least a third of a century, employers and employees contracting together in Michigan have relied on the principle that they can agree to shorter deadlines to sue than set out in statutes of limitations. See *N Am Brokers, LLC v Howell Pub Sch*, 502 Mich 882, 913 NW2d 638 (2018) (McCormack, J., concurring) ("Considerations in favor of stability are strongest in 'cases involving property and contract rights, where reliance interests are involved.'" (quoting *Payne v Tennessee*, 501 US 808, 828 (1991)). For national employers, this has eased and maintained their entry into the Michigan market. To upend this rule now would mean that suddenly, all deadline-to-sue provisions are fair game for individualized litigation. In any individual case, a court might deem such a provision unreasonable or unconscionable. The uncertainty this would inject into the law, and burden it would place on trial courts, is profound.[5]

Third, there have been absolutely no "changes in the law or facts" that undermine *Rory* or call it into question. Quite the opposite. It is easier than ever before for prospective plaintiffs to comply with contractual deadlines to commence litigation. With just a few clicks of a mouse, a

[5] This is not a case where the *Rory* Court somehow interpreted a clear or almost-clear statute contrary to its text. See *Robinson*, 463 Mich at 467 (discussing reliance interests involved where courts are construing statutes). Here, employers and employees have relied on the word of *this* Court and other courts interpreting Michigan law for decades.

prospective plaintiff can ask large friend groups for a referral of counsel, or search Google for area employment attorneys or how to format a *pro se* complaint. And, in our increasingly integrated world, employers have a heightened interest in knowing that their contracts will be uniformly enforced across jurisdictions.

Together all these factors highlight the need to follow *stare decisis* in this instance.

CONCLUSION AND REQUESTED RELIEF

This case ultimately presents the question of whether public policy bars the use of deadline-to-sue provisions in employment contracts. 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 provisions. *Clark* correctly applied the straightforward principles articulated in *Rory*. Larger and more general policy considerations also support such deadline-to-sue provisions. Among other considerations, such provisions incentivize businesses to invest and hire in the state of Michigan.

Nor should this Court conclude that the deadline-to-sue provision at issue here is unconscionable. The clear public policy that supports such provisions is proof that the inclusion of such a provision in an employment contract is hardly conscience-shocking.

Moreover, *Rory* as applied by *Clark* is hardly an outlier. The Sixth Circuit in *Myers* had already affirmed the principle that deadline-to-sue provisions do not violate public policy in 1988. This Court should be hesitant to upend this longstanding legal regime. Employers and employees have long relied upon the ability freely to insert such deadline-to-sue provisions in their contracts. The rule is workable, and the alternative is not. Accordingly, this Court should continue to follow *Rory* for reasons of *stare decisis*.

For all these reasons, this Court should affirm the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation pursuant to MCR 7.212(B). The Brief contains 6,800 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.

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