STATE OF MICHIGAN
IN THE SUPREME COURT

GARY & KATHY HENRY, ET AL.,	Docket No. 156128
Plaintiffs-Appellees,	Court of Appeals Docket No. 328716
vs.	Saginaw County Circuit Court LC No. 03-047775-NZ
THE DOW CHEMICAL COMPANY,	Hon. Patrick J. McGraw
Defendant-Appellant.	

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
BRIAN M. SCHWARTZ (P69018)
150 West Jefferson
Suite 2500
Detroit, MI 48226
(313) 963-6420

JENNER & BLOCK LLP
MATTHEW S. HELLMAN
(*pro hac vice pending*)
1099 New York Ave., N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

Attorneys for Amicus Curiae the Chamber of Commerce of the United States of America

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THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

Pursuant to MCR 7.311 and MCR 7.312(H), the Chamber of Commerce of the United States of America (the "Chamber") hereby moves for leave to file the accompanying brief as *Amicus Curiae* in support of Defendant-Appellant in the above-captioned case and, in the event leave to appeal is granted, to file a brief as *Amicus Curiae* in support of the Defendant-Appellant's position on appeal. In support of its motion, *Amicus* states as follows:

1. The Chamber seeks to address the critical importance of the proper application of Michigan's statute of limitations law, and to explain why this Court should grant review in the above-captioned case to determine whether the circuit court erred in determining that Plaintiffs' claims were timely.

2. The Chamber is the world's largest business organization. The Chamber directly represents the interests of its more than 300,000 members, and indirectly represents the nation's more than three million businesses. Its membership includes organizations of varied sizes from every business sector and region of the country.

3. The Chamber regularly represents the interests of its members in state and federal courts in cases raising issues of national importance for the business community. In pursuit of that goal, the Chamber regularly files briefs as *amicus curiae* in state and federal courts across the United States.

4. This Court has previously granted the Chamber's motion to file a brief as *amicus curiae* in this case—both at the leave to appeal stage and after the case has been calendared. See, e.g., *Henry v Dow Chem Co*, 484 Mich 483, 487; 772 NW2d 301, 303 (2009); *Henry v Dow Chem Co*, 473 Mich 63, 66; 701 NW2d 684, 685 (2005). The Chamber was also granted leave to participate as an *amicus curiae* at other stages of this litigation, including most recently in the Court of Appeals in connection with the decision on review here. See Order, *Henry v Dow Chem Co*, No 328716 (Mich Ct App Feb. 2, 2017), Dkt Entry 51; Order, *Henry v Dow Chem Co*, No 266433 (Mich Ct App May 11, 2006), Dkt Entry 52.

5. The Chamber has a particular interest in the proper interpretation and application of statutes of limitations, like the Michigan statutes at issue in this case. Among other things, the proper application of Michigan's statutes of limitations promotes predictability and finality for the businesses that operate in this state.

6. The Chamber seeks leave to file the accompanying Brief in Support of Defendant-Appellant to address the pressing need for this Court to reaffirm the inapplicability of the continuing violations doctrine, and to clarify that, contrary to the Court of Appeals' determination, new damages that flow from a defendant's alleged acts neither constitute a new injury nor provide a plaintiff with a new limitations period.

7. Given its expertise, the Chamber believes that its accompanying brief will assist the Court in determining whether to grant Defendant-Appellants leave to appeal and whether to

determine whether the Circuit Court's application of Michigan's statute of limitations should be corrected. The Chamber is uniquely situated to address the potential effects the Court's decision will have on the state's business community.

8. If this Court grants Defendants-Appellant's application for leave to appeal, *Amicus* wishes to file an *Amicus Curiae* brief in support of Defendants-Appellant's position on appeal, pursuant to MCR 7.312(H).

For the foregoing reasons, the Chamber respectfully requests that this Court grant its motion for leave to file the accompanying *Amicus Curiae* brief and, in the event leave to appeal is granted, to allow *Amicus* to file an additional brief in support of Defendant-Appellant's position on appeal.

Respectfully submitted,

/s/ Brian M. Schwartz
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
BRIAN M. SCHWARTZ (P69018)
150 West Jefferson
Suite 2500
Detroit, MI 48226
(313) 963-6420

JENNER & BLOCK LLP
MATTHEW S. HELLMAN
(*pro hac vice pending*)
1099 New York Ave., N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

Dated September 29, 2017

Attorneys for Amicus Curiae the Chamber of Commerce of the United States of America

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MILLER, CANFIELD, PADDOCK
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BRIAN M. SCHWARTZ (P69018)
150 West Jefferson
Suite 2500
Detroit, MI 48226
(313) 963-6420

JENNER & BLOCK LLP
MATTHEW S. HELLMAN
(*pro hac vice pending*)
1099 New York Ave., N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

Attorneys for Amicus Curiae the Chamber of Commerce of the United States of America

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Whether, assuming that Plaintiffs' allegations of risk-based "injury" give rise to a cause of action for common-law negligence or nuisance, such a cause of action is time-barred.

The trial court would answer:	No.
The Court of Appeals would answer:	No.
The Chamber of Commerce of the United States answers:	Yes.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business organization. The Chamber directly represents the interests of its more than 300,000 members, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community in state and federal courts across the United States.

The Chamber, which has been granted leave to file as an *amicus* on several occasions in this case, and by the Court of Appeals below, has a particular interest in the proper interpretation and application of statutes of limitations, like the Michigan statute at issue in this case. Among other things, the proper application of Michigan's statute of limitations promotes predictability for the businesses that operate in this State.

STATEMENT OF THE CASE

Amicus adopts by reference the Statement of Facts and Procedural Background of Defendant-Appellant Dow Chemical Company ("Dow").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Dow's Application for Leave to Appeal explains why Plaintiffs-Appellees' claims are doubly barred—both by the statute of limitations and by Michigan's present physical injury rule—and why this Court should grant leave to appeal the Court of Appeals' contrary decision. The Chamber submits this brief to emphasize an issue that was wrongly decided by the Court of Appeals and that is of great concern to the broad array of businesses the Chamber represents within Michigan and throughout the nation.

Over a decade ago, this Court correctly recognized that the Michigan Legislature has rejected the continuing violations doctrine. In Michigan, the limitations period for a claim begins running once a plaintiff has suffered some injury from an alleged unlawful act, and does not begin to run afresh as new injuries are incurred. Put simply, the statute of limitations runs from the *first* injury a plaintiff has suffered, not the last. The reasons for that rule are manifest and sensible. If a plaintiff received a new limitations period every time he could point to a supposed new injury from a bad act, liability would be unending. Conduct that is literally decades-old could repeatedly give rise to new causes of action. That in turn would deprive defendants of the predictability that Michigan law bestows, allow plaintiffs to sleep on their rights until evidence and witnesses have disappeared, and burden the courts with a mass of increasingly stale claims.

The Court of Appeals' reasoning below surreptitiously restores the continuing violation doctrine. That fact would make this case worthy of review under any circumstances. But this case—which this Court has already considered on two occasions and which has been pending for years in Michigan courts—also presents a textbook example of why it is critically important for this Court to reaffirm that the continuing violations doctrine has no place in Michigan. As Plaintiffs themselves have acknowledged in this Court, "[t]heir claims for nuisance and negligence commonly arise from Dow's dioxin contamination along the Tittabawassee River, which includes the contamination of the Plaintiffs' floodplain properties." Pls.-App.'s Answer in Op'n at 2; see also *id.* at 1, 2-3, 14, 17. For statutes of limitations purposes, however, Plaintiffs point to an allegedly separate and independent "injury": the 2002 release of a report by the Michigan Department of Environmental Quality ("MDEQ") discussing dioxin contamination in the Tittabawassee River floodplain, which they claim drove down their property values. A divided panel of the Court of Appeals erroneously accepted Plaintiffs' theory that the 2002 report inflicted

a "new" injury that reset the limitations clock and thereby allowed them to sue Dow for the underlying contamination.

Plaintiffs' claims cannot be resuscitated simply by alleging new manifestations of an old injury. A court's ability to define a new "injury" with a fresh limitations period whenever new damages result flies in the face of this Court's precedent. The decision below undermines the predictability and finality that Michigan's limitations law rightly seeks to provide. Under the Court of Appeals' reasoning, defendants will be unable to reliably predict when a court might construe a later harm as a new "injury" that restarts the limitations period. That uncertainty is of substantial concern to businesses that operate in this State.

The Chamber therefore urges this Court to grant Dow's application for leave to appeal, and to reaffirm that the continuing violations doctrine continues to have no place in Michigan.

ARGUMENT

I. Michigan Has Rightly Rejected The Continuing Violations Doctrine, Ensuring The Finality That Michigan Limitations Law Guarantees.

A. Michigan Rejects The Continuing Violations Doctrine.

Some jurisdictions have adopted a rule known as the "continuing violations" (sometimes the "continuing nuisance" or "continuing wrongs") doctrine. Under that rule, each new injury from an alleged unlawful act provides a fresh statute of limitations for the plaintiff. That is, each new occurrence or reoccurrence of an injury from the alleged tortious conduct is considered "a separate cause of action," and "a new temporary nuisance claim accrues each time the injury occurs." 54 CJS, Limitations of Actions, § 236, p 277-78 (2010); see also 58 Am Jur 2d, Nuisances, § 221, p 740-41 (2012) (explaining that when an "injury from the alleged nuisance is temporary in its nature, or is of a continuing or recurring character, . . . one recovery against the

wrongdoer is not a bar to successive actions for damages thereafter accruing from the same wrong," and that "every day's continuance is a new nuisance").

In *Garg v Macomb County Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), this Court squarely rejected the continuing violations doctrine as inconsistent with the plain language of Michigan limitations law. As this Court explained, a claim accrues in Michigan, pursuant to statute, "at the time the wrong upon which the claim is based was done *regardless of the time when damage results*." MCL 600.5827 (emphasis added). Once accrued, the statute of limitations runs for three years "after the time of the death or injury."[1] MCL 600.5805(10). Thus, "[o]nce all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run." *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972). Most importantly, later damages may result from the wrong, but those damages "give rise to no new cause of action, nor does [the] statute of limitations begin to run anew as each item of damage is incurred." *Id.*

In *Garg*, this Court explained that the continuing violations doctrine "bears little relationship to the actual language of the relevant statute of limitations." *Garg*, 472 Mich at 281. Indeed, the Legislature's chosen language directly and "simply states that a plaintiff 'shall not' bring a claim for injuries outside the limitations period." *Id.* at 282. Accordingly, nothing in the state's limitations statutes "permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations.'" *Id.*

[1] This Court has explained that the statutes' alternative references to "the time the wrong . . . was done" and the "time of death or injury" are not inconsistent but, rather, complementary. See *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387-88 n 8; 738 NW2d 664 (2007). This is because "[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted." *Id.* at 388 (quoting *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003)).

This Court recognized that application of the plain terms of Michigan's limitations law appropriately gives effect to the Legislature's intent. See *id.* at 281 ("Fundamental canons of statutory interpretation require us to discern and give effect to the Legislature's intent as expressed by the language of its statutes."). If courts were to restart the limitations clock for each new injury, they would, in essence, be "simply . . . extend[ing] the limitations period beyond that which was expressly established by the Legislature." *Id.* at 282. Regardless of the policy wisdom of the continuing violation doctrine or whether it "constitutes a useful improvement in the law," this Court correctly concluded that there existed no basis for the Court to "construct such an amendment" to the Legislature's chosen scheme. *Id* at 285. And as this Court recognized, to contravene the Legislature's scheme would pose considerable costs, both by "undermining the clarity and predictability of the law, allowing stale complaints to proceed, and injecting uncertainty into a myriad of legal relationships," as well as by exceeding courts' institutional bounds through the exercise of "legislative, not judicial, power." *Id*. at 285 n 12 (internal quotation marks omitted).

Given the statutes' plain language, this Court's decision in *Garg* correctly construed and gave effect to Michigan's limitations statutes.[2]

[2] Many decisions in the Court of Appeals have faithfully applied *Garg*, and rejected the application of the continuing violations doctrine in a number of contexts. See, e.g., *Terlecki v Stewart*, 278 Mich App 644, 656-58; 754 NW2d 899 (2008); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009). The Court of Appeals has acknowledged, however, that at least two panels have issued decisions in conflict with *Garg*. In one post-*Garg* case, a panel "concluded that the continuing wrongs doctrine applied to an action alleging a recurrent nuisance," *Marilyn Froling*, 283 Mich App at 284 & n 31 (citing *Dep't of Envt'l Quality v Waterous Co*, 279 Mich App 346; 760 NW2d 856 (2008)), while another panel suggested that *Garg* might be limited to civil rights actions, see *id.* at 281-82 & n 23 (citing *Attorney General ex rel Dep't of Envt'l Quality v Bulk Petroleum Corp.*, 276 Mich App 654, 667 n 3; 741 NW2d 857 (2007)). Yet, this Court's decision was unequivocal. Michigan's generally applicable limitation statute "simply states that a plaintiff 'shall not' bring a claim for injuries outside the limitations period." *Garg*, 472 Mich at 282. Granting Dow's application for leave to appeal would therefore also provide this Court with the opportunity to confirm what many lower courts in this state have rightly concluded—that "*Garg* and its progeny *completely and*

B. Continued Rejection Of The Doctrine Protects Finality And Reliance Interests, Policy Goals Of Particular Importance To The Business Community.

Michigan's rejection of the continuing violations doctrine also best serves the finality and reliance policy goals that statutes of limitations advance. These interests are particularly important for businesses that operate in Michigan and those that are considering moving to the State. Exposing businesses to ever-renewing statutes of limitations whenever a plaintiff can cast her injuries as "new" is detrimental to the predictability statutes of limitations are intended to secure.

As this Court has explained, statutes of limitations "are grounded in a number of worthy policy considerations." *Lothian v City of Detroit*, 414 Mich 160, 166; 324 NW2d 9 (1982). Limitations periods encourage plaintiffs to promptly recover damages and "penalize plaintiffs who have not been industrious in pursuing their claims." *Id.* at 166-67. Statutes of limitations also protect defendants in several additional respects. They "relieve defendants of the prolonged fear of litigation." *Id.* at 167. In more practical terms, limitations periods guard against the assertion of stale claims, particularly when plaintiffs might otherwise "purposely . . . postpone[]" enforcement of their claims "until the lapse of time ha[s] destroyed the proofs of their falsity." *Smith v Smith's Estate*, 91 Mich 7, 11; 51 NW 694 (1892); see also *Gabelli v SEC*, 568 US 442, 448 (2013) ("Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (internal quotation marks and citation omitted)). Overall, statutes of limitations "relieve defendants of the prolonged fear of litigation" and provide certainty as to their potential liabilities. *Lothian*, 414 Mich at 167.

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retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases." *Marilyn Froling*, 283 Mich App at 288 (emphasis added).

These policy goals are particularly applicable to nuisance claims—regardless of the type of nuisance claim involved. On the one hand, to the extent a nuisance is abatable, a requirement that a plaintiff assert his rights as soon as injury occurs both increases the possibility that a plaintiff's injuries will be minimized, and incentivizes defendants to take remedial action. If plaintiffs do not timely assert a claim, the limitations period serves to make businesses' "operating costs more predictable" and ensures that unexpected claims based on ongoing activities will not arise in the future. Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz L Rev 271, 311 (2008). And, on the other hand, if a defendant's ongoing conduct cannot be abated, to allow for continuous assertion of claims would "undermine the important policies underpinning statutes of limitation, including preventing plaintiffs from sleeping on their rights." *Horvath v Delida*, 213 Mich App 620, 626; 540 NW2d 760 (1995).

To be sure, strictly enforcing statutes of limitations—and rejecting a continuing violations doctrine—imposes some costs on potential plaintiffs. But those costs are ones that "the Legislature apparently believes [are] outweighed by the benefits of setting a deadline on stale claims." *Garg*, 472 Mich at 282 n 8. Indeed, it is the "necessary task" of the Legislature to "balanc[e] plaintiffs' and defendants' interests" and to determine when to "protect[] defendants from stale or fraudulent claims." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 392; 738 NW2d 664 (2007). The Legislature has determined that guaranteeing predictability and preventing the resurrection of stale claims are worthy policy goals. And the Legislature apparently continues to conclude that that the policy balance it has struck is an appropriate one. Since this Court's decision in *Garg* over a decade ago, the Legislature has not elected to amend its limitations statute.

It is critically important that Michigan courts heed the decision of this Court—and the wisdom of the Michigan Legislature—and continue to reject the continuing violations doctrine.

II. The Court Of Appeals' Decision Subverts This Court's Decision In *Garg* And Jeopardizes Michigan's Ability To Attract Business.

The Court of Appeals evaded this Court's clear holding in *Garg* by characterizing the 2002 release of the MDEQ report as posing a distinct injury for Plaintiffs. Permitting courts to artificially construe later damages that flow from an existing injury as a separate and independent injury that resets the limitations clock directly undermines this Court's precedent and threatens Michigan's ability to attract business. This Court should grant Dow's application for leave to appeal and correct the Court of Appeals' erroneous determination.

A. The Court Of Appeals' Decision Undermines This Court's Construction Of Michigan Limitations Law.

The Court of Appeals avoided application of the continuing violations doctrine abrogated in *Garg* only by characterizing the release of the MDEQ report in 2002 as a separate, discrete injury. The Court of Appeals correctly acknowledged that a claim accrues "at the time the wrong upon which the claim is based was done," irrespective of when damage results. *See* 6/1/17 Op., at 4 (quoting MCL 600.5827). But the court then went astray when it accepted Plaintiffs' contention that they were not legally injured until the 2002 MDEQ notice was published. *See id.* at 5. The Court of Appeals claimed that Plaintiffs' only relevant injury was the "direct contamination of their property with dioxins," and the accompanying "significant loss of the use and enjoyment of [their] property and diminution in property value" occasioned by the MDEQ's then-recent "warnings and restrictions." *Id.* According to the court, until dioxins in Plaintiffs' soil reached "potentially toxic levels," Plaintiffs did not suffer a loss of use and enjoyment of their property or the depreciation of their property, and thus lacked the "damages element necessary" for their claims. *Id.* at 6.

In construing Plaintiffs' claims in this way, the Court of Appeals focused myopically on the most recent manifestation of Plaintiffs' alleged injury, to the exclusion of the previous injuries

that even Plaintiffs concede they have suffered as a result of pollution in the Tittabawassee River. That position—that the latter damages is all that is relevant and gives rise to a separate claim—is a surreptitious revival of the continuing violations doctrine. In effect, the Court of Appeals' analysis allows creative plaintiffs to revive time-barred claims and to "recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations,'" where plaintiffs purportedly continue to suffer damages within the limitations period. *Garg*, 472 Mich at 282.

The Court of Appeals' decision conflicts with *Garg* and this Court's limitations case law in several respects. First, the Court of Appeals erroneously considered "damages" to be the touchstone of a claim's accrual. But "'damages' and 'injury' are not one and the same." *Hannay v Dep't of Transp*, 497 Mich 45, 64; 860 NW2d 67 (2014). Instead, "damages *flow from* the injury." *Id.* (emphasis in original). And the relevant limitations period here runs for three years from the date of the injury. MCL 600.5805(10). Once the plaintiff has been injured, subsequent damages flowing from that injury "give rise to no new cause of action, nor does [the] statute of limitations begin to run anew as each item of damage is incurred." *Connelly*, 388 Mich at 151. Thus, the Court of Appeals' focus on whether the MDEQ notice precipitated new or additional damages was error—and irrelevant for purposes of the limitations period.

Second, the Court of Appeals' description of Dow's alleged contamination of the Tittabawassee River reveals that Plaintiffs' purportedly new injury is merely the continuation of a prior harm. The Court of Appeals noted that Plaintiffs conceded that the public had been made aware of the presence of dioxins in the Tittabawassee River as early as 1984. 6/1/17 Op. at 5. Indeed, it is telling that the Court of Appeals was at pains to emphasize that Dow's prior activities had not, in the court's view, caused "the direct harm of soil contamination . . . as early as it *caused*

harm, in other forms." *Id.* at 6 (emphasis added). But in acknowledging that Dow's actions had caused harm "in other forms," the Court of Appeals tacitly conceded that the 2002 MDEQ report is merely the most recent manifestation of Plaintiffs' existing injury of alleged soil contamination.

As a result, the new standalone "injury" from which new "damages" arose is an artificial creation of the court. The Court of Appeals' need to repeatedly use qualifying language when describing Plaintiffs' purported injury—"*direct* harm," "*direct* contamination," "*significant* loss of . . . use and enjoyment," "*potentially toxic*" levels of dioxin accumulation—make this plain. 6/1/17 Op., at 5-6 (emphasis added). While the Court of Appeals protested that soil contamination was not "the same as" the prior public notice of contamination to the river, its runoff, and its floodwaters, *id.* at 6, the point is that Plaintiffs never allege that their properties were first contaminated with dioxins within three years of when they filed this lawsuit.

In reality, the Court of Appeals' decision and the record in this case cannot be squared with *Garg*. Plaintiffs' attempt to focus solely on a more recent "type" of injury is a surreptitious attempt to revive the very continuing violations doctrine which *Garg* rejected. Plaintiffs—and now the Court of Appeals—appear to have gone to great lengths to dress up the now-rejected "continuing violations" theory precisely because once the doctrine is ruled out as a basis for resuscitating the statute of limitations, Plaintiffs' claims are straightforwardly time-barred. Plaintiffs' claims accrued when they *first* suffered injury from those dioxins, and injury was apparent at least as of the early 1980s, even if additional injuries have arisen since.[3] Accordingly, and contrary to the

[3] Plaintiffs' own Third Amended Complaint alleges that as a result of heavy rains and flooding, dioxins migrated *for years* down the river and upon the flood plain. See 3d Am Compl ¶ 126. In addition, as Dow also explains, Plaintiffs' attempt to construct a new injury when they first became aware of the dioxins' presence on their property in 2002 is an attempt to evade this Court's rejection of the common law discovery rule and, in any event, contrary to the record evidence which shows that Plaintiffs long had knowledge of the dioxins' existence. See Def.-App.'s App. for Leave to Appeal. at 20, 25-30.

Court of Appeals' determination, Plaintiffs' claims are time-barred under Michigan's three-year statute of limitations.

It troubling that, by maintaining that Plaintiffs have asserted an entirely new injury and claim, the Court of Appeals believed it could completely brush aside any relevance of this Court's decision in *Garg*. The court acknowledged *Garg*, but simply concluded in a non sequitur that this Court's "abrogation of the continuing wrongs doctrine is not relevant to the issues presented here" because the Plaintiffs had "filed their complaint within the applicable limitations period." 6/1/17 Op. at 7. Without further action from this Court, other courts may make the same analytical error.

B. Permitting The Court Of Appeals' Decision To Stand Imposes Considerable Costs On The Businesses Community.

The Court of Appeals' decision below deprives defendants, and in particular businesses, of needed predictability, with the result that they will be hindered as they seek to structure their activities, manage their costs, and take remedial actions.

The decision below permits a plaintiff to evade a clear statute of limitations by relying on a single report as the basis for a "new" property injury, where virtually identical information had been publicly reported, disclosed, and disseminated for decades prior. Armed with the Court of Appeals' decision, enterprising plaintiffs' lawyers will be able to resurrect decades-old, time-barred claims whenever a "new" report surfaces retreading the same subject matter. The ability of a creative Plaintiffs' attorney, or a court, to characterize later harm as a new injury is precisely the type of risk that this Court's decision in *Garg* was intended to guard against.

Businesses are put at considerable risk if they are unable to reliably predict when a court might construe a later harm as a new "injury" that restarts the limitations period. As time passes, defendants become less able to meaningfully respond to or defend against stale claims. *Cf Trentadue*, 479 Mich at 393 (rejecting discovery rule because "the expectations of defendants . . .

are harmed when a plaintiff brings claims long after an event occurred"). "Defendants must, at some point, be able to safely dispose of business records and other seemingly mundane evidence that they would have no reason to expect could exculpate them in litigation." *Id.* at 393-94.

In addition, if businesses cannot determine when potential liability will cease, operating costs will prove highly unpredictable. The Court of Appeals' decision makes it difficult for businesses that operate in Michigan, or those that are considering moving to the state, to predict their legal risks reliably and make investments accordingly.

As this Court recognized in *Garg* and *Trentadue*, the Michigan Legislature has the institutional authority to balance the interests of defendants and plaintiffs. In striking that balance, the Legislature has determined that embracing the continuing violations doctrine is not worth the costs. This Court should grant Dow's application for leave to appeal to reaffirm that determination.

* * *

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the Chamber of Commerce of the United States of America respectfully requests that this Court grant Defendant-Appellant Dow Chemical Company's application for leave to appeal the Court of Appeals' decision affirming the circuit court's order denying Dow's motion for summary disposition of plaintiffs' common-law negligence and nuisance claims. In the alternative, *Amicus* requests that the Court enter a peremptory order reversing the Court of Appeals' decision and remanding to the circuit court for entry of summary disposition in Dow's favor.

Respectfully submitted,

/s/ Brian M. Schwartz
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
BRIAN M. SCHWARTZ (P69018)
150 West Jefferson
Suite 2500
Detroit, MI 48226
(313) 963-6420

JENNER & BLOCK LLP
MATTHEW S. HELLMAN
(*pro hac vice pending*)
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000

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Attorneys for Amicus Curiae the Chamber of Commerce of the United States of America