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April 22, 2014

Supreme Court of Texas  
Supreme Court Building  
201 W. 14th Street, Room 104  
Austin, Texas 78701

Re: No. 13-0961; *Occidental Chemical Corporation v. Jason Jenkins*

To the Honorable Texas Supreme Court:

This letter is submitted on behalf of amicus curiae the Chamber of Commerce of the United States of America (the “U.S. Chamber”) and the American Chemistry Council (“ACC”). The U.S. Chamber is the world’s largest federation of businesses and associations. It has 300,000 direct members and represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and in every geographic region of the country – including Texas, where many of the U.S. Chamber’s members are headquartered or otherwise conduct business. ACC represents leading companies engaged in the business of chemistry, which in Texas alone generates payrolls of \$7.3 billion and directly provides over 73,000 jobs. An important function of both the U.S. Chamber and ACC is to represent the interests of their members in important matters before the courts, legislatures, and executive agencies. Both amici support the position advocated by Occidental Chemical Corporation (“Occidental”) in the above-referenced petition for review. The purpose of this letter is to urge the Supreme Court to request briefing on the merits of the case and to inform the Court that amici intend to submit a full amicus curiae brief in support of the petition in the event that merits briefing is indeed requested.<sup>1</sup>

The U.S. Chamber and ACC urge the Supreme Court to grant briefing on the merits and accept the petition for review in order to clarify Texas law on the scope of a former property owner’s common law duties. As construed by the court of appeals in the present case, Texas common law now permits property owners to be held liable for negligence in the design and construction of improvements to the realty long after it has been sold to new owners. Imposing an ongoing duty of care on a former owner, who no longer has any right or ability to control, ameliorate, or eliminate an allegedly dangerous condition on the property, makes no policy sense. It is also contrary to the majority rule, embodied in § 352 of the Restatement (Second) of Torts, that the seller of real property is not liable for physical harm caused to the buyer or to others by any dangerous condition that existed at the time the buyer took possession of the property.

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<sup>1</sup> Pursuant to Rule 11, Texas Rules of Appellate Procedure, all fees for the preparation and submission of this amicus letter are being paid by amici.

In the case at hand, the plaintiff's injury did not occur until eight years after Occidental had sold its former facility to a new, unrelated owner. Elsewhere in the country, that sale would have extinguished any ongoing duty of care by Occidental, which no longer controlled the property on which the plaintiff's injury occurred. The court of appeals departed from that rule by holding that a former property owner could continue to be held liable in negligence for the allegedly defective design of an improvement located on the property. That unwarranted expansion of negligence and premises liability law puts Texas out of step with the remainder of the country and threatens to burden property owners with potentially endless liability for the condition of their property, even long after their ownership has ended. The U.S. Chamber and ACC therefore urge the Court to grant merits briefing and grant the petition for review in order to reaffirm Texas' adherence to the principle embodied by § 352 of the Restatement.

The U.S. Chamber and ACC also support Occidental's position on the court of appeals' unwarranted and unnecessarily restrictive reading of the two statutes of repose at issue in this case. Even if Texas law were to recognize a former property owner's continuing obligation for the condition of that property, the Texas Civil Practice & Remedies Code already provides for a 10-year statute of repose for claims relating to the design, plan, or inspection of an improvement to real property (§16.008), as well as for claims relating to the construction or repair of an improvement to real property (§ 16.009).

Statutes of repose provide needed certainty to businesses, property owners, and individuals that they will not be subject to indefinite liability for actions taken long before a claimant's alleged injury. They reflect the policy judgment of the Legislature that the passage of time alone should provide "absolute protection to certain parties from the burden of indefinite potential liability." *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003). In this instance, the plaintiff's injury did not occur until 14 years after the improvement at issue was designed, constructed, and installed at Occidental's facility. Yet under the court of appeals' interpretation of §§ 16.008 and 16.009, Occidental and other property owners may now be held liable in perpetuity for improvements made under the supervision of the owners' professional engineers and constructed or installed by the owner's contractors. That outcome is plainly contrary to the legislative intent embodied in the text of §§ 16.008 and 16.009.

That result is also bad policy. Unlike statutes of limitation, which begin to run once a *plaintiff's* claim has accrued, statutes of repose are keyed to the *defendant's* conduct, beginning to run at the time of the allegedly tortious acts. Where a statute of limitation encourages prompt action by plaintiffs once a cause of action has accrued, a statute of repose provides potential defendants with peace-of-mind that their actions will not expose them to liability in perpetuity. There are a host of policy advantages to keying liability limitations to the defendant's conduct. Among other things, perpetual liability incentivizes companies to act unreasonably in an attempt to avoid liability. The courts benefit as well, by limiting stale claims that would otherwise clog dockets and frustrate judicial economy. Keying liability limitations to the defendant's conduct, then, is intended to facilitate both finality and predictability for economic actors – two crucial features of a legal environment that can sustain a well-functioning and expanding economy. The court of appeals disrupted the Legislature's careful balance between the competing public policy goals of making injured plaintiffs whole on the one hand, and preserving court resources and providing predictability and finality to economic actors on the other.

Ultimately, it will be the Texas economy and Texas courts that bear the consequences of the court of appeals' decision to expand property owners' tort liability and to depart from the Legislature's clear command on the statutes of repose. This Court should grant briefing on the merits and, ultimately, the petition for review in order to prevent those erroneous holdings from eliminating those valuable protections for Texas businesses and other property owners.

The U.S. Chamber and ACC thank the Court for its consideration, and they look forward to addressing the issues more fully on the merits.

Sincerely,

*/s/ Richard A. Smith*

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Chamber of Commerce of the United States of America  
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## Participants Added or Updated

Name	Role	Email
Richard A Smith	Attorney	
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American Chemistry Council	Amicus Curiae	