

No. 11-1074

IN THE
Supreme Court of the United States

JACOBS ENGINEERING GROUP INC.,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

**On Petition for a Writ of Certiorari to
the Minnesota Supreme Court**

**BRIEF FOR *AMICI CURIAE* ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, ASSOCIATED
GENERAL CONTRACTORS OF MINNESOTA,
AMERICAN COUNCIL OF ENGINEERING
COMPANIES, AMERICAN COUNCIL OF
ENGINEERING COMPANIES OF MINNESOTA,
AMERICAN SOCIETY OF CIVIL ENGINEERS,
MINNESOTA SECTION OF AMERICAN SOCIETY OF
CIVIL ENGINEERS, AND CONSTRUCTION INDUSTRY
ROUND TABLE IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST¹

The Associated General Contractors of America (“AGC”) is a nationwide trade association of construction contractors and related firms. AGC was formed in 1918 when President Woodrow Wilson asked the construction contractors critical to the country’s future to create an organization that could facilitate communication with and among those firms. Today, AGC is the recognized leader of the construction industry in the United States. It has approximately 32,000 members across the country. It has 95 chapters representing its members at the state and local levels.

AGC members engage in the construction of public and private buildings, including offices, apartments, hospitals, laboratories, schools, shopping centers, factories and warehouses. They also construct the public and private infrastructure that serves as the critical starting point for nearly all other economic activity, including highways, bridges, tunnels, airports, power lines, power plants, clean and waste water facilities, and the utilities necessary for housing development.

AGC members also have considerable expertise in the insurance that construction contractors require to manage and spread their cost of risk. Within

¹ No part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution intended to fund to the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made such a monetary contribution. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici curiae*’s intent to file this brief and granted consent. Copies of the consent letters have been filed with the Clerk.

most of the larger contractors are experts in the procurement and administration of insurance programs. In addition, AGC's "associate" members include hundreds of the insurance brokers and carriers that arrange and provide insurance to construction contractors.

The Associated General Contractors of Minnesota ("AGCM") is a non-profit professional trade association representing general contractors and trade subcontractors in the construction industry. Founded in 1919, AGCM was the first state chapter of the Associated General Contractors of America. Dedicated to the development and promotion of excellence and opportunity in the construction industry, AGCM has more than 440 members in Minnesota, including general contractors, trade and specialty subcontractors and industry-related affiliate members. AGCM is Minnesota's largest and most active construction-related trade association, with an emphasis on industry sectors involving general building and commercial construction, highway/heavy and utility construction and industrial construction. Few non-residential construction projects get built in Minnesota without the involvement of at least one AGCM member.

The American Council of Engineering Companies ("ACEC") is the national non-profit trade association of the engineering industry, representing more than 5,000 firms throughout the country. Founded in 1909, ACEC's mission is to advance America's prosperity, health, safety and welfare through legislative advocacy and business education services on behalf of the engineering industry. ACEC is organized into 51 state and regional member

organizations. ACEC's member firms employ more than 500,000 engineers, architects, surveyors, scientists, and other specialists responsible for more than \$200 billion of private and public works annually.

The American Council of Engineering Companies of Minnesota ("ACEC/MN") represents over 150 firms totaling over 4,500 employees. Formed in 1949, ACEC/MN is the leading business practice and policy advocate for consulting engineering firms in Minnesota. ACEC/MN member firms provide services to all segments of society, including federal, state and local governments, private industry and the general public. ACEC/MN's mission is to advance the engineering industry for the public good through government advocacy, outreach to client groups, business practice education for our member firms, and encouraging the pursuit of careers in engineering.

Founded in 1852, the American Society of Civil Engineers ("ASCE") is an educational and scientific society representing more than 141,000 members worldwide, including some 110,000 engineers and comprising hundreds of technical and geographic organizations, chapters, and committees. Its objective is to advance the science and profession of engineering to enhance the welfare of humanity. ASCE facilitates education in the science of engineering by publishing technical and professional papers, books, standards, codes, and other works; by conducting educational conferences, seminars, and other forums related to the engineering field; and by encouraging and promoting professionalism, leadership, career growth, and environmental

stewardship within the profession to protect the public health and safety and improve quality of life.

The Minnesota Section of ASCE has 1,300 members, including nearly 800 licensed engineers, who work or reside in Minnesota. Its activities include sponsorship of continuing education meetings and programs; public outreach in support of education in math, science, engineering and technology; and advocacy for infrastructure and sustainability initiatives in Minnesota.

The Construction Industry Round Table (“CIRT”) is a national trade association of approximately 110 CEOs from the leading design (architectural and/or engineering) firms and construction companies in the United States. Initially launched in 1987 as the Construction Industry President’s Forum, CIRT was incorporated in 1998 as a not-for-profit association with the mission “to be a force for positive change in the construction industry.” CIRT serves a distinctive role as a single voice representing the richly diverse and dynamic design and construction community. CIRT’s CEO members represent firms that directly hire more than 500,000 employees and do billions of dollars of both public and private sector infrastructure work across the country in all 50 states and around the globe. These projects contribute directly to the quality of life unparalleled in human history enjoyed by all Americans, as well as the economic vitality and competitiveness of the nation.

Amici curiae and their members have a great interest and an enormous stake in the outcome of this case. Architects, engineers, and construction contractors design and construct countless

improvements to real property across the country each and every year. If properly maintained, these structures have nearly indefinite lives. Most last for decades. Many last for generations. Some last for centuries. Design and construction firms, however, rarely have any control over a structure—or any responsibility for maintaining it—once it is completed. Statutes of repose, which exist in 50 American jurisdictions, recognize that as a matter of sound public policy architects, engineers, and construction contractors should not be required to defend against claims or be held liable for projects completed many years in the past. If the design and construction industry cannot rely upon such repose statutes, the risk of future liability may grow so large and uncertain that it defies any of the known tools for design and construction risk management.

The decision below holds that some 40 years after the completion of a large public construction project, and some 25 years after the relevant statute of repose extinguished all claims that might arise out of the design or construction of that project, a state legislature may retroactively revive such claims and seek to shift the state's own costs onto designers and builders. If allowed to stand, the decision below will set a very troubling precedent. It will greatly complicate the design and construction of the public and private works vital to the American economy. If a statute of repose can be nullified retroactively, architects, designers, and construction firms will have to bear unknown and unknowable risks of liability extending into the indefinite future. The construction projects which serve as the starting point for so much of America's economic activity are

far too important to reduce to such a riverboat gamble.

STATEMENT

The I-35W Bridge

In 1962, the State of Minnesota contracted for the construction of a bridge in Minneapolis spanning the Mississippi River. The bridge was substantially completed and opened to traffic in 1967. Forty years later, on August 1, 2007, the bridge collapsed, causing 13 deaths and many more injuries.

A number of private contractors were involved in the bridge project. In 1962, the State hired Sverdrup & Parcel and Associates, Inc., to design the bridge. Sverdrup certified the final design plans in March 1965, and the Minnesota Department of Highways approved the design plans in June 1965. Hurcon, Inc., and Industrial Construction Company built the bridge. The latter company constructed the steel trusses and deck used in the bridge. See Minn. Dep't of Transp. ("Mn/DOT"), *Interstate 35W Mississippi River Bridge, Minneapolis Fact Sheet 1* (Oct. 16, 2007), <http://www.dot.state.mn.us/i35wbridge/pdfs/factsheet.pdf>.

The I-35W bridge was built as a steel deck truss bridge. The bridge's design was based upon the American Association of State Highway Officials' *Standard Specifications for Highway Bridges* (1961) and *Interim Specifications* (1961 and 1962) and the Minnesota Highway Department's *Standard Specifications for Highway Construction* (1964). The average life span of a deck steel truss bridge is about 50 years.

The 1,907 foot-long I-35W bridge “was built at a time when the bulk of the nation’s freight moved by rail and not by massive eighteen-wheel trucks. It was built to carry approximately 60,000 cars per day.” Barry B. LePatner, *Too Big to Fall: America’s Failing Infrastructure and the Way Forward* 5 (2010) (hereinafter, *Too Big to Fall*). “By 2007, the year the bridge collapsed, approximately 160,000 cars were passing over it every day.” *Id.* at 5-6. And the weight of the traffic on the bridge (due to greater traffic volumes and heavier truck loads), and the weight of the bridge itself (due to modifications in 1977 and 1998), “was significantly greater than the structure’s design load.” *Id.* at 6. At the time of its collapse, the bridge carried eight lanes of traffic, four northbound and four southbound.

Pursuant to federally-mandated inspections, the I-35W bridge had been classified as “Structurally Deficient” every year from 1991 to 2007. See National Transp. Safety Bd., *Accident Report: Collapse of I-35W Highway Bridge, Minneapolis, Minnesota, August 1, 2007* 49 (Nov. 14, 2008), <http://www.dot.state.mn.us/i35wbridge/ntsb/finalreport.pdf> (hereinafter, NTSB Report); see also 23 C.F.R. §§ 650.307, 650.311 (requiring states to inspect highway bridges at regular intervals). From 1991 to 2007, the bridge’s superstructure was rated as in “Poor Condition,” meaning that the “Superstructure has advanced deterioration. Members may be significantly bent or misaligned. Connection failure may be imminent.” NTSB Report 49-50.

Sverdrup and the other companies involved in the bridge’s design and construction in the 1960s were

not involved in the maintenance of the bridge in the four decades between its completion and collapse. The State of Minnesota owned and operated the bridge and was responsible for inspecting and maintaining it.

Analyses of the cause of the bridge's collapse vary. *Compare, e.g.*, NTSB Report 152 (concluding that the probable cause of the collapse was design error and the failure of quality control procedures by Sverdrup as well as inadequate design review and inadequate inspections by federal and state transportation officials) *with Too Big to Fall* 4-5 (“The I-35W Bridge was ultimately brought down by a long history of inadequate maintenance resulting from managerial and financial shortsightedness.”); *id.* at 9 (“The most obvious starting point of this disaster must include the failure by Mn/DOT to provide needed maintenance for a bridge that was deteriorating for many years.”).

Minnesota's Statute of Repose

In its 1962 contract with the State of Minnesota, Sverdrup agreed to indemnify the State from all claims arising out of its work. Sverdrup no longer exists; a successor company, Sverdrup Corporation, merged with Petitioner Jacobs Engineering Group Inc., in 1999. The State contends that Jacobs is required to reimburse it for its payment of claims alleging that Sverdrup negligently designed the bridge. Pet. App. 3a-5a.

By 1982, Minnesota's statute of repose, Minn. Stat. § 541.051, extinguished any liability Sverdrup had arising from its work on the bridge. First enacted in 1965, the statute of repose provided that “any action

for damages, including an action for contribution or indemnity, arising out of the defective and unsafe condition of an improvement to real property, could not be brought * * * more than ten years after the completion of the construction.” *In re Individual 35W Bridge Litig.*, 806 N.W.2d 811, 816 (Minn. 2011) (companion case). In 1980, the statute of repose was amended to extend the repose period “from ten to fifteen years after substantial completion of the construction.” *Id.* In the decision below, the Minnesota Supreme Court held that “the 1980 version of the statute of repose in section 541.051 was applicable to the State’s action for contractual indemnity against Jacobs, and that action was extinguished in 1982.” Pet. App. 8a.

In 2008, after the I-35W bridge collapse, the Minnesota Legislature enacted a new statute (“the compensation statute”) providing that the State may recover from its contractors any payments made by the State to bridge collapse victims to the extent that the contractor caused or contributed to the collapse. *See* Minn. Stat. § 3.7394, subd. 5(a).

The Decision Below

Because the compensation statute is operative “[n]otwithstanding any statutory or common law to the contrary,” *id.*, the Minnesota Supreme Court held that it “retroactively revived the State’s cause of action for statutory reimbursement previously extinguished by the statute of repose in 1982.” Pet. App. 10a. The compensation statute therefore “retroactively revives the State’s cause of action for statutory reimbursement against Jacobs that was previously extinguished by the statute of repose.” Pet. App. 11a.

The Minnesota Supreme Court also held that the compensation statute “does not violate [the] constitutional right to due process by retroactively reviving a cause of action previously extinguished by the statute of repose.” Pet. App. 20a. The court below recognized that “when the repose period expires, a statute of repose defense ripens into a protectable property right.” Pet. App. 16a. But the court concluded that the compensation statute did not violate due process because it “satisfies the rational basis test.” Pet. App. 19a.

SUMMARY OF ARGUMENT

The question presented is very important to the design and construction industry. Statutes of repose are vital to the industry and advance important public policies. If a state can retroactively revive claims extinguished by a statute of repose, the industry will not be able to rely on such statutes.

The insurance industry cannot provide the design and construction industry with an effective means of spreading the risk or otherwise stabilizing the cost of claims that a statute of repose has extinguished but a state may later revive.

The issue in this case will likely recur. America’s infrastructure is aging and deteriorating. A life-threatening failure of infrastructure can occur anywhere at any time. The next time a mass disaster occurs, the decision below, if allowed to stand, will serve as a precedent for other states to revive reposed claims, as Minnesota did here.

ARGUMENT

I. The Petition for Certiorari Presents a Legal Question of Great Importance to the Design and Construction Industry.

This case and the constitutional issue it raises are of great concern to the American design and construction industry. The legal question, as framed and decided by the Minnesota Supreme Court, is whether a state’s “retroactive revival of claims extinguished by [a] statute of repose violates due process.” Pet. App. 18a. The court below decided that the retroactive revival of reposed claims does not violate due process so long as the state can show a rational basis for doing so. That is a very troubling constitutional ruling, because it means that no architect, engineer, or builder can ever rely upon a statute of repose in assessing whether it might someday be sued or held liable for old construction projects completed many decades in the past.

Statutes of repose “impos[e] time limitations upon lawsuits against architects, engineers and builders for injury to persons, injury to property or death arising out of the defective or unsafe condition of an improvement to real property.”² The statutes of repose applicable to construction projects “usually begin to run on the date of substantial completion, acceptance, or first use of the improvement.”

² Martha Ratnoff Fleisher, Annotation, *Validity, as to Claim Alleging Design or Building Defects, of Statute Imposing Time Limitations Upon Action Against Architect, Engineer, or Builder for Injury or Death Arising Out of Defective or Unsafe Condition of Improvement to Real Property*, 5 A.L.R.6th 497, 516 (2005).

Josephine Herring Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627, 631 (1985) (footnotes omitted).

Forty-eight States (all except New York and Vermont) plus the District of Columbia and Puerto Rico have statutes of repose that bar claims arising from improvements to real property after the passage of a certain number of years (usually ten or more years).³ See generally Allen Holt Gwyn & Paul E. Davis, *Statutes of Repose*, 21 Construction Lawyer 33 (2001).

Congress enacted the District of Columbia's statute of repose in 1972. The Senate report described the important public policy served by statutes of repose:

³ See Ala. Code § 6-5-221; Alaska Stat. § 09.10.055; Ariz. Rev. Stat. § 12-552; Ark. Code § 16-56-11; Cal. Civ. Proc. Code § 337.15; Colo. Rev. Stat. § 13-80-104; Conn. Gen. Stat. § 52-584a; 10 Del. Code § 8127; D.C. Code § 120310; Fla. Stat. § 95.11; Ga. Code § 9-3-51; Haw. Rev. Stat. 657-8; Idaho Code § 5-241; 735 Ill. Comp. Stat. § 5/13-214(b); Ind. Code § 32-30-1-5; Iowa Code § 614.1[11]; Kan. Stat. § 60-513(b); Ky. Rev Stat. § 413.135; La. Rev. Stat. § 9.2772; 14 Me. Rev. Stat. § 752-A; Md. Code, Cts. & Jud. Proc. § 5-108; Mass. Gen. Laws ch. 260, § 2B; Mich. Comp. Laws § 600.5839; Minn. Stat. § 541.051; Mo. Rev. Stat. § 516.097; Mont. Code § 27-2-208; Neb. Rev. Stat. § 25-223; Nev. Rev. Stat. §§ 11.202-11.205; N.H. Rev. Stat. § 508:4-b; N.J. Stat. § 2A:14-1.1; N.M. Stat. § 37-1-27; N.C. Gen. Stat. §§ 1-50(a)(5); N.D. Cent. Code § 28-01-44(1); Ohio Rev. Code § 2305.131; Okla. Stat. tit. 12 § 109; Or. Rev. Stat. § 12.135; 42 Pa. Cons. Stat. § 5536; P.R. Laws tit. 31 § 4124; R.I. Gen. Laws § 9-1-29; S.C. Code § 15-3-640; S.D. Codified Laws § 15-2A-3; Tenn. Code § 28-3-202; Tex. Civ. Prac. & Rem. Code §§ 16.008-16.009; Utah Code § 78B-2-225; Va. Code § 8.01-250; Wash. Rev. Code § 4.16.310; W. Va. Code § 55-2-6a; Wis. Stat. § 893.89; Wyo. Stat. § 1-3-111.

Architects who design buildings or improvements to real property, engineers who design and install equipment, or contractors, who build the improvements under rigid inspection and conformity with building codes, may find themselves named as defendants in such damage suits 20 years after the improvement was completed and occupied. Moreover, architects, engineers, and contractors have no control over an owner whose neglect in maintaining an improvement may cause dangerous or unsafe conditions to develop over a period of years. They cannot prevent an owner from using an improvement for purposes for which it was not designed. Nor can they prevent the owner of a building from making alterations or changes which may, years afterward, be determined unsafe or defective and appear to be a part of the original improvement. Can it be doubted that to allow actions without regard to a reasonable time limitation imposes a difficult evidentiary burden on design professionals and their progenies? This proposed legislation strikes the balance between the rights of injured parties to seek recovery on the one hand, and the substantial interest of the design professions to have finality to their work on the other. After a considerable amount of examination of the interests of both design professionals and consumers, we believe that as a matter of sound policy and fairness, a 10-year limit should be established within which actions against design professionals must be brought.

S. Rep. No. 92-1274, 92d Cong., 2d Sess. 1-2 (1972).

Speaking of repose statutes generally, this Court has explained that such statutes “afford[] plaintiffs what the legislature deems a reasonable time to present their claims” and “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *United States v. Kubrick*, 444 U.S. 111, 117 (1979). “[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Id.* (internal quotation marks omitted).

The need for statutes of repose is especially pressing in the context of the design and construction industry. Modern structures, whether a bridge, a building, a water main, or some other construct, have very long lifespans and can last for many decades. Yet all physical structures inevitably deteriorate over time, and they do so more rapidly if they are not properly maintained. Thus, absent a statute of response, an architect, designer, or builder may find itself defending in a lawsuit and facing liability several decades after it has finished its work on a project.⁴ Such lawsuits can put the defendant in an untenable position, for three reasons.

First, it can be unfair to force a builder to defend decisions and choices made decades earlier because important documents may be discarded or lost over

⁴ See Hicks, 38 Vand. L. Rev. at 632 (“Responsibility for * * * ‘permanent’ or durable improvements expose [the construction industry] to abnormally long periods of potential liability and unusually large numbers of potential plaintiffs.”).

time and key witnesses, if they are still alive and can be found, may have forgotten the relevant events.⁵ Sverdrup, the company that designed the I-35W bridge, ceased to exist in 1999 when it merged with Jacobs. But Jacobs is liable to the State of Minnesota under the compensation statute for Sverdrup's actions more than 40 years ago.

The NTSB's investigation into the bridge collapse itself demonstrates the problem of lost records and faded memories. The NTSB reported that "Jacobs Engineering was unable to locate the original Sverdrup & Parcel calculations that had been used in designing the main truss gusset plates on the I-35W bridge. Nor did Mn/DOT, in its bridge construction files, have the calculations for the main truss gusset plates." NTSB Report 102. *See also id.* at 102 n.48 (noting that Jacobs could not locate a particular Sverdrup procedures manual from the 1960s). The NTSB interviewed the former Sverdrup engineer who would have been responsible for checking the designs and design calculations of the bridge's truss connections, but the engineer (who retired in 1992 after 41 years with Sverdrup) "did not specifically recall working on the I-35W project." *Id.* at 105.

Second, when the deterioration or failure of a bridge, building, or other man-made structure

⁵ See Andrew Alpern, Note, *Statutes of Repose and the Construction Industry: A Proposal for New York*, 12 Cardozo L. Rev. 1975, 1979 (1991) ("[B]ecause of a high level of turnover in the construction industry, the people with knowledge about any particular project leave for other jobs, and can no longer be located to serve as defense witnesses.").

results in injury many years after the project's completion, the cause of the injury may be a faulty design or construction, but the cause could also be the owner's failure to properly maintain the structure.⁶ The designer or builder is unlikely to have had any involvement in or responsibility for maintaining the structure.⁷ Statutes of repose recognize that it can be unfair to expose the designer or builder to liability many years after it has ceased to have any control over the structure.⁸ A designer or builder that has no control over the structure once it is completed has no opportunity to discover or correct any defects in their prior work.⁹

⁶ “[B]uildings have long life spans and are particularly susceptible to deterioration. In these cases negligent maintenance, rather than improper design or specification of materials, could be the cause of injuries.” Michael J. Vardaro & Jennifer E. Waggoner, Note, *Statutes of Repose—The Design Professional’s Defense to Perpetual Liability*, 10 St. John’s J. Legal Comment. 697, 713 (1995) (footnote omitted).

⁷ See, e.g., *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 826 (Colo. 1982) (en banc) (“In most cases, it is not likely that the architect or contractor who participated in initial design would be a participant in the ownership and control of the building or its maintenance for over ten years.”).

⁸ “Although design professionals customarily are involved in the design and construction of a structure they rarely play a role in its maintenance or repair, particularly when such maintenance is to be performed over a period of many years. The unfortunate consequence is that design professionals are held liable for structures over which they exercise no control.” Vardaro & Waggoner, 10 St. John’s J. Legal Comment. at 698 (footnotes omitted).

⁹ See Alpern, 12 Cardozo L. Rev. at 1975.

In the case of the I-35W bridge, the firms involved in the design and construction of the bridge—Sverdrup, Hurcon, and Industrial Construction Company—had nothing to do with the bridge’s maintenance (or lack thereof) in the 40 years between its opening to traffic in 1967 and its tragic collapse in 2007. The State of Minnesota, which owned and operated the bridge, was responsible for inspecting and maintaining the bridge.

Third, statutes of repose are in part motivated by the concern that

A jury deciding whether a design professional was negligent in designing a structure twenty-five years ago might have a difficult time evaluating the actions of the professional in the context of the technology available at that past date and would be likely to impose standards based on present-day technology. In this scenario, the potential for prejudice to the design professional is enormous.

Vardaro & Waggoner, 10 St. John’s J. Legal Comment. at 704.

This concern, too, is borne out by the I-35W bridge collapse. Built in the 1960s, the I-35W bridge “was designed as fracture-critical, meaning that the failure of any one of its supporting structural members could result in the collapse of the whole bridge.” *Too Big to Fall* 5. At the time, such designs were common as a means of streamlining construction and saving costs. They remained common until the 1980s, when new specifications issued by the American Association of State Highway and Transportation Officials (AASHTO) led to a requirement of greater load-path

redundancy—in other words, bridges now had to be designed so that if one structural support failed, the load could be distributed among other supports in order to prevent a sudden, catastrophic collapse.

Id. See also NTSB Report 12 (“The I-35W bridge was designed and built before metal fatigue cracking in bridges was a well-understood phenomenon.”).

II. Design and Construction Firms Have No Practical Way to Manage the Risk That a State Will Revive Claims Extinguished by a Statute of Repose.

Design and construction firms have three kinds of risk management tools: operational, contractual and financial. While effective in managing many risks, these tools are not up to the task of protecting a firm from the risk that a state will revive extinguished claims. Design and construction firms can always improve their operations, but cannot erase all risk of future litigation. They can attempt to negotiate contractual protection from their clients, but the notion that their clients will agree to defend and indemnify them from third-party tort claims that may not arise for several decades seems fanciful. The third way to manage the risk that a state will revive extinguished claims is to finance and spread that risk over time, so that the cost is stable. Insurance policies are designed stabilize and spread the cost of reasonably expected losses.

The problem is that the insurance industry has nowhere near the data it would require to determine either the frequency or severity of the claims that design and construction firms should reasonably expect decades after they have completed their work.

Up to this point, statutes of repose have largely succeeded in preventing such stale claims from arising. The actuarial record is bare.

Insurance carriers would find it equally difficult to turn the problem around, and attempt to determine what it would cost them to cover claims arising out of work performed many years ago. The carriers do not have any practical way to perform an underwriting review of such work. The earlier management of the firm, and its past contractual, operational and other business practices, would be impossible to evaluate.

Unable to make any reasonable estimate of the cost of covering extinguished claims that a state may later revive, insurance carriers would be hard pressed to determine the appropriate premium to charge for such coverage. One would have to expect the insurance carriers, acting prudently, and in defense of their own balance sheets, to leave such claims uncovered, and if necessary, to exclude them.

Design firms typically purchase claims-made professional liability policies to cover the risk of a loss arising out of their design work. Such a policy only covers claims made against the insured (1) during the policy period and (2) arising out of services rendered since a retroactive date that the insured has negotiated with its insurance carrier, and the two have specified in the policy itself. That retroactive date can advance, particularly as design firms change insurance carriers, putting such firms at risk of a gap in their professional liability coverage. In addition to their many other benefits, statutes of repose limit the risk of any such gap in coverage. Unless this Court grants the petition and

reverses the decision below, the risk of such gaps in coverage will increase tremendously. Unable to price the risk of pushing retroactive dates on professional liability policies back to the point where they will cover all work that a firm has ever performed or inherited, prudent insurance carriers will not be likely to take that step.

Over time, the scope of services that construction contractors provide to their clients has tended to expand, and today, many of those services also fall into the professional category. Indeed, many of today's contractors are design-build firms that assume the responsibility for both designing and constructing improvements to real property. For that reason, many of today's construction contractors also purchase professional liability policies, and they will also bear the risk of any increase in the gaps in the professional liability coverage available in the marketplace.

Construction contractors also purchase occurrence-based commercial general liability ("CGL") policies that will indemnify them for any amounts they become legally obligated to pay for bodily injury or property damage caused by any "occurrence" during the policy period. Such CGL policies typically cover both ongoing and completed operations, without regard to any retroactive date. The pricing of such CGL policies does, however, take statutes of repose into account. If insurance carriers cannot rely on statutes of repose to cut off liability for completed operations, and they lack the data they need to determine the cost of adding coverage for the apparently extinguished claims, the logic of the situation will similarly lead them to resort to time

limits on their CGL coverage for completed operations. Indeed, there is every reason to expect that significant gaps would also begin to plague CGL coverage.

Many of today's largest construction projects have "wrap-up" insurance programs that provide CGL coverage for all of the firms working on those projects, displacing the insurance that each firm has independently purchased, insofar as it would apply to that project. It is already typical for such wrap-up programs to limit CGL coverage for completed operations to a certain number of years. The insurance industry is already familiar with time limits on CGL coverage for completed operations and it would require little effort to add such limits to all CGL policies.

Without insurance premiums to guide them, or any other means of pricing the risk that a state will revive extinguished claims, design and construction firms would find that risk equally difficult to self-finance. At the end of the day, they would be compelled to put their balance sheets on the line, and for the indefinite future, each and every time they undertook a new project.

III. The Issue in This Case Is Likely to Recur.

This case arose from a bridge collapse. The next case could involve a highway or a water works. Sadly, the state of America's infrastructure is such that it would be foolish to think that another tragic failure will not occur in the future. Of course, the issue in this case could just as easily arise from the collapse of a privately owned structure, such as a hospital or hotel.

America's infrastructure is in a state of significant disrepair. In 2009, the American Society of Civil Engineers reported that "the overall condition of our nation's infrastructure—including its dams, wastewater treatment plants, power grid, roads, and bridges—deserves a grade no higher than D." *Too Big to Fall* xix. "The U.S. transportation system includes over 600,000 bridges, of which nearly a quarter are deemed to be either 'structurally deficient' or 'functionally obsolete.'" *Id.* at xx. And "there are 7,980 bridges in our nation today facing the same problems that the I-35W bridge encountered in the years leading up to its collapse." *Id.* at xxi. The Interstate Highway System "has more than 55,000 bridges, many of which are reaching 40 to 50 years of age." American Ass'n of State Highway & Transp. Officials, *Rough Roads Ahead: Fix Them Now or Pay for it Later* 19 (2009), http://roughroads.transportation.org/RoughRoads_FullReport.pdf (hereinafter, *Rough Roads*).

American roadways, too, are in poor shape. "Our outdated and overused road system is falling apart. Vehicular travel on America's roads increased 41 percent between 1990 and 2006, while miles of available roads increased by only 4 percent." *Too Big to Fall* xxii. "Years of wear and tear, unrelenting traffic, an explosion of heavy trucks, deferred maintenance, harsh weather conditions, and soaring construction costs have taken their toll on American roads." *Rough Roads* vi. "The number of miles driven in this country jumped more than 41 percent from 1990 to 2007—from 2.1 trillion miles in 1990 to 3 trillion in 2007." *Id.* "In some major urban centers, more than 60 percent of roads are in poor

condition.” *Id.* Thus, the underlying conditions that gave rise to this litigation continue to exist—and they will only become worse.

Given the advanced (and advancing) age of our national infrastructure, inevitable deterioration, and the shortage of public funds for proper maintenance, a life-threatening event can occur anywhere, any time. One such event occurred in the Washington, D.C. metropolitan area just one year after the I-35W bridge collapse. On December 23, 2008, a 66-inch-diameter water main burst, sending a four-foot wave of water down River Road in Bethesda, Maryland. Fortunately, no lives were lost, but dozens of motorists were imperiled. An analysis blamed the incident on the improper installation of the concrete pipe by the contractor in 1965. *See* Katherine Shaver, *Contractor Incorrectly Installed Water Main That Burst on Bethesda’s River Road*, Wash. Post, May 21, 2009.

When mass disasters occur, the government often seeks to provide compensation to the victims—and seeks to recover from other parties, including for government’s own liabilities, as happened in this case.¹⁰ When claims are barred by a statute of repose, the decision below will encourage governments to retroactively revive those claims, as Minnesota did in this case. And this is not an isolated occurrence. The petition cites numerous

¹⁰ This Court has recognized that it “makes sense to scrutinize governmental action more closely when the State stands to benefit.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993) (internal quotation marks omitted).

cases involving attempts by states to retroactively revive liabilities foreclosed by statutes of repose. *See* Pet. 10-12 & n.6; *see also Waller v. Pittsburgh Corning Corp.*, 946 F.2d 1514, 1515 (10th Cir. 1991) (involving Kansas amendment “purporting to revive actions which would otherwise be barred by operation of the statute [of repose]”). This is not the first time that a State has retroactively revived liabilities that had been settled by a statute of repose. Nor will it be the last—unless this Court grants the petition and holds that the retroactive revival of reposed claims is unconstitutional.

CONCLUSION

The petition for certiorari should be granted.

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