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

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS
JONATHAN F. COHN
JOSHUA J. FOUGERE
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

JAMES DUFFY O'CONNOR*
DAVID F. HERR
KIRK O. KOLBO
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200
james.oconnor@maslon.com

Counsel for Petitioner Jacobs Engineering Group Inc.

* Counsel of Record

May 7, 2012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI	1
I. THE LOWER COURTS ARE DEEPLY DIVIDED	1
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT	5
III. THIS COURT HAS JURISDICTION	8
IV. THE DECISION BELOW CARRIES SIGNIFICANT IMPLICATIONS FOR THE NATIONAL ECONOMY	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

Campbell v. *Holt*, 115 U.S. 620 (1885) 2
Chase Sec. Corp. v. *Donaldson*, 325 U.S. 304 (1945) 6
Colony Hill Condo. I Ass'n v. *Colony Co.*, 320 S.E.2d 273 (N.C. Ct. App. 1984), *review denied*, 325 S.E.2d 485 (N.C. 1985) 3, 6
Davis v. *Valley Distrib. Co.*, 522 F.2d 827 (9th Cir. 1975) 6
Dua v. *Comcast Cable of Md., Inc.*, 805 A.2d 1061 (Md. 2002) 4
Flynt v. *Ohio*, 451 U.S. 619 (1981)..... 8
Givens v. *Anchor Packing, Inc.*, 466 N.W.2d 771 (Neb. 1991) 2
Int'l Union of Elec. Radio & Mach. Workers v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976) 6
Keller v. *City of Freemont*, 790 N.W.2d 711 (Neb. 2010) 2
Kelly v. *Marcantonio*, 678 A.2d 873 (R.I. 1996) 2
Local No. 438 Constr. & Gen. Laborers' Union v. *Curry*, 371 U.S. 542 (1963) 9
McDonald v. *Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008) 6
Mercantile Nat'l Bank at Dall. v. *Langdeau*, 371 U.S. 555 (1963) 9
Methodist Healthcare Sys. of San Antonio, Ltd. v. *Rankin*, 307 S.W.3d 283 (Tex. 2010) 6
Miracle v. *N.C. Local Gov't Emps. Ret. Sys.*, 477 S.E.2d 204 (N.C. Ct. App. 1996) 3
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 9

TABLE OF AUTHORITIES—continued

	Page
Pelland v. *Rhode Island*, 317 F. Supp. 2d 86 (D.R.I. 2004)	3
R.I. Depositors Econ. Prot. Corp. v. *Brown*, 659 A.2d 95 (R.I. 1995)	3
Rosenblatt v. *Am. Cyanamid Co.*, 86 S. Ct. 1 (1965)	9
Shadburne-Vinton v. *Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995)	7, 8
Shivaee v. *Commonwealth*, 613 S.E.2d 570 (Va. 2005)	2
Stogner v. *California*, 539 U.S. 607 (2003)	4, 7
Swisher Int'l, Inc. v. *Schafer*, 550 F.3d 1046 (11th Cir. 2008)	4
William Danzer & Co. v. *Gulf & Ship Island R.R.*, 268 U.S. 633 (1925)	3, 5
Yee v. *City of Escondido*, 503 U.S. 519 (1992)	8

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The State's opposition only confirms the need for this Court's review. According to the State, statutes of repose are "a matter of public policy based on legislative judgment." Opp. 26. Shorn of euphemism, the State's position is that repose statutes are subject to repeal at any time and provide no protection beyond the political whims of the legislature. A state may wield its "legislative judgment" whenever it wants, and neither the Constitution nor the courts have much to say about it.

This is a frightening proposition in its own right, but it is especially troublesome here because the State has nullified Jacobs' twenty-five-year-old right to be free from liability in order to protect its own treasury from a financial burden. As Jacobs and its amici have explained, this issue is recurring, the lower courts are sharply divided, and only this Court can restore the Constitution's proper role in protecting repose rights against such self-dealing and claimed legislative omnipotence. The petition for certiorari should be granted and the decision below reversed.

I. THE LOWER COURTS ARE DEEPLY DIVIDED.

The conflict among the lower courts is stark and unmistakable. Minnesota, the Fourth Circuit, and the D.C. Circuit (and Kansas in dictum) have all found that a state may constitutionally revive a liability that was long ago extinguished by a statute of repose. At least six other states, by contrast, have held (correctly) that such retroactive legislation is unconstitutional. Pet. 10–12.

The State makes no headway in attempting to refute this split of authority. Opp. 20. For instance, the State asserts that cases from Virginia and Nebraska are inapposite because they were made "pursuant to particular state constitution due process clauses." Opp. 22. But, the State ignores the fact that Virginia and Nebraska, like Minnesota, expressly interpret their due process clauses coextensively with the federal constitution—as Jacobs pointed out in its petition (Pet. 11). See *Keller* v. *City of Freemont*, 790 N.W.2d 711, 713 (Neb. 2010) (per curiam); *Shivaee* v. *Commonwealth*, 613 S.E.2d 570, 574 (Va. 2005). The State fails even to cite *Keller* or *Shivaee*. Instead, it baldly asserts that Virginia and Nebraska apply a "stricter" due process standard than the federal constitution. Unsurprisingly, this erroneous statement comes without any citation to any state case so holding. Opp. 22.[1]

Nor is the State's attempt to discount Rhode Island persuasive. The State relies on *Kelly* v. *Marcantonio*, 678 A.2d 873, 883 (R.I. 1996) (recognizing that states are "free to interpret and to construe their own … constitutional due process … provisions"), but that case concerned a statute of limitations, not a statute of repose. *Id.* at 874. Further, the State does not

---

[1] The Nebraska Supreme Court's brief discussion of *Campbell* v. *Holt*, 115 U.S. 620 (1885), and its dissent in *Givens* v. *Anchor Packing, Inc.*, 466 N.W.2d 771, 774 (Neb. 1991), is inconsequential. There is no conflict between *Givens* and *Campbell* because *Givens* concerned a statute of repose, which "extinguished" a cause of action, 466 N.W.2d at 773, whereas *Campbell* concerned a statute of limitations, 115 U.S. at 621. Further, as noted, the Nebraska Supreme Court has since made clear that it interprets state constitutional protections "coextensive to those of the federal Constitution," and "ha[s] not afforded greater state constitutional protections." *Keller*, 790 N.W.2d at 713.

dispute that the Rhode Island Supreme Court has generally analyzed due process challenges to retroactive legislation under the federal and Rhode Island constitutions as one and the same. *R.I. Depositors Econ. Prot. Corp.* v. *Brown*, 659 A.2d 95, 101–04 (R.I. 1995). Nor does the State contest that the due process analysis has been called "identical" under both constitutions. *Pelland* v. *Rhode Island*, 317 F. Supp. 2d 86, 97 (D.R.I. 2004).

For North Carolina, the State makes two points, but neither is sound. First, the State contends that the relevant discussion in *Colony Hill* is dicta. Opp. 22 (citing *Colony Hill Condo. I Ass'n* v. *Colony Co.*, 320 S.E.2d 273, 277 (N.C. Ct. App. 1984), *review denied*, 325 S.E.2d 485 (N.C. 1985)). That is simply wrong. The court squarely held that "revival of the defendants' liability to suit, long after they have been statutorily entitled to believe it does not exist … would … deprive them of due process." *Colony Hill*, 320 S.E.2d at 276. Accordingly, the court declined to construe a later statute in a way that would immediately render it unconstitutional. *Id.*

Next, the State argues that *Colony Hill* should be ignored because it does not "mention, let alone address, *Usery*, *Pension Benefit* or *General Motors Corp*." Opp. 22. But, as Jacobs has already explained, none of those cases concerned repose statutes, and none overruled *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), *sub silentio*. Pet. 15–16. Far from being a point of fault, the North Caroina court's "fail[ure]" to address those inapposite cases is perfectly understandable.[2]

---

[2] The State's additional citation to *Miracle* v. *North Carolina Local Government Employees Retirement System*, 477 S.E.2d 204 (N.C. Ct. App. 1996), adds nothing. That case does not address

For similar reasons, the State fares no better with Wisconsin or Maryland. It seeks to discount the pertinent authorities because they "were decided years before this Court's due process clause analysis of retroactive statutes in *Usery*, *Pension Benefit* and *General Motors Corp*." Opp. 21. But, again, this is of no consequence because that due process analysis did not address repose statutes and did not overrule *Danzer*.[3] Indeed, this Court subsequently reaffirmed *Danzer* in *Stogner* v. *California*, 539 U.S. 607, 631–32 (2003), which the State fails to cite or acknowledge.

Nor is there any merit to the State's assertion that the Wisconsin and Maryland decisions are strictly limited to statutes that simultaneously create the cause of action and the repose period in the same piece of legislation. Opp. 21. As discussed below, such a limitation is utterly nonsensical. See *infra* § II. The Constitution does not turn on whether a legislature completes its business in one step or two.

At bottom, the State's scramble of meritless arguments only highlights the deep divide in the lower courts. To the extent the State's opposition adds anything, it is the point that all twelve federal circuits have weighed in—not just the Fourth and D.C. Circuits. Opp. 20–21.[4] But, regardless of

---

a statute of repose and did not even decide whether the retroactive legislation at issue violated due process because the record had not been sufficiently developed. *Id.* at 209–10.

[3] *Dua* v. *Comcast Cable of Maryland, Inc.*, 805 A.2d 1061 (Md. 2002), cited by the State, Opp. 21, likewise does not concern statutes of repose. 805 A.2d at 1065.

[4] In all candor, none of the cases cited from the other ten circuits concerns the retroactive revival of a defendant's liability that was previously extinguished by a statute of repose. Opp. 20–21. Worse, some are not even about retroactive legislation at all. *See*, *e.g.*, *Swisher Int'l, Inc.* v. *Schafer*, 550 F.3d 1046, 1058

whether twelve or two circuits have sided with Minnesota, there is an entrenched and irreconcilable conflict in the lower courts, which only this Court can resolve.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

Having swung and missed at the split, the State contends that the decision below does not conflict with *Danzer* and its progeny. This, too, is meritless. *Danzer* squarely holds that a statute purporting to nullify a defendant's settled property right to be free from liability pursuant to a repose statute violates Due Process, and subsequent cases confirm that holding. See Pet. 12–14.

The State offers a grab bag of arguments hoping to challenge *Danzer*'s applicability, but every one of them falls short. First, the State asserts that *Danzer* "is not controlling authority" because it is "limited to claims in which the limitations period is created at the same time as the cause of action." Opp. 13 (citing *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 312 n.8 (1945)). But that arbitrary distinction is found nowhere in *Danzer*, which simply turned on the attempted resurrection of a liability that had already been extinguished, not on the happenstance of whether the repose statute was enacted in the same piece of legislation as the cause of action. *Danzer*, 268 U.S. at 636 (due process violation stemmed from

---

(11th Cir. 2008) ("The crucial difference between the instant case and *Eastern Enterprises* is that the obligation imposed upon Swisher in the instant case is not retroactive."). The State is misguided.

the fact that "the lapse of time … destroyed the liability of defendant").[5]

Other courts have properly recognized as much. See, *e.g.*, *Davis* v. *Valley Distrib. Co.*, 522 F.2d 827, 830 n.7 (9th Cir. 1975) ("A close reading of *Chase Securities* indicates that the Supreme Court did not distinguish *Danzer* on the ground that the limitations provision was contained in the statute that created the substantive liability."); *Colony Hill*, 320 S.E.2d at 275–77; Pet. 10–15. And for good reason: Repose statutes protect defendants from "never-ending uncertainty as to liability," *Methodist Healthcare Sys. of San Antonio, Ltd.* v. *Rankin*, 307 S.W.3d 283, 286 (Tex. 2010), regardless of whether they are enacted "at the same time as," or before or after, the cause of action creating the liability, Opp. 13. Statutes of repose are "'concerned with … defendant[s'] peace,'" *McDonald* v. *Sun Oil Co.*, 548 F.3d 774, 779–80 (9th Cir. 2008), and that peace is no less pronounced when the legislature passes two statutes instead of one. Further, under the State's logic, statutes of repose would afford virtually no protection in the context of common law causes of action, which, by definition, are not "created at the same time as" the repose period.

Second, the State casts aspersions on *Danzer* as a relic of the "*Lochner* era." Opp. 6, 13. But *Danzer*

---

[5] As noted in the Petition, *Chase* is distinguishable because it concerned a statute of limitations, not a statute of repose. Pet. 13; *see also Int'l Union of Elec. Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243–44 (1976) (statute of limitations case). Further, *Chase* recognized that the legislature need not enact the repose provision in the same statute as the substantive cause of action. 325 U.S. at 312 n.8. Finally, unlike *Chase*, here there is unquestionably a property right, as the Minnesota Supreme Court held. Pet. App. 11a–18a.

and its principles have long endured and continue to be cited by this Court. See, *e.g.*, *Stogner,* 539 U.S. at 631–32. In any event, it is not up to the State of Minnesota (or any other lower court) to decide for itself the lifespan of this Court's precedent. See Pet. 13–15.

Third, the State maintains that *Danzer* is inapposite because Jacobs "did not rely on the statute of repose in contracting with the State and designing the Bridge." Opp. 14; see also *id.* at 25. This argument is simply odd. Neither *Danzer* nor this petition concerns a contract or promissory estoppel claim, and thus reliance at the time of contracting is irrelevant. What matters is that, once the repose period expired, Jacobs had a settled expectation and a property right to be immune from suit, and the State destroyed that right when it resurrected liability for its own benefit.

Finally, the State argues that *Danzer* should not be considered because "the Minnesota Supreme Court did not have the opportunity to address [Jacobs'] contention regarding the … decision." Opp. 12–13. But there is no question that the Minnesota Supreme Court had an opportunity to address *Danzer*. Indeed, the State itself cited *Danzer*: In its brief, the State alleged that "Jacobs erroneously relied below on [*Danzer*]" and went on to try to distinguish and criticize the case as "no longer good law." Br. of Respondent State of Minn. at 28 n.12, *In re Individual 35W Bridge Litig.*, Nos. A10-87 et al. (Minn. Jan. 18, 2011). Moreover, as the State recognizes, the decision below "based its due process analysis" in part on *Shadburne-Vinton* v. *Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995), which also discussed *Danzer*, *id.* at 1074–76, and which had a dissent that contended *Danzer*

controlled, *id.* at 1078–81. That Jacobs concentrated on *Danzer*'s progeny in its brief below does not diminish the indisputable fact that the issue was squarely presented and decided. See also *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

Stripped to its core, the State's position is that *Danzer* is too old to be followed, the rational basis test is outcome-determinative, and Jacobs has conceded that it is satisfied here. Opp. 7, 15–20, 27. This creative attempt to sweep the entire dispute under the rug, however, is entirely baseless, and Jacobs does in fact "contest," "challenge," and "dispute[]" whether the reimbursement statute survives scrutiny. Under this Court's precedent, it clearly does not. Pet. 12–16.

III. THIS COURT HAS JURISDICTION.

Section 1257(a) confers jurisdiction over this case, Pet. 18–19, and the State's contention to the contrary is meritless. The thrust of the State's argument rests on the notion that a federal constitutional right to be free from liability and immune from suit is in no way eroded by forcing Jacobs to wade through the hassle and expense of a lawsuit. Opp. 7–11. To state this proposition is to expose its fallacy.

Flynt v. *Ohio*, 451 U.S. 619 (1981) (per curiam), the focus of the State's argument, is inapposite. Not only did "other federal issues [remain] to be resolved," *id.* at 621, which is not the case here, but *Flynt* concerned an Equal Protection claim about selective enforcement of criminal obscenity laws, *id.* at 620—a

claim that is not remotely analogous to a federal right to be immune from suit altogether.[6]

Instead, *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963) and *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963) are the closest analogies, and both firmly support jurisdiction. Pet. 18–19. If anything, the federal interest here is more significant: Whereas "the federal policy" in those cases concerned which tribunal "had jurisdiction to hear those actions in the first instance," Opp. 11, the federal due process right at issue here concerns whether *any* tribunal can hear the State's action in *any* instance. Section 1257 presents no barrier to this Court's review of that claim.[7] See also *Rosenblatt*, 86 S. Ct. at 3 & n.7; cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 524–30 & n.8 (1985) (denial of qualified immunity is appealable final decision).

---

[6] The State mentions four other cases denying jurisdiction but they are similarly off base. Two (*Guillen* and *Jefferson*) are cited for the proposition that a win for Jacobs on remand could moot the federal question. Opp. 8. But that was the case in *Langdeau* and *Curry* as well. And, "since the federal right is one not to stand trial, the possible outcome of a trial is … irrelevant." *Rosenblatt* v. *Am. Cyanamid Co.*, 86 S. Ct. 1, 3 n.7 (1965) (Goldberg, J. in Chambers). The other two (*Johnson* and *Thomas*, Opp. 9) are inapposite for the same reason *Flynt* is—they do not concern anything like a federal right to be free from liability and immune from suit.

[7] Contrary to the State's assertion, Jacobs has not suggested that Minnesota interlocutory rules control the federal jurisdictional question. Opp. 10. The citation to the lower court's interlocutory ruling merely described the nature of the due process right at issue. Pet. 19.

IV. THE DECISION BELOW CARRIES SIGNIFICANT IMPLICATIONS FOR THE NATIONAL ECONOMY.

Jacobs and its amici have demonstrated at length the significant consequences of the decision below for the engineering industry and many other sectors of the national economy. See Pet. 16–18; Br. for Amici Curiae. Repose statutes exist in at least 50 jurisdictions and are "vital" to the industries that they protect. Br. for Amici Curiae 10–18. If these protections can be abolished retroactively, potential defendants and their insurers "will have to bear unknown and unknowable risks of liability extending into the indefinite future." *Id.* at 5.

In response to these concerns, the State asks for special treatment based on the supposedly "extraordinary" circumstances of its case. Opp. 24–25. This is a typical tack: Every legislature seeking to retroactively revive extinguished liabilities can be counted on to assert that its unconstitutional conduct is justifiable in light of the special circumstances the government faced. As Jacobs' amici have explained, however, this issue has arisen before and is bound to recur unless this Court promptly intervenes. Br. for Amici Curiae 21–24. Nothing renders Minnesota's situation singularly "extraordinary" or worthy of a constitutional exception. Opp. 24.

In truth, the State ultimately agrees that this is no one-of-a-kind case. When push comes to shove, it fully embraces a claim of essentially unchecked state power regardless of the circumstances. Opp. 19, 26–27. The State contends that statutes of repose are merely "matters of public policy," subject to retroactive abrogation whenever a state chooses and no matter how settled a party's expectations have become. Worse, the State argues that it can do so

even when the claims at issue are its own and even when it unabashedly purports to award itself an advantage that no other litigant could.

This Court's review is necessary to set the record straight. A state's ability to revive liabilities long-extinguished under a statute of repose is far from endless; it is barred by the Constitution. The State's arbitrary self-dealing in this case violates due process, and the magnitude, reach, and recurring nature of these issues warrants this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
JONATHAN F. COHN
JOSHUA J. FOUGERE
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

JAMES DUFFY O'CONNOR*
DAVID F. HERR
KIRK O. KOLBO
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200
james.oconnor@maslon.com

Counsel for Petitioner Jacobs Engineering Group Inc.

* Counsel of Record

May 7, 2012