

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 10 WAP 2025

CLEARFIELD COUNTY, PENNSYLVANIA,
Plaintiff-Appellant,

v.

TRANSYSTEMS CORPORATION successor to L. ROBERT KIMBALL
AND ASSOCIATES; LEONARD S. FIORE, INC; and
SHOWALTER MASONRY, INC.,
Defendants-Appellees

Brief of Amici Curiae American Council of Engineering Companies of
Pennsylvania, American Institute of Architects of Pennsylvania,
Associated Builders and Contractors – Eastern, Keystone and Western
Chapters, Pennsylvania-Delaware Chapter of the American Society of
Landscape Architects, Structural Engineers Association of
Pennsylvania, Pennsylvania Society of Professional Engineers

Appeal from the Order of the Commonwealth Court of Pennsylvania at
193 C.D.2024, dated November 1, 2024, affirming the Order of Court of
Common Pleas of Clearfield County, Case No. 2023-31-CD dated
February 15, 2024

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STATEMENT OF INTEREST OF AMICI CURIAE

The American Council of Engineering Companies of Pennsylvania; the American Institute of Architects of Pennsylvania; the Associated Builders and Contractors- Eastern, Keystone, and Western Chapters, the Pennsylvania-Delaware Chapter of the American Society of Landscape Architects; the Structural Engineers Association of Pennsylvania; and Pennsylvania Society of Professional Engineers jointly submit this *amici curiae* brief seeking an order affirming the dismissal of Plaintiffs' action based upon the applicable construction statute of repose ("Statute of Repose"). *See* 42 Pa.C.S. §5536.

ACEC/PA, now in its 57th year, works to enhance public understanding of the critical work performed by consulting engineers and the importance of quality engineering to a construction project's success. ACEC/PA members particularly focus on large public projects that drive quality of life and economic growth in Pennsylvania. ACEC/PA represents more than 120 independent consulting engineering firms with over 11,000

engineers, land surveyors, and other licensed design professionals engaged in the practice of engineering under Pennsylvania's Engineer, Land Surveyor and Geologist Registration Law. 63 P.S. §148, *et seq.*

Founded in 1909, as the statewide component of the American Institute of Architects, AIA Pennsylvania ("AIA PA") currently has over 3,000 statewide members engaged in the practice of architecture. AIA PA is committed to advancing the architectural profession by providing its members with resources, advocacy, and professional development opportunities to support successful practice in the built environment. Under Pennsylvania's Architects Licensure Law, individuals and architectural firms performing architectural services in Pennsylvania are required to be registered. 63 P.S. §34.101, *et seq.*

The Associated Builders and Contractors Eastern, Keystone, and Western Chapters ("ABC") work to advocate, train, and develop the construction workforce, supporting the construction industry. ABC promotes the "merit shop" selection, a philosophy that encourages open

competition and free enterprise in the construction industry. These three ABC Chapters encompass all of Pennsylvania and have more than 1,650 members.

The Pennsylvania-Delaware Chapter of the American Society of Landscape Architects (“PA-DE ASLA”), established 85 years ago, is the pre-eminent professional association of registered landscape architects. PA-DE ASLA represents nearly 600 landscape architects individually licensed. PA-DE ASLA strives to advance the practice of landscape architecture by encouraging members to be leaders in design and advocates for the construction industry.

The Structural Engineers Association of Pennsylvania (“SEAoP”), established in 2009, is a statewide organization for consulting structural engineers aiming to advance the practice of structural engineering in Pennsylvania. SEAoP represents over 300 structural engineering members from more than 75 engineering firms in Pennsylvania. SEAoP members focus on improving structural engineering services provided throughout Pennsylvania.

The Pennsylvania Society of Professional Engineers (PSPE) was established in 1933, in tandem with the National Society of Professional

Engineers, to unify the network of engineers and protect the profession's standards of excellence. PSPE has over 1,000 members statewide, including presidents, owners, and consulting engineers who significantly impact professional advancements and societal impacts in the Commonwealth.

Together, *Amici* support the application of a uniform and rational judicial test that comports with the plain language, historical background, and the legislative intent associated with adoption of the Construction Statute of Repose.¹ Consistent application of the statute of repose to both private and public projects in conformity with legislative intent and this Court's longstanding precedent is crucial to the construction industry. The Construction Statute of Repose is critically important to licensed design professionals and contractors who created business policies in reliance upon the unambiguous language, including record retention and insurance maintenance policies. Here, both the trial court and the Commonwealth Court appropriately barred Clearfield County's stale

¹ Pursuant to Pa.R.A.P. 531(b)(2), *Amici* file this brief in their own right and on behalf of their respective members. *Amici* state that no person, other than their respective members and counsel, paid for or authored this brief.

design and construction claims brought well outside the repose period.

Accordingly, *Amici* seek a finding that Pennsylvania's Construction Statute of Repose abolished Clearfield County's cause of action for alleged design and construction errors on a county jail project, which was substantially completed in 1981. In the instant matter, an Occupancy Permit was issued for the jail on March 4, 1981. Clearfield County's claims all arise from voluntarily entered design and construction contracts.

The doctrine of *nullum tempus occurrit regi* (*nullum tempus*) does not relieve the County from the legislatively adopted Construction Statute of Repose. Indeed, the Statute of Repose abrogates the common law doctrine. Moreover, because this appeal involves an action where the County, acting as a market participant voluntarily entered into construction contracts for design and construction, the common law doctrine of *nullum tempus* simply does not apply.

SUMMARY OF ARGUMENT

Pennsylvania's Construction Statute of Repose completely abolishes and eliminates causes of action for design and construction deficiencies commenced more than 12 years after completion of construction of an improvement to real property. The text of the Statute of Repose is clear and unambiguous reflecting a deliberate legislative policy that all claims of alleged errors or omissions on any construction project are extinguished 12 years after completion. This appeal turns on the plain meaning of the Construction Statute of Repose and the interplay of the common law doctrine of *nullum tempus*. The Construction Statute of Repose creates a jurisdictional bar, which legislatively abolishes *any* cause of action after 12 years. Simply stated, the common law doctrine of *nullum tempus* does not toll Pennsylvania's Construction Statute of Repose.

The enactment of the Construction Statute of Repose sought to address expanding liability resulting from the elimination of contractual privity requirements for suits against design professionals and contractors. Because construction projects have a long-life cycle, the Legislature adopted the Construction Statute of Repose eliminating a

cause of action against an architect, engineer, or contractor – in some cases even before a cause of action arises. Section 5536 states that a civil action brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages....” 42 Pa.CS §5536. There is no legislative exception for a public project.

The common law doctrine of *nullum tempus*, translated from Latin means “time does not run against the king”, does not apply to Clearfield County for several reasons. First, *nullum tempus* does not apply to a County engaged in the construction of a jail. Second, even if Clearfield County was entitled to assert the doctrine of *nullum tempus*, the doctrine does not apply to a statute of limitation (let alone a statute of repose) in an action arising from a voluntary public contract. Third, the doctrine of *nullum tempus* is abrogated by the Construction Statute of Repose, which creates a jurisdictional bar eliminating any cause of action.

ARGUMENT

I. This Court Must Reject the County's Attempt to Revive a Cause for an Alleged Design or Construction Omission Forty-One Years After Substantial Completion.

A. The History, Adoption, and Plain Meaning of Pennsylvania's Construction Statute of Repose Requires Dismissal of the County's Lawsuit.

Design and construction services, which improve real estate, are intended to long outlive the client and the owner. Furthermore, buildings and infrastructure improvements are built with the expectation that renovations and improvements will be made by owners to extend the useful life. These are critical distinctions between improvements to real estate and commercial products and services. Because improvements to real property have a long post-construction lifespan, during which owners exclusively control, maintain, and renovate the improvement, it has long been recognized that there must be a moment after which licensed design professionals and construction contractors are no longer exposed to liability. *See* Margaret A. Cotter, *Limitation of Action Statutes for Architects and Builders – Blueprints for Non-Action*, 18 Catholic Univ. L. Rev. 361, 361 (1969).

Historically, at common law, design professionals and contractors

were protected from indeterminate liability as injured parties were required to be in privity of contract. See Richard P. Gilardi, *The Unsettled Foundation of the Pennsylvania Construction Projects Statute of Repose*, 30 Duq. L. Rev. 681, 684 (1992). As the common law evolved in the early 1960s, eroding the requirement for contractual privity and thereby exposing licensed design professionals and contractors to claims for defective design and construction of improvements to real property, statutes of repose began to be enacted across the country. *Id.* at 685. The eradication of privity also coincided with the growing trend of judicial adoption of the discovery rule for the accrual of a cause of action allowing tolling of an applicable statute of limitations. Cotter, *supra* at 364; see *Nesbitt v. Erie Coach Co.*, 416 Pa. 89 (1964); see also *Pocono Int’l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80 (1983).

Construction statutes of repose, like Pennsylvania’s Section 5536 were specifically developed to redress precisely such broadening liability and the unmanageable risk in the construction industry. These statutes “provide a fresh start or freedom from liability,” *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014), offering needed certainty by

“cutting off a defendant’s liability after a given number of years,” which, in turn, facilitates “efficient business planning” to the benefit of “consumers[] and the economy,” *Yanakos v. UPMC*, 218 A.3d 1214, 1223 (Pa. 2019) (citation and quotation marks omitted). Statutes of repose also serve the laudable goal of “protecting parties from the prosecution of stale claims, when, by loss of evidence from the death of some witnesses and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth.”

Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1868). Here, Clearfield County avers a breach of contract against the architect and contractor but acknowledges that no one has the actual contracts for the project. This appeal is the epitome of the type of construction dispute the Legislature laid to rest with the adoption of the Statute of Repose.

Critically, architects and engineers who sign and seal drawings and specifications are exposed to individual liability for design errors or omissions. As a matter of public policy, Pennsylvania prohibits individual design professionals from seeking indemnity for liability arising out of the practice of architecture or engineering. *See* 68 P.S. § 491. Together, these developments and changes spurred the adoption of

construction statutes of repose across the country. To this end, forty-eight (48) states have construction statutes of repose. Pennsylvania has one of the two longest construction statutes of repose in the nation. Accordingly, Pennsylvania provides more time for property owners to bring actions than almost any other jurisdiction in the country.

In adopting Pennsylvania's Construction Statute of Repose, the General Assembly used unambiguous terms indicating its intent to require that *any* lawsuits brought against a class of individuals "must be initiated within 12 years of completion." H.R. Leg. J. Vol. 1, No. 86, 149th Pa. Gen. Assemb., 1965 Sess. at 2243 (1965) (statement of Rep. Charles F. Mebus on S.B. 307, Act 469 of 1965).² To this end, the remarks on the Journal state, in relevant part, as follows:

This I believe to be a fair period of time for the owner to judge the work.

This bill provides that suits for improper professional conduct must be initiated within 12 years of completion. After this period of time, it becomes exceedingly difficult, if not impossible, to provide proper and complete defense against the

² Pennsylvania enacted its first construction-related statute of repose 60 years ago. *See* 12 Pa. C.S. §65.1 (repealed). The Statute of Repose curtailed the time within which a plaintiff could sue for injuries arising out of defects relating to construction and improvements to real property. *Id.* The construction statute of repose required claimants to bring a lawsuit within 12 years of completion and has the effect of creating a jurisdictional bar to any claims not asserted within that period. *Id.* (Act 469 of 1965 was the predecessor to Section 5536 of Judicial Code).

allegations which may be brought against him.
This results from several things:

1. Records, however good, may have become lost or destroyed.
2. Associates or employees may have died, moved to new jobs or gone out of business.
3. Even if all the parties are available, their memories have faded.

Id.

The General Assembly elected to apply the Statute of Repose expressly to “any improvement to real property.” 42 Pa.CS. §5536. Moreover, statutes of repose stand in sharp contrast to general statutes of limitations. The latter, of course, begin to run when a claim accrues and often are subject to equitable tolling, tying commencement of the limitations period to the plaintiff and their diligence in discovering their injury and its cause. *See Dubose v. Quinlan*, 173 A.3d 634, 644–645 (Pa. 2017).

On the other hand, statutes of repose “run from the date of the last culpable act or omission of the defendant,” *Kornfield v. New Werner Holding Co.*, 241 A.3d 1212, 1220 (Pa. 2022), and may “bar a plaintiff’s suit” even “*before the cause of action arises*,” *McConnaughey v. Building*

Components, Inc., 637 A.2d 1331, 1332 n.1 (Pa. 1994) (opinion announcing the judgment of the court) (emphasis added). Moreover, while a statute of limitations is procedural, Pennsylvania's Construction Statute of Repose is substantive in nature because it extinguishes a cause of action precluding its revival. *See Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270 (1978). It is well established that a statute of repose commences after a determined period of time and is not subject to tolling.

In Pennsylvania, the Construction Statute of Repose has been repeatedly interpreted by this Court as extinguishing a cause of action. Indeed, the Construction Statute of Repose has been interpreted as extinguishing a cause of action before one even arises.

Under the Pennsylvania Constitution, the General Assembly plainly has the power to establish causes of action and to eliminate causes of action. In this instance, the Legislature made a clear policy choice to eliminate *any* cause of action against a design professional or contractor furnishing design, planning, or construction phase services 12 years after completion of the improvement. This legislative judgement is based, in part, upon economic policy decisions without

regard to whether the individual or entity contracting was a public or private entity.

In adopting the Statute of Repose, the Legislature used clear language to establish a cutoff for *any* design and construction claims. There is no limitation to a private project or any exception for a public project. Rather, Section 5536 provides, in relevant part, as follows:

(a) General rule. Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction, or construction of the improvement.

(2) Injury to property, real or personal, arising out of any such deficiency.

42 Pa. C.S. §5536.

This Court, applying the unambiguous text, has routinely held that Section 5536 and its predecessor is a Statute of Repose. By definition statutes of repose “set a designated event for the statutory period to start running and then provide that at the expiration of that

period any cause of action is barred regardless of usual reasons for ‘tolling’....” Restatement (Second) of Torts § 899 comment g (1979). The definition of the term repose is to lie at rest; to lie dead; to remain still or concealed. This Court has repeatedly stated that the Pennsylvania Construction Statute of Repose completely eliminates all causes of action arising out of negligence in design or construction of an improvement to real property.³ *Misitis v. Steel Piping City Co.*, 441 Pa. 339, 343 (1971) *See also, Vargo v. Koppers Co., Inc., Eng’g & Constr. Div.*, 552 Pa. 371, 376 (1998) (holding that Section 5536 “is a statute of repose, not a statute of limitations”); *Noll v. Harrisburg Area YMCA*, 537 Pa. 274, 280 (1994) (identifying Section 5536 as a statute of repose which “completely abolishes and eliminates the cause of action”); *McCormick v. Columbus Conveyor Co.*, 522 Pa. 520, 522 (1989) (identifying Section 5536 as a statute of repose). Interpreting the instant Construction Statute of Repose, this Court found that the Legislature could abolish a judicially recognized cause of action before it even accrues. *See Freezer Storage*, 476 Pa. at 281 In

³ As defined in *Black’s Law Dictionary*, “repose” means “a statutory period after which an action cannot be brought in court, even if it expires before the plaintiff suffers any injury.” *Black’s Law Dictionary* (12th ed. 2024).

Freezer, the Court concluded that the 12-year limitation of the Construction Statue of Repose “rests on real distinctions” and that the Court, therefore, had no discretion to review the legislative judgment. *See Freezer* 476 at 278.

Here, the Construction Statute of Repose runs from substantial completion of the improvement to real property. In the case of a building, that is generally understood to be when the building is suitable for occupancy. In this case, there is no dispute that the Pennsylvania Department of Labor & Industry issued the Certificate of Occupancy for the jail on March 4, 1981.

Clearfield County, without providing any rationale or case law, asserts that the common law doctrine of *nullum tempus* (time does not run against the king) exempts its cause of action arising from its contracts for the design and construction from the plain and unambiguous operation of the Construction Statute of Repose. There is no basis for Clearfield County’s claim. Indeed, the text of the statute and this Court’s precedent make plain that the Construction Statute of Repose eliminates Clearfield County’s cause of action 12 years after

Substantial Completion.⁴ Rather than stopping time from running, Clearfield County asks this Court to judicially grant it a cause of action where one no longer exists because the Legislature eliminated the cause of action against the architect, engineer, and contractor.

B. Clearfield County is not entitled to assert the common law doctrine of *Nullum Tempus* as it is acting as a market-participant, is not a Commonwealth agency, and is not enforcing an obligation imposed by the Pennsylvania Constitution or any Statute.

The common law doctrine of *nullum tempus* does not apply to Clearfield County as it is participating as a market participant voluntarily contracting for design and construction services. Simply stated, Clearfield County's causes of action sounding in breach of contract do not accrue to either a political subdivision or Commonwealth agency in their governmental capacity. Rather, the lawsuit involves claims associated with a breach of contract voluntarily entered into for the design and construction of a building. *See*

⁴ Clearfield County's argument leads to an absurd result, which is prohibited by the Statutory Construction Act. 1 Pa. C.S. § 1922(1). If successful, Clearfield's assertion of *nullum tempus* naturally leads to the Statute of Repose providing absolutely no protection for design professionals or contractors on public projects. Simply stated, a Commonwealth Agency or Political Subdivision, which was sued by a third party for bodily injury or property damage after the running of the Statute of Repose, could successfully join the architect, engineer, or contractor. Accordingly, Clearfield County's argument in contravention of the plain and unambiguous language of the 12-year Construction Statute of Repose makes it inapplicable to an entire segment of the construction industry – public projects. This is an absurd and unreasonable result not intended by the General Assembly.

Pennsylvania Turnpike Commission v. Atlantic Richfield Co., 482 Pa. 615 (1978) (holding that a Commonwealth Agency could not assert *nullum tempus* to avoid the statute of limitations because the case involved “an agreement voluntarily entered into by the Commission” and not a public right).

For more than a century, Pennsylvania exclusively reserved immunity from statutes of limitations for the Commonwealth. *City of Philadelphia v. Glado*, 216 A.3d 811, 820 (Pa. 2019); *City of Philadelphia v. Holmes Electric Protective Co.*, 335 Pa. 273 (1939); *Evans v. Erie County*, 66 Pa. 222, 228 (1870). In *City of Philadelphia v. Holmes Electric Protective Company of Philadelphia*, this Court stated that “the immunity of the sovereign from subjection to statutes of limitations does not, in the absence of express provisions to the contrary, extend to municipalities, counties, townships or boroughs.” *City of Philadelphia v. Holmes Elec. Protective Co. of Philadelphia*, 335 Pa. 273 (1939) (emphasis added) (citing *Evans*, 66 Pa. 222, 228 (1870)); *Commonwealth v. Perry*, 330 Pa. 355, 360, 199 A. 204 (1938). The *Holmes* court determined that *nullum tempus* is only available to political subdivisions to defeat statutes of limitations in extremely

narrow circumstances:

Statutes of limitations cannot be pleaded against such political subdivisions when they are seeking to enforce *strictly public rights*, that is, when the cause of action accrues to them in their governmental capacity and the suit is brought to enforce an obligation imposed by law as distinguished from one arising out of an agreement voluntarily entered into by the defendant.

Id (emphasis added).

Courts have interpreted *Holmes* as establishing a two-part test to determine whether a political subdivision, such as Clearfield County, may benefit from the doctrine of *nullum tempus*. *Mongomery County v. MicroVote Corp.*, 152 F. Supp. 2d 784, 788 (E.D. Pa. 2001), *aff'd* 320 F.3d 440 (3d Cir. 2003). Under this line of lower court decisions, in order for a political subdivision to benefit from *nullum tempus* the claim must: (1) accrue to it in its governmental capacity; and (2) seek enforcement of an obligation imposed by law rather than a voluntary agreement. *Id.* To benefit from *nullum tempus* and defeat the generally applicable statute of limitations defense, a county **must** meet both elements.

Amazingly, Clearfield County does not analyze or even cite this

Court's decision in *Holmes*. Rather, Clearfield County contends that this is an issue of first impression for this Court and argues that public policy justifies extending *nullum tempus* not only to counties that voluntarily contract for design and construction services but as a bar to the Construction Statute of Repose. This is not a new issue for this Court. Clearfield County cannot satisfy the elements of *Holmes* or avoid the natural consequences of this Court's decision in *Turnpike Commission v. Atlantic Richfield Co.*, 482 Pa. 615 (1978).

This Court has explained the rationale behind the doctrine of *nullum tempus* as follows:

Whenever the Commonwealth invokes the doctrine of *nullum tempus*, it is seeking as a plaintiff to vindicate public rights and protect public property. Thus, since its adoption in this country, the rationale for the doctrine of *nullum tempus* has been "the great public policy of preserving public rights, revenues and property from injury and loss."

Dep't of Transp. v. J. W. Bishop & Co., 497 Pa. 58, 64 (1981) (applying *nullum tempus* to a trespass action brought by PennDOT against private companies for alleging damage to state bridges causing collapse). In the absence of express provisions, the doctrine does not extend to municipalities, counties, or other political subdivisions to

prevent the running of a general statute of limitation. *Northampton County Area Community College v. Dow Chemical U.S.A.*, 566 A.2d 591, 597 (Pa.Super 1989), *aff'd* 528 Pa. 502 (1991).

Here, Clearfield County not only seeks to dispose of a generally applicable statute of limitation for breach of contract using the doctrine of *nullum tempus* but argues that the doctrine relieves the County from the Pennsylvania Construction Statute of Repose. As alleged in the complaint, the jail project was designed between 1977 and the early 1980s.⁵ Clearfield County, without providing either a contract for the Architect or the General Contractor, claims negligence in the design and construction as well as a breach of contract against the architectural firm and the contractor for a project that was completed in 1981. The fact that Clearfield County was unable to locate any of the contracts leads to the result that it cannot allege with any precision the parties with which it actually contracted or the precise construction delivery method.

The alleged damages and only liquidated contractual damage

⁵ The design and construction of the jail occurred nearly forty-four (44) years ago. The County jail project was constructed reaching substantial completion with a Certificate of Occupancy issued by the Department of Labor and Industry on March 4, 1981. The jail was occupied that same year. *See Trial Court Opinion* p. 5.

averred in the County's Complaint is a claim for \$3,878,660 for change order work performed during a 2021 renovation project. The change order is allegedly associated with removing the roof deck and placing a bond beam around the perimeter of the jail. *See* Complaint Paragraph 38-40, R.R. 9a-10a. The damages alleged are purportedly related to Clearfield County's alleged contract(s) with L. Robert Kimball Associates (Architectural Firm) for architectural services and Leonard S. Fiore, Inc. (General Contractor) for construction of the County Jail. Further, the alleged damages are claimed to be a direct result of Clearfield County and its renovation contractor relying upon a set of record drawings delivered to the County by Kimball in or about 1982. The County avers that these drawings depict the bond beam.⁶ In any event, all of Clearfield County's alleged damages arise out of contracts for the original design of the jail in 1977 (Complaint ¶12; RR 6a), the original construction that was completed and a certificate of occupancy issued in 1981 (RR 293a), and when Clearfield County contracted with ABM in 2021 for renovations (Complaint ¶¶30-33 RR 8a).

⁶ It appears as though Clearfield County utilized the 1982 record drawings in entering into a public contract for renovation of the prison with ABM Building Solutions. *See Trial Court Opinion* p. 2; Complaint ¶32.

Applying the two-part *Holmes* test to these facts, Clearfield County does not even qualify for *nullum tempus* to defeat the statute of limitations. Regarding the first prong, the requirement for Clearfield County to be acting in a governmental capacity, this action arises out of the County's decision to design and construct a jail in the late 1970s and early 1980s. Clearfield County does not, and cannot, point to any statutory or constitutional requirement for the County to publicly procure design or construction contracts to build a jail. This is because there is no such provision requiring Clearfield County to contract for the design, planning, or construction of a jail. Plainly stated, Clearfield County was never obligated to design or construct a jail, it elected to do so in 1977.

The closest Clearfield County comes to identifying such a governmental capacity for its decision to design and build the jail is a Constitutional mandate for the conditions on setting bail. *See*, Appellant's Brief at pgs. 15 – 16. Clearfield County then leaps to assert that "[i]mplicit in the Constitutional mandate and statutory mandate to set conditions for bail, is the converse mandate that counties have jails to house pretrial detainees who are unable to secure bail." *Id.*, at pg. 16.

This logical leap by Clearfield County is not supported by any statute or the Constitution. There was no requirement for Clearfield County to design and construct its own jail. The Constitutional language cited by Clearfield County simply prohibits it from holding prisoners without bail except in exceptional circumstances; it is not a mandate to design and construct a jail. Lacking any such legal authority to compel it to construct a jail, the county further misses the mark by not identifying any legal requirement for Clearfield County to contract with the Defendant Appellees to design and construct a jail. Clearfield County is simply unable to establish that it was acting in a governmental capacity when it invoked the public procurement processes to contract with the Appellees for the design and construction of the building.

As to the second element of the *Holmes* test, there is no basis for Clearfield County to assert that the duties it alleges were owed by the Defendant Appellees were imposed by law rather than voluntarily assumed. There was certainly no law requiring the Appellees to contract with Clearfield County to design and construct the jail at issue. To the contrary, even Clearfield County concedes that the Appellees voluntarily entered into the alleged contracts that underlie the

construction project at issue. Had the County not acted as a market participant soliciting public bids and Appellees not entered into the alleged contracts, then Appellees would not have owed any duties that Clearfield County now alleges were breached.

In sum, Clearfield County cannot meet the elements set forth by this Court in *Holmes* to extend the doctrine of *nullum tempus* to a county to prohibit the application of a general statute of limitation. Significantly, Clearfield County never even cites the *Holmes* test or this Court's decision in *Turnpike Commission* finding that *Holmes* does not apply to an action on an agreement voluntarily entered into by a Commonwealth agency.

C. The Doctrine of *Nullum Tempus* does not apply to design or construction claims arising out of an alleged breach of a contract.

Simply stated, the doctrine of *nullum tempus* does not apply to a breach of contract action. This was the decision by this Court in the case of *Pennsylvania Turnpike Commission v. Atlantic Richfield Co.* 394 A.2d 491, 494 (Pa. 1978). That matter involved leases entered into by the Pennsylvania Turnpike Commission (a Commonwealth Agency) with ARCO, and the Turnpike Commission's effort to collect allegedly

unpaid rents ranging from 18 to 21 years overdue. *Id.* at 491. ARCO raised the statute of limitations as an affirmative defense, and the Turnpike Commission countered contending that *nullum tempus* precluded the running of the statute of limitations. *Id.* This Court ruled that *nullum tempus* was not available to the Commission because the case arose out of “an action on an agreement voluntarily entered into by the Commission....” *Id.* at 494.

This argument is similar to the second element of the *Holmes* test, but it is worth examining why *any* action for breach of contract is excluded from the doctrine of *nullum tempus*. The principle underlying the doctrine of *nullum tempus* is that government officials are too busy focusing on their duties to the Commonwealth to timely pursue common law claims; thus, by eliminating statutes of limitations the time pressure is removed and the public purse preserved. However, that rationale does not hold when applied to an alleged breach in a governmental contract. Unlike common law and tort claims, such as trespass, of which the Commonwealth may understandably be unaware, the Commonwealth is acutely aware of a contract that it voluntarily enters into. *See Pennsylvania Turnpike Commission v. Atlantic*

Richfield, supra.

To this end, the Commonwealth has always had detailed statutory and regulatory provisions governing public procurement of design and construction services by public entities. The Legislature adopted a detailed Commonwealth Procurement Code, which has an entire Chapter devoted to procurement of construction and design professional services. *See* 62 Pa. C.S. §§ 901 – 907. The policies behind applying *nullum tempus* to common law actions and actions to enforce statutes do not exist in public contracting for design and construction services.

Indeed, the Commonwealth has long waived the even more powerful doctrine of sovereign immunity as it relates to breach of contract claims. To this end, the Legislature in 1937 created the Board of Claims specifically to decide claims arising from contracts with the Commonwealth. The Board's jurisdiction was originally set forth in the Board of Claims Act, which waived sovereign immunity. *See Mckeesport Municipal Authority v. McCloskey*, 690 A.2d 766 (Pa. Cmwlth. 1997). The Board of Claims was originally recognized in the Commonwealth Procurement Code in 1998 and in 2003 fully integrated into the Commonwealth Procurement Code at 62 Pa. C.S. §§ 1721-1726. The

Procurement Code expressly waives Sovereign immunity as established in Article I Section 11 of the Pennsylvania Constitution and 1 Pa. C.S. § 2310 (relating to sovereign immunity reaffirmed). *See* 62 Pa. C.S. § 1702(b).

Unlike sovereign immunity, which is based in the Pennsylvania Constitution and reaffirmed by the Legislature in Section 2310 of the Judicial Code, *nullum tempus* is exclusively a creature of common law. The doctrine of *nullum tempus* has no foundation in the Pennsylvania Constitution or any statute. As set forth above, it exists to protect the public purse in areas of the law in which the government may be too busy to know and assert its legal claims in a timely fashion. However, if the doctrine were to be applied to breach of contract actions, the result would be detrimental to procurement and the public fisc.

Specifically, the practical effects of applying *nullum tempus* to general statutes of limitations on breach of contract actions for design and construction services would increase the costs passed on to the taxpaying public. To this end, design professionals and contractors would face potential indefinite exposure for the full duration of the 12-year Construction Statute of Repose. As such, bidders for public projects

would factor increased risks into proposals and bids. If Clearfield County's position is adopted, *nullum tempus* would extend to a county's breach of contract action indefinitely, overriding not only general statutes of limitations but also the Construction Statute of Repose. That greatly expands the common law doctrine to breach of contract claims, forcing design professionals and contractors to obtain greater insurance and factor increased risk into public proposals and bids, all of which is to the detriment of the public fisc and counter to the purpose of *nullum tempus*.

Several courts outside Pennsylvania have analyzed the history and purpose of the common law doctrine of *nullum tempus* concluding that the doctrine does not apply to breach of design or construction contracts. In *Baltimore County v. RTKL Associates*, an action arising out of a construction dispute in Baltimore County, the Court of Appeals of Maryland ruled that "[t]he entire underpinning of *nullum tempus* is therefore absent with respect to the counties and municipalities in contract actions." 846 A.2d 433, 444 (Md. 2004). Likewise, in *City of Rochester v. Marcel A. Payeur, Inc.*, also involving a construction project dispute, the Supreme Court of New Hampshire ruled that "[b]ecause

applying the doctrine of *nullum tempus* to a municipality's contract claims is not supported by the public policy underlying *nullum tempus* and undermines the public policy underlying statutes of limitations, we conclude that *nullum tempus* does not bar the application of [the statute of limitations] to the City's contract claims." 152 A.3d 878, 884 (N.H. 2016).

Similarly, the Supreme Court of New Jersey recognizes that as an aspect of sovereign immunity, *nullum tempus* does not apply to breach of contract claims involving construction. *New Jersey Educ. Facilities Auth. v. Gruzen Partnership*, 592 A.2d 559,561 (N.J. 1991). This analysis appropriately refuses to superimpose the common law doctrine in instances where the governmental entity is proceeding on private-law theories such as causes of action sounding in breach of contract against a design professional or contractor. The exact same rationale applies to the instant matter where Clearfield County seeks to pursue a breach of contract theory against both the architect and the contractor more than forty-one years after substantial completion. *See Northwest Ark. Conservation Auth. v. Crossland Heavy Contractors*, 47 F.4th 705 (8th Cir. 2022). The doctrine of *nullum tempus* simply does not apply to

displace general statutes of limitations for breach of contract, let alone Pennsylvania's specific Construction Statute of Repose.

D. The Doctrine of Nullum Tempus does not bar enforcement of the construction statute of repose, which eliminates any cause of action after the passage of 12-year period.

Even if this Court were to conclude in applying the two-part *Holmes* test that the doctrine of *nullum tempus* bars the running of the statute of limitations, *nullum tempus* does not bar the running of the Construction Statute of Repose. The Construction Statute of Repose, unlike a statute of limitations, is substantive, specifically focused on a narrow industry, and cannot be tolled.

The Construction Statute of Repose applies to a narrow class of persons who design and construct improvements to real property. The Statute of Repose actually extinguishes a plaintiff's cause of action- in many instances before the cause of action arises. Clearfield County's cause of action was eliminated before the time that the County purportedly discovered the design or construction omission of the bond beam.

This Court's precedent instructs lower courts to apply a three-part jurisdictional test to determine whether the Statute of Repose applies.

The test requires the movant to show: (1) what is supplied is an improvement to real property; (2) more than 12 years have elapsed between the completion of the improvements to the real estate and the injury; and (3) the activity of the moving party must be within the class which is protected by the statute. *McCormick*, 522 Pa. at 523-25; *see, e.g. Noll*, 537 Pa. at 281; *McConnaughey*, 536 Pa. at 99; *NVR, Inc. v. Majestic Hills, LLC*, 670 F. Supp. 3d 206, 215 (W.D. Pa. 2023), *reconsideration denied*, No. 2:18-CV-1335-NR, 2023 WL 3726895 (W.D. Pa. May 30, 2023); *Venema v. Moser Builders, Inc.*, 284 A.3d 208, 212 (Pa. Super. 2022). Application of this threshold jurisdictional test presents a legal question, which requires the dismissal of Clearfield County's lawsuit. *See Gilbert v. Synagro Cent., LLC*, 634 Pa. 651, 675 (2015) (holding "statutes of repose are jurisdictional and their scope is a question of law for courts to determine."); *see also Branton v. Nicholas Meat, LLC*, 159 A.3d 540, 546 (Pa. Super. 2017); *Venema*, 284 A.3d at 212; *Johnson v. Toll Bros., Inc.*, 302 A.3d 1231, 1234 (Pa. Super. 2023).

The Construction Statute of Repose is based upon a legislative judgment that it is in the public's economic best interest as a whole to grant immunity for architects, engineers, and contractors based upon a

legislative balance of the respective rights of potential plaintiffs and defendants. *See Goad v. Celotex Corp.* 831 F.2d 508, 511 (4th Cir. 1987). The doctrine of *nullum tempus* traces its roots in common law as an aspect of sovereign immunity and as a mechanism to prevent the affirmative defense of a statute of limitations from running against the Commonwealth.

Clearfield County's cause of action against Transystems (formerly Kimball), Fiore, and Showalter Masonry was eliminated by the Construction Statute of Repose – not barred by a statute of limitations. Unlike a statute of limitations, the 12-year ultimate repose period prescribed by the Construction Statute of Repose commences to run on the date on which an improvement to real property is substantially completed, not on the date on which an Owner knows or should have known of an injury. The 12-year statute of repose runs whether or not a public official or any other plaintiff fails to assert a claim in a timely manner or not. The public policy for exempting the Commonwealth from statutes of limitations, therefore, does not apply to the Construction Statute of Repose, which is substantive and not procedural in nature.

In an effort to circumvent the plain language of the Statute of Repose, Clearfield County alleged that its jail was never finished. This is absurd. To this end, the County acknowledges the Certificate of Occupancy was issued and never objected to admission of the certificate by the Trial Court. Further, Clearfield County acknowledges, as it must, that the County housed inmates in the jail since 1981. The averment that the jail was never completed is a shameless attempt to avoid the natural application of the Construction Statute of Repose.

As a fallback position, the County now asks the courts to reinstate its cause of action, which was eliminated by the General Assembly's adoption of the Construction Statute of Repose. The County's argument is tantamount to seeking to have this Court repeal the Legislature's Construction Statute of Repose for all public projects. This is inconsistent with the text of the Construction Statute of Repose, the legislative intent, and this Court's prior decisions finding that the statute eliminates a cause of action. *See Dubose*, 643 Pa. at 261 (stating "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time'").

Importantly, the legislature considered exceptions to the Statute of Repose when adopting it, and set forth the limited exceptions in Subsection (b). *See*, 42 Pa.C.S. 5536(b). Contrary to Clearfield County's position, there is no mention in Subsection (b) for a public project. Had the legislature intended to exempt public projects from the Statute of Repose it would have included it in this subsection. It did not.

Plainly, the General Assembly did not intend to create any exception to the abrogation of a cause of action after the passing of the 12-year Construction Statute of Repose for the Commonwealth or any political subdivisions. Rather, the Legislature clearly intended to set an outer limit on when litigation may be filed against a category of people, which includes design professionals and contractors engaged to design and construct *any* improvement to real property, regardless of whether the construction improvement was for a private or public project. *See Freezer Storage*, 476 Pa. at 284; *see also Cotter, supra* at 381. This Court should affirm the lower courts' decisions to dismiss Plaintiff's lawsuit as barred by the Construction Statute of Repose.

CONCLUSION

For the foregoing reasons and the additional reasons set forth in

Appellee Transsystems Corporation, successor to L. Robert Kimball and Leonard S. Fiore Inc.'s principal briefs, *Amici* respectfully request that this Court affirm the Trial Court and the Commonwealth Court's order dismissing Clearfield County's lawsuit based upon the plain and unambiguous application of Pennsylvania's Construction Statute of Repose which eliminated the County's cause of action depriving the Court of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amicus Curiae* ACEC-Pennsylvania, AIA-Pennsylvania, Associated Builders and Contractors, Pennsylvania-Delaware Chapter of the American Society of Landscape Architects, Structural Engineers Association of Pennsylvania, Pennsylvania Society of Professional Engineers, complies with the word-count limit set forth in Pa.R.A.P. 531(b)(3). Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required by Pa.R.A.P. 2135 (b) and (d)), contains 6,845 words.

I also certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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PROOF OF SERVICE

I hereby certify that, on this 11th day of August, 2025, I am causing to be served the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P.

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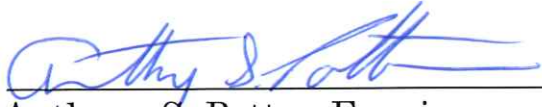
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